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THE

LAW OF LITERATURE

REVIEWING

THE LAWS OF LITERARY PROPERTY IN MANUSCRIPTS; BOOKS, LECTURES, DRAMATIC AND MUSICAL COMPOSITIONS; WORKS OF ART, NEWSPAPERS, PERIODICALS, &C.; COPYRIGHT TRANSFERS, AND COPYRIGHT AND PIRACY; LIBEL AND CONTEMPT OF COURT BY LITERARY MATTER,

ETC.

WITH AN APPENDIX OF THE AMERICAN, ENGLISH, FRENCH, AND GERMAN STATUTES OF COPYRIGHT

BY

JAMES APPLETON MORGAN, M.A.

OF THE NEW YORK BAR

IN TWO VOLUMES

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CONTENTS OF VOLUME II.

BOOK III.

OF PROPERTY IN LITERARY COMPOSITION AFTER PUBLICATION.

CHAPTER I.

HISTORY OF COPYRIGHT.

	PAGE
Copyright a modern contrivance by which an author may at once relinquish and retain his composition	2
The author's privilege not a monopoly	2
Laws of copyright beneficial to the public as well as to the author	3
Loss to Literature by the early absence of statutes of copyright	3
Illustrated by the case of Shakespeare and others	3
Nature of the author's right in copy	4
Earliest instance of a protested copyright	6
In Venice	6
In Germany	6
Literature always a subject encouraged by the law	7
Early rights of copy in England	7
Influence of the Star-Chamber upon it	8
Speculations concerning the Star-Chamber	9
Its early cognizance of the printing and publishing of books	11
Examples of punishments inflicted by it for	12
Milton's efforts in behalf of the press	14
Origin of the Stationers' Company	14
Abolition of the Star-Chamber	17
Milton's Areopagitica, a state paper of the republic of letters	18

PAGE

Ordinance of the long parliament 20
Indices expurgata—their practical effect 22
Numerous examples of 39
In England 40
The licensing act 48
The "Prerogative" or "Crown Cases" 51
Crown copyright claimed in the Bible, in law books, in almanacs, and the Latin grammar 55
In law books 56
In liturgical books 56
In the Latin grammar 56
Application to parliament for protection to holders of copy 57
First statute of copyright 58
Statutes of international copyright 58
History of efforts to obtain one between the United States and Great Britain 62–79
Difficulties in the way of, discussed 79–
Author's right to perpetuate and conserve his own works 94
Copyright may exist in artistic as well as literary works 108
"The Rights of Readers" 114

CHAPTER II.

OF THE STATUTES OF COPYRIGHT.

Preamble of the first statute of copyright 134
Provisions of 135
The next statute 138
The third 141
Statutes of copyright in the United States—In Connecticut 143
In Massachusetts 143
Considered in the old congress 144
Resolution of May 27th, 1783 145
Statute in Virginia—In New York 145
Provision in the constitution of the United States . 146
Statutes of other countries in chronological order—France 147
Decree of Napoleon 148
In Russia 149
Sweden and Norway 152
In Prussia 153, 161
In Germany, including Austria and Bavaria . . . 154–161

PAGE

In Saxony 154
In Portugal 154
In Spain 154
In Denmark 154
In Italy 154
Treaty between Austria, Lombardy, and Sardinia . . 155
Acceded to by Tuscany, the Sicilies, Lucca, and Modena 156
In Holland 157
In Greece 161
In Denmark 162
Progress of the statutory protection in the United States 162
Power of congress 163
The case of Millar v. Taylor considered and reviewed 166
Statutes of copyright do not affect an author's right to his work; they affect solely his right to multiply copies thereof 174
Reasons for a limit to his right 178
Napoleon's reason for the limitation 179
Tax upon authors in favor of libraries 181
Eight successive copyright acts in the United States . 182
Peculiar powers of congress thereunder . . . 183–185
Powers of the states to enlarge the privileges given by acts of congress to their own citizens . . 183–185
Present copyright law of the United States . . 186
All copyright records transferred to Washington . . 187
The act considered by sections 187–266
Who may take out a copyright 187
And for what 187
And for how long 187
Renewals of 188
Assignments of 189
Method of securing 188
Duties of postmaster 188
Fees payable to librarian of Congress in copyrighting matter 188
Notice of copyright 189
Penalties for non-compliance with requisites of copyright act 189
Subject-matter in which copyright may be granted . 190
Who are citizens of the United States or resident therein 191
Design, peculiar signification of the word in the United States copyright law 192
American author living abroad and publishing here 196

PAGE

Alien friend, rights of 197
Copyright of foreigners 198
British copyright may be now acquired by American citizens 201
Another method 204
Copyright in works of unknown authors . . . 207
No government-copyright in the United States, with the exception of the copyright of the people in the opinion of judges, statutes, &c. 211
Official reports, &c. 213
No copyright of a plan or method distinct from a work itself 216
Nor in abstract titles or subjects 219
The thing copyrighted must be something which can be protected under no other act 221
As to books, charts, maps, &c. 222
As to dramatic works 223
As to pictures—the copyright of, does not protect the method by which it is manufactured or produced 224
No provision in the American copyright law for correcting a record 224
Application for extension of copyright . .
Assignment of copyright 228
Details of the act of copyrighting 230
Must deposit title-page 230
And before publication 231
Two copies of the published book must thereafter and within ten days after publication be deposited 231
Various interpretations of these provisions . . 232
Duties of the librarian of congress upon receipt of the title-page 233
Notice of copyright to be inserted in the copyrighted volume, or 234
Impressed upon the map, chart, picture, model, or statue 234
Same record may appear in every volume . . . 236
The record, however, must be accurate in all its details 236
Penalties for fraudulent use of the entry . . . 238
Penalties for fraudulently printing or publishing a copyrighted a work without its author's consent 238
Distinction between actions for the piracy and actions for the penalty 240

PAGE

A piracy may be of a part; the penalty can only be recovered for the whole 241
Penalty only recoverable within two years . . 241
Penalty in case of piracy (by representation) of dramatic works 242
Jurisdiction of copyright questions . . . 246
Writs of error 247
Costs to be allowed in such proceedings . . 248
Difference between American and English copyright laws 248
Of trademarks 249
Labels and artistic designs designed for merchandise other than literary, under the control of the patent office 252
Status of copyright property in the eye of the law 255
One great difficulty arising under the English copyright laws 257
Sundry regulations adopted by the library of congress 257–266

CHAPTER III.

OF DRAMATIC COPYRIGHT OR STAGERIGHT.

Antiquity of the dramatic form of composition . . 267
Examples of the first drama 267
Popularity of the drama 267
Miracle plays and moralities 271
The historical drama 272
Attempts to suppress the drama 274
Dramatic literature an early prey to imitators and plagiarists 283
The privileges which the law gives to dramatic productions are in addition to, and not in place of, or derogatory of its privileges as literary matter . . 285
Dramatic copyright or stageright the last right of authors recognized by statute 286
Publication of a multiplication of copies of dramatic matter 287
How a copyright of such matter to be secured . . 287
Five inquiries necessary to the exposition of the subject 288
Definition of a dramatic composition 288
Musical productions when not specifically mentioned (as

PAGE

in the United States copyright law) construed to come within dramatic copyright acts 289
Proprietary or accessorial copyright in dramatic matter 289
So a pianoforte score 290
Or a descriptive song 291
Doctrine of innocence applicable to dramatic compositions 292
Common-law rights of alien dramatic authors in the United States 298
Law of originality sometimes qualified in the case of dramatic matter 302
As *e. g.* in the case of the dramatization of romantic matter 302
What adjuncts, incidents, and accompaniments are protected by the copyright of dramatic matter . . 305
Titles of plays 305
Where two persons have copyrighted the same title, in good faith, it will be held to be the property of the one who first makes the title available to the public 307
Analogy for this rule found in the law of patents . 308
Inconvenience of any other rule 309
A copyright will not protect any mechanical adjuncts or processes for producing an incident, though it may the incident itself 319
Delicate questions as to what may constitute piracy of a dramatic or "romantic" incident 321
"Romantic incident" further considered 322
Accessorial or proprietary copyright in dramatic matter 326
Dramatic piracy—early instance of an appeal to the law for protection against 328
Piracy by memorization 330
The doctrine doubted 331
Piracy by amateur theatricals 345
Abridgment of dramatic matter—when allowed . 347
Application for an injunction should be made at once, as acquiescence might be implied from delay . 348
Dramatic piracy — what acts in furtherance of such piracy will render one liable for 349
Examples 349
One who knowingly sells a dramatic composition to another for purposes of piracy is a participant in the wrong-doing 352
What is a representation 352
To an agent 352

PAGE

A court of equity cannot compel one to write plays under a contract 353
But it sometimes has enjoined one against writing plays for a particular theatre 353
Or against acting for other theatres than the complainant's 353
The rule in Daly v. Smith discussed 354
Rules and principles by which equity will be guided in regard to dramatic works 357
As to injunctions 358
As to questions of proprietorship 359
As to the dedication 359
As to the piracy 360
No property in gestures, tones, or combinations of scenery 360
Rules laid down in Keene v. Wheatley discussed . . . 361
1. Citizenship of the author 362
2. Property in a dramatic work, when in fact a mere license 362
3. When copyright acts superfluous 362
4. Doctrine of literary accretions applied in this case 362
5. Suit for a literary larceny estopped by a dedication 363
6. Alterations in a written dramatic manuscript existing only in the brain of the performer, not subject of litigation 363
7. Difference between literary and general publication of a dramatic composition 363
8. Surreptitious procurement of a manuscript a violation of the literary property other than copyright therein (see 5) 363
Case of Crowe v. Aiken as to alien proprietor considered —he must prove himself a resident 364
Novel aspect of the question in Palmer v. Thorne . 364
An actor's contract to render services unassignable . 365
Assignment of dramatic composition must be in writing 366
Former rule that an assignment of dramatic matter could not be of anything less than a complete right—not the rule to-day 366
Infringement may be quite unintentional and yet illegal; case of Toole v. Young considered 366
Question as to what is a place of dramatic entertainment, does not arise in the United States . . 367

PAGE

Details observable in the copyrighting of dramatic manuscripts 367
Statutory protection under copyright act of 1870 to dramatic matter 367
Disadvantages of the absence of a treaty of international copyright between the United States and Great Britain 368
How they may be, in part, obviated 368
By a joint authorship 369
But such joint authorship must be bona fide . . . 369
Other questions as to dramatic matter arise in considering the subject of piracy 370

CHAPTER IV.

NEWSPAPERS AND PERIODICALS.

Importance of the subject 371
Origin of 371
All the principles of the law of literature applicable to newspapers 380
Newspapers entitled to copyright equally with all other literary matter 381
Or particular articles in, may be 381
Former doubts on the subject 381
Principal property in a newspaper, however, exists in its title 383
Right in a title cannot be obtained by a simple copyrighting of the word or phrase—without taking any steps to make it available to a publication . . . 383
Where two people unknowingly copyright the same title, the one first making the title available to the public will be protected in its 383
Illustrations of the rule 384
Right to a title is a chattel interest capable of being assigned or transferred 387
And copyrightable as connected with the thing entitled 387
Unless assumed for the purpose of deceiving the public 388
How far equity will interfere to protect property in a title 389
Characteristic title only will be protected 389
Generic titles will not be 390
1. Where the title has been a long time in use . 391
2. Where the title is new 391

PAGE

Title apart from the thing entitled will not be protected 394
Inconvenience of a contrary rule 394
Wrongful use of an author's name 396
Case of Harte v. De Witt considered 396
Objections to copyright in the case of newspapers . . 398
Of a price current 401
Of a list of hounds 402
Of newspaper correspondence 404
Law of newspaper libel 409
Vast importance and nicety of this branch of the inquiry 409
The mere fact that a man writes for a newspaper gives him no immunities from the operation of the law of the land 410
All persons have the right to discuss either favorably or unfavorably matters of public interest . . . 410
The freedom of the press means the freedom of the individual and nothing more 410
A larger latitude of criticism will be allowed upon the characters of public than of private persons . . 410
But there is a limit beyond which neither the newspaper-writer, nor anybody else can be permitted to go 411
The privilege will not extend to a gratification of personal malice or vindictiveness, or to imputation of corrupt motives 411
Or of dishonest conduct 411
Or to reckless or inaccurate criticism of any kind . 411
Public discussion, so long as honest, important to the well-being of the state—and will be protected to the utmost 411
But an honest and bona fide belief in the truth of statement will not afterward justify a newspaper any more than an individual 412
A reasonable degree of judgment and moderation required in one assuming to publicly criticise or condemn 412
A public writer may not assail one whom he fancies to be open to suspicion 413
Nor charge him with trickery or fraud 413
Equivocal statement by Cockburn, J. 414
Absolute good faith and honest belief in the truth of statements made may constitute a defense to an action 414
All charges made through the columns of a newspaper construable as the utterance of the newspaper itself 414

PAGE

A difference to be observable between public interest and public curiosity 415
The first will justify statements which the second will not 415
As to statements contained in comments upon the advertisement of a medical practitioner . . . 415
Sometimes best to refrain from making even true charges against our neighbors 417
English statement of the doctrine of privilege . . . 417
Examples of cases justifying public interest . . . 419
The management of public institutions is matter of public interest 420
But not of strictly privates ones 422
Contempt of court by newspapers 423
Publication of proceedings of courts of justice . . 424
Great vigilance necessary on the part of the reporter 424
Must give no uncharitable view of parties . . . 424
Must be careful not to prejudge the case 425
Must not publish purely ex parte statements . . 425
Or a charge against a man who has no opportunity to defend himself 425
Or conclusions of his own from such ex parte statements injurious to the accused 426
Criticism contained in advertisements 427
Examples 428
Advertisement attacking personal character . . 428
Comments on the private character of public individuals 432
Circumstances of each case must be considered . . 432
Criticism of motives not sanctioned by the law . . 432
Communications by persons who believe themselves particularly interested in matters of reform or of useful inquiry 438
But such self-constituted authorities must avoid reflections upon private individuals 434
Where two or more persons engage in a public discussion through the newspapers, each is at his own peril 434
Personal quarrels and misunderstandings are not matters of public interest, and therefore their discussions not privileged 435
Unless that quarrel involve matter of public solicitude 436
Above rule applied to advertisements of a physician . 436
To the report of an archæological society . . . 437
To the denunciation of an impostor, such denunciation, however, cannot be privileged if it extends to statements concerning the impostor's past career . 437

PAGE
Further examples of the rule 438
Performances at theatres, how far matters of public interest 438
Examples of permissible and unpermissible criticism of 439
An audience at a theatre have a right to express their opinions by applause or demonstrations of disapproval 439
Performances of authors of published works liable to criticism 441
But such criticism must not be defamatory of the author 441
The rules governing this branch or subject stated . 443
Must be fair and reasonable 444
Must be free from malice 445
False imputation of an immoral or absurd literary production, libelous 446
A tradesman's hand-bill, like a book, may be a subject of criticism 446
Query as to a sermon delivered by a clergyman to his congregation 447
The rule applied to an artist 448
To an architect 449
No man has a right to make another man personally ridiculous 449
The rule applied to a publisher of a magazine . . 451
In the case of privately printed works the rule probably would have no application 451
A writer of book reviews as amenable to the law of libel as any other person 452
The case of Johnston v. Dilke ("The Athenæum") considered 452
The rule as to literary criticism briefly stated . . . 455
Newspapers liable for negligent statements 456
Libel by accident 456
Case of Sheapherd v. Whittaker (the London "Bookseller") considered 456
A newspaper liable for publishing false news . . . 457
Or false and idle rumors 457
Or rumors calculated to affect the market 457
Defamatory rumors affecting one or more individuals, or a certain sect or order 459
Precautionary rule in France 459
Publication of the reports of legislative bodies . . 462
Of public meeting 467
Early status of the press 471

PAGE

Courts not open to the public as a matter of right in the people, but rather as matter of expediency to the courts 474
Rules as to the publication of proceedings of courts by newspapers 475
They must be careful to publish nothing more or less 475
To refrain from any romantic or sensational coloring of the facts elicited 476
The newspaper makes comments upon a trial at its own peril 478
Matter may be so scandalous as not to justify its publication 481
Privileges of members of legislative bodies does not extend to newspapers reporting their speeches . . 482
And if a proceeding is held before a tribunal having no jurisdiction to entertain it, newspapers publish the proceedings at their peril 485
Newspapers responsible for the headings attached to reports published by them 490
Libelous sometimes to announce that a certain person is unpopular 494
The right to criticise considered 496
The "Poland Gag Law" 499
As to what is competent evidence relating to newspapers 503
When witness may testify to contents of 505
Newspapers themselves, when evidence of statements made by them 507
Death cannot be proved by an obituary notice in . . 508
The manuscript must be accounted for 509
Newspapers may be evidence of certain matters of public notice 509
May be read to the jury as matter of argument . . 510
Re-publication of a libelous article in a newspaper . 511
Proof of the truth of the re-published article cannot be offered by the defendant in mitigation 511
Newspapers not responsible to those who purchase copies for mistatements made 511
Responsibilities of the press 512

CHAPTER V.

OF LEGAL REPORTS.

Origin of courts 515
of juries 516

PAGE
Origin of the custom of law reporting 517
Early records and instances of reports of trials . . 519
Theory of precedents 525
Early reports 527
Sir Edward Coke's prophecy 528
Early appointment of official reporters . . . 529
Extent and magnitude of legal literature . . . 530
Embarrassments connected therewith 532
Report to the Bar Association of the city of New York upon the subject . . . . . (note) 532
Copyright of legal reports exists in the crown or the state 549
The reports, common property in the United States . 565
How far a reporter may obtain a copyright discussed 565
Copyright in annotation of legal work; rule in Lawrence v. Dana 576
Not applicable to digests 583

CHAPTER VI.

OF CONTRACTS CONCERNING LITERARY PROPERTY.

"Glory" an unsafe and inexpedient reward of authorship 619
No consideration with publishers 619
Glory and gain move hand-in-hand 620
A right to part with literary property for value, co-existent with the property itself 621
Poets Laureate 621
Specific performance of literary contracts . . . 624
Rules applicable to photographs, engravings, and prints 628
Action for breach of contract 629
Equitable relief of author 630
Not entitled to injunction for until paid 630
Publisher's action against author 630
Purchaser of a manuscript for publication may alter it 631
Author may maintain action for inaccurate edition . 631
Joint owners of copyright 631
Draughting of agreements between authors and publishers 632
Author cannot copyright his manuscript after selling it 632
Nor the published work 632
Rule of "caveat emptor" 633
Statute of Frauds 633
Publisher publishing at his own risk . . . .

PAGE
Publisher to determine time and mode of publication 634
When contract a license, and when a partnership . 635
Instances or particular contracts 635
Termination of literary contracts . . . 636, 638
What constitutes a new edition of a work . . . 637
Publisher cannot assign a contract except upon original terms 640
But may sell plates, purchaser to account to author . 640
Warranty in sale of a copyright 641
Chattel mortgage of copyright 641
Printer's lien for services 641, 661
Transfer of copyright by writing 642
Contract may be gathered from a receipt . . . 643
Divisibility of copyright 643
Bankruptcy 644
Parol assignment of copyright valid if registered in the copyright office 644
Agreement to assign 645
Literary contracts, when not assignable 646
Assignment of right to dramatise work 649
Of right to represent dramatic work 649
Must be in writing 649
Author's right to first publication of work now parted with 649
Such right not seizable for benefit of creditors . . 650
First recognized by decree of Louis XV. of France . 650
Literary contract in violation of copyright void . 653
Author's right on bankruptcy of publisher . . . 654
Personal representatives of authors not entitled to benefit of literary contracts 659
Insurance of manuscripts 660
Printer has no lien on stereotype plates . . . 662

CHAPTER VII.

OF PIRACY.

Definition to be drawn from the cases 664
Question of damage does not enter into the definition 665
Nor of intention 665
Nor the method of committing it 666
Copyrights do not protect processes 666
Questions of profit or loss have nothing to do with piracy 667
Nor place where the pirated matter is procured . .

PAGE
Plagiarism or borrowing of ideas, no piracy . . . 668
Piracy is an offense against a statute of copyright . 670
Earliest actions for 671
The leading case of Millar v. Taylor 673
Courts will not curtail the fair use of literary material . 676
Animus furandi, how far essential to piracy . . 677
Question of piracy by use of extracts or quotations will depend upon the animus furandi 680
And upon the other circumstances of the case . . 680
Test of piracy will mainly be the extent of the interference 681
Piracy by quotation 684
By annotation 687
By abridgments 689
Of musical works 689
Copyright protection extends to every part of a work 691
Piracy of titles 691
Of periodicals 694
Of pictures 696
A tradesman's advertisement or circular, is not original literary matter 696
No copyright in matter itself copied 696
Piracy of copyrighted dramatic production . . . 697
Of the averments necessary in an action for piracy . 698
Of the evidence necessary 699, 704
Question of piracy one of fact for the jury . . 700
Question of who is the author of a certain work might be difficult to determine 701
Of remedies for piracy 705
Two sorts of injunctions 706
Not granted when title is in doubt 707
When a provisional injunction will be granted . . 708
Of the parties to a suit for 710
Right of plaintiff to an account 714
Nothing will call a court of equity into activity but conscience, good faith, and personal diligence . . 714
Inquiries when the damages are minute, discouraged . 714
Minutness of damage will disentitle to relief in equity 716

THE LAW OF LITERATURE.

BOOK III.

OF PROPERTY IN LITERARY COMPOSITION AFTER PUBLICATION.

CHAPTER I.

OF COPYRIGHT.

208. Before the invention of the art of printing, we have seen that literary compositions were published,[1] either by delivery, by word of mouth, or by a laborious and careful copying of the manuscript upon parchment, which was then wound upon rollers into a volume or book. Still later, writings were published by being inscribed upon parchment, and scattered broadcast along the highways, or over the fields. Says the outlaw's song of Trail le Baston:[2]

[1] The German word which corresponds to the English "publish," signifies not only a "giving out," but an "appearance," or a "knowledge," such as could only be possessed by copies of the publication being issued. A book, they say, is "ausgegeben," when it has been issued from the press. It is only fully published when it has "appeared," "erscheinen." Vid. Klostermann,—"Das Urheberrecht und das Verlagsrecht," § 24, p. 248.

[2] Date of Edward I. See Foss's Judges of England, 30 b. And see also Darcy v. Markham, Hobart, 120: Political Songs of England, from John to Edward I., published by Thomas Wright, for the Camden Society, 1839; London Quarterly Review, April, 1857.

"Escrit estoit en parchemyn pur mont remember
Egitté en haut chemyn qe um le dust trover."

This method of publication seems to have been employed until quite the sixteenth century. We find mention of "a libel or book entitled 'The Supplication of Beggars,' thrown and scattered at the procession in Westminster, on Candlemas day (2 February, 1562), before King Henry the Eighth, "for him to read and peruse"; and of Wolsey, complaining to that king, "of divers seditious persons having scattered abroad books." So, too, Burdett was tried "for conspiring to kill the king and prince by casting their nativities, fortelling the speedie death of both, and scattering letters containing the prophecy among the people."[1] Copyright is a modern contrivance by which an author may, if he will, still scatter his productions to the four winds, and yet retain, if he will, the exclusive control over them, and over their further multiplication. It is a provision by which the contents of the scattered page are still his (disconnected from any possession in plate, or type, or paper, or in any other physical existence[2]), constituting a property in which he can traffic, and which he can buy and sell and bestow.[3]

209. The privilege of an author to the exclusive sale of his works for a limited number of years, although practically in the nature of a monopoly, is not a monopoly in the odious meaning of the term.

[1] Cro. Car. 121; Foss's Judges of England, 9.

[2] See remarks of Thompson, J., in Stevens v. Cady, 14 How. 530; Stowe v. Thomas, 9 Am. Law Reg. 228.

[3] *Ante*, vol. i. pp. 15, 16. "By section 9 of the act of congress of 1831, no new right is secured or conferred, but simply a remedy for the violation of an existing right in another form." Pierrepont v. Fowle, 2 Wood & M. 43; Woolsey v. Judd, 4 Duer, 379; Palmer v. Dewitt, 7 Am. 480; 47 N. Y. 532.

A monopoly proper is a right given to one individual to produce or traffic in a commodity which others are fully as able to produce or traffic in as he, if permitted to do so. A monopoly is a rule against competition. But there can be no competition in the productions of a man's own brain. A man has, by natural law, a right to the exclusive power of first disposing of his own productions or manufactures; and the pursuit and enjoyment of that exclusive right can never be a monopoly.[1] The author only has given him, by law, what in morality, equity, and good conscience, he had before. Or, to speak more accurately, the law gives him a method of asserting and protecting his right. Statutes of copyright only shift the burden of proof in favor of the author.

That copyright laws are beneficial to the public, as well as to the author, cannot be questioned. Rich and vast as are our stores of literature, how much richer and vaster might they have been, if the first English copyright act had been the act of Elizabeth instead of the act of Anne;[2] or if the days of Chaucer, no less than the days of Dryden, had been enlightened by such protective legislation!

It is not improbable that we owe to the fact, that, in his day, a manuscript or published work, was practically without protection and not to be intrusted beyond the writer's hand, that no authentic and authoritative text of Shakespeare exists, and nothing but inaccurate, interpolated, and expurgated texts of Fletcher, Beaumont, Webster, and a score of other

[1] See Bentham's Works (by Bowring), Edinburgh, William Tait, 1843, vol. i. p. 136. And see Thompson, J., in Blunt v. Patten, 2 Paine, 395; *ante*, vol. i. p. 19; Stowe v. Thomas, 5 Am. Law Reg. 228.

[2] The first English copyright act is known as 8 Anne, c. 19.

contemporary writers. So long as a service to literature is a service to the people, copyright laws cannot be classed as mere individual monopolies. The only property which is reserved to the author, and which the law gives him, is the exclusive right to multiply copies of that particular combination of character which exhibits, to the eye of another, the ideas he intends to convey.[1]

210. It was settled in the year 1769,[2] after long and nice consideration, and elaborate and careful argument as to the nature of the property which an author has in his work, that such property consists in the "right of copy," that is, in the sole right of printing, publishing, and selling his literary composition or book. And not that he has such a property in his original conceptions, that he alone can use them in the composition of a new work, or clothe them in a new dress, by means of epitomization, translation, or abridgment.[3] It was furthermore declared, in that renowned controversy, that the right of an author to control his copy exists by statute; although, as we have urged, the right to the copy itself, is a moral and a natural one. But it is not worth while insisting on the distinction. If the statute right had opposed the moral right, it would have been time to protest. As it did not,- -but only, by superseding, confirmed and declared it,—it is to be praised and accepted. *Longum est iter per precepta—*

[1] Stowe v. Thomas, 9 Am. Law Reg. 228.

[2] *I.e.*, in the leading cases of Millar v. Taylor and Donaldson v. Beckett, 4 Burr. 2303.

[3] Stowe v. Thomas, 5 Am. Law Reg. 228, 230; Clayton v. Stone, 2 Paine, 383; following Donaldson v. Beckett, 4 Burr, 411; Dudley v. Mayhew, 3 Const. 12; Wheaton v. Peters, 8 Pet. 661.

Breve et efficax per statuta.[1] In the United States this statute law, under and by virtue of which alone the author has exclusive property or copyright in his published production, consists of acts of Congress. In passing the copyright act, congress did not legislate merely in reference to existing rights. It did not merely sanction—it created a right.[2]

211. It was not to be supposed that traces of the peculiar legislation of which we are treating, should have made their appearance at a very early date. So long as the mechanical or other processes of multiplication were cumbersome and tedious, there was no necessity for it. The works of the Roman author, as we have seen, were published by being transcribed from the waxen tablet, upon which he had traced with his stylus, to sheets of parchment, which, when exposed for sale, were covered with skins smoothed with pumice stone,[3] and annointed with some fragrant oil[4] to aid in their preservation, with a ball or boss of wood, bone, horn, or other durable material, attached to the outside for security and ornament.[5]

Under this slow and laborious process of book-making, it does not seem unnatural that the Institutes,

[1] Attributed to Seneca:

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

[2] Wheaton v. Peters, 8 Pet. 661.

[3] 1 Horat. Epit. 1, 20; Plin. xxxvi. 21, 23, 42; Catull, xx. 8; Tibull, iii. 1, 10.

[4] Posse lindena cedro, et levi servanda cupresso.—Hor. Art. Poet. 332.

[5] Called *umbillicus*, from its resemblance to that part of the human body (Hor.Epod. xiv. 8), or cornæ (Martial, xi. 108, Ovid Inst. i. 1, 8). The present form of a book was invented by Julius Cæsar, who divided his letters to the senate into pages; and folded them as we do now. Suet Caes. 56; Suet Aug. xiv. 53; Tib. xviii, 66, cl. 15, N. 15; Domit. 17; Martial, viii. 31.

while recognizing the subject-matter of a writing, as distinguished both from the material upon which it was inscribed, and from the manual labor involved in the inscription,[1] should have apparently made no effort to protect that property from infringement. So long as the published volume of his works was nothing more than an engrossed copy of his manuscript, the author's protection existed in the length and tediousness of the processes by which alone his works could be multiplied; the unprofitable nature of the wrong-doing; and, without doubt, as well in the "*sic vos non vobis*," *i.e.*, the social ignominy attending the discovery of the plagiarist; for, said Martial:

> Mutare dominum non potest liber notus
> Sed pumice ala frente, si quis est nondum
> Nec umbillicus cultus, atque membrana
> Mercare tales adeo, nec sciet quisquam.
> Aliena quio quis recitat et petit famam
> Non emere librum, sed silentium debet.[2]

When, however, the invention of printing had made the multiplication of copies of a published work a comparatively trifling task, and the revival and diffusion of learning had added a pecuniary value to such multiplicates, this branch of natural law could be no longer neglected, and clamored for recognition upon the statute book.

212. The earliest instance of a protected copyright for printed books, was granted by the senate of Venice, in 1469; and, as early as 1486, a censorship of the press, or restraint on the sale of printed books,

[1] *Ante*, vol. 1, p. 14; Inst. 2, 1, 13.

[2] Martial, Epig. xiv. 194. A well-known book cannot change its master; but if there is one to be found, yet unpolished by the pumice-stone, yet unadorned with bosses and cover, buy it. I have such by me, and none shall know it. Whoever recites another's compositions and seeks for fame, must buy, not a book, but its author's silence.

was introduced in Germany.[1] In England, the law seems to have always favored and fostered learning. Not only did it, in the darkest ages, found universities and colleges, but it extended, in its criminal code, an immunity and forgiveness to the scholar, which it refused to the illiterate culprit. Few and heinous were those crimes to which it refused the "benefit of clergy." Again, in the feudal procedure, distress for rent, for suit, or services, was superseded, not only in favor of the needful implements of husbandry and trade, but as well in favor of the "books of a scholar."[2] And up to the act of Anne, or, more properly speaking, up to and until the decision in Millar v. Taylor, in 1769, it was the ancient and invariable custom to regard copyright in an author as a perpetuity—the subject of family settlements and of devises. In that case this was specially found by the jury at *nisi prius*

[1] Hallam's Introduction to the Literature of Europe, vol. i. 344, 348. When the copyright, or the exclusive privilege of printing and selling books for a limited period. was introduced in Spain, under Isabella, it was granted in consideration only of the grantee's selling at a reasonable rate; and foreign books of every description were allowed to be imported into the kingdom free of all duty whatsoever.—Prescott's Ferdinand and Isabella, vol. ii. p. 207.

[2] Maugham on Lit. Prop. vii. "The contrast is singular," says Maugham, in 1828, "between the favor which was thus shown to literature in times comparatively savage, and the discouragement it encountered during the refinement of the last century. In the ages of semi-barbarism we perceive every inducement presented to the ingenious student for the improvement of his faculties and the cultivation of letters. In the era of boasted enlightenment we witness the curtailment of rights and the imposition of burdens." "But," says Christian (since the principles which now prevail on the law of copyright are totally at variance with the opinions of many distinguished judges, and especially of Lord Mansfield and Mr. Justice Blackstone), "every person may be permitted to indulge his own opinion upon the propriety of these laws without incurring the imputation of arrogance."

—their special verdict expressly setting forth, "that, before the reign of her late majesty, Queen Anne, it was usual to purchase from authors the perpetual copyright of their books, and to assign them from hand to hand for valuable considerations, and to make the same the subject of family settlements for the provision of wives and children."[1] And the preamble of an act of Charles II., in 1684, confirming a former charter of the stationer's company, recited "that divers brethren and members of the company have great part of their estate in books and copies," while the act itself goes on to provide for the sole enjoyment of such book or copies "as in that case has been usual heretofore."

213. But, whatever may be owing to a just popular sentiment, it is none the less the apparent fact, that the statutes of copyright in England—not unlike many other wise and benignant provisions—had their origin in tyranny and injustice.

As the principles and doctrines regulating the transmission and alienation of real property had their root in the feudal system of the dark ages; so statutes of copyright in England grew out of the despotism of that notorious and unrighteous tribunal—the star

[1] I was surprised, on carefully examining one of the registers in Queen Elizabeth's time, from 1576 to 1595, to find, even in the infancy of English printing, above two thousand copies of books entered as the property of particular persons, either in the whole, or in shares, and mentioned from time to time to be sold, and be conveyed to others; and the whole tenor of these registers is a clear proof of authors and proprietors having always enjoyed a sole and exclusive right of printing copies, and that no other person whatever was allowed to invade their right (Carte, cited Maugham, Lit. Prop. 17). Bentham discusses the encouragement of literature by positive rewards (Works by Bowring, Edinburgh: William Tait, 1843, vol. ii. p. 136.)

chamber. The origin of the star chamber itself, is involved in obscurity. Sir Thomas Smith, in his "Commonwealth of England,"[1] says, speaking of it, "This court began long before, but took augmentation and authority at the time that Cardinal Woolsey, archbishop of York, was chancellor of England, who of some was thought to have first devised that court, because that he, after some intermission of time, augmented the authority of it," &c.

The star chamber has been said to date from the statute of 3 Henry VII., yet Sir Edward Coke[2] in 1614, solemnly declared, in open court, that that statute "extendeth not in any way to this court" (of star chamber). Lord Hale, Sir Thomas Smith, and others, have also recorded their opinions which have also been considered by Hallam, in his "Constitutional History," who acknowledges "the difficulty of determining at what time the jurisdiction legally vested in this court."

The statute 3 Henry VII., recited and enacted

[1] "The Commonwealth of England, and the Manner of the Government thereof, by Honorable Sir Thomas Smith." London, 1609.

[2] Sir Stephen Proctor's Case. Sir Edward Coke sat as a judge in the star-chamber, where he lent the authority of his reputation for legal knowledge to strain its power to its utmost, as it was natural, to support the proceedings of the judge in his writings. Brodie says that Sir Edward cites fifteen cases to show the antiquity of the court, but nine of them are quite inapplicable, and refers to Prynne's Animad. on the 4th Institute, p. 419. Had such a court existed, Sir John Fortescue could not have failed to allude to it in his De Laudibus Legum Angliæ, written about 1470 (Burns's Star-Chamber, p. 1; vol. II.). "And therefore," says Hudson, in his Treatise on the Star-Chamber, after quoting Bracton ("father of our laws"), who wrote in the reign of King Henry III., and Britton (writing in the reign of Edward I. of what he calls the king's council), "it is plain that this court was not founded by act of parliament in Henry the VII.'s time."

that "The king, our said sovereign lord, remembereth how by unlawful maintenances, giving of liveries, signs and tokens, and retainders by indentures, promises, oaths, writings or otherwise, embraceries of his subjects, untrue demeanings of sheriffs in making of panels and other untrue returns, by taking of moneys by juries, by great riots and unlawful assemblies—the policy and good rule of this realm is almost subdued. It is ordained that the chancellor and treasurer of England for the time being, and the keeper of the king's privy seal, or two of them, calling to them a bishop and a temporal lord of the knights' most honorable council, and the two chief justices of the king's bench and common pleas for the time being, or other two justices in their absence, upon bill or information put to the said chancellor, for the king or any other against any person for any misbehavior above rehearsed, have authority to call before them, by writ or by privy seal, the said misdoers, and them to punish as if convicted according to law."[1]

[1] This was the star chamber in effect certainly, if not in origin. "In our ancient year-books," says Hudson (in his Abstract of a Treatise on the High Court of Star Chamber), written by a person well acquainted with the proceedings of the same, "it is called camera stellata, not because the chamber where the court is kept is adorned with stars, but because it is the seat of the great court; and the name is given according to the nature of the judges thereof, denminaotio being a præstantiori and majus dignum trahit ad se minus. And it may be so fitly called, because the stars (in the common opinion) have no light but that which is cast upon them from the sun by reflection, it being a representative body; and as King James was pleased to say, when he sat there in his royal person, 'Representation must needs cease when the person is present.'"

"So in the presence of his majesty, which is the sun of honor and glory, the shining of those stars is put out, not having any power to pronounce any sentence in this court (for the judgment is the king's only) but by way of advice to de-

Of the various matters of which the star chamber took cognizance, one of the earliest was the publishing, printing, and even the keeping and read-

liver their opinions, which his wisdom alloweth or disalloweth, increaseth or abateth at his royal pleasure, which was performed by King James, even like unto Solomon's wisdom, in the great case of the Countess of Exeter against Sir Thomas Lake, wherein his majesty sat five continued days in a chair of state, elevated above the table about which his lords sat; and after a long and patient hearing, and the opinions particularly of his great council, he pronounced a sentence more accurately, eloquently, judicially, grave, and honorably, more just to the satisfaction of all hearers, and all lovers of justice, than all the records extant in this kingdom can declare to have been done by any of his royal progenitors. There is no man will deny that in all monarchies the king is the fountain of all justice, to whom is the first refuge for those that are distressed, and the last to whom appeals are to be made," &c. &c.

Sir Thomas Smith (*ubi supra*), however, says that it is "called the star chamber (chambre des estoyers, or estoilles), either because it is full of windows, or because at the first all the roof thereof was decked with images of stars gilded." *Vid.* the Archæologia, vol. 25.

Blackstone suggests that the name was derived from a repository for deeds, &c., relating to the Jews, and called *starr*, or *shetar*, which was near to the star chamber. He cites a record of 41 Edw. III., that the king's council, his chancellor, treasurer, justices, and other sages were assembled "en la chambre des estoilles pres la rescript at Westminster (Beval, 4, p. 266). Before the banishment of the Jews under Edward I. their contracts and obligations were denominated in the ancient records, *sterra*, or *starras*, from the Hebrew word *shetar*, a covenant. These starrs, by an ordinance of Richard I., preserved by Hoveden, were commanded to be enrolled and deposited in chests, under three keys, in certain places, one and the most considerable of which was in the king's exchequer. This room was probably called the starr chamber; and, when the Jews were expelled, the room was applied to the use of the king's council, sitting in their official capacity. In confirmation of this, the first time the star chamber is mentioned it is said to have been situated near the receipt of the exchequer at Westminster. In process of time, when the Jewish starrs were forgotten, the word starr chamber was naturally rendered, in law French, "le chambre les estoilles," and in law Latin,

ing of books. On the twenty-eighth day of January, in the year 1540, one Thomas Marsh, a stationer, was arraigned for selling books without license of the patentees, when we find it "Ordered, that the persons detected for the printing and corrupting of the bishop of London's book shall be bound to print no more."[1]

In 1567, Cooke and others[2] were accused *ore tenus* for buying, reading and keeping seditious books against the religion professed; sent to the Fleet and ordered to pay a fine of 100 marks.

April 20th, 1632, certain persons were fined £200, and £100 for publishing certain libelous books, which were printed and sold at Bristol, and the books were ordered burned.

In 1637, John Liliburne and John Warton were accused, in the star chamber, of unlawfully printing and publishing libelous and seditious books, entitled "News from Ipswich." They refused the oath ex officio, says "The Record,"[3] and were sent to prison. Four days later, they were brought to the court, and still refusing the oath, the court remanded them to the fleet, and fined them £500 each. Liliburne to be whipt through the streets from the Fleet to the pillory, between Westminster Hall gate and the star chamber, where Warton was also to be put. At the pillory he spoke against the bishops, &c., and scattered copies of phamphlets, whereupon the star chamber, which was then sitting, ordered him to be

"*camera stellata*," which continued to be the style in Latin until the dissolution of that court. Lamb. Arch. Blackst., vol. 4.

[1] The court then made several rules and orders for the government of printers (Star Chamber MS. 639, 8 Eliz.), ordinances for reformation of disorders in printing and selling of books; Burn's Star Chamber, 63.

[2] Id. 64.

[3] Burn's Star Chamber, 149.

gagged, which was done. This was followed by an order of the star chamber, dated April 8th, 1637, that Liliburne should be laid alone with iron on his hands and legs, &c., &c. He remained in prison until 1640.[1]

"In 1649 he was tried at the Guildhall, for a seditious book, and by his courage, tenacity, and logical skill, eventually beat the twelve judges and council of state."[2]

In 1637, the year in which Bostwick, Burton and Prynne were sentenced,[3] the court made the decree (July 11, 1637) respecting books and printing. It imposed restrictions on the importation and sale of books, upon type founders, printers, merchants and masters of ships, carpenters and smiths, employed in making presses, &c.; it prohibited any "haberdasher of small wares, iron-monger, chandler, shopkeeper," or any person not having served an apprenticeship to a bookseller, to receive, buy or sell any "bibles, testaments, psalm books, primers, abcees, almanacks," or other books, upon pain of punishment by the star chamber or high commission.[4] It appointed twenty persons by name, to have printing presses, and four persons to be letter founders. And it forbade any merchant or other tradesman to open any packs of books from abroad, before the archbishop of

[1] Rushworth, ii. 468. When the court called upon Liliburne to answer interrogatories, he refused, and said that it was the oath *ex officio*, and that no freeborn Englishman ought to take it, not being bound by the law to accuse himself. Whence he was called, ever after, "Freeborn John."

[2] "Omitted Chapters of the History of England," by Andrew Basset, 1864.

[3] About his Histrio Mastix, Anno, 1633, and of losing his ears a second time, Anno, 1637.—Hudson's Treatise on the Star Chamber.

[4] A court which played into the hands of the star chamber, and *vice versa*. The High Commission, Notices of the Court, and its Proceedings, London, 1865.

Canterbury or the bishop of London, had appointed their chaplain, or some other learned man to be present at the opening thereof, that all seditious, schismatical, or offensive books might be seized.

This decree was followed by orders of parliament and occasioned Milton's "Areopagitica," written, he says, "in order to deliver the press from the restraints with which it was encumbered; that the power of determining what was true and what was false, what ought to be published, and what to be suppressed, might no longer be intrusted to a few illiterate and illiberal individuals, who refused their sanction to any work which contained views or sentiments at all above the level of the vulgar superstition."

214. In order to comprehend the organization of the body known as the stationers' company, it is necessary to somewhat retrace our steps. Printing had become extensive in England about a century after its discovery. In the year 1556,[1] Philip and Mary granted a charter to the stationers' company,[2] an incorporation consisting, not of venders of stationery, in the present sense of the word, but of booksellers and printers, who, for their general benefit, determined to keep at their hall a register, in which

[1] Their second charter was in 1558.

[2] "Why Stationers' Hall was intrusted with the profitable privilege of registering new publications, of demanding fees, of imposing vexatious restraints upon searchers for titles in their office, is not very clear, unless this arose from the reverence for vested interests, which, though it is sometimes justifiable, on moral grounds, is certainly carried, in this country, to superstitious lengths. A vested interest over somebody else's property; a prescriptive right vested in individuals to interfere with the future work of other people's hands and brains, or to derive an exclusive profit from it, cannot be defended."—*John Camden Hotten, Seven Letters, &c., on Literary Property*, London, Hotten, 1871.

should be entered the title of every new book, the name of the proprietors, and the successive transfers of the copyright.

The desire of the crown to suppress the reformed religion led to the severest restrictions being laid upon the press, and there are various decrees and ordinances of the star chamber of this date,[1] "regulating the manner of printing, the number of presses throughout the kingdom, and prohibiting all printing against the force and meaning of any of the statutes or laws of the realm, or in any injunction, letters patent, or ordinance, set forth, or to be set forth, by the queen's grant, commission, or authority."[2]

[1] *Vid.* Millar v. Taylor, 4 Burr. 2312, 2313. In 1583, two printers, Wolf and Ward, insisted upon a right of printing all books, even where there were copyrights existing (Stowe, 223, tit. Stationers' Company). But commissioners, appointed by the crown, willed them to desist. See Wedderburn's Argument in Tonson v. Collins, 1 W. Black. R. 304.

[2] "It is natural to suppose that a government thus arbitrary and vigilant must have looked with extreme jealousy on the diffusion of free inquiry through the press. The trades of printing and book-selling, in fact, though not absolutely licensed, were always subject to a sort of peculiar superintendence. Besides protecting the copyright of authors, the council frequently issued proclamations to restrain the importation of books, or to regulate their sale. It was penal to utter, or so much as to possess, even the most learned works on the Catholic side; or if some connivance was used in favor of educated men, the utmost strictness was used in suppressing that light infantry of literature, the smart and vigorous pamphlets with which the two parties arrayed against the church assaulted her opposite flanks. Stow, the well-known chronicler of England, who lay under suspicion of an attachment to popery, had his library searched by warrant, and his unlawful books taken away; several of which were but materials for his history. Whitgift, in this, as in every other respect, aggravated the rigor of preceding times. At his instigation, the star chamber, 1585, published ordinances for the regulation of the press. The preface to these recites 'enormities and abuses of disorderly persons professing the art of printing and selling

By another decree of the star chamber, June 23, 1585,[1] every book or other publication was to be licensed, "nor shall," it proceeds, "any one print any book, work or copy, against the form or meaning of any restraint contained in any statute or laws of this realm, or in any injunction made by her majesty or her privy council; or against the true intent and meaning of any letters patent. Commissions or prohibitions, under the great seal, or contrary to any allowed ordinance set down for the good government of the stationers' company." A proclamation of September 25, 1623,[2] recites the above de-

books," to have more than increased in spite of the ordinances made against them, which it attributes to the inadequacy of the penalties hitherto inflicted. Every printer, therefore, is enjoined to certify his presses to the stationers' company, on pain of having them defaced, and suffering a year's imprisonment. None to print at all, under similar penalties, except in London, and one in each of the two universities. No printer, who has only set up his trade within six months, to exercise it any longer, nor any to begin it in future until the excessive multitude of printers be diminished and brought to such a number as the archbishop of Canterbury and bishop of London for the time being shall think convenient; but whenever any addition to the number of master-printers shall be required, the stationers' company shall select proper persons to use that calling, with the approbation of the ecclesiastical commissioners. None to print any book, matter, or thing whatsoever, until it shall have been first seen, perused, and allowed by the archbishop of Canterbury or bishop of London, except the queen's printer, to be appointed for some special service, or law-printers, who shall require the license only of the chief justices. Every one selling books printed contrary to the intent of this ordinance, to suffer three months' imprisoment. The stationers' company were empowered to search houses and shops of printers and booksellers, and to seize all books printed in contravention of this ordinance, to destroy and deface the presses, and to arrest and bring before the council those who shall have offended therein (Hallam's Constitutional History of England, vol. 1, p. 238).

[1] 28 Eliz., art. 4. [2] 121 Jac. 1.

cree, 28 Elizabeth, and that the same had been evaded, among other things, by printing "beyond sea such allowed books, works or writings, as have been imprinted within the realm, to such to whom the sole printing thereof by letters patent, or lawful ordinance, or authority, doth appertain, and goes on to enforce the said decree."[1]

By another decree of the star chamber, made on the 11th day of July, 1637,[2] no person was to print or import any book or copy thereof, which the company of stationers, "or any other person or company hath or shall by any letters patent, order, or enter, in their register book, or otherwise have the right, privilege, or allowance, solely to print."

The abolition of the star chamber, in 1640, and the consequent lifting from the press of all restraint, including the charter powers of the stationers' company, seems to have been immediately succeeded by a license almost unbounded. "The king's author-

[1] No case of a prosecution in the star chamber for printing without license, or against letters patent, or pirating another man's copy, or any other disorderly printing has been found. Most of the judicial proceedings of the star chamber are lost or destroyed. But it is certain that down to the year 1640, copies were protected and secured from piracy, by a much speedier and more effectual remedy, than actions at law, or bills in equity. No license could be obtained to print another man's copy. Not from any prohibition, but because the thing was immoral, dishonest and unjust. And he who printed without a license, was liable to great penalties. It appears that there is no ordinance or by-law relative to copies till after the year 1640, and yet, from the first charter of the stationers' company, copies were entered as property, and pirating was punished. . . . . It is remarkable that the decree of the star chamber in 1637, expressly supposes a copyright to exist otherwise than by patent, order or entry in the register of the stationers' company, which could only be by common law.—Willes, J., in Millar v. Taylor, 4 Burr. pp. 2313, 2314.

[2] Art. 7.

ity was set at naught, all regulations of the press and restraints of unlicensed printing, by proclamations, decrees of the star chamber and charter powers, given to the stationers' company, were deemed to be and certainly were illegal."[1]

215. The extremes to which libels upon itself were carried, induced parliament to pass an ordinance forbidding publication of a book, unless it were first licensed, and entered in the register of the stationers' company. This ordinance further contained a prohibition against printing a work without its author's or owner's consent, or importing copies of such work, if printed abroad, upon pain of forfeiting the same to the owner of the work.[2]

In November, 1644, Milton published his famous speech for the liberty of unlicensed printing, against this ordinance.[3]

"The Areopagitica"[4] is a state paper of the

[1] Willes, J., in Miller v. Taylor, 4 Burr. p. 2314.

[2] Copyrights in their opinion then, (*i..e.* the parliament) could only stand upon the common law; both houses take it for granted. . . . . This provision necessarily supposes the property to exist. It is nugatory if there was no owner. An owner could not exist at that time save by the common law. Id. *Vid.* Copinger on Copyright, p. 11.

[3] 4 Burr. 2315.

[4] 'The Areopagitica illustrates the influence of Greece upon Milton scarcely less than the Samson Agonistes. Its name is Greek, and its model was Greek. In the prose work, Isocrates is to the author what Euripides was to him in the dramatic poem. And it is introduced with a Greek motto.

In looking round for parallels to himself, in his oration to the English Parliament in behalf of a free press, he naturally turned his eyes to Greece, and the men who in the days of Greece "professed the study of wisdom and eloquence." He saw the nearest resemblance to his own case in the *Λόγος Ἀρεοπαγιτικός*, the Areopagitic Discourse of Isokrates, and he adopted the name, or a mere variation of it. It is Isokrates he means when he speaks of him 'who from his private house

republic of letters. It is the Declaration and the Bill of Rights of the liberty of literature. It was written at a time when there was no freedom of letters, or of unlicensed printing, and bridges over an interval in wrote that discourse to the parliament of Athens that persuades them to change the form of democracy which was then established."

It was one of the dearest hopes of his youth to visit this Athens in the body, but "when I was preparing to pass over into Sicily and Greece, the melancholy intelligence which I received of the civil commotions in England made me alter my purpose; for I thought it base to be traveling abroad while my fellow-citizens were fighting for liberty at home." It may well be believed that this resignation of his Greek tour was not the least of the sacrifices Milton made at the call of duty. Such was the fascination of Greek artistic form over him that, as is well-known, his first design for his great poem was formed on the model of the Greek drama. Towards the close of his life, he did so plan and compose his Samson Agonistes.

Of the circumstances under which the Areopagitica was written, Milton has himself given an account in his "Second Defense of the People of England" (*Defensio Secunda pro Populo Anglicano contra infamem libellum anonymum cui titulus Regii Sanguinis Clamor ad Cælam adversus Parricidos Anglicanos*). In that work, to refute fully the calumnies heaped on his name by his enemy, he gives a rapid sketch of his past life. After speaking of his earlier days, he mentions his travels abroad, and then how, coming home, he was drawn into the great struggle that he found prevailing, or beginning to prevail. He continues, "Lastly I wrote my 'Areopagitica,' after the true Attic style, in order to deliver the press from the restraints with which it was encumbered; that the power of determining what was true and what was false, what ought to be published and what to be suppressed, might no longer be intrusted to a few illiterate and illiberal individuals, who refused their sanction to any work which contained views or sentiments at all above the level of the vulgar superstition. On the last species of civil liberty I said nothing, because I saw that sufficient attention was paid to it by the magistrates; nor did I write anything on the prerogative of the crown till the king, voted an enemy by the parliament, and vanquished in the field, was summoned before the tribunal which condemned him to lose his head."—*Hales.*

the history of letters, otherwise without its record.[1]

In 1649 the long parliament made an ordinance

[1] "The attempt made to reimpose restrictions upon the freedom of expressed thought, against which Milton raises his voice in the 'Areopagitica' with so noble a vehemence, so that it will still be heard to the very end of time, was only too significant of the temper and tendencies of the Presbyterian rule that then lay upon his country. From the meeting of the long parliament in November, 1640, to June, 1643, the press had been practically free (Masson's "Life of John Milton and History of his Time," iii. 265, *et seq.*)." Hales. Even the custom of registering publications in the books of the stationers' company had been widely neglected. On June 14, 1643, the following ordinance was ordered by the lords and commons assembled in parliament:

"An order of the lords and commons assembled in parliament, for the regulating of printing, and for suppressing the great late abuses and frequent disorders in printing many false, scandalous, seditious, libellous, and unlicensed pamphlets, to the great defamation of religion and government.

"Also authorizing the masters and wardens of the company of stationers to make diligent search, seize and carry away all such books as they shall finde printed or reprinted by any man having no lawfull interest in them, being entred in the hall book to any other man as his proper copies.

"Die Mercurii, 14 June, 1643.—Ordered by the lords and commons assembled in parliament that this order shall be forthwith printed and published.—J. Brown Cler. Parliamentorum: Hen. Elsing, Cler. D. Com.

"Die Mercurii, 14 Junii, 1643.

"Whereas divers good orders have bin lately made by both houses of parliament, for suppressing the great late abuses and frequent disorders in printing many false, forged, scandalous, seditious, libellous, and unlicensed papers, pamphlets, and books to the great defamation of religion and government. Which orders (notwithstanding the diligence of the company of stationers, to put them in full execution) have taken little or no effect: By reason the bill in preparation, for redresse of the said disorders, hath hitherto bin retarded through the present distractions, and very many, as well stationers and printers, as others of sundry other professions not free of the stationers company, have taken upon them to set

forbidding the printing of any book legally granted or any book entered, without consent of the owner, upon pains of forfeiture, &c.

up sundry private printing presses in corners, and to print, vend, publish and disperse books, pamphlets, and papers, in such multitudes, that no industry could be sufficient to discover or bring to punishment, all the severall abounding delinquents: And by reason that divers of the stationers company and others being delinquents (contrary to former orders and the constant custome used among the said company) have taken liberty to print, vend, and publish, the most profitable vendible copies of books, belonging to the company and other stationers, especially of such agents as are imployed in putting the said orders in execution, and that by way of revenge for giveing information against them to the houses for their delinquences in printing, to the great prejudice of the said company of stationers and agents, and to their discouragement in this publik service.

"It is therefore ordered by the lords and commons in parliament, that no order or declaration of both, or either house of parliament shall be printed by any, but by order of one or both the said houses: Nor other book, pamphlet, paper, nor part of any such book, pamphlet, or paper, shall from henceforth be printed, bound, stitched or put to sale by any person or persons whatsoever, unlesse the same be first approved of and licensed under the hands of such person or persons as both, or either of the said houses shall appoint for the licensing of the same, and entred in the register book of the company of stationers, according to ancient custom, and the printer thereof to put his name thereto. And that no person or persons shall hereafter print, or cause to be reprinted any book, or books or part of book, or books heretofore allowed of and granted to the said company of stationers for their relief and maintenance of their poore, without the license or consent of the master, wardens, and assistants of the said company; nor any book or books lawfully licenced and entred in the register of the said company for any particular member thereof, without the licence and consent of the owner or owners thereof. Nor yet import any such book or books, or part of book or books formerly printed here, from beyond the seas, upon paine of forfeiting the same to the owner, or owners of the copies of the said books, and such further punishment as shall be thought fit.

"And the master and wardens of the said company, the

The practical fruits of indices expurgata, of the licensing and burning of books which prevailed in Europe to a greater or less extent from the era of

gentleman usher of the house of peers, the sergeant of the commons house and their deputies, together with the persons formerly appointed by the committee of the house of commons for examinations, are hereby authorized and required, from time to time, to make diligent search in all places, where they shall think meete, for all unlicensed printing presses, and all presses anyway imployed in the printing of scandalous or unlicensed papers, pamphlets, books, or any copies of books belonging to the said company, or any member thereof, without their approbation and consents, and to seize and carry away such printing presses letters, together with the nut, spindle, and other materialls of every such irregular printer, which they find so misimployed, unto the common hall of the said company, there to be defaced and made unserviceable according to ancient custom; and likewise to make diligent search in all suspected printing-houses, warehouses, shops, and other places for such scandalous and unlicensed books, papers, pamphlets, and all other books, not entred, nor signed with the printers name as aforesaid, being printed, or reprinted by such as have no lawfull interest in them, or any way contrary to this order, and the same to seize and carry away to the said common hall, there to remain till both or either house of parliament shall dispose thereof, and likewise to apprehend all authors, printers, and other persons whatsoever imployed in compiling, printing, stitching, binding, publishing, and dispersing of the said scandalous, unlicensed, and unwarrantable papers, books and pamphlets as aforesaid, and all those who shall resist the said parties in searching after them, and to bring them afore either of the houses or the committee of examinations, that so they may receive such further punishments, as their offences shall demerit, and not to be released untill they have given satisfaction to the parties imployed in their apprehension for their paines and charges, and given sufficient caution not to offend in like sort for the future. And all justices of the peace, captaines, constables and other officers, are hereby ordered and required to be aiding and assisting to the foresaid persons in the due execution of all, and singular the premisses and in the apprehension of all offenders against the same. And in case of opposition to break open doores and locks.

"And it is further ordered, that this order be forthwith

Henry the Eighth, to the times of Charles I. of England, were never such as to encourage the dignataries who maintained that policy. The institution unprinted and published, to the end that notice may be taken thereof, and all contemners of it left inexcusable.

"FINIS."

For some account of the previous history of book-censorship the reader may be referred to the "Areopagitica" itself, where, in the opening part of his argument, Milton rapidly surveys the conduct of other countries and times in this respect (See also Standard Library Cyclop. s. v. Press Censorship; Beckmann's Hist. of Inventions, on Book Censors, and on Exclusive Privilege for Printing Books (ii. 512–522, of the 4th Engl. edit.); Knight's London, vol. 5; The Old London Booksellers; Hart's Index Expurgatorius Anglicanus, parts i. and ii; Hallam's Constitut. Hist. of Engl. *passim*; D'Israeli's Curiosities of Literature, on Licensers of the Press; Hunt's Fourth Estate, 1850, &c.). It is clear that books enjoyed an immunity from restriction in the middle ages, only because they were held to be of comparatively slight account. As soon as ever their influence began to extend, and the printing press to multiply copies without limit, so soon were they regarded with jealous eyes and threatened with a rigorous supervision. From the close of the fifteenth century a formal censorship became a more and more common institution.

"The oldest mandate, for appointing a book-censor," says Beckmann, "is, as far as I know at present, that issued by Berthold, Archbishop of Mentz, in the year 1486, and which may be found in the fourth volume of Guden's Codex Diplomaticus. In the year 1501, Pope Alexander VI. published a bull, the first part of which may form an excellent companion to the mandate of the Archbishop of Mentz. After some complaints against the devil, who sows tares among the wheat, his holiness proceeds thus: 'Having been informed that, by means of the said art, many books and treatises containing various errors and pernicious doctrines, even hostile to the holy Christian religion, have been printed, and are still printed in various parts of the world, particularly in the provinces of Cologne, Mentz, Triers, and Magdeburg; and being desirous, without further delay, to put a stop to this detestable evil, . . . we, by these presents, and by authority of the Apostolic chamber, strictly forbid all printers, their servants, and those exercising the art of printing under them, in any manner whatsoever, in the abovesaid prov-

doubtedly originated in the Inquisition, although previously we learn that the monks had a part of their libraries called the inferno, not indeed as being

inces, under pain of excommunication, and a pecuniary fine to be imposed and exacted by our venerable brethren, the archbishops of Cologne, Mentz, Triers, and Magdeburg, and their vicars-general or official in spirituals, according to the pleasure of each in his own province, to print hereafter any books, treatises, or writings, until they have consulted on this subject the archbishops, vicars, or officials above-mentioned, and obtained their special and express license to be granted free of all expense, whose consciences we charge, that before they grant any license of this kind, they will carefully examine, or cause to be examined, by able and Catholic persons, the works to be printed; and that they will take the utmost care that nothing may be printed wicked or scandalous, or contrary to the orthodox faith.' The rest of the bull contains regulations to prevent works already printed from doing mischief. All catalogues and books printed before that period were to be examined, and those which contained anything prejudicial to the Catholic religion were to be burned. In the beginning of the sixteenth century it was ordered by the well-known council of the Lateran, held at Rome in the year 1515, that in future, no books should be printed but such as had been inspected by ecclesiastical censors. In France, the faculty of theology usurped, as some say, the right of censuring books; but in the year 1650, when public censors, whom the faculty opposed, were appointed, without their consent, they stated the antiquity of their right to be two hundred years. For they said, 'It is above two hundred years since the doctors of Paris have had a right to approve books without being subjected but to their own faculty, to which they assert they are alone responsible for their decisions.'"

In countries where the inquisition was established, the work of the censorship was undertaken by the holy office. Elsewhere it was taken up by the bishops. In England it was especially discharged by the star chamber, a court that was in fact, whatever the theoretic constitution, mainly in the hands of the bishops. Long before Archbishop Laud's time this court had exercised authority over the press (as, for example, at Whitgift's instance in 1585); but it was under him that its restrictive power was put forth in its severest form. On the 11th day of July, 1637, was passed the notorious "Decree of Starre-Chamber concerning printing." This document is one

the part least visited by them, which contained all prohibited books. This inquisitorial power assumed its most formidable shape in the council of Trent,

of the few decrees of this notorious tribunal which has been completely preserved, and runs as follows:

"In Camera Stellata coram Concilio ibidem, vndecimo die Iulii, Anno decimo tertio Caroli Regis.

"*Imprimis*, That no person or persons whatsouer shall presume to print, or cause to bee printed, either in the parts beyond the seas, or in this realme, or other his maiesties dominions, any séditious, scismaticall, or offensive bookes or pamphlets, to the scandall of religion, or the church, or the government, or governours of the church or state, or commonwealth, or of any corporation, or particular person or persons whatsoeuer, nor shall import any such booke or bookes, nor sell or dispose of them, or any of them, nor cause any such to be bound, stitched, or sowed, vpon paine that he or they so offending shall loose all such bookes and pamphlets, and also haue, and suffer such correction, and severe punishment, either by fine, imprisonment, or other corporall punishment, or otherwise, as by this court, or by his maiesties commissioners for causes ecclesiasticall in the high commission court, respectiuely, as the several causes shall require, shall be thought fit to be inflicted upon him, or them, for such their offence and contempt.

"II. Item, That no person or persons whatsoeuer, shall at any time print, or cause to be imprinted, any booke or pamphlet whatsoever, vnlesse the same booke or pamphlet, and also all and euery the titles, epistles, prefaces, proems, preambles, introductions, tables, dedications, and other matters and things whatsoeuer, thereunto annexed, or therewith imprinted, shall be first lawfully licenced and authorized onely by such person and persons as are hereafter expressed, and by no other, and shall be also first entred into the registers booke of the company of stationers; vpon paine that euery printer offending therein shall be for euer hereafter disabled to use or exercise the art or mysterie of printing, and receiue such further punishment, as by this court, or the high commission court respectiuely, as the severall causes shall require, shall be thought fitting.

"III. Item, That all bookes concerning the common laws of this realme, shall be printed by the especiall allowance of the lords chief iustices, and the lord chiefe baron for the time being, or one or more of them, or by their appointment: And

when some gloomy spirits from Rome and Madrid, foresaw the revolution of this new age of books. "The triple-crowned pontiff had in vain rolled the thunders

that all bookes of history, belonging to this state, and present times, or any other booke of state affaires, shall be licenced by the principall secretaries of state, or one of them, or by their appointment; and that all bookes concerning heraldry, titles of honour and armes, or otherwise concerning the office of earle marshall, shall be licenced by the earle marshall, or by his appointment; and further, that all other bookes, whether of diuinitie, phisicke, philosophie, poetry, or whatsoeuer, shall be allowed by the lord arch-bishop of Canterbury, or bishop of London for the time being, or by their appointment, or the chancellours, or vice-chancellors of either of the vniuersities of this realme for the time being.

"Alwayes prouided, that the chancellour or vice-chancellour, or either of the vniuersities, shall licence onely such booke or bookes that are to be printed within the limits of the vniuersities respectively, but not in London, or elsewhere, not medling either with bookes of the common law, or matters of state.

"IV. Item, That euery person and persons, which by any decree of this court are, or shall be appointed or authorised to licence bookes, or giue warrant for imprinting thereof, as is aforesaid, shall haue two seuerall written copies of the same booke or bookes with the titles, epistles, prefaces, proems, preambles, introductions, tables, dedications, and other things whatsoeuer thereunto annexed. One of which said copies shall be kept in the publike registries of the said lord arch-bishop, and bishop of London respectively, or in the office of the chancellour, or vice-chancellour of either of the vniuersities, or with the earie marshall or principall secretaries of state, or with the lords chiefe iustices, or chiefe baron, of all such bookes as shall be licenced by them respectiuely, to the end that he or they may be secure, that the copy so licenced by him or them shall not bee altered, without his or their priuitie, and the other shall remain with him whose copy it is, and vpon both the said copies, he or they that shall allow the said booke, shall testifie vnder his or their hand or hands, that there is nothing in that booke or books contained, that is contrary to Christian faith, and the doctrine and discipline of the church of England, nor against the state or gouernment, nor contrary to good life, or good manners, or otherwise, as the nature and

of the Vatican, to strike out of the hands of all men the volumes of Wickliffe, of Huss, and of Luther, and even menaced their eager readers with death. At this

subiect of the work shall require, which licence or approbation shall be imprinted in the beginning of the same booke, with the name, or names of him or them that shall authorize or licence the same, for a testimonie of the allowance thereof.

"V. Item, That every merchant of bookes, and person and persons whatsoeuer, which doth, or hereafter shall buy, or import, or bring any booke or bookes into this realme, from any parts beyond the seas, shall before such time as the same book or books, or any of them be deliuered forth, or out of his, or their hand or hands, or exposed to sale, giue, and present a true catalogue in writing of all and euery such booke and bookes vnto the lord arch-bishop of Canterbury, or lord bishop of London for the time being, vpon paine to haue and suffer such punishment for offending herein, as by this court, or by the said high commission court respectiuely, as the seueral causes shall require, shall be thought fitting.

"VI. Item, That no merchant, or other person or persons whatsoeuer, which shall import or bring any book or books into the kingdome, from any parts beyond the seas, shall presume to open any dry-fats, bales, packs, maunds, or other fardals of books, or wherein books are; nor shall any searcher, wayter, or other officer belonging to the custome-house, vpon pain of loosing his or their place or places, suffer the same to passe, or to be deliuered out of their hands or custody, before such time as the lord arch-bishop of Canterbury, or lord bishop of London, or one of them for the time being, haue appointed one of their chaplains, or some other learned man, with the master and wardens of the company of stationers, or one of them, and such others as they shall call to their assistance, to be present at the opening thereof, and to view the same: And if there shall happen to be found any seditious, schismaticall, or offensiue booke or bookes, they shall forthwith be brought vnto the said lord arch-bishop of Canterbury, lord bishop of London for the time being, or one of them, or to the high commission office, to the end that as well the offendor or offendors may be punished by the court of star chamber, or the high commission court respectiuely, as the seuerall causes shall require, according to his or their demerit; as also that such further course and order may be taken concerning the same booke or bookes, as shall bee thought fitting.

council Pius IV. was presented with a catalogue of books of which they denounced that the perusal ought to be forbidden; his bull not only confirmed this list

"VII. Item, That no person or persons shall within this kingdome, or elsewhere imprint, or cause to be imprinted, nor shall import or bring in, or cause to be imported or brought into this kingdome, from, or out of any other his maiesties dominions, nor from other, or any parts beyond the seas, any copy, book or books. or part of any booke or bookes, printed beyond the seas, or elsewhere, which the said company of stationers, or any other person or persons haue, or shall by any letters patent, order, or entrance in their register book, or otherwise haue the right, priuilege, authoritie, or allowance soly to print, nor shall bind, stitch, or put to sale, any such booke or bookes, vpon paine of losse and forfeiture of all the said bookes, and of such fine, or other punishment, for euery booke or part of a booke so imprinted or imported, bound, stitched, or put to sale, to be leuyed of the party so offending, as by the power of this court, or the high commission court respectiuely, as the seuerall causes shall require, shall be thought fit.

"VIII. Item, Euery person and persons that shall hereafter print, or cause to be printed, any bookes, ballads, charts, portraiture, or any other thing or things whatsoeuer, shall thereunto or thereon print and set his and their owne name or names, as also the name or names of the author or authors, maker or makers of the same, and by, or for whom any such booke, or other thing is, or shall be printed, vpon pain of forfeiture of all such books, ballads, chartes, portraitures, and other thing or things, printed contrary to this article; and the presses, letters and other instruments for printing, wherewith such books, ballads, chartes, portraitures, and other thing or things shall be printed, to be defaced and made vnseruiceable, and the party or parties so offending, to be fined, imprisoned, and have such other corporall punishment, or otherwise, as by this honourable court, or the said high commission respectiuely, as the seuerall causes shall require, shall be thought fit.

"IX. Item, That no person or persons whatsoeuer, shall hereafter print, or cause to be printed, or shall forge, put, or counterfeit in or vpon any booke or books, the name, title, marke or vinnet of the company or society of stationers, or of any particular person or persons, which hath or shall haue lawfull

of the condemned, but added rules how books should be judged. Subsequent popes enlarged these catalogues, and added to the rules, as the monstrous priuiledge, authoritie, or allowance to print the same, without the consent of the said company, or party or parties that are or shall be so priuiledged, authorized, or allowed to print the same booke or books, thing or things, first had and obtained, vpon paine that euery person or person so offending, shall not onely loose all such books, and other things, but shall also, haue, and suffer such punishment, by imprisonment of his body fine, or otherwise, as by this honourable court, or high commission courte respectively, as the seuerall causes shall require, it shall be to him or them limited or adiudged.

"X. Item, That no Haberdasher of small wares, ironmonger, chandler, shop-keeper, or any other person or persons whatsoeuer, not hauing beene seuen yeeres apprentice to the trade of a book-seller, printer, or book-binder, shall within the citie or suburbs of London, or in any other corporation, market-towne, or elsewhere, receive, take or buy, to barter, sell againe, change or do away any bibles' testaments, psalmbooks, primers, abcee,s almar[illegible].es, or other booke or books whatsoeuer, vpon paine of forfeiture of all such books so receiued, bought or taken as aforesaid, and such other punishment of the parties so offending, as by this court, or the said high commission court respectiuely, as the severall causes shall require, shall be thought meet.

"IX. Item, For that printing is, and for many yeers hath been an art and manufacture of this kingdome, for the better incouraging of printers in their honest, and iust endeavours in their profession, and preuention of diuers libels, pamphlets, and seditious books printed beyond the seas in English, and thence transported hither:

"It is further ordered and decreed, that no merchant, booke-seller, or other person or persons whatsoever, shall imprint, or cause to be imprinted, in the parts beyond the seas or elsewhere, nor shall import or bring, nor willingly assist or consent to the importation or bringing from beyond the seas into this realme, any English bookes, or part of bookes, or bookes whatsoeuer, which are or shall be, or the greater or more part whereof is or shall be English, or of the English tongue, whether the same booke or books haue been here formerly printed or not, vpon pain of the forfeiture of all such English bookes so imprinted or imported, and such further

novelties started up. Inquisitors of books were appointed; at Rome they consisted of certain cardinals and 'the master of the holy palace;' and literary

censure and punishment, as by this court, or the said high commission court respectively, as the seurall causes shall require, shall be thought meet.

"XII. Item, That no stranger or forreigner whatsoeuer, be suffered to bring in, or vent here, any booke or bookes, printed beyond the seas, in any language whatsouer, either by themselues, or their secret factors, except such onely as bee free stationers of London, and such as haue beene brough vp in that profession, and haue their whole meanes of subsistance, and liuelihood depending thereupon, vpon paine of confiscation of all such books so imported, and such further penalties, as by this court, or the high commission court respectiuely, as the seurall causes shall require, shall be thought fit to be imposed.

"XIII. Item, That no person or persons within the citie of London, or the liberties thereof, or elsewhere, shall erect or cause to be erected any presse or printing-house, nor shall demise, or let, or suffer to be held or vsed, any house, vault, celler, or other roome whatsoeuer, to, or by any person or persons, for a printing-house, or place to print in, vnlesse he or they which shall so demise or let the same, or suffer the same to be so vsed, shall first giue notice to the said master and Wardens of the Company of stationers for the time being, of such demise, or suffering to worke or print there, vpon paine of imprisonment, and such other punishment as by this court, or the said high commission court respectiuely, as the seuerall causes shall require, shall bee thought fit.

"XIV. Item, That no ioyner, or carpenter, or other person shall make any printing-presse, no smith shall forge any irone-worke for a printing-presse, and no founder shall cast any letters for any person or persons whatsoeuer, neither shall any person or persons bring, or cause to be brought in from any parts beyond the seas, any letters founded or cast, nor by any such letters for printing, vnless he or they respectively shall first acquaint the said master and wardens, or some of them, for whom the same press, iron-works, or letters, are to be made, forged, or cast, vpon paine of such fine and punishment, as this court, or the high commission court respectiuely, as the seuerall causes shall require, shall thinke fit.

"XV. Item, The court doth declare, that as formerly, so now,

inquisitors were elected at Madrid, at Lisbon, at Naples, and for the low countries; they were watching the ubiquity of the human mind. These catalogues

there shall be but twentie master printers allowed to haue the vse of one presse or more, as is after specified, and doth hereby nominate, allow, and admit these persons whose names hereafter follow, to the number of twentie, to have the vse of a presse, or presses and printing-house, for the time being, viz., Felix Kingstone, Adam Islip, Thomas Purfoot, Miles Flesher, Thomas Harper, Iohn Beale, Iohn Legat, Robert Young, Iohn Haviland, George Miller, Richard Badger, Thomas Cotes, Bernard Alsop, Richard Bishop, Edward Griffin, Thomas Purflow, Richard Hodgkinsonne, Iohn Dawson, Iohn Raworth, Marmaduke Parsons. And further, the court doth order and decree, That it shall be lawfull for the lord arch-bishop of Canterbury, or the lord bishop of London, for the time being, taking to him or them six other high commissioners, to supply the place or places of those which are now already printers by this court, as they shall fall void by death, or censure, or otherwise: Prouided that they exceed not the number of twentie, besides his maiesties printers, and the printers allowed for the vniuersities.

"XVI. Item, That euery person or persons, now allowed or admitted to have the vse of a presse, and printing-house, shall within ten dayes after the date hereof, become bound with sureties to his maiestie in the high commission court, in the sum of three hundred pounds, not to print or suffer to be printed in his house or presse, any booke, or bookes whatsoeuer, but such as shall from time to time be lawfully licensed, and that the like bond shall be entred into by all, and euery person and persons, that hereafter shall be admitted or allowed to print, before he or they be suffered to haue the vse of a presse.

"XVII. Item, That no allowed printer shall keep above two presses, vnlesse he hath been master or upper warden of his company, who are hereby allowed to keep three presses and no more, vnder paine of being disabled for euer after to keepe or vse any presse at all, vnlesse for some great and special occasion for the publique, he or they haue for a time leaue of the lord archbishop of Canterbury, or lord bishop of London for the time being, to have or vse one, or more aboue the foresaid number, as their lordships, or either of them shall thinke fit. And whereas there are some master printers that

of prohibited books were called indexes; and at Rome a body of these literary despots are still called 'the Congregation of the Index.' The simple index is a

haue at this present one or more presses allowed them by this decree, the court doth further order and declare, That the master and wardens of the company of stationers, doe foorthwith certifie the lord archbishop of Canterbury, or the lord bishop of London, what number of presses each master printer hath, that their lordships or either of them, taking vnto them six other high commissioners, may take such present order for the suppressing of the supernumarie presses, as to their lordships, or to either of them shall seem best.

"XVIII. Item, That no person or persons, do hereafter reprint, or cause to be reprinted, any booke or bookes whatsoeuer (though formerly printed with licence) without being reuiewed, and a new licence obtained for the reprinting thereof. Alwayes provided, that the stationer or printer be put to no other charge hereby, but the bringing and leauing of two printed copies of the book to be printed, as is before expressed of written copies, with all such additions as the author hath made.

"XIX. Item, The court doth declare, as formerly, so now, That no apprentices be taken into any printing house, otherwise then according to this proportion following (viz.) euery master printer that is, or hath beene master or upper warden of his company, may haue three apprentices at one time and no more, and euery master printer that is of the liuerie of his company, may have two apprentices at one time and no more, and euery master printer of the yeomanry of the company may have one apprentice at one time and no more, neither by copartnership, binding at the scriueners, nor any other way whatsoeuer; neither shall it be lawfull for any master printer when any apprentice or apprentices, shall run or be put away, to take another apprentice, or other apprentices in his or their place or places, vnlesse the name or names of him or them so gone away, be raced out of the hall booke, and never admitted again, vpon paine of being for euer disabled of the vse of a presse or printing-house, and of such further punishment, as by this court or the high commission court respectiuely, as the seuerall causes shall require, shall be thought fit to be imposed.

"XX. Item, The court doth likewise declare, that because a great part of the secret printing in corners hath been caused

list of condemned books never to be opened; but the expurgatory index indicates those only prohibited till they have undergone a purification.' No book was to

for want of orderly imployment for iourneymen printers, There-fore the court doth hereby require the master and wardens of the company of stationers, to take especiall care that all iourneymen printers, who are free of the company of stationers, shall be set to worke, and imployed within their own company of stationers; for which purpose the court doth also order and declare, that if any iourneyman printer, and free of the company of stationers, who is of honest, and good behauiour, and able in his trade, do want imployment, he shall repaire to the master and wardens of the companie of stationers, and they or one of them, taking with him or them one or two of the

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[1] "Pursuant to the decree of the star chamber in 1637, concerning the press, all books of divinity, physic, philosophy, and poetry, were licensed either by the Archbishop of Canterbury, or the Bishop of London, or by substitutes of their appointment. The document is in Rushworth, Hist. Col. iii. 306, appendix; and is reprinted in the Memoirs of Thomas Hollis, p. 641." (Holt White.) Lambeth House, the residence of the Archbishop of Canterbury, "from at least the thirteenth century."

Disraeli in his Curiosities of Literature (p. 99, § 1), preserves the following documentary relics of this epoch, which, he says, serves as a curious instance, in what manner the censors of books clipped the wings of genius when it was found too daring or excursive—

"I, the underwritten John Paul Marano, author of a manuscript Italian volume, intituled 'l'Esploratore Turco, tomo terzo," acknowledge that Mr. Charpentier, appointed by the lord chancellor to revise the said manuscript, has not granted me his certificate for printing the said manuscript, but on condition to rescind four passages. The first beginning, &c. . . By this I promise to suppress from the said manuscript the places above marked, so that there shall remain no vestige; since without agreeing to this, the said certificate would not have been granted me by the said Mr. Charpentier; and for surety of the above, which I acknowledge to be true, and which I promise punctually to execute, I have signed the present writing. Paris, 28th September, 1686.—John Paul Marana."

be allowed on any subject, or in any language which contained a single position, an ambiguous sentence, even a word, which, in the most distant sense, could

master printers, shall go along with the said iourneyman printer, and shall offer his seruice in the first place to the master printer vnder whom he serued his apprentiship, if he be liuing, and do continue an allowed printer, or otherwise to any other master printer, whom the master and wardens of the said coupany shall thinke fit. And euery master printer shall bee bound to imploy one iourneyman, being so offered to him, and more, if need shall so require, and it shall be so adiudged to come to his share, according to the proportion of his apprentices and imployments, by the master and wardens of the company of stationers, although he the said master printer with his apprentice or apprentices be able without the helpe of the said iourneyman or iourneymen to discharge his owne worke, vpon paine of such punishment, as by this court, or the high commission court respectiuely, as the several causes shall require, shall be thought fit.

"XXI. Item, The court doth declare, That if the master and wardens of the companie of stationers, or any of them, shall refuse or neglect to go along with any honest and sufficient iourneyman printer, so desiring their assistance, to finde him employment, vpon complaint and proofe made thereof, he, or they so offending, shall suffer imprisonment, and such other punishment as by this court, or the high commission court respectively, as the seuerall causes shall require, shall be thought fit to be imposed. But in case any master printer hath more imployment then he is able to discharge with helpe of his apprentice or apprentices, it shall be lawful for him to require the helpe of any iourney-man or iourney-men-printers, who are not imployed, and if the said iourney-man, or iourney-men-printers so required, shall refuse imployment, or neglect it when hee or they haue vndertaken it, he or they shall suffer imprisonment, and vndergo such punishment, as this court shall thinke fit.

"XXII. Item, The court doth hereby declare, that it doth not hereby restraine the printers of either of the vniuersities from taking what number of apprentices for their service in printing there, they themselues shall thinke fit. Prouided alwayes, that the said printers in the vniuersities shall imploy all their owne iourney-men within themselues, and not suffer any of their said iourney-men to go abroad for imployment to the printers of London (vnlesse vpon occasion some prin-

be construed opposite to the doctrines of the supreme authority of this council of Trent; where it seems to have been enacted, that all men, literate and illiterate,

ters of London desire to imploy some extraordinary workman or workmen amongst them, without preiudice to their owne iourneymen, who are freemen) vpon such penalty as the chancellor of either of the vniuersities for the time being, shall think fit to inflict vpon the deliaquents herein.

"XXIII. Item, That no master-printer shall imploy either to work at the case, or the presse, or otherwise about his printing, any other person or persons, then such only as are free-men, or apprentices to the trade or mystery of printing, vnder paine of being disabled for euer after to keep or vse any presse or printing house, and such further punishment as by this court, or the high commission court respectiuely, as the severall causes shall require, shall bee thought fit to be imposed.

"XXIV. Item, The court doth hereby declare their firme resolution, that if any person or persons, that is not allowed printer, shall hereafter presume to set vp any presse for printing, or shall worke at any such presse, or set, or compose any letters to bee wrought by any such presse; hee, or they so offending, shall from time to time, by the order of this court, bee set in the pillorie, and whipt through the citie of London, and suffer such other punishment, as this court shall order or thinke fit to inflict vpon them, vpon complaint or proofe of such offence or offences, or shalbe otherwise punished, as the court of high commission shall thinke fit, and is agreeable to their commission.

"XXV. Item, That for the better discouery of printing in corners without licence; The master and wardens of the company of stationers for the time being, or any two licensed master printers, which shall be appointed by the lord archbishop of Canterbury, or lord b. of London for the time being, shall haue power and authority, to take vnto themselues such assistance as they shall think needfull, and to search what houses and shops (and at what time they shall think fit) especially printing-houses, and to view what is in printing, and to call for the license to see whether it be licenced or no, and if not, to seize vpon so much as is printed, together with the severall offendors, and to bring them before the lord archbishop of Canterbury, or the lord bishop of London for the time being, that they or either of them may take such further order therein as shall appertaine to iustice.

prince and peasant, the Italian, the Spaniard, and the Netherlander, should take the mint-stamp of their thoughts from the council of Trent, and millions of

"XXVI. Item, The court doth declare, that it shall be lawfull also for the said searchers, if vpon search they find any book or bookes, or part of booke or books which they suspect to containe matter in it or them, contrary to the doctrine and discipline of the church of England, or against the state and gouernment, vpon such suspition to seize upon such book or books, or part of booke or books, and to bring it, or them, to the lord arch-bishop of Canterbury, or the lord bishop of London for the time being, who shall take such further course therein, as to their lordships, or either of them shall seeme fit.

"XXVII. Item, The court doth order and declare, that there shall be foure founders of letters for printing allowed, and no more, and doth hereby nominate, allow, and admit these persons, whose names hereafter follow, to the number of foure, to be letter-founders for the time being, (viz.) John Grismand, Thomas Wright, Arthur Nichols, Alexander Fifeild. And further the court doth order and decree, that it shall be lawfull for the lord arch-bishop of Canterbury, or the lord bishop of London for the time being, taking unto him or them, six other high commissioners, to supply the place or places of these who are now allowed founders of letters by this court, as they shall fall void by death, censure, or otherwise.

"Prouided, that they exceede not the number of foure, set downe by this court. And if any person or persons, not being an allowed founder, shall notwithstanding take vpon him, or them, to found, or cast letters for printing, vpon complaint and proofe made of such offence, or offences, he, or they so offending, shall suffer such punishment, as this court, or the high commission court respectiuely, as the seuerall causes shall require, shall think fit to inflict vpon them.

"XXVIII. That no master-founder whatsoeuer shall keepe aboue two apprentices at one time, neither by copartnership, binding at the scriueners, nor any other way whatsoeuer, neither shall it be lawfull for any master-founder, when any apprentice or apprentices shall run, or be put away, to take another apprentice, or other apprentices in his, or their place or places, vnlesse the name or names of him, or them so gone away, be rased out of the hall booke of the company, whereof

souls be struck off at one blow, out of the same used mould."

The result, of course, was that an insertion of its

the master-founder is free, and never admitted again, vpon pain of such punishment, as by this court, or the high commission respectiuely, as the seuerall cases shall require, shall be thought fit to bee imposed.

"XXIX. Item, That all iourney-men-founders be imployed by the master-founders of the said trade, and that idle iourneymen be compelled to worke after the same manner, and vpon the same penalties, as in case of the iourneymen printers is before specified.

"XXX. Item, That no master-founder of letters, shall imploy any other person or person in any worke belonging to the casting or founding of letters, then such only as are freemen or apprentices to the trade of founding letters, saue onely in the pulling off the knots of mettle hanging at the ends of the letters when they are first cast, in which work it shall be lawfull for euery master-founder, to imploy one boy only that is not, nor hath beene bound to the trade of founding letters, but not otherwise, upon pain of being for euer disabled to vse or exercise that art, and such further punishment, as by this court, or the high commission court respectiuely, as the severall causes shall require, be thought fit to be imposed.

"XXXI. Item, That every person or persons whatsoeuer, which shall at any time or times hereafter, by his or their confession, or otherwise by proof be conuicted of any of the offences, by this, or any other decree of this court made, shall before such time as he or they shall be discharged, and ouer and aboue their fine and punishment, as aforesaid, be bound with good sureties, never after to transgresse, or offend in that or the like kinde, for which he, or they shall be so conuicted and punished as aforesaid; and that all and euery the forfeitures aforesaid (excepting all seditious schismaticall bookes, or pamphlets, which this court doth hereby order to bee presently burnt.) And except such bookes, as the forfeitures are already granted by letters patent, shall be diuided and disposed of, as the high commission court shall find fit. Alwaies prouiding that one moitie be to the king.

"XXXII. Item, That no merchant, master, or owner of any ship or vessel, or any other person or persons whatsoeuer shall hereafter presume to land, or put on shore any booke or

title in an index was the most valuable of advertisements for the book itself; as fast as the names appeared the owners were enabled to print new editions and

bookes, or the part of any booke or books, to be imported from beyond the seas, in any port, hauen, creek, or other place whatsoeuer within the realme of England, but only in the port of the city of London, to the end the said bookes may there be viewed, as aforesaid; and the seuerall officers of his maiesties ports are hereby required to take notice thereof.

"XXXIII Item, That whereas there is an agreement betwixt Sir Thomas Bodley, Knight, founder of the vniuersity library at Oxford, and the master, wardens, and assistants of the company of stationers (viz.), That one booke of euery sort that is new printed, or reprinted with additions, be sent to the vniuersitie of Oxford for the vse of the publique librarie there; The court doth hereby order and declare, that euery printer shall reserue one book new printed, or reprinted by him, with additions, and shall before any publique venting of the said book, bring it to the common hall of the companie of stationers, and deliuer it to the officer thereof to be sent to the librarie at Oxford accordingly, vpon paine of imprisonment, and such further order and direction therein, as to this court, or the high commission court respectiuely, as the severall causes shall require, shall be thought fit.

"FINIS."

"In camera stellata coram concilio ibidem, vndecimo die iulij, anno decimo tertio Caroli regis.—This day Sir John Bankes, knight, his maiesties attourney-generall, produced in court a decree drawn and penned by the aduice of the right honourable the lord keeper of the great seale of England, the most reuerend father in God the lord arch-bishop of Canterbury his grace, the right honorable and right reuerend father in God the lord bishop of London lord high treasurer of England, the lord chief iustices, and the lord chiefe baron, touching the regulating of printers and founders of letters, whereof the court hauing consideration, the said decree was directed and ordered to be here recorded, and to the end the same may be publique, and that euery one whom it may concerne may take notice thereof, the court hath now also ordered, that the said decree shall speedily be printed, and that the same be sent to his maiesties printer for that purpose. Whereas the three and twentieth day of June in the eight and twentieth yere of the reigne of the late Queene Elizabeth, and before, diuers decrees and ordinances haue been made for the better

make their own fortunes. The publisher of Erasmus's "Colloquies" intrigued to procure the burning of his book, which raised the sale to twenty-four thousand.

gouernment and regulating of printers and printing, which orders and decrees haue been found by experience to be defectiue in some particulars; ana diuers abuses have sithence arisen, and been practiced by the craft and malice of wicked and evill disposed persons, to the preiudice of the publike; and diuers libellous, seditious, and mutinous bookes haue been vnduly printed, and other bookes and papers without licence, to the disturbance of the peace of the church and state: For prevention whereof in time to come, it is now ordered and decreed, that the said former decrees and ordinances shall stand in force with these additions, explanations, and alterations following, viz.

"An order made by the honorable house of commons.

"Die Sabbati, 29, Januarii. 1641 [1642].

"It is ordered that the master and wardens of the company of stationers shall be required to take especiall order, that the printers doe 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 shall then be proceeded against, as both printer and author thereof, and their names to be certified to this house. H. Elfinge Cler. Parl. do. com.

"Die Iovis 9. Maatii 1642 [1643].

"An order of the commons assembled in parliament for regulating printing.

"It is this day ordered by the commons house of parliament, that the committee for examinations, or any foure of them, have power to appoint such persons as they thinke fit, to search in any house or place where there is iust cause of suspition, that presses are kept and employed in the printing of scandalous and lying pamphlets, and that they do demollish and take away such presses and their materials, and the printers nuts and spindles which they find so employed, and bring the master-printers, and workmen printers before the said committee; and that the committee or any four of them, have power to commit to prison any of the said printers, or any other persons that do contrive, or publikely or privately vend, sell, or publish any pamphlet scandalous to his majesty or the proceedings of both or either houses of parliament, or that shall refuse to suffer any houses or shops to be searched,

In the times of Henry VII., Tonstall, bishop of London, whose extreme moderation, of which he was accused at the time, preferred burning books to burning authors, to testify his abhorrence of Tindal's principles, who had printed a translation of the New Testament, a sealed book for the multitude, thought of purchasing all the copies of Tindal's translation, and annihilating them in the common flame. When passing through Antwerp in 1529, then a place of refuge for the Tindalists, he employed an English merchant there for this business, who happened to be a secret follower of Tindal, and acquainted him with the bishop's intention. Tindal was extremely glad to hear of the project, for he was desirous of printing a more correct edition of his version; but the first impression still hung on his hands, and he was too poor to make a new one; he furnished the English merch-

where such presses or pamphlets as aforesaid are kept; and that the persons imployed by the said committee shall have power to seize such scandalous and lying pamphlets as they find uppon search, to be in any shoppe or warehouse, sold, or dispersed by any person whomsoever, and to bring the persons (that so kept published, or sold the same), before the committee; and that such persons as the committee shall commit for any offences aforesaid, shall not be released till the parties imployed for the apprehending of the said persons, and seizing their presses and materialls, be satisfied for their paines and charges. And all iustices of the peace, captains, officers, and constables, are required to be assisting in the apprehending of any the persons aforesaid, and in searching of their shopps, houses, and warehouses; and likewise all iustices of peace, officers, and constables, are hereby required from time to time to apprehend such persons as shall publish, vend, or sell the said pamphlets. And it is further ordered, that this order be forthwith printed and published, to the end that notice may be taken thereof, that the contemners of this order may be left inexcusable for their offence. (A collection of all the publike orders, ordinances and declarations, &c. By Edward Husband, p. 1 London, 1646."

chant with all his unsold copies, which the bishop as eagerly bought, and had them all publicly burnt in Cheapside: which the people not only declared was "a burning of the word of God," but it so inflamed the desire of reading that volume, that the second edition was sought after, at any price; and when one of the Tindalists, who was sent here to sell them, was promised by the lord chancellor in a private examination, that he should not suffer if he would reveal who encouraged and supported his party at Antwerp, the Tindalist immediately accepted the offer, and assured the lord chancellor that the greatest encouragement was from Tonstall, the bishop of London, who had bought up half the impression, and enabled them to produce a second![1] The indexes themselves were republished with preface and annotation. "The parties," says Disraeli, "made an opposite use of them. While the Catholic crossed himself at every title, the heretic would purchase no book which had not been indexed. One of their portions exposed a list of those authors whose heads had been exposed as well as their books; it was a catalogue of men of genius."[2] These indices or "indexes," being compiled in different countries were usually exactly antipodal to each other. The learned compiler of indexes at Antwerp, Arias Montanus, lived to see his own works placed in the Roman index. "Men who began by insisting that all the world should not differ with their opinions, ended by not agreeing with themselves. A civil war raged among the index makers, and if one criminated, the other retaliated. If one discovered ten places necessary to be expurgated, another found thirty, and the third inclined to place the whole work in the con-

[1] Curiosities of Literature, p. 257. [2] Id.

demned list. The inquisitors at length became so doubtful of their own opinions, that they sometimes expressed, in their license for printing, that they "tolerated the reading after the book had been corrected by themselves, until such time as the work should be considered worthy of some further correction," and sometimes they kept the books themselves until they had properly qualified them, "interem se calificum," which in one instance is said to have taken them forty years! As to the books themselves, after being licensed, as will be imagined, they became—like a record which had been tampered with—anything but an expression of their author's opinion or result of his research.

"The commentaries on the Luciad, by Faria de Souza, had occupied his zealous labors for twenty-five years, and were favorably received by the learned. But the commentators were brought before this tribunal of criticism and religion, as suspected of heretical opinions; when the accuser did not succeed before the inquisitors of Madrid, he carried the charge to that of Lisbon; an injunction was immediately issued to forbid the sale of the commentaries, and it cost the commentator an elaborate defense, to demonstrate the catholicism of the poet, himself."[1]

"Nani's history of Venice was allowed to be printed, because it contained nothing against princes. Princes then were either immaculate, or historians false. The history of Guicciardini is still scarred with the merciless wound of the papal censor; and a curious account of the origin and increase of papal power was long wanting in the third and fourth book of his history. Velly's history of France would have been an admirable work, had it not been printed at Paris!"[2]

[1] Disraeli's Curiosities of Literature, p. 257. [2] Id.

When the insertions in the index were found of no other use than to bring the peccant volumes under the eyes of the curious, they employed the secular arm in burning them in public places. The history of these literary conflagrations has often been traced by writers of opposite parties; for the truth is, that both used them; zealots seem all formed of one material, whatever be their party. "They had yet to learn that burning was not confuting, and that these public fires were an advertisement by proclamation."[1]

In England the same system was carried to all lengths. Camden declares that he was not suffered to print all his "Elizabeth," and sent those passages over to De Thou, the French historian, who printed his history faithfully two years after Camden's first edition, 1615. The same happened to Lord Herbert's history of Henry VIII., which has never been given according to the original. In the poems of Lord Brooke, we find a lacuna of the first twenty pages; it was a poem on religion, canceled by the order of archbishop Laud. The great Sir Matthew Hale ordered that none of his works should be printed after his death; as he apprehended, that in the licensing of them, some things might be struck out or altered, which he had observed, not without some indignation, had been done to those of a learned friend; and he preferred bequeathing his uncorrupted MSS. to the society of Lincoln's Inn, as their only guardians; hoping that they were a treasure worth keeping. Contemporary authors have frequent allusions to such books, imperfect and mutilated at the caprice or the violence of a licenser.

Proclamations were occasionally issued against

[1] Disraeli's Curiosities of Literature, p. 257.

authors and books; and foreign works were, at times, prohibited. The freedom of the press was rather circumvented, than openly attacked, in the reign of Elizabeth, who dreaded the Roman Catholics, who were at once disputing her right to the throne and the religion of the state. Foreign publications, or "books from any parts beyond the seas," were therefore prohibited. The consequence of which prohibitation was that "men of learning were at a loss to know what arms the enemies of England and of her religion were plotting against her."[1]

Queen Elizabeth had a keen scent after what she called treason, which she allowed to take in a large compass. She condemned one author (with his publisher) to have the hand cut off which wrote his book; and she hanged another.[2] With the fear of Elizabeth

[1] Strypes' Life of Whitgift, p. 268.

[2] The author, with his publisher, who had their right hands cut off, was John Stubbs of Lincoln's Inn, a hot-headed Puritan, whose sister was married to Thomas Cartwright, the head of that faction. This execution took place upon a scaffold, in the market-place at Westminster. After Stubbs had his right hand cut off, with his left he pulled off his hat, and cried with a loud voice, "God save the Queen!" the multitude standing deeply silent, either out of horror at this new and unwonted kind of punishment, or else out of commiseration with the man. whose character was unblemished. Camden, who was a witness to this transaction, has related it. The author, and the printer, and the publisher, were condemned to this barbarous punishment, on an act of Philip and Mary, against the authors and publishers of seditious writings. Some lawyers were honest enough to assert, that the sentence was erroneous, for that act was only a temporary one, and died with Queen Mary; but, of these honest lawyers, one was sent to the tower, and another was so sharply reprimanded, that he resigned his place as a judge in the common pleas. Other lawyers, as the lord chief justice, who fawned on the prerogative far more then than in the Stuart-reigns, asserted, that Queen Mary was a king; and that an act made by any king, unless repealed, must always exist, because the king of England never

before his eyes, Holinshed castrated the volumes of his history. When Giles Fletcher, after his Russian embassy, congratulated himself with having escaped with his head, and on his return wrote a book called "The Russian Commonwealth," describing what he termed its tyranny, Elizabeth forbade the publishing of the work.[1] And as we have seen one of Milton's noblest similies in the "Paradise Lost," all but cost the world the poem itself.

James I. proscribed Buchanan's history, and a political tract of his, at "the Mercat Cross;" and every one was to bring his copy "to be perusit and purgit of the offensive and extraordinare materis," under a heavy penalty. Knox, whom Milton calls "the Reformer of a Kingdom," was also curtailed; and "the sense of that great man shall, to all posterity, be lost for the fearfulness, or the presumptuous rashness of a perfunctory licenser."

The regular establishment of licensers of the press

dies! It was Sir Francis Bacon, or his father, who once pleasantly turned aside the keen edgo of her regal vindictiveness; for when Elizabeth was inquiring whether an author, whose book she had given him to examine, was not guilty of treason, he replied, "Not of treason, madam; but of robbery, if you please; for he has taken all that is worth noticing in him from Tacitus and Sallust." Disraeli's Curiosities of Literature, p. 259.

[1] It is curious to contrast this fact with another better known, under the reign of William III.; then the press had obtained its perfect freedom, and even the shadow of the sovereign could not pass between an author and his work. When the Danish ambassador complained to the king of the freedom which Lord Molesworth had exercised on his master's government, in his account of Denmark; and hinted that, if a Dane had done the same with the king of England, he would, on complaint, have taken the author's head off: "That I cannot do," replied the sovereign of a free people; "but, if you please, I will tell him what you say, and he shall put it into the next edition of his book."—Id.

appeared under Charles I. and his archbishop of Laud. When Charles printed his speech on the dissolution of the parliament, which excited such general discontent, some one printed Queen Elizabeth's last speech, as a companion-piece. This was presented to the king by his own printer John Bill, not from a political motive, but merely by way of complaint that another had printed without leave or license, that which, as the king's printer, he asserted was his own copy-right. Charles does not appear to have been pleased with the gift, and observed, "You printers print anything."[1]

[1] Disraeli's Curiosities of Literature, p. 259.

The reading of the Bible itself was prohibited by Henry VIII., except by those who occupied high offices in the state; "a noble lady or gentleman might read it in their garden or orchard, or other retired place;" but men and women in the lower ranks of life were positively forbidden to read it, or to have it read to them. It appears by an act dated 1516, that in those days, the Bible was called "Bibliotheca" or "The Library." The word "library" then was limited in its signification to the Biblical writings. The Bible was not only prohibited but actually improved. There have been several remarkable attempts to expurgate the Bible, even archbishop Tillotson having been credited with such a design. Dr. Geddes' version is, says Disraeli, "aridly literal and often ludicrous by its vulgarity." Castillon endeavored to make the Bible classical, by introducing into its text such phrases and episodes as he thought proper, from profane writers, and Père Burrnyer, recomposed the entire Bible into a romance, which he styled "Histoire du Peuple de Dieu." His histories of Joseph, and of King David, are relishing morsels, and were devoured eagerly in all the boudoirs of Paris. For instance, he tells us: "Joseph combined with a regularity of features, and a brilliant complexion, an air of the noblest dignity; all which contributed to render him one of the most amiable men in Egypt." At length "she declares her passion, and pressed him to answer her. It never entered her mind that the advances of a woman of her rank could ever be rejected. Joseph at first only replied to all her wishes by his cold embarrassments. She would not yet give him up. In vain he flies from her: she was too passionate to waste even

But the whole career of the so-called licensers of the press is such a mass of ridiculous and quite incredible absurdity as to merit preservation rather among the curiosities than among the Laws of Literature. Milton, who raised the strongest voice for literary freedom, was by turns under the disfavor of both church and Puritan, of both king and commons. Among the French instances are retained. Malebranche said, that he could never obtain an approbation for his "Research after Truth," because it was unintelligible to his censors; and at length Mezeray, the historian, approved of it as a book of geometry. Latterly in France, the greatest geniuses were obliged to submit their works to the critical understanding of persons who had formerly been low dependents on some man of quality, "who never printed their names

the moments of his astonishment." This good father, however, does ample justice to the gallantry of the Patriarch Jacob. He offers to serve Laban seven years for Rachel. "Nothing is too much," cries the venerable novelist, "when one really loves;" and this admirable observation he confirms by the facility with which the obliging Rachel allows Leah for one night to her husband! In this manner the patriarchs are made to speak in the tone of the tenderest lovers; Judith is a Parisian coquette, Holofernes is rude as a German baron; and their dialogues are tedious with all the reciprocal politesse of metaphysical French lovers! Moses in the desert, it was observed, is precisely as pedantic as Père Berruyer addressing his class at the university. One cannot but smile at the following expressions: "By the easy manner in which God performed miracles, one might easily perceive they cost no effort." When he has narrated an "Adventure of the Patriarchs," he proceeds, "After such an extraordinary, or curious, or interesting adventure, &c." Quite the reverse of this treatment was that of the gothic bishop, mentioned by Jortin (Remarks on Ecclesiastical History, A. 2), who translated the scriptures into the Gothic language, but omitted the Book of Kings, lest the wars, of which so much is there recorded, should increase their inclination to fighting, already too prevalent!

but to their licenses." One of these suppressed a work, because it contained principles of government, which appeared to him not conformable to the laws of Moses. Another said to a geometrician, "I cannot permit the publication of your book; you dare to say, that, between two given points, the shortest line is the straight line. Do you think me such an idiot as not to perceive your allusion? If your work appeared, I should make enemies of all those who find, by crooked ways, an easier admittance into court than by a straight line. Consider their number!" In Austria, they condemned two books as heretical; of which one, entitled "Principes de la Trigonometrie," the censor would not allow to be printed, because the Trinity, which he imagined to be included in trigonometry, was not permitted to be discussed; and the other on the "Destruction of Insects," he insisted had a covert allusion to the Jesuits, who, he conceived, were thus malignantly designated.[1]

216. In 1662, was passed the licensing act,[2]—which was an act confirming all the rules, regulations, and resolutions of the stationers' company,[3] which it had proceeded upon its organization to enact, as well

[1] A curious literary anecdote has been recorded of the learned Richard Simon. Compelled to insert in one of his works the qualifying opinions of the censor of the Sorbonne, he inserted them within crotches. But the printer, who was not let into the secret, printed the work without these essential marks, and the author beheld his own opinions overturned in the very work he had written to maintain them.

[2] 13 and 14 Car. II., 33.

[3] Following is a fac similie of an early page of the books of the stationers' company:

23 April

John wolf Entred for his copie vnder th[e h]and of the lord Bysshop of LONDON a book intituled. . *A shorte answere to the reasons which the popyshe Recusantes alege*

as to levy, considerable fines upon members acting in controvention thereof.

This licensing act interdicted the printing of any book unless first entered in the registry of the stationers' company, and licensed by the lord chamberlain, and

why they will not come to our churches \ FFRAUNCIS BENNY beinge the Author . . . . vj[d]

xviij° Aprilis

Richard ffeild assigned over to master Harrison senior 25 *Junij* 1594

Entred for his copie vnder th[e h]andes of the Archbisshop of CANTERBURY and master warden **Stirrop** a booke intituled *VENUS and ADONIS* . vj[d]

3 Aprilis

Master Woodcock

Entred for his copie A booke entituled. *Idea. The sheperdes garlond. ffasshioned in x eccloges.* and alowed vnder master **hartwelles** hand *intratur in curia.* vj[d]

[By MICHAEL DRAYTON.]

Wydowe Charlwood

Entred for her copie a booke intituled. GERVIS MARKUM *his THRYSIS and DAPHNE* . vj[d]

[This work is apparently now lost.]

2 Maij [1593]

Richard ffeild

Entred for his copie a book intituled, *the first parte of christian passions conteyninge a hundred Sonnettes of meditacion humiliacon and prayer*, aucthorised vnder the hande of the L[ord] Bisshop of LONDON . vj[d]

[This edition is apparently now lost.]

7 May

Thomas Orwin

Entred for his copies by assent of a Court holden this Day these bookes followinge which were first **kingstons** and after **Georg[e] Robinsons** whose widowe the said **Orwin** hath married . v[s] viij[d]

viz

The whetston of wytt
master WILSONS *Retorik* and *logik*
master CALVINS *Catechisme.*
VIRGIL in Latin.
TULLIES Offices latin
ACOLASTUS.
STURMIUS *epistles*
SUSEMBROTUS *figures*
pueriles confabulationes
pueriles Scriptur[a]e

prohibited the printing of any work without its owner's consent upon pain of forfeiture, and a penalty, a moiety of which was to go to the owner of the work infringed.[1]

This act, after being continued by several successive parliaments, expired May 9th, 1679,[2] but was revived by the statute of James I.,[3] continued by the statute of William and Mary,[4] and finally expired in the reign of William in 1694.

217. During all these years, while all these different charters, acts and statutes had been seeking to expand, abridge, protect and regulate the property of the publisher, even down to the printers they should employ and the presses they should use, no statute had regulated, or even apparently recognized the rights of the author of the manuscript from which the book was printed. But when we reflect upon the state of English literature all this time, and upon the illustrious names that even then filled its history, it is difficult to believe that the word "owners," when used in these statutes, meant only the royal patentees, to the exclusion of the actual producers of the work, or that a right in the author to the product of his own labor was not conceded. Indeed, in 1681, two years after the first expiration of the licensing

[1] The various provisions of this act effectually prevented piracies, without actions at law or bills in equity. But cases arose of disputed property. Some of them were between different patentees of the crown; some whether the property "belonged to the author from his invention and labor, or the king, from the subject-matter." . . . . The legislature which passed this act could never have entertained the most distant idea that the productions of the brain were not a subject-matter of property. Copinger on Copyright, 12.

[2] 31 C. I.

[3] 1 Jac. I. c. 7.

[4] 4 W. & M. c. 24.

act of 1679, we find the stationers' company adopting an ordinance or by-law, reciting that several of its members have "great part of their estate in copies;" that "by ancient usage of the company, when any copy or book is duly entered in their register to any member he hath always been reputed to be the proprietor, and entitled to the sole right of printing thereof," and that "this privilege hath of late been often violated and abused; and providing a penalty for any further transgressions of the sort." This ordinance, which could have no possible vitality outside of themselves,—even if it had not been a sort of windy pronunciamento to the effect that their own members should not violate the law of the land,—the stationers probably intended as a sort of advertisement to the rest of the public that, although their rights had been taken away from them, they were not disheartened. It certainly could have served no other purpose. For five years successively, attempts were made to secure a new licensing act. Such a bill, indeed, once passed the house of lords, but afterwards miscarried upon constitutional objections to a license.

218. It was during these years that the so-called "prerogative" or "crown copyright cases were brought."[1] Indeed, from its first introduction, the art

[1] From 1556 (the abolition of the star chamber in 1640) no records exist, of any prosecutions for literary piracy. The judicial proceedings of the star chamber having been lost or destroyed. "But," says Mr. Curtis, "it is obvious that no man could print another's copy, because he could not obtain a license to do so, for two reasons. In the first place, the literature of England was not then so extensive, that the officers of the crown, whose duty it was to license publications, would not, generally, know to whom the copyright of any work belonged, which any applicant might find it worth while to reprint. There was, therefore, little danger that licenses would be incautiously granted. In the second place, the decree of

of printing had been considered a state right and franchise, belonging to the crown, and not a mere private industry to be assumed by the subject at will. And furthermore, the art was said to belong to the king, because it had been introduced at the king's expense: that Henry the VI., upon learning of the new invention of printing which was beginning to make some stir in Europe, was moved by the archbishop of Canterbury to procure a printing mold to be brought into England,[1] and that Mr. Robert Toarnor, the master of the Rolls, disguised himself by shaving his beard and hair, and taking to his assistance Mr. Caxton, "a citizen of good abilities, who traded in Holland, who proceeding to Leyden (not daring to enter Haarlem), succeeded in bringing away in the night one Corsells, or Corsellis, and that Corsellis was carried under guard to Oxford, where the

28th Elizabeth prohibited all printing 'contrary to any allowed ordinance set down for the good government of the stationers' company.' Now, although we know of no ordinance or by-law of the company relative to copies, until after the year 1640, yet from 1558 to 1582 there are, it is said, entries in the records of the company which show that copies were entered as property, and that pirating was punished (4 Burr. 2313). In 1583, two printers, Wolf and Ward, insisted upon a right of printing all books, even where there were copyrights existing (Stowe, 223, tit. Stationers' Company). But commissioners, appointed by the crown, willed them to desist. See Wedderburn's Argument in Tonson v. Collins, 1 W. Black. R. 304. This shows the contemporary opinion as to this species of property, and renders it highly probable that no license could have been obtained for printing another man's copy, because it would have been asking for an authority to do what was then held to be immoral, dishonest, and unjust. It is a just inference, that what was so held by the stationers' company, in that age a recipient of royal favor and of extraordinary powers from the crown, would have been so held by the crown itself."

[1] See *ante*, vol. i. notes, pp. 429, 430, et seq.

first printing press was set up at the king's expense."[1] Afterwards the king set up a press at St. Albans, and another at Westminster, the king thereafter permitting "no law books to be printed, nor did any printer exercise the art but only such as were the king's sworn servants, the king himself having the price and emolument for printing."[2] Indeed, it seems to have been generally conceded, upon the introduction, that this "black art"[3] was a dangerous craft, and only to be exercised at the king's license.[4] And from whatever source this theory sprung, it was well that it was so for the preservation of the industry itself, since, if assumed at will, in those early days, it might have died out for want of support.

The crown, besides licensing those who should be printers, claimed an exclusive right to the copy of all law-books, reports and statutes, almanacs, Lelys' Latin grammar, the English bible, and the book of common prayer.

The first prerogative case arose in the eighteenth

[1] Maugham. Lit. Prop. p. 45. But, says Maugham, "even if the credit of the introduction belongs to the crown and not to Caxton, which does not seem to have been discovered until it became the interest of Atkyns, the king's printer (who tells this strange story), in a quarrel with the stationers' company, to set up the right of the crown; the crown would only have a monopoly of the use of wooden types. (which were all that were brought by Corsellis from Holland), since Caxton himself introduced the use of metal types.

[2] Id. p. 45. Dibdin's Life of Caxton, 1 Ames. p. xcvii.; 4 Burr. 2417; Id. 2401; Harleian's MS. vol. 1, p. 528, note on Essay from the Anthology, 1696.

[3] "So called, because the letters imprinted were exact counterparts of each other, an identity of shape which seemed inexplicable to those familiar with manuscript, and so ascribed by them at once to the devil."

[4] Bacon's Abridgment, tit. Prerogative, F. 5, Carter 90 3 Mod. 75; Skin. 234; Vern. 275; Carter on C. p. 39.

year of Charles I., when one Atkyns, the law-patentee, claimed the right to print all law books. Certain members of the stationers' company had printed "Rolles' Abridgment," and upon his bill, an injunction was granted, restraining the defendants. The case was subsequently appealed to and argued in the house of lords, who stated the reason of the crown's copy in law book to be that it hires and pays the judges who pronounce that law.[1] And although the claim is no longer pressed, yet its influence is still apparent both in England and the United States, where no copyright can exist in the opinions of judges—although the annotation, synopsis or analyses accompanying them can and does exist in the reporter or commentator.[2]

The next case, Roper v. Streater,[3] turned upon the same question. Roper had purchased of the executors of Mr. Justice Croke, one-third share in his reports, whereas Streater was at the time, as Atkyns had been, the law patentee. But the house of lords held that the king was the owner of Croke's reports, and that therefore, Croke's executors could not have conveyed them to Roper.

The Stationers' Company v. Seymour,[4] was the case of Gadsbury's almanac. It was laid down in this case that the property in an almanac is in the crown.

[1] Atkyns' Case, Carter, 89; 4 Burr. 2315; Bacon's Abr. Prerog. F. 5.

[2] Wheaton v. Peters, 8 Pet. 591. And see *post*, chapter on Legal Reports.

[3] Skin. 234; 22nd and 24th Charles, 11; 1 Mod. 257; Bacon Abr. Prerog. F. 5; 4 Burr. 2316. There was also a case of the Stationers' Company v. Parker, 1 Jac. 2; Skin. 233. It does not appear what book was in controversy, but the question was substantially the same as the above, holding that the king had power to grant the right to print books concerning law or religion.

[4] 1 Mod. 256; vid. Stationers' Company v. Partridge, 10 Mod. 105; 6 Bac. Abr. 508; 4 Burr. 2402.

Because (1) an almanac has no certain author, and (2) because it must be more or less a following of the calendars printed in the book of common prayer, regulating the festivals and fasts of the church, and there o c an infringement on that part of the king's prerogative as head of the church.

Upon the same principle, as head of the church the king has a right to the exclusive publication of liturgical and other books of divine service, though it was not until in 1781, in Eyre and Strahan v. Carnan,[1] which was decided in the court of exchequer, that a bill was filed to restrain the defendant from publishing a form of prayer which had been ordered by his majesty to be read in all churches. The plaintiffs who were the king's printers, produced a grant of the office of printer to his majesty, and his successors, of (amongst other things) all Bibles and Testaments in the English language; and of all books of common prayer, and administrations of the sacraments, and other rights and ceremonies of the church of England; in all volumes whatsoever heretofore printed by the king's printer, or to be printed by his command; and of all other books which he, his heirs or successors, should order to be used for the service of God in the church of England. The bill stated, that in December, 1779, a form of prayer was ordered by his majesty to be used in all churches and chapels throughout England and Wales, upon the fourth of February, 1780, that it was printed by the plaintiffs, and a sufficient number thereof circulated for sale at sixpence each, which was a reasonable price, and at which they had been formerly sold; that the defendant had printed and sold a great number of them, and thereupon the court held that the grant was founded on public convenience, was supported by

[1] 6 Bac. Abr. Prer. F. p. 509.

long usage, and the injunction was accordingly continued.[1]

In the Stationers' Company v. Parker,[2] the name of the particular book in controversy does not appear, but it was undoubtedly a law book, and the question was between concurrent patentees, whether the plaintiff's patent excluded the defendants. Holt, arguing for the defendant, agreed that the king had power to grant the printing of books concerning law or religion, and admitted it to be an interest, but not a sole interest. The court inclined for the defendant, but reserved the question for advisement.[3]

There is no case in the books concerning the Latin Grammar, but the right of the king was grounded on the allegation, that he paid for compiling and publishing it. This claim to Lillys' Grammar, is now of course obsolete; but, it being apparent that the right was independent of any idea of prerogative, this claim also goes to prove the very early existence of a theory of literary property. With regard to the "Year Books," the claim rested also upon the fact that the crown was at the expense of taking the notes.[4]

There is no reported case of this date as to crown copy in the Bible, but it was founded upon the claim that the crown is the supreme head of the church, and besides, had paid its translators[5] (as in the case of the "Year Books," it was held that the crown had been at

[1] E. T. 1781; 5 Bac. Ab. 597.—Maugham on Literary Property, p 109.

[2] (1 Jac. 2), 1 Skin. 233.

[3] Prerog. F. 5; 4 Burr. 2317.

[4] See Shortt, p. 39.

[5] Maugham on Literary Property, p. 103; 2 Black. Com. 410; 4 Burr. 2315, 2329, 2405; 3 Perciv. 255. But see an application for an injunction to prevent the printing of an edition of the Bible in numbers—which appears to have been

the expense for making the notes),[1] and in the case of the Latin Grammar, that the crown had paid for its preparation and publishing.[2]

These crown prerogative cases are important, as showing that no sooner had the art of multiplication of copies arisen, than an exclusive right to such multiplication was held to exist somewhere, and to be capable of transmission by license, upon the ground that it was property, like any other possession.

219. 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.[3]

In one of the cases given to parliament in 1709 in support of their application for a bill, the petitioner said, "The liberty now set on foot of breaking through this ancient and reasonable usage, is no way to be effectually restained but by an act of parliament. For, by common law, a bookseller can recover no more costs than he can prove damage; but it is impossible for him to prove the tenth, nay, perhaps the hundredth part of the damage he suffers; because a hundred 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 al-

denied — Grierson & Jackson; Ridgway's R. 304: See Maugham on Literary Property, p. 107; 2 Evans Stat. 620.

[1] Curtis on C. p. 42.

[2] 4 Burr. 2329.

[3] A bill in equity in any other case had never been attempted or thought of. An action on the case was thought of in 31 C. 2, but was not proceeded in. Millar v. Taylor, 4 Burr, 2318.

ways a pauper; so the plaintiff must lose the costs of his 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."[1]

220. 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 house; and reported with amendments on the 21st day of February, 1709.

Such is a brief resumé of the events which led to the enacting of the first statute of copyright known as the Statute of Eighth Anne, chapter xix., which became law on the tenth day of April, in the year of our Lord one thousand seven hundred and ten.[2]

221. Before advancing chronologically with this and the succeeding statutes of copyright, let us proceed to trace the history of literary property somewhat further.

After making a recognition national, the next step is

[1] Burr, p. 2318.

[2] But even this bill did not satisfy everybody. Said Sir John Dalrymple, a counsel engaged on the trial of Donaldson v. Becket, "This act of Queen Anne which was ushered in under the idea of encouraging literature, was very far from having such a tendency. What (he demanded) did the authors and booksellers gain? Why, a perpetuity was changed to a term of fourteen years. A price was fixed and a clause inserted to force them to send copies to public libraries. What encouragements are these? They are rather discouragements." —Maugham, Lit. Prop., p. 17.

to make it international. The English statutes of international copyright are of the present reign.

In pursuance of the powers conferred on the Sovereign by the Act 7 & 8 Vict. c. 12, a convention for an international copyright between England and the French Republic was signed at Paris on the 3rd November, 1851, and presented to both Houses of Parliament in 1852. An Order in Council was made on the 10th January, 1852. After reciting that the convention had been made, the Order proceeds: "Her Majesty, by and with the advice and consent of her Privy Council, and by virtue of the authority committed to her by an Act passed in the session of Parliament holden in the seventh and eighth years of her reign, intituled 'an Act to amend the Law relating to International copyright,' doth order, and it is hereby ordered, that from and after the 17th day of January, 1852, the authors, inventors, designers, engravers, and makers of any of the following works (that is to say), books, prints, articles of sculpture, dramatic works, musical compositions, and any other works of literature and the fine arts, in which the laws of Great Britain give to British subjects the privilege of copyright, and the executors, administrators, and assigns of such authors, inventors, designers, engravers and makers respectively, shall, as respects works first published within the dominions of France, after the said 17th day of January, 1852, have the privilege of copyright therein for a period equal to the term of copyright which authors, inventors, designers, engravers, and makers of the like works respectively first published in the United Kingdom are by law entitled to, provided such books, dramatic pieces musical compositions, prints, articles of sculpture, or other works of art, have been registered, and copies thereof have been delivered according to the require-

ments of the said recited Act, within three months after the first publication thereof in any part of the French dominions; or if such work be published in parts, then within three months after the publication of the last part thereof.

"And it is hereby further ordered that the authors of dramatic pieces and musical compositions which shall after the said 17th day of January, 1852, be first publicly represented or performed within the dominions of France, or their assignees, shall have the sole liberty of representing or performing in any part of the British dominions such dramatic pieces or musical compositions during a period equal to the period during which authors of dramatic pieces and musical compositions first publicly represented or performed in the United Kingdom, or their assignees, are entitled by law to the sole liberty of representing or performing the same, provided such dramatic pieces or musical compositions have been registered, and copies thereof have been delivered, according to the requirements of the said recited Act, within three months after the time of their being first represented or performed in any part of the French dominions."

By the terms of the Convention of 3rd November, 1851, to secure a copyright in France for works first published in the British dominions, every such work must be registered at the Bureau de la Librairie of the Ministry of the Interior at Paris; the charge for registration not to exceed one franc and twenty-five centimes; the charge for a certificate of such registration not to exceed six francs and twenty-five centimes, and a copy of the best edition, or in the best state, is to be given for deposit at the National Library at Paris.

The provision in the preceding Order in Council as to works published in parts, which gives a copyright

in them if registered within three months after the publication of the last part, must, according to Sir W. Page Wood, V. C. (now Lord Hatherley, C.), be interpreted as referring to publications which are to be completed in a specified number of parts, and not to those which are to be continued for an indefinite period as newspapers. The effect of the other construction would be that at any period the publisher of such a work might register it, and carry back his copyright to the earliest period in 1852, when French authors first had a copyright in this country—a result which could not have been intended by the Order in Council.

In the case of a newspaper, the first number must be registered within three months after publication, in order to bring it within the provisions of the International Copyright Act; and where it was not proved in evidence that the first number of a newspaper had not been so registered, an injunction to restrain its infringement was refused.

Besides the convention made with France, conventions to secure international copyright have also been made with Prussia, Saxony, Saxe-Weimar, Saxe-Meningen, Saxe-Altenburg, Saxe-Coburg Gotha, Brunswick, Schwarzburg-Rudolstadt, Schwarzburg-Sondershauser, Reuss in 1846, registration and delivery of copies being required within twelve months after the first.[1]

An act has recently been printed to amend the law relating to international copyright. By the 15th Vict. cap. 12, her Majesty the Queen was enabled to carry into effect a convention with France on the subject of copyright, and empowered by an Order of Council to grant certain privileges to dramatic authors, and it was further enacted that, subject to any provisions or quali-

[1] Shortt, p. 146.

fications contained in the order, and to the provisions in the said act, the law for the time being in force for insuring to the author of any dramatic piece first publicly represented in the British dominions the sole liberty of representing the same should be applied for the purpose of preventing the representations of any translations of the dramatic pieces to which such order extends which were not sanctioned by the authors thereof. The recited act provided that nothing in it should be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country. The object of the present statute is to amend the last-mentioned provision (the sixth section) under certain circumstances. It is provided that in any case in which by virtue of the enactments recited, any Order in Council has been or may hereafter be made for the purpose of extending protection to the translations of dramatic pieces first publicly represented in any foreign country, it shall be lawful for her Majesty, by Order in Council, to direct that the sixth section of the act shall not apply to the dramatic pieces to which protection is so extended, and thereupon the said recited act shall take effect with respect to such dramatic pieces, and to the translations thereof, as if the said sixth section were repealed.

223. Although treaties of International Copyright exist between most of the European nations, resulting in considerable practical advantages, a difficulty appears to exist to a treaty of reciprocal copyright between the United States and Great Britain; the subject having been in a state of greater or less agitation for the last fifty years. In February, 1837, a petition signed by fifty-six British authors, including some of the most illustrious of the number, was presented to the United

States Senate by Henry Clay, praying for the privilege of copyright upon this side of the Atlantic.' And the arguments of justice and morality—which are, of course,

' This petition was as follows—

"The humble address and petition

"Of certain authors of Great Britain, to the Senate and House of Representatives of the United States, in Congress assembled,

"Respectfully showeth—

"1. That your petitioners have long been exposed to injury in their reputation and property, from the want of a law by which the exclusive right to their respective writings may be secured to them in the United States of America.

"2. That, for want of such a law, deep and extensive injuries have, of late, been inflicted on the reputation and property of certain of your petitioners; and on the interests of literature and science, which ought to constitute a bond of union and friendship between the United States and Great Britain.

"3. That, from the circumstance of the English language being common to both nations, the works of British authors are extensively read throughout the United States of America, while the profits arising from the sale of their works may be wholly appropriated by American booksellers, not only without the consent of the authors, but even contrary to their express desire—a grievance under which your petitioners have, at present, no redress.

"4. That the works thus appropriated by American booksellers are liable to be mutilated and altered, at the pleasure of the said booksellers, or of any other person who may have an interest in reducing the price of the works, or in conciliating the supposed principles or prejudices of purchasers in the respective sections of your union; and that the names of the authors being retained, they may be made responsible for works which they no longer recognize as their own.

"5. That such mutilation and alteration, with the retention of the authors' names, have been of late actually perpetrated by citizens of the United States; under which grievance your petitioners have no redress.

"6. That certain of your petitioners have recently made an effort in defence of their literary reputation and property, by declaring a respectable firm of English publishers in New York to be the sole authorized possessors and issuers of the works of the said petitioners; and by publishing in certain American newspapers their authority to this effect.

unanswerable and which it is not necessary to recapitulate here—were sounded on all hands, and exhaustively canvassed, not only in Congress but outside of it,

"7. That the object of the said petitioners has been defeated by the act of certain persons, citizens of the United States, who have unjustly published, for their own advantage, the works sought to be thus protected; under which grievance your petitioners have, at present, no redress.

"8. That American authors are injured by the non-existence of the desired law. While American publishers can provide themselves with works for publication by unjust appropriation, instead of by equitable purchase, they are under no inducement to afford to American authors a fair remuneration for their labors; under which grievance American authors have no redress but in sending over their works to England to be published, an expedient which has become an established practice with some of whom their country has most reason to be proud.

"9. That the American public is injured by the non-existence of the desired law. The American public suffers, not only from the discouragement afforded to native authors, as above stated, but from the uncertainty now existing as to whether the books presented to them as the works of British authors, are the actual and complete productions of the writers whose names they bear.

"10. That your petitioners beg humbly to remind your honors of the case of Walter Scott, as stated by an esteemed citizen of the United States, that while the works of this author, dear alike to your country and to ours, were read from Maine to Georgia, from the Atlantic to the Mississippi, he received no remuneration from the American public for his labors; that an equitable remuneration might have saved his life, and would, at least, have relieved its closing years from the burden of debts and destructive toils.

"11. That your petitioners, deeply impressed with the conviction that the only firm ground of friendship between nations is a strict regard to simple justice, earnestly pray that your honors, the representatives of the United States in Congress assembled, will speedily use, in behalf of the authors of Great Britain, your power 'of securing to the authors the exclusive right to their respective writings.'

"And, as in duty bound, your petitioners will ever pray."

"On the 16th day of February, 1837, Mr. Clay made the

among lawyers, publishers, and authors. Very ingenious and plausible objections, with a greater or less degree of sincerity,[1] were made to the proposed measure,

following report, as chairman of a committee to whom the above petition had been referred—to the Senate.

"The select committee to whom was referred the address of certain British, and the petition of certain American authors, have, according to order, had the same under consideration, and beg leave now to report—

"1. That, by the act of congress of 1831, being the law now in force regulating copyrights, the benefits of the act are restricted to citizens or residents of the United States; so that no foreigner, residing abroad, can secure a copyright in the United States, for any work of which he is the author, however important or valuable it may be. The object of the address and petition therefore, is to remove this restriction as to British authors, and to allow them to enjoy the benefits of our law.

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

"3. It being established that literary property is entitled to legal protection, it results that this protection ought to be afforded wherever the property is situated. A British merchant brings or transmits to the United States a bale of merchandise, and the moment it comes within the jurisdiction of our laws, they throw around it effectual security. But if the work of a British author is brought to the United States, it may be appropriated by any resident here, and republished, without any compensation whatever being made to the author.

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[1] See "Remarks on Literary Property," by Philip H. Nicklin. Philadelphia, 1838.

but it is at least doubtful if any argument is advancable against an international copyright, upon general principles, which is not equally an argument against any copyright at all, either local or general.

We should be all shocked if the law tolerated the least invasion of the rights of property, in the case of the merchandise, whilst those which justly belong to the works of authors are exposed to daily violation, without the possibility of their invoking the aid of the laws.

"4. The committee think that this distinction in the condition of the two descriptions of property is not just; and that it ought to be remedied by some safe and cautious amendment of the law. Already the principle has been adopted in the patent laws, of extending their benefits to foreign inventions or improvements. It is but carrying out the same principle to extend the benefit of our copyright laws to foreign authors. In relation to the subjects of Great Britain and France, it will be but a measure of reciprocal justice; for, in both of those countries, our authors may enjoy that protection of their laws for literary property which is denied to their subjects here.

"5. Entertaining these views, the committee have been anxious to devise some measure which, without too great a disturbance of interests, or affecting too seriously arrangements which have grown out of the present state of things, may, without hazard be subjected to the test of practical experience. Of the works which have heretofore issued from the foreign press, many have been already republished in the United States; others are in a progress of republication, and some probably have been stereotyped. A copyright law which should embrace any of these works, might injuriously affect American publishers, and lead to collision and litigation between them and foreign authors.

"6. Acting, then, on the principles of prudence and caution, by which the committee have thought it best to be governed, the bill which the committee intend proposing, provides that the protection which it secures shall extend to those works only which shall be published after its passage. It is also limited to the subjects of Great Britain and France; among other reasons, because the committee have information that, by their laws, American authors can obtain there protection for their productions; but they have no information that such is the case in any other foreign country. But, in

Mr. Clay's bill was framed by a committee, to whom had been referred a petition to the senate and house of representatives, of the above-mentioned principle, the committee perceive no objection to considering the republic of letters as one great community, and adopting a system of protection for literary property which should be common to all parts of it. The bill also provides that an American edition of the foreign work for which an American copyright has been obtained, shall be published within a reasonable time.

"7. If the bill should pass, its operation in this country would be to leave the public, without any charge for copyright, in the undisturbed possession of all scientific and literary works published prior to its passage—in other words, the great mass of the science and literature of the world, and to entitle the British or French author only to the benefit of copyright in respect to works which may be published subsequent to the passage of the law.

"8. The committee cannot anticipate any reasonable or just objection to a measure thus guarded and restricted. It may, indeed, be contended, and it is possible that the new work, when charged with the expense incident to the copyright, may come into the hands of the purchaser at a small advance beyond what would be its price if there were no such charge; but this is by no means certain. It is, on the contrary, highly probable that, when the American publisher has adequate time to issue carefully an edition of the foreign work, without incurring the extraordinary expense which he now has to sustain to make a hurried publication of it, and to guard himself against dangerous competition, he will be able to bring it into the market as cheaply as if the bill were not to pass. But, if that should not prove to be the case, and if the American reader should have to pay a few cents to compensate the author for composing a work by which he is instructed and profited, would it not be just in itself? Has any reader a right to the use, without remuneration, of intellectual productions which have not yet been brought into existence, but lie buried in the mind of genius? The committee think not; and they believe that no American citizen would not feel it quite as unjust, in reference to future publications, to appropriate to himself their use, without any consideration being paid to their foreign proprietors, as he would to take the bale of merchandise, in the case stated, without paying for it; and he would the more readily make

"eminent British authors." That committee, "anxious to devise," so ran the report, "some measure which, without too great a distubance of interests, or affecting this trifling contribution, when it secured to him, instead of the imperfect and slovenly book now often issued, a neat and valuable work, worthy of preservation.

"9. With respect to the constitutional power to pass the proposed bill, the committee entertain no doubt, and congress, as before stated, has acted upon it. The constitution authorizes congress 'to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.' There is no limitation of the power to natives or residents of this country; such a limitation would have been hostile to the object of the power granted. That object was to promote the progress of science and the useful arts. They belong to no particular country, but to mankind generally. And it cannot be doubted that the stimulus which it was intended to give to mind and genius, in other words, to the promotion of the progress of science and the arts, will be increased by the motives which the bill offers to the inhabitants of Great Britain and France.

"10. The committee conclude by asking leave to introduce the bill which accompanies this report."

The bill accompanying this report was as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in congress assembled, That the provisions of the act to amend the several acts respecting copyrights, which was passed on the third day of February, eighteen hundred and thirty-one, shall be extended to, and the benefits thereof may be enjoyed by, any subject or resident of the United Kingdom of Great Britain and Ireland, or of France, in the same manner as if they were citizens or residents of the United States, upon depositing a printed copy of the title of the book or other work for which a copyright is desired, in the clerk's office of the district court of any district in the United States, and complying with the other requirements of the said act: Provided, That this act shall not apply to any of the works enumerated in the aforesaid act, which shall have been etched or engraved, or printed and published, prior to the passage of this act: And provided also, That, unless an edition of the work for which it is intended to secure the copyright, shall be printed and published in the United States simultaneously with its issue in the foreign country, or

too seriously arrangements which grow out of the present (*i.e.* 1837) state of things, may, without hazard be subjected to the test of practical experience," reported a bill in thirty lines, which seemed to them all that was necessary in the matter, which, however, failed to become a law.

The subject was again seriously agitated in 1873, on the seventh day of February, in which year the Hon. Lot M. Morrill, United States senator from Maine, submitted a unanimous and unfavorable report of the joint committee on the library, to whom was referred the resolution directing them to inquire into the practicability of securing to authors the benefit of international copyright.[1]

within one month after depositing as aforesaid the title thereof in the clerk's office of the district court, the benefits of copyright hereby allowed shall not be enjoyed as to such work."

[1] The committee reported that, after attentive consideration of the subject-matter, they have found the question of international copyright attended with grave practical difficulties, and of doubtful expediency, not to say of questionable authority.

At the outset of the examination much contrariety of opinion between those who demand the measure as a just recognition of the rights of authors to their works and those representing the manifold interests, occupations, and domestic industries involved in the contemplated legislation became conspicuous; in the prominency and fervor of which the primary motive of any and all contemplated constitutional action, namely, the promotion of the progress of science and the useful arts, seemed—unconsciously, of course—likely to be overcast.

On behalf of authors and artists it is insisted that congress owes it to universal authorship to grant protection to literary and scientific productions, irrespective of nationality, as a matter of justice and right; that the constitution in this respect, as in the case of domestic authors, is mandatory in its character; that the mode and manner of such protection are prescribed, in terms, in its provisions; and that none other than the mode prescribed is at all allowable, leaving congress no discretion in the premises, and that not to legislate in this behalf is to refuse the performance of an obvious duty; and that, having by the law of copyright secured to domestic authors exclusive

Mr. Morrill's report is, perhaps, the most ambitious attempt in the history of legislation upon this subject, to defend, upon constitutional and legal grounds, the rights to their works, thereby recognizing the obligation of protection to authorship. Congress stands derelict in the performance of its whole duty, in that it has not provided equal protection to universal authorship.

Upon the soundness and cogency of this proposition both American and foreign authors are understood generally to be agreed.

A portion of the American publishers (and they are among the most important) are willing to accede to the demands of the authors, upon the condition of satisfactory stipulations as to the medium of communication with the American public through their publishing houses; while the authors divide on the question of publication, a portion, not illogically, insisting upon the supposed duty of absolute protection without stint, limit, or condition, and a part are disposed to yield to the terms of the publishers; and this adjustment of the matter, it is supposed, would redound to the progress of science and the arts.

A portion, and much the larger number of domestic publishers, are understood to be either hostile to the whole subject of international copyright, or consider all action in regard to it at least of questionable utility to the world of letters, and especially to the progress of science and the arts in this country and among our own people.

The printers, type-founders, binders, paper-makers, and others engaged in the manufacture of books, in large numbers remonstrate against the measure as calculated to diminish the popular sale and circulation of books by raising the price thereof, and thus prejudicial to this branch of industry.

These classes, interests, and industries, have been ably represented before the committee, and it may be observed that from these the measure is invested with its special interest, as we are not aware of any popular representation or demand, by memorial or remonstrance, or otherwise, on behalf of either book buyers or readers or the mass of the people.

The protection in his works that the author demands, it will be noticed, is an absolute and exclusive right of property therein. To all such appeals to congress (without entering into the consideration of such a pretension as an abstract proposition) it is deemed sufficient to reply that the framers of the constitution did not seem to have apprehended the jus-

non-existence of an international copyright. The argument of that report is divided into two parts. First, into an attempt to show that neither the letter nor

tice of a claim so extensive on the part of authors, nor to have contemplated the promotion of the progress of science by legislation so partial and engrossing as that proposed; but, on the contrary, in the interests of science, and altogether subservient to its ends, and as an incentive to authorship to enter into its service, did provide for the enjoyment in their works of an especial privilege for a limited period.

The nature of the prerogative conferred, its use and limitation, are each and all alike inconsistent with the assumed rights; and whatever abstract rights of property the author may be supposed to have in his production, it is clear that his appeal to congress for protection can be recognized only within the express limitations of the constitution.

It became important, in the outset, to bring to the examination of the subject a just appreciation of the provision of the constitution in relation to it. That provision is as follows: congress shall have power "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

All opinions, interests, policies, and economies must be brought to the test of this clause of the constitution, in which the objects and manner of legislation are clearly expressed, and must constitute the rule of action upon the subject.

It may be proper to remark that the policy of national copyright does not necessarily enter into the discussion. It may be assumed that the constitution not only contemplated such legislation, but that such action is supposed to be consistent with and in the interest of science, and tends to its progress. Nor is it supposed that a question properly arises as to the abstract rights of the author in his writings; neither is it important to consider whether any such rights had been recognized in England or in the American States anterior to the constitution, as these rights do not constitute the object nor form the basis of that legislative action contemplated in the constitution.

The constitutional provision is primarily in the interest of science, to which the rights and interests of authors are subordinated, and with which they are not necessarily, in all respects, identical. The very terms of the instrument are a

the spirit of the clause in the constitution which gives to congress power to pass laws of copyright, recognizes the right of authors to copyright of their works as ex-

limitation on the power of congress against the recognition of such absolute right—thus, "by securing for limited times to authors exclusive right to their writings."

The precise question is, are the terms of the constitution equally applicable to international copyright, and would their application "promote the progress of science"?

The language is sufficiently comprehensive, doubtless, to include all authorship. But in construing the constitution reference should be had to the condition of affairs at the period of its adoption, the obvious intent of the framers, as gathered from contemporaneous history, and must receive such construction as will carry out the object in view.

It was, it should be observed, to constitute, in a qualified sense, a government in the interests of the people of the United States. Its framers would not, therefore, be expected to be solicitous for the protection of individual rights of those alien to its jurisdiction, nor were the circumstances of their national position such as were calculated to invite to the consideration of topics so eminently international in their operations and relations.

Besides, it must be borne in mind that the constitution of the United States antedates all legislation upon international copyright in any country; that no thought of such a law was suggested to the convention that framed that instrument. Nor are there to be found in the history of the times such sentiments and opinions upon the subject as to justify a reasonable supposition that such a proposition could have been present in the minds of those who proposed the particular provision. It may be safe, therefore, to assume that international copyright was not within the contemplation of the constitution, whatever interpretation the language may be thought to be susceptible of. To the argument as to the mendatory character of the provisions in the interests of universal authorship, it may be replied that none but citizens could properly lay claim to protection of individual rights, and that, under the constitution, these were all subordinated to the interests of science, and that whoever invokes the protection of the one must show that his demand is at least compatible with the other.

Whether the constitution, in what it provides, is to be re-

isting at all, except in so far as, subsequently to that clause and by virtue of the power it proceeds to delegate, congress shall thereafter grant them that right. garded as mandatory or permissive, confined to American or domestic authors, or extended to foreign or alien, in spirit and intent, it demands, as a primary, essential, and paramount consideration, that whatever is done in its name shall be in the interests of, and for the promotion of, the progress of science. In the presence of this paramount object, all rights of authors, publishers, booksellers, and bookmakers must needs take a secondary place in legislative consideration. Nor is it less certain that herein lies the true interest of all genuine authorship. A demand for copyright, national or international, as a measure of protection to a property right simply, necessarily tends to sink the question of science to the level of a commercial transaction, and subjects it to the odium of an indefensible monopoly. It is only when considered as a tribute to genius, the quality and beneficence of whose productions are of universal recognition in the world of letters, that science and authorship become identical. It can not be doubted that if, under undue stimulus of national copyright, the quality of literary productions should become inferior, commonplace, and baneful, congress, in the interest of science, could apply the remedy, by limiting the privilege or denying it altogether.

It has even been said that a tendency in this direction already exists; that authors who write for fame are growing fewer, and that writers who write merely for money are multiplying; that, in short, the relations between writers on one side, and publishers and the public on the other, are growing more mercenary; but this may be said to arise from the fact that the men of true genius who are really entitled to the honorable name of American authors are confounded with men who have no just claim to such a distinction. A question fairly arises and presents itself at the threshold of any proposition of copyright, whether this commercial spirit is identical with, and friendly to the progress of science. Considering the undeniable fact that a larger portion of authors are now writing for gain than formerly, and that publishers have come to estimate their writings by the profits likely to accrue from their publications, can it be inferred that from such a union of literature and commerce the highest interests of science are likely to be promoted? Under the influence of this union, can it be denied that a class of books are put

That is to say, that, as it could not well recognize a thing which it gave the power to congress to bestow, but which had not yet been bestowed by congress, upon the market which, in literary quality, bear slight resemblance to the productions of genius, and others, where the attribute of authorship could not well be discovered? and yet these all seek shelter under the law of copyright, and enjoy that exclusive privilege designed alone for genius and the votaries of science.

While, doubtless, the constitutional provision had its origin in the belief in the identity of the interests of authorship and science, it is true that the law of copyright, as it lies in the constitution, is not the protection of authors as an object —not as the reward of genius independent of science, but as an incentive to the former in the interests of the latter.

Is the question of authorship, in its relations to science, so simple and of such universal application as to be productive of equally beneficial results when subjected to the method of the constitution as a rule for the different nations and different conditions of letters therein?

Authorship, standing by itself, although the essential element, still it is not all the world of letters, and can not in any measure having at heart the interests of literature be considered as standing independent and by itself. If it be conceded to be the soul of science, it is essential that its productions should be embodied in books, and these involve the varied skill, industries, and cunning workmanship of many hands, and at last, and not the least important agency, the enterprise, capital, and address of the publisher through whom these books are to be introduced to the reading public.

These interests press upon the legislator at the very threshold of any measure of international copyright, demanding consideration and protection. The right conferred upon the foreign author, a variety of questions of labor, art, skill, and the like, enter into the practical question, and force upon consideration the chances of ruinous monopolies at the world's great book-centres, when competition and a provident share in opportunities would seem to be our necessity.

The question before us is not national copyright, but whether the monopoly of the foreigner in his work, enjoyed in his land, can, in the interests of science, fairly be claimed for him in every land where his work may be printed. The English author has the exclusive privilege secured to him as an incentive to his genius. Does it need the further stimulus

the constitution did not recognize the rights of authors in their works. Besides, argues Mr. Morrill, if the constitution had, in spirit, recognized the natural and absolute rights of an author in his works, it would never of privilege in other lands? And if so, can such privilege be considered as demanded in the interests of literature, or would the fruits of such encouragement compensate for the natural repression of the diffusion of knowledge? Assuming now that the measure cannot be commended or rightfully demanded in the interests of authors alone, nor in that of authors and publishers combined, it remains to be seen whether the facts justify the conclusion that the measure can be granted in the interests of science.

It will doubtless be conceded that international copyright would have the effect to enhance the price of books of foreign authorship in the American market, and a tendency and the probable effect to increase the price of the American copyrighted book in our own market.

While it may be conceded that the tendency of the law of copyright is to stimulate the production of literary and scientific works, it is believed to be equally true that one of its effects is to repress the popular circulation of such works. Such, it is apparent, must be its natural tendency, and such is understood to be the fact in this country and in England, especially the latter. As a general proposition, during the existence of copyright, the interests of both publisher and author are best consulted by a small edition and consequent limited circulation, as a larger profit may be realized from a small edition at high rates than the reverse. Notable instances may be given in proof of this general proposition in England and our own country. The average price of seventy-five English books, as given in the accompanying table, is $5.60, and the average price of the American reprints of the same books is only $2.40.

The same general fact may be further illustrated by comparing the prices of English books reprinted here with the prices here of American copyrighted books of a similar character. (See table.)

And a similar effect will be observed by comparing the home prices of American copyrighted books with their prices when reprinted in England.

The English prices are generally taken from the Eeglish catalogue by Sampson Low, 1835–1862. (See table.)

have attempted to secure to him a qualified and limited right in them, and so, if congress has not seen fit to grant copyright to certain aliens, the constitution

THE LOWEST PRICES OF SOME ENGLISH BOOKS REPRINTED IN AMERICA.

(THE AMERICAN PRICES ARE GENERALLY TAKEN FROM THE BIBLIOTHECA AMERICANA, 1820 TO 1866, OR AMERICAN CATALOGUE, KELLY, 1866 TO 1871.)

NAME OF AUTHOR AND TITLE OF WORK.	ENGLISH PRICE.		PRICE OF AMERICAN REPRINT.
	IN STERLING.	IN GOLD.	
Alison, Life of Marlborough	30 0	$7 50	$1 75
Aytoun, Scottish Cavaliers	7 6	1 87	1 50
Ballads and Fermilian	13 6	3 37	1 50
Browning, Mrs., Poems	30 0	7 50	1 50
Belcher's Mutineers of the Bounty	12 0	3 00	1 50
Burton's Lake Regions of Africa	31 6	8 00	3 50
Bulwer, Athens—its Rise and Fall	21 6	8 00	1 50
Caxtoniana	21 0	5 25	1 75
Novels	2 6	0 62	0 50
Lady. Budget, &c.	31 6	8 00	2 50
Braddon, Miss, Girls' Book	4 6	1 25	0 90
Lovels of Arden	31 6	8 00	0 75
Conybeare and Howson, Life of St. Paul (complete)	48 0	12 00	3 00
Collins, Poor Miss Finch	31 6	8 00	50c., 1 00
Darwin, Variation of Plants, &c.	28 0	7 00	6 00
Dixon, Free Russia	32 0	8 00	2 00
Fair France	16 0	4 00	1 50
Dickens's Works	132 0	33 00	10 50
Dilke's Greater Britain	28 0	7 00	1 00
Desert of the Exodus	28 0	7 00	3 00
Forster's Life of Landon	28 0	7 00	3 50
Life of Dickens	12 0	3 00	2 00
Guizot's Meditations	10 0	2 50	1 75
Grote's Greece, per volume	8 0	2 00	2 00
Gould's Origin of Religious Belief	15 0	3 75	2 00
Goulbourn's Sermons	6 6	1 62	1 00
Huxley's Lay Sermons	7 6	1 88	1 75
Holland's Recollections	10 6	2 62	2 00
Hemans's Poems	12 6	3 12	0 75
Hughes, Tom Brown at Oxford	....	1 75	0 50
Tom Brown's School-Days at Rugby	....	1 75	0 75
Haweis, Music and Morals	12 0	3 00	1 75
Jowett's Plato	120 0	30 00	12 00
Kinglake's Crimea	32 0	8 00	2 00
Kingsley's At Last	20 0	5 00	1 50
Ravenshoe	31 6	8 00	1 75
G. Hamlyn	6 0	1 50	1 25
Layard's Nineveh	36 0	9 00	1 75
Lever, Lord Kilgobbin	31 6	8 00	0 75
Lockhart, Fair to See	31 6	8 00	0 75
Mulock, Hannah	21 0	5 25	0 50
Girl's Book	4 6	1 25	0 90
Morley's Voltaire	14 0	3 50	....
McGregor, Rob Roy on the Jordan	12 0	3 00	2 50

cannot be said to recognize their right to such a copyright.

In answer to this circumferential reasoning it is

NAME OF AUTHOR AND TITLE OF WORK.	ENGLISH PRICE. IN STERLING.	ENGLISH PRICE. IN GOLD.	PRICE OF AMERICAN REPRINT.
Oliphant's China	21 0	5 25	3 50
Pressense, Early Years of Christianity	12 0	3 00	1 75
Russell's American Diary	21 0	5 25	1 00
Robinson's Diary	36 0	9 00	4 00
Reclus, The Earth	24 0	6 50	5 00
Schelleris, Spectrum Analysis	28 0	7 00	6 00
Speke's Africa	21 0	5 25	4 00
Sacristan's Household	6 0	1 50	0 75
Stanley's Jewish Church	24 0	6 00	5 00
Eastern Church	12 0	3 00	2 50
Sinai and Palestine	14 0	3 50	2 50
Trollope, Harry Hotspur	9 0	2 25	0 50
Can you Forgive Her?	12 0	3 00	1 50
Orley Farm	12 0	3 00	1 50
Thackeray's Novels	7 0	1 75	50 to 75c.
Tyndall, Heat	10 6	2 62	2 00
Sound	9 0	2 25	2 00
Tennyson's Works, incomplete	9 0	2 25	0 75
The Speaker's Commentary	30 0	7 50	5 00
Vámbéry's Asia	21 0	5 25	4 50
White's St. Bartholomew	16 0	4 00	2 50
Wilfred Cumbermede (George Macdonald)	31 6	8 00	1 75
Wood's Homes without Hands	21 0	5 25	4 50
Bible Animals	21 0	5 25	4 50
Whymper's Alaska	16 0	4 00	2 50
Wallace's Malay Archipelago	24 0	6 00	3 00
Warren's Ten Thousand a Year	9 0	2 25	1 50
Spencer's Psychology	18 0	4 50	1 50
Essays	16 0	4 00	2 50
Biology	34 0	8 50	5 50
Total	.....	$109 72	$176 80

From the exhibits it would seem clear that the law of copyright, as existing in England and this country, in its practical operations in the two countries, tends unmistakably to check the popular diffusion of literary production by largely increasing the price. This fact could be further illustrated by recurrence to the vast disproportion in the sale of the cheaper reprints and the copyrighted editions in both countries.

England is the great book-making and producing nation with which this country has to do, and consequently our interests would be most affected by the proposed measure; and that such measure would not promote the progress of science

perhaps only necessary to say that the whole question as to the natural rights of authors was discussed and exhausted in the two great causes célèbres of Millar v. Taylor and Donaldson v. Beckett, which together occupied the attention of the English House of Lords and of the authors and publishers of the English-speaking world for the better part of five years—from 1759 to 1764—in whose consideration sat Lords Mansfield, Yates, De Gray, Willes, and Aston, in the discussion of which Lord Camden delivered his famous argument, and to which reference has so frequeutly been made in these pages, we have seen that there is no moral difference between literary and any other property; for, and the useful arts among the American people is believed to be obvious and to admit of little doubt.

The policy of the different states of Europe as to the protection of literary property varies as to the period of time for which it is granted. In England and in this country the protection is ample. The prevailing policy among the nations seems to be to grant such protection for literary property as is deemed a proper incentive to production.

It is questionable whether any system of international copyright could be proposed which would be equally beneficial and just, owing to the different languages prevailing among them.

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

although the last mentioned case of Donaldson v. Beckett may be considered as reversing the former, and of establishing the superiority of copyright to common-law right, it can hardly be maintained that, because an author gives up a fragment of his natural rights in order that the law may more completely and fully protect the remainder, he has no natural rights at all. The right of a man to the offspring of his own brain is a natural and a moral right, secured to him by the unwritten law; and if the constitution of the United States, or any other written law, attempts to abrogate natural and moral right and unwritten law—except as a punishment for crime—that written law, whatever it is, and by whomsoever enacted, is, in just so far, null and void. But it is hardly to be supposed that the constitution does any such thing.

The second portion of Mr. Morrill's argument is to the inexpediency of an international copyright, founded upon the only apparent difficulties in the matter, and which we shall proceed in this chapter to discuss, namely, the question of competition, not in the brains of authors, but in the capital and labor manufacturers of books. It is not a little remarkable that, with all the ventilation the subject has received, nothing practical appears to have ever been said upon the subject. When the time for practicalities does come, it will probably be discovered that the opposition to an international copyright with England has never come from the people of the United States. That is to say, if we are to understand by an international copyright, a measure for the benefit of authors, a measure by the provisions of which authors—the writers themselves, and not their publishers or their booksellers—can be enabled to receive payment for their own labor, and dispose of the tangible product

of their intellectual toil for value, without reference to the geographical boundaries which inclose them; the English author might travel from New York to San Francisco, from St. Paul to St. Augustine, without meeting a man, woman, or child who would disagree with him. No man—Englishman, or Gentile, or American—can enjoy a book—and who will read a book he does not enjoy—with a grudge against its author. Sergeant Talfourd gave a most satisfactory expression to this sentiment, when, in his noble speech upon the rights of authors, to which reference has been repeatedly made in these pages, in discussing the extent to which an author should receive renumeration, he exclaimed: "But if it is asked, how much an author should receive for his writings, I answer just so much as his readers are delighted to pay him!"

Again, the opposition to an international copyright between England and the United States is widely supposed to come from the publishers of the United States. It is a question of definition again. If, as has been already said, we are to understand by international copyright the rights of authors, and of the descendants of authors, without regard to clime, or sky, or country, we think it is clearly demonstrable that it does not come from the publishers. The idea that publishers are the natural enemies of authors only obtains among those authors (if such are entitled to the name at all) who cannot by any possibility find publishers. The author who finds a publisher, finds also, and that very speedily, that he is his best friend. For, as has been repeatedly pointed out, the publisher's and the author's interests are identical; the former are quite as anxious to publish a paying book as the latter can be to write one. So far

from shutting up his ears, stuffing his hands in his plethoric pockets, and turning his back upon starving authors, the publisher is waiting with his lampblack and rags; nay, he is standing on tiptoe and scanning with eager eye the whole horizon, if happily he may find an author who will take his gold in exchange for a book that his customers will buy. This picture will answer for the publisher of any nationality, and the enthusiasm with which he will welcome a paying book will never be interrupted by a question on his part, as to whether the author is an Englishman or an American. It is but justice to add that the American publisher has never expected to publish paying books without paying their authors. Allusion is only necessary to the fact that the American publishers gratuitously pay thousands of dollars yearly to English authors; they pay them not only for the privilege of publishing, but a regular percentage on the sales of their books; and (while that consideration has nothing, of course, to do with the morale) it is to be doubted if, under an international copyright, the gross amount so paid would be materially enlarged. It might even be lessened; for under an international copyright, the size of the percentage would be matter of bargain made between author and publisher, in contemplation of a joint experiment, while at present, in the absence of such a copyright, it is a matter of gratitude for a success.

It is quite possible to a say word for the American publisher. John Smith, an obscure English writer, publishes a book in England. One of his copies finds its way three thousond miles across the ocean, and an American publisher sets up from it, and reprints the book. If it pays the American publisher, in gratitude he sends Mr. Smith a sum of money, and Mr. Smith receives it in silence. He does not rush into his

newspaper with a—"Sir, allow me to extol the American publisher as the most unexampled generous man in the world. When the laws of his country not only wink at, but allow him honorably to make a profit out of my book, without asking me if I would like a penny of it—or without my demanding or even suggesting it—he cordially and freely sends me a check." Nor do Mr. Tennyson, nor Mr. Collins, nor Mr. Herbert Spencer, nor Mr. Charles Spurgeon, nor Miss Jean Ingelow, all of whom, it is believed, have received, and are daily receiving payments on the sales of American editions of their books, write letters to their newspapers to spread the fact before the world; nor are the American publishers ostentatious enough to print the receipts they receive from those authors. But look at another phase of the matter. Supposing that Mr. John Smith's book does not pay the American reprinter—supposing that nobody will read it at any price—supposing that it dies still-born, that the edition is sent to the papermaker, and the plates melted up, and the whole thing charged to profit and loss—what is it we see then? Why, Mr. Smith fairly flies into print. The newspapers wax intemperate with the indignity done a British subject. The American publisher is a robber, a thief, a highwayman. He steals unblushingly Mr. Smith's book, and Mr. Smith never hears a word of it. "A friend of mine while passing a bookstore in New York, saw a placard announcing an American edition of my book. Now, sir, &c., &c.," writes Mr. Smith to his favorite journal. Every Grub street writer in all England "knows of a similar case, sir," and the periodical paroxysms about American pirates and brigands has its day out and dies. Mr. Tennyson, and Mr. Spurgeon, and Miss Ingelow, of course, take no part; they can-

not, with justice, join in the hue-and-cry; neither can they with good taste proclaim that their American publishers paid them, because that would only be another form of declaring that their books paid American publishers, as Mr. Smith's did not (which Mr. Smith's and his clacquers know only too well. Indeed, it may be a question whether it is not that very knowledge which makes them noisy), since it is to be borne in mind that no book pays its author which does not first pay its publisher. The former's profits must of necessity come through the latter's hands. The author seldom complains of his publisher so long as he sends him checks. If he does not send him checks, it is not hard to see that it is the author's fault; and yet the moment the sales stop, the devoted publisher must take the abuse! We have yet to learn that clime or race or country operates to make any difference in these rules.

The international copyright ought to exist, and it does not exist; therefore it follows that there must be opposition to it somewhere. We have seen where the opposition does not exist. Let us see if we can discover where it does. The opposition to an international copyright between Great Britain and the United States arises from the fact that that term unfortunately does not signify, and is not another name for "the rights of authors." Unfortunately for the authors, international copyright means "the rights of publishers"—or it means rather, "the competition of international publishers;" and while there does not breathe a soul in the United States who does not want to see a scheme devised by which, when he pays for a book by an English author, that English author or his children shall receive a certain percentage of the money, the most of them are very strongly opposed to any law by which

the English publisher shall be enabled to drive the American publisher out of his own bookstore. If Frenchmen or Germans should ask for an international copyright with the United States to-morrow, nothing would be easier than for them to get it. Our publishers do not want to publish German or French books; but they do want to publish books in the English language, and they must, or starve. Everybody knows that where an Englishman pays a shilling for labor, we pay a dollar; and in no class of merchandise is there so much labor represented, and so little raw material, as in books. The simple fact is, that if an Englishman were allowed to manufacture books for the American market, no American publisher could keep his office open a week. He could buy his rags and his lampblack and his glue just as cheaply, but he could not compete with the Englishman the moment the rags became paper, the lampblack ink, and labor began to be expended upon the raw material. Even if the American could manufacture books in spite of this, he could get no books to maufacture; for authors would naturally carry their manuscripts to the publisher who would pay them best, and the one who manufactured most cheaply could easily afford to pay the largest percentage upon sales. Now this inequality must fall heavily somewhere, and unfortunately it falls upon authors. When an American publisher refuses to buy an American author's manuscript, it is not because he knows that he can help himself gratis to an English author's book upon the same subject, but because the cost of manufacturing the manuscript in book form is about one hundred and seventy-five per cent. more than it should be, and that the surplus percentage must be overcome by the author, in one way or another.

But aside from this inequality of manufacture, there

is another reason for the public policy which shuts out the competition of the English publisher. Although the United States is indebted to Great Britain for her language, it has far exceeded her in the number of readers. The numerical proportion of the inhabitants of Great Britain who buy books is remarkably small. In this country, a vast system of forced expenditure has trained up a nation of forty millions of readers, not only, but of book buyers; of readers depending for their reading not upon their neighbors or upon an adjoining library, but upon their own purses and upon the ambition which is common to every person to whom "print is open" to possess a collection of books. It is to this ripe and tempting field that English publishers seek an entrance. They have not been taxed to raise the cost of preparing and nurturing it. They have not plowed, nor watched, nor watered it, but one and all, they are none the less eager to reap the harvest. Nobody can blame them for their eagerness, but the American publishers who have been taxed, who have plowed and watched and watered, and it is but fair that the field should be theirs so long as they can supply it. It is needless to suggest that it could be theirs no longer, for the laws of supply or demand are inexorable, and regulate themselves. This argument and the policy which is borne of it, it need not be said, does not apply to authors. There is no competition in authorship, or poetry, or fiction, or science. The reading of Longfellow does not create a disinclination to read Tennyson; nor will the study of Emerson supersede the desire to study Carlyle or Herbert Spencer, or of Parsons on Contracts the reading of Addison on Contracts.

The only real difficulty in the way of international copyright, arises just here. If a method can be de-

vised whereby our forty millions of readers can pay the English authors for what they care to read, without paying foreign manufacturers for merchandise which they can get equally to their taste at home, and if they can continue, as they try to do now, to pay only those English authors whose books they read—that measure will be eagerly seized upon and adopted by the people of these United States.[1]

If an English author wishes to have his book published in the United States, why does he not bring it to a United States publisher just as a native author does? It is hardly a supposable case that an American publisher would refuse a book because its author was an Englishman. The one reason, perhaps, why the English author does not come to the American publisher, is because by his own laws—by his own British statutes—a prior publication in this country deprives him of his copyright at home.[2] If this be so, then the reason why English authors cannot have a field for the sale of their literary property in the United States, is simply because their own laws refuse it to them, and it is a little hard that our long-suffering people should be characterized as "thieves" and "pirates" and "highway robbers," because short-sighted English laws have deprived their own subjects from reaping international profits for their works.

It is possible to suggest a very simple plan, whereby, so far as we are concerned, we can give the English author a copyright in his own composition among us, without forcing upon our publishers the burden of a grievous and impossible competition, and without

[1] The present tariff on books does not appear to offer any relief to the inequality which has been demonstrated.

[2] Boucicault v. Delafield, 1 H. & M. 597; 9 L. T. N. S. 709; 33 L. J. ch. 38.

driving them into bankruptcy. Our prescnt copyright law,[1] enacts[2] that "Any citizen of the United States who shall be the author," &c. Now by simply changing the word "citizen" to "person" the result would be accomplished, and any English, French, or German author could send his manuscript over and obtain a copyright. In such case the title-page of the proposed book could be registered as it is now, and the author's rights be secured; while by a simple amendment of the section[3] which requires the deposit of two copies of the best edition of the book within ten days after publication, by providing that such deposit shall be accompanied in every case with the author's or publisher's affidavit that the edition has been wholly manufactured in the United States, the American publisher is protected, and can have no cause of complaint. But the only reason why such a simple concession on our part could not become to the British author the real international copyright of his dreams, is because the laws of his own country would not allow him to accept its benefits, except at the price of his copyright at home. It is, to say the least, insincere for Englishmen to charge the United States with standing in the way of a policy to which the only real barrier is opposed by themselves. The above amendments would certainly be to the interest of our publishers, as giving them the opportunity of publishing books for the authors of the world, while a similar provision in Great Britain would be greatly to the interest of our authors, the practical effect being to make the two countries one for the purpose of authorship, while the actual manual man-

[1] U. S. Rev. Stat. Revision of 1873–4, sec. 4948, *et seq.*
[2] Sec. 4952.
[3] 4959.

ufacture for the English market should be performed by English labor, and for the American market by American labor. This would be a realization of international copyright, that is international Authors' Rights, and—until some now utterly unforeseen bond of amity between English and American publishers is cemented—is probably the only realization possible. The only opposition to this realizaion as we have endeavored to demonstrate, is the condition of the British laws themselves. A reversal by the English courts of the ruling in Boucicault v. Delafield [1] will be, so far as Englishmen are concerned, the first great step towards the international rights of authors. So far as American authors are concerned, under the ruling in Low *v.* Routledge,[2] and Low *v.* Ward,[3] as has been elsewhere demonstrated,[4] they can,

[1] 1 H. & M. 597; 9 L. T. N. S. 709; 33 L. J. 38. "If he had first represented his drama here," said the court, "he would have been entitled to the provisions of the Dramatic Copyright Act. Then 7 & 8 Victoria was passed, enabling her majesty to make arrangements conferring on other nations the privileges accorded to all people who first publish their works here. If the plaintiff had this sort of double right, it was the very thing which the 7 & 8 Victoria was intended to extinguish. The statute says in effect (sec. 19), that 'if any person, British subject or not, chooses to deprive this country of the advantage of the first representation of his work, then he may get the benefit of copyright, if he can, under the arrangement which may have been come to pursuant to 7 & 8 Victoria, between this country and the country which he so favors with his representation; but if he chooses to publise his performance in a country which has not entered into any treaty, or made any such arrangement with regard to copyright, then this country has nothing more to say to him. He must be taken to have elected under which of the two statutes with respect to copyright he wishes to come, by performing his work in one country instead of the other, and he is thereby excluded from the advantage of publishing in the other.'"

[2] Ch. 3 H. L. 200.

[3] L. R. 6 Eq. 418.

[4] See *post*, vol. ii. 204.

upon the publication of their book, obtain either an English or a French copyright, or both, with very little effort, by merely residing for a few days in the dominion of Canada.

Mr. Morrill argued that the constitution bestows the power of enacting copyright laws upon congress, in order "to promote the progress of science," and how, he asks, will an international copyright law promote the progress of science? If an English author is already incited to mental labor by the copyright laws of his own country, how will an international copyright law operate as a further incitement?

There does not appear to be any reason why the international law should not operate as a further incitement to the English, or, it might be added, to the American author.

Indeed, not only is a large area of incalculable importance in furnishing the motive for literary labor, but in the case of certain works, the value of which to the cause of science at least will not be questioned, an international circulation alone will justify production. For example, such a work as Audubon's "Birds of America," originally published at the price of a thousand dollars a copy (and perhaps a score of others might be named), could never derive any support from one country alone. True, it will be urged that works of this magnitude are as fully protected as can be desired, from the fact of their costly and elaborate execution, which it would not pay to pirate. "Neither Europe nor America could furnish purchasers enough to warrant Mr. Audubon's publication; but Europe and America did, each continent taking about eighty copies," says a writer, quoted by the late Mr. John Camden Hotten in a letter upon the subject of international copyright. But it would

be a poor consolation to an author, who has put the labor of his lifetime, or the publisher, who has put his whole capital into an immense work, to know that his protection therein depends only upon whether or not he has a rival who is rich enough to afford to steal his venture.

"That better and more important works will be published for a large community than for a comparatively small one," Mr. Hotten proceeds to say, "is as certain as that metropolitan journalism is, and ever will be, superior to that of a small provincial town. What books of equal importance might have been produced if their anthors had been able to secure the advantages which accident secured to Audubon, it is impossible to say, but it is easy enough to suggest some. Who can doubt, for example, that a copyright convention with the United States, by which the two countries would become one market for authors, would be followed by the publication of a really great biographical dictionary in the English language, a thing which no publisher has attempted without afterward abandoning his scheme in bitter repentance? Again, what scholar has not felt the want of a great comprehensive catalogue of English publications, comprising not only all that are in the British Museum, but as far as possible, all that are not there? Such a work would be easy enough to project; and by the employment of many hands, under one presiding mind, not very difficult to execute. The title, not only of every book existing in any collection throughout the world, but of every book known to have existed, ought to be included in such a catologue, with a note indicating where a copy—if any were known—could be seen. . . . But what publisher in his senses, would venture on such an undertaking while his market is

limited to one half what it might be, if England and America would join in the good work of encouraging literary enterprise ?"

And, apart from any mere interest of author or publisher, but in general, that an international copyright would have an undoubted effect in the encouragement and elevation of literature as a whole, as a science and an art, seems hardly to be denied. Nobody can blame an author, who writes for his daily bread, for pandering to the tastes of the vulgar and of the masses ; but there might be cultivated readers enough in both England and America to warrant an author in doing his best, and writing, not only for the best market, but for the best readers.

But aside from all this, and admitting for the sake of the discussion, that an international copyright could not be a further incitement to the English (and it might be added, the American) author, then, in that case, Mr. Morrill's argument, if it proves anything proves too much, since the next question must be, do copyright laws make authors ? Can a law of copyright make an author out of one who has no genius or talent or ability for authorship ? Which brings us back to what was said before, and what, perhaps, is all that there is to be said on the subject—namely, that if there is no reason for a law of international copyright, then there is no reason for any law of copyright at all.

But whether there is or ought to be an international and universal copyright or not, it is a fact that an author's universal right to the result of his own labors, wherever he is and to whatever nationality he claims allegiance, is fully recognized and admitted to-day, both in England and America. And this appears to be abundantly proved, from the consideration that the courts of both countries have done their utmost to

give to alien authors every privilege and opportunity possible, in the absence of an international statute, and to strain every possible point in their favor.

Two American cases which show this generous and liberal spirit will be considered further on in their appropriate place.[1] And in England the cases of Low v. Routledge,[2] which was the case of Miss Cummings the authoress, of the city of New York, and her novel of "Haunted Hearts," and of Low v. Ward,[3] which was the case of Dr. Oliver Wendell Holmes and his novel of "The Guardian Angel," by virtue of which a citizen of the United States can obtain copyright in England for his work, by simply crossing our northern frontier and passing a few days in Canada, indicate the same liberality and sense of justice.[4] Besides which it appears as if an

[1] *Post*, p. 298.

[2] L. R. 3 H. L. Cas. 100.

[3] L. R. 6 Eq. 418.

[4] Following is the present act respecting copyrights in force in the Dominion of Canada:

Her Majesty by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. The Minister of Agriculture shall cause to be kept in his office books to be called the "Registers of Copyrights," in which proprietors of literary, scientific, and artistic works or compositions, may have the same registered in accordance with the provisions of this act.

2. The Minister of Agriculture may, from time to time, subject to the approval of the Governor in Council, make such rules and regulations, and prescribe such forms as may appear to him necessary and expedient for the purposes of this act; such regulations and forms being circulated in print for the use of the public shall be deemed to be correct for the purposes of this act, and all documents, executed and accepted by the said Minister of Agriculture, shall be held valid so far as relates to all official proceedings under this act.

3. If any person prints, or publishes, or causes to be printed or published, any manuscript whatever, the said manuscript having not yet been printed in Canada or elsewhere,

American author, by merely depositing his volume in the requisite library of Paris, could obtain a copyright in France (which is the most liberal nation in the

without the consent of the author or legal proprietor first obtained, such person shall be liable to the author or proprietor for all damages occasioned by such publication, to be recovered in any court of competent jurisdiction.

4. Any person domiciled in Canada or in any part of the British possessions, or being a citizen of any country having an international copyright treaty with the United Kingdom, who is the author of any book, map, chart, or musical composition, or of any original painting, drawing, statue, sculpture, or photograph, or who invents, designs, etches, engraves, or causes to be engraved, etched, or made from his own design, any print or engraving, and the legal representatives of such person, shall have the sole right and liberty of printing, reprinting, publishing, reproducing, and vending such literary, scientific, or artistic works or compositions, in whole or in part, and of allowing translations to be printed or reprinted and sold, of such literary works from one language into other languages, for the term of twenty-eight years, from the time of recording the copyright thereof in the manner hereinafter directed.

(2.) The condition for obtaining such copyright shall be that the said literary, scientific, or artistic works be printed and published or reprinted and republished in Canada, or in the case of works of art, that it be produced or reproduced in Canada, whether they be so published or produced for the first time, or contemporaneously with or subsequently to publication or production elsewhere. Provided that in no case the exclusive privilege in Canada shall continue to exist after it has expired anywhere else.

(3.) No immoral, or licentious or irreligious, or treasonable, or seditious literary, scientific, or artistic work shall be the legitimate subject of such registration or copyright.

5. If at the expiration of the aforesaid term of twenty-eight years, such author, or any of the authors, when the work has been originally composed and made by more than one person, be still living, or being dead, has left a widow, or a child, or children living, the same exclusive right shall be continued to such author, or if dead, then to such widow and child or children (as the case may be), for the further term of fourteen years; but in such case, within one year after the expiration of the first term, the title of the work secured shall be a

world to authors, making no distinction between its own citizens and foreigners), which copyright by virtue of treaties between France and England, making

second time recorded, and all other regulations herein required to be observed in regard to original copyrights shall be complied with in respect to such renewed copyright.

6. In all cases of renewal of copyright under this act, the author or proprietor shall, within two months from the date of such renewal, cause a copy of the record thereof to be published once in "The Canada Gazette."

7. No person shall be entitled to the benefit of this act, unless he has deposited in the office of the Minister of Agriculture two copies of such book, map, chart, musical composition, photograph, print, cut, or engraving, and in case of paintings, drawings, statuary, and sculpture, unless he has furnished a written description of such works of art, and the Minister of Agriculture shall cause the copyright of the same to be recorded forthwith in a book to be kept for that purpose, in the manner adopted by the Minister of Agriculture, or prescribed by the rules and forms which may be made, from time to time, as hereinbefore provided.

8. The Minister of Agriculture shall cause one of the two copies of such book, map, chart, musical composition, photograph, print, cut, or engraving aforesaid, to be deposited in the Library of the Parliament of Canada.

9. No person shall be entitled to the benefit of this act, unless he gives information of the copyright being secured, by causing to be inserted in the several copies of every edition published during the term secured, on the title-page, or the page immediately following, if it be a book, or if a map, chart, musical composition, print, cut, engraving, or photograph, by causing to be impressed on the face thereof, or if a volume of maps, charts, music, engravings, or photographs, upon the title-page or frontispiece thereof, the following words, that is to say: "Entered according to Act of Parliament of Canada, in the year by A. B., in the office of the Minister of Agriculture." But as regards paintings, drawings, statuary, and sculptures, the signature of the artist shall be deemed a sufficient notice of such proprietorship.

10. Pending the publication or republication in Canada of a literary, scientific or artistic work, the author, or his legal representatives or assigns, may obtain an interim copyright by depositing in the office of the minister of agriculture a copy

what is copyright in one of them copyright in the other, would be a valid one in England—so true is it that it is the tendency of all law to gravitate towards

of the title, or a designation of such work intended for publication or republication in Canada, the said title or designation to be registered in an interim copyright register in the said office, to secure to the author aforesaid, or his legal representatives or assigns the exclusive rights recognized by this act, previous to publication or republication in Canada; the said interim registration, however, not to endure for more than one month from the date of the original publication elsewhere, within which period the work shall be printed or reprinted and published in Canada.

(2.) In all cases of interim registration under this act, the author or proprietor shall cause notice of such registration to be inserted once in the *Canada Gazette*.

3. A literary work, intended to be published in pamphlet or book form, but which is first published in separate articles in a newspaper or periodical, may be the subject of registration within the meaning of this act, while it is so preliminarily published, provided that the title of the manuscript and a short analysis of the work are deposited in the office of the Minister of Agriculture, and that every separate article so published is preceded by the words "Registered in accordance with the copyright act of 1875;" but the work when published in book or pamphlet form, shall be subject, besides, to the other requirements of this act.

(4.) The importation of newspapers and magazines published in foreign countries, and containing, together with foreign original matter, portions of British copyright works republished with the consent of the author or his assigns or under the law of the country where such copyright exists shall not be prohibited.

11. If any other person, after the interim registration of the title of any book according to this act, within the term herein limited, or after the copyright is secured and for the term or terms of its duration, prints, publishes, or reprints, or republishes, or imports, or causes to be so printed, published or imported, any copy or any transalation of such book without the consent of the person legally entitled to the copyright thereof, first had and obtained by assignment, or knowing the same to be so printed or imported, publishes, sells, or exposes for sale or causes to be published, sold or exposed for sale any copy of such book without such consent, such offender shall

justice and right, whatever statutes legislators enact, or whatever treaties nations make or neglect to make.[1] Mr. Morrill's exhibits to prove the greater comparative

forfeit every copy of such book to the person legally entitled to the copyright thereof; and shall forfeit and pay for every such copy which may be found in his possession, either printed or printing, published, imported or exposed for sale, contrary to the intent of this act such sum, not being less than ten cents nor more than one dollar, as the court shall determine; of which penalty one moiety shall be to the use of Her Majesty, and the other to the legal owner of such copyright, and such penalty may be recovered in any court of competent jurisdiction.

12. If any person, after the recording of any painting, drawing, statute or other work of art, within the term or terms limited by this act, reproduces in any manner or causes to be reproduced, made or sold, in whole or in part, copies of the said works of art, without the consent of the proprietor or proprietors, such offender or offenders shall forfeit the plate or plates on which such reproduction has been made, and also every sheet thereof so copied, printed or photographed to the proprietor or proprietors of the copyright thereof, and shall further forfeit for every sheet of the same reproduction so published or exposed for sale contrary to the true intent and

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[1] There have not been wanting gentlemen, upon both sides of the water, who, impatient of the law's delays, have endeavored, by ingenuity and mother wit, to anticipate the coming treaty of international copyright, and to secure a protection for themselves, and for their works on the opposite shore, without it.

One method suggested, was for the English author to publish his work in the United States a little prior to copyrighting it in England, thereby, as it was supposed, entitling himself to a copyright in both. Another, equally ingenious, was for the English author to obtain an American confederate to write an introduction to his work, or to add a few lines here and there to its text. And we are told that T. W. Robertson, a well-known London dramatist, did accordingly induce Mr. Charles F. Browne (better known as Artemas Ward) to write a few sentences in one of his plays, which play was thereupon registered in the proper office in the United States, as the joint work of Charles F. Browne and of T. W. Robertson.

But both of these "dodges" were exceedingly short-lived. The first, or "prior" publication dodge had been disposed of

cheapness, to the public, of American reprints which pay no copyright, to the English copies which have —could only prove—what nobody would be disposed

meaning of this act such sum, not being less than ten cents nor more than one dollar as the court shall determine; and one moiety of such forfeiture shall go to the proprietor or proprietors and the other moiety to the use of Her Majesty, and such forfeiture may be recovered in any court of competent jurisdiction.

13. If any person after the recording of any print, cut or engraving, map, chart, musical composition or photograph, according to the provisions of this act, within the term or terms limited by this act, engraves, etches or works, sells or copies, or causes to be engraved, etched, or copied, made or sold, either in the whole or by varying, adding to or diminishing the main design, with intent to evade the law, or prints, or reprints or imports for sale, or causes to be so printed or imported for sale, any such map, chart, musical composition, print, cut or engraving, or any part thereof, without the consent of the proprietor or proprietors of the copyright thereof, first obtained as aforesaid, or knowing the same to be so printed or imported without such consent, publishes sells or exposes for sale, or in any manner disposes of any such map, chart,

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even before it was conceived, by the leading English case of Boucicault v. Delafield (1 H. & M. 597; 9 L. T. N. S. 709; 33 L. J. 38 Ch.), in which case the plaintiff prayed for an injunction to restrain the defendant from producing a drama (the "Colleen Bawn"), written by him in the United States, and represented by him in New York, prior to its being represented in England. The vice-chancellor refused the injunction and dismissed the bill, being of opinion that the words of the English act (7 & 8 Victoria, c. 12, sec. 10) took away whatever rights the plaintiff might otherwise have had.

The second, or "joint authorship dodge," has never, to our knowledge, come before a court for its disposition. But where a similar artifice was attempted, to subserve a different purpose, the specious claim of "joint authorship" was ventilated in Levi v. Rutey (L. R. 6 c., p. 523). Said the court: "If two persons undertake jointly to write a play, agreeing in the general outline and design, and sharing the labor of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it. But to constitute joint authorship, there must be joint design."

to deny—that it was is cheaper to take than to buy. Whatever opposition to international copyright exists, in the United States, at least, is based upon sincerer grounds.

musical composition, engraving, cut, photograph or print, without such consent, as aforesaid, such offender or offenders shall forfeit the plate or plates on which such map, chart. musical composition, engraving, cut, photograph or print has been copied, and also every sheet thereof, so copied or printed as aforesaid, to the proprietor or proprietors of the copyright thereof, and shall further forfeit for every sheet of such map, musical composition, print, cut, or engraving which may be found in his or their possession, printed or published or exposed for sale, contrary to the true intent and meaning of this act, such sum, not being less than ten cents nor more than one dollar, as the court shall determine; and one moiety of such forfeiture shall go to the proprietor or proprietors, and the other moiety to the use of Her Majesty, and such forfeiture may be recovered in any court of competent jurisdiction.

14. Nothing herein contained, shall prejudice the right of any person to represent any scene or object, notwithstanding that there may be copyright in some other representation of such scene or object.

15. Works of which the copyright has been granted and is subsisting in the United Kingdom, and copyright of which is not secured or subsisting in Canada, under any Canadian or provincial act, shall, upon being printed and published, or reprinted and republished in Canada, be entitled to copyright under this act; but nothing in this act shall be held to prohibit the importation from the United Kingdom of copies of such works legally printed there.

(2.) In the case of the reprinting of any such copyright

And that decision goes on distinctly to hold that where one who makes "mere additions to a complete piece," which do not "in themselves amount to a dramatic piece," the maker of the "mere additions" is in no sense a "joint author" who can appeal to the protection of statutes of copyright.

Levi v. Rutley, indeed, had nothing to do with a question of international copyright. But the principle is undoubtedly an equitable one, and if the little game of Mr. Robertson and Mr. Browne had ever happened to come before a court, we cannot doubt that it would have received the same summary disposition.

As questions concerning literary property and copyright statutes come with more frequency before the courts, the impossibility of treating them

work subsequent to its publication in the United Kingdom any person who may have, previous to the date of entry of such work upon the registers of copyright, imported any foreign reprints shall have the privilege of disposing of such reprints by sale or otherwise, the burden of proof, however, in such a case will lie with such person to establish the extent and regularity of the transaction.

16. Whenever the author of a literary, scientific or artistic work, or composition which may be the subject of copyright, has executed the same for another person or has sold the same to another person for due consideration, such author shall not be entitled to obtain or to retain the proprietorship of such copyright, which is by the said transaction virtually transferred to the purchaser, who may avail himself of such privilege, unless a reserve of the said privilege is specially made by the author or artist in a deed duly executed.

17. If any person not having legally acquired the copyright of a literary, scientific, or artistic work, inserts in any copy thereof printed, produced, reproduced, or imported, or impresses on any such copy, that the same hath been entered according to this act, or words purporting to assert the existence of a Canadian copyright in relation thereto, every person so offending, shall incur a penalty not exceeding three hundred dollars (one moiety whereof shall be paid to the person who sues for the same, and the other moiety to the use of Her Majesty), to be recovered in any court of competent jurisdiction.

(2.) If any person causes any work to be inserted in the register of interim copyright, and fails to print and publish, or reprint and republish the same within the time prescribed, he shall incur a penalty not exceeding one hundred dollars (one moiety whereof shall be paid to the person who sueth for the same, and the other moiety to the use of Her Majesty), to be recovered in any court of competent jurisdiction.

18. The right of an author of a literary, scientific, or artistic work, to obtain a copyright, and the copyright when obtained shall be assignable in law, either as to the whole interest or any part thereof, by an instrument in writing made in duplicate and to be recorded in the office of the minister of agriculture, on production of both duplicates and payment

as questions concerning mere chattels or chattel interests, grows more and more apparent. To such treatment, indeed, as we have seen, they are entitled. The

of the fee hereinafter provided. One of the duplicates shall be retained in the office of the minister of agriculture, and the other returned, with certificate of registration, to the party depositing it.

19. In case of any person making application to register as his own, the copyright of a literary, scientific, or artistic work already registered in another person's name, or in case of simultaneous conflicting applications, or of an application made, by any person other than the person entered as proprietor of a registered copyright, to cancel the said copyright, the party so applying shall be notified that the question is to be settled before a court of competent jurisdiction, and no further proceedings shall be had concerning the subject before a judgment is produced maintaining, cancelling, or otherwise settling the matter; and this registration or cancellation or adjustment of the said right shall then be made by the minister of agriculture in accordance with such decision.

20. Clerical errors happening in the framing or copying of any instrument drawn in the office of the minister of agriculture, shall not be construed as invalidating the same, but when discovered they may be corrected under the authority of the minister of agriculture.

21. All copies or extracts certified, from the office of the minister of agriculture shall be received in evidence, without further proof and without production of the originals.

22. Should a work copyrighted in Canada become out of print, a complaint may be lodged by any person with the minister of agriculture, who, on the fact being ascertained to his satisfaction, shall notify the copyright owner of the complaint and of the fact, and if, within a reasonable time, no remedy is applied by such owner, the minister of agriculture may grant a license to any person to publish a new edition or to import the work, specifying the number of copies, and the royalty to be paid on each to the copyright owner.

23. The application for the registration of an interim copyright, of a temporary copyright, and of a copyright, may be made in the name of the author or of his legal representative, by any person purporting to be the agent of the said author, and any fraudulent assumption of such authority shall be a misdemeanor, and shall be punished by fine and imprison-

laws of personal property, so far as applicable, must be applied in favor of literary property; whatever difference in its case the law is compelled to make, it makes

ment accordingly, and any damage caused by a fraudulent or an erroneous assumption of such authority shall be recoverable before any court of competent jurisdiction.

24. If any person shall willfully make or cause to be made any false entry in the registry books of the minister of agriculture, or shall willfully produce or cause to be tendered in evidence any paper falsely purporting to be a copy of an entry in the said books, he shall be guilty of a misdemeanor, and shall be punished accordingly.

25. If a book be published anonymously, it shall be sufficient to enter it in the name of the first publisher thereof either on behalf of the unnamed author, or on behalf of such first publisher, as the case may be.

26. It shall not be requisite to deliver any printed copy of the second or of any subsequent edition of any book or books, unless the same shall contain very important alterations or additions.

27. No action or prosecution for the recovery of any penalty under this act, shall be commenced more than two years after the cause of action arose.

The following fees shall be payable to the minister of agriculture before an application for any of the purposes hereinafter mentioned shall be entertained, that is to say:

On registering a copyright . . .	§1.00
On registering an interim copyright .	0.50
On registering a temporary copyright .	0.50
On recording an assignment . . .	1.00
On certified copy of registration . .	0.50
On registering any decision of a court of justice, for every folio	0.50

On office copies of documents not above mentioned, the following charges shall be made:

For every single or first folio certified copy,	$0.50
For every subsequent hundred words (fractions from and under fifty not being counted, and over fifty being counted for one hundred)	0.25

(2.) The said fees shall be in full of all services performed under this act by the minister of agriculture or by any person employed by him in pursuance of this act.

(3.) All fees received under this act shall be paid over to the

over and above; in excess, and not in limitation, of the rights of ordinary personal property. In closing this chapter upon copyright property, two features remain to be particularly noticed, wherein literary or copyright property claims rights adhering in no other commodity which passes between man and man. The alienator of ordinary goods and chattels upon parting with their possession, parts also with every claim to or control over them. An author, however, upon parting with his literary property, has still two rights remaining. These two rights may be stated to be: his right to, I, perpetuate, and, II, to conserve his own production after he has parted with it for value.

I. If A. sells B. a house, it is B.'s option, upon becoming its purchaser, to treat it as he pleases. He may add to or curtail it of wings and stories, may raise or depress it, and alter its internal or external

receiver-general and form part of the consolidated revenue fund of Canada. No fees shall be made the subject of exemption in favor of any person; and no fee, exacted by this act, once paid, shall be returned to the person who paid it.

28. "The Copyright Act of 1868," being the act thirty-first Victoria, chapter fifty-four, and all other acts or parts of acts, inconsistent with the provisions of this act, are hereby repealed, subject to the provisions of the next following section.

29. All copyrights heretofore acquired under the acts or parts of acts repealed, shall in respect of the unexpired terms thereof, continue unimpaired, and shall have the same force and effect as regards the province or provinces to which they now extend, and shall be assignable and renewable, and all penalties and forfeitures incurred and to be incurred under the same may be sued for and enforced, and all prosecutions commenced before the passing of this act for any such penalties or forfeitures already incurred may be continued and completed as if such acts were not repealed.

30. In citing this act it shall be sufficient to call it "The Copyright Act of 1875."

arrangements at will, by tearing out or inserting doors, windows, towers, or chimneys, or may paint or plaster it anew until it shall be utterly unrecognizable as the house of its former proprietor; or he is at perfect liberty, if he so desire, to pull it down altogether, or remove it from the site upon which it stood, and scatter the material of which it was composed wherever he may choose. All this is understood as being among the entire and unquestioned rights to which he succeeded upon becoming possessor of the property. But with literary property it is quite different. If an author sell his work to a publisher, it is understood, in the absence of an express contract to the contrary, that he sells it, and the publisher purchases it, for the purpose of perpetuation by means of publication, and the publisher may not, upon becoming the owner, either suppress or destroy the work. If one desire to purchase a work in order to withhold it from publication, he must so express his intention, and the author must so clearly understand the object and intention of the contract which he makes. ". . . les éditeurs," said a French court, in a recent case,[1] " ne peuvent se considérer comme maitres absolus de l'œuvre dont ils se sont rendus adjudicataires [*i. e.*, who are adjudicated purchasers] et libres de l'anéanter en en supprimant ou en en interrompant la publication." The purchaser of literary property will be supposed to purchase it for the sake, and with the intention of publishing it; and we are of opinion that a remedy would lie, if not in equity—which, as we shall see,[2] is chary of interference in the case of contracts between authors and publishers—at least at law, wherein an author might

[1] Tribunal civil de la Seine. 1^ere^ chambre. Présidence de M. Chappin, Audiences des 5 et 12 Janvier, 1875.

[2] *Post*, 629, 631.

have his action for damages against the publisher for the suppression of his work.

II. The second right which the owner of literary property, if he be its author, has, is to conserve his own work. It is to be understood in this case, as in the former, that the right only arises where the vendor of the literary property is its author, except that, if he be such a legal representative of the author as may be fairly considered as interested in the preservation of the author's literary reputation and good name, or one who has been expressly charged by the author with the preservation thereof (as, for instance, a "literary executor" might be), the right would also, according to the French case,[1] exist. As between mere owners, buyers, and purchasers of literary property, neither of whom is its author, no question peculiar to the rights of authors would, of course, arise. This author's right to conserve consists, after he has sold his composition to a publisher, or even after he has dedicated it to the public, in his privilege of watching over the text of his work, by keeping it pure and free from interpolation or corruption.

His work might, under certain circumstances, as we have seen, be annotated, edited, or even abridged, but from the text of the work itself, for which he alone is responsible, by which his reputation as an author is to be established, and by which he is to be judged by his contemporaries and by posterity, he has therefore a right to ward off the intrusion of foreign and interpolated matter, and, presumably, to correct such errors of the press as may have crept into it; whether he has the same right to prevent expurgation

[1] Tribunal civil de la Seine. 1ere chambre, audiences des 5 et 12 Janvier, 1875.

[1] *Ante*, vol. 1, p. 306, *et seq.*

as he has to prevent interpolation, does not seem to be as clear, but it would probably depend much upon whether the work was innocent in its nature, and therefore entitled to the protection of the law.

Although we find the first expression of this peculiar phase of the right in the decision of a French court,[1] as we shall have repeated occasion to notice, the principle involved has always been known to the common law, which has invariably recognized an author's right to the enjoyment of the literary reputation arising from his written works, uninterrupted by any tampering with the text of the works themselves. Not only have courts never hesitated to enjoin the use of an author's name attached to works which he did not himself compose, or for which he was not entirely responsible,[2] but an author may maintain an action for injury to his reputation against the publisher of an inaccurate edition of his works falsely purporting to be executed by him, even though the publisher be the owner of the copyright.[3] "Such a case," said Lord Tenterden,[4] "resembles cases in which a person, having a reputation for the manufacture of a particular commodity, but not protected by a patent, brings an action against another for selling an inferior article in his name.[5] The cases are not exactly alike; there the sale of the commodity is affected, here the character of the author, but they bear a close analogy." In summing up, his lordship held, that it was a question

[1] Tribunal civil de la Seine. 1ere chambre. Présidence de M. Choppin. Audiences des 5 et 12 Janvier, 1875, *post*, p. 99.

[2] See *post*, p. 396, citing Lord Byron, Johnston and Harte v. De Witt.

[3] Archbold v. Sweet, M. & Rob. 162.

[4] Id.

[5] And see Blofield v. Payne, 4 B. & Ald. 410, where there was no proof of the inferiority of the wares.

for the jury whether the edition, in the form in which it is put forth, would be understood by purchasers to be by the plaintiff (the author); if purchasers who paid reasonable attention to its contents, would not understand it, the verdict must be for him. And not only has the author himself this right, but he may delegate others, who, after his death, shall continue to exercise this conservation. Said the French court, in the case to which allusion has been made: "Il est incontestable qu'en aliénant son droit de propriété littéraire, un auteur n'abdique pas le droit de veiller à ce que l'œuvre concue par lui soit fidèlement reproduite; il lui est donc loisible de désigner une personne qui, aprés son décès, exerce à sa place cette indispensable surveillance; qu'on ne saurait s'en rapporter pour la conservation du texte au travail matériel d'un correcteur ou mème à l'intelligence de l'éditeur." That is to say, that it is beyond question, that, when he alienates his literary property, an author does not part with the right to watch over and control his own text, and to see that his work be faithfully reproduced; that he is, moreover, permitted to designate a person who, after his decease, shall still exercise, in his place, this indispensable surveillance, in order that the preservation of his text in its purity shall not be left to the manual labor of a mere corrector, or even to the intelligence of a publisher or an editor.[1]

The case from which this ruling is extracted was one which involved, among other matters, the right of M. Michelet, a deceased French author, to appoint his widow his "literary executor" (to use a familiar term), and conservator of the text of his writings. As to

[1] The word "editeur" may be translated either "publisher" or "editor," though generally used as signifying what we understand by a "publisher."

that right, the court was clear that the late M. Michelet had such right, and that the power which he thus placed in his wife's hands was one in the nature of a mandate or personal charge such as he might have given to any third person, and not such a power or property as would descend to her heirs: "Lorsque, par testament, le de cujus a chargé sa veuve de la conservation de ses œuvres littéraires il lui a conféré un droit personnel non transmissible à ses héritiers, ni à un tiers delégué par elle de son vivant. Un semblable droit, qui n'est pas sujet á une évaluation en argent, n'a aucun caractère du droit de propriété; ce n'est en réalité qu'un mandat qui a pu étre conferé é sa femme par l'écrivain, comme il aurait pu l'étre á un étranger."[1]

[1] Tribunal civil de la seine. 1ere chambre. Présidence de M. Choppin. Audiences des 5 et 12 Janvier, 1875. M. Poullain-Dumesnil, ingénieur, Mme. Baudoin et Mlle. Camille Poullian-Dumesnil, mineure, représentée par son père, tous trois petits-enfants de M. Michelet critiquaient la clause que voulait faire insérer Mme. veuve Michelet dans le cahier des charges dressé pour parvenia à la vente du droit de publier les œuvres de M. Michelet. Cette clause élait ainsi conçue: "Le droit exclusif de publication, qui constitue la propriété littéraire, ne comportant pas le droit de modifier en quoi que ce soit le texte de l'auteur, les adjudicataires devront se conformer, pour la publication, aux dernières éditions publiées par feu Michelet. La veuve Michelet aura seule, aux termes du § 4 de l'article 3 du testament de Michelet, le droit de surveilier les éditions qui se feront des œuvres de Michelet, son mari, de revoir les épreuves et de veiller à ce que tous les ouvrages soient en cours constant de publication."

M. Poullian-Dumesnil et consorts proposaient de remplacer la clause proposée par Mme. veuve Michelet, par la suivante: "L'adjudicataire ne pourra joindre à la publication des œuvres de Michelet aucune préface, aucune note, aucune notice; il devra se conformer, pour la publication, aux dernières éditions publiées par Michelet."

Le tribunal a rendu un judgement qui offre beaucoup d'intérêt au point de vue du droit de conservation des œuvres.

Not only the pen of the author, but the pencil of the painter, the knife of the engraver, the spatula of the modeler, the chisel of the sculptor, or the

litéraires que l'auteur peut conférer, après sa mort, à un tiers qui n'est pas hériticr.

En voîci le texte:

Le Tribunal.

En ce que touche la contestation élevée contre l'une des clauses insérées par la veuve Michelet, au cahier des charges dressé pour parvenir à la vente des œuvres de son mari:

Attendu que les consorts Poullain-Dumesnil critiquent dans toutes ses parties la clause suivante: "Le droit exclusif de publication, que constitue la propriété littéraire, ne comportant pas le droit de modifier en quoi que ce soit le texte de l'auteur, les adjudicataires devront se conformer, pour la publication, aux dernières éditions publiées par feu Michelet. La veuve Michelet aura seule, aux terms du paragraphe 4 de particle 3 du testament de Michelet, le droit de surveiller les éditions qui se feront des œuvres de Michelet, son mari, de revoir les épreuves et de veiller à ce que tous les ouvrages soient en cours constant de publication."

Attendu, en ce qui concerne le premier paragraphe de ladite clause, que la prétention des demandeurs d'imposer aux adjudicataires, non-seulement l'obligation de se conformer aux dernières édition publiées par feu Michelet, mais encore la prohibition d'insérer dans les ouvrages aucune préface nouvelle, aucune note et aucune notice, serait de nature à nuire tout à la fois au succès de la vente dont s'agit et à la mémoire mème de Michelet; qu'en effet, les éditeurs des œuvres d'un auteur mort peuvent avoir intérèt à faire accompagner la reproduction de ses œuvres, soit de préfaces, soit de notes explicatives, soit de notices intéressantes sur la vie et sur les différents ouvrages de l'auteur;

Attendu que la crainte des demandeurs de voir la veude Michelet ajouter aux œuvres de son mari des productions personnelles qu'elle obligerait les adjudicataires à insérer dans les éditions nouvelles est chimérique, les acquéreurs d'une propriété littéraire ayant intéret à livrer au public l'œuvre mème qu'ils ont acquise, et à ne pas violer la condition essentielle de leur contrat, en faisant des additions ou des suppressions susceptibles d'altérer la forme ou la valeur de œuvre;

Attendu, en ce qui concerne le paragraphe reclatif au droit de surviellauce des éditions, qu'il est incontestable qu'en aliénant son droit de propriété littéraire, un auteur n'abdique pas

camera of the photographer, may create matter which will be property entitled to the protection of laws of copyright, and in whose favor every principle which

le droit de veiller à ce que l'œuvre concue par lui soit fidelement reproduite; qu'il lui est donc loisible de désigner une personne qui, après son décès, exerce à sa place cette indispensable surveillance; qu'on ne saurait s'en rapporter, pour la conservation du texte, au travail matériel d'un correcteur, ou même à l'intelligence de l'éditeur;

Attendu que si Michelet n'a pas expressément chargé sa femme de surveiller les éditions qui devraient se faire de ses œuvres après sa mort, il résulte de l'ensemble de son testament, et particulièrement des articles 3 et 7, que c'est à elle qu'il s'en est remis, à l'exclusion de tous autres, et notamment de ses petits-enfants, pour la conservation de ses œuvres littéraires, et la surveillance à exercer sur la publication; qu'ainsi il rappelle que sa femme à contribué à sa fortune, nonseulement par sa vie économique, mais encore par une collaboration active et continuelle à ses œuvres; qu'il regarde donc comme juste que sa femme conserve sur tous ses ouvrages, outre les droits personnels que lui attribue la loi, tous ceux qu'elle peut tenir de sa volonté, et qu'il lui confère dans les limites les plus étendues; qu'il invite ses petits-enfants, plus que tous autres, à respecter cette volonté; qu'il annonce qu'il à publié tous ses manuscrits, et qu'il ne laissera que les matériaux qui ont préparé ses ouvrages; qu'il recommande à ses petits-enfants d'épargner à sa femme la formalité des scellés; que, pour le cas ou ses papiers devraient sortir des mains de sa femme, il recommande expressément à ses exécuteurs testamentaires de les brûler;

Attendu qu'en présence de semblables dispositions, il est impossible de méconnaitre qu'en ce qui regarde ses œuvres littéraires, Michelet considère sa femme comme un autre lui-même; que c'est donc à juste titre qu'elle réclame pour elle personnellement le droit de veillerà l'exacte et fidèle reproduction des œuvres de son mari;

Attendu que c'est à tort que les consorts Poullain-Dumesnil se préoccupent de la réclamation qui pourrait ètre faite de l'exercice de ce droit de surveillance, soit par les héritiers de la veuve Michelet après sa mort, soit-par un tiers auquel elle le déléguerait de son vivant, ce droit lui étant tout personnel et par sa nature spéciale, et à raison des conditions dans lesquelles le Tribunal reconnait qu'il lui à été conféré par son mari;

we have seen, or shall find, invoked in favor of literary property, will obtain and govern. It is the original work of the artist, in every case, which will be pro-

Que c'est à tort également qu'ils prétendent, d'une part, que la condition proposée par la veuve Michelet trancherait la question réservée par le jugement qui a ordonné la vente et renvoyé à la liquidation, à savoir si les droits de la dame Michelet sur la propriété littéraire, en vertu de la loi de 1866, ne se trouvent pas confondus avec ceux qui lui sont acquis en qualité de légataire universelle, conformément à l'article 1098 du Code civil, et, d'autre part, que le droit qui en découle pour la dame Michelet porterait atteinte à la réserve; qu'en effet un semblable droit, qui n'est pas sujet à une évaluation en argent, n'a aucun des caractères du droit de propriété; qu'il ne constitue en réalité qu'un mandat que Michelet a pu valablement confier à sa femme comme il aurait pu le confier à un étranger;

Attendu enfin que, ainsi qu'il a été dit plus haut, la responsabilité des acquéreurs offre une sérieuse garantie contre l'abus que la veuve Michelet pourrait faire de son droit de surveillance; que cette responsabilité est proclamée par la veuve Michelet elle-mème, dans le premier paragraphe de la clause dont s'agit, lequel interdit aux adjudicataires de modifier le texte de l'auteur;

Attendu, en ce qui concerne le dernier paragraphe de la clause contestée, que si, en raison méme de la nature spéciale de la propriété littéraire, les éditeurs ne peuvent se considérer comme maitres absolus de l'œuvre dont ils se sont rendus adjudicataires, et libres de l'anéantir en en supprimant ou en en interrompant la publication, la rédaction proposée par la veuve Michelet crérrait une gène réelle pour ces éditeurs, en les exposant à une surveillance incessante et minutieuse; qu'il convient, tout en maintenant le principe qu'a voulu poser la veuve Michelet, d'en rendre l'application plus facile et plus pratique; qu'il y a donc lieu de remplacer le dernier paragraphe par une clause qui permette seulement aux veuve et héritiers Michelet de reprendre la libre disposition de la propriété littéraire aliénée, dans le cas ou les éditeurs refuseraient, après un certain délai, de procéder à l'impression d'une édition nouvelle;

En ce qui touche les volumes existant chez le brocheur:

Attendu que les parties sont d'accord pour reconnaitre qu'il y a lieu d'obiger les adjudicataires à prendre ces volumes comme accessoires de chacun des ouvrages auxquels ils se rapportent;

tected, and although every one of the above indicated processes may reproduce an original work, each in the way and by the method peculiar to itself, they may all

Par ces motifs,

Reçoit Quicherat et Celliez intervenant dans la cause en leur qualité d'exécuteurs testamentaires de feu Michelet;

Dit qu'il n'y a lieu de remplacer la clause insérée par la veuve Michelet au cahier des charges par celle proposée par les consorts Poullain-Dumesnil;

Dit que le premier paragraphe de la clause insérée par la veuve Michelet sera maintenu;

Dit que le second paragraphe sera rédigé en ces termes: "La dame veuve Michelet aura seule, conformément aux dispositions du testament de M. Michelet, le droit de surveiller les éditions qui se feront des œuvres de M. Michelet, son mari, et de revoir les épreuves;"

Dit que le troisième paragraphe sera supprimé et remplacé par le paragraphe suivant: "Dans le cas ou les adjudicataires refuseraient, dans les six mois qui suivront l'épuisement d'une édition des ouvrages par eux acquis, de procéder à l'impression d'une édition nouvelle, les veuve et héritters de Michelet en reprendraient la libre disposition";

Dit que les adjudicataires seront tenus de prendre comme accessoires de la propriété de chaque ouvrage, les exemplaires et feuilles existant chez le brocheur; que ces exemplaires et feuilles seront, en conséquence, compris dans la vente ordonnée, savoir: dans le premier lot, environ onze cents exemplaires de: "les Femmes sous la Révolution;" environ sept cents exemplaires en feuilles de: la Femme; environ cinq cents exemplaires en feuilles de: l'Amour, à cinquante centimes l'exemplaires, à payer par l'judicataire en sus de son prix; daus le troisième lot, environ huit cent cinquante exemplaires de l'Histoire de France, Louis XIV (tome IV); environ deux cent cinquante exemplaires de l'Histoire de France, Louis XV et Louis XVI (tome XVIII); environ cent vingt-cinq exemplaires de l'Histoire de France (tome VII); environ cent quatre-vingts exemplaires de l'Histoire moderne, à un franc le volume, à payer par l'adjudicataire en sus de son prix; dans le cinquième lot, environ soixante exemplaires en feuilles de: la Mer, à cinquante centimés l'exemplaire, à payer par l'adjudicataire en sus de son prix;

Dit que le compte du brocheur sera réglé de façon à comprendre dans la liquidation les sommes qu'il a pu recevoir des libraires en livrant des feuilles ou exemplaires;

be infringers and trespassers. He who first produces an artistic work by any of the above methods, is its author; and the photograph of an artist's work might be a piracy of it.[1]

The copyright will in no case protect the process by which the artistic work is produced.[2] The name of the copyright proprietor, and the date from which the protection begins, must appear in the form of a notice upon every multiplied copy of the artistic work, for the information of the public,[3] and if the proprietor's name change, a change must be made in the notice;[4] and the nationality of the artist, like that of the author, will entitle or disentitle him to protection under his copyright, according to precisely the same rules and conditions.[5] The artistic work must, however, have a title by which it may be designated; and it is probable that all the rules as to titles hereafter laid down,[6] will apply to the artistic as well as to the literary work. Thus, in a recent case,[7] it was held that the entry of the name, "Ordered on Foreign Service," was not a sufficient description of a picture of a young officer in a railway carriage, taking leave of a lady; nor

1 Ordonne l'emploi des dépens de l'incident en frais de vente, avec distraction aux avoués.

[1] But see the contrary ruling in Graves's case, 20 L. T. N. S., 877, L. R., 4 Q. B., 715, which held that a photograph of an engraving of a picture was not a piracy. In that particular case it may not have been, but if the court in that case is to be understood as ruling that a wrongful multiplication of a protected picture by process of photography is not a piracy, we must dissent from his reasoning.

[2] See *post*, p. 696.

[3] Thompson v. Symonds, 5 T. R., 45.

[4] Id.

[5] Page v. Townshend, 5 Dim., 395.

[6]

[7] Ex parte Beal, 9 B. & S., 395; L. R., 3 Q. B., 387; 18 L. T. N. S., 285; 37 L. J., 161 Q. B.

the entry of the names, "My First Sermon," and "My Second Sermon," a sufficient description of a picture and a photograph of a child looking with eyes wide open at its first sermon, and fast asleep at its second. The description must be "such as shall ear-mark the subject."[1] There might be a similar difficulty arising from the designation of a picture of a dog, under the title, "A Distinguished Member of the Humane Society"; or of a bullfinch and a couple of squirrels, described as "A Piper and a Pair of Nutcrackers." The question is, "Does what is given 'ear-mark' the picture."[2] Musical productions may be both literary and artistic, and in either aspect or in both aspects are entitled to the protection of laws of copyright.[3]

The final question which arises in consideration of copyright property and copyright laws is, whether the right of an originator of intellectual property (literary or artistic) to its control, includes the right to withdraw it from publication at his own pleasure, or after his ownership under the statute shall have expired. This is one point upon which statutes of copyright have been silent. It has been remarked,[4] that just as the owner of lands and houses pays to the state a certain percentage of their value, as his contribution to the wealth and power of the government whose protection he enjoys, so is it but fitting that after the author shall have enriched himself from the store of his own culture and thought, that culture and thought should pass into the general fund of the culture of the commonwealth, and enrich the stores of art and learning of his mother-land, to which, as the Greek poet said,

[1] Id.; per Blackburn, J.
[2] Shortt, p. 122.
[3] Id. p. 114, *post*, pp. 698–707.
[4] *Ante*, vol. 1, p. 17.

he owes the whole honor of his rearing." But unfortunately, the practical fact is, that these works, instead of becoming the property of the public, do actually become the property of the publisher, who, possessing the plates of the work, and a sort of "good-will," relieved of the burden of paying a copyright, will continue to supply the people with new editions. From these facts there has arisen a consideration as to what has been, not inaptly, termed "the rights of readers." This question has been so ably canvassed by the late Mr. Hotten,[1] an English publisher, that we take the liberty of presenting here some of his reflections upon the subject.

"In any attempt," said Mr. Hotten, "to improve and consolidate our copyright law, both the rights of the public and the rights of authors should be duly considered. The arguments of the extreme advocates of author's rights, who would protect even the Saxon Chronicles from the hand of the 'unauthorized' publisher, if a legal representative of their authors could be found, are at least intelligible. But while most persons are agreed that the public are the reversioners of literary property, it is absurd to neglect to take precautions for securing to them the benefit of all unexpired copyrights."

"What motive," he asks, "has the legislature in conferring, to the detriment of the public, a monopoly, for which no equivalent has been given, upon some publisher's grand-children? A better, or at least a more popular plea might be found by asking whether, even supposing that a book is no longer of market value, and that it is only one early work of a voluminous author, it would be just to allow it to be printed

[1] In his "Literary Copyright: Seven Letters to Lord Stanhope." London, 1871.

under his eyes without his consent? The answer is that in any case the law will permit this to be done. It is only a question of time, and indeed, in the case supposed presumptively, a question of a very short time. There is the case of Mr. Tennyson. He, as is well known, has declined to reprint a very considerable numbers of those poems which first made his name known to the world. Many of those suppressed poems are in the judgment of his readers in themselves very beautiful, and it need not be said that in point of good morals they are unexceptionable. But to the more refined taste of the author in his later years these, no doubt, appear unworthy of his genius. Anyway, he declines to republish them, and this being the case they can now practically only be read in the library of the British museum, where at all events no respect for the author's feelings prevents their being placed at the service of readers, and where a request from the author for their suppression would certainly not be entertained. Now, granting the propriety of permitting the author to withhold at least from public sale these earlier productions of his genius, to what extent would he be injured as far as these early poems are concerned, if the present lifetime period of copyright were withdrawn and the minimum term only left—that is, a definite forty-two years. Mr. Tennyson would, no doubt, prefer to suppress these poems forever. But seven years after his death they will undoubtedly be re-published. No respect for his wishes will prevent, or ought to prevent that; at least such is the deliberate opinion of the legislature. It is as certain as anything in this world can be that every line which he has made public will eventually be included in complete editions of his works, and issued in far greater numbers than have ever yet been published. Such is the case with Pope,

with Byron, with Shelley, in short with all great poets; and such will necessarily be the case with Tennyson. Nor is the desire on the part of the public to have everything mature or immature which a great poet has written either unnatural or without justification.[1] Grant the immaturity of Shelley's 'Queen Mab,' of Southey's 'Wat Tyler:'[2] grant the offense which these works may cause to persons whose political or religious feelings are opposed to the views they express: the fact that these poems were written by those great writers is at least one of biographical interest. A student of the life of Shelley or of Southey would at all events not be benefited by being kept in the dark about their existence, or denied an opportunity of reading them without a visit to the British museum and a diligent search in the catalogues of that vast collection. Nay even the very immaturity of early works of genius is a subject of interest, and is frequently not the least instructive fact in the story of a life. Would the world be a gainer if no specimens but those of the later manner of Raffaelle had descended to posterity? Or, to keep more closely to my subject, if Lord Macaulay had been allowed to take back from the public that famous essay on Milton, which the world still admires, though the author long afterwards expressed himself ashamed of its too ornate and exuberant style, would it not be a case to be deplored? And so with Mr. Tennyson. His 'Confessions of a Sensitive Mind' may not be now to his taste, but the mystic beauty of its lines will probably ensure it a life as long as any of those poems which their author cherishes more fondly. The world will prize that remarkable little poem, not only because it is intrinsical-

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ly valuable, but also because he wrote it, and because it represented at least a stage in the development of his genius, which has its special value and interest to a student of his works.

"But it may be asked, is an author to have no power of recall? Is a thing once published to be gone from his control forever? Is he not even to be allowed to repent of the publication of some work which may appear to him, in his later judgment, absolutely mischievous? I answer that the legislatures of all countries, after almost endless discussion, both within and without their walls, have all refused such a power. It is, as I have said, only a question of time. A brief delay is allowed; that is all. The fact that the power is limited in any way is sufficient to prove that the principle on which such questions are based, is not recognized: and the reasons are obvious. They are the same reasons which operate against all suppression of thought not contrary to public law. Subject to a certain copyright, deemed sufficient to encourage genius and learning, a published book is the heritage of the public, and cannot be taken from them by the author himself. An author's self-love, or vanity, or prejudice, may lead him to wish he had never put forth his work; but the public have no interest in the gratification of those feelings. Even an honest conviction that his book contains lines which—

'Dying he may wish to blot,'

affords no ground for permitting him to blot what may have uses which he does not perceive or does not value. The later view may be the incorrect, the earlier the correct one. If old heads are wiser then young, on the other hand young hearts are frequently better than old. Bigotry and intolerance, as well as wisdom

and prudence, may suggest suppressions. Wise and precious utterances have ere now been publicly recanted, while their authors have done voluntary penance. Cowley and Waller were not necessarily wiser or better men when they penned compliments to a king than when they composed panegyrics on the Lord Protector. I presume that but few would contend that it would be a gain to the world to permit any eminent 'pervert,' as we say, at these times, to suppress and destroy all traces of his earlier writings, all public evidence of his ever having entertained any other views than his later ones, on the ground that ripe experience is always better than early and less matured opinions. Our legislature wisely permits the world to be the judge of these things; and will, at least, after the expiration of the copyright term, allow the free issue of any work which it has not thought fit to restrain the author from publishing. But it will be said that something is due to the author's feelings, and this is, no doubt, true; but how often do we see similar considerations overruled for the sake of passing a law, the general tendency of which is good, but which would not be possible without some such sacrifice. The supposed hardships would at least be rare, and where they occurred would not be without compensating advantages. It would often, perhaps, puzzle a casuist to say whether a man who had once put forth views of which he afterwards repented, or published works of which he was subsequently on æsthetic grounds ashamed, would be most benefited by having them reproduced and commented on while he still lived, or by having them re-published soon after his death, when he would no longer be able to explain the circumstances of its publication, or defend it from the attacks—foreseen and unforeseen—of

enemies; attacks more painful, perhaps, to those to whom his memory is dear, than ever they could have been to their author if living."

"Perhaps one of the strongest cases against what is called 'an unauthorized' publication of public speeches, was that which arose on the publication of Lord Macaulay's speeches by Mr. Henry Vizetelly. Certainly no case excited more general sympathy for the author, whose rights were alleged to have been invaded. Lord Macaulay himself denounced Mr. Vizetelly's proceedings in an angry and eloquent address to the reader of his own edition of the speeches subsequently printed, and the 'Edinburgh Review' of October, 1854, devoted to the subject a powerful article, in which, probably, every argument that could be used in defense of public speakers' rights was exhausted. As instances of this kind are frequently arising, it may be worth while to devote some attention to this famous case, and for this purpose I probably cannot do better than examine the principal arguments of the Edinburgh reviewer in the article referred to.

"It appears that Lord Macaulay—then Mr. Macaulay—had determined, for reasons which are unexplained, not to give to the public any collection of his speeches. He had, in fact, publicly expressed that determination. It is to this circumstance that the reviewer alludes in the opening sentence of his article, which is in the form of a review of the authorized edition. 'If,' he says, 'the reader is one who can be reconciled by happy issues to an act of wrong-doing, he may perhaps look indulgently on the unauthorized publication of Mr. Macaulay's speeches, since it has compelled that gentleman, much against his will, to issue this remarkable volume. Any way, therefore, it

appears that a remarkable volume would have been lost to the world, or probably, at least, to some generations, but for Mr. Vizetelly's act. It may be remarked that our statute law contains one example at least, of the legislature setting its face against the suppression of important works once made public, even though such works are protected by copyright. Still more strongly, therefore, would this principle apply to the suppression of speeches which are excepted from the benefits of copyright; for that exception could not possibly have any object but that of giving to such productions a publicity so completely unrestricted that it should be out of the power even of the public speaker himself to defeat or even to control it in any way. But what the author in this case desired to impose was avowedly not—so to speak—a fiscal, but a prohibitory burden on the circulation of his speeches. He made no claim to the profits of authorship, and though Mr. Vizetelly was accused of acting for gain, preferred no complaint against that gentleman for depriving him of the reward of his intellectual exertion. Avowedly all that Lord Macaulay desired was, that neither he nor anybody else should be permitted to issue those speeches in a form which would render them generally accessible to the public, and it was this claim which the reviewer undertook to defend.

"Lord Macaulay's reasons, as I have said, have not been wholly explained; but it is not difficult to conceive that there were many things in the speeches of the young and comparatively unknown orator of 1832, which were not to the taste of the Whig statesman of 1853, whose increased responsibilities, not to speak of the natural caution of later years, would prompt him to wish that these utterances might remain buried in the comparative obscurity of files of the public papers.

or in the voluminous and unwieldy collection of Hansard. Now it may certainly be affirmed that although these feelings and motives are natural enough, and are probably very common among public men, they are feelings and motives in which they have no right to be indulged, as being contrary to the public interest, which requires that speeches of this kind should neither be suppressed nor tampered with. As a fact, indeed, Lord Macaulay did not in his own edition suppress what may be presumed to have been, in his eyes, the most objectionable of those speeches. He left, for example, his famous oration upon Earl Grey's reform bill, in which opinions were advanced, and principles defended, that were substantially identical with some of those for which Chartist orators were subsequently successfully indicted as disturbers of the peace and utterers of seditious doctrines.

"But it must be remembered that this was not done until the 'unauthorized' edition had directed the attention of the public to the subject; and that even then, his lordship's step was taken with great and avowed reluctance. The same remark applies to his declaration that where, as was admitted in his own edition, he had very much altered his speeches from any and every contemporary report of shorthand writers, still 'the substance was faithfully given.' As regards the 'remaining speeches,' also, he observed, 'I have not made alterations for the purpose of saving my reputation, either for consistency or for foresight. I have not softened down the strong terms in which I formerly expressed opinions which time and thought may have modified; nor have I retouched my predictions in order to make them correspond with subsequent events. Had I represented myself as speaking in 1831, in 1840, or in 1845, as I should

speak in 1853, I should have deprived my book of its chief value.'

"In all this there is no ground for doubting the author's sincerity, but it may still be argued that granting to public speakers exclusive right to issue their own speeches, while they are empowered in this way to edit and improve them in accordance with their later judgment, involves a dangerous principle. It requires but little knowledge of human nature in such cases to be aware that a reviser and corrector may be unsuspicious of his own bias, or of the degree in which—while even believing himself anxious merely to substitute a better word, or improve the turn of a sentence—he is in fact falsifying what may be an historical document.

"It will be readily understood that I am not disputing the value of authorized editions of speeches when their authors choose to put them forth. In point of literary qualities, Lord Macaulay's volumes were, beyond question, greatly preferable to Mr. Vizetelly's. They were, in the first place, more complete. In many respects they were probably more correct. Certainly they were free from some very gross blunders, which, however, were chiefly copied by Mr. Vizetelly's editor from Hansard's Debates, the recognized authority for quotations, even within the walls of parliament. That a corrected and improved edition of this kind should be allowed to circulate side by side with a reprint of contemporary reports (if any such should exist) is undoubtedly an advantage; but it is another thing to forbid every version but that which the author, correcting and improving from memory after a lapse of years, should think fit to put forth. Every bookseller is, indeed, aware that although authors' editions are, as a rule, most in request, a separate and distinct demand exists for speeches not issued under

the author's sanction, and particularly where those speeches extend over a life-time. It is certainly so in the case of Lord Macaulay's speeches, and it is equally certain that but for the publication of which his lordship so eloquently complained, this demand could not have been satisfied, except by reference to publications which are practically out of the reach of the majority of readers.

"The perversity with which men will occasionally reason on questions of this kind, is nowhere better exemplified than in the reviewer's remarks on Mr. Vizetelly's rather chivalrous disclaimer of 'mercenary aims.' The term 'mercenary' has acquired by association an offensive significance, but there is certainly nothing in its derivative meaning which should induce a publisher who does not lay claim to anything more than the character of an honest trader, to shrink from adopting it. That a publisher of books should reap a sufficient reward for the labor, risk, and outlay of his undertaking, is a proposition simple enough; and that he will make no more than this on an average in the case of publications not protected by copyright will be understood by all who have the least knowledge of political economy. In fact, in such cases he is compelled, by the unrestricted competition to which he is, or at any moment may be, subjected, to exact from the public no more. The holder of a protected monopoly, in short, may charge a price altogether independent of the cost of production; but the publisher, who has no such protection, can only be safe while giving the public books so cheap that it will practically be worth no one's while to compete with him. Thus we continually find books of which the copyright term has expired, issued in new editions at little more than the cost of print, paper, and binding. This is the

answer to those writers who in such cases sometimes reproach a publisher, as Mr. Tegg was reproached by the late Mr. Justice Talfourd, with having 'no relation to literature but that of the depositary of its winnings.' The profits of a publisher of uncopyrighted works are really made out of nothing but his own industry and capital. It is true that this industry and capital would have nothing to exercise themselves on if no books had been written. But we are now considering, not the literary, but the market worth of a production. Neither the wisdom of Bacon, nor the creative power of Shakespeare, however much they may redound to the glory of our country, can now be counted as a constituent of value—that is, of saleable value in a new edition of their works—for the simple reason that those literary qualities, not being any longer property, have no value in the market sense, and therefore afford no ground for enhancing the price of a book. Any one who is capable of understanding these truths may appreciate the Edinburgh reviewer's comparison of Mr. Vizetelly to a man who, taking it into his head that you are suffering a piece of ground to be wasted which might be profitably converted into pasture or arable, says, 'I see, neighbor, you do not make what you might out of that plot; I will take it out of your hands and make it yield something worth having. But don't suppose, I beseech you, that I design any profit by it. I am purely concerned for the public and you. Appoint some one with whom I may reckon for the profits.'

"The answer to this is, of course, that a piece of land is a property which it is admitted by the reviewer that public speeches are not. In offering, as Mr. Vizetelly appears to have done, 'to name some party to whom he might account for the profits of the

sale,' he certainly gave encouragement to notions of this kind; but an Edinburgh reviewer ought to have been aware that a thing which any one may have for nothing, can be worth nothing in a pecuniary sense, and that therefore if there were any profits in the matter, they could not be properly assigned to any cause but the publisher's labor and outlay.

"But the reviewer is of opinion that there was another reason for which 'Mr. Macaulay had a right to be indignant at the publication.' This, it appears, was 'the obvious want of editorial supervision.' But it is admitted that the publisher had applied to Mr. Macaulay for assistance in this matter, and had been met by a refusal to have anything to do with the publication of speeches which the author desired to withhold, as far as in his power, from the public. It seemed, therefore, somewhat hard to complain afterwards that the speeches were given with all the imperfections, including merely verbal errors of the shorthand writers. Lord Macaulay was himself emphatic in his censure of the publisher on this point. Some of the blunders were, he declared, to the last degree ludicrous, and in one or two other instances scarcely less so. His lordship was particularly severe on the unauthorized publisher for making him say that 'the principle of limitation is found among the pandects of the Benares.' I am afraid that there are a good many young men, possibly quite capable of pulling stroke oar in a university match, who yet might pass over such a passage without being struck with any absurdity. But it was of course, easy for a man of Lord Macaulay's power and knowledge to make fun of an editor who allowed such expressions to pass, and to ask triumphantly whether this man believed that he ever uttered these words, or that the house of commons listened patiently to them. The reviewer selects

other passages, and asks, 'Who can believe that Mr Macaulay deliberately or extemporaneously ever gave expression to such sentences?' That I may not be charged with understating the case of the defenders of Lord Macaulay, I will, as to a supplementary charge to this one of imperfect editing, here quote the reviewer's own words, as follows:

"'There is another point in which the lack of proper editing has inflicted a grievous wrong. We refer to the absence of all discrimination in the selection and rejection of materials. After the manner of those biographers who sweep out the writing desks of the objects of their cruel admiration, and in their zeal for the public or the bookseller, will hardly leave a check or a card of invitation inviolate, we here find almost every scrap that has been reported—anyhow, anywhere—in provincial papers as well as the metropolitan, however imperfect or mutilated—remorselessly seized upon, and gross injustice, as might be expected, has been done. One speech, which we ourselves heard in Edinburgh and of which we retain a very vivid remembrance, namely, that delivered at the memorable election of 1847, must, have been deplorably reported. Though full of powerful passages, which will ever live in our memory, we cannot discover a trace of them in this wretched daguerreotype. If Mr. Vizetelly would publish the speeches of Mr. Macaulay, it was due to the eminence of the speaker, and the merit of the specches, to procure the very best editing. The task should have been confided to one of judgment and taste, accuracy and patience, with a charge to select only what was sufficiently well reported to be retained, and to subject to the most minute collation all the different reports of the same speeches.'"

"If the published reports were so unsatisfactory, they were still the only reports that could be obtained.

If the inaccuracies were a fact, they showed only the necessity of an author's edition. But this the author had publicly declared that he would never give to the world. Unless, therefore, it is to be argued that the public have an interest in the suppression of such matter, it is hard to see how Mr. Vizetelly could be blamed for giving the speeches with all their imperfections on their heads. Nor is this answer much affected by the reviewer's notion that the unauthorized editor, instead of taking any single report, should have constructed according to his own taste and judgment a kind of patchwork composition from various versions. Still less am I inclined to agree with him that this model editor would have been bound to exercise 'discrimination in the selection and rejection of material,' or should have permitted only what was in his opinion sufficiently well reported to be retained. How an editor, who had not enjoyed the reviewer's advantage of being present at the delivery of the speeches (indeed, more than his advantage, for he must have been present at the delivery of all), or how such an editor, even under these circumstances, if he were less fortunate in the matter of memory, or let us say more diffident about trusting to that treacherous faculty with regard to mere words spoken in the heat of an election meeting years before—how such an editor, I say, could be expected to fulfill such duties as these, does not appear. I confess that I, for one, if I had purchased a copy of his book, should have been little inclined to thank him for his pains, and would certainly have preferred to have all the speeches as they were to be found in some one or other of the only authorities which the author permitted to exist.

"But the reviewer to some degree anticipates the argument of the inadvisability of entrusting an editor with such discretionary powers. The plea that 'it

was not in the power of an editor who professed to give the reported speeches to reject any,' he regards as absurd, because in fact many were omitted. These omissions, however, were probably accidental. The difficulty of obtaining copies of reports, some of which only existed in files of country newspapers—their very existence being perhaps unknown to the editor—was apparently the sole cause of them. Still, so far as they went, they were undoubtedly valid objections to Mr. Vizetelly's publication; but the affair was rather one between him and the public, or between him and the purchaser of his book, than between the publisher and Lord Macaulay, who had refused any aid in rendering the publication either complete or accurate. Certainly they only affected in the slightest degree the moral aspect of the case, namely, the right of a publisher to issue without the author's consent, and even in defiance of his wishes, a collection of his public speeches. The same may be said of the reviewer's complaint, that reported speeches of all great speakers, especially among those they have delivered before country audiences, are far less those of the speaker than those of the reporters, and that many of those given in Mr. Vizetelly's volume were 'evidently mere summaries of what was said, and not always correct summaries.' 'It would be as fair,' remarks the writer I am quoting, 'to publish the "argument" of some book of an epic poem for the book itself, as give some of the meagre condensations of speeches contained in these volumes for the very speeches themselves.' Is not an obvious answer to this, that imperfect as they were, these versions were the best that could be got, and that even a summary by a country reporter of a speech by a great statesman, might be conceived to be preferable to nothing at all. The speeches 'in the Senate of Liliput,'

which Dr. Johnson and others furnished to 'The Gentleman's Magazine,' were probably in many cases mere faint adumbrations of the speeches actually delivered in the House of Commons; but it is frequently through these sources only that a notion has descended to our time of famous orations of Walpole, Chatham, Burke, and Fox.

"The fact that the reviewer of Macaulay's speeches in the *Edinburgh* is, as far as I am aware, the only writer of position who has put forth a plea for extending the law of copyright to public speeches, will, I hope, justify me in devoting some further space to the examination of his arguments. A notion that the public have an interest in this question which deserves consideration does indeed appear to have haunted his mind. Something he is willing to concede to this consideration; but he claims to limit the public rights in a manner which appears to be arbitrary and unsound. The liberty of daily journals to give reports of speeches as part of the news of the day he does not contest. Even Hansard he would allow; and indeed the absurdity of a member of Parliament being permitted to refuse to allow any record of his parliamentary utterances to appear either in the pages of Hansard or in the public journals, must be sufficiently obvious. More than that, he does not even insinuate that a parliamentary speaker should be allowed to compel either of such authorities to adopt his revised speech, or even his next day's view of what he said, or intended to say, or wished he had said, in preference to the version of their own reporters. If he had, his reader's attention would have been inevitably at once directed to the weakness of his plea; for though every reader is not capable of understanding an appeal to abstract principles, all are able to appreciate a threatened deprivation of something that is

useful, to which they have long been accustomed. The reviewer's prudence on these points is therefore incontestable. But he argues that though Hansard and the *Times* may be endured, a reprint in any other form ought to be repressed if the public speaker so willed it. The difference between these things, however, is not very easy to perceive. The reviewer attempts to make a distinction from the fact that newspaper and like reports are given on the authority of the organs in which they appear, whereas reprints bear the name of the author. But as in the case of Macaulay's speeches, every one knew, or from the very title-page of the volume might know, and indeed was sure to be told, that Mr. Vizetelly's book had no other authority than the *Times* or Hansard, the re-publication was virtually the same thing as publication in those organs. The reviewer's notion that the public ought to be permitted to read the next morning in the *Times*, but must never afterwards be permitted to read except in a paper, is certainly founded on no intelligible principle. Besides, is not a volume of Hansard both a portable and a permanent record in which any man might read unauthorized versions of speeches if he was only rich enough to buy the series; and the index of that publication as much affixes the speeches to the author's name as Mr. Vizetelly's title-page. But perhaps the oddest of all the reviewer's notions is that the unauthorized publishers should be strictly confined to newspapers and such collections as Hansard, because those publications are of an essentially unwieldy and inconvenient character. Surely the right to publish with or without the author's consent ought to include the right to publish in a form convenient to the reader.

"As to newspapers, the reviewer thinks reports there tolerable, because associated with that 'infinite

chaos of intelligence which the public is concerned to know merely as news;' because, being there, as he also expresses it, 'mixed up with an infinite jumble of chaotic information—births, deaths, and marriages, police reports, advertisements, trials, sketches of sermons, and dreadful accidents—more attractive than all of them—they go the way of all paper.' And so with the matter of Hansard. This he regards as a case for exception, because it is 'a vast repertory,'—so vast that few can purchase it,—'where all sorts of speeches of all dimensions, from two lines to twenty columns, of every conceivable quality and on all subjects, from a Turnpike Act to Parliamentary Reform, are huddled together;—and where (as he rather clumsily expresses it) thin grains of eloquence faintly streaked infinite platitudes, and grains of golden ore lie entombed in whole continents of rubbish.' The absurdity of this proposition, that publication should be permitted only on the condition that the thing published should 'faintly streak infinite platitudes,' and 'lie entombed in whole continents of rubbish,' must, I think, be pretty obvious to any reader in his senses. This notion, that it can be at the same time an object both to give and to withhold—to make known and yet not to make known—can perhaps only be paralleled by the story of the foreign countess in very reduced circumstances, who, having to sell water-cresses in the street, selected a lonely quarter of the town and cried her merchandise in a low tone of voice, while muttering between whiles, 'I hope to goodness nobody hears me.' These things are, as the reviewer admits, historical documents. They are, in fact, something more,—they concern the interests of the generation in which they are spoken; they are matter which the public have a right to access to, not grudgingly but freely. If ever pretensions to copyright in them such

as this writer has put forth, or a claim to any further right for the speaker than that of issuing his own authorized edition for any one to prefer if he chooses, should be subjected to the searching criticism of a parliamentary debate, it may safely be prophesied that the fallacies of the reviewer on this point will be quickly disposed of. But even granting that such speeches are merely documents of history, it may still be reasonably asked why historical documents, if they are to be permitted to exist at all, independently of the will of any person, should be only permitted in an inaccessible form.

"The inconveniences which may result from according to public speakers any approach to a right to suppress or tamper with speeches, are obvious enough; but we are not left to infer this form any prior considerations. As I have said, Lord Macaulay, in the extensive alterations which he introduced into the reporter's versions of his speeches, disavowed emphatically any intention at least to falsify historical documents. But he does not conceal from his readers that he would much have preferred, and this for reasons having reference merely to private feelings, to suppress at least some portions of these addresses. 'It was (he declares) especially painful to me to find myself under the necessity of recalling to my own recollection, and to the recollection of others, the keen encounters which took place between the late Sir Robert Peel and myself,' and he adds, 'I lamented his untimely death as both a private and public calamity, and I earnestly wish that the sharp words which have sometimes been exchanged between us might be forgotten.'

"Feelings of this kind undoubtedly do honor to the heart of a public man; but the public has certainly no interest in the suppression of such matter, and on

the whole it may be doubted whether any good purpose is really served by suppressing such episodes in a period of our history even temporarily. The encounters in Parliament and elsewhere between two such men as Macaulay and Peel are facts of interest to all Englishmen. What allowance should be made for them, what respect for the memory of the dead may demand when we look back upon them, will certainly not be denied by history, or even by the sentiment of the time in which we live. What I contend for is, that they ought not to be suppressed, and that no man should have even a partial right to place artificial obstacles in the way of such facts becoming known. This is a principle at least well-known to our law. Lord Eldon, for example, in the case of Gee v. Pritchard, 'repudiated, and that most distinctly, any notion of interference by the Court of Chancery with a publication simply because it might wound feelings;' and, as Mr. Phillips remarks,[1] 'it seems abundantly clear, from all the reported decisions that, except upon the ground of property, or of breach of contract or trust, an English Court of law or equity will not give relief in the case of an unauthorized publication.' The reason of this is, of course, that private feelings, however commendable in individuals, ought not to be permitted to interfere with public rights. With so many motives for suppression and modification of bygone speeches, as every active statesman must experience in later years, it is indeed intelligible enough why so few of such publications are issued. It might even be argued that the author of such speeches is himself the worst person to be permitted to revise them, for the reason that the motives for tampering with their historical truth and accuracy are presumptively stronger in him than in any other person."

[1] Law of Copyright, p. 36.

CHAPTER II.

OF THE STATUTES OF COPYRIGHT.

222. The first English Statute of Copyright—to whose enactment we have thus traced the history of Literary Property—recited in its preamble that "printers, booksellers, and other persons," frequently took "the liberty of printing, reprinting and publishing, or causing to be printed, reprinted and published, books and other writings, without the consent of the authors and proprietors of such books and writings, to their very great detriment, and, too often, to the ruin of them and their families. Wherefore: "to prevent such wrong-doing, and for the encouragement of learned men to compose and write useful books, the statute enacted that from and after the tenth day of April, 1710, the author of any book or books already printed, who hath not transferred to any other the copy or copies[1] of such book or books in order to print or reprint the same; shall have sole right and liberty of printing

[1] By the word "copy" in this statute and in the early cases on the subject, is meant what we now call a "copyright." "I used the word 'copy' in the technical sense in which that name or term has been used for ages, to signify an incorporeal right to the sole printing of somewhat intellectual communicated by letters."—Lord Mansfield, in Millar v. Taylor, 4 Burr. 2396. "The copy of a book," said Aston, J. (Id. 2346), "seems to have been not familiarly only, but legally, used as a technical expression of the author's sole right of printing and publishing that work." See also per Willes, J., Id. 2311.

such book for the term of one-and-twenty years, to commence from the said tenth day of April, and no longer; and that the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assignees, shall have the sole liberty of printing and reprinting such book or books for the term of fourteen years, to commence from the day of first publishing the same, and no longer." And the act inflicted a penalty on those who should, within the time specified in the act, print, reprint, or import, or cause to be printed, &c., "without the consent of the proprietor or proprietors thereof first had and obtained in writing," or should sell, publish, or expose to sale any book or books so printed, &c., without consent, the penalty being a forfeiture of the book or books to the proprietor of the copy, and one penny for every sheet found in the offender's possession, one moiety to go to the sovereign, and the other to any person suing for it.[1]

The benefit of the preceding enactment was, however, extended only to those books published after the passing of the act, whose proprietor's title was entered in the register book of the Stationers' Company in the manner usual before the act.[2]

The act furthermore empowered every person who considered the price of a book too high, to bring the matter before the archbishop of Canterbury, the lord chancellor or lord keeper, the bishop of London, the chief judge of the king's bench, the chief judge of the common pleas, the chief baron of the exchequer, the vice-chancellors of the two English universities, the lord president of the sessions, the lord justice general,

[1] Sec. 1.
[2] Sec. 2.

or the rector of the college of Edinburgh; one or more of whom might examine into the cause of complaint and settle the price of the book as seemed just, and make the bookseller or printer pay all the costs of the person making the complaint.

Provision was made that nine copies of every book should be given to different libraries, and the rights of the universities were saved.[1] With respect to books in other languages, the act[2] provided that nothing

[1] The public libraries, entitled to the receipt of a copy each, upon demand, were the King's Library (now the British Museum), the Bodleian, Oxford; the University, Cambridge; the Library of the London Clergy (otherwise Sion Library), London. In Scotland the libraries of the Universties of Edinburgh, Glasgow, St. Andrews, and Aberdeen, with that of the Faculty of Advocates.

To these were added, by a subsequent act, in 1791, two Irish libraries, viz.: Trinity College, Dublin, and the Society of the King's Inns, in that city.

The delivery of nine copies of every new book was a heavy sacrifice, and booksellers were indefatigable in their efforts to evade it; delivering at one time only a single volume, and at others venturing to omit the ungracious duty altogether. Hence a necessity for new acts of parliament, more particularly those of 1775 and 1791. Still these acts were not sufficiently positive; and it having been decided in 1798 (in the case of Beckford v. Hood), that publishers were not prevented by such irregularities, from obtaining damages for pirated editions, they became more and more remiss in their deliveries. At last, in 1811, the university of Cambridge having determined to bring the question to an issue, brought an action for the non-delivery of Fox's History, and obtained a verdict. The booksellers, finding that this act was now no longer a dead letter, applied to parliament; but a committee of the house of commons, appointed in March, 1813, made a report in favor of their opponents; and in the succeeding spring an act was passed, confirming, in the most explicit terms, the claim of the public libraries, who were not even required to pay any proportion of the price of such books as they thought proper to require. Enc. Brit. Sup.

[2] The present English Copyright Law (5 and 6 Vict. 45), dating from 1st July, 1842, gives to authors a copyright in their

contained in it should extend or be construed to extend "to prohibit the importation, vending, or selling of any books in Greek, Latin, or any other foreign

works, for the natural life of the author, and for seven years after his death; or in any event, for forty-two years from the first publication.

The honor of this bill is due to Mr. Sergeant Talford, whose brilliant effort in its behalf merits all preservation. Said the sergeant, in 1837, "Although I see no reason why authors should not be restored to that inheritance which, under the name of protection and encouragement, has been taken from them, I feel that the subject has so long been treated as matter of compromise between those who deny that the creations of the inventive faculty, or the achievements of the reason, are the subjects of property at all, and those who think the property should last as long as the works which contain truth and beauty live, that I propose still to treat it on the principle of compromise, and to rest satisfied with a fairer adjustment of the difference than the last act of parliament affords. I shall propose—subject to modification when the details of the measure shall be discussed—that the term of property in all works of learning, genius, and art, to be produced hereafter, or in which the statuable copyright now subsists, shall be extended to sixty years, to be computed from the death of the author; which will at least enable him, while providing for the instruction and the delight of distant ages, to contemplate that he shall leave in his works themselves some legacy to those for whom a nearer, if not a higher duty, requires him to provide, and which shall make 'death less terrible.' When the opponents of literary property speak of glory as the reward of genius, they make an ungenerous use of the very nobleness of its impulses, and show how little they have profited by its high example. When Milton, in poverty and in blindness, fed the flame of his divine enthusiasm by the assurance of a duration coequal with his language, I believe, with Lord Camden, that no thought crossed him of the wealth which might be amassed by the sale of his poem; but surely some shadow would have been cast upon 'the clear dream and solemn vision' of his future glories, had he foreseen that, while booksellers were striving to rival each other in the magnificence of their editions, or their adaptation to the convenience of various classes of his admirers, his only surviving descendant—a woman—should be rescued from ab-

language printed beyond the seas; anything contained in this act to the contrary notwithstanding.

223. The next statute on the subject was that of ject want only by the charity of Garrick, who, at the solicitation of Dr. Johnson, gave her a benefit at the theatre which had appropriated to itself all that could be represented of Comus. The liberality of genius is, surely, ill urged as an excuse for our ungrateful denial of its rights. The late Mr. Coleridge gave an example, not merely of its liberality, but of its profuseness; while he sought not even to appropriate to his fame the vast intellectual treasures which he had derived from boundless research, and colored by a glorious imagination; while he scattered abroad the seeds of beauty and of wisdom to take root in congenial minds, and was content to witness their fruits in the productions of those who heard him. But ought we, therefore, the less to deplore, now when the music of his divine philosophy is forever hushed, that the earlier portion of those works on which he stamped his own impress—all which he desired of the world that it should recognize as his—is published for the gain of others than his children—that his death is illustrated by the forfeiture of their birthright? What justice is there in this? Do we reward our heroes thus? Did we tell our Marlboroughs, our Nelsons, our Wellingtons, that glory was their reward, that they fought for posterity, and that posterity would pay them? We leave them to no such cold and uncertain requital; we do not even leave them merely to enjoy the spoils of their victories, which we deny to the author; we concentrate a nation's honest feeling of gratitude and pride into the form of an endowment, and teach other ages what we thought, and what they ought to think, of their deeds, by the substantial memorials of our praise. Were our Shakespeare and Milton less the ornaments of their country, less the benefactors of mankind? would the example be less inspiring if we permitted them to enjoy the spoils of their peaceful victories—if we allowed to their descendants, not the tax assessed by present gratitude, and charged on the future, but the mere amount which that future would be delighted to pay—extending as the circle of their glory expands, and rendered only by those who individually reap the benefits, and are contented at once to enjoy and to reward its author?

"But I do not press these considerations to the full extent; the past is beyond our power, and I only ask, for the

89 Geo. I., Chapter 13, which extended the provisions of the statute of Anne to every person who should "invent or design, engrave, etch, or work in mezzo-

present, a brief reversion in the future. 'Riches fineless,' created by the mighty dead, are already ours. It is in truth the greatness of the blessings which the world inherits from genius that dazzles the mind on this question; and the habit of repaying its bounty by words, that confuses us and indisposes us to justice. It is because the spoils of time are freely and irrevocably ours—because the forms of antique beauty wear for us the bloom of an imperishable youth—because the elder literature of our own country is a free mine of wealth to the bookseller and of delight to ourselves, that we are unable to understand the claim of our contemporaries to a beneficial interest in their works. Because genius by a genial necessity communicates so much, we cannot conceive it as retaining anything for its possessor. There is a sense, indeed, in which the poets 'on earth have made us heirs of truth and pure delight in heavenly lays;' and it is because of the greatness of this very boon—because their thoughts become our thoughts, and their phrases unconsciously enrich our daily language—because their works, harmonious by the law of their own nature, suggest to us the rules of composition by which their imitators should be guided—because to them we can resort, and 'in our golden urns draw light,' that we cannot fancy them apart from ourselves, or admit that they have any property except in our praise. And our gratitude is shown not only in leaving their descendants without portion in the pecuniary benefits derived from their works, but in permitting their fame to be frittered away in abridgments, and polluted by base intermixtures, and denying to their children even the cold privilege of watching over and protecting it!

"There is something, sir, peculiarly unjust in bounding the term of an author's property by his natural life, if he should survive so short a period as twenty-eight years. It denies to age and experience the probable reward it permits to youth—to youth, sufficiently full of hope and joy, to slight its promises. It gives a bounty to haste, and informs the laborious student, who would wear away his strength to complete some work which 'the world will not willingly let die,' that the more of his life he devotes to its perfection, the more limited shall be his interest in its fruits. It stops the progress of remuneration at the moment it is most needed, and when

tinto or chiaro oscuro, or from his own works and inventions should cause to be designed, engraved," &c. . . .

the benignity of nature would extract from her last calamity a means of support and comfort to survivors. At the season when the author's name is invested with the solemn interest of mortality—when his eccentricities or frailties excite a smile or a sneer no longer—when the last seal is set upon his earthly course, and his works assume their place among the classics of his country, your law declares that his works shall become your property, and you requite him by seizing the patrimony of his children. We blame the errors and excesses of genius, and we leave them,—justly leave them,—for the most part, to the consequences of their strangely-blended nature. But if genius, in assertion of its diviner alliances, produces large returns when the earthly course of its frail possessor is past, why is the public to insult his descendants with their alms and their pity? What right have we to moralize over the excesses of a Burns, and insult his memory by charitable honors, while we are taking the benefit of his premature death, in the expiration of his copyright and the vaunted cheapness of his works? Or, to advert to a case in which the highest intellectual powers were associated with the noblest moral excellence, what right have we to take credit to ourselves for a paltry and ineffectual subscription to rescue Abbotsford for the family of its great author (Abbotsford, his romance in stone and mortar, but not more individually his than those hundred fabrics, not made with hands, which he has raised, and peopled for the delight of mankind), while we insist on appropriating now the profits of his earlier poems, and anticipate the time when, in a few years, his novels will be ours without rent-charge to enjoy—and any one's to copy, to emasculate, and to garble? This is the case of one whom kings and people delighted to honor. But look on another picture —that of a man of genius and integrity, who has received all the insult and injury from his contemporaries, and obtains nothing from posterity but a name. Look at Daniel De Foe; recollect him pilloried, bankrupt, wearing away his life to pay his creditors in full, and dying in the struggle!—and his works live, imitated, corrupted, yet casting off the stains, not by protection of law, but by their own pure essence. Had every school-boy, whose young imagination has been prompted by his great work, and whose heart has learned to

The statute of George III., Chapter 38, came next in order, extending the benefit of the act to every person who should "engrave, etch, or work in mezzo-

throb in the strar ;e yet familiar solitude he created, given even the halfpeni y of the statute of Anne, there would have been no want of a provision for his children, no need of a subscription for a statue to his memory!

"The term allowed by the existing law is curiously adapted to encourage the slightest works, and to leave the noblest unprotected. Its little span is ample for authors who seek only to amuse; who, 'to beguile the time, look like the time;' who lend to frivolity or corruption 'lighter wings to fly;' who sparkle, blaze, and expire. These may delight for a season—glisten as the fire-flies on the heaving sea of public opinion—the airy proofs of the intellectual activity of the age; —yet surely it is not just to legislate for those alone, and deny all reward to that literature which aspires to endure. Let us suppose an author, of the true original genius, disgusted with the inane phraseology which had usurped the place of poetry, and devoting himself from youth to its service; disdaining the gauds which attract the careless and unskilled in the moving accidents of fortune—not seeking his triumph in the tempest of the passions, but in the serenity which lies above them,— —whose works shall be scoffed at—whose name made a by-word—and yet who shall persevere in his high and holy course, gradually impressing thoughtful minds with the sense of truth made visible in the severest forms of beauty, until he shall create the taste by which he shall be appreciated—influence, one after another, the master-spirits of his age—be felt pervading every part of the national literature, softening, raising, and enriching it; and when at last he shall find his confidence in his own aspirations justified, and the name which once was the scorn admitted to be the glory of his age—he shall look forward to the close of his earthly career, as the event that shall consecrate his fame and deprive his children of the opening harvest he is beginning to reap. As soon as his copyright becomes valuable, it is gone! This is no imaginary case—I refer to one who 'in this setting part of time' has opened a vein of the deepest sentiment and thought before unknown—who has supplied the noblest antidote to the freezing effects of the scientific spirit of the age—who, while he has detected that poetry which is the essence of the greatest things, has cast a glory around the lowliest conditions of hu-

tinto or chiaro oscuro, or cause, &c., &c., any print taken from any picture, drawing, model or sculpture, either ancient or modern, . . . in like manner as if such print had been graved or drawn from the original design of such engraver, etcher, or draughtsman," and the term of protection afforded, from fourteen to twenty-eight years. The statute 38 George III., Chapter 71, extended this protection to models and busts, and the statutes 41 Geo. III., Chapter 107, and 54 Geo. III., Chapter 156,[1] amended the existing provisos as to remedies and penalties.

224. Such was generally the condition of the statutes, down to the year 1783, in England. Let us now look at America.

manity, and traced out the subtle links by which they are connected with the highest—of one whose name will now find an echo, not only in the heart of the secluded student, but in that of the busiest of those who are fevered by political controversy—of William Wordsworth. Ought we not to requite such a poet, while yet we may, for the injustice of our boyhood! For those works which are now insensibly quoted by our most popular writers, the spirit of which now mingles with our intellectual atmosphere, he probably has not received through the long life he has devoted to his art, until lately, as much as the same labor, with moderate talent, might justly produce in a single year. Shall the law, whose term has been amply sufficient to his scorners, now afford him no protection, because he has outlasted their scoffs—because his fame has been fostered amidst the storms, and is now the growth of years?"

Sergeant Talfourd afterwards, in 1838 and 1839, delivered other speeches in favor of the extension of copyright, and the measure was finally carried in 1842, proving, as said the poet Wordsworth, who was one of the petitioners for the copyright, that "justice is capable of working out its own expediency." (Three Speeches delivered in the House of Commons in favor of the Measure for an Extension of Copyright. By T. N. Talfourd, Sergeant-at-Law. London, 1840.)

[1] Repealed by 5 and 6 Victoria, ch. 45, § 1, except as to rights existing or proceedings pending at the time of the passing of that act.

The fundamental principle of the law of the United States, is that the colonies possessed, as their heritage, the common law of England, in so far as it was suited to their circumstances and condition.[1] "Our ancestors," said Parsons J.,[2] "when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were inapplicable to their new state and condition."

And so whatever was common law in England up to the 4th of July, 1775, or, as some say, up to the formal adoption of the Articles of Confederation, was and is the common law of the United States to-day.

225. The state of Connecticut, as early as January, 1783, passed an act "for the encouragement of literature and genius," of which the preamble ran as follows: "Whereas it is perfectly agreeable to the principles of natural justice and equity, that every author should be secured in receiving the profits that may arise from the sale of his works: and that such security may encourage men of learning and genius to publish their writings, which may do honor to their country and service to mankind," &c., &c. The law contained a proviso to the effect that the benefit of the law should not extend to the authors of another state, until such state should have passed similar laws.[3]

The state of Massachusetts, in March, 1783, passed a law entitled, "an act for the purpose of securing to the authors the exclusive right and benefit of publishing their literary productions for twenty-one years." The preamble to this act was as follows: "Whereas

[1] 1 Story on Const. 137–140; Vanness v. Packard, 2 Pet. 144; Wheaton v. Peters, 8 Id. 591.

[2] In Commonwealth v. Knowlton, 2 Mass. R. 534.

[3] Statutes of Conn. 474.

the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness greatly depend on the efforts of learned and ingenious persons in the various arts and sciences; as the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and, as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind; therefore, to encourage learned and ingenious persons to write useful books for the benefit of mankind, be it enacted, &c." The act then proceeds to declare that all books, treatises, and other literary works, &c., shall be the sole property of the author or authors, being subjects of the United States of America, their heirs and assigns, for the full and complete term of twenty-one years from the date of their first publication. And certain penalties are affixed to a violation of the right, with a proviso that the act shall not be construed to extend in favor, or for the benefit of any author or subject of any other of the United States, until the state, of which such author is a subject, shall have passed similar laws for securing to authors the exclusive right and benefit of publishing their literary productions.[1]

It appears from the journals of the old Congress[2] that the question was brought before that body, by sundry papers and memorials on the subject of literary property, "which upon being referred to a committee of which Mr. Madison,[3] afterwards President Madison,

[1] Laws Mass. 94.

[2] 8 Journals, 257.

[3] Mr. Madison was author of "The Federalist," No. 43, in

was one, the following resolution was reported and adopted on the 27th of May, 1783:

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

In 1785 Virginia followed,[1] and, in 1786, the colony of New York passed a law "to promote literature," reciting, "whereas it is agreeable to the principles of natural equity and justice that every author should be secured in receiving the profits that may arise from the sale of his works; and such security may encourage

which the clause of the constitution, giving congress power to pass laws regulating copyright, is discussed.

The utility of the power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain, to be a right at common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The states cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of congress.—"The Federal," No. 43 (old No. 42), University Edition, New York, 1870, p. 297.

[1] 1 Rev. Code, Virgin. 534.

persons of learning and genius to publish their writings, which may do honor to their country and service to mankind," &c., &c. The law makes provision for securing to authors the sole right of printing, publishing, and selling their works, for fourteen years, with a proviso to the fourth section of the act, recognizing a common-law right, but leaving it open and unaffected in cases not coming within the act, as follows: "Provided that nothing in this act shall extend to, affect, prejudice, or confirm the rights which any person may have to the printing or publishing of any books or pamphlets at common law, in cases not mentioned in this act."[1]

But under the existing governments of the United States, before the adoption of the Constitution, adequate protection could not be given to authors throughout the United States by any general law. It depended on the legislatures of the several states, others of whom, following the examples of states above quoted, had meanwhile enacted similar laws, and this led to the provision in the present constitutution[2] of the United States (May, 1789), which enacted that congress should have power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries, . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.[3]

[1] Wheaton v. Peters, 8 Pet. p. 682.

[2] Con. art. 1, § 18.

[3] Mr. Madison proposed the following: "To secure to literary authors their copyrights for a limited time.
"To establish a university.

226. Next chronologically to recognize and protect the rights of authors of all kinds of writings, of composers of music, of painters and engravers, were the French, who, by the Republican decree of July nineteenth, of the year 1793, giving to all such a right for life in their works, and to their heirs for ten years after their deaths, with strong provisions against the invasion of such literary property. The history of this law is curious and instructive, the French National Convention having passed it in that memorable month of July, 1793, "when the whole republic was in the most violent convulsions: when the combined armies were invading France and besieging Valenciennes; when Paris was one scene of sedition, terror, imprisonment, proscription, and judicial massacre; when the convention had just been mutilated by its own denunciation, and the imprisonment of the Girondist deputies, and when the whole nation was preparing to rise en masse to expel the invaders. The spectacle of an assembly, at such a moment, sitting calmly down to pass, for the first time, a law to protect

"To encourage by premiums and provisions the advancement of useful knowledge and discoveries."

Mr. Pinckney proposed:

"To establish seminaries for the promotion of literature and the arts and sciences.

"To secure to authors exclusive rights for a certain time."

These propositions were referred to a committee of eleven, but not reported back.

Mr. Madison and Mr. Pinckney, near the close of the session, renewed their proposition as follows:

"To establish a university in which no preferences or distinctions should be allowed on account of religion."

Mr. Morris remarked: "It is not necessary; the exclusive power at the seat of government will reach the object."—Yeas 4. Nays 6. The committee of eleven reported the clause (8), as it stands, and it was agreed to, nem. con.—Towle's Hist. and Analysis of the Constitution, p. 129.

its authors, is no more curious than admirable and instructive."[1]

This law was further modified by an imperial decree of February 5th, 1810, and the French author now enjoys the protection of his copyright during his life, and after his death his heirs for fifty years are secured therein. By the decree of Napoleon of the 5th of February, 1810 (now abrogated) a distinction was made between descendants and other heirs, that law giving the security of copyright to the author's widow for twenty years after his death, and to his children for twenty years after that. As this operated as a premium upon matrimony, it has been said, that Napoleon in this decree had "it as much in view to encourage the multiplication of soldiers as of books."[2] But no such distinction now obtains.[3]

[1] 2 Kent Com. p. 377 (note).

[2] Nicklin on Copyright, p. 75.

[3] Comment en France les lois ont-elles successivement résolu les questions relatives a la propriété des œuvres littéraires, dramatiques et artistiques? Voilà ce que je me propose de passer rapidement en revue dans ce chapitre, afin de mieux juger des progrès introduits peu à peu dans la législation.

Pour plus de clarté, je traiterai successivement de ces trois sortes d'œuvres; mais, que le lecteur ne s'effraie point, je ne commencerai pas mon récit à la création du monde, je dois me borner à remonter au déluge des productions de l'esprit, c'est-à-dire à l'époque où les droits des auteurs commencèrent à prendre quelqu'importance à cause de la facilité plus grande qu'ils eurent de tirer profit de leurs œuvres; en ce qui concerne les œuvres littéraires il ne sera donc point nécessaire de se reporter au delà de l'anée 1436, époque de la découverte de l'imprimerie; et, en ce qui concerne les représentations dramatiques et les œuvres artistiques, il ne sera même pas possible de remonter aussi haut.

L'imprimerie ayant commencé vers 1469, à être exercée dans la capitale de la France, Louis XI. en 1475 et Charles VIII. en 1488 accordérent, par lettres patentes, certains advantages aux imprimeurs; ce sont les deux plus an-

227. In Russia the first copyright law was enacted in 1828, securing the author's right during his life, and his children for twenty-five years, extendable for

ciens documents relatifs à cette matière. Il faut ensuite passer sans transition à l'ordonnance de Moulins, rendue sous Charles IX. en 1566, laquelle accordait aux auteurs la jouissance exclusive de leures œuvres, à la condition de demander une concession royale. Dès cette époque jusqu'en 1789 le régime du privilége prévalut comme en toute autre matiére, et le roi devint pour ainsi dire le suzerain de la propriéte intellectuelle, comme il était déjà celui de la propriété territoriale; toutefois, outre les priviléges concédés par le roi, il y en eut qui furent accordés par les parlements, par les unviersités et même par le prévôt de Paris. Ces priviléges étaient, ou perpétuels, ou limités; ils pouvaient être prolongés et accordés même pour des ouvrages anciens tombés dans le domaine public; on en indiquait la nature en tête de l'ouvrage. Du reste, c'était ordinairement aux imprimeurs et aux libraires qu'ils étaient concédés; quant à l'auteur, il verdait son manuscrit aux éditeurs et ne s'occupait pas ordinairement de la publication; des priviléges furent même parfois accordés aux éditeurs sans le consentement de l'auteur.

Pendant deux siècles la question sommeilla dans le même ordre d'idées; sans parler d'une déclaration de Charles IX. en 1571 et des lettres patentes de Henri III. en 1581, il n'y à noter qu'un édit de Louis XIII. de 1617, qui ordonne de faire à la bibliothèque le dépôt de deux exemplaires de toute publication. Mais, au commencement du régne de Louis XVI., furent rendus deux arrêts du Conseil du roi qui tranchèrent la question de propriété. Ces arrêts sont très-importants; le premier du 30 août 1777, arrêt du Conseil du 30 août 1777, décida que l'auteur avait sur son œuvre un droit de propriété perpétuelle, transmissible à ses héritiers; mais qu'en cas de cession, ce droit se réduirait à la durée de la vie de l'auteur; le second, du 30 juillet 1878, arrêt du Conseil du 30 jullet 1778, confirma et compléta ces dispositions.

En 1789, tous priviléges étant abolis, les auteurs purent publier librement; le principe de la perpétuité continua à subsister à leur profit, mais on ne tarda pas à apporter des restrictions à la durée de leurs droits. L'assemblée constituante, par décret du 13 janvier 1791, commenca par régler le droit de représentation des œuvres dramatiques; l'auteur put dès lors, pendant sa vie, empêcher d'exécuter ses œuvres sans son autorisation; mais le droit des héritiers et celui des cession-

five years more by publication of a new edition, such right being exempted from conversion for debt. By a ukase of 1857, which is the present law, the author's

naires fut restreint à cinq ans après la mort de l'auteur. Quoi qui ce décret ne se soit occupé que du droit de représentation, i a eu une grande importance sur la réglementation du droit de publication des œuvres littéraires, car il présentait la questior sous un jour nouveau en distinguant le droit de l'auteur de celui de ses héritiers; deux ans après on s'inspira des mêmes idées pour promulguer la loi des 19–24 juillet 1793 relative à la publication; cette loi donna à l'auteur un droit de propriété sur ses œuvres pendant sa vie, et le même droit, pendant dix ans aprés sa mort, à ses héritiers ou cessionnaires. Elle s'applique aux auteurs d'écrits en tous genres, aux compositeurs de musique, aux peintres, et aux dessinateurs qui font graver des tableaux ou dessins; elle règle en outre les poursuites, punit la contrefaçon et ordonne le dépôt. Quoiqu'en principe elle soit encore aujourd'hui en vigueur, elle a été successivement modifiée dans ses différentes parties, et l'on n'en a guères conservé qne la disposition qui accorde à l'auteur un droit exclusif pendant sa vie.

D'abord, en ce qui concerne le droit des successeurs, un décret du 5 février 1810 introduisit une première innovation; il accordait à la veuve de l'auteur un droit exclusif pendant sa vie, au détriment des héritiers, si toutefois ses conventions matrimoniales lui en donnaient le droit; la loi du 8 avril 1854 resta dans cet ordre d'idées; le droit viager fut laissé à la femme dans les mêmes conditions; celui des descendants ne commencait qu'à son décès. La nouvelle loi de 1866 modifie ce droit: 1° en ce qu'elle l'accorde non-seulement à la veuve mais à tout conjoint, prévoyant ainsi le cas où c'est la femme qui est auteur; 2° en ce qu'elle le qualifie de simple jouissance; 3° en ce qu'elle le déclare réductible s'il depasse la quotité disponible dans le cas où il y a des héritiers réservataires; 4° en ce que le conjoint survivant est appelé à jouir de ce droit viager quel que soit le régime qu'il ait adopté par son contrat de mariage.—On voit que ce sont là toutes dérogations apportées aux principes de droit commun; j'examinerai plus loin si elles sont suffisamment justifiées, je me borne en ce moment à une simple énonciation.

La durée du droit accordé aux héritiers de l'auteur s'est étendue de plus en plus depuis la loi de 1793; elle était, d'après cette loi, de 10 ans à partir du décès de l'auteur; le décret du 5 février 1810 introduisit une distinction: pour les descendants

copyright is for life, and for fifty years to his children, and is assignable in writing, but an author is not at liberty to reserve the right of translation.[1]

la durée fut de 20 ans à partir de l'extinction des droits de la veuve, et pour les autres héritiers de 10 ans à compter du décès de l'auteur, comme antérieurement, mais avec cette différence cependant, que par suite du droit viager accordé à la veuve, ils n'avaient plus rien à prétendre si ce droit s'était prolongé pendant 10 ans. La loi du 8 avril 1854, porta à 30 ans le droit des descendants, à partir du décès de la veuve, et laissa subsister pour les autres héritiers le délai de 10 ans à partir du décès de l'auteur. Enfin, la loi de 1866 ne fait plus, quant au délai, de distinction entre les descendants et les autres héritiers; la durée est de 50 ans à partir du décès de l'auteur pour tous les héritiers, successeurs irreguliers, donataires ou légataires; il s'en suit que, si la jouissance du conjoint survivant se prolongeait pendant cinquante années, les successeurs n'auraient rien, quand bien même ce seraient des descendants.

Quant aux cessionnaires, avant la loi de 1866 leurs droits étaient aléatoires, la durée en étant réglée par la qualité des héritiers; ils se prolongeaient d'abord pendant la vie de la veuve, unsuite pendant trente ans s'il y avait des descendants; pendant dix ans s'il n'y avait ni veuve ni descendants. Sous l'empire de la loi actuelle, le délai étant toujours de cinquante années, les éditeurs sauront que le droit qu'ils achètent ne pourra jamais se prolonger au delà, à partir du décès de l'auteur, quand même la vie du conjoint survivant se prolongerait plus de cinquante ans.

En résumé, d'après la loi nouvelle, l'auteur conserve son droit exclusif pendant toute sa vie, conformément au droit commun en matière de propriété. Le conjoint survivant est ensuite préféré à tous héritiers, par dérogation aux principes qui régissent les contrats de mariage et les successions, puisque le Code Napoleon ne lui accorde aucun droit viager sur les biens du conjoint décédé, et qu'il n'est habile à lui succéder que s'il n'y a aucun héritier. Quant aux héritiers, leur droit dure cinquante ans à partir du décès de l'auteur, et ce délai court pendant le droit de survie accordé au conjoint survivant.

Ajoutons, pour compléter cette exposition, que les constatations de contraventions sont faites par les commissaires de police; que les peines sont purement pécuniaires; et enfin qu'il faut faire le dépôt de deux exemplaires de chaque ouvrage

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[1] Fliniaux.

228. In Sweden and Norway a copyright law was enacted in 1812. In Austria the first law dates from 1813, in Belgium from 1814, and in Holland from 1619,

pour la bibliothèque impériale et le ministère de l'intérieur; s'il contient des estampes il faut présenter un troisiénie exemplaire pour l'autorisation de police.

Œuvres dramatiques. — Le droit des auteurs d'empêcher ou de permettre la représentation de leurs œuvres ne parait pas avoir été réglementé dans l'antiquité païenne; on sait cependant combien dans la Grèce était cultivé l'art dramatique, combien à Rome étaient applaudies les œuvres de l'esprit avant que les peuple en le repaissant de jouissances materielles.

En France les représentations des mystéres ou scènes religieuses paraissent avoir été les premières œuvres scèniques; mais en 1547 un arrêt du Parlement défendit avec raison de jouer sur le théâtre des sujets sacrés et en 1566 le concile de Tolède mit definitivement fin aux abus que ces représentations avaient introduits. Ce ne fut donc qu'à la fin du XVI^e^ siècle que l'art dramatique commença en France à prendre toutes les formes; un grand nombre de tliéâtres furent alors construits en rotonde avec loges et gradins comme ceux de nos temps modernes; puis survinrent, au siècle suivant, Corneille, Racine et Molière; enfin, la sociétié de la Comédie Française se fonda en 1680. Mais aucun règlement n'apparut en ette matière jusqu'à la révolution 1789.

Nous avons déjà vu que le décret de l'Assemblée constituante du 19 janvier 1791 déclarait que tout citoyen pouvait élever au théâtre; il accordait en outre à l'auteur pendant sa vie le droit de permettre la représentation de ses œuvres, et à ses héritiers pendant 5 ans après sa mort. Quant au droit de publication, il a toujours été réglé de la même manière que pour les autres œuvres littéraires.

La loi du 3 août 1844 donna à la veuve et aux descendants les mêmes droits que pour la publication, c'est-à-dire qu'elle accorda un droit viager à la première et un délai de 20 ans aux seconds; la loi du 8 avril 1854 porta le délai de 20 à 30 ans confirmant ainsi cette assimilation. Quant aux héritiers autres que les descendants, ils restèrent pendant tout ce temps sous l'empire du décret de 1791 qui leur accordait 5 ans à partir du décès de l'auteur; toutefois un arrêt de cessation du 5 decembre 1843 leur accordait 10 ans conformément a la loi de 1793. En vetu de la loi nouvelle ce délai est de 50 ans pour tous héritiers même autres que descendants, et le droit de représentation est complétement assimilé au droit de publication.

while Germany, the country where the art of printing had its birth, was still more tardy to come to the rescue of her authors. By a royal ordinance promulgated

Il faut ajouter que l'autorisation est nécessaire pour pouvoir représenter les œuvres dramatiques ; elle doit émaner du ministère de la maison de l'Empereur pour Paris, et des préfets pour les départments. (Décret du 8 juin 1806.—Loi du 30 juillet 1850.—Loi du 31 juillet 1853. — Décret du 30 décembre 1852. — Décret du 6 juillet 1853. — Décret du 6 janvier 1864.)

Œuvres d'art. — L'ancien droit ne nous fournit pas de documents législatifs en ce qui concerne la reproduction des œuvres d'art ; c'est seulement, en effet, après le perfectionnement des procédés mécaniques que l'on put arriver à multiplier ces œuvres. Or, quoique les anciens aient connu la gravure en creux, l'art de tirer des épreuves des planches gravées sur métal ne remonte pas au delà de l'annee 1452 ; la gravure à l'eau forte était connue des Chinois dès le xi^e^ siècle et des Indiens dès le xiii^e^, mais elle ne fut introduite en Europe et perfectionnée que vers l'an 1445. Quant à l'invention des procédés de moulage, elle ne remonte pas au delà du xiv^e^ siècle. Le mode de reproduction le plus ancien est celui de la fonderie, puisque les Egyptiens et les Grecs le connaissaient, mais ce n'était pas un moyen de multiplier une œuvre artistique ; il servait seulement à la transformer en un métal plus solide.

Les premiers documents que nous trouvons sur la règlementation des reproductions artistiques sont : une sentence du 11 juillet 1702, qui défend aux fondeurs de se dessaisir des ouvrages des sculpteurs, et aux sculpteurs des modèles faits pour les fondeurs ; puis une ordonnance de police de 1^er^ octobre 1737. Les règlements de 1730 des corporations de peintres et sculpteurs, ceux des graveurs, des ciseleurs et ceux des fondeurs de 1766 continnent aussi quelques dispositions prohibitives. Deux arrêts du Conseil du 19 juin 1774 et du 14 juillet 1787, sont plus explicites ; ils défendent expressément d'imiter les dessins des étoffes de soie et de les reproduire sans le conseviement de l'auteur. Nous avons va que la loi de 1795 assimilait pureœent et simplement aux auteurs d'ecrits les peintres et Ressinateurs qui font graver les tableaux et dessins ; les lois qui se sont succédé, ainsi que la loi de 1866. Ont reproduit la même assimilation ence qui concerne la gravure. En vertu de l'ordinnance de 1824, it faut faire le dépôt de trois épreuves des planches et estampes ; il faut en outre présenter un quatrième excomplaire pour obtenir

June 11th, 1837, copyright was bestowed upon authors for their lives, and to their heirs for thirty years thereafter. In the rest of Germany, by the act of union of the Germanic confederacy of 1815, copyright is perpetual[1] and there is a reciprocal security of copyright between Prussia and Austria. Then followed Bavaria in 1840; Saxony in 1844; Spain in 1847; Portugal in 1851; Denmark in 1857; and Italy in 1865.[2]

l'autorisation de police exigée par le décret organique de 1852. — Flinaux Legislation et Jurisprudence, concernant la Proprieté Littéraire.

[1] La proprieté littéraire en allemange est perpetuelle et transmissible, comme toute outre autre espèce de propriété.—Didot, La Proprieté Littéraire, p. 13.

[2] *Des legislations étrangères.* — C'est seulement depuis environ cinquante ans que la plupart des nations civilisées ont commencé à régler le droit de reproduction des œuvres littérares et des œuvres artistiques; elles se sont aussi occupées des œuvres dramatiques ou musicales, tant au point de vue de la publication qu'au point de vue de la représentation. Les solutions, auxquelles ces questions ont donné lieu, sont diverses, et parfois opposées entre elles; il est non seulement curieux, mais encore utile, de les grouper et de les comparer, afin de pouvoir mieux apprécier les différents points de vue sous lesquels on peut se placer relativement à une même question.

Les lois les plus nouvelles sont celles de Bavière du 28 juin 1865, d'Italie du 25 juin 1865, du Danemark du 31 mars 1864 et du 25 février 1866; plusieurs autres lois, quoque plus anciennes, sont également importantes, ce sont celles d'Espagne, d'Angleterre, d'Autriche, de Prusse, de Portugal et de Russie, et il faut avouer qu'elles sont plus complétes que la loi française, qui, comme nous l'avons vu, laisse à la jurisprudence le soin de résoudre presque toutes les questions.

La plupart des législations emploient le nom de propriété littéraire et artistique pour désigner les droits dont il s'agit; l'Angleterre les désigne sous le nom de droits de copie et la Hollande sous celui de droits de reproduction; en France l'ancienne formule vient d'être abandonnée pour adopter celle de droits d'auteur.

Œuvres littéraires.—Il faut noter d'abord qu'aucune nation

In May, 1840, a treaty was entered into by the Austrian-Lombardy and Sardinian governments providing for the security of literary property, and also

n'a adopté le système de la perpétuité ; et ensuite que toutes en Europe ont laissé à l'auteur un droit exclusif pendant sa vie ; la cession du droit n'est prohibée nulle part, elle est même suvent expressément accordée.

Pour les héritiers le délai varie dans des proportions assez notables, main on ne distingue guères, pour en régler la durée, entre les diverses classes d'héritiers, descendants, ascendants ou collatéraux. Du reste dans aucun pays on ne sort en cette matière du droit commun tel qu'il est établi relativement aux successions et aux droits des conjoints ; ainsi le conjoint survivant n'a pas de droit de survie au détriment des autres héritiers, si la loi du pays ne lui en accorde pas en toute autre matière. C'est un point qu'il est bon de remarquer puisque la loi française de 1866 accorde au conjoint survivant un droit viager ou de préférence, et déroge au droit commun dans ce cas spécial.

Le délai pour les héritiers est en Espagne et en Russie, comme en France, de 50 ans à partir du décès de l'auteur ;—en Italie de 40 ans ;—en Autriche, en Allemagne, à Bade, en Hollande, en Prusse, en Portugal, en Wurtemberg, en Saxe, en Hanovre, en Bavière, en Suisse de 30 ans ; en Belgique, en Danemark, en Suéde de 20 ans ;—en Grèce de 15 ans ;—à Venezuéla de 14 ans ;—à Rome de 12 ans ,—au Mexique de 10 ans ; au Chili de 5 ans ;—en Turquie le droit s'éteint avec la mort de l'auteur.

L'Angleterre, l'Italie, la Russie, la Suède, les Etats-Unis et la Suisse méritent sur ce point une mention particulière, parce que ces Etats ont inauguré des systèmes spéciaux.—La législation anglaise accorde 7 ans aux héritiers ; mais si, à la fin de cette période de 7 ans, il n'y a pas 42 ans écoulés depuis la première publication, les héritiers conservent le droit jusqu'à ce que cette période soit terminée ; ils ont donc 7 ans au moins, 42 ans au plus, suivant les circonstances.—En Italie deux périodes sont également distinguées mais avec plus de complications. Si l'auteur a vécu moins de 40 ans depuis la première publication, les héritiers conservent le droit jusqu'à la fin de cette période ; puis ils ont encore pendant 40 autres années, quoique l'ouvrage soit tombé dans le domaine public, un droit de 5 % sur le prix fort de chaque exemplaire. Si au contraire l'auteur a vécu plus de 40 ans, l'ouvrage tombe a sa mort dans le domaine public, mais la redevance de 5 % est

extending to works of science and art, to which the king of the two Sicilies, the grand duke of Tuscany, and the dukes of Lucca and Modena, acceded.

due aux héritiers pendant 40 ans à partir du décès de l'auteur. — La Russie avait précédemment adopté un autre système: les héritiers n'avaient que 25 ans; mais ce dàlai était augmenté de dix ans s'ils publiaient une nouvelle édition dans les cinq dernières années; l'intérêt de la société était ainsi sauvegardé; maintenant depuis l'ukase de 1857 le délai est de 50 ans. — La Suède, suivant le même ordre d'idées, n'a accordé 20 ans aux successeurs de l'auteur que s'ils faisaient une nouvelle édition; et on peut les mettre en demeure de l'exécuter. — En Danemark il existe une règle analogue: si depuis cinq ans l'editeur n'a plus aucun exemplaire de l'œuvre, tout le monde peut publier. — Aux Etats-Unis le délai n'est pour les héritiers que de 28 ans à partir non du décès de l'auteur, mais de la première publication; il est de 14 ans en plus s'il y a une veuve et des enfants. — En Suisse il est aussi réduit à 50 ans à partir de la première publication et non du décès de l'auteur.

Il faut ajouter que dans certains pays en Angleterre, en Autriche, en Bavière, en Saxe, en Grèce le gouvernement peut accorder un privilége plus étendu.

Les sociétiés savantes, les académies, les universitiés, l'Etat, s'ils publient un ouvrage, ont en Portugal, en Prusse, en Russie, en Espagne, en Bavière, en Wurtemberg, en Allemange un droit égal à celui qui est accordé aux héritiers; en Angleterre il est perpétuel, en Autriche de 50 ans au lieu de 30, en Italie de 20 ans au lieu de 40.

Les ouvrages posthumes, c'est-à-dire publiés après le mort de l'auteur, sont également la propriété des héritiers en Angleterre, en Autriche, en Prusse, en Bavière, en Saxe, en Portugal, en Belgique, en Russie, pendant le temps qui leur est accordé pour les autres ouvrages, mais à partir de la première publication; en Espagne et en Danemark à partir du décès de l'auteur, il faut donc se hâter de publier.

En France le décret du 1er germinal an XIII a appliqué, quant aux œuvres posthumes, la même, protection aux héritiers qu'à l'auteur lui-même, à condition de ne pas joindre le nouvel ouvrage aux œuvres complètes; cette disposition est encore en vigueur en Belgique.

Les éditeurs de chants nationaux, proverbes, fables, contes

229. The Dutch law on the subject is somewhat novel. By the law of January 25th, 1819, the kingdom of Holland gives the author copyright for life,

ou de tous autres monuments de l'antiquité nationale, conservés par tradition orale, ont recu dans plusieurs législations une mention spéciale, afin d'encourager les recherches de ce genre; le Portugal leur acccorde trente ans, la Russie les protége pour une édition; en France la jurisprudence s'est prononcée dans un sens opposé et à défaut de disposition législative, on n'a pas cru pouvoir accorder aux amateurs de l'antiquité la protection due à leurs travaux.

Une autre classe d'œuvres, qui méritait une mention spéciale, c'étaient les discours, sermons, cours publics; plusieures législations l'Espagne, la Russie, l'Italie, le Portugal, l'Angleterre, l'Autriche, la Prusse, la Bavière, la Saxe, le Danemark, se sont prononcées pour l'assimilation aux autres œuvres littéraires, mais la Prusse n'empêche les tiers de publier que pendant la vie de l'auteur; l'Angleterre a fait une exception pour les cours des professeurs rétribués, et l'Italie pour les discours prononcés dans les Chambres législatives, ou dans des réunions publiques sur un sujet d'intérêt politique ou administratif.

La Russie seule a réglé la question des lettres intimes, et elle a déclaré qu'elles étaient à la fois la propriété de celui qui les avait envoyées et de celui qui les avait reçues, de sorte qu'elles ne pouvaient être publiées sans leur consentement mutuel; le Portugal a seulement refusé protection aux éditeurs. Nous savons que la Jurisprudence française ne s'est pas encore aussi nettement prononcée sur la question.

Quant aux traductions des œuvres littéraires, peu de législations s'en sont occupées; l'Italie concède à l'auteur le droit exclusif de faire traduire son œuvre pendant dix ans à partir de la première publication; s'il ne l'a point exercé, tout le monde peut traduire, et acquérir sur la traduction des droits d'auteur dans les limites ordinaires. L'Autriche ne donne qu'un an pour publier. Les conventions internationales se sont du reste occupées de cette question, sur laquelle il était indispensable d'être fixé, les traductions se faisant le plus souvent dans les pays étrangers et non dans le pays où l'ouvrage a paru.

La loi Italienne a introduit une innovation assez singulière, c'est l'expropriation pour cause d'utilité publique, prononcée dans les formes ordinaires, le Conseil d'Etat entendu, au profit de l'Etat, des provinces et des communes; l'indemnité est

and to his heirs or representatives for twenty years thereafter. The penalty for infringement of copyright was: I. Confiscation of all unsold pirated copies in

réglée par trois expertes. L'Espagne avait déjà, il est vrai, adopté une disposition à peu près analogue, mais seulement en ce qui concerne les annotations faites d'un ouvrage; si elles sont utiles à la science, l'auteur peut reproduire l'ouvrage moyennant indemnité réglée par experts. En France rien de semblable n'existe encore; la loi du 10 fructidor an IV permet seulement à l'Etat de traiter à l'amiable avec les auteurs pour les ouvrages d'instruction publique.

Avant les traités internationaux, le droit des étrangers était le plus souvent méconnu; nous savons cependant qu'en France, le décret du 28 mars 1852 leur a accordé sans conditions la même protection qu'aux Français; le Chili et la république de Venezuéla ont seuls une disposition semblable. Le Portugal, l'Autriche, la Bavière, la Saxe, le Danemark, la Suède, la Grèce ont établi un droit de réciprocité. En Espagne on ne pouvait, avant les traités, introduire d'ouvrages étrangers sans une autorisation, qui n'était pas donnée pour plus de cinq cents exemplaires.

Comme en France, le dépôt est exigé en Espagne, en Italie, en Portugal, en Belgique, en Hollande, dans les Etats-Romains, aux Etats-Unis, au Chili; en Saxe et en Bavière, s'il n'est pas effectué, il n'y a pas pour cela déchéance du droit de poursuivre en contrefaçon; il n'a pas lieu en Danemark, en Suède, et en Autriche. En Angleterre, en Russie, et en Prusse il est remplacé par un enregistrement de l'œuvre sur un registre spécial.

La contrefaçon est en général un délit qui ne peut être poursuivi d'office sans qu'il y ait plainte de la partie lésée; la contestation est portée devant les tribunaux civils ou correctionnels. En Russie les tribunaux peuvent consulter l'Académie des Beaux-Arts, en Autriche des experts littérateurs ou artistes. — En Angleterre la cour de la chancellerie peut rendre, préalablement au jugement, une injonction pour faire cesser de suite la vente et le préjudice causé.

La contrefaçon est en général punie simplement de peines pécuniaires, sauf en Autriche où il y a emprisonnement en cas d'insolvabilité, en Portugal en cas récidive, et en Russie où la peine du fouet et celle de la déportation peuvent être appliquées.

Œuvres dramatiques. — En ce qui concerne la reproduction des œuvres dramatiques, il suffit de dire qu'elle est partout

the kingdom. II. A fine equivalent to the value of 2,000 copies of the original edition, to the use of the proprietor; and III. A fine of not less than one hundred

assimilée expressément ou tacitement à la reproduction des autres œuvres littéraires.

Quant au droit de représentation il a été souvent réglementé d'une autre façon. Il est, il est vrai, concédé à l'auteur pendant sa vie dans toutes les législations qui ont parle des œuvres dramatiques; mais le délai accordé à ses héritiers est parfois moindre que pour la reproduction; ainsi la Belgique ne leur donne que 10 ans au lieu de 20, l'Autriche, 10 ans au lieu de 30, la Prusse et la Bavière également, la Saxe 7 ans au lieu de 30, l'Espagne 25 ans au lieu de 50.

De plus la Prusse, l'Autriche et la Saxe distinguent si l'œuvre dramatique a été ou non publiée; si l'auteur l'a publiée, ses héritiers n'ont plus aucun droit sur la représentation. La législation italienne va même plus loin; l'auteur lui-même est déchu du droit de pouvoir défendre la représentation de son œuvre s'il l'a publiée; mais en ce cas lui et ses héritiers ont droit à 10 p. c. sur le produit des représentations pendant le temps qui reste à courir pour éteindre leurs droits renfermés, comme nous l'avons vu, dans la limite de deux périodes de 40 ans. Ces solutions dérivent de l'application de cette idée que l'auteur en publiant s'est dessaisi de son œuvre et qu chacun dès lors peut en faire usage; nous avons vu que ce principe est avec raison contesté.

Il existe en Danemark une disposition particulière en cas de cession, c'est que si le concessionnaire a laissé passer cinq ans sans représenter l'œuvre; l'auteur en reprend possession; c'est une sorte de libération de servitude par le non-usage.

Œuvres d'art. — En ce qui concerne les œuvres d'art, plusieures législations les assimilent sans grands détails aux œuvres littéraires. Il n'y a à noter que quelques dispositions particulières.

L'Angleterre accorde aux graveurs, peintres, dessinateurs, photographes vingt-huit ans à partir de la première publication; quant aux héritiers, ils ne font que continuer chaque période de quatorze ans; l'œuvre originale doit être enregistrée au bureau des libraires et chaque exemplaire de gravure doit porter le nom du propriétaire et la date de la première publication.

La Russie suit le même système que pour les œuvres litté

raires. Elle s'occupe aussi du droit, que l'on peut a[illegible]r, d'imiter ou de copier une œuvre originale pou en faire une

or more than one thousand florins to be given to the poor of the district where the offender resides. A second offense disabled the offender from exercising his "trade of printer or bookseller."[1] In Prussia, copyright is for the author's life, and to his heirs for thirty years. The assignment of his work by an author to a publisher only entitles the latter to issue a single edition thereof, of a size optional with himself. (This principle is adopted in Saxony and Bavaria also, the edition in the latter being limited—in the absence of express stipulation—to one thousand copies.) A distinction is made by the Germans between reprints or new issues

autre œuvre originale; ce droit est restreint quand il s'agit d'œuvres de même nature, mais on peut reproduire par la sculpture un sujet de peinture et réciproquement.

L'Italie accorde aux artistes et à leurs héritiers les mêmes délais que pour les œuvres littéraires en ce qui concerne la reproduction faite sur ébauche de l'auteur. Il faut noter que l'auteur peut seul, pendant dix ans, faire de son œuvre une œuvre d'espèce, différente, d'un tableau une statue et reciproquement; après dix ans ce droit ne lui appartient plus exclusivement; cette transformation est assimilée à la traduction d'un ouvrage en langue étrangère.

Le Danemark concède aux héritiers des artistes trente années, comme pour les œuvres littéraires; la photographie et le moulage sont considérés comme œuvres d'art originales; on applique encore cette règle déjà signalée, à savoir que l'œuvre tombe dans le domaine public si l'éditeur ne possède plus depuis cinq ans un seul exemplaite de la dernière édition.

L'Autriche ne laisse à l'auteur le droit exclusif de reproquire son œuvre que s'il le fait dans les deux années qui en suivent la confection; et il faut qu'il se soit réservé ce droit.

L'Espagne ne protégé pas les dessins pour tissus, meubles et autres objets d'un usage commun. En Danemark il existe une disposition analogue, mais le fabricant peut obtenir un privilége de dix ans relativement à sa reproduction.

Les cartes géographiques et les plans sont spécialement protégés en Angleterre, en Espagne, en Danemark, et aux Etats-Unis.

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[1] Lowndes on Copyright, App. 121.

(Auflage) and new editions (Ausgabe).[1] In the case of the former, the publisher may reprint as often as he pleases, by paying to the author, for each new issue, half the sum paid by him for the first. The new edition can only be issued by the author's written consent. This privilege is limited to the author's life, though his children have a claim for an honorarium for each edition issued after his death.[2] Copyright in the kingdom of Greece is for fifteen years from the date of publication.[3] The German confederation of 1837 fixed copyright at ten years, but granted it for a longer period in voluminous and costly works, and in the works of the great German poets.[4] This was changed

Les œuvres d'architecture sont assimilées en Russie et en Portugal aux autres œuvres d'art; la production n'st donc point permise; la jurisprudence française semble aussi se prononcer en ce sens au profit des architects. En Bavière le contraire a été décidé par la loi de 1865. La loi de Danemark de 1864 distingue s'il s'agit d'une façade extérieure ou d'une construction qui n'est pas livrée aux regards du public; la reproduction n'est permise que dans le premier cas.

La cession de l'œuvre dessaisit-elle l'auteur du droit de la reproquire par la gravure, le moulage ou autrement? La Bavière s'est prononcée pour la négative, la Prusse pour l'affirmative; la Russie fait une distinction; l'artiste n'a cédé le droit de reproduction que si la chose n'a pas été faite sur commande ou pour l'Etat. Nous avons vu que la jurisprudence française s'était prononcée dans le sens de la cession complète de la part de l'artiste.

Le dépôt n'est pas ordinairement exigé sauf en Portugal pour toutes œuvres d'art, et en Belgique pour la gravure; en Angleterre il faut faire enregistrer au bureau des libraires.—Flineiux.

[1] "Ausgabe" in the practice of the the trade means either the same book with a fresh cover or title, and not necessarily printed afresh; or: it applies to the size or style of getting up, as 4to-ausgabe, Octav-ausgabe, Pracht-ausgabe, Illustrirte ausgabe, &c.

[2] Copinger on Copyright, p. 241. [3] Id. p. 244.

[4] The works protected were:

Schiller's works for twenty years from November 23, 1838.

by decree of the diet, June 10th, 1845, to a duration for the author's lifetime, and for thirty years thereafter, and the same decree enacted that in the works of all authors deceased before the 9th of November, 1837, a copyright should exist for thirty years beyond that date.[1] In Denmark, copyright is perpetual. It lapses, however, if the work in which it exist remain out of print for five years.[2] In Sweden copyright inures to the author for twenty years, but if he or his author fail to continue the publication, the copyright falls to the state.

230. In the United States, the term of a copyright was fixed, by the act of 1790, at fourteen years, with a right of renewal for fourteen years longer. By the act of 1831, the first term of a copyright was enlarged to twenty-eight years, with a right of renewal, as before, for fourteen years; thus, in effect, creating a protection for forty-two years. And such by sections eighty-seven and eighty-eight of the law of 1870—which repealed all existing laws of copyright—is still the term in this country for which copyright is secured.[3]

Goethe's works for twenty years from April 4, 1840.
Jean Paul's " " October 22, 1840.
Wieland's " " February 11, 1841.
Herder's " " July 23, 1840.

[1] Copinger on Copyright, p. 243. And see "Das Urheberrecht und das Verlagsrecht, nach Deutschen und Ausländischen Gesetzen," &c., von Dr. R. Klostermann.

[2] The 38th section of the ordinance of July 11, 1837, extends the protection of the Danish law to works first published in a foreign state, in the same proportion as works first published in Prussia are protected in that foreign state. Copinger on Copyright, p. 242.

[3] U. S. Revised Statutes, Revision of 1873-4, § 4948. The question as to the expediency of a longer or shorter term of copyright is one upon which much is at present being said and written. The following instructive extract upon the subject is reprinted from the supplement to the Encyclopœdia Britannica:

Congress, however, can grant such exclusive rights for any period, or extend existing terms, as it may see fit; and it has frequently exercised such

"We are now to enter on the grand question, of the 'advantages of a further prolongation of the term of copyright;' —a question that has never yet been brought fully before the public, and which requires a considerable share of previous explanation.

"We shall begin, by examining a very material point,—we mean the dispositions and habits of those with whom authors have principally to deal, and here, from long familiarity with men of business, we entreat the particular attention of our literary brethren; for, however anxious to be instrumental in procuring them relief, we must not hesitate to point out their errors or misconceptions. Of the surprising quantity of publications issuing annually from the press, not a tenth part are the production of writers of established character; the rest proceed from candidates whose reputation is yet to make. In what manner are booksellers to form an estimate of the mass of unknown MSS. thus laid before them? Their own habits are not those of study but of business, and they must consign the task of examination to friends who have been called, not unaptly, 'literary tasters.' Need we wonder that the patience of the critic should be put to a severe test by the mediocrity of the great majority of these performances, and that his report should, in general, be so little decisive, that the bookseller is led into the habit of putting one work on a par with another, and of subjecting them, in the mode of publishing, to the coarse application of a common rule? It has become the avowed practice to decline any other terms for a new work than those of defraying the paper and print in return for the manuscript, and in the understanding that the profit of the edition, if there be any, shall be shared between the bookseller and the author.

"Now, this plan of publishing, however natural in the present state of the law, is replete with mischief to all parties, bringing forth a mass of books which ought never to have seen the light, and which, in truth, would never have been published, could the writer or publisher have foreseen their failure. It is a remarkable fact, disclosed in the inquiries arising from a late parliamentary discussion, that only 'one publication in eight is found to come to the second edition.' (See evidence taken by copyright committee in 1814.) The

power, by special acts, even after the expiration of terms secured under the general law.

234. Having paused for the chronological order

unfortunate limitation of copyright discourages literary men from the labor necessary to produce standard works; and the bookseller, tempted to assail the public by the attraction of novelty, goes on publishing books by the dozen, in the hope that some lucky chance may make up for his past disappointments.

"All this shows that, in the great majority of cases, the contract between an author and a bookseller is made without previous data, and is nothing more nor less than what is commonly termed a blind bargain. Dr. Paley, on finishing the MS. of his 'Moral and Political Philosophy,' tendered the copyright of it to a bookseller for £300, and was offered in return £250, exactly in the way that a cautious purchaser takes care to bid for unknown merchandise. During this negotiation, it happened that a brother of the trade, apprised of the value of Paley's work, came boldly forward and offered £1,000 for the copyright. The author consenting to give the party first in treaty the previous option, the latter now saw the matter in a new light, and ended by paying four times the amount of his original offer.

"No notion is more general among authors than that booksellers make rapid fortunes at their expense. One writer has published, that Jacob Tonson and his nephew died worth £200,000 (D'Israeli's Calamities of Authors, vol. 1, p. 29); and not one reader in twenty will stop to question the accuracy of the allegation. It is our firm belief that such a sum was never possessed by any bookseller, or partnership of booksellers, that ever existed (*sic*). Among them, as in all lines of business, there are examples of considerable capitals, but these are only realized in the case of long-established concerns, and after a progress of acquisition infinitely slower than the angry imagination of a disappointed author allows him to believe. In his eagerness to take for granted that his publishers are getting rich at his expense, he forgets the history of the fathers and grandfathers of the present men, and omits to mark the slow steps by which they paved the way for the eventful rise of their descendants. He fails, likewise, to scrutinize another material point, namely, the quantum which a close calculator would deduct from the estimated fortunes so liberally assigned by current report to booksellers. The latter, like all men in

of the statutes, let us now resume tracing the principles of literary property as they come before the courts for enunciation. The conflicting claims of com-

business, are desirous of passing for affluent; but, if so few publications are found to be successful, must there not necessarily follow a large abatement from the imagined extent of their annual gains? It is, on various accounts, a matter of regret, that the limited profits of the bookselling business should not be better understood by literary men. The discovery of it would remove the film from their eyes, would lessen greatly their habits of complaint, and would lead to cordial co-operation for redress of their common grievances. We may with confidence assert, that a small offer from a bookseller, as in the case of Paley, is indicative, not of a design to overreach, but of an apprehension that, to give more, would be to injure himself. On the other hand, we are by no means disposed to launch out into a penegyric of the liberality either of particular individuals, or of the body at large. Like other men of calculation, they naturally mete out their advances, not by attachment to the writer, but by the extent of the expected return. A large allowance for a finished book, denotes a confidence of extracting a still larger from the public, while the scanty, and apparently niggardly, payment of an unknown author, is a token of the fear and trembling with which a bookseller handles a production of doubtful promise.

"The customary agreement between a bookseller and a new author proceeds as follows: The latter having prepared a work, of which he has high hopes, but in which he has not had either guidance or advice, sets out by making an offer of his MS.; and, after some time taken for consideration, is answered, that his name not being yet known to the public, the publishers can not take on themselves to make him a payment for his labor, but are willing to give it to the world on their joint account. This leads to a compact in terms somewhat like the following:

"'It is agreed between Messrs. Y. and Company, booksellers, and Mr. Z. that Messrs. Y. and Company shall print and publish for their account, jointly with Mr. Z., in two volumes, octavo, his historical work on ———, Mr. Z. supplying the manuscript, and Messrs. Y. and Company taking on themselves the paper, printing, and other publishing charges. The statement of the account to be made up every year at midsummer; and when, after deducting the various publishing expenses, there shall appear a balance of profit, the same to

mon law and statutory rights of authors, we have said, first came before a court in the great case of Millar v. Taylor.[1]

be equally shared between Mr. Z. and Messrs. Y. and Company. The books to be accounted for at the regular trade sale price."

"The publication now takes place, and in a twelve-month after, an account is made up in the following form:

Dr.	History of ———			Cr.		
Printing 60 sheets at 40s..	£120	0	0	750 Copies printed, retail price 21s. the price to the trade 15s. 150 copies sold and delivered in sheets, at 15s.	£112	10	0
Over-running and Corrections.....	9	0	0				
Paper, 90 reams at 30s...	135	0	0				
Advertising.....	30	0	0				
Boards for 25 copies delivered to the author's friends.....	2	10	0	Balance at Dr., carried to next year.....	184	0	0
	£296	10	0		£296	10	0

"Next year the account is considerably shorter, the charges consisting only of advertising and interest of money; but the attraction of novelty having gone off, the sale is also less and does not probably exceed eighty copies, leaving still an adverse balance of £100. The bookseller goes on with mercantile punctuality to render him a further account, but the sale is now in a state of progressive decrease, and does not, for the third year, exceed fifty copies, leaving still an unfavorable balance of £80. The author now loses patience, and entreats the bookseller to relieve him of all responsibility, by taking over the remaining copies, and considering the account closed. Such is the fate of five-sixths of the books, great and small, that come before the public. Composed without the benefit of experience, they are unprofitable to the publisher, uninstructive to the reader, and discouraging to the author. If we are suspected of stating an extreme case, let another be supposed, in which the author is less of a novice, and in which a bookseller, from confidence equally in him and in the subject, ventures to make an advance of money, and to agree to pay a fixed price for the copyright. An arrangement is made for bringing out the work against a given time, and the writer proceeds with all the ardor attendant on a new enterprise. Authors, however, were never remarkable for accurate calculations, or, rather, their undertakings are almost always found to require more time and labor than is anticipated:—

[1] 4 Burr, 2314.

Previous thereto, the property of a book seems to have been considered as permanent as the property of an estate in lands or tenements. The limitation of a

the prescribed time expires, and the bookseller agrees to postpone it for another twelvemonth. This also passes away; the publishing season draws near; the work is still unfinished, but the author is impatient of further labor, and the bookseller thinks it high time to get a return for his money. The work goes to press, and comes out without either a correction or an acknowledgment of its imperfections, unless the author be particularly modest, in which case the public is requested, in a well turned apology, to make allowance for his multiplied avocations and the urgent nature of the subject. This is the case with almost all the better class of our new publications; the sale, in such cases, is somewhat less unfavorable than the specimen given above; but four or five years are requisite to run off a new edition, and, on coming a second time before the public, it is necessary for the author to do what should have been done at first—revise and correct the whole. A second edition comes out, but under considerable disadvantages; the attraction of novelty is gone or greatly impaired; the number of readers is lessened by those who have purchased copies of the first edition, and the character of the book has been estimated, in reviews and elsewhere, by an unfavorable standard. The bookseller is thus curtailed of profit, the author of reputation, yet each has the happy gift of throwing blame off his own shoulders; the publisher attributing the failure to the distraction of the public attention by some unlucky novelty, while the other vents his complaints on the incurable frivolity of the age. In truth, neither of the parties is much to blame; their conduct is the natural result of their situation; the haste of authors and the acquiescence of the booksellers are mainly owing to the short-lived tenure of the fruits of their labor; the habits of the one and the calculations of the other having been all along adapted to this state of things.

"Is there then no remedy for so modifying a state of things? No method of relieving the public from such an unprofitable expenditure of time and attention? Some have been desirous to call in the patronage of government, and have argued, that literature can never, like the coarser objects of industry, find adequate repayment in the fruit of its exertions. It is, indeed, a current subject of complaint among authors, that there should not be a larger proportion of provisions for life appro-

fixed number of years in the act of 1709 seemed to have no practical effect in the matter, and copyright was still considered permanent, by authors, booksellers, priated to literary men. Sed non tali auxilio—whatever be their distress, we beg to deprecate any interference on the part of government. No engine is so formidable as the press in the hands of an arbitrary or artful ruler. Look at the degraded picture exhibited, during a succession of years, by the French press; and you will find men, who, under the auspices of freedom, would have acted an independent part, tempted, threatened, and gradually compelled to become the advocates of a tyrant, and to participate in the guilt of riveting the chains of their countrymen. It is in vain, even for a liberal legislature or a disinterested sovereign, to attempt to make up for the deficient reward of literary labor, by granting pensions or creating places for men of letters. These measures, though apparently beneficial, carry with them all the disadvantages of irregular and unnatural interference. A literary man promoted, as is not unusual in France, to a government employment, is withdrawn from his proper sphere of utility; he becomes lost to general reasoning and liberal views amid the endless details of practical routine. The pension granted to Johnson by Lord Bute was generally approved, both as the fair reward of past industry, and as a seasonable relief to pecuniary difficulty; but what was the consequence? It fostered his natural indolence, prevented the composition of further works, and, by enabling him to live in idleness, rendered him perpetually dissatisfied with himself. Had the property of his literary labor been permanent, he would have received twice as much from the booksellers, and might have continued his proper pursuits under circumstances progressively improving, without incurring the humiliation of dependence, or degrading his name by the composition of party pamphlets.

"It is equally vain for zealous friends to attempt making up for the inadequacy in question, by procuring private subscriptions for a work; for whatever may be the success, in a pecuniary sense, the step is humiliating to the author, is liable to abuse, and is, besides, an interference with the proper business of a bookseller. One of the most splendid of such examples was Pope's translation of Homer; an undertaking where the importance of the task and the talents of the translator called equally for liberal remuneration. Pope was perfectly ready to sacrifice several precious years for the sake of

and the public, no less than by three[1] of the four judges of the king's bench in which that case was first heard.

eventual competency, and he found in his friends, particularly in Swift, most zealous promoters of his views. Proposals were circulated, liberal subscriptions were obtained, and a favorable bargain made with the bookseller; the translation of the Iliad was executed, and will forever remain a proof of the perseverance to which an author may be prompted by the love of fame, when relieved from pecuniary pressure, and enabled to give long-continued labor to his task. So far all was well; but the success of this first undertaking induced Pope to resort to the same method for publishing a translation of the Odyssey, which proved far inferior; being performed either hastily by himself, or by two coadjutors, whose respective contributions, though not altogether concealed, were unfairly represented to the world. Could such an abuse have taken place had sub-

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[1] In the session of 1873-4, this question came decisively before parliament, the booksellers having brought in a bill for declaring copyright perpetual. This bill passed the commons, but was thrown out, after much debate, by the lords. Lord Mansfield, and Willes and Aston JJ., per contra Yates, J. An action for a similar trespass was some time after brought before the court of sessions in Scotland; the London proprietor of a copyright claiming damages for an infraction by a provincial bookseller (Hinton v. Donaldson). Here the majority of the bench were adverse to the opinion formerly delivered by Lord Mansfield, and discharged the defendant with only the dissentient voice of Lord Monboddo.

The booksellers managed, however, to carry their point by means of addenda, which they managed to procure and add to the work at the end of the copyrighted term. Forty years after, in 1814, the extension to twenty-eight years was re-enacted. Gibbon did not scruple to write to his publisher, that a thorough revisal of his history would form "a valuable renewal of the copyright at the end of the term."—Correspondence from Lausanne Memoirs.

Booksellers follow this plan avowedly and habitually; and it is the remark of a very intelligent writer on the subject of copyright, that, unless a change take place, our purest and best authors will become so disfigured by annotation, and increased in price by increased bulk, that the early editions will be called for.—Address to parliament on the claims of authors, 1837.

232. Millar v. Taylor,[1] was an action brought in 1766 for pirating "Thomson's Seasons," in the court of King's Bench, where it was elaborately argued. That

scription been out of the question, and had the remuneration of Pope been proportioned to the eventual sale of his book? The public would, in that case, have had a translation of equal merit with its predecessor, and Pope would have been spared the reproach of a literary imposition. The least exceptionable mode of rewarding literary eminence is by church preferment in the southern part of the kingdom, and by admission to professional chairs in the north. But the extent of both, particularly of the latter, is limited, and does not always place a man in that station where he can be most useful, or in the mode of employment most congenial to his habits. Both besides require more of connection, of interest, and of management, than commonly falls to the lot of a retired student.

The only effectual plan is, to find the means of relief in the prosecution of literature itself; to relieve it from existing shackles, and to allow every writer to reap his reward in the sale of his books, exactly as we do in other kinds of employment. This is all that literature wants, and all that it is good for her to have. She will then make no claims to patronage from government—no appeal to the subscriptions of private friends—nor will appointments in the church, or at universities, be an object of indecent contention; they will be coveted by a smaller number, by those only whose particular habits fit them for such situations. Perpetuity of copyright is as much the right of the author or purchaser of a book, as of the builder or purchaser of a house; and the public will never reap its full harvest of advantage from literary compositions till the law be made to confirm the claim of equity. But, as this opinion is as yet far from general, the true plan is to desist from pressing it to its extent, to demand only the grant of a specific period, and to leave the public to enact perpetuity at a future time, when it shall have had practical and undoubted evidence of the beneficial effect of prolongation."

"La justice, le bon sens et l'équité veulent que la propriété littéraire ne soit plus un mensonge sous forme de concession temporaire. Il faut qu'elle soit une propriété garantie par les lois, inviolate et à toujours; . . . . . Un ouvrage ne prend son essor que des qu'il est delivré des entraves du privilége exclusif. . . . . Est it possible de

[1] 4 Burr. 2314.

court, in 1769, gave judgment in favor of the subsisting copyright, Lord Mansfield, Mr. Justice Willes, and Mr. Justice Aston, holding that copyright was perpetual by the common law, and not limited by the statute, except as to penalties, and Mr. Justice Yates dissenting from them. In 1774, the question was brought up again in Donaldson v. Beckett, before the lords, when eleven judges delivered their opinions upon it, six of whom thought the copyright limited, while five held it perpetual; Lord Mansfield, who would have made the numbers equal, retaining his opinion, but expressing none. "By this bare majority—against the strong opinion of the Chief Justice of England—was it decided that the statute of Anne substituted a short term in copyright for an estate in fee; and the rights of authors were delivered up to the mercy of succeeding parliaments."[1]

The case of Donaldson v. Beckett[2] and others, before the House of Lords, February 9, 1774, was an appeal from a decree founded upon this judgment in Millar v. Taylor, and it was ordered that the judges be directed to deliver their opinion upon the questions:

1. Whether at common law, an author of any work 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?

concilier la liberté du commerce et le droit de l'auteur? Rien n'est plus facile; il ne s'agit pour cela que de changer le privilége exclusif temporaire en un privilege perpétuel sur les réimpressions des ouvrages: . . . . . Déclarez donc l'abolition du privilege exclusif, permettez à tout le monde l'impression des livres quels qu'ils soient, mais sous condition d'un droit à payer chaque fois aux auteurs."—Bossarge.

[1] Speech of Sergeant Talford, in parliament, May 18, 1838.

[2] 4 Burr. 2305.

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

3. If such action would have been at common law, is it taken away by the statute of 8th Anne; and is an author by the said statute precluded from every remedy, except on the foundation of the said statute, and on the terms and conditions prescribed thereby? —Together with the further questions, of which the first three appeared to be conclusive.

4. Whether the author of any literary composition and his assigns had the sole right of printing and publishing the same in perpetuity by the common law?

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

Eleven judges delivered their opinions upon these questions; eight to three were for the affirmative upon the first question; four to seven on the second; and six to five on the third; and the great question was at last laid to rest and decided for thenceforth, that, although an author had by common law an exclusive right to print his works, and did not lose it by the mere act of publication, yet the act of Anne completely deprived him of that right, and substituted the statutory right in its stead. In Scotland this same question had been tried in 1748, twenty-six years earlier, and decided against the author's right.[1]

[1] Midwinter v. Hamilton (Mor. Dict. Dec. 19, 20, 8305), 1 Cr. & St. 488. The same was pronounced in Hinton v. Donaldson, July 28, 1773, Id. 8307; 5 Brown's Sup. 508; Cadell v. Robertson, Dec. 18, 1804; Mor. Dict. of Dec. App. Lib. Prop. 5 (5 Paton, 490). Payne v. Anderson, 1 Mor. Dict. of Dec. 19, 20, p. 836.

233. The question may perhaps be disposed of by saying that statutes of copyright do not seek to alter, abridge, or in any way interfere with the author's personal property at common law in his work, and in his right to use and enjoy the product of his labor;[1] that "where such statutes find it there they leave it;" and that an author may, as before, proceed to sell his manuscript, or publish and sell his book, just as we have seen the Roman author do in the days of Martial.

[1] Palmer v. De Witt, 7 Amer. 480, 47 N. Y. 532. Per contra, however, see Clayton v. Stone, 2 Payne, 382; Wheaton v. Peters, 8 Pet. 662; Dudley v. Mayhen, 3 Coms. 12; Stevens v. Cady, 14 How. 530. This doctrine underwent a learned decision in the court of common pleas, in the case of Lonson v. Collins (1 Bla. Rep. 301, 321), but the point was not determined. It was afterward agitated in Miller v. Taylor (4 Burr. 2303), where three judges, among whom was Lord Mansfield, delivered very elaborate opinions to prove the existence of the right. But Mr. Justice Yates, in a most profound and eloquent opinion, declared that an author had not such a common-law right. The same question arose in Becket v. Donaldson (Bro. P. C. 145; 4 Burr. 2408), when it was decided without discussion in favor of the right, in order that it might immediately be carried by writ of Error into the House of Lords—who held that if the right contended for ever did exist, it had been abrogated by the statute of 8 Anne (Godson's Law of Patents, pp. 203, 205). The question practically can never be of much importance, since no one would be likely to labor to establish a right, and remedy at common law, when so easy and simple a protection is afforded them by statute.

1 De Witt v. Palmer, 7 Amer. 488. The common-law right of authors is expressly recognized by Story in his commentaries. In considering article I., section 8, of the constitution, he says: "This power did not exist under the confederation, and its utility does not seem to have been questioned. The copyright of authors, in their works had, before the revolution, been decided in Great Britain to be a common-law right, and it was regulated and limited under statutes passed by parliament upon that subject" (3 Story, Com. 48). "It was," says Chancellor Kent, "for some time the prevailing and better opinion in England."

But when the modern process of publication by printing not only supersedes the value of the manuscript, but actually and materially destroys the manuscript itself, by tearing it apart, separating it, and distributing it piecemeal among compositors, and in other ways rendering it waste and worthless, while the common-law right of property of its author therein undergoes no change whatever, it becomes practically abrogated by the destruction of the thing in which it inhered, and the author, for whom the process of multiplication of copies by printing has developed a new value in his work, is nothing loth to ignore this right to the paper upon which he wrote, for the sake of his more profitable right to follow the words and thoughts first borne upon it, in their flight beyond him into the open world. Statutes of copyright, then, in theory, have nothing whatever to do with the author's right to his work; they have simply and solely to deal with the multiplication of copies thereof.[1] And the only exception to the rule arises, when a statute like the present copyright act of the United States, contains, as we shall see further on, a provision against the printing of an author's manuscript without his consent.

All his property in his own ideas, indeed, that he has under them, he had before, but the printing press, by making it a property worth pirating, and at the same time furnishing the facility for pirating it, has made him eager to invoke the protection of a new law which will secure him from its infringement. A law no surer than the old, but stronger and more speedy in its relief.

234. In order to secure the protection of this statute, the author must give its price. But it is not

[1] Palmer v. De Witt, 7 Amer. 480, 47 N. Y. 532.

one that it will trouble him to pay. The statute only asks first, that he advertise the fact of his having sought its protection, by appealing to it formally; and second, in case he shall not so formally and notoriously appeal to it, that he shall be deemed to have waived his common-law right—not to his manuscript—but to his ideas and words, and to have dedicated them forever to the use of whomsoever shall choose to employ them for profit after he has published them to the world, and made every individual therein who cares to read them, master of them and of the expressions in which they are clothed (which, as long as he kept them spread upon a manuscript to which he alone had access, were exclusively his own). But once having dedicated them to the public by publication, they are equally at the service of all. They are (if so the case be) at everybody's mouth. He is now only one of many who possess them equally with himself. He has elected that it be so, and there is nothing in the common law that can give him the benefit of his labor beyond the reputation that they earn for him.

If he have preserved the manuscript, whose contents have been printed, it will still be larceny in one who appropriates it, but anybody may appropriate and multiply copies of its contents. To obviate this injustice, statutes of copyright arise and say: You shall have the exclusive profit that arises from your own sentiments, even though you have voluntarily published them to all mankind.[1]

235. If there exist anywhere the right to multiply copies of a work, surely no one can show so perfect a title to the right as the author whose original con-

[1] If a work is published without a copyright being secured, this is a dedication of it to the public, and any one may republish it. Bartlett v. Chittenden, 5 McLean, 37.

ception it was, and who first gave it form and system no less than bodily and physical shape.

In the first instance the work is his, and he may lock it from the eyes of the world—if he will. But the author does not desire to keep forever to his own contemplation the work he had produced, any more than the painter wishes to hold forever for his own enjoyment the picture he has wrought upon canvas, and to exclude the rest of the world from the sight thereof. Works of literature and art tend to improve, cultivate, and refine the race. And, as lord Camden said: glory is the reward of their authors. Their promulgation, therefore, is their life; and the wider their circulation, the vaster their influence and the instruction they diffuse. Now the difference between literary and all other property arises just here. In order that these works shall have their due influence, they must be made the individual property of each reader, be absorbed with his own intellect and his own consciousness, until they are his thoughts and ideas as completely as they ever belonged to their authors. It is by their appropriation that their author and real owner is benefited. A contrivance by which, the more he parts with his works, the more substantially they are his own, must necessarily be a creature of some written law, although the ground upon which it is founded, and which Blackstone calls "title by occupation," is an unwritten and a natural law.

It is the purpose of the author and the painter, not only to achieve glory, but a livelihood—to receive a direct compensation for the instruction, or the pleasure which his works communicate to their neighbors, and the search of the examiner of the law of literature and of art is to discover how this can be done, and

how to find the right, and the substance to which the right may attach.

236. The whole claim of literary property is a claim simply of a right to multiply copies of the author's work, and to part with the same for value. The more completely the ideas and sentiments of the work are appropriated by those before whose eyes these copies may fall, the better the author is satisfied. The more widely it is cited and quoted by contemporary authors, the more widely his reputation is extended. So long as copies of his whole work are not multiplied, without his license, his right is not infringed. If the purchase of a single copy of a work passed to the purchaser, a right to multiply the same for his own profit, the price set upon each copy would of necessity approximate to the value of the original manuscript of the work itself, and thus the laws of copyright, by regulating duties, regulate also prices, and are beneficial to mankind generally, by placing within their access works of literature and art for their instruction and delectation, which without them must of necessity be too costly for any but the wealthiest citizens.

237. Again, the laws of copyright, by securing to the author the sole right of multiplying copies of his work, are a benefit to mankind, since they preserve to them the author's sentiments and knowledge in their purity. If the multiplication were in other hands, there would be no security for the accuracy of such multiplied copies. Since the reputation of the author is dearer to himself than to any one else, and since upon the careful and scrupulous exactness of his published writings his reputation depends, he will certainly sanction no imperfect or interpolated version or copyright of his own work.

238. But why is this right to be limited, if right at all? Why is it ours for twenty-one, or twenty-eight, or thirty-five years, only? Perhaps, say the disappointed authors, "Before we published our work, it was ours perpetually. Now we have benefited mankind by communicating it to them, we are rewarded by having our own bestowed upon us for an arbitrarily prescribed and limited time."

This may, and undoubtedly does seem a hardship. But upon examination, we will find that, since the only profit an author can secure from the labor of his brain, is the profit which arises from the parting with its possession,—from its dedication to the public,—it is a benign law which enacts that, although he part with it, he shall yet retain the profit which arises from it.

And, furthermore, we will find that it is only a following out of the principles which govern all property. Supposing, for instance, that the owner of twelve lots of land, in a certain neighborhood, conceive the idea of donating one of them to the community for a public building, or to a religious society for a church edifice, in order that the improvement of the one lot shall enhance the value of the eleven he still retains. In this case he profits by the alienation and dedication of his land, but he cannot, nor does he expect to retain the twelfth lot, and give it away at the same time. And yet the owner of literary property is enabled by the statutes of copyright —we may almost assert—to give away and profit by the gift, and still to retain the possession and the profits of that which he gives away. Or, to make the analogy perfect, the lawyer or the physician may publish works relating to his profession, and thereby enhance his own reputation and consequent practice, just as the capitalist increases the

value of what he has left by the loss of what he gives away. Only in the latter case of the lawyer or physician, what he gives away he still retains. Moreover, the shortest term for which a copyright is ever granted, far exceeds (such is the mutabilty of all literary tastes) the average life of a literary composition. The number of published works that survive their first copyright, will be found to be exceedingly small.[1]

And lastly, while we see, everywhere, traces of the public policy of nations to encourage authorship,—not only of those immortal productions which add to the national lustre, and whose fame is a portion of the national birthright, but those humbler productions of well-directed labor, through whose elementary simplicity lies the entrance to the whole realm of knowledge,—there is no doubt but that the only means by which the state can protect those to whom it owes so much, is by means of this same limitation. True, it might, instead, protect the author by pains and penalties prescribed for his infringers, but states always prefer to abridge, rather than to extend their penal statutes, and it is hardly to be expected that they should be increased in favor of an exclusive right.

Another reason also exists against a perpetuity to the author, which is understood to have been suggested by no less a statesman than Napoleon the Great. Foremost in legal and political acumen, no less than in arms, the Emperor did not neglect, while shaping the

[1] What is the ordinary course of the business of a great publishing house? A large proportion of the books they send forth pass unnoticed, and hardly defray the paper and print. What loads of unsaleable volumes encumber their warehouse! What a world of expense do they incur for unproductive advertising! The success of the house depends on the very few works of standard merit (perhaps one in forty) which obtain extensive sale, and form a counterpoise to their ill-starred brethren.—Supplement to Enc. Brit. Art. "Copyright."

policy of a continent, to consider the private rights of his subjects. He is reported as having declared "que la perpetuité de la propriété dans les familes des auteurs aurait des incouvéniens. Une propriété littéraire est une propriété incorporelle, qui se trouvant, dans la suite des temps et par le cours des successions, divisée entre une multitude d'individus, finirait, en quelque sort, par ne plus exister pour personne; cas, comment un grand nombre du propriétaires, souvent éloignés les uns des autres, et connaissent à peine, pouvraient-ils s'entendre et contribues pour réimprimer l'ouvrage de leur auteur commun? Cependant, s'ils n'y parviennent pas, et qu'euz seuls aient le droit de le publier, les meilleurs livres desparaitront insensibiblement de la circulation." "Il y aurait un autre inconvenient non moins grave. Le progres des lumieres serait arrété, puisqu'il ne serait plus permis, ni de commenter, ni d'annoter des ouvrages: les gloses, les notes, les commentairs ne pourraient, être siparés d'un texte qu'on n'aurait pas la liberté d'imprimer.

"D'ailleurs, un ouvrage a produit a l'auteur et a ses heritiers tout le bénéfice qu'il, pouvent naturellement en attendre, lorsque le premier a en le droit exclusif de le vendre pendant tout sa vie, et les autres pendent les dix ans qui suivent sa mort.

"Cependant si l'on vent favariser davantage encore la veuvre et les heritiers qu'on porte leur propriété à vingt ans."[1]

That is to say, if perpetual, a copyright might come at last to be partitioned off among so many heirs and representatives of a deceased author that a difficulty might arise, among divers interests, to prevent its publication at all, or its use, in case of an original

[1] Lockré. "Legislation civile de la France, t. ix. pp. 17, 18, 19. Renouard, Droits. D'Auteurs, tom. 1, p. 387.

author, for the purpose of annotation and comment.

To the encouragement of literature, the law owes its own advancement and enlightenment. There need be no fear that it will not, in turn, protect and foster it. Authors have always been extremely tenacious of what they have understood to be their "common-law rights;" yielding with great reluctance to the conviction that a statute of copyright were more to their interest, even though abbreviating the duration while increasing the efficacy of their protection.

239. Nor have the fraternity of authors looked at all with favor upon the tax, in the shape of the contributions to public libraries, which these statutes have imposed. In America two copies, and in England seven copies of the best edition (which in the case of a costly work like Audubon's "Birds of America," might, in the latter country, easily amount to a tax of thousands of pounds), are required for a gratuity to public institutions, and it is not strange that proprietors should complain.[1] But, be that as it may,

[1] For an interesting account of the origin of this impost in favor of the libraries, see Maugham on Literary Property, p. 41, 49. Maugham handled the literary tax with no gentle hand. "Such," says he, "was the origin of this impost, which, it has been contended, is designed for the 'encouragement of learning.' . . . . It was enacted not for the encouragement of learning; not as a consideration for the privileges given by that act, which, though it recognized the titles to copies against intruders (a property which the law of parliament had previously enforced, unalloyed by any such condition, was so far from an act of bounty, that it has ever since been branded with infamy for its usurpation of the free rights of the press), . . . but unquestionably for the purpose of furnishing the ministers of state and the vice-chancellors of the universities with means to put in force the despotic provisions of the act.

Maugham says that the claim for copies to the British Museum and Sion College rests upon public grounds. But that those

while the policy of states may differ as to the measure of taxation, the general right of taxation remains undisputed, and the author, as well as every other citizen, must contribute his per centum of the value of his property to the revenue of his government. It is, if anything, an exception in his favor, which is made in the favor of no other class of citizens, that he is allowed to pay his tax in kind, instead of in coin.

240. In the United States, since the provision of the constitution before cited, there have been eight[1] different acts of congress on the subject of copyright. These eight are now repealed by the further act of July 8th, 1870, which, as amended in some few particulars by the act of June 18th, 1874, is the only statute of copyright now in force in the United States.

The first act on the subject of copyright, as we have seen, was passed in 1790. The fifteenth chapter of that act (designed "for the encouragement of learning by securing the copies of maps, charts, and books, to the

to the universities upon purely private grounds. "This notable plan for the encouragement of literature," says he, "was commenced under Charles I. The pretensions of Oxford were begun by that monarch, and increased by a decree of the star chamber, and by agreement of Sir Thomas Bodley (founder of the Bodleian library), with the Stationers' Company. Henry VIII. granted the pretension to Cambridge. And at the union of Great Britain with Ireland and Scotland, their universities were also empowered to demand copies." Mr. Maugham analyzes each of these rights, and comes to the conclusion that they are all, except possibly the first two, illegal and oppressive.

[1] The acts of February 15, 1819, 3 U. S. Stat. at. L. ch. 19, p. 481; February 3, 1831, 4 U. S. Stat. at L. ch. 16, p. 436; June 30, 1834, 4 U. S. Stat. at L. ch. 157, p. 728; August 18, 1856, 11 U. S. Stat. at L. ch. 169, p. 138; February 5, 1859, 11 U. S. Stat. at L. ch. 22, p. 380; February 18, 1861, 12 U. S. Stat. at L. ch. 37, p. 130; March 3, 1865, 13 U. S. Stat. at L. ch. 126, p. 540; February 18, 1867, 14 U. S. Stat. at L. ch. 43, p. 395.

authors and proprietors of such copies") fixed the term of copyright at fourteen years, with a right of renewal for fourteen years more, if, at the expiration of the first term the author were living, and a citizen of or resident in the United States. This act was repealed by an act passed in 1831, which, amended and enlarged by the subsequent acts of 1834, 1846, 1856, 1859, 1861, 1865, and 1867, continued in force down to July, 1870, when an act was passed to revise, consolidate, and amend the statutes relating to copyrights and patents, repealing the previous enactments on the subject.

The constitution[1] gives to congress, as before stated, "power to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; also to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

The power of congress under this article and section, is limited to authors and inventors only, and does not embrace mere introducers, who are neither authors nor inventors.[2] Though the clause will not be construed to prevent the several states from exercising the power of securing to introducers of useful inventions the exclusive benefit of such inventions for a limited period.[3]

Nor does it take away from the states the power to enlarge, within their jurisdiction, the privilege, by extending the term of the patent or monopoly beyond the term allowed by the acts of congress; nor operate as an exclusion of all state legislation to aid and protect

[1] Art. 1, § 8.
[2] Livingston v. Van Ingen, 9 Johns. 560, 566, 582.
[3] Id.

the rights obtained under the general government, if the power is exercised in harmony with, and in subordination to, the superior power of congress.[1]

Though a state cannot take away from an individual his patent, yet if an author or inventor, instead of resorting to the act of congress, should apply to the legislature of a state for an exclusive right to his production, there is nothing to hinder a state granting it, though the operation of the grant would be confined to the limits of the state.[2]

The power of congress is only to ascertain and define the rights of property in the invention; it does not extend to regulating the use of it. This is exclusively of local cognizance; such property, like every other species, must be used and enjoyed within each state, according to the laws of such state;[3] though, doubtless, the laws of any state granting exclusive rights and privileges in respect to patents and inventions, are inoperative against the laws of the United States with which they come into collision.[4] Though if the author's book or print contains matter injurious to the public morals or peace, or if the inventor's machine or other production will have a pernicious effect upor the public health or safety, a competent authority remains with the states to restrain their use.[5]

Such species of property is likewise subject to taxation, and to the payment of debts, as other personal property.[6]

[1] Livingston v. Van Ingen, 9 Johns. 567, 581.
[2] Id. 581.
[3] Id
[4] Gibbons v. Ogden, 9 Wheat. 186.
[5] See Chapter on Innocence, *ante*, vol. i.
[6] Id. 582.

241. The power of congress to legislate upon the subject of patents and copyrights is plenary; and as there is no restraint upon its exercise, there can be no limitation to the right to modify at pleasure the laws respecting patents, so that they do not take away the rights of property in existing patents.[1] It is no objection to the validity of these laws that they are retrospective in their operation.[2] Congress may pass an act which shall act retrospectively. Such an act is not necessarily unconstitutional. Though no state can impair the obligations of a contract, this inhibition does not apply to the general government.[3]

242. Neither is the power of congress to pass copyright laws exhausted or in any way affected by their passage of such an act, for the purposes of passing any other or further act or law upon the subject,[4] but congress may continue to exercise the power in any way it chooses, either by special acts or by a general system,[5] since one legislature has no power by its acts to bind a subsequent legislature.[6] But all statutes and acts of congress bearing upon the subject are statutes in pari materia, and are to be construed together.[7] Though a particular state cannot take away from an individual the property given him by an act of congress, and though the laws of such state are inoperative as against the laws of the United States with which they may come in collision,[8] yet if an author or

[1] McClurg v. Kingsland, 1 How. 206.
[2] Id.
[3] Bloomer v. Stolley, 5 McLean, 165.
[4] Id.
[5] Id.
[6] Id.
[7] Bloomer v. McQuewan, 14 How. 549, 551.
[8] Gibbons v. Ogden, 9 Wheat. 186.

inventor, instead of resorting to the act of congress, should apply to the legislature of a particular state for an exclusive right to his production, there is nothing to hinder that state granting it, though the operation of such grant would be confined to the limits of the state;[1] and the use of the property is exclusively of local cognizance. Like all other property, it may be used and enjoyed within each state, according to the laws of such state.[2]

The act of congress of July 8th, 1870, which was amended in some few formal particulars by the act of June 18th, 1874, superseded and repealed all preceding acts upon the subject.

These previous acts were eleven in number. The act of May 31st, 1790, chapter 15 (repealed by the act of § 14, 1831); the act of April 29th, 1802, chapter 36 (repealed by the same act), and the various acts of February 15th, 1819, chapter 19; February 3rd, 1801, chapter 16; June 30th, 1834, chapter 157; August 18th, 1856, chapter 169; February 5th, 1859, chapter 22; February 18th, 1861, chapter 37; March 3rd, 1865, chapter 126; and February 18th, 1867, chapter 43. All these statutes are printed in the appendix to this treatise, however, as important to the student in tracing the history and the animus of the American Copyright Law.

243. The present copyright law of the United States consists of a revision and substantial re-enactment of the act of July 8, 1870.[3] That act is entitled "An act to revise, consolidate, and amend the statutes relating to patents and copyright," and the sections relating to copyright are twenty-five, beginning with

[1] Livingston v. Van Ingen, 9 Johns. 581.
[2] Id.
[3] Revised Statutes of the United States, § 4948, et seq.

section eighty-fifth, and including section one hundred and ten.

By this law of July 8, 1870, as amended June 18th, 1874, the laws of the United States respecting copyright were entirely revolutionized.

Among other things, it took from the United States district courts all agency in the matter, and has transferred the same to a bureau at Washington.

The new act placed all records having relation to copyrights under the control of the librarian of congress, and devolved upon him the duty heretofore imposed upon clerks of district courts. It provided that he shall, for performing these duties, receive $4,000 per annum. Heretofore the cost of the service was nothing to the United States.[1]

It was provided by that act that "any citizen of the United States or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns," may secure the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same, and, in case of a dramatic composition, of publicly performing or representing it, and causing it to be performed or represented by others, and authors may reserve the right to dramatize or translate their own works.[2] This exclusive privilege will be granted for twenty-eight years from the day on which the title of such work is

[1] Sec. 85.
[2] Sec. 86.

recorded, and an extension of fourteen years will be granted if a second record be made within six months of the expiration of the original right, and upon publication in at least one newspaper within two months from the date of the renewal for four weeks of a notice of the re-record.[1] Copyrights so received are assignable, but, that any assignment may have validity, it must be recorded with the librarian within sixty days from its date.[2]

As to the manner of securing the right, the law required that the author deposit in the mail a printed copy of the title, addressed to the librarian of congress, and within ten days of the publication of his work; deposit in the post office two copies of his work, the postmaster to receive such matter, it being marked "copyright matter;" if required, to give a receipt for it. He was then to forward it in the mail, free of expense, to the author, but this provision was abrogated by certain of the postal[3] as well as the copyright laws, and copyright matter now forms no exception to the general rule that no official or other matter be conveyed unstamped through the mails. Upon being received at Washington, the librarian was to record the title, and if the party transmitting it so desires, to furnish him with evidence of such record.[4]

For recording and certifying any instrument of writing for the assignment of a copyright, the librarian of congress was, by that act, entitled to receive from the persons to whom the service is rendered, the sum of one dollar, and for every copy of an assignment, one dollar; such fees to cover, in either case, a certi-

[1] Secs. 87, 88.
[2] Sec. 89.
[3] Sec. 90.
[4] See *post*, p. 260 (*n*).

ficate of the record, under seal of the librarian of congress, and to be paid into the treasury of the United States.[1]

Notice that a work is copyrighted was to be given in each issue, and ten days after publication, two complete printed copies of the best edition to be forwarded to the librarian, under penalty of twenty-five dollars.

For the publication of any work not copyrighted that it is so copyrighted, a penalty of one hundred dollars was to be imposed, and violation of a copyright was to forfeit all copies made, and such damages as might be recovered at law. Wrongful representation of a dramatic composition entitled to a recovery of not less than one hundred dollars for the first representation, and fifty dollars for each subsequent one; if one without consent publish the manuscript of another, he might be held accountable in damages; actions for a violation of copyright to be commenced within two years after the cause of action accrued. In such actions the defendant to plead the general issue, and give the special matter in evidence under it. And, of such actions, jurisdiction is given to the United States courts, which may enjoin violations of the rights of authors under the law, and, in all cases where there is a recovery for a violation, forfeiture, or penalty, full costs are to be allowed.

244. Section eighty-fifth (4948[2]) provided that all

[1] Amendment of June 18, 1874, section 2; by the law of 1870, section 92, the fees to be paid for these services were fifty cents for recording, and for a copy under seal of the recorded title, fifty cents, for recording an assigement of a copyright fifteen cents for each one hundred words, and for every copy of such assignment furnished, ten cents for each one hundred words, the proceeds to be accounted for to the treasury.

[2] The figures in brackets in the text refer to the present Revised Statutes of the Uuited States.—Revision of 1873–74.

records and other things relating to copyrights, and required by law to be preserved, shall be under the control of the librarian of congress, and removed to his office from the office of the clerks of the various judicial districts, where the same were previously performable, all formal steps necessary to secure the protection of the act.[1] These provisions are, it seems, directory[2] only, and not mandatory. .

Copyrights recorded prior to July eighth, 1870, in the district clerk's office, do not require re-entry at Washington. But one copy of each book, or other article or thing copyrighted since March fourth, 1865, and up to July eighth, 1870, is required to be deposited in the library of congress, if not already so deposited, and without such deposit, the copyright is void by law.[3]

245. Section eighty-sixth (4952) enumerates the subject-matter in which copyright may be granted. It provides "that any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor[4] of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models and designs intended to be perfected as works of the fine arts, and his executors, administrators, or assigns, shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing completing, copying, executing, finishing, and vending the same; and in the case of a dramatic composition, of publicly performing or representing it, or causing it

[1] Act of February 5, 1859, ch. 22, § 8. And consult acts of February 3, 1831, ch. 16, § 1; August 18, 1856, ch. 169, § 1; March 3, 1865, ch. 126, § 1.

[2] 2 Kent Com. 378 (note).

[3] 13 U. S. Stats. 540.

[4] Carey v. Collier, 56 Niles Reg. 262.

to be performed or represented by others; and authors may reserve the right to dramatize, or to translate their own works."

This section confers copyright only on those who are citizens of the United States, or resident therein.[1] The word "resident" has been interpreted to require that the application for a copyright must in all cases be accompanied by a distinct and accurate statement of the name of the person copyrighting,[2] and his character, whether author, inventor, designer, or proprietor, but no affidavit or formal petition is required. A person, to be entitled to copyright as a "resident" under the corresponding sections of previous copyright laws, and, by inference, under the present, must be a permanent resident of this country. One temporarily residing here, it seems, even though he has declared his intention of becoming a citizen, cannot take or hold a copyright.[3] This was the ruling of Betts, J., in 1839, but it is possible that a more liberal rule might obtain now. In a case twenty years later,[4] Cadwallader, J., added to this statement of those who might obtain copyright, "and proprietors under derivations of title from such authors," but qualified this by continuing, "the assignee of a work composed by a non-resident alien cannot obtain a copyright therefor," and this undoubtedly is the rule to-day, from which our courts will not depart.

The legal assignee of the author may take out the

[1] The illiberality of the rule, which requires permanent residence in order to entitle to copyright, contrasts very disadvantageously with the rule of our (*i. e.*, the English) law on the subject, as laid down in the cases of Jeffreys v. Boosey and Low v. Routledge.—Shortt L. Lit. p. 244.

[2] See this chapter, *post*, practical directions for taking out copyrights.

[3] Carey v. Collier, 26 Niles Reg. 262.
Keane v. Wheatley, 9 Am. Law Reg. 45.

copyright, and it will make no difference whether he holds it as trustee for the benefit of another or not.[1]

The words "author," "inventor," or "designer," are meant to imply and cover the various definitions of primary and secondary authorship heretofore discussed in the chapter on originality.[2] "The phrase design," said Washington, J.,[3] "when used as a term of art means the giving of a visible form to the conceptions of the mind, or, in other words, to the invention." This was decided upon interpreting the word "design," in the first section of the act of 1831, and the derivative "designer," first appears as applied generally to any form of copyrightable matter, in the present act of 1870.

246. A "design," as signifying "any new and original design for a manufacture, bust, statue, alto-relievo, or bas-relief, or for the printing of woolen, silk, cotton, or other fabric, any new and original impression, ornament, pattern, print, or picture, to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new, useful, and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, may, upon payment of the duty required by law, and other due proceedings had, the same as in cases of inventions or discoveries, obtain a patent therefor.

Up to the year 1870 the only provision for such productions of skill and intellectual labor was by copyrighting them; the acts of 1870, in the portion thereof

[1] Little v. Gould, 2 Blatchf. 366.
[2] Binns v. Woodruff, 4 Wash. 52.
[3] Id.

relating exclusively to patents, made a matter for entry in the patent office.[1]

In the registration of designs which must now be made in the patent office, the originality of design will be more carefully examined into, if anything, than the originality of either a patented or a copyrighted work.

It has been held that the English act for the protection of designs does not extend to designs which have reference to a purpose of utility through the combination of parts, independently of their shape and configuration.[2] Thus, where the design was for a ventilator, consisting of a thin metallic frame occupying the place of one of the panes of the upper sash of a window, containing a whole pane and a half of glass, the one within the other, so as to appear, when the ventilator was closed, to be one single pane; the frame being hinged at the top, so as to open by means of a straight screw, the head of which formed a pulley, over which were passed cords for the purpose of turning it, and so of either opening or shutting the ventilating pane; the half pane of glass being fixed in the lower portion of the frame, in which the ventilating frame moved, in order to prevent a downright draught of cold air; and the registration of the design stated that the part or parts of the design which were not new or original were "all the parts taken per se, and apart from the purposes thereof," and that what was claimed as new was "the general configuration and combination of the parts;" it was held by the court of

[1] "An act to revise, consolidate and amend the statutes relating to patents and copyrights." July 8, 1870, § 71, *et seq.* Revision of 1873–74, § 1.

[2] Reg. v. Russell, 16 Q. B. 810; 20 L. J. 177; M. C., 15 Jur. 773.

Queen's Bench that the design was not for "the shape or configuration" of an article of manufacture within the act, and was, therefore, not the subject of registration. "It appears to me," said the court, "that this invention is not within the meaning of the statute. It is a skillful combination of means for producing an end. But the statute applies only to shape or configuration; and, in producing the end which is here attained, shape and configuration are immaterial. The figure of the pane in the drawing is an oblong rectangle; a square or a circular pane would produce the same result. The screw is straight; a crooked screw would produce the result equally well, perhaps better." "Combination" "is not 'shape.' What the general meaning of 'configuration' is, I cannot exactly define; but the word, must, I think, have been used by the legislature to denote some relation to shape visible to the eye. Here there is nothing peculiar in the shape; all depends upon the way in which the parts are put together; that is, as has been rightly said, upon the general combination."[1]

These designs, although provided for by acts of congress relating to patents, seem, as being works of art and of intellectual labor with pen and pencil, to come logically under the same head as the other productions of which this volume treats. And such has always been their disposition in England, where designs have invariably been the subjects of copyright.[2]

[1] Reg. v. Russell, 16 Q. B. 810; 20 L. J. 177; M. C. 15 Jur. 773.

[2] The older acts of parliament (27 Geo. 3, c. 38; 29 Id. c. 19; 34 Id. c. 23; and 2 & 3 Vict. c. 13), dealing with the copyright in designs, have been repealed by the act of 5 & 6 Vict. c. 100, (*a*) which, amended by subsequent acts (6 & 7 Vict. c. 65; 13 & 14 Id. c. 104; 21 & 22 Id. c. 70; and 24 & 25

The protection of a design by registering it in the Patent Office, was authorized by the statute of August twenty-ninth, 1842,[1] and of March second, 1861,[2] previous to the act now referred to.[3] It is to be noticed that the understanding of the term "designs," under the United States acts, differs substantially from the English idea, as set forth in the case just cited. The idea, with us, seems to be that a design means an ornamental design; a useful design being rather, in the nature of a specification or contrivance for a machine or process patentable under other provisions and acts of congress. "The material upon which the design or configuration is imprinted, or of which it is moulded, will not enter into the patent of a 'design.' If the shape be old, it cannot become a new 'design' by being expressed in new material, or if it be new, it will be patentable, although expressed in old material.[4] It is the appearance to the eye that constitutes, mainly, if not entirely, the contribution to

Id. c. 73) is now the governing statute on this branch of the law relating to copyright.

Before 2 & 3 Vict. c. 13, copyright in designs existed only in the case of linens, cottons, calicoes, and muslins. That act (§ 3) extended the copyright to fabrics composed of wool, silk, or hair, and to mixed fabrics composed of any two or more of the following materials—linen, cotton, wool, silk, or hair.

Copyright in designs is of a twofold character: (1) copyright in the application of designs for ornament; and (2) copyright in the application of designs to some purpose of utility. The latter kind of copyright owes its origin to the stat. 6 & 7 Vict. c. 65.—Shortt, L. Lit. p. 602.

[1] 5th U. S. Stat. at L. p. 543, § 3.

[2] 12 Id. ch. 37, p. 130, § 11.

[3] U. S. Rev. Stats. Revision of 1873–74, p. 962, §§ 4929, 4933.

[4] W. N. Bartholomew, Com. Decisions, Dec. 2, 1869, p. 103; G. H. Sellers, Id. June 8, 1870, p. 58; W. L. Tyler, Id. April 27, 1871, p. 106; Gorham Manufacturing Co. v. White, 14 Wall. 511.

the public which the law deems worthy of recompense; and identity of appearance, or sameness of effect upon the eye, is the main test of substantial identity of design.[1] In treating of these patents for designs, the term "useful," means an adaptation "producing pleasant emotions."[2] It is, therefore, to be considered as settled that these design patent acts are intended to give encouragement to the decorative arts;[3] as independent of the other acts which protect all other contrivances and in no sense included in them or derogatory thereof.

It will be noticed that, while the English construction of the word design practically admits a copyright of matter, which when reduced to the actual physical expression or contrivance would be patentable, our own construction allows the patenting of matter which might, under certain forms, be copyrightable.

247. An American author living abroad, but publishing here, will also be entitled to copyright, and this is also, with regard to English subjects, the effect

[1] Id.

[2] Per Commissioner Leggett, in re Parkinson, Com. Dec. 1871, p. 251; and see Wooster v. Crane.

[3] Fisher, P. C. 583; Gorham Manufacturing Co. v. White, 14 Wall. 511. As to the patenting of designs and their validity, see further, Root v. Ball, 4 McLean, 177; Booth v. Garelly, 1 Blatchf. 277; Clark v. Bonsfield, 10 Wallace, 133; Wooster v. Crane, 2 Fisher's Patent Cases, 583; Gorham M'f'g. Co. v. White, 7 Blatchf. 513 (reversed U. S. Supreme Court, December Term, 1871, 14 Wall. 511); Collender v. Griffith, 11 Blatchf. 212; Higgins v. Sparkman, 1 Blatch. 205; Israel C. May, Commissioner's Decisions, 1870, p. 14; W. N. Bartholomew, Id. 1869, p. 103; Jason Crane, Id. 1869, p. 7; B. L. Solomon, Id. 1869, p. 49; Stuart & Bridge, Id. 1870, p. 15; Geo. H. Sellers, Id. 1870, p. 58; William King, Id. 1870, p. 109; E. W. Sperry, Id. 1870, p. 139; E. R. Fenno, Id. 1871, p. 52; W. L. Tyler, Id. 1870, p. 106; Phillip Weinberg, Id. 1871, p. 244; P.C. Parkinson, Id. 1871, p. 251; W. N. Barthol-

of the English statutes.[1] If, however, the native author have previously published abroad, he can obtain no copyright at home, by the English law,[2] and probably by our own.

Any alien friend residing in the country under whose laws he copyrights, is entitled to their protection[3] in his enjoyment of his innocent and original

omew, Id. 1871, p. 298; William Whyte, Id. 1871, p. 304; J. D. Diffenderfer, Official Gazette, U. S. Patent Office, vol. 2, p. 57; T. B. Doolittle, Id. p. 275; H. W. Collender, Id. p. 360, vol. 3, pp. 91, 267; T. B. Oglesby, Id. vol. 3, p. 211; L. W. Fairchild, Id. p. 323; Alois Kohler, Id. vol. 4, p. 53; F. G. & W. F. Niedringhaus, Id. vol. 7, p. 171; Union Super. Collar Co. v. Leland, Id. vol. 7, p. 221; Henry W. Gould, Id. vol. 5, p. 121; Simonds on Design Patents, p. 173.

[1] Stats. 5 & 6 Vict. c. 45; 7 & 8 Id. c. 12, § 19.

[2] Cocks v. Purday, 5 C. B. 860; Jeffreys v. Boosey, 4 H. L. Cas. 877; D'Almaine v. Boosey, 1 Y. & C. 288; Bentley v. Foster, 10 Sim. 329; Clementi v. Walker, 2 B. & Cr. 861; Chappel v. Purday, 4 Y. & Cal. 495: Boosey v. Purday, 4 Exch. 145; Boosey v. Davidson, 13 Q. B. 257; Delondre v. Shaw, 2 Sim. 240; Ollendorf v. Black, 4 De G. & S. 209; Pisani v. Lawson, 6 Bing. N. C. 90; Routledge v. Low, L. Rep. 3 H. L. Cas. 100; 18 L. T. N. S. 874; 37 L. J. 454, ch.; Low v. Routledge, 35 L. J. 114, ch.; 13 L. T. N. S. 421; Boucicault v. Delafield, 1 H. & M. 597; 9 L. T. N. S. 709; 33 L. J. 38, ch.

[3] A natural born British subject before the Naturalization Act (33 Vict. c. 14) was held to carry his allegiance with him throughout the world, and no change of circumstance, time, or place could free him from it (Calvin's Case, 7 Rep. 66). An English author, therefore, might reside abroad, and yet have his right as an English author upon publication here Residence abroad could not release him from his natural allegiance, and therefore he carried with him also the natural rights of a subject of England wherever he went (Jeffreys v. Boosey, 4 H. L. Cas. 977). Besides this natural and perpetual allegiance, our law also recognizes a local or temporary allegiance which is due from every alien or stranger born for so long a time as he continues within the sovereign's dominion and protection (Calvin's Case, ubi supra), and which he ceases to owe as soon as he transfers himself from this king-

work, published in such country during his residence therein. As to whether an alien friend, not residing in the country whose laws he invokes, the question arising is more difficult.

The burden of authority seems to be that an alien may acquire personal rights, and maintain personal actions in respect of injuries done to him, though he cannot maintain real actions, and that a foreigner resident abroad may acquire copyright in a work first published by him as author or as author's assignee, though residing abroad at the time that the work was first published.[1]

In the English case of Bentley v. Foster,[2] the court said (Shadwell, V.C.) that "if an alien friend wrote a book, whether abroad or in this country, and gave the British public the advantage of his industry and knowledge, by first publishing the work here, he was entitled to the protection of the laws relating to copyright in this country."[3] But in the later case

dem to another (2 Steph. Black, 418). An alien friend temporarily residing here and consequently owing a temporary allegiance, is entitled to copyright in any work which he publishes here whilst so temporarily residing, however short his period of residence may be.

[1] Cocks v. Purday, 5 C. B. 860.

[2] 10 Sim. 329.

[3] And in Chappell v. Purday (4 Y. & Col. 495), Lord Abinger, C.B., had declared himself of opinion that a foreigner, who is the author of a work unpublished abroad, might communicate his right of property therein to a British subject, at least for the period prescribed by the statute of Anne. Another decision in favor of the doctrine that a foreigner, though resident abroad at the time of the publication, may have copyright in this country if the first publication takes place here, was pronounced by the court of Queen's Bench in Boosey v. Davidson (13 Q. B. 257), where an action was brought for infringement of copyright in certain operatic airs composed by a foreigner and alleged to have been first printed and published in England.

of Boosey v. Purday,[1] the court of exchequer refused to hold the same rule in the case of a plaintiff who was the assignee of certain airs of an opera which one Signor Ricordi had purchased from the composer Bellini, where action was brought for an infringement by the defendant of the plaintiff's copyright in the dramatic airs. That court held that a foreign author residing abroad, who composes a work abroad, and sends it to Great Britain, where it is first published under his authority, acquires no copyright therein; neither does a British subject to whom such work is assigned by the foreign author.[2]

248. The law on the subject of the copyright of foreigners, which these conflicting decisions had left in considerable doubt, appeared to be finally determined by the house of lords in the case of Jeffreys v. Boosey, after all the judges had been called on to deliver their opinions. The facts of the case were as follows: Bellini, the celebrated musical composer, an alien

[1] 4 Exch. 145.

[2] Pollock, C.B., in delivering the judgment of the court, said, "We perfectly concur with the court of common pleas, that a foreigner in amity with this country may sue for the infringement of any of his rights, a point which he never doubted; but we thought it clear that a foreigner had no copyright in England by the common law, and that his right must depend wholly upon the construction of the statutes, and if they did not give it to him he could have no right at all. And, with respect to the construction of the statutes, we thought, if there were no binding authorities to the contrary, that the legislature did not mean to confer a copyright on any but British subjects. . . . . Our opinion is that the legislature must be considered prima facie to mean to legislate for its own subjects only, in some sense of that term, which would include subjects by birth or residence, being authors, and the context or subject-matter of the statutes does not call upon us to put a different construction upon them." *Vid.* also Ollendorf v. Black, 4 DeG. & S. 209.

friend, composed, while living at Milan, an operatic work "La Sonnambula," in which, by the laws there in force, he had a certain copyright. He there, on the 19th of February, 1831, by an instrument in writing, bearing date on that day, made an assignment of that copyright to Giovanni Ricordi, which assignment was valid by the laws there in force. Ricordi afterwards came to this country, and on the 9th of June, 1831, by deed assigned, for valuable consideration, the copyright in the said work to Boosey, his executors, administrators, and assigns, but for publication in the United Kingdom only. Boosey printed and published the work in this country before any publication abroad. Then Jeffreys, without any license from Boosey, printed and published the same work in this country. Boosey brought an action against Jeffreys for the infringement of his copyright, and the action was tried before Rolfe, B. (subsequently Lord Cranworth), who directed the jury, in accordance with the decision in Boosey v. Purday, to find a verdict for the defendant Jeffreys. The matter came, on bill of exceptions, before the court of exchequer chamber. That tribunal pronounced the direction given by the judge at the trial, to be wrong. A writ of error was then brought in the House of Lords, where the question was fully and at great length argued, the House finally reversing the decision appealed from and upholding the doctrine of the judge who originally heard the case, that to entitle a foreigner to the copyright in any work first published by him in this country, he must be actually resident here at the time of the publication of such work, and consequently that no assignment by a foreigner, not resident here at the time of publication, can vest in a British subject a

copyright in the work of the foreigner published here by that British subject.[1]

[1] "It may be assumed," said Lord Cranworth, C., "that on the facts thus proved, the right of Bellini, the author (if any), had been effectually transferred to Boosey, the defendant in error; and thus the important question arose, whether Bellini had by our law a copyright which he could transfer through Ricordi to Boosey, so as to entitle the latter to the protection of our laws? . . . . In the first place, it is proper to bear in mind that the right now in question—namely, the copyright claimed by the defendant in error (Boosey)—is not the right to publish or to abstain from publishing a work not yet published at all, but the exclusive right of multiplying copies of a work already published, and first published by the defendant in error (Boosey) in this country. Copyright thus defined, if not the creature, as I believe it to be, of our statute law, is now entirely regulated by it, and, therefore, in determining its limits, we must look exclusively to the statutes on which it depends. . . . The substantial question is whether under the term 'author' (in 8 Anne, c. 19) we are to understand the legislature as referring to British authors only, or to have contemplated all authors of every nation. My opinion is that the statute must be construed as referring to British authors only. Prima facie, the legislature of this country must be taken to make laws for its own subjects exclusively, and where, as in the statute now under consideration, an exclusive privilege is given to a particular class at the expense of the rest of Her Majesty's subjects, the object of giving that privilege must be taken to have been a national object, and the privileged class to be confined to a portion of that community, for the general advantage of which the enactment was made. When I say that the legislature must, prima facie, be taken to legislate only for its own subjects, I must be taken to include under the word 'subjects,' all persons who are within the queen's dominions, and who thus owe to her a temporary allegiance. I do not doubt but that a foreigner resident here, and composing and publishing a book here, is an author within the meaning of the statute—he is within its words and spirit. . . . . Copyright, defined to mean the exclusive right of multiplying copies, commences at the instant of publication; and if the author is at that time in England, and while here he first prints and publishes his work, he is, I ap-

249. If the author reside anywhere in the British dominions,[1] he can have a copyright in England. Accordingly it was held by the court of appeals in

prehend, an author within the meaning of the statute, even though he should have come here solely with a view to the publication. . . . . But if at the time when copyright commences by publication the foreign author is not in this country, he is not, in my opinion, a person whose interests the statute meant to protect. I do not forget the argument that from this view of the law the apparent absurdity results, that a foreigner having composed a work at Calais, gains a British copyright if he crosses to Dover, and there first publishes it, whereas he would have no copyright if he should send it to an agent to publish for him. I own that this does not appear to me to involve any absurdity. It is only one among the thousand instances that happen, not only in law, but in all the daily occurrences of life, showing that whenever it is necessary to draw a line, cases bordering closely on either side of it are so near to each other, that it is difficult to imagine them as belonging to separate classes; and yet our reason tells us they are as completely distinct as if they were immeasurably removed from each other. . . . . If the object of the enactment was to give, at the expense of British subjects, a premium to those who labored, no matter where, in the cause of literature, I see no adequate reason for the exception, which it is admitted on all hands we must introduce, against those who not only compose, but first publish abroad. If we are to read the statute as meaning by the word 'author' to include 'foreign authors living and composing abroad,' why are we not to put a similar extended construction on the words 'first published?' And yet no one contends for such an extended use of these latter words. Some stress was laid on the supposed analogy between copyright and the right of a patentee for a new invention; but the distinction is obvious. The crown, at common law had, or assumed to have, a right of granting to any one, whether native or foreigner, a monopoly for any par-

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[1] The words "British dominions" are defined by 5 & 6 Vict. c. 45, § 2, to mean and include all parts of the United Kingdom of Great Britain and Ireland, the islands of Jersey and Guernsey, all parts of the East and West Indies, and all the colonies, settlements, and possessions of the crown, which now are or hereafter may be acquired.—Shortt, L. Lit. p. 33.

chancery, in the case of Low v. Routledge,[1] that an alien friend (a native of the United States of America) could, by a temporary residence in Canada at the

ticular manufacture. This was claimed as a branch of the royal prerogative, and all which the statute (21 Jac. 1, c. 3, § 6), did was to confine its exercise within certain prescribed limits; but it left the persons to whom it might extend untouched. The analogy, if pursued to its full extent, would tend to show that first publication abroad ought not to interfere with an author's right in this country. For certainly it is no objection to a patent that the subject of it has been in public use in a foreign country. . . . . My opinion is founded on the general doctrine, that a British statute must prima facie be understood to legislate for British subjects only, and that there are no special circumstances in the statute of Anne, relating to authors, leading to the notion that a more extended range was meant to be given to its enactments." The reasons assigned by Lord Brougham were of a similar nature. Lord St. Leonards, in the course of his judgment, said, "I venture to submit to your lordships that it is quite clear, as an abstract proposition, that an act of parliament of this country, having within its view a municipal operation—having, as in this particular case, a territorial operation, and being therefore limited to the kingdom—cannot be considered to provide for foreigners, except as both statute and commom law do provide for foreigners when they become resident here, and owe at least a temporary allegiance to the sovereign, and thereby acquire rights just as other persons do; not because they are foreigners, but because, being here, they are here entitled, in so far as they do not break in upon certain rules, to the general benefit of the law for the protection of their property, in the same way as if they were natural-born subjects. . . . . It has been decided, and it is no longer to be disputed, nor is it attempted to be disputed, that the first publication must take place here; but that is only by implication from the provisions in the act of parliament. Well, then, if the first publication must take place here, must the printing likewise take place here? There is no such actual provision: it is not said so, but I apprehend it is implied; I think it is clearly implied from the provisions of the act, that

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[1] 35 L. J. 114, ch.; 13 L. T. N. S. 421; *vid.* also Low v. Ward, *post*, p. 204.

time of publication in England, acquire a British copyright in the work published here. In that case it was agreed between the plaintiffs and an American authoress, from whom they had purchased the manuscript of a book written by her, that she should go to Montreal and reside there till after the publication of the work in England by the plaintiffs. She resided at Montreal from the 19th of May, 1864, till after the 4th of June, 1864, when the book was published for the first time by the Messrs. Low, in London. An injunction was granted to restrain the defendants from

the printing must take place here. . . . . If it is clear as I apprehend it to be, that, in the first place, a book which is a foreign composition must be first published here, and secondly, that it must be printed here; would it not necessarily and naturally follow that the man himself should be here to superintend that publication. Is it not a natural inference from the act of parliament, which does not expressly provide for either of the foregoing conditions, that it implies that the man shall be here to superintend his publication, seeing that it shall not only be first published here, but that it shall also be printed here? Nothing could be further from the intention of the legislature at the time that this act of parliament was passed than that a foreigner should be enabled to import books printed abroad; but unless you put that construction upon the act of parliament, he would have been able to import books printed abroad, and bringing them here, to have a copyright in their publication. That would plainly be directly contrary to the intention of the legislature. I think, therefore, that gives us an easy means of interposition as to the meaning of the statute, with regard to the residence of the publisher. . . . . If there is no common-law right, which, in my opinion, there clearly is not, and if the statute does not apply to foreigners, *quâ* foreigners (although I entirely, of course, admit, that when a man owes a temporary allegiance, he is entitled to the benefit of it) then there being no common-law right, it would be a new right given by act of parliament, and the foreigner must bring himself within the terms of that act of parliament in order to enjoy it; and to do so, in my apprehension, he must be able to predicate of himself that he is a subject of these realms, at least for the time being."

publishing an edition of the same, which was affirmed on appeal.[1] Under the present international copyright law of England, it is probable that an American author depositing his work in France, can procure a

[1] Lord Justice Turner observed: "It was said for the defendants that the same word 'author,' which is contained in this statute, was also contained in the statute of Anne, the first copyright act, and that strong opinions were expressed by the judges, and by the law lords in the house of lords, in the case of Jeffreys v. Boosey, that the word 'author' in the statute of Anne means an author resident in England at the time of publication, and that the same construction ought to be given to the word 'author' in the Stat. 5 & 6 Vict. c. 45, now under our consideration. But there is no provision in the statute of Anne that the statute shall extend to the colonies, and in the statute we are now considering it is expressly so provided." It was also urged on behalf of the defendants that 5 & 6 Vict. c. 45, did not extend to colonies having legislatures of their own, as Canada; but the lord justice held that the word "colonies,' in the absence of a context to control it, must extend to all colonies. This decision was affirmed by the house of lords. *Vid.* L. Rep. 3 Eng. & Tr. App. 100; 18 L. T. N. S. 874; 37 L. J. 454.

Even if a statute of the colony in which the alien resides at the time of the publication of his work here, prevents an alien acquiring a copyright in a work published by him in the colony during his residence there, that would make no difference as to his title to copyright here. An alien has rights as a subject of the crown whilst residing in one of its colonies, as well as rights as a subject of the colony; and though his civil rights within the colony depend upon the colonial laws, his civil rights beyond the limit of the colony are independent of those laws. "Every alien," said Turner, L.J., in the case last referred to, "coming into a British colony becomes temporarily a subject of the crown, bound by, subject to, and entitled to the benefit of, the laws which affect all British subjects. He has obligations both within and beyond the colony into which he comes. As to his rights within the colony, he may well be bound by its laws; but as to his rights beyond the colony he can not be affected by those laws, for the laws of a colony can not extend beyond its territorial limits."—Shortt, L. Lit. p. 35.

As of peculiar interest, in the absence of an international

copyright for his work in Great Britain. It would be no obstacle to his obtaining such copyright in France that he had formerly copyrighted here—for French copyright appears to be allowed to works

copyright, to American authors, we append the report of Low v. Ward, L. Rep.; 6 Eq. p. 418:

The case of Low v. Ward, came up on a motion for an injunction to restrain the defendants from printing, publishing and selling, any copies of the book called "The Guardian Angel," or any part thereof, other than and except copies printed and published by plaintiffs.

"The Guardian Angel" was written by Professor Oliver Wendell Holmes, of Boston, United States, and was brought out by him in a serial form in the numbers of the "Atlantic Monthly," a magazine published at Boston, commencing January, 1867, and terminating in December, 1867.

In March, 1867, Professor Holmes entered into an agreement with the plaintiff's firm of publishers, in Ludgate Hill, to take the necessary steps for acquiring a British copyright in "The Guardian Angel," it being agreed that the copyright so acquired should be purchased by the plaintiffs. In pursuance of this agreement, Professor Holmes, in October, 1867, went to Montreal, in Canada, and was living there before and at the time of the publication of "The Guardian Angel" by plaintiffs, in London, which took place on the 25th of October. The work was published complete in two volumes, price 16*s*., and on the same day a copy was delivered at the British Museum, pursuant to 5 & 6 Vict. c. 45. At this date the story wanted six chapters for completion in the "Atlantic Monthly."

The defendants who are also publishers in Paternoster Row, brought out an edition of "The Guardian Angel," in one volume, price 2*s*. on the 27th of April, 1868. They stated, in their affidavit, that they were ignorant of any claim to copyright for the work in this country, or of the publication of the plaintiff's edition, and that they had not seen a copy of plaintiff's edition, when they (defendants) brought out their edition which was a reprint, from the pages of "The Atlantic Monthly," in the numbers of which, from January to December, 1867, "The Guardian Angel" first appeared. Before bringing out their edition, the defendants had searched the register at Stationers' Hall, which then contained no entry of

already copyrighted in another country, while the international act above alluded to allows an English copyright in cases of all books copyrighted in France.

the work. The entry, it appeared, was not made until the 30th of June, 1868, and was in the following form:

TIME OF MAKING ENTRY.	TITLE OF BOOK.	NAME OF THE PUBLISHER AND PLACE OF PUBLICATION.	NAME AND PLACE OF ABODE OF THE PROPRIETOR OF THE COPYRIGHT.	DATE OF FIRST PUBLICATION.
June 3, 1868.	"The Guardian Angel."	Samson Low, the elder, Samson Low, the younger, and Edward Marston, Milton House, Ludgate Hill, in the City of London.	Dr. Oliver Wendell Holmes, now of the City of Boston, Mass., but at the date of publication, residing at Montreal, in Canada.	October 25, 1867.

On the same day the following entry of the assignment to them of the copyright, was made by plaintiff:

DATE OF ENTRY.	TITLE OF BOOK.	ASSIGNER OF THE COPYRIGHT.	ASSIGNEE OF THE COPYRIGHT.
June 3, 1868.	"The Guardian Angel."	Dr. Oliver Wendell Holmes, now of the City of Boston, Mass., U. S., lately residing at Montreal, in Canada.	Sampson Low, the elder, Sampson Low, the younger, and Edward Marston, of Crown Buildings, No. 188 Fleet Street, all in the City of London.

As soon as the defendant's edition appeared, the plaintiffs wrote to complain, informing the defendants that they had paid a large sum for the copyright, and calling upon them at once to stop the sale of their edition, and to account to them for the profits.

The defendants in reply expressed their surprise at the assertion of any claim for copyright in this country, adding that they had never seen the story in any other form than in "The Atlantic Monthly."

Under these circumstances the bill was filed, and the plaintiffs now moved for an injunction.

Mr. Druce, Q.C., and Mr. Speed, in support of the motion relied upon Low v. Routledge (Law Rep. ch. 1, 42; 3 H. L. 100), as showing that an alien, by residing temporarily in a British colony, and during the time of such residence, pub-

The rule on this subject, which, it seems to us, would equally obtain in this country, was illustrated in a case in the Scotch sessions, where a Scotch pub-

lishing in England a book of which he was the author, would acquire a British copyright in the work.

Mr. Kay, Q.C., and Mr. Westlake, for the defendants.

The plaintiffs are not entitled to copyright in "The Guardian Angel," as the essential condition of a first publication in the United Kingdom of the entire work, has not been complied with. Copyright is incapable of division, and cannot be claimed for a portion of a book only. As in the case of a patent, the monopoly is granted as a recompense for the benefit conferred upon the public by the giving to the world, in a complete form, a new and original work or invention; and unless that benefit has been received by the public, the privilege of the author or inventor cannot be sustained.

So, in this case, as only the last six chapters of "The Guardian Angel" were first published in this country, the public has not received the requisite consideration for granting the author the right of exclusive publication. Even assuming that copyright can be claimed in these last six chapters, the interest is too trifling for protection by interlocutory injunction. Again, it is the peculiar feature of copyright, that, though a monopoly, it disturbs no existing rights, and takes nothing from anyone, and neither in law, policy nor morals, can a copyright which infringes this condition be maintained. But if Holmes, by going to Canada, could acquire a copyright in the first thirty chapters of a work already published by him in America, and consequently open to the defendants, he would be depriving the defendants of their existing right to publish those thirty chapters, and consequently his claim to copyright must fail. In any case Professor Holmes, by his culpable omission to give any notice of his intention to acquire a British copyright by residence in Canada, and the plaintiffs, by not getting their assignment registered until June, 1868, long after publication of the defendant's edition, forfeited any right that they might otherwise have had to relief. On these grounds the motion must be refused.

Sir G. M. Giffard, V.C.—I have not the slightest doubt about this case. It is settled by Low v. Routledge, that an American who chooses to go across the frontier into Canada, and then publishes his work in the United Kingdom, acquires

lisher has brought out an edition of the works of Dr. Channing, previously published here. Various slight alterations and corrections were made, with the assistance of Dr. Channing, for this edition. And the Scotch publisher paid to Dr. Channing a sum of money "in acknowledgment therefor, but not as the result of any contract entered into. The court, however, held that the publisher was not entitled to copyright the edition, and could not, therefore, prevent another from publishing it."[1]

250. Where an author is unknown, the copyright of a book belongs to its publisher. In considering the question whether there must be a known author, by whose life and from whose death the statutory period of copyright is to be determined, the observations of Lord Deas in the Scotch case of Maclean v. Moody,[2] in the year 1858, are deserving of attention. In that case an argument was addressed to the court against the title of the claimants to copyright in a shipping list called "The Clyde Bill of Entry," to the following effect;—that the object of the statute 5 &

exactly the same rights as if he had been a British subject. The only ground on which this motion was resisted, was, that there could not be copyright as to a part of a work only. But there are numerous cases showing that, where the parts of a work can be separated, there may be a copyright in any distinct part of it. I may instance the cases of the last canto of Lord Byron's Childe Harold; Croker's Notes to Boswell's Life of Johnson, and of particular articles in Cyclopædias. There is no analogy, in this respect, between a patent and the case of copyright, as it matters not whether the copyright is for the entire work or for a part only. It was not, in my opinion, incumbent upon Professor Holmes to give notice of his intention to claim copyright in this country, and I see nothing to deprive plaintiffs of their right to an injunction as to the last six chapters of the work.

[1] Hedderwick v. Griffin, 3 Scotch Sess. Cas. 2 Ser. 383.

[2] Cases in Scotch Court of Sessions, vol. 20, p. 1163.

6 Vict, c. 45, was to encourage literary merit; that intellectual labor constituting authorship is alone thereby protected; that there can be no authorship without an author; that the claimants were not the authors in the present case, nor did they name the authors; that the life of the author affords the only criterion the statute gives for measuring the endurance of the privilege; and that without the statutory means of measuring the privilege, the privilege itself cannot exist. Lord Deas said, "I am humbly of opinion that this argument, although ingenious, is unsound. The act does not confine the privilege to works of literary merit, nor to cases in which there is a known author, whose life shall afford a measure for the endurance of the privilege. A person may find a manuscript in his ancestor's repositories, or get a gift of it and publish it, and he may be entitled to copyright, although he cannot tell who was the author, or whether the author is living or dead. The crown might, I presume, get up a publication and be entitled to copyright, and yet the crown never dies. . . . . That the first publisher may have copyright in the work, although he cannot point out the author, appears to me implied in section sixteen of the statute, which requires the defendant 'if the nature of his defense be that the plaintiff in such action was not the author or first publisher of the book' to give notice of 'the name of the person whom he alleges to have been the author or first publisher.' I think it is here assumed that there may be cases, in which, if the plaintiff be 'the first publisher' he may be entitled to copyright, although no author has been or can be named on either side. In all such cases it is obvious that the endurance of the privilege can have no reference to the author's life, but must be for forty-two years after

the first publication."[1] The question as to the copyright of works posthumously published will be hereafter considered.

[1] With respect to the duration of copyright in books, the English Statute (5 & 6 Vict. c. 45, § 3), enacts "that the copyright in every book which shall after the passing of this act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns."

In the case of books published before the passing of the act (1st July, 1842), and in which copyright then subsisted, section 4 enacts, "that the copyright which at the time of passing this act shall subsist in any book heretofore published (except as hereinafter mentioned) shall be extended and endure for the full term provided by this act in cases of books thereafter published, and shall be the property of the person who at the time of passing of this act shall be the proprietor of such copyright: provided always, that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this act, but shall endure for the term which shall subsist therein at the time of passing of this act, and no longer, unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright shall, before the expiration of such term, consent and agree to accept the benefits of this act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to this act annexed to be entered in the book of registry hereinafter directed to be kept, in which case such copyright shall endure for the full term by this act provided in cases of books to be published after the passing of

251. There is not, in the United States, any case of which we are aware where the government claims a copyright in any published work. In England the crown and the universities are the owners of certain exclusive copyrights, and entitled therein to the same protection as individual owners of like property.[1] The only analogous right in this country is the right of the people to the publication of all public documents, opinions of judges, &c., &c. A reporter cannot have any copyright in the written opinions of the judges of a court, nor can the judges confer any such right on a reporter. Such decisions are the property of the public, and anybody may print them. Though it has been uniformly held that a reporter may arrange and annotate them, and have a copyright in such arrangement and preparation.[2]

this act, and shall be the property of such person or persons as in such minute shall be expressed."

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

Though the act gives a meaning to the word "book," which includes dramatic and musical compositions, besides reviews, serials, &c., we shall treat in this chapter only of books commonly so called, and reserve for a separate treatment the most important of the other productions which the word is used in the act to include.—Shortt, L. Lit. p. 76.

[1] Wheaton v. Peters, 8 Pet. 688; Little v. Gould, 2 Blatch. 170.

[2] Id. See *post*, chapter on Legal Reports.

The publication of an official report under the direction of congress, and for the benefit of the public, is a dedication of it, and of what is contained in it to the public, and anyone may reprint it.[1]

[1] Heine v. Appletons, 4 Blatch. 125; see *post*, chapter on Legal Reports. The copyright claimed by the English crown extended to the English translation of the Bible, the Book of Common Prayer, the Statutes, orders of the Privy Council, and State Proclamations; also to Almanacs, Lilly's Latin Grammar, the Yearbooks and reports of judicial proceedings. The exclusive right of printing these was held to be vested in the king; and he granted letters patent authorizing others to print and publish them. Some part of this claim has now become obsolete, but a large part still remains unquestioned, and has been recognized in various decisions of courts, both of common law and equity.

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

252. What may be copyrighted under the section we are considering, has been already considered of Bibles and other works contained in their patent (Manners v. Blair, 3 Bligh, N. S. 402).

The exclusive right of printing and publishing and selling copies of the Bible, New Testament, and Book of Common Prayer, is vested by letters patent of the 13 Eliz. in the universities of Oxford and Cambridge, concurrently with the queen's printer, and no one else may print or publish in England any such copies, or sell in England any other copies of the said books than such as have been printed and published by or for the universities and the queen's printer, or one of them (Universities v. Richardson, 6 Ves. 689).

It seems to be agreed that the Bible may be printed by others than those having the patent right, if it be accompanied by bona fide notes (2 Ev. Stat. p. 19, note 11).

There is no crown copyright in the Hebrew Bible, the Greek Testament, or the Septuagint. They are all common, according to Lord Mansfield; and, said that learned judge, "if any man should turn the Psalms, or the writings of Solomon or Job into verse, the king could not stop the printing or the sale of such a work. It would be the author's work" (4 Burr. 2405).

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

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

The claim of the crown to the exclusive publication of the Book of Common Prayer is rested on similar grounds—the duty and prerogative of the sovereign as head of the church and as chief executive magistrate, to superintend the publication of books of divine service. In Manners v. Blair (3 Bligh, N. S. 391) it was contended that as to the Book of Common Prayer the king could not in Scotland confer the exclusive right of printing it on his printer there, as the king was not the supreme head of the Scotch church as he was of the English; and the Scotch court from which the appeal was brought to the House of Lords seems to have been of that opinion.

in the chapter on Originality.[1] The matter treated of in that chapter, however, must be substantial.

Lord Lyndhurst, however, in moving the judgment of the House of Lords, rested the claim of the crown to copyright in the prayer book as well as the Bible on the executive character of the sovereign—a character which he has equally in Scotland and England; and the patent of the king's printer in Scotland was held valid as to the Book of Common Prayer as well as the translation of the Bible. It seems that down to the 34th year of Henry VIII., the different books used in divine service were not printed here, but were imported from abroad. A patent was granted in that year for the sole printing of such books, and in the first year of Elizabeth the exclusive right of printing books of divine service was inserted in the same patent with the right of printing the acts of parliament, which had some time before been granted, and from that time they were regularly enjoyed together by the king's patentee. In 1781, in the case of Eyre v. Carnan (cited 6 Bac. Abr. 509), an injunction was granted to restrain the defendant from printing and publishing a form of prayer which had been ordered to be read in all churches. And in Manners v. Blair, before the House of Lords in 1828, the copyright of the crown was fully recognized.

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

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

Various grounds for the claim of the crown, at one time asserted, to copyright in almanacs have been alleged. In the Stationers' Company v. Seymour (1 Mod. 256) (Temp. Chas. II.), the right to grant the exclusive privilege of printing almanacs was held to vest in the king; first, because an almanac has no certain author, and, therefore, by the rule of our law, the sovereign had the property in it; secondly, because the almanacs made yearly are but applications of the general rules laid down in the almanac prefixed to the Book of Common Prayer which regulates the movable feasts of the church. And the addition of prognostications and other things that are common in almanacs was held not to alter the case, "any more than if a man should claim a property in

[1] *Ante*, vol. i. p. 320.

> There can be no copyright of a mere plan or method of a work, distinct from the work itself, any more

another man's copy, by reason of some inconsiderable additions of his own." Notwithstanding the decision in this case, the court of King's Bench in the case of the Stationers' Company v. Partridge (10 Mod. 105), is strongly inclined against the prerogative right to the printing of almanacs. No judgment, indeed, was given in that case, but it stood over, that the court might see if they could make it like the case of the Book of Common Prayer, and show that the right of the crown had any foundation in property; and it was never moved afterwards. The subject, however, received a positive decision adverse to the claim of the crown in the Stationers' Company v. Carnan (2 W. Bl. 1004). That was a case sent from the court of exchequer for the opinion of the court of common pleas, and that court, after hearing counsel on both sides of the question, certified their opinion "that the crown had not a prerogative or power to make such grant [of almanacs] to the plaintiffs, exclusive of any other or others." In consequence of this, it was enacted by 21 Geo. 3, c. 56, § 10, that £500 a year should be paid to the universities of Oxford and Cambridge severally, out of the duty upon almanacs, as a compensation for the annual sum of £1,000, for which they had demised to the Stationers' Company the privilege of printing almanacs. In 1799, Lord North brought in a bill to revest in the universities and the Stationers' Company the exclusive right of printing almanacs, but the bill was thrown out in the House of Commons after Erskine had been heard at the bar of the house against it. No further assertion of the right of the crown appears to have been made since.

With regard to nautical almanacs, section 2, of 9 Geo. 4, c. 66, enacts that "It shall and may be lawful to and for the Lord High Admiral, or the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland for the time being, to cause such nautical almanacs or other useful table or tables which he or they shall from time to time judge necessary and useful, in order to facilitate the method of discovering the longitude at sea, to be constructed, printed, published and vended, . . . and that every person who, without the special license and authority of the Lord High Admiral or Commissioners for executing the office of Lord High Admiral aforesaid, for the time being, to be signified under the hand of the Secretary of the Admiralty, for the time being, shall print, publish, or

than there can be copyright of an abstract idea.[1] The words in which an idea is expressed are a subject

vend, or cause to be printed, published, or vended, any such almanac or almanacs, or other table or tables, shall for every copy of such almanac or table so printed, published, or vended, forfeit and pay the sum of twenty pounds, to be recovered, with costs of suit, by any person to be authorized for that purpose by the Lord High Admiral or Commissioners for executing the office of Lord High Admiral aforesaid (such authority to be signified under the hand of the Secretary of the Admiralty as aforesaid), by action of debt, bill, plaint, or information, in any of His Majesty's Courts of Record at Westminster; and that the proceeds of the said penalty, when recovered, shall be paid and applied to the use of the Royal Hospital for Seamen at Greenwich."

A narrative of a voyage of discovery prepared under the orders of the crown is the property of the crown; but a publisher authorized to publish it by the secretary to the admiralty, the profits remaining at their disposition, was held by Lord Chancellor Thurlow not entitled to restrain a stranger from publishing it (Nicol v. Stockdale, 3 Swans. 637).

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

Copyright is given only so long as the books or copies belonging to the universities or colleges are printed at their own printing presses within the said universities or colleges respectively, and for their sole benefit and advantage. If they delegate, grant, lease, or sell their copyrights or exclusive

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[1] Story's Heirs v. Holcombe, 4 McLean, 316.

of property, and so is the classification of the subject discussed.[1]

rights of printing the books or any part thereof, or allow, permit, or authorize any person or persons or body corporate to print or reprint the same, then the privileges granted by the act are to become void and of no effect. They may, however, sell such copies so bequeathed or given in like manner as any author or authors may do.

In order that the penalties for piracy may be enforced, it is necessary that every book be entered in the register book at Stationers' Hall within two months after the bequest or gift of it shall have come to the knowledge of the vice-chancellors of the said universities, or heads of houses and colleges of learning, or of the principal of any of the said four universities respectively. The register book may be inspected without fee, and the clerk is to give a certificate of any entry or payment of a fee not exceeding sixpence.

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

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

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

5 & 6 Vict. c. 45, which (§ 1) repeals the act of 41 Geo. 3, c. 107, provides (§ 27) that nothing contained therein shall affect or alter the rights of the two universities of Oxford and Cambridge, the colleges or houses of learning within the same, the four universities in Scotland, Trinity College, Dub-

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[1] Story's Heirs v. Holcombe, 4 McLean, 316.

If there could be, then a copyright of a book of German lessons upon the plan or method of Ollendorf, or any elementary teacher, would preclude the publication of a book of French, or Italian, or Spanish lessons, upon a similar one, and thus a discovery of great practical benefit to the public might amount to a great detriment; the invention of an admirable and easily acquired method of teaching young persons one language becoming an actual embargo upon their being taught any other language by a similarly admirably and easily acquired method. If an early dictionary maker could have copyrighted his plan of giving first a word, with its orthography, and then its definition, we could have had but the one, except by a payment of tribute to him for the privilege of publishing other dictionaries of other languages.

253. We have said that an author could not copyright a subject, or a theme such as the moon, or the Atlantic ocean, or a cardinal virtue,—neither can he copyright the name of either of these, so that that name cannot be thereafter used as the title of any copyrighted matter without his consent. The case of Isaacs v. Daly, was where the plaintiff had copyrighted the title "Charity," having written a play by that name. Toward the close of February, 1871, one Daly, proprietor of the Fifth-avenue Theatre, in the city of New York, advertised, for representation at such theatre, a play, written in England, by one Gilbert, also bearing the name of "Charity." There was no pretense that the plays were the same in any particular,—the only fact apparent was, that both were called "Charity," and that plaintiff had already copy-

lin, and the several colleges of Eton, Westminster, and Winchester, in any copyrights theretofore vested or thereafter to be vested in them.

righted that word as a title to a literary production. Said the court:

"The other question as to whether the defendant should be enjoined from performing the play, under the name of 'Charity,' is not free from difficulty. The affidavits fail to satisfy me that the plaintiff would be injured on the ground claimed by him, that Mr. Gilbert's play has been unfavorably received and criticised when played. It is not alleged that there has been any bad faith on either side. The complication appears to be purely accidental. Should the dramatic performance be enjoined because the word 'Charity' is the title of each? No question exists as to any imitation or similitude in Mr. Gilbert's play. It is simply to be considered whether the use of the word 'Charity' in Mr. Isaacs' play, for a title, and his copyrighting the play, gives him the exclusive right to that word as a title, in public performance of plays. Charity is a virtue that has been symbolized and portrayed in every stage and department of art for all ages. Would it be just that an engraver who has copyrighted a design that he entitles 'Charity,' should restrain another engraver from vending to the public a different design which the latter also designated 'Charity,' both being works of art symbolizing the same virtue but differing in plan and execution? If this question is answered in the affirmative, the same principle might be invoked by a publisher who has copyrighted a sermon called 'Charity,' by one person, to enjoin the sale by another publisher of a sermon utterly different in composition, also called 'Charity,' written by some other person. The law favors literature and art; and, while it seeks

[1] New York Superior Court, Curtis, J., unreported, see N. Y. Times, March 3rd, 5th and 6th, 1874.

to protect all in the enjoyment of their property and their rights, it does not limit and abridge the field of occupation and enterprise. The use of the word 'Charity' as a designation for any work of art or literature cannot ordinarily be monopolized by any one person." [1]

254. The thing copyrighted must be something which can properly find protection under no other act. The terms book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, negative, painting, drawing, chromo, statue, statuary, models and designs, will be most liberally construed. But if it shall appear that if any of these may be protected under the patent laws, they will be referred to those statutes. Thus a label used in the sale of an article, it was held in 1829,[2] is not a book within the provisions of the statute respecting copyrights. And similarly in 1871, it was held that a mechanical contrivance used upon the stage, to represent the incident [3] of a draw-bridge, surreptitiously opened in order to precipitate an approaching train of cars into a stream of water running below it, and of its being closed just in time to allow the safe passage of the train, being patentable, could not be protected by a copyright

[1] Although the case of Isaacs v. Daly, never passed beyond the hearings at special term, and hence never was reported, we regard it as being the first of its kind, and as passing upon many very important principles. The remainder of Judge Curtis's opinion, and a full discussion of the other important points passed upon therein as arising more naturally under that head, will be found fully discussed, *post*, in the chapter on Dramatic Copyright.

[2] Coffeen v. Brunton, 4 McLean, 516.

[3] The incident, however, as expressed in words and language is copyrightable, according to the decision of Blatchford, J., in Daly v. Palmer, 6 Blatchf. 257, even though that incident had been borrowed from a romance published in a

of the play in representing which such contrivance was used.[1]

These rulings were made the gist of a special enactment by congress, in the "act to amend the law relating to patents, trademarks, and copyrights," passed June 18, 1874, which provides,[2] "that in the construction of this act, the words 'engraving,' 'cut,' and 'print,' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the patent office." Thus securing to the office of the librarian of congress the entry of only scientific, literary, and artistic matter.

255. Of the above terms, perhaps the word "book" is the only one as to the interpretation of which any serious difficulty could arise. A "book" within the statute[3] need not be a volume made up of many sheets bound together; it may consist of a single sheet, or page of character, as, for instance, the words of a song, or the music accompanying a song.

The words "map" and "chart" are to be understood, of course, as applying to the particular map or chart copyrighted, since the natural objects from which maps and charts are made are open to all.[4]

literary magazine (*Vid. post*, chapter on Dramatic Copyright).

[1] Freligh v. Carroll & McCloskey, MSS., unreported Benedict, J., U. S. Circuit Court, Eastern District of New York, 1871.

[2] Section 3. This section especially charges the commissioner of patents with the supervision and control of the entry of such matters. See Wolfe v. Barnett, 24 La. An. 97; 13 Amer. 111.

[3] Clayton v. Stone, 2 Paine, 383, 391.

[4] Blunt v. Patten, Id. 400, 401.

The decision of Thompson, J.,[1] that a "price current" cannot be considered a book within the sense and meaning of the copyright laws, was not, we think, meant to hold that such a compilation, upon which great care and industry may be expended, would not be deemed worthy of protection in itself. That was the case of a newspaper which published a daily price current, and the learned judge's ruling was made upon the ground—as he stated it—that a daily newspaper was not a literary or scientific work, which could be protected under laws which are passed "for the promotion of science."[2] But, as we have before remarked, if the proprietor of a newspaper should take the trouble to formally copyright, in the proper office, each succeeding impression of such newspaper, there is no reason why such a copyright should not be valid.

If the author wish or intend, by virtue of this section, to reserve a right to translate or to dramatize his work, he should cause to be printed, below the notice of copyright provided to be inserted in each copyrighted work, by section ninety-seven (4952), the words "right of translation reserved," or "right of dramatization reserved," as the case may be; or, in case he shall intend to reserve both, the words "all rights reserved." The librarian of congress should also be notified by the author or person copyrighting in his office, in order that he may enter the reservation or reservations upon his record. In case of books or works published in more than one volume or portion, if issued or sold separately, or of periodicals published in numbers, or of engravings, photographs, or other articles published with variations, a copy-

[1] Clayton v. Stone, *ubi supra.*
[2] Clayton v. Stone, 2 Paine, 392.

right should be taken out separately for each volume, book, or number of the periodical, and for each variety, as to size or description, of the article.

Pictures, whether included under any of the terms of the section we are considering, are protected by copyright thereunder, but a new and peculiar method of manufacturing the picture must be protected by patenting.[1] So a method, for instance, of forming a picture of pieces of birch bark, each piece having the shape of one of the things to be portrayed, and the whole mounted on cardboard and suitably colored and shaded whereby the several articles are brought into relief, is patentable, and will not be protected by a copyrighting of the particular picture so composed.

There is no provision in the American copyright law, providing for the correction of a copyright registry by a bill or information of any party aggrieved by such a registry. By a provision of the English statute,[2] if any person shall deem himself aggrieved by any entry made, under color of this act, in the said book of registry, it shall be lawful for such person to apply by motion to the court of queen's bench, court of common pleas, or court of exchequer, in term time, or to apply by summons to any judge of either of such courts in vacation, for an order that such entry may be expunged or varied; and that upon any such application by motion or summons to either of the said courts, or to a judge as aforesaid, such court or judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to such court or judge shall

[1] Joseph B. Sprague's appeal, Official Gazette of the U. S. Patent Office, vol. 6, p. 469.

[2] Id.

[3] 4 & 5 Vict. c. 45, § 14.

seem just; and the officer appointed by the Stationers' Company for the purposes of this act, shall, on the production to him of any such order for expunging or varying any such entry, expunge or vary the same according to the requisitions of such order."[1]

[1] There are not many reported cases of application for relief under this section of the act. A rule absolute to "vary or expunge," at the option of the applicant, an unauthorized entry in the register at Stationers' Hall, was granted by the court of common pleas in ex parte Bastow (14 C. B. 631).

In ex parte Davidson (2 El. & Bl. 577), Robert Cocks brought an action against Davidson for publishing three pieces of music, in which Cocks claimed the copyright. Two of the pieces were registered in the name of Cocks, and the third in the name of a person who had assigned the copyright to him. A rule nisi to expunge or vary the entries was obtained upon an affidavit of Davidson, not asserting a copyright in the airs in himself, but deposing to his belief that the three airs were old, and that the persons who on the entries professed to be the authors were not really the authors. The ground suggested for expunging the entries was that they would be prima facie evidence against Davidson on the trial of the action brought against him. The court declined to expunge the entries, but on the refusal of the counsel for Cocks to consent not to use the entries on the trial, an order was made by the court, proprio vigore, without consent, that the rule should be enlarged till the trial of an issue to determine the question of copyright, in which Cocks should be plaintiff and Davidson defendant, and on the trial of which the entries should not be used.

The court of common pleas in a subsequent case (18 C. B. 297) in which the same person applied for assistance, distinctly disclaimed the power exercised by the court of queen's bench, in the preceding case, and refused to expunge an entry of proprietorship unless it was clearly shown to be false, or to vary it, unless satisfied by affidavit that in so doing they would make a true entry. The circumstances of the case before the court of common pleas were somewhat peculiar. Mr. Lover, the author of a song called "The Low Back'd Car," being in America, and wishing to secure to himself the copyright in England and in America by a simultaneous publication in both countries, instructed his publishers here to publish it in London on a certain day. This

If an author in the United States shall find upon receipt of his copy of the record at Washington, that an error has occurred therein, his simplest plan would be to prepare a new record and forward it with a second fee, and the first record to be canceled, to the librarian of congress.

256. Sections eighty-seven[1] (4953[2]) eighty-eight (4954[3]),and eighty-nine (4955[4]), regulate the term of a copyright, and of a renewal thereof, and provide for its assignment. In case of the renewal provided for by section eighty-eight, by the widow, heirs, or other personal representatives of a deceased author, the application for such renewal should be accompanied by explicit statements of the relation upon which the applicant depends, and of his claim to the right; and,

was done, and the song was registered at Stationers' Hall, but in the entry the publishers described themselves as the proprietors of the copyright. The song having been published in this country by Davidson, from a copy sent from America, where the publication was alleged to have taken place three days before the publication here, Mr. Lover obtained a judge's order to vary the entry by substituting his name as proprietor, and got an injunction and brought an action for the infringement of his copyright. A rule to expunge or vary the amended entry having been obtained on behalf of Davidson, the court discharged it with costs, considering that no case had been made out for its interference. In Grave's Case (L. R. 4 Q. B. 721; 17 W. R. & H. 20; L. T. N. S. 877), the court said: "That a person to be 'aggrieved' within the meaning of the statute must show that the entry is inconsistent with some right that he sets up in himself or in some other person, or that the entry would really interfere with some intended action on the part of the person making the application."—Shortt, L. Lit. p. 94.

[1] The numbers given in brackets in the text are the numbers of sections in the Revised Statutes of the United States. Revision of 1873–4.

[2] Act of Feb. 3, 1831, ch. 16, § 1

[3] Act of Feb. 3, 1831, ch. 16, §§ 2, 3.

[4] Act of June 30, 1834, ch. 157, § 1.

in any case, an application for an extension should be accompanied by an accurate statement of the date of the original copyright. The term of copyright fixed by virtue thereof, is twenty-eight years from the time of recording the title thereof, with a right of renewal for fourteen years more (thus making the whole term forty-two years), if, at the expiration of the first period, the author, inventor, or designer is still living, and a citizen of the United States, or resident therein. If he has died, leaving a widow or children, the same exclusive right is continued to them for the further term of fourteen years. But, in either case, all the conditions as to recording the title of the work, &c., required in the first instance, must be observed with respect to this renewed copyright within six months before the expiration of the first term. A copy of the record must also, within two months from the date of the renewal, be published in one or more newspapers printed in the United States, for the space of four weeks.[1]

Under the similar clauses in the act of 1831, it was held that the extension provided for, looks entirely to the author and his family, and not to assignees.[2] The taking out a second term of a copyright is not like the strengthening of a defective title, but rather like a new interest, obtained after the general interest has expired.[3] An assignee alone cannot take out the second or extended term, unless he has clearly contracted and paid for it, and is entitled to be protected in it, in equity, rather than according to any mere technical rule of law.[4] The time within which any

[1] Sec. 88, Act of Feb. 3, 1831, ch. 16, §§ 2, 3.
[2] Pierpont v. Fowle, 2 Wood & Min. 23.
[3] Id. 46.
[4] Id. 44.

prospective work thus copyrighted by recording its title, may be issued, is not limited by any law or regulation, if bona fide, but depends wholly upon the discretion of the proprietor. He will not, however, be permitted, by copyrighting a mere title, to obtain a monopoly of such title, against another who may produce a book.

257. By section eighty-nine (4955), copyrights may be assigned in law by any instrument of writing. Such assignment is to be recorded in the office of the librarian of congress within sixty days after its execution; in default of which, it is to be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice.[1]

The assignment of a copyright, therefore, should not, by construction, be extended beyond the first term, unless it seems to be actually meant by the author to be transferred forever, and including any future contingency.[2]

But where, however, it is clear that the author intended to transfer all his interest in the copyright, as well in the extended as in the original term, and the assignment is not in its terms broad enough to cover the second term, a court of equity will direct the contract to be reformed, so as to embrace all the interest.[3]

The assignment of an interest in a copyright must be in writing, but an agreement to assign may be by parol; and such an assignment, although unrecorded, will be valid as between the parties, and as to all persons not claiming under the assignors.

[1] Act of July 8, 1870, ch. 230, § 87; Little v. Hall, 18 How. 165; Webb v. Powers, 2 Wood & M. 495.

[2] Pierpont v. Fowle, 2 Wood & Min. 44.

[3] Cowen v. Banks, MS., Nelson J., N. Y. 1862.; Gould v. Banks, 8 Wend. 565; Webb v. Powers, 2 Wood & Min. 510.

It was held by McLean, J.,[1] in 1855, that under the act of 1834, a formal transfer of a copyright was required to be proved and recorded as deeds for the conveyance of land, and that such a record would operate as notice; but, in a later case,[2] a limited local or other partial assignment, if made for a valuable consideration, was carried into effect, whether it would be effectual in law or not. "For while the statutes of the United States for the protection of authors," said Cadwallader, J., in that case, "do not, like those for the benefit of inventors, sanction transfers of limited local proprietorships of exclusive privileges, ... a writing which is in form a transfer by an author of his exclusive right for a designated portion of the United States operates at law only as a mere license, and is ineffectual as an assignment, except between the parties themselves." The statute provides only the instrument by which such assignment may be made, and the mode of recording it, but does not define what interest may be assigned.[3] "There is no sufficient reason," said Sprague, J.,[4] "for preventing an author conveying a distinct portion of his right;" and he therefore held, in the case of an assignment of an exclusive right of acting and representing a certain drama within the United States, except in certain cities, for the term of one year, that such an assignment was valid.[5]

The assignment of a "copyright," in general terms, will be referred to what was in existence at the date of the assignment, and not to any future contingency;[6]

[1] Little v. Hall, 18 How. 165.
[2] Keene v. Wheatley, 9 Am. Law Reg. 46, 47.
[3] Pierpont v. Fowle, 2 Wood & Minn. 43–45.
[4] Roberts v. Myers, 13 Mo. Law Rep. 401.
[5] Id.
[6] Id.

and it will in no case be construed to operate as an assignment of a second and future renewal or term, unless the author so expressly state it, or unless it seems so actually to be meant by the author, beyond a reasonable doubt;[1] as when the contract of assignment or sale uses language looking beyond the existing copyright; such as referring to all the "interest" in the matter, or to the "manuscript" thereof, or some term in itself more expressive than "copyright."[2]

The absence of the formal part of the transfer; *i. e.*, the recording in the office of the librarian of congress, "within sixty days after its execution," makes the assignment void as against any subsequent purchaser or mortgagee for a valuable consideration without notice.[3]

A claim under a renewal involves the validity of the right under the first, as well as under the second term.[4]

258. By section ninety (4956), no person is "entitled to a copyright," unless, before publication, he deposits in the mail a printed copy of the title of the book, or other article, or a description of the painting, drawing, chromo, statue, statuary, or model or design for a work of the fine arts, for which he desires a copyright, addressed to the librarian of congress; and also, within ten days from the publication, deposits in the mail two copies of such copyright book, or other article; or, in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of the same, to be addressed to the said librarian of congress.[5]

[1] Pierpont v. Fowle, 2 Wood & Min. 45.

[2] Id.

[3] Wheaton v. Peters, 8 Pet. 663; and see *post*, chapter on Contracts relating to Copyright.

[4] Act of Feb. 3, 1831, ch. 16, § 4.

[5] For the requisites which had to be observed before this

Two complete printed copies of the best edition of every copyright book, or other article, or description or photograph of such article, as before required, must be "mailed" by the proprietor to the librarian of congress, at Washington, within ten days after publication; and also a copy of every subsequent edition in which substantial changes are made, under a penalty of twenty-five dollars.[1] Of course this word "mailed" is to be construed "deposited"; the method by which the deposit is made being quite immaterial. It seems to have been held previously that the failure to make the deposit subjected to the fine only, and did not invalidate the copyright; but a recent case[2] appears to hold the reverse.

Under the similar sections in the act of 1831, the depositing the title-page in the proper clerk's office, publishing a notice according to the act, and delivering a copy of the book, are conditions the performance of which is essential to the title.[3]

Until all the things required by these sections are done, the copyright is not secured; but, by taking the incipient step, a right is acquired, which chancery will

act, see Jollie v. Jacques, 1 Blatchf. 618, 620; Baker v. Taylor, 2 Id. 83.

[1] Secs. 93–94, *id.* Act of March 3, 1865, ch. 126. §§ 2, 4; and of Feb. 18, 1867, ch. 43, § 1.

[2] The United States Circuit Court for the District of California, in Parkinson v. Lasalle, reported in the "Pacific Law Reporter" for the 23d of April, 1875, held that under sections 4956 and 4952, an author cannot obtain an exclusive right to his work, unless, before publication, he delivers to the librarian of congress, or deposits in the mail, addressed to him, a printed copy of the title of the work or map; and also, within ten days from the publication, delivers to the said librarian, or deposits in the mail, two copies thereof.

[3] Baker v. Taylor, 2 Blach. 83; Jollie v. Jacques, 1 Id. 620; Struve v. Schwedler 4 Id. 23.

protect until the other acts may be done.[1] So that, if the title-page has been duly entered, the author may maintain an action for infringement, if the printed copies were never deposited, and even if the work were never published at all.[2] This was the ruling of Sprague, J., in Massachusetts, in 1860; but Cadwallader, J., in Pennsylvania,[3] in the same year, laid down exactly the opposite rule.

The title-page must be deposited, before publication of the book, in order to entitle the copyright to protection;[4] and the record from the proper office, made in the prescribed form, is prima facie evidence of the deposit.[5]

The number of volumes in which it is stated that a work will be published, may vary in different editions without affecting the record. Such statement is not a part of its title, but may be rejected as mere surplusage;[6] but the process of copyrighting must be gone through with in the case of every volume of a work, separately. Under the corresponding provisions of the act of 1790, it was held that the one requiring the author to publish the title of his book in a newspaper was merely directory, and constituted no part of the essential requisites for securing the copyright,[7] being intended as legal notice merely of the rights secured to the author,[8] necessary only to enable him to sue for

[1] Pulte v. Derby, 5 McLean, 332.
[2] Roberts v. Meyers, 13 Mo. Law Rep. 401.
[3] Keene v. Wheatley, 1 Am. Law Reg. 33.
[4] Baker v. Taylor, 2 Blatch. 84.
[5] Roberts v. Meyers, 3 Month. L. Rep. 401; Baker v. Taylor, 2 Blatchf. 84.
[6] Dwight v. Appletons, 1 N. Y. Leg. Obs. 198–199.
[7] Nichols v. Ruggles, 3 Day, 158; Ewer v. Coxe, 4 Wash. 490.
[8] Nichols v. Ruggles, *ubi supra*.

the forfeitures provided for in the statutes,[1] but unessential, if actual notice is otherwise brought home to an infringer.[2] The interpretation of all similar clauses in previous acts of congress, as to the delivery of the copy to the officer provided by law to receive it, has uniformly been that such requirements were directory merely, and constituted no part of the essential requisites for securing a copyright. "The copy so designed to be delivered to the secretary of state, under the act of 1790," said the court, in Nichols v. Ruggles,[3] "appears to be designed for public purposes and has no connection with the copyright."

"Under this section," said Attorney-General William Wirt,[4] "a copy of a book may be deposited with the department of state after the expiration of six months from the time of its publication, if not done before, and will avail from the time of its being deposited. And where a work consisted of a number of volumes, the delivery to the secretary of state (who was at that date, 1843, the proper officer) of the first volume of a work within six months after its publication, and of the rest of the volumes before the offense complained of was committed, or the action brought, is a sufficient compliance with the law."[5]

In the case of copyright of a painting, statue, model, or design intended to be perfected as a work of the fine arts, the description provided for in this section must be definite and complete, and the photograph must be at least as large as what is technically known in this country as "cabinet size."

[1] Ewer v. Coxe, *ubi supra*.
[2] Nichols v. Ruggles, *ubi supra*.
[3] 3 Day, 158.
[4] Daboll's Case, 1 Op. 532.
[5] Dwight v. Appletons, 1 N. Y. Leg. Obs. 199.

259. Section ninety-one (4957[1]) provides that on the book being sent to the librarian of congress, that officer is to record the name of the copyright book or other article forthwith in a book to be kept for that purpose, in the words following: "Library of Congress, to wit: Be it remembered, that on the —— day of ———, Anno Domini ——, A. B., of ———, hath deposited in this office the title of a book [map, chart, or otherwise, as the case may be, or description of the article], the title or description of which is in the following words, to wit: [here insert the title or description], the right whereof he claims as author, originator [or proprietor, as the case may be], in conformity with the laws of the United States respecting copyrights.—C. D., Librarian of Congress." He is also to give a copy of the title or description, under the seal of the librarian of congress, to the proprietor whenever he requires it.

260. Section ninety-two (4958[2]), as amended, provides that for recording the title or description of any copyright book, or other article, the librarian of congress shall receive, from the person claiming the same, fifty cents; and for every copy under seal actually given to such person, or his assigns, fifty cents; and for recording and certifying any instrument of writing for the assignment of a copyright, one dollar; and for every copy of an assignment, one dollar. Said fees to cover, in either case, a certificate of the record, under seal, of the librarian of congress.

261. Section ninety-seven (4962[3]) enacts that, "to enable the proprietor to maintain an action for

[1] Act of Feb. 3, 1831, ch. 16, § 4.

[2] Acts of Feb. 3, 1831, ch. 16, § 4; June 30, 1834, ch. 157, § 2; Feb. 26, 1853, ch. 80, § 1; July 8, 1870, § 92; June 18, 1874, § 2.

[3] Act of Feb. 3, 1831, ch. 16, § 5.

the infringement of his copyright, a further requisite must be observed. A notice must be given, by inserting in the general copies of every edition published, on the title-page, or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model, or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: 'Entered according to act of congress, in the year ——, by A. B., in the office of the librarian of congress, at Washington,[1] or, at his option, the words, "Copyright, 18 , by A. B."

All the things required to be done by the sections of the various preceding laws for which this provision is now substituted, must, it seems, be done strictly, to secure a copyright.[2]

A photograph, obtained from a glass negative, is not a "print, cut, or engraving," within the provisions of the copyright act of February 3rd, 1831.[3] Section fifth of that act, which requires a copyrighted engraving to have the information that it is copyrighted "impressed on the face thereof," is sufficiently complied with, if such information be engraved on the plate, and printed from it, in such a position as not to be covered when the picture is properly framed

[1] By the amendment of June 18, 1874, § 1, which was passed after the revision (of 1873–74) of the statutes, see United States statutes at large, vol. 18, part 3, chapter 301, p. 78.

[2] Jollie v. Jacques, 1 Blatch. 620.

[3] Struve v. Schwedler, 4 Blatch., Nelson, J., 1857; Baker v. Taylor, 2 Id. 83; Wood v. Abbott, 5 Blatch. 323.

with a reasonable margin.[1] And it is an infringement of an engraving so copyrighted, if copies thereof be taken by the photographic process."[2]

Until these required steps be taken, the copyright is not secured, though, by taking the incipient step, a certain right is doubtless acquired, which chancery will protect until the other steps are taken; and it was so held by McLean, J., in 1852.[3]

Where a work consists of a number of volumes, the insertion of the record on the page next following the title-page of the first volume of the work, is a sufficient compliance with the statute;[4] and the author may insert the same record in another edition, without impairing the copyright.[5]

When a person intended to be designated by the words "and company" was a person who received a fixed sum monthly out of the business, Held, that this did not constitute such person a partner or part proprietor, so as to require his name to appear on a plate or print. But the change in the style of printing an author's or publisher's name, or even a change of publisher's, will not affect the copyrighted title of the book.

The English rule on this subject is very strict. Errors in the name of the person copyrighting or of the date of copyright prevent the author or proprietor from proceeding by action, suit, or otherwise, until such errors have been amended; or invalidate a subsequent assignment under the act.[6] Thus, where "the

[1] Rossiter v. Hall, Id. 362.
[2] Id.
[3] Pulte v. Derby, 5 McLean, 332.
[4] Dwight v. Appletons, 1 N. Y. Leg. Obs. 198.
[5] Ib. 199.
[6] Low v. Routledge, 33 T. J. 717; ch. 10, L. T. N. S. 838; 10 Jur. N. S. 922; 12 W. R. 1069.

time of the first publication" of a book was entered on the registry as the 25th May, 1864, when, in fact, it was first published on the 23d May in that year, this was of itself held fatal to the fact of the registry of proprietorship operating by way of assignment.[1] And where the entry on the registry of the name of the publisher was "Sampson Low, Son, and Marston," whereas the name of the firm was "Sampson Low, Son & Co.," this was held also fatal.[2] The name of a firm, however, will be sufficient, although it may not contain the names of all its members.[3] And this record,

[1] Id.; Matheson v. Harrod, L. R. 7 Eq. 270.

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

[3] Rock v. Lazarus, L. R. 15 Eq. 104.

so printed, will be prima facie evidence of copyright.[1]

Care should be taken, however, that the record be accurate, for an error will be a fatal defect in the author or proprietor's copyright.[2] Where the title page of a book was deposited in 1846, and the notice of the entering inserted in the volume stated it to have been deposited in 1847, even though the error arose from a mistake, it was held to be fatal to the copyright.[3]

262. By section ninety-eight[4] (4963) a penalty of one hundred dollars (to be recovered by an action in any court of competent jurisdiction) is inflicted on every person inserting or impressing such a notice on any of the articles named, for which he has not obtained a copyright, one moiety of the penalty to go to the person suing for it, and the other to the use of the United States.

This penalty is given by the similar section of the act of 1831, to "the person who shall sue for the same," and it was ruled, under that act, that it could only be sued for by one person, and that a declaration for such penalty in the name of two persons was bad,[5] the court saying, "there is a manifest difference between giving a penalty to a common informer, and imposing one for the benefit of the person aggrieved." In the latter case the term person may be regarded as comprehending every one affected by the injury.[6]

263. Section ninety-nine[7] (4964) provides that if

[1] Roberts v. Meyers, 13 Mo. Law Rep. 398; Baker v. Taylor, 2 Blatch. 82.

[2] Baker v. Taylor, 2 Blatch. 82.

[3] Id.

[4] Feb. 3, 1831, ch. 16, § 11.

[5] Atwill v. Ferrett, 1 Blatch. 154.

[6] Id. 156.

[7] Act of Feb. 3, 1831, ch. 16, § 7.

any person, after the recording the title of any book according to the act, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, print, publish, or import, or knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such book, such offender shall forfeit every copy thereof to the said proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction. There is a similar provision as to maps, prints, &c.

264. Section one hundred (4965) enacts, "that if any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided in the act, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article as aforesaid, he shall forfeit to the said proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or which have by him been

sold or exposed for sale; one moiety to go to the proprietor, the other to the United States.

The intent with which a work is reprinted cannot be taken into consideration; it is the act of reprinting that is prohibited by the statute.[1] It will be of no consequence in what form the works of another are used, whether it be a simple reprint, or by incorporating it in some other work, or by taking so much thereof as to impair the value of the original. If his copyright is violated he can maintain an action therefor.[2] The entirety of the copyright is the property of another, and it is no defense to an action that another has appropriated a part of such property, and not the whole.[3] The matter taken will be judged equitably, and the fact of the piracy will not depend upon the quantity taken, but the rule will be as above, as to whether it forms in the pirated shape a substitute or colorable substitute for the original work.[4] If a book infringe in part only, and not in the whole, it will only be deemed piratical in so far as it infringes, and the remedy will not be extended beyond the injury.[5] But a translation of a work is not a piracy of the original.[6]

265. A distinction, however, is to be observed between an action for the piracy and an action for the penalty. The former is either an action in equity for an injunction and an accounting, or at law in an action

[1] Nichols v. Ruggles, 3 Day, 158; Mellett v. Snowden, 1 West. L. Jour. 240; Story's Ex. v. Holcombe, 4 McLean, 309-310; and *vid.* also chapter on Piracy, *post*, p.

[2] Gray v. Russell, 1 Story, 19; Folsom v. Marsh, 2 Story, 115.

[3] Id. 116.

[4] Story's Ex. v. Holcombe, 309-310.

[5] Id. 315.

[6] Stowe v. Thomas, 2 Am. Law Reg. 230.

on the case for damages[1]; and the latter is recoverable by an action for debt.[2]

A piracy, as we have seen, may be a piracy in part, and not in whole, of a work. The penalty, however, can be adjudged only for the printing and publishing of the whole.[3] Congress, it has been said, did not intend to inflict the penalty for a publication of less than the whole of a work.[4] But this may be doubted.

Where any wrong has been committed in respect to a literary work, and the bill does not ask for an injunction to protect the common-law rights of the author, or the violation of his copyright, but only prays for an accounting, the redress must be sought at law, for damages, and not in equity. The asking of an injunction is what constitutes the process equitable.[5]

The words "a copy of a book" as occurring in the corresponding section of the act of 1831, were held to mean a transcript or copy of the whole, and not to include a copy of less than the entire book.[6] And courts will only adjudge such penalty for the copies found in the possession of the defendant.[7]

The penalty for an infringement of copyright in engravings, maps, charts, and the matters set forth in

[1] An action on the case is the proper form of action to recover damages; trespass will not lie. Atwill v. Ferritt, 2 Blatch. 48.

[2] Id.; Dwight v. Appletons, 1 N. Y. Leg. Obs. 198. Where the law gives a penalty without providing a special form of action therefor, it is to be recovered by an action for debt. Broom. Leg. Max. p.

[3] Rogers v. Jewett, 12 Mo. Law Rep. 340.

[4] Id. But see *post*, chapter on Piracy.

[5] Monk v. Harper, 3 Edw. Ch. 110–11.

[6] Rogers v. Jewett, 12 Mo. Law Rep. 340.

[7] Backus v. Gould, 7 How. 811; Dwight v. Appletons, 1 N. Y. Leg. Obs. 198.

section one hundred,[1] is only recoverable according to section one hundred and four, within two years before the action is brought,[2] but every distinct act of printing for sale would be a new infraction for the purpose of the limitation.[3]

We have seen that according to the amendment of June 18, 1874,[4] the words "cut," "print," and "engraving," in the act of 1870, are to be construed as applying only to pictorial illustrations, or works connected with the fine arts, and not to include any prints or labels designed to be used for any other articles of manufacture.

266. Section one hundred and one[5] (4966) provides that any person who publicly performs or represents any dramatic composition for which a copyright has been obtained, and without the consent of the proprietor or his heirs or assigns, is to be liable to damages (recoverable by action in any court of competent jurisdiction), to be assessed in all cases at such sum, not less than 100 dollars for the first, and 50 dollars for every subsequent performance, as to the court shall appear to be just.

This section is undoubtedly intended as a substitute for the act of 1856. That act was passed to give to the authors of dramatic compositions the exclusive right of acting and representing, which they did not enjoy under previous statutes.[6]

"That act," said Sprague, J., in 1860,[7] "assumes the

[1] Act of Feb. 3, 1831, ch. 16 § 13.

[2] Reed v. Carusi, 8 Law Rep. 412; Mellett v. Snowden, 1 West. Law Jour. 240.

[3] Reed v. Carusi, *ubi supra*.

[4] Sec. 3.

[5] Act of Aug. 18, 1856, ch. 169, § 1.

[6] Roberts v. Meyers, 13 Mo. Law Rep. 401.

[7] Id.

doctrine that representation is not publication.[1] The prior acts secured to authors the exclusive right of printing and publication, and it was only because publication did not embrace acting or representation, that this act was passed, superadding that exclusive right to those previously enjoyed."

"The act of 1856," said Cadwallader, J., in the same year, "is the only act which affords redress for unauthorized theatrical representations; but such act only applies to cases in which copyright is effectually secured under the act of 1831." . . . A legislative enactment securing generally to literary proprietors a copyright for a limited period, but containing no special provision as to theatrical representation, does not in the case of a dramatic literary composition include the sole right of representing it.[2]

267. The previous acting or representing a play will not deprive the author of the right afterward to take out a copyright.[3] And an action may be maintained by him upon such copyright although he or his assignee has only filed his title-page, and has not published the work or play.[4] This was the ruling of Curtis, J., in Massachusetts, in 1860.[5] But Cadwallader, J.,[6] in Pennsylvania, in the same year, held directly the reverse, and ruled that where a printed copy of the dramatic work had not been filed by an assignee of a dramatic composition, the copyright was invalid.

An assignee of the exclusive right of performing a

[1] Keene v. Wheatley, 9 Am. Law. Reg. 44.
[2] Id. See *post*, chapter on Dramatic Copyright.
[3] Roberts v. Meyers, 13 Mo. Law Rep. 401.
[4] Id. 401.
[5] Id.
[6] Keene v. Wheatley, 9 Am. Law Reg. 44. See *post*, chapter on Dramatic Copyright.

dramatic composition within certain limits may maintain an action for injunction to restrain its representation and performance within such limits,[1] if he has performed all the acts required by law to secure a copyright.[2] This subject will be further discussed in the following chapter, when we come to consider Dramatic Copyright, or Stageright.

By section one hundred and two (4967[3]), what has been termed copyright before publication, and is generally dependent solely on the common law, is provided for. This section provides that any person who shall print or publish any manuscripts whatever, without the consent[4] of the author or proprietor first obtained (if such author or proprietor be a citizen of the United States or resident therein), shall be liable to said author or proprietor for all damages occasioned by such injury, to be recovered by action on the case in any court of competent jurisdiction.

The similar enactment in the statute of 1831 was held not to take away the right of property which the author possesses at common law in his works before publication, and which he may protect by action at law, or by claiming the aid of a court of chancery, which will be given on general equitable principles.[5]

An author has a common-law right in his manu-

[1] Roberts v. Meyers, 13 Month. Law. Rep. (N. S.) 401.

[2] Keene v. Wheatley, 9 Am. Law Reg. 421; *contra* Roberts v. Meyers, *ubi supra*.

[3] Act of Feb. 3, 1831, ch. 16, § 9.

[4] The act of 1831 (sec. 9) required the consent to be in writing, signed in the presence of two or more credible witnesses.

[5] Wolsey v. Judd, 4 Duer, 385; Wheaton v. Peters, 8 Pet. 657; Jones v. Thorne, 1 N. Y. Leg. Obs. 407; Bartlett v. Crittenden, 4 McLean, 301. Hoyt v. Mackenzie, 3 Barb. Ch. 323.

script until he relinquishes it by contract or some other unequivocal act.[1]

A surreptitious publication of an important part of a manuscript is as much within the statute as if the manuscript were complete; and the whole of a manuscript need not be printed.[2]

The enactment as to unpublished manuscripts operates in favor of a resident of the United States, who has acquired the proprietorship of an unprinted literary composition from a non-resident alien author; but it has been held to give no redress for an unauthorized theatrical representation.[3]

268. In the case of the copyright of a manuscript by a deposit of a printed title thereof, a question has arisen whether the record of registration provided for by section 4967, should be inscribed or printed upon the manuscript itself. It seems to us that it should so appear. True, as long as the manuscript remained in its author's possession, such a memorandum of its registration would be a merely private memorandum, but no more private than the surface upon which it appears; but if the manuscript should be lost or stolen, it might be serviceable as guarding the literary property of its author therein—against a resumé, abridgment, catalogue, or account of its contents—a publication against which this section of the act does not seem to provide. The record of copyright probably should be made in the same manner as the manuscript; that is to say, if written, such record might also be written; if engraved, copperplated, or printed, it

[1] Bartlett v. Crittenden, 5 McLean, 36, 38; Wheaton v. Peters, 8 Pet. 957; Jones v. Thorne, *ubi supra* 409; Little v. Hall, 18 How. 170; Eyre v. Higbee, 32 How. Pr. 198; *vid.* chapter on Manuscripts, *ante*, vol. 1, p. 380 *et seq.*

[2] Bartlett v. Crittenden, 5 McLean, 39–40.

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

might also be engraved, copperplated, or printed. But this question does not appear to have ever arisen.[1]

269. Section one hundred and three (4971[2]) provides that nothing contained in the act shall be construed to prohibit the printing, publishing, importation, or sale of any book, map, chart, dramatic, or musical composition, print, cut, engraving, or photograph, written, composed, or made by any person not a citizen of the United States, nor resident therein.

270. Section one hundred and four[3] (4968), as has been already noticed, provides that all actions for forfeitures or penalties under the act shall be commenced within two years from the arising of the cause of action.

Section one hundred and five[4] (4969) provides that in all actions arising under the laws respecting copyrights the defendant may plead the general issue, and give special matter in evidence.

Section one hundred and six[5] (4970) provides that all actions, suits, controversies, and cases are to be originally cognizable, as well in equity as at law, whether civil or penal in their nature, by the circuit courts of the United States, or any district court having the jurisdiction of a circuit court, or in the supreme court of the District of Columbia, or any territory; and the court is empowered, upon bill in equity, filed by any party aggrieved, to grant injunction to prevent the violation of any rights secured by the copyright laws according to the course and principles of courts of equity, on such terms as the court may deem reasonable.

[1] See *ante*, vol. 1, chapter on Manuscripts.
[2] Act of Feb. 3, 1831, ch. 16, § 8.
[3] Act of Feb. 3, 1831, ch. 16, § 13.
[4] Ib. § 10.
[5] Act of Feb. 15, 1819, § 1.

The act of 1819, for which this section is now substituted, looked to the remedy, and not to the right,[1] and—until the act of 1870—was the only law conferring equitable jurisdiction on the United States courts in cases of copyright.[2] Section nine of the act of 1831 supplemented this act by extending that jurisdiction to the case of manuscripts.[3] The equity jurisdiction of the federal courts does not extend to the adjudication of forfeitures, and a decree cannot be entered for the penalties incurred for violation of copyright.[4]

Under the acts of 1790 and 1870 the owners of copyrights do not have redress or relief in any cases, in which they did not, before those acts, have relief in a court either of law or equity.[5] Those acts merely enabled such to prosecute their claims in the circuit courts of the United States, as they had done before in the state courts; the public interest at that time, as now, requiring a uniform construction to be placed, by one tribunal, on all important questions connected with the rights so held.[6]

The jurisdiction of the federal courts, so granted, has not taken away or diminished, however, the original jurisdiction, which, before the acts granting it, was exercisable by state courts, except where the jurisdiction is made exclusive in express terms, or by necessary construction of the federal constitution;[7] and where such jurisdiction is so expressly given, the federal courts will not be ousted thereof by the citizenship of the parties litigant.[8]

[1] Keene v. Wheatley, 9 Am. Law. Reg. 44–5.
[2] Stephens v. Gladding, 17 How. 455.
[3] Id. [4] Id.
[5] Pierpont v. Fowle, 2 Wood. & M. 27.
[6] Id.
[7] Woolsey v. Judd, 4 Duer. 382.
[8] Keene v. Wheatley, 9 Am. Law Reg. 44–5.

271. By section one hundred and seven,[1] a writ of error or appeal to the supreme court of the United States lay from all such judgments and decrees of any court in the same manner and under the same circumstances as in other judgments and decrees of such courts, without regard to the sum or value in controversy.

272. By section one hundred and eight,[2] in all recoveries, either for damages, forfeitures, or penalties, full costs were to be allowed.

273. By section one hundred and nine and one hundred and ten (4948) the librarian of congress is made chargeable with all the duties pertaining to copyrights required by law. He is to make an annual report to congress of the number and description of copyright publications for which entries have been made during the year (4951), and all copyrightable matter heretofore sent to the clerks' offices of the several federal districts, and to the department of the interior, is to be transferred to his office.

274. The full text of the law of July 8, 1870, which we have been considering, together with the text of the successive laws preceding it and the present laws upon the subject, will be found in the Appendix, together with the English law of copyright.

The main features in which the English law differs from the one we have been considering are, that the English copyright is always for the lifetime of the author, in him, and for seven years more in his personal representatives, except that if the seven years shall terminate before the end of forty-two years from the date of the copyright, the copyright shall continue on until the expiration of such forty-two years. A copyright taken out after the death of an author, also

[1] Act Feb. 18, 1861, ch. .37, § 1.
[2] Act of Feb. 3, 1831, ch. 16, § 12; sections 107, 108, 109, 110.

endures for the term of forty-two years, and is the property of the legal owner of the author's manuscript from which the book is printed. And a complete copy of the best edition, in the best binding in which the book is issued, must be furnished, not only to the British Museum, but, upon demand in writing, within one month of publication, also to the Bodleian Library in Oxford, the public library of Cambridge, the library of the Faculty of Advocates at Edinburgh, and the library of the Holy and Undivided Trinity of Elizabeth at Dublin.[1]

275. Besides providing for the protection of all literary matter, all prints, engravings, photographs, statues, &c., &c., and all other works of science and art, the English statutes of copyright also provide for the protection of designs.[2]

In the United States, however, as we have just seen, these designs are protected by the law of patents, providing that instead of being copyrighted they should be patented.[3] Trade-marks also are by the same section sent to the patent office. A trade-mark is a name or device adopted by a manufacturer, dealer, or proprietor to designate such goods or wares or properties as are manufactured, dealt in, or maintained by him, or such as he guarantees to be what they seem or pretend to be, or to be adequate to the purposes for which they are intended. So the label of a blacking-box is a prima

[1] There is no feature of the English copyright law which calls forth more protest and opposition than this, which in the case of valuable books might amount to a tax of a thousand pounds upon a single edition, as has been demonstrated by Maugham (L. Lit. amendment of June 18, 1874, taking effect August 1, 1874) and others.

[2] 5 & 6 Vict. c. 100; 6 & 7 Vict. c. 65; 13 & 14 Vict. c. 104; 21 & 22 Vict. c. 70; 24 & 25 Vict. c. 73. As to copyright in designs, see Lazarus v. Charles, L. R. 16 Eq. 117.

[3] A trademark registered in the patent office is protected for thirty years. Revision of Statutes, sec. 4941.

facie guaranty that the blacking therein contained is of a certain sort and manufacture. The name of a magazine is a prima facie guaranty that the reading matter contained therein has passed the editorial scrutiny of its conductors.[1] The name and color of an omnibus are prima facie guarantys that that vehicle runs between certain stations, and is under a certain management.[2] And all these are valuable as representing labor, reputation, and good-will.

A trade-mark is, then, first, a mark of origin; and, second, a guaranty of fitness or of quality; and, as it is to the interest of the proprietor of the mark to maintain the character and the confidence of the public in his guaranty, so it is the policy of the law to foster and encourage his interest in so doing, and to interfere to prevent and punish any attempt to derogate from its value, by imitation, or by placing it upon inferior goods, wares, or properties. It is to be noticed that in the word or words, device or devices, used for the trade-marks, in themselves, no property can be acquired; it is only when they are adopted and applied to goods, wares, and properties of a certain sort, kind, and description. If a manufacturer stamps all cloth made by him with the figure of a lion couchant, he may prevent a rival cloth manufactu from stamping his with the figure of a lion couchant, or from any such colorable imitation as will lead the public to confound the cloths of the two manufacturers, because he wishes to be known as making an article of a certain quality, which he recommends the public to buy, and by whose character he must stand or fall; and it would be unfair to oblige him to stand or fall by the

[1] Hogg v. Kirby, 8 Ves. 215; Maxwell v. Hogg, L. R. 2 C. A. 307.

[2] Knott v. Morgan, 2 Keene, 213.

quality of cloth which he does not make, and which bears his trade-mark. But, however, if a manufacturer of soap sees fit to stamp his bars of soap with the identical figure of the lion couchant, the manufacturer of cloth cannot prevent his doing so. The right to trade-marks is, therefore, a right not arising from contract, but a right against the world at large, and, as such, will be construed strictly, and against the individual proprietor. It is a right "which can be said to exist only, and can be tested only by its violation."[1]

A trade-mark, then, is a jus in rem[2]—a right in the thing itself, and in nothing else. This right, it is evident, is founded, not upon contract, but upon property; and the right to prevent or punish its infringement, upon property, and not upon fraud. For where a trade-mark is wrongfully used by one not its owner, the injury arises from the fraud, not upon its proprietor, but upon the public, who are deceived as to his wares by such wrongful use.

The right in the thing cannot be sold separately from the thing itself; and the owner of a trade-mark cannot sell it, except he sell the thing itself, or the authority or faculty of producing that thing, and of imprinting upon it the trade-mark.[3] A trader, who has been a manager or a partner in a firm of established reputation, has a right, on setting up an independent business, to make known to the public that he has been with that firm, but he must take care not to do so in a way calculated to lead the public to

[1] Cranworth, J., in Farina v. Silverlock, 6 De G. & M. & G. 217. And as to any difference between a label and a trade-mark, see Alexius Podellot, 6 Official Gazette of the U. S. Patent Office, p. 641.

[2] Ludlow & Jenkins on Trademarks, p. 5.

[3] *Vid.* Hall v. Barrows, 33 L. J. Ch. 207.

believe that he is still carrying on the business of the old firm, or is in any way connected with it.[1]

The principle which governs all cases of trade-marks, undoubtedly is, that no one is permitted to appropriate the benefit of another's reputation. A trade-mark, though undoubtedly originally signifying a single device or insignia, as in the case of the lion couchant, has come to signify anything that has become in time adopted as the prima facie means of detecting the goods, wares, or properties of certain proprietors; so the name, color, and general appearance of a line of omnibuses;[2] the shape, style, and general contour of a steel pen, and the method of packing the same in small boxes of a certain shape and size; and these, again, in other larger ones of a certain shape and size; which boxes were covered with paper lithographed with certain devices, and lines of printing of certain directions and styles of letters, have been held to be, what is perhaps the best and most comprehensive term which can be used—colorable imitations of each other—and these form infringements upon the jus in rem of a trade-mark.[3]

276. Under the provisions of the amendment to the copyright laws of June 18, 1874, not only labels, but cuts and prints, not designed for book illustrations or fine-art designs, are excluded from copyright in the office of the librarian of congress. The fine arts, as defined in that office, are limited to painting and sculpture; and other pictorial illustrations, to be entitled to copyright, must be such as come clearly

[1] Hookman v. Pottage, L. R. 8 Ch. App. 91.

[2] Knott v. Morgan, 2 Keen. 2-3; Canaham v. Jones, 2 Ves. & B. 218; Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. C. 538.

[3] Washington Medalion Pen Co. v. Esterbrook, N. Y. Times, Feb. 4, 1869.

within the designation of engravings, cuts, chromos, or photographs. And all applicants for protection for medals, scrolls, ornaments, regalia, utensils, emblems, earthenware, &c., will be referred to the patent office. Articles not coming under the descriptions of the articles enumerated in section 4952, or the head of trade-marks, or articles heretofore patented, or which cannot be regarded as designs intended to be perfected as works of the fine arts, are to be protected, if at all, under the law of patents for designs. The fee for registry of "trade-marks" at the patent office is twenty-five dollars.

A mere form of words, device, method, or invention, whether applied to advertising or otherwise, is not protected by the copyright laws, because not coming within the designation of books, prints, or other articles which are the subjects of copyright. Any printed circular or pamphlet would be entered.

277. Under the provisions of sections 77 to 84 of the act of congress of July 8, 1870, "to revise, consolidate, and amend the statutes relating to patents and copyrights, trade-marks were for the first time recognized and made the subjects of protection by the laws of the United States. Being fully provided for by the patent laws, trade-marks, eo nomine, cannot be copyrighted, and, in fact, any supposed protection which was claimed for them under the old law of copyright was of doubtful validity, by reason of the fact that the majority of them do not come within the designation of articles which are lawful subjects of copyright. While prints, cuts, and engravings, as such, are the subjects of copyright, the exclusive right secured by the law will not extend (nor has it ever extended) to the protection of any article of manufacture covered

by the print, cut, or engraving. Such articles can be protected only by a patent, for which all applications are to be made to the commissioner of patents, at Washington.

An analogy has been attempted between a title of a book as required to be copyrighted in the United States previously to the deposit of a copy of the book itself and a trade-mark; and this we have elsewhere discussed.[1] This question can only arise in the United States, all other countries making the copyright concurrent with the deposit of the book, and not with the record of its title.

278. It has been recently held that if a patent is not pronounced valid at law, a picture of that patent could not be copyrighted so as to prevent one using the patent from using the picture thereof. In other words that if the patent was not entitled to protection, neither would the copyright be.[2] The case in which this ruling seems to follow, in principle, Wyatt v. Barnard,[3] where Lord Eldon said, with reference to specifications of patents, that a person who chose to go to the office, copy a specification, and publish it, could not by so doing acquire a right to restrain another from copying it. It is not clear, from the meagre report, whether Lord Eldon intended merely to assert the right of every one to copy the original specification, or to deny altogether the existence of copyright in productions copied from specifications. The reporters, judging from their marginal note, seem to have understood him in the latter sense, but the former was most probably what he intended.

[1] *Post*, chapters on Newspapers and on Dramatic Copyright.

[2] Collender v. Griffith, 11 Blatch. 212; 19 Wall. (U. S.) 212.

[3] 3 Ves. & B. 78.

So where plaintiff brought suit for an infringement of his patent for a design for a billiard table, and another upon a copyright of an engraving exhibiting a view of the same billiard table, with its ornamentation and other features. The court, after holding that billiard tables and designs therefor having the sides and ends bevelled, being old, a patent for a design having a greater bevel is void as presenting no feature of invention or discovery, ruled that a copyright of an engraving of such a patented design could not be used to prevent a person who has the right to make billiard tables in the way he makes them, from advertising them by publishing an engraving of them.[1]

But the principle would hardly be taken to be a general one, and must be interpreted by the circumstances of this case. For, if the plaintiff had added other features to his picture of the billiard table, as, for example, figures of men and women in certain positions playing or watching a game, &c., we think he would have been entitled to protection in the enjoyment of the copyright of his picture.

Of the status of copyright, in the eye of the law, very little more need be said. We have seen that it is in all respects personal, and subject to all the laws regulating the transfer of personal property. It can be levied upon by a sheriff in execution, or be made available in bankruptcy for one's creditors through the assignee.[2] It is only a perfect and effective copyright, however, which can be so seized. A manuscript[3] in the author's hands, or a book half printed or in process

[1] Collender v. Griffith, 11 Blatch. 222.

[2] Longman v. Tripp, 3 New R. 67; Mauman v. Tegg, 2 Russ. R. 385, 392; Keene v. Harris, cited 17 Ves. 338; Curtis on C. p. 231; Maugham Lit. Prop. p. 177.

[3] 1 Bell's Com. 68; 4 Burr. 2311, 2396–7; Godson on Patents & Cop. 2d ed. p. 430; Curtis on C. pp. 85, 218.

of publication[1] could not probably be so taken in assignment. For, before publication, this property is beyond the reach of creditors, is in fact only potentially or formatively in existence, since no man can be forced, by any operation of law, to publish his thoughts for the benefit of his creditors.

Neither will the printer of a book in process of publication be entitled to sell it for his payment,[2] although he undoubtely has a lien upon it, until delivery, against the author or his creditors.[3] Once published, however, the book is a property, and that property is a subject which creditors can attach and sell, and the price unpaid by the bookseller is as completely open to the diligence of creditors as the price of any other commodity or piece of merchandise.[4]

We have just seen that it was not unusual, when copyrights were considered a perpetuity, to make them the subjects of family settlements.[5] There does not appear to be any reported case in which the title to copyright depended upon a bequest, but there can be no doubt that it can be so transferred. A patentee may bequeath his interest in a patent,[6] and if he die intestate, it will be assets in the hands of his administrator. So also the proprietor of a copyright may transfer it by testament, or in the absence of such testament it will pass as does other personal property.[7]

Since the duration of copyright has been limited, such cases are possibly of rare occurrence. The case of Keene v. Harris[8] was more properly one involving the good-will of a work, or the contract or right to publish it, together with the implements and proper-

[1] Maugham, p. 177, note (4).
[2] Bell's Com. p. 68.
[3] Id.
[4] Id.
[5] Maugham Lit. P. p. 16.
[6] Godson, 168.
[7] Maugham Lit. P. p. 176.
[8] Cited 17 Ves. 338.

ties thereof, than the property or copyright in the publication itself.

279. The English and other copyright laws, which give copyright to an author for his lifetime and for a term thereafter, are open to the serious objection that they thus create a property, the exact duration of which it might be impossible to determine. The date when a great author like Wordsworth or Dickens dies is matter of public knowledge and repute, but the vast majority of authors of copyrighted books are comparatively obscure, and in their case, to say nothing of the author of an anonymous volume, it might not unfrequently be impossible to ascertain when copyright in their works determined. Who can point to the hour when a copyright ceased to exist in the "Letters of Junius." Supposing that unknown to have lived to years, which actual instances of longevity prove are not impossible to mortals, such a copyright might, to-day, exist in his native land. The American rule of a fixed term is certainly preferable in this regard.[1]

280. It seems to have been uniformly held that serials, or other publications, if issued or sold separately, require a separate copyright entry for each distinct part or number, in order to protect them against infringement.

[1] 1 & 2 Vict. c. 12, repealed by 7 & 8 Vict. c. 12, amended by 15 Vict. c. 12. The English international copyright act of 1852, requires that, in order to entitle the foreign author to the benefit of the act, a translation sanctioned by the author must be published within three calendar months of the registration of the original work—such a translation must be of the whole work and not a version. And an English version of the French play of Frou Frou, entitled "Like to Like," in which English names and scenes and habits were substituted for the French, was held not to be such a translation as entitles to the benefit of the act. Wood v. Chart, and Wood v. Wood, L. R. 10 Eq. 193.

It is, however, optional with publishers to enter without certificate, in the office of the librarian of congress, at fifty cents each issue, or to take certificates at one dollar, that office holding, that, to entitle any one to use the notice of copyright secured, "Entered according to act of congress," &c., each distinct work or issue bearing such imprint should be actually entered; and that the mere entry of a general title conveys no right to use the copyright imprint beyond one issue of the publication. The provisions and penalties of sections 4959 and 4960 of the copyright law are held to apply to periodicals as well as to books, each issue of a periodical being a book, for the purposes of the act.

281. Of the two copies of each publication now required to be sent to the office of the librarian of congress within ten days after publication, to perfect the copyright, one is in lieu of the one formerly required to be deposited with the copyright records in the office of the district court of the United States; the other is for the library of congress.[1]

[1] The following is a copy of a pamphlet issued by the department:

"Directions for securing copyrights, under the revised act of congress which took effect August 1, 1874:

"A printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or a description of the painting, drawing, chromo, statue, statuary, or model or design for a work of the fine arts, for which copyright is desired, must be sent by mail or otherwise, prepaid, addressed, 'Librarian of Congress, Washington, D. C.' This must be done before publication of the book or other article.

"A fee of fifty cents, for recording the title of each book or other article, must be inclosed with the title as above, and fifty cents in addition (or one dollar in all) for each certificate of copyright under seal of the librarian of congress, which will be transmitted by return mail.

"Within ten days after publication of each book or other

282. Where the copyright of a prospective publication is to be secured, the title required to be sent must be printed; and this, whether the work is intended

article, two complete copies of the best edition issued must be sent, to perfect the copyright, with the address, 'Librarian of Congress, Washington, D. C.'

It is optional with those sending books and other articles to perfect copyright, to send them by mail or express; but, in either case, the charges are to be prepaid by the senders. Without the deposit of copies above required the copyright is void, and a penalty of twenty-five dollars is incurred. No copy is required to be deposited elsewhere.

"No copyright is valid unless notice is given by inserting in every copy published, on the title-page or the page following, if it be a book; or, if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected as a work of the fine arts, by inscribing upon some portion thereof, or on the substance on which the same is mounted, the following words, viz.: 'Entered according to act of congress, in the year ——, by ——————, in the office of the librarian of congress, at Washington;' or, at the option of the person entering the copyright, the words: 'Copyright, 18—, by ——————.'

"The law imposes a penalty of one hundred dollars upon any person who has not obtained copyright, who shall insert the notice, 'Entered according to act of congress,' or 'Copyright,' &c., or words of the same import, in or upon any book or other article.

"Any author may reserve the right to translate or to dramatize his own work. In this case, notice should be given by printing the words, 'Right of translation reserved,' or 'All rights reserved,' below the notice of copyright entry, and notifying the librarian of congress of such reservation, to be entered upon the record.

"Each copyright secures the exclusive right of publishing the book or article copyrighted for the term of twenty-eight years. At the end of that time, the author or designer, or his widow or children, may secure a renewal for the further term of fourteen years, making forty-two years in all. Applications for renewal must be accompanied by explicit statement of ownership, in the case of the author, or of relationship, in the case of his heirs, and must state definitely the date and place of entry of the original copyright.

to be kept in manuscript, as in the case of a dramatic production, to be published by representation only, or is to be published by any mechanical process of multiplying its contents, as printing, engraving, photographing, and the like.

The department is not at liberty to record or issue certificates of copyright upon written titles. The law

"The time within which any work copyrighted may be issued from the press is not limited by any law or regulation. but depends upon the discretion of the proprietor. A copyright may be secured for a projected work as well as for a completed one.

"Any copyright is assignable in law by any instrument of writing, but such assignment must be recorded in the office of the librarian of congress within sixty days from its date. The fee for this record and certificate is one dollar, and for a certified copy of any record of assignment, one dollar.

"A copy of the record (or duplicate certificate) of any copyright entry will be furnished under seal, at the rate of fifty cents each.

"In the case of books published in more than one volume, or of periodicals published in numbers, or of engravings, photographs, or other articles published with variations, a copyright is to be taken out for each volume or part of a book, or number of a periodical, or variety, as to size, title, or inscription, of any other article.

"To secure a copyright for a painting, statue, or model or design intended to be perfected as a work of the fine arts, so as to prevent infringement by copying, engraving, or vending such design, a definite description must accompany the application for copyright, and a photograph of the same, at least as large as 'cabinet size,' must be mailed to the librarian of congress within ten days from the completion of the work.

"Copyrights cannot be granted upon trade-marks, or labels intended to be used with any article of manufacture. If protection for such prints or labels is desired, application must be made to the patent-office, where they are registered at a fee of six dollars for labels, and twenty-five for trade-marks.

"Every applicant for a copyright must state distinctly the name and residence of the claimant, and whether the right is claimed as author, designer, or proprietor. No affidavit or formal application is required."

explicitly requires a printed copy of the title of the book or other article for which a copyright is desired to be sent to the office of the librarian of congress before the author or proprietor can be entitled to receive a copyright. The particular form or style of type is immaterial, it being necessary to print only the precise words of the title.

283. For each change or variation, either of title or of substance, in any publication secured by copyright, a distinct entry should be made, in order to the protection of each variety issued.[1] But the publisher's imprint, place of business, or date of issue may be

[1] Upon receipt of the two printed titles of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or negative thereof (which would be of course the title of the photograph therefrom to be printed), painting, drawing, chromo, statute, statuary, model, or design to be perfected as a work of art (which would be also of course the title of the perfected work), which title should be in every case accompanied by the fees of fifty cents, by a letter to the librarian of congress, stating whether the sender claims his right to the projected work as author or proprietor (and for which letter no particular form is required); the librarian of congress will record the title as copyrighted, and upon receipt of an additional fifty cents will return post paid by mail a record or transcript of the register, in the form and words following:

Librarian of Congress,
Copyright
Office,
United States of America.

Library of Congress,
Copyright Office, Washington.

No. ——

To wit: Be it remembered that on the first day of April, anno domini 187–, John W. Smith, and Henry C. Brown, of New York, have deposited in this office the title of a Dramatic Composition, the title or description of which is in the following words, to wit: "If Wishes were Horses Beggars might Ride," a drama in five acts, by George Evelyn, Esq., New York, 1874; the right whereof they claim as authors and proprietors, in conformity with the laws of the United States respecting copyrights.

A. R. SPOFFORD,
Librarian of Congress.

changed without affecting the validity of the copyright, or possibly the style or designation of the author, as, for instance, we apprehend that no forfeit of the title would accrue from an author's styling himself A. B. instead of A. M. or LL. D., or of adding "author of" any works he may have composed, under his name on the title page, or of annexing the name of any office, position, or profession of which he may be an incumbent or member. It appears to be a rule of the present librarian of Congress that any changes in copyright entries, whether of name or title, not arising from errors made in that office, require repetition of the original fee of fifty cents, and the return of the original

And whether the work be a book, map, photograph, or any of the matters enumerated, or whether the copyrighter or copyrighters claim as author or proprietor, or as both, by section 4952 of the Revised Statutes, the same form will be used.

The "title" called for by the act should be a literal transcript or fac similie of the title which is to be used if the matter is to be printed with a title page or title at all, though a slight detail, as a change of the publisher's name, or a legend or letters after the author's name, if inadvertently or otherwise omitted, would not be material. *Post*, vol. 1, p. 470.

Within ten days after the work has been actually issued from the press, two copies should be immediately sent to the librarian of Congress, at Washington, whereupon a receipt in the following form will be sent:

Librarian of Congress,
Copyright
Office,
United States of America.

Library of Congress,
Washington, June 1st, 1875.

John W. Smith and Henry C. Brown,
186 Broadway, New York.

The undersigned hereby acknowledges the receipt of two copies of "If Wishes were Horses Beggars might Ride," transmitted to the library in conformity with the laws of the United States respecting copyrights.

Very respectfully,
A. R. Spofford,
Librarian of Congress.

certificate of copyright; no corrections being made, of the nature of amendments of the record, after two weeks have expired. But the change of the name of the publisher of a work would not invalidate the copyright of its author.

284. The copyright on any publication once entered should be announced in the name of the original proprietor until the first term of twenty-eight years have expired, the renewal to be made in the name of the person renewing the same.

Copyrights are[1] assignable "by any instrument of writing," no particular form being prescribed by any law or regulation. A simple transfer, endorsed on the original certificate of copyright, or on a separate paper, and attested by one witness, is sufficient, without other formalities.

To render the assignment valid, it is to be recorded in the office of the librarian of congress within sixty days from its date.

285. The librarian of congress is a ministerial officer only, and has no discretion or authority to refuse any application for a copyright coming within the provisions of the law. No questions as to priority or infringement, or concerning the validity of a copyright, can be determined by any other authority than a United States court. A certificate of copyright is prima facie evidence of an exclusive title, and is highly valuable as the foundation of a legal claim to the property involved in the publication.

286. Previous to the act of congress of 1870, removing all records, or future registrations of copyrights to the one office of the librarian of congress, at Washington, there had been at least sixty distinct offices in the United States where such records were kept and such

[1] Section 4955.

registrations made. Upon the transfer of the entire copyright business of the United States to that office, in 1870, most of these records were found to be without index. The librarian, therefore, will decline to certify whether or not a particular title has ever been copyrighted. All entries since July 8, 1870, however, are indexed under a three-fold heading: 1. By name of author. 2. By name of proprietor (or publisher). 3. By title, or subject-matter. And inquiries since that date are answered immediately.

287. By section 4961 of the present statutes, the postmaster to whom such copyright book, title, or other matter is delivered, is directed, if requested, to give a receipt therefor. And it will be found well in every case where such title is deposited in the post-office, to take such an acknowledgment. For it is submitted that under the new law the vital step towards copyright is taken upon such deposit, and consequently the date of the postmaster's receipt—he being in some sort substituted for the clerk of the district court, who formerly received the copyrightable matter—will be evidence in a court of justice of the actual date of the copyright, if not a conclusive certificate thereof.[1] It is apprehended that if the wrapper containing the matter be not marked "copyright matter," or prepaid, the postmaster would not be authorized to give a receipt for the same, though there

[1] A simple form of such receipt might be:

U. S. Post-Office,
Station D, New York City,
May 31st, 1871.

Received of John W. Smith a pre-paid parcel, marked "copyright matter," and addressed to the librarian of congress, Washington, D. C.

_____,
Postmaster or Superintendent.

is nothing in the section, or in the regulations of the post-office department, to that effect. By sections ninety-five and ninety-six of the act of 1870, it was provided that copyright matter directed to the librarian of congress, should be transported in the mails free of cost to the copyrighter, but under the new post-office regulations such matter, like all other mailable parcels,[1] must pay postage.

288. The thing copyrighted must be something which can properly find protection under no other act. The terms book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, negative, painting, drawing, chromo, statue, statuary, models, and designs will be most liberally construed.

But if it shall appear that any of these may be protected under the patent laws, they will be referred to those statutes. Thus, a label used in the sale of an article, it was held in 1829,[2] is not a book within the provisions of the statute respecting copyrights.

289. Lord Campbell once expressed an opinion that no work ought to be allowed a copyright, unless it had an index; and it is a suggestion well worthy of serious consideration. If the time has not already come when books can no longer be read, but must be merely consulted, it is fast approaching. The presses of the world are manufacturing about forty thousand new volumes yearly,[3] and the end is not yet.

[1] See the present postal laws of the United States, *ante*, vol. i., pp. 489 *et seq.*

[2] Coffeen v. Brunton, 4 McLean, 517.

[3] If we are to credit the estimates of those whose duty it is to collect such statistics, the above rough estimate is not far out of the way. For example, in 1873, there were registered in France (according to the Chronique du Journal General a

l'Impremerie et de la Librarie) . . .	11,530	works.
In the United States, for that year, according to the report of the librarian of congress (these figures only inclusive of new books) .	3,424	"
In Germany (Prussia and Austria) . .	11,351	"
In Great Britain, ...	4,569	"
Grand total of these countries for the year 1873, say, ...	30,874	"

These figures are exclusive of Italy, Russia, Spain, Portugal, Sweden, and Denmark, and the other countries of Europe where literature is constantly on the increase; nor do they accurately show either the proportionate or the actual grand total of publications in the various countries, on account of differences in the laws under which the registration is made. For instance, the registration in France is imperative, and must include everything, from a two-page pamphlet to an encyclopædia, whether the author looks for profit therefrom or not. In Germany the registration is customary, but not compulsory; while in England and America a large proportion of published works are what are known as privately printed or author's books, which may not be registered at all. For further information, see the (London) Athenæum, Dec. 1874, and January, 1875; also, New York Evening Mail, February 17th, 1874.

In the year ending 1872, the total number of works, including books, all works of art, dramatic and musical compositions, maps and charts, copyrighted in the office of the librarian of congress, was 22,140. In the year 1874 there were published in Great Britain 3351, new books, besides 961 editions of older books. In the year 1874 the whole number of copyright entries in the United States was 16,206. In France, in 1874, there were issued 11,917 works in French—new works or fresh editions, no periodical publications being reckoned—2,196 engravings and maps, and 3,841 pieces of music; total, 17,954. In 1869, the most prosperous year in the book-trade of France, there were 17,394 publications registered. In 1870, 8,831, and 10,659 in 1872. The annual averages for the last twenty years of publications of all kinds is 15,000; 10,000 of which belong to the typographical department of production, 3,000 are engravings and photos, and 2,000 music. The Bibliothèque Nationale has since 1853 received one of the two copies of all new works required by law to be left at the depot of the Ministre de l'Intérieur.

CHAPTER III.

OF DRAMATIC COPYRIGHT OR STAGERIGHT.

290. The dramatic[1] form of composition is of great antiquity. The book of Job, in the old Testament, is of this form, and many learned men are of opinion that the Homeric poems were so rendered by their author or authors.

About the year 535 B. C., Thespis, a native of Attica, achieved the idea of separating the performers or renderers of this sort of production from their audience, and, as we are told by Horace,[2] employed a cart for the purposes of a stage, from which his actors might amuse the people, and in which they might also be carried from place to place in the course of their representations.

To the monotony of the Thespian declaimer, for the first actors seem to have been but little more, succeeded presently the stately shows of Æschylus, where noble diction combined itself with music, scenery, and costume. The words were now pronounced by two speakers as a dialogue instead of a monologue. The performers, instead of staining their faces with the juices of vegetables, assumed the masque, and the whole was presented to an orderly and attentive

[1] The Greek word, δραμα, evidently from δραω—to draw—signified a poem accommodated to action and gesture, and conveying its burden or theme to the eye by means of representation.

[2] De Arte Poet. 275.

audience, within the enclosure of a regularly constituted theatre.[1]

To Æschylus succeeded Euripides and Sophocles, and the first distinction between tragedy and comedy made its appearance.[2]

The first comedy of Aristophanes was rendered B. C. 383.[3] Of his comedies eleven have come down to us extant. But for a knowledge of the two hundred comedies of Menander we are indebted solely to his imitator and borrower, Terence.

Dramatic entertainments made their appearance in Rome, in the year of the city 391, when the first one was performed to propitiate certain of the gods, who had sent a grievous plague; before this, the games of the circus had been the only public pastime of the people.[4]

[1] Potter's Ant. Qr., p. 76. Among the Greeks these theatres soon became the popular place for all public gatherings and spectacles, and even among the Romans it was usual to scourge malefactors on the stage. (Sult. Aug. 47; Tac. ii. 80. Sen. Ep. 108, Cic. Flaac. 7.) This the Greeks called *θεατριζειν και παραδειγματιζειν.*

Theatical exhibitions in Rome were called ludi scenici (whence our words scenic and scene), because they were first acted in a shade formed by branches and leaves of trees, or in a tent. So, after theatres were built, the stage where the actors stood was called scena.

[2] Both, says Aristotle, owe their existence to the fruitful genius of Homer, the Iliad and the Odyssey furnishing theme for tragedy, and the "Margites" for comedy. Æschylus himself declares that his tragedies are but scraps from the magnificent repasts of Homer.

[3] Donaldson.

[4] Ov. de Art. Am. i. 105, Suet. Tib. 34, Cic. Planc. 11, Ver. iii. 79. Serv. in Virg. i. 164, Suet. Caes. 84.

A century and a half after the death of Euripides and Sophocles, and after Menander half a century, Livius Andronicus, a slave, produced the first play ever written at Rome. Plays were thereafter adapted from the Greek by Naevius, Plautus, Caecilius, Terence, Afranius, Pacuvius, Accius, and others.

Pantomimes are said to have been the invention of Augustus, though before his time the mimi both spoke and acted.[1]

Through the dark ages a rude drama existed, chiefly founded, as to its incident, on Scriptural themes.

So popular was this form of amusement, even at that early day, that the audience submitted to the rudest and clumsiest devices for scenic effect, and good-naturedly supplied with its own vivid and accommodating imagination all that in these days we have come to demand under the unity of place. Said Sir Philip Sidney: "You shall have Asia of the one side, and Africke of the other, and so many other under Kingdomes, that the Plaier, when he comes in, must ever begin with telling where hee is, or else the tale will not be concieved. Now you shall have three ladies walke to gather flowers, and then we must beleeve the stage to be a garden. By and by we heare news of shipwracke in the same place, then we are to blame if we accepte it not for a rocke . . . . while, in the meantime, two armies flie in, represented with four swordes and bucklers, and then what harde hart will not receve it for a pitched field? Now of time they are much more liberall. For ordinary it is, that two young princes fall in love, after many traverses.

Of these, Naevius, Afrianus, Plautus, Caecilius, and Terence copied chiefly from Menander, the best writ of comedies that ever existed. (Quintillian x. 1.) No Roman tragedies are extant, save a few of Senacas; and of the comedies, we have only a few of Plautus and of Terence, vid. Schlegel's Eighth Lecture, Donaldson, p. 306.

[1] The most celebrated composers of mimical performances were Laberius and Publius Syra, in the days of Julius Cæsar, while under Augustus there were two famous rivals in their representation, Pylades and Bathyllus, in whose behalf their respective admirers often drew blood.—Potter, Greek Ant.

She is got with childe, delivered of a faire boy, hee is lost, groweth a man, falleth in love, and is readie to get another childe; all this in two hours space!"[1]

[1] The Defence of Poesie (ed. 1629, p. 562). Doubtless these enormities were somewhat reduced under Shakespeare. With a few hangings, rude representations of animals, towers, forests, they assisted somewhat the public imagination. But, in fact, in Shakespeare's plays, as in all others, the public imagination is the great contriver; it must lend itself to all, substitute all, accept for a queen a young boy whose beard is beginning to grow, endure in one act twelve changes of place, leap suddenly over twenty years or five hundred miles, take half a dozen supernumeraries for forty thousand men, and to have represented by the rolling of the drums all the battles of Cæsar, Henry V., Coriolanus, Richard III. All this, imagination, being so overflowing and so young, does accept! Recall your own youth! For my part the deepest emotions I have had at a theatre were given to me by an ambling bevy of four young girls, playing comedy and drama on a stage at a coffee-house, when I was eleven years old. So, in this theatre, at this moment, their souls were fresh, as ready to feel everything, as the poet to dare everything.—Taine's English Literature (ed. N. Y. 1871, p. 224).

Let us try, then, to set before our eyes this public, this audience, and this stage, all connected with one another, as in every natural and living work; and if ever there was a natural and a living work, it is here. There were seven theatres in Shakespeare's time, so brisk and universal was the taste for representations. Great and rude contrivances, awkward in their construction, barbarous in their appointments; but a fervid imagination readily supplied all that they lacked, and hardy bodies endured all inconveniences without difficulty. On a dirty site, on the banks of the Thames, rose the principal theatre, a sort of hexagonal tower, surrounded by a muddy ditch, surmounted by a red flag. The common people could enter as well as the rich; there were six-penny, two-penny, even penny seats; but they could not see it without money. If it rained, and it often rains in London, the people in the pit—butchers, mercers, bakers, sailors, apprentices—receive the streaming rain upon their heads. I suppose they did not trouble themselves about it; it was not so long since they began to pave the streets of London; and when men like them have had experience of sewers and puddles, they are not afraid of catching cold. While waiting for the piece, they amuse

And at a still earlier date the "miracle play" and the "morality" appear to have been a favorite diversion with the people.[1]

themselves after their fashion, drink beer, crack nuts, eat fruits, howl, and now and then resort to their fists. They have been known to fall upon the actors, and turn the theatre upside down. At other times they have gone in disgust to the tavern to give the poet a hiding, or toss him in a blanket. They were rude jokers, and there was no month when the cry of "Clubs" did not call them out of their shops to exercise their brawny arms. When the beer took effect, there was a great upturned barrel in the pit, a peculiar receptacle for general use. The smell arises, and then comes the cry, "Burn the juniper!" They burn some in a plate on the stage, and the heavy smoke fills the air. Certainly the folk there assembled could scarcely get disgusted at anything, and cannot have had sensitive noses. In the time of Rabelais there was not much cleanness to speak of. Remember that they were hardly out of the middle age, and that in the middle age man lived on the dung-hill.

Above them, on the stage, were the spectators able to pay a shilling, the elegant people, the gentle folk. These were sheltered from the rain, and if they chose to pay an extra shilling, could have a stool. To this were reduced the prerogatives of rank and the devices of comfort. It often happened that stools were lacking. Then they stretched themselves on the ground; they were not dainty at such times. They play cards, smoke, insult the pit, who give it them back without stinting, and throw apples at them into the bargain. As for the gentle folk, they gesticulate, swear in Italian, French, English; crack aloud jokes in dainty, composite, high-colored words. . . . With such spectators illusions could be produced without much trouble; there were no preparations or perspectives; few or no movable scenes; their imagination took all this upon them. A scroll in big letters announced to the public that they were in London or Constantinople, and that was enough to carry the public to the desired place. There was no trouble about probability. Id. 223.

[1] Mysteries, moralities, farces, sotties, and the like devout spectacles were first introduced by pilgrims returning from the Holy Land, or other consecrated places, who composed canticles of their travels, and amused their religious fancies by interweaving scenes of which Christ, the apostles, and other objects of devotion served as the themes. Menestrier informs us that these pilgrims traveled in troops, and stood in

The historical drama seems to have next succeeded, and to its rendition Shakespeare, amongst others, devoted his most careful study.[1] And to-day the drama

the public streets, where they recited their poems, with their staff in hand, while their chaplets and cloaks, covered with shells and images of various colors, formed a picturesque exhibition, which at length excited the piety of the citizens to erect occasionally a stage on an extensive spot of ground. These spectacles served as the amusement and instruction of the people. So attractive were these gross exhibitions in the dark ages, that they formed one of the principal ornaments of the reception which was given to princes when they entered towns.

When the mysteries were performed at a more improved period, the actors were distinguished characters, and frequently consisted of the ecclesiastics of the neighboring villages, who incorporated themselves under the title of Confréres de la Passion. Their productions were divided, not into acts, but into different days of performance, and they were performed in the open plain. This was at least conformable to the critical precept of that mad knight whose opinion is noticed by Pope. It appears by a MS. in the Harleian library, quoted by Warton, that they were thought to contribute so much to the information and instruction of the people, that one of the popes granted a pardon of one thousand days to every person who resorted peaceably to the plays performed in the Whitsun-week at Chester, beginning with the "Creation," and ending with the "General Judgment." These were performed at the expense of the different corporations of that city, and the reader may smile at the ludicrous combinations. "The Creation" was performed by the drapers; "The Deluge," by the dyers; "Abraham, Melchisedek, and

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[1] Collier's Hist. of Eng. Dramatic Poetry. Drake's Shakespeare and his Times, ii. 205 et seq. The drama proper of England begins with "Ferrex & Perrox," a drama framed upon a Spanish model, which was played before Queen Elizabeth, Jan. 15, 1561, by the gentlemen of the Inner Temple. "It partakes rather of the character of a historical than a classical drama, although more nearly allied to the latter class than to the chronicle plays which at a later day took possession of the stage." English comedy may be considered as beginning with "Gammer Gurton's Needle," acted at Christ Church College, Cambridge, 1575.

not only absorbs a no inconsiderable share of the literature, but, as will be seen, of the law of the land as well.

Lot," by the barbers; "The Purification," by the blacksmiths; "The Last Supper," by the bakers; "The Resurrection," by the skinners; and "The Ascension," by the tailors. In these pieces the actors represented the person of the Almighty, without being sensible of the gross impiety. So unskillful were they in this infancy of the theatrical art, that very serious consequences were produced by their ridiculous blunders and ill-managed machinery. In the "History of the French Theatre," vol. ii. p. 285, the following singular anecdotes are preserved concerning a mystery which took up several days in the performance:

"In the year 1437, when Conrad Bayer, bishop of Metz, caused the mystery of 'The Passion' to be represented on the plain of Veximel, near that city, God was an old gentleman, named Mr. Nicholas Neufchatel, of Touraine, curate of Saint Victory of Metz, and who was very near expiring on the cross had he not been timely assisted. He was so enfeebled, that it was agreed another priest should be placed on the cross the next day, to finish the representation of the person crucified and which was done. At the same time the said Mr. Nicholas undertook to perform 'The Resurrection;' which being a less difficult task, he did it admirably well." Another priest, whose name was Mr. John de Nicey, curate of Metrange, personated Judas; and he had like to have been stifled while he hung on the tree, for his neck slipped. This being at length luckily perceived, he was quickly cut down and recovered."

John Bouchet, in his "Annales d'Aquitaine," a work which contains many curious circumstances of the times, written with that agreeable simplicity which characterizes the old writers, informs us that in 1486 he saw played and exhibited in mysteries, by persons of Potiers, "The Nativity, Passion, and Resurrection of Christ," in great triumph and splendor. There were assembled on this occasion most of the ladies and gentlemen of the neighboring counties.

We will now examine the mysteries themselves. I prefer for this purpose to give a specimen from the French, which are livelier than our own. It is necessary to premise to the reader that my versions being in prose will probably lose much of that quaint expression and vulgar naïvetté which prevail through the originals, written in octosyllabic verses.

One of these mysteries has for its subject the election of an

In England, during the civil wars, and down to the restoration, the theatre was suppressed, actors dispersed, and even followed as objects of political

apostle to supply the place of the traitor Judas. A dignity so awful is conferred in the meanest manner it is possible to conceive. It is done by drawing two straws, of which he who gets the longest becomes the apostle. Louis Chocquet was a favorite composer of these religious performances. When he attempts the pathetic he has constantly recourse to devils; but, as these characters are sustained with little propriety, his pathos succeeds in raising a laugh. In the following dialogue Anne and Caiaphas are introduced conversing about Saint Peter and Saint John:

Anne.—"I remember them once very honest people. They have often brought their fish to my house to sell."

Caiaphas.—"Is this true?"

Anne.—"By God, it is true; my servants remember them very well. To live more at their ease they have left off business; or perhaps they were in want of customers. Since that time they have followed Jesus, that wicked heretic, who has taught them magic. The fellow understands necromancy, and is the greatest magician alive, as far as Rome itself."

Saint John, attacked by the satellites of Domitian, amongst whom the author has placed Longinus and Patroclus, gives regular answers to their insulting interrogatories. Some of these I shall transcribe, but leave to the reader's conjectures the replies of the saint, which are not difficult to anticipate.

Parthemia.—"You tell us strange things, to say there is but one God in three persons."

Longinus.—"Is it anywhere said that we must believe your old prophets (with whom your memory seems overburdened) to be more perfect than our gods?"

Patroclus.—"You must be very cunning to maintain impossibilities. Now listen to me: Is it possible that a virgin can bring forth a child without ceasing to be a virgin?"

Domitian.—"Will you not change these foolish sentiments? Would you pervert us? Will you not convert yourself? Lords! you perceive now very clearly what an obstinate fellow this is! Therefore, let him be stript and put into a great caldron of boiling oil. Let him die at the Latin gate."

Pesart.—"The great devil of hell fetch me, if I don't Latinize him well. Never shall they hear at the Latin Gate any one sing so well as he shall sing.

persecution. The persecution of the stage by the puritans, according to Disraeli,[1] had begun in the reign of Elizabeth, but it was not until they became the

Torneau.—"I dare venture to say he won't complain of being frozen.

Patroclus.—"Frita, run quick; bring wood and coals, and make the caldron ready.

Frita.—"I promise him, if he has the gout or the itch, he will soon get rid of them."

St. John dies a perfect martyr, resigned to the boiling oil and gross jests of Patroclus and Longinus. One is astonished in the present times at the excessive absurdity and indeed blasphemy which the writers of these Moralities permitted themselves, and, what is more extraordinary, were permitted by an audience consisting of a whole town. An extract from the "Mystery of St. Dennis" is in the Duke de la Valliere's "Bibliothèque du Théâtre François depuis son Origine. Dresden, 1768."

The emperor Domitian, irritated against the Christians, persecutes them, and thus addresses one of his courtiers:

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[1] At this epoch a great comic genius, Robert Cox, invented a peculiar sort of dramatic exhibition, suited to the necessities of the time—short pieces, which he mixed with other amusements, that these might disguise the acting. It was under the pretense of rope-dancing that he filled the Red-bull playhouse, which was a large one, with such a confluence that as many went back for want of room as entered. The dramatic contrivance consisted of a combination of the richest comic scenes into one piece, from Shakespeare, Marston, Shirley, &c., concealed under some taking title; and these pieces of plays were called "humors," or "drolleries." These have been collected by Marsh, and reprinted by Kirkman, as put together by Cox, for the use of theatrical booths at the fairs.

The title of this collection is "The Wits, or Sport upon Sport, in select pieces of Drollery, digested into scenes by way of Dialogue. Together with variety of Humors of several nations, fitted for the pleasure and content of all persons, either in Court, City, Country, or Camp. The like never before published. Printed for H. Marsh, 1662." Again printed for F. Kirkman, 1672. To Kirkman's edition is prefixed a curious print representing the inside of a Bartholomew-fair theatre. Several characters are introduced. In the middle of the stage a clown with a fool's cap peeps out of the curtain

government that in 1648 the theatres were suppressed because "stage plaies do not suit with seasons of humiliation." The ordinance of that year being en-

> "Seigneurs Romains, j'ai entendu
> Que d'un crucifix d'un pendu,
> On fait un Dieu par notre empire,
> Sans ce qu'on le nous daigne dire."
>
> Roman lords, I understand
> That of a crucified hanged man
> They make a God in our kingdom,
> Without even deigning to ask our permission.

He then orders an officer to seize on Dennis in France. When this officer arrives at Paris, the inhabitants acquaint him of the rapid and grotesque progress of this future saint:

> "Sire, il preche un Dieu à Paris
> Qui fait tous les mouls et les vauls.
> Il va à *cheval sans chevauls.*
> Il fait et defait tout ensemble.
> Il vit, il meurt, il sue, il tremble.
> Il pleure, il vit, il veille, et dort.
> Il est jeune et vieux, foible et forte.
> Il fait d'un coq une poulette.
> Il jeue des arts de roulette,
> Ou je ne sçais que ce peut être."

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with a label from his mouth "Tu quoque," which perhaps was a cant expression used by clowns or fools. Then a changeling, a simpleton, a French dancing-master, Clause the beggar, Sir John Falstaff and hostess. Our notion of Falstaff by this print seems very different from that of our ancestors. Their Falstaff is no extravaganza of obesity, and he seems not to have required, to be Falstaff, so much "stuffing" as ours does.

The argument prefixed to each piece serves as its plot; and, drawn as most are from some of our dramas, these "drolleries" may still be read with great amusement, and offer, seen altogether, an extraordinary specimen of our national humor. The price this collection obtains among book-collectors is excessive. In "The Bouncing Knight, or the Robbers Robbed," we recognize our old friend Falstaff, and his celebrated adventure. "The Equal Match" is made out of "Rule a Wife and Have a Wife;" and thus most. There are, however, some original pieces, by Cox himself, which were the most popular favorites; being characters created by himself, for himself, from ancient farces. Such were, "The Humors of John Swabber, Simpleton the Smith," &c. These remind us of the

titled "An act for the suppression of all stage plaies, and for the taking down all their boxes, stages and seats whatsoever, that so there might be no more plaies

> Sir he preaches a God at Paris
> Who has made mountain and valley.
> He goes a horseback without horses.
> He does and undoes at once.
> He lives, he dies, he sweats, he trembles.
> He weeps, he laughs, he wakes, and sleeps.
> He is young and old, weak and strong.
> He turns a cock into a hen.
> He knows how to conjure with cup and ball,
> Or I do not know who this can be.

Another of these admirers says, evidently alluding to the rite of baptism,—

> "Sire, oyez que fait ce fol prestre:
> Il prend de l'yaue en une escuele,
> Et gete aux gens sur la cervele,
> Et dit que partant, sont sauvés!"
>
> Sir, hear what this mad priest does:
> He takes water out of a ladle,
> And, throwing it at people's heads,
> He says that when they depart, they are saved!

This piece then proceeds to entertain the spectators with

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extempore comedy and the pantomimical characters of Italy, invented by actors of genius. This Cox was the delight of the city, the country, and the universities. Assisted by the greatest actors of the time, expelled from the theatre, it was he who still preserved alive, as it were by stealth, the suppressed spirit of the drama. That he merited the distinctive epithet of "the incomparable Robert Cox," as Kirkman calls him, we can only judge by the memorial of our mimetic genius, which will be best given in Kirkman's words: "As meanly as you may now think of these drolls, they were then acted by the best comedians; and I may say, by some that then exceeded all now living—the incomparable Robert Cox, who was not only the principal actor, but also the contriver and author of most of these farces. How I have heard him cried up for his John Swabber and Simpleton the Smith; in which he being to appear with a large piece of bread and butter, I have frequently known several of the female spectators and auditors to long for it; and once that well-known natural Jack Adams, of Clerkenwell, seeing him with bread and butter on the

acted." But, as the laws for the licensing of books produced exactly the reverse effect to the one sought, so the suppression went to increase the public appetite

the tortures of St. Denis, and at length, when more than dead, they mercifully behead him:—the saint, after his decapitation, rises very quietly, takes his head under his arm, and walks off the stage in all the dignity of martyrdom.

These wretched representations, while they prohibited the people from meditating on the sacred history in the book which contains it in all its purity and truth, permitted them to see it on the theatre sullied with a thousand gross inventions, which were expressed in the most vulgar manner, and in a farcical style. Warton observes: "To those who are accus-

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stage, and knowing him, cried out, 'Cuz! Cuz! give me some!' to the great pleasure of the audience. And so naturally did he act the smith's part, that being at a fair in a country town, and that farce being presented, the only master-smith of the town came to him, saying, 'Well, although your father speaks so ill of you, yet when the fair is done, if you will come and work with me, I will give you twelve pence a week more than I give any other journeyman.' Thus was he taken for a smith bred, that was, indeed, as much of any trade."

At this period, though deprived of a theatre, the taste for the drama was, perhaps, the more lively among its lovers; for, besides the performances already noticed, sometimes contrived at, and sometimes protected by bribery, in Oliver's time they stole into a practice of privately acting at noblemen's houses, particularly at Holland-house, at Kensington: and "Alexander Goffe, the woman-actor, was the jackall, to give notice of time and place to the lovers of the drama," according to the writer of "Historia Histrionica." The players, urged by their necessities, published several excellent manuscript plays, which they had hoarded in their dramatic exchequers, as the sole property of their respective companies. In one year appeared fifty of these new plays. Of these dramas many have, no doubt, perished; for numerous titles are recorded, but the plays are not known; yet some may still remain in their manuscript state, in hands not capable of valuing them. All our old plays were the property of the actors, who bought them for their own companies. The immortal works of Shakespeare had not descended to us, had Heminge and Condell felt no sympathy for the fame of their friend.—Diraeli, Curiosities of Literature, p. 283.

for dramatic amusement, and contributed to make it an institution which has claimed its recognition in the law, as well as in literature and in society.

tomed to contemplate the great picture of human follies which the unpolished ages of Europe hold up to our view, it will not appear surprising that the people who were forbidden to read the events of the sacred history in the Bible, in which they are faithfully and beautifully related, should at the same time be permitted to see them represented on the stage, disgraced with the grossest improprieties, corrupted with inventions and additions of the most ridiculous kind, sullied with impurities, and expressed in the language and gesticulations of the lowest farce." . . . However, they had their use; "not only teaching the great truths of scripture to men who could not read the Bible, but in abolishing the barbarous attachment to military games and the bloody contentions of the tournament, which had so long prevailed as the sole species of popular amusement. Rude, and even ridiculous as they were, they softened the manners of the people by diverting the public attention to spectacles in which the mind was concerned, and by creating a regard for other arts than those of bodily strength and savage valor."

Mysteries are to be distinguished from Moralities, and Farces, and Sotties. Moralities are dialogues where the interlocutors represented feigned or allegorical personages. Farces were more exactly what their title indicates; obscene, gross, and dissolute representations, where both the actions and words are alike reprehensible.

The Sotties were more farcical than farce, and frequently had the licentiousness of pasquinades. An ingenious specimen of one of these moralities is entitled, "The Condemnation of Feasts, to the Praise of Diet and Sobriety for the Benefit of the Human Body."

The perils of gorging form the present subject. Towards the close is a trial between Feasting and Supper. They are summoned before Experience, the Lord Chief Justice! Feasting and Supper are accused of having murdered four persons by force of gorging them. Experience condemns Feasting to the gallows, and his executioner is Diet. Feasting asks for a father confessor, and makes a public confession of so many crimes, such numerous convulsions, apoplexies, head-aches, stomach-qualms, &c., which he has occasioned, that his executioner, Diet, in a rage stops his mouth, puts the cord about his neck, and strangles him. Supper is only condemned to load

291. Literary matter designed for dramatic representation, appears, from the earliest times, to have been a shining prey for imitators and plagiarists.

his hands with a certain quantity of lead, to hinder him from putting too many dishes on table; he is also bound over not to approach dinner too near, and to be placed at the distance of six hours' walking under pain of death. Supper felicitates himself on his escape, and swears to observe with scrupulous exactness the mitigated sentence.

The Moralities were allegorical dramas, whose tediousness seems to have delighted a barbarous people not yet accustomed to perceive that what was obvious might be omitted to great advantage: like children, everything must be told in such an age; their own unexercised imagination cannot supply anything.

Of the farces the licentiousness is extreme, but their pleasantry and their humor are not contemptible. The "Village Lawyer," which is never exhibited on our stage without producing the broadest mirth, originates among these ancient drolleries. The humorous incident of the shepherd, who, having stolen his master's sheep, is advised by his lawyer only to reply to his judge by mimicking the bleating of a sheep, and when the lawyer in return claims his fee, pays him by no other coin, is discovered in these ancient farces. Bruyès got up the ancient farce of the "Patelin" in 1702, and we borrowed it from him.

They had another species of drama still broader than Farce, and more strongly featured by the grossness, the severity, and personality of satire. These were called Sotties, of which the following one I find in the Duke de la Vallière's "Bibliothèque du Théâtre François."

The actors come on the stage with their fool's-caps each wanting the right ear, and begin with stringing satirical proverbs, till, after drinking freely, they discover that their fool's-caps want the right ear. They call on their old grandmother, Sottie (or Folly), who advises them to take up some trade. She introduces this progeny of her fools to the World, who takes them into his service. The World tries their skill, and is much displeased with their work. The Cobbler-fool pinches his feet by making the shoes too small; the Tailor-fool hangs his coat too loose or too tight about him; the Priest-fool says his masses either too short or too tedious. They all agree that the World does not know what he wants, and must be sick, and prevail upon him to get some advice from a physician. The World obligingly sends what is required to an Urine-

Terence, in the prologue[1] to one of his plays, complains of a rival:

> Qui bene hortendo et easdem scribendo male
> Ex Græcis bonis Latinas fecit non bonas.
> Idem Menandri Phasma nunc nuper dedit,
> Atque in Thesaurio scripsit, causam dicere
> Prius unde in patrium auro qua resit suam,
> Quam illic qui petit, unde is sit Thesaurius sibi.

doctor, who instantly pronounces that "the World is as mad as a March hare!" He comes to visit his patient, and puts a great many questions on his unhappy state. The World replies, "that what most troubles his head is the idea of a new deluge by fire, which must one day consume him to a powder; on which the Physician gives this answer:

> "Et te troubles-tu pour cela?
> Monde, tu ne te troubles pas
> De voir ce larrons attrapars
> Vendre et acheter benefices;
> Les enfans en bras des Nourices
> Estre Abbés, Eveques, Prieurs,
> Chevaucher très bien les dieux sœurs,
> Tuer les gens pour leurs plaisirs,
> Jouer le leur, l'autrui saisir,
> Donner aux flatteurs audience,
> Faire la guerre à toute outrance
> Pour un rien entre les Chrestiens!"

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[1] Prol. in Eunuch. 7. "Who by translating plays verbally, and writing them in bad Latin, has made out of good Greek plays Latin ones by no means as good; just as of late he has published the Phasma of Menander, and has described (in the Thesaurus) him of whom the gold is demanded as pleading his cause why it should be deemed his own. . . . . After the Ædiles had purchased the Eunuch of Menander—the play which we are about to perform—he menaged to get an opportunity of viewing it," &c., &c. The Roman play-right, it appears, "borrowed" from the Greek, just as the English do from the French, and the Americans from the English.

The advertisement by the Latin author that he had "adapted" from the Greek, seems to have increased rather than diminished its reputation. Terence, at least, is not ashamed to confess it.

Non negat personas translutîsse in Eununchum suam Ex Graceâ, sed has fabulas faetas prius Latinas.

Doubtless, because of their greater immediate value, which, without necessitating their printing and publishing through the press, renders them in

> And you really trouble yourself about this?
> Oh World! you do not trouble yourself about
> Seeing those impudent rascals
> Selling and buying livings;
> Children in the arms of their nurses
> Made Abbotts, Bishops, and Priors,
> Intriguing with girls,
> Killing people for their pleasures,
> Minding their own interests, and seizing on what belongs to another,
> Lending their ears to flatterers,
> Making war, exterminating war,
> For a bubble, among Christians!

The World takes leave of his physician, but retains his advice; and to cure his fits of melancholy gives himself up entirely to the direction of his fools. In a word, the World dresses himself in the coat and cap of Folly, and he becomes as gay and as ridiculous as the rest of the fools.

This Sottie was represented in the year 1524.

Such was the rage for Mysteries, that René d'Anjou, King of Naples and Sicily, and Count of Provence, had them represented with all possible magnificence, and made them a very serious occupation. Being in Provence, and having received letters from his son, the Prince of Calabria, who asked him for an immediate aid of men, he replied, that he had a very different matter in hand, for he was fully employed in settling the order of a mystery—in honor of God.

Mr. Strutt, in his "Manners and Customs of the English," has given a description of the stage in England when Mysteries were the only theatrical performances. Vol. iii., p. 130:

"In the early dawn of literature, and when the sacred Mysteries were the only theatrical performances, what is now called the stage did then consist of three several platforms, or stages raised one above another. On the uppermost sat the Pater Cœlestis, surrounded with his Angels; on the second appeared the Holy Saints, and glorified men; and the last and lowest was occupied by mere men who had not yet passed from this transitory life to the regions of eternity. On one side of this lowest platform was the resemblance of a dark, pitchy cavern, from whence issued appearance of fire and flames; and when it was necessary, the audience were treated

modern times, possibly the most lucrative of literary productions, the rights and privileges of dramatic production have latterly engrossed much attention of

with hideous yellings and noises as imitative of the howlings and cries of the wretched souls tormented by the relentless demons. From this yawning cave the devils themselves constantly ascended to delight and to instruct the spectators—to delight, because they were usually the greatest jesters and buffoons that then appeared; and to instruct, for that they treated the wretched mortals who were delivered to them with the utmost cruelty, warning thereby all men carefully to avoid the falling into the clutches of such hardened and remorseless spirits." An anecdote relating to an English mystery presents a curious specimen of the manners of our country, which then could admit of such a representation. The simplicity if not the libertinism of the age was great. A play was acted in one of the principal cities of England, under the direction of the trading companies of that city, before a numerous assembly of both sexes, wherein Adam and Eve appeared on the stage entirely naked, and performed their whole part in the representation of Eden, to the serpent's temptation, to the eating of the forbidden fruit, the perceiving of and conversing about their nakedness, and to the supplying of fig-leaves to cover it. Warton observes they had the authority of scripture for such a representation, and they gave matters just as they found them in the third chapter of Genesis.

One of the most elegant moralities was composed by Louise L'Abé, the Aspasia of Lyons in 1550, adored by her cotemporaries. With no extraordinary beauty, she however displayed the fascination of classical learning, and a vein of vernacular poetry, refined and fanciful. To accomplishments so various she added the singular one of distinguishing herself by a military spirit, and was nicknamed Captain Louise. She was a fine rider and a fine lutanist. She presided in the assemblies of persons of literature and distinction. Married to a rope-manufacturer, she was called La belle Cordière, and her name is still perpetuated by that of the street she lived in. Her anagram was Belle à Soy. But she was belle also for others. Her morals in one point were not correct, but her taste was never gross. The ashes of her perishable graces may preserve themselves sacred from our severity, but the productions of her genius may still delight.

Her morality entitled "Débat de Folie et D'Amour—The

courts and legislative bodies.[1] We have already remarked that, whereas the value of other literary productions depends upon the ability of its author or

contest of Love and Folly," is divided into five parts, and contains six mythological or allegorical personages. This division resembles our five acts, which, soon after the publication of this morality, became generally practiced.

In the first part, Love and Folly arrive at the same moment at the gate of Jupiter's palace, to a festival to which he had invited the gods. Folly observing Love just going to step in at the hall of the festival, pushes him away and enters in first. Love is enraged, but Folly insists on her precedency. Love, perceiving there was no reasoning with Folly, bends his bow and shoots an arrow; but she baffled his attempt by rendering herself invisible. She in her turn becomes furious, falls on the boy, tearing out his eyes, and then covers them with a bandage, which could not be taken off.

In the second part, Love, in despair for having lost his sight, implores the assistance of his mother; she tries in vain to undo the magic fillet; the knots are never to be untied.

In the third part, Venus presents herself at the foot of the throne of Jupiter to complain of the outrage committed by Folly on her son. Jupiter commands Folly to appear. She replies, that though she has reasons to justify herself, she will not venture to plead her cause, as she is apt to speak too much, or to omit what is material. Folly asks for a counsellor, and chooses Mercury; Apollo is selected by Venus. The fourth part consists of a long dissertation between Jupiter and Love, on the manner of loving. Love advises Jupiter, if he wishes to taste of truest happiness, to descend on earth, to lay down all his majesty and pomp, and, in the figure of a mere mortal, to seek to give pleasure to some beautiful maiden: "Then wilt thou feel quite another contentment than that thou hast hitherto enjoyed: instead of a single pleasure, it will be doubled; for there is as much pleasure to be loved, as to love." Jupiter agrees that this may be true, but he thinks that to attain to this, it requires too much time, too much trouble, too many attentions—and that after all it is not worth them.

In the fifth part, Apollo, the advocate for Venus, in a long pleading demands justice against Folly. The gods, seduced by his eloquence, show by their indignation that they would

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[1] Vid. Collier, "Annals of the Stage," iii., p. 427.

proprietor to multiply copies, the value of a dramatic work consists wholly in his power to prevent such a multiplication.

292. Nor will the author's composition, by being in a dramatic form, lose any of its literary character. Besides all the privileges which attach to it as literary property, its proprietor has the additional and

condemn Folly without hearing her advocate Mercury. But Jupiter commands silence, and Mercury replies. His pleading is as long as the adverse party's, and his arguments in favor of Folly are so plausible, that when he concludes his address, the gods are divided in opinion; some espouse the cause of Love, and some that of Folly. Jupiter, after trying in vain to make them agree together, pronounces this award:

"On account of the difficulty and importance of your disputes, and the diversity of your opinions, we have suspended your contest from this day to three times seven times nine centuries. In the meantime we command you to live amicably together, without injuring one another. Folly shall lead Love, and take him whithersoever he pleases: and when restored to his sight, after consulting the Fates, sentence shall be pronounced."

Many beautiful conceptions are scattered in this elegant Morality. It has given birth to subsequent imitations; it was too original and playful an idea not to be appropriated by the poets. To this Morality we perhaps owe the panegyric of Folly by Erasmus, and the Love and Folly of La Fontaine. Disraeli's Curiosities of Literature, p. 131.

The "Chester Mysteries" were performed during the mayoralty of John Arneway, who was incumbent at Chester from 1268 to 1276. The first speaking drama "Della Passione di nostro Signor Jesù Christo," was written in Italy, by Guilliano Dati, Bishop of San Leo, about 1445. And in France the Miracle Play of "Un Jeu" is assigned by M. Legrand to the thirteenth century.

To the Mysteries succeeded the Moralities, a species of drama involving more art and skill and more suited to public presentation than the Miracle Plays, which were mere parodies of sacred subjects, and which were not unlike the old comedy of the Greeks. These, it seems, were more political than religious. Sir David Lindsay wrote, in 1539, a Morality entitled "The Satire of the Three Estates."

further privileges which its dramatic character bestows. This second right which arises in addition to copyright, in favor of the dramatic author, has, not inaptly, been termed Stageright, and it would be correct therefore to speak of an author of a romantic work, as in reality possessing three rights in his work, namely, his common-law right, his copyright, and his stageright. For, as we shall presently see, the tendency of two very recent decisions[1] in the United States is to resurrect a great portion of the first right, in the absence of the second, while the present copyright law permits authors to reserve the right to dramatize their own works, in which case the third right would obtain.

293. Dramatic Copyright or Stageright was, chronologically, the last right of authors to be recognized by statute. From the passing of the English copyright act of Anne, in 1710,[2] the authors of dramatic as well as of other literary composition could indeed enjoy a copyright in their work, could prevent the publication of their manuscripts, or multiplication of copies thereof;[3] but whoever became possessed of their productions, and chose thereafter to transcribe it for representation upon the stage, could seemingly do so with perfect impunity.[4] It was not until the statute of William, known as Sir Bulwer Lytton's act,[5] that the author or the assignee of the author of any tragedy, comedy, farce, or any other dramatic piece or entertainments composed, and not printed or published,

[1] Palmer v. De Witt, 47 N. Y. 532; 7 Amer. 480; Crowe v. Aiken, 2 Bish. 208.

[2] 8 Anne, ch. 9.

[3] Macklin v. Richardson, Amb. 694.

[4] Coleman v. Mathews, 5 T. R. (D. & E.) 245; Crowe v. Aiken, 2 Biss. 208.

[5] 3 & 4 William iv. c. 15.

had the sole right, in British dominions, to the profits of his own labor.

In the United States, the copyright act of 1831 was silent as to dramatic composition, and it was not until 1856[1] that the right of the dramatic author was completely recognized and protected.

The present copyright law,[2] after reciting the various individuals and kinds and sorts of works to whom its protection is extended, adds, "And in the case of a dramatic composition the author shall have the sole liberty of publicly performing or representing it, or causing it to be performed or represented by others."

294. The only publication known in the case of the literary compositions we have been considering is a multiplication of copies by mechanical process. With dramatic composition, however, the publicity sought is one by means of representation upon the stage. The dramatic author, therefore, enjoys the privilege extended to the author of no other class of composition, of copyrighting his manuscript, and thenceforward to prevent its piracy by a multiplication, not of copies, but of representations of its contents, a privilege we have seen in addition to and not in diminution of any of the other privileges to which, as an author, he is entitled.[3]

295. The copyright of a manuscript play may be made to consist in the entry of its title[4] in the office of the librarian of congress. If the play should ever be printed, it seems probable that two copies thereof should be forwarded to that office; at any rate, it would

[1] Act of 1856, ii. Stat. at L. 138.
[2] Sec. 86, Laws of 1870. See Revision of 1873–74, § 4952.
[3] See 1 Shortt, L. L., p. 114.
[4] Vid. also Boucicault v. Ward, 2 Biss. 34.

be safe to do so, though the authorities do not appear to be clear as to whether it is absolutely necessary, privately printed matter occupying, as we have seen, the status of manuscripts before the law. If such deposit were necessary at all, it would probably be on the ground that the copyright laws invariably require copies of the "best edition" of a work to be deposited. If the play be actually published, of course, the mere previous registration of its title would not be sufficient, but the two copies must be forwarded, a neglect to do so involving a liability upon the part of its proprietor, as we have already seen, to a fine of twenty-five dollars, to be recovered by the librarian of congress in an action of debt, but not invalidating any of the author's rights in his manuscript. But as between a manuscript and a printed copy, the latter would be the "best edition." This, however, has never been expressly decided.

296. In the consideration of dramatic copyright it may be convenient to inquire:

I. What may be a subject of protection as a dramatic work;

II. What constitutes a publication, and what a dedication of such work;

III. What adjuncts, incidents, circumstances, and accompaniments of the composition or representation will be protected by the copyright;

IV. What will constitute an infringement upon or a piracy of a dramatic composition; and

V. Who will be liable for such infringement or piracy.

297. I. A dramatic production is a production intended to be publicly performed or represented upon a stage, and before an audience for profit. Such a production may be a play, a piece of music which is

rendered by an artist, a pantomime, or a trick, or a written introduction[1] to any of these.

It was decided in England, in Bach v. Longman,[2] long previous to the dramatic copyright act,[3] that written music was within the copyright of Anne; but up to the time of the passing of 5 & 6 Victoria, chapter 45, the author was unable to restrain the unauthorized public performance of his compositions by others. Lord Mansfield, in the case which decided that music was within the act of Anne, said: "A person may use the copy by playing it; but he has no right to rob the author of the profit by multiplying copies, and disposing of them to his own use." The author is now placed on a level, in this respect, with the author of dramatic pieces commonly so called.

An introduction to a pantomime, which is the only written part of such an entertainment, is a dramatic piece within the protection of this act.[4] It is not correct to say that such an introduction is not an entire and complete piece.[5]

Where a person is employed by another, to write, for reward paid to him, a musical composition, to be used as part of the representation of a dramatic piece, and as a mere accessory to such dramatic piece, the composer of the musical accessory has no copyright therein. The property in music so composed, becomes vested in the employer, and he does not require the consent of the composer in order to rep-

[1] Lee v. Simpson, 3 C. B. 871.
[2] Cowp. 623.
[3] 3 & 4 Wil. iv. c. 15.
[4] Lee v. Simpson, 3 C. B. 871.
[5] 3 C. B. 881, 882. And as to what is a dramatic entertainment within 6 & 7 Vict. c. 68, which extended the provisions of Sir Bulwer Lytton's act to musical compositions, vid. Day v. Simpson, 18 C. B. N. S. 680.

resent it. This was decided in the case of Hatton v. Kean,[1] where the plaintiff had been employed by the defendant to compose certain music to be performed during and as a part of the representation of three of Shakespeare's plays. The musical composition was held to have become the property of Mr. Kean, and the plaintiff was held never to have been, within the language of the statute, the owner or proprietor thereof. This case was followed and approved in Wallenstein v. Herbert,[2] where the composer of the musical accessories was employed to find an orchestral band, to procure and pay all the musical performers, and furnish all the musical instruments, to provide, lead, and perform overtures and entr'acte music, and the music incidental to the dramatic performances. In performance of his duties under this engagement, he composed the music for a drama called "Lady Audley's Secret," and it was held that he had no copyright in such music.[3]

A pianoforte score of an opera is an independent musical composition, separate and distinct from the opera itself; and where such pianoforte score has been arranged by a person other than the composer of the opera, it is incorrect to register the score as the composition of the composer of the opera.[4]

[1] 7 C. B. N. S. 268; 29 L. J. 20, C. P.; 1 L. T. N. S. 10.

[2] 16 L. T. N. S. 435. 15 W. R. 838.

[3] So in Keene v. Wheatley (9 Amer. Law Reg. 47), where A., in the general theatrical employment of B., was engaged in the office of assisting in the adaptation of a play for representation, and B. was held to be the proprietor of the alterations so made, as products of his intellectual exertions in a particular service in his employment; on the principle that where an inventor, in the course of his experimental essays, employs an assistant who suggests and adapts a subordinate improvement, it is in law an incident or part of the employer's main invention. See *ante*, vol. I. p. 374.

[4] Per Cockburn, C. J., in Wool v. Boosey (L. Rep. 2 Q. B.

Whether a pianoforte arrangement of the score of an opera executed without the consent of the composer of the opera would be an infringement of his copyright therein, has not been in England expressly decided. In Wood v. Boosey, Kelly, C. B., on appeal,[1] says, "No doubt it is a piracy of the opera, and the composer may maintain an action against the adapter or the publisher of the adaptation;" but it was not necessary to decide the point in that case.

It was the question also in Russel v. Smith whether[2] the term "dramatic production" could properly be extended to the case of a song relating to the burning of a ship at sea, and the escape of those on board, and describing their feelings in vehement language—sometimes expressing them in the supposed words of the suffering parties. The court held that it did: that the act,[3] while declaring that a "dramatic piece" includes "tragedy, comedy, play, opera, farce, or" any other scenic, musical, or dramatic entertainment, "comprehends any piece which could be called dramatic in its widest sense; any piece which, on being presented by any performer to an audience, would produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience, and that the absence of scenes and appropriate dresses and a regular theatre has been urged for the defendant. But we should take away a part of the protection conferred on authors if we held

340; 7 B. & S. 86; 15 L. T. N. S. 530; 36 L. J. 103, Q. B.; affirmed on appeal, L. Rep. 3 Q. B. 223; 9 B. & S. 175; 37 L. T. 31 Q. B.; 18 L. T. N. S. 105). See also D'Almaine v. Boosey, 1 T. & C. 288.

[1] 18 L. T. N. S. 108, L. Rep. 3 Q. B. 223; 37 T. J. 84 Q. B. 16 W. R. 485. Vid. also D'Almaine v. Boosey, 1 T. & C. 288.

[2] 12 Q. B. 217.

[3] Sect. 2 of 5 & 6 Vict. c. 45.

that there could be no public representation without these accompaniments."[1]

The whole question is simplified, however, in the United States by the present copyright act, which expressly enumerates, among the works entitled to copyright,[2] a musical composition. Delivered lectures, not being enumerated, must be relegated, for their protection, to the common-law and statutory rights now possessed by authors in their manuscripts.[3] And this, probably, whether the lecture be delivered for profit or not, or whether a fee in the form of a stated price of admission, or of a collection or subscription; and that a lecturer using his lecture as a means of extending his reputation or his professional practice, will be as much entitled to legitimate protection if he makes his lectures free, as if he demanded a fee per capitum, at the door.

298. As in all other cases of copyrightable matter, the dramatic composition must be innocent in its nature.

The cases of Martinetti v. Maguire, and Maguire v. Martinetti,[4] had regard to the somewhat famous spectacular drama known as "The Black Crook." The bill of Martinetti in the suit in which he was complainant, charged that on the 17th day of October, 1866, in the city of New York, one James Schonberg composed and copyrighted a dramatic composi-

[1] A song was held to be a dramatic production also, in Clark v. Bishop, 1872, Ex. 25 L. T. 907; Planché v. Braham, 1 Jur. 823; 8 C. & P. 68; 4 Bing. (N. S.) 17; De Penna v. Pal-hill, 8 C. & P. 78. So also music, Wallerstein v. Herbert, 16 L. T. N. S. 453; 15 W. R. 835; Storace v. Longman, note to Clementi v. Golding, 2 Camp. 27.

[2] U. S. States Revision of 1873–4, § 4952.

[3] See ante, vol. I., pp. 393 *et seq.*

[4] Deady's R. 216.

tion called "The Black Rook," which was then and there assigned to the complainant, proprietor of the Metropolitan Theatre, in the city of San Francisco; that the defendants surreptitiously procured a manuscript copy of one of complainant's employees, and changing the name of the drama from "The Black Crook" to "The Black Rook," and making various slight alterations in its dialogues and incidents, and changing the names of the characters, produced the same at Maguire's Opera House, in the same city, just as complainants were about to bring out the same at their (the Metropolitan) theatre.

The cross-bill of Maguire and others, charged, on the other hand, that one Charles M. Barras, in the city of New York, composed a play, about July 1, 1866, which he called "The Black Crook." That the said play was exhibited at Niblo's Theatre, in that city, in September of that year, and for a long time continuously thereafter, and that about March 25, 1867, the right to perform the said play in the state of California was assigned or conveyed to said Maguire and others. It further charged that the James Schonberg mentioned in the first bill was employed by the defendants Martinetti and others to attend the exhibition of "The Black Crook" at Niblo's, and take down the play in short-hand from the mouths of the actors, and that the defendants Martinetti and others were about to exhibit the same under the name of "The Black Rook," in the city of San Francisco, to complainant's damage, &c.

The question, being principally one of fact, as to which was original and which imitation, is hardly of moment to our present examination; but the decision of the California circuit is valuable as to other points.

The court held that "The Black Rook" was a

colorable imitation of "The Black Crook," and that the injunction prayed in the cross-bill, under ordinary circumstances, would have been granted, although, had Martinetti have become possessed by legal methods of his copy of the play, his possession being prior to the assignment to Maguire, he (Martinetti) would have had the legal right to represent and produce the same.

But it appearing that the Black Crook was merely a spectacle, with a scant and meaningless dialogue, "a sort of verbal machinery tacked on to a succession of ballet and tableaux," that "the principal part and attraction of the spectacle" was "the exhibition of women in novel dress or no dress, and in attractive attitudes or action,"[1] the court (Deady, J.) held that such spectacle was not a "dramatic composition" within the meaning of the act of congress.[2] "To call such a spectacle a dramatic composition, is an abuse of language," said the court, "and an insult to the English drama; a menagerie of wild beasts or an exhibition of model artistes, might as justly be called a dramatic composition."

The court also held that the spectacle in question was not "suited for public representation within the meaning of those words, in the act providing that a dramatic composition, to be entitled to be copyrighted, should have this qualification." "I do not for a moment suppose or pretend," said the court, "that congress has power to interfere directly and prescribe a standard of good morals on this subject." But the benefit of copyright is a privilege conferred

[1] "The closing scene is called 'Paradise,' and as witness Hamilton expresses it, consists mainly 'of women lying about loose,' a sort of Mohammedan paradise, I suppose, with imitation grottos and unmaidenly houris." Opinion of Deady, J., Deady's R. p. 221.

[2] 4 Stat. 436; 11 Stat. 138.

by congress, in pursuance of the constitution of the United States. In conferring this privilege or monopoly upon authors or inventors, I suppose that it is both proper and constitutional for congress so to legislate as to encourage virtue, and to discourage immorality. It is the solicitude of congress to secure the morality of the citizen. In order to be naturalized under the laws of congress, the applicant is obliged to prove that for five years prior to such application "he has behaved as a man of g od moral character;"[1] besides, the power to pass what are called copyright and patent laws is expressly conferred upon congress, to enable it to promote the progress of science and useful arts.[2] And, it appearing, in the above case, that the drama known as "The Black Crook" was one "only attractive in so far as it pandered to a prurient curiosity or an obscene imagination by very questionable exhibitions and attitudes of the female person," the court held that it was entitled to no protection under the statutes of copyright. And so, too, equity will interfere to enjoin the representation of a play which is libellous in its nature.[3]

299. II. Simultaneously with the inquiry as to what will constitute the publication of dramatic composition, it will be found convenient to examine what has been very recently held in two cases[4] to be the common-law rights of dramatic authors in the United States.

Under the English and American statutes of copyright the publication of a dramatic work consists in its public representation for profit. If not preceded

[1] 2 U. S. Stat. 154.

[2] Cons. U. S., art. 158, subd. 8; and see ante, vol. i. pp. 35–47.

[3] Stageright, by John Coryton, App. p. viii; and see ante, vol. i. p. 202.

[4] Palmer v. DeWitt, 47 N. Y. 532; 7 Amer. 480; Crowe v. Aiken, 2 Biss. R. 208.

by the formal registration of its title, such publication, if made with the author's consent, is undoubtedly a dedication to the public.[1]

The sale of a play to parties, with a view to its public representation, makes the seller a participant in causing the play to be publicly represented.[2]

In Toole v. Young,[3] which arose in England, under the statute 3 & 4 Will. 4, c. 15, sections 1 and 2, one H. wrote and published a novel, which he afterwards dramatized, subsequently assigning the resulting drama, which was never printed, published, or represented upon the stage, to the plaintiff. Thereafter one G., in ignorance of H.'s drama, also dramatized the novel in a different form, and assigned his drama to the defendant, who represented it on the stage. Upon the plaintiff's seeking to recover for the representation, it was held that A. having published his novel, any one might dramatize it; and, although the two dramas were founded upon the novel written by H., the representation upon the stage of the drama written by G. was not a representation of the drama written by H. and that plaintiff could not restrain or recover for such representation.

The fact that a play has been performed in a public theatre before it is offered for registration in the proper office, will not affect the validity of the copyright.[4] Nor does the performance 'constitute such a publication as will make a deposit of the copies, required by law to be made within a given time, necessary.[5]

In England, in Boucicault v. Delafield,[6] where

[1] Daly v. Palmer, 6 Blatchf. 257.

[2] L. R. 9 Q. B. 523.

[3] Boucicault v. Delafield, 9 Jur. N. S. 1282; 33 L. J. 38 ch. 12 N. R. 101.

[4] Roberts v. Myers, 13 Month. Law Rep. (N. S.) 396.

[5] Id. [6] *Ubi supra.*

the plaintiff sought to restrain the unauthorized representation of a dramatic piece—"The Colleen Bawn"—composed by him and first performed in New York, but duly registered at Stationers' Hall on the day of its first representation in England, it was held, that if the plaintiff had been an American, and had first represented his piece in England, he would have been entitled to the benefit of the provisions of the dramatic copyright act; that if any person chooses to publish his performance in a country which has not entered into any treaty or made any such arrangement with regard to copyright with England, then that country has nothing more to say to him; he must be taken to have elected under which of the two statutes with regard to copyright he wishes to come, by performing his work in one country instead of the other, and he is thereby excluded from all advantage of publishing in the other. "I cannot see," said the court, "anything to justify me in restricting the provision, or to enable me to say that it applies to foreigners and does not apply to British subjects. The object of the legislature seems to have been in these cases to secure in this country the benefit of the first publication, and if it extended to any other country the same benefit, it was only to be on certain conditions, namely, that reciprocity should be afforded, and that the representation should take place for the first time in England. I am bound, therefore, to hold that Mr. Boucicault's right fails."

300. But a late case in the United States is more generous. All rights of action, at law and in equity, conferred by the copyright laws of the United States, it was there held, may accrue before actual publication of the work,[1] and the provisions, in the various

[1] Boucicault v. Wood. 2 Biss. 34.

statutes of copyright, to the effect that no person shall be entitled to their protection, unless he gives information of his copyright by causing to be inserted in each copy of each edition of his work a notice to that effect, cannot be construed as depriving an author of his right to copyright his manuscript, or of his action for injury previous to publication.[1]

According to the two very recent cases before alluded to, it appears, first, that an alien dramatic author in the United States practically and in effect receives precisely the same protection in his literary property as the citizen can receive in his; and, second, that by neglecting to comply with our copyright laws the alien dramatic author can actually enjoy greater privileges of protection in his literary property than he could by complying with them.

Such, at least, would seem to be the practical effect of two recent decisions—the one in the court of appeals of the state of New York, and the other in the United States circuit court for the seventh judicial circuit.

The first of the above decisions was in Palmer v. De Witt.[2] In that case it appeared that, previous to 1868, one T. W. Robertson, a resident of London, and a citizen of Great Britain, composed a drama called "Play," of which he assigned, on the 1st day of February in that year, one Palmer, theatrical manager of the city of New York, by instrument in writing, "the exclusive right of printing, publishing, performing, enacting, representing, and producing," &c., "throughout the United States." On and after the 15th day of February, 1868, the drama of "Play" was publicly performed in London at the

[1] Boucicault v. Wood, 2 Biss. 34.
[2] 47 N. Y. 532; 7 Amer. 480.

Prince of Wales theatre, and subsequently at the Fifth-avenue theatre, in the city of New York. On the 25th day of March, 1868, one De Witt, a publisher in the city of New York, printed and sold copies of the drama in question, not obtaining or pretending to have obtained the same of or through the memory of one who had witnessed its public performance; it appeared to be, so far, settled that one may memorize a performance, and afterwards make any use of it he pleases.[1]

Upon this state of facts the court of appeals held: First, that the resident American assignee was the literary proprietor of the composition; second, that its representation upon the stage in this country was not a waiver of his rights as such; and third, that—it never having been published in print by its assignee—the publication by De Witt was an infringement, for which the assignee could recover.

The court did not pass upon the question whether De Witt might not have represented the uncopyrighted drama upon the stage, that question not being before it. But in Crowe v. Aiken,[2] the question as to the representation did fairly and distinctly present itself. In that case, the play "Mary Warner," also the composition of an alien author, which had been written for a British actress, and performed upon a British stage, appears to have been assigned to the plaintiff, an alien, who came to the United States for the sole purpose of producing it, having obtained, in addition to the assignment, "license to perform the same in the United States for the term of five years." Meantime,

[1] Macklin v. Richardson, Amb. 694; Wallack v. Barney Williams, MS. N. Y. S. C., 1867. See this rule doubted, *post*, this chapter.

[2] 2 Biss. R. 208.

however, the publisher De Witt, before mentioned, had procured and printed "Mary Warner," as he had previously procured and printed "Play," and had sold a copy thereof to the defendant Aiken, the proprietor of a theatre in the city of Chicago, who had caused it to be publicly performed therein. Held, that its production by Aiken was an infringement upon the common-law right of the assignee to his literary property.

Now, the effect of these two decisions, taken together—since, according to the first, the composition cannot be printed and sold, and, according to the second, it cannot be represented on a stage without its proprietor's permission—is, undoubtedly, that an alien dramatic author in this country receives precisely the same protection in his literary property as the citizen receives in his.

Previously, in 1860, had occurred the case of Keene v. Wheatley.[1] This was the case of the comedy "Our American Cousin," originally composed (as were the others) in London, for representation at a London theatre. But, upon its being assigned to Miss Laura Keene, she, unfortunately for herself, proceeded to copyright the manuscript play, under the act of congress, before producing it on the stage. Upon its proving a success, other and rival establishments to Miss Keene's managed to procure and produce versions of the comedy, which establishments she brought various suits to enjoin, among them being the one entitled as above.

Now, upon this state of facts, precisely the same as in the cases we have just been examining—except that Miss Keene complied with the copyright laws of the United States where the others did not—the court

[1] 9 Am. Law Reg. 33.

held that a resident alien could not copyright the works of a non-resident alien, and, therefore, that Miss Keene could not restrain, on that ground, any one who wished to do so from performing the comedy "Our American Cousin," which she had purchased, and for which she had paid. Miss Keene, indeed, prevailed in the case against Wheatley, upon her common-law rights; but her copyright was ignored. It seems to follow, therefore, that since that the citizen dramatic author is obliged to pay a nominal fee to the office of the librarian of congress to obtain the protection for his play, which the alien dramatic author thus receives without the payment of any fee at all (for so far as his protection goes "it makes no difference whether he does or does not comply with our copyright laws"), by neglecting to comply with our copyright laws, he (*i. e.* the alien author, or his assignee, who stands in his place) can actually enjoy greater privileges of protection in his literary property than he could by complying with them. It is difficult to see how an alien could obtain anything more than a perfect protection in his literary property, even though he obtain it through an assignee, and not personally. He is a poor author, indeed, who cannot procure an assignee.[1]

[1] In the London Athenæum of October 3rd, 1874, and the New York Herald of December 8th, of the same year, and in the Forum Law Review, January, 1875, this writer, in commenting upon this rather startling result of the decisions in the cases alluded to in the text, ventured the following reflections:

"The absence of a treaty of international copyright between the two English-reading and English-speaking nations of the world—Great Britain and the United States—and of any mutual legislation whereby the literary property of citizens of either can be protected in the other, has given rise to an inconsistency in the practical working of the common

301. The general rule that a composition, to be protected, must be original, applies to dramatic as to all other classes of composition. It has been seen that law, when called upon to pronounce concerning the interests involved.

"In the United States, this inconsistency appears to take the form of a discrimination against the citizen, and in favor of the alien, and may, for convenience sake, be stated in two propositions.

"These propositions are—first, that an alien dramatic author in this country, practically and in effect, receives precisely the same protection in his literary property as the citizen receives in his; and, second, that by neglecting to comply with our copyright laws he can actually enjoy greater privileges of protection in his literary property than he could by complying with them.

"Whatever may be thought of this law as law—and it is difficult to see how it could well be otherwise than as it is—and whatever may be thought of our statutes of copyright, it is not surprising that the above paradoxical and anomalous condition of things—namely, a law which gives to an alien, as of course and freely, what it denies to the citizen, except upon his compliance with certain formulæ and upon payment by him of a certain fee, and a law which rewards its own breach rather than its own observance (a condition of things arising, be it remembered, from the construction of those statutes, by application of principles of common law), should lead a lay newspaper (N. Y. Express, Nov. 11, 1874) to exclaim that they were 'a stultification' and 'a curiosity;' for it cannot well be public policy for a nation to discriminate against its own citizens; and where it can be shown that, by declining to pass a certain law or laws, statute or statutes, or to negotiate a certain treaty or treaties, a nation is in effect putting a premium upon alienage, and a discouragement and a penalty upon citizenship—it would seem to prove, or at least to suggest very strongly, that such laws, statutes, and treaties were desirable, expedient, and necessary." In those three papers he contended that the remedy for this state of things lies, and lies only, in the negotiation by the Congress of the United States and the Crown of Great Britain of a treaty of, or by otherwise securing an international copyright. And it was difficult to see how any other legislation would meet the case; and urged, besides, a number of reasons why it seemed to him that such a policy was unquestionably to the interest of both nations."

an original work is one which is the bona fide product of original mental labor, either primarily, in the compositions of the imagination, fancy, reason, or research; or secondarily in the form of translation, re-arrangement, abridgment, annotation, or commentary, of or upon, the composition of a predecessor.

In the case of dramatic composition there is but one variation of this rule. The dramatic arranging of another man's composition involves, undoubtedly, original mental labor as well as a knowledge of the usages and requirements of the stage. But it would be manifestly unfair to allow an author's romance or fiction to be deliberately appropriated by another author merely because the second happens to be a writer of plays. It is a question whether imaginative material, any more than such historical and scientific, can ever be publici juris, but at all events, the common law having preserved silence upon this point, the statute has stepped in and declared that an author may reserve to himself the right to dramatize his own work, and impliedly that if he does not so reserve it, it will become publici juris, the property of the public.

302. In another view, the works of the dramatic author are not to be too strictly judged by the rule. A palpable following of the plot of a story, with only colorable variations, is not to be tolerated in this case any more than in any other. But the law will be very chary of its injunction in a case where only the outline of a plot or incident be followed. The case of Daly v. Palmer,[1] which we shall consider further on, only went so far as to hold that the fact that the leading incident of a story had been copied into a drama did not make that drama publici juris to such an extent that it could be itself copied at will; but the question

[1] 6. Blatchf. 256.

whether the drama itself was a piracy of the story was not before the court. There is scarcely a play of Shakespeare, of which the plot is not taken bodily from some tale or history extant and popular in his day. Thus his King John, Richard II., Henry IV., V., VIII., are taken from Holinshed's Chronicles; incidents in King John, Henry IV. and V. being taken from still earlier plays of the same name. Henry VI. is taken from Hall's Chronicle, Macbeth from Holinshed's History of Scotland, while King Lear is taken partly from Holinshed historically, while the literary matter and incident is arranged from an older play of the same name—from Sidney's Arcadia, and from Higgins' Queen Cordila, in the Mirror for Magistrates, and so on.[1]

In Reade v. Lacy,[2] the plaintiff sued to restrain publication of the play, "Never too Late to Mend," an alleged dramatization of his novel of that name. But the pure question of dramatic originality was not presented to the court, it appearing that the plaintiff, before composing his novel, had used the incident employed in it in a play called "Gold," and it was held that, even if the play, "Never too Late to Mend," was a fair adaptation of the novel of that name, it was an infringement on the copyright in the plaintiff's play of "Gold."[3]

303. In an action for piracy of a romantic work by dramatization, the animus furendi of the subsequent author, would undoubtedly be taken into view,[3] though to what extent—in the case of this class of composi-

[1] "Shakespeare's Library," Collier, London, 1843.

[2] J. & H. 524.

[3] Trusler v. Murray, 1 East. 363; Jeffreys v. Baldwin, Barb. 164; Jerrold v. Houlston, 3 K. T. J. 716, 3 Jur. (N. S.) 1051; Reade v. Lacy, 1 J. & H. 524. *Vid.* chapters on Originality and on Piracy, in this work.

tions—other or further than has been already shown to be the rule in the case of all other literary productions, has not yet particularly appeared.

304. III. As to what adjuncts, incidents, accompaniments, and circumstances are protected by the copyright of a play:

Whether the copyright will cover the title of the play, there appears to be as yet some doubt. A title is more of the nature of a trade-mark than of copyright. In the case of the mere copyright of a title, whether bona fide or not, where no further steps are taken to publish the thing so entitled, the subsequent use of that title by an actual publication we do not think would be held to be an infringement. Such was the rule laid down in Isaacs v. Daly,[2] where the plaintiff had copyrighted the title "Charity," alleging that he was about to produce a play of that name; and the defendant unknowingly did thereafter actually produce a drama so entitled.[3]

In Leech v. Freligh, the bill prayed for an injunction restraining the defendant from causing to be represented at the Bowery Theatre, in the city of New York, a drama under the title of "Around the World in 80 Days," which plaintiffs claimed was an infringement of a composition of the plaintiffs, of which he had copyrighted—as had the plaintiff in Isaacs v. Daly—a title, "Round the World in 80 Days," the title-page of the last-named drama having been duly filed in the office of the librarian of congress, under copyright law. It was admitted in the argument that both dramas were adaptations from the

[1] Reported in N. Y. Times, March 3d, 4th, and 5th, 1874. And see *ante*, vol. II. pp. 219, *et seq.*; p. 228, § 256. *Vid.* also Upman v. Elkan, 20 W. R. 131; S. R. 12 Eq. 140; 19 W. R. 367.

French of Jules Verne's work styled "Le Tour du Monde dans Quatre Vingt Jours:" held, that no injunction would lie.[1]

305. In Isaacs v. Daly,[2] the plaintiff had copyrighted in the office of the librarian of congress the title of a play written or to be written by him, which title consisted of the single word "Charity." Subsequently to this, the defendant, proprietor of the Fifth Avenue Theatre, in the city of New York, purchased or otherwise procured from one W. S. Gilbert—the author of a play also called "Charity," at that time being represented at a theatre in the city of London—the right to produce, at his Fifth Avenue Theatre, the play "Charity." Accordingly, it was announced in the New York newspapers for a certain night, advertised by posters, and the usual preparations of scenery, effects, and the like, went on at Mr. Daly's theatre. But on the day upon the evening of which the first representation was to have been given, a motion was made by Isaacs, who, without claiming that the "Charity" of Mr. Gilbert was a copy of any infringement upon his "Charity," alleged his previous copyright of the name.

As we have already seen,[3] the court held that the name of an abstract virtue, which was publici juris, could not be so exclusively copyrighted by a dramatic author, that another proprietor of dramatic matter could not affix the same name to his work, if in good faith he chose to do so.

"There may be," said Curtis, J., "occasions when a title is made use of in bad faith, or to promote some

[1] Unreported motion for a temporary injunction, April 14, 1875, U. S. Circuit Court for the Southern District of New York, decided by Judge Shipman, April 22, 1875.

[2] See *ante*, this volume, p. 219.

[3] *Ante*, this volume, p. 219.

imposition, or to inflict a wrong, when a court of justice should interfere to prevent its use, or to compensate a party who has in consequence sustained an injury. But the present case does not appear to be one where the court is called upon to interfere for any of these reasons. Both parties having acted in good faith, it would be inequitable to subject the defendant to loss, who has prepared for representation, and advertised Mr. Gilbert's play under the name of 'Charity.'"

"Nothing is shown by which it appears that the plaintiff would sustain a loss by changing the name of his play, if he desired to do so; and I do not find any case where the court has granted a plaintiff, under the circumstances appearing in the papers, the relief he seeks by the present application. The motion for an injunction must be denied, with costs."

The rule was thus laid down in Isaacs v. Daly, that a mere title could not be copyrighted so as to entitle the copyrighter to an injunction against the publication of a literary or dramatic work by that name; and that where one writes and copyrights a play, but neglects, or is unable to secure its representation upon the stage, and meanwhile another play by the same name is written, copyrighted, and represented, that the latter play will not be deemed an infringement of the former, from the mere coincidence in the names. But in that case the name chosen in both cases was "Charity." It might possibly have made a difference if the name had been one peculiar and unusual, such as would not be likely to occur from a mere coincidence; as for instance, if each had called his play "Arrah na Pogue," or "London Assurance," or "Meg's Diversion." This rule might be said to be sound in law for another reason, namely, that where

each of two individual rights are equally valid, the right of the public must control. And so, even if each party had equal right to the name of the play, the one who should first make that name valuable to the public by producing his play should, on grounds of public policy, prevail.

A like principle obtains in the law of patents. In Hart v. Little,[1] it was held that alleged sketches of an invention, not preserved or accounted for, and not followed up by a reduction of the invention to practice, are not sufficient to establish priority of invention. Where one is first to conceive of an invention, but throws aside all evidence of the conception, makes no effort to complete, or introduce the invention to the public, and delays making application for a patent for nearly four years, he has no standing as an inventor. He who first reduces an invention to practice, and first puts it upon the market, is prima facie the inventor.[2]

[1] Official Gazette of the U. S. Patent Office, vol. 7, p. 962. And see Rees v. Bullock, Id. 39.

[2] William S. Carr, 5 Id. 30; Clark and Osborne, 5 Id. 667. The opinion of the court in Osgood v. Allen (U. S. Official Gazette, &c., vol. 3, p. 124) is very conclusive as to the question of titles. Said Shepley, J.: The complainants are the proprietors and publishers of an illustrated magazine for boys and girls, entitled "Our Young Folks," which has been published monthly, in the city of Boston, under the same title, since December, 1864. Previous to the publication of the first number, the publishers duly entered the title of their magazine for securing the copyright thereof. The publication and sale have been continued in regular monthly numbers by the firm of Ticknor & Fields and their successors, including the complainants, and the copyright of each number was taken out and secured according to law, previous to its publication. Complainants allege that when the copyright of the first number was taken out, the title, "Our Young Folks," had not been adopted and was not in use for any other similar publication, and has not been used for any other similar publication since,

And again, it is not difficult to see that, were the rule otherwise, the provision in our law allowing copyright of the name of a literary work,

except by the defendant; that they have expended large sums of money in publishing and selling the same; that by reason of their expenditure and the care and skill by them bestowed, the magazine has acquired an extensive and valuable reputation throughout the United States and elsewhere as a publication for young people, under the title of "Our Young Folks," and was a source of profit to complainants.

The respondent, a publisher at Augusta, Maine, announced by advertisements and otherwise that he would publish on the first and fifteenth days of each month, commencing October 1, 1871, an illustrated publication for young people, under the title "Our Young Folks' Illustrated Paper."

It is admitted that he accordingly did issue a very large edition of his illustrated publication, a copy of which is filed with the proofs in the case, and that, upon demand by the complainants before publication, he refused, and still refuses, to withdraw the announcement of the publication or to change the title, and has published and sold large numbers under said title. The complainants claim that they are entitled to a remedy under the law of copyright, and also that they have a right to the exclusive use of the name "Our Young Folks," as indicating a periodical, according to the doctrine of trade-marks as applied to the protection of literary publications. It is apparent upon inspection, and not disputed, that the publications of the complainants and the respondent are in no respect the same or even similar, except in the use by both of the words "Our Young Folks" as a part of the title. The title of the one on the title page is "Our Young Folks: an Illustrated Magazine for Boys and Girls;" of the other, "Our Young Folks' Illustrated Paper." Both are illustrated periodicals for the young. The reading matter and the illustrations are not the same or similar.

Copyright laws are designed for the encouragement of learning by securing to authors and their representatives the exclusive right to the publication of their literary compositions, as patent laws secure to inventors certain exclusive rights in their discoveries. The constitution conferred upon congress the power to promote the progress of science and the useful arts "by securing for limited times to authors and inventors the exclusive rights to their respective writings and

might become a license for bad faith, trickery, and blackmail. In such a case, one learning that a play or novel was in course of preparation in England or

discoveries." Accordingly, in 1790, congress passed an act for the encouragement of learning by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned.

This act provided that the author and authors of any map, chart, book, or books . . . "shall have the sole right and liberty of printing, reprinting, publishing, and vending such map, chart, book, or books for fourteen years from the time of recording the title thereof." The remedy provided by this statute was a right of action given to the proprietor of the copyright against any person who, without his consent, should publish, sell, or expose to sale, or cause to be published, sold, or exposed to sale, any copy of such map, chart, book, or books.

The act of 1870, "to revise, consolidate, and amend the statutes relating to patents and copyrights," provides that the author . . . or proprietors of any books, &c., shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same.

The nineteenth section provides that no person shall be entitled to the benefit of the act unless he shall, before publication, deposit in the mail for the librarian of congress a printed copy of the title of such book, and shall, within ten days after publication, mail to the librarian two copies of such copyright book. The remedy of the author or proprietor under this statute is against the person who, without the consent in writing of the proprietor of the copyright, shall print, publish, or import, or knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such book.

By the plain terms of the statute, the copyright protected is the copyright in "the book," the word "book" being used to describe any literary composition. Although a printed copy of the title of such book is required before the publication to be sent to the librarian of congress, yet this is only as a designation of the book to be copyrighted, and the right is not perfected under the statute until the required copies of such copyright book are, after publication, also sent. It is only as a part of the book, and as the title to that particular literary

France, for example, to bear a certain title, might hastily prepare and print a title-page of a supposititious play, with that same title; register it in the office of

composition, that the title is embraced within the provision of the act. It may possibly be necessary in some cases, in order to protect the copyrighted literary composition, for courts to secure the title from piracy, as well as the other productions of the mind of the author in the book. The right secured by the act, however, is the property in the literary composition, the product of the mind and genius of the author, and not in the name or title given to it. The title does not necessarily involve any literary composition; it may not be, and certainly the statute does not require, that it should be the product of the author's mind. It is not necessary that it should be novel or original. It is a mere appendage, which only identifies and frequently does not in any way describe the literary composition itself, or represent its character. By publishing, in accordance with the requirements of the copyright law, a book under the title of the life of any distinguished statesman, jurist, or author, the publisher could not prevent any other author from publishing an entirely different and original biography under the same title. When the title itself is original and the product of the author's own mind, and is appropriated by the infringement, as well as the whole or a part of the literary composition itself, in protecting the other portions of the literary compositions courts would probably also protect the title. But no case can be found, either in England or this country, in which, under the law of copyright, courts have protected the title alone separate from the book which it is used to designate. In Jollie v. Jacques, 1 Blatchford, 627, Mr. Justice Nelson says: "The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it as certainly as the principal carries with it the incident." The only doubt expressed by Mr. Justice Nelson in that case is how the question might be decided in case of a valid copyright of a book and an infringement of the title by the defendant. While expressing no opinion upon this question, the reasoning by which he arrives at the conclusion that when the book fails to be protected the title goes with it would seem clearly to point to a similar result in a case of alleged infringement of copyright of the book, namely, that if there was no piracy of the copyrighted book, there could be no remedy under the

the librarian of congress, at Washington; and thenceforth, without ever having written a play of that name, prevent the representation of the French or English act for the use of a title which could not be copyrighted independently of the book. The injunction granted in the case of Hogg v. Kirby, 8 Vesey, 215, was not founded on copyright, but on the power a court of equity has to restrain one person from carrying on a trade or from publishing a work under a fraudulent representation that such trade or work is that of another. The chancellor (Lord Eldon) in the opinion in that case says: "In this case, protesting against the argument that a man is not at liberty to do anything which affects the sale of another work of this kind, and that because the sale if affected, therefore there is an injury (for if there is a fair competition by another original work really new, be the loss what it may, there is no damage or injury), I shall state the question to be, not whether this work is the same, but in a question between these parties whether the defendant has not represented it to be the same; and whether the injury to the plaintiff is not as great and the loss accruing ought not to be regarded in equity upon the same principles between them as if it was in fact the same work. Upon the point whether the work was in fact meant to be represented to the public as the same, I do not say that it is not a question proper for a jury." In the case of Jollie v. Jacques, Mr. Justice Nelson declined to consider the question whether the court will interfere to prevent the use of a title in fraud of the plaintiff upon principles relating to the good-will of trades, because, in the case before him, both parties were residents, and, for aught that appeared in the case, citizens, of New York, and therefore independently of copyright, the court had no jurisdiction in the case.

In the case before this court the bill is filed by complainants as citizens of the commonwealth of Massachusetts, against the defendant, a citizen of Maine. Relief is sought not only under the law of copyright, but upon the general ground of equity as related to the good-will of trades and the doctrine of trade-marks. It becomes necessary for the court to determine, in this case, how far the complainants are entitled to a remedy upon these grounds of equity jurisdiction, and upon the general principles governing courts of equity jurisdiction. Property in the use of a trade-mark or name has very little analogy to that which exists in copyrights or

play in this country. The absence of good faith in such a case might be very difficult to prove, and equity perhaps powerless to interfere.[1]

patents for inventions. In all cases where rights to the exclusive use of a trade-mark are invaded, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another. It is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. Canal Company v. Clark, 13 Wallace, 311, 322; words or devices may be adopted as trade-marks, which are not original inventions of the one who adopts and uses them. Words in common use may be adopted, if, at the time of adoption, they were not used to designate the same or similar articles of production. A generic name, or a name merely descriptive of an article of trade, or its qualities or ingredients, cannot be adopted as a trade-mark so as to give a right to the exclusive use of it. The office of a trade-mark is to point distinctively to the origin or ownership of the article to which it is affixed. Marks which only indicate the names or qualities of products cannot become the subjects of exclusive use, for from the nature of the case any other producer may employ, with equal truth and the same right, the same marks for like products. Geographical names which point out only the plan of production, and not the producer, cannot be appropriated exclusively, so as to prevent others from using them and selling articles produced in the districts they describe under these appellations. In the case of Brooklyn White Lead Company v. Masury, 25 Barbour, 416, the court said, that as both plaintiff and defendant dealt in the same article, and both manufactured it at Brooklyn, each had the same right to describe it as Brooklyn white lead.

Lord Langdale, master of the rolls, well expresses the whole law of trade-marks by names in the case of The Collins Company v. Cowen, 3 Kay & Johns. 428. He says: "There is no such thing as property in a trade-mark as an abstract name. It is the right which a person has to use a certain name for articles which he has manufactured, so that he may prevent another person from using it, because the mark or name denotes that articles so marked were manufactured by a

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[1] See *post*, chapters on Newspapers and Dramatic Copyright.

306. As in other cases, the main question will be as to the good faith. If the defendant, in the suit we have been just examining, had taken the title "Charity" for the purpose of deceiving the public, we cannot doubt that the ruling would have been a different one. So in the case of Daly v. Hooley,[1] decided by the United States circuit and district judges in San Francisco: the plaintiff Daly had produced at the Fifth

certain person, and no one else can have the right to put the same name upon his goods and then represent them to have been manufactured by the person whose mark it is. Applying these principles to the case before the court, the question presented on this branch of the case is whether the defendant has so simulated the mark of the complainant as to deceive the public, so that the public will naturally mistake his publication for that of the complainant."

Complainants aver that defendant, fraudulently designing to procure the custom and trade of persons who are in the habit of buying their magazine, and to induce them and the public to believe that his publication is in fact the complainants', and in order to obtain for himself the benefit of the reputation of complainants' publication, advertises, prints, and offers for sale his publication under that title, and alleges thereby the public will be deceived by the title, and led to purchase respondent's publication under the belief that it is the magazine of the complainants. The agreed statement of facts is silent on the question whether the public are deceived or are in danger of being deceived as alleged. And whether the customers of the complainants or the public are induced to believe, or are in danger of being induced to believe, that respondent's publication is in fact the complainants' and thereby led to purchase the respondent's magazine under the belief that it is the complainants'.

The case will therefore be referred to a master to ascertain and report the fact upon the foregoing questions to the court, and further proceedings in the case will be stayed until the coming in of the master's report.

[1] Unreported as yet. See Wilkes' Spirit of the Times (New York). June 12, 1875. See also the case of a play concerning the title, "Bertha, the Sewing Machine Girl," or imitations thereof, Foster v. Wood, decided in Philadelphia, but unreported.

Avenue theatre, in the city of New York, a dramatic piece called "The Big Bonanza," a free adaption—not a translation—of a German play "Ultimo." Daly, first of all, claimed the title, which he had first applied to a dramatic work, and had duly copyrighted. The principal feature of the play, as represented in New York, was that its characters were more or less interested in the stock exchange, and used upon the stage the jargon or dialect of that institution, which up to that time had not been done upon the stage. The defendant in San Francisco subsequently imitated it, calling his play at different times "Bonanza," "Buying Bonanza," "Ultimo, or The Big Bonanza," "Ultimo the Original of The Big Bonanza;" but the court sustained the plaintiff in his copyright title, as a designation peculiar to his play.

Secondly, the plaintiff claimed to have copyrighted his own original idea of adapting "Ultimo" to American life and manners. For example, there is no Big Bonanza in the German Ultimo; no New York; no San Francisco; none of the argot of the New York exchange; no miners' talk; none, as he claimed, of those popular elements which made the success of the play at the plaintiff's theatre. Entirely original scenes, besides, were written in by the plaintiff. There does not appear to be any authorized report of this case, but if, as it is asserted, the California court held that the idea, even of making a German piece American, can be copyrighted and held as a property, it is indeed a long stride in advance of the preceding decisions, and indicative of the existing tendency, to which we have before alluded, to make the protection accorded to authors absolute.

307. The question as to copyright of titles of

prospective works has been already examined.[1] A person copyrighting the title of a drama not original with himself, cannot obtain a right to that title to the exclusion of others who have previously, and before the date of his copyright, applied the same title to a dramatic composition founded on the same romance or story.[2] Benn v. Le Clerc, decided in 1873, was a suit in equity to restrain defendants from the infringement of plaintiffs' copyright, by representing a play called "The New Magdalen." The title of the play copyrighted by the plaintiffs was in these words: "The New Magdalen, a drama in a prologue and three acts, adapted from Wilkie Collins's celebrated novel of the above title, by Walter Benn, author of sundry Dramatic Works, with Directions, Cast of Characters, &c." It appeared, in defense, that Wilkie Collins, an English author, had made and published a novel with the title of "The New Magdalen," and it was alleged that at the time of the deposit of title by the plaintiff, Mr. Benn, he had composed a drama under the same title, partly adapted from the novel so far as it was published, and partly anticipating the novel, when the novel should be published. It was proved that, before the deposit of the title by Benn, Mr. Collins was himself engaged in a dramatization of his own novel.

Said the court (Shipley, J.): "In this case a bill in equity was brought to enforce rights claimed by the plaintiff, Mr. Benn, under a copyright. On the 28th of February, 1873, he deposited with the librarian of Congress the title of a drama substantially in these words: 'The New Magdalen, a Drama in a Prologue and

[1] *Ante*, and see *post*, chapter on Newspapers.

[2] Benn v. Le Clerc, 18 Int. Rev. Record, 93, May 17, 1873.

Three Acts, adapted from Wilkie Collins's celebrated Novel of the above title, by Walter Benn, author of sundry Dramatic works, and with Directions, Cast of Characters, &c.' This is the title. It is not 'The New Magdalen' alone, but it is the whole title as filed and recorded. By this deposit, undoubtedly, Mr. Benn would have secured the dramatic composition bearing the title he had deposited, so far as it was original with him, provided he subsequently complied with the other provisions of the statute requisite to be performed to perfect the copyright. But, in securing this product of his mind, the dramatic composition of which he is the author, he secures that only. And the rule applied in this court in numerous cases, applies here also. He secures only that which was his own. He cannot prevent others from composing or publishing a similar book on the same subject, provided that they do not pirate from his copyrighted book, but rely on their own intellect and mental power.

"The rule is familiar, and the present case forms no exception to it. The complaint sets forth that defendant not only acts and represents a drama with the same title, but that it contains the same cast of characters, and that this cast is secured to him by the copyright. There is no evidence of this, for there is no evidence of the cast of characters of the complainant's play, and no evidence that complainant's play has ever been performed at any place where defendants could have seen and copied it.

"It appears in defense, that Wilkie Collins, a celebrated English author, has made and published a novel under the title of 'The New Magdalen.' And, at the time of the deposit of title by Mr. Benn, it is claimed that he had composed a drama under the same title, partly adapted from the novel so far as it was pub-

lished, and partly anticipating the story of the novel, where the novel was not published. It was proved that, before the deposit by Mr. Benn of the title, Mr. Collins had gone very far in the completion of this drama. It is clear, then, that Mr. Benn cannot be the originator of the title of the drama complained of. It was not original with him as a product of his own mind, nor was it original as the title of a drama, for it was applied to an original drama by Mr. Collins, before Mr. Benn deposited it for copyright. The case, then, presents this simple question: Can a person who deposits in the copyright office the title of a drama not original with himself, secure to himself such title to the exclusion of others, who have applied such title to a dramatic composition founded on the same story, before the date of such deposit? The statement of the proposition is its refutation. In Osgood v. Allen[1] (the case on the proprietorship and use of the words 'Young Folks,' as a title or part of a title to a magazine or newspaper), this court held as follows, and it sees no reason to change or reverse the doctrine there affirmed. It must not be understood that the court will not protect a title in any case. Cases may occur in which a title would be protected, independently of the contents of the book. But they would not occur under the copyright laws. They would occur under the common-law provisions, which protect the stamp put on goods offered for sale, and the protection would be analagous to that granted in case of trade-marks. In that case it must be shown that the defendant has pirated an original title, original with the copyrighter, not a title taken from the composition of the same class or character to which another author had already

[1] 3 Official Gazette, Patent Office, 124; 4 Amer. Law Times, O. S. 20, reported *ante*, p. 309, *n.*

appropriated it. Now Mr. Collins cannot be charged with piracy of the title in this case, for he had used it as a title for a novel and a drama, before Mr. Benn conceived the idea of depositing it for copyright. No such state of facts as that under which the court would prohibit the use of title, exists here. The dramatic composition of plaintiff has not been represented. It follows from this, that the injunction must be denied."

308. It has been held that the copyright of a play will cover and include the music, the action, the letter-press, text, or speech, or any portion thereof. It cannot include the protection of the use of any mechanical contrivance, however, for facilitating the flow of the action, though, as it will appear further on, it will include the incident represented on the stage by the use of such contrivance. Thus in Freligh v. Thompson,[1] Thompson, one of the defendants, had been an actor in the employment of one Freligh, proprietor of the Bowery Theatre, in the city of New York. While there, he had been employed as the principal actor in a play called "On Hand," in which the action around which the interest of the play centres is as follows: the actor, Thompson, is represented to be the keeper of a drawbridge over a running stream, over which draw is laid a railway track. Among the passengers upon a train of cars which is approaching and about to run over this track are certain persons against whom the villain of the play is supposed to have an enmity, and whose lives he seeks. This villain contrives, in the absence of Thompson, to open this draw, and to leave it in this condition, in

[1] Unreported. First circuit and eastern district of N. Y., William B. Freeligh against John Thompson, Carroll and McCloskey, December, 1871.

order that the approaching train may be precipitated into the water. He then disappears. Meanwhile, the rumbling of the train is heard growing louder and louder, when Thompson appears in a boat, takes in the situation at a glance, climbs up on the bridge and turns the draw back into its place, just in time to allow the train to pass over it in safety.

This play had been copyrighted by the complainant, who sought to enjoin the defendant Thompson and the proprietor of another theatre from representing it, except in his (the complainant's) theatre. Upon argument, the court (Benedict, J.) held that the mechanical contrivance composing the drawbridge over the running water, and the train moving thereupon, could not be protected by the copyright of the play, but was a proper subject for a patent.

This case differs somewhat from the case of Daly v. Palmer,[1] though resembling it in many of its features, which we shall presently consider.

309. We have ventured, heretofore, certain suggestions as to what may be considered unconscious or legitimatized plagiarism, in examining the question of originality. The question comes up with much more regularity in the case of dramatic productions. There is scarcely a theatre in the land which does not employ one or more clever men who provide matter for its stage from whatever material in literature or real life they happen to light upon. And legitimately, too, for if, in the exact sciences, no man can copyright geometrical figures, such as a triangle, a circle, or a square, or numbers, or combinations or periods of numbers, it would seem, a fortiori, that they could not do so in the wide and untrammeled region of romantic incident.

[1] 6 Blatchf. 256. See *post*, p. 322.

Now Dr. Johnson appeared to believe that one might travel in the beaten path, so long as he did not tread precisely in his predecessor's foot-steps, without committing plagiarism. Let us suppose, however, for example, that A. writes a novel, in which the interest centres upon the machinations of a rich and influential personage in love with a lady who does not return his affection; who causes her brother to be apprehended (through the services of an informer), sentenced, and transported as a felon, and then procures his pardon in order to convince the lady of his magnanimity, and to merit her obligations. Subsequently B. publishes a romance containing a highly wrought scene where a great temptation is brought to bear upon a holy recluse, to tell a lie to save the life of one he loves very dearly. Subsequently still, C. composes a story in which, through the services of a good-natured vagabond and his faithful dog, a young gentleman (who has been foster-brother to the vagabond) is saved from hazardous perils, and ultimately married to a heroine. D. meanwhile produces a drama in which, while certain actors are speaking its dialogue on a stage representing the interior of a building—the scenes shift before the eyes of the audience so as to bring them upon its exterior, or where one actor is shown digging into a stone wall from the outside, while another is digging out of the same wall from the inside; while thereafter, E., a poet, writes a poem, wherein a young army officer, sent by his government to apprehend a rebel, falls deeply in love with the rebel's sister, and is compelled to struggle between love and duty.

Now let us further suppose that F. and G. are playrights, ever on the alert for a novelty. F., we will say, brings out at his theatre a drama comprising any

three of the above incidents, while G. mounts at his, a spectacle comprising any four of them.

The question then arises are F. and G. pirators upon A., B., C., D., and E., or upon any of them? If they had copied the story or drama or poem of any one of the five, would they have been infringers upon all, in such a sense as that an action would lie (A., B., C., D., and E. holding copyrights, let us say, in their compositions)? Again, supposing that F. discovers the similarity which exists between his production and G.'s, and sues G. for piracy? The question as to the beaten path, or as it has been termed "the romantic incident," as can be readily seen, becomes intricate and perplexing.[1]

310. The case of Emerson v. Davies[2] enunciated the doctrine of "literary equivalents;" the case of Daly v. Palmer[3] propounds a doctrine of "romantic equivalents," analogous to the doctrine of mechanical equivalents of the patent or mechanical law, and appears to be the first which recognizes and establishes a property in an incident. This latter came upon an application for a provisional injunction to restrain the defendant from the public performance and representation of a scene called "the railroad scene" in a play called "After Dark." The plaintiff alleged in his complaint, on or before the first day of August, 1867, had composed and written a dramatic composition

[1] As these pages are going to press, the case of Boucicault v. Hart, as to the originality of the Shaugraun, and therefore as to plaintiff's right to restrain the performances of the Skibbeah (which, it is admitted, is pretty much the same thing), is before the circuit court of the United States in this city (N. Y.). Meanwhile, a temporary injunction has been granted to the plaintiff Boucicault.

[2] 3 Story, 768.

[3] 6 Blatchf. 256.

called "Under the Gaslight," which he had duly copyrighted on that day, and publicly represented in the city of New York, for the first time, on the 12th of August of the same year. He alleged further that the drama became very popular and profitable, and that its popularity and profitableness were mainly due to what was known as the railroad scene, in which one of the characters is represented as secured by another, and laid helpless upon the rails of a railroad track in such manner and with intent that the train, which is represented to be momentarily expected, shall run over and kill him, and—just at the moment when the train approaches, and such a catastrophe seems inevitable—another of the characters contrives to reach the intended victim, and to drag him from the track, as the train rushes in and passes over the spot where he lies. The plaintiff further alleged that this scene and incident was entirely novel and new, and unlike any dramatic incident known to have been theretofore represented on any stage, or invented by any author previous to its invention by the plaintiff. That one Dion Boucicault, a dramatic author, and actor, and theatrical manager, a subject and resident of Great Britain, had procured a copy of the play, by some means, and prepared therefrom a play which is called "After Dark," introducing therein several scenes and incidents, and the attractive features of plaintiff's play but slightly and colorably only, and among others, the said railroad scene, only varying the same, by making the surface railroad of "Under the Gaslight" an under ground railroad in "After Dark:" for the rescuer of the victim a man instead of a woman: for the railroad station in which the rescuer was confined, a cellar, and for the breaking down a door to escape and rescue the victim, the breaking down a wall or a door in the

wall, and that the said play of "After Dark" was advertised to be performed in New York, &c., &c.

The defense to the application was confined to showing, by affidavits that the following matters, namely, a representation on a stage of a train of cars drawn by a locomotive engine on a railroad, a like representation where the train appeared to run over a man lying on the track, and a like representation wherein the train appeared to run over a man lying on the track, who had been thrown thereon by another of the characters in order that he might be run over and killed, were known prior to the taking out by the plaintiff of his copyright. A story called "Captain Tom's Fright," published in the "Galaxy" magazine for April, 1867, was also produced by the plaintiff, in which the interest centres in the binding of a man to a railroad track, who sees in the distance the head-light of a locomotive rapidly approaching him. He screams for help. The train comes nearer and nearer; the track trembles at its approach; the light glares in his eyes; the hot breath of the engine is in his face; he swoons from terror; the wheels are within a foot of his head: but the engine and train passes on a side track temporarily laid down for repairs in the main track upon which the man was bound. The answer rested here, not denying any of its allegations of plagiarism or colorable imitation. This play of "After Dark" was printed by the author for his own private use, but never published. It was also contended that these contrivances, or what are called sensations or tableaux of the drama, were not of a literary, but of a mechanical order, and not subject to the protection of the statute of copyright, and that the scene, to be protected in any other form than the form laid down in the plaintiff's drama, with its exact set of stage directions,

and its series of incidents, and dialogue, and presence of characters, must be protected by patent for the machinery, and design patents for the scenery and properties. The opinions of classical English writers and essayists were read to show that, in their opinion, these mechanical adjuncts to the drama were a deteriorating literature, and therefore the copyright acts "to advance science and the useful arts"[1] did not apply.

The defendants also raised the technical point that the title of the book registered by the plaintiff, was "Under the Gas-light, a Romantic Panorama of the streets and houses of New York," whereas the title of the printed play filed as an exhibit to show what had been infringed, was "Under the Gaslight, a totally Original and Picturesque Drama of life and love in these Times," claiming that the protection of the statute had been lost by this change of title.

The court (Blatchford, J.) granted the injunction, thus appearing to hold that a dramatic incident or situation is a subject of copyright, independent of the language of the characters, surroundings of the stage, or method of literary treatment. That, in the dramatic copyright act of 1856, the word "acting" imports representing by countenance, voice, or gesture as real, that which is not real; and that, therefore, a pantomime is subject of copyright; and hence, that to merely change the method of indicating the process of events on the stage from pantomime to narrative does not evade the statute; and that the dramatic copyright act of 1856 protected the representation of a copyright play in whole or in part, and, under it, the representation of a single scene is an infringement.

The court further held, in this case, that the substance of a dramatic composition consists in the series

[1] Constitution U. S. art. 1, § 8.

of events, directed in writing, by the author; that therefore stage directions, and the movements of actors in conformity thereto, are protected by its copyright; and that if the events, even of a single scene, are copied by another, without variation or change of sequence in their constituent parts, it amounts to an infringement.

And lastly, the court held two other important points, namely, that the sale of a play for representation makes the vendor a participant in the representation, and an injunction will issue against the sale of a plagiarized scene as well as against its representation; and that the words of description added to the title filed in the clerk's office to secure copyright, may be changed in the published work, without loss of copyright.

311. The mere employment of an author to write a play, even where the subject is suggested by the employer, does not constitute the employer a joint author. To constitute joint authorship, the production must be the result of a preconcerted joint design. Mere alterations or improvements by another person, with or without the sanction of the author, will not constitute the other person a joint author.[1]

In Keene v. Wheatley, which was the case of the comedy, "Our American Cousin,"[2] originally com-

[1] Levi v. Rutey, L. R. 6; C. P. 523.

[2] No right of property is recognized in any of the above-mentioned works except what this act confers. Section 19 enacts, "that neither the author of any book, nor the author or composer of any dramatic piece or musical composition, nor the inventor, designer, or engraver of any print, nor the maker of any article of sculpture, or of such other work of art as aforesaid, which shall after the passing of this act be first published out of her majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the

posed in England, for representation at a London theatre, difficulties of adoption preventing its performance there, its author, for value, sold and assigned the play to Miss Laura Keene, an American lady. She thereupon adopted measures for procuring a copyright, and, in so doing, performed all such acts prescribed by statutes of the United States as were necessary where the matter was not in print. She adapted the play to representation in her theatre in Philadelphia, with the assistance of one Joseph Jefferson, an actor of her company, to whom the principal character was assigned, and made sundry extensive and important alterations and additions, at his suggestion. Besides this, Jefferson, in the course of its performance, was in the habit of interpolating speeches and phrases, for the repetition of which he trusted to his memory alone. The defendants, also proprietor of a theatre in Philadelphia, managed, however, to possess themselves of a copy of the original manuscript in England, and performed the same. The court held, upon the above facts, that the writer's additions to the play were simply accessions, and belonged to the complainant, as the actor who was their author, and who furnished them, was in her

public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this act."

This enactment applies equally to British and to foreign authors who first publish their books or publicly represent their dramatic compositions abroad. And though no convention has been made with the foreign country in which a dramatic piece has been performed, and so a compliance with the requisites of 7 & 8 Vict. c. 12, is impossible, the author, though a British subject, is not entitled in this country to any copyright in his drama if it has been first represented abroad. *Vid.* however, Routledge v. Low, L. Rep. 3 H. L. Cas. 100; 18 L. T. N. S. 874; 34 L. J. 454 Ch.

[1] 9 Am. Law Reg. pp. 23, 45.

employ; and if the proprietorship of the unwritten additions did not exist in the proprietor of the play itself, it could not exist in anybody.

312. IV. The earliest instance in which the intervention of law was implored for the purpose of restraining a rival performance, appears to have been in England, in 1387, when the Choristers of St. Pauls presented a petition to Richard II., praying "that certain ignorant persons be prohibited from acting the history of the Old Testament, to the prejudice of the clergy of the church, who had expended considerable sums upon a public representation projected for the Christmas holidays next ensuing, founded upon that portion of scripture."[1] The first reported case in which a dramatic composition came before a court for protection, occurred about four hundred years later, in Macklin v. Richardson, in 1770. In that case the plaintiff was author of a farce entitled "Love a la Mode," in two acts, which was performed by his permission several times at different theatres in successive years, but never printed or published by him. When the performance of the farce was over, he had been in the habit of taking the copy away from the prompter; and whenever it was played at benefits or on other particular occasions, plaintiff had been in the habit of charging a certain sum for its performance, to the beneficiaries on those occasions.

Meanwhile the defendants, who were proprietors and publishers of a magazine, employed a short-hand writer upon several occasions to proceed to the theatre and take down the words of this play, and thereupon published the first act of "Love a la Mode" entire, in an issue of their magazine; giving also, at the same time, notice that the second act would be contained in

[1] Collier, Annals of the Stage, vol. i. p. 17.

the succeeding number. Lord Commissioner Smythe consented to enjoin such publication, holding, very clearly, that the representation of a play is not such a publication, or such a dedication of it to the public, as will destroy the author's rights therein as to a purely literary composition; that is to say, that he would still possess the right, after such public representation, to publish and sell copies of his composition, should he desire to do so. And neither would it affect his right to its continued representation.

In this earliest case in the reports, was enunciated the doctrine which has been followed substantially ever since, namely, that the publication of a play by representation before an audience is not such a dedication of it to the public as would destroy, abridge, or in any wise affect the author's rights therein as to a purely literary composition, that is to say, his right to print, publish, and sell the same for his own benefit. Neither is it such a dedication, according to this precedent, as will destroy his further right to its continual representation, though there is a conflicting opinion upon this point in the case of Keene v. Wheatley, which will be noticed further on in this chapter.

313. In Coleman v. Wathen,[1] in 1793, which appears to have been the second case in the reports in which dramatic copyright came before the courts, it having been preceded only by Macklin v. Richardson,[2] in 1770, a new and elaborate question arose, for which they were entirely unprepared.

Plaintiff had purchased the copyright of a play or entertainment known as "The Agreeable Surprise," from its author, O'Keefe, the comedian, and proceeded

[1] 5 Term R. 245.
[2] Amb. 694.

to represent it upon the stage of his theatre, when it was unexpectedly and concurrently produced and represented by the defendant at a neighboring and rival theatre.

The name of the play itself seems to have been ominous, for, upon the case coming into court, an "agreeable surprise" was in store, not only for the plaintiff, but for the law and for equity itself. It appeared—how we are not told, but it seems to the satisfaction of the court—that the defendant had obtained his copy of the play by process, not of stenography, but of memory!

Upon this state of facts, and upon the ground, apparently, that it would be carrying the power of courts to an absurd and ridiculous degree, should they assume to enjoin exercise of a man's purely mental function, the court, Buller, J., held that no action could lie, saying, "Reporting anything from memory can never be a publication within the statute. Some instances of strength of memory are very surprising; but the mere act of repeating such a performance cannot be left as evidence to the jury that the defendant had pirated the work." The whole opinion upon this novel and hitherto unconsidered point, whose reasoning and conclusion has been implicitly followed by courts and legal writers for the better part of a century, is embraced in the few words above quoted.

It is to be regretted that such is the case. It would have interested the lawyer of the present day to have known from the reporter what points were raised by counsel, and to have learned by what ingenious and ingenuous arguments they were able to induce the learned and admirable Judge Buller to enunciate the one solitary case, in which stealing is not

stealing, in which piracy is not piracy, and in which theft is not theft.

The principle thus apparently occurring to the learned judge is undoubtedly a wise one,—(we say apparently, for the entire reported case[1] is contained in thirty lines, and no word is said about the evidence of the memorization, or as to the principles involved. Indeed, the word "memory" occurs but once, and then in the few concluding sentences pronounced as above, by Buller, J.) For, if courts of justice can enjoin the memory of man, there would seem to be nothing that they could not do. If one who, having witnessed a play, or having read a treatise or a story, by repeating the argument of the same to others can be obliged to respond in damages or in equity, to the author—who may fancy himself thereby deprived of the profits which might have accrued to him if those others had been obliged to witness or to read for themselves—there would scarcely be any limits to the investigation of courts. They would soon find themselves obliged to discriminate between absolute and partial repetitions, and between partial and temporary and absolute injunctions against the exercise of a man's purely mental faculties and processes, and to proceed to lengths of absurdity beyond all speculation.

But, on the other hand, if one, deliberately, for his own profit, and to the end that the legitimate property of another shall be destroyed or diminished, sets himself down to memorize that other's dramatic or other composition; and if, after the laborious exercise of his trained memory, and the attendance night after night at the performance have enabled him to possess himself completely of its whole—dialogue, actions,

[1] 5 Term R. 245.

properties, and all—he writes the same out for the use and benefit of himself and a troupe of his own, who thenceforward produce the same—if it be a play—with the same title, scenery, and effects, so that the real author or proprietor is deprived of the fruits of his own labor; it is difficult to see the difference—in effect at least—between this and other piracies, in which other channels of transportation have been employed.

There is scarcely any achievement of which the human memory is incapable. Nor is it, possibly, more wonderful that one should commit to memory a play, after a number of consecutive attendances at its representations, and more or less familiarity with its performance, than that he should be able to catch it so accurately from the mouths of the actors, and move his hand so nimbly to and fro across a page as to be enabled to carry away with him, in black and white, the words which he has heard uttered by actors upon a stage. Both processes would appear to be the result of training, the one of the ear and hand, two physical members limited in their action by certain physical laws; the other of a purely mental and incorporeal faculty, unrestrained by any laws, and as utterly limitless as thought itself. It is certainly hard to imagine a reason why—when both of these faculties are turned to purposes of wrongful appropriation of the lawful property of another—the more volatile and potent faculty should be allowed to be used at pleasure, while the other, and purely physical process, should be restrained.

It certainly cannot be the policy of the law to permit a spoliation merely because it happen to be accomplished with unusual skill, and by the exercise of a wonderful talent on the part of the spoiler. If it is,

then we must look contentedly upon the depredations of the experienced house-breaker, who enters our dwellings deftly and robs us neatly, and it is only of the clumsy thief that we can make an example.

And again, if the feat of memorization releases from responsibility for acts committed through its means, why should not the principle obtain in the law of defamation, as well as in the law of piracy? Why should not one who hears defamatory and slanderous words spoken of his neighbor, be allowed to repeat them at pleasure, so long as he repeats them from memory, and so long as he does not transcribe them, in the first instance, from paper?

And, moreover, what provision must the law of evidence make for the question? Is the presumption to be in favor of or against the memorization? And how is either presumption to be rebutted? The best evidence obtainable must, of necessity, be the defendant's own unsubstantiated and impossible-to-be-impeached testimony. Since who else but himself can swear that he does or does not repeat that which he repeats—from memory—or that he transcribes what he transcribes in the solitude of his closet from memory, or from stenographic or other notes?

"When a literary work," said Allen, J., in Palmer v. De Witt,[1] "is exhibited for a particular purpose, or to a limited number of persons, it will not be construed as a general gift or authority for any purpose of profit or publication by others."

In spite of the venerable precedent which, like an ancient landmark, has been so long left undisturbed, there would seem to be no satisfactory reason why the dramatic author, or proprietor, like every other, should not be permitted to retain his right in the productions

[1] 47 N. Y. 532.

of his own brain and his own pen, until he relinquish it by contract, or by some unequivocal act, indicating an intent to dedicate it to the public. Lectures are not, by their public delivery or performance in the presence of all who choose to listen to them, or to pay for the privilege of attending them, so dedicated to the public that they can be printed and published, without their author's permission, or diverted to objects for which he did not assign them.' The manuscript, and the right of the author therein, are still within the protection of the law, the same as if they had never been communicated to the public in any form. This principle is too well established in every other case than that of memorization to need any citations to support it, and has been expressly enacted by statute in Great Britain.'

If an author has any rights at all in his composition, or if courts have any power to protect him in those rights, it is difficult, we repeat, to see how the mere process employed in the piracy is to take away that right, or to cancel that power.

It is just possible that Buller, J., did not mean to say exactly what he has been understood as having said during all these years. The concluding words of his opinion, in five lines, are: "The mere act of repeating such a performancc cannot be left as evidence to the jury that the defendant had pirated the work;" which is, perhaps, self-evident, as is also the statement that "some evidences of strength of memory are very surprising." The gist of the decision is, however, supposed to be included in the words: "Reporting anything from memory can never be a

[1] Bartlett v. Chittenden, 4 McLean, 301.
[2] 5 & 6 Will. 4, c. 65.

publication within the statute" (meaning the first statute of copyright, 8 Anne, c. 19).

But he does not say that repeating, or delivering, or acting the matter "reported from memory," is not such a publication. Clearly, courts cannot enjoin the memorization, nor, if they would, could they enforce their injunction. A man can cultivate his powers of remembering to almost any extent. We doubt if he can extend, or if any court on earth could compel him to extend, his powers of forgetting. As a rule, efforts to forget are always ineffectual, though efforts to remember are far from being always crowned with success. When Simonicles offered to instruct Themistocles in an art to improve the memory: "I had rather," replied Themistocles, "be taught how to forget. Things I am most unwilling to remember, these I have no power to forget."

In general, the law will regard the element of deliberation as increasing, if anything, the responsibility for a wrongful or doubtful act; but in this respect, again, the instance before us seems to negative every rule and animus of the law. Surely that law cannot desire to fix such a premium upon the exercise of a man's memory as to render itself in that instance alone, oblivious of the rights of others not only, but of its own policy.

It is undoubtedly true that courts cannot enjoin a man's exercise of his powers of memorizing what he hears or sees. It is quite doubtful, even, if they would attempt to enjoin either the manual labor of writing out the play so memorized, or the parting with the manuscript for value. In Morris v. Coleman,[1] indeed, a court did enjoin the defendant from writing plays for a particular theatre, but upon the ground

[1] 18 Ves. 437.

that he was under a contract to write for another exclusively.

But most assuredly, equity could enjoin the production, upon the stage of a theatre, of the play purloined by the memorization, with as much consistency as it enjoined the production and representation in Macklin v. Richardson, and as it has been done in hundreds of cases since. Nay, more, it seems probable that equity could enjoin even the individual actors from performing a purloined play, since it has asserted the right to enjoin an actor from performing any play whatever. The superior court of the city of New York did not hesitate to enjoin an actress from acting for a particular manager, and that too, in a case where it was apparent that the plaintiff had an adequate remedy at law.[1]

Is it not barely possible that the above ruling of Buller, J., has escaped criticism on account of the rarity with which these cases of memorization occur; or, what is still more likely, from the fact that when they occur they scarcely ever reach a court where the principles they involve can be leisurely and carefully examined? Dramatic manuscripts, from the fact of their immediate availability, without tarrying for the expensive and laborious processes of printing and manufacture, no less than because of the attractiveness of the drama, which has been for three hundred years the favorite amusement of the civilized world, have become, perhaps, the most valuable of all literary compositions; and mainly, too, because their value depends upon a season or a "run," the cases in which the law is called upon to interfere in reference to them, make very little show in the reports or in the

[1] Daly v. Smith, Albany Law Journal, September 19th, 1874, p. 187.

digests, and very seldom get beyond a mere motion or two at a special term or in chambers. If the plaintiff obtains his preliminary injunction, defendants are usually permitted to settle, and the case ends.

There have been but few instances in which the question of memorization has come before an American court, and that case never was reported and never went beyond the single motion for an injunction argued at chambers in the city of New York. In Wallack v. Barney Williams,[1] the plaintiff had brought out the play of "Caste," at his theatre in the city of New York, when the defendant, the manager of a rival theatre in that city, also produced it. The plaintiff's motion for an injunction restraining this rival representation,—upon the affidavit of the principal actor, one Florence, in the employ of defendant, that he had obtained the version of the play used at defendant's theatre by process of memorization,—was refused, upon the strength of Coleman v. Wathen.

But the principle, for all its undisturbed antiquity, appears to us to be one vicious, and in contravention to well-known rules. It would seem to be a cardinal rule of the law that the parting with, by the individual, of his own property, or with the product of his own lawful labor, must be by his own voluntary act, either actually or constructively; and it is quite too late in the day to attempt a distinction between literary and any other property, so far as this principle goes. There certainly can be no valid reason why the crafty, skillful or unusual processes by which A. pirates B.'s property, should be construed, on account of its unusual or marvellous nature, into a voluntary alienation

[1] Unreported. N. Y. Sup. Ct. 1st Dist. S. C., 1867. But see Keene v. Kimball, 16 Gray (Mass.) 545.

of his property by A. Again, what would become of the maxim of the law, sic utere tuo ut alienum non lædas[1]—enjoy your own in such a way as not to injure that of another? And while the maxim undoubtedly refers to the use of another's property, the principle appears to be the same in regard to any right. "Where rights are such as, if exercised," says Broom,[2] "conflict with each other, we must consider whether the exercise of the right claimed by either party be not restrained by the exercise of some duty imposed on him toward the other. Whether such duty be or be not imposed must be determined by reference to abstract rules and principles of law."

The right to vociferate, and to exercise a man's lungs, may be a right inalienable, and yet, if it injure his neighbors in one of their substantial rights, as, for instance, the right to peaceably assemble for public religious worship,[3] or for the purpose of a sale at auction,[4] even that right may become a wrong. The case of State v. Linkhaw,[5] which seems to hold the contrary, is only to the effect that the intention to disturb and interfere must be apparent.[6]

Finally, if a play can be pirated by means of the eye, ear, and memory, why not a printed book? Why may not one (as any child can) commit to memory the poems of Longfellow one by one, or all together, and then write them down, print them in a volume—under the title of Longfellow's works—and obtain a copyright in them because he wrote them down from memory, and did not actually transcribe them by

[1] 9 R. 59.
[2] Leg. Max. 394.
[3] Kindred v. State, 33 Tex. 69.
[4] Furness v. Anderson, 1 Pa. Law Jour. R. 324, 569; N.C. 214.
[5] 69 N. Carolina, 214.
[6] American Law Register, vol. 14 (N. S.) p. 207.

means of his eye and hand alone? If there is any reason in the piracy by memorization rule, it would be hard to find a copyright registry that could not be violated with impunity, at will.

314. The idea of the means by which a version of a play was obtained, operating to defeat any right of its author therein, would seem to be held in disfavor by the learned judge (Allen), who delivered the decision in Palmer v. DeWitt.[1] "When a literary work is exhibited," said the court in that case, "for a particular purpose, or to a limited number of persons, it will not be construed as a general gift or authority for any purpose of profit or publication by others."

"The speech of the orator, the sermon of the preacher, lecture of the professor," said the court, in the leading case of Jeffreys v. Boosey,[2] "have no greater claim to protection, and to be the foundation of exclusive property and right, than the labors of the man of science, the invention of the mechanic, the discovery of the physician or empiric, or, indeed, the successful efforts of any one in any department of human knowledge or practice; and it is difficult to say where, in principle, this is to stop. Why is it to be confined to the larger and graver labors of the understanding? Why does it not apply to a well-told anecdote or a witty reply, so as to forbid the repetition without the permission of the author? And, carried to its utmost, it would at length descend to lower and meaner subjects, and include the trick of a conjurer, or the grimace of a clown. . . . . Let us observe that this question cannot be confined to the form, whether written or printed. . . . If it is clear that, before publication, the author has the right and may proceed

[1] 9 Amer. 480; 47 N. Y. 532.
[2] *Vid.* 4 H. L. Cas. 937, 964.

against those to whom he imparts his manuscript under conditions, it is equally clear that if he had the communication of some one authorized by him, although no condition had been imposed upon those who entered the place of recitation to listen; and if any such auditor, unknown to the author or his licensee, has recited it, the author, or his licensee, or assignee, may proceed against the party to whom that recital has been made, in case he repeats, without leave, what he has been told by the first hearer. This consequence, if not wholly absurd, yet assuredly somewhat startling, follows the title alleged."

The question is a very nice one, and the decisions hedge closely upon each other. In Keene v. Clark,[1] it was laid down that the production of an arrangement of words, whether by speech, by writing, or printing, so as to convey special ideas or thoughts, and forming any species of literary composition, gives its composer or producer, until he shall voluntarily part therewith, the exclusive right to its use and enjoyment. The learned chief justice in that case (Robertson), after carefully going over the authorities, seems to have come to the conclusion of Baron Pollock, above quoted, that it is very difficult to practically maintain this right, without prejudice to the community; that it can only be protected by preventive remedies, and then only when an express or implied reservation of it accompanies such communication, imposing upon the hearer or recipient a restraint from divulging it. So it seems the delivery of a manuscript or printed copy may be made confidential by a notice written or printed thereon that it is for private circulation only.[2] And a limited communication of literary composition,

[1] 5 Rob. 38.
[2] Keene v. Clark, 5 Rob. 38.

by means of lectures, recitation, or performance, would not be construed to be an abandonment,[1] because of the retention of ownership implied by the limited number of its recipients.

But when such communications are indefinitely multiplied; when an audience is unlimited, as in the case of a public theatrical representation, the public are unquestionably to be held entitled to make use of their natural faculties of memory and impression—which indeed are the very faculties to which the representation is addressed, and upon the possession of which by human beings, authors, and actors, and managers, and publishers are dependent for their profits. If it were possible to separate the two, and to assert that one should be admitted to receive impression, but not to remember; if the purchase or receipt of a card of admission to a place of public entertainment was an implied service with an injunction upon one's memory, the doctrine that every act in life is accompanied by the obligation of a contract[2] would be carried to its absurdity.

315. When the spectators at a public performance of a drama, have not, however, entered into some express or implied understanding with its proprietor, limiting the use they may make of their ordinary faculties, and of the impressions or knowledge they derive from their presence at such performance, we do not see how they can be restrained as to the use by them of so much of it as remains by them, or that they retain and carry away with them in their memory. It is very certain that no such understanding or contract can be implied to accompany the reception of the ticket or license of admission by the

[1] Bartlett v. Chittenden, 4 McLean, 300.
[2] Parsons on Contracts, 11.

spectator.[1] Nor need the proprietor of the theatre give public warning to his audience that they may not carry away in memory, or by short-hand, or by any other process, the performance that they have come to witness. Even should he go to that length, his rights in the case, whatever they were, would undergo no diminution or increase. Neither must a merchant, who exposes his wares for sale, so display upon them placards to the effect that "these goods must not be stolen, or carried away by the public, without paying for them."[2]

316. Following the case of Coleman v. Wathen, in 1820, came the case of Morris v. Kelly & Arnold,[3] where the author had sold, between the years 1781 and 1785, the copyright of a play called "The Young Quaker," to the proprietor of the Haymarket theatre, in London, and where the theatre and the above copyrights had been afterwards purchased by and vested in the plaintiffs. The defendant Kelly, an actress, had published an advertisement announcing that play as to be performed at her benefit at the play-house known as the English Opera House, of which the defendant Arnold was proprietor, and, it appearing by affidavit that the above play had been assigned to the Haymarket Theatre, by three several identures of assignment in writing, the lord chancellor granted the injunction.

The only important point passed upon in this case seems to have been the necessity of a written assignment of the copyright, and the lord chancellor appears to have been guided by the ruling in Power v. Walker,[4] decided six years before.

[1] Keene v. Clark, 5 Rob. 38.
[2] Crowe v. Aiken, 2 Bos. 208.
[3] 1 J. & W. 481.
[4] 3 Maule & Sel. 7.

Murray v. Elliston,[1] was the case of Lord Byron's tragedy, Marino Faliero, which, by deed dated April 14, 1821, its author had assigned to his publisher Murray. The defendant, being the manager of the Theatre Royal, Drury Lane, after the publication of the tragedy, printed and exposed to view at the entrance to his theatre, and at other conspicuous places in London and Westminster, an announcement of the representation of the tragedy, altered and abridged, for the stage, together with a notice as follows: "Those who have perused Marino Faliero, will have anticipated the necessity of considerable curtailments; aware that conversations or soliloquies, however beautiful and interesting in the closet, will frequently tire in public recital. This intimation is due to the ancient admirers of Lord Byron's eminent talents, and will, it is presumed, be a sufficient apology for the great freedom used in the representation of this tragedy on the stage at Drury Lane Theatre." On the evening of the 25th April, 1821, the same, altered and abridged, was publicly represented. The question was whether an action could be maintained for publicly acting and representing for profit the tragedy so abridged, without the consent of the owner of the copyright, and the lord chancellor on submission, the judges of the king's bench, held that an action could not so lie.

In commenting upon these cases, Mr. Justice Hoar, in a late case,[2] says: "The case of Morris v. Kelley[3] was heard ex parte by Lord Eldon, and the report does not show the grounds upon which the injunction was asked or granted. Unless it proceeded

[1] 5 B. & Ald. 657 (1822).
[2] Keene v. Kimball, 16 Gray, 545.
[3] 1 J. & W. 481.

upon an allegation of the use of a surreptitious copy of the work, it seems impossible to reconcile it with the earlier case of Coleman v. Wathen,[1] or with the subsequent decision in Murray v. Elliston.[2] In both of these cases the plaintiff was the owner of a copyright of the play, and yet its representation upon the stage was held to be no violation of his rights."

In the case of Boucicault v. Fox,[3] 1862, it was held, that a person who agrees to write a play to be acted at the theatre of another person, and to act in it himself as long as it will run, and receive a share of the profits as a compensation[4] does not thereby confer upon any one the legal or equitable title to the play, and is entitled to take out a copyright for it, even after it has been so acted at the theatre, and that such performance with his consent and for compensation does not amount to an abandonment or dedication of the play either to the public or to his profession.[5]

317. In an action for infringement of copyright in a play, the copyright and the fact of representation being established, the burden is on the defendant to show the author's consent to the representation.[6]

318. We shall have occasion to see further on[7] that the fact that an infringing publication was gratuitously distributed, would make no difference as to the piracy, and so it will make no difference in

[1] 5 T. R. 245.
[2] 5 B. & Ald. 65.
[3] 5 Blatchf. 87.
[4] Roberts v. Myers, 13 Mo. L. Rep. 400; cited Law's Digest of Patent, Trade-mark and Copyright Cases, p. 211.
[5] *Vid.* Boucicault v. Wood, 9 Am. Law Reg. N. S. 539; Roberts v. Myers, 13 Month. Law Rep. N. S. 396.
[6] Id.
[7] See Novello v. Sudlow (12 C. B.) 177, cited *post*, chapter on Piracy.

the act of infringement that the unlicensed and illegal representation was gratuitous.

If publicity and pecuniary profit are necessary to the piracy of a dramatic or delivered composition, interesting questions might be foreseen as to amateur or parlor theatricals, or readings. Such a case has never come up for adjudication; but, upon principle, it would appear that a dramatic property might be pirated, as well by amateur as by professional actors, and at amateur as well as regular theatres—the fact of admission being gratuitous, or complimentary, or limited, making no difference in the legal aspects or consequences of the act. The section of the act,[1] indeed, employs the word "publicly," and renders only liable for damages, as we have seen,[2] "any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof." But it is apprehended that, as in derogation of an absolute right, the word "publicly" would be construed very strictly. Affirmative words, it has been said, do not take away the common law, a former custom, or a former statute, or general words, a particular benefit, or privilege.[3] "For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging, of the common law," says the same authority,[4] "four things are to be discerned and considered: 1. What was the common law before the making of the act? 2. What was the mischief and defect against which the common law did not provide?

[1] U. S. Rev. Stats., Revision of 1873–74, § 4966.

[2] *Ante*, this vol. p. 242.

[3] See Dwarris on Statutes, Am. ed. by Potter, p. 219.

[4] Id. p. 184; and see Hart v. Cleis, 8 Johns. 44; Waller v. Harris, 20 Wend. 561–2.

3. What remedy the parliament (legislature) both resolved and appointed to cure the disease, &c.? and, 4. The true reason of the remedy." And so since the proprietor of the play has his unquestioned right to control the representation of his play, the publicity of the infringement would be very carefully examined before a greater or less degree of such publicity would be allowed to interfere with it. The publicity of the performance, perhaps, might be a question of fact for the jury, though as a question of construction of a statute, it might equally well be a question of law for the court.

In the latter case, where a public rhetorician reads or recites from standard and well-known authors, the exact copying of his programme by another public reader might be an infringement upon his rights, if his programme was registered or copyrighted, but possibly not otherwise. In such an event, an interesting question would arise as to whether, in the first place, a programme could be legitimate subject of copyright, and in the second place, whether the protection would extend to the performance, or carrying out of the order of exercises.

319. It has been held that a dramatic, like any other literary composition, may be abridged or altered. In Murray v. Elliston,[1] where Lord Byron's tragedy of Marino Faliero was altered and abridged by the manager of Drury Lane Theatre and announced for representation, it was held by the King's Bench, in 1822, that the plaintiff could not prevent its representation. But we doubt if this case would be followed to-day. The favor with which the law has been said to regard abridgments, as we have seen, was on account of their aiding in the diffusion of knowledge, by cheapening

[1] 5 Barn. & Ald. 657.

and otherwise rendering learned and elaborate works accessible to the people. It is submitted that this spirit of the law, even if it were undoubted (as it is not), could not apply to a dramatic production exhibited to amuse, and not to instruct. We take the liberty, therefore, to question if the piracy of a dramatic work could be defended on the plea that it was an abridgment of the original.

320. In Roberts v. Myers,[1] one Boucicault, an actor then in the employ of one Stewart, proprietor of the Winter Garden Theatre, in the city of New York, wrote a play, "The Octoroon," which was to be produced by Stewart as long as it continued to draw audiences. It was held that the copyright was properly taken out in Boucicault's name, and that the proprietor of the Winter Garden Theatre, Stewart, had no other right or title to the play, except that of having it performed at his theatre.

321. In the case of piracy of a dramatic, as of any other species of composition, the application for an injunction should be made at once, as such an acquiescence might be inferred from the lapse of time as would disentitle the complainant thereto.[2] The bill for the injunction should carefully specify the infringement, and in case of infringement in part only, that part should be accurately and distinctly set forth.[3] The former practice in such cases was to refer the two works to a master for comparison, but courts not unfrequently will perform that labor themselves.[4]

[1] 13 Month. Law Rep. (N. S.) 396.

[2] Correspondent Co. v. Sanders, 12 L. J. (N. S.) 540; 11 Jur. (N. S.) 540; 13 W. R. 804; Platt v. Button, Cooper's Ch. Cas. 303.

[3] Page v. Wisden, 17 W. R. 483; 20 L. J. (N. S.) 435. See, however, Fradilla v. Weller, 2 R. & M. 247.

[4] Jeffreys v. Bowles, Dick. 429; Carman v. Bowles, 2 Bro. C. C. 80; Carman v. Ledbetter, 7 Ves. 681; Losh v. Hague, 2

322. V. By section one hundred and one of the present copyright law (4966), "any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the license of the proprietors, or his heirs or assigns, shall be liable for damages therefor, covered by action; such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court shall appear to be just." For the piracy of unpublished plays, there is no limitation as to the damages recoverable.[1]

323. The words "publicly performing or representing," or their equivalents in the English act,[2] are also to be construed. It appears[3] that no person can be made liable for a "representation" unless he himself, either personally or by his agent, takes part in the representation violating the copyright. Where the defendant had let a room in his tavern for the giving of a musical entertainment, and after the entertainment had been continued for some nights, the defendant received formal notice from the plaintiff that certain of the pieces performed in the room in question were the copyright property of the plaintiff, the defendant, notwithstanding this, permitted the entertainment to be continued, furnished the platform and lights for the performances, allowed bills of them to be put up in the tavern, and tickets of admission to be advertised to be sold at the bar, and himself sold one ticket, it was held that this conduct on the part of the defendant did not amount

Cooper C. C. 59 (n.); Moct v. Couston, 33 Beav. 578; 10 Jur. (N. S.) 1612.

[1] Boucicault v. Wood, 2 Biss. 34.

[2] 3 & 4 Will. 4, c. 15; 5 & 6 Vict. c. 45.

[3] Russell v. Briant, 6 C. B. 836.

to a "representing or causing to be represented" within the meaning of the acts. "If it were held," said the court, "that all those who supply some of the means of representation to him who actually represents are to be regarded as thereby constituting him their agent, and thus causing the representation within the meaning of the act, such a doctrine would, we think, embrace a class of persons not at all intended by the legislature."

This doctrine was carried a step further, in Lyons v. Knowles.[1] In Russell v. Briant it appeared that the defendant received a fixed sum per night for the room in which the performance took place, and derived no other profit from it. In Lyons v. Knowles the defendant, who was the licensed proprietor of a theatre, received, as his remuneration for the use of the theatre, one-half of the gross receipts, which were taken by his own servants at the doors, the remainder being handed to one Dillon, to whom the defendant let the use of the theatre for the purpose of dramatic entertainments. Dillon provided the company, and had the selection of the pieces to be represented, together with the entire management of their representation, and exclusive control over the persons employed in the theatre. The defendant, on his part, paid for printing and advertising, furnished the lighting, door-keepers, scene-shifters, and supernumeraries, and hired the band, music being a necessary part of the performance. Certain of the copyright pieces of the plaintiff having been performed without his consent, an action was brought against the defendant. It was held that the defendant was not liable, the court being of opinion that he was nothing more than

[1] 3 B. & S. 556; 10 L. T. N. S. 876; 12 W. R. 1083.

the proprietor of the theatre, who had transferred for the time the exercise of all his rights in it, as such, to Dillon, and that Dillon was the person who "represented, or caused to be represented" any pieces performed there while he had the sole possession. With regard to the scene-shifters, &c., supplied by the defendant, the court said: "Even apart from authority, I do not think that, by furnishing servants to another, a man can be said to do all that is done by those servants while under the command of that other." And with respect to the division of profits: "The question is whether, looking at the present case fairly, it amounts to more than this—that the rent of the theatre is to be paid by part of the profits. I do not think that the defendant's divesting himself of control over the theatre would divest him of liability, if he and Dillon were partners. Suppose there had been an agreement of partnership between the defendant and Dillon that each should contribute so much money, or that each should contribute so much capital, though of a different kind, and the theatre were taken between them. I should think the act of either was the act of both. But the authorities clearly show that two persons merely receiving payment out of the gross profits of a business does not make a partnership between them, even as against the world." "If the receipt of the money in this way was only a colorable pretense to escape the consequence of a partnership, I do not say that it would not have made a difference."

It seems, if the proprietor of the theatre were also the proprietor of the scenery, lights, &c., and the employer of the actors and actresses, he would be liable for an unauthorized representation of a dramatic piece, even although on the occasion of its representation he had, for a fixed sum, let his theatre to another per-

son who was to have all the profits and to select the pieces performed. Thus, in Marsh v. Conquest,[1] the defendant granted to his son, who was also his stage-manager and one of his actors, the use of the company of actors, with the scenery, &c., for a benefit night, in consideration of a fixed sum paid, the son to choose the pieces played. A piece belonging to the plaintiff having been played without his consent, the defendant was held liable to pay the statutory penalty. The Chief Justice (Erle) distinguished this case from Lyons v. Knowles: "There, Dillon, to whom the defendant in that case had let his theatre, brought his own company of actors and actresses; whereas here the defendant was the owner of the dramatic company, with whom the son performed the piece. The defendant, therefore, I think, in this case, caused such piece to be performed."

What is a representation within the act, is a question for the jury. In England, where a jury found that the singing of two or three songs of the plaintiff's libretto to Weber's opera of "Oberon," was a representation of part of the plaintiff's composition, the court refused to grant a new trial.[2] "It is difficult," said the court, "to say what is or is not a representation of part of a dramatic production: the subject patitur majus et minus, and it must be left to a jury to determine the fact."

324. One who, knowing the object for which it is desired, sells to another with a view to its public representation by him, a dramatic composition, is a participant in the causing of the same to be represented. And if the representation of it is an infringe-

[1] 10 Jur. N. S. 989; 33 L. J. 319, C. P.; 10 L. T. N. S. 717; 12 W. R. 309.

[2] Planchè v. Braham, 4 Bing. (N. C.) 17.

ment, the seller is a wrongdoer equally with the purchaser.[1]

One who, although as the agent of another, officiated as the manager of a theatre, paid certain actors, and discharged others, is a manager so far as to be liable for an unlawful representation.[2] And an assignee of the exclusive right of acting and representing a drama for a certain time,[3] and in certain localities,[4] may maintain an action in his own name against a mere wrongdoer.[5]

325. We have seen that courts of equity will decline to interfere by injunction to compel an author to compose. Agreements to write for the stage, likewise, are not enforceable. The only remedy for the party aggrieved is by his action for breach of contract. In Morris v. Coleman,[6] Coleman, who was partner with the plaintiff and others in the Haymarket Theatre, entered into an agreement, not indeed to write for that theatre, but that he would not write for any other, and the injunction in that case was a negative one, enjoining him against writing for the rival establishment. And, of course, no court could compel an author to act, though it seems courts have enjoined actors from performing for a rival when in the employment of a manager.[7] But we think that the principle is, to say the least, doubtful; for equity will rarely interfere where there is a remedy at law.

[1] Daly v. Palmer, 6 Blatchf. 256.

[2] Parsons v. Chapman, 5 C. & P. 33.

[3] In this case one year—Roberts v. Myers, 13 Month. Law Rep. (N. S.) 396.

[4] In this case throughout the United States, except in five designated cities.

[5] Roberts v. Myers, 13 Month. Law Rep. (N. S.) 396.

[6] 18 Ves. 437.

[7] 38 N. Y. Superior Court (J. & S.) 158.

In Daly v. Smith,[1] one Daly, proprietor of the Fifth Avenue Theatre, in the city of New York, sought to restrain an actress, Fanny Morant, from violating a contract made with him to act as a member of his stock company. By the contract the defendant bound herself for three seasons to perform at the Fifth Avenue Theatre, at a weekly salary of $130, payable on Monday of each week. This contract also contained a negative clause to the effect that if the defendant refused to fulfill the conditions thereof, and threatens to engage with any other theatre within the city of New York, the plaintiff should have the right, "by legal process or otherwise," to prevent her fulfillment of such threatened rival engagement. Reciting in his complaint the provisions of this contract, together with the further fact that the defendant was about to violate them by an appearance on the stage of a rival establishment, the Union Square Theatre, Daly obtained a temporary injunction, restraining her from such threatened act, together with an order to show cause why such injunction should not be continued in force until the final termination of the suit.

In opposition to the right to the injunction and its continuance in force it was urged that the contract itself was conceived in fraud on the part of plaintiff, his intention being, not to produce the defendant on the stage of his theatre, but to prevent her appearance on any stage in New York in any of those plays in which she had won professional renown, or any plays adapted to her eminent and mature histrionic talents; that his assignment of her, under a previous engagement (subsequent to the execution of the present con-

[1] Albany Law Journal, Sept. 19, 1874, 187.

tract), to parts comparatively unimportant and unworthy of her talents and reputation on the stage, and his failure to completely fulfill his pecuniary engagements to her under the previous contract, convinced her, not only of his intention to not merely repress her from appearing on the stage in this city, but of his inability to fulfill the pecuniary conditions of the contract at issue in the present suit, and that, in either aspect, he had invalidated such contract; that even if such contract was valid, he had not complied with that condition which bound him to pay her the one-fourth of her stipulated salary, before obtaining an injunction restraining her from appearing at any other theatre in this city; that, in any event, a remedy by injunction would not lie, but the plaintiff must be remitted to his remedy at law. In addition to relying on the terms of the contract itself, to overcome any weight which might be given by the court to the allegations of the defendant in avoidance of her contract, plaintiff set forth additional statements that he had not discriminated against the defendant in the assignment of parts to her, although that was by the terms of the contract left to his discretion; that so far from its being his intention to keep her off the stage in this city, he had announced her appearance under her new contract; had sent her a part to be studied which she had refused to receive or open, and that he had made the contract in good faith, with a view to secure for his theatre and pecuniary benefit the eclat of her popular name and eminent talents, and to deprive any rival theatre in this city of both.

The opinion devotes much space to the consideration of the question whether theatrical engagements, which contain a negative clause providing for non-performance at certain specified places, can be enforced

in equity, as similar provisions in relation to other trades and employments. Reviewing the decisions on this point, it comes to the conclusion that there is no reason why theatrical performances should stand upon any different footing from other contracts involving the exercise of intellectual faculties, or why actors and actresses, by the law of contracts, should be treated as a specially privileged class, or why theatrical managers, who have to rely upon their contracts with performers of attractive talents to carry on the business of their theatres, should, with a large capital necessarily invested in their business, be left completely at the mercy of their performers: that actors and actresses, like all other persons, should be held to a true and faithful performance of their engagements, and that, whenever the court has not proper jurisdiction to enforce the whole engagement, it should, as in all other cases, operate to bind their consciences, at least so far as they can be bound, to a true and faithful performance. As to the plea that the plaintiff was in arrears on the preceding contract, it holds that the defendant, knowing this fact, should have incorporated in the new contract a provision that while plaintiff remained in arrears under the old contract she should not be compelled to carry out the terms of the new one. It further held the allegation that plaintiff did not intend to carry out his engagement to put defendant on the stage, unsustained by the evidence, whereas, on the contrary, it appeared that plaintiff, in pursuance of the contract, had sent her a part for study and rehearsal which she had refused to receive or open.

As to her plea that plaintiff had discriminated against her in the assignment of parts, it holds that she had the opportunity to provide against such discrimination by providing in her contract how often she should

play, in what plays she should appear, and what parts she should assume.

The clause as to the payment of one-fourth of defendant's weekly salary, in consideration of her being restrained from playing elsewhere in said city, the judge left to be discussed at the close of his opinion, because, as he said, as the parties could not confer jurisdiction on the court by stipulation, it was necessary to first consider whether the court had jurisdiction. But having already concluded that the court had jurisdiction, the clause was one proper to enforce in order to prevent defendant acting at a rival establishment. Having such jurisdiction, it would not be equitable to remit the plaintiff to a suit at law for damages, a mode of redress which, as a general rule, would not prove a very effective remedy against breaches of contract by actors and actresses. He concludes by directing that the injunction restraining the defendant from acting in any other theatre in New York be continued in force until the termination of the suit, but on condition that plaintiff pay to her, or on her order, every Monday, during such restraint, the one-fourth of each week's salary, as provided for in the contract, and also that plaintiff pay defendant forthwith the sum which has accrued under such stipulation since the granting of the temporary injunction accompanying the order to show cause.

326. The cases of Keene v. Kimball,[1] Keene v. Wheatley,[2] and Keene v. Clark[3] were brought by Miss Keene after she became possessed by purchase of the comedy known as "Our American Cousin," which proved of great value to her, and was represented in

[1] 16 Gray (Mass.) 545.
[2] 5 Rob. 38.
[3] 29 Am. Law Reg. 33.

Philadelphia, New York, Boston, and other places in the United States, to very large audiences, which induced other managers to procure, by various means, and to produce the same play at their houses. The bills in the above cases set forth substantially the same facts of purchase, proprietorship, and production of the comedy as in the case against Wheatley, which we have already considered: that its value was very great to the complainant, and had been largely enhanced and increased by her own skill, care, and personal attention; and the skill and ability (as in the case of Keene v. Wheatley) of her employees.

In the case in Massachusetts,[1] the plaintiff, upon the above facts, asked an injunction to restrain the performance of the comedy by the defendant, who was proprietor of the Boston Museum. In this case it seems to have been admitted that the plaintiff had no copyright, and that nothing had been done by the defendant which was a violation of a copyright, had she possessed one. Neither did she invoke the protection of the United States statute of August 18, 1856,[2] known as the dramatic copyright act; but rested her case solely upon her common-law right of property in a literary production, as in the case in Pennsylvania.[3] Judge Hoar, in delivering the decision, held, that a play once published by its author, may be represented on the stage by any person without an infringement on the author's rights, "and no case has been cited," he continued, "nor are we aware that any exists in England or America in which the representation of a play has been restrained by injunction where no copyright has been acquired, and where

[1] Keene v. Kimball, 16 Gray, 545.
[2] 11 U. S. at L. 169.
[3] Keene v. Wheatley, 29 Am. Law Reg. 35.

the proprietor had permitted its public representation for money, except in the case of Morris v. Kelley,[1] which was heard ex parte by Lord Eldon, and where it does not appear upon what grounds the injunction was asked or granted." Unless it proceeded upon the allegation of the use of a surreptitious copy of the work, it seems to be impossible to reconcile it with the earlier case of Coleman v. Wathen,[2] or with the subsequent decision in Murray v. Elliston.[3] In both of these cases the plaintiff was the owner of a copyright of the play, and yet its representation upon the stage was held to be no violation of his rights.

This case, and that of Keene v. Wheatley,[4] which it follows, will be found to hold briefly as follows:

327. The sole proprietorship of an author's manuscript, and of its incorporeal contents wherever copies exist, is, independently of legislation, in himself and his assigns, until he publish it. Where a copyright under the statute exist, the publication cannot affect this right, but where a copyright does not exist, an unqualified publication, and one unrestricted by any condition, such as the making or sanctioning its literary or dramatic representation, is a dedication to the public, and its proprietor cannot thereafter maintain an objection to such representation or representations as others are enabled either directly or secondarily to make from its having been retained in the memory of any of the audience. "In other words, the public acquire a right to the extent of the dedication, whether complete or partial, which the proprietor has made of it to the public."

[1] J. & W. 481.
[2] 5 T. R. 245.
[3] 5 B. & Ald. 657.
[4] 9 Amer. Law Reg. 33

It is to be carefully observed, however, that the distinction between a general and a limited publication is not affected by this ruling. Said Judge Hoar, "There may be a limited publication by communication of the contents of the work by reading, representation, or restricted private circulation, which will not abridge the rights of the author to the control of his work any further than necessarily results from the nature and extent of this limited use which he has made or allowed to be made of it."

"These principles," continued the judge, "sustain the demurrer to the plaintiff's bill. She has publicly represented the play, 'Our American Cousin,' before audiences consisting of all persons who chose to pay the price charged for admission to her theatre. She has employed actors to commit the various parts to memory, and unless they are restrained by some contract, express or implied, we can perceive no legal reason why they might not repeat what they have learned, before different audiences, and in various places. If persons, by frequent attendance at her theatre, have committed to memory any part or the whole of the play, they have a right to repeat what they have heard to others. We know of no right of property in gestures, tones, or scenery which would forbid such reproduction of them by the spectators as their powers of imitation might enable them to accomplish."

"It should be perhaps added, to avoid misconstruction, that we do not intend in this decision to assert that there is any right to report, phonographically[1] or otherwise, a lecture or other written discourse, which its author delivers before a public audience, and which he desires again to use in like manner for his own

[1] *Vid.* Keene v. Clarke, 5 Rob. 38.

profit, and to publish it without his consent, or to make any use of a copy thus obtained. The student who attends a medical lecture may have a perfect right to remember as much as he can, and afterward to use the information thus acquired in his own medical practice, or to communicate it to students or classes of his own, without involving the right to commit the lecture to writing for the purpose of subsequent publication in print, or by oral delivery.[1] So any one of an audience at a concert or opera may play a tune which his ear has enabled him to catch, or sing a song which he may carry away in his memory, for his own entertainment or that of others, for compensation or gratuitously, while he would have no right to copy or publish the musical composition We found our opinion wholly upon the doctrine that there is nothing in the plaintiff's bill to show that the defendant has done anything beyond that which the dedication of the plaintiff's property to the public authorized him to do, and our decision goes no further than to hold that the representation by the defendant of a dramatic work of which the proprietor has no copyright, and which she had previously caused to be publicly represented and exhibited for money, is no violation of any right of property, although done without license from such proprietor, and, as it does not appear to have been done in violation of any contract or trust, cannot be restrained by injunction."

328. In this case the following features are to be carefully noticed: (1.) The play was originally composed in England for performance at a London theatre; its author, a non-resident alien, (2) for a valuable consideration, assigned and transferred his

[1] *Vid.* Bartlett v. Chittenden, 4 McLean.

proprietorship in it for the United States to Miss Keene, the complainant, who (3) immediately thereupon took all measures for securing a copyright performable without a publication in print. (4) The play, under her management and at her expense, was materially altered, and, as altered and adapted, was publicly represented at the complainant's theatre. (5) It was not printed, and (6) many of the alterations were never even written, but only pronounced by the actors employed in its representation on the stage. The defendants, proprietors and managers of a theatre at Philadelphia, performed the play (7) without the complainant's license, (8) closely imitating its general and particular performance under the complainant's management, (9) availing themselves besides of a copy of the English manuscript, which had been surreptitiously passed into their hands by an actor at the London theatre for which the play had been composed, and (10) the written and unwritten additions were, without the complainant's permission, communicated to the defendants by an actor in her (complainant's) employ. These points were all carefully considered and passed upon as follows:

1. The author not being a citizen of the United States, his production was not copyrightable within their limits, and, therefore, the complainant has no standing in court as a complainant, under and by virtue of the United States statutes of copyright. For her cause of action, however, she might sue, said the court, if the court had permission through the citizenship of the parties.

2. That having no property in his production in the United States, the foreign author's assignment was in law inoperative, except as a mere license, but, nevertheless, having been for a valuable consideration

it was in equity a valid assignment of whatever property the assignor had in his production.

3. The acts of copyright were superfluous, since whatever rights the complainant possessed in the uncopyrightable manuscript, she possessed by virtue of the common law.

4. The complainant, under the law of "literary accretions," was proprietor of the alterations made in the play by actors in her employment.

5. Never having been printed or published, the complainant was its literary proprietor, and as such, could have sustained her suit for the literary larceny of its contents, if she had not herself dedicated it to the public by representing it theatrically.

6. Such alterations in a written manuscript as exist only in the brain of an artist, are not a subject for litigation. A court cannot enjoin a man from altering the coinage of his brain. But, nevertheless, the complainant was entitled to be protected in the unwritten additions, on the ground that they were not independent compositions, but accessories to the principal play; that they were made for her by a person in her employ, and that she had priority in the employment of him, of which equity would not allow her to be deprived by unfair competition.

8. A publication, literary or dramatic, may be either limited or general. It is general when the communication affecting it is not restricted as to the persons to whom and the purpose for which it is made. When general it is a dedication to the public for such unlimited uses, including all modes of publishing and republishing, as it may be the means of directly or secondarily enabling any person to make. Complainant's prior performance of the play at her own theatre was a general publication. Therefore, if it had been the

means of directly or secondarily enabling the defendants to represent it through a retention of its words in their own memory, or in that of others of her audience, her literary proprietorship could not have been so asserted as to enable her to maintain her suit.

9. The surreptitious procurement of the manuscript from another source was a violation of the complainant's rights as literary proprietor, and had she not herself publicly represented the play upon the stage, she could have maintained an action for such violation.

329. Previously to the case of Crowe v. Aiken, it had been held by the same court[1] (Drummond, J.) that in order to entitle an alien to the benefit of the copyright laws he must prove himself a resident of the United States. And that such residence, within the meaning of the statute, is to be determined by his intention, accompanied by his acts, and not simply by lapse of time. That the fact that the alien left the country after going through the form of copyrighting the title of his manuscript does not necessarily deprive him of his rights; his change of interest does not avoid the copyright, although, if previous to the filing he had such intention, he will not be within the protection of the statute, and that a consent of the author to publication abroad places him in the position of a foreign author, and is an abandonment of his rights under the statute.[2] But, according to the later case, the alien author need not ask the protection of any statute on the subject, since his protection is more complete and perfect without it by common law, and since (to again quote the same decision) common-law rights can run

[1] U. S. Circuit Court for the Seventh Circuit, District of Illinois.

[2] Boucicault v. Wood, 2 Biss. 34.

only up to publication, and that thereafter the work is protected solely by statute.[1]

330. The case of Palmer v. Thorne[2] is a peculiar one, and illustrates a less familiar application of the principle we are considering. Upon a certain play, "Les Deux Orphelins," appearing in Paris, a correspondent of the New York Herald, resident in that city, wrote to that newspaper a synopsis of its scenery, plot, and incidents. Thereupon two playwrights, Johnson and Cheever, working in conjunction upon the basis of the correspondent's letter, produced a play called "The Two Orphans," which they agreed to allow the defendant, who was lessee and manager of Niblo's Garden Theatre in New York city, to represent upon his stage, upon terms. Meanwhile the plaintiff had purchased a translation of the original play, and notified defendant that they claimed the sole right to its representation.

The question would have doubtless turned upon one of two questions, namely, whether the translation was copyrightable, and copyrighted in the United States, and whether the play thus formed upon the basis of the letter of the newspaper correspondent by the two playwrights, who had never seen the French play, was a copy thereof. But while the plaintiff was held entitled to a preliminary injunction, the case itself never proceeded to a trial.

331. The contract which an actor makes with a manager for the performance of personal services, unlike other contracts, is unassignable, so as to vest in the assignee the right to give directions to and have control over the person having engaged to perform the services. So, where an actor has bound himself to give theatrical performances for A. at any place A. might direct, for a time certain, and not to perform for

[1] 2 Biss. 34.

[2] N. Y. Herald, Sept. 10, 1874.

any one else, it was held that A. could not assign his rights under the contract to plaintiff, so as to give him the right to prevent defendant from giving performances for other persons.[1]

In other respects the contract is like all others between employer and employed. Plaintiff was engaged to perform as an actor at a certain theatre for a definite time, and at a fixed salary, but was discharged before the period for which he was engaged had elapsed. He denied the defendant's right to discharge him, and offered performance on his part, which was not accepted. He then left the city and remained absent until the period for which he was engaged had expired, and did not, during that period, hold himself in readiness to render his services according to the contract, nor did he make any efforts to obtain other employment. Held, that he was not entitled to recover anything but the wages due him up to the time of his departure.[2]

An assignment of a dramatic composition, to be valid, must, like all other assignments of copyright, be in writing.

Where the assignees of the copyright in a comedy sought the aid of a court of equity, but did not state in their bill that the assignment to them was in writing, Lord Eldon refused to grant an injunction till that fact should be proved. The plaintiffs afterwards produced an affidavit stating that all the manuscripts of dramatic compositions belonging to the Haymarket Theatre, including the comedy in question, had been assigned to them by three several indentures in writing, dated in the years 1805, 1808, and 1819. Lord Eldon then said he would assume

[1] Hayes v. Willis, 4 Daly (N. Y.) 259. In this case the right of the plaintiff as assignee to a ne exeat was denied.

[2] Polk v. Daly, Id. 411.

the plaintiff's title to be regular, till the contrary were shown, and granted the injunction prayed for.[1]

332. The once leading case of Jeffreys v. Boosey,[2] held that a copyright was indivisible. and that the owner could not assign a part of the right, as to print in a particular place or country, or do anything less than assign the whole right given by the statute. But we doubt, at least in the case of dramatic copyright, if the rule would be so held to-day. An assignment of the right to represent a play does not include the right to print it.[3]

333. Toole v. Young[4] was a case where one Hollingshead wrote a novel called "Not Above His Business," which was published in a periodical called "Good Words," and about two months afterwards a drama called "Shop," which was, in effect, a dramatization of the novel. Two years afterward Hollingshead assigned this drama of "Shop" to the plaintiff, who, however, did not cause it to be produced or represented on any stage, nor to be published or printed. Four years after the assignment, one Grattan, being ignorant that the novel, "Not Above His Business," had been dramatized, himself dramatized it, calling his play "Glory," and assigning it to the defendant, who represented it on a stage of which he was proprietor. Held, that Hollingshead having published his novel, anyone might dramatize it, and that although the two dramas, "Glory" and "Shop," were founded upon Hollingshead's novel,

[1] Morris v. Kelly, 1 J. & W. 481. *Vid.*, however, *post.*, (chapter on Contracts, &c., and cases cited); also, Kyle v. Jeffreys, 21 Scotch Sess. Cas. N. S. 8; 18 Id. 906, which holds that the assignment may be by parol, if it be registered at Stationers' Hall. Such an assignment need not be attested by witnesses in England. Shortt, L. Lit. p. 153, and cases cited.

[2] 4 H. L. C. 978.

[3] Stage Right, by John Coryton, Barrister: London, 1873.

[4] L. R. 9 Q. B. 523.

the representation by Grattan of the play of "Glory," was not a representation of the drama of "Shop" written by Hollingshead, and that the plaintiff was not entitled to the statutory penalties for an infringement.

334. The English statutes of dramatic copyright, by using the words "place of dramatic entertainment," introduce an additional element into the inquiry, namely, as to what will constitute a place of dramatic entertainment.[1] But in the construction of the United States statute on the subject, a similar question does not arise.

In copyrighting manuscripts, the title filed must be printed, and not written, and the time elapsing between copyright of the title and the completion of the manuscript will not affect the copyright. In case of every variation in the title, a new copyright must be taken out, and the exact and precise words must be copyrighted in order to make the registration valid. The particular form or style of type in which the title is printed, is of course immaterial. In the case of dramatic manuscripts, it appears that the notice of copyright required by the law to be printed in the words, "entered according to act of congress, &c.," need not appear. Neither need two copies of the manuscript be filed.[2]

[1] But see *ante*, vol. 1, p. 470.

[2] The answer to the question, What is a place of dramatic entertainment within the statutes 3 & 4 Will. 4, c. 15, and 5 & 6 Vict. c. 45? is given by the court of king's bench, in Russell v. Smith. Any place in which a piece of a dramatic character is represented is, for the time being, a place of dramatic entertainment within the meaning of those statutes. "The use for the time in question," says Lord Denman, C. J., in that case, "and not for a former time, is the essential fact. As a regular theatre may be a lecture-room, dining-room, ball-room, and concert-room on successive days, so a room used ordinarily for either of those purposes would become for the time being a theatre, if used for the representation of a regular stage play."—Shortt, L. Lit. p.

335. IV. The section of the act of congress of July, 1870, revising, consolidating, and amending the statutes relating to copyrights and patents, and repealing all previous enactments on the subject, which enacted that "any person who shall print or publish any manuscripts whatever, without the consent of the author or proprietor first obtained (if such author or proprietor be a citizen of the United States, or resident therein), shall be liable to said author or proprietor for all damages occasioned by such injury, to be recovered by action in the case in any court of competent jurisdiction," it would appear, following decisions under the 9th section of the act of 3d February, 1831 (which was to a similar effect), will not be construed to give redress for an unauthorized representation of the contents of a dramatic manuscript, the publication intended by the statute being a publication in print.[1]

336. In the absence of an International Copyright law between Great Britain and the United States, and in view of the large and increasing demand for English plays, managers and dramatic authors have resorted to many and ingenious expedients to secure a monopoly of the representation of their plays while performing them or causing them to be performed in the United States. The transient nature of these productions, however, whose lucrative character can continue only during a limited season, or "run," while affecting in no degree the frequency with which courts are called upon to interfere between rival managers and actors, has the effect to render the law upon this subject, if possible, more unsettled than ever, since the particular case in question very rarely reaches a court of last resort for a careful enunciation

[1] Keene v. Wheatley, 9 Am. Law Reg. pp. 23, 45.

of the principles involved, but, after a temporary injunction at a special term (which in most cases is the only relief sought by the complainant), it is usually settled by the litigants themselves, as we have before remarked. If an English dramatic writer refrain from himself multiplying copies of his production, and send the original manuscript to the United States, the practical difficulties of procuring it, will in themselves, obviate much of the necessity of a stringent law. His manuscript is in the hands of its proprietor by common law, and against one surreptitiously copying its contents, either by actual access to the manuscript, or from the lips of the actors engaged in its representation on the stage, his remedy lies under no copyright laws of this country, but at common law. If he cause his play to be printed, in order that every actor may be in possession of a copy, and one of these copies finds its way into the hands of a rival manager, the question then arises as to whether the play has been published so far as to make the printed play, in the absence of a copyright, a legitimate dedication to the public, and therefore at the legitimate service of whoever desires to make use of it. The better opinion would seem to be that the mere fact of privately printing a manuscript does not change its essential character of an unpublished production, but, in the present state of the law, a wise author will refrain from printing, and so save the occurrence of the question at all.

The difficulties arising in this case from the nonexistence of an international copyright law, have been attempted to be obviated by a not unusual resource of authors, namely, of joint authorship. If a citizen of the United States in good faith associate with himself a citizen of a foreign country, and they jointly produce a literary work the result of their own

"preconcerted joint design,"[1] there is nothing to prevent each of them from copyrighting the production in the country of which he is a citizen.[2]

337. The important inquiry arising in the case of the dramatization of romances, tales, novels, poems, or other works not originally published in a dramatic form, by others than the one so dramatizing it, now, as we have seen, expressly reserved to the author of the original work by statute,[3] will be found examined in the chapter on Piracy. In all questions involving the common-law rights of authors, the state courts have jurisdiction. Said Curtis, J., in Isaacs v. Daly:[4] "It is objected that the action should have been commenced in the federal courts. This court (the Superior Court of the city of New York) has long exercised a jurisdiction to protect literary property; and the act of congress of 1870, conferring jurisdiction in that class of suits upon the federal courts, appears to afford an additional remedy, without affecting the pre-existing jurisdiction in respect to the rights the plaintiff has in the play by common law, independently of all statutes."

[1] Levi v. Rutey, L. R. 6; C. P. 522.

[2] In the case of the comedy of "Ours," its author, Mr. T. W. Robertson, an Englishman, procured several immaterial portions thereof to be written by the late Charles F. Browne (Artemus Ward), and the production was jointly copyrighted both in England and America. In cases where a fraud is intended for the sole purpose (as above) of avoiding the copyright-laws of the two countries, the difficulty of arriving at due legal proof thereof might be its immunity, though equity would of course annul such a transaction, if once clearly spread before it. Levi v. Rutey.

[3] Laws of 1870, § 106, Revision of 1873–4, § 4970.

[4] New York Times, March 5, 1874. See Palmer v. De Witt, 47 N. Y.

CHAPTER IV.

OF NEWSPAPERS AND PERIODICALS.

338. There is no more important branch of the law of literature than that relating to newspapers. The interests and the capital involved in them have come, in these days, to be immense. They afford support to thousands of editors, compositors, publishers, *correspondents*, and *literary men*; *their* circulation has grown commensurate with the civilized world, while the modern newspaper is in itself a volume of opinions, chronicles, records, and suggestions from every corner of the globe, prepared not by one author, but by hundreds.

It is believed that we are indebted to the Italians for the idea of newspapers. The title of their gazettas was perhaps derived from gazzera, a magpie or chatterer; or more probably from a farthing coin, peculiar to the city of Venice, called gazetta, which was the common price of the newspapers. Other etymologists derive it from the Latin *gaza*, which would colloquially lengthen into gazetta, and signify "a little treasury of news." The Spanish so derive it from the Latin gaza, as likewise, their *gazatero* and our "gazetteer," for a writer of the gazette, and—what is peculiar to themselves—"gazetista," for a lover of the gazette.

"Newspapers, then, took their birth in that principal land of modern politicians, Italy, and under the government of that aristocratical republic, Venice. The first paper was a Venetian one, and only monthly; but it was merely the newspaper of the government.

Other governments afterwards adopted the Venetian plan of a newspaper, with the Venetian name; from a solitary government gazette, an inundation of newspapers has burst upon us."

Chalmers, in his life of Ruddiman, gives a curious particular of these Venetian gazettes: "A jealous government did not allow a printed newspaper; and the Venetian gazetta continued long after the invention of printing to the close of the sixteenth century, and even to our own days, to be distributed in manuscript." In the Magliabechian library at Florence are thirty volumes of Venetian gazettas, all in manuscript."[1]

Those who first wrote newspapers were called by the Italians "menanti"; because, says Vossius, they intended commonly, by these loose papers, to spread about defamatory reflections, and were therefore prohibited in Italy, by Gregory XIII., by a particular bull, under the name of menantes, from the Latin minantes, threatening. Menage, however, derives it from the Italian menare, which signifies to lead at large, or spread afar.

Mr. Chalmers discovers in England the first newspaper. "It may gratify national pride," says he, "to be told that mankind are indebted to the wisdom of Elizabeth and the prudence of Burleigh for the first newspaper. The epoch of the Spanish Armada is also the epoch of a genuine newspaper. In the British Museum are several newspapers which were printed while the Spanish fleet was in the English Channel, during the year 1588."[2] It was a wise policy to prevent, during a

[1] Disraeli.

[2] In this obscure origin they were skillfully directed by the policy of that great statesman, Burleigh, who, to inflame the national feeling, gives an extract of a letter from Madrid,

moment of general anxiety, the danger of false reports, by publishing real information. The earliest newspapet is entitled "The English Mercurie," which, by authority, "was imprinted at London by her highnesses printer, 1588." These were, however, but extraordinary gazettes, not regularly published.[1]

which speaks of putting the queen to death, and the instruments of torture on board the Spanish fleet.—Curiosities of Literature, p. 58.

[1] The first newspaper in the collection of the British museum is marked No. 50, and is in Roman, not in black letter. It contains the usual articles of news, like the London gazette of the present day. In that curious paper there is news dated from Whitehall, on the 23rd July, 1588. Under the date of July 26 there is the following notice: "Yesterday the Scots ambassador being introduced to Sir Francis Walsingham, had a private audience of her majesty, to whom he delivered a letter from the king, his master, containing the most cordial assurances of his resolution to adhere to her majesty's interests, and to those of the Protestant religion. And it may not here be improper to take notice of a wise and spiritual saying of this young prince (he was twenty-two) to the queen's minister at his court, viz., that all the favor he did expect from the Spaniards was the courtesy of Polypheme to Ulysses, to be the last devoured." Mr. Chalmers defies the gazetteer of the present day to give a more decorous account of the introduction of a foreign minister. The aptness of King James's classical saying carried it from the newspaper into history. I must add, that in respect to his wit no man has been more injured than this monarch. More pointed sentences are recorded of James I. than perhaps of any prince, and yet such is the delusion of that medium by which the popular eye sees things in this world, that he is usually considered as a mere royal pedant. I have entered more largely on this subject in an "Inquiry of the Literary and Political Character of James I."

From one of these "mercuries" Mr. Chalmers has given some advertisements of books, which run much like those of the present times, and exhibit a picture of the literature of those days. All these publications were "imprinted and sold" by the queen's printers, Field & Baker.

1st. An admonition to the people of England, wherein are answered the slanderous untruths reproachfully uttered by

Periodical papers appear to have become prevalent to a considerable extent, in England, during the civil wars of the cavaliers and the roundheads, each party having its particular organ.[1]

Mar-prelate, and others of his brood, against the bishops and chief of the clergy.

2ndly. The copy of a letter sent to Don Bernardin Mendoza, ambassador in France, for the king of Spain, declaring the state of England, &c., the second edition.

3rdly. An exact journal of all passages at the siege of Bergen-op-Zoom, by an eye-witness.

4thly. Father Parson's Coat well Dusted; or short and pithy animadversions on that infamous fardle of abuse and falsities, entitled Leicester's Commonwealth.

5thly. Elizabetha Triumphans, an heroic poem by James Aske, with a declaration how her excellence was entertained at the royal course at Tilbury, and of the overthrow of the Spanish fleet.

[1] Says Disraeli, speaking of the writers of these "newspapers": "They form a race of authors unknown to most readers of these times. The names of some of their chiefs, however, have just reached us, and in the minor chronicle of domestic literature I rank these notable heroes—Marchamont Needham, Sir John Birkenhead, and Sir Roger L'Estrange.

"Marchamont Needham, the great patriarch of newspaper writers, was a man of versatile talents, and more versatile politics; a bold adventurer, and most successful, because the most profligate of his tribe. We find an ample account of him in Anthony Wood. From college he came to London; was an usher in Merchant Taylor's school; then an under clerk in Gray's Inn; at length studied physic, and practiced chemistry; and finally he was a captain; and, in the words of honest Anthony, 'siding with the rout and scum of the people, he made them weekly sport by railing at all that was noble, in his Intelligence, called Mercurius Britannicus, wherein his endeavors were to sacrifice the fame of some lord, or of any person of quality, and of the king himself, to the beast with many heads.' He soon became popular, and was known under the name of Captain Needham, of Gray's Inn; and whatever he now wrote was deemed oracular. But whether from a slight imprisonment for aspersing Charles I., or some pique with his own party, he requested an audience on his knees with the king, reconciled himself to his majesty, and

Peter Heylin, in the preface to his "Cosmography," mentions that "the affairs of each town or war were better presented to the reader in the 'Weekly News-showed himself a violent royalist, in his 'Mercurius Pragmaticus,' and galled the Presbyterians with his wit and quips. Some time after, when the popular party prevailed, he was still further enlightened, and was got over by President Bradshaw as easily as by Charles I. Our mercurial writer became once more a violent Presbyterian, and lashed the royalists outrageously in his 'Mercurius Politicus.' At length, on the return of Charles I., being now conscious, says our friend Anthony, that he might be in danger of the halter, once more he is said to have fled into Holland, waiting for an act of oblivion. For money given to a hungry courtier, Needham obtained his pardon under the great seal. He latterly practiced as a physician among his party, but lived universally hated by the royalists; and now only committed harmless treasons with the college of physicians, on whom he poured all that gall and vinegar which the government had suppressed from flowing through its natural channel.

"The royalists were not without their Needham, in the prompt activity of Sir John Birkenhead. In buffoonery, keenness, and boldness, having been frequently imprisoned, he was not inferior, nor was he at times less an adventurer. His 'Mercurius Anglicus" was devoted to the court, then at Oxford. But he was the fertile parent of numerous political pamphlets, which appear to abound in banter, wit, and satire. He had a promptness to seize on every temporary circumstance, and a facility in execution. His 'Paul's Church Yard' is a bantering pamphlet, containing fictitious titles of books and acts of parliament, reflecting on the reformers of these times. One of his poems was entitled 'The Jolt,' being written on the Protector having fallen off his own coach-box. Cromwell had received a present from the German count, Oldenburgh, of six German horses, and attempted to drive them himself in Hyde Park, when the great political phaëton met the accident, of which Sir John Birkenhead was not slow to comprehend the benefit, and hints how unfortunately for the country it turned out! Sir John was, during the dominion of Cromwell, an author by profession. 'After various imprisonments for his majesty's cause,' says the venerable historian of English literature, already quoted, 'he lived by his wits, in helping young gentlemen out at dead lifts in making poems, songs, and epistles, on and to their mistresses: as also

books.' Hence we find some papers entitled News from Hull, Truths from York, Warranted Tidings from Ireland, &c. We find, also, 'The Scot's Dove' opposed to 'The Parliament Kite,' or 'The Secret Owl.' Keener animosities produced keener titles: 'Heraclitus Ridens' found an antagonist in 'Democritus Ridens,' and 'The Weekly Discoverer' was shortly met by 'The Discoverer Stript Naked.' 'Mercurius Britannicus' was grappled by Mercurius Mastix, Faithfully Lashing all Scouts, Mercuries, Posts, Spies, and others." Under all these names, papers had appeared, but a Mercury was the prevailing title of these 'News-Books,' and the principles of the writers were generally shown by an additional epithet. We find an alarming number of these Mercuries, which, were the story not too long to tell, might excite some laughter; they present us with a very curious picture of those singular times."

At the Restoration the proceedings of parliament were interdicted to be published, unless by authority; and the first daily paper after the Revolution took the popular title of "The Orange Intelligencer."

In the reign of Queen Anne, there was but one daily paper; the others were weekly. Some attempted

in translating, and other petite employments.' He lived, however, after the Restoration, to become one of the masters of requests, with a salary of three thousand pounds a year. But he showed the baseness of his spirit (says Anthony), by slighting those who had been his benefactors in his necessities.

"Sir Roger L'Estrange among his rivals was esteemed as the most perfect model of political writing. The temper of the man was factious, and the compositions of the author seem to us coarse, yet I suspect they contain much idiomatic expression. His Æsop's Fables are a curious specimen of familiar style. Queen Mary showed a due contempt of him after the Revolution, by this anagram:

'Roger L'Estrange.
Lie strange Roger!'

"Such were the three patriarchs of newspapers.

to introduce literary subjects, and others topics of a more general speculation. Sir Richard Steele formed the plan of his "Tatler." He designed it to embrace the three provinces of manners and morals, of literature, and of politics. The public were to be conducted insensibly into so different a tract from that to which they had been hitherto accustomed. Hence politics were admitted into his paper. It remained for the chaster genius of Addison to banish this painful topic from his elegant pages. The writer in polite letters felt himself degraded by sinking into the diurnal narrator of political events, which so frequently originate in rumors and party fiction. From this time, newspapers and periodical literature became distinct works. De Saint Foix, in his curious Essais Historiques sur Paris, gives the origin of newspapers in France. Renaudot, a physician at Paris, to amuse his patients, was a great collector of news; and he found, by these means, that he was more sought after than his more learned brethren. But, as the seasons were not always sickly, and he had many hours not occupied by his patients, he reflected, after several years of assiduity given up to this singular employment, that he might turn it to a better account by giving every week to his patients, who in this case were the public at large, some fugitive sheets, which should contain the news of various countries, and obtained a royal privilege for this purpose in 1632.

The invention of reviews is ascribed to Denis de Sallo, a counsellor in the parliament of Paris, who in 1665 published his "Journal des Sçavans," in the name of the Sieur de Hedonville, his footman.[1] The

[1] The animadversions of Salio were given with such asperity of criticism, and such malignity of wit, that this new journal excited loud murmurs, and the most heart-moving complaints.

character of his work was speedily imitated throughout Europe. In 1684 appeared the "Nouvelles de la Republique des Lettres," of Bayle; and his contemporary and antagonist, Le Clerc,[1] produced three

The learned had their plagiarisms detected, and the wit had his claims disputed. Sarasin called the gazettes of this new Aristarchus, Hebdomadary Flams! Billevezees Hebdomadaries! and Menage, having published a law-book, which Sallo had treated with severe raillery, he entered into a long argument to prove, according to Justinian, that a lawyer is not allowed to defame another lawyer, &c. Senatori malidicere non licet, remaledicere jus fasque est. Others loudly declaimed against this new species of imperial tyranny, and this attempt to regulate the public opinion by that of an individual. Sallo, after having published only his third volume, felt the irritated wasps of literature thronging so thick about him that he very gladly abdicated the throne of criticism. The journal is said to have suffered a short interruption by a remonstrance from the nuncio of the pope, for the energy with which Sallo had defended the liberties of the Gallican church.

An index to the Journal des Sçavans has been arranged on a critical plan, occupying ten volumes in quarto, which may be considered as a most useful instrument to obtain the science and literature of the entire century.—Curiosities of Literature.

[1] Intimidated by the fate of Sallo, his successor, Abbé Gallois, flourished in a milder reign. He contented himself with giving the titles of books, accompanied with extracts; and he was more useful than interesting. The public, who had been so much amused by the raillery and severity of the founder of this dynasty of new critics, now murmured at the want of that salt and acidity by which they had relished the fugitive collation. They were not satisfied in having the most beautiful, or the most curious parts of a new work brought together; they wished for the unreasonable entertainment of railing and raillery. At length another objection was conjured up against the review; mathematicians complained they were neglected to make room for experiments in natural philosophy; the historian sickened over the works of natural history; the antiquaries would have nothing but discoveries of MSS., or fragments of antiquity. Medical works were called for by one party and reprobated by another. In a word, each reader wished only to have accounts of books which were interesting to his profession or his taste. But a review is a work presented to the public at large, and written for more than one country. In

bibliothèques—"Universelle et Historique," "Choisie," and "Ancienne et Moderne"—forming in all eighty-two volumes.'

Other reviews are, the "Memoires de Trevoux," written by the Jesuits. Their caustic censure and vivacity of style made them redoubtable in their day; spite of all these difficulties, this work was carried to a vast extent.—Id.

' Inferior to Bayle in the more pleasing talents, he is, perhaps, superior in erudition, and shows great skill in analysis; but his hand drops no flowers! Apostolo Zeno's Giornale de' Litterati d'Italia, from 1710 to 1733 is valuable. Gibbon resorted to Le Clerc's volumes at his leisure, "as an inexhaustible source of amusement and instruction."

Beausobre and L'Enfant, two learned Protestants, wrote a Bibliotheque Germanique, from 1720 to 1740, in 50 vols.; our own literature is interested by the Bibliotheque Britannique, written by some literary Frenchman, noticed by La Croze in his "Voyage Litteraire," who designates the writers in this most tantalizing manner: "Les auteurs sont gens de merite et que entendent tous parfaitement l'Anglois; Messrs. S. B. le M. D. et le savant Mr. D." Posterity has been partially let into the secret; De Missy was one of the contributors, and Warburton communicated his project of an edition of Gellcius Paterculus. This useful account of only English books begins in 1733, and closes in 1747, Hague, 23 vols.; to this we must add the Journal Britannique, in 18 volumes, by Dr. Maty, a foreign physician residing in London; this journal exhibits a view of the state of English literature from 1750 to 1755. Gibbon bestows a high character on the journalist, who sometimes "aspires to the character of a poet and a philosopher; one of the last disciples of the school of Fontenelle."

Maty's son produced here a review known to the curious, his style and decisions often discover haste and heat, with some striking observations: alluding to his father, Maty, in his motto, applies Virgil's description of the young Ascanius, "Sequitur patrem non passibus æquis." He says he only holds a monthly conversation with the public; but criticism demands more maturity of reflection and more terseness of style. In his obstinate resolution of carrying on this review without an associate, he has shown its folly and its danger; for a fatal illness produced a cessation, at once, of his periodical labors and his life.—Id.

they did not even spare their brothers. The "Journal Literaire," printed at the Hague, and chiefly composed by Prosper Marchand, Sallengre, and Van Effen, who were then young writers. This list may be augmented by other journals, which sometimes merit preservation in the history of modern literature.

In England, "The Memoirs of Literature," and "Present State of the Republic of Letters," were the titles of early publications of this character, while "The Monthly Review," the first regular publication answering to our present idea of a critical journal, appeared in 1749.

339. The principles of the law of literature, as suggested in the preceding pages, apply with equal force to newspapers,[1] except in so far as from their nature and circumstances it is abridged or qualified.

[1] In England, for a long time, the government regarded the press with jealousy, and many enactments were made to facilitate the proof of the publication of newspapers as well as to secure to government the heavy duties with which they were charged. Even the size of newspapers was to a late period regulated by statute. An act of the 6 Geo. 4, c. 119, first allowed them to be printed on paper of any size.

Amongst the provisions swept away by the act of 32 & 33 Vict. c. 24 (called "The Newspapers, Printers, and Reading Rooms' Act"), were enactments requiring, before the publication of any newspaper, the delivery at the stamp office of a declaration containing the title of the paper, description of the house where it was to be published, and the names and places of abode of the printer, publisher, and proprietor, certified copies of which declarations were to be received as conclusive evidence of everything contained in them relating to the newspapers. Copies of all newspapers published had to be delivered to the commissioners of stamps and taxes, and might be produced in evidence. Every supplement to a newspaper must have had the word "supplement" printed on it, and have had the same title and date as the newspaper, and a penalty was incurred by publishing supplements without the newspapers.

Every person who prints any paper for hire, reward, gain,

340. The impracticability of copyrighting under the statutes each succeeding issue of a newspaper, renders them somewhat independent of the laws of copyright, though there is no reason why each successive issue should not be duly entered according to act of congress, if the proprietor should desire to do so.

The bulk of the contents of a newspaper, whether consisting of advertisements, news items, editorials, or miscellaneous matter, is generally, by a comity and custom of the newspaper fraternity, considered, when once published, at the service of any newspaper or other publisher who chooses to quote or appropriate it—the esprit du corps of each being considered as completely satisfied, if "credit" is given to the first source. If any particular matter be published in a newspaper, which it is especially desired, however, to protect, there appears to be no objection to its being copyrighted, though, in that case each succeeding issue of the newspaper containing the matter must be deposited with the librarian of congress, in the prescribed and usual way.

In Platt v. Walter,[1] the court doubted strongly whether a copyright can exist in the case of news-

or profit, must still carefully preserve and keep one copy (at least) of every paper so printed by him or her, on which he or she must write, or cause to be written or printed, in fair and legible characters, the name and place of abode of the person or persons by whom he or she is employed to print the same. Every person so printing, who neglects to have written or printed the name of the employer, or to keep or preserve it for the space of six calendar months next after the printing thereof, or to produce and show the same to any justice of the peace who within the said space of six calendar months may require to see the same, is, for every such omission, neglect, or refusal, to forfeit and lose the sum of twenty pounds.—Shortt, L. Lit., p. 256.

[1] 17 L. T. N. S. 159; *vid.* Clayton v. Stone, 2 Paine, 383–391.

papers, and referred to Ex parte Foss,[1] as seeming to imply a doubt whether there was such a thing as copyright in a newspaper. One of the justices spoke of the right to publish newspapers bearing a particular name as "that which has been called the copyright of a newspaper," but his colleague in the same case, considers copyright in a newspaper as a right "which undoubtedly exists."

341. The fact that the greater portions of their contents have no permanent value, and perhaps no value at all, except to the journal which is enabled to first spread them before those who will pay in money to be possessed of them, is another reason why newspapers are very rarely found invoking the statutes of copyright; and similarly the extracts, anecdotes, facetiæ, and gossip, with which columns of more valuable matter are daily brought down to the required length, every editor or editor's assistant feels at perfect liberty to clip from the exchanges on his table.

That the fact is not otherwise, is due only to the circumstances. There can be no logical reason why literary matter in which property may exist, should lose that literary character from being first published in a newspaper, whether its proprietor has or has not paid value for the matter, or why it should not be copyrighted either by the author or the publisher, like any other lawful composition.

Where the contributor to a newspaper has furnished a composition to its columns, however, there seems, as a rule, to be no further steps taken on the part of the publisher to secure it. It may thenceforth be copied into another newspaper or other published work, or the author himself may publish it singly, or

[1] 2 DeG. & J. 230.

together with other matter, in a volume. And it seems that it makes no difference whether the newspaper has paid for the contributed matter or not. It must not be forgotten, however, that this state of things arises from the comity and the toleration of the fraternity, and does not even have the authority of a custom of trade, to prevent any matter so printed, which has been copyrighted, from becoming entitled to all the protection which the act affords.

342. The principal property which the proprietor has in his newspaper, is in its title. The right to the title of a newspaper is one analogous to the right in a trade-mark, and the proprietor has a right to prevent any other person from adopting the same name for any other similar publication.[1]

343. But, by merely going through the statutory form of copyrighting a title to a periodical or newspaper which he intends to publish at a future day, a right to that particular word or form of words, constituting such title, cannot be obtained as against any who may bona fide and actually use the same; the principle being that where two persons, in good faith and without collusion, happen to copyright the same thing, the one who first makes that thing useful to the public, and available, will have the protection of the law.[2]

The same protection afforded by statutes of copyright is not in this sense prospective.[3]

[1] Clayton v. Stone, 2 Paine, 383–391; Kelly v. Hutton, L. Rep. 3 ch. App. 708; 19 L. T. N. S. 231; 38 L. J. 917, ch.; Keene v. Harris, referred to 17 Ves. 338; Longman v. Tripp, 2 Bos. & P. 67; Ex parte Foss, 3 DeG. & S. 230; Platt v. Walter, 17 L. T. N. S. 159; Shortt, L. Lit. p. 255. And see the case of Osgood v. Allen, reported *ante*, this vol. p. 308, note.

[2] See *ante*, this vol. p. 308.

[3] Shortt, L. Lit. p. 100.

Hogg v. Maxwell[1] was a suit brought by the Messrs. Hogg, who, in October, 1863, three years before the commencement of a periodical publication, called "Belgravia," had copyrighted that word as a title, to restrain the use of that word as a title by the defendants.

Said the court (Cairns, L. J.) in that case: "It is said that the word 'Belgravia,' being used upon the title-page of the magazine, was part of a volume. But at the time of making the entry in the register at Stationers' Hall, there was no volume, no part of a volume, no sheet, no separate fraction of a publication of any kind or description. There was nothing in existence, except that very entry itself, as the entry of the name of a future publication. It is quite absurd to suppose that the legislature, in providing for the registration of that which was to be the indicium of something outside the registry, in the shape of a volume or part of a volume, meant that by the registration of one word, copyright in that one word could be obtained, even although that one word should be registered as what was to be the title of a book or of a magazine. . . . I apprehend that if it were necessary to decide the point, it must be held that there cannot be what is termed copyright in a single word, although the word should be used as a fitting title for a book.[2] The copyright contemplated by the act must be not in a single word, but in some words in the shape of a volume or part of a volume, which is communicated to the public, by which the public are benefited, and in return for which a certain protection is given to the author of the work."

And in The Correspondent Newspaper Company

[1] L. Rep. 2, ch. App. 316; 16 L. T. N. S. 133; 36 L. J. 433, ch.
[2] *Vid.* also Jollie v. Jaques, 1 Blatch. 627.

v. Saunders,[1] it was doubted whether the title of a periodical formed part of the copyright, the object of the act, as to that class of publications, being to regulate the rights as between the contributors and the proprietors.

And if the work be not in esse, but only contemplated at the time of the copyright, no amount of outlay or expenditure will give a right to an injunction to restrain another from using its proposed title. "That expenditure upon a work not given to the world," said the court, in Maxwell v. Hogg, just cited, "can create, as against the world, an exclusive right to carry on a work of this nature, seems to me a proposition quite incapable of being maintained. It never, so far as I am aware, has been thought that any such equity exists. Then, if the expenditure alone will not confer such a right, will the advertisements do so? . . . He, the plaintiff, does not, by his advertisements, come under any obligation to the public to publish the work, and therefore the effect of holding the advertisements to give him a title would be, that, without having given any undertaking or done anything in favor of the public, he would be acquiring a right against every member of the public to prevent their doing that which he himself is under no obligation to do, and may never do. . . . There is a great distinction between the case of advertisement followed by publication, and a case resting upon advertisement only. In the case of advertisement followed by publication, the party publishing has given something to the world, and there is some consideration for the world's giving him a right; but in the case of mere advertisement, he has neither given, nor come under any obligation to give, anything to the world, so that

[1] 11 Jur. N. S. 541; 12 L. T. N. S. 540; 13 W. R. 804.

there is a total want of consideration for the right which he claims."[1]

But a case may occur, even where the statutory requisites as to copyrighting have been duly observed, where the conduct of the proprietor of a periodical may be of such a nature as to disentitle him to aid from a court of equity, by means of interlocutory injunction. If, for example, he lie by and knowingly allow another person to incur expense in bringing out a work, which is an infringement of his strict legal right. Thus in The Correspondent Newspaper Company v. Saunders,[2] a company was formed to establish and carry on a weekly paper called 'The Correspondent,' but, although the proprietors duly proceeded to copyright the title, the paper was not brought out until after the appearance of advertisements of the intended publication, by the defendants, of a paper bearing the same title. The defendants registered the same title, in ignorance of the intended publication by the company, and incurred considerable expense in advertisements. Said the court: "It is no doubt true that a title may be acquired, as in a trade-mark. The question is this: there being two persons equally honest, and one of them having given notice that he is about to produce an article with a certain name, and the other contemplating the same thing, whether or not the first, by bringing out his article a day or two sooner than the other, acquires a right by way of trade-mark. The plaintiffs' position is this: The defendants in perfect good faith, and not knowing of this rather dormant company, bring out their advertisements. It was incumbent on the plaintiffs then to

[1] *Vid.* Hogg v. Kirby, 8 Ves. 115, and comments thereon in chapter on Piracy.

[2] 12 L. T. N. S. 540; 11 Jur. N. S. 540; 12 W. R. 804.

communicate with them as quickly as possible, because the defendants were incurring great expense, and, by their advertisements, really playing into the hands of the plaintiffs. The plaintiffs, however, laid by for eight days, and did not give the defendants notice till after they had brought out their own paper, and, as it is to be observed, on a Wednesday, either for the purpose of gaining priority, or else having changed their day of publication, thus supplying one of the ingredients of mistake [it was said that the papers were mistaken for each other, and that the plaintiffs were thereby damnified]." An interlocutory injunction was refused, and the motion was ordered to stand over till the hearing.

Nothing in these cases, however, will be construed to overrule the right to enjoin colorable or other piracies, or imitations of the titles of newspapers or periodicals which tend to deceive the public.[1]

344. The right to a title is a chattel interest, capable of assignment and transfer, like any other.[2] The title of a periodical or newspaper has been repeatedly held to be a proper subject of copyright, as characterizing the particular publication.[3] Such title cannot, therefore, be assumed without injury, although a similar title distinguishable may be assumed.[4]

[1] Hogg v. Kirby, 8 Ves. 215.

[2] Clayton v. Stone, 2 Paine, 383–391; Kelly v. Hatton, L. Rep. 3 ch. App. 708; 19 L. T. N. S. 231; 38 L. J. 917; Keene v. Harris, referred to 17 Ves. 328; Longman v. Tripp, 2 Bos. & P. 67; Ex parte Foss, 3 DeG. & J. 230; Platt v. Walter, 17 L. T. N. S. 159. In England as in America this right is considered a chattel for the purpose of the Bankrupt Law (Longmann v. Tripp, 2 Bos. & P. 69), but is not seizable by a sheriff upon execution (Ex parte Foss, 2 DeG. & J. 230).

[3] Hogg v. Kirby, 8 Ves. 338; Constable v. Brewster, 3 Sess. Cas. 215 (N. E. 152); Copinger's Law of Copyright, p. 41; Keene v. Harris, cited 17 Ves. Jr. 338.

[4] Id.

Though there is nothing analogous to copyright in the name of a newspaper, the proprietor has a right to prevent any other person from adopting the same for any other similar publication; and this right is a chattel interest, capable of transfer by purchase and sale.[1] What stress is to be laid upon the words "similar publication," may be inferred from the fact that the cases all appear to be cases of intentional violation. If the violation were unintentional, and the publications dissimilar, there would probably be a difference.

In the suit of Bradbury & Evans (his publishers) against Charles Dickens,[2] the title "Household Words," as applied to a newspaper, was held to be a part of the plaintiff's partnership assets. In this case Mr. Dickens, when withdrawing from the editorship of "Household Words," advertised that that periodical would be thereupon "discontinued." Held, that this was an unlawful tampering with a valuable property and consideration.

Where such title, name, or style is assumed for the sake of deceiving the public, the general rules governing trade-marks would, in all probability, be applied; and the right of the party aggrieved to his remedy in chancery, by injunction and accounting, is undoubted.[3]

In the United States, the decisions upon the right to a mere title or name of a newspaper, where no colorable imitation or piracy is intended, seem to lean toward the protection of the title and name.[4] But in Snowden v. Noah, and in Bell v.

[1] Kelly v. Hutton, L. Rep. 3 ch. App. 708; Shortt, L. Lit. 253.

[2] Bradbury v. Dickens, 27 Beav. 53.

[3] Cruttwell v. Lye, 17 Ves. Jr. 335; Bell v. Locke, 8 Paige, 74.

[4] Snowden v. Noah, Hopkins' Ch. Rep. 347; Bell v. Locke, *ubi supra*; and see Matsell v. Flanagan, 2 Abb. N. S. 459.

Locke,[1] where no colorable imitation was intended, and the public were not deceived, the injunction was denied.

In the later cases of Jollie v. Jacques,[2] and in Osgood v. Allen,[3] the circumstances were otherwise, the court saying in the latter case, that "the title of a periodical publication, separate and apart from the work which it is used to designate, is not protected by the copyright law;" and in the former, that "a copyright is given for the contents of a work, not for its mere title. There need be no novelty in the title."[4]

345. The question as to what extent equity will interfere to protect a title, must be examined by light of the principles of equity alone. In the case of Keene v. Harris, the trustee of a newspaper published another newspaper under the same title. The relief was granted on the ground that the second publication was a breach of trust. In Hogg v. Kirby,[5] the ground was, the false representations, but the principal ground upon which the protection will be extended will be undoubtedly the principle, as we have already stated, of the good-will of trades.

There may be at least two distinct cases in which the question will arise: 1. Where the title taken has been a long time in use. 2. Where the title is new, and but just copyrighted for a new and prospective work. There may also be two distinct classes of titles (a)—characteristic titles—such as either descriptive of

[1] Bell v. Locke, 8 Paige, 75.

[2] 1 Blatch. 618. And the same rule was laid down in Matsell v. Flanagan, 2 Abb. (Pr.) N. S. 459.

[3] 6 Am. L. T. Rep. 20, reported *ante*, p. 308.

[4] Note also the recent case of Isaacs v. Daly, *ante*, pp. 219, 306, wherein the plaintiff sought to enjoin the use of the word "charity," as a title to a dramatic composition, and the opinion of Curtis, J., denying such injunction.

[5] Cited in Cruttwell v. Lye, 17 Ves. 335, 342.

the peculiar contents of the work,[1] or of its author, or as mark its individuality, beyond the reasonable probability of coincidence; as for instance, "Mliss,"[2] for the name of a novel. "Le Constitutionel,"[3] or "Gazette de Sante,"[4] "Dictionnairie de l'Academie Française;"[5] "The Bath Chronicle;[6] "History of the Conquest of Mexico, with a preliminary view of the Ancient Mexican Civilization;" and the "Life of the Conqueror Hernando Cortez;"[7] and (6) titles so generic and natural in their wording as to be ordinarily selectable; such as a "Dictionary of the English Language;" "A History of the United States;" "A Treatise on Copyright;" "A Life of Washington;" "Railway Guide;" "A Guide to Germany," &c. In the latter cases courts would probably hesitate to grant exclusive copyrights. So, although the question has been decided both ways, the better opinion seems to be that there can be no exclusive trademark in a geographical name. In a leading case in the United States the name of a town near which a commodity was manufactured was protected as a trademark,[8] but still later decisions seem to tend the other way.[9]

346. As to the first case, where the title has been a long time in use, the main grounds of protection will be

[1] 8 Ves. 215.

[2] Harte v. De Witte, *post*, this chapter, and see chapter on Piracy.

[3] Reonouard, tom. 2, p. 125.

[4] Id. p. 128. But see Benn v. Cheeney, XVIII. Int. Rev. Record, p. 94 (No. 12); Osgood v. Allen, 6 Amer. L. T. (O. S.) 20.

[5] Merlin Questions de Droit—Properties Litteraire, § 1.

[6] Keene v. Harris, 8 Ves. 215.

[7] See Spottiswoode v. Clarke, 2 Phillips Ch. R. 154.

[8] Newman v. Alvord, 51 N. Y. 189.

[9] See Glendon, &c. Co. v. Uhler. Supreme court of Pennsylvania; U. S. Official Gazette of the patent office, vol. vi. p. 154.

the title to the periodical or regular returns which the publication, under that title, produced, which would enable the court to see and to compute at once the probable damage caused by the copying of the name;[1] or again, that the copying is a fraud upon the public. As in the case of Spottiswoode v. Clarke,[2] which was the case of such a colorable imitation of the title of a long-established almanac, as could reasonably be supposed to mislead. The title of a periodical work, such as a newspaper, by which it has been known for a long period of time, is evidently its own, and valuable; and the longer it is worn, of course the more valuable it becomes.[3] Nor can the title of a well-known work, which marks its individuality, be used for another work of a totally different character, even if used with slight modifications, if there is any chance of confusing the one work with the other.[4] In this latter case, both of the elements of a piracy were present, and a court could not withhold its protection.

The second case would be one more difficult to construe, as, in the event of a new publication, where the title had been copyrighted as a preliminary to its publication, neither of these elements of damage could arise. Being as yet an untried venture, the court could not presume that it would be pecuniarily profitable, and the title, being as yet unknown to the public, the public could not be said to be deceived by a second use of that title.

347. In the first case, of long-established publications, perhaps the distinction as to the two classes of titles might not so strictly arise, and the whole ques-

[1] 2 Story Eq. § 951; Curtis on Copyright, 295.
[2] 2 Phillip's Ch. R. 159.
[3] Renouard. tom. 2, p. 118–128, Merlin Questions de Droit, Proprietie Litteraire, § 1, Repertoire de Jurisprudence v. Livre.
[4] See Curtis on Copyright, 298.

tion resolves itself into the question whether the colorable imitation was such as to interfere with the goodwill of the publication, and as to mislead the public. For neither would be permitted or tolerated by law; and in the case of the ordinary title, the question would be rendered less generic by the circumstances, as to whether the color and design of the cover, the size, and shape, and bulk of the periodical, or possibly the day and method of its publication, were not all calculated to aid the interference, and show willfulness and bad faith. No one of these circumstances might be of itself sufficient, but all together might, as in the case of a trade-mark,[1] be taken as a cumulative infringement.

In the case of the "Dictionnaire de l'Academie Française," the French court of Cassation held that the title of "Dictionary of the French Academy" is an essential part of the dictionary itself; that to usurp it is to usurp a part of the work; that the law treats the usurpation of part of a literary work as an infringement (contre façon), and punishes it in a peculiar manner:—that if, under the title of "Theatre de Racine," a printer were to publish the plays of Bradon, and if Racine were living, and in the enjoyment of all his rights of property, it would be impossible to say that the printer had not committed a piracy (vol litteraire), and ought not to be visited with the penalties enacted for that offense. The court adopted this reasoning, and held that the object of the law of 1793 (the copyright law) was to secure to authors, their heirs and assigns, the exclusive right to print, sell, and distribute their own works, and consequently to prohibit the printing and distribution of every work which, by an

[1] See Washington Medallion Pen Co. v. Esterbrook Pen Co., cited *ante*, p. 252 this vol.

invasion, more or less extensive, could interfere with this exclusive right; and that the adoption of such a title as that in question was an offense against the law of 1793, inasmuch as it tended directly to injure the proprietors of the genuine work.[1]

The Cour Royal, however, sanctioned the publication of a journal styled the "Gazette de Santé," which another journal had formerly borne, but had abandoned, having seven months previously assumed the title "Gazette Medicale de Paris."[2]

348. The question as to the title of the (musical) composition was not regularly passed upon, however, in Jollie v. Jacques.[3] The court expressly said, in that case, "The question whether the court will interfere to prevent the use of the title in fraud of the plaintiff upon the good-will of trades is not before us, and cannot be entertained in this suit." The right secured (by the copyright) is the property in the piece of music, the production of the mind and genius of the author, and not in the mere name given to the work. That is indeed essential, as well in taking out the copyright as in identifying the composition protected, and is sometimes, doubtless, the source of as much profit as the intrinsic merits of the thing itself. But it is not the thing protected, or intended to be protected. There need be no novelty or originality in it, nor need it be even the production of the author, for anything contained in the act; it may be taken from the suggestion of a friend, or picked up from any source, as the author may desire. The title or name is an appendage to the

[1] Renouard, tom. 2, p. 128.

[2] Merlin, Questions de Droit, 1 Propertie Litteraire, § 1.

[3] Blatchf. 618. This was a bill filed to restrain the defendants from an infringement of the plaintiff's copyright in a musical composition know as "The Serious Family Polka, &c.," arranged by George Loder.

book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it, as certainly as the principle carries with it the incident.

349. A title, separated from the publication which it is used to designate, is not protected by the copyright law.[1] It is to be noticed that, therein, is an essential difference between a trade-mark and the name of a particular literary work; for a trade-mark is only infringeable by the production or sale of goods of the same kind as those protected by the first trade-mark, as, for instance, the trade-mark "Mason's Challenge Blacking," would not be infringed by the production of "Mason's" or of "Brown's" "Challenge Ink." A title, moreover, might fit any number of literary works, a poem, a play, or a novel. For example, it is very hard to imagine a literary work, especially an original work, which might not bear as its title "The Wide, Wide World," or a novel, or a play which might not be called "All's Well that Ends Well," since the business of novel or play writing is invariably to carry a hero or heroine through chances and perplexities, and bring them out well in the end. Therefore the law says you shall not copyright a title alone,[2] separated from the work itself. It takes very little penetration to perceive, that, otherwise, designing persons might support themselves by levying a sort of blackmail, under the protection of statutes of copyright, by making a business of copyrighting titles, words, and phrases in the office of the librarian of congress, thereafter waiting

[1] Osgood v. Allen, 6 American Law Times, O. S., 20. See *ante*, p. 308.

[2] Benn v. Cheney, xiii. Int. Rev. Rec. p. 94. See this case treated at length in the chapter on Dramatic Copyright.

until some laborious author had completed and published his work, when they might fall upon him, and extort damages for the use of what has cost them no labor, and very little ingenuity; or they might, with comparatively small trouble and no ingenuity whatever, ascertain what authors or playwrights were preparing certain works, to be entitled by certain names, and, by merely sending that name to the proper office, and paying the nominal fee, be enabled to prevent the author or playwright from enjoying the fruits of his legitimate labor, without paying them for their interference.

350. In the supposable case of two authors, each of whom in good faith should prepare a literary work, in themselves dissimilar, and copyrighting the same under precisely the same title, we are of opinion that the one first making his available to the public, without regard to the date of his copyright, would be entitled to protection. For, where each one came before equity "with clean hands," and with an equal claim to protection so far as his own labor and good faith was concerned, equity would be obliged to recognize a jus tertii, or third right, namely, the right of the people, which third right would most likely turn the scale. And this, as we understand it, was the case of Isaacs v. Daly, where the plaintiff had previously copyrighted a play under the name of "Charity." His play, however, had not been performed or otherwise published when the defendant produced at his theatre a play also called "Charity." It was not claimed that the plays were in any respect similar, or that the second was an infringement of the first, except as to the title. The court held that an injunction would not lie to prevent the defendant from representing the second play.[1]

[1] See *ante*, this vol. pp. 219, 305

351. The wrongful use of an author's name, as we have already seen in treating of Innocence, is a deception of the public, and will be enjoined by equity. Lord Eldon enjoined the publication of certain poems which were alleged to have been written by Lord Byron, and issued under his name, upon an affidavit of his agent that it was highly probable that they were not his, and upon the defendant's refusing to swear that he believed Lord Byron to be their author.[1] So in the case of a book purporting to be a translation of the devotions of C. C. Sturm,[2] and in the recent case of Harte v. DeWitt,[3] brought by Mr. Harte, to restrain the defendant, a publisher, from courting public patronage by attaching his (Mr. Harte's) name as author, to a book of which he was not the author. As claimed on the part of plaintiff in the suit, and not denied on the other side, on the trial, the cunning device of plaintiff was to publish and offer for sale a book purporting to be the story of "'Mliss," written by Mr. Harte, the first thirty pages of which was taken from Mr. Harte's book of the same title, while one hundred and ten succeeding pages were written by some one else. At the point where their plagiarism of Mr. Harte's book ends, and the unknown author's production begins, is inserted a brief note informing the reader that the remainder of the story is not the production of Mr. Harte. This act of defendant, it was claimed on behalf of Mr. Harte, was not only an infringement of Mr. Harte's copyright, but also of his right to his name as a trade-mark; was a fraud upon the public,

[1] Lord Byron v. Johnson, 2 Meriv. 29.

[2] Wright v. Tallis, 1 C. B. Rep. 893.

[3] N. Y. Supreme Court, 1st Dist. See N. Y. Times, March 24, 1875.

and, on all three grounds, a proper case for the exercise of the equitable powers of the court, in the form of an order of injunction.

The defendant admitted the facts as alleged by plaintiff, to be substantially true, but claimed that the story of 'Mliss had, by dedication to the public, become public property; that the plaintiff could not copyright his name, nor had he under the circumstances a trade-mark *right in it; that in a religious* point of view, his books contained characters of an immoral tendency, the right of authorship in which, a court of equity would not interfere to protect, and that the use of his name as author by defendant was legitimate and lawful, notwithstanding but a portion of the book to which it was so attached was the production of his pen.'

[1] Mr. Harte was placed on the stand and testified to the facts generally that he did not surrender his copyright of his stories which were published by him originally in monthly magazines; that he never authorized the use of his name by the defendant; that 110 pages of the book in question were not written by him, and that he considered his rights and fame as an author and his pecuniary interests to have been injured by defendant's acts.

Not disputing Mr. Harte's facts, counsel for defendant confined his cross-examination to the question of the irreligious tendency of his books. On this point he asked:

Q.—What was the design in your mind in drawing those characters, that is "Kentuck" and "'Mliss"? A.—In "Kentuck" I endeavored to draw the character of a great-hearted, good-natured, rough man, a man whose nature was fine but whose education was limited, and who had lived a good deal in rough life—whose tenderness was awakened by a helpless child, who became devoted to that child and his nature refined by it, and who eventually sacrificed his life for the sake of the child.

Q.—And the lesson to be drawn from that character is, in your judgment, what, as a literary man? A.—The lesson of sacrifice.

Q.—What was the character of "'Mliss"? A.—The char-

352. The question as to copyright in newspapers was examined in the case of Clayton v. Stone.[1]

Said Thompson, J., in that case, in 1821,[1] "The

acter of "'Mliss" was that of a bright, rather preternaturally smart child, with something of a man's intellect, who had been very ignorant and was put to school; who had before her certain problems in her school lessons, of which she had very little prior knowledge, and which she was endeavoring to understand. One of these ran counter to something that had been taught her in the Sunday-school class, and she found some difficulty in reconciling the two statements, and expressed herself that way.

In reply to further questions on this subject, Mr. Harte testified that he did not consider any of his characters as tending to discredit the doctrines of the Bible, and certainly were never so intended by him; he did not consider that anything in the story of "The Outcast of Poker Flats" or "The Luck of Roaring Camp" had any such tendency.

At the close of the testimony in the case, Mr. Warren, on the part of the defendant, asked a week to hand in points of law on the questions involved. He thought he would be able to satisfy the court as matter of law that plaintiff [Mr. Harte] had no right to prohibit the use of his name in the form in which the defendant had used it—that, in fact, he had no exclusive right to his name as an author.

Judge Van Brunt.—Do you mean to contend that a man has no right to his own name—that you can publish something under my name as author, and I cannot restrain you from the act?

Mr. Warren.—Yes, your Honor. I mean that we have a right to publish a book of which you may be the author, putting your name as author, and inserting the Lord's Prayer at back of it, and you cannot object.

Judge Van Brunt.—I can restrain you from publishing the Lord's Prayer as my production. This book, I find, as matter of fact, to be a fraud, and a court of equity has a right to interpose to prevent fraud. It is sold as "'Mliss," by Bret Harte, and the purchaser as such, after reading thirty pages, meets a note by the publisher informing him that the remainder of the book is not by Bret Harte. If that is not a fraud, I'd like to be told what can be.

Mr. Walker closed in by adding that the name of Bret

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[1] 2 Paine, 382–391.

copyright act was passed in the interests of and for the promotion of science, and it would certainly be a pretty extraordinary view of the sciences to consider Harte, coupled with "'Mliss," was clearly within the law of trade-mark, and as such to be protected by injunction. This closed the trial, except the submission of points by counsel, and the court reserved its decision. In the meantime the injunction against the publication of the book in controversy in the form of which Mr. Harte complains is restrained by injunction.

The findings in this case were as follows: "This action having been brought to trial before me, at a special term of this court, held at the city of New York on the 23rd day of March, 1875, after hearing the evidence produced by each of the said parties, and the arguments of their respective counsel, I find as matters of fact, first, that previous to the year 1863, and from thence to the present time, the plaintiff was and is an author by profession, having composed and written various books published in his name in the United States, which have been extensively sold and circulated therein. Second, that by such means the plaintiff has established a valuable literary reputation, and has been enabled to dispose of his literary productions on terms of pecuniary benefit and advantage to himself, and that during such period he was not engaged in any other business or occupation. Third, that for some time before the year 1873, and from thence to the present time, the defendant has been and is a bookseller and publisher of books, carrying on business in the city of New York. Fourth, that about the year 1863 the plaintiff composed and wrote a story entitled ''Mliss,' in four parts or chapters, which was published in a newspaper called the 'Golden Era,' published in California, under permission granted by him to the proprietors of said paper to publish said story therein, but not in any other way or manner. Fifth, that about the year 1865 he composed and wrote a continuation or extension of said story, containing five additional chapters, the right of the publication of which in said newspaper, but not otherwise, was also granted by him to said proprietors. That such story was afterwards published in the Sunday Mercury, in the city of New York. Sixth, that said original story, and the continuation or extension thereof, were published in said newspaper, and the same have been since, and continue to be published by one James R. Osgood & Co., publishers, together with other works written and composed by him, in one volume, under a contract between him

a daily or weekly publication of the state of the market as falling within any class of them. . . . . The term science, cannot, with any propriety, be ap-

and said James R. Osgood & Co., from which he has derived and is deriving considerable profit and income. Seventh, that all of the aforesaid publications were made under the name of the plaintiff as author thereof. Eighth, that before the year 1873 the following-named works (among others), written and composed by the plaintiff, had with his consent been published in the United States, under his name as author, and under the following titles, viz.: 'Condensed Novels,' 'Heathen Chinee,' 'Luck of Roaring Camp,' and 'Mrs. Skagg's Husbands.' Ninth, that in or subsequent to the year 1865, about fifty additional chapters, written and composed by one G. R. Densmore, and purporting to be an extension or continuation of said story of ''Mliss,' were published in said 'Golden Era' newspaper, under the name of said Densmore as author thereof. Tenth, that in or about the year 1873, without the knowledge or consent of the plaintiff, the defendant printed, published, and sold, in the city of New York, a volume containing one hundred and forty-eight pages of closely-printed matter, in double columns and small type, with paper covers, and which is designated on the title-page, and on the first page of the outside of the cover thereof, ''Mliss, an Idyl of the Red Mountains. A Story of California in 1863. By Bret Harte, author of "Condensed Novels," "Heathen Chinee," "Luck of Roaring Camp," "Mrs. Skagg's Husbands," &c.;' and on that part of the cover which forms the outer back of said volume is printed, in large and heavy type, the words, ''Mliss, an Idyl of the Red Mountains, by Bret Harte.' Eleventh, that the whole contents of the said volume consists of the nine chapters written by the plaintiff, and published in the Golden Era newspaper before mentioned, and the fifty chapters, or thereabouts, written by said G. R. Densmore, also published in said newspaper, as before stated. and that the part written by the plaintiff is in about thirty pages, being about one-fifth portion only of the contents of said volume. Twelfth, that the publication and sale of the said volume was continued by the defendant, without the consent of the plaintiff, down to the commencement of this action, and that he had no knowledge of such publication or sale until about a week before this action was commenced. Thirteenth, that at the end of the tenth chapter of said volume, in the body of the work, is inserted a printed note, in small type, purporting to inform the reader that the first ten chapters of the vol-

plied to a work of so fluctuating and fugitive a form as that of a newspaper or price current, the subject-matter of which is daily changing, and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise . . . yet the law does not contemplate their being rewarded in this way; it must seek patronage and protection from its utility to the public, and not as a work of science. The title of the act of congress[1] is "An Act for the Encouragement of Learning." It was not intended for the encouragement of mere

ume were written by Bret Harte, but that the residue of said volume was not written by him, but by some other person, which statement is untrue, as the tenth chapter was not written by the plaintiff, but was written by the said G. R. Densmore Fourteenth, that the statements contained in and printed on the said title page and cover, as stated in the above tenth finding, are calculated and designed falsely to represent and affirm the plaintiff to be author of the whole of the volume published by the defendant, and injure and defraud the plaintiff in his professional reputation, and in the profit and advantage to be derived by him from his literary works; and that the note printed at the end of said tenth chapter is calculated and designed to induce purchasers and readers of said volume to believe the plaintiff to be a consenting party to said false representations.

"And I conclude, as matter of law: First, that the plaintiff is entitled to judgment against the defendant, enjoining and restraining the defendant from printing, publishing, selling, giving away, or parting with, or in any way, by publication, notice, hand-bill, or otherwise advertising for sale, the said volume, or any book or volume containing the contents of said volume, or any part thereof, not written by the plaintiff, under the name or title of ''Mliss,' or ''Mliss, an Idyl of the Red Mountains,' and under the name of the plaintiff, in the publication, sale, or advertising of said volume, or any part thereof, without his consent first obtained. Second, and that the plaintiff is entitled to judgment for his costs of his action.

"(Signed) C. H. VAN BRUNT."

[1] *I. e.*, the act of 1819, 1 L. U. S. 104. The title of the present act (of 1870) is "an act to revise, consolidate and amend, &c."

industry, unconnected with learning and the sciences. The preliminary steps required by law cannot reasonably be applied to a work of so ephemeral a character as that of a newspaper, all the minutiæ of which would have to be done for every newspaper. The right cannot be secured for any given time, for the series of papers published from day to day, or week to week; and it is so improbable that any publisher of a newspaper would go through this form for every paper, it cannot be reasonably presumed that congress intended to include newspapers under the term "book." That no such pretense has ever been set up, either in England or in this country, affords a pretty strong argument that such publications were never considered as falling under the protection of the copyright laws. We are, accordingly, of opinion that the paper in question is not a book, the copyright to which can be secured under the act of congress."

353. This question came for the first time in England, according to Shortt,[1] "for express decision, in the recent case of Cox v. The Land and Water Journal Company,[2] where the plaintiff, the proprietor of the Field newspaper, sought to restrain the publication in the Land and Water Journal of a 'list of hounds,' alleged to be copied from a list printed in the former paper. It was contended, on behalf of the defendants, (1) that the plaintiff had no copyright in the article of the piracy of which he complained; (2) that if he had a copyright, he could not sue until his paper was registered under the copyright act. The court said: "The preliminary objection taken in this case raises a

[1] L. Lit. p. 250. This according to Shortt is the only case appearing upon the subject.

[2] L. Rep.; 9 Eq. 324; 21 L. T. N. S. 548; 18 W. R. 206.

point of vast importance to the proprietors of newspapers, and to the public at large, so important that it seems almost incredible that it should never have arisen before, whether the proprietor of a newspaper has or has not such a property in articles published in that newspaper, and paid for by the proprietor, as entitles him to prohibit the publication by any other newspaper in any other form whatever."

"For the purposes of the argument, it must be assumed that the article complained of was a copy of the article of the plaintiff, and upon that ground the defendant takes the objection that there can be no copyright in any article published in this newspaper, because it is not registered under the act 5 & 6 Vict. c. 45, commonly called the copyright act. Now suppose, for instance, the proprietor of a newspaper employs a correspondent abroad, and that correspondent, being employed and sent abroad at great expense, makes communications to a newspaper which are highly appreciated by the public, can it be said that another newspaper, published perhaps in the evening of the same day, may take and publish those communications in extenso, with or without acknowledgment? If the contention of the defendants is right, the paper which copied might say: 'But they are common property. True it is, I admit, that you have paid for them. I admit that you have given a great deal of money for them, and they are so very valuable that I desire to turn them to account by publishing them in my newspaper; but you have no property in them, although you pay for them; you cannot sue for your newspaper as a book, for then the copyright must be registered, and as you have not registered the book, nothing in the newspaper is protected.' If that is the law, it is a monstrous state of

the law—repugnant to common sense and common honesty—because that there is a property in these articles, there can be no shadow of doubt. Still, however clear the right of property may be, if the case falls within the act of parliament, I must follow the same course which I took in the Brighton Directory case, Mathieson v. Harrod.[1] . . . . Now, I have put the case of letters from correspondents abroad. With foreign papers, we all know, it is the practice to publish novels, and in some English newspapers it is also done. Supposing a newspaper proprietor were to engage the first novelist of the day to write for him a novel to be published in his newspaper, part every day, and pay him highly, is the proprietor of such a newspaper to lose all property, because the paper is not registered? What information would it give if it were registered? Would the registration of a paper called "The Field," registered twenty years ago, give information as to when the copyright would commence and end?—not the slightest; and, therefore, it is not within the policy of the act, and, I am of opinion, that it is not within the words of the act. The question depends first upon the second section of the act. What is a book? because every book must, by the twenty-fourth section, be registered. We find that 'book,' under the second section, 'shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, or dramatic piece,' and so forth. Now, certainly, a newspaper does not fall within any of those descrip-

[1] L. Rep. 7 Eq. 270; 19 L. T. N. S. 629; 38 L. J. 129, Ch. In this case a bill to restrain the piracy of the plaintiff's directory was dismissed with costs, because the entry at Stationers' Hall of the date of first publication contained only the month, and not the day of the month, on which it had first been published.—Shortt, L. Lit. p. 251.

tions, and if it was intended that this act should be applied to newspapers, it would have been inserted, as the word 'newspaper' is well understood; and that word not being inserted, I must take it as advisedly omitted, because it was not the intention of the legislature that newspapers should be included within the act. Then comes the section which prescribes what is to be done with regard to periodical publications. Sect. 19 provides 'that the proprietor of the copyright in any encyclopedia, review, magazine, periodical work, or other work published in a series of books or parts, shall be entitled to all the benefits of the registration at Stationers' Hall, under this act, on entering in the said book of registry the title of such encyclopedia, review, periodical work, or other work, published in a series of books or parts, the time of the first publication of the first volume, number, or part thereof, or of the first numbers or volume first published, after the passing of this act, in any such work which shall have been published heretofore, and the name and place of abode of the proprietor thereof, and of the publisher thereof, when such publisher shall not also be the proprietor thereof.' That, again, does not mention newspapers, and I must come to the same conclusion—that a newspaper was not mentioned, because it was not intended to be included. Then, can a person have any copyright or property in that which is not registered under the act? This depends, I apprehend, upon the construction of the 18th section, which enacts that when any publisher or other person shall . . . have projected, conducted, and carried on . . . any encyclopedia, review, magazine, periodical, work, or work published in a series of books or parts, or any book whatsoever, and shall have employed any person to compose the same, or any

volumes, parts, essays, articles, or portions thereof, for publication in, or as part of, the same, and such work, &c., shall be composed on the terms that the copyright shall belong to such proprietor, and be paid for by him; then the proprietor of such work shall be entitled to copyright (except that after the term of twenty-eight years the copyright shall revert to the author), and shall be entitled to sue upon registering the same at Stationers' Hall. Now, must every right included in this section be registered according to the act? The present Lord Chancellor decided that question in Mayhew v. Maxwell.[1] Mr. Mayhew wrote a certain article or series of articles, in a periodical called The Welcome Guest, and the proprietor proceeded to publish them in a separate form. The plaintiff filed his bill to restrain him from publishing in any other form than in that for which he wrote the work. The same point arose in Strahan v. Graham,[2] where Mr. Graham had sold the right of publishing photographs of the Holy Land in a publication called 'Good Words,' in which Dr. M'Leod was publishing a work with regard to the Holy Land, and the proprietors of 'Good Words' had given him permission to use the photographs; but Mr. Graham contended that Mr. Strahan had no right to give it to Dr. M'Leod. I decided in that case, and my decision was confirmed by Lord Chancellor Chelmsford, that there was no right to publish in a separate form that which he had authority only to use in 'Good Words,' and that Mr. Graham had a good right of action. But these are distinct authorities to show that there is a property in a publication, although it is not registered. That is the ground upon which Vice Chancellor Wood commented on the 24th section, in Mayhew v. Max-

[1] J. & H. 312. [2] 16 L. T. N. S. 87.

well. He says : 'The plaintiff has not registered under the 24th section.' Now, I have been referred to the case of Sweet v. Benning,[1] which was a case between Mr. Sweet, the proprietor of 'The Jurist,' and Mr. Benning, a bookseller. Sweet brings an action against Benning for copying the marginal notes of cases in a separate publication. This was the subject of the action. I suppose 'The Jurist' had been published before this act of 5 & 6 Vict., and therefore it was not registered at all. If so, the question whether these reports, published in 'The Jurist,' were subject to the provisions of the act, did not arise. Now, in deciding that case, Jervis, C. J., said:[2] 'I think that, under the circumstances stated, there is an implied condition, understanding, or arrangement between the proprietors of "The Jurist" and the gentlemen who furnished them with reports, that the former shall acquire a copyright in the articles so written.' Now, therefore, it appears to me that a 'newspaper,' (which is the best possible and only definition of such a publication as "The Field,") not being within any of the provisions of this act, I must infer that it was not the intention of the legislature to apply the act to newspapers (for it was absolutely impossible that it should have missed insertion in some of the sections), and that the circumstance of non-registration throws no difficulty in the way of the plaintiff maintaining his right in law or equity; and though it is seldom worth the while of proprietors to assert the copyright in articles in a newspaper, I am of opinion that, whether it be the letters of a correspondent abroad, or the publication of a tale or a treatise, or the review of a book, or whatever else, he acquires—I will not say as copyright, but as property—such a property in every

[1] 16 C. B. 459. [2] Ib. 480, 481.

article for which he pays under the 18th section of the act, or by the general rules of property, as will entitle him, if he thinks it worth while, to prohibit any other person from publishing the same thing in any other newspaper, or in any other form."[1]

[1] The effect, says Shortt (L. Lit. p. 254), "which cannot be considered a satisfactory one, is that the proprietor of a newspaper has a property in its published contents, entitling him to restrain the piracy of any portion thereof for which he has paid, under section 18 of this act, without the necessity of a preliminary registration at Stationers' Hall. This right, it is obvious, is exactly 'the sole and exclusive liberty of printing, or otherwise multiplying copies' which section 2 of 5 & 6 Vict. c. 45, calls 'copyright,' a term which the vice-chancellor is reluctant to apply to it, but which section 18 does expressly apply to it enacting that the proprietor who has paid for the articles shall have 'such term of copyright therein as is given to the authors of books by this act.' Now, it is settled by the decision of the House of Lords, in Donaldson v. Beckett (4 Burr. 2408), that that the common-law right of property in literary works, after publication, if such right ever existed, has been taken away by statute, and that copyright after publication is now altogether dependent on statutory enactment. It exists only in those works, and can be enforced only on the observance of those conditions which are mentioned and prescribed in the acts now in force. Considerations of the great hardship of allowing the unauthorized copying and publication of the copies of paintings, drawings, and photographs were not regarded as sufficient to justify the courts of law or equity in interfering for the protection of the owners of such works, and the intervention of the legislature was necessary to confer a copyright in them; so that the observation of the vice-chancellor on the hardship of denying a protection from piracy to the proprietor of newspaper articles, are by no means decisive as to the existence of a right to prevent such piracy independent of the statute. If it be thought only just, as everybody must think it, that the publisher of a newspaper should be able to restrain the wholesale piracy of its contents, there does not seem to be much difficulty in the way of interpreting a newspaper to be a 'book' within the meaniag of section 2 of the above act, there construed to mean and include "every volume, part, or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart,

354. The law of libel, which we have already examined at length, makes no exception, in principle, in favor of newspapers. Because a man is the editor of a newspaper, or a contributor to a newspaper, he has no peculiar rights touching the reputation of his neighbors. The peculiar exceptions which do arise to general rules in dealing with newspapers, and which are noticed in the present chapter, will be found, we imagine, to be exceptions in the application of rules by which courts are guided in judging of the element of malice which, more or less, affects every case of libel. From the fact that newspapers are servants of the public, and perhaps, too, from the consideration that it is essential to the safety of the state or the public that every man should be known, as he is, by his neighbors, and by the community at large, a certain latitude is allowed, which we shall endeavor to exemplify.

355. The questions of Innocence and of Libel, as applied to literary composition in general, in consideration of the vast interests which accrue to the public from the close and searching supervision of the newspaper press over matters of public or general interest, and its criticisms on the conduct of servants of the public, will be found to undergo in their behalf some relaxation of the strict rules which it has been found necessary to apply in other cases, for the purpose of preserving the reputation of individuals from defamatory attacks. The duty which the public expects from the Press, of watching and making generally known the acts of all

or plan separately published," or in holding it to be a "periodical work, or other work published in a series of books or parts," within the meaning of section 19 of the same act; in either of which cases, however, registration would be necessary before the proprietor could sue in respect of an infringement of his copyright."

public servants, and censuring them when deserving of censure, of commenting freely on all matters which touch the public welfare, of fearlessly exposing whatever is corrupt, oppressive, or otherwise deserving of reprobation,—of being, as it should be, and is when rightly conducted, a censor of the public morals, and a keeper of the public virtue, entitle it to a latitude and a leniency where its functions are exercised, bona fide, in that regard.

It must not be supposed, however, than an individual, from the mere circumstance of his being a writer for a newspaper, is entitled to any immunity from the laws of his country, or from the consequences of his own acts.[1] He stands in the same light precisely as other men; he is in no way privileged. He cannot, on account of his employment, be allowed to indulge in malicious attacks upon the acts or the reputation of his fellow-men.

Every person has a right to discuss all matters of public interest, and to comment favorably or unfavorably thereon, either by attack upon or ridicule of their official acts. And the freedom of the press is, when rightly understood, commensurate and identical with the freedom of the individual, and nothing more. In Parmiter v. Coupland, it was held[2] that a much greater latitude will be extended to criticisms on persons occupying a public capacity than to criticisms on private individuals; and publications which would be clearly libellous if levelled against the latter may be innocent, and even commendable, when directed against the former. "That criticism may reasonably be applied

[1] Shortt, p. 433; Davidson v. Duncan, 7 El. & B. 231; Campbell v. Spottiswoode, 8 Law Times Rep. N. S. 201; 3 Fost. & F. 421; Sheckell v. Jackson. 10 Cush. 25; Kane v. Mulvany, 2 Ir. C. L. 402.

[2] Per Alderson, B., Parmiter v. Coupland, 6 M. & W. 108.

to a public man in a public capacity which might not be applied to a private individual. The same thing might be no libel on one which might be a very grievous and injurious libel on another."

But there is a rational limit beyond which neither the newspaper writer nor anybody else may go; and that limit appears to be this: "The writer must not make the occasion one for the gratification of personal malice and vindictiveness; in commenting on public matters he must not make imputations of base, sordid, or corrupt motives, or dishonest conduct; though he is not called upon to justify to the very letter everything that he writes, his erroneous inferences must not be reckless; nor will he go beyond the limits of fair and honest, though it may be hostile or severe, or even, in some respects, inaccurate criticism. If he does, even though he may bona fide believe in the truth of his imputations, the publication is a libel."[1]

"There is a difference," said the court, in Parmiter v. Coupland,[2] "between publications relating to public and private individuals. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander; but any imputation of wicked or corrupt motives is unquestionably libellous."

"The right of public discussion on matters of public interest is important, and it requires for its beneficial exercise that it should be exercised fully and freely, without being subject to too harsh or strict a limitation. So long as it is exercised fairly and honestly, it will be protected, even although it may incidentally involve the publication of defamatory matter. But

[1] Shortt, p. 434.
[2] 6 M. & W. 108.

the comments must be fair, that is, conceived in a fair spirit—in the spirit of fair discussion—and not in a spirit of reckless or inconsiderate imputation. That which is recklessly defamatory can hardly be deemed fair."[1]

An honest and bona fide belief in the truth of the comments, as we have seen, will not itself justify a defamatory statement in a newspaper, any more than elsewhere.

In the case of Campbell v. Spottiswoode,[2] where a newspaper article insinuated that the editor of another newspaper, in putting forth to the public the sacred cause of the dissemination of religious truth among the heathen, he was acting as an impostor, and that his purpose was to put money into his own pocket by obtaining contributions to his newspaper; and that he had not only published in his newspaper the name of a fictitious person as the authority for his statements, but also, with a view to induce people to contribute, published a fictitious subscription list, the article was held to be libellous, although the jury found that the writer believed the imputations contained in it to be well founded.

One who assumes to publicly criticise and condemn the conduct or motives of another, must bring to the task not only an honest sense of justice, but also a reasonable degree of judgment and moderation. A fair and legitimate criticism on the conduct and motives of the party who is the object of censure, is all that can be allowed.[3]

[1] Per Cockburn, J., in Hedley v. Barlow, 4 F. & F. 230.

[2] 3 B. & S. 769; 8 L. T. N. S. 201; 32 L. J. 185, Q. B.

[3] Wason v. Walter, L. Rep. 4 Q. B. 96; 19 L. T. N. S. 409; 38 L. J. 34 Q. B.

If the self-constituted critic of public morals addresses himself to the public in a matter which nearly interests and concerns them, it constitutes no reason why he himself should escape without responsibility. The law will not fail to distinguish between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated. One man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation.[1] . . . . It is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honor with a view to the welfare of the country, if attacks upon them, destructive of their honor and character, and without foundation, could be made with impunity. Because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is not, therefore, justified in assailing his character as dishonest." "I should be unwilling," said the court, in a late English case,[2] "to limit the right of a writer in a newspaper, or any other individual, to canvass any scheme, even though it be a scheme of public benevolence. But, giving full latitude to fair comment, so soon as a writer imputes that the

[1] Short, L. Lit. p. 436.

[2] Turnbull v. Bird, 2 F. & F. 524; *vid.* also Paris v. Levy, 2 F. & F. 74.

person proposing the scheme is doing it from a base and sordid motive, and is putting forth a list of fictitious subscribers, in order to delude others to subscribe, it cannot be said to be within the limits of fair criticism."

356. The question as to what is fair and candid criticism, and as to whether the writer had a bona fide honest and justifiable belief in the statement made by him, is a question of fact for the jury.[1]

Cockburn, J., in a late case,[2] laid down the rule somewhat equivocally, as follows: "I think the fair position in which the law may be settled is this, that where the public conduct of a public man is open to animadversion, and the writer, who is commenting upon it, makes imputations on his motives, which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable."

This seems to us equivalent only to saying, If you wish to know whether an action is maintainable or not, try it and see. There is certainly no means of knowing whether "a jury shall say that the criticism was not only honest, but also well founded," without bringing an issue before it; and therefore, according to Cockburn, J., a plaintiff could only be sure that he had no action of libel until he had been non-suited or beaten by a verdict against him. If, then, we deny that good faith and honest belief in the truth of the criticism constitute no defense to an action of libel in newspaper comments upon matters of public interest, we open a wide and limitless field of discussion.

[1] Shortt, L. Lit. p. 436.
[2] *Vid.* 1 Shortt, p. 436.

It seems to us, however, that a simple rule might be enunciated somewhat as follows, which would cover the cases which we shall cite in this chapter, namely: All charges which are in the nature of libelous communications to the public press, are to be construed as made by the newspaper publishing them. But where these are honestly made matters of public interest and concern, and not of mere public curiosity,[1] with a view only to the public good, and where the maker believes them to be just and true, they are deemed privileged upon grounds of public policy; but where any one of these elements is wanting, an action will lie.[2]

So in a case[3] where the alleged libel consisted of a newspaper article commenting, in the severest manner, upon certain advertisements of a medical practitioner, and representing him as an impostor and scoundrel, the court directed the jury, on the second ground of defense relied on by the defendant, viz., that the publication was justifiable as a fair comment on a matter of public interest, as follows: "Under that head of defense he (the defendant) says that it was a matter of public interest and public concern; that the plaintiff by his advertisements invited people to submit to his

[1] *Vid.* Harle v. Catherall, 14 L. T. N. S. 801.

[2] Or perhaps the rule might be laid down thus: that bona fide comments not in every respect justifiable, and honest inferences not altogether correct as to conduct or motives, may be excused, provided the matter be one of public interest, that the circumstances of the case render comments and inferences of such a character not unnatural, and that there is no considerable margin of unsubstantiated defamatory imputation; whilst, on the other hand, as expressly decided in Campbell v. Spottiswoode, unfounded imputations of base and sordid motives are unjustifiable, however honestly their truth may be believed in by the writer who publishes them.—Shortt, L. Lit. p. 439.

[3] 4 F. & F. 1005.

system of treatment; and that if he (the defendant) really believed it to be a delusion, then he had a right to maintain that it was so; and that even if, in drawing inferences of imposture and bad intention, he fell into error, yet, if he wrote honestly and with the intention of exercising his vocation as a public writer, fairly and with reasonable moderation and judgment, he is entitled to the verdict. And I entirely agree in that view. Here is a man challenging public criticism by bringing forward what professes to be a new system of treatment, and inviting the public to adopt it as the only means of curing the most destructive disease known among us. In doing this he challenges public criticism; and if a public writer, using a reasonable degree of temper and moderation, as behoves any one who makes imputations upon others—if a public writer, thus discussing the subject in the exercise of his vocation, falls into error as to the facts or the inferences, and goes beyond the limits of strict truth, he is, nevertheless, privileged. The occasion is a privileged one, and if the privilege is exercised honestly, faithfully, and with reasonable regard to what truth and justice require, then, though he may exceed the limits of what he can legally prove to be the truth, he is protected from liability. It is not, therefore, necessary that the justification should appear to you to be made out, if you think that the defendant or the writer was in the reasonable and honest exercise of his vocation as a public writer, even although he was not fully warranted in drawing the inferences he did as to the conduct of the plaintiff, and although it may be that he was not entirely justified by the absolute truth.'

' The court (Cockburn, J.) seems in this instance to have gone quite as far as he did in the opposite direction in the equivocal judgment before quoted.

Much more epigramatic and to the point, however, is the language of Pollock, C. B., in Gathercote v. Miall:[1] "All bona fide and honest remarks upon persons occupying public positions may be freely made, without being questioned too nicely for either truth or justice."

The rule we have laid down will not authorize the speaking of the truth even of another without a privilege to do so. The old doctrine of the star chamber, that a libel could be carried in a sealed letter, and that "the greater the truth the greater the libel," is superseded, indeed, but it is sometimes best to refrain from bringing charges that are true against one's neighbors.

The rule of privileges is ably stated by Blackburn, J., in the recent English case of Campbell v. Spottiswoode.[2] "The word privilege," said he, "is often used loosely and in a popular sense, when applied to matters which are not, properly speaking, privileged. But, for the present purpose, the meaning of the word is, that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libelous in any one else. For instance, a master giving a character of a servant, stands in a privileged relation; and the cases of a memorial to the lord chancellor or the home secretary on the conduct of a justice of the peace,[3] and of a statement to a public functionary reflecting upon some public officer,[4] rank themselves under that class. In Maitland v. Bramwell,[5] the bona fides of the defendant was left to the jury, because she was privileged by her

[1] 15 M. & W. 332.
[2] 3 B. & S. 769; 8 L. T. N S. 201; 32 L. J. 185 Q. B.
[3] Harrison v. Bush. 5 E. & B. 344.
[4] Beatson v. Skene, 5 H. & N. 838.
[5] 2 F. & F. 623.

position to say what she believed to be true. So in Eastwood v. Holmes,[1] when properly understood, Willes, J., must have considered that there was a privilege of this kind when he non-suited the plaintiff in an action against the publisher of a report of the proceedings of "The British Archæological Association," in which it was stated that some supposed antiquities, offered for sale by the plaintiff, were of recent fabrication. In these cases no action lies, unless there is proof of express malice. If it could be shown that the editor or publisher of a newspaper stands in a privileged position, it would be necessary to prove actual malice. But no authority has been cited for that proposition; and I take it to be certain that he has only the general right, which belongs to the public, to comment upon public matters; for example, the acts of a minister of state; or, according to modern authorities somewhat extending the doctrine, where a person has done or published anything which may fairly be said to invite comment, as in the case of a handbill or advertisement.[2] In such cases every one has a right to make fair and proper comment; and so long as it is within that limit it is no libel." "It is necessary," said Crompton, J., in the same case, "to confine privilege, as the law has always confined it, to cases of real necessity or duty, as that of a master giving a servant a character, or of a person who has been robbed charging another with robbing him."[3]

[1] 1 F. & F. 347.

[2] Paris v. Levy, 9 C. B. N. S. 342; 30 L. J. 11 C. P.

[3] The case of Campbell v. Spottiswoode must be regarded as an express and distinct authority for the proposition that there is no privilege, in the strict sense of that term, in the case of comments by public writers on matters of public interest, and on persons occupying public positions, though the expression "privileged publication" has been frequently ap-

357. Not only must the commentary be made without malice, not recklessly,[1] but bona fide, and with the honest belief of its truth, but the matter must be one of legitimate public interest.

In the case of public officers this public interest will be supposed, for there is a presumption of law that every good citizen is interested in the affairs of the state, and in their virtuous administration.

Where a petition was presented to the house of lords, charging a high judicial officer with having been guilty of dishonorable conduct many years before, and praying for an inquiry, and that he should be removed from his high office if the charge were proved true, and a debate took place on the subject, when the charge was utterly refuted, it was held by the court of

plied by eminent judges to such writings. For privilege, where it exists, excuses, in the absence of actual malice, every statement, however false in itself, or injurious to the person respecting whom it is made. Thus, a letter written by a master giving the character of a servant, is privileged, though it may contain a specific charge of fraud against the servant which is utterly false. To enable the servant to maintain an action of libel in respect of it, he must prove the existence of actual malice on the part of the master (Weatherston v. Hawkins, 1 T. R. 110; Edmondson v. Stephenson, Bull. N. P. 8; and see Rex v. Cator, 4 Esp. 117; Dunman v. Bigg, 1 Camp. 269), whereas the case of Campbell v. Spottiswoode has distinctly decided that neither the absence of actual malice nor the bona fide belief of the public writer in the truth of the imputations which he makes, will justify him in making such imputations as there complained of, if they are not true in point of fact. In this strict sense, then, of the term privileged, the public writer, when dealing with matters and characters of public interest, is not privileged. He is, however, treated with more indulgence than a private individual who publishes defamatory matter of another, in that slight errors will in his case be excused, where he writes honestly in the interest of the public, and not with a malicious design of doing a personal injury. —Shortt, L. Lit. p. 439.

[1] Morrison v. Belcher, 3 F. & F. 619.

Queen's Bench, that this was a matter of great public concern, on which a newspaper writer had a full right to comment, and that his comments, though reflecting strongly on the person who presented the petition, were not actionable in absence of proof of malice.[1]

The working of any public institution, such as a college or a hospital, is a matter of public interest, which may freely be discussed by and through the medium of the press.[2]

An inspector, sent to institute inquiry into the working of a medical college, made a report of the results of his inquiry, in which was set forth a letter addressed to the bishop of the diocese, and complaining of "the arbitrary, tyrannical, and overbearing conduct" of the plaintiff, a professor in the college, as well as of "his complete inefficiency in every office" which he held in the college. The college still continuing in an unsatisfactory state, the defendant, about three years after the report was made, published the whole of it in a newspaper, of which he was the proprietor, and the plaintiff brought an action for the libel contained in the letter. The publication of the report was introduced by an article in the newspaper, stating that appeals on behalf of the college had been frequently made in its columns, and that the institution was known to be in an unsatisfactory state. Held, that the questions for the jury were (1) whether the matter was one which it interested the public to know, and (2) whether the defendant published it with the honest desire to afford the public information, and not with a sinister motive to injure the

[1] Wason v. Walter, L. Rep. 4 Q. B. 73; 19 L. T. N. S. 409.

[2] Cox v. Feeney, 4 F. & F. 13.

plaintiff; and that if they found both of these in the affirmative, they must find for the defendant.[1]

But the doctrine of public interest cannot be

[1] As to the former question, his lordship said, "There can be no doubt whatever that this institution, with reference to which these questions have arisen, is one of public concern. Although it may have been founded, in the first place, by private contributions, it has also been founded for public purposes; so far as the hospital is concerned, with a view to the assistance of the poor inhabitants of Birmingham who may stand in need of medical or surgical aid; so far as the college is concerned, for the instruction of the students in the important branches of knowledge there taught. It appeals to the public, and holds out expectations with reference to the students whom their parents or guardians send there. It is, therefore, a public concern to the inhabitants of Birmingham and its district. That being so, the public have an interest in its government, its management, its discipline, and, what is essential, the management of its financial concerns. What is said with reference to its discipline, to its means of imparting instruction, to its means of fulfilling the objects for which it exists, have all of them great interest in the eyes of the people of the great town in which it exists. Has it been well-conducted or ill-conducted? Has it been prudently and well managed, or has it been suffered to fall into a state of decay and comparative uselessness in consequence of defective management? You have before you abundant materials for forming your judgment upon this question. You find from the report of the commissioner sent down to inquire and report—the accuracy and fidelity of which Mr. Cox (the plaintiff) himself has been constrained to admit—that the finances of the college have become embarrassed, and its authorities, to whom its management is committed, careless. . . . . I take it that at that time the report made by the commissioner, and which seems to have embodied the result, at all events, of the whole inquiry and proceedings which had been carried on,—I take it that if that report had been published at the time, no man could say that it was beyond the province of a public journalist whose business—aye, and whose duty—it is to bring before the public information which may be useful to them. It would be his duty to publish the report from beginning to end for the information of the general public and inhabitants of Birmingham, who are so deeply interested in this hospital and college, which are two of the principal institutions of the

carried so far as to to extend to the administration of the private charity of a parish. It was held by the court of exchequer that the conduct and management. by the clergyman of a parish, of a clothing charity in the parish, from the benefits of which dissenters were, by his sanction, excluded, was not a matter of public interest, so as to justify, under the plea of not guilty, the publication in a newspaper, of defamatory matter respecting the clergyman in relation to the charity.[1]

town." His lordship then, referring to the argument founded on the lapse of time, said to the jury: "The system of bad management which appears to have been the origin of the whole, seems to be perpetuated; and in addition, when we find that the warden and the professor and tutor in the theological department have filed a bill and taken the whole body into chancery does it seem to you that the people of Birmingham ought to have before them the whole history of the system whereby the present condition of the hospital has been brought about! This is a matter for you. If you can see a sufficient reason why a public journalist should, in the honest discharge of his duty, feel it incumbent on him to bring before the public this information, it will be for you to find for the defendant. . . . . If you can see no public duty, no matter of public interest or moment which can have properly influenced the defendant in publishing this, you ought to say so by your verdict. Or if you can see your way to the conclusion that he has been acting under the influence of some sinister motive, with a desire of doing personal injury to the plaintiff, your verdict ought to be for the plaintiff. But if you see nothing more than what a journalist in the discharge of his duty might have done, even with a view to what took place five years ago, then look only at the actuating motive. If the defendant had singled out the letter and published it alone, I should have thought there was good ground for the complaint. If he had given garbled passages, then also I should have thought so; but he professed the intention of bringing the whole report before the public for the purpose of enabling them to see what had been the radical and inherent defects in the constitution and management of this institution, and he did so."—Shortt, L. Lit. p. 441.

[1] Gathercote v. Miall, 15 M. & W. 319. "I think," said Pollock, C. B., in that case, "that a parochial charity, with the

358. The due administration of justice is a matter of the very highest possible concern to the public, and in its interest, as we have seen in the chapter on Contempt of Court, the widest latitude will be accorded to the press and public in commenting thereupon.

It is only when such comments actually impair or impede such due administration of justice by the courts, that they will be summarily dealt with.

"The direction of a judge, the verdict of a jury, the decree of a court, may be all made subjects of free comment. It is the interest of all of us that it should be so. But, in commenting on such matters, a public writer as much as a private writer is bound to attend to the truth, and to put forward the truth honestly and in good faith, and to the best of his knowledge and ability. It is not to be expected that,

vicar at the head of it, among other persons in the parish, not for parochial purposes, but for some exclusive purpose, with reference either to religious opinion or to anything else, is a private matter, and is not open to what may be called licentious comment, as opposed to a comment that must be based in truth. It really seems to me that licentious comments cannot be applied to a case of this sort, without extending such comments to almost every transaction in society." And Alderson, B., said: "It is no part of his peculiar ministerial duty to have a clothing club, though it is a very proper thing for him or any other charitable man to do. I am at a loss to see how his case differs from that of any other individual who chooses to institute a private charity within particular limits. If so, then the criticism and observations that are to be made upon him are the criticism and observations which are to be made upon any other private individual, and are to be judged by the same rules and subject to the same limits." Rolfe, B., added: "It seems to me preposterous to say that the act of a clergyman in sanctioning some individuals in his parish, in giving relief to some, and excluding a large class of others who are not to partake of it, can be considered in the light of a public act. The act does not become a public act because half a dozen or a dozen join in it. It is essentially private; they may manage it as they please."

in discharging this duty of a public journalist, he will always be infallible. His judgment may be biassed one way or the other, without the slightest reflection upon his good faith; and, therefore, if his comments are fair, no one has a right to complain. The law imposes no undue restraint upon the freest and fullest comments upon all that passes in public courts of justice; for, that the administration of justice should be made a subject for the exercise of public discussion is a matter of the most essential importance. But, on the other hand, it behoves those who pass judgment, and call upon the public to pass judgment, on those who are suitors to or witnesses in courts of justice, not to give reckless vent to harsh and uncharitable views of the conduct of others; but to remember that they are bound to exercise a fair and honest and an impartial judgment upon those whom they hold up to public obloquy."[1]

Lord Ellenborough lays down the rule broadly,[2] that all publications of preliminary proceedings before magistrates are illegal. "The publication," he said, "of proceedings in courts of justice, where both sides are heard and matters are finally determined, is salutary, and therefore permitted. The publication of these preliminary examinations has a tendency to pervert the public mind, and to disturb the course of justice; and it is therefore illegal. . . . Trials at law, fairly reported, although they may occasionally

[1] Woodgate v. Riot, 4 S. & T. 223; Seymour v. Butterworth, 3 F. & F. 385.

[2] Rex v. Fisher, 2 Camp. 571. So in Dickens's Great Expectations—when Mr. Wopsle has read with great effect to the villagers an account of a murder, giving great stress to the enormity of the prisoner's crime, Mr. Jaggers takes him severely to task for encouraging public sentiment against a man who has not yet been heard in his own defense.

prove injurious to individuals, have been held to be privileged. Let them continue so privileged. But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice. But," added his lordship, "what defense can be made for a publication which, besides containing an ex parte statement of evidence before a magistrate, against a man who has had no opportunity to defend himself, actually denominates him a criminal, and describes him as a monster?" But the change in the manners and customs of his day, the wider diffusion of literature and education, and the consequent increase of liberal influences, have wrought a change in the law, and Lord Ellenborough's rule, perhaps, might not now be implicitly followed.

A newspaper reporter of the proceedings at a trial, cannot be expected to discriminate nicely between what is strictly relevant and what is irrelevant to the issue; and a fair and full report would be held protected, though it contained some defamatory matter not relevant to the issue; at any rate, where it is not wholly and palpably irrelevant.

"There are cases where an individual must suffer for the public good, and it is difficult to draw the line between relevancy and irrelevancy. Wherever the report is of something not wholly irrelevant, the fact that it contains reflections on a third person does not prevent the reporter from being protected."[1]

The report of judicial proceedings, whatever the tribunal before which they take place, must, in order to be protected, be free from comments injurious to the character of the parties concerned, and must be

[1] Ryalls v. Leader, L. Rep. 1 Ex. 300; 14 L. T. N. S. 563; 35 L J. 185, Ex

accurate as well as fair. The moment comments are made, the immunity is gone.[1]

As in all cases of libel, malice is the gist of the action.[2] By legal malice is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act. This presumption of law may be rebutted, indeed, by the circumstances under which the defamatory matter has been uttered or published; and if successfully rebutted, though the character of the party concerned may have suffered, no right of action will arise. If the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice.[3] It is thus that, in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned, but solely to afford information to the public, and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged. The other, and the broader principle on which this exception to the general law of libel is founded is, that the advantage to the community, from publicity being given to the proceedings of courts of justice, is so great, that the occasional inconvenience to individuals arising from it must yield to the general good."[4]

It is the presumption that the publication of a fair account of what passes in a court of justice, not ex parte, is justifiable. "It is a good defense to an action

[1] Lewis v. Levy, El. Bl. & El. 544. *Vid.* Behrens v. Allen, 3 F. & F. 135.

[2] Weson v. Walter, L. Rep. 4 Q. B. 87,

[3] Bromage v. Prosser, 4 B. & C. 255.

[4] Taylor v. Hawkins, 16 Q. B. 321; 20 L. J. 314, Q. B.

of libel," says Campbell, C. J., "that it consists of a fair and impartial (though not verbatim) report of a trial in a court of justice."[1]

The law will, however, infer malice from the act of uttering or publishing slanderous matter actionable in itself, and not justified by sufficient cause; but the question whether slanderous matter has or has not been published, is for the jury.[2]

"It may now be considered," says a late English writer, "as established, beyond possibility of doubt, that an impartial, correct, and bona fide, even though not a verbatim report, and though published from day to day, of any proceedings of a court of justice, which are not merely ex parte, is privileged, unless the publication be prohibited by the court itself, or the nature of the trial unfits it for publication; and the privilege is not confined to reports of the proceedings of the superior courts."[3]

359. Criticisms on things, contained in an adver-

[1] In England the same protection has been extended to a fair report, published in a newspaper, of the proceedings held in jail before a registrar in bankruptcy, under sects. 101 and 102 of the Bankruptcy Act, 1861, upon the examination of a debtor in custody (Ryalls v. Leader, L. Rep. 1 Ex. 296; 14 L. T. N. S. 563; 35 L. J. 185 Ex.). "The only question," said Pollock, C. J., "is whether the registrar's court was, under the circumstances, a public court. I think that it was. We ought, in my opinion, to make as wide as possible the right of the public to know what takes place in any court of justice, and to protect a fair, bona fide statement of proceedings there."

The proceedings before examiners appointed under 9 Geo. 4, c. 22, s. 7, to examine into the sufficiency of the sureties on the trial of an election petition, were also held to be proceedings before a legal court, of which a fair and accurate report might be published. Cooper v. Lawson, 18 A. & El. 746.

[2] Dicas v. Lawson, cited in Chalmers v. Payne, 2 C. M. & R. 156; 5 Tyrw. 766.

[3] Shortt, 457.

tisement (exceptions to the rule laid down)[1] are not libelous. It was held not to be a libel upon a dealer in coal in L., who had advertised "genuine Franklin coal" for sale, to publish the following advertisement:

"Caution.—The subscribers, the only shippers of the true and original Franklin coal, notice that other coal-dealers in L. than our agent, J. S., advertises Franklin coal. We take this method of cautioning the public against buying of other parties than our agent, J. S., if they hope to get the genuine article, as we have neither sold nor shipped any Franklin coal to any party in L., except our agent, J. S."[2]

From the earliest times it seems to have been generally understood that a man may laud his own wares to any extent,[3] even if he depreciates his neighbor's by so doing. And so an application for an information was refused against one for publishing that "Ward's Pill and Drop had done great mischief in twelve different cases, and that they were a compound of poison and antimony, &c."[4]

If an advertisement, however, attacks personal character, the rule will be different. In Perret v. New Orleans Times newspaper,[5] certain irresponsible per-

[1] *Ante*, vol. 1, p. 176.

[2] Boynton v. Remington, 3 Allen, 397. This was an action not against the newspaper, but against the advertiser.

[3] See a curious advertisement in the London "General Advertiser," January 9, 1750:

"Given Gratis. By J. Newberry, at the Bible and Sun in St. Paul's Church-yard, over against the North Door of the Church (only paying One Penny for the Binding), Nurse Truelove's Christmas-Box; or, The Golden Plaything for little Children, by which they may learn the Letters as soon as they can speak; and know how to behave so as to make every Body love them; adorn'd with thirty Cuts."

[4] Rex v. Roberts, 3 Bac. Abr. tit. Libel, 492.

[5] 25 La. Ann. 170.

sons, whose residence was unknown, and whose names were fictitious, published an advertisement, as follows:

"New Orleans, February 19, 1869.

"We, the undersigned, most respectfully lay before the public the following very astonishing facts that took place last night near the Carrollton depot: While we were on our way home from Carrollton to New Orleans, three police-officers of the above place assailed us with revolvers pointed to us, to deliver every cent we had about us. All the money that we had was five dollars, and on delivering the same they left off. What sounds more horrible is that these so-called officers were accompanied by his honor Judge Perret, of Carrollton and Canal-avenue.

"Signed, JOHN BRIANT,
D. L. THOMPSON,
W. B. SAVORY,
H. B. DELORD,
JAMES B. RUBB,
No. 413 Frenchman Street."

The defendant admitted the publication, but said it was published as an advertisement; that it was received by one of the employés of the establishment at a late hour of the night, and during the absence and without the knowledge of the proprietors of the newspaper; he denied that the advertisement contained any libelous or slanderous charges or imputations that could damage plaintiff; and specially denied that it was made with any malicious intent on the part of the respondent; that when complaint was made to him by the plaintiff that the advertisement was false, and injurious to him, he caused to be inserted in an editorial article in the "Times" newspaper, an explanation, which the plaintiff accepted as satisfactory, in these words: "An advertisement appeared in the

"Times" yesterday, in which Judge Perret, of Jefferson, and the police officers of Carrollton are charged with certain very improper conduct toward five persons, whose names were attached to the advertisement. We are assured by Judge Perret that there is not a word of truth in this card; that he and the police officers of Carrollton were engaged in the performance of their duties in preserving peace and order in the cars, where the advertisers were creating a disturbance, and violating the ordinances of the city and the laws of the state. If Judge Perret's statements are correct, the advertisers in question have assumed a responsibility by their publication which they have no right to expect us to share with them."

Said the court: "The plaintiff, by the publication in question, is charged with complicity in the commission of a high crime. The terms used admit of no other construction. This charge is shown to be false and defamatory. Malice is, therefore, implied as arising from the needless and reckless publication of the advertisement, in wanton disregard of the rights of others. The facts certainly show the culpable want of a prudent respect for the character and feelings of others, which should be shielded from falsehood and defamation. On the first presentation of the libelous card, the managing editor, as he states himself, advised the parties not to have it published. This clearly shows that he saw the impropriety of its publication, and yet he yielded to the importunities of those men, and permitted its insertion—an act which his first impression and better judgment did not approve. In the defense of this case much has been said of the liberty of the press, and of the right of persons to make known to the public their wrongs and grievances; and it is asserted as a duty, to publish pleas

addressed to public opinion, asking that justice be rendered, and a wrong like that complained of by the parties, who presented their card to the defendant, be condemned by the popular censure and disfavor. The press is set up as a tribunal for the redress of wrongs. The liberty of the press, we concede, is the palladium of civil liberty. It is one of the essentials of a free government. It is a sacred right secured by our organic law; but, with the grant of the right, is imposed the obligation to refrain from its abuse. Public journalists, like everybody else, are held to an observance of the proprieties of social life. While the utmost latitude is accorded to them in the discussion of all subjects, and they may freely comment upon the acts and conduct of men as individuals, to say *nothing of the wide expanse of authority to* speak faithfully and boldly in the interests of the people regarding public measures and questions of all kinds that concern the community at large, still there is a limit beyond which this freedom becomes license. It is upon the confines of these that responsibility begins. The law which shields the private character and reputation of an inoffensive person from the assaults of calumny and falsehood, is founded upon a public sentiment of greater power even than that of the free press. It forbids the wanton violation of the sacredness of personal character and good name. In this case no public need required the publication of the offensive card. No public interest was subserved by it. No private wrong was redressed by it, and no good reason existed to suppose there would be. But, as the result shows, a wrong was inflicted. A man of respectable character and good report in the community was falsely charged with the crime of robbery; the charge went forth to the world in the columns of

a newspaper having an extensive circulation, and the defendant must respond therefor."

360. As to how far newspapers are privileged to indulge in comments on the private characters of public individuals, there might be some difficulty in laying down one universal rule. The circumstances of the case would probably have much to do with deciding such a question. There is no other possible means of judging of the fitness of a man for the service of the public, than the record of his private life. He who is unjust or immoral in the private relations and duties of life, cannot be fitted for stations of public trust. The state needs the services of her best citizens, and it is in proportion as they are illustrious in virtue and honor and bravery, that she rises in the estimation of nations, and takes her place among the powers of the world.

But the law recognizes the possibility of reformation in individuals and institutions, and will not encourage a malicious and scandalous raking up, from private sources, of old and perhaps atoned-for offenses and errors, to gratify mere personal and political envy or hatred, in the case of a faithful, or even of a new and untried public servant.

Such a doctrine would be cruel and unjust. The law which, as we have seen, ever regards with solicitude the reputation of her subjects, will rather encourage and favor the opportunity for reformation and repentance, than throw obstacles in its way.

Least of all will it sanction the criticism of motives; that is one thing of which she will never seek to judge. It is only when the necessity—as in the case of crimes—is forced upon her that she will undertake their scrutiny.

It was held, in a recent English case,[1] to be a fair subject for discussion by the press (in dealing with a

[1] Seymour v. Butterworth, 3 F. & F. 376.

particular appointment to a recordership of a barrister who was also a member of parliament) whether it is desirable that members of the bar, being also in the house of commons, should receive appointments to subordinate offices, as the reward of parliamentary adhesion, from one or other of the political parties of the state; although an unfounded imputation of corruption in the particular case would be libelous. The independence of the bar, the independence of parliament, and the independence of the representatives of the people, the court held, were matters of public interest, and if the writer goes beyond that, and asserts that a member of parliament had bargained to sell his vote upon a corrupt contract, or that a member would not have voted or spoken as he did, but for a corrupt understanding that he should receive a reward, it becomes a serious charge, and one actionable. "At the same time," added the court, "those who filled a public position must not be too thin-skinned in reference to comments made upon them. It would often happen that observations would be made upon public men, which they knew, from the bottom of their hearts, were undeserved and unjust; yet they must bear with them and submit to be misunderstood for a time, because all knew that the criticism of the press was the best security for the proper discharge of public duties."[1]

The principle of privileged communications made by an individual, or by individuals, who honestly suppose or believe that they have a peculiar interest in a certain matter of useful inquiry made to others, who also believe in their peculiar and useful interest in such matters, will not always be extended to a self-constituted organization, setting itself up to attempt the reformation of society.

[1] Shortt, L. L. 447.

In a recent English case,[1] the committee of a reform union published in a newspaper a report stating: "The first exposures of the union having failed to produce any improvement in the mode of conducting elections in Berwick, and the persons there who traffic in votes being utterly impervious to public opinion, we have submitted the evidence to the best legal advice we could obtain, and, in accordance with that advice, have issued writs against the following persons," mentioning the plaintiff amongst others, and adding, amongst the comments, "In a few days writs will be issued against another list of offenders." An action of libel having been brought, the court, after stating to the jury that, as a general rule, "it is lawful to discuss in the columns of a public journal matters of public interest, provided it be done bona fide, without actual malice or the unnecessary making of personal imputations on any individual," added, that the defendants had no right, in doing so, to make a personal imputation on an individual. "I suggest to you," continued the learned judge, "that any self-constituted body which sets itself up for the reform of the public, whether in religious, in commercial, or in political points of view, must be extremely cautious, in all their publications and writings concerning private individuals, not to reflect on private character. A man stands at fearful odds when he has to contend with a public body. If they publish that which reflects on the private character of individuals, they should be very careful of the truth of what they say.

In the case of public discussions by individuals in the newspapers, each is at his own peril. So, in an action for libel, first of the plaintiff generally, and secondly of him as a clergyman, it appeared that de-

[1] Wilson v. Reed, 2 F. & F. 151.

fendant had published a pamphlet entitled "Truth Vindicated," and the alleged libels were contained in a review of that pamphlet published in a newspaper. Said Erle, C. J.: "Where the plaintiff and defendant have both had recourse to the press, and the libel has been published in the course of a discussion in which both parties have been before the public, and in which the plaintiff first had recourse to the press, and made the matter public, it is important to see if malice has been made out against the party sued, or if he has published only what he believed was required for the interests of truth."[1]

361. The personal quarrels or misunderstandings of individuals, are not matters of public interest in the sense of our definition.[2] But if a quarrel or misunderstanding involve a matter of general

[1] Hibbs v. Wilkinson, 1 F. & F. 608.

[2] Per contra, however, see the decision of Erle, C. J., in Hibbs v. Wilkinson, 1 F. & F. 608. In that case the plaintiff, a clergyman, in the course of a public controversy with another clergyman, published a document purporting to be a collection of "Opinions of the Press" on a pamphlet written by the plaintiff, and, amongst others, an incorrect extract from an article published in the defendant's newspaper; and the defendant published another article in his paper, stating that the concoctor of the paragraph, purporting to be extracted from it, had been guilty of adding to the article offensive and insulting expressions which it never did and never should have suffered to appear, and of suppressing other passages so as to alter the sense, changing one passage "with a malice which evidently overcame his sense of truth and honesty." On the trial of an action of libel, the jury were told by Erle, C. J., that if they were of opinion that the defendant wrote what he did for the purpose of maintaining the truth, sincerely having that object in view, without any corrupt motive, and that the language he used, even although it might be exaggerated, was prompted by the desire to maintain the truth, and that the exaggerated language was provoked by similar language on the other side, which might well have accounted for the use of strong expressions, they might find a verdict for the defendant.

interest or solicitude to the public, it might become so.

A correspondence between a churchwarden and the incumbent of a parish on the subject of an alleged desecration of the church, by allowing books to be sold in it during service and turning the vestry-room into a cooking apartment, is a matter of public interest, and may be commented upon in the press, provided the language made use of be not stronger than the occasion will justify. "The maintenance of decency and propriety in conducting public worship, and of the sanctity of the sacred edifice and all connected with it," said Cockburn, C. J., "is surely a matter of the greatest public concern. The very use of the term 'public worship' shows this."[1]

362. In the case of public advertisements, pretensions, or performances, the law will regard the health, safety, and reputation of its subjects. So, the publication in a newspaper, by a medical practitioner, of an advertisement of a new mode of treating and curing consumption,[2] has been held to be a matter of public interest. The alleged libel in this case was contained in a leading article, and represented the advertiser as a quack and impostor, comparing him—by reason of his describing himself as an M.D., on account of a diploma obtained in America—to "scoundrels" who pass bad coin. The libel having been justified on the ground of its being true in substance and effect, the jury were instructed "that even if the plea of justification were not made out, the defendant would still be entitled to their verdict if he had written honestly, and with the intention of exercising his vocation as a public writer

[1] Kelley v. Tinling, L. Rep. 1 Q. B. 699; 13 L. T. N. S. 255; 35 L. J. 231, Q. B.

[2] Hunter v. Sharke, 14 F. & F. 983

fairly, and with reasonable moderation and judgment."

So again, a newspaper paragraph giving an account of some proceedings at the British Archæological Association, and describing certain leaden figures reported to have been found in the Thames, and sold by the plaintiff as antiquities, the sale of which it stigmatized as an attempt at extortion and fraud, was held to be, in the absence of malice, protected by the privilege of fair discussion on a matter of public interest.[1]

Where the writer of a letter published in a newspaper, replying to a question asking "who was Zadkiel," gave the name of the plaintiff, who was the proprietor and editor of "Zadkiel's Almanac," and stated that Zadkiel's mischievous propensities were "not solely involved in that foolish publication, 'Zadkiel's Almanac,'" but that he had "gulled" many of the nobility by means of a magic ball of crystal, by which he pretended to tell what was going on in the other world, and that he took money for "these profane acts, and made a good thing of it"—the court directed the jury, that the privilege accorded to public writers would extend to a denunciation of the almanac, and the use of the ball, as an imposture, but not to an unfounded statement that the plaintiff had made money by a conscious and fraudulent imposture by the use of the magic ball. "If the system was mischievous, and calculated to delude the unwary and the credulous, it was, no doubt, fit subject for indignant denunciation. But it was another thing to say that, because a man put forward such a publication or such a system, a public writer could go back into his past history and make statements which were not true, and calculated to

[1] Eastwood v. Holmes, 1 F. & F. 347.

do him injury. His system might be described as an imposture, but facts must not be invented or misstated as to his past life, with a view to destroy his credit. In order to find a verdict for the defendant, they must be satisfied, not only that he honestly believed that the plaintiff had taken money for a fraudulent exhibition, but that he had such fair grounds for his imputation that his inference was not so unfair as to be reckless."[1]

And similarly, where a newspaper published of an exhibitor of flowers at a horticultural show, that "the name of G. is to be rendered famous in all sorts of dirty work; the tricks by which he and a few like him used to secure prizes, seem to have been broken in upon by some judges more honest than usual. If G. be the same man who wrote an impudent letter to the Metropolitan Society, he is too worthless to notice; if he be not the same man, it is a pity two such beggarly souls could not be crammed into the same carcass"—the court held that such observations did not fall within the limits of fair criticism on G.'s floral exhibition.[2]

363. Performances at theatres, or other places of public amusement, are, by their own seeking and profession, places of public interest; and it would be unreasonable to allow them to complain of the publicity they seek for, and upon which they thrive, if it should happen to provoke unfavorable criticism. The members of the theatrical profession, and proprietors of places of public amusement, as a rule, recognize this; and it is very rarely that we find them coming into courts for protection against criticism, wisely choosing, by taking

[1] Morrison v. Belcher, 3 F. & F. 614.
[2] Green v. Chapman, 4 Bing. N. C. 92.

advantage of its suggestions, to avoid awakening its repetition.

In an action for libel, however, brought by Charles Dibdin, the poet and song-writer (who was also the proprietor of a place of public entertainment, where he sung songs supposed to be written and composed by himself), against the editor and printer of a newspaper, for a paragraph insinuating that the songs were not in fact written by him; that on the first night of the performance there had been a very thin audience, and composed of persons admitted by orders; and that they alone had applauded the music of the songs, which was of a very inferior kind; Lord Kenyon said, "that the editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment, but it must be done fairly, and without malice, or view to injure or prejudice the proprietor in the eyes of the public; that if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, that such is a libel, and therefore actionable."[1]

364. As to the limits to which theatrical criticism may go, in the case of Fry v. Bennett[2] it was held to be beyond the limits of ordinary and legitimate criticism, to publish in a newspaper, statements that it "was part of plaintiff's system of management to get his critics to abuse and defame the females of his company, in ignorant and blackmail newspapers—in the purchased and corrupt newspapers under his control; that he began this system on Madame Pico, and was carrying out the same game with Truffi; that

[1] Dibdin v. Swan. 1 Esp. 28.
[2] 5 Sand. 54; 2 Bosw. 200; affirmed, 28 N. Y. 324.

Madame Pico was insulted and summarily set adrift, and had sued the plaintiff; that plaintiff's pet journals in Philadelphia came out and abused Madame Truffi in the grossest terms; that, last year, the subscribers were cheated out of one-third of the subscription money, &c.; that plaintiff packed his opera-house, from parquette to amphitheatre, with loafers and hirelings, to hiss Benedetti off the stage; that at least three hundred persons, by special permit of the plaintiff, were allowed to grace the opera for the first time in their lives; that plaintiff appeared before the audience and sustained his favorite character of an ape, by no means for the first time, &c.; that the opera season was a history of ridiculous blunders, violent contentions, supercilious ignorance, laughable rows and riots, and nothing but disgraceful brawling, and broken promises, &c.; that but for the patronage of public gamblers at the opera, the plaintiff could not sustain himself a week," &c., &c.[1]

It has been pronounced in England, that the public at a theatre have a right to express their free and unbiassed opinion of the merits of the performers, but that certain persons have no right, by a preconcerted plan, to make such a noise that an actor, without any judgment being formed as to his performance, should be driven from the stage. However, the decision of the case in which this was said,[2] gives the above little more than the force of a mere dicta. In that case the

[1] See, as to the rights of actors, Gregory v. Duke of Brunswick, 6 M. & G. 950, where the plaintiff, an actor, sued the defendant for hooting and hissing him off the stage. The court, however, held that the public had a right to express their diapproval of theatrical performances, and found against the plaintiff. It seems in this case that the disapprobation was of the private character of the plaintiff, and not of the merits of his acting.

[2] Gregory v. Duke of Brunswick, 6 M. & G. 950.

defendants appeared to have expressed their disapprobation at the private character of the actor, and not at the merits of his acting, and a verdict in their favor was found by the jury.

365. The published productions of authors are also performances of public interest, which the press may freely discuss and criticise. The first limit which the law places to the exercise of this right is, that it be not made the occasion for the indulgence of private spite or malice, or a defamatory attack on the personal character of the author whose work is criticised. Bona fide strictures, however unsparing their character—ridicule, however poignant—may be employed, provided his ignorance, or unfitness for authorship justify it. And under certain circumstances—as if, for instance, the author is a charlatan and a pretender—criticisms and ridicule which affect him personally, but only in his character of author, and are not directed against his private life, are not libelous.[1]

"Liberty of criticism," says Lord Ellenborough,[2] "must be allowed, or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel which has for its object, not to injure the reputation of any individual, but to correct mis representations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality."

"Every man," says the same learned judge, in another case,[3] "who publishes a book commits him-

[1] Shortt, L. Lit. 449. *Vid.* also, Fraser v. Berkeley, 17 C. & P. 625; Carr v. Hood, 1 Camp. ; Reede v. Sweetser, *ante*, vol. i. p. 179.

[2] Tabart v. Tipper, 1 Camp. N. P. 351.

[3] Carr v. Hood, 1 Camp. N. P. 358. The plaintiff in this

self to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction

case, Sir John Carr, had written, amongst other books, one called "The Stranger in Ireland;" and the alleged libel consisted of a book entitled "My Pocket-Book, or Hints for a Ryghte merrie and conceited Tour, in quarto, to be called The Stranger in Ireland in 1805, by a Knight Errant," and contained a frontispiece entitled "The Knight leaving Ireland with Regret." The declaration alleged that this frontispiece contained a false, scandalous, malicious, defamatory, and ridiculous representation of the said Sir John, in the form of a man of ludicrous and ridiculous appearance, holding a pocket-handkerchief to his face and appearing to be weeping; and also containing therein a certain false, malicious, and ridiculous representation of a man of ludicous and ridiculous appearance, following the said representation of the said Sir John, and representing a man loaded with and bending under the weight of three large books, &c., and a pocket-handkerchief in one of his hands, the corners thereof appearing to be held or tied together, as if containing something therein, with the printed word "wardrobe" depending therefrom, thereby falsely, scandalously, and maliciously meaning and intending to represent, for the purpose of rendering the said Sir John ridiculous, and exposing him to laughter, ridicule, and contempt; that one copy of the said first-mentioned book, and two copies of the said book of the said Sir John, secondly mentioned, were so heavy as to cause a man to bend under the weight thereof; and that his the said Sir John's wardrobe was very small, and capable of being contained in a pocket-handkerchief, &c. The declaration laid, as special damage, that Sir John had lost the sale of the copyright of a book of his, giving an account of a tour through part of Scotland, owing to the publication of the alleged libel. Lord Ellenborough said, in reference to the special damage laid: "If the reputation or pecuniary interests of the person ridiculed suffer, it is damnum absque injuria. Where is the liberty of the press, if an action can be maintained on such principles? Perhaps the plaintiff's 'Tour through Scotland' is now unsaleable; but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer after he had been refuted by Mr. Locke? But shall it be said that he might have

for the purpose of condemnation, he exercises a fair and legitimate right. . . . . The critic does a great service to the public who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider an injury, because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profits to which he was never entitled." "Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is damnum absque injuria. Where is the liberty of the press, if an action can be maintained on such principles? . . . . We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise, the first who writes a book on any subject, will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on personal character is another thing. Show me an

sustained an action for defamation against that great philosopher, who was laboring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works." And his lordship concluded, after laying down the general principles above cited, by directing the jury that if the writer of the publication complained of had not traveled out of the work he criticised, for the purpose of slander, the action would not lie; but if they could discover in it anything personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action. The jury returned a verdict for the defendants."

attack on the moral character of the plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule." His lordship added, that if, in the case before him, the party writing the criticism followed the plaintiff into domestic life, for the purposes of slander, that would have been libelous.

And in another case[1] Tenterden, C. J., stated the rule as follows: "Whatever is fair and can be reasonably said of the authors of works, or of themselves as connected with their works, is not actionable, unless it appear that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author; and then it will be a libel. That there is in this publication a great deal of ridicule must be admitted by every one; and I think that there appears also to be some rancor; still, if the jury think that what is said here was fairly called for by what the plaintiff had done as the editor of another publication, the defendant is entitled to a verdict; but if the jury think the remarks were not fairly called for, you must find for the plaintiff."

In the two recent English cases of Strauss v. Francis,[2] the question of what is a legitimate criticism of a literary work was very fully reviewed. In the first case, where the alleged libel was contained in a critique (in the Athenæum) on a novel, describing the work as "characterized by vulgarity, profanity, and indelicacy, bad French, bad German, and bad English, and abuse of persons living and dead," the court charged the jury,

[1] Macleod v. Wakeley, 3 C. & P. 313.

[2] 4 F. & F. 1113, and Id. 1116. *Vid.* also, the case of Reade v. Sweetzer, *ante*, vol. i. p. 179, and 6 Abb. Pr. N. S. 9.

"that the question was whether, severe as it was, it was not warranted by the nature of the work. It was of the last importance to literature, and, through literature, to good taste and good feeling, to morality and to religion, that works published, for general perusal, should be such as were calculated to improve, and not to demoralize, the public mind; and therefore, it was of vast importance that criticism, so long as it was fair and reasonable and just, should be allowed the utmost latitude, and that the most unsparing censure of works, which were fairly subject to it, should not be held libelous. A man who publishes a book challenges criticism; he rejoices in it if it tends to his praise, and if it is likely to increase the circulation of his work; and, therefore, he must submit to it if it is adverse, so long as it is not prompted by malice, or characterized by such reckless disregard of fairness as indicates malice towards the author. You must say whether, in this case, you think the critique was the fair and genuine result of the judgment of the critic upon the work, or whether it was prompted by reckless disregard of the author's feelings, for the sake of displaying the writer's powers of denunciation."

The defendants, having consented to the withdrawal of a juror, afterwards published an article commenting on the proceedings in the action, and suggesting, as a reason for assenting to the withdrawal of a juror, the inability of the plaintiff to pay costs if the verdict had been against him. Another action of libel having been brought for the publication of this article, the court told the jury, that if they thought that the allusion was brought in only to make an attack upon the circumstances or character of the plaintiff, it would be malicious and actionable.

366. Falsely to impute to a person the publication

of any immoral or absurd literary production would be libelous, in a newspaper or in an individual.[1] A tradesman's handbill, circular, or advertisement stands, in respect of the right of commenting upon it, on the same footing as a book, and may be made the subject of fair and reasonable criticism in the public press, or otherwise.[2]

[1] Tabart v. Tipper, 1 Camp. N. P. 350. "I can see no distinction," said Byles, J., in Paris v. Levy (9 C. B. N. S. 362; 3 L. T. N. S. 324; 30 L. J. 11 C. P.), "between a handbill or a circular or advertisement which is published to all the world, and a book: both are literary productions, and are addressed to the public, and both are subject to the same comment and criticism. The shape in which they are published makes no difference: many advertisements indeed are issued in the form of books. Two-thirds of the daily newspapers are usually taken up with advertisements of various sorts. It is plain, therefore, that the form in which the publication appears can make no difference." *Vid.* also Hunter v. Sharpe, 4 F. & F. 1005.

[2] The case of Paris v. Levy, above quoted, was where a marine store-dealer having published and extensively circulated a handbill setting forth the prices which he was prepared to give for a variety of articles, an alderman, sitting as a magistrate at Guildhall, called the attention of a newspaper reporter to it, and stigmatized the system as most pernicious in its effects, as offering great inducements to servants to rob their masters and mistresses. The observations of the alderman, together with the handbill itself, were published in the newspaper, with a heading "Encouraging Servants to Rob their Masters." A leading article was also published, commenting upon the handbill, and ending as follows: "Will Mr. P. (the plaintiff) allow us to put this simple question to him —are not these unheard-of high prices, these clamorous demands for rags, bones, kitchen stuff, plated metal, and old copper—are not these clap-trap announcements, that flare on the door-jambs of five hundred dolly-shopkeepers such as he, a premium offered to dishonesty? a direct incentive to servants to rob their masters and mistresses? The high prices which the Clapham rag-merchant vaunts his ability to give, the ready money he is so charmingly anxious to pay—these read very much like invitations to servants, when their

Whether a sermon delivered by a clergyman to his congregation is a performance of sufficiently public interest to bring it within the rule, does not seem to be settled.[1]

legitimate and allowed perquisites run short, to make perquisites for themselves. How many visits to Mr. P.'s *omnium gatherum* does it take for one to Wandsworth Police Court? Mr. P. may be a very upright man, and his business may be conducted in a perfectly legitimate manner; but it is the duty of all employers to warn their servants against the specious placards that throw out baits to the weak and ignorant, and tempt the most trustworthy to pilfering and malversation. The servant may begin with a surreptitious piece of fat or a few rags; she may end by rifling her mistresses wardrobe, and running away with her best moire antique dresses. The footpage may take an old buckle to the ragman to begin with; and end by breaking open the plate chest. The climax of Mr. P.'s unprecedentedly high prices may be penal servitude."

On the trial of an action of libel for the foregoing publication, Earle, C. J., told the jury that if the plaintiff put forward and drew public attention to a handbill which, in the opinion of the editor of the newspaper, was most dangerous to honesty, and held out a temptation to servants to depart from their duty, the editor might be able strictly to excuse, before a jury, the remarks which he made, if in their judgment those remarks were well founded and called for by the occasion; but had the defendant said one word against the plaintiff with reference to his private life or his mode of managing his business, he (the learned judge) would have felt bound to say that there was no pretense of justification. The jury having returned a verdict for the defendant, a rule *nisi* was obtained for a new trial on the ground of misdirection, but the rule was afterwards discharged. "The real question was," said Byles, J., "did the remarks exceed the fair license of criticism, and degenerate into reflections upon the private character of the plain-

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[1] There was a difference of opinion amongst the learned judges, in Gathercote v. Miall (15 M. & W. 319), as to whether sermons preached in a church, but not published, are the lawful subject of public comment; Alderson and Rolfe, BB., leaning to the opinion that they are, Pollock, C. B., and Parke, B., inclining the other way.—Shortt, p. 444.

The law is the same as to comments on works of other kinds which appeal to the public.

Thus, it has been held that a picture publicly exhibited may be criticised in the press; and, however strong the terms of censure—as, for instance, calling the painting "a mere daub"—no action for libel will lie, provided the work be fairly and honestly criticised, and the criticism be not made the vehicle of personal malignity towards the painter.[1]

So where an architect and professor of architecture in the Royal Academy, brought an action for an alleged libel upon him, contained in a publication which professed to give an account of the principles of a new order of architecture, called the Bœotian order, stating it to have been invented by the plaintiff, whom it termed the Bœotian professor, and setting forth several absurd principles as the rules of the new order, which it illustrated by examples of buildings, all of which were the works of the plaintiff, Lord Tenterden, C. J., thus directed the jury: "This publication professes, in substance, to be a criticism on the architectural works of the plaintiff. On such works as well as on literary productions, any man has a right to express his opinion; and, however mistaken in point of taste that opinion may be, or however unfavorable to the merits of the author or artist, the person entertaining it is not precluded, by law, from its fair, reasonable, and temperate expression. It may be

tiff." "I think," said Keating, J., "my lord was perfectly right in telling the jury that there was no distinction as to fair comment and criticism between a handbill and a book or any other publication; as also in telling them that if they thought that the language of the alleged libels was that of fair criticism, and free from personal imputation, the defendant was entitled to their verdict."—Shortt, L. L. p. 448.

[1] Thompson v. Schackell, 4 M. & Mal. 187.

fairly and reasonably expressed, although through the medium of ridicule. In the present case, the censure is certainly strong; nevertheless, if you think the criticism fair, reasonable, and temperate, although it may not be correct, the defendant will be entitled to your verdict. If you think it unfair and intemperate, and written with the intention and for the purpose of injuring the plaintiff in his profession, by imputing to him that he acts on absurd principles of art, you will find for the plaintiff.'

"A man who publishes a book challenges criticism; he rejoices in it if it tends to his praise, and if it be likely to lead to an increase in the circulation of his work, and therefore he must submit to it if it be adverse, so long as it is not prompted by malice, or characterized by such reckless disregard of fairness as indicates malice toward the author.[2] But, as respects the person, except in the instances and to the extent heretofore pointed out, there is no privilege of criticism. No man has a right to render the person or abilities of another ridiculous.[3] I think no personal ridicule of the author is justifiable.[4] If an author has made himself ridiculous by his writings, he may be ridiculed; if his works show him to be vicious, his reviewer may say so. But the latter has no right to violate the truth in either respect."[5]

Where the plaintiff being one of the proprietors of a newspaper, "The Courier," brought his action for libel against the defendant, the editor of "The Statesman" newspaper—Lord Ellenborough charged the

[1] Soane v. Knight, 1 M. & Mal. 75.

[2] Strauss v. Francis, 4 Fost. & F. 1114.

[3] Rex v. Tutchin, 2 L'd Raym. 1061, criticising Carr v. Hood, 1 Camp. N. P. 358.

[4] Thompson v. Schackell, 1 Mo. & Malk. 187.

[5] Cooper v. Stone, 24 Wend. 442; Carr v. Hood, 1 Camp. 358.

jury: "In the first place, the plaintiff was described as the 'prostituted Courier,' and his 'full-blown baseness and infamy' were represented as 'holding him fast to his present connections, and preventing him from forming new ones.' It was certainly competent in one public writer to criticise another, exerting his talents in all the latitude of free communication belonging to a public writer;[1] and so Lord Kenyon held, that the opinions and principles of a public writer were open to ridicule, in the same way as those of any other author, but that the privilege did not extend to calumnious remarks on the private character of the individual. In that respect, the editor of a newspaper enjoyed the rights of protection in common with every other subject. Since, then, the defendant in this case had stigmatized the defendant as the venerable apostle of tyranny and oppression, and as a man whose full-blown baseness and infamy held him fast to his present connection, because they left him without the power of forming new ones; in all this he had undoubtedly overstepped the limits which had been drawn, and by which his conduct ought to have been regulated."[2]

If the critic, however, go out of his way to attack the private character of the author, such an attack is a libel. It is important that a line should be drawn between fair discussion for the promotion of the truth, and publications for the aspersion of personal character. In all cases of criticism, "The question is one of good faith." "The question whether there is any excess in the comments, is matter entirely for the jury." If it be shown that the comment is unjust, is malevo-

[1] Stuart v. Lovell, 2 Stark. Cas. 73.

[2] Heriot v. Stuart, 1 Esp. Cas. 337; and see Latimer v. West. Morning News. Asso. 25 L. T. N. S. 44.

lent, and exceeding the bounds of fair opinion, it is actionable.[1]

Nor is it within the limits of criticism to write of the publisher of a magazine, that he had inserted in his magazine a series of articles, the greater part of which were false and of a gross character;[2] nor to write of a book publisher, that he published books of an immoral character, and ascribing to him the authorship of some silly rhymes;[3] nor to impute to an author false and dishonest or unworthy motives in the preparation of his book.[4]

Criticism of a literary work, being matter of pure opinion, it would be unfair, as well as perhaps impracticable, to apply the criterion of absolute truth, or the lawfulness of the occasion; the only question will be, Is it fair, proper, and in good faith?[5]

367. In the cases of works only privately printed, for circulation among friends, and which do not invite criticism, the element of public interest being wanting, the rule would not probably apply to save a hostile

[1] McLeod v. Wakely, 3 C. & P. 311; Hibbs v. Wilkinson, 1 F. & F. 610; Cooper v. Stone, 24 Wend. 422; Dibdin v. Swan, 1 Esp. 28; Heriot v. Stuart, 1 Esp. Cas. 437; Latimer v. West. Morning News Asso. 25 L. T. N. S. 44.

[2] Coburn v. Whiting, cited in Cooke on Defamation p. 58.

[3] Tabart v. Tipper, 1 Camp. 350, the rhymes were:

"There was a little maid,
And she was afraid
Her sweetheart would come to her;
She bound up her head,
When she went to bed,
And she fastened her door with a skewer."

And were followed by this line:

"Dixin ego vobis Atticam quandam inesse elegantiam."

[4] Cooper v. Stone, 4 Wend. 434.

[5] And so generally, as to all criticism. Fry v. Bennett, 1 Code, R. N. S. 239, 5 Sanf. 54; Buddington v. Davis, 6 How. Pr. 401; Reg. v. Hicklin, L. R. 3 Q. B. 376; and these ques-

criticism from the character of a libel.[1] Literary critics are as amendable to the law as any other class of persons. Because they see fit to choose the vocation of a critic, there appears to be no reason why an immunity from the law should be extended them which does not attach itself to any other of the vocations which men select. There cannot logically be one law of libel for a reviewer of books, and another for a reviewer of horses and stock and prices current. In the suit of an Edinburgh publishing firm of W. & A. K. Johnston against the "London Athenæum," a literary review of acknowledged superiority, a verdict of £1,275 was awarded against the paper for publishing a review which, while being generally unfavorable, stated besides that the work (an atlas) was not worthy of the reputation of the firm whose name was on its title-page; that it could not be the production of either the celebrated geographer, Sir William Johnston, or of his son, as the former had retired from the firm, and the latter had gone to Paraguay to seek his fortune. It was admitted that the maps were "nicely got up," but notwithstanding that merit, it was pronounced "scarcely a work likely to maintain the special character of the firm." The reputation thus alluded to being well known to all persons interested in geography, they would appreciate the full force of the following, which was the concluding sentence of the criticism: "On the whole, we miss in this atlas the presence of the master-mind which, in both father and son, gave to the house of W. & A. K. Johnston the character it has so long enjoyed, and which we fear it is now losing, in the world of science."[2]

tions of fairness and good faith are for the jury. Cooper v. Lawson, 8 Adol. & E. 746.

[1] Vid. the dictum in Gathercote v. Miall, 15 M. & N. 334.

[2] Since this has been printed, however, on June 16th, 1875,

This may seem going to considerable lengths against what has been, up to this time, the law regulating comments on matters of public interest; but, matter of opinion as criticism is, it must not be expressed too harshly and too unnecessarily. If the publisher of a literary review be unable to speak favorably of a volume submitted to him, he, at least, has his option to remain quiet and say nothing about it. Therefore, if he treat it too mercilessly, and an action be brought against him for libel, there is the element of the gratuity of the attack, at least, to be considered in searching for the malice which is more or less an element of every libel. True, a review is supposed to be fair and candid, to praise what is praiseworthy, and to excoriate what is pretentious, or ignorant, or dishonest. It has, perhaps, a right to expose a plagiarist, or to ridicule humbug or trash. But while there is safety in the utmost limit of flattery, or adulation, it must not go beyond reason in the opposite

in the Second Division of the Court of Sessions, Edinburgh, the question was discussed of granting a new trial in the case of Johnston v. Dilke, the recent libel suit against the "London Athenæum." The Lord Chief Clerk, without discussing the rule laid down, which was not before him, said he thought the damages excessive, and that it was impossible to avoid granting the new trial on that ground, but he thought a reasonable sum might be named for acceptance by the pursuers, instead of having the case reopened. Lord Neaves thought the amount of damages utterly unjustified by the evidence. In his opinion the sum was outrageous. Mr. Fraser, for the pursuers, said he was in the hands of the Court as to the amount of damages which ought to have been awarded in the former trial. The Court then assessed the damages at £100, and, on a motion by the defendant's counsel, allowed them half of their expenses in connection with the discussion of the motion for a new trial. On the part of the defendant it was proved that the atlas contained serious errors, and it was shown that the criticism was written by Dr. Beke, a geographer of unquestionably high reputation.

direction. The tendency of the day is to hold literary reviewers strictly to the same rules of law by which everybody else is judged; but it is to be remembered that the enormous production of books in our day and the vast capital invested in them, and consequent patronage by way of advertisement which they afford to newspapers, sometimes induces a sort of partisanship between certain of the press and certain publishers. If, then, it should come to be understood that books which, upon their first appearance, are sent to newspapers for review, are treated less upon their merits than according to the terms upon which the publisher may happen to stand with the newspaper, or according to the desirability and frequency of the advertisements which the house contracts for with the proprietors of the journal, it would follow that a publisher who invests his capital in a book, has a right to sue for any unmerited or damaging criticism of it, and that, if it be libelous, and cannot be justified, just as any other libel must be justified (if justified at all), by proving its truth, he can recover damages sufficient to recompense him for the profit he has lost through the influence of his rival.

Such libels can rarely be justified, since, at the most, they are matters of pure opinion, and can be offset by other opinions. And it is, perhaps, an advance towards justice that critics, like every other class in the community, must use words at their peril, and with full knowledge of their meaning. It must be remembered, however, that publishers, by sending their volumes for review, do, in effect, request the expression of an opinion upon their merits, and this will go far to modify the above strictures. The knowledge upon the publisher's part that the diversities in human opinions are very great, and that, upon the whole, the proba-

bilities are against a majority of unfavorable reviews, and the open question whether an unfavorable is not fully as profitable to him in dollars and cents as a favorable review, is doubtless the reason why fewer of these actions are not brought. If, however, a review goes out of its way to attack and malign a work, a copy of which is not sent to it for an expression of its opinion, the law would be different, and the malignant review would be undoubtedly libelous.

It is to be remembered, that it requires very little labor or reading to unfavorably criticise a book. It has come to be understood on all hands, that there is scarcely a newspaper attaché in the country who could not, in twenty minutes, demonstrate that a work which has cost its author twenty years of laborious study and research, is "vicious," a "farrago of nonsense," and "positively of no value whatever." And it is manifestly unjust, no less than impolitic, that a writer, merely because what he happens to write is printed in the form of a newspaper article, may be permitted, at his own whim or caprice, to libel a book which represents not only the capital of its publisher, but the livelihood of its author. In the case of a physician, or of a lawyer, his professional reputation is dependent upon a book he has himself written, even more than upon the estimation of his ability, and character entertained by his immediate neighbors. We have seen, in our consideration of the law of libel, that the law will allow neither the one nor the other to be tampered with. The principle, in the case of public criticism, appears to apply with all the greater force, and we believe that the tendency of the courts is to hold to a strict accountability, newspaper editors, as well as all other persons, before the law, for a strict regard for the law of words.

The doctrine of the law as to literary criticism (and which, after all, is only the doctrine of common sense) may be summed up thus: If a volume be sent to one learned in its subject-matter, to be reviewed on its merits, and that reviewer point out sufficient errors, misstatements, and inaccuracies to justify him in characterizing the work as an unsafe guide, or as unauthoritative, or vicious, this is nothing more than the risk its author and publisher incurred—the first, by writing upon subjects which he had not thoroughly examined; and the second, by publishing the work of such an unconscientious author.

But there are two sorts of persons who do book-reviewing for the press. One comes to his task qualified by a previous acquaintance with the subject of which the book to be reviewed treats—the other is a versatile and gifted gentleman, perhaps, who writes rapidly and well, possessing a large store of mother-wit, and a strong penchant for satire, but no especial knowledge of the subject of the volumes sent him. Such a gentleman would, undoubtedly, in the absence of instructions, follow his own humor, rather than the merits of the work before him. In the latter case, the risk is entirely with the proprietor of the newspaper who prints the review thus prepared. And if that review be unjust, or calculated to injure the sale of the book, he must assume the burden of proving its substantial truth.

A newspaper cannot always escape from the consequences of a libel, upon the plea that it was an accident; and it seems that an utter absence of malice in the publication will not relieve it. In a late case the plaintiffs were a firm trading under the name of "The British and Foreign Stationery Society." In 1873, one of the members was a person named Yeomans.

But some time in 1874 he retired, and became a traveling agent of the firm; and the dissolution of the partnership was duly registered, and published in the "Gazette." The defendant was the publisher of a newspaper called the "Bookseller," in which dissolutions of partnership, bankruptcies, and other matters of special interest to the trade were inserted. In January of that year the notice of this particular dissolution, so far as regards the man Yeomans, was copied verbatim from the "Gazette," and it so appeared in the "Bookseller;" but by a blunder of the printer in arranging his matter, it fell under the head of "First Meetings Under the New Bankruptcy Act," instead of that of "Dissolutions of Partnership." Directly the mistake was discovered, which was not till two or three days after, the defendant called upon the plaintiffs, and expressed his regret for the error. He also published the correction in his own paper, and in another trade-periodical called the "Stationer," besides circulating it far and wide, throughout the country, by means of printed circulars. The plaintiffs, however, were not satisfied with this, and brought their action; and although the defendant proved that the alleged libel was a printer's error, and enumerated the apology, and the various means taken to have it rectified; and although the judge summed up in his favor, even going so far as to declare that such actions only impeded the course of justice, and prevented the trial of others which were of real importance, the jury returned a verdict for the plaintiffs, with fifty pounds damages.[1]

[1] This case is not reported, and we are indebted for the above, which may be colored, to the newspapers, but as evincing the tendency of the times in regard to the regulation of the press, we feel justified in its insertion. Newspapers have become, in our day, so opulent and powerful that it is not necessary they

368. A newspaper, in its records of the news of the day, must be careful to publish the absolute and accurate truth, and no more, and if its reporters shall have inserted into their reports of daily occurrences, falsehoods or misstatements, the newspaper publishing them will be none the less liable because they happen to be given in the form of a rumor, a surmise, or a statement or extract from a contemporary, for which the paper disclaims any responsibility.

So, where a newspaper in Great Britain published an extract as follows: "Riot at Preston.—From the Liverpool Courier.—It appears that Hunt pointed out Counseller Seager to the mob, and said, 'There is one of the black sheep.' The mob fell upon him and murdered him. In the affray, Hunt had his nose cut off. The coroner's inquest have brought in a verdict of willful murder against Hunt, who is committed to jail.—Fudge."—The court held that if the paragraph, which was copied from another paper, stood without the word "fudge" it would be a libel. If they were of opinion that the object of the paragraph was to vindicate the plaintiff's character from an unfounded charge, the action could not be maintained; but if the word "fudge" were only added for the purpose of making an argument at a future day, then it would not take away the effect of the libel.[1]

Magazines, reviews, &c., are to all intents and purposes books, and there is no reason why they cannot be copyrighted as such in the usual way.

should any longer be especially favored by the law, or have any of its rules, to which all other citizens are amenable, relaxed in favor of their editors and proprietors. Almost this precise case arose in 1837, where, by the same negligence, the name of a solvent house was inserted by the "New York Herald" in its list of failures during a financial panic. This also appears tc be unreported.

[1] Hunt v. Algar, 6 C. & P. 247.

The publication of false and idle rumors, whether published with or without a definite purpose, if they produce a detriment to the public, is punishable by indictment; such as false rumors to raise the price of provisions or other necessaries of life.[1]

It appears from a case in the 43rd Edw. 3,[2] that the attempt, by words, to enhance the price of merchandise was punishable by law.

In 1814, one De Berenger, with seven other persons, were indicted for conspiring by false rumors to raise the price of the public government funds on a particular day, with intent to injure such of the subjects of the realm as should purchase on that day; but the crime here lay in the act of conspiracy and combination to effect the illegal purpose.[3] Or if such rumors and stories are defamatory in their nature, the same rule will apply.

And it will make no difference that the libel is not upon a single individual, but upon a number, or upon a class of persons. So, in 1732, the court of King's Bench made absolute a rule for an information against the publisher of a paper, entitled "A true and surprising revelation of a murder and cruelty that was committed by the Jews lately arrived from Portugal; showing how they burnt a woman and a new-born infant, the latter end of February, because the infant was begotten by a Christian."[4]

In France every journalist is obliged[5] to sign his

[1] 3 Inst. 196; Dig. T. L. 23. Rex v. Waddington, 1 East. 143.

[2] Lib. Ass. Pl. 38.

[3] Rex v. De Berenger (3 M. & S. 67). The false rumor was that Napoleon, with whom England was then at war, was dead.

[4] Rex v. Osborne, Kel. 30; 2 Barn. K. B. 138, 166; vid. also Reg v. Gathercote, 2 Lew. C. C. 237.

[5] By the "law Tinguy Laboulie," so nicknamed after its two originators.

name to every article written by him, appearing in the public press; which has a salutary effect in checking the publication of newspaper libels.

In Ackerman v. Jones,[1] an action was brought by a private detective, or police officer, to recover damages of the defendant for publishing an alleged libelous article in the New York "Times" newspaper.

The complaint alleges, that on October 21, 1871, the defendant maliciously composed, and published in said "Times," an article setting forth that one John T. Burleigh appeared before Judge Shandley, a police justice, at the Jefferson market police court, and stated that several important letters and a check of thirty dollars, were stolen from his safe by a detective named Ackerman, at the instance of Emil Justh; that Burleigh did not make any such statement in his said affidavit, and that, by reason of the publication, the plaintiff was injured in his reputation and credit as such detective, and otherwise injured. The article published was as follows:

"Singular Complications in a Divorce Case.—On Wednesday last, John T. Burleigh, of No. 23 Dey-street, appeared before Judge Shandley, at Jefferson market police court, and stated that several important letters and a check for thirty dollars were stolen from his safe by a private detective named A. A. Ackerman, at the instance of Emil Justh, a banker, residing at No. 63 Exchange Place. Yesterday Sergeant McComb proceeded to the residence of Mr. Justh, to arrest him on the charge, but the latter refused to accompany him to the station, and when force was about to be used, presented a revolver at the officer's head. Patrolman Tully witnessed the occurrence, and before the weapon could be discharged wrenched it

[1] 37 N. Y. Superior Ct. (J. & S.) 42.

from his hand. He was then conveyed to the station, where the letters were found in his possession. These letters, Justh alleges, afford proof of the seduction of his wife by Burleigh, and he desired to use them in proceedings for a divorce now pending. Justh was discharged from custody, and Judge Shandley retained the letters in his possession for the present."

It further appeared that a retraction of the publication was requested in writing, but never made by the defendant; and plaintiff offered to prove that he had never taken any money, &c.

The court (Speir, J.) held, that no action would lie against the editor or proprietors of a newspaper, for the publication of a fair and true report of a judicial proceeding, except on proof of malice in making such report, which is not to be implied from the fact of the publication. "That the fact that he who claims to be libeled by the report was not a party to the judicial proceeding, does not affect the privilege. That an ex parte affidavit presented to a police magistrate to obtain a search warrant, is within the statute. That where the affidavit states that affiant had probable cause to suspect and did suspect that letters written and addressed to him, and being his property, and also a check for thirty dollars, indorsed to his order, and being his property, had been feloniously taken, stolen, and carried away from his safe by one A., at the instigation and by the direction of B.; and then sets forth the reasons for the suspicion, a report, stating that the affiant appeared before a police magistrate, and stated that several important letters and a check for thirty dollars were taken from his safe by a private detective named A., at the instance of B., a banker; that B. was arrested and taken to the station-house, where the letters were found in his possession; and then he was

discharged from custody, and the police magistrate retained the letters in his possession for the present (there being no evidence that the letters were found in the possession of B., or that the magistrate retained them),—is a fair and true report; consequently privileged; and an action by A. for libel, founded thereon, cannot be sustained. That failing to notice a letter advising the editor of the falsity of the charge, and requesting him to communicate with plaintiff's attorney as to a retraction and redress of the grievance, is not evidence of malice. That where the report is privileged, and that constitutes the defense, evidence of the falsity of the charge is inadmissible. And that when the question whether a report is privileged depends wholly on a comparison of written judicial proceedings, and the report thereof, there being no ambiguity of language, it is a question of law."

369. In this country scarcely any restrictions seem to be imposed upon the publication by newspapers of the proceedings of legislative bodies. The custom of publishing reports of deliberative bodies is not of very ancient date. In England, the publishers of "The Political State of Great Britain," about 1698, appear to have been the first who ever dared to publish regular reports of the doings of parliament, for the general public. Prior to that time the only records were the private labors of Sir Symonds D'Ewes, in his journal of Queen Elizabeth's parliament; Sir Benjamin Rudyard (time of Charles I.); Burton, who made reports of the Commonwealth parliaments; Anchitell Grey, who recorded the proceedings of Charles II.'s parliaments; Somers who took pencil notes of the debates of the Convention; and others. Various resolutions had from time to time been passed by both Houses against publishing reports of their debates. There is

a standing order of the House of Lords of the 27th of February, 1698, declaring "that it is a breach of the privilege of this House, for any person whatsoever to print, or publish in print, anything relating to the proceedings of the House, without the leave of the House."[1] And disobedience thereof was visited with emphatic punishment.[2] The House of Commons ordered, in 1641, "That no member shall either give a copy or publish in print anything that he shall speak here, without leave of the House"; and in 1642 resolved, "That what person soever shall print or sell any act or passages of this House, under the name of a diurnal or otherwise, without the particular license of this House, shall be reputed a high contemner and breaker of the privilege of parliament, and so punished accordingly."[3] In 1694, the House resolved, "That no news-letter writers do in their letters, or other papers that they disperse, presume to intermeddle with the debates or any other proceedings of this House;"[4] and repeated the same resolution in 1695[5], 1697,[6] 1703,[7] and 1722.[8] In the last-mentioned year, the Commons also resolved, "That no printer or publisher, of any printed newspapers, do presume to

[1] Shortt, p. 481.

[2] The House of Commons, in 1801, fined one Allen Macleod £100, and committed him to Newgate for six months, for publishing in The Albion and Evening Advertiser certain paragraphs ordered to be expunged from the journals of the House, and also a report of the debate thereupon (43 Lords' J. 105); and, in the same year, the printer and the publisher of the Morning Herald were committed to the custody of the Black Rod, for publishing in that paper what purported to be an account of a debate, which the House resolved to be a scandalous misrepresentation of what had passed (43 Lords' J. 60).

[3] Com. J. 220.

[4] 11 Com. J. 193.

[5] Id. 439.

[6] 12 Id. 48.

[7] 14 Id. 270.

[8] 20 Id. 99.

insert in any such papers any debates or any other proceedings of this House or any committee thereof." In 1728, the House resolved, "That it is an indignity to, and a breach of the privilege of, this House, for any person to presume to give, in written or printed newspapers, any account or minutes of the debates or other proceedings of this House, or of any committee thereof;" and "that upon discovery of the authors, printers, or publishers of any such written or printed newspaper, this House will proceed against the offenders with the utmost severity."[1]

[1] 21 Com. J. 238. See further orders, 23 Com. J. 148; 23 Com. J. 754; 29 Com. J. 207. In a debate which took place on the subject in 1738, Mr. Pulteney said he thought no appeals should be made to the public with regard to what was said in the House, "and to print or publish the speeches of gentlemen in this House, even though they were not misrepresented, looks very like making them accountable without doors for what they say within. Besides, sir," added the honorable member, "we know very well that no man can be so guarded in his expressions as to wish to see everything he says in this House in print" (Parl. Hist. vol. 10, p. 283). Sir Robert Walpole, in the same debate, complained (p. 285) that in some of the reports he had been made to speak the very reverse of what he meant; and that in others, all the wit, the learning, and the argument had been thrown into one side, and into the other nothing but what was low, mean, and ridiculous; and yet, when it came to the question, the division had gone against the side which, upon the face of the debate, had reason and justice to support it, so that, had he been a stranger to the proceedings and the nature of the arguments themselves, he must have thought this to be one of the most contemptible assemblies on the face of the earth. The debate ended in a resolution, "That it is a high indignity to, and a notorious breach of the privilege of this House, for any news-writer, in letters or other papers (as minutes, or under any other denomination), or for any printer or publisher of any printed newspaper of any denomination, to presume to insert in the said letters or papers, or to give therein any account of the debates or other proceedings of this House, or any committee thereof, as well during the recess as the sitting of Parliament; and that this

We are told in Hawkins's "Life of Johnson," that the parliamentary reports written by the latter (for "The Gentleman's Magazine") were the only parts of his writings which gave him any compunction; being frequently written from very slender materials, and often from none at all—the mere coinage of his own imagination. Of Pitt's famous speech in reply to Horace Walpole, we learn from "Boswell's Life of Johnson" that the Doctor avowed his having written it in a garret in Exeter-street, adding, "I saved appearances tolerably well; but I took care that the Whig dogs should not have the best of it." In order to evade the resolutions of the Houses of Parliament against the publication of their debates, recourse was had to the expedient of publishing them as the debates in the senate of "Magna Liliputia," or as the debates in the Roman Senate, with Roman names adapted to the several speeches. In 1771, Colonel George Onslow made a complaint to the House of Commons of a number of newspapers, as misrepresenting the speeches and reflecting on several of the members of the House, in contempt of the order, and in breach of the privilege of the House, and moved that the printers should be brought to justice. Warm and long-continued debates ensued; orders were issued for the arrest of the printers; the city was in a ferment; mobs assembled around the House; and ultimately the offending printers were wrested by force from the hands of the parliamentary messengers. Since this time, no attempt House will proceed with the utmost severity against such offenders." It must be remembered that there was considerable ground for complaining of the manner in which the debates were at this time misrepresented in the reports which appeared, language and sentiment being frequently attributed to members which they never used or entertained.

has been made to check the publication of the parliamentary debates.

At the present day the completest reports of the doings of all deliberative bodies are habitually spread before the reader in the daily newspaper.[1]

[1] The following summary of the law, regarding publication of reports and parliamentary proceedings, is epitomized from Shortt's Law of Literature, p. 481.

Reports of proceedings of parliament may now be regarded as standing on the same footing with reports of proceedings in courts of justice.

For a long time the law on the subject remained in a doubtful state, but the recent case of Wason v. Walter (L. R. 4 Q. B. 73) may be considered to have placed beyond doubt the right to publish, without liability to civil action or criminal proceeding, a full and fair report of parliamentary debates, even though they contain matter defamatory of an individual.

In that case an action was brought against the publisher of the "Times" newspaper, for an alleged libel contained in a report of a debate, which took place in the House of Lords, on the presentation of a petition by the plaintiff, charging a high judicial officer with having been guilty of dishonorable conduct many years previously (see Wason v. Walter, ubi supra, and the remarks of Lord Brougham in the 70th vol. of Hansard, p. 1225).

Though a member of either house may, with impunity, make, in the house, a speech defamatory of an individual, the publication of that speech alone, whether by himself or by another person, is libelous; unless, perhaps, where it is published bona fide for the information of his constituents.

In Rex v. Lord Abingdon (1 Esp. 226), tried before Lord Kenyon, in 1774, the defendant had, in the House of Lords, read from a written paper a speech highly defamatory of an attorney, and afterwards had it published in several newspapers; for which a criminal information was filed against him. Lord Kenyon held that, although the defendant was not amenable to the jurisdiction of the court for a speech delivered in parliament, yet he was liable for its publication, if it contained defamatory matter, remarking, "that a member of parliament had certainly a right to publish his speech, but that speech should not be made the vehicle of slander against any individual; if it was, it was a libel."

Rex v. Creevy (1 M. & S. 273), was a stronger case. There

370. The proceedings of public meetings, of whatever nature, are matters of public interest, but in publishing reports of them newspapers must still be scrupulous to confine themselves to the exact occurrences, and to refrain from malicious criticism. Such reports are not "privileged" in the sense in which re-

the defendant, a member of the house of commons, had made, in the course of a debate, a speech containing several charges against a man named Kirkpatrick. An incorrect report of the debate having appeared in the Liverpool and other papers, the defendant sent a correct report of his speech to the editor of a Liverpool paper, with a request that he would publish it, which was done. The court held, that a member of parliament was answerable for publishing what he has delivered in his speech in parliament, if it contains defamatory matter.

The authority of Rex v. Creevy, so far as it is understood to decide that the publication of his speech by a member of parliament can, under no circumstances, be justified, if it contains matter defamatory of an individual, is much weakened by the opinions expressed with reference to it by eminent judges in two recent cases.

In Davison v. Duncan (7 El. & Bl. 233), Lord Campbell, C. J., said: "As Rex v. Creevy has been mentioned, I will add that, though I perfectly concur in the doctrine of Rex v. Lord Abingdon, that a malicious publication of his speech by a member of either house of the legislature is not privileged, I should think that a publication of a report of his speech by a member of the house of commons, bona fide addressed to his constituents, would be privileged;" and Crompton, J., added that, "The privilege in such a case would arise because the publication was as a communication between a member and his constituents, and not because it was a report of what took place in parliament."

In the more recent case of Wason v. Walter, Cockburn, C. J., in delivering the judgment of the Court of Queen's Bench, said: "Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose, or with the effect of injuring an individual, will be unlawful, as was held in the cases of Rex v. Lord Abingdon and Rex v. Creevy. At the same time it may be as well to observe that we are disposed to agree with what was said in Davison v. Duncan, as to such a speech being privileged, if bona fide published by a member for the information of his constituents."

ports of courts of justice and of deliberative bodies are privileged. On the trial of an action for a libel contained in a newspaper report of such a meeting, evidence of the accuracy of the report could not be given as a matter of justification, though it might be given in mitigation of damages.[1]

[1] Charlton v. Watton, 6 C. & P. 385.

Fair and correct reports of the proceedings at public meetings do not enjoy in England the same privilege as similar reports of judicial or parliamentary proceedings.—Shortt, L. Lit. p. 489. A fair account of what takes place in a court of justice, says Campbell, L. J., in Davison v. Duncan (7 El. & Bl. 231; 26 L. J. 106 Q. B. "is privileged. The reason is that the balance of public benefit from the publicity is great. It is of great consequenee that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of the injury to private character is infinitesimally small as compared to the convenience of publicity. But it has never yet been contended that such a privilege extends to a report of what takes place at all public meetings. Even if confined to a report of what was relevant to the object of the meeting, it would extend the privilege to an alarming extent. . . . . At such meetings things may well be said very relevant to the subject in hand, yet very calumnious. In what an unhappy situation the calumniated person would be, if the calumny might be published, and yet he could not bring an action and challenge the publishers to prove its truth! The legislature may think fit to extend the privilege of publication beyond the limits to which it now goes. If it does, it can impose such restrictions on the extension as it thinks fit. We in a court of law can only say how the law now stands; and, according to that, it is clear the action lies, and the plea is bad."

The action in this case was for a libel published in a country newspaper, and purporting to be an account of the proceedings of a meeting of the West Hartlepool Improvement Commissioners, at which a license from the Bishop of Durham to the chaplain of the West Hartlepool cemetery was said by some of the commissioners to have been procured by the plaintiff, the late bishop's secretary, from the present bishop, by misrepresentations The defendant pleaded that

371. By the liberty of the press is meant the liberty of those who conduct the press[1] to print, without any other license whatever. They have, subject

the various matters, stated in the libel to have taken place, did take place at a public meeting of the commissioners, acting under the powers of the West Hartlepool Improvement Act, 1854, and that the alleged libel was a just, true, faithful, correct, and accurate report of what took place at the meeting, and was published without malice. The plea was held bad.

A libelous publication cannot be justified on the ground that the matter contained in it was promulgated at a public meeting called to petition parliament (Hearne v. Stowell, 12 A. & E. 919).

In an Irish case, Pierce v. Ellis (6 Ir. L. Rep. N. S. 65, 66), where defendant handed to the newspaper reporter a correct version of his own speech, and the court was of opinion that it appeared from the defense itself, that the report of the proceedings was not a fair one, and in which the privilege accorded to reports of the proceedings of courts of justice was claimed for reports of the meetings of boards of guardians, Pigot, C. B., said: "A difference, great and obvious, exists between their proceedings and those of courts of law, in reference to some, at least, of the grounds on which the publication of fair reports of the latter are generally held to be privileged. Courts of justice are open to all the public who can be conveniently accomodated within them. The public have a right to be admitted to witness their proceedings. No such right exists of being admitted to witness the proceedings of boards of guardians; they have the power of deliberating (I believe rarely exercised, and, I believe, the rarer the better) with closed doors. Again, every court of justice has some presiding authority, with ample power to maintain order, and to control within due bounds the discussions which take place before it. The guardians have no presiding authority save that of the chairman, with very limited powers. It is obvious that,

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[1] Holt on Libel, 1, c. iv.; Hamilton arg. The People v. Croswell, 3 Johns. Cas. 360; and see The Federalist, No. 81; The Fourth Estate; Story on the Constitution, §§ 1880 to 1889; 1 Tindal's continuation of Rapin's History of England, 350; Remarks on Pultney's bill to prohibit the circulation of unlicensed newspapers; Root v. King, 7 Cow. 628; 1 Mence on Libel, 158; Essays on the liberty of the Press, chiefly as it respects personal slander, by Bishop Hayter, p. 6.

only to the law of the land, the right to publish with impunity, the truth with good motives, and for justifiable ends, whether it respects governments, magistracy, or individuals.

in such a body, discussions and accusations may take place altogether *ex parte*, and may be made the medium of the most injurious charges against individuals in their absence, without inquiry, without even adequate means of instituting inquiry, or of enforcing the production of proofs, and without any presiding authority having sufficient power to control or direct the proceedings."

Even where the legislature renders imperative the publication, at a specified time, of a report made by a medical officer of health to a vestry board, and directs that copies shall be given to any person on paying for them, a publisher of a newspaper will not be justified in publishing it, even without comment, as part of a report of the proceedings of the parish vestry, at any rate before it has been published by the vestry, as directed by the act of parliament (Popham v. Pickburn, 7 H. & N. 891; 5 L. T. N. S. 846; 31 L. J. 133, Ex).

A newspaper proprietor was held liable for publishing, under the circumstances last referred to, the following libel of the plaintiff, a chemist and druggist: "I communicated some time since with the registrar-general upon the giving of false medical certificates by Mr. P., of Exmouth-street. The registrar has requested the district registrar to warn this person. I beg, however, to advise the vestry to communicate with the secretary of state, so that a prosecution for forgery may be instituted. It is most important to the welfare of this district that this proceeding be put a decisive stop to."

"In this case," said Wilde, B., delivering the judgment of the court of exchequer, "the plaintiff is entitled to judgment. The defendant has published that of the plaintiff which is undoubtedly a libel, and which is untrue. He seeks to protect himself, on the ground that the publication is a correct report of a document read at a meeting of the Clerkenwell vestry, which document must have been published and sold at a small price by the vestry for a short time. But we are of opinion this furnishes no defense. Undoubtedly, the report of a trial in a court of justice, in which this document had been read, would not make the publisher thereof liable to an action for libel, and reasonably; for such reports only extend that publicity which is so important a feature of the administration of

On the introduction of the printing press into England, at the expense of the government, the press was regarded as a state right, and subject to the coercion of the crown,[1] as too dangerous a contrivance to be left unwatched. It was regulated, therefore, by the king's proclamations, prohibitions, charters of privileges, and licenses, and then by the decrees of the court of the star chamber, until the abolition of that court, in 1641. The long parliament, in 1643, assumed the power of licensing, which was continued by various statutes, till 1694. Governor Dongan was instructed (A. D. 1688) not to allow any printing press in New York, although Massachusetts had at that time en-

the law in England, and thus enable to be witnesses of it, not merely the few whom the court can hold, but the thousands who can read the reports. But no case has decided that the reports of what takes place at the meeting of such a body as this vestry are so privileged; indeed the case cited in the argument (Davison v. Davison) is an authority that they are not. Then, is the publication justified by the statute? It is true that the documents would have been accessible to the public in a short time, though not published by the defendant; but this cannot justify his anticipating the publication, and giving it a wider circulation, and, possibly, without an answer which the vestry might have received in some subsequent report or otherwise, and which would then have been circulated with the libel. This defense, therefore, fails. It was further contended that this libel might be justified as a matter of public discussion on a subject of public interest. The answer is—this is not a discussion or comment. It is the statement of a fact. To charge a man incorrectly with a disgraceful act is very different from commenting on a fact relating to him truly stated. There the writer may, by his opinion, libel himself rather than the subject of his remarks."

His Lordship added: "It is to be further observed that this decision does not determine or affect the question whether, after the statutory publication, it might or not be competent to others to republish these reports with or without reasonable comment."

[1] Hills v. University of Oxford, 1 Vern. 275; Basket v. University of Cambridge, 2 Burr 661.

joyed a printing press for nearly thirty years. By the common law of England no man not authorized by the crown had the right to publish political news.[1] But the constitution of the United States provides that congress shall make no law abridging the freedom of speech or of the press.[2] "It was," says Holt,[3] "from the press that originated what is in fact the main distinction of the ancient and modern world, public opinion."[4]

372. The proprietor of a newspaper is responsible for all that appears in its columns, although the publication be made without his knowledge, in his absence, or against his positive orders; because he, and he alone, is responsible to the public for the acts of the actual publisher.[5]

An action for a libel lies against the proprietor of a journal edited by another, though the publication was made without the knowledge of such proprietor.[6]

But if a printing press and newspaper establishment be assigned to a person, merely as security for a

[1] London Gazette, May 5 and 17, A. D. 1680.

[2] Art. 1, Amendment of 1789. And so the constitution of New York provides: Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press (C. of 1846, art. 7, § 8). This is repeated in the bill of rights of that State, and similar provisions occur in the constitution of every State of the Union.

[3] On Libel, p. 61.

[4] In the "Tent on the Beach," the poet Whittier speaks of an editor who

> Had left the Muses' haunts to turn
> The crank of an opinion mill.

[5] Huff v. Bennett, 4 Sand. 120; Dunn v. Hall, 1 Carter (Ind.) 345; 1 Smith, 288; Curtis v. Mussey, 6 Gray (Mass.) 261; Commonwealth v. Kneeland, Thatcher's Crim. Cas. 346.

[6] Andres v. Wells, 7 Johns. 260.

debt, and the press remains in the sole possession and management of the assignor, the ownership of the person holding the security or lien, is not such as will render him liable to an action as proprietor.[1]

But a receiver of a newspaper establishment, appointed to take charge thereof, and continue the publication of the newspaper, would be responsible for any defamatory matter published in the newspaper while the same was under his control.[2]

And in a late case, where the proprietor of a newspaper, gave to his assistant express instructions not to print anything personal, abusive, or exceptionable, which might be brought to the office by one who was in fact the author of the libel published, he was still held liable."[3]

A person who derives profit from, and who furnishes means for carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears.[4]

373. The question as to the conflicting rights of contributors and proprietors, to which allusion has already been made in the chapter on Originality, will be found further treated in the chapter on Piracy.

[1] Id.

[2] Marten v. Van Schaick, 4 Paige, 479; Dayton v. Wilkes, 17 How. Pr. 510.

[3] Dunn v. Hall, 1 Carter (Ind.) 345.

[4] Per Curiam in Rex v. Gutch, 1 Moo. & Mal. 433, and see Att'y-Gen. v. Seddon, 1 Cr. & Jer., 220; 3 Albany Journal, 46; Rex v. Alexander, 1 Moo. & Mal. 437; Perret v. New Orleans Times Newspaper, 25 La. Ann. 170; Tresca v. Maddox, 11 La. Ann. 206; Runkle v. Meyer, 3 Yeates, 518; Romayne v. Duane, 3 Wash. 246; Kennedy v. Gregory, 1 Bonney, 85; Daly v. Van Benthuysen, 3 La. Ann. 69; Huff v. Bennett, 4 Sandf. (N. Y.) 130; Ackermann v. Jones, 37 N. Y. Superior Ct. 44.

374. It seems to be popularly supposed that the proceedings of courts of justice are open to public inspection and criticism, as a matter of right, but such is very far from being the case, unless so enacted expressly by statute. "No law," says Lieber,[1] "insures the publicity of courts of justice either in England or the United States. A court has as much right to sit with closed doors, as the congress of the United States or as the legislature of any State, unless expressly enacted otherwise by statute." Thus in New York it is provided by statute that the sittings of every court shall be public, and every citizen may freely attend the same, and the custom is the same in England, where Lord Campbell,[2] pronounced it to be "of great consequence that the public should know what takes place in the courts." It is said furthermore,[3] that, as a rule of law every citizen is supposed to be cognizant of the proceedings of courts of justice—but this, probably, goes no further than to mean that every citizen is supposed to know the law of his country, which is to a large degree pronounced by courts.

We have seen, in treating of contempt, that every court is presumed to have the potentiality of controlling the publication of its own proceedings, although disposed to exercise it very rarely and only when such publication can interfere with, trammel, or affect the impartiality and freedom of its inquiry. Newspapers are, with this exception, entitled to publish as news the proceedings of courts. Said Lord Mansfield[4] on its

[1] Civil Liberty, 134, ed. 1859.

[2] In Hearne v. Stowell, 12 Ad. & El. 718; 4 Per. & D. 696.

[3] Willard Equity Juris. p. 251.

[4] And see Per Wilde B. in Popham v. Pickburn, 7 Hurl. & N. 891; Pollock, Ch. B., Ryalls v. Leader, Law Rep. 1 Ex. 298; Flint v. Pike, 4 B. & C. 473, Littledale, J.; Campbell, Ch. J., Hearne v. Stowell, 12 Adol. & El. 718; 4 Per. & D. 696;

once being remarked before him that certain persons attended court merely to watch the proceedings, "No matter; we sit every day in the newspapers."

But there may be cases in which a jus tertii or third right intervenes upon the privilege of the press. Such a case occurs when the proceedings in court, upon being published, become libelous of an individual.

If a court of justice, after impartial and careful scrutiny, and after permitting to the defendant every right to be heard in his own behalf, decide that he is a thief, an adulterer, or a swindler, a newspaper may undoubtedly publish that decision among other news of the day. It is quite a different thing, however, if the newspaper overhear that—in a court of justice or before a grand jury—a man has been accused of being a thief, an adulterer, or a swindler, and forthwith publish such tidings to the world. The ex parte and preliminary statements of litigants, or of counsel, may be in effect libelous, and, while the privilege of the court may extend its protection to them, that privilege may not extend to a newspaper which, with indecent haste, announces the fact. Nay more, preliminary examinations, which are generally ex parte before a magistrate, may result in a presumption of the guilt of a citizen, but no newspaper will have the right to comment, injuriously to him, upon such preliminary and ex parte examinations.

If, however, the newspaper published the proceedings, and then added that the accused was discharged, the whole might be regarded as merely a matter of

Bramwell, B., Ryalls v. Leader, Law Rep. 1 Ex. 298; Eyre, Ch. J., Currie v. Walter, 1 B. & P. 525; Stiles v. Nokes, 7 East, 493; 2 Stark. Slan. 263.

public interest, although much of the matter published would otherwise have been libelous, but if it merely publishes the report of the examination, it seems that it will do so at its own peril,[1] though the circumstances of the case and the question of malice or of the absence thereof, may mitigate the liability. For instance, if in the publication, of the minutes of a trial lasting from day to day, the matters and things contained in the testimony given on one particular day might be scandalous and libelous, and if the newspaper do not afterwards give the contrary testimony elicited, or leave the matter there, it would undoubtedly be responsible for the matter printed.

So where a newspaper published a highly-colored account of a charge against the captain of a vessel, who was brought before a magistrate for an alleged felonious assault on a lady on board his own ship, and held to bail to take his trial for the offense, which report was not a mere statement of the nature of the charge and the evidence given on the examination before the magistrate, but a highly-colored narrative of the transaction, interspersed with comments of the writer tending to inflame violently the public against the accused; telling of the assistance rendered by a passenger, who, having his attention attracted by the cries of the lady, "instantly rushed to the spot in time to prevent the perpetration of the vile and dishonorable intentions of the captain, from whose loathsome embrace he extricated his almost senseless victim"; stated that immediate application was made for a warrant, "in consequence of which the criminal is likely to meet the legal punishment of his villainy"; de

[1] Lewis v. Levy, El. Bl. & El. 537; 27 L. J. 287, Q. B.
[2] Rex v. Fisher, 2 Camp. 563.

scribed the accused as not seeming "the least affected at his disgraceful situation, or feeling in the slightest degree the very contemptuous manner in which he was regarded by all who were aware of his unmanly conduct"; and continuing—"he employed a short-hand writer, a barrister, and a phalanx of friends, if possible, to intimidate his accuser by the publicity of her exposure; notwithstanding these attempts, however, to screen himself behind her delicacy, she gave her testimony in the clearest and most collected manner, which conscious innocence and innate virtue could only have enabled her to accomplish, &c., &c." Such an inflammatory account of the preliminary investigation before the magistrate, could not, of course be regarded as an impartial and dispassionate report of what had taken place, and was held libelous. "Does this publication," said Lord Ellenborough, "leave the mind in a state of equipoise as to his guilt or innocence? No one with the feelings of a man can read it without being roused to indignation against the person whose misconduct is depicted in such glowing colors. Even if a fair and dispassionate account of the examination were allowed, is this account fair and dispassionate? It comes to conclusions which would only be fair after verdict. It assumes everything that the woman said to be true, and represents the accused as conscious of his guilt. It talks of 'the contemptuous manner in which he was regarded by all who were aware of his unmanly conduct,' and triumphantly asserts that 'he is likely to meet the legal punishment of his villainy.' Allowing the utmost latitude to fair and candid statement, is this to be tolerated? Jurors and judges are still but men; they cannot always control feelings excited by such inflammatory language. If

they are exposed to be thus warped and misled, injustice must sometimes be done."[1]

A highly-colored account of the trial of a prosecution against an attorney and judge of a court of conscience, for an assault—headed "judicial delinquency," calling him "our hero," describing, amongst other similar things, how, on the instant of being pronounced guilty, he bustled out of court, "reduced to a condition in which ordinary manners or brutality might be expected to excite some little compassion"; how he was pursued by hisses, and "the feelings of disgust and indignation triumphed over the decorum of the court"; and adding that "though it clearly appeared from the testimony of every person that was in the room" when the assault was committed, except him, that no violence had been used against him yet he had sworn to a violent assault committed upon him by the prosecutor—was attempted to be justified by a plea, referring generally to "such parts of the supposed libel as purport to contain an account or statement of the trial," and stating that such parts contained a just and faithful account of the trial; but the court gave judgment for the plaintiff.[2]

If the newspaper makes any comments, or adds any reflections upon the ex parte statement, it seems that it does so at its peril.[3]

[1] Rex v. Fisher, 2 Camp. 563.

[2] Stiles v. Noakes, 7 East. 453; Andrews v. Chapman, 3 Car. & Kir. 288.

[3] Andrews v. Chapman, 1 Car. & K. 288.

In Roberts v. Brown (4 Moo. & S. 407; 10 Bing. 519), an account of the proceedings under a commission of lunacy, in which the plaintiff had been examined as a witness (to prove the insanity of Mr. W.), did not set out his evidence, but stated shortly that "it was attempted to be proved by the testimony of Mr. R., the plaintiff, that Mr. W. had conversed in a peculiar manner with him on a certain day;" that "on this

If the newspaper has any right in the matter at all, it is only a right to state nakedly, and without any high coloring, the facts as they appear in evidence. It should not describe their effect merely as pointing to or establishing the guilt of the accused, or confirming or negativing the account of the matter given by him.

If there is any justification for the publication, it is the justification of "public interest;" and the public interest, if it exist, exists only in the facts as they occur, and not in the gratuitous announcement of the opinion of the newspaper, that the facts proved this, or disproved that, or "showed plainly this," or "entirely negatived that."

A report of the proceedings upon the hearing of a summons before a magistrate, charging a person with having committed perjury, which stated simply that the evidence before the magistrate "entirely negatived" the story of the accused, was held not to be protected; and a plea, justifying it on the ground that it was a fair and correct report of the proceedings which had taken place, was held bad, even after verdict for the defendant. A reporter may not take upon himself to aver that the evidence adduced against the plaintiff entirely negatived his story. Such conclusions are wholly unjustifiable. And, where the report of legal proceedings contains, beside commentaries reflecting

evidence it was meant to be inferred that Mr. W. was insane at that time and on that day; but Mr. R.'s testimony being unsupported by that of any other person, it failed to have any effect on the jury;" that "the object of fixing on the 22nd of September was to set aside a will supposed to be made on that day;" and concluded thus: "Mr. Jervis made a splendid speech of two hours' duration in favor of Mr. W.'s sanity, and commented with cutting severity on the testimony of Mr. R.," it was held that the whole publication, taken together, was libelous, and that a plea justifying the concluding sentence only was bad on demurrer.

upon any of the parties whose names appear in it, it entirely loses any privilege which it might otherwise claim.'

' Lewis v. Levy, El. Bl. & El. 544. And see Behrens v. Allen, 3 F. & F. 135.

In Cooper v. Lawson (8 A. & El. 746) the newspaper report of an examination into the sufficiency of the sureties on an election petition, before the examiners appointed under 9 Geo. 4, c. 22, § 7, set forth affidavits stating circumstances to show that the plaintiff, who had sworn to his own sufficiency as one of the sureties, was embarrassed in his affairs, unable to pay his debts, and an insufficient surety; and, after asking why, being unconnected with the borough, he should take so much trouble about the matter, proceeded—"There can be but one answer to these very natural and reasonable queries: he is hired for the occasion." The publisher of the newspaper, against whom an action for libel was brought, having pleaded that the publication was a correct report of proceedings in a legal court, together with a fair and bona fide commentary thereon, it was held that the statement as to the plaintiff's being hired for the occasion, not being mere inference from the previous statement, but introducing a substantive fact, required a distinct justification; and, therefore, that, on the trial of an issue on a replication de injuriâ to the above plea, it was properly left to the jury to say, not only whether the evidence made out the facts first alleged, but also whether the imputation that the plaintiff had been hired was a fair comment. "I do not say," said Patteson, J., "that in all cases where an alleged libel consists partly of comment, it should be left to the jury to say whether the comment is fair, because if, as the attorney-general has put it, the words were 'he has murdered his father, and therefore is a disgrace to human nature,' it would be ridiculous to ask whether the observation was or was not a fair comment. But where the comment raises an imputation of motives which may or may not be a just inference from the preceding statement, it is a distinct libel. That is so here; and therefore the question put to the jury related to a material part of the issue." "The plea," said Lord Denman, C. J., "is perfectly good, justifying the libel; partly as the report of proceedings before a court, partly as stating that which is in itself true, and partly as giving a fair and bona fide commentary on the proceedings stated. Now, a comment may be the mere shadow of the previous imputation; but if

Again: the matter may be so scandalous in itself as not to justify its publication in the newspapers. Courts are often bound, for the purpose of justice, to hear evidence in the course of judicial proceedings, the publication of which, at any distant period of time, or at any time afterwards, may have the effect of an utter subversion of the morals and religion of the people. It very often happens that, for the purposes of justice, our ears may be shocked with extremely offensive and indelicate evidence. But though we are bound in a court of justice to hear it, other persons are not at liberty afterwards to circulate it at the risk of those effects, which, in the minds of the young and unwary, such evidence may be calculated to produce.[1] Matters may appear in a court of justice that may have so immoral a tendency, or be so injurious to the character of an individual, that their publication could not be tolerated.[2]

In Rex v. Carlile,[3] the defendant had published, with the heading, "The Mock Trial of Mr. Carlile," a full and correct report of the trial of an indictment for publishing "Paine's Age of Reason;" in the course of which Mr. Carlile had read over to the jury the whole of that book. The court were unanimous in holding that the republication of the book could not be justified on the ground that it was part of a true report of what took place at the trial.

375. However a proceeding may be privileged it

it infers a new fact, the defendant must abide by that inference of fact, and the fairness of the comment must be decided upon by a jury. The defendant here cannot say that if the plaintiff became bail under the circumstances stated, it followed as a necessary inference that he was hired."

[1] Per Curiam, in Rex v. Carlile, 3 B. & Ald. 167.

[2] Carry v. Walter, 1 Bos. & P. 525.

[3] 3 B. & Ald. 167.

does not always follow that therefore other proceedings only incidentally connected therewith, are privileged. It may be libelous to publish a report of a privileged speech in a deliberative body. "For speeches made in parliament by a member, to the prejudice of any other person, or hazardous to the public peace, that any member enjoys complete immunity," said Muller, J.[1] "For any paper signed by the speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So, if the speaker, by authority of the House, order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it, than King Charles's warrant for levying ship-money could justify his revenue officer."[2] And so while the words of a witness on the box are privileged,[3] it is not settled, beyond dispute, that a newspaper would be justified in publishing the words if libelous.—But as to this, quære?

[1] Dorecote v. Dorecote, 4 M. & S. 23.

[2] Shortt, p. 462.

[3] Weston v. Dobniet, Cro. Jac. 432; Damport v. Sympson, Cro. Eliz. 520; Astley v. Younge, 2 Burr. 807; Harding v. Bulman, 1 Brownl. 2; Lewis v. Few, 5 Johns. 13; Revis v. Smith, 18 C. B., 126; Rex v. Skinner, Lofft, 55; Calkins v. Sumner, 13 Wis. 293; Barnes v. McCrate, 32 Maine (2 Red.) 442, and Perkins v. Mitchell, 31 Barb. 461; Smith v. Lewis, 3 Johns. 157; Grove v. Brandenburg, 7 Blackf. 234; Cunningham v. Brown, 18 Verm. 123; Dunlap v. Gladding, 31 Maine, 435.

In a case where a charge of perjury having been preferred against the plaintiff, the investigation before a magistrate was adjourned from time to time, and the defendant published in his newspaper a report of each day's proceedings in next day's impression—one on the 26th of June, stating that the plaintiff

"It has been argued," said the court (Bayley, J.), in Rex v. Creevey,[1] "that the proceedings of courts of justice are open to publication. Against that, as an

was charged with perjury, and an adjournment, but reserving the report; another on the 4th of July, also stating an adjournment, in language intimating that there would be a report of the proceedings of the day to which the proceedings were adjourned; and the third on the 18th of July, stating that "the magistrate dismissed the summons, there not being sufficient evidence to secure a conviction," the two former reports being headed "Willful and Corrupt Perjury;" it was held by the Court of Queen's Bench, after verdict finding that the reports were fair and correct, that an action of libel could not be maintained by the plaintiff for their publication.

The court held that the defense was sufficient as to the reports of the first and third day's proceedings; the great doubt was as to the report of the second day's proceedings, which set out evidence injurious to the plaintff, whilst the charge against him was still pending. "If the whole inquiry," said Lord Campbell, "had taken place before a magistrate during *one hearing, would an impartial and correct report of the* proceeding published in a newspaper next morning have been actionable? We think not. . . . . And for the same reasons an impartial and correct report of the proceedings at the three different hearings would have been privileged, if published simultaneously on the 18th of July. We have, therefore, only to consider the effect, under the circumstances of the case, of there having being three publications instead of one. Considering that the three taken together are found by the jury to have been a true and faithful and bona fide report of the proceedings against the plaintiff on this charge of willful and corrupt perjury, we think that the second cannot be selected and taken separately to be a libel. Had there been no other notice of the charge in the defendant's journal, it might well have been deemed malicious and actionable. But the number of 26th of June, after stating the adjournment, says 'as the publication of what transpired might frustrate the ends of justice, we reserve our report until the next hearing.' From the number of the 4th of July it might reasonably be inferred that a report would subsequently be given of what should be done at the adjourned meeting: and the number of 18th of July concludes the history by stating that the magis-

[1] 1 M. & S. 281.

unqualified proposition, I enter my protest. Suppose an indictment for blasphemy, or a trial where indecent evidence was necessarily introduced, would

trate dismissed the summons. We do not see how, on principle, this is to be distinguished from the daily report in a newspaper of a criminal trial, which lasts several days, before the Court of Queen's Bench or the Central Criminal Court, or at the assizes. . . . . The decision of Lord Chief Justice Eyre in Curry v. Walter (1 Bos. & P. 525), rested on sound legal principles, and is now almost universally approved of. On the same principles, we think, we ought to hold in this case that no action can be maintained for any part of the impartial and correct and bona fide report of the proceedings against the plaintiff before the magistrate, which ended in the charge being dismissed; although, the proceedings being adjourned from day to day, the report appeared in portions in different numbers of the defendant's journal."

In Duncan v. Thwaites (3 B. & C. 556) the plaintiff had been charged before a magistrate with indecently assaulting a female child, and the report contained a statement that the evidence of the child herself and her cousin "displayed such a complication of disgusting indecencies that we cannot detail it," held (on demurrer to a plea) that the report could not be justified on the ground of being a correct report of the proceedings which took place in the course of a preliminary inquiry before a magistrate; and there is no doubt that the judgment of the court, was delivered by Abbott, C.J., proceeds on the general ground that any publication of such proceedings is unlawful. Rex v. Fleet (1 B. & Ald. 379), was also one in which comments on the conduct of the parties were added to the report. A riot having taken place at Brighton, the high constable called forthe assistance of the military, who charged the mob, and one person was killed. An inquest was held before the coroner, which lasted some days and ended in a verdict of wilful murder against the high constable, one of his assistants, and the soldier who caused the death of the deceased. The defendant, before the jury had finished their labors, published in his newspaper a statement of the evidence, accompanied with remarks tending to cast blame on the high constable and the other peace officers for imprudently and unnecessarily calling out the military for the purpose of suppressing the tumult which had arisen. The court made absolute a rule for a criminal information.

everyone be at liberty to poison the minds of the public by circulating that which, for the purposes of justice, the court is bound to hear? I should think not; and it is not true, therefore, that, in all instances, the proceedings of a court of justice may be published."

A publication of reports of proceedings before magistrates, in cases over which they have no jurisdiction, cannot be justified as a correct and fair report of legal proceedings, if it contain defamatory matter. If magistrates, while, occupying a bench from which justice is intended to be administered, under pretense of giving advice or making suggestions, publicly hear slanderous complaints which they have no jurisdiction to hear judicially, the proceedings derive no privilege from the place where they are taken, no more than if they were sitting in a club-room or on the curbstone.[1]

[1] In the English case of McGregor v. Thwaites (3 B. & C. 556), a Mr. Prince and a Captain Antrim waited upon the lord mayor elect (who sat for the lord mayor) to request his advice as to three orphan children who had been brought home to England by Captain Antrim from Poyais on the Mosquito Coast in America, to which place a large number of persons had emigrated from Great Britain. A report of what occurred before the magistrate was published in a newspaper, of which the following was the important part: "Mr. Prince stated that about 200 of the victims of delusion had returned from the Mosquito Coast to Honduras in a state of utter destitution, and of disease, which terminated the sufferings of a great part of them soon after. They must have all died but for the charity of the people and the authorities of Honduras. The poor creatures had been led by Mr. McGregor to expect a land where they would live in the greatest plenty, where everything was flourishing, and but little labor would be required: it was mentioned to them as a mark of the improvement of the place, that a fine theatre had been established and other establishments formed, indicative, not merely of civilization and comfort, but of luxury. Captain Antrim

376. If the due administration of justice is supposed so to require, the court has authority to make an order against publishing any part of the trial till the whole

mentioned a charge which the poor creatures had preferred to him against McGregor. Most of those who sailed from Leith were poor people, who had by their frugality saved small sums of money of from £15 to £30; McGregor learned the property which the settlers had with them, and, telling them that Scotch money would not pass at the settlement, persuaded them to give it all up to him, and take his drafts for the amounts upon his bankers at Poyais. The savings were all given up to him, and it is perhaps unnecessary to add, that the settlers, on their arrival at the houseless wilds of Poyais, found that no such thing as a banking-house was in existence. Captain Antrim regretted that he had not arrived sooner, as another ship had sailed with settlers for the same place just before his arrival, who, he feared, would also fall a sacrifice. He had thought it his duty to make the statement publicly, that the poor might be put on their guard." To an action of libel for the publication of this report, the publisher pleaded that Mr. Prince and Captain Antrim did go before the magistrate and make the statements charged as libelous, and that the alleged libel contained a correct and fair account of the proceedings before the magistrate, and that the facts charged in it were true. The jury having found that the report was a true, fair, and correct report of the proceedings before the lord mayor elect, but that the facts charged in it were not true, the court held that the publication could not be justified on the ground of its being a correct and fair report of what took place before the lord mayor elect, as the matter was not brought before him in his judicial character, or in the discharge of his magisterial functions. "I think," said Littledale, J., "that the lord mayor elect had no legal authority to inquire into the matter brought before him by Captain Antrim; that he was not then exercising his office of magistrate, and that this case is to be considered in the same light as if the communication had been made to him in his private room. It is unnecessary, therefore, to decide in this case whether the defendant would have been justified in publishing this matter in a newspaper, if it had contained a correct report of a proceeding which had taken place before a magistrate acting in a judicial capacity."

is concluded. Nevertheless, where no such order has been made, the practice has long existed of daily publishing, without any disapprobation from the court, each day's proceedings till the trial is concluded. And in several instances this practice, which, in reality, only extends the area of the court, has been found highly beneficial in the discovery of material evidence. . . . The law must bend to the approved usages of society, though still resting upon the same principle, that what is hurtful and indicates malice should be punished, and that what is beneficial and bona fide should be protected."[1]

The reason for allowing this liberty of publication is stated[2] to be—that the balance of public benefit from the publicity is great: it is of great consequence that the public should know what takes place in court, and the proceedings are under the control of the judges; the inconvenience, therefore, arising from the chance of the injury to private character, is infinitesimally small as compared to the convenience of publicity. To the same effect is Rex v. Wright:[3] "The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to private persons whose conduct may be the subject of such proceedings."

377. Fair and candid and bona fide comments upon matters of public interest will be protected as privileged, but furnishing the public with the opinions or reflections of an editor or reporter, upon facts which are equally at the disposition of the public to draw their own conclusions from, are not necessarily fair and candid and bona fide comments. Such comments,

[1] Campbell, C. J., in Hunter v. Sharpe, 4 F. & F. 983.
[2] 4 F. & F. 1005.
[3] 2 Chitty, 162.

if defamatory in their nature, will require a justification. Some comments are little more than another mode of stating what has gone before. "It would be extravagant to say that in cases of libel, every comment upon facts requires a justification, but a comment may introduce independent facts, a justification of which is necessary. A comment may be the mere shadow of the previous imputation; but if it infers a new fact the defendant must abide by that inference of fact, and the fairness of the comment must be decided upon by the jury."[1]

If a newspaper takes occasion to say that the examination "fully established the facts as stated by the counsel for one of the parties," it does so at its peril. And it will state at its own peril, also, that "such and such" were the circumstances of the case "as stated by the counsel for" one of the parties, and does not give the evidence. Such a report does not even profess to be an account taken from evidence given at the trial, nor even to be an account taken from counsel's statement, but afterwards corrected by the evidence given in the cause. Statements of counsel are of course ex parte, and they not unfrequently make allegations, of which there is a failure in the proof. Such a proceeding is privileged, on the part of counsel, because they are discharging their duty; but a newspaper is not dis-

[1] Cooper v. Lawson, 8 A. & El. 753. Where the report of a trial professed to give a short summary of the facts of the case, and stated that the counsel for the defendant was both extremely severe and amusing at the expense of the plaintiff's attorney; and then, without setting out the evidence, professed to give an outline of the speech of defendant's counsel, the part set out containing some very severe reflections on the conduct of the plaintiff's attorney in advising the form of action with a view to his own profit, a plea justifying the report as being in substance a true report of the trial was held bad on demurrer. Flint v. Pike, 4 B. & C. 473.

charging any duty in repeating them, and it is not privileged. "Would it be either safe or proper that after a cause has been tried, a statement which the evidence has not at all supported, should be published in a newspaper; and then, merely because that statement has been made by counsel, it should be held to be privileged? Ought such a publication to be considered a fair report of what had passed in court, although the evidence afterwards given might not only not support, but might even to some extent contradict it? Ought such a publication to be privileged? I conceive not; and I think that such will not be held to be the law of the land."[1]

Still less can a report be justified which not only does not give the evidence, but adds to the speech of counsel, which it sets out, that all that he stated was proved.[2]

And even if on a final trial the defamatory suppositions of the newspaper proved to be correct, we doubt if it would change their libelous character, for a question as to whether defamatory matter is or is not libelous, can be met by a plea that such question must remain in abeyance for a man's lifetime, on the presumption that, "as nobody knows what may happen," it might at some day or other prove true. Such a view would be manifestly absurd.

The case of Curry v. Waller[3] has generally been regarded in England as determining that the report of

[1] Per Tindal, J., in Saunders v. Mills, 6 Bing. 218.

[2] Shortt, L. L. p. 477.

[3] 1 Bos. & P. 525. The legality of publishing an accurate and impartial report of the preliminary proceeding, where it has ended in the dismissal of the charge, must, as before stated, be taken to be now settled by the decision in Lewis v. Levy (El. Bl. & El. 537; 27 L. J. 287, Q. B.), and some eminent judges have recently refused to join in unqualified disappro-

a preliminary trial may be published without an abuse of the privilege of newspapers in regard to matters of public interest. But the report, in order to be protected, must be not only bona fide, but also accurate, or at least substantially accurate. It need not be a verbatim report, or set out fully all that occurred at the trial; but, if it summarizes or abridges, it must do so fairly, and not give a one-sided complexion to the narrative.

"The privilege—a valuable privilege for the public—of publishing reports of proceedings in courts of justice would be useless if it were necessary to set out every word of the evidence and of the speeches, and of what was said by the judge. That is not necessary; if what is stated is substantially a fair account of what took place, there is an entire immunity for those who publish it."[1]

378. Newspapers have a full right to publish, either a verbatim or an abridged or condensed report of what passes in courts of justice; and, however it may affect the character of an individual, he has no ground for an action of libel, unless it be an unfair report.[2] In reporting the proceedings of courts of justice, omissions and abridgments are often essential, but they must not be such as to change the complexion of the proceedings; if they do, they do not constitute the fair and just report which they are privileged to make.

379. A newspaper will be liable if it put a general heading of a libelous character to what may be, in

bation of accurate and impartial reports of proceedings which do not so end, but in which the accused is held to bail or committed for trial.—Shortt, L. Lit. p. 469.

[1] Andrews v. Chapman, 3 C. & Kir. 289.

[2] Blake v. Stevens, 11 L. T. N. S. 544; 4 F. & F. 237. See Ackerman v. Jones, *ante*, this chapter, p. 459.

other respects, a fair report of a judicial proceeding. A particular case, in which an attorney has treated his client badly, will not justify the prefixing to the report of that case a general heading in the words, "How Lawyer B. Treats His Clients."[1]

So, where a newspaper published a report of proceedings in the insolvent debtors' court, headed "Shameful Conduct of an Attorney," a plea that the alleged libel contained a correct account of what took place in court was, even after verdict for the defendant, held bad, on the ground that, by the prefatory words, the defendant had taken upon himself to make an allegation of shameful conduct against the plaintiff.[2]

[1] Bishop v. Latimer, 4 L. T. N. S. 775.

[2] Lewis v. Clement, 3 B. & Ald. 702; *vid.* also Lewis v. Levy, El. Bl. & El. 537; 27 L. J. 287, Q. B.

In Lewis v. Walter (4 B. & Ald. 605), where a report of the trial of the plaintiff (an attorney) and two other persons for a conspiracy to defraud the under-sheriff of Hants, set out the speech of the counsel for the prosecution, and then continued: "The first witness was R. P., who proved all that had been stated by the counsel for the prosecution; Mr. J. G., the attesting witness to the bill of sale from the sheriff to Messrs. W., was next called, but not being able to prove a deputation from the under-sheriff for that year, the jury, under the direction of the learned judge, were obliged to give a verdict of acquittal, to the great regret of a crowded court, on whom the statement and the evidence, so far as it went, made a strong impression of their guilt;" a plea justifying the report on the ground that in fact such a speech had been made, and that the witness called proved all that had been so stated, but not setting out the evidence or justifying the truth of the charges made in the counsel's speech, was held bad on demurrer. "The objection," said Abbott, C. J., "taken to the plea seems to me to be unanswerable. It is asserted in the libel that a certain witness proved the allegations contained in a speech made by counsel in stating a case to the jury. Now that justification cannot be supported. The defendant ought to have detailed and transcribed in the publication the evi-

380. If a decision or sentence be pronounced upon any person by a competent authority, in a matter of public interest and observation, a public writer may

dence of the witness. If he had done so, his readers might then have judged for themselves. If a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence." "It is no justification," said Bayley, J., "that a defendant has truly stated, in his publication, the speech made by counsel in stating a case to the jury; he must go further and show the truth of the facts there stated. It is the duty of a counsel to state facts, although they may be injurious to the character of individuals, and he is privileged so to do, if he speaks conscientiously according to his instructions, but if it were to follow that others might repeat what he says, it might be most injurious to the character of individuals; for, as to them, the reason for the privilege, which is the advancement of public justice, does not apply." *Vid.* also Hodgson v. Scarlett, 1 B. & Ald. 232.

In Stockdale v. Tarte (4 A. & El. 1016), where the plaintiff and another had been convicted of a conspiracy to extort money from a third person, an action of libel was brought against the publisher of a report of the trial, for publishing that the counsel who moved for judgment had stated the plaintiff to have been the writer of one letter, which was not in fact written by him, but by his co-conspirator. The plaintiff's evidence on the trial proving the great probability of the counsel alluded to having in fact made the statement reported, it was held that it was properly left to the jury to say whether the publication was a libel, and, the jury having found a verdict of not guilty, that this was not contrary to the evidence.

In Chambers v. Payne (5 Tyrw. 766), an action of libel was brought against the proprietors of a newspaper for publishing what purported to be a report of the trial of another action of libel, brought by the same plaintiff against the proprietors of another newspaper, who justified the libel on the ground of its truth. The report stated the libel on which the original action was brought, the defendant's proofs on the justification, and the judge's summing up, and ended by stating that the plaintiff had a verdict for £30. No proof was given that such a trial had taken place, or whether, if it had, the report in question was a fair and impartial report of it. Lord Abinger, C. B., told the jury that if, in their opinion,

comment upon it, and assume it to be correct; and it will make no difference if the sentence be afterwards reversed; for it would be manifestly unfair and unreasonable that the public writer should be held responsible for the results of a review of the decision or sentence.[1]

So, the hearing of a case upon a charge of felony, or a fair report of it in a newspaper, is a proper subject for comment in the press; and a public writer would not be liable to an action for discussing the conduct of the magistrates, in dismissing the charge without fully hearing the evidence, or even in commenting upon the evidence given in support of his view. If the report was so worded as to indicate a malicious motive against the plaintiff, or to be injurious to his character by misstatement, or by conveying an insinuation of his being actually guilty of the matter originally imputed, notwithstanding he was stated to have obtained damages for the imputation, or if the report of such a trial having taken place was pure fiction, invented by the defendants, their verdict should be for the plaintiff; but if they thought otherwise, or, that the report, though containing some allegations prejudicial to the plaintiff, yet when taken altogether, with the alleged verdict in his favor, was not on the whole injurious to him, the verdict should be for the defendants. The jury having found for the defendants, the court refused a new trial on the ground of misdirection.

In Rex v. Lofield (2 Barn. Rep. 128), decided in 1732, one Lofield, having recovered £1,100 damages in an action against a person named Bancroft for maliciously charging him with felony, published in the news "that Bancroft had conspired to charge him with this felony, that in vindication of his character he had brought an action against Bancroft for so doing, and had recovered £1,100 damages against him." The Court of King's Bench made absolute a rule for a criminal information against Lofield for this publication, because it falsely represented the fact; for Lofield did not bring his action for a conspiracy, but for Bancroft's maliciously charging him with felony, and a conspiracy requires an infamous judgment.

[1] Seymour v. Butterworth, 3 F. & F. 385.

however, he goes further, and not only argues upon the effect of the evidence given, but speaks of "evidence which might have been adduced," and makes statements of matters of fact not in evidence, and tending to show that the accused was guilty of the felony, the publication is a libel.[1]

381. Comments may be made by the press, on the evidence given by a particular witness in any inquiry on a matter of public interest, even, it seems, to the extent of imputing that the evidence is unfounded, incautious, or careless; but an unfounded imputation that the evidence is "maliciously" or "recklessly" false, would be libelous.[2]

382. It has been seen that a newspaper may be responsible for a libel contained in matter printed by it as an advertisement, though this has been doubted. It is clear, however, that the individual inserting the matter will be responsible.[3] It may even be libelous in a newspaper to record, under certain circumstances, the fact that a man is unpopular. A Mr. Hennesey, having received the ap-

[1] Hibbins v. Lee, 4 F. & F. 243.

[2] Hedley v. Barlow, Id. 224. In New York the publication of judicial proceedings is protected by statute, which enacts: No reporter, editor, or proprietor of any newspaper shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper of any judicial, legislative, or other public official proceedings of any statement, speech, argument, or debate, in the course of the same, except upon actual proof of malice in making such report, which shall in no case be implied from the fact of publication (Laws 1854, c. 130, § 1). Nothing in the preceding section contained shall be so construed as to protect any such reporter, editor, or proprietor, from an action or indictment for any libelous comments or remarks superadded to and interposed or connected with such report (Id. § 2).

[3] Simpson v. Downs, 16 L. T. N. S. 391; and see Finden v. Westlake, 1 Mo. & Malk. 461; Gasset v. Gilbert, 6 Gray (Mass.) 94.

pointment of professor of mathematics in the Royal College of Science, Dublin, the appointment was unpopular with the students, who sent in a petition against it, charging him with incompetency; but, on inquiry, the committee of council justly confirmed the appointment, and the result fully confirms their opinion of the unjustness of the charge. The "Educational Reporter," a small monthly paper, in mentioning the dispute, in a paragraph of eight lines, appeared to indorse the opinion of the students, and Hennesey commenced an action. Not satisfied with the apology offered by the editor of that sheet, the action was tried in London, the jury giving the plaintiff a verdict, with seventy-five pounds damages.[1]

383. The proprietor of a newspaper is responsible for whatever appears in it, and it need not appear that he knew of or authorized it.[2] He is liable even if it is published against his express instructions.[3] And one who had been appointed by a court receiver of a newspaper, will be liable for libelous matter published during his control of the same;[4] but if one holds the

[1] Reported in The Bookseller, London, July 3, 1875.

[2] Huff v. Bennett, 4 Sandf. 130.

[3] Dunn v. Hall, 1 Carter Ind. 345; 1 Smith, 288; Curtis v. Mussey, 6 Gray (Mass.) 261; Andres v. Wells, 7 Johns. 260; but this is not undisputed; see per contra Commonwealth v. Kneeland, Thatcher Crim. Cases, 346; Rex v. Fisher, 1 Moo. & M. 433. In Rex v. Almon, and in Woodfalls' Case, where the publication was by a servant of the defendant, while the defendant was in prison. Rex v. Fisher, 1 Moo. & Mal. 433, held that the presumption arising from proprietorship of a newspaper may be rebutted, and an exemption established. If the publication is made without the consent of the writer, the offense is not complete as to him (Weir v. Hoss, 6 Ala. 881; see Holt on Libel, 294). As if the writing be stolen from him (Mayne v. Fletcher, 9 B. & C. 382). Townshend on Libel and Slander, p.

[4] Marten v. Van Schaick, 4 Paige, 477.

newspaper and its presses merely as an assignment for a debt, the property continuing to be worked and conducted by the assignor, the assignee would not be liable for libelous matter uttered by the newspaper.[1]

Where defendant published a pamphlet, entitled "Truth Vindicated," and alleged libels were contained in a review of that pamphlet published in a newspaper preceding the trial, Erle, J., said: "Where the plaintiff and defendant have both had recourse to the press, and the libel has been published in the course of a discussion in which both parties have been before the public, and in which the plaintiff first had recourse to the press, and made the matter public, it is important to see if malice has been made out against the party sued, or if he has published only what he believed was required for the interests of truth."[2]

384. "The right," it was said in Kane v. Mulvany,[3] "to criticise is not a peculiar privilege of the press, nor is a man any the less liable for wrongful or malicious acts, because he happens to conduct a public press."[4]

The constitution of New York provides: Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press (Constitution of 1846, art. 7, § 8). This is repeated in the bill of rights of that state, and similar provisions are,

[1] Andres v. Wells, 7 Johns. 260. This appears to be analagous to the case of the attorney who introduced defamatory matter into a pleading without his client's knowledge. And the client was held not to be responsible therefor. Hardin v. Comstock, 3 A. K. Marsh. 480.

[2] Hobbs v. Wilkinson, 1 Fost. & F. 608; and see Sheckell v. Jackson, 10 Cush. 25; Campbell v. Spottiswoode, 8 Law Times Rep. N. S. 201; Davison v. Duncan, 7 El. & B. 231.

[3] 2 Ir. C. L. 402.

[4] See cases cited supra, note 1.

we believe, to be found in the constitution of every state in the Union.[1]

385. Where matter reflecting upon the character of an individual is published in a newspaper, it will not be libelous for the attorney of the individual characterized to publish statements honestly intended to vindicate him.[2]

[1] Townshend on Libel and Slander, p. . March 14, 1859, in the New York Senate, Mr. Ely introduced a bill to amend chapter 130 of the Laws of 1854, by providing that no publication in any newspaper, respecting any person holding office, shall be deemed a libel, and providing that any assault upon the person of an editor who has made any such publication shall not be illegal or punishable, unless resulting in the death or maiming of the person assaulted. Id.

[2] Reg. v. Velley, 4 Fost. & F. 1117.

The preparation by M. Dufaure of a law for the regulation of the French press affords the Paris correspondent of the "London Times" an opportunity to speak of the rigorous character of the German press laws, and to fortify his description by a number of examples. Formerly the only punishment inflicted on a Prussian editor who published an obnoxious article was a small fine, provided that he had not read the article before printing it. In case, however, the government attempted to ascertain who wrote the article, and in the course of its investigation was met by the refusal of the editor, or any of the men employed by him, to make disclosures, such persons as refused so to testify could be imprisoned for a term not exceeding two years. This inquisition into the authorship of articles was very distasteful, and in 1862 an unsuccessful attempt was made in the Reichstag to abolish it. In May, 1874, a new press law was established, which was regarded on the whole as a concession to the freedom of the press. In this law, as proposed, a clause was inserted forbidding the inquisition into the authorship of articles, but at the last moment the government announced that its assent to the bill would depend upon the omission of this clause and the sanction of the right of the police to seize the edition of any journal. The new law concentrated responsibility upon the editor. This feature was thought to be a great improvement on the old law, because it tends to preserve contributors from the vexations and punishments which result from

In France, the penalty visited on a newspaper for publishing false news is very severe, and very few excuses are allowed.[1]

official supervision, and it was regarded moreover as a substantial guaranty that the government would not exercise the legal right which it retained to inquire into the authorship of articles. Within a few months, however, this right has been revived, and the correspondent of the "Times" mentions two attempts to enforce it. The first case is that of the editor of the "Frankfort Zeitung," who uniformly assumes full responsibility for whatever he publishes. He is now undergoing two sentences of three months' imprisonment for articles published in his journal, and several other prosecutions are still pending against him. The government has made a systematic attempt to find out who wrote these articles, and the entire office staff, including even the men employed in the mechanical departments, have been questioned as to their authorship. The writers have not been discovered yet, and no one has been imprisoned for refusing to give the desired information, but in case the authors were discovered the law would permit them to be punished, and as construed would not release the editor. Thus under the press laws of Germany two persons may be made to suffer for the same offense. The other case is that of an ultramontane journal at Berlin, whose account-books were seized recently by the government, to find out the source of certain articles. The information was not obtained, and the editor has announced that hereafter no accounts or other written evidence of connection with his journal will be kept by him.

The "Times" correspondent points out that one result of this close censorship of the German press is that the government will be held responsible abroad for whatever the German newspapers say.—N. Y. Evening Post.

[1] "Le Progrès du Nord," a radical newspaper, published at Lille, whose chief editor is M. Masure, formerly Chef de Cabinet to M. Gambetta during the Tours dictatorship, has been, June 19, condemned to 2,000 francs fine and 500 francs damages for propagating false news and publishing libelous articles against the Jesuits and Dominicans. "L'Echo du Nord," also published at Lille, has been condemned to 500 francs fine and 500 francs damages for similar offenses. These judgments carry costs

The relations of newspapers with the post-office have been already discussed.[1]

386. In 1874, a bill, supposed to have especial ref-

[1] *Ante*, vol. I. pp. 489–503. In October, 1874, a treaty was signed at Berne, in Switzerland, by the representatives of the United States, of all the states in Europe, and Egypt, goes into operation July 1, 1875. It stipulates that the countries between which the treaty was concluded shall form "a single postal territory for the reciprocal exchange of correspondence between their post offices." It establishes five cents as the general Union rate of postage for each prepaid letter not exceeding half an ounce in weight, and provides that a single rate shall be imposed for every additional half-ounce or fraction thereof. The Union charge for newspapers, books, or other parcels is a cent and a half for every two ounces, though, in the case of newspapers, countries so desiring it may fix the rate for a single copy weighing not more than four ounces at two cents. When either letters, newspapers, or parcels are carried more than three hundred nautical miles by sea within the territory of the Union, an additional charge not exceeding half the general Union rate may be levied. The general Union rate in regard to letters may be so far modified as to be reduced to four cents or raised to six cents per half ounce, according to the monetary or other requirements of the country fixing the rate. In the case of other postage, the general rate may be lowered to one cent or raised to two cents per two ounces. The country from which letters or other postal packets are dispatched —technically known as the "country of origin"—keeps all the sums collected under these rules, and the country of destination cannot levy any additional charge upon such prepaid letters or packages. In cases where they are unpaid, the country of destination keeps the money collected on them.

The necessity for an International Office of Account—to be established and organized in Switzerland—arises under the article which guarantees the right of transit through the entire territory of the Union. The liberty of sending "in transit through intermediate countries, closed mails as well as correspondence in open mails," involves the right to demand the supply of transit as well as the obligation of paying for it. The dispatching office must pay to the office of the territory providing such transit, at the rate of two francs per kilogramme—say twenty cents per pound—for letters, and twenty-five centimes per kilogramme—say two and one-half cents per pound, for newspapers and other postal packets. This pay-

erence to the growing power and audacity of the press of the country, was introduced into the senate of the United States. The word "newspapers" did not occur in the text of the bill, which provided merely that, for any crime committed against the United States—committed in the District of Columbia—the offender might be arrested in any state, and removed to the District of Columbia for trial; but the measure, which newspapers dubbed, from the name of its mover, the "Poland Gag-law," provoked great animadversion and criticism. The bill, however, became a law,[1] and it has been held thereunder that for a libel composed and published in the District of Columbia, an indictment

ment may be doubled when the transit provided is more than four hundred and sixty-six miles in length over the territory of one office. The members of the Union engage to reduce the expenses of sea service as much as possible, and the office providing ocean transit of over three hundred nautical miles cannot claim from the dispatching office more than seventy-five cents per pound for letters, or more than twenty-five cents per pound for other postal packets. The mail to British India, and the mails conveyed between New York and San Francisco, are to continue to be regulated by special arrangements between the post offices concerned.

The international postal system defined in the treaty is detailed with a good deal of minuteness in the regulations for its execution, which were signed along with the treaty itself. These are followed by a series of carefully drafted schedules and tables for the purpose of carrying out the uniform system of international postal administration which it was the purpose of the Berne congress to institute. The treaty is to be binding for three years from the first of July last, and a meeting of plenipotentiaries of the countries forming the Union is to be held every three years, with the view of perfecting the system now adopted and of discussing the common affairs of the Union. When the first term of three years has been passed, the treaty shall be considered as binding in perpetuity, but any contracting party may withdraw from the Union by giving notice one year in advance.

[1] Rev. Stat. U. S. § 3014.

may be found there, against the author and publisher; and if convicted, they may be there removed, wherever arrested, and punished accordingly; but the indictment must strictly aver a publication within the district, and an offense against the laws of the United States; otherwise it would be the duty of a federal court to refuse a warrant in any state for the removal of the alleged offender to the District of Columbia.[1]

[1] Re Buell, reported in Central Law Journal, vol. 2, p. 312 (May 14, 1875), which appears to be the first authoritative decision under the act alluded to, was an appeal by the United States from an order of the United States district court for the eastern district of Missouri, March 9, 1875, in a proceeding by habeas corpus, discharging one Buell from the custody of the marshal for said district, and refusing to issue its warrant for the removal fo said Buell for trial to the District of Columbia.

The defendant, Augustus C. Buell, was indicted July 2, 1874, in the supreme court of the District of Columbia, for a criminal libel on one Zachariah Chandler, a senator of the United States, contained in an article in the "Detroit Free Press," printed in the city of Detroit and state of Michigan, February 19th, 1874.

Buell was apprehended in the eastern district of Missouri, and committed by a commissioner to the custody of a United States marshal. Said Dillon, Circuit Judge, "In the argument before me the counsel for Mr. Buell has not maintained that the matter charged in the indictment to have been composed and published by him concerning Mr. Chandler is not in its nature libelous, and there is no doubt that it is so. Nor has the counsel for Mr. Buell controverted the position that for a libel composed and published in the District of Columbia, the offender may there be indicted and punished as for an offense against the laws of the United States. And of this opinion was the learned judge of the district court—that opinion resting upon the act of congress of February 27, 1801 (2 Stats. at Large, 103), adopting and continuing in force within the District of Columbia the laws of Maryland; the act of February 25, 1865 (13 Stats. at Large, 439), recognizing libel as an indictable offense against the United States in the District of Columbia, and the decisions of the supreme court of the United States concerning the effect of the above mentioned

387. The subject of contracts between newspapers, where essentially different from other contracts, will be treated in a following chapter, when we come to consider Contracts in Relation to Literary Property.[1]

act of February 27, 1801. Rhodes v. Bell, 2 How. 397; United States v. Simms, 1 Cranch, 258; Stelle v. Carroll, 12 Peters, 205; Kendall v. United States, Id. 524; ex parte Watkins, 7 Id. 575.

By the act of 1801, says Chief Justice Taney, "the common law in civil and criminal cases, as it existed in Maryland at the date of this act of congress (February 27, 1801), became the law of the District of Columbia, on the Maryland side of the Potomac." The Virginia portion was retroceded in 1846. 9 Stat. at Large, 33.

It will therefore be assumed that the offense of libel in the District of Columbia is an offense against the United States, for which the offender may be there indicted as at common law and punished.

This being so, and Mr. Buell having been there indicted for such an offense, our inquiry is, whether there is any law authorizing the removal of persons found beyond the District of Columbia to that district for trial, for offenses committed therein. In this respect there is no difference between libel

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[1] A novel point came before the court of chancery for decision in the case of Platt v. Walter, 17 L. T. N. S. 157. The defendant's grandfather had established both the "Times" and "Evening Mail" newspapers, the former in 1788, and the latter in 1789. The "Evening Mail," as described in the answer of the defendant, consisted of "a republication, on the evenings of the Mondays, Wednesdays, and Fridays in each week, of the matter (other than the advertisements) contained in the two preceding numbers of the 'Times,' with such omissions and abridgments as were considered desirable, but with the addition of a postscript containing the latest market intelligence, and also such advertisements as had been separately bespoken and paid for, for the 'Evening Mail.'" This mode of publishing both newspapers continued down to the year 1864, although in 1820 one-fourth share in the "Evening Mail" became, by purchase from a son of the original founder, vested in a stranger, from whom the plaintiffs derived their title. The object of the suit instituted in chancery was to have it declared that the arrangement which had been so long in existence gave the proprietors of the "Evening Mail"

388. It is not competent, in an action for services rendered, in preparing certain reports for a newspaper, to ask a witness if, in his opinion (founded upon his

and other offenses, and the question is a general one, whether for any offense committed in the District of Columbia, against the laws of the United States, the offender found elsewhere can be removed there for trial. On this point, under the law as it stands, I have no doubt. The authority is ample, and the language of the revised statutes (sec. 1,014) in connection with the act of June 22, 1874, removes the doubts arising on the words "such court of the United States as by this act (the judiciary act of 1789), has cognizance of the offense."

The District of Columbia is not a sanctuary to which persons committing offenses against the United States may fly and be beyond the reach of justice, nor is the law so defective that persons there committing such offenses and escaping or found elsewhere, cannot be taken back there for trial. I agree to the views in general of the district judge on this point, as expressed in his opinion, which accompanied the record in the case, and do not think it necessary to enlarge upon it.

The statute provides that United States commissioners and certain magistrates "for any crime or offense against the United States," may "arrest and imprison, or bail the offender

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certain rights and interests in and over the "Times," which the proprietors of the latter newspaper could not at their mere will determine, viz.: the right of republishing the matter of the two last preceding numbers of the "Times," or any selection and abridgment of it, and the right of causing to be edited, printed, and published the "Evening Mail" whenever the "Times" should from time to time be edited, printed, and published. The bill further prayed that, in case a notice given by defendant for the dissolution of the partnership had been properly given, it might be declared to be dissolved, and directions should be given for the sale as a going concern of the "Evening Mail," and the copyright and good-will thereof, including particularly the rights and interests in and over the "Times," and the copyright and good-will and other property thereof; and in case the proprietors of the "Times" should be unwilling to carry it on subject to such rights and interests of the "Evening Mail," then that the proprietors of the latter paper should be declared entitled to have the "Times" and the copyright, &c., thereof sold, subject to such rights and interest. The Vice-Chancellor (Stuart) dismissed the plaintiff's

having read the articles, and upon his familiarity with the author's style), the reports were written by the plaintiff;[1] but, under certain circumstances, handwritings may be compared.[2]

for trial before such court of the United States as by law has cognizance of the offense." Rev. Stat. sec. 1,014. An information was filed before Commissioner Clarke, who committed the prisoner to the custody of the marshal. In such a case the further provision is that "where any offender is committed in any district, other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender is imprisoned, seasonably to issue, and the marshal to execute a warrant for his removal to the district where the trial is to be had." Rev. Stat. sec. 1,014. On the proceedings before him the district judge refused to issue the warrant of removal and discharged the prisoner; and the question is whether his action in this case ought to be reversed.

The district judge, in making this order, proceeded upon the ground that he might properly look into the indictment, and if it was fatally defective in essential averments to con-

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bill, except so much of it as prayed a dissolution of the partnership and an account; and the Lord Chancellor (Chelmsford) confirmed this decision.

It was contended for the plaintiffs that, although so long as the original founder continued to be sole proprietor of both newspapers, no rights or interests could be said to belong to the "Evening Mail" either in connection with or independently of the "Times;" yet when the original founder had made a separate grant to one of his sons of one-fourth share in the "Evening Mail," he thereby not only gave birth to rights in that paper, but also created a kind of servitude over the "Times:" *i. e.*, he took upon himself an irrevocable obligation to allow the matter in its columns to be copied into the "Evening Mail," and to permit it to be printed at the same place and with the same types as the "Times." In reply to this, Lord Chelmsford says: "Suppose a covenant to this

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[1] Lee v. Bennett, How. Ct. App. Cas. 202.

[2] Tarpley v. Blabey, 2 Bing. N. S. 437; 2 Sc. 642; 7 Car. & P. 395; May v. Brown, 3 B. & Cr. 123; Finnerty v. Tipper, 2 Camp. 72; Wakley v. Johnson, 1 Ry. & M. 422; Stark. Sland. 429, 3 ed.; and see Morgan's Best on Evidence, vol. i. p. 437, as to handwriting.

389. A witness may testify to the contents of a paper not produced, if it is a printed one, always issued in the same form. To prove the publication in a news-

stitute an offense triable in the District of Columbia, he might refuse to issue the warrant for the prisoner's removal. It is argued that the question of the sufficiency of the indictment is for the court in which it was found, and not for the district judge on such an application. Re Clarke, 2 Benedict, 540. I cannot agree to this proposition in the breadth claimed for it in the present case. This provision devolves on a high judicial officer of the government, a useful and important duty. In a country of such vast extent as ours it is no light matter to arrest a supposed offender, and on the mere order of an inferior magistrate remove him hundreds, it may be thousands of miles, for trial. The law wisely requires the previous sanction of the district judge to such a removal. Mere technical defects in an indictment should not be regarded; but a district judge who should order the removal of a prisoner when the only probable cause relied on or shown was an indictment, and that indictment failed to show any offense against the laws of the United States, or showed an offense not committed or triable in the district to which the removal is sought, would misconceive his duty and fail to protect the liberty of the citizen.

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effect to be good against the grantor, who was sole proprietor and also printer of the 'Times,' how could it bind the future proprietors and printers of that newspaper? The covenant relates not to the property granted, but it imposes what may be properly described as a servitude upon the property, which is of a personal nature. It is at the utmost, therefore, a *mere* personal covenant, *binding upon the covenantor and* his personal representatives, but the burden of it not running with the property of the 'Times' against assigns."

In answering to a further argument on behalf of the plaintiffs, based on the length of time during which the arrangement had continued, the lord chancellor observed: "The presumption of a grant from long contiuned usage arises only where the origin of the usage is unknown. But in the present case, if the right claimed by the plaintiffs originated in the grant to William Walter [the founder's son], the usage is not required to establish it; and if it did not so originate, the usage is of no avail. The claim of the plaintiffs makes it necessary for them to prove that, either by the original grant of the shares in the 'Evening Mail' to Wil-

paper, it is not necessary to produce a copy actually published. 'It is sufficient to produce a copy, and prove that papers of the same kind were published.'

It is the constitutional right of the citizen to be tried in the district in which the offense imputed to him is alleged to have been committed, and not elsewhere. Article 2, section 2.

In this case the district judge discharged the prisoner, on the ground that the indictment failed to show that the alleged libel was published in the District of Columbia, but showed rather that the offense charged therein was an offense, if at all, against the laws of Michigan. If this is a proper view of the indictment, his action was unquestionably proper. The language of the indictment is peculiar. It was only necessary for the pleader to have averred that the defendant did not compose and publish the libelous matter, setting it out, within the District of Columbia. Such are the precedents. Why is it alleged out of the ordinary course, that the libel was composed and written in the form of a newspaper article, and printed in the Detroit Free Press, in the state of Michigan,

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liam Walter, or by some subsequent right obtained by the plaintiffs against the proprietors of the 'Times,' a perpetual benefit to the 'Evening Mail,' and a perpetual burden on the 'Times' were established, however prejudicial it might prove to the interests of the proprietors of the 'Times;' and that upon the dissolution of the partnership in the 'Evening Mail,' and the consequent sale of the property in that newspaper, the proprietors of the 'Times' were bound to give a value to the good-will by continuing the arrangement for its publication as long as the 'Times' should continue to be published. There is certainly no express contract to anything like this effect between John Walter, the grandfather, and his sons, when the separate interests in the 'Evening Mail' were first created; and it would be a strong implication to draw from the transaction, that the burden of such an obligation was intended to be assumed by Mr. Walter for himself and for all future proprietors of the 'Times.'" Finally, the lord chancellor said: "What are called in the bill the rights and interests of the 'Evening Mail' over the 'Times'

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[1] Simmons v. Holster, 13 Min. 249; and see Cook v. Ward, 6 Bing. 409; Rex v. Pearce, Peakes. Cas. 75; as to proving the time the publication took place, see Wright v. Britton, 1 Morris, 286; Richardson v. Roberts, 23 Geo. 215.

Newspapers, as a rule, are not evidence in courts of justice of the publication of matters advertised therein.[1] As, for instance, an advertisement, in a news-

and afterwards, to wit, on the day and year aforesaid, published in the District of Columbia?

The district attorney, notwithstanding some old English cases, very properly admitted that publication by the defendant in the District of Columbia was essential to the offense, and that if this libel was published in Michigan, by the procurement of the defendant, he could be there indicted for it. But he contended that if the paper containing the libelous article was afterwards published (in the legal sense) by the defendant in the District of Columbia, he could also be there indicted for it as an offense against the United States, and he claimed that in this aspect of the question, the indictment was sufficient to charge such an offense. Whatever may be the correctness of the contention of counsel in these respects, it seems to me quite doubtful whether the indictment intended to charge a substantive publication by the defendant in the District of Columbia, or any publication in that district, except so far as composing a libel there for publication in a newspaper elsewhere, is in law a publication in the district. This without more would not be a publication in the district. Upon the authorities it seems clear that if the defendant composed a libel in the District of Columbia, with intent to have it published in a newspaper in Michigan, and it was there published by the defendant's procurment or consent, he would be liable to indictment in the latter state (1 Russell on Crimes 258 and cases cited; 3 Chitty Cr. Law 872; Rex v. Johnson, 7 East, 68; Commonwealth v. Blanding, 3 Pick. 304). But the indictment would then be for an offense against the laws of the state of Michigan, and not of the United States.

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appear to me to have begun in will and pleasure, and to have continued throughout upon the same footing. They could at no time have been enforced; and upon the dissolution of the partnership in the 'Evening Mail' and its consequent sale, the court has no power to direct that they shall be included in the good-will and property of that newspaper."—Shortt, p. 286.

[1] Sweet v. Avenant, 2 Bay (S. C.) 492. Advertisements in a newspaper are improper evidence to go to a jury except to prove a notice under a statute, or the publishing of a libel, &c. Id.; and see Payson v. Everett, 12 Minn. 216.

paper, that a note for the payment of money had been illegally obtained, and was void, was no evidence of those facts.[1] Nor would an obituary notice, in a news-

Therefore the present indictment states facts which show a violation of the laws of Michigan. But it is contended that it also shows an offense against the laws of the United States in the District of Columbia. Merely composing the libel in the district would not be sufficient, as the whole corpus delicti, which includes publication in the district, is essential. If it had been intended to charge that the defendant not only wrote the libel in the District of Columbia, but after its publication in the "Detroit Free Press" he had also published it in the District of Columbia, in any manner which in law constitutes a publication, the pleader should either have followed the precedents and omitted all reference to the publication in Michigan, or, if he alleged such publication, he should have made a positive and plain allegation of a substantive and distinct publication by the defendant of the libel, in the District of Columbia.

As above remarked, the most natural construction of the indictment, is that it is framed upon the erroneous legal notion that if a libel is composed within the District of Columbia for publication elsewhere, and it is accordingly published, this, without more, is a publication in the district, and makes the offense complete. But suppose that it can be deduced that the pleader intended to charge a distinct, substantive publication of the libel by the defendant, in the District of Columbia, it can hardly be expected that the well-known requirements of certainty in the allegations of an indictment can be disregarded, and that the court will supply by inference and argument the defects or omissions in the indictment. The most essential ingredient of libel is the publication; and the all-essential element of the offense charged in the present indictment is the publication by the defendant within the District of Columbia. The uncertainty of the indictment in the latter respect is sufficient to vitiate it. As the grand jury have not plainly said that the defendant published the article in the District of Columbia, in addition to the publication in Michigan, the court cannot intend that they meant to say it. It is a fundamental doctrine in English and American law, that there can be no constructive offenses; that before a man can be punished, his case must be clearly within the law: the

[1] Ring v. Huntington, 1 Mill. (S. C.) Const. R. 162.

paper, be admissible in evidence to prove the fact of a person's death.[1] In any such cases, the manuscript of the advertisment or notice would first have to be accounted for.[2] But various matters of public knowledge, but of which courts could not take judicial charge is to be unmistakably set forth in the indictment, and if there be uncertainty or fair doubt, whether the law embraces the act, or the indictment sufficiently charges the offense, the doubt is to be resolved in favor of the accused. United States v. Morris, 14 Pet. 464. United States v. Wiltberger, 5 Wheat. 76.

I have no hesitation in applying these liberal and just principles to the present case, because if libel in the District of Columbia be an indictable offense against the United States, it is an exception, curiously brought about, to the general rule that there are no common-law offenses against the general government, and because the defect in the present indictment is not merely formal or technical, but goes to the gist of the offense for which the prisoner is sought to be removed.

The provision (Rev. Stat. sec. 731) that when any offense is commenced in one district and terminated in another, the trial might be had in either, and the offense may be deemed to have been committed in both, although urged by the district attorney, has, in my judgment, no application to this case. The argument is, that if the defendant composed the libel in Washington, and sent it to Michigan for publication, and it was there published, he may be tried in either place in the courts of the United States. Such an extension of the law of libel can hardly be said to have the sanction of the English courts, where prosecutions for libel have been carried very far, and it can not be very seriously expected that a court in this country will assert any such alarming and dangerous doctrine.

Not to mention other fatal objections to the argument, it is sufficient to advert to the fact that, in the case supposed, there is no law in the state of Michigan where the offense is said to have been "terminated," making libel an offense against the United States. The order of the district court is affirmed and the prisoner discharged.

[1] At least, in the State of New York, Fosgate v. Herkimer Mfg. Co., 9 Barb. 287.

[2] Sweigart v. Lowmarter, 14 Serg. & R. 200; Man v. Russell, 11 Ill. 586; Somerwell v. Hart, 3 Har. & M. (Md.) 546.

cognizance, have been allowed to be proved by the production of newspaper advertisements. As, for instance, the times of the arrival of a stagecoach; the state of the market at a certain date;[2] or that a certain establishment was a hotel;[3] or the offering of a reward,[4] or the like; or a comparison of the printing in two newspapers might be allowed, to show that they were printed by the same person.[5] The general rule in regard to other matters contained in newspapers will, as in the case of books, fall under the general rule that such publications, when not concerning things of which judicial cognizance is taken,[6] may be read to the jury, by permission of the judge, but as matter of argument, and not of evidence.[7]

[1] Commonwealth v. Robinson, 1 Gray, (Mass.) 555.

[2] Cliquot's Champagne, 3 Wall. 114; Sisson v. Cleveland, &c. R. R. Co., 14 Mich. 489; Henkle v. Smith, 21 Ill. 238.

[3] Stringer v. Davis, 35 Cal. 25.

[4] Lee v. Flemingsburg, 7 Dana, (Ky.) 28.

[5] McCorkle v. Binns, 5 Binn. (Pa.) 340.

[6] See Morgan's Best on Evidence vol. 1, p. ; and a late curious case in New York, where it was held error to instruct a jury that they might take notice that the Fifth-avenue, in the city of New York, was comparatively deserted and very quiet at midnight. Lanahan v. People, N. Y. Court of Appeals.

[7] See, as to books, Laning v. State, 1 Chand. (Wis.) 178; Wale v. DeWitt, 20 Tex. 378; Harmer v. Morris, 1 McLean, 44; Stondenmeier v. Williamson, 29 Ala. 558; Meckle v. State, 37 Id. 139; Bowman v. Woods, 1 Greene, (Iowa.) 441; Beebe v. DeBaun, 8 Ark. 510; Bostwick v. Bogardus, 2 Root. (Conn.) 250; Canfield v. Squire, Id. 300; Spaulding v. Hedges, 2 Pa. St. 240; McKinnon, 21 N. Y. 206; Fowler v. Lewis, 25 Tex. 380; Harris v. Panama R. R. Co., 3 Bosw. (N. Y.) 7; Bogardus v. Trinity Church, 4 Sandf. (N. Y.) 633; Denn v. Pond, 1 N. J. L. (Coxe) 379; State v. Daniels, 44 N. H. 383; Wood v. Banks, 14 Id. 101; Charlotte v. Choutean, 33 Mo. 194; Pettyjohn v. Pettyjohn, 1 Houst. (Del.) 332; Donaldson v. Mississippi, &c. R. R. Co. 18 Iowa, 280; Barbour v. Archer, 2 A. K. Marsh. 9; Green v. Croce, 17 La. Ann. 3;

390. Any manuscript letter or communication sent to any newspaper or periodical for the purpose, expressed or implied, of publication therein, becomes, upon its receipt by an editor or proprietor, the property of that newspaper or periodical, and should it fall into the hands of any other person, could not be lawfully published by him.[1]

391. It was held in Cooper v. Barber,[2] that where a party is sued for re-publishing a libelous article in a newspaper, and the re-publication is accompanied by remarks tending to a justification of the article, but not amounting to it, the defendant will not be permitted to prove the truth of the remarks in mitigation of damages, because the evidence would tend to prove the charge well founded. Evidence in mitigation must be such as admits the charge to be false.

392. While, as we have seen, newspapers are responsible to the parties themselves for negligent, wrongful, and injurious statements, they are not responsible to others; and one who, relying upon a newspaper report of the price of gold, or the state of the market, or the trial of a prisoner, the bankruptcy of a merchant, or upon any subject, should find himself damaged, could not recover from the newspaper. The reasons for this are many and obvious. In the first place, there is no privity of contract between the newspaper and the

Purchase v. Call, 1 Mass. 483; Ashworth v. Kittridge, 12 Cush. 193; Carter v. State, 2 Ind. 617. The writings of a living author upon historical subjects are not competent as evidence in a court, if the author is at the time within reach of the process of the court (Mowris v. Harmer, 7 Pet. 554). As to the authority of textual works, see a very interesting chapter of "Ram's Legal Judgment," and some very curious notes thereto by Mr. Townshend.

[1] Copinger on Copyright, p. 32; Hogg v. Kirby, 8 Ves. 215.

[2] 24 Wend. 104.

reader who purchases it. He is not obliged to buy it, and if he were, he could only reasonably expect to find the latest reports concerning matters in which if he was particularly interested, it was his duty to find out for himself. And in the second place, if any such rule should obtain, no newspapers could be published at all. They certainly could insert no tradesman's advertisement without becoming strictly liable to the world for that tradesman's statement that his wares were the best, the cheapest, or the most durable, or for any other extravagant or laudatory statement he might feel moved to make.

393. The newspaper has done everything for the United States. Nowhere else in the world has it undertaken, and nowhere else has it accomplished, so much, and the country has recognized in its law the debt she owes to it for the almost universal intelligence and education of her citizens. The laws of every one of the United States have not only been uniformly lenient in its treatment of the press, but invariably eager to guard the fulness and the sanctity of its freedom, and to carry that sanctity and freedom to their utmost limit. But, for all that, there are some things which even the press must not attempt, and some lessons which even the press must learn. We cannot too highly commend the late enunciation of a gentleman, himself an editor, which seems not only to express the spirit of all the law, but to say in a word all that can well be said upon the subject of this chapter: "There are no privileges of the press that are not the privileges of the people. Any citizen has a right to tell the truth—to speak it or write it—for his own advantage or the general welfare. No editor can properly claim, in a court or on the street, more than that. Our equality in rights with our neighbors is

positive. But if we have the means of addressing a larger audience than others, there is an increase of responsibility, and not an enlargement of right."[1]

[1] Mr. Halsted, of the Cincinnati Commercial, an address delivered before the Kentucky State Press Association, May 20, 1874. The circumstances under which editors and proprietors of newspapers may become liable to proceedings for a contempt of court, have been already considered. State v. Galloway, 5 Coldw. 326; case of the Memphis Avalanche, contempt; and see Lewis v. Levy, El. Bl. & El. 534; 4 Jur. N. S. 970; 27 L. J. Q. B. 282; Turner v. Sullivan, 6 L. T. N. S. 130; Delegal v. Highley, 5 Scott, 154; 3 Bing. (N. C.) 950; 8 C. & P. 444; 3 Hodges, 158; Lewis v. Clement, 3 B. & A. 702; 57 Moore, 200; 3 B. & B. 297; Lewis v. Walter, 4 B. & A. 605; Smith v. Scott, 2 C. & K. 580; 5 Caldw. 326. As to privileged communications and contempt of court, see the novel and interesting cases of Reg. v. Onslow and Whalley, 12 Cox's Criminal Cases, 358; and Reg. v. Skipworth, Reg. v. DeCastro, *Id.* 371, reported since the pages on Contempt of Court in the first volume were printed. These cases grew out of the famous Tichborne trial in England, that first cited holding that the making of speeches by two members of parliament and a barrister-at-law (at meetings convened by them for the purpose of raising money for the Tichborne claimant's defense), wherein the speakers imputed perjury and conspiracy to certain witnesses, and prejudice and partiality to the lord chief justice presiding (whom they asserted to have proved himself unfitted to preside thereat), was contemptuous of the court then pending (namely, a trial of the indictments against the claimant for forgery and perjury), and that, although the speeches might be the subject of a criminal information, the parties making them might also be prosecuted for a contempt of court, the remarks being an unwarrantable interference with the course of justice, an attempt to discourage and intimidate witnesses, to influence public opinion, and to deter the lord chief justice from presiding; and that it made no difference that the object of the meetings (*i. e.*, to raise money for the defense) was not illegal. The members of parliament proceeded against, upon apologizing and submitting themselves to the court, were fined one hundred pounds and discharged; but the case is positive to the effect that a privilege attaching to members of parliament would not prevent an imprisonment

of its members for contempt of court upon occasion. The second of the cases above cited held to the same effect, that while it was not a contempt of court to solicit subscriptions to enable a defendant on his trial on a criminal charge to carry on his defense, it was a contempt to impugn the impartiality or honesty of the judge before whom the trial was being had, or to attempt, by exciting public prejudice, to obstruct or resist the course of justice. See these cases reported in Mr. Moak's Reprint of English Cases, pp. 443–456.

CHAPTER V.

OF LEGAL REPORTS.

394. In primitive times, the question of jurisdiction and of the settlement of disputes was a very simple one, involving merely the calling in of a third party, to give an opinion concerning the claims of two adversely interested persons. The earliest form of jurisdiction was, undoubtedly, arbitration. As times advanced, however, this jurisdiction began, from the nature of things, to involve more. There seemed to be a moral reason why, when an opinion had been sought by the two opposing parties, and had been delivered by the third, that the two should abide by it. And so, the next step was to give the arbitrator authority to command obedience. This power being too great to be allowed indiscriminately to mere third persons, however, a sort of standing arbitrator, or arbitrator-in-chief, was sought. And so, the chief who led the clan, horde, or settlement to war, was naturally appealed to, to decide controversies. Cæsar, describing the Germans, and their manners, tells us, that "Quum bellum civitas aut illatum defendit aut infert, magistratus, qui ei bello præsint, ut vitæ necisque habeant potestatem delinguntur. In pace nullus communis est magistratus, sed principes regionum atque pagorum inter suos jus dicunt, controversiasque menuunt."[1] And his jurisdiction soon came to involve, not only the giving of an opinion as a third party, at

[1] Commentaria, lib. 6.

the request of two other adversely interested parties, but a privilege to declare what was law, and authority to compel obedience to his decrees—precisely what we understand by jurisdiction to-day. It followed soon, as a matter of course, that the chief ruler, or king, finding it impossible to sit personally in every difference or dispute between two subjects, was obliged to proceed vicariously to this branch of his duties. And so, judges were first appointed. Their appointment naturally suggested the next step, namely, the appointment of a place wherein they might sit, to hear disputes. And so, courts were established, which, in time, subdivided themselves into civil and criminal; and these, again, into higher and lower grades.

It is observable, however, that for a long time, and even among the most enlightened civilizations, that the functions of a judge continued to be, mainly, those of an arbitrator, or umpire; and all litigation was, in fact, more or less of an arbitration, or submission. Even under the admirable and codified laws of the Romans, the definition of "litis contestation" appears to have been a "judicial contract." The earliest analogy to a jury probably exists in the appointment of the dicasts at Athens, to the number of six thousand, who appear to have been judges both of law and fact. Certain it is, that the style used by counsel in addressing them, "Οι ανδρες δικαστες" is best translated by our modern formula of "Gentlemen of the Jury." But these dicasts were, in fact, only arbitrators, from whose decision there was no appeal.[1]

395. The actual appearance of a trial by a jury of twelve men is accredited to Great Britain, but his-

[1] See Aristophanes' Comedy of the Wasps, and Forsyth's admirable History of Lawyers, Ed. New York, James Cockcroft & Co., 1875, p. 26.

torians have never precisely settled its locality. In Woodward's "History of Wales from the Earliest Times," accounts are given of several sovereign Welsh princes and kings of the name of Morgan, warlike, and who constituted themselves formidable barriers against Anglo-Saxon domination and encroachment, some of them living as far back as A. D. 400. "To one of these ancient kings, Morgan, of Gla-Morgan, about A. D. 725, is accredited the invention and adoption of the trial by jury, which he called 'the apostolic law,' since, as Christ and his twelve apostles were finally to judge the world, so human tribunals should be composed of the king and twelve wise men!" And this was a century and a half prior to the reign of Alfred the Great, to whom is generally accredited the invention of juries.[1]

396. Courts, then, being organized and permanent, and open to all litigants, the next necessity which arose was the necessity of a record. For, as it was natural that the same or similar questions[2] should continually arise between suitors, it became vital that these courts should not stultify themselves by deciding a certain

[1] The curious student is particularly referred to "A History of Trial by Jury, by William Forsyth" (New York, James Cockcroft & Co., 1875), a work of great learning and research, for a careful examination of the merits of the various theories and traditions.

[2] The Roman law recognized this order very early in their history. They established certain forms of cases, formulæ actionem, and decreed that if the litigant could not bring his case under one or another of them, he could have no remedy. New cases, however, arising in the progress of things, they ordained still another form, actiones in factum, in which the fact might be set forth without any reference to form. The common law followed the Roman precisely, and ordained certain actions, such as trespass, trover, assumpsit, replevin, &c., answering to the formulæ, while the action on the case exactly corresponded to the Roman,—actiones in factum.

question in one way one day, and in another way the next. Hence arose the doctrine of precedents or reports of the decisions of the court, preserved for their own guidance in case of the recurrence of the same question. The more civilization advances, and commercial and social relations and interests magnify and commingle, the faster these reports will increase. And the number and volume of legal reports within its borders will be found to be an infallible test of the wealth, the importance, and the prosperity, much more than of the antiquity or the culture or refinement, of the realm or state.[1]

397. We shall have constant occasion to allude to the scrupulous fidelity with which the law has preserved its own records. It would seem worthy of notice, at least, in this connection, that even in traditional times the records of a forensic contest were deemed worthy of collection, and that even in the most fragmentary portions and desjecta membra of literature, such have been embalmed for us.

So in Homer,[2] in that earliest account of a trial, where inquisition is made for blood, in the description of the shield made by Hephæstus, at the request of Thetis, for Achilles, the parties are represented as pleading, each as his own advocate, before the judges:

[1] So in Abbott's United States Digest for 1874, we find digested for that year, eighteen volumes of reports of cases decided in the State of New York, and one each of cases decided in the States of Delaware and South Carolina. So of the Western States, we find three from Illinois, four from Wisconsin, five from Indiana to one from Texas. These figures undoubtedly depend somewhat upon the convenience or resources of the compiler, but the general idea which they convey of the relative commercial importance of States of about the same age and standing, otherwise, is tolerably accurate.

[2] Iliad, xviii. 497–508.

"The people thronged the forum, where arose
The strife of tongues, and two, contending, stood:
The one asserting he had paid the mulct,
The price of blood for having slain a man;
The other claiming still the fine as due.
Both eager, to the judges made appeal.
The crowd, by heralds scarce kept back, with shouts
And cheers applauded loudly each in turn.
On smooth and polished stones, a sacred ring,
The elders sat, and in their hands their staves
Of office held, to hear and judge the cause;
While in the midst two golden talents lay,
The prize of him who should most justly plead."

The Old Testament scriptures have preserved the trial of Susanna, at which the first bill of particulars was demanded by the defense;[1] and of the trial of title to an infant, before Soloman, and Diodorus Seculus, gives a very interesting account of a trial in ancient Egypt. "From each of the great cities of Egypt—Heliopolis, Thebes, and Memphis—ten of the most eminent persons were selected to form the court; these thirty, meeting, chose one of their number as president (*ἀρχιδικαστής*). In order to supply the vacancy thus occasioned among the puisnes, the city from whence he had come then sent another in his place. These judges were supported by the king, but the more ample maintenance fell to the lot of the president, who wore suspended around his neck by a gold chain (like that of the Lord Chief Justice or Chief Baron of England), a small image, made of precious stones. The name of this image was Truth, and whenever the president put it on, it was the signal for the commencement of the trial. The whole of the laws of the realm were contained in eight books, which, for the convenience of reference, lay before the judges. The proceedings were all conducted in

[1] See Mr. Shearman's argument on a motion for a bill of particulars in the case of Tilton v. Beecher, New York, 1874.

writing. The plaintiff first wrote down the nature of his cause of action, and the amount of damages which he claimed. The defendant then pleaded to the declaration, either by denying the facts alleged, or by confessing and avowing them, or pleading in mitigation of damages. Upon this, the plaintiff replied, and the defendant rejoined. The cause now being at issue, and the court, taking the proper books, proceeded to consider the case, and judgment was delivered by the president placing his image of Truth upon the written pleadings of the party in whose favor the court finally determined."[1]

We are told of a law-suit at Athens, involving a bottomry bond, a barratry, and a question of equity, in which Demosthenes appeared as counsel,[2] and

[1] History of Lawyers, Forsyth, p. 15.

[2] Hegestratus, who was master of an Athenian vessel, on a voyage to Syracuse and return, had a partner named Zenothemis. These two, when in Syracuse, conspired to borrow money on a bottomry bond, that is on the security of the vessel, and then to sink her, in order to avoid the necessity of payment. The ship was at the time loading a cargo of corn on account of Protus, an Athenian, who had bought it with money borrowed from Demon. Hegestratus and Zenothemis obtained the loan by representing themselves as owners of the cargo, and having put the money on board of another ship sailed homeward. During the voyage, Hegestratus, went below and began to knock a hole in the bottom of the vessel, while Zenothemis remained on deck with the passengers. The noise, however, attracted attention, and Hegestratus was caught in the act, and to escape seizure leapt overboard and was drowned. Zenothemis then tried to work on the fears of the crew to induce them to abandon the ship, she being in a sinking state. But the supercargo, by promises of large reward if they brought the ship into port, induced them to exert themselves, and she finally reached Cephallenia, "thanks," says Demosthenes, "first to the good providence of the gods, and next to the skill and bravery of the crew." After being repaired she proceeded to Athens, but on her safe arrival at the Peraius, Zenothemis claimed a lien on the corn.

there is an authentic report of the trial, at Athens, more than two thousand years ago, of Euphiletus, who had killed the seducer of his wife, one Eratosthenes, who had been surprised in the very act. Euphiletus was defended by Lysias, and—in reading the report of the trial, and of the latter's speech (composed for the defendant to deliver), in the account of the by-play in which the guilty wife attempted to accuse her husband of infidelity with her own maid, and in the circumstances of the discovery of the crime—it is difficult to believe in its great antiquity.[1]

The records of trials at Rome are too numerous and easy of access to render the recapitulation of instances necessary here. The trials of Jesus and of St. Paul[2] have received careful analysis and treatment at

alleging that it had been purchased by Hegestratus, with money which he had lent to him, and it was in this litigation that Demosthenes appeared as counsel.—Forsyth's History of Lawyers, p. 23.

[1] See this case reported in Forsyth (History of Lawyers, p. 44). Following this case (p. 48), is the report of an Athenian will case, where the testator (Cleonymus) when dying, sent for his will, in order that he might alter or cancel it, but the archion who brought it was prevented by the defendant from entering the house, and so Cleonymus died without destroying it, and the next of kin disputed the will which was thus preserved from cancellation. And see Inst. Quinct. Orat. ii. 15; and an amusing account of a mock trial in Lucians. Bis. Accusatis, quoted by Forsyth, p. 21 (note).

[2] See Greenleaf's Examination of the Testimony of the Evangelists (New York, James Cockcroft & Co., 1874), pp. 551, 613.

When the Apostle Paul was seized by the Jews, and delivered into the hands of authority, he, claiming the prerogative of his birth, said unto Festus, the Roman governor: "I stand at Cæsar's judgment-seat, where I ought to be judged, I appeal unto Cæsar." "Hast thou appealed unto Cæsar?" said Festus; "unto Cæsar shalt thou go!" After a time, when King Agrippa came to visit Festus, he sent for the technical prisoner, who stood on his rights as a citizen, and, hav-

the hands of learned commentators and students, M. Salvador, a learned Jew, having contended that the former trial was strictly in accordance with the law

ing heard St. Paul's defense, said: "This man might have been set at liberty, if he had not appealed unto Cæsar."

Agrippa spoke like a lawyer. St. Paul stood convicted of no crime or misdemeanor. There was nothing in the merits of his case on which to hold him in fetters, but he had blindly butted against a dangerous technicality, which, had he been a lawyer, he would have avoided. Had he been a lawyer himself, or had he employed counsel, he would have been apprised that his surest, swiftest way to a release, was to throw himself on the naked merits of his case; but, in his ignorance, he had appealed to the appellate court—the ultimate resort—unmindful of the weary distance between the subject and his emperor, which distance he must spend in prison and in bonds. Festus might have discharged him, Agrippa might have discharged him; but there was this theory, that every Roman citizen, by appeal to the emperor, gave the emperor jurisdiction of his case; and to have set St. Paul at liberty, he having invoked the throne, would have been to deny the imperial prerogative, and to have been guilty of præmunire and of treason. Were it not for these malevolent technicalities, lawyers might be drones in the hive; bare right would meet bare justice, unassisted by these intermediaries, and the unhappy apostolic mistake, in the matter of St. Paul (reported in Acts xxv., xxvi.), a warning to nobody.

"The law is a benignant mother to her busy children. She does not ask them to toil and fret in her service, and then force them outside of her pale for their recreation; she has her own grim humor, and often does she fetch a smile to the stern student's face as he pores over her black-lettered lore. Jurisprudence is perhaps the only system in the world that has scrupulously preserved its own record. Since its inception, there is no hiatus in its history; from smallest to greatest, every ruling of the court, every point of counsel, every dictum of the judge, she has written down for the guidance of her children, and bound in mighty tomes for their instruction. And there is much there, too, to entertain as well as to instruct, when, often and often, weary bench and tired bar have reanimated their flagging interest with interlocutory joke and jest, as dragged along some interminable case."

"Nothing will persuade the lawyer that he does not possess in his library the original of Shakespeare's inimitable grave-

and practice of the Jews at the time, and with the ordinary course of the administration of the Roman supervision, under which the Jews were held, while

digger's argument about "crowner's quest law" in "Hamlet" —the famous case of Hales v. Pettit, reported in old Plowden, A. D. 1550. Sir James Hales, a justice of the common pleas, committed suicide by throwing himself into a water-course. The coroner sat upon his body, and this being before the days of "moral insanity," presented that, "passing through ways and streets of the said city of Canterbury, he, the said James Hales, did voluntarily enter the same, and did himself therein, voluntarily and feloniously, drown." Suicide being a felony, this felony worked a forfeiture of his estates. But, in answer to this, his successors pleaded that Sir James did not commit suicide; he only threw himself into the water, and suicide implying death, as he did not die during his life, he committed no suicide. The question was, then, did Sir James commit suicide during his life? For, if he only threw himself into the water in his lifetime, throwing himself into the water is no felony, and the suicide not being complete until his death—it being impossible for him to have died during his life—ergo, he committed no felony. This perplexing proposition was argued by six sergeants-at-law, and their wearying dialectics, here recorded in solemn black-letter, are fully as mirth-provoking as in Shakespeare's travesty. The question arose in the course of a suit for trespass brought by Lady Hales, claiming, as survivor in joint-tenancy of her husband, against one Pettit, attempting to enter by virtue of a crown-grant of the forfeited estates. The lawyers worked themselves into a hopeless desperation, which it was left for William Shakespeare to disentangle for the public verdict.

"1st Clown. It must be se offendendo; it cannot be else; for here lies the point: if I drown myself wittingly, it argues an act, and an act has three branches, it is, to act, to do, and to perform: argal, she drowned herself wittingly.

"2nd Clown. Nay, but hear you, goodman delver.

"1st Clown. Give me leave. Here lies the water; good. Here stands the man; good. If the man go to this water, and drown himself, it is, will he, nil he, he goes; mark you that: but if the water come to him, and drown him, he drowns not himself: argal, he that is not guilty of his own death, shortens not his own life.

"2nd Clown. But is this law?

"1st Clown. Ay, marry is't; crowner's quest law."

M. Dupin has criticised the same, contending that, by certain irregularities in the trial, they are liable to the imputation of having put Jesus to death unjustly.

That which purges of the felony in Hales v. Pettit entitles to Christian burial in re Ophelia (reported in "Hamlet," vol. 1), and in either, if the water did the deed, the human being was unaccountable.

This almost equals the burlesque case of "Straddling against Stiles," written by Dr. Arbuthnot, and whose humor, says Warren, "is not greater than its fidelity." Here a testator bequeathed to his friend, Matthew Straddling, "all my black and white horses." Said testator left six white, six black, and six pied horses. His executor, Stiles, delivered to Straddling the six white and the six black, but the latter demanded the six pied horses as well, and brought suit therefor. Learned counsel for the plaintiff contended that "white and black are the two extremes of colors, and, therefore, include all colors whatsoever. By a bequest, therefore, of black and white horses, gray or pied horses are passed; for, when two extremes or remotest ends of anything are devised, the law, by common consent, will intend whatsoever is contained between them. But the present case is still stronger; since, by the word black, all black horses are devised; and, by the word white, all white horses are devised; and by the same words, with the conjunction copulative between them, the white and black, *i. e.*, the pied, are devised; for whatever is black and white is pied; and whatever is pied is white and black." This reasoning appears to have carried the court with it: for although the defendant's sergeant stoutly maintained that "a pied horse is not a black horse, neither is a pied horse a white horse," "Le court après grand déliberation eu-judgment fuit donner le plaintiff, nisi causa."

"Motion, in arrest of judgment, that the pied horses were mares! Thereupon, an inspection was prayed. Et sur le court advisare vult."

Half a dozen years ago, we had the spectacle of an entire court, bench, and bar, turned into lexicographers and philologists, buzzing over dictionaries, dragging down the classical masters, and pulling over the poets with a most exemplary energy.

The duke of Cornwall had leased one of his farms, under an agreement which provided, among other things, that the tenant should "perform work and service for his grace, at the rate of one day's team-work, with two horses and one proper

398. A reported case is an authority.[1] "Our book-cases," says Coke, "are the best proofs of what is law."[2] "A report," he continues, "is a memorial or remem-

person for every fifty pounds of rent." One day, his grace's steward requested the tenant to sent a cart to transport some coals. "I will furnish you a team and a man, according to my agreement," said the latter, "but am not bound to send any cart." His grace thereupon brought an action in ejectment against his tenant for failure to comply with the condition, and consequent forfeiture of his lease. Tenant denied the non-performance, and plead readiness to comply, &c. The question was, of course, the construction to be placed upon the word "team;" does "team" mean horses and vehicle, or only the horses? If the first, judgment for the duke; if the second, judgment for the farmer. The case was tried before a jury at Oxford, who found for the duke. A rule was obtained, and the question of the definition of the word team brought before the judges of the Queen's Bench. Before this tribunal, the complainant contended that a team was both the horses and the vehicle; that such must surely be the sense of the word in the lease, since "team-work" cannot be done by horses without a wagon, and work done by horses without a wagon is not team-work: *e. g.*, two horses drawing a wagon are doing team-work; two horses grinding corn are not doing team-work. So Gray:

> "Oft did the harvest to their sickle yield,
> The furrow oft their stubborn glebe hath broke;
> How jocund did they drive their team afield,
> How bowed the wood beneath their sturdy stroke!"

Johnson and Walker both define team, "A number of horses drawing the same carriage;" then, too, a teamster is a man who drives a team. Clearly, a man who drives horses in droves, or working a tread-mill, is not a teamster; but, if he drives horses pulling a wagon, then he is, per se, a teamster.

But now comes defendant's counsel, armed with Bosworth's "Anglo-Saxon Dictionary," Richardson's "English Dictionary," and the whole library of poets. To prove that team means only the horses, and not the carriage, he reads from Spenser:

> "Thee a ploughman, all unmeeting, found
> As he his toilsome team the way did guide
> And brought thee up a ploughman's state to bide."

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[1] Litt. Mon. §§ 420–514; Co. Lit. 11 a, 24 a, 293 a, 293 b; 3 Co. Pref; 4 Inst. 4; 1 Black. Com. 71.

[2] Co. Lit. 254 a; and see Id. 260 a.

brance, in rolls of parchment, of the acts and proceedings of courts of justice, which hath power to hold pleas, according to the course of the common law."

Again, from his "Virgil":

"By this the night, forth from her darksome bower
Of Erebus, her teamed steed you call."

From Roscommon:

"After the declining sun
Had changed the shadows, and their task was done,
How with their weary team they took their way."

Shakespeare, too, was evidently for the defendant, saying:

"We fairies that do run
By the triple Hecate's team,
From the presence of the sun,
Following darkness like a dream."

And again:

"I am love, but a team of horses
Shall not pluck that from me, nor who 'tis I love."

Dryden, too:

"He heaved with more than human force to move
A weighty straw, the labor of a team."

And, in another place:

"Like a long team of snowy swans on high
Which clap their wings, and cleave the liquid sky."

Says Martineau: "On stiff clays they may plough an acre of ground with a team of horses."

"I do not consider," said one of the judges, "that the duke has proved a forfeiture; the word team does not clearly imply the cart as well as the horses. Says Wordsworth:

'My jolly team will work alone for me;'

and this discretion Wordsworth would not apply to the cart, even if he did the adjective 'jolly,' while both may be predicated of horses. I remember this:

'Giles Jelt was sleeping, in his cart he lay:
Some waggish pilfrers stole his team away;
Giles wakes, and cries, "Ods bodikins! what is here?
Why, how now? am I Giles or not?
If he, I've lost six geldings to my smart—
If not, ods bodikins, I've found a cart!'

And, as to the meaning of the word in the lease, it would seem impossible that the tenant should be expected to bring a vehicle before he knew the quality of work required of him; whereas, when he brought horses, they could be attached to the vehicle the necessity demanded." And so their honors

In the first instance these reports were a mere memoranda of the judge's disposition of the case. "In the records the reasons or causes of the judgment are not

held that team means the horses, and not the horses and carriage together.

Perhaps a more curious case than any of these was that of the brothers who claimed a legacy of two hundred thousand francs apiece under their uncle's will; whereas, the residuary legatee denied, in the French courts, their right to more than half that sum. The will was written in French. The writing giving the legacies was: "A chacun d eux cent mille francs." But, between the d and the eux, there occurred a speck of ink. Here the litigants put themselves upon the country; for, if this speck were made by the pen intentionally, it was an apostrophe, and reduced each legacy to one-half the amount claimed, giving them each one hundred thousand francs; but, if it were merely an accidental blot, made in folding the paper before the ink was dry, they were each entitled to two hundred thousand francs. The two readings were:

1. A chacun deux cent mille francs.
2. A chacun d'eux cent mille francs.

The first interpretation is: "To each one two hundred thousand francs;" the second, "To each one of them one hundred thousand francs." Being a question of fact, this, while fully as entertaining as the others, would hardly have been as profitable to counsel employed. And see Morgan's Best on the Principles of Evidence, p. 451.

"In the rude origin of law, such a dispute as this last would have been settled by the contestants in open field, vi et armis. Even questions of law were once thus arbitrated. In Germany, there was a long dispute whether a man's children should inherit his effects during the life of their grandfather. At last, it was agreed at the diet of Arensburg, about the middle of the tenth century, that the point should be decided by combat. Accordingly, an equal number of champions being chosen on both sides, those of the children obtained the victory, and so the law was established in their favor, that the issue of a person deceased should be entitled to his goods and chattels in preference to his parents" (Mod. Un. Hist. xxix., 28). The wager of battle is treated of by Blackstone (as obsolete), though, on the authority of "The Diary, Reminiscences, and Correspondence of Henry Crabb Robinson," it was (once) resorted to as lately as 1817."

"Retainers are among the least understood amenities of law-

expressed," says Coke, "for wise and learned men do, before they judge, labor to reach to the depths of all the reasons of the cause in question, but in their judgment express not any; and in troth, if judges should should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like elephantini libri, of infinite length, and, in my opinion, lose somewhat of their present authority and reverence." It is to be regretted, that in these days of stenographic reporters and law-book makers, the old lawyer's prophecy has come to be literally true, and the evils which we shall presently notice, are thick upon us.

399. "Sir Edward Coke," says Ram,[1] "mentions the

yers. No lawyer works for a prospective fee—making his renumeration contingent upon his success—yet most laymen fail to see that such a course would result in the utter uselessness of the profession. And why? Surely because you cannot be unprejudiced where your interests are at stake; it is not human that you should be; hence you go to your lawyer for a clear, unbiassed brain. But if you make his fee depend upon your own and his prevailing,—if, in other words, you make him as interested as yourself,—how can he give you that clear, unbiassed judgment, that cool instruction, you so imperatively require?"

"Nothing so abundantly preserves the ancient and majestic origin of the profession as this very custom of taking the retainer. So exalted and valuable a privilege was it held to be to speak for the oppressed, that the Roman client would have as soon thought of feeing the Pontifex Maximus for a sight of his sacrifice to Jupiter as the proctor for pleading his case.

"Under the tables, the lawyer could take neither fee nor reward, but his client would present him beforehand with a token (honorarium) of his regard and confidence."—Appleton's Journal, vol. 2, No. 38, Dec. 18, 1869.

[1] 3 Co. Preface, 3.

[2] The Science of Legal Judgment, p. 77; and see, for valu-

fact that the kings of this realm, that is to say, Edward the Third, Henrys the Fourth and Fifth, Edward the Fourth, Richard the Third, and Henry the Seventh, did select and appoint four discreet and learned professors of law, to report the judgments and opinions of the reverend judges." And by this consideration, among others, it may be observed, appear how profitable and necessary the reports of the judgments and cases in law, published in former ages, have been. And, according to Sir W. Blackstone, the reports are extant, in a regular series, from the reign of Edward the Second, inclusive; and from his time to that of Henry the Eighth, were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published annually, whence they are known under the name of the year-books.[1] And the same learned writer, in continuation, says, "It is much to be wished that this beneficial custom had, under proper regulations, been continued to this day; for though James the First, at the instance of Lord Bacon, appointed two reporters, with a handsome stipend, yet that wise institution was soon neglected; and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands, who, sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect, perhaps contradictory accounts of one and the same determination.[2] And yet, with all these difficulties and acknowledged evils, the great library of the reports is distinguished as an example of faithful records and

able commentaries on the reports, see Wallace's admirable treatise on "The Reporters."

[1] 4 Ves. 24

[2] 1 Black. Com. 72.

minute memorials, such as no other earthly institution can exhibit.

400. There is no literature that can compare for extent, magnitude, and scrupulous and accurate perpetuation of its records, parts, and fragments, with the literature of the law.[1] Of making many books there is

[1] Neither is there any branch of general literature which does not owe a large debt to lawyers. That there is an intimate connection between the law and literature there can be very little doubt. "Petrarch was a law student—and an idle one—at Bologna. Bocaccio began life with the intention of being a lawyer, Goldini, till he turned strolling player, was an advocate at Venice. Metastasio was for many years a diligent law student. Tasso and Ariosto both studied law at Padua. Politian was a doctor of law. Schiller was a law student for two years, before taking to medicine. Goethe was sent to Leipsic, and Heine to Bonn, to study jurisprudence. Uhland was a practicing advocate, and held a post in the ministry of justice at Stuttgart. Ruckert was a law student at Jena. Mickiewicz, the greatest of Polish poets, belonged to a family of lawyers. Kacinczy, the Hungarian poet and creator of his country's literature, studied law at Kaschau. Corneille was an advocate, and the son of an advocate. Voltaire was, for a time, in the office of a procureur. Chaucer was a student of the Inner Temple. Gower is thought to have studied law; it has been alleged that he was chief justice of the common pleas. Nicholas Rowe studied for the bar. Cowper was articled to an attorney, called to the bar, and appointed a commissioner of bankrupts. Butler was clerk to a justice of the peace. The profession of Scott need not be stated. Moore was a student of the Middle Temple. Gray, until he graduated, intended himself for the bar. Campbell was in the office of a lawyer at Edinburgh. Longfellow, a lawyer's son, spent some years in the office of his father. . . . . Milton was the son of a scrivener. There is no need to indorse the fancy that Shakespeare may have been a law clerk; he certainly, from some source or other, introduces into his plays an extraordinary amount of legal knowledge, and, if a lawyer at all, was certainly a very sound one, since he appears to have stated no single proposition which, so far as we have proceeded in the three hundred years since, we have found occasion to reverse. Dante passed many years in residence at the great legal university of Bologna. But there is

no end Poets, historians, philosophers, and casuals live and write and die, and their thoughts sometimes survive them. They all toil for a hard mistress, who now and then rewards them with a few brief years of immortality. Now and then there have been favored sons of hers whose usefulness has turned a century, but how few! Homer, and Shakespeare, and Bacon, and perhaps as many more, but beyond them, who? The grand army of authors, no less than "the mob of gentlemen who wrote with ease," who were their stragglers and camp followers, have come to find their immortality with the bookworm, while the world listens to its own contemporaries.

Look, on the other hand, at the law. For eight hundred years she has written down in records more lasting than brass, every utterance from her bench. Not one syllable has escaped her. Nations have been born and shattered, have been rebuilded and lost, and sunk from history and tradition; but the words uttered from the judicial bench in the days of Moses (who, according to Lord Coke, was the first law reporter)[1] of the judges of Israel, of Solomon, of Tiberius and Augustus Cæsar; in the crude days of King Stephen, and of King Henry the Second, stand side by side on the shelves of the lawyer with reports of the term that adjourned yesterday, and he reads from the Rotuli Curiæ Regis, 1194—of the days of King Richard and King John—and from the last volume of

another list strikingly to the purpose—the long roll of great lawyers who, like Cicero, Sir Thomas More, Lord Somers, Blackstone, Sir William Jones, Lord Campbell, and in later days Samuel Warren, Thomas Hughes, Saxe, Mr. Butler, and a host of others, have found flirtation with the Muses no impediment to their marriage with the law."

[1] Preface to 6 Rep. p. xv.

the report of his own state, alike, when he constructs his brief. Jurisprudence is the only human system that has from first to last scrupulously preserved its own record. Since its inception, there has been no hiatus in its history; from smallest to greatest, every ruling of the court, every point of counsel, every dictum of the judge, it has written down for the guidance of those that should come after. And it has come to pass that the law is, perhaps, the only learned profession to which books are an absolute necessity. Other men of letters might, upon an emergency, manufacture their authorities, but scarcely the lawyer.[1]

401. And yet, it is but candid to confess that in all this mass of literature there is much of error, misquotation, mistake, and incorrection. Says Mr. Wallace, in his most valuable and interesting treatise:[2] "We have, up to this date, nearly thirty scores of different persons who have acted as reporters, nearly all of them self-constituted, and without having been subjected to any antecedent test of integrity, education, or general capacity.[3]

[1] The French law requires that a lawyer shall have "a decent lodging, and a library of books," before he can be admitted to plead.

[2] Wallace on the Reporters, p. 5.

[3] As illustrative both of the magnitude of the undertaking which aims to report everything coming from the bench, and of the lax and unreliable records produced by incompetent, careless, and hasty reporting, we annex the following interesting and valuable report of a committee of the Bar Association of the city of New York, to whom this subject was lately referred.

At a meeting of the Association of the Bar, held on the 13th day of May, 1873, Mr. Delafield, as chairman of the committee on law reporting, made their report as follows:

To the Association of the Bar of the City of New York:

The undersigned to whom the subject of law reporting

402. This system, mighty and admirable as it is, however, has its disadvantages. It must be confessed that the grand problem with which the learned pro-

was referred by the Association of the Bar of the city of New York, respectfully report:

That there are at present seven independent Reporters in this State, editing the seven series of regular reports mentioned below, and each of them issuing, annually, about the following number of volumes:

Sickles' New York Reports	.....	4
Lansing's Supreme Court Reports	.....	3
Barbour's " " "	.....	3
Abbott's Practice "	.....	2
Howard's " "	.....	3
Daly's Common Pleas "	.....	1
The Superior Court "	.....	2

The Reports of the Surrogate's Court are published irregularly, and are not included in this list. Besides this, there are the various law periodicals, and the irregular reports, such as Keyes' Reports, and the Transcript Appeal Reports. The last two belong to a class of reports which the profession is likely to have forced upon it whenever it is supposed that a profit can be made from them. They occupy a position in reporting very similar to that of mercenary troops in war—the sole object of both being personal gain.

It was evident, from a very superficial examination of these reports, that grave faults were to be found with them, and with the system which fostered them.

Your committee were so impressed with the fact that they determined to undertake the great labor of a critical examination of all the reports of the State during the last five years.

This mode of procedure recommended itself as being the fairest to the reporters whose works came under review, excluding, as it did, the possibility of a judgment based upon defects in any one or two volumes.

Besides this they have generally examined all the reports, and carefully considered their faults.

Although the resolution appointing your committee condemns the pretent system of law reporting, and declares that it requires amendment, it is believed that very few of the profession have any adequate idea of the extent of the evils complained of, and as your committee are of the opinion that radical changes are necessary, they think it best to detail the results of their examination somewhat at length.

From the year 1307 to 1872—a period of 565 years—there

fession is to grapple, is how to curtail in future this vast body of decided law, which is rolling up in such *unwieldy proportions. Under our present system, it* were published in England 1,036 volumes of reports. The great increase of these books claimed the attention of the British bar at various times during the past century.

They felt that they would be overwhelmed if the evil were not checked, and this conviction culminated in the reform inaugurated by the Council of Law Reporting.

Our plight, however, is infinitely worse than theirs ever was. From the year 1794 to 1873—a period of 79 years—there were published in the State of New York alone 400 volumes of reports; more than one-third of the reports of Great Britain for 565 years.

If the 190 volumes of the decisions of the United States courts are added—which should be done to make a fair comparison with the number of English Reports—there are 590 volumes in 79 years; more than one-half of all the reports of England.

A table of the American Reports, prepared by the librarian of the Albany Library, in 1871, shows 2,012 volumes—nearly twice as many as the reports of Great Britain in seven times as long a period—and of this number, the reports of the State of New York were 348, or one-sixth of those of the whole country.

Judge Story, in noticing the fact that between the revolution and the year 1821, more than 150 volumes of law reports had been published in the United States, said: "The danger indeed seems to be, not that we shall want able reports, but that we shall be overwhelmed by their number and variety."

If anything could draw the spirit of the great commentator back to the earth, it might well be a wish to retract his opinion as to the ability of the reporters; and if anything were needed to keep it away, the 2,000 volumes of our decisions might have this effect.

Your committee find that the number of the reports is due to the fact that law reporting has become a distinct business, conducted by private individuals for their own emolument; that book-making is the interest of those engaged in this traffic, and that their profits depend, not upon the excellence, but upon the number of the volumes they edit; the profession having been found ready to buy whatever the publisher would print.

is not difficult to see that, in a few years, no libraries will contain the law reports of the world. Let us suppose that a point, which is first decided in the Year-

This general charge is fully sustained by an examination of the reports under the following heads :

Multiplication of reports of the same case.

Indiscriminate publication of whatever is presented.

Prolixity.

Reckless reporting.

The extent to which reports of the same case are multiplied can be best appreciated by an examination of the tables which are annexed to this report.

These tables include the number of times each case is reported in all its stages. Thus, the reports of the same cases, six, seven, and eight times, are not always the same opinion, but present the actions in their different conditions. Many motions are made and appeals taken in the progress of causes, the decisions of which, although utterly unimportant as precedents, find their way into the reports.

It was thought best to include them all under this head, for the purpose of showing how the wholesale business of manufacturing reports is carried on.

The tables, therefore, only show approximately how many times precisely the same decisions are reprinted in the various reports.

On this point, your committee find that it is common to find four reports of the same case differing very little from each other, three reports of the same case are numerous, and there are two of every important case and of many unimportant cases. The editor who first reports a case is not responsible for its republication by others, and its subsequent multiplication is chargeable upon the system and not upon him.

The following general summary of the examinations made under this head may not prove uninteresting.

The ten volumes of Howard's Practice Reports, from volumes 34 to 43, contain reports of 770 cases.

In these volumes there are 89 cases again reported in the Superior Court Reports, 87 cases again reported in Abbott's Pr. Reports, 15 cases again reported in the Common Pleas Reports, and 52 cases are decisions of the Courts of the United States.

There are 72 decisions of the Court of Appeals, and of this number 49 are again reported in the New York Reports.

books, occurs to-day. If the case approach a hearing hurriedly, it is fair to suppose that the briefs of counsel on either side will cite a fair proportion of modern

The table shows that in volumes 35 to 43 of Howard's Pr. Reports there are—

1 case which is reported 7 times in the various reports.
2 cases which are reported 6 times in the various reports.
7 " " " 5 " " "
33 " " " 4 " " "
73 " " " 3 " " "
199 " " " twice " " "

In volumes 5 to 10 of Abbott's Pr. Reports, N. S., there are:

1 case which is reported 7 times in the various reports.
1 " " 6 " " "
8 cases which are reported 5 times in the various reports.
11 " " " 4 " " "
39 " " " 3 " " "
77 " " " twice " " "

In these volumes there are 41 cases again reported in the Court of Appeals Reports, 41 cases again reported in the Supreme Court Reports, 12 cases again reported in the Superior Court Reports, 57 cases again reported in Howard's Practice Reports, and none again reported in the Common Pleas Reports.

In volumes 55 to 62 of Barbour's Reports, there are:

1 case which is reported 8 times in the various reports.
1 " " " 6 " " "
7 cases which are reported 5 times in the various reports.
5 " " " 4 " " "
26 " " " 3 " " "
58 " " " twice " " "

There are 41 cases reported in Barbour's Reports which are also reported in Lansing's Reports.

The first 5 volumes of Lansing's Reports contain 41 cases again reported in Barbour's Reports, 4 cases again reported in Abbott's Pr. Reports, and 7 cases again reported in Howard's Pr. Reports.

Two hundred and four pages of Redfield's Surrogate's Reports, issued in 1864, are devoted to a single case which had been reported at length the year before in the New York Reports.

Your committee find that little or no discrimination is used by any of the present reporters (except Judge Daly) in the character of the cases they report.

That reports are constantly published which enunciate no new principle, and give no useful illustration of the applica-

decisions, say within the ten years immediately preceding. Upon its decision, the majority of these will be noticed by the judge in his written opinion, which

tion of an old principle, which are not worthy of preservation, and only furnish false lights to be reversed by the appellate courts. They have no hesitation in saying, that two-thirds of all the reported cases are of this character, and should not be reported at all.

There will, of course, always be room for a fair difference of opinion as to what should and what should not be reported.

There is no room, however, for any doubt as to the worthlessness of two-thirds of our reports, as herein explained.

The tables appended to this report show the number of cases affirmed or reversed on appeal in the volumes specified. An examination of the cases reversed will satisfy any lawyer that a large proportion of them should not have been reported, that they are opposed to well-known principles of law, and were such as must have been reversed on appeal. A similar examination of the affirmed cases discloses the fact that many of the appeals were taken for the purpose of delay; the questions involved present nothing new, the judgments were such as must have been affirmed, and the decisions of both the inferior and appellate courts are, for this reason, unworthy of preservation for citation or reference.

The small number of reversed and affirmed cases shown on the tables in the last volumes of each series of reports, is not to be attributed to any decay in the spirit of litigation, but to the fact that some of the cases there reported are still before the courts.

It is a common practice of the reporters to publish the opinion of the inferior court at the same time with that of the appellate court. Where the judgment above affirms that below, the opinion of the inferior court is generally useless, and merges in that of the appellate court. Where the judgment is reversed, the opinion below is absolutely valueless. The necessity of book-making, however, disregards all scruples of this kind. It is no uncommon thing to find the opinion of the courts of first resort reported years after they have been reversed by the appellate courts.

The following are a few samples:

Cases in which the opinions of the special term and general term are reported together.

is at once printed in a volume of reports. Just in proportion as the tribunal is higher or the time longer, or the counsel more eminent and scrupulous, the

People v. Norton, 59 Barb. 174.
Id. v. Gardner, 59 Barb. 203.
Cary v. Grant, 59 Barb. 575.
Marshall v. McGregor, 59 Barb. 519.
Cleveland v. Barrows, 59 Barb. 366.
Clark v. Holdridge, 58 Barb. 64.
Robinson v. Flint, 58 Barb. 112.
Hubbard v. Schoening, 58 Barb. 500.
Matter of Egan, 58 Barb. 560.

Cases in which the opinions of the supreme court were reported after their affirmance by the Court of Appeals.

Parks v. Comstock, 59 Barb. 37.
Tracy v. Troy 55 Barb. 529.
Comstock v. Buchanan, 57 Barb. 146.
Finnegan v. Carahar, 61 Barb. 252.

Cases in which the opinion of the special term are reported after their affirmance by the general term.

Gaskin v. Anderson, 55 Barb. 259.
People v. Gates, 57 Barb. 291.

Cases in which the opinions of the courts below were reported, after they were reversed by the appellate courts

Townsend v. Hendricks, 2 Sweeny, 503.
Wright v. Rowland, 36 How. Pr. 115.
Reversed, 36 How. Pr. 248.
Re Mary Smith, 40 How. Pr. 124.
Reversed, 40 How. Pr. 318.
Trustees &c. v. Calhoun, 62 Barb. 381.
Reversed, 25 N. Y. 422.
Sweetman v. Prince, 62 Barb. 256.
Reversed, 26 N. Y. 224.

The practice of reporting special term, nisi prius, county court, marine court, court of sessions, and sometimes referees' decisions and opinions, although generally to be condemned, is, in their zeal for book-making, universally followed by the reporters.

All such cases are thrown together in the annexed tables, under the head of special term decisions.

The six volumes of Abbott's Pr. R., N. S., examined contain 121 such reports.

The eight volumes of Barbour's reports contain 55 such reports.

The ten volumes of Howard's Pr. R. contain 221 such reports.

Your committee find that the reports, with few exceptions, are carelessly prepared.

citations will increase in number, the judge's opinion will be longer, the report more comprehensive, and the volume bulkier. And so, the decision in the Year-

In the more important and intricate cases, involving difficult questions of fact as well as law, and labor on the part of the reporter to condense the facts, it is a common practice to report the opinions alone without any statement of facts or points, sometimes adding "the facts appear sufficiently in the opinion of the court," while in other, and generally the simpler cases, the pleadings, testimony, and arguments are spread, with needless prolixity, upon the record. Striking instances of the latter fault will be found in—

Brand v. Brand, 39 How. Pr. 193–287.
People v. Mallon, 39 How. Pr. 454.
Keeney v. Grand Trunk Railroad, 59 Barb. 104.
People v. Hurlbert, 59 Barb. 447.
Hayden v. Crane, 1 Lansing, 181.
Crossman v. Bradley, 53 Barb. 125.
Erie and Susquehanna Suit, 38 How. Pr. 192.
Farnham v. Mallory, 5 Abb. Pr. N. S. 380.

Your committee respectfully call the attention of the Bench to the unnecessary length of some of the opinions. Prolixity is one of the great defects of our system, and so long as it is indulged in by the judges, the bar and the reporters will follow suit. It is unnecessary to point out cases in which opinions of from twenty-five to fifty pages in length have been written, and some of them largely made up of copious quotations from other decisions, when a bare reference would serve every purpose. The labor of condensation is indeed great, but we feel confident that when the extent of the evil is appreciated, the courts will themselves apply the remedy.

The reports of the older English reporters present a striking contrast to ours in this particular. Instead of a long statement of facts, the nature of the action is denoted by a symbol abbreviated from a few Latin words; the defense is briefly stated; then follows the names of counsel, and those points alone on which the case turned The opinion of the court, often taking no more than a page, and rarely over half a dozen, completes the record.

The result is that a volume of English reports contains many more cases than one of ours.

The volumes of Law Reports, of about 670 pages, contain on an average about ninety decisions of the Queen's Bench, and 130 of the equity decisions.

The English law and equity reports, of about 600 pages,

book of 1307 will be reviewed, together with innumerable ones between, to make a volume in 1875; and these, again, with the one additional, to make a

contain on an average about 130 cases. Beavan's volumes, of 660 pages, contain on an average about 150 decisions; Best and Smith's, about 119; Barnwell and Alderson's, about 140 decisions.

The contrast with our reports is striking. The New York Reports, of about 608 pages, contain on an average about 79 cases. Lansing's Reports of about 530 pages, about 85 cases.

Barbour's Reports, of about 670 pages, about 67 decisions.

Howard's Practice Reports, of about 500 pages, about 76 cases.

Abbott's Practice Reports, of 450 pages, about 72 cases

Our old reporters were much less diffuse than their successors. The early volumes of Johnson's Reports, containing about 600 pages, have about 150 cases.

Each volume of Howard's and Abbott's Practice Reports contains a digest of from 100 to 150 pages of points of practice, embraced in other reports, issued during the period covered by the volume. One such digest might be useful; two can only be attributed to the desire of book-making.

The following are a few miscellaneous instances of reckless reporting which have come under our observation:

The Trustees of the Auburn Theological Seminary v. Calhoun, was reported by Barbour in 1872.

65 Barb. 381.

It was decided in 1862. The length of time that elapsed between the decision and the report, ten years, is bad enough. But Barbour had reported the same case in almost the same words in 1863.

38 Barb. 148.

And to make the matter worse, the decision had been reversed by the Court of Appeals a year before Barbour first reported it.

25 N. Y. 522.

Sweetman v. Prince,

62 Barb. 256,

was decided in 1862, and reported by Barbour in 1872. It had been unanimously reversed by the Court of Appeals in 1863.

26 N. Y 224.

volume in 1876; and so on, literally, without end. In 1874 there were one thousand four hundred and seventy-eight volumes of English, Scotch, and Irish, and two thousand eight hundred and thirty-seven

Matteson v. N. Y. Central R. R.,
62 Barb. 364.

was decided in 1862. Barbour reported it in 1872. It had been affirmed by the Court of Appeals in 1866.

35 N. Y. 487.

Wait v. Green,
62 Barb. 241,
Vickery v. Dickson,
62 Barb. 272, and,
Crain v. Cavana,
62 Barb. 109,

were decided in 1862. They were reported by Barbour in 1872. He had reported the same cases in 1872, only giving the opinions of other justices as those of the court.

35 Barb. 585,
35 Barb. 96,
36 Barb. 410.

The former was affirmed by the Court of Appeals in 1867,

36 N. Y. 556.

Spaulding v. Strang,

Was reported by Tiffany in

37 N. Y. 135.

He reports the same again, giving another opinion in

38 N. Y. 1,

without any reference to the first report.

Beach v. Bay State,

at Special Term, is reported in

6 Abb. Pr. 415,
16 How. Pr. 1,
27 Barb. 248.

This decision was reversed at General Term and the opinion is reported.

30 Barb. 433,
18 How. Pr. 335,
10 Abb. Pr. 71.

Matter of Douglass at Special Term is reported in—

58 Barb. 174; 9 Abb. Pr. N. S. 84, and 40 How. Pr. 201.

It was reversed by the Court of Appeals, and is reported in—

46 N. Y. 42, and 12 Abb. Pr. N. S. 161.

The decision of the general term of the Superior Court in—

Mayor, &c. v. Erben,

10 Bosw. 189, and 24 How. Pr. 358,

volumes of United States reports, while Canada adds more than two hundred and fifty-six volumes; India, one hundred and ten volumes; the Cape of Good

was affirmed by the Court of Appeals. The opinion published in—

38 N. Y. (11 Tiffany) 305,

was a dissenting opinion. It is printed as the decision of the court.

The digest in—

37 How. Pr. 574, and Abbott's Digest, Supp. 8,

are misled by the above report, and give as the law established by the Court of Appeals the reverse of what was in reality decided.

Eight decisions of the Court of Appeals, reported in Keyes' Reports are published in Howard's Reports the year after they appeared in Keyes.

In Schuchardt v. Mayor, &c.,

59 Barb. 295,

Joslyn v. Fiske,

59 Barb. 308,

there were no judgments, the two judges who heard the cases having disagreed, and yet the cases are reported at length.

Mullford v. Muller,

1 Keyes, 31,

has a note-head, containing a single proposition which the court distinctly said they did not determine.

Alexander v. Hard,

42 How. Pr. 131,

was carelessly reported. The error is corrected at page 384, at the request of a justice of the Supreme Court.

Little v. Dean,

1 Keyes, 235, and 31 How. Pr. 68,

report the opinion of Johnson, J., as that of the court. After this opinion was prepared the cause was re-argued and a different decision reached, which is reported in—

34 N. Y. 452.

This is the final decision of the court on the questions involved.

Gilbert v. Gilbert,

1 Keyes, 159, and 34 How. Pr. 142.

This case is misreported, the opinion being a dissenting opinion. The order of the general term was reversed, and the judgment on the report of the referee affirmed.

Hartly v. Tatham,

24 How. Pr. 505, and 10 Bosw. 273.

Hope, five volumes; and other common-law colonies, too numerous and unimportant to detain us here, swell the list.' And the annual increase in the United

On the second trial, the defendant prevailed and judgment was affirmed in—

1 Rob. 246, and 26 How. Pr. 158,

and this decision was modified by the Court of Appeals. This decision is misreported in—

1 Keyes, 222.

Wilcox v. Green,

23 Barb. 639,

was decided in 1854; it was reported in 1859; it had been affirmed by the Court of Appeals in 1856.

Mills v. Stewart,

62 Barb. 444,

was decided in 1862; it was reported in 1872; it had been affirmed in effect by the Court of Appeals in 1869.

41 N. Y. 384.

Grant v. Johnson,

5 Barb. 161, and 6 Barb. 337,

was reported in 1858. This decision had been reversed by the Court of Appeals in 1851.

5 N. Y. 247.

Davis v. Peabody,

10 Barb. 91,

is misreported. Instead of a new trial being granted, the judgment was affirmed.

See 1 Commissioner's Draft,

R. S., p. 581.

Burgher v. Columbia Fire Ins. Co.,

17 Barb. 274,

is misreported. The opinion of Edmonds, J., printed, was a dissenting opinion. The opinion of the court was by Roosevelt, J., and instead of a new trial being ordered, the judgment was affirmed.

Griggs v. Howe,

2 Keyes, 574, and

Johnson v. Hathorn,

2 Keyes, 476,

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[1] Of these the State of New York alone furnishes 447 volumes, but, as we have seen from Mr. Delafield's report, the fact is to be accounted for upon the supposition that in that state the temptation to "book-making" is stronger than perhaps anywhere in the world.

States alone, is from one hundred to one hundred and twenty volumes annually.

This evil has not failed to attract the serious con-

were reported a second time by Keyes in the same words.
3 Keyes, 168.
3 Keyes, 126.

The opinion reported in

Day v. Saunders,

3 Keyes, 347,

was not only never adopted by the court, but was never delivered.

The opinion of Wright, J., in

Smart v. Bement,

3 Keyes, 241,

was not adopted by the court. They modified the judgment to some extent in accordance with the opinion of Leonard, J.

The opinion in

Clark v. Mayor, &c.,

1 Keyes, 9,

was not adopted by the court. The only point determined in the case was that discussed in the unreported opinion of Selden, J.

Passing from the number of the reports to the manner in which they are edited, the attention is at once arrested by the delay in publishing the reports of decisions.

There is no reason why an energetic reporter should not publish opinions in pamphlet form within thirty days after they are delivered. With us, however, years often elapse after the rendition of opinions before they are reported. Taking the last two volumes of some of the reports for examples, it will be found that 61 Barb. issued in July, 1872, contains reports of some cases decided in 1868; 62 Barb. issued in November, 1872, contains 70 cases, 31 of which were decided in 1861, 1862 and 1863; 4 Lansing, issued in April, 1872, and 5 Lansing, issued in November, 1872, contain decisions made in 1869, early in 1871, and a few in 1872; 47 N. Y. issued in 1872, contains cases decided from December, 1871, to March, 1872, and 48 N. Y. issued in 1872, contains cases decided from September, 1871, to May, 1872.

The Practice Reports are issued in pamphlets, the intention being to report cases as fast as decided; but to show how lamentably they fail in this, it is only necessary to state that 11 Abb. Pr. N. S. issued in 1871 and 1872, contains decisions made in 1869 and 1870, several early in 1871, and none in 1872.

sideration of lawyers; and suggestions as to a remedy have been many and thoughtful. It has been proposed that no case be officially reported, without the concur-

12 Abb. Pr. N. S. issued in 1872, contains decisions in 1871 and early in 1872.

42 How. Pr. has the unusual merit of being able to foresee the opinions of judges, and to report them before their delivery. It appears by its title-page to have been issued in 1871, and it reports several decisions rendered in 1872, also cases of 1866.

43 How. Pr. was issued in 1872, and contains decisions of 1871 and 1872.

The reporters of the Court of Appeals Reports, have generally failed to comply with the direction of 3 R. S. 263, § 39 (5th ed.), which requires them to issue their reports in pamphlets of 250 pages each as fast as they are compiled.

One of the evils which is experienced by late reporting illustrated by the case of—

Ferren v. O'Hara, 62 Barb. 517,

decided in 1862 and reported in 1872. The authorities on which the decision rested, were declared, in the interval between the rendition of the opinion and its report, to be of no force.

See Passaic Manuf. Co. v. Hoffman, 3 Daly, 495.

It is said that Lord Mansfield absolutely forbade the citing of Barnardiston's Reports before him, and said "it would only be misleading students to put them upon reading it." He added, "it was marvelous, however, to those who know the sergeant and his manner of taking notes, that he should so often stumble upon what was right; but yet that there was not one case in his book which was so throughout."

This criticism might well be extended to the reports and the reporters of the present day.

Before approaching the remedies for the evil which have been indicated, it will be well to review the legislation now existing upon the subject of reporting.

The constitution directs that "the legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as it may deem expedient. And all laws and judicial decisions shall be free for publication by any person," art. 6, § 22. Under this provision the office of State Reporter, and Supreme Court Reporter have been created.

The Court of Appeals has an official reporter, appointed for three years, at a salary of $2,000 per annum. It is made

rence of certain judges; but judges are not indifferent to the publication of their own opinions; and even should they exclude them from official volumes, the

his duty to report every cause which the court shall order reported, and such others as the public interests shall, in his judgment, require. The judges are directed to deliver their opinions to him. The reporter has no pecuniary interest in the reports, which are reported under his supervision, by contract between him and the secretary of state and comptroller, with that publisher who offers to comply with the prescribed conditions, one of which is to sell the reports at not exceeding $3 per volume.

Laws 1847, ch. 280.
" 1848, ch. 224.

Under the early and last reporters, these volumes have been generally well edited. Your committee regret that they can not say the same of Tiffany's Reports. Besides other criticisms to which they are open, a number of cases were omitted, which should have been reported. This afforded an excuse for the publication of the five volumes of Keyes' Reports, which, considering the existence of an official reporter, and the practice of the court to designate what cases should be reported, can only be regarded as an audacious attempt to foist another set of generally worthless reports upon the profession, for the sole benefit of the reporter, and without the provision regulating the price of the regular reports prescribed by statute. Many cases in Keyes' Reports are incorrectly reported; in several instances the dissenting opinion is given as the opinion of the court, and in others, the report is presented in such a form as to make it impossible to know what was decided.

In 1869, the legislature provided for the appointment of a supreme court reporter. He was to hold office for five years, and it was made his duty to report from among the decisions forwarded to him by any general or special term, such as he should think expedient.

To enable him to perform this duty, the judges of the supreme court were directed to deliver to him their opinions in all cases in which they should order the opinion to be reported.

Not more than three volumes were to be published annually. The reporter was to receive no salary, and the cost of the reports was limited to $2.50 per volume of 500 pages.

1 Laws 1869, p. 176.

large number of unofficial volumes would be sure to contain whatever they exclude.

403. The law relating to the copyright of legal

Mr. Lansing was appointed reporter in June, 1869, and since that time has issued six volumes. They are reported intelligently and clearly, and are superior to those of his competitor, Mr. Barbour.

Since the year 1848, Mr. Barbour has reported the decisions of the supreme court, and has now issued his 63d volume. Notwithstanding the act of 1869, he continued the publication of these reports, as he had a legal right to do, and since then has issued eleven volumes. The existence of two sets of supreme court reports is unnecessary, and an unmixed evil, entailing great labor and expense upon the bar.

While there is no law to prevent Mr. Barbour publishing reports, there is a law requiring judges to deliver all the opinions which they think should be reported, to the supreme court reporter. If this law had not been very generally disregarded, it would have been impossible for Mr. Barbour to continue his reports.

An examination of his volumes show many cases decided by one court or judge reported seriatim, from which it would appear that certain judges are in the habit of sending him all their decisions.

It can hardly be necessary for us to combat the idea that judges have a proprietary right to their opinions, that they may retain them, or give them exclusively to their favorites, that reporters depend upon their courtesy, and not upon their own rights. "Judge-made law" is as much the law of the land as the acts of the legislature, and is. on principle, entitled to the same publicity.

It cannot be supposed that judges would permit any feeling of favoritism to induce them to send their opinions to an unauthorized reporter, after a law requiring their transmission to the official reporter had been brought to their notice, and it is hoped that this suggestion will lead to the abandonment of any practice of this kind which may have heretofore existed. The present method, or rather want of method, in the transmission of opinions by the judges to the various reporters for publication, sometimes leads to unexpected results. And even the care that judges take to insure the reporting of their opinions may, in the absence of any system throughout the state for collecting them, increase the difficulty. Thus one reporter may receive the opinion of the court from the

reports and text-books is somewhat complicated, from the fact of the public nature of the subject-matter, and the theory that, the law being laid down by the judge who prepared it, while another reporter receives the dissenting opinion in the same case from its author. Both reporters naturally suppose the opinions sent to them express the decision of the court, and publish them as such. A curious case of this kind may be found in Ballou v. Cunningham, 4 Lansing's R., 74, where the dissenting opinion is published under the idea that it is the opinion of the court. The true opinion is reported in 60 Barb. 425.

The character and quality of Barbour's volumes sufficiently appear under other heads of this report. The general conclusion to which your committee have arrived respecting them is that they present some of the worst features possible in law reporting.

The two reporters of the Practice Reports have no official position. And as long as the bar will buy their reports, no blame can attach to them for publishing them. These volumes constantly contain the same decisions; they often contain cases which are also reported in Barbour, Lansing, and the New York Reports. Thus it happens that we habitually have two reports, often three, and sometimes four, of the same case. This evil is more particularly noticed under another head. The Practice Reports, however, have ceased to contain practice cases exclusively. Some of them appear to be made up of whatever comes to hand, without reference to its quality or authenticity. Instances of the latter may be found in White v. Delaware and Lack. R. R., 39 How. Pr. R. 479, and in the note at 16 Howard Pr. R. 288, which are reported upon the authority of newspaper articles. Howard's Practice Reports contain many decisions of the supreme court of the United States, and of the circuit court and district court of the United States, most of which are quite out of place in practice reports.

The syllabus in The People v. Parkes, 15 How. Pr. R. 551, commencing, "This little case shows what a justice of the peace can do, when he tries," and the disquisition on "cider" in the foot-note in 19 How. Pr. R. 266, are quite out of place in reports of any standing. There is a letter in 20 How. Pr. R. 96, from a former judge of the common pleas to Mr. Howard, acknowledging writing an opinion in the case of Fox v. Lewis, but denying that in any sense it resembles the one attributed to him in 19 How. Pr. R. 561.

In 16 How. Pr. R. 288, there is a similar letter from a judge

king or the people, from the mouths of judges paid by the state, the king, or the people, became thereupon their property. In England, from time immemorial, the

of the supreme court, adding that the publication of unauthorized opinions injures the authority of the reports; a conclusion in which your committee entirely concur.

The reporters of the superior court and common pleas have no official position.

Daly's Reports are not subject to the general criticisms contained in this report, and are models of conscientious care. They contain many important decisions, and, as appears by the tables, comparatively few that are reported elsewhere.

On the 2nd of December, 1863, a meeting of the Bar of England was held in Lincoln's Inn Hall, convened by Sir Roundell Palmer, now the lord chancellor, to consider the subject of law reporting. At that time there were in England fourteen independent series of reports, besides the weekly serials, and the evils complained of were identical with those felt here. They were also embarrassed by the habit of judges delivering oral opinions, so that the reporters were not only editors and digesters, as with us, but actually reported the words which fell from the lips of the court.

Resolutions similar to those passed by the Bar Association were adopted, and a committee appointed to consider the subject.

Lord St. Leonards proposed a scheme which was, with some modification, adopted by the committee, and recommended to the bar. They reported, "the multiplicity of the reports, apart from the cost (£50 per annum), occasions the evils of which the profession complain. The remedy proposed is the establishment, under the management and control of the profession, of one set of standard reports, upon the basis of a fair regard for existing interests. One complete set of reports, prepared with the requisite learning, skill, and care, and published with expedition, regularity, and at moderate cost, is all that is required for citation as authority.

"It needs, surely, no argument to prove how deeply the interests of the public are concerned in the certainty of the law, or how important it is that the judge who decides, the counsel who advises, and the solicitor under whose guidance the client acts, should all be regulated by one and the same standard of authority."

They recommended that a set of reports should be prepared and published, under the management of a counsel, representing the whole bar, who should be appointed as follows:

copyright of the reports of decisions of the various courts and judicial tribunals has inhered in the crown, on the ground of the payment by the king of the

2 By Lincoln's Inn.
2 By the Inner Temple.
2 By the Middle Temple.
2 By Gray's Inn.
2 By Sergeants' Inn; and
2 By the Incorporated Law Society.

The government was to be represented by the attorney-general, the solicitor-general, and the queen's advocate, who were ex-officio members.

The council were to act gratitously, but were to have the services of a paid secretary, who should be an experienced man of business. The objection that the duties of the council would not be properly performed, without adequate remuneration, was considered and left to the future. It is best answered by the result of their work.

The report of this committee was made after great deliberation, and having in view the systems of all other countries.

A very large meeting of the bar was held to consider the report, at which the cost of the proposed undertaking was anxiously discussed, formed the principal topic of consideration, and led to an adjournment for the purpose of further consideration.

On the 28th of November, 1864, another meeting was held, and the report adopted.

In 1865, the report was submitted to the inns of court, the Incorporated Law Socicty, and the Benchers of the Temples.

Gray's Inn passed a resolution, that "they had not sufficient confidence in the scheme to induce them to join it."

Sergeants' Inn, under the influence of some of the common-law judges, declined to co-operate.

The Incorporated Law Society at once signified their approval of the scheme, but declined to share the responsibility of carrying it out until they were satisfied with the soundness of the financial details. After being satisfied of this, they signified to the attorney-general their entire adherence, and not only appointed two members to the council, but voluntarily added their guarantee to those of the inns of the court to provide for the preliminary expenses.

The then lord chancellor, although sympathizing heartily with the movement, did not signify his approval until Mr.

salaries of the judges who pronounce the law, and the payment also, in former times, of the costs of compiling and publishing the volumes of reports. The

Beavan ceased reporting the decisions of his court, after which he gave it his unqualified support.

All the other law societies and courts united with the enterprise from the start.

Sergeants' Inn and Gray's Inn signified their adherence to the scheme, after witnessing its success for a few months.

In March, 1865, Sir Fitzroy Kelly issued a circular to the profession, detailing what had been done, and inviting their assistance and co-operation for the purpose of accomplishing the object involved in the resolutions of the bar.

The subscription for the entire series of the proposed reports was fixed at £5 5s. per annum.

It was considered necessary that there should be 2,000 subscribers to insure success, and it was determined not to commence operations until this number was obtained. The council met from the start the opposition of the irregular reporters and law journals, such as the "Jurist" and the "Law Times," whose commercial interests would be prejudiced by its success. Their plans, however, matured so rapidly that in August, 1865, they accepted an offer made to them by the printing firm of Clowes & Sons for the printing, publication, sale and distribution, of the proposed series of reports for a period of three years, upon terms which absolved the council from all pecuniary liability, while it left to them the receipt and application of all subscriptions. This employment of a firm, not engaged in the business, led to remonstrances from the regular law publishers, who had been previously applied to by the council, but refused to give the statistics of the profits of law publishing.

The council undertook to pay out of the subscriptions the first moiety of the salaries of the editors and reporters, amounting to £5,350.

Clowes & Sons looked to the surplus amount of subscriptions for the payment of their charges, which had been determined beforehand.

As a further security to the editors and reporters, a guarantee fund of over £2,000 per annum, for three years, was established, and signed by most of the practitioners of the chancery bar, headed by the lord chancellor, for a larger amount than any of the other subscribers.

A sub-committee of three was appointed to receive pro-

right was twice affirmed by the House of Lords, in the reign of Charles II., with respect to Rolle's Abridgment[1] and Croke's Reports[2] Shortly after the

posals for the appointment of editors and reporters, subject to the approval of the council.

The council offered an appointment to every member of the bar, who was then engaged as reporter, in any of the fourteen series of authorized reports, and all accepted but three. Within the first year of the establishment of the law reports all of the fourteen series of reports previously existing were discontinued but one, that of Best and Smith, which ceased in 1869. Of the weekly serial reports all were discontinued but three.

The first volume published under the supervision of the council appeared in 1866. It was issued in monthly numbers, and gave general satisfaction.

Since then the council has published forty-six volumes, which, if not perfect, are better than any that preceded them.

At the end of its first year, the council made a report of its proceedings. From this it appears that there were 4,000 subscribers. The success was so great that they felt justified in establishing "The Weekly Notes," an ephemeral paper, to inform the profession of the current decisions of the courts. In addition to this, they published the statutes as fast as issued. Thus, for the small sum of five guineas, they supplied the profession with the complete body of the case law and statute law for the year, which before had cost more than ten times that sum. Five thousand copies of the law reports and statutes were printed.

In July, 1868, the council made their second annual report; from this it appears that the prepaid subscriptions for the first year were £20,334 18s.; for the second year, £21,860 16s. 4d.; and for the first half of the third year, £21,102 6s.

This report gives a full statement of the business part of the enterprise, and of its financial condition in detail. The receipts were such that besides the reports, weekly notes, and statutes, they determined to publish a digest.

The third annual report appeared in April, 1870, and showed the same sound financial condition.

It may be doubted whether, even if reporters had greater and more varied professional ability, there would be any great

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[1] Carter, 89; Bac. Abr. Prer. F. 5; 4 Burr. 2315.

[2] Skin. 234; 1 Moo. 217; 4 Burr. 2316.

Restoration, an act of parliament having prohibited the printing of law-books without the license of the lord chancellor, the two chief justices, and the chief

improvement while the present system continues. So long as reporting is conducted by private enterprise, for the sole purpose of making as much money out of it as possible—so long as lawyers must buy all the reports, and pay for the chaff in order to get the wheat—the temptation of printing worthless cases and of mere book-making will exist.

Your committee are of the opinion that all reporting should be official, that the reporters should be responsible to some supervisory body, and should be paid by salaries, and thus made independent of the number of volumes they may be able to publish annually.

Your committee entertain no doubt that it is the duty of the state to inform its citizens of its laws; and that this duty is not fulfilled so long as it makes only partial provision for reporting judicial decisions.

There are, however, serious objections to committing the practical work of law reporting to any state officer under our form of government. The work is not of a kind to be well done by an elective officer, nor is it likely to be well done by an officer, who, if appointed, goes out of office with changing administrations. A first-class reporter requires particular qualities, and should have a permanent position. If undertaken by the state, and the profits of the office went to the reporter, the place would soon be sought by political aspirants, and if they went to the state the work would be badly done, and soon relapse into the present evils.

Nor should the reporter be in any way dependent upon the courts, whose favor and friendship it is his privilege to win and enjoy. In a free country, it is well that courts should feel that they are acting before an intelligent and reading public, to whom their decisions will certainly become known through fearless and independent reporters.

Your committee are of opinion that the provision of the constitution permitting any person to publish the laws and judicial decisions is a wise one, and that counsel should be at liberty to cite any authority from the whole range of literature, leaving the weight of the citations to be judged of by the court. If these views are sound, any new series of reports that it may be thought wise to edit must depend for their success upon their merits alone, and must, in the first instance, compete with the reports now in the field. But your committee are

baron of the exchequer, it became the practice to prefix such a license to all reports published after that period, in which it was usual for the rest of the judges to concur, and to add to the imprimatur a testimonial of the great judgment and learning of the author. That act was renewed from time to time, but finally dis-

> convinced that a new series of reports, properly edited, and based upon sound principles, would, within a year, compel the withdrawal of all the existing reports; and that while the publication of the reports should be legally free to whoever will undertake it, the state might aid, by necessary legislation, or by reasonable appropriations, any responsible body that would relieve it of the duty imposed upon it by the constitution of making known its laws to its citizens.
>
> Your committee, after the thorough examination they have given to this subject, and the knowledge they have acquired of the great success of the English Council of Law Reporting—as shown by the admirable volumes which form the fruit of their labors, and by their financial resources—would have no difficulty in recommending a scheme which, in their opinion, would ensure the desired reform.
>
> But inasmuch as it is apparent that certain legislation will be needed, and the subject is one which is of deep importance to the bench and the bar throughout the state, and it is desirable that the plan to be adopted should comprehend all interests, and have the hearty support and sympathy of all, and is also likely, if successful, to be followed in other states, your committee have concluded not to recommend at present any definite scheme, but to suggest that this report be published and circulated among the judges and profession generally throughout the state, with a request that they communicate to this committee any recommendations or suggestions which may occur to them as valuable, and after considering the suggestions which it is hoped this course will elicit, your committee will be prepared to report the definite plan of action called for by the resolution under which they were appointed.
>
> All of which is respectfully submitted.
> New York, May 12, 1873.
>
> LEWIS L. DELAFIELD,
> Chairman Committee on Law Reporting.

appeared in the reign of William III. The same form of license and testimonial, however, continued in use for a long time after, until the judges refused to grant them any longer, which they did some time before the appearance of Douglas's Reports." [1] The reports since then have appeared without them. The court regarded as a contempt the publication of their proceedings without their authority; and Sir James Burrow, in the preface to his "Reports of Cases Decided in the King's Bench," apologizes for publishing them without an imprimatur, stating that if he gives

Accompanying this report was the following tabular resumé of the same:

BARBOUR'S REPORTS.

Volume.	Number of Cases reported 5 times.	Do. 4 times.	Do. 3 times.	Do. twice.	Special Term Decisions.	Affirmed.	Reversed.	Remarks.
55	1	2	5	11	12	5	4	This vol. contains one case reported six times, and one reported eight times.
56	..	..	1	2	1	4	4	This vol. contains eleven cases decided in 1865–66 not reported until 1870.
57	2	2	10	6	9	7	9	
58	3	1	2	6	4	3	5	
59	..	..	2	3	1	6	2	In this vol. points and arguments are very much extended.
60	1	..	2	12	16	3	..	
61	..	..	2	9	5	1	2	Cases decided in 1868–9 are here reported in 1872.
62	..	..	2	9	5	3	3	This vol. contains thirty-one cases decided in 1861–3, and reported in 1872.

[1] Preface to Doug. p. 7. With reference to these licenses, Sir Jas. Burrow says (preface, p. v.): "I have been assured that some now possessed of judicial offices have declared that they would never sign one, because it hangs out false colors, and misleads those that think it gives the least approbation or authority to the work."—Shortt, p. 42

offense in doing so, he will stop and suppress his work.[1]

404. So far was this crown right insisted on, that

HOWARD'S PRACTICE REPORTS.

VOLUME.	Number of Cases reported 5 times.	Do. 4 times.	Do. 3 times.	Do. twice.	Special Term Decisions.	AFFIRMED.	REVERSED.	REMARKS.
35	4	3	18	30	25	8	3	67 cases in this vol.; 1 case reported 6 times; 10 cases reported in N. Y. R.; 16 cases reported in Superior Court R.
36	1	7	13	24	20	4	4	72 cases in this vol.; 14 cases reported in N. Y. R.; 1 case reported 7 times; 8 cases reported in Superior Court R.; 13 decisions of U. S. Courts.
37	1	11	16	17	32	5	3	80 cases in this vol.; 8 cases reported in N. Y. R.; 19 cases reported in Superior Court R.
38	..	2	9	15	24	4	4	58 cases reported in this vol.; 1 case reported 6 times; 8 cases reported in Superior Court R.
39	..	5	4	10	18	4	7	54 cases in this vol.; 5 cases reported in Superior Court R.
40	1	1	6	2	32	4	4	73 cases in this vol.; 16 cases reported in Superior Court R.
41	..	1	2	4	22	1	3	73 cases in this vol.; 1 reference reported; 5 cases reported in Superior Court R.
42	..	3	4	5	25	3	1	7 decisions in U. S. Courts in this vol.
43	..	..	1	2	23	2	..	8 decisions of U. S. Courts in this vol.

Since this report, however, many of these evils have been remedied.

The committee having been continued, a second report was presented, December 3rd, 1873, as follows:

In compliance with the resolution of the association, passed on the 13th day of May, 1873, they caused 2,500 copies of their report upon law reporting to be printed and circulated among all the judges and judicial officers, and a large part of the law-

[1] Since the "Year Books," no judicial proceedings have been published under authoritative care and inspection, either by the House of Lords or by any court in Westminster Hall, except State trials.—Doug. preface, p. 5.

the English courts have, not unfrequently, punished as a contempt, the unauthorized reports by newspapers of their proceedings.

yers and public men of the state. The report was also sent to the principal libraries, newspapers, and periodicals, and every effort made to secure for it a wide circulation. Accompanying the report was a note calling attention to the importance of the subject, and requesting the suggestions and co-operation of the bench and bar.

The favor with which the report was received has been most gratifying to your committee, and inspires them with the liveliest hopes for the reform they contemplate.

They have received letters from judges, lawyers, and public men from all parts of the state, deploring the evils of the present system, and advocating an entire change in the manner of reporting judicial decisions. The press has been unanimous in its commendation and earnest in its call for reform.

Having considered the suggestions received, and thoroughly examined the system of law reporting adopted by the council of law reporting in Great Britain, your committee are now prepared to recommend a scheme which will, in their judgment, solve all the difficulties of the position. In considering the many different methods by which the desired result might be attained, they could not be indifferent to the precedent set by the English council. This council met, contended with, and overcame almost every difficulty in our path. Their reports are a great literary and financial success. It seemed that by following the same path we might have the benefit of their experience and share their success. Besides this the more carefully your committee examined the general outline of their plan, the better did it seem adapted, by intrinsic merit, to our necessities.

Your committee have, therefore prepared a plan based upon that of the English council of law reporting, with such modifications as the judicial system, constitution, and laws of our state required. By adopting this course they secure the great advantage of precedent for every step they take. They follow no doubtful paths, they tread the "*vias attritas*," which lawyers love.

This appeared especially important, as it proposed to ask the members of the bar to unite in guaranteeing the expense of the undertaking in the sum of $250 each per annum, for a period of three years.

The issue of a new series of reports involves a great ex-

405. Though, perhaps, the so treating them may have proceeded, not so much on the ground of a sole right of property, as on the expediency, with

penditure of money, and some one must be responsible for its first expenses. Your committee are satisfied, from their inquiries, estimates, and examination, that the reports will be self-sustaining, and that those uniting in the guarantee will never be required to respond to it. But as it was unavoidable that some one should assume this responsibility, your committee wished to furnish a precedent of the little risk that will be incurred by pointing to the facts and figures of the English council which they have had before them, and a general summary of which is given in their last report.

The importance of prompt action is best illustrated by the fact that the strictures contained in the first report have had no effect upon the existing reporters, whose recent volumes show little improvement over those criticised, and by the fecundity of the reports and reporters of these times. In the six months that have elapsed since the report of your committee, two new series of reports have been begun, and one digest, making nine series of running reports, and adding twenty-three volumes annually to our over-burdened shelves.

How many more will appear during the coming six months it is impossible to foresee.

It is evident that the reports are hydra-headed—as fast as one is destroyed two others spring up in its stead. If the monster can be exterminated at all, it must be by the united effort of the bar. No single blow can accomplish it.

Your committee submit the following scheme as capable of effecting the desired object:

1. The reports recommended by this committee shall be placed under the general management and control of a council composed of members to be appointed as follows:

1 by the court of appeals.

1 by the justices of the supreme court designated to hold general terms.

6 by the association of the bar of the city of New York.

The chief judge of the court of appeals and the attorney-general for the time being shall be ex officio members.

In the event of bar associations having the same general objects and of the same general character as that of the city of New York, being formed in the cities of Brooklyn, Albany, Buffalo, Rochester, and Syracuse, the said associations may each appoint one member of said council.

a view to the due administration of justice, of having careful and accurate reports of the decisions which serve as precedents for future cases; this, at any rate,

2. The members of the council shall act gratuitously. The term of office shall be for five years. All members retiring shall be eligible for re-appointment.

3. Any occasional vacancy in the council by death, resignation or otherwise may be filled by a new appointment by the body which originally appointed the retiring member, and the member so appointed shall retire at the time when the member occasioning the vacancy would, in the ordinary course, have retired.

4. It is desirable that the council be incorporated by act of the legislature.

The council may have the assistance of a secretary or executive officer. The payment of his salary, and the office and other expenses of the council shall not exceed together $4,000 per annum.

5. The reports shall be prepared by reporters under the supervision of the council, or an editor, if they see fit to employ one, and the cases to be reported shall be carefully selected upon the principle of rejecting all cases useless as precedents.

6. The reports shall be divided into series, viz.:

1. The court of appeals reports.
2. The supreme court reports.
3. The superior court reports.
4. The common pleas reports.
5. The surrogate's court and miscellaneous reports, with such subdivisions (if any) of such series, and with such additions of the opinions of other courts as the council may think desirable.

7. The council shall have power, if they should find it desirable, to establish in connection with the permanent reports a set of daily or weekly reports, and from time to time to prepare such digests or other publications as may be deemed expedient.

9. The staff of reporters and their salaries shall be as follows:

1 Court of appeals and commission of appeals reporter	$6,000 00
1 Assistant for court of appeals	1,000 00
1 Assistant for commission of appeals	1,000 00
1 Supreme court reporter	4,000 00
4 Assistants for the supreme court reporter, $1,000 00 each	4,000 00

is the ground on which the House of Lords claims the right of prohibiting the publication, otherwise than as it directs, of the report of any trial on im-

1 Reporter for the superior court of the city of New York, court of common pleas of the city of New York, and surrogate's courts.....	$3,000 00
1 Assistant.....	1,000 00

These salaries shall be paid semi-annually. One moiety thereof (hereinafter referred to as the first moiety) shall be paid in all events at the end of the first six months' employment. The other, or second moiety, shall be paid at the end of a year's employment. But for this second moiety, the reporters and other employers shall look, in the first instance, to the proceeds of the sales of the reports, and afterwards to the guarantee hereinafter mentioned.

The members of the bar shall be requested to unite in a guarantee of $250 per annum apiece for three years, of all the expenses and liabilities that may be incurred by the council, including the salaries of all employees, the cost of producing the reports, and all expenses and liabilities connected therewith or resulting therefrom.

10. The court of appeals possessing under the constitution the power of appointment and of removal of its reporter, shall appoint the said reporter and remove him at its pleasure.

The legislature shall be petitioned to repeal all laws providing any compensation for the reporter of the court of appeals, and for his clerical help, and his compensation shall be paid by the council.

11. It being intended by the constitution that the judges of the supreme court designated to hold general terms should appoint a reporter for the supreme court, the legislature shall be requested to provide for such appointmeut, but not for any compensation of such reporter, which shall be paid by the council.

The legislature shall also be requested to repeal the act of 1869, providing for the appointment of a supreme court reporter.

12. The legislature shall be petitioned to grant to the council of law reporting $20,000 per annum to pay the above salaries.

13. One of the assistants of the supreme court reporter shall be attached to each department thereof, and shall reside in the department to which he is attached.

14. The legislature shall be requested to enact that every

peachment or indictment that takes place before it. In Gurney v. Longman,[1] where an injunction was granted until the hearing, restraining the publication,

general and special term of the courts herein mentioned, on rendering an opinion, shall cause to be endorsed thereon a recommendation of "To be reported" or "Not to be reported;" and that suitable laws may be enacted committing the custody of all opinions to the council of law reporting immediately after their rendition.

15. The editor and reporters shall be lawyers. The reporter of the court of appeals and of the supreme court shall be appointed and removable by those courts. The editor, all the other reporters, all the assistant reporters, and all employees, shall be appointed and removable by the council.

16. It is suggested that in justice to the existing reporter of the court of appeals, the official supreme court reporter, and the editor of Daly's common pleas reports, the appointing power request them to fill the positions under the present scheme corresponding to those they now occupy. In other appointments of reporters, a preference may, if the council think fit, be given to the reporters of any publication which may be discontinued in consequence of the issue of the reports recommended by the committee.

17. Subject to Rule 15, the editor and reporters shall be appointed for a term of five years, and shall be eligible for reappointment.

18. The particular duties of the editor, reporters, assistants, and secretary, and of all employees, shall be prescribed by the council, who shall have full power to increase or diminish the number engaged, establish and vary their duties and adjust or alter their salaries, regard being had to existing interests for the time being under Rule 9.

19. The reporter of the court of appeals and of the supreme court, shall not practice in any court of record. The other reporters and all their assistants may practice, but it must be a fundamental requirement that their duties be faithfully and punctually discharged.

20. The judges of the several courts shall be requested to appoint convenient places to be occupied by the reporters, to allow the reporters access to all such papers as they can control and to their written opinions.

21. The bar shall be requested to afford the reporters all

[1] 13 Ves. 495–501.

by the defendant, of an unauthorized report of Lord Melville's trial, Lord Erskine said: "Upon the case of Bathurst v. Kearsley,[1] and the practice of the House

the assistance in their power, for the better discharge of their duties, by communicating information, and by permitting the use of briefs and papers and short-hand writers' notes.

22. The profession shall be invited to subscribe to the reports (which it is supposed will be about eleven volumes per annum) at the following price. For the entire set $50.00 per annum, to be paid in advance in such sums as the council shall determine.

23. Such invitation shall contain an announcement that it is considered essential for carrying out the scheme that the aggregate amount of subscriptions, including what may be allowed by the state, shall reach $65,000 per annum at the least, but that the council may commence their work whenever the prepaid subscription is, in their opinion, sufficiently large, and the guarantee executed by enough members of the bar to do so with prudence.

24. The prices to non-subscribers shall be one-third more than those charged to subscribers.

26. The council shall have power to make such arrangements as will lead to the discontinuance of any set of existing reports, and for discharging the consideration of the same by payments out of the profits.

27. The council shall make such arrangements for obtaining and collecting subscriptions for the reports, and disbursing the same, and for obtaining the guarantee of the bar, referred to in Rule 9, and for naming, publishing, selling and distributing the reports, as in their judgment, shall seem best.

28. The proceeds of the sale of reports and other publications, and other profits therefrom, shall be applied as follows:

1. In defraying the expenses of the publication, sale, and distribution, including the commission or other remuneration agreed to be given to the publishers or printers.

2. In payment of the secretary's salary and other expenses of the council under Rule 4, and the first moiety of the salaries under Rule 9.

3. The payment of the second moiety of the salaries under Rule 9, and of the consideration, if any, agreed to be given

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[1] This was the case of the publication of a report of the trial of the Duchess of Kingston.

of Lords, I may grant the injunction; which I do, not upon anything like literary property, but upon this only, that these plaintiffs are in the same situation as to this particular subject, as the king's printer exercising the right of the crown as to the prerogative copies. I shall not state anything as to other courts, but shall act upon this precedent." His lordship desired that it should be understood that he had not delivered any judgment of this case, further than by granting the injunction until the hearing, upon the precedent of Bathurst v. Kearsley; and that he should therefore consider the questions as open in any future stage.[1]

for the discontinuance of any existing reports under Rule 26, in such order and priority as the council shall have arranged.

4. In making good to the members of the bar who have united in the guarantee of any moneys which they may have paid under the same.

Lastly, in augmenting the salaries of the reporters, or of such of them (if any) as the council shall consider proper to be augmented, or in constituting a reserve fund to meet future contingencies, or in such other way as the council, in their discretion, shall decide best calculated to improve the system of reporting and for the interest of the bar.

29. The council shall have power, so far as they may not be fettered by any subsisting engagement, to lessen the subscription price of the reports, if found practicable.

30. The council shall prepare and publish annually a financial statement and report of the working of the system.

The difficulties here suggested appear to have very lately attracted the attention of the New Hampshire legislature—one case in the last volume of the reports of that state, having occupied over 270 pages, the legislature found it necessary to intervene and provide "that each judge should state briefly his reasons for his" judgment." Albany Law Journal, Aug. 7, 1875.

[1] The practice of the House of Lords has been to make an order that the lord chancellor or lord speaker do cause the trial to be published; and that no other person do presume to print or publish the same; and, with the exception of

But the English courts[1] have not for a long time asserted a claim to the exclusive publication of their own reports; and in two modern cases—Butterworth v. Robinson,[2] and Saunders v. Smith[3]—the plaintiffs were held by the court of chancery, to possess a copyright in certain law reports published by them. In the former case an injunction was granted to restrain the defendant from publishing a colorable abridgment of the Term Reports, of which the plaintiff was proprietor; and in the second, an injunction was refused, only because the plaintiff's conduct was such as misled the defendant into the publication.

406. Courts have not, however, abandoned their right to restrain the publication of their proceedings in cases where such publication would be likely to hinder an impartial trial, or otherwise defeat the ends of justice. On the trial of Thistlewood and others for treason, in 1820, the court prohibited the publication of any of the proceedings until the trial of all the prisoners should be concluded, and upon a report of the trial of the prisoners being thereafter published by a newspaper, its proprietor was fined for the offense, on failing to appear to answer for contemptuously publishing such proceedings. The court observed: "It is argued that if the court have this power of

Lord Oxford's case and a few others, such an order appears to have been made in almost every instance of a trial before them, whether upon impeachment or indictment. The lord chancellor or lord speaker, upon this order, appoints a publisher of the trial. See the case of the Earl of Cardigan, tried before the House of Peers in 1841, and the order made by the House on the 19th February of that year (Lords' Journals vol. 73, p. 46).—Shortt, p. 44.

[1] Ib.

[2] Ves. 709,

[3] 3 My. & Cr. 711.

prohibiting publication, there is no limit to it, and that they may prohibit altogether any publication of the trial. I think that does not follow. All that has been done in this case is very different, for the prohibition here has only been till the whole trial was completed." Courts of record have a right to make orders for regulating their proceedings, and for the furtherance of justice in the proceedings before them, which are to continue in force during the time that such proceedings are pending, leaving every person at liberty to publish the report of the proceedings subsequently to their termination.[1]

407. The rule in the United States is the same; and the decisions of courts are a sort of common property, which may be appropriated and printed by whoever wishes to do so. The case of Wheaton v. Peters[2] is leading on this point in the United States. Said McLean, J.: "It may be proper to remark, that the court are unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court, and that the judges thereof cannot confer on any reporter any such right."

However, if a reporter publish them, combined with the product of any labor of his own, as if, for instance, he annotate, or abridge, or amplify them, he can copyright the work, decisions and all, as a whole.

And if he prefix to each case a syllabus or resumé of the points therein passed upon by the court, he will of course have a copyright in such resumés;

[1] For a more recent examination of this principle in England, see the case of Tichborne v. Tichborne, quoted in the chapter on Contempts of Court, and as to the right of newspapers generally, see chapter on Newspapers.

[2] 8 Pet. 591–593. As to legal reports see also the cases of Atwill v. Ferrett, 2 Blatchf. 39; Little v. Gould, Id. 362; Paige v. Bank, 7 Id. 152.

and one who appropriates them, either in the form of a digest, or otherwise, is liable for an infringement of his copyright.

Precisely the same rule which we have noticed in England and in this country, as to reports of judicial proceedings, may be affirmed as applying to statutes of states, ordinances of cities, and all public acts of public, judicial, deliberative, or administrative bodies, proclamations, memorials, messages of the president of the United States, and governors of the different states, and speeches delivered by members of deliberative bodies; though an edition of any of these, arranged for publication by their authors, or others, might be copyrighted.

408. "In England the crown," says Shortt,[1] "still possesses the exclusive right of printing and publishing acts of parliament. Blackstone rests the right on grounds of political and public convenience; the king, as executive magistrate, possessing the right of promulgating to the people all acts of state and government.[2] Grierson v. Jackson[3] recognized the right, because it is necessary that there should be a responsibility for correct printing, and because copy can only be had from the rolls of parliament, which are within the authority of the crown. At one time the king's officers transmitted authentic copies of all state ordinances to the sheriffs, who proclaimed them in their county courts. When the demand for authentic copies began to increase, and when the introduction of printing facilitated the multiplication of copies, the king's patentee, by command of the king, supplied copies to the people, this seeming an obvious and reasonable

[1] P. 41.
[2] 2 Bl. Com. 410.
[3] Ridg. Rep. 304.

extent of that duty which lay upon the crown, to furnish the people with the authentic text of their ordinances.'

"The right of the crown was recognized in repeated decisions.[2] The right of the patentees of the crown to the sole printing of the statutes, as now recognized, must depend upon usage, and the force of the decision of the court of king's bench, in Basket v. The University of Cambridge,[3] in 1758, and upon the recognition of the doctrine of prerogative copies by the house of lords in the case of Manners v. Blair,[4] in 1828.[5] The former case did not present for direct decision the question of the validity of patents for the exclusive printing of the statutes, as between the crown and the public, the dispute there being between rival patentees, under patents from different sovereigns, each party therefore being interested in upholding the general prerogative. The court of chancery sent the case into the king's bench, for the opinion of that court; and, after argument, the validity of the patents given to both the parties litigant was upheld. This of course assumes the validity of the claim of the crown.

"If bona fide notes accompany statutes printed by others than those having the patent right, the copyright of the latter, it seems, is not infringed;[6] but there is no express decision on this subject. The notes must,

[1] Eyre v. Carnan, 6 Bac. Abr. 511.

[2] Atkins's case, Carter, 89, Bac. Abr. Prer. F. 4 Burr. 2315; Roper v. Streater, Skin. 234; Stationers' Company v. Parker, Id. 233; Eyre v. Carnan, 6 Bac. Abr. 509; Basket v. University of Cambridge, 1 W. Bl. 105; Basket v. Cunningham, Id. 370; 2 Eden, 137.

[3] 1 W. Bl. 105.

[4] 3 Bligh, N. S. 391.

[5] Curtis on Copyright, 126.

[6] Maugham, 106; 2 Evans's Statutes, 19.

however, be bona fide, and not merely colorable or collusive. In Baskett v. Cunningham,[1] the defendant was publishing, in weekly numbers, a digest of the statute law, methodized under alphabetical heads, with large notes from Coke and other writers on the law. He had contracted with the proprietors of the patent for printing law-books, to print this work, and it was printed at their press. Baskett, the king's printer (whose patent extended to all statutes), filed a bill for an injunction. It was urged for the defendant, that the work was not within the meaning of the letters patent, being a work of labor and industry, and the method entirely new. The lord chancellor, however, was of opinion that the work was within the patent of the king's printer, and that the notes were merely collusive; and he ordered an injunction to issue, restraining the proprietors from printing at any other than at a patent press.

"Except in case of editions of the statutes published with bona fide notes, the right to print and publish the statutes is vested in the universities of Oxford and Cambridge, concurrently with the king's patentees. It seems that the concurrent authority which the two universities have with the patentees of the crown, to print acts of parliament, and abridgments of them, has not been extended to the sovereign's proclamations, orders in council, and other state papers, which would accordingly appear to be vested in the king's printer solely."[2]

409. Law reports, then, are to be considered, as to copyright, the same as any other literary works, except that there can be no copyright in the opinions of judges who are enjoying a salary paid by

[1] 1 W. Bl. 370.

[2] Shortt, p. 42; and *vid.* Maugham, p. 106.

the people or the state. But it seems that it would be piracy, where a publisher has printed a series of law reports, and obtained a copyright in the same, for a subsequent publisher to collect therefrom all the cases contained upon a particular subject, and to republish them, even though differently arranged and added to new cases upon that subject, though the writer of a treatise, perhaps, might take certain cases from the reports in question and print them at length.[1]

410. An examination of all the reported cases warrants us in the conclusion that the reason why a judge can have no literary property in opinions, pronounced by himself, upon legal questions presented or discussed before him, is simply and solely because he is but the mouth-piece of the state, paid by the people, or the state, to utter and construe their law. We have seen that courts are the distributors of the justice of the people, and that, by theory of law, the state hears all disputes of its citizens.[2]

But, if the reason is a good one, it would seem to apply equally to a reporter, who also receives a salary from the people, to catch the opinions as they fall from the lips of the judges appointed by the people, and to arrange and publish them for the use of the people, and that there would, therefore, be no copyright in the labors of an official reporter appointed by the court or elected by the people, provided his salary or the compensation for his services be paid from the public treasury.

In Little v. Hall[3] it was held that, under a statute

[1] Hodges v. Welsh, 2 I. E. R. 266.

[2] *Ante*, vol. i. p. 223.

[3] 18 Howard, U. S. 165; 1 Miller's Decisions of the U. S. Supreme Court, p. 143.

of the state of New York—by virtue of which Judge Comstock was appointed reporter of the decisions of the court of appeals—no copyright could be had in the reports.

411. And the same principle will hold as applied to a publisher. In Chase v. Sanborn [1] it was held that publishers of decisions of a state court, where the judges of the state not only furnished the opinions, but also the head-notes, can acquire no copyright in either. Said the court (Clifford, J.):

"Briefly stated, the claim of the complainant is that one Lyon, deceased, became, by purchase of the authors, the proprietor of the copyrights of the judicial reports mentioned in the bill of complaint, and also of the copyright of the digest therein named; and that, by means of the said purchases, he became the true and lawful owner of the exclusive right and liberty of printing, reprinting, publishing, and vending the same; and that the complainant, subsequently, and by means alleged, became and is the true and lawful owner of the said several copyrights, and he charges that the respondents have infringed the same, as fully set forth in the bill of complaint, which, as he claims, is contrary to equity and good conscience; wherefore, he prays for process, and for an account, and for an injunction. Process was issued and served, and the respondents appeared and filed an answer. They admit that the original purchaser of the copyrights of the judicial reports published the digest mentioned in the bill of complaint; that he caused, what purports to be the proper entry, to be inserted in the title-page thereof; but they do not admit that the required formula was ever entered in the clerk's office of the dis-

[1] Official Gazette of the U. S. Patent Office, vol. 6, p. 932.

trict court, as required by the act of congress. Certain other defenses are also set up, as follows: First, that the digest in question is made up almost exclusively of the language of the head-notes of the cases included in it, and that it follows the language of the head-notes; that the state law made it the duty of each justice of the superior court of that state to prepare for the press correct reports of the decisions of the court thereafter pronounced by him; and that the state statute also created the office of a state reporter, and made it his duty to edit the reports so furnished, and to provide for their sale by selling the copyright, or by such other means as he might deem expedient, and directed that he should pay into the treasury of the state the net proceeds of such sale.[1] All of the reports mentioned, the answer alleges, were published at the several times stated in the bill of complaint; but the respondents allege that they have no knowledge of what the arrangement was between the publishers and the reporter, though they believe that the former acquired all the rights of the state and of the reporter; and that the complainant purchased from him or his executor whatever rights he acquired under that arrangement. Second, that the title-page of the digest contains a statement that the required entry was made in the clerk's office of the district court, but they do not admit that such an entry was ever made in the clerk's office. Third, that the respondents published the digest as charged in the bill of complaint, but they deny that it is any infringement of any copyrights owned by the complainant, for several reasons: First, because the digest in question was made by the author, upon an examination, by him, of each case in relation to which the respondents are charged with

[1] Rev. Stat. U. S. 405.

infringement, and that it is a new, separate, independent, and much-needed work ; second, because the head-notes in the digest published by them, if in any instances they are the same as in the digest of the complainant, are taken from the opinions of the court from the head-notes of the opinions prepared by the judge who delivered it, as the author had a right to do, even if the proprietor of the older digest has a copyright of the same, which is denied, and they deny that the digest published by them has incorporated any part of the former digest, except as herein stated."

"Evidence was taken on both sides, when the complainant moved the court to send the cause to a master ; but the respondents resisted that motion, insisting that the complainant showed no equity in the bill of complaint, and that the same should be dismissed."

"Hearing was had, but inasmuch as the usual course in such cases is to send the case to a master before determining the merits, the court came to the conclusion that it was not proper in this case to depart from the usual course. Accordingly, the cause was sent to a master, with directions to report, as set forth in the decretal order. Since that time the master has made his report, and the parties have again been fully heard upon all the questions in the case. Among other things, the master was directed to report whether the use, in the respondents' said book, of the parts or features taken from the complainant's books, and original therein, tended to prejudice, and, if so, to what extent, the sale of the complainant's books. Opportunity for a full hearing was granted to the complainant, but the master reports that no evidence was introduced by him tending to show any such preju-

dice, and the court is of the opinion that the report of the master is correct, and that it be, and hereby is, confirmed. Viewed in the light of that report, it is clear that the complainant is not entitled to an account nor to an injunction. Nothing remains for consideration except the question whether the complainant is entitled to nominal damages, as it is very clear that substantial damages cannot be allowed in a case where it appears that the matters charged have not worked any prejudice to the complaining party. Nominal damages may perhaps be allowed, unless some one or more of the defenses are sustained, which remains to be considered.

"First. Evidence to show that the vendor of the complainant ever had a valid copyright of the digest which it is charged the respondents have infringed, is entirely wanting, which is all that need be said upon the subject. Damages cannot be recovered of a party for having used the matters published in a book which was never copyrighted, nor can a suit be maintained against a party for infringement in a case where there is no evidence of copyright introduced by the complainant.

"Second. Sufficient evidence was introduced by the complainant to show that a printed copy of the title-page was deposited in the clerk's office of the district court of the district wherein the author or proprietor of the several volumes of reports mentioned in the bill of complaint, resided, but there was no evidence in the case that such deposit was made before publication, as required by the fourth section of the copyright act.[1] Proof was also introduced sufficient to show that the author or proprietor did deliver, or cause to be delivered, a copy of the said several vol-

[1] 4 Stats. at L. U. S. 437.

umes to the clerk of the said district court, but there is no evidence that the same were in any case delivered within three months from the publication of the book; nor are there any facts or circumstances from which the court can supply by inference the want of direct evidence upon the subject, as there is no evidence whatever when publication was made. Persons claiming that they own the copyright of a book, in a suit for infringement must prove their ownership by competent evidence, else their suit cannot be maintained, as the burden is upon the complainant to prove his title to copyright, as well as to prove infringement. Power is vested in congress to secure to authors and inventors, for a limited time, the exclusive right to their respective writings and discoveries; and congress having exercised that power, authors as well as inventors must comply with the conditions which congress has seen fit to annex to the enjoyment of such exclusive right. Deposit of the printed copy of the title of the book must be made before publication, in the clerk's office of the district court of the district wherein the author or proprietor shall reside; and he (the author or proprietor) must deliver a copy of the book to the clerk of said district court within three months from the publication of the same, else he is not entitled to the benefit of the act. Such are the absolute requirements of the act of congress; nor is it competent for the circuit court to disregard the requirements.[1]

"Third. Suppose it were otherwise, still the court is of the opinion that the complainant is not entitled to recover even nominal damages, as by the statute law of the state the judges of the court, respectively, were the authors of their opinions. Reporters of the de-

[1] Wheaton v. Peters, 8 Pet. 653; Reade v. Conquest, 9 C. B. (N. S.) 755.

cisions of the superior court are appointed by the governor, with the advice of the council; but the second section of the same statute provides that each justice of said court shall prepare for the press, and furnish to the reporter, concise reports of the cases in which the judgment or opinion of the court in matters of law pending at the law terms was pronounced by him, within six months after the same is pronounced (Rev. Stats. 405). Section 5 of the same statute enacts that the said reporter shall edit said reports as early as practicable, provide for the sale thereof by disposing of the copyright, or otherwise, as he may deem expedient, and the direction is that he shall pay into the state treasury the net proceeds, after deducting the reasonable and necessary expenses of publishing and selling. Of course the judges, respectively, prepare the opinions, and the proof is equally full and decisive that they also prepared the head-notes to each of the cases reported in the several volumes of reports in question. Even grant that the copyright is not defective, still it cannot secure to the complainant what he does not own, nor could their vendors convey to them what they never owned. Nemo dat quod non habet. Persons, therefore, who buy from one not the owner acquire no property whatever in the thing purchased, as no one in such a case can convey any better title than he owns, unless the sale is made in market overt, or under circumstances which show that the seller lawfully represented the owner.[1]

"None of the reporters were the authors of the opinions, nor of the head-notes, and, of course, they

[1] Foxley's Case, 5 Coke, 109; 2 Black. Com. 449; 2 Kent. Com. (11th ed.) 224; Marsh v. Keating, 2 Cl. & Fen. 250; Benjamin on Sales, 4; 1 Pars. Con. (5th ed.) 520; Mitchell v. Hawley, 16 Wall. 550.

had no copyright in the same; and it follows that, inasmuch as they had no such copyright in the opinions or head-notes, they could not convey any title to the grantor of the complainant, and that the latter acquired nothing in that regard by virtue of the several conveyances under which he claims.

"Having come to this conclusion, it is not necessary to decide whether the proofs introduced by the complainant show an infringement or not, as it is quite plain that the bill of complaint must be dismissed."

412. The custom, so common among students in the legal profession, of annotating old and reliable law-texts, with reference to later decisions and precedents, often involves a careful discrimination between the proprietary rights of subsequent annotators of received and standard texts. An examination of the rights involved in such preparations was most carefully and thoroughly made in the case of Lawrence v. Dana,[1] which held that where the owner of a copyright

[1] Official Gazette of the United States Patent Office, vol. 7, p. 81.

The case of Lawrence v. Dana, was tried in the U. S. circuit court for the district of Massachusetts, at the May term, 1869, before Judges Clifford and Lowell. The following is the elaborate opinion of Clifford, J.:

Complainant alleges in substance and effect that Catharine Wheaton, deceased, widow of the late Henry Wheaton, in the year 1853, then in full life, requested him to prepare a new edition of "Wheaton's Elements of International Law," and that he, in pursuance of that request, prepared such notes for that purpose as seemed to him fit, and also an appendix and introductory remarks, with a full and careful memoir of the life of the deceased author; that, so far as the edition contained matters not previously published in this country, it was duly copyrighted by the said Catharine as proprietor thereof; that the same was subsequently published by the firm of Little, Brown & Co., and that all the profits arising out of the contract with the publishers were enjoyed by the said Catharine, as the complainant intended they should be when he

in a text, who agreed with the author of certain notes, and additions thereto, to make no use of such notes and additions in any subsequent editions of the undertook to prepare the edition; that he afterwards, in pursuance of a similar request from the same source, prepared other annotations of the same work, which were also copyrighted by the same person, and that they were published in 1863 by the same publishers; that he is advised and believes that the transactions as recited, in respect to those two editions, operated to convey to the said Catharine no other beneficial interest in the said annotations and additions to the work than the right to use the same in those editions; that in fact it was always understood and agreed by and between them that the beneficial interest in the same, except as aforesaid, belonged to the complainant, and that the copyrights were taken out and held in trust by the said Catharine in accordance with that understanding and agreement. Prior to that period the author, as the complainant alleges, had caused four several editions of the work to be published, two at Philadelphia, one at London, and one, in 1848, at Leipzig, in two volumes, by F. A. Brockhaüs, in the French language; that in the edition of 1848 the author inserted and published, both in the text and notes, many new matters never before published by him in the English language; that the author died in 1848; that the French editionwas re-printed by the said Brockhaüs in 1853, and that the complainant in 1860 ascertained that the said Brockhaüs had published another edition of the work in French, without the knowledge or consent of the representatives of the author, and that he contemplated publishing further editions of the same without paying anything to those representatives for copyright; that in view of these circumstances, and at the request of the said Catharine, he commenced negotiations with the said Brockhaüs upon the subject; and he alleges that the result was, that the parties came to an agreement that the complainant should revise and translate his annotations and adapt the same for a work to be sold in Europe, making such additions thereto as should render the work as complete as possible down to the time of publication; that the representatives of the deceased author should give up all claim on the said Brockhaüs in respect to the editions published and to be published; and that in consideration thereof the said Brockhaüs agreed to pay to the said Catharine, if the complainant so directed, the sum of six thousand francs, together with the sum

work, had assigned any claim such owner might have had in the notes and additions, by reason of their attachment to the text, that each subsequent editor of of four hundred and fifty dollars, to be paid to the complainant to defray in part the expenses to be incurred in preparing the translations; that the complainant, before the agreement was completed, stated to the said Catharine or her agent, Martha B. Wheaton, that he would do no more work on any book over which he did not possess exclusive control; that he would only undertake the work required of him in the proposed arrangement on the condition that the entire copyright should be assigned to him; that the said Catharine, manifesting a great desire to retain the legal title to the copyrights of the book, requested him to confer with Professor Parsons in her behalf, in order that some arrangement might be made which should substantially secure to the complainant what he desired, and be at the same time acceptable to the said Catharine; and the complainant alleges that he assented to that proposition, that he had one or more interviews with Mr. Parsons, and made an agreement with him as to the title to the copyrights and other matters, as expressed in the memorandum set forth in the bill of complaint, as follows: "*Memorandum.*—Mr. Lawrence will write to Mr. Brockhaüs in terms to bring to Mrs. Wheaton the right to draw on Mr. Brockhaüs at once for 6,000 francs. He will also endeavor to get from Mr. Brockhaüs as much as he can toward the actual expense of having the translation into French made here, and so much of that expense as he fails to get from Brockhaüs, Mrs. Wheaton will pay from the proceeds of the draft on Brockhaüs. Mrs. Wheaton will, on the paymemt of her draft on Brockhaüs, agree formally to make no use of Mr. Lawrence's notes in a new edition without his written consent, and Mrs. Wheaton will give to Mr. Lawrence the right to make any use he wishes to of his own notes."

That the said Parsons, for the purpose of being more certain that the memorandum would be approved by the said Catnarine, wrote on the same sheet of paper to the respondent, Martha B. Wheaton, that he and the complainant had come to a perfectly amicable result, as expressed generally in the memorandum, and suggested to her that she should make a copy of the same for herself, if the result was satisfactory; and the complainant also alleges that the said Martha afterward, in behalf of her mother and herself, and to signify their approval

the same text, so far as his annotations can be distinguished and separated, has a sole property in them; but that, if they cannot be so distinguished and

of the result, signed the said memorandum, and wrote the date, "June 14, 1863," thereon, and caused the same to be delivered to the complainant. Additions were subsequently made to the agreement, and the terms of it were in some respects varied, as appears by the correspondence between the parties; but the complainant alleges that he is advised and believes that the amendments to the same do not vary any such parts of the same as relate to the copyrights in this country; and he also alleges that the consideration of the agreement of the said Brockhaüs to pay said amount to the said Catharine was the promise of the complainant to furnish new and additional notes for the future editions of the work, as was well known and understood by the parties; that he, the complainant, wrote to said Brockhaüs, as agreed; that the letter was approved by the other parties, and was by the said Martha and Catharine sent to the said Brockhaüs, and that the said Catharine, on the 17th of June, 1863, drew a bill of exchange on him for the amount specified in the memorandum; and that the same, in consequence of said letter and of the promises and undertakings of the complainant, was duly honored and paid.

The theory of the complainant is, and he accordingly alleges, that there was not, on the first day of January, 1865, any valid subsisting copyrights of the editions published, respectively, in 1836 and 1846; that the copyrights of the editions published in 1855 and 1863 secured the exclusive right to the same only so far as those editions differed from the aforesaid antecedent editions; that it was a part of the agreement made through the agency of the said Parsons, that the said Catharine should execute and deliver to the complainant a formal instrument, securing to him all his rights in the premises, of such a nature as to admit of being recorded, as required by the acts of congress relating to copyrights; and he avers that the other respondents had full notice and knowledge of the agreement, and that he, in a court of equity, by virtue of that agreement, is taken and deemed to be the owner and proprietor of the last-mentioned copyrights, in and as to all matters contributed by him as aforesaid; and that, by reason thereof, the respondents are bound not to make any use of any such matters so contributed by him to either of the

separated, he cannot use them without violating the copyright of former editors in their annotations, and that an injunction will lie to restrain such use. The

said editions of the said work. Based upon these and other allegations, as more fully set forth in the record, the claim of the complainant is, that he is in equity the exclusive owner and proprietor of the copyrights for all the matters which he contributed to those two editions; and he charges that the said firm of Little, Brown & Co. procured and induced the said Martha, in her own behalf and that of her mother, to consent and agree that the said publishing firm of Little, Brown & Co. should publish an edition of that work, and procure the same to be edited and notes to be prepared for the same by some person other than the complainant; that thereupon the said firm procured and employed Richard H. Dana, Jr., one of the respondents, to edit the proposed edition, and to prepare the notes as aforesaid; and the complainant further shows that the respondents, without his consent, have caused the proposed edition to be printed, published, and publicly sold. Reference is also made to certain alleged pretenses set up by the respondents; and the complainant prays for an account and for an injunction, and that the respondents may be decreed to surrender and deliver up all copies of the book on hand, and to make and deliver to the complainant a good and sufficient deed of the copyrights of 1855 and 1863, in accordance with his equitable title.

Questions of intrinsic importance and of great difficulty are presented for decision in respect to the title of the complainant, and as they are in their nature preliminary, they will be first considered. Briefly stated, his claim of title, considered broadly, is to the additions to and emendations of the text of two editions as published under his supervision, to the memoir of the author, as contained in those editions, to the annotations prepared by him and published in those editions, and to the arrangement of the same, and the mode in which they are therein combined and connected with the text, and to the indices as published in those editions. He rests his claim upon the following grounds, as substantially stated in the bill of complaint: First, upon a contract or agreement between Catharine Wheaton and himself, that she should make no use of his notes aforesaid in any new edition of the work without his written consent; and that she would convey to him, by a formal instrument, the right to make any use he might see fit to make of his own notes. Secondly, upon the ground

court further held, that the editor of a subsequent edition may not borrow from citations used in the previous ones by the former editor, without infringing that, in the consideration of a court of equity, he is taken and deemed to be the owner and proprietor of the copyrights in and as to all the matters contributed by him and published in those two editions. Evidently both claims, as presented, have respect to the agreement as expressed in the memorandum of June 14, 1863, and the subsequent correspondence upon that subject, as the first is founded in covenant or contract, and the second in an equitable title to the copyright, as derived from the original arrangement and by virtue of the agreement expressed in that written paper. Confirmation of that proposition is not needed, as the language employed in the stating part of the bill of complaint is too plain for controversy; but if it were not so, every vestige of ambiguity is removed by the principal prayers of the bill of complaint, which are for an injunction and an account, and for a good and sufficient deed conveying the legal title to the coprights.

The respondents contend that the complainant is not entitled to any relief, for several reasons:

1. Because the memorandum, as they contend, is not a perfected contract, but merely a note or memorandum of the stipulations of a proposed agreement as to the true understanding and definite terms of which the parties never actually agreed, and on which their minds never in fact met.

2. Because, the parties having failed to agree as to the true understanding of the memorandum and the terms of the formal agreement which it contemplated, the complainant relinquished and abandoned the whole subject-matter of the instrument, and so notified the respondents.

3. They also contend that the agreement cannot be enforced, because the same was procured by fraudulent misrepresentations and concealments of the complainant.

4. That the agreement cannot be enforced, because the memorandum is without consideration.

5. Because the basis of the memorandum and the negotiations which led to it were the supposed legal copyrights held by the said Catharine; and they insist that those copyrights are void, and consequently that the agreement is inoperative, inasmuch as the parties entered into the same through mutual mistake.

6. Because the memorandum containing the agreement does not transfer nor assign any copyright to the complain-

ment of the latter's copyright; nor can he borrow citations of authorities, without remarks or comments, even when prefixed or appended to notes not otherant, or provide for or contemplate any such transfer or assignment.

I. Search is made in vain for any support to the first proposition of the defense, as applied to the terms or execution of the memorandum.

Interviews took place between the complainant and Professor Parsons, and they conferred together upon the subject-matter embraced in that memorandum, as suggested by the said Catharine; and the proofs show that they came to a perfectly amicable result; that the memorandum was drawn by the latter and delivered to the complainant, to be transmitted to the said Martha B., for her examination; and that she afterwards, on behalf of her mother and herself, and to signify their approval, signed the memorandum, and wrote the date thereon, and caused the same to be delivered to the complainant. Expressed in intelligible terms, as the memorandum is, the construction and effect of the language are questions of law, which cannot be controlled or influenced by the opinion of any witness, not even by that of the person employed to prepare the draft for the consideration of the parties. He may not at the time have regarded it as a contract, but they were at liberty to adopt it as such; and if they did so, and it was duly and understandingly executed as such, their rights under it must be ascertained from the language employed, as applied, in view of the surrounding circumstances, to the subject-matter of the negotiation.

They subsequently differed, as the correspondence shows, as to the proper terms of the formal agreement, for which the memorandum provides; but it was not denied, throughout that period, that the said Catharine had agreed "to make no use of Mr. Lawrence's notes in a new edition, without his written consent;" nor that she had also agreed to give him "the right to make any use he wishes of his own notes." Attempt was made, it is true, to ingraft the qualification into the latter branch of the stipulation, that the complainant should not publish in the United States a new edition of the notes and other matter of his own composition, "which he had added to the said two editions of said book, until the last edition is sold;" but it is clear to a demonstration that the agreement, as expressed in the memorandum, contains no such qualification. Properly considered, it is equally clear also that there is

wise objectionable. But the learned judge is not to be understood, of course, as saying, what would be manifestly absurd, that a mere list of cases used by nothing in the correspondence to sustain the theory of the respondents, as presented in their first proposition. "On reflection," said the complainant, in his letter to Mr. Parsons, dated June 14, 1863, "the suggestion you made yesterday offers many advantages over my proposed plan, ... as it settles at once, and forever, all questions in regard to the book." Influenced by those considerations, as he represents, he wrote a second letter of that date, as a substitute, if preferred by the other party, for the one previously prepared, to be forwarded to Mr. Brockhaüs, and submitted it to the approval of Mr. Parsons, as the friend of the said Catharine; but he expressly stated therein that, in sending it, he did not wish to recede from the former arrangement. On the contrary, he stated in the inclosed letter that, having made an arrangement with the said Catharine, which gave him the entire control over his notes as published in English, and any claim she might have to the editions published by his correspondent, he had advised her to the effect that she might draw for the whole six thousand francs. He proposed in that letter to Mr. Parsons, that the said Catharine might retain the copyright to the text, and to relinquish all claim for the expenses of the stipulated translation; but he did not propose to vary the agreement, as expressed in the memorandum, as to his own notes, and he also made claim to the right, if any, that the said Catharine had to the text and notes of the foreign editions.

Full consultation took place between Mr. Parsons and the said Martha, as the agent of the said Catharine; and Mr. Parsons, under date of June 16, 1863, wrote to the complainant that—"1. Mrs. Wheaton will send your last letter to Mr. Brockhaüs, and returns you your former letter. 2. Mrs. Wheaton will draw at once on Mr. Brockhaüs, at twenty days, for 6,000 francs. 3. When Mrs. Wheaton learns that the bill is paid, she will execute instruments satisfactory to you, which shall in the first place bind her not to use your notes without your written consent, and in the next place give you all her claims and interests in respect to the whole book, text and notes, for continental Europe, in future."

Inadvertently Mr. Parsons omitted to restate the second clause of the agreement as expressed in the memorandum, that Mrs. Wheaton would give to the complainant the right to make any use he wished of his own notes; but, his attention

one writer cannot be used by another, who happens to find occasion to illustrate a principle involved in them all. Cases are the materials from which law-books are

having been called to the omission by the complainant on the following day, he replied, on the 19th of the same month, that the complainant was certainly right in his construction of their arrangement, that the complainant under it could make any use he saw fit of the matter which he had contributed. Appended to that letter is a note in the nature of a postscript, dated four days later, in which the writer suggests that Mrs. Wheaton was bound by her contract with Little, Brown & Co., as the publishers of the then current edition of the work, and that she could not convey to him anything covered by her copyright in any way detrimental to that edition; but he proposed no alterations of the agreement, and confirmed the same by his two letters, and none was made or proposed by the parties. Prior to the 31st of August, 1863, the complainant received intelligence that the bill of exchange drawn by the said Catharine had been duly honored, and on that day he wrote to Mr. Parsons, requesting him to cause the agreement of June 14, 1863, to be carried into effect. Delay ensued before any response was received to that request; but when it came, October 17, 1863, it brought with it a draft for the formal agreement, as stipulated in the memorandum. As originally prepared, the draft contained three several stipulations. First, that the said Catharine should retain unimpaired the full legal exclusive copyright in the text of the book. Second, that she should in all ways respect the rights of the complainant to all the notes and other matter of his own composition which he had added to the book, in the same manner and to the same extent as if he had a full legal copyright of the same. Third, that she thereby transferred and assigned to him thereafter the whole title, text, and notes, to the editions published in continental Europe.

Besides these several stipulations, there was interlined in pencil at the close of the second stipulation the words following, to wit: "But the said W. B. Lawrence shall not publish a new edition thereof until the last edition is sold."

Beyond the doubt the draft was prepared without the words in pencil, and the explanations of Mr. Parsons upon the subject are that he probably exhibited the paper after it was drafted to the said Martha B., or to the respondent, Charles C. Little, and that he made the interpolation at their suggestion. Dissatisfied with the draft as prepared, the complainant re-

made; and if the first person using them can acquire a right to their names, the compiling of legal works must cease with the first comer. Take, for example,

turned it to Mr. Parsons. His objections were twofold, as expressed in the letter returning the paper. First, because it made no reference to the "Historie du Droit des Gens;" but, chiefly, on account of the stipulation that he should not publish a new edition until the last edition was sold, which he declared to be wholly inadmissible, as it would lead to new embarrassments. Alterations were subsequently made in the form of the draft, obviating the first objection, and limiting the restriction constituting the second and principal one, so that the complainant might publish a new edition before the last was sold anywhere except in the United States; but he declined to adopt it, insisting that the agreement, as expressed in the memorandum, contained no such stipulation. Determined not to involve himself in new complications, the complainant returned the last draft, as amended, to Mr. Parsons, stating to him at the same time that he had concluded, on reflection, to decline accepting ar · paper from Mrs. Wheaton. He had previously given hi .o understand that no such arrangement could be accepted, and more than intimated that if Mrs. Wheaton did not accede to his views in that behalf, matters must rest as they were in the original agreement. Contention, however, arose by some means between the parties in respect to what was quite unimportant, and what was not probably thought of by them or by Mr. Parsons when the memorandum was framed and executed.

Stipulations for the protection of the contract with the publishers of the prior editions were unnecessary, as their remaining interests, if any, were vested, and, being antecedent to the negotiations between these parties, could not be impaired by the agreement contained in the memorandum, for the reason, as clearly stated by the complainant, that Mrs. Wheaton could not convey what she did not own.

Viewed in any light, the correspondence shows nothing more than that the parties disagreed as to the extent of the obligation imposed by the memorandum, which is a question of construction; but it was never even suggested that it did not contain a complete valid agreement. Conclusive proof that neither Mr. Parsons nor Mrs. Wheaton entertained any such views during that period, is found in the drafts for the formal instrument, as prepared by the former, executed by the latter, and forwarded to the complainant for his acceptance.

the lists of cases published in a digest, for the convenience of law-writers, as well as law-students and practitioners. Now, a digest is invaluable to them

Both were prepared and signed, as therein recited, "in execution of an agreement heretofore made by and between" Mrs. Wheaton and the complainant, which is plenary evidence that up to that time the agreement expressed in the memorandum as to the notes was regarded as complete and obligatory.

II. Abandonment is the next defense to be considered; but the proposition must be examined in view of the conclusion announced, that the stipulations contained in the memorandum, as to the notes contributed by the complainant, are a perfected agreement, and not a mere proposal, as suggested by the respondents. Mere proposals may in general be withdrawn at any time before they are accepted by the party to whom they are made; and ordinary contracts, executory on both sides, may in certain cases be regarded as forfeited, as where the reciprocal stipulations are dependent, and where a party seeking to enforce performance has himself omitted to do something which he was required to perform as a condition precedent to his right of action. Cases may arise also where a party is estopped to set up a particular contract, as where he has subsequently agreed, in due form of law, and for a valuable consideration, to relinquish its benefits, or not to enforce its provisions, or where he has, by his representations and conduct, designedly caused the other party to believe that the contract had been discharged, or that it would not be enforced, and has intentionally induced that party to act on that belief, to his pecuniary prejudice. If the belief so induced is unfounded, the party in fault in such a case is estopped to allege or prove the falsity of his representations, as evidenced by his words and conduct. Pickard v. Sears, 6 Ad. & Ell. 474; Freeman v. Cooke, 2 Exch. 654; Van Rensselaer v. Kearney, 11 How. 326; Hawes v. Marchant, 1 Curt. 144; Moore v. Crofton, 3 Jones & La. T. 446.

Argument to show that the case is not one of forfeiture is unnecessary, as the proposition finds no support whatever in the evidence. Contracts executed on one side and unperformed on the other stand upon a very different principle from those where nothing has been done by either, so far as respects the party who has fulfilled his obligation and paid the stipulated consideration. Rights and obligations secured or imposed under such circumstances have become vested and absolute; and if the delinquent party seeks to avoid the obliga-

both: nay, it is this very universality of usefulness that makes digests valuable at all, or that creates a demand for them. And if every lawyer who printed

tion imposed on him, he must allege and prove a new contract, for a valuable consideration, amounting to a valid release, or that the other party is estopped to enforce the obligation by virtue of some operative binding agreement to relinquish the benefits from the same, or not to enforce the stipulation; or he must allege and prove that he has been deceived and designedly misled by the admissions and representations of the other party, as before explained (Foster v. Dawber, 6 Exch. 854; Edwards v. Chapman, 1 Mees. & Wels. 231; Wildes v. Fessenden, 4 Met. 12; 1 Smith Lea. Cas., 5th Am. ed. 462; Bank of Virginia v. Groves, 12 How. 51). None of the elements of estoppel exist in this branch of the case, as the complainant did not agree that he would discharge the memorandum or that he would not enforce its provisions. Nothing approximating to such an agreement is exhibited in the record, nor do the respondents in fact set up any such defense. What they do set up is that the complainant relinquished and abandoned any agreement in the premises, and so notified the respondents, by which it is understood they refer to the letter of the complainant, addressed to Mr. Parsons, of the 2d of November, 1863, in which he says—"On reflection, I have determined to decline accepting any paper whatever from Mrs. Wheaton, and therefore return the inclosed," meaning the amended draft for the formal agreement. Disconnected from the circumstances and the other correspondence, it might be possible to misunderstand the meaning of the writer of that letter; but it must be construed in view of what preceded it, and of the subject-matter to which it related. Since the 31st of August preceding the date of that letter, the complainant had been more or less engaged in efforts to procure the formal agreement in respect to the notes as stipulated in the memorandum; but all his efforts proved fruitless. Only eight days before, he prepared the draft of the letter exhibited in the record as one intended for the same correspondent, in which he stated to the effect that his sole object in asking for the formal agreement was to prevent any further litigation, saying that he was satisfied that without it he could restrain any attempt to use these notes by Mrs. Wheaton, or any one else, in a future edition; adding, at the same time, that if she "does not sign the paper as now suggested," meaning one of the drafts for the formal agreement, without any restriction as to the use of the notes,

authorities from a digest in his brief, or in his treatise, infringed upon the copyright of the digest-maker, they would be very cautiously employed. But this is

then "matters can rest as they are." Although never sent to his correspondent, the exhibit may well be referred to as tending to show the real intent of the complainant at the time it was written.

Weighed in view of the antecedent correspondence and the surrounding circumstances, it certainly would be a perversion of the language of the complainant to regard what he wrote on that occasion either as an agreement to relinquish or not to enforce that stipulation; and, even when separately considered, the language falls far short of what is necessary to justify any such conclusion. He made no admission by that statement inconsistent with the claim he now sets up; nor did he say anything to induce the said Catharine, or any one of the respondents, so to act that either she or they will be injured if the agreement expressed in the memorandum is held valid and enforced (Howard v. Hudson, 2 El. & Bl. 10; Audenried v. Betteley, 5 Allen, 385; Pierrepont v. Barnard, 2 Seld. 291; Rich v. Atwater, 16 Conn. 416; Plumer v. Lord, 9 Allen, 458). Expressions of a doubtful character are not sufficient to support such a defense as against a contract fully executed on the part of the complainant; but the meaning of the language employed must be clearly such that a man of ordinary prudence would take the representation to be true, and believe that it was meant that he should act upon it; and it must also appear that he did act upon it as true, so that he will be pecuniarily injured if it be allowed to be disproved. Rich v. Atwater, 16 Conn. 415; Mowry v. Sheldon, 2 R. I. 379; Flagg v. Mann, 2 Sum. 516; Langdon v. Doud, 10 Allen, 435; Moore v. Crofton, 3 Jones & La. T. 446.

Estoppels are allowed to shut out the truth only when it is necessary to protect a party setting up such a claim or defense against an injury or liability to which he is exposed without his own fault, and by reason of having trusted to the statements designedly made by the other party to expose him to such injury or liability, and which were of such a character that a man of ordinary prudence would take the representations to be true, and believe it was meant that he should act upon them as presenting the true state of the case. They must be proved, and will not be extended by implication beyond the plain import of the deceptive act, admission, agreement, or representation. When the request was made by the

perhaps an extreme case. An elementary work is valuable only in so far as it is an authority upon a given subject. A digest is valuable only in so far as it

complainant for the formal agreement he doubtless expected that it would include the "Histoire," as well as the notes specified in the memorandum, and perhaps the memoir of the author and the indices; but the better opinion is, that, when he wrote the letter of June 14, 1863, he surrendered all claim to everything mentioned in the antecedent negotiations, except the claim to the notes as already secured, including, of course, the arrangement of the same, and the mode in which they are therein combined and connected with the text. All claim to the copyright of the text was abandoned by the complainant at a very early period of the negotiations, and it does not appear that it was ever after renewed.

Abundant evidence exists in the record to show that Mrs. Wheaton, as well as Mr. Parsons and Miss Wheaton, was willing to concede the claim of the complainant as to the history; but inasmuch as it was not included in the memorandum, the conclusion of the court is, that the complainant, when he elected to stand upon the original agreement, relinquished that claim. He had previously described it as a matter of little or no value; and when he gave notice that he had determined not to accept any paper whatever from Mrs. Wheaton, it must be understood that he was content with what was secured to him in the memorandum. His right to the notes is therein plainly expressed, and there is no evidence in the record which shows that Mrs. Wheaton, or any one of the respondents was ever misled by the language of the letter giving that notice. Conclusive evidence to the contrary is found in the several answers of the respondents, and their subsequent conduct confirms that conclusion.

III. Grant that the memorandum was regarded by the parties thereto as a contract, still the respondents contend that it cannot be enforced, because, as they allege, it was procured by the fraudulent misrepresentations and concealments of the complainant. They submit that general proposition, and under it they make the following specific accusations: First, that when the negotiation as to the notes was commenced there was not, in fact, any understanding between the complainant and Mr. Brockhaüs that the former should perform for the latter any editorial labor, either of revision or of translation. Second, that the foreign publisher was ready at that time to pay the six thousand francs to Mrs. Wheaton, without

disclaims any authority as to any given subject, but groups under the heads of all, or of a certain class of given subjects, reference to every case within a certain

requiring any such labor from the complainant. Third, that the said publisher had not then made a final proposal to the complainant to pay anything to any one in that behalf, as appears by his letters addressed to the complainant. Fourth, that the complainant concealed the contents of those letters from Mrs. Wheaton, and those acting in her behalf. Fifth, that he falsely represented to her and those acting for her that the said publisher would not pay the sum specified, except upon his undertaking to revise his annotations, and make such additions to the same as would adapt them to a new edition to be sold in Europe, and the general charge is that she was induced to assent to the memorandum by reason of those false representations.

Accusations of fraud amount to nothing as a defense to a contract otherwise legal and binding, unless they are satisfactorily proved; and the burden of proof to establish such a defense is upon the party who makes such a charge (Attwood v. Small, 6 Cl. and Fin., 447; 1 Story, Eq. Jur., § 200; Park v. Johnson, 4 Allen, 266; Jennings v. Broughton, 5 De G., M., & G., 132; Campbell v. Fleming, 1 Ad. & Ell., 41). Apart from the inferences attempted to be drawn from the correspondence between the complainant and the foreign publisher, it is scarcely pretended that those accusations find any substantial support in the record; and the court is of the opinion that the several letters, when properly construed and considered in their proper connection, show that every one of the specific suggestions of fraud is unfounded. Correspondence, between the complainant and the foreign publisher, in relation to a new edition of the work for the foreign market, commenced more than three years before the date of the memorandum; and in the first letter written by the complainant, he stated that he did not expect any compensation for his services, but that he should desire to obtain what he could for the widow of the author; and it is a mistake to suppose that the negotiation as to the notes commenced before there was any understanding upon that subject between those parties. Enough certainly had been learned to satisfy any reasonable person that the arrangement could be made if desired, and that was sufficient to justify the complainant in ascertaining what would be conceded as to the notes. Equally unfounded also is the charge that Mr. Brockhaüs was ready at that time,

range, or scope, or period, which in any way affects all subjects in common. Text-books are valuable, if at all, as authority upon the subjects of which they treat.

or at any time before or afterwards, to pay the six thousand francs without any stipulation from the complainant to revise the notes and superintend their publication. His letter of the 29th of April, 1863, is a complete refutation of both those charges, and shows to a demonstration that the services to be rendered by the complainant really constituted the chief inducement to the arrangement. Convinced that the "rich emendations" made to the work by the complainant would, if adapted to his proposed new edition, be of great value, he was desirous to secure his services to accomplish that object, and in order to do that, he was willing to pay the described amount. By his letter of June 12, 1860, Mr. Brockhaüs called for a definite proposal; and the complainant, in his letter of August 25, 1862, complied with that request, and made the proposal, which, with slight modifications, was subsequently accepted; but whether before or after the commencement of the negotiations as to the notes, is wholly immaterial. The charge that the letter of the 29th of April, 1863, or any of the others, was concealed from Mrs. Wheaton, or those acting in her behalf, is disproved by the correspondence from which the inference is attempted to be drawn. Taken as a whole, the correspondence satisfies the court that the foreign publisher never did agree to pay the six thousand francs, except upon the undertaking of the complainant to revise his annotations and to adapt the same to the proposed new edition for the foreign market, and that the respondents have failed to prove that the complainant was guilty of any fraudulent misrepresentations or concealment.

IV. Extended argument to show that the fourth proposition of the respondents cannot be sustained, is unnecessary, as it finds no support in the evidence. Founded as the proposition is upon the theory that the foreign publisher was willing to pay the money for antecedent obligations, or as a gratuity to the family of the author, it is sufficient answer to it to refer to what is said in response to the preceding proposition, without entering into details.

V. The next proposition of the respondents is that the copyrights of the editions of 1855 and 1863 are void, and consequently that the agreement expressed in the memorandum is inoperative, inasmuch as the parties entered into the same through mutual mistake. They insist that the copyrights are

A digest is valuable, if at all, only as an index to the material of which the text-books are composed. The only copyright possessed by a digest-maker is in the

void for several reasons, which will be separately considered: First, because no written assignment of copyright, or of the inchoate right of the complainant thereto, as the author, was ever made to Mrs. Wheaton. Second, because the "notice of copyright inserted in the several copies published of said editions" is defective "in the omission to give notice in said editions of the copyright secured in the" original edition of the work. Third, because, upon the facts alleged and proved by the complainant, the copyrights of the editions in question were not taken out by the proper person nor in the proper district.

Copyright may be granted, under the copyright act, to the author of any book falling within the classes described in the first section of the act, if the author is a citizen of the United States, or permanently resident therein; and the first section also provides that such author shall have "the sole right and liberty of printing, reprinting, publishing, and vending such book," for the term of twenty-eight years from the time of recording the title of the same, as therein required. Executors, administrators, and legal assigns of the author are also included in the purview of the section; but the fourth section provides that no person shall be entitled to the benefit of the act unless he shall, before publication, deposit a printed copy of the title of such book in the clerk's office of the district court of the district where the author or proprietor shall reside; and the provision is that the clerk of such court shall record such printed copy forthwith in a book to be kept for that purpose, and in the form therein prescribed (4 Stat. at Large, 437). Where the author continues to be the owner he is entitled to a copy of the title; but if he has parted with the ownership, the requirement is that the clerk of such district shall give a copy of the title, under the seal of the court, to the proprietor (Ibid. 437). Proprietors of any such book, though not authors, are also recognized as entitled to the benefits of the act in another provision of the fourth section, in which they are required, within three months from the publication of said book, to deliver, or cause to be delivered, a copy of the same to the clerk of the said district. Legal proprietors, though not authors, may also recover of persons who print or publish any manuscript, the property of which is in them, without their consent, all damages occasioned by such

originality displayed in his grouping of his authorities, and in his statement of the point or points involved in each particular case. He is working in matter not

injury. Stevens v. Gladding, 17 How. 447. See, also, 4 Stat. at Large, 437, 439, §§ 6, 15.

Left in moderate circumstances, Mrs. Wheaton very properly desired to obtain something from the literary publications of her late husband, and with that view she sought the advice of the complainant, as the intimate friend of the author and of his family. Consultations accordingly took place between them upon the subject. Suggestion was first made that his reports of the decisions of the supreme court might be republished; but their attention was soon directed to a new edition of the "Elements of International Law," as affording more promise of profit beyond mere remuneration. Editorial labors were necessary to such an undertaking, and the complainant tendered his services, and the same were gladly accepted by Mrs. Wheaton and her children.

Pursuant to that arrangement, the complainant edited in succession the two editions in question—that is, he made some additions to and emendations of the text, prepared the notes, composed the memoir, and made the indices. Alterations were made in the arrangement as first concluded; but it is unnecessary to enter into details, as the proofs are clear that the complainant acted throughout that entire period with the distinct understanding that his services in editing those editions were to be gratuitous and without any charge. Speaking of the first annotated edition, the agreement was distinct that the contributions were to be furnished without charge, and the edition of 1863 was prepared with the same explicit understanding between the parties. Although the services were gratuitous, the contributions of the complainant became the property of the proprietor of the book, as the work was done just as effectually as they would if the complainant had been paid daily an agreed price for his labor. He gave the contributions to the proprietor for those two editions of the work, and the title to the same vested in the proprietor, as the work was done, to the extent of the gift, and subject to the trust in favor of the donor, as necessarily implied by the terms of the arrangement (Sweet v. Benning, 16 C. B. 480; Mayhew v. Maxwell, 1 Johns. & H. 315). Delivery was made as the work was done, and the proprietor of the book needed no other muniment of title than what was acquired when the agreement was executed (Sweet v. Cater, 11 Sim. 572; Simms v. Marryat,

only publici juris, as does the compiler of a work on mathematics or astronomy or the languages, but with matter which, besides being publici juris, is actually

7 Eng. L. & Eq. 337; Woods v. Russell, 5 Barn. & Ald. 942; Atkinson v. Bell, 8 Barn. & Cress. 277). Vested as the title and property of the contributions were in Mrs. Wheaton, she would not acquire anything by an assignment from the contributor, as he had neither the immediate title to the contributions nor any inchoate right of copyright in those editions. He could not assign anything, because he owned nothing in præsenti, as the title to his contributions, and the inchoate right of copyright for those editions had become vested in Mrs. Wheaton as proprietor of the book (Clarke v. Spence, 4 Ad. & Ell. 448; Laidler v. Burlinson, 2 Mees. & Wels. 602). Guided by these views, the court is of the opinion that none of the authorities cited by the respondents to show that a written assignment from the complainant to Mrs. Wheaton was necessary have any proper application to the question under consideration, because the complainant never acquired any right to demand a copyright in his contributions to those two editions, but the contributions as they were made and composed, or put in form, became vested in the proprietor (Shepherd et al. v. Conquest, 17 C. B. 443, 444; Chitty on Con. 10th Am. ed. 401; Tonson v. Walker, 3 Swanst. 672). Certain remarks are found in the opinion of the court in the case of Pierpont v. Fowle, 2 W. & M. 46, apparently inconsistent with the views here expressed; but the decision of the court in that case is a sufficient answer to those remarks. Contrary views, it is sometimes supposed, are also expressed in the case of Atwill v. Ferrett, 2 Blatch. 46; but the learned judge admits that an equitable title may vest in one person to the labors of another where the relations of the parties are such that the former is entitled to an assignment of the production, which is the precise point involved in the case before the court; and many other authorities than those cited in that case sustain the same principle. Sweet v. Shaw, 3 Jurist, 217; Colburn v. Duncomb, 9 Sim. 155; Little v. Gould, 2 Blatch. 362; Sweet v. Cater, 11 Sim. 572; Mawman v. Tegg, 2 Russ. 385; Nicol v. Stockdale, 3 Swanst. 687; Cary v. Longman, 3 Esp. R. 273.

Second defect in the copyright, as alleged in argument by the respondent, "consists in the omission to give notice in said editions of the copyright secured in the original edition." Persons desirous of securing a copyright must comply with

the property, by right of purchase, of the People. He has a right, indeed, to claim the language in which he states the law which the people have pronounced

the conditions of the copyright act, and if they fail to do so they are not entitled to the benefit of its provisions. Authorities to support that proposition are not necessary, as those conditions are prescribed by an act of Congress. Deposit must be made before publication, if the subject-matter is a book, of a copy of such book in the clerk's office of the district court, as before explained; and the applicant must give information of copyright being secured, by causing to be inserted, in the several copies of each and every edition published during the term secured, on the title-page or the page succeeding, the following words, viz.: "Entered according to act of Congress in the year ——— by A. B., in the clerk's office of the district court of ———" (as the case may be). Beyond doubt, the omission to comply with those requirements renders the copyright invalid, as the act provides that no person shall be entitled to the benefit of the act unless he fulfills those conditions; but the important inquiry arises, What are those conditions? (Wheaton v. Peters, 8 Pet. 591; Ewer v. Coxe, 4 Wash. 487). Full compliance with the conditions prescribed in the fourth section of the act is conceded; but the theory of the respondents is that the fifth section of the act requires that the same notice in totidem verbis must be inserted in the several copies of each and every edition published during the term secured, so that the second and every subsequent edition shall correctly specify the date of the original entry. They cite no authorities which support the proposition, and they assign no reasons in support of it, except that the act makes no provision for a change of the date in the successive notices to be given, and that the omission to give notice of the original copyright in subsequent editions tends to mislead the public. Acts of Congress are to be construed by the rules of the common law, and the construction should be such as will carry into effect the true intent and meaning of the legislature; but the province of construction can never extend beyond the language employed as applied to the subject-matter and the surrounding circumstances (Rice v. Railroad, 1 Black, 359; Binney v. Canal Co., 8 Pet. 201). Change of date in the notice required in case of successive editions of the same book, it may be conceded, is not contemplated by the fifth section of the copyright act; but the meaning of the provisions that a new notice in the same prescribed form shall be given in

through their mouthpieces, the courts. He has a right to group, systematize, and arrange that law under any headings, or topics, or principles that he thinks fit

every improved edition published during the term. Compliance with that requirement, when the original edition is published, is a full protection for that edition throughout the term; but it is no protection to a second edition with notes, nor to any succeeding edition with improvements, because the requirement is that the "information of copyright secured" shall be "inserted in the several copies of each and every edition." Neglect to comply with that condition in a second edition will not vitiate the copyright of the original edition if it was regularly secured, nor will a valid copyright of a second edition cure material defects in the copyright of the original edition. Copyrights of the editions of a work other than the original edition are granted for additions to, emendations of, or improvements in the work, and every copyright should bear date of the day when it was secured. Authors or proprietors of a book for which a copyright is secured are required by the second section of the act of the 3rd of March, 1865, "within one month of the date of publication" to transmit, free of postage or other expense, a printed copy of the book to the library of congress at Washington, for the use of said library; and the fourth section provides that, in the construction of that act the word "book" shall be construed to mean every volume and part of a volume, together with all maps, prints, or other engravings belonging thereto, and shall include a copy of any second or subsequent edition which shall be published with any additions; but the proviso enacts that the author or proprietor shall not be required to deliver to the said library any copy of the second or any subsequent edition of any book, unless the same shall contain additions as aforesaid, nor of any book not the subject of copyright (13 Statutes at Large, 540). Prior to the passage of that act, the courts had decided that the "information of copyright being secured," if duly entered in the first volume of a work of several volumes, was sufficient; but all the residue of the provision is merely in affirmance of the true intent and meaning of the copyright act (Dwight v. Appleton, 1 N. Y. Leg. Obs. 198). Subsequent editions without alterations or additions should have the same entry, because they find their only protection in the original copyright; but second or subsequent editions, with notes or other improvements, are new books within the meaning of the copyright act, and the authors or

(that is, unless the arrangement be so simple or ordinary as to involve no invention or ingenuity; as, for instance, an alphabetical arrangement, or an proprietors of the same are required to "deposit a printed copy of such book," and "give information of copyright being secured," as if no prior edition of the work had ever been published; and the term of the copyright as to the notes or improvements is computed from the time of recording the title thereof, and not from the time of recording the title of the original work. Copyrights, like letters-patent, afford no protection to what was not in existence at the time when they were granted. Improvements in an invention not made when the original letters-patent were issued are not protected by the letters-patent, nor are the improvements in a book not made or composed when the printed copy of the book was deposited and the title thereof recorded as required in the fourth section of the copyright act. Protection is afforded by virtue of a copyright of a book, if duly granted, to all the matter which the book contained when the printed copy of the same was deposited in the office of the clerk of the district court, as required by the fourth section of the copyright act; but new matter made or composed afterward requires a new copyright, and if none is taken out, the matter becomes public property, just as the original book would have become if a copyright for it had never been secured Publishers may be in the habit of inserting more than one notice in new editions, but there is no act of congress prescribing any such condition. Whenever a renewal is obtained under the second section of the copyright act, the requirement is that the title of the work so secured shall be a second time recorded, and that the applicant must comply with all the other regulations in regard to original copyrights; but there is nothing in any act of congress to show that each successive edition must specify the date of the original copyright, as contended by the respondents. Tendency to mislead the public cannot be successfully predicated of a copyright in due form of law, where it appears that the party who secured it complied with all the conditions prescribed in the copyright act, which is all that need be remarked in reply to the suggestion of the respondents upon that subject.

Special examination of the third objection made by the respondents to the copyrights in question, is unnecessary, as it is clear that if the property and title of the matter contributed by the complainant vested in Mrs. Wheaton as the work

arrangement by states, or by years or by other familiar divisions of time). But if he go further, and claim a right to the mere titles of cases cited by him, his claim

was done, she was the proper person to take out the copyright; and it is not controverted that, if she was the proper person, she took it out in the proper district.

Based as the objections to the validity of the copyrights are upon an assumed construction of the fifth section of the copyright act, the court thought it right to examine the several questions presented upon their merits; but it would be a sufficient answer to the entire proposition to say that no such defense is set up in the answer (Foster v. Goddard, 1 Black, 518). Other answers are made by the complainant to the proposition; but the court having come to the conclusion that it is founded in a misconstruction of the copyright act, do not find it necessary to give the other suggestions much consideration. Stated in brief words the conclusions of the court are that the copyrights are valid, and that the agreement set forth in the memorandum is binding.

VI. Unexecuted. however, as the agreement is, it does not transfer nor assign the copyrights in question to the complainant. Both parties agree to that proposition; but the respondents err in supposing that the agreement does not provide for nor contemplate any such transfer or assignment, as is plainly shown by the very terms of the memorandum. Copyright of a book, when taken out in due form, secures to the author or proprietor the sole right and liberty of printing, reprinting, publishing, and vending such book during the term for which it is granted; but it secures nothing more; and the agreement was that Mrs. Wheaton, who held the legal title of the copyrights, should make no use of the notes in a new edition without the written consent of the complainant, and that she would give him the right to make any use of the same he might see fit, which was in all respects equivalent to a contract to transfer and assign to him the legal title to the copyrights. Equity would have compelled the execution of the formal instrument therein stipulated if the right to demand it had not been waived by the complainant. His claim as now presented is twofold, and in the judgment of the court it may be sustained upon both grounds (Curtis on C., 315; Mawman v. Tegg, 2 Russ., 385; Sweet v. Shaw, 3 Jurist, 217; Colburn v. Duncombe, 9 Sim., 155). The legal title to the copyrights is in Mrs. Wheaton or her legal representative, and the complainant claims in the first place that the same is held in trust

will be construed very strictly, as against the right of the people, and of the very persons for whom his work is printed, and from whom it derives its support.

for him as the equitable owner of the notes by virtue of the original arrangement under which the same were prepared. Secondly, the complainant claims that the negative as well as the affirmative promise contained in the agreement in regard to the use of the notes was binding upon Mrs. Wheaton, and that both are obligatory upon her legal representative, and all others having notice of the existence of those covenants (Barfield v. Kelly, 4 Russ., 355).

Two principal objections are taken by the respondents to the claim of the complainant that he is the equitable owner of the notes under the original arrangement. First, they deny that the proofs in the case warrant any such finding, especially as the theory is denied in the answer. Second, they contend that Mrs. Wheaton, if such was the agreement, could not legally copyright the notes, as it would show that she was but a mere licensee, and that the copyrights in that state of the case would be void on that account.

First, conclusive proof to show what was the original understanding between the parties is found in the correspondence upon the subject. Unaided by any one, the complainant prepared the notes, but with the express understanding that he would do so without any charge, and that the property of the same, so far as respected the new edition, should vest in the proprietor of the book, and that she should take out the copyright and remain, as she was, the sole and exclusive owner of the entire book. Liberal, however, as the agreement was toward the proprietor of the book, yet it did not include anything except that edition; and when the second annotated edition was prepared under a similar arrangement, as conceded by both parties, the agreement was not extended beyond that publication. Confirmation of those propositions is unnecessary, as they are not controverted by the respondents. They deny that it was agreed between the parties that the notes should ever afterward become the property of the complainant, but they do not allege, nor offer any proof tending to show, that his agreement with Mrs. Wheaton extended beyond the annotated editions. Tested by these indubitable facts, the rights of the parties are plain, and easy to be understood. As the proprietor of the book, Mrs. Wheaton, by virtue of that arrangement, became the absolute owner of the notes as they were prepared, so far as respects the editions in ques-

413. It is to be observed that the case of Lawrence v. Dana was a case involving the construction of a contract, and did not proceed solely and entirely upon the principles governing piracy.

tion; and she also acquired therewith the right to copyright the same for the protection of the property; but she did not acquire thereby any right or title, legal or equitable, to use the notes in a third edition of the annotated work without the consent of the complainant. Proof to support any such right or title is entirely wanting in the record, and no such right or title is set up in the answer (Sweet v. Cater, 11 Sim. 572). Such omission confirms the view that no such right or title was intended to be conveyed, and the subsequent conduct of the parties in executing the memorandum tends strongly to the same conclusion.

Second: suppose the facts to be so, then the respondents contend that the copyrights are void, because, as they insist, the applicant for the same was a mere licensee of the author of the notes; but the court is of a different opinion, for the reasons already given, as well as for others yet to be mentioned. Literary property, even when secured by copyright, differs in many aspects from property in personal chattels, and the tenure of the property is governed by somewhat different rules; but the difference in the nature and tenure of the property is much greater before copyright is taken out, and while the right to that protection for the same remains entirely inchoate. Title to the notes or improvements prepared for a new edition of a book previously copyrighted may, in certain cases, be acquired by the proprietor of a book from an employé, by virtue of the contract of employment, without any written assignment; and, when so acquired, the tenure of the property depends upon the terms of the contract, but it cannot be held to be a mere license where, as in this case, the contract was that the proprietor of the book should take the exclusive right to the contributions for two successive editions, together with the right to copyright the same for the protection of the property, as the inchoate right of copyright unquestionably passed to the proprietor of the book by the same arrangement (Agawam Co. v. Jordan, 7 Wall. 603; Fletcher v. Morey, 2 Story, 564). Such inchoate right is incapable of any other limitation than that prescribed by the copyright act, so that the proprietor of the book necessarily took out the copyright in the usual form. Beyond controversy, she took it out by

The principle upon which an injunction against the publication of a work is granted, is that it interferes with the rightful value of a preceding work. But the consent of the complainant; and it is equally clear, in the judgment of the court, that she took it out for the protection of her own property in the notes, and in trust for the complainant when her property in the notes should cease (Mawman v. Tegg, 2 Russ. 385; Little v. Gould, 2 Blatch. 365). Arrangements of the kind, it is believed, are frequently made between the proprietors of books and editors employed to prepare notes or other improvements to successive editions; and it is not perceived that there is any legal difficulty in upholding such a contract where, as in this case, it violates the rights of no one, and is entirely consistent with the public right (Fletcher et al. v. Morey, 2 Story, 566). Entered into as it was in good faith, and with a full knowledge of all the facts, it was not void; and neither the representative of the proprietor of the book, nor any other person having notice of the same, is at liberty to repudiate it, as it appears it was knowingly acted upon in a way that the complainant would suffer serious pecuniary injury to allow it to be disproved (Farina v. Silverlock, 39 Eng. L. & Eq. 516; Eicolt v. Bannister, 17 C. B. (N. S.) 708; Sherman v. Champlain Co., 31 Vt. 175; Cairncross v. Lorimer, 3 Law Times, 130).

Covenant is the second ground of claim, as set forth in the bill of complainant, and it is undoubtedly true, as contended by the respondents, that the theory of the claim as presented in allegation and in proof is that the legal title to the copyrights vested in the proprietor of the book. The respondents in argument deny that proposition, and insist that the copyrights are void; but the objections they make to their validity have already been examined and overruled, and the reasons assigned for the conclusions need not be repeated. Expressed as the promises are. both the negative and affirmative, in plain and unambiguous language, they require neither construction nor explanation; and it is clear that they are binding upon the legal representative of the proprietor of the book, and all others having notice of the rights of the complainant (Colby v. Dunconibe, 9 Sim. 155). Mrs. Wheaton died March 5, 1866, leaving two children; but it is alleged and conceded that the respondent, Martha B. Wheaton, is the administratrix of her estate, and so far as respects the book in question her sole heir. Controlled by these reasons, the court is of the opinion that the complainant, in the view of a court of equity, is the

the value of an elementary work depends upon its exposition of principles, without which the most extended list of cases is valueless, and could not suffer

equitable owner of the notes, including the arrangement of the same, and the mode in which they are therein combined and connected with the text, and of the copyrights taken out by the proprietor of the book for the protection of the property, including the equitable ownership of the complainant (Fletcher v. Morey, 2 Story, 564; Parker v. Muggridge, 2 Id. 342; Clark v. Southwick, 1 Curt. 299; Rerick v. Kern, 14 S. & R. 271; Simms v. Marryat, 7 Eng. L. & Eq. 337; Curt. on C. 315; Mayhew v. Maxwell, 1 Johns. & Hem. 345).

Grant that the several conclusions announced by the court are correct, still the respondents insist that the complainant is not entitled to a decree, because they contend that they have not infringed the equitable right of the complainant to the exclusive use of the notes in question, nor violated the terms of the agreement as expressed in the memorandum.

Before proceeding to examine the question of infringement, it will be necessary to reproduce, as concisely as possible, some of the principal issues upon the subject as presented in the pleadings.

Statement of the complainant is that, prior to the last edition annotated by him, there was no book of international law in which all the authorities bearing upon the different questions discussed or referred to in the original work of the author, or in his antecedent annotations, were collected and presented in a convenient form for reference. Such authorities as he represents consisted of judicial decisions, diplomatic discussions by distinguished diplomatists, and dissertations, treatises, and lectures of learned publicists and writers upon the law of nations; that he undertook to collect and present, and by a considerable amount of labor and intellectual exertion did collect and present, in his notes and in a convenient form, with reference to each question so discussed, the discussions and opinions as aforesaid, translating such as were in any foreign language, and giving them in full where they seemed sufficiently important to be so presented, and in other cases referring to them giving the name of the book and the page where the passage could be found; that many of the authorities so collected, and particularly those relating to diplomatic discussions and negotiations, and those showing the way in which cases involving principles of international law have arisen between different nations and been determined,

from the appearance of the names of the same cases, even if repeated in the same order, in another elementary work, while the value of a digest depends

are to be found in newspapers, gazettes, legislative debates, the series of books such as the Annual Register and others named or referred to in the bill of complaint, not treatises on international law; that there is no book which can serve as an index or digest to assist an author in any material respect in collecting such authorities; that the number of books and papers of that nature examined by him in searching for the authorities and matters cited by him is so great that it is only possible to make such collection by devoting much attention to the subject for many years, and by making and preserving memoranda of such matters bearing upon the subject as from time to time they come to the knowledge of a person giving large share of his attention to such matters, and reading all such books as relate to the subject, and availing himself of much intercourse with persons conversant with such matters. Corresponding statement of the respondent is that the plan of work he adopted was to take the text of the author of the book with his notes and annotate the same with original notes of his own, in the same manner as if they had never before been annotated; that it was no part of his plan to revise, reduce, or alter the complainant's notes, even in such manner as the law of copyright would have permitted if the complainant had had a copyright therein; but that his course was after reading a topic in the text, if he thought it required annotation, to examine all the works to which he had access bearing upon the topic, and, among others, but not more or differently than others, the contributions of the complainant. When he had made all the examination he thought necessary, the allegation is that he then gave the subject the best reflection he could, and subsequently wrote out a new and original note in every instance, in manuscript throughout, in his own hand or that of an amanuensis, and without other reference to, or assistance from, any notes of the complainant than as above stated.

The complainant also alleges that in preparing the text of his edition he exercised a considerable amount of skill and judgment in the arrangement of his annotations, and in combining and connecting them with the text, and that he prepared a complete index to the same; and he charges that the respondents, in their book, have copied, conformed to, and pirated the said annotated book and the annotations of the

upon its list of cases upon all subjects, together with its statement of the points as to which each case may furnish light or illustration, and could not suffer from

same, which he prepared; and that they have used and availed themselves of the said book and annotations and the said labors of the complainant. Responsive to the charge that his notes are in a great part taken and copied from those of the complainant, and that he has pirated and unduly used the contributions of the complainant, the respondent totally denies the same and every part thereof. Evidence to show that the notes in the two annotated editions of Wheaton's Elements of International Law, as prepared by the complainant, involved great research and labor beyond what appears in those two works, is unnecessary, especially as the allegations in the bill of complaint to that effect are not directly denied in the answer; and it is equally obvious and clear that the results of the research and labor there exhibited could not well have accomplished by any person other than one of great learning, reading, and experience in such studies and investigations. Such a comprehensive collection of authorities, explanations, and well-considered suggestions is nowhere, in the judgment of the court, to be found in our language, unless it be in the text and notes of the author of the original work. Uncontradicted as these propositions are, it would be an act of supererogation to add anything further in their support. Much, also, has been accomplished by the last editor of the work in the same direction, and in the collection and presentation of similar matters wholly distinct and separate from what was antecedently collected and presented by the complainant. But the review and comparison of the merits of the respective books are not matters within the province of the court, except so far as the same become necessary, in order to decide the issues involved in the pleadings. Stripped of all mere form, the charge against the respondent is that he has infringed the rights of the complainant; and that question is the only one of much importance which remains to be considered. Apart *from the testimony of the parties themselves*, and *the com*parison of the books, the evidence in the case consists mainly of the testimony of the two experts, and the result of the respective comparisons made by them, of the notes and citations of authorities contained in one of the books with those of a corresponding character contained in the other, together with the opinion of each expert witness, whether the several notes and citations so examined and compared are or are not of the

the copying of its list of cases upon a single topic, or from anything less than a borrowing of the whole work, or of such a large or important portion or

same character. Though admissible in all such cases, the opinions of experts are nevertheless in their nature secondary evidence; but the comparisons made by them in this case have very much facilitated the investigations made by the court. Considerable aid has been derived from that source, and from the testimony of the parties; but the court has found it necessary to re-examine the comparisons made by the witnesses, and to make others for themselves, in order to come to a satisfactory conclusion. Regarded as a basis to enable the court to compare one book with the other, the results given by the experts as exhibited in their depositions, have proved to be of great service to the court in estimating the weight to be given to their respective opinions. Complicated as the facts are, the examination of the case has imposed much labor upon the judges; but the investigation has been made with care, and continued from time to time until both are satisfied that the court is prepared to render a just decision. Like other controversies of a similar character, the issue upon the merits presents two questions, one of fact and the other of law. Stated in brief terms, the question of fact is, What use did the respondents who edited the edition in question make of the complainant's notes? And the question of law presented, inasmuch as it is conceded that he used the same to some extent, is, Was that use allowable, or was it of a character and to such an extent that it infringed the complainant's rights? Direct evidence upon the subject is unattainable, as the respondent states that he cannot remember nor undertake to give the authors from whom he derived any particular class of citations. Difficult though it be to make proof, still the complainant is not entitled to any decree unless he proves infringement, as alleged, to the satisfaction of the court, as the burden in that issue is always upon the party making the charge. Except that the burden is upon the complainant, the same difficulty is experienced by the respondents in their efforts to prove the affirmative allegations of the answer, and consequently both parties are obliged to rely chiefly upon a comparison of the contents of the respective books, as the best evidence which either party is able to produce. Examination of the notes contained in the respective books will show that the description given of them by one of the respondents' witnesses is quite accurate. He states to the effect that they

feature thereof, as to render the borrowed work a substitute for the work itself.

Except in reference to the somewhat delicate ques-

are either statements of historical events, accounts of legislative debates, narratives of diplomatic discussions, negotiations, or correspondence, abstracts of cases in the courts or judicial tribunals of different countries, or summaries of other text-writers or essayists on international law and other kindred topics, accompanied with references to the books and documents where the matters are to be found. Such authorities and references of the kind mentioned are very numerous in the edition containing the notes of the complainant, and he contends that the respondent has made a much larger use of such notes, references, and authorities, including those collected and presented by him to illustrate particular topics of international law, than the law of copyright or the agreement between him and Mrs. Wheaton, as expressed in the memorandum will permit. Numerous instances are given where the same topics are illustrated in the two works by reference to the same historical facts or diplomatic negotiations, and where the views expressed are supported by the citation of the same books, pamphlets, debates, and newspapers; and the complainant contends that these coincidences occur in instances so numerous that it is past belief that they could be accidental; and he insists that the just inferences to be drawn from these coincidences, when taken in connection with the admission of the respondent that he did make some use of the complainant's book for the purposes of reference, fully sustain the burden of proof on his part, and justify the conclusion that, in each particular instance in which the citations and authorities are the same, they were in fact taken from his book, unless the respondent can explain these coincidences, or show that the citations and authorities were derived from some other quarter. Weighed as required by the rules of circumstantial evidence, the complainant contends that these coincidences of fact, as exhibited in the two books, are not only consistent with the charge of infringement, but that they, taken as a whole, are absolutely inconsistent with any other theory, which is the test usually applied in cases where proof is required beyond any reasonable doubt. Great latitude is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required in the administration of justice; and whenever the necessity for a resort to such evidence arises either from the

tion of the paramount right of the State to its common law, the infringement upon copyrights of legal works becomes a question of ordinary piracy of literary

nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy, even in common-law suits, are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially if corroborated by moral coincidences, be sufficient to constitute full and conclusive proof (Castle et al. v. Ballard, 23 How., 187; 1 Stark Ev., 58, 862).

Instances quite numerous are also given where clerical and typographical errors and peculiarities, including special translations, are reproduced in the edition prepared by the respondent; and the court is reminded in argument that cases have arisen where the strongest proof of copying consisted "in the coincidence of errors" (Jeremy, Eq. Jurisd., 322). W re the question is whether the defendant, in preparing his book, had before him and copied or imitated the book of the plaintiff, it is manifest, says Mr. Curtis, that this kind of evidence is the strongest proof, short of direct evidence, of which the fact is capable (Curtis on C., 255; Murray v. Bogue, 1 Drewry, 367; Spiers v. Brown, 6 W. R., 353). Other authorities may be cited where the presumptions arising from the identity of inaccuracies is carried much further, and where it is held that when a considerable number of passages are proved to have been copied by the copying of the blunders in them, other passages which are the same with passages in the original book must be presumed prima facie to be likewise copied, though no blunders occur in them (Mawman v. Tegg, 2 Russ., 394; Longman v. Winchester, 16 Ves. Jr., 269).

Coincidence of citation is also invoked by the complainant as evidence of copying; and the instances given as examples are many where the authorities are cited in the same way—that is, by volume and page, or by chapter and section, as the case may be, and from the same edition of the work, and from the same place.

Identity in the plan and arrangement of the notes, and in the mode of combining and connecting the same with the text, is also invoked by the complainant, as strongly supporting the charge of infringement; and it is quite apparent, on a comparison of the two books, that the instances of identity in that

matter, such as will be found treated of in the chapter upon that subject.

respect are numerous and pervading. Copyright may justly be claimed by an author of a book who has taken existing materials from sources common to all writers, and arranged and combined them in a new form, and given them an application unknown before, for the reason that in so doing he has exercised skill and discretion in making the selections, arrangement, and combination, and having presented something that is new and useful, he is entitled to the exclusive enjoyment of his improvement, as provided in the copyright act (Gray v. Russell, 1 Story, 11; Lewis v. Fullarton, 2 Beav., 6; Greene v. Bishop, 1 Cliff, 199; Emerson v. Davies, 3 Story, 758; Story v. Holcombe, 4 McLean, 309). Books "made and composed" in that manner are the proper subjects of copyright; and the author of such a book has as much right in his plan, arrangement, and combination of the materials collected and presented, as he has in his thoughts, sentiments, reflections, and opinions, or in the modes in which they are therein expressed and illustrated; but he cannot prevent others from using the old material for a different purpose. All he acquires by virtue of the copyright is "the sole right and liberty of printing, reprinting, publishing, and vending such book" for the period prescribed by law. Others may use the old materials for a different purpose, but they cannot copy and use his improvement, which includes his plan, arrangement, and combination of the materials, as well as the materials themselves, of which the book is made and composed (Emerson v. Davies, 3 Story, 768; Curtis on C., 180; Gray v. Russell, 1 Story, 17).

But the respondent contends that, even if it be true that matters of fact, citations, and authorities have been borrowed to a considerable extent, he had a right to take them, as the use he made of them was substantially new, and different from that made by the complainant in the two prior annotated editions of the work, because they were used by him in illustrations of new and original propositions. Secondly, he contends that the complainant is not entitled to any decree on account of any use he has made of the matters of fact, citations, and authorities exhibited in those editions, because, as he insists, the use he so made amounts to no more than a fair and original abridgment of the former editions. The doctrine of new and different use in the law of copyright applies more particularly to the old materials and not to the materials of a work like

that of the last annotated edition of the complainant, where the materials collected are much abridged, and sometimes paraphrased and newly arranged, and combined with the text of the original work. Beyond all doubt he might take the old materials as found in the sources from which the matters of fact, citations, and authorities of the complainant were drawn, and use them as he pleased in illustration of new and original propositions, or for any other purpose not substantially the same as that to which they are applied in the annotated editions edited by the complainant; but he could not borrow the materials as therein collected and furnished, nor could he rightfully use the plan and arrangement or the mode by which they are combined with the text, beyond the extent falling within the definition of fair use, which rule is only applicable to the materials, and not to the plan, arrangement, and mode of operation. Proper attention to the nature of the charge in the bill of complaint will show that the doctrine of new and different use is wholly inapplicable to the matter in issue between the parties, because the charge is that the respondent has borrowed the matters of fact, citations, and authorities collected and presented in the notes of the complainant, and not that he has made the same use of the old materials. On the contrary, the charge is that he has not consulted the old materials at all, but that he has borrowed the matters of fact, citations, and authorities exhibited in his book from the matters of fact, citations, and authorities as collected, arranged and combined with the text in those two annotated editions. Even supposing the rule to be otherwise, and that a second writer may take bodily the matters of fact, citations, and authorities collected, arranged, and combined, as in the two annotated editions before the court, if the use he makes of the materials is substantially new and different, still the concession will not benefit the respondent, as his edition of the work, except the new materials collected and presented, occupies the same field and was designed for the same class of readers, and was "made and composed" for the same general purpose. Unsupported by the evidence, as the theory of fact involved in the proposition is, it is quite clear that it cannot furnish any defense for the respondent, even if the principle is correct. Argument to show that an author may have a copyright in his notes to an older work, though the materials collected are not new, is unnecessary, as the proposition is elementary, if it appear that they have never before been collected and embodied (Gray v. Russell, 1 Story, 11).

The respondent's second proposition deserves more consid-

cration, as it presents a defense applicable to the main issue involved in the pleadings. Concisely stated, the proposition is that, even conceding that he borrowed materials from the prior annotated editions to a considerable extent, still the quantity so taken and used did not amount to more than a fair and original abridgment of the former annotated editions Third persons cannot make any use of a patented invention without the consent or license of the patentee, because he acquires, by virtue of his letters-patent issued under the patent act, the full and exclusive right and liberty of making and using his invention, as well as of vending it to others to be used, for the term allowed by law; but the right secured to the author or proprietor of a book is only "the sole right and liberty of printing, reprinting, publishing, and vending such book," which, as construed by the courts, means the exclusive right to multiply copies for the benefit of the author or his assigns (Stephens v. Cady, 14 How. 330; Reade v. Lacy, 1 Johns. & Hem. 526; Millar v. Taylor, 4 Burr. 2311; Stowe v. Thomas, 5 Am. L. Reg. 228). Courts have sometimes supposed that the same rule of decision should be applied to a copyright as to a patent for a machine, and consequently that an abridgment of an original work made and condensed by another person without the consent of the author of the original work ought to be regarded as an infringement; but the language of the respective acts of congress making provision for the protection of such rights is different; and the opposite doctrine has been too long established to be considered at the present time as open to controversy (Story v. Holcombe, 4 McLean, 309). Whatever might be thought if the question was an open one, it is too late to agitate it at the present time, as the rule is settled that the publication of an unauthorized but bona fide abridgment or digest of a published literary copyright, in a certain class of cases at least, is no infringement on the original (Phillips on C. 171; Newsbery's Case, Llofft R. 775; Dodsley v. Kinnersley, Ambler, 403; Whittingham v. Wooler, 2 Swanst. 428; Giles v. Wilcox, 2 Atk. 141).

Strong doubts are expressed by Mr. Curtis, whether the definition of an allowable abridgment, as given in the earlier cases, can be sustained, except as applied to such works as histories, or works composed of translations, and others of like kind; but it was decided in this court, in the case of Folsom v. Marsh, 2 Story, 105, that an abridgment in which there is a substantial condensation of the materials of the original work, and which required intellectual labor and judgment to

make the same, does not constitute an infringement of the copyright of the original author; and the court, as now constituted, is inclined to adopt that rule in cases where it also appears that the abridgment was made bona fide as such, and that it is not of a character to supersede the copyrighted publication. Unless it be denied that a legal copyright secures to the author "the sole right and liberty of printing, reprinting, publishing, and vending the book" copyrighted, it cannot be held that an abridgment, or digest of any kind, of the contents of the copyrighted publication, which is of a character to supersede the original work, is not an infringement of the franchise secured by the copyright. What constitutes a fair and bona fide abridgment in the sense of the law is, or may be, under particular circumstances, one of the most difficult questions which can well arise for judicial consideration; but it is well settled that a mere selection or different arrangement of parts of the original work into a smaller compass will not be held to be such an abridgment (Campbell v. Scott, 11 Sim. 38 and note; Gyles v. Wilcox, 2 Atk. 141; Folsom v. Marsh, 2 Story, 107). Substantially the same views are expressed in the case of Tinsley v. Lacy, 1 Hem. and Miller, 753; and the vice-chancellor in that case, in speaking of the authorities by which fair abridgments have been sustained, goes on to say that the courts have gone far enough in that direction, and adds that it is difficult to acquiesce in the reason sometimes given, that the compiler of an abridgment is a benefactor to mankind, by assisting in the diffusion of knowledge. Viewed in the light of these principles, it is quite clear that the book of the respondent, even if it could be regarded as an abridgment of the prior editions, must still be held to be an infringement of the same; but the court is of the opinion that it is not an abridgment of those editions in any sense known to the law of copyright. Instead of being an abridgment of the prior editions, it is precisely what it purports to be, a reprint of the text of the author, with notes by a new editor; and the proofs are full to the point that he was employed to edit a new edition of the work, to supersede the antecedent editions annotated by the complainant. Instructed as he was to make no use of the complainant's notes, his principal defense still is that he complied with those instructions, and that he did not make any use of the notes in his edition beyond what is allowable as fair quotations from the published work of a prior author treating upon the same subject. Copying is not confined to literal repetition; but includes also the various modes in which the matter of any publication may be

adopted, imitated, or transferred, with more or less colorable alterations to disguise the source from which the material was derived; nor is it necessary that the whole or even the larger portion of a work should be taken, in order to constitute an invasion of a copyright. Some use may be made by a subsequent writer of the contents of a book or treatise antecedently made, composed, and copyrighted by another person, in making and composing a new book upon the same subject, whether the contents of the antecedent book or treatise were wholly original, or were partly original, and partly made up of selections from other authors. Copyright differs in this respect from patent right, which admits of no use of the patented thing without the consent or license of the patentee. Persons making, using, or vending to others to be used, the patented article are guilty of infringing the letters patent, even though they may have subsequently invented the same thing without any knowledge of the existence of the letters patent; but the recomposition of the same book without copying, though not likely to occur, would not be an infringement. Coincidence if perfect, is sufficient to prove the infringement of a patent, as the charge is that the defendant, if it be a machine, has made machines in the similitude of the patented machine, and with the same mode of operation. Copying is essential to constitute an infringement of copyright, but identity of contents, arrangement, and combination, is strong evidence that the second book was borrowed from the first, as it is highly improbable that two authors would express their thoughts and sentiments in the same language throughout a book or treatise of any considerable size, or adopt the same arrangement or combination in their publication (Reade v. Lacy, 1 Johns. & Hem., 526). Great difficulty attends every attempt to define in definite terms the privilege allowed by law to a subsequent writer to use without consent or license the contents of a book or treatise antecedently made, composed, and copyrighted by another author; or to mark the boundaries of the privilege of such subsequent writer to borrow the materials in a book like the annotated editions of the complainant, where the materials have been selected from such a variety of sources, and where the materials so selected are arranged and combined with certain chosen passages of the text of the original work, and in a manner showing the exercise of discretion, skill, learning, experience, and judgment. Decided cases are referred to where the principal criterion of determination is held to be the intent with which the person acted who is charged with infringement. Remarks to that effect are to be found in the

opinion of the court in the case of Carey v. Kearsley, 4 Esp. R., 170, and the decision in the case of Spiers v. Brown, 6 W. R., 353, refusing the application for an injunction, turned to some extent upon the same consideration; but the vice-chancellor (now chancellor) refused to apply that doctrine in the subsequent case of Scott v. Stanford, Law Rep., 3 Eq., 722, and explained the grounds of his ruling in the former case, which show that he would not sanction that rule in any case unless it appeared that the defendant had bestowed such mental labor upon what he had taken as to produce an original result. Evidence of innocent intention may have a bearing upon the question of "fair use"; and where it appeared that the amount taken was small, it would doubtless have some probative force in a court of equity in determining whether an application for an injunction should be granted or refused; but it cannot be admitted that it is a legal defense where it appears that the party setting it up has invaded a copyright (Cary v. Faden, 5 Ves., 23; Reade v. Lacy, 1 Johns. & Hem., 526; Bramwell v. Halcomb, 3 Myl. & Cr., 738). Few judges have devised safer rules upon the subject than Judge Story. He held that, to constitute an invasion of copyright, it was not necessary that the whole of a work should be copied, nor even a large portion of it, in form or substance; that if so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient in point of law to constitute an infringement; that, in deciding questions of this sort, courts must "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the objects of the original work" (Folsom v. Marsh, 2 Story, 116). Mere honest intention on the part of the appropriator will not suffice, said Vice-Chancellor Wood, as the court can only look at the result, and not at the intention in the man's mind at the time of doing the act complained of, and he must be presumed to intend all that the publication of his work effects (Scott v. Stanford, Law Rep., 3 Eq., 723; Hodges v. Welsh, 2 Irish Eq. R., 266). Twenty years before that decision was made, Mr. Curtis, in his valuable work on the law of copyright, expressed the same views, and this court entertains no doubt they are correct (Curtis on C., 240). Recent decisions afford more ample protection to copyright than those of an earlier date, and they also restrict the privilege of the subsequent writer or compiler in respect to the

use of the matter protected by the copyright within narrower limits. Express decision in Kelley v. Morris, Law Rep., 1 Eq., 697, is, that in the case of a map, guide-book or directory, or the like, where there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to do for himself that which was done by the first compiler; that he is not entitled to take one word of the information published without independently working out the matter for himself so as to arrive at the same result from the same common sources of information, and that the only use he can make of a previous publication of that kind is to verify his own calculations and results when obtained. Rights secured by copyright are property within the meaning of the law of copyright, and whoever invades that property beyond the privilege conceded to subsequent authors commits a tort, and is liable to an action. None of these rules of decision are inconsistent with the privilege of a subsequent writer to make what is called a fair use of a prior publication; but their effect undoubtedly is to limit that privilege so that it shall not be exercised to an extent to work substantial injury to the property which is under the legal protection of copyright. Reviewers may make extracts sufficient to show the merits or demerits of the work, but they cannot so exercise the privilege as to supersede the original book. Sufficient may be taken to give a correct view of the whole, but the privilege of making extracts is limited to those objects, and cannot be exercised to such an extent that the review shall become a substitute for the book reviewed (Story v. Holcombe, 4 McLean, 309). Examined as a question of strict law, apart from exceptional cases, the privilege of fair use accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication; but cases frequently arise in which, though there is some injury, yet equity will not interpose by injunction to prevent the further use, as where the amount copied is small and of little value, if there is no proof of bad motive, or where there is a well-founded doubt as to the legal title, or where there has been long acquiescence in the infringement, or culpable laches and negligence in seeking redress, especially if it appear that the delay has misled the respondent (Sweet v. Cater, 11 Sim., 580; Tinsley v. Lacy, 1 H. & M., 752; Spiers v. Brown, 6 W. R., 353; Strahan v. Graham, 15 W. R., 487; Bramwell v. Halcomb, 3 Myl. & Cr., 738; Reade v. Lacy, 1 Johns. & Hem., 527; Jarrold v. Houlston, 3 Kay & Johns., 717; Lewis v. Fullarton, 2 Beav.

6; Bell v. Whitehead, *17* L. T., *141*; Curtis on C., *326*; Saunders v. Smith, 3 Myl. & Cr., 711).

Guided by the rules of law, as already explained, the court, after having examined the whole case with care, is of the opinion that many of the notes presented in the edition edited by the respondent, whose case is under consideration, do infringe the corresponding notes in the two editions edited and annotated by the complainant, and that the respondent borrowed very largely the arrangement of the antecedent edition, as well as the mode in which the notes in that edition are combined and connected with the text. Judge Story held, in the case of Emerson v. Davies (3 Story, 780), that every author had a copyright in the plan, arrangement, and combination of his materials, and in his mode of illustrating his subject, if it be new and original; and it was also held, in Greene v. Bishop (1 Cliff. 199), that there may be a valid copyright in the plan of a book, as connected with the arrangement and combination of the materials; and no doubt is entertained that both those decisions were correct; but it is a mistake to suppose that a subsequent writer can be held to have infringed a book where he has not borrowed any of the materials of which the book is composed. New materials are certainly the proper objects of copyright; and old materials when subsequently collected, arranged, and combined in a new and original form, are equally so; and in either case the plan, arrangement, and combination of the materials are as fully protected by the copyright as the materials embodied in the plan, arrangement, and combination. Damages may be recovered in either of the supposed cases for the infringement of the property protected by the copyright; but the property in the latter case consists chiefly, if not entirely, in the plan, arrangement, and combination of the materials collected and presented in the book, as any other person may collect from the original sources the same materials, and arrange and combine them in any other manner not substantially the same as that of the antecedent author (Barfield v. Nicholson, 2 Sim. & Stu. 6).

Detailed specification of the instances of infringement, as shown by a comparison of the two books, would be impracticable, and will *not* be attempted; as the settled practice in equity is, where the works are voluminous and of a complex character, containing, as in this case, much original matter mixed with common property, the cause will, at some stage of the case, be referred to a master to state the facts, together with his opinion, for the consideration of the court. Much

the better course is to make the references before the final hearing; but the parties in this case waived any reference at that stage of the cause, and elected to proceed to final hearing without any such report. Cases arise where the court, under such circumstances, would not order a reference, but would proceed to compare the books and ascertain the details of the infringement; but the case before the court is far too complex to admit of that course of action (Curtis on C. 325; Mawman v. Tegg, 2 Russ. 400; 2 Story Eq. Jur. § 941). Details have been examined, as far as practicable, consistent with the claims of other official duties, but the judges are of the opinion that they should be further examined, and the results classified, before the court proceeds to determine the extent of the infringement, as the danger of injustice cannot well be avoided in any other way. New matter of value has been collected and presented by the respondent, and he has added much that is valuable in his references to events which have occurred since the publication of the last preceding annotated edition. Whatever may have been the rule in the earlier history of equity jurisprudence, it is now settled law in this court that a book may in one part of it infringe the copyright of another, while in other parts it may be entirely original and the proper object of a copyright; and in such a case it was held, in Greene v. Bishop (1 Cliff. 201), that remedy will not be extended beyond the injury. Preceding that decision, the same rule had been adopted in Story v. Halcombe (4 McLean, 315), in which the opinion was given by the late Mr. Justice McLean. Modern practice in the chancery courts of England is the same, as appears in the case of Jarrold v. Houlston (3 Kay & Johns. 721), in which the opinion was given by Vice-Chancellor Wood, since promoted to the office of chancellor (Kelly v. Morris, Law Rep. 1 Eq. 701; Carnan v. Bowles, 2 Brò. Ch. 80; Curtis on C. 325). Suggestion is made that it will be impossible to separate that which is original from that which is borrowed, and to some extent the suggestion may be of weight; but the court is of the opinion that the difficulties in that behalf, when the matters pass under the searching examination of a master, will be much less than is apprehended by the parties. Should the difficulty in any instance or class prove to be insurmountable, then the rule in equity is, that if the parts which have been copied cannot be separated from those which are original without destroying the use of the original matter, he who made the improper use of that which did not belong to him must suffer the consequences of so doing. If a second writer mixes the

literary matter of another, which is under the protection of a copyright, with his own, without the license or consent of the proprietor, he must nevertheless be restrained from publishing what does not belong to him; and if the parts of the work cannot be separated, so that the injunction prevents also the publication of his own literary production so mixed with that of another, he has only himself to blame (Mawman v. Tegg, 2 Russ. 390; Lewis v. Fullarton, 2 Beav. 11). Extended application of that rule, it is believed, will not be required, in view of the proofs exhibited in the record, and of the facilities afforded by the comparison of the notes in the respective editions to separate what is original from that which has been copied.

Attention is called by the respondent to the fact that some of the notes in the edition edited by him are entirely original; that in others the material copied is much condensed, or the notes reduced to a mere reproduction of the authorities cited in the prior edition, and that other notes have been enlarged and improved by the addition of new matter, and, in view of those circumstances, he contends that the edition edited by him should be regarded as a new and original work; but the decisive answer to the first and last suggestion is, that no man is entitled to avail himself of the previous labors of another for the purpose of conveying to the public the same information, even though he may append additional information to that already published (Scott v. Stanford, Law Rep., 3 Eq 724; 2 Story, Eq. Jurisp. § 940; 2 Kent, Com. 382 and 383 Cary v. Faden, 5 Ves. 25 and note; Wheaton v. Peters, 8 Pet. 591; Bramwell v. Halcomb, 3 Myl. and Cr. 737).

Additional remarks in respect to the alleged fact that the contents of the notes copied were condensed is unnecessary, as it is quite clear, as before explained, that the change made in that behalf is not of a character to afford the respondent any defense.

Supported by these reasons, the conclusions of the court are as follows:

1. That the complainant in a court of equity is the equitable owner of the notes in the two annotated editions described in the pleadings as arranged, and the mode in which they are combined and connected with the text.

2. That the title to the entire text, together with the title to the memoir and indices, is in the proprietor of the book, and not in the complainant, as alleged in the bill of complaint.

3. That there are notes in the edition edited by the respondent of substantial importance in point of number and

the value of the materials which do infringe the equitable rights of the complainant, as explained and defined by the court.

4. That all the respondents had notice of the claim of the complainant, as explained and defined by the court.

5. That there are notes in that edition of substantial importance in point of number and the value of the materials which do not infringe any rights of the complainant.

6. That the notes in that edition consisting wholly of citations found in the corresponding notes of the complainant do infringe his rights, as explained and defined by the court, though many of them are unaccompanied by the extracts collected and presented in the next preceding edition.

7. That notes consisting of authorities or collections of authorities copied in like manner as described in the preceding proposition, and without remarks or comments, do also infringe the complainant's rights, though they are found inserted in, or prefixed or appended to, notes otherwise not objectionable.

8. That notes of which the whole or some substantial and material part is condensed from the corresponding notes in the preceding edition or from the extracts therein printed and published, without any marks of original labor, or of any such labor except the study of the note copied and adopted, do also infringe the complainant's rights, as explained and defined.

9. That notes wholly original do not infringe.

10. That notes partly original and partly copied from the preceding edition do not infringe except for the matter copied, if it be practiable to ascertain and define the separate proportions and make the separation of the same; but if not, still the respondent, at the proper stage of the case, must be restrained from using the part copied.

11. That the cause must be referred to a master to examine the pleadings and proofs and report the extent of the infringement as adjuged by the court in this investigation, and also to examine and ascertain what, if any, other instances of the alleged infringements within the principles here explained are proved; and if any, to classify the same, and report the details, together with the reasons for his conclusions, for the consideration of the court.

12. That all other matters in the cause will be reserved until the coming in of the master's report.

CHAPTER VI.

OF CONTRACTS CONCERNING LITERARY PROPERTY.

414. Lord Camden, in his famous speech against literary property, declared that "glory" was the reward of authorship, and that the putting of a value in coin upon such labors would encourage the wretched scribblers and charlatans of literature, while it could not add an inducement to genius, or make that worthy of print which was not so before. But, while this may be very true in theory, its practical working, as a principle for the guidance of book-sellers and book-buyers, would be very awkward, and probably as unsatisfactory in its results; for we must have primary arithmetics, and grammars, and spelling-books, as well as The Canterbury Tales, or Hamlet, or Paradise Lost. "And since," as Mr. Curtis very justly observes, "no man ever wrote a spelling-book for glory," as long as a spelling-book is a necessity, there must be some inducement for its production. No man ever did write a spelling-book for "glory," and yet there are very few works compiled of greater utility than a spelling-book, and it would be very poor policy to discourage their production.

The fact is, that the list of authors who write for pure glory is growing smaller and smaller every day, and the majority make no secret of their writing for gain. Publishers, at any rate, regard the works of authors in purely a commercial light, estimating their value solely by the profit or loss presumably conse

quent upon their manufacture and sale in book form.[1] And it is well to reflect that, separate as they are in theory, "glory" and "gain" move hand-in-hand; and the cold commercial judgment of the publisher as to the amount of profit in the book, though not possibly infallible, is, after all, the only practical criterion of the fame that may ensue. The book, nowadays, that brings no gain to its publisher, very rarely brings "glory" to its author.[2] "When we say," said Sergeant Talfourd, "that one has obtained immense wealth by writing, what do we assert but that he has multiplied the sources of enjoyment to countless readers, and lightened thousands of else sad, or weary, or dissolute hours."[3] And, unromantic as it may sound, this is the sort of composition that sells in the market.

[1] To write for money was once held to be disgraceful; and Byron, as we know, taunted Scott because his publishers combined

"To yield his muse just half-a-crown per line,"

while Scott seems half to admit that his conduct requires justification, and urges that he sacrificed to literature very fair chances in his original profession. Many people might, perhaps, be disposed to take a bolder line of defense. Cut out of English fiction all that which has owed its birth more or less to a desire of earning money honorably, and the residue would be painfully small. The truth, indeed, seems to be simple. No good work is done when the one impelling motive is the desire of making a little money; but some of the best work that has ever been done has been indirectly due to the impecuniosity of the laborers. When a man is empty he makes a very poor job of it in straining colorless trash from his hard-bound brains; but when his mind is full to bursting, he may still require the spur of a moderate craving for cash to induce him to take the decisive plunge.—Hours in a Library, Leslie Stephen.

[2] We cannot decide the abstract question of genius and money, but the question of how much the author ought to receive is easily answered—so much as his readers are delighted to pay him.—Speech of Sergeant Talfourd.

[3] Id.

So, it is to the advantage of the public that the value of a book to its publisher depends entirely upon its value to them, and that the interests of the author and the publisher are, in reality, identical.

415. It certainly is true, as we have seen at every step in this inquiry, that so long as there has been any such thing as literary composition, there has been such a thing as parting with it *for value*. When encouraged in no other way,—when society was too crude and illiterate to buy poetry,—monarchs encouraged it by rewards, and favors, and emolument. Before the poet secured publication, he secured, at least, a place.

Poets were first crowned in Greece, and afterwards by the Romans, under the empire. In the twelfth century, the emperor of Germany adopted the custom, and invented the title and office of poet laureate. Henry the Fifth crowned his historian, and Frederic the First his monkish Gunther, who celebrated him in epic strains. Petrarch was crowned laureate in the fourteenth century, in Rome, and Tasso died just as he was to have received the honor. Frederic the Third of Germany crowned with his own hands Æneas Sylvius Piccolomini, and in 1491 Conradus Celtes, whose distich, in which he pronounces himself the first to hold that office, is still preserved.

> Primus ego titulum gessi nomenque poetæ,
> Cæsareis manibus laurea nexa mihi.

And so, Ulrich von Hutten was crowned by Maximilian the First, who degraded the office, by giving to the Counts Pataline the right of creating their own poets. Both under him and under Ferdinand the Second, the counts multiplied poets, until their place had no value or importance whatever. About this time the German and English universities appear to have granted the degree of "poeta laureatus" without much

stint. In France the favored bards were known as "royal poets," though in Spain they retained the name of Laureates,—at least Cervantes, whether as reflecting upon the office or its incumbents, or not, does not appear, makes Sancho Panza, who with his ass has tumbled into a ditch, console the animal, by saying to it, "I promise to give thee double feed, and to place a crown of laurel on thy head, so that thou mayest look like a poet laureate!"

Edward the Third, of England, in imitation of the crowning of Petrarch at Rome, granted the office to Chaucer, with a yearly pension of one hundred marks and a tierce of Malvoisie wine.[1] Henry Scogan is alluded to by Ben Jonson as the laureate of Henry the Fourth. John Kay was court poet under Edward the Fourth, and Andrew Bernard held the same office under Henry the Seventh and Henry the Eighth. John Skelton received from Oxford, and subsequently from Cambridge, the title of poet laureate; and Spenser is spoken of as the laureate of Queen Elizabeth, on the ground of having received a pension of fifty pounds a year, upon presenting her the first books of the "Faery Queen." Samuel Daniel and Michael Drayton were also laureates, "the latter being one of the poets," says Southey, "to whom the title of laureate was given in that age, not as holding the office, but as a mark of honor, to which they were entitled." The introduction of masques into England from Italy during the reign of Elizabeth, rendered necessary the

[1] Though this is mainly traditional, there is, however, a record of an annuity of 20 marks granted by that monarch to his "valet Geoffrey Chaucer," with the controllership of the wool and petty wine revenues for the port of London, the duties of which he was to perform in person. There is in reality no evidence that this office was conferred on the ground of poetical merit.

employ ment of poets, and, in 1619, James the First, probably to save expense, secured the services of Ben Jonson, by granting him by patent an annuity for life of one hundred marks. In 1630 the laureateship was made a patent office in the gift of the lord chamberlain, and the salary increased from one hundred marks to one hundred pounds and a tierce of Canary wine, which latter was commuted in the time of Southey for twenty-seven pounds a year. From that time until the present there has been a regular succession of laureates.'

[1] The following is a list of those who have held the office, with the dates of their accession and withdrawal: Ben Jonson, 1630–1637; William Davenant, 1638–1668; John Dryden, 1670–1689; Thomas Shadwell, 1689–1692; Nahum Tate, 1693–1714; Nicholas Rowe, 1714–1718; Lawrence Eusden, 1719-1730; Colley Cibber, 1730–1757; William Whitehead, 1758–1785; Thomas Warton, 1785–1790; Henry James Pye, 1790–1813; Robert Southey, 1813–1843; William Wordsworth, 1843–1850; Alfred Tennyson, 1850. As might be inferred from many of the names in this list, political considerations often controlled the appointment to the office. Such considerations removed Dryden and substituted in his place Shadwell, whose appointment the Earl of Dorset vindicated, "not because he was a poet, but an honest man." To such an extent was the degradation of the office carried by its connection with unworthy names, that a strong feeling was raised in favor of its abolition. After the derangement of George III., in 1810, the performance of the annual odes was suspended, and subsequently fell completely into disuse. Upon the death of Pye, the office was offered to Walter Scott, who declined it, but recommended Southey; and the latter was appointed with the virtual concession, which has since become the rule, that he should write only when and what he chose. Wordsworth wrote nothing in return for the distinction, and Tennyson has written but little.—American Encyclopedia.

It has been held by the House of Lords, in England, that in the case of a sinecure granted by government for meritorious services in the past, that the consideration for the office has already been paid, and the incumbent, therefore, entitled to the office without the performance of any further labor or duty.

416. Literary property can only be a source of profit to its author, according to his power of parting with it, either in whole or in part, for value, and of specifying the uses for which it is so alienated; and these rights the ownership of literary property, as of all other, involves. We have seen that in the eye of the law such property, either before or after copyright, is personal property,[1] and subject to all the rules of personal property as to its alienation, transfer, and descent. In general, therefore, all contracts relating to such alienation or transfer will be governed by the familiar principles of the law of contracts. A few exceptions, arising from the peculiar nature of literary property, remain to be considered here.

417. We have before remarked that courts of equity will not decree a specific performance, by an author, of a contract to write or compose[2] a literary composition, though an ordinary action at law for damages for breach of contract might lie.

Equity, however, might prevent the author, who has contracted to write certain matter for a certain publisher, from writing the same matter for a rival publisher.[3] So, where a young lady agreed to sing at the Queen's theatre for a certain number of nights,

[1] In England this is, besides being common law, expressly enacted by statute 5 & 6 Vict. c. 45, § 25, which provides "that all copyright shall be deemed personal property, and shall be transmissible by bequest, or, in case of intestacy, shall be subject to the same law of distribution as other personal property, and in Scotland shall be deemed to be personal and movable estate." Sect. 3 of 25 & 26 Vict. c. 68, has a similar enactment as to the nature of the property in paintings, drawings, and photographs.

[2] *Ante*, vol. ii., p. 353, and cases cited; Clarke v. Price, 2 Wils. Ch. Cas. 157; Morgan's Addison on Contracts, vol. 1, p. 755; Brace v. Wehnert, 25 Beav. 351; 27 L. J. Ch. 527.

[3] Morris v. Colman, 18 Ves. 437.

and that she would not during the period sing anywhere else, but afterwards accepted an engagement and agreed to sing at a rival theatre, the court, by injunction, restrained her from singing at the rival theatre, although it had no power to compel her to sing at the Queen's theatre.[1]

If an author contracts not to write or edit any other work, on the subject treated in a work already written by him, a court of equity will not interfere until there is a violation of the agreement by actual printing and publication. And accordingly, in the case of the famous law-writer, Mr. Chitty, where a publisher purchased of him the copyright of a treatise written by him upon the criminal law, he undertaking not to write or edit any other work upon that subject, and an advertisement appeared that the defendant was about to edit "Burn's Justice," Lord Brougham refused a motion to restrain him from editing articles on the criminal law in that book, saying that the defendant was at liberty to write in his closet what he pleased.[2]

418. And though this rule might work hardship in many cases, yet it is founded in reason, and in the nature of things; for the intellectual labor which was performed under the coercion of a court of justice, or of the officers of the law, would hardly be very valuable to anybody; besides which consideration, the law would be very careful to avoid making a decree which it could not, by any possibility or prowess, enforce. Courts of equity, therefore, will not assume

[1] Lumley v. Wagner, 21 L. J. Ch. 898; 1 De G., M. & G. 618; Webster v. Dillon, 3 Jur. N. S. 432; Catt v. Tourle, L. R 4 Ch. 654; 38 L. J. Ch. 665; and see Daly v. Smith, 38 N. Y Superior Ct. (J. & S.) 158.

[2] Brooke v. Chitty, 2 Cowp. 216.

jurisdiction to decree the specific performance of such contracts between auth rs and publishers.[1]

"I have no jurisdiction," said the court, in Clark v. Price,[2] "to compel Mr. Price to write reports for the plaintiffs. I cannot, as in Morris v. Colman,[3] say that I will induce him to write for the plaintiffs by preventing him from writing for any other person, for that is not the nature of the agreement. The only means of enforcing the execution of this agreement would be to make an order compelling Mr. Price to write reports for the plaintiffs, which I have not the means of doing. If there be any remedy in this case, it is at law. If I cannot compel Mr. Price to remain in the court of exchequer for the purpose of taking notes, I can do nothing. I cannot indirectly, and for the purpose of compelling him to perform the agreement, compel him to do something which is merely incidental to the agreement. It is also quite clear that there is no mutuality in this agreement. I am of opinion that I have no jurisdiction in this case."

The case of Morris v. Colman, alluded to in the above, held that a covenant in articles of partnership, by which a dramatic writer undertook not to compose pieces for any other than a particular theatre, was a legal covenant. Such a covenant was compared, in argument before Lord Eldon, to contracts in restraint of trade, which are void on principles of public policy; but his lordship said, "I cannot perceive any violation of public policy in this provision. The case of trade to which it has been compared is perfectly distinct. The contract is not unreasonable upon either construction; whether it is that Mr. Colman shall not

[1] Hazlitt v. Templeman, 13 L. T. N. S. 593.
[2] And see Wils. Ch. Cas. 157.
[3] 18 Ves. 437.

write for any other theatre without the license of the proprietors of the Haymarket theatre, or whether it gives to those proprietors merely a right of pre-emption."

The court could not compel Colman to write for the Haymarket theatre; but it did the only thing in its power—it induced him indirectly to do one thing by prohibiting him from doing another.

419. Courts will continue to recognize the difference between intellectual and other labor, not only by declining to coerce it, but even to accelerate it when once begun. A contract between a publisher and a printer, wherein the latter undertakes to print a work within six months, does not bind the former to furnish the materials within the six months, in the absence of an express stipulation to that effect. Such an engagement to print within six months is only conditional upon the copy being supplied to the printer fast enough; but it does not create, by inference, an engagement by the employer to furnish it within that time. It would, however, be an answer to any action that might be brought against the defendant for not printing the work within the six months, to say that the copy was not supplied fast enough.[1]

We have already seen that no degree of usefulness, or of value, must be shown to exist in a work, in order to entitle it to a copyright. An inventor in the United States, before a patent is granted to him for seventeen years, must prove to the satisfaction of the commissioner of patents, not merely the originality, but the usefulness of his invention, and only receives his patent upon the payment of considerable fees to the patent office; often too, additionally large ones to agent and solicitors. A copyright, on the contrary, is granted for a nominal fee, and without any represent

[1] Mawman v. Gillett, 2 Taunt. 325.

ations or affidavit whatever, of course in the same measure to a book run together with paste and scissors, as to one the result of a lifetime of labor, research, and isolation. But if an author, under a contract with his publisher to supply him the manuscript of a work for a particular treatise or work of reference, produce a work utterly useless or valueless for the publisher's purpose, an action for damages might lie, but this question does not appear to have ever directly arisen.

420. In the case of an agreement between an author and a publisher, that the latter should publish at his own risk and expense the work of the former, on the terms that the profits should be equally divided, and that the author should, if a subsequent edition were required, prepare it for the press, and the publisher should print it on the same terms, Knight Bruce, L. J., was of opinion that the duties on neither side were of such a nature that their performance could be specifically enforced by a court of equity.[1]

Either party may, however, in such a case, be made liable in damages for breach of contract. Thus, where a person was employed to write a treatise on a particular subject, to be published in the "Juvenile Library," but before he had completed the treatise the "Juvenile Library" was abandoned by the defendants, who had employed him, he was entitled to recover damages for the breach of contract on the part of the defendants, without any tender or delivery of the treatise on his own part.[2]

[1] Stevens v. Benning, 6 De G. M. & G. 229.

[2] Planché v. Colburn, 8 Bing. 14; 5 C. & P. 58; and see Colnaghi v. Ward, 6 Jur. 969, where an action was brought for breach of contract to deliver an engraved plate to be published by the plaintiff.

And the publisher may maintain an action against the author for breach of contract to deliver the manuscript of a work to be published, provided the work is of an innocent character.[1]

421. Though the terms of the contract between author and publisher be, that the latter should bring out the work at his own expense, and that the profits should be divided between both, this does not prevent the bringing of such an action as last referred to, because it is not brought to recover partnership profits from the author, but to make him liable for not contributing his labor towards the attainment of profits, to be subsequently divided between the parties. Lord Ellenborough indicated the amount of damages to be given in such a case as that which would include the expenses of publication, and the profits which would probably have been derived from it.[2]

422. It seems that, if an author has agreed with a publisher for the publication of his book, and the publisher has in consequence made advances of money, an injunction would, be granted to restrain the publication of the work by another publisher until the former had been repaid.[3]

But a court of equity will not interfere to restrain an author, who has written a work for one publisher, from writing a similar work, or a continuation of the first, for another, in the absence of any stipulation in the matter.

So, where a bookseller agreed with an author for an edition of a new translation of Buchanan's "History of Scotland," with a continuation to the time of the Union, to be contained in four volumes, and had

[1] Gale v. Leckie, 2 Stark. N. P. 107.
[2] Id.
[3] Brook v. Wentworth, 3 Austr. 381.

obtained subscriptions for all that could fall within his edition, he was held by the court of session not entitled to prevent the author from publishing in a fifth volume a continuation of the history, which embraced part of the period, and also some of the matter contained in the last of the four volumes, this being repeated in order to keep up the connection.[1]

Nor, on the other side, will a court grant an injunction to restrain the publication of a manuscript on the ground that the sum agreed to be paid to its author for contributing it has not been paid; but such payment may be enforced at law.[2]

423. But when the actual printing or publishing has taken place, equity will no longer have the same grounds for non-interference. Either party, in such a case, may have an action for damages for the breach of contract. And the publisher may maintain an action against the author for breach of contract to deliver the manuscript of a work to be published, provided the work is of an innocent character.[3]

424. Where one contracts to supply another with a composition in such a form as to enable the latter to publish it as his own, a court of equity will not restrain the publication of the manuscript in an altered or mutilated form, unless there is a special contract, express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper.[4]

But it seems that if a publisher puts forth an inaccurate edition of an author's work, purporting to be executed by him, the author may maintain an action

[1] Blackie v. Aikman, 5 Scotch Sess. Cas. 719 (1827).
[2] Cox v. Cox, 11 Hare, 118.
[3] Gale v. Leckie, 3 Stark, N. P. 107.
[4] Cox v. Cox, 11 Hare, 118.

against the publisher for injury to his reputation, even where the publisher is the owner of the copright.[1]

425. Contracts between authors and publishers, for the joint or other participation in their copyrights, are perhaps as frequently presented for interpretation by courts as contracts having other subject-matters. Equity will take jurisdiction to enforce specific performance of a contract for the sale of a copyright, and it will make no difference that other matters are mixed up with it.[2]

But where joint owners in a copyright make a contract between themselves as to it, neither will be permitted to set up, as against the other, any original rights as joint owner of such copyright, in violation of such contract.

This was the ruling in Gould v. Banks.[3] "There is no principle or authority," said the court in that case, "which will inhibit such a contract between parties, because they may be partners in the subject-matter of it. They may bind themselves by a private agreement concerning the partnership business, but so far as third persons may be interested, it would be inoperative as to them."[4]

426. It is important, in the draughting of agreements between authors and publishers, that they should express, beyond a doubt, whether they are to operate as assignments of the copyright in the work, or merely as licenses to publish.[5]

If an author sell and dispose of his manuscript in

[1] Archbold v. Sweet, 1 M. & Rob. 162.

[2] Simms v. Marryat, 17 Q. B. 281.

[3] 8 Wend. 568.

[4] *Vid.* also Lindley on Partnership, 2 Ed. pp. 869, 870.

[5] This was the difficulty in the cases of Stevens v. Benning (6 DeG. M. & G. 223), and Reade v. Bentley (3 K. & J. 276), in which case the vice-chancellor refused to allow costs to

specie to a publisher, with the express understanding that the latter is to publish it, he cannot afterwards copyright it in his own name, but the copyright belongs to the publisher.

If the author dispose of his manuscript in specie to a publisher, with the intention that he shall publish it, he cannot copyright the work so published. So, where a reporter agreed to furnish a law-publisher for five years, in manuscript, the reports of a certain court, the publisher agreeing on his part to publish the same, and to pay the reporter one thousand dollars for every volume of such reports that he should publish, the court held, that the publisher had the perpetual right, as against the reporter, to print, publish, and sell copies of a volume issued in accordance with the above agreement, without paying anything further than the one thousand dollars, and that the reporter could not copyright the volume so issued by the publisher.[1]

427. As in the purchase of other property, the rule caveat emptor would seem to apply. It has been held, that the purchaser or contractor of literary property cannot afterwards disclaim his purchase, and withhold payment, on the ground that he did not know its character.[2]

Neither equity nor law will, of course, protect or

either party, considering each of them responsible for the defective form of the agreement.—Shortt, L. Lit. p. 270.

[1] Paige v. Banks, 7 Blatchf. 152.

[2] "The Swiss Times," a newspaper published in Geneva, Switzerland, employed Gen. Cluseret, the French communist leader, to write his souvenirs for its columns, but discovering that the circulation of their paper was about to be suppressed on that account, in Paris, cancelled the contract with him and discontinued the publication. In a suit by Cluseret for such breach, held that the newspaper must be held to have known the character of matter which would be furnished by Cluseret.—Albany Law Journal, September 12, 1874.

enforce any contracts of which the subject-matter is immoral, or otherwise non-innocent literary productions, though such non-innocence will never be presumed, but must be proved by profert of the work itself.[1] Nor will the publication of an advertisement of a work, which advertisement disparages a rival work, be non-innocent in such a sense that it will be interfered with by equity.[2]

As to all other contracts, the statute of frauds applies to contracts between authors and publishers having the preparation or publication of literary matter for their subject.[3]

428. Where an agreement between an author and his publisher is, that the publisher shall take the whole charge and risk, and the whole duty of bringing out the work as he thinks best for the interest of both parties, it seems to be necessarily incident to the duty which the publisher has to perform, that he shall also have the right of fixing the price at which the work is to be brought out.[4] And, in such a case also, the

[1] Gale v. Leckie, 2 Stark. N. P. 110; Fores v. Johnes, 4 Esp. 97; Poplett v. Stockdale, Ry. & M. 338.

[2] Seeley v. Fisher, 11 Dim. 581.

[3] Sweet v. Lee, 4 Scotts. N. R. 77; 3 M. & Gr. 452; Jackson v. Lowe, 1 Bing. 9; Phillimore v. Barry, 1 Camp. 513; Saunderson v. Jackson, 2 B. & P. 398; Johnson v. Dodgson; 2 M. & W. 653; *vid.* also the famous case of Boydel v. Drummond, 11 East. 142.

[4] Reade v. Bentley, 3 K. & J. 276. In an agreement like the foregoing, where the work was to be brought out at the publisher's expense and the profits to be divided, the addition of a clause providing that the books sold should be "accounted for at the trade-sale price, reckoning twenty-five copies as twenty-four, unless it be thought advisable to dispose of any copies, or of the remainder at a lower price, which is left to the judgment and discretion" of the publisher, does not justify an inference that the publisher has no discretion in fixing the price except in the particular case there mentioned. The

publisher is the proper party to determine upon the time and mode of publication.

"An agreement," says Shortt,[1] "between an author and a publisher, that the latter should publish, at his own risk and expense, a work belonging to the former, on the terms of an equal division of the profits after all expenses had been paid, may be regarded in the double light of a license and a partnership—a license for the publication of the work, and then a joint adventure between the author and publisher in the copies so to be published. The publisher cannot be considered, in such a case, as merely the agent of the author—a mere agent seldom embarking in the risk of the undertaking."[2]

429. The sale of stereotype plates of a quarto edition of the Bible, with copyrighted notes appended, —by the proprietor of the notes,—these plates being

meaning of such a clause is explained by Lord Hatherley, (when vice-chancellor) in Reade v. Bentley. "It is quite obvious that this clause was introduced with no such view, but because Mr. Bentley is to bring out the work, and in bringing it out, he is to fix a certain price to the trade; he is aware that there are persons who are in the habit of purchasing all these works for re-sale; there is a certain quantity in the first instance offered to the trade, as it is called, who send in their orders, each buyer for a certain quantity of copies, and it is brought out to the trade at a price which is fixed upon each edition. Then it might happen that some copies would remain unsold. Mr. Bentley first agrees to account with the author for all copies at the trade price; but then, as that might be too hard upon the publisher, who has had all the expense of bringing out the work, it is agreed that, if any copies remain unsold, he is to have liberty, as regards that edition, to dispose of the unsold copies at a lower price. That is the obvious meaning of this clause, and it has no reference to the general question of fixing or not fixing the price."—Shortt, L. Lit. p. 271; Id. and Reade v. Bentley, 4 K. & J. 276.

[1] P. 272.

[2] Id. and Stevens v. Benning, 6 DeG. M. & G. 231.

afterwards sold to a third party at public sale, was held not to allow the last purchaser to publish therefrom a folio Bible, with commentaries at the foot of each page—such a use being not contemplated when the sale was made.[1]

Where it has been agreed that the publisher shall choose embellishments, and everything else connected with the publication, for all editions which should be brought out during the subsistence of the agreement,[2] a clause in such an agreement that the books sold should be "accounted for at the trade-sale price, reckoning twenty-five copies as twenty-four, unless it be thought advisable to dispose of any copies, or of the remainder at a lower price, which is left to the judgment and discretion" of the publisher, does not justify an inference that the publisher has no discretion in fixing the price, except in the particular case there mentioned.[3]

430. Where an agreement between author and publisher states that, after payment of the expenses of publication, &c., "the profits remaining of every edition that should be printed of the work are to be divided into two equal parts," one moiety to go to the author, and the other to the publisher, this points out certain

[1] Fullarton v. McPhun, 13 Scotch Sess. Cas. (2d ser.) 219.

[2] Reade v. Bentley, 3 K. & J. 276.

[3] Id. "It is," said the vice-chancellor, "obvious that this clause was introduced with no such view, but because Mr. Bentley is to bring out the work, and in bringing it out, he is to fix a certain price to the trade; he is aware that there are persons who are in the habit of purchasing all these works for re-sale; there is a certain quantity in the first instance offered to the trade, as it is called, who send in their orders, each buyer for a certain quantity of copies, and it is brought out to the trade at a price which is fixed upon each edition. Then it might happen that some copies would remain unsold. Mr.

definite times for the adjustment of the accounts, and at which the author becomes entitled to terminate his agreement with the publisher.[1]

Nor would the contract of a reporter with a publishing house, for the exclusive right to publish for his five years of office, confer on him any right to the manuscripts prepared by him for such reports, and no injunction could be issued by a federal court, by

Bentley first agrees to account with the author for all copies at the trade price; but then, as that might be too hard upon the publisher, who has had all the expense of bringing out the work, it is agreed that, if any copies remain unsold, he is to have liberty, as regards that edition, to dispose of the unsold copies at a lower price. That is the obvious meaning of this clause, and it has no reference to the general question of fixing or not fixing the price."

[1] Nor can the publisher by stereotyping the work deprive the author of this right. It was objected in Reade v. Bentley, that when a work has once been stereotyped, the term "edition" is no longer applicable; that when a work is published in what is called "thousands," twenty thousand or thirty thousand being circulated, each thousand could not properly be called an edition. To this, Lord Hatherley replied: "I apprehend that not merely in point of etymology, but having regard to what actually takes place in the publication of any work, an 'edition' of a work is the putting of it forth before the public, and if this be done in batches at successive periods, each successive batch is a new edition; and the question whether the individual copies have been printed by means of movable type or by stereotype, does not seem to me to be material. If movable type is used, the type having been broken up, the new edition is prepared by setting up the type afresh, printing afresh, and repeating all the other necessary steps to obtain a new circulation of the work. In that case the contemplated break between the two editions is more complete, because, until the type is again set up, nothing further can be done. But I apprehend it makes no substantial difference, as regards the meaning of the term 'edition,' whether the new 'thousand' have been printed by a re-setting of movable type, or by stereotype, or whether they have been printed at the same time with the former thousand or subsequently."

virtue of the copyright acts of congress, to prevent others from publishing them.[1]

431. As to what is a new edition, the court in the same case held, that a "new edition is published whenever, having in his storehouse a certain number of copies, the publisher issues a fresh batch of them to the public; so that if, after printing the copies, a publisher should think it expedient, for the purpose of keeping up the price of the work, to issue them in installments of a thousand at a time, each successive issue would be a new edition, in every sense of the word."

And in the Scotch case of Blackwood v. Brewster,[2] it was held, that the reprint of a portion of a book, to replace copies destroyed by fire while in the publisher's hands, was not "an edition."

This question is not unfrequently of great importance, in cases where it becomes necessary to cancel or discontinue an agreement between an author and a publisher.[3] If such an undertaking be determinable at the mere option of either party thereto, it might not unfrequently work great hardship.

For, on the one hand it might be said, on behalf of the publisher, that he had given to the undertaking the benefit of his talents and position as a publisher, and had incurred expenses in bringing out the first edition, in the expectation of being reimbursed for the cost of the first by the sale of the second and subsequent editions; and that to hold the author entitled, at his own instance, to determine the agreement when the first edition had been published, would be to

[1] Little v. Hall, 18 H., 365; 1 Decisions of U. S. Sup. Ct., Miller, 143.

[2] 23 Scotch Sess. Cas. 2d ser. 142 (Dec. 2, 1860). And see Black v. Murray, *ante*, vol. i. pp. 375 et seq.

[3] Shortt, p. 272.

enable him, by an arbitrary and unreasonable exercise of his option, to deprive the publisher of all his profits. On the other hand, it may be urged, on the part of the author, that, unless he has the power of determining the agreement, the consequence would be that he may be under an obligation to the publisher during the whole of the publisher's life, while the publisher will be under no reciprocal obligation to him. The publisher could compel the author to abstain from publishing a single copy of the work, so long as he expressed his readiness to continue publishing, while the author has no reciprocal power. He could never compel the publisher to publish more than a single edition of the work. Further, the publisher, in the bona fide exercise of his discretion as to the fitting time and mode of publication, might decline indefinitely to publish, but without resigning his contract; while the author might, at the same time, be of a contrary opinion, and yet for months, or even years, might be kept in suspense, and be prevented from publishing on his own account, until his publisher should be of opinion that the time had come for the revival of the public interest in the work.

The decision of this question, in the case of Reade v. Bentley, appears to have held, that the position of the author, under such circumstances, is one of so great hardship and difficulty; that unless it were clearly shown to have been contemplated by both parties to the agreement, it should not be forced upon him.

If an author sells his copyright in a work, for a limited term, to a publisher, the publisher may, except in case of actual fraud, continue, after the expiration of the term, to sell copies of the work printed during its continuance.[1]

[1] Howitt v. Hall, 10 W. R. 381; 6 L. T. N. S. 348.

432. In Pulte v. Derby,[1] where a contract in writing was entered into between an author and a firm of publishers, whereby the former agreed to give the latter "the exclusive right to print and publish an edition of one thousand copies of a work to be written" by the author, in consideration whereof, the publishers agreed "to print and publish an edition above mentioned (one thousand copies), at their own cost and expense, and pay the author the sum of fifteen cents each for all and every copy sold;" and that, if the publishers "find a second edition called for, the said author should revise and correct a copy of the first edition ready for the press, which the said publishers agree to have stereotyped at their own cost, having the exclusive use and control of the plates, printing as many copies as they can sell, paying to the said author the sum of twenty cents for each and every copy sold; settlement to be made semi-annually from the day of publication, on their note, at four months from the date of settlement;" and where the publishers, with the author's knowledge and acquiescence had themselves recorded as proprietors of the copyright, it was held, that they had the legal title to the copyright in them, but only for the purposes of the contract. "The right," said the courts, "covers their interest, and protects it so long as they shall be engaged in the publication and sale of the work, and no further. They cannot transfer or assign the copyright, nor publish the work, except upon the terms of the contract."

The first edition of the work in .at case having been exhausted, the publishers stereotyped the corrected manuscript of the second edition, but printed only one thousand five hundred copies of the first im

[1] 5 McLean, 337.

pression; and, when these were sold, two thousand more copies were published, being called, in the title-page, the third edition. The author then revised a third edition, caused it to be stereotyped and printed, took out a copyright in his own name, and filed a bill for an injunction to prevent the publishers from further printing, publishing, or selling their third edition, as contrary to his wishes, and in fraud of his rights. The court held, that the publishers were not limited, under the contract, to the number of copies which they might strike off at the first impression of the second edition, but might print any number they could sell, as they should be wanted, during the existence of the copyright; and that the author had no right to print an edition for himself, and take out a copyright, so long as the publishers complied with the contract.

The court also held, that though the publishers could not transfer their copyright to a third party, they might sell him the plates, and authorize him to publish, still accounting to the author, pursuant to the contract; and that the publishers were bound to keep the market supplied, and could not refuse to print, if they could sell.

433. As to whether, on the sale of a copyright, the law implies a warranty in the seller, in the absence of an express warranty, or whether the ordinary rule of sales of personal property will be held to govern, there is, it seems, some doubt.[1]

A chattel mortgage on the copyright of a work is not a mortgage on the profits arising from a user of the copyright.[2]

[1] Shortt, p. 280; Simms v. Marryat, 17 Q. B., 281.

[2] Kelly v. Hutton, 3 L. Rep.; 3 Ch. App. 703; 38 L. J. 917; Ch. L. T. N. S., 223.

The questions arising upon an agreement between proprietors that the matter or type of one newspaper shall be used for another, were discussed in the case of Platt v. Walter,[1] which has been already noticed in the chapter on Newspapers.

434. The question as to whether and how far a *lien in the nature of a mechanic's lien* will subsist in a printer for his services in printing a work, was discussed in England in the cases of Clay v. Yates,[2] Blake v. Nicholson,[3] Bleaden v. Hancock.[4] The question will depend somewhat upon the custom of the trade.[5] But if the book be non-innocent in its character, the printer equally with its author and publisher, is excluded from any protection in connection therewith.[6]

No person who has had anything to do with the composition of an immoral or libelous work, can maintain an action against the person who employed him, to recover remuneration for his labor. One who lends himself to the violation of the public morals, or the laws of the country, cannot have the assistance of those laws to carry his purpose into execution.[7]

435. Copyright may be transferred, the same as all other personal property, either by instrument in

[1] 17 L. T. N. S., 157, *ante*, p. 502.
[2] 1 H. & N., 73.
[3] M. & S., 167.
[4] M. & Mal. 465; 4 C. & P., 152.
[5] Gillett v. Mawman, 1 Taunt. 137; Adlard v. Booth, 7 C. & P., 108. As to custom of the trade of printing in England generally, see also Cunningham v. Fonblanque, 6 C. & P. 44; Hill v. Levey, 3 H. & N., 8; Mawman v. Gillett, 2 Taunt. 323.
[6] Forres v. Johnes, 4 Esp. 97; Clay v. Yates, 1 H. & N., 73; Gale v. Leckie, 2 Stark., N. P., 110; Poplett v. Stockdale, Ry. & M., 337.
[7] Poplett v. Stockdale, Ry. & M., 337.

writing, or by parol; but in the latter case the transfer, in order to be valid in law, must be recorded, as provided by law, in the office where the copyright was registered under the statute.[1]

But it has been held that when the proprietor's intention to assign appears, the contract will be held binding.[2] A mere receipt might be such evidence,[3] and in a late case,[4] a passage in a letter running thus: " . . . In answer to your letter of the 16th instant, I beg to say that I accept the offer you therein make me, and agree to the condition you propose for cancelling my debt to you, viz., to let you have my drama of 'Doing for the Best,' in discharge of £10 of the sum due, and to furnish you with a little piece in a couple of months "—was held to be a complete assignment of the writer's property in the drama mentioned. The rule will probably be, as in all other cases, that between the parties an unrecorded assignment would still be valid.[5] But, in all other cases, the rules of personal property seem to apply. In the case of patents, a right to manufacture and sell may be granted by the patentee, for certain localities. It

[1] Stats. U. S. Revision of 1873–75, Dec. 4955. In England the rule is the same; the assignment must be duly entered at Stationers' Hall, *vid.* also Power v. Walker, 4 Camp. 8; 2 M. & Selw., 7; Clementi v. Walker, 2 Bar. & Cres., 861; De Pinna v. Pothill (ob.), 1; Davidson v. Bohn, 6 C. B., 456; Morris v. Kelly, 1 J. & N., 481; *vid.* aliter Cumberland v. Copeland, 7 H. & N., 118. As to the necessity of witnesses, see Shortt, L. Lit., p. 153, 154.

[2] Leader v. Purday, 7 C. B., 4.

[3] Levi v. Rutley, L. R. 6 C. P., 523.

[4] Lacy v. Toole, 15 L. T. (N. S.) 512; *vid.* Cumberland v. Copeland, Ex., 7 H. & N., 118; 31 L. J., 19 Ex., 4 L. T. (N. S.), 803. Also chapter on Contracts Relating to Contract, *post*, p.

[5] And see Webb v. Powers, 2 Wood & M., 497.

seems to have been thought in England—though the case has never met with an express decision—that copyright is not so divisible,[1] though, it seems, the term of a copyright may be divided.[2] And we have seen, in considering stageright or dramatic copyright, that a right to represent a play may be granted for certain localities.[3]

436. It has been repeatedly decided, that property

[1] In Jeffreys v. Boosey (4 H. L. Cas., 815), in which there had been assignment to the defendant of an opera for publication in the United Kingdom only, Lord St. Leonards, Pollock, C. B., and Parke, B., were strongly of opinion that copyright is indivisible and consequently incapable of being partially assigned. The case was not, however, decided upon that ground. Parke, B., in giving his opinion to the House of Lords, said: "I am of opinion that this is an indivisible right, and the owner cannot assign a part of the right, as to print in a particular county or place, or do anything less than assign the whole right given by the English law. It seems to me analogous to an exclusive right by patent, which cannot, I apprehend, be parcelled out, though licenses under it may." And Lord St. Leonards, still more strongly: "If there is one thing which I should be inclined to represent to your lordships as being more clear than any other in this case, it is that copyright is one and indivisible. I am not speaking of the right to license; but copyright is one and indivisible; or is a right which may be transferred, but which cannot be divided. Nothing could be more absurd or inconvenient than that this abstract right should be divided, as if it were real property, into lots, and that one lot should be sold to one man, and another lot to a different man. It is impossible to tell what the inconvenience would be. You might have a separate transfer of the right of publication in every county in the kingdom." The assignment in this case took place before the passing of the Act 5 & 6 Vict., c. 45, but this act has made no change as to the extent of copyright.

[2] Says Maule, J., in Davidson v. Bohn (6 C. B., 458): "The author or proprietor may assign the right to less than the full term. It never could have been intended to introduce the complicated sort of copyright suggested."

[3] *Ante*, p. 299; Crowe v. Aiken, 2 Biss. R. 208.

in a newspaper passes to the assignees, under proceedings in bankruptcy.[1] Whether the assignees, however, could take a mere right to copyright (sometimes called copyright before publication), does not appear to have been decided.[2] A foreign author, not a resident of the United States, cannot, by an assignment of his copyright to a citizen, evade the statutes of copyright.[3]

437. It seems that an assignment made by parol may be valid, if it be registered in the office where the copyright was entered. In the Scotch case of Kyle v. Jeffreys,[4] the defendant claimed copyright by assignment from the authoress, in the words of a song written by Miss Eliza Cook, and sought to restrain the publication of the song by Kyle. Jeffreys had registered himself as proprietor, at Stationers' Hall, and a certified copy of the registry (by statute, prima facie proof of proprietorship), was produced at the trial. His title being impeached by Kyle, other evidence was offered, consisting of a receipt, by Miss Cook, for a sum of money paid her by Jeffreys, "for copyright of words of a song written by me, entitled 'The Old Arm Chair;'" and also the testimony of a person to whom Miss Cook had stated that she had parted with the copyright in the song to Jeffreys. The court admitted the receipt as evidence, holding that where the prima facie evidence afforded by the certificate of registration was rebutted, the claimant might still support his title, without production of a formal instrument of assign-

[1] Longman v. Tripp, 12 Bas. & P. N. S. 67.

[2] Atcherty v. Vernon, 10 Mod. 518; *vid.* 4 Burr. 2311, Amb. 695.

[3] Jeffreys v. Boosey, 4 H. L. Cas. 815.

[4] Scotch Sess. Cas. N. S. 8.; 18 Scotch Sess. Cas. N. S. 906.

ment. As the evidence of title admitted on the trial in this case was not a writing under seal, the approval by the House of Lords of this ruling decides that a deed is not necessary to a valid assignment of copyright.[1]

438. An agreement to assign a copyright will be treated by equity as a valid assignment, upon the maxim, that equity looks upon that as done which ought to have been done. The most common cases of the application of the rule are under agreements, all such being considered as performed, which are made for a valuable consideration, in favor of persons entitled to insist on their performance. Hence, a man has in many cases a title, recognized and enforced by equity, where he has no title at law. Thus, an agreement to assign is treated by equity as a valid assignment, and infringements of literary property have been restrained where the claimant of the aid of chancery had only an equitable title to relief, and possessed no title recognized at law.[2]

439. Written agreements between author and publisher are often made, by which the copyright is not intended to be passed. A written agree-

[1] Shortt, p. 153.

[2] "Lord Mansfield, indeed, was of opinion that relief would not be given in such a case, and said, in Millar v. Taylor, 4 Burr, 2400, that unless a court of equity saw a law right existing in the author it would not interfere. Such also was the opinion of Lord Eldon, in Rundell v. Murray, 1 Sac. 315 But Lord Lyndhurst, in Chappell v. Purday, 4 Y. & Col., referring to this expression of opinion, observed. "If by this it was meant to be said that a court of equity would only interfere when the legal right was in the party applying for its interference, I will not go so far; because I think that a court of equity will assist any party having an equitable right, where the legal right intervenes to prevent his obtaining justice; otherwise great fraud would ensue."—Shortt, p. 159. *Vid.*, however, Mawman v. Tegg, 2 Russ. 385.

ment between an author and a publishing firm, that the latter "should print, reprint, and publish a work of the author's, at their own risk, on the terms of dividing equally with him any profits that there might be after payment of all expenses; and that if all the copies should be sold, and another edition should be required, the author should make all necessary alterations and additions, and the publishers should print and publish a second and subsequent editions on the same terms; and that if all the copies of any edition should not be sold in five years from the time of publication, the publishers might sell the remaining copies by auction or otherwise, in order to close the account," was held, in Stevens v. Benning,[1] not to be a contract for the assignment of the author's copyright, but a mere personal contract on both sides, not assignable by either party.[2]

[1] 6 DeG. M. & G. 228; 1 Kay & J. 168.

[2] Id. The firm with whom the agreement was made, in that case, having been changed, and their interest having been assigned to a new firm, the latter firm was held not entitled to restrain the publication of a new edition by another publisher with the author's concurrence. *Vid.* also Sweet v. Shaw, 3 Jur. 217; Sweet v. Maugham, 4 Id. 456; Bohn v. Bogue, 10 Id. 421; Mawman v. Tegg, 2 Russ. 402; Sweet v. Cater, 11 Sim. 573; Reade v. Bentley, 3 K. & J. 271. In this latter an agreement was entered into between the plaintiff and defendant that the latter should "publish at his own expense and risk a book written by the plaintiff, and after deducting from the produce of the sale thereof the charges for printing, paper, advertisements, embellishments, and other incidental expenses, including the allowance of £10 per cent. on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition that should be printed, to be divided equally between the plaintiff and defendant; the books sold to be accounted for at the trade-sale price, reckoning twenty-five copies as twenty-four, unless it should be thought advisable to dispose of any copies, or of the remainder at a lower price, which was left to the judgment and discretion of the de-

440. The present copyright law of the United States[1] provides that authors shall have the exclusive right to dramatize their own works. It is to be

fendant." The vice-chancellor (Wood) was clearly of opinion that this agreement was not, and was never intended by either party to be, a contract for the sale or purchase of the copyright. The vice-chancellor said: "It is unfortunate that publishers and authors should frame their agreements with so little precision, as from the case of Stevens v. Benning and this case it appears they are in the habit of doing. At the same time, from what I see in this case, I feel more confident than I did in Stevens v. Benning that there was no intention to dispose of the copyright by this agreement, because I cannot suppose that authors or publishers are so unaware of the importance and value of that right, as not clearly to express their intention when they mean the copyright to pass."

When this case came up a second time before the court (*vid.* 4 K. & J. 664), the defendant did not contend that the agreement amounted to a sale of the copyright, but insisted that the plaintiff had thereby granted to the defendant an irrevocable license to print and publish. The vice-chancellor did not, however, adopt this construction of the agreement. He said: "If the defendant's construction be correct, it follows that so long as he lives and is willing to continue publishing fresh editions of the work, so long, according to the doctrine in Sweet v. Cater, the plaintiff will be precluded from asserting a right to publish any competing edition. The defendant could compel the plaintiff to abstain from publishing a single copy of the work, so long as he expressed his readiness to continue publishing. But the plaintiff had no reciprocal power. He could never compel the defendant to publish more than a single edition of the work. His powers are limited to what the contract gives him; and according to the contract, when the defendant has published a second edition the contract on his part is fulfilled. This is a position of considerable hardship for an author, and one which ought to be clearly shown, upon the face of a contract, to have been contemplated by the parties who entered into it. . . . . It cannot be contended that the agreement on the author's part is like a grant, in which the onus is upon the grantor, of showing that he has not parted with all which the grant appears

[1] Stats. U. S. Revision of 1873–74, § 4952.

inferred that this right, like others recognized or conferred by the statute, must be parted with in the same way, and by means of the same formalities, as necessary to the transfer of the copyright itself. It was held in England, in a leading case on this subject,[1] that when an author assigned his copyright, he also parted with the right to its dramatic representation. But this was in the case of matter dramatic in its form, and it has since been enacted by express statute[2] "that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right shall pass by such assignment."[3] An assignment of the right

to comprise. The onus is here with the party who contends that this agreement amounts to a license, which, upon the face of it, it does not. It clearly is not an assignment of the copyright. It does not appear to me to create more than a joint adventure; and if license there be at all, it is only a license so far as may be necessary for carrying out that joint adventure, and an implied license for that purpose. That being so, the onus is upon the defendant of showing that the contrary construction is necessary; and that not being shown, a construction which would leave the author fast bound, and the publisher entirely free, after the publication of one edition, is not a reasonable construction to adopt in considering the effect of an agreement of this character?" His honor showed his disapprobation of the loose manner in which the agreement had been framed, by giving no costs, considering each party equally in fault for having entered into an agreement so difficult of interpretation.—Shortt, L. Lit. p. 161.

[1] Cumberland v. Planche, 1 A. & E. 580.

[2] 5 & 6 Vict. c. 45, § 22.

[3] "A valid assignment of the copyright in dramatic and musical compositions, regarded simply as literary productions,

to represent a dramatic or musical composition, must be in writing.[1] But such writing, it seems, may be executed by the proprietor's agent.[2] An assignee of a copyright is substituted entirely in the place of his assignor, and may maintain actions for penalties or damages in regard to the same.[3]

441. The right to first publish a work is exclusively in the author (or in the literary proprietor of the manuscript), and such a right will not be construed as alienated, except by express and unmistakable act of such author or proprietor. And under a contract between author and publisher, whereby the publisher agrees to publish the work, and pay the author, for the copyright, seven-and-a-half cents for every copy of the book published, the publisher does not obtain the exclusive right to publish the work.[4]

442. Until he shall have parted with it formally, and by such formalities as will leave no doubt of his manifest intention so to do, the manuscript itself—the paper and the ink—is a chattel indeed, and, like every other chattel, is seizable for debt; but the intangible literary and not carrying with them the right of representation, may be made either, first, by an instrument in writing which need not be under seal or attested by witnesses, or, secondly, by entry in the book of registry at Stationers' Hall in the form above given (p. 156) for the assignment of books.

"The necessity of writing to confer a title by assignment, valid at law, is apparent from the cases already cited with reference to the assignment of copyright in books, as by the interpretation clause (§ 2) of 5 & 6 Vict. c. 45, the word "book" is used to include "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, &c." —Shortt, L. Lit. p. 165.

[1] Shepherd v. Conquest, 17 C. B. 427: 25 L. J. 127, C. P.

[2] Lacy v. Toole, 15 L. T. N. S. 512; Moreton v. Copeland, 16 C. B. 517.

[3] Thompson v. Symonds, 5 T. R. 45.

[4] Willis v. Tibbals, 33 N. Y. Superior Ct. 219.

property cannot be seized, nor can one who has levied upon the manuscript avail himself of the intangible literary property.

The earliest recognition of this principle was probably embraced in a decree of the French king, Louis the Fifteenth, in 1749. When Crebillon,[1] the French tragic poet, published his Catilina, the creditors of the poet attached the profits thereof, as well at the bookseller's, who had printed the tragedy, as at the theatre where it was performed. The poet, much irritated at these proceedings, addressed a petition to the king, in which he showed that "it was a thing yet unknown, that it should be allowed to class the productions of the human mind amongst seizable effects; that if such a practice was permitted, those who had consecrated their vigils to the studies of literature, and who had made the greatest efforts to render themselves, by this means, useful to their country, would see themselves in the cruel predicament of not daring to publish works, often precious and interesting to the state; that the greater part of those who devote themselves to literature require, for the necessaries of life, those succors which they have a right to expect from their labors; and that it never has been suffered in France to seize the fees of lawyers, and other persons of liberal professions." In answer to this petition, a decree immediately issued from the king's council, commanding a withdrawal of the arrests and seizures, of which the petitioner complained. This honorable decree was dated 21st May, 1749, and bore title, "Decree of the Council of his Majesty, in favor of

[1] Louis XV. further testified his esteem of Crebillon by having his works printed at the Louvre, and, after his death, by consecrating to his glory a tomb of marble.

M. Crebillon, author of the tragedy of Catilina, which declares that the productions of the mind are not amongst seizable effects."

And it has been held in the United States, that although a sheriff may seize upon the manuscript of an author, he may not publish its contents for the benefit of his creditors.[1] It is piracy, therefore, for an officer who has levied upon a manuscript, of value to its author, to multiply copies thereof.[2] So, where a sheriff had seized upon a manuscript set of abstract books and indices, containing complete abstracts of title to all the lands in a county, with the incumbrances and liens thereupon, and a sheriff had seized upon them in execution, it was held, that he was entitled to hold the manuscript as a chattel, but that he could not print and dispose of a set of abstract books and books of indices, containing complete abstracts of title to all the lands in a county, with the incumbrances and liens upon them, prepared with labor, skill, and care, by an individual, for his own use, in the prosecution of his practice as a conveyancer, which are proper subjects of protection by copyright so long as the author retains the ownership of the manuscript thereof.[3]

And in the case of Stevens v. Cady[4] it was held,

[1] Banker v. Caldwell, 5 Minn. 89. Paper and ink used by a printer, in a state where by law they are not exempt as tools and implement, are liable to levy (Salle v. Walker, 17 Ala. 482). "And where a newspaper printing establishment has been seized," says Herman on Executions, p. 145, "the subscription list may be included."

[2] Banker v. Caldwell, 3 Minn. 94.

[3] Banker v. Caldwell, 3 Min. 94; see also Matthewson v. Stockdale, 12 Ves. 270; Longman v. Winchester, 16 Id. 424; Casey v. Longman, 1 East, 354.

[4] 14 How. U. S. 528; see also Stevens v. Gladding, 17 How. 447.

that copyright in a published print is not the subject of seizure or sale by execution, although it may be reached by a creditor's bill, and applied to the payment of the debts of the author. In that case the copperplate engraving of a map, in which the plaintiff had secured a copyright, was seized and sold under an execution; but the purchaser was restrained from striking off and selling copies of the map. "The copperplate engraving," said the court, "like any other tangible personal property, is the subject of seizure and sale, on execution, and the title passes to the purchaser, the same as if made at a private sale. But the incorporeal right, secured by the statute to the author, to multiply copies of the map by the use of the plate, being intangible, and resting altogether in grant, is not the subject of seizure or sale by means of this process —certainly not at common law. No doubt the property may be reached by a creditor's bill, and be applied to the payment of the debts of the author, the same as stock of the debtor is reached and applied, the court compelling a transfer and sale of the stock for the benefit of the creditors. But in case of such remedy, we suppose, it would be necessary for the court to compel a transfer to the purchaser, in conformity with the requirements of the copyright act, in order to invest him with a complete title to the property."

443. Any contract to reprint a literary work, in violation of a copyright of such work, secured to, and existing in, a third person, is void.[1] Nor will a sale or transfer, for value, between two persons, of any physical substance, carry a copyright. So, for example, the sale, upon execution, of a copperplate for a map, does not pass in the purchaser a right to use the copperplate to print such a map.

[1] Nichols v. Ruggles, 3 Day, Con. 145.

In Warne v. Routledge,[1] the facts were as follows: In April, 1873, a married woman, Mrs. Cook, verbally agreed with the Messrs. Warne that they should take a manuscript which she had written, entitled "How to Dress on £15 a Year as a Lady," and should publish it anonymously, bearing all expenses connected therewith, selling each copy of the book at one shilling, and paying her a royalty of one cent upon each copy, reckoning every thirteen copies as twelve for that purpose. Plaintiffs thereupon expended large sums in advertising the book, which reached a large sale, whereupon they paid Mrs. Cook the sum of one hundred pounds, as her royalty on the copies sold. Differences having arisen between Mrs. Cook and the plaintiffs, in November, 1873, she and her husband agreed with the Messrs. Routledge that they should publish a revised edition of the book, which they accordingly advertised, under the same title; while about two thousand copies of the edition published by the plaintiffs remained unsold. Said the court: "This bill in effect seeks to restrain the authoress from publishing, or allowing others to publish, a work, the copyright in which is undoubtedly vested in her. If there is anything to prevent her exercising her rights, it must be found either in the bill or in the evidence, and I cannot find it in either. There is not, as far as I can see, a pretense for saying that she ever contracted not to publish the book, and this is what I am asked to prevent her from doing." "It is said," continued the court, "that if you give the publisher no protection, the result may be that the author may publish another edition a day or two after the publish-

[1] L. R. 18 Eq. 497; and see also Howitt v. Hall, 10 W. R. 381; Sweet v. Cater, 11 Sim. 572; Stevens v. Benning, 1 K. & J. 168; Lumley v. Wagner, 1 D. M. & G. 604.

ing of the first edition, and so destroy the value of the remaining copies of the first edition remaining unsold. That may be. And it is said that this is so unreasonable that you must infer some stipulation to prevent it. Why? No doubt partnerships have their inconveniences as well as their conveniences. There is no reason why I should make persons take up a totally different position from that which they have agreed to take up, because it might be convenient to one of the parties after the termination of the arrangement. If you want that protection for a definite term, you must contract for it. But I cannot import such a term into the contract. If I did, I should make partnerships at will involve consequences that partners never dreamt of."

Where a published work is advertised as copyrighted in the name of an assignee of its author, courts will disregard a license from the author to publish it.[1]

444. Leading as to the right of an author upon the bankruptcy of his publisher, is Curry's Case, arising out of the property in the novels "Jack Hinton," "Tom Burke of Ours," and "The O'Donahue," which were to be published by the bankrupt firm, from manuscript supplied by Charles Lever. It was agreed that these novels should be supplied to the publishers, Curry & Company, by Lever, in monthly numbers, the publishers to pay all expenses of eleven thousand copies of each number, and one hundred pounds to Lever, such copies to be sold at one shilling each, and upon all numbers above the said eleven thousand, the said Lever and said Curry & Company to share and share alike. The publishers becoming bankrupt

[1] Hodge v. Welsh, 2 I. E. R. 266.

meanwhile, and having sold two thousand copies to a publisher, at a reduced rate, Mr. Lever claimed to recover for them, and in the premises, from the assignee. But the court held, that if Mr. Lever was a partner, he was only a dormant partner as to the unsold stock; that it all belonged to the bankrupts' creditors' and that Mr. Lever had no lien upon it; that the sale of copies at a reduced price, raised, if anything, a claim for damages, and not for compensation out of the bankrupts' estate. The court further pronounced that a mere question of title between an author and a bankrupt publisher, as to which is owner of a portion of a copyright, cannot be decided in a proceeding in bankruptcy, but that semble, that where an author allowed a publisher to advertise himself as the owner of a copyright, though it had never been assigned in writing to him, such copyright should be dealt with as the publisher's property in bankruptcy.[1]

445. Letters and communications sent impliedly or expressly for publication, and received from correspondents by the editors or proprietors of periodical publications, become the property of the person to whom they are directed, and cannot be published by any other person obtaining possession of them.[2]

446. No agreement will be implied on the part of an author not to publish a subsequent edition of a work until a previous edition is exhausted. Nor will equity enjoin an author from publishing the second edition under such circumstances.[3]

The contract between an author and his publisher

[1] Re Curry, 12 I. E. R. 382.
[2] Copinger on Copyright, p. 32.
[3] Warne v. Routledge, L. R. 8 Eq. 469.

is in the nature of a partnership at will, wherein one partner contributes the skill, and another the capital; in the absence of any contract continuing the partnership, either can withdraw at any time, and the other cannot restrain him from continuing to do business, because of the loss he has sustained by the withdrawal.[1]

447. In the absence of any special contract to the contrary, the assignor of a copyright is entitled to continue selling copies of the work printed by him before the assignment, and remaining in his possession.[2]

448. A shopkeeper cannot recover for the price of immoral or obscene prints and libels sold by him;[3] and a printer has no action against a publisher for the price agreed to be paid for printing an indecent, libelous, and immoral history.[4] Where the plaintiff,

[1] "Suppose two people took a shop, one finding the capital, and the other the skill and power of management, and the one finding the capital took a lease of the shop and expended a large sum of money in furniture, fixtures, stock in trade, and goods, and suppose a week afterwards the other one determined the partnership, no doubt that might occasion a very great loss to the capitalist; but could I import an agreement that the other man should not carry on any business elsewhere, until sufficient time had been given to enable the first man to get remuneration in buying stock and leasing the shop." Per Jessel, M. R. Id. Warne v. Routledge, L. R. 8 Eq. 469.

[2] Taylor v. Pillow, L. R. 7 Eq. 418.

[3] Fores v. Johnes, 4 Esp. 97.

[4] Poplett v. Stockdale, 2 C. & P. 200. "It is not material whether the person who disperses libels is acquainted with their contents or otherwise, for nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them" 2 Starkie on Slander, 30, note *z*; Moore, 627; Wood's Inst. 431; Bac. Abr. tit. Libel, 458.

Nutt's Case, Fitzg. 47; Barnard 306, was where defendant

a printer, agreed to print for the defendant a certain number of copies of a treatise, to which a dedication was to be prefixed, and, after the treatise was printed, and the proof-sheet of the dedication was revised by the defendant and returned to the plaintiff, the latter, for the first time, discovered that it contained libelous matter, and on that account refused to complete the printing, it was held, that he was justified in so refusing, and was also entitled to recover for printing the treatise. "I told the jury," said Pollock, C. B., in that case,[1] "that if the plaintiff agreed to print the dedication and the treatise, and so undertook to print that which he knew to be libelous, and afterwards said that he would not print both; in such case he could not recover. I think his right to recover rests entirely on the ground that he had been fur-

was tried for publishing a libel. It appeared in evidence the defendant kept a pamphlet shop, and that the libel was sold in defendant's shop, by her servant, in her absence, and that she did not know the contents of it, nor of its coming in or going out. Held to be a publication by the defendant.

Rex v. Dodd, 2 Sess. Cas. 33: The defendant was tried for publishing a libel. It was insisted for the defendant that she was sick, and that the libel was taken into her house, without her knowledge; held no excuse. And see Rex v. Almon, 5 Burr. 2689, where the court said that the sale of a libel in a bookseller's shop was prima facie evidence of a publication, though rebuttable by circumstances. A defendant may rebut the presumption by evidence that the libel was sold contrary to his orders, or clandestinely; or that some deceit or purprise was practiced upon him; or that he was absent under circumstances which entirely negatived any presumption of privity or connivance. 2 Starkie on Slander, p. 34.

Chubb v. Flanaghan, 6 Car. & P. 431, held that where a publication consists in selling copies of a periodical in which the libel was contained, it was a question for the jury whether the defendant knew what he was selling; and see *ante*, vol. i. chapter on Innocence and Libel.

[1] Clay v. Gates, 1 H. & N. 73.

nished with the treatise without the dedication. The dedication was afterwards sent, but he had no opportunity of reading it, until after it was printed. He then discovered that it was libelous, and refused to permit the defendant to have it. I think that if a contract is bona fide entered into by a printer to print a work, consisting of two parts, and at the time he enters into the contract he has no means of knowing that one part is unlawful, and he executes both, but afterwards suppresses that which is unlawful, there is an implied undertaking on the part of the person employing him to pay for so much of the work as is lawful."

"Although the illegality or immorality of an intended publication, would be a good defense to an action brought against the author for breach of contract to deliver his manuscript for publication, this illegality or immorality is not to be presumed where the work itself is not produced at the trial.'[1]

449. It is a rule of law, that the personal representative is entitled to the benefit of all such of the executory contracts of the deceased as he can fairly and efficiently fulfill; and, therefore, if a man builds half a house, or makes half a wheel-barrow, or half a pair of shoes, and dies, the executors may complete and deliver them, and sue either for work and labor done by them, or for goods sold and delivered by them as executors.[2] When, however, the contract is founded upon the known skill of the deceased, or his peculiar talents, and intellectual capabilities, and acquirements, it is determined by his death. If a publisher, for example, agrees to pay some celebrated poet or author

[1] Gale v. Leckie, 2 Stark, N. P. 110.

[2] Werner v. Humphreys, 3 Sc. N. R. 226; Marshal v. Broadhurst, 1 Cr. & J. 405; Collinson v. Lister, 20 Beav. 365.

a fixed sum of money for a poem or treatise, and the writer dies before he has completed his task, the contract is absolutely determined, and the publisher is not bound to pay any part of the stipulated remuneration, unless he has accepted and used some portion of the work; in which case he will be liable upon the ordinary implied promise in respect of a benefit actually received.[1]

450. It would appear that there is no general custom of trade binding printers to insure, for

[1] Morgan's Addison on Contract, vol. i. § 456, p. 630. But where an engineer was appointed to construct certain works, which it was calculated would occupy fifteen months, and was to be paid for his services during that period the sum of £500, by equal quarterly instalments, and shortly after the end of the third quarter he died, two of the quarterly instalments then remaining unpaid, it was held that, although his death put an end to the contract for the future, it did not divest the right of action for those instalments which had already accrued to him, and that his administrator was therefore entitled to recover them, and not merely to sue upon a quantum meruit for the value of the amount of the work actually done. Stubbs v. Holywell Ry. Co. L. R. 2 Ex. 311; 36 L. J. Ex. 166.

In England, printers are required (2 & 3 Vict. c. 12, s. 2; 32 & 33 Vict. c. 24) to affix their names and places of abode or business to all papers and books printed by them for publication; and if a printer neglects to comply with the requisitions of the statute, he cannot maintain an action for his labor, or for the materials provided for the printing. But, as the name is required to be printed on the first or last leaf of every book, the omission might be rectified by the tender of the requisite printed leaf to the author or publisher at any time before actual publication. As soon as a printer discovers that he is printing libelous matter, he ought to stop, and may then recover for what he has done; but, if he goes on with his printing, he makes himself a party to the unlawful transaction, and cannot recover his charges (Morgan's Addison on Contracts, vol. i. p. 230; Clay v. Yates, 1 H. & N. 73; 25 L. J., Ex. 237). As to the registration of printing presses, see Day v. Hemming, 9 W. R. 703.

booksellers, the paper given for works to be printed.[1] If there is an express undertaking by the printer to insure the paper given him for a work which he contracts to print within a certain time, he is liable for a loss by fire which takes place after that time, even though the completion of the work within the specified time has been prevented by the failure of his employer to supply copy fast enough.[2] If he wishes to exonerate himself from all risk after the specified time has elapsed, he must abandon the contract altogether. If, whilst complaining of the delay in supplying copy, he continues to print, his contract to insure continues.[3]

Where certain printers were employed to print a work, of which the impression was to be seven hundred and fifty copies, and a fire broke out on their premises before the whole number of copies had been delivered, in an action to recover the amount to be paid for the work, Tindal, C. J., held, that the printers' right to recover depended on the question whether the whole seven hundred and fifty copies had been printed when the fire broke out, or whether the fire took place while the press was set, and before the whole was printed off; in which latter case they would not be entitled to recover anything.[4] Disraeli mentions a custom of insurance companies, to insure authors' manuscripts, adding that the companies will decline to allow the authors themselves to estimate the value of such manuscripts. It is not difficult to see how impracticable such a plan would be. Unless an insurance company kept a "reader," like a publishing-

[1] Mawmann v. Gillett, 2 Taunt. 325.
[2] Id.
[3] Id.
[4] Adlard v. Booth, 7 C. & P. 108.

house, it would be impossible to place any value, and consequently to write any policy, upon a manuscript. In the United States, insurance companies do not underwrite upon authors' manuscripts, but, upon application for such insurance, advise the applicant to invest his intended premium in copying-charges, and keep his two copies in two different places, not likely to be exposed to one fire. Their principle is to guard against any insured making a profit by a fire. The value of a manuscript is, in a commercial aspect, estimated in the market as purely fictitious; and no sensible underwriter would put himself in a position where a writer could force him to buy his manuscript, at his own valuation. A manuscript is, in its very nature, uninsurable. As composing parts of libraries, ancient and rare manuscripts are sometimes insured, but, without specific bargain, they are excluded.

451. A printer who is employed to print certain numbers, but not all consecutive numbers, of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of those numbers.[1]

Where a printer so employed by one Stratford, printed eight thousand seven hundred and fifty copies, of which he delivered only five thousand nine hundred and eighty-seven to Stratford, the residue remaining in his own warehouse, though Stratford supplied the paper for printing the several numbers from time to time, as they were to be printed, and the printer made a separate charge for each number, the assignees of Stratford, who afterwards became bankrupt, were held not entitled to recover

[1] Blake v. Nicholson, 3 M. & S. 167.

from the printer the copies remaining in his possession, on tendering to him so much as was due for the printing of those copies, in proportion to his charge for the whole. Lord Ellenborough, C. J., said: "I think the defendant had a lien for the whole balance, the work being an entire work in the course of prosecution, upon the same principle that a tailor, who is employed to make a suit of clothes, has a lien for the whole price upon any part of them. It would be inconvenient if he was obliged to make stops in the course of the work: the nature of the work affords a reason for his general lien." And Le Blanc, J., added: "The supplying the paper from time to time did not make it the less one entire work.[1]

It seems that a stereotype printer has not a general lien on stereotype plates, not manufactured by himself, but only put into his hands for the purpose of printing from them.[2]

To establish a general lien in such a case, the stereotype printer must show, according to Tindal, C. J., such a custom of trade that the other party to the transaction must be taken to have contracted with with reference to it. "Nothing short of this," said the chief justice, "will dispense with an express contract; for generally that is the only mode of creating such a lien as this, which the common law does not recognize. In trades long established such a usage may not improbably have grown up; but it requires strong evidence to show its existence in a new trade like that of stereotype printing, which has sprung up within a short period, and in which it is not very

[1] Blake v. Nicholson, 7 C. & P. 103.

[2] Bleaden v. Hancock, M. & Mal. 465; 4 C. & P. 152. This case was decided in 1829.

probable that any such general usage has yet been established."[1]

It seems, that by the custom of trade a printer cannot recover for the printing of a work before the whole is completed and delivered.[2]

[1] Bleaden v. Hancock, M. & Mal. 456; 4 C. & P. 152.

[2] Gillet v. Mawmann, 1 Taunt. 137. See also Adlard v. Booth, 7 C. & P. 108.

CHAPTER VII.

OF PIRACY.

452. Copyright being, as we have seen, not monopoly, but property,[1] trespass can be committed upon it, as upon all other property; and this trespass is called piracy. If this property be innocent and lawful in its nature,[2] both equity and law will take cognizance of piracy—the former, by preventing its continued commission; and the latter, by compensating in damages for that already committed.

453. It will be found a much less difficult task to seek for a definition of piracy, by inquiring in what it does not, rather than in what it does, consist. It is, in the first place, a trespass or tort committed upon copyrighted matter. But its peculiar character must be derived from an examination of the cases. It will be readily perceived that the question of damages does not enter into the definition, for there may be

[1] *Ante*, vol. ii. p. 2. Pierpont v. Fowle, 2 Wood. & M. 46.

[2] See *ante*, vol. i. chapter on Innocence. The recent case of Commonwealth v. Landis, 8 Phil. (Pa.) R. 453, goes further than many cases we were able to cite in the earlier pages of this work, and holds that a work ostensibly written in the interests of science may come under the penalty of the law of Innocence. The question whether a work is obscene or not, does not depend upon the question whether it is true or false, but upon its tendency to inflame the passions and debauch society. Anything which offends modesty—which is lewd, indecent, or has a tendency to produce lascivious desires, is obscene—such tendency is matter of fact, and to be judged of by the jury. A book purporting to give medical instruction may be found by a jury to have a tendency to debauch society, rather for purposes of personal gain to its writer than to benefit the public, even though it appear from the evidence of scientific men that its statements are true.

piracy where no damage (by which term the law always understands pecuniary damage, or damage reducible to a pecuniary estimate) is done to the proprietor of the pirated work. And again, on the other hand, there may be great and lasting damage done by the publication without its constituting piracy. For example, in the case of Prince Albert v. Strange,[1] which was held to be piracy, the plaintiff was not damaged at all, but sought to restrain the multiplication of copies of his work, merely because he preferred that it should not be made public; while in the case of Martinetti v. Maguire,[2] where the plaintiff was very seriously injured by an interference which was held to be no piracy, from the fact that the production interfered with was not itself entitled to protection under the copyright laws. Neither will, as in other cases, the intention constitute the wrong-doing. In other cases the maxim of the law is intentio cæca mala. But the intention to pirate has been held not to be necessary to constitute the offense of piracy. The animus furendi may be entirely wanting, and a later writer may, in perfect good faith, and without any idea of surreptitiously appropriating that which is not his, pirate and infringe upon the labors of a predecessor, with the best intentions, and yet be liable therefor.[3]

454. The simple, and at the same time a perfect,

[1] De G. & S. 652; 1 Mac. & G. 25. [2] Deady, R. 216.

[3] "The intention to pirate," says Lord Ellenborough (1 Camp. 98), "is not necessary in an action of this sort; it is enough that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced." And says Shadwell, V. C., in Campbell v. Scott, 11 Sim. 38, with reference to a book of avowed extracts from the poetical writings of others, "If A. takes the property of B., the animus furendi is inferred from the act." *Vid.* also Clement v. Maddick, 1 Giff. 98; Milett v. Snowden, 1 West. Law. Jour. 240

definition of piracy is, that it is "an infringement of a statute of copyright." That is to say, it must infringe upon something protected by statute, and is to be carefully distinguished, first, from a trespass upon a common-law right, and second, from an appropriation of matter other than that protected by an exact statute of copyright. For example, the stealing of a man's manuscript is not piracy, neither is the taking of a photograph of the Coloseum at Rome a piracy of a former photograph of the Coloseum, even though both be taken from precisely the same point of observation, the camera in each instance being planted on precisely the same spot. In the former case, the misdemeanor is a theft, against which it was not necessary to pass a statute; while in the second case, the only imitation which could be assigned to the second photographer, was the use of the same process for taking his picture. Although patents often protect processes, copyrights only protect the results of processes. So, as we have seen, the process by which a result is accomplished, whether it consist of the formation of a picture by pasting pieces of bark upon sheets of paper,[1] of a photograph, or by combining acids with a surface upon which light is admitted, or of representing an incident upon a stage by means of a mechanical contrivance, must be patented.[2] The picture, the photograph, or the romantic incident, are, however, legitimate subjects of copyright. If it were otherwise, the copyright of the photograph would protect the inventor of the camera which the operator used, the chemical process by which the negative was produced, the contrivance which printed the lights and shades

[1] Sprague, Joseph B. Official Gazette of U. S. Patent Office, vol. vi. (No. 14) 469.

[2] Freligh v. Carrol & Thompson, *ante*, this vol. pp. 221–319.

from the negative upon the paper, the paper itself, and the very tripod upon which the instrument stood. That the method employed to effect a piracy will not mitigate the character of the misdemeanor, we have already seen in Palmer v. Thorne,[1] where an infringing drama was constructed from a newspaper correspondent's outline of a play, written out and sent across the ocean; and again, in Toole v. Young,[2] where an infringing play was dramatized from a novel whose author—unknown to the infringer—had already dramatized it,—the solitary instance in which this doctrine has been heretofore held inapplicable, *i. e.*, the case of piracy by memorization, we have taken the liberty of questioning.[3]

Neither, it seems, will it make any difference in the act of piracy that the defendant has received no profit or gain by the particular acts; infringement and a multiplication of copies of a protected piece, is as much a piracy as if the multiplication had been made for purposes of pecuniary profit. So, where a member of a philharmonic society, desirous of having a certain piece of published music performed at a concert of the society, to which, besides the performers, an audience was admitted for money, caused copies of the said musical composition to be lithographed and gratuitously distributed among the performers, without consent of its proprietor, such act was held to be an act of piracy, and an infringement upon the proprietor's right in the published music.[4] In this case, however, it might have made a difference if no audience had been admitted for money.[5]

[1] Freligh v. Carrol & Thompson, *ante*, this vol. p. 364.
[2] Id. p. 296.
[3] Id. p. 330.
[4] Novello v. Sudlow, 12 C. B. 177.
[5] And see *ante*, this vol. p. 345, as to amateur theatricals.

Neither will it make any difference where the pirator procures the pirated matter. If A. publish and copyright a book, and B. pirates it, and C., upon meeting with B.'s book, without knowing its source, prints it over again, C. is none the less an infringer upon A.'s copyright, even though he never heard of his book, or that B. had pirated it. Nor need A. pursue his remedy against B. before suing C., but may proceed against both or either at his option. But if A. publish a guide-book or work of reference, from month to month, the copyrighted number for every month consisting of the same material as that of the month before, with the slight addition or change, perhaps, of such figures or words as would keep up with changes in the matters or arrangements to which it was a handbook: if B. should, without authority, copy from the number for June, we think it would be an infringement upon only the number for June, or upon the preceding numbers. For it could not well be an infringement upon those numbers which should be published after and subsequent to B.'s publication.

Hence it happens that while the offense is not defined by statute expressly, a multitude of decisions have arisen, wavering among themselves according to the circumstances of the particular cases presented.

455. We have seen that there can be no property in a subject or theme; that no writer on mathematics can lay claim, therefrom, to a monopoly of the science of mathematics, or if he write of Asia, can he copyright the subject, or the geography, or the climate, or any of the characteristics of that continent. It is equally apparent that one may refer to, or quote from, or translate, or versify, or even abridge a copyrighted work, even though by such abridgment he seriously impair the profits arising from the publication of the

larger work,[1] without being liable to the penalties attending piracy.

456. So one may, without infringing, take ideas from another's work, as for instance, the idea of alphabetically arranging a list of residents in a city, or of authorities cited in a treatise. Undoubtedly the idea of arranging indices, tables of contents, &c., alphabetically, occurred to some one originally, and was used by some one for the first time, but it is no infringement on his plan to make out tables of cases, or of contents, or directories, or indices, alphabetically. But an idea is not copyrightable, though the words in which it is expressed or demonstrated may be. This is analogous to the law of patents, which says that "an idea of itself is not patentable, although a new device by which it may be made practically useful is,"[2] *e. g.*, the idea of advertising by means of a baloon

[1] Shortt, 169. *Ante*, vol. i. p. 340.

[2] Waite, C. J., U. S. supreme court.—The Rubber Pencil Company, appellants, v. Samuel E. Howard et al.—This is the case of Blair's patent for a new and useful rubber head for lead pencils. After stating the claim of the patentee in his specifications, the court proceeds: The first question which naturally presents itself for consideration at the outset of this inquiry is, whether the new article of manufacture, claimed as an invention, was patentable as such. If not, there is an end of the case, and we need go no further. A patent may be obtained for a new or useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof. In this case Blair's patent was for a "new manufacture," being a new and useful rubber head for lead pencils. It was not for the combination of the head with the pencil, but for a head to be attached to a pencil, or something else of like character. It becomes necessary, therefore, to examine the description which the patentee has given of his new article of manufacture, and to determine what it is, and whether it was properly the subject of a patent. It is made of rubber, or rubber and some other material which will increase its erasive properties. This part of the invention alone could not have

is not patentable, although a balloon made for the purpose might be.'

457. As piracy is an offense against a statute of copyright, and not against whatever common-law rights may exist, the earliest case is to be sought for been patented. Rubber had long been known, and so had rubber combined with other substances to increase its naturally erasive qualities. It is to be of any convenient external form. It may have a flat top surface, or it may be of a semicircular or conical shape, or any other that may be desirable. This would seem to indicate clearly that the external form was not a part of the invention. It was, however, urged upon the argument that the invention did consist in the projecting surfaces extending out of the head, and which appear, as is claimed, in the drawing attached to the specifications. It is true that in two out of three drawings projecting surfaces are indicated, but such is not, beyond question, the case with the third. The shape then shown is conical, extending to a point, and evidently intended to represent the form mentioned as specially adapted to the use of draughtsmen in erasing lines from their drawings. It was the end of such a pencil, not the the sides, that was to furnish the particular advantage of form. But although drawings do accompany the specification and all referred to, it is evident that this reference is for the purpose of illustration only, because the patentee is careful to say that "he does not limit his invention to the precise forms shown, as it may have such, or any other convenient for the purpose, so long as it is made so as to encompass the pencil and present an erasive surface upon the sides of the same." Certainly words could not have been chosen to indicate more clearly that a patent was not asked for the external form, and it is very evident that the essential element of the invention, as understood by the patentee, was the facility provided for attaching the head of the pencil. The prominent idea in the mind of the inventor clearly was the form of the attachment, not the head. If additional proof of this is required, it may be found in the further statement in the specifications, which locates the head for use at or near the end of the pencil, and so made as to surround the part on which it is to be placed, and to be held thereon by the inherent elasticity of the

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[1] Gould, Henry W. U. S. Official Gazette of the Patent Office, vol. v. (No. 5) p. 121.

subsequent to the first copyright law, *i. e.*, the English statute of Anne, in 1710. But none appear until 1735, when the limitation of twenty-one years had

material of which it is to be composed. If intended for use at any other place than on the end of the pencil, the projections could not be essential, as any form that would surround the part would present the requisite erasive surface Again, the head is to have in it, longitudinally, a socket to receive one end of a lead pencil or a tenor extending from it. This socket is to be cylindrical, or of any other proper shape. Usually, the inventor says, he made it so as to extend part way through the head, but if desirable it might be extended entirely through. It must be within one end, but any particular location at the end is not made essential. This clearly is no more than providing that the piece of rubber to be used must have an opening leading from one end into or through it. This opening may be of any form and of any shape longitudinally. The form, therefore, of the inside cavity is no more the subject of the patent than the external shape. Any piece of rubber with a hole in it is all that is required thus far to meet the calls of the specifications, and thus far there is nothing new, therefore, in the invention. Both the outside and inside may be made of any form which will accommodate the parties desiring the use. But the cavity must be made smaller than the pencil, and so constructed as to encompass its sides and be held thereon by the inherent elasticity of the rubber. This adds nothing to the patentable character of the invention. Everybody knew, when the patent was applied for, that if a solid substance was inserted into a cavity in a piece of rubber smaller than itself, the rubber would cling to it; the small opening in the piece of rubber, not limited to form or shape, was not patentable, neither was the elasticity of the rubber. What, therefore, is left for this patentee but the idea that if a pencil is inserted into a cavity in a piece of rubber smaller than itself, the rubber will attach to the pencil, and when so attached become convenient for use as an eraser. An idea of itself is not patentable, but a new device by which it may be made practically useful is. The idea of this patentee was a good one, but his device to give it effect, though useful, was not new. Consequently he took nothing by his patent.—Reported in the New York Times, August 8, 1875. And so the idea of advertising by means of balloons is not patentable either as a contrivance or as a design.

already passed. The first case seems to have been in that year, when the Master of the Rolls enjoined the publication of "The Whole Duty of Man," which had appeared first in 1657.[1] In the same year also the printing of Pope's and Swift's Miscellanies was enjoined,[2] in the face of the objection that the statute term had expired, according to Lord Mansfield[3] In 1736, an injunction was granted against publishing Nelson's "Festivals and Fasts" (originally published in 1703,[4] and before the statute of Anne). In 1739, and again in 1751, injunctions were granted against printing Milton's "Paradise Lost," the first, under the plaintiff's assignment from Milton of the work, in 1667,[5] and the second, as to the poem, which was printed with Dr. Newton's notes, and those of other commentators, all of which belonged to the plaintiff. The bill in the latter case alleged title to the poem by Milton's assignment, in 1677; to the life by Fenton, published in 1727; to Bentley's notes, published in 1732; and to those of Dr. Newton, published in 1749. Lord Hardwicke, before whom this case came, said that he granted this injunction as to the poem, only "until the matter could be considered at the hearing," because there was a "probability of right in the plaintiffs."[6] The fact was, that the question upon which Lord Hardwicke ruled so cautiously, *i. e.*, the continuing literary property of the author's assignee, was at that moment depending in the court of King's Bench.[7]

[1] Eyre v. Walker, cited 4 Burr. 2325; 3 Swanst. 673.
[2] Motte v. Falkner, cited Id.
[3] 1 W. Bl. 334.
[4] Walthoe v. Walker, cited 4 Burr. 2325.
[5] Tonson v. Walker, cited 4 Burr. 2325.
[6] Curtis on Copyright, p. 48, note.
[7] *I e.*, in the case of Baskett v. University of Cambridge, 1 Black, P. 105.

That question was not finally settled until 1758, when it was held that the right of the copy in the king continues after publication at common law, and by analogy in the subject.[1]

But Lord Hardwicke's injunction, however charily granted, was esteemed by Lord Mansfield as a precedent, "for," said he, "the judicial opinions of the great men who granted these injunctions, in cases clearly not within the statute, uncontradicted by any book, judgment, or saying, must weigh in any question of law, much more in a question of mere theory and speculation, as to what is agreeable or repugnant to natural principles."[2]

In 1761, the case of Tonson v. Collins was brought by the plaintiffs, as assigns of one Jacob Tonson, who, in 1712, had purchased of Addison and Steele the "copy" of The Spectator, which, however, the copyright having expired, was not then within the protection of any statute. But the case, after two elaborate arguments, was left undecided, and no settlement of the question was arrived at until the renowned case of "Thompson's Seasons," and then only to be overthrown again, not many years later.[3]

"The Seasons," by the poet Thompson, was first published by him on his own account, as proprietor, in 1727, and several times subsequently, until 1729.

In the latter year he sold the work to one Andrew Millar, who entered it at Stationers' Hall, and continued to publish it after the poet's death, and until the year 1763, when one Robert Taylor also published an edition. The protection of the statute of Anne had

[1] *Vid.* also 2 Edm. 137, and 4 Burr, 2401, 2404, per Lord Mansfield.

[2] 4 Burr. 2399.

[3] 1 W. Black, 301–321–345; 4 Burr. 2400, per Lord Mansfield.

expired, and the action brought by Millar, in 1766, could only stand upon the theory of a perpetual copyright at common law.

The eminent character of the judges concerned in this case make it, in every regard, leading. It was twice argued, with great learning and ability, before a full bench, a special verdict having been first obtained. At the end of three years, judgment was pronounced by Lord Mansfield, in favor of the plaintiff, Yates, J., delivering an equally learned and elaborate dissenting opinion; and, in 1770, the injunction was issued.

The law then, in 1770, was:

I. That property exists in the author's work, and the publication thereof shows no intention on the part of the author to abandon such property; and,

II. That statutes of copyright are merely intended to give, for a term of years, a more efficient protection than could be attained without them, and do not take away any existing property at common law.

And so the law continued for about four years.

A case, destined to be equally illustrious, was even then pending.

One Becket had sued for an injunction against the Donaldsons, for publishing a book, in which he claimed a common-law copyright. After Millar v. Taylor, the lord chancellor (Apsley) granted it, as of course, against the defendants, who appealed to the house of lords.

In 1774, this appeal was argued with a learning and ability equal to that displayed in Millar v. Taylor, and heard by jurists of equal eminence.

At the close of the evidence, ten judges declared in favor of the author's right of first printing and publishing, and of restraining the publication and sale

of his work without his consent, and one was of opinion to the contrary.

Six were of opinion that the statute of Anne superseded the common-law right of action, and five were of opinion to the contrary.

Seven were of opinion that the author and his representatives had the right to publish, as a perpetuity, by common law, and four were of opinion to the contrary.

Six were of opinion that this right in perpetuity was taken away by the statute, and five were of opinion to the contrary.

Lord Mansfield being a peer, was not allowed to deliver any opinion, though he was considered as maintaining his reasoning in the prior case. And thus, upon the question of the perpetuity at common law, the judges stood seven to four, and upon the question as to whether the statute abrogated such perpetuity, they were equally divided.

In this state of the case Lord Camden, who was its greatest enemy, delivered his celebrated argument against literary property.[1] He denounced the per-

[1] It was in this speech that the passage so often quoted, as to "glory being the reward of authorship" (quoted *ante*, vol. i. p. 9) occurs It was not to have been supposed that Lord Camden would have agreed with his greatest rival, Lord Mansfield, but the bitterness with which the former attacked the idea of literary property—the "wretched scribblers" and "hackney compilers" must have sprung from conviction. But how about Milton? The poet's career and writings, as we have had occasion to allude to them in noticing the history of literary property, do not seem to warrant the belief that he was insensible to the tangible reward for literary labor. Milton did, indeed, sell the copyright of "Paradise Lost" to Samuel Simmons, for five pounds, but that sum was not "a miserable pittance" in those days; neither did the poet suppose that he was parting with his copyright for that sum. The five pounds was only an immediate payment, the agreement

petuity contended for, as odious and selfish, and likely to become intolerable; asserted that an author's thoughts, once published, were his no longer; denied that there was any implied contract between the seller and buyer of a printed copy of a book; and it was through his exertions that the author's common-law right, so lately asserted, was lost to Englishmen forever.

458. It has been well said by an American writer,[1] that the law endeavors, in treating cases of piracy, to protect the author, without curtailing the fair use of existing material in any department of letters; that "it proposes to itself, first, the vindication of rights acquired by genius, discovery, invention, and labor in the productions of the mind; and, secondly, the acknowledgment, upon motives of public policy, of the right to a fair use, by any writer, of all that has been recorded by previous authors." This question is of constant recurrence in regard to what we have classified as secondary works;[2] *i. e.*, abridgments,

setting forth that five pounds more should be paid when thirteen hundred copies of the first edition should be sold, and the like sum when the same number of the second edition should be sold, and the same of the third,—the editions not to exceed fifteen hundred copies each. At the end of two years the second five pounds were paid, and his receipt made on the 26th day of April, 1669, is still preserved. The second edition stipulated for was published in 1674, after Milton's death, and for the third edition, in 1678, his widow receipted, under date December 21, 1680, for eight pounds, and gave him her general release, dated April 29, 1681. Simmons afterward sold the right to Aylmer, for twenty-five pounds, who in turn sold it to Tonsont, half in August, 1683, and half in March, 1690 (Todd's Life of Milton, 193–195). Thomas Lord Lyttleton replied to Camden upon this occasion, "and the house of lords stood twenty-two to eleven against the common-law right of authors."

[1] Curtis on C., p. 237.

[2] *Ante*, vol. i. chapter on Originality

compilations, guide-books, indices, and the like, or what is sometimes called "base copy."[1]

In Scott v. Stanford,[2] the defendant, in a book of "Mineral Statistics of the United Kingdom of Great Britain and Ireland, for the year 1865," published by him, had inserted, in a different arrangement, the whole of certain statements (amounting to about one-third of the work) of the quantity of coal, &c. brought into London, which the plaintiff, as clerk and registrar of the city coal market, had compiled, published, and registered. There was no concealment, in the defendant's book, of the source from which the information was obtained, it being distinctly stated, at the head of the statistics, that they were "compiled from the returns published by authority of the corporation of London, by James R. Scott, Esq., clerk and registrar of the coal market." Nevertheless, the defendant was held to have infringed the copyright of the plaintiff, and an injunction was granted to restrain the publication of such portions of the defendant's work as contained the statistics compiled by the plaintiff. "The term animus furendi could not be defined in so restricted a sense," said the court, "as to allow a man who had an honest intention of benefiting the public, and no idea that he was infringing a copyright, to take, and without any labor, a very large portion of the work of another, and materially injure sale of it. It was as impossible to define the internal act of a man, as to measure it. It was only the result of the internal act that could be measured. A man must be presumed, in point of law, to intend all that the publication of his work effects."

[1] So called in the English statute, 8 Geo. 2 C. 13; see Appendix II., and see Graves v. Ashford, L. R. 2 C. P. 419; 16 L. T. N. S. 98. [2] 16 L. T. N. S. 51; L. Rep.; 3 Eq. 718.

And it was held in Reade v. Lacy,[1] that the cases to which the animus furendi test properly applies, is that difficult class relating to dictionaries, road books, and the like, where a certain amount of common material is used by different persons, and the matter in issue is "piracy or no piracy." But copyright is like patent right in that, if it is infringed, ignorance will not avail as a defense to the infringement.

Reade v. Lacy was a case where the plaintiff had written a drama called "Gold," and afterwards published a novel founded upon it, called "Never Too Late to Mend," into which were introduced many scenes and passages from the play. The defendant afterwards published a drama called "Never Too Late to Mend," founded on the plaintiff's novel, containing scenes and passages substantially identical with scenes and passages common both to the plaintiff's novel and his play of "Gold." On motion for injunction to restrain publication of the defendant's drama as an infringement of the plaintiff's copyright in his play of "Gold," evidence was given that the defendant's play was a bona fide adaptation of the novel, written without any reference to and without any knowledge of the published play. The Vice-Chancellor granted the injunction prayed for, saying: "The plaintiff has a copyright in the printed book called 'Gold,' and no one has a right to reprint it without his consent. It so happens that, after having acquired this right, he himself extracted a large portion of this drama, and republished it in the form of a novel. The defendant alleges, and I assume in his favor, that he knew nothing about the drama, and that his play was compiled from the novel alone. I also assume for the purpose of the argument, and this only, that the defendant

[1] 1 J. & H. 527.

had a right to dramatise the plaintiff's novel,[1] and that, as far as the novel is concerned, what was done was a fair adaptation of a complicated novel, so as to produce a short drama. This point I shall leave to be decided by a court of law; but even supposing it to be determined in the defendant's favor, still that will not justify the reprinting of scenes and passages identical with those in 'Gold,' merely because the novel also happens to contain them, and the defendant took them from that source. The plaintiff did not by transferring these passages into his novel, lose any part of the copyright which he had in his drama; nor can ignorance of the existence of the drama on the part of the defendant be urged as a valid defense. . . . To admit such a defense would be to open a door to fraud and perjury. There is a manifest invasion of the plaintiff's copyright in the drama; and it is no answer to say that this is not an invasion, because it would not have been so if the matter appropriated had appeared only in its later form as a novel."[2]

Neither will the quantity of one work introduced into another, be a test of piracy, since, as has been said, one writer might take all the vital part of another's work, although constituting in bulk but a very small portion of his published book. It is not the quantity, but the value of the appropriated portion that will be considered. A difference is here to be observed between plagiarism and piracy. The former is an offense against morals and against taste. The latter is an offense against the law of copyright. Where there is no copyright, there can be no piracy.[3]

[1] *Vid.* Coleman v. Wathen, 5 T. R. 245.

[2] *Vid.* Story's Executors v. Halcombe, 4 McLean, 310; Webb v. Powers, 2 Wood. & Min. 512; and Lee v. Simpson, 3 C. B. 871, 883.

[3] *Ante*, this chapter, p. 666.

"I think," said Story, J.,[1] "it may be laid down as the clear result of the authorities in cases of this nature, that the true test of piracy or not, is to ascertain whether the defendant has, in fact, used the plan, arrangements, and illustrations of the plaintiff, as the model of his own book, with colorable alterations and variations only to disguise the use thereof; or whether his work is the result of his own labor, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental or arising from the nature of the subject. In other words, whether the defendant's book is, quoad hoc, a servile or evasive imitation of the plaintiff's work, or a bona fide original compilation from other common or independent sources."

459. The question as to how far one writer may avail himself of the copyrighted labors of another, like the question of originality which arises before copyright, is of very difficult solution, and while intimately connected therewith, of much more frequent occurrence.

Lord Eldon[2] stated that the test amounted to a question whether the publication was "a legitimate use of the previous work, in the fair exercise of a mental operation deserving the character of an original work."

Another test is well stated to be, whether the use of the work of another amounts to such an extraction that it comes up to an extraction of the vital part.[3]

If the matter taken by the writer of one book from a preceding book, for the promotion of science

[1] In Emerson v. Davies, 3 St. Rep. 793.

[2] In Pike v. Nicholas, 20 L. T. N. S. 906; 38 L. J. 529, Ch. L. Rep. 5 Ch. App. 251.

[3] Murray v. Bogue, 1 Drew, 369.

and the benefit of the public, be used fairly, and without an animus furendi[1]—an intention to take for the purpose of saving himself labor[2]—it will not be piracy; and this question must depend upon the circumstances of each particular case.

Said the court, in dealing with a work in the form of question and answer, on a variety of scientific subjects:[3] "I take the illegitimate use, as opposed to the legitimate use of another man's work on subject-matters of this description to be this: If, knowing that a person whose work is protected by copyright has, with considerable labor, compiled from various sources a work in itself not original, but which he has digested and arranged, you being minded to compile a work of a like description, instead of taking the pains of searching into all the common sources, and obtaining your subject-matter from them, avail yourself of the labor of your predecessor, adopt his arrangements, adopt moreover the very questions he has asked, or adopt them with but a slight degree of colorable variation, and thus save yourself pains and labor, by availing yourself of the pains and labor which he has employed, that I take to be an illegitimate use."

[1] *Vid.* Cary v. Kearsley, 4 Esp. 169; Shortt, p. 182–183.

[2] Jarrold v. Houston, 3 K. & J. 716.

[3] Jarrold v. Houston, 3 K. & J. 716, and said Lord Jeffrey in Alexander v. Mackenzie (9 Scotch Sess. Cas. 2 Ser. 758): "Is there reasonable evidence that the two works are identical, and that the last author did not mount upon the back, and walk on the crutches of, his predecessor, but actually used his own muscular exertions in traversing the field in which he made his observations? Did he, on the whole, do so fairly and honestly for himself, although he may occasionally have followed in the vestigia left by his precursor? Or is there evidence that the second writer's not going over the ground for himself is not the very cause why he has arrived at almost identical conclusions with his predecessors?"

"No finer test," says a late writer,[1] "of piracy has been applied in the various cases on record than that of the degree in which one work interferes, by reproduction, with the benefits derivable from another work in which copyright exists. It may well be supposed that a test of this character has afforded scope for variance of opinion, and that many litigated cases have arisen with respect to its application. It will be well to treat the subject separately as to each class of productions in which piracy may be committed. Neither is it necessary, to constitute piracy, that the pirator receive profit by the trespass. Ordinarily piracy can only be committed by the multiplication of copies of a copyrighted work,[2] whether that multiplication be by a printing, publishing, and selling of the work, or by dramatization, or by reading the book before an audience, and at the same time distributing among the audience gratuitous copies of the work, to assist them in following the reading or representation.[3]

460. The multiplication of copies for gratuitous distribution is as much an infringement of the proprietor's copyright as if made for purposes of pecuniary profit. So, where a member of a philharmonic society, desiring to have a particular piece of published music performed at a concert of the society, to which, besides members, other persons were admitted for money, caused a number of copies of the piece of music to be lithographed and distributed amongst the members of the choir, without the consent of the proprietor of the copyright, this was held to be a violation of the proprietor's right.[4]

[1] Shortt, p. 169. [2] Ib. p. 168–169.

[3] Tinsley v. Lacy, 1 H. & M. 747; 32 L. J. 535, Ch. 11, W. R. 877.

[4] Novello v. Sudlow, 12 C. B. 177; *vid.* also Alexander v. Mackenzie, 9 Scotch Sess. Cas. 2 ser. 748.

461. As to the taking of parts or portions of a work, it may be said, generally, that if a work be not original, its proprietor will be liable for piracy to the owner of the work from which it was copied; and the first work will be the one protected, unless indeed it appears, as in the celebrated case of The Road Book,[1] that that first work was not itself original; in which case, of course, it cannot look for protection.

In case of a book on the "Origin of the English Nation," the court held, that there was no monopoly in the main theory of the plaintiff, nor in the theories and speculations by which he supported it, nor even in the use of the published results of his own observations, though the plaintiff had a right to say that no one is permitted, whether with or without acknowledgment, to take a material and substantial portion of his work, his argument, his illustrations, his authorities, for the purpose of making or improving a rival publication.[2]

In all cases where the sources from which materials for composition are to be derived are of a common or general nature, that is to say, in medio, it is open to any one to gain a copyright in any arrangement of them; and of this character, as we have seen, must necessarily be dictionaries, guide-books, almanacs, calendars, and other works of reference, where not only the material, but the language and comments of the compiler must necessarily be very nearly identical.[3]

[1] *Ante*, vol. i. p. 335.

[2] Pike v. Nicholas, 20 L. J. N. S. 906, 38 L. J. 529, Ch. L. Rep. 5 Ch. App. 251. The decision of Samer v. C. in this case was, however, overborne by the lord justices of appeal.

[3] Spiers v. Brown, 6 W. R. 325; Longmann v. Winchester, 16 Ves. 271; Cox v. Land & Water Journal Co., L. Rep. 9 Eq. 324.

462. The test can only be whether in the work of the defendants no other labor has been applied than copying the plaintiff's work; if it is impossible to deny that the one was copied from the other verbatim et literatim, an injunction must lie. And of the whole class of works, embracing tables of figures, directories, calendars, guides, and other such, the only mode of arriving at the amount of labor bestowed, was by the common test resorted to of discovering the copy of errors and misprints indicating a servile copying.[1]

463. If a book in a foreign or dead language be copyrighted, an original translation will, it seems, be no infringement of the copyright; but it will itself be entitled to copyright protection. In Burnett v. Chetwood,[2] the defendant had published a translation of Burnett's "Archæologia Sacra." It was held that a translation was not the same as reprinting the original, and not within the prohibition of the act, "on account that the translator has bestowed his care and pains upon it."[3]

If a foreigner translates an English copyright work, and then an Englishman re-translates that foreign work into English, that would be an infringement of the original copyright. And it would be no defense that the re-translator was not aware that the work he translated was itself a translation from an English work.[4]

[1] Ib.

[2] *Vid.* note to Southey v. Sherwood, 2 Meriv. 443.

[3] The injunction in this case was granted upon other grounds. *Vid.* also Millar v. Taylor, 4 Burr. 235; Prince Albert v. Strange, 2 De G. & M. 693.

[4] Murray v. Bogue, 1 Drew, 353; 22 L. J. 457 Ch. For the English law of translations *vid.* the International copyright act of 15 & 16 Vict. c. 12.—The right of a translator in Eng-

464. As to quotation also, great difficulty is experienced in endeavoring to lay down any general rule. That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action.[1] But the extracts may be too many, or contain too large or important a portion of the work from which they are made, and then they will amount to piracy, even though they are published in the form of quotations, and the source from which they are taken is expressly declared.[2]

"Quotation," says Lord Eldon,[3] "is necessary for the purpose of reviewing; and quotation for such a purpose is not to have the appellation of piracy affixed to it; but quotation may be carried to the extent of manifesting piratical intention." Said Lord Ellenborough, in Roworth v. Wilkes:[4] "A review will not in general serve as a substitute for the book reviewed; and even there, if so much is extracted that it communicates the same knowledge with the original work, it is an actionable violation of literary property. The intention to pirate is not necessary in an action of this sort. It is enough that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced. A compilation of this kind [a large encyclopædia] may differ from a

land seemes only to exist for five years, which is the shortest period of protection ever given by statute in literary composition. With us, the same period is given in translations as in every other work.

[1] Per Lord Ellenborough in Cary v. Kearsley, 4 Esp. 169.

[2] Lee v. Simpson, 3 C. B. 871, 883; Webb v. Powers, 2 Wood and Min 512; and Story's Executors v. Holcombe, 4 M'Clean, 310; Bohn v. Bogue, 19 Jur. 420; and Scott v. Stanford, L. Rep. 3 Eq. 718; 10 L. T. N. S. 51.

[3] Mawman v. Tegg, 2 Rus. 393.

[4] 1 Camp. 97.

treatise published by itself, but there must be certain limits fixed to its transcripts; it must not be allowed to sweep up all modern works, or an encyclopædia would be a recipe for completely breaking down literary property."

465. The question is, would the defendant's work serve, by reason of its quotation therefrom, as a substitute.[1]

"No one can doubt," says Justice Story,[2] "that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism On the other hand, it is as clear that if he thus cites the most important parts of the work with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use

[1] Referring to this word substitute, used in the above case by Lord Ellenborough, Shadwell, J., in Sweet v. Shaid, 3 Jur. 216; 8 L. J. Ch. 216, said: "That does not mean a substitute for the whole work. From what you state, suppose a book to contain a hundred articles, and ninety-nine were taken, still it would not be a substitute;" and again, in Bohn v. Bogue, the same judge observes: "With respect to that expression of Lord Ellenborough, 'substitute,' his Lordship must be taken to have used that word with reference to the particular case before him; and it is perfectly clear to my mind that never can be the criterion." His Honor put the case of a publication of "Liddell and Scott's Lexicon," omitting three or four words at the end of each letter of the alphabet. This could not be taken as a substitute. "But can it be doubted," he asks, "that it might have a very material effect in diminishing the price of the first book; for though nobody would take it as a substitute, many people might not care about so much, and might take it cheaply for what it really did contain, which might be more than ninety-nine hundreths of the whole, and yet it would in no manner be a 'substitute?' And, therefore, the language is not generally correct, so as to be capable of application to every case." *Vid.* also Sweet v. Cater, 11 Sim. 580.

[2] Folsom v. Marsh, 3 Story R. 106.

will be deemed in law a piracy. A wide interval might, of course, exist, between these two extremes, calling for great caution, and involving great difficulty, where the court is approaching the dividing middle line which separates the one from the other."

When the publisher of a theatrical newspaper was sued for publishing six or seven pages of a dramatic piece, about forty pages in length, the court held, that, as the defendant had given no entire act or scene, but only broken and detached fragments, it was not a piracy.[1]

In Dodsley v. Kinnersley, the plaintiffs were assignees of Johnson's "Prince of Abyssinia," and had already published an abstract of that work in a newspaper known as "The London Chronicle." The defendant printed part of the narrative in his magazine, leaving out all the "reflections." The court held, that such publication would have tended to prejudice the plaintiffs, had they not themselves before published an abstract of the work in "The London Chronicle," and the injunction was refused.

466. So, where it appeared that seventy-five out of one hundred and eighteen pages of a work on fencing had been transcribed into an encyclopædia, it was held to be a piracy; and the same rule will undoubtedly apply in the case of a review. In the case of the encyclopædia and the review, the latest information, and a correct purview of the subject of the book under analysis might be given, but neither have a right to take enough matter from a copyrighted work to injure that work, by providing a substantial substitute for it.[2]

[1] Whittingham v. Wooler, 2 Swanst. 428.

[2] 1 Camp. 97; 4 Esp. 168; 17 Ves. 422; Eden on Inj. 281; Murray v. McFargilhar, June 25, 1785, Mor. Dic. of Dec. 8309; Green v. Bishop, 2 Cliff. 186.

467. If a literary composition be taken by another author as a basis for annotations or notes of his own, he may publish the original text along with his own composition, without being liable for piracy.[1] Especially, in the case of legal text-books, and elementary works, is it customary for writers to publish their notes upon the labors of their predecessors or contemporaries,[2] or reports of cases extracted from books of reports in which copyright exists, but it has never been judicially determined whether such a practice does or does not amount to piracy of the original reports. The question was raised but not settled in the case of Saunders v. Smith,[3] the decision in that case against the proprietor of the original reports proceeding on the ground of his acquiescence in the labors of the defendant.

468. In miscellaneous works, as well as legal, the quantity as well as the character of the critical notes added to the work of another, is an important element in determining the question of bona fides. Thus, where a book of selections of poetry contained seven hundred and ninety pages, of which thirty-four were taken up with a general disquisition upon the nature of the poetry of the nineteenth century, and all the rest consisted of extracts, without any notes appended,

[1] Martin v. Wright, 2 Sim. 298.

In Cary v. Kearsley (4 Esp. 169), says Shortt, p. 187, the question was put in argument to Lord Ellenborough whether, if a man took "Paley's Philosophy" and copied a whole essay with observations and notes, or additions at the end of it, such a proceeding would amount to piracy. Lord Ellenborough replied, "That would depend on the facts of whether the publication of that essay was to convey to the public the notes and observations fairly, or only to color the publication of the original essay, and make that a pretext for pirating it; if the latter, it could not be sustained."

[2] Shortt, p. 187.

[3] 3 M. & Cr. 711.

from the works of different poets, some of their poems being given entire, the court considered that the book could in no sense be said to be a book of criticism; and an injunction was granted to restrain its publication at the suit of Mr. Campbell, one of the poets from whose writings large extracts had been made.[1] "If," said the vice-chancellor, "there were critical notes appended to each separate passage, or to several of the passages in succession, which might illustrate them, and show from whence Mr. Campbell had borrowed an idea, or what idea he had communicated to others, I could understand that to be a fair criticism. But there is, first of all, a general essay, then there follows a mass of pirated matter, which in fact constitutes the value of the volume."

The addition of plates to the copyright letter-press of another would not, it seems, constitute a defense to a charge of pirating the letter-press. The mere act of embellishing cannot divest the right of the owner in the text.[2]

469. The question of good faith in cases of this kind is the important one. In legal works, especially, where the course of time, the growing wants of the public, and the new light which each additional case often throws upon an old rule or doctrine, the original work often becomes speedily unreliable, if not wholly obsolete, and the labors of the annotator, by pointing out changes in the law, and the reasons therefor, of the utmost value.

In the case of abridgments of, or annotations to, a literary work, the question of the usefulness may arise, to determine whether the publication of the abridged

[1] Campbell v. Scott, 11 Sim. 31; *vid.* Tonson v. Walker, 3 Swanst. 672.

[2] Carnam v. Bowles, 2 Br. C. C. 85.

or annotated work be a piracy; but in what may seem at first to be the analogous case of variations, or new and peculiar arrangements of a musical work, the same rule could not be applied; for music being a purely pleasurable science and art, although requiring a certain amount of skill and original labor, will be an infringment. It is the air or melody which is the invention of the author, and it is piracy if, by taking not a single bar, but several, the subsequent author incorporate in the new work that in which the whole meritorious part of the invention consists." "It appears to me," said Lyndhurst, J., "that if you take from the composition of an author all those bars consecutively which form the entire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them, in a different order, or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now, the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding of variations makes no difference in the principle."

470. "The composition of a new air or melody," says Nelson J., in Jollie v. Jacques,[1] "is entitled to

[1] 1 Blatchf. 618.

protection; and the appropriation of the whole or of any substantial part of it, without the license of the proprietor, is a piracy." How far the appropriation might be carried in the arrangement and composition of a new piece of music, without an infringement, is a question that must be left to the facts in each particular case. If the new air be substantially the same as the old, it is, no doubt, a piracy; and the adoption of it, either by changing it to a dance, or by transferring it from one instrument to another, if the ear detects the same air in the new arrangement, will not relieve it from the penalty; and the addition of variations makes no difference. The original of an air requires genius for its construction, but a mere mechanic, it is said, can make the adaptation or accompaniment."

471. The question of abridgments has been fully considered in the chapter on Originality. They will be severally examined, and unless the labors of the abridger appear to be useful, candid, and original, involving original care, labor, judgment, study, and research, they will not be protected.[1]

472. The protection of copyright extends not only to a work in its entirety, but to every part thereof, and it seems, it would be piracy to republish separately the prints or engravings in a copyrighted work.[2]

473. As we have seen,[3] the name or title of a work may be considered as a kind of trade-mark which no other person than the proprietor of the work can use so as to damage him in his property therein.[4] "Cases of this kind depend rather upon the question

[1] *Ante*, vol. i. pp. 338–344, and cases cited; also Bullar-worth v. Robinson, 5 Ves. 709.

[2] Bogue v. Houlston, 5 DeG. & Sm. 267.

[3] *Ante*, this vol. pp. 219, 306, 387

[4] *Vid.* Seely v. Fisher, 11 Sm. 582; Spottiswoode v. Clarke, 42 P. K. 154.

whether the defendant has a right to sell, as his own, that in which another has acquired a description of property, than on the question of copyright."[1] The cases of Hogg v. Kirby,[2] Prowett v. Mortimer,[3] and Clement v. Maddick, are English cases in which the plaintiff's right to a title came into court. In the first, the proprietor of a magazine called "The Wonderful Magazine," obtained an injunction to restrain the publication of a magazine under a similar title, described as a new series "improved."

In the second, the proprietor of a newspaper called "The John Bull" having incorporated it with another newspaper called "The Britannia," and issued the publication under the title of "The John Bull and Britannia," was held entitled to an injunction to restrain the publication, by the printer and publisher of "The Britannia" of a publication called the "True Britannia," in imitation of and as a continuation of "The Britannia." The injunction in this case also restrained the defendant from soliciting custom, in the name of the plaintiff's trade and business, as for "The Britannia" newspaper. In the last mentioned case the proprietor of a newspaper known as "Bell's Life in London" obtained an injunction to restrain the publication of a newspaper under the title of the "Penny Bell's Life." The possibility of mistaking the one publication for the other (the plaintiffs having an exclusive right to the title) was considered sufficient by Sir John Stuart, V.C., to entitle the proprietors to the protection of the court.[5]

[1] Shortt, p. 196; Chappel v. Davidson, 2 K. & J. 126.

[2] 8 Ves. 215; *vid.* also Longman v. Winchester, 16 Ves. 271.

[3] 2 Jur. N. S. 414; 4 W. R. 517.

[4] 1 Giff. 98.

[5] The case of Ingram v. Stiff (5 Jur. N. S. 947), says Shortt (L. Lit. p. 197), went very far in this direction. There

In Chappel v. Davidson,[1] the title "Lillie Dale," being the name of the piece of vocal music, was held as entitled to protection, and the title "Minnie Dale," the proprietor of a weekly penny publication, called "The London Journal"—a publication which was not a newspaper, but contained tales and romances, illustrated with wood engravings—sold his interest therein to the plaintiff, and covenanted with him not to publish, either alone or in partnership with anybody else, any weekly publication of a nature similar to "The London Journal." An injunction to restrain him from publishing a daily penny newspaper, called "The Daily London Journal" was granted, on the plaintiff undertaking to abide by any order the court might make as to damages, and to bring an action at law within a week.

[1] 2 K. & J. 123. A song consisting of original words, adapted to an old American air by the plaintiffs, was published by them under the title of "'Minnie;' sung by Madame Anna Thillon and Miss Dolby, at Monsieur Jullien's Concerts. Written by George Linley. London: Jullien and Co., 214 Regent-street, and 45 King-street," the title-page containing also a portrait of Madame Anna Thillon. The defendants having subsequently published a song to the same air, on the title-page being printed the words "Musical Bouquet. 'Minnie Dale;' sung at Jullien's Concerts (and always encored) by Madame Anna Thillon. The music composed by H. S. Thompson. London: Musical Bouquet Office, No. 192 High Holborn, and J. Allen, 20 Warwick-lane, Paternoster-row," the title-page containing also a portrait of Madame Anna Thillon, which was a copy with some slight alterations, but reduced in size, of the portrait on the title-page of the plaintiffs' song, Vice-Chancellor Wood granted an injunction to restrain the defendants from publishing their song, "Minnie Dale," or any copy or copies thereof, or any other publication containing a colorable imitation of the name, title, or title-page of the plaintiffs' song. "The defendants," said the vice-chancellor, "do not profess that their song is by the same composer or the same publisher. But the first thing anybody proposing to purchase the song would say would probably be, 'I want "Minnie," sung by Madame Thillon;' and that name and description, it seems to me, the defendants have no right to whatever. The plaintiffs' publication is the *identical song which that lady did sing*; it was composed for the plaintiffs, it is called by the name of 'Minnie,' and they had a perfect right to entitle it 'Minnie,' as a song sung by

given to the same tune, to be a colorable imitation thereof.

474. Copyright in periodical publications may be infringed in the same manner as in the case of other literary works, in England, by statute. But this species of property may also, probably, be infringed in a manner peculiar to itself. Even when the copyright in contributions to encyclopædias, reviews, magazines, and other periodicals is vested in the proprietors of such encyclopædias, &c., the right of publishing his contribution in a separate form, reverts to the author after twenty-eight years from the first publication, and the proprietor cannot, during the term of his own copyright, publish it in a separate form without the previous consent of the author or his assigns. The

that lady; and then the name, having acquired a celebrity as the name of a song sung by her, the defendants advertise another song by the same name as sung by this lady, which cannot be meant merely to refer to the melody as sung by her. No person who heard 'Scots wha hae,' sung by Braham, would ask for 'Hey Tuitte Taitte,' the name of the old melody. Therefore, it seems to me that there was a plain and palpable purpose in the assumption of the name. The original song, as sung in America, was 'Lillie Dale,' and the defendants have changed it into 'Minnie Dale,' sung by Madame Thillon, and a description can be for no other purpose than to appropriate the property of the plaintiffs."

An injunction was also granted to restrain another defendant from publishing a song consisting of different words to the same air, with a title-page on which was a different portrait of Madame Anna Thillon copied from an American publication, and the words "Minnie, dear Minnie. Madame Anna Thillon." This Vice-Chancellor Wood considered an obvious attempt to pass off the defendants' publication for that of the plaintiff. It was urged on the part of the defendant in this case that he had cautioned his shop-boys and others to say that it was not the song of the plaintiffs; but the vice-chancellor considered that that afforded no defense, as there was no security that retail dealers would sell the song with the same caution to the public.—Shortt, p. 197.

author has a modified property in possession, and the sole property in reversion.[1]

It is, then, an infringement of the author's property to publish, without his consent, any of his contributions in a separate form; and such separate publication will be restrained.[2] It is not improbable that in the United States, this right may also exist by common law, for, if the proprietary copyright exist at all, it would exist for the term allowed by statute, The question never appears to have come before a court in this country, but it seems to have been held, or at least strongly suggested, in England, that the author had a similar right at common law.[2]

[1] Shortt, pp. 98, 99.

[2] *Vid.* Bishop of Hereford v. Griffin, 16 Sim. 190; Mayhew v. Maxwell, 1 J. & H. 312; Murray v. Maxwell, 3 L. T. N. S. 466. Stewart v. Black, 7 Scotch Sess. Cas. 1026; Fullerton v. McPhun, 13 Id. 219.

A republication in supplemental numbers of a periodical of a selection of various tales previously published in that periodical, is a separate publication within the meaning of sect. 18 of 5 & 6 Vict. c. 45, and such republication will be restrained. Smith v. Johnson, 4 Giff. 632; 32 L. J. 137 Ch.

[3] But see Wyatt v. Barnard, 3 V. & B. 77; Barfield v. Nicholson, 2 S. J. 90, 102; 2 Sim. & S. 1.

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

475. Taking copies of a protected picture or engraving by the process of photography, or by any other process, mechanical or otherwise, whereby copies may be indefinitely multiplied—is piracy,[1] but, as we have seen must be the case,[2] the piracy consists in the multiplication and copies of the picture, and not in the chemical and mechanical process of the photography.

476. A tradesman's advertisement is not such an original composition as can be copyrighted, not being a work of a literary character or of lasting benefit to mankind. And so the catalogue of an upholsterer,[3] or the circular of a billiard manufacturer,[4] was not held entitled to protection, although they had been copyrighted by the manufacturers. Neither can there be any copyright in matter which is itself copied.[5] But where persons, by paying a certain sum, had their names published in a directory in larger type than was ordinarily employed in the work, with additional descriptions of their trade or business, this was not held to make those names such common

lected form, he should find that they had already been published separately from the periodical work to which they were contributed. *Vid.* Mayhew v. Maxwell, 1 John & H. 315.

"This right of an author" of an article in a periodical to prevent a separate publication is not copyright within the meaning of the 24th section of 5 & 6 Vict. c. 45, and so no registration by the author is necessary to entitle him to an injunction to restrain such separate publication. Shortt, p. 103; *vid.* also Brown v. Cocker, 11 Jur. 77; Richardson v. Gilbert, 1 Sim. N. S. 336; Sweet v. Benning, 16 C. B. 459, 481, 489.

[1] Graves v. Ashford, L. R. 2 C. P. 410.

[2] *Ante*, this chapter, p. 667.

[3] Cobbett v. Woodward, L. R. 14 Eq. 407; see also Leather Cloth Co. v. American Leather Cloth Co., 1 H. L. C. 523; Jarrold v. Houlston, 3 K. & J. 708.

[4] Collender v. Griffiths, 11 Blatchf. 222; 19 Wall. 212.

[5] Jarrold v. Houlston, 3 K. & J. 708.

property, that another directory-maker could reprint the names so printed in the first directory. In granting an injunction against the imitation, the court expressly stated that it would not apply to advertisements, distinct from the body of the work.[1]

477. Piracy of a copyrighted dramatic production may be committed, as we have seen,[2] by its publication, representation, or imitation. The case of Reade v. French was a motion by the author, Mr. Charles Reade (applying in person), for an interim injunction, restraining the defendant, French, a theatrical publisher, and successor to Lacy, from publishing or selling copies of the comedy of "Masks and Faces," the joint production of the plaintiff and one Taylor, and the drama of "Never Too Late to Mend," which the plaintiff alleged, was adapted from and largely contained characters, scenes, situations, and passages in the play entitled "Gold." Plaintiff stated that with regard to the second of the works of which he sought to have the publication restrained, an injunction had already been obtained by him many years ago from Lord Hatherley against Lacy, the first-mentioned play being a mere reprint. The plaintiff proceeded to read the affidavit of a gentleman, stating that a printed list of plays issued by one Heywood, of Manchester (a provincial agent of the defendant), having come to his hands, comprising "Never Too Late to Mend," he apprised said Reade of the fact, and it was then further ascertained that "Masks and Faces" was also advertised for sale in London by the defendant, from whom copies were thereupon purchased on the plaintiff's behalf. The present application was supported by the usual affidavit of service

[1] Morris v. Ashbee, L. R. 7 Eq. 34.
[2] *Ante*, chapter on Stageright.

upon the notice of motion. Plaintiff claimed that in consequence of the unfortunate non-existence of an international copyright, the defendant (who also carries on business in New York) was enabled to reprint these works in America, whence they were imported into England in a semi-clandestine manner. The defendant made no appearance, and the vice-chancellor granted an interim injunction against him, until the hearing, in the terms asked.[1]

478. Mere delay in taking proceedings against a defendant, after knowledge of a piracy, will not in itself constitute such acquiescence in the piracy as will deprive a plaintiff of his right to an injunction.[2]

479. Letters and communications sent to a periodical publication, upon receipt by its proprietor or editor, become its property, and it would be piracy for any other person or periodical to publish them without the consent of the writer.[3]

480. Courts will interfere by injunction to protect the copyright of the assignee of an author, although there is no assignment in writing, and the assignee's title is merely an equitable one.[4]

481. The proprietor of a copyright in a book, need not, in an action for the infringement thereof, aver that the defendant published the plaintiff's book; the complaint sets forth a good cause of action if it aver that defendant published "parts" of the plain-

[1] London Times, 1874.

[2] 1 Hogg v. Scott, L. R. 18 Eq. 444. Nor does the 26th section of the act, 5 & 6 Vict. c. 45, prevent such an injunction to restrain a piraces of copyright by sale of a book published more than twelve months before bill filed, see *post*, p. 714.

[3] Copinger on Copyright, p. 32; 8 Ves. 215.

[4] Hodges v. Welsh, 2 I. E. R. 266.

tiff's book. And it is no answer to such a cause of action that the plaintiff's book and the defendant's book were composed by one and the same author from sources of common information.[1]

482. "In an action for an infringement of an author's copyright," says Espinasse, in his tract on Evidence, "the only evidence required for the plaintiff is the proof that he is the author of the book or work in question, which may consist of its production, by calling a witness who knows it, or by the printer who received the copy from him. He should then produce the work or book published by the defendant, and prove that he published it, which may be done by a witness who bought it at defendant's house, and then, by comparing one book with another, the piracy will appear. Thirdly, he should prove the injury from the sale of the defendant's book.

"The evidence for the defendant may show: 1. That the book published by him is essentially different from the plaintiff's, though the subject is the same, by pointing out the additions or amendments made by him. This is done by collating the two books, and pointing out the passages; that reduces the matter to a question for the jury to say whether the books are the same or different. 2. He may show

[1] Rooney v. Kelly, 14 I. C. L. R. 158. And so complaint that plaintiff was the owner of the copyright of a book entitled: "The Æneid of Virgil: first six books, as read at the Entrance Course, T. C. D., military examination at Sandhurst, and the various endowed schools in Ireland, literally translated, by J. R. Morgan, ex-scholar, T. C. D.," and that defendant, &c., did print divers parts of plaintiff's said book, &c., in a volume, entitled "Morgan's Aldine Virgil: Virgil, the Æneid," books one to twelve, complete: with English notes, explanatory and critical, also a metrical analysis of the Æneid, by Roscoe Morgan, N. B., ex-scholar, Trinity College, Dublin, &c.," was held good.—Id.

that the time given by the statute to the author has expired. This may be proved either by the person who printed the first edition of the plaintiff's work, or by others who know when it first came out; the time of the printing of the defendant's work or book will appear from the title-page."[1] The author might have added a third case, viz.: Defendant may show that the work claiming to be infringed is in itself an infringement of a previous work, that is, that it is not original; or, 4. That it is not entitled to its copyright, by reason of being not innocent in any of the forms in which we have seen that the reverse of innocence exists, viz., that it is libelous, contemptuous of a court, seditious, obscene, blasphemous, &c., &c.

483. In determining what is or is not a piracy, the court must instruct the jury as to the law, and the question as to the fact will remain with them. The nearest approach to a simple rule regulating cases of piracy would be that not so much of the quantity as of the value of the selected materials is to be regarded. As was significantly said on another occasion—"Non numerantur, ponderantur."[2] It may make a difference, too, as we have seen, as to how the transfer of the matter not original is effected,[3] as to whether he who transfers or he who uses after the transfer, will be held liable for piracy.

Even if the public recitation of a book, in which copyright exists, is not made from memory, but takes the form of a public reading, from the

[1] Espinasse on Evidence, ch. xiii. p. 2787.

[2] Per Story, J. (1 St. Rep. 20); *vid.* also Story's Exccutors v. Holcome, 4 McLean 310; Bramwell v. Holcombe, 3 My. & Cr. 738.

[3] Coleman v. Wathen, 5 T. R. 245; Murray v. Elliston, 5 B. & Ald. 657; *vid.* however, Palmer v. DeWitt, 7 Am. 480; 47 N. Y. 532; Stowe v. Thomas, 2 Amer. Law Reg. 231

work itself, of the whole or portions of it, this would not amount to an infringement of the author's copyright.'

484. In the pursuit of one's remedies for piracy, evidence of real authorship or proprietorship is first to be introduced. A plea of not guilty merely, in an action for infringement of copyright, only denies the alleged infringement, whether it be selling, printing, &c., or whatever be the wrongful act; it does not deny the copyright of the plaintiff. This must be done by a special plea.[2]

"The copyright act," says Wightman, J., "throws on a defendant, if he seek to defend the infringement on the ground that the plaintiff is not the proprietor, the onus of showing who is, in order that the plaintiff may not be taken by surprise at the trial."[3]

In the subsequent case of Boosey v. Purday,[4] the judges of the court of exchequer took a less strict view of the requirements of the section, and pointed out the inconveniences which would follow from a rigid adherence to its words. Alderson, B., addressing the counsel, who moved for a rule to amend the notice of objections given in that case, said: "Suppose a man were to enter his name at Stationers' Hall as proprietor of the *Εικὼν βασιλική*; according to your argument he would acquire the property in it, for it would puzzle excessively to find out the author of that book; or, as proprietor of the works of Homer —that would raise the question, Was there such a man?" Rolfe, B., observed, "The court must endeavor

[1] Tinsley v. Lacy, 1 H. & M. 747; 11 W. R. 877; 32 L. J. 535, ch. And see *ante*, this vol, p. 347.

[2] Shortt, p. 220; Boosey v. Davidson, 4 Dow. & L. 147; see also Leader v. Purday, 7 C. B. 4.

[3] Boosey v. Davidson, supra.

[4] 10 Jur. 1038.

to get at some construction of the statute which shall not force a man to say who first published at one place or another. It may have been that the defendant saw the work at both places." Alderson, B., added, "The defendant in his objections ought to show a definite publication by somebody. That construction will remove all the absurdity which otherwise would follow from a literal interpretation of the statute."

485. Where, in an action for piracy at the suit of two plaintiffs, it appeared that the defendant had published the work in question, pursuant to the conditions of a cognovit, given by him to one of the plaintiffs and one P., in a former action, for not performing an agreement to write the same work, it was held to be a sufficient defense to the action for infringement of the plaintiff's copyright.[1]

According to the decision of the Irish court of Queen's Bench, in Rooney v. Kelly,[2] it is not necessary, in an action for the infringement of copyright in a book, to aver that the defendant published the plaintiff's book; and a declaration charging the defendant with publishing "divers parts of the book of the plaintiff," states a good prima facie cause of action, though it is open to the defendant to displace such prima facie charge, by showing that either from the quantity and quality of such portions, or from the nature and character of defendant's book, the copying and printing, &c., of those portions were justifiable, and should not properly be considered as an infringement of the copyright.[3]

It was further held, on demurrer, in this case, that the charge of defendant's book "containing printed therein, various parts" of plaintiff's book, was not

[1] Sweet v. Archbold, 10 Bing. 133; Shortt, p. 221.
[2] 14 Ir. Com., 8 Rep. 158. [3] Id.

answered by a plea, in confession and avoidance, to the effect that the books of the plaintiff and defendant were composed by the same author from common sources of information, and that no part of the defendant's book was copied or colorably altered from that of the plaintiff.

486. Where an action is brought for infringement of copyright in a book, the court will allow interrogatories as to the number of copies sold for a limited period before and after the date of the infringement, to be administered to the plaintiff, for the purpose of ascertaining the amount of damage sustained, and enabling the defendant to pay into court a sum sufficient to meet it.[1]

487. Where a bookseller published a catalogue of "old and curious books" in his possession, as an advertisement, and a rival bookseller copied it in great part as an advertisement of a similar stock of his own, it was held to be an infringement of the copyright in the original catalogue, although the second catalogue was not offered for sale, and was used merely to promote the sale of the books mentioned,[2] whether a license from an author to a publisher to print and sell his work, or a transfer to him of his literary property is a contract for a sale of goods within the statute of frauds, does not appear to have been expressly held, though a contract by a printer to print and find the paper for a certain number of copies of a work has been held in England not to be.[3]

[1] Wright v. Goodlake, 13 L. T. N. S. 120; Shortt, p. 221.

[2] Boosey v. Davidson, 4 Dow. & L. 155.

[3] Hotten v. Arthur, 1 H. & M. 603; 9 L. T. N. S. 199; 32 L. J. 771, Ch.; 11 W. R. 934.

[4] Clay v. Yates, 1 H. & N. 73. In an action for infringement of

488. The production of his manuscript is sometimes very important on the part of the person charged with piracy.[1]

Where the proprietor of copyright notes on the Bible sold the stereotype plates of a quarto edition containing these notes, together with the right of printing from them, and the plates were afterwards sold to a third party, at a public sale, at which a specimen leaf of the work was exhibited, the Scotch court

the copyright of certain engravings, the locus of the alleged acts of infringement was not specified. The court of session considered this a grave defect in the averments, but allowed an amendment on payment of expenses since the closing of the record (Groves v. Logan, 7 Scotch Sess. Cas. 204). "In the second article, as it now stands," said the lord president, "there is no averment, as to where the offense was committed. The defender is designed in the summons as being a printseller at 27 Sanchie-hall-street, Glasgow; but we do not know even whether that is his shop or his residence. Be it the one or the other, however, it is not alleged that the defender sold a copy of the print there, nor that he did it in Glasgow, nor even that he did it within the United Kingdom, though that is necessary to bring the case under the statutes. That is a very grave imperfection; but I think it is just one of those which it is the policy of the recent statute to allow to be amended on certain conditions. And therefore I think that we should allow the record to be amended in this respect on payment of expenses since the closing of the record."

In the same same case the lord ordinary thought it too vague and uncertain for the pursuer to rest his case on an alleged violation of various copyright acts, "or one or other of them;" but the inner house was of a different opinion. "These statutes," said the lord president, "are all to be read together, I apprehend, in considering the nature and privileges of printers and publishers of engravings. It may very well be that in this case the provisions of one of the statutes may be more applicable than those of another; but it is not necessary for the pursuer to tie himself down to one particular statute or clause of a statute."—Shortt, p. 225.

[1] Murray v. Bogue, 1 Drew. 361; Pike v Nicholas, 20 L. T. N. S. 908; 38 L. J. 529, Ch.

of session granted an interdict to restrain the purchaser from publishing a folio Bible, printed from the plates, with the addition of a commentary at the foot of each page, on the following grounds: that what was sold were the plates of a particular Bible, of which a specimen leaf had been shown, and had been referred to in the catalogue; that the nature of stereotype plates was to multiply copies of the same work until they were worn out, whereas, if commentaries were added to each page, the work would be a different one, and if sold as cheap as the original quarto, the value of the latter would be diminished, not by the multiplication of the same work, but by a production different from the plates, a thing not intended when the sale was made.[1]

489. An advertisement of a work, which merely disparages a rival work, will not be restrained by injunction, where it is not such as would induce the public to take the one book for the other.[2] An allegation that matter contained in a particular edition of a work is spurious and of no value, is, if true, no subject for an injunction, although it might be the subject of an action, as being a libel on or disparagement of the edition.[3] To obtain a patent, it is necessary to show both novelty and utility, but nothing of the sort is required in the case of a copyright.

490. As to remedies in equity, it is not necessary for a person whose copyright has been infringed, and seeks an injunction, to specify, either in his bill or his affidavit, the parts of the defendant's work which he thinks have been pirated from his work. It is sufficient to allege generally that

[1] Fullarton v. McPhun, 13 Scotch Sess. Cas. 2nd Ser. 219
[2] Seeley v. Fisher, 11 Sim. 581.
[3] Id. 583.

the defendant's work contains certain passages pirated from the plaintiff's work, and to verify the rival work by affidavit.[1] "The great remedial process," says Shortt,[2] "which was for a long time peculiar to equity, is the writ of injunction. This may be described to be a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ. Its object is generally preventive and protective rather than restorative; it seeks to prevent a meditated wrong more often than to redress an injury already done.[3] It is a remedy of a very flexible nature; and it may be total or partial, qualified or unconditional, as well as temporary or perpetual.[4]

There are two sorts of injunctions—(1) provisional, *i. e.*, such as are to continue only until a certain specified period, such as the coming in of the defendant's answer, or the hearing of the cause; and (2) perpetual, *i. e.*, such as form part of the decree made at the hearing upon the merits, whereby the defendant is perpetually enjoined from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience.[5] Lord Eldon[6] thus states the grounds on which equity interferes by injunction in the case of infringements of copyright: "The jurisdiction, upon subjects of this nature, is assumed merely for the purpose of making effectual the legal right, which cannot be made effectual by any action for damages; as, if the work is pirated, it is impossible to lay before a jury the

[1] Sweet v. Maugham, 11 Sim. 51.
[2] P. 231.
[3] Story, Eq. Jur. §§ 861–862.
[4] Id. § 886
[5] 2 Daniel's Chanc. Pr. 1462.
[6] 6 Wilkins v. Aikin, 17 Ves. 424.

whole evidence as to all the publications which go out in the world to the plaintiff's prejudice. A court of equity, therefore, acts with a view to make the legal right effectual by preventing the publication altogether; and, accordingly, in the exercise of this jurisdiction, where a fair doubt appears, as to the plaintiff's legal right, the court always directs it to be tried, making some provision in the interim, the best that can be, for the benefit of both parties." Elsewhere the same learned judge says, "The principle of granting the injunction in those cases is, that damages do not give adequate relief; and that the sale of copies by the defendant is in each instance not only taking away the profit upon the individual book, which the plaintiff probably would have sold, but may injure him to an incalculable extent, which no inquiry for the purpose of damages can ascertain."[1]

To obtain an injunction, the course of procedure is for the proprietor to file a bill, stating his title to the original work, the nature of the piracy, and the consequent injury. The particular facts are next to be verified by affidavit, and a special motion may then be made to restrain the publication. The whole question may thus be brought before the court; and an injunction will either be granted forthwith, or an issue directed to try the question before a jury.[2]

An injunction will not be granted where the title is in doubt. Thus, where the plaintiff claimed an injunction as the purchaser, from the composer, of the copyright of certain songs, and the defendant produced affidavits from the composer and one Elliston, from which it appeared that Elliston had a copy-

[1] Hogg v. Kirby, 8 Ves. 225.
[2] Maugham, 169.

right, but whether qualified or absolute was doubtful, Sir John Leach refused to grant an injunction.[1]

In a case decided under the copyright act of Anne, an injunction obtained by the plaintiff to restrain the unauthorized publication of a book in which he claimed copyright, was dissolved by Lord Chancellor King, on the ground that the plaintiff had not set out a good title in his bill or affidavit, as it was there stated only that he had purchased or legally acquired the copy, which was not sufficient without saying that he purchased or acquired it "of the author."[2]

A provisional injunction, if granted, would sometimes be productive of more mischief than that which it was intended to remedy, *e.g.*, if the book whose publication was sought to be restained were of such a nature that its chief value depended upon its appear-

[1] Lowndes v. Duncombe, 2 Cowp. 216.

[2] Gilliver v. Snaggs, 2 Eq. Cas. Ab. 522; 4 Viner's Abridg. 279.—Courts of equity used formerly to direct an issue to be tried by a jury in a court of common law in order to determine the plaintiff's title to copyright. But sect. 1 of 25 & 26 Vict. c. 42, now directs that every question of law or fact, cognizable in a court of common law, on the determination of which the title to the relief or remedy sought in a court of equity depends, shall be determined by or before that court, unless (sect. 2) where questions of fact may be more conveniently determined at the assizes or in a court of common law in Westminster or Middlesex, in which cases issues of fact may be directed to be tried as before. Re Hooper, 11 W. R. 130.

Courts of equity are now also empowered to award damages to the party injured, either in addition to or in substitution for an injunction (21 & 22 Vict. c. 27, 32; Tinsley v. Lacy, 11 W. R. 887). The measure of damages in a case of piracy was thus stated by James, V. C., in a recent case: "That the defendant is to account for every copy of his book sold as if it had been a copy of the plaintiff's, and pay the plaintiff the profit which he would have received from so many additional copies." Pike v. Nicholas, 20 L. T. N. S. 909; 38 L. J. 529, Ch. Shortt.

ing immediately. "There is a great difference," said Lord Eldon,[1] "between works of a permanent and of a transitory nature. The case upon the former may be brought to a hearing. But the effect is very different upon a work of this kind [an East Indian calendar], perishable; particularly in this instance; consisting of the names of persons continually fluctuating: a work that would be good for nothing in another year."

The difficulty in such cases is forcibly stated and the mode of avoiding it suggested by Lord Cottenham, C., in dealing with the question of an almanac, alleged to be pirated from another.[2] "The greatest of all objections," said the lord chancellor, "is that the court runs the risk of doing the greatest injustice in case its opinion upon the legal right should turn out to be erroneous. Here is a publication which, if not issued this month [December], will lose a great part of its sale for the ensuing year. If you restrain the party from selling immediately, you probably make it impossible for him to sell at all. You take property out of his pocket and give it to nobody. In such a case, if the plaintiff is right, the court has some means, at least, of indemnifying him, by making the defendant keep an account; whereas, if the defendant is right and he be restrained, it is utterly impossible to give him compensation for the loss he will have sustained. And the effect of the order in that event will be to commit a great and irremediable injury. Unless, therefore, the court is quite clear as to what are the legal rights of the parties, it is much the safest course to abstain from exercising its jurisdiction till the legal right has been determined."

Where the work is of such a nature as those just

[1] Mathewson v. Stockdale, 12 Ves. 275.
[2] Spottiswoode v. Clarke, 2 Phil. 156.

referred to, the court of chancery orders the defendant to keep an account of all copies sold, until the title of the plaintiff is ascertained, when the proceeds must be handed over to him.

491. There appears to be no provision in the copyright act concerning the copyright of works posthumously published. The French law expressly provides: "Les propriétaires par succession, ou à autres titres, d'un ouvrage posthume ont les mêmes droits que l'auteur; et les dispositions sur la propriété exclusive des auteurs et sur la durée leur sont applicables; toutefois à la charge d'imprimer séparément les œuvres posthumes et sans les joindre à une nouvelle édition des ouvrages déjà publiés et devenus propriété publique."[1] And the rule in the United States would probably be similar—namely, that the legal representatives who would ordinarily administer the other personal property of the decedent, would have the right to the literary property as well, and might publish the work.

492. Although an equitable title to the work pirated, is sufficient to entitle to the assistance of a court of equity,[2] the person who has the legal title should also be made a party to the suit.[3] But where there are distinct infringements of copyright by several persons, they cannot be joined as defendants in the same suit. Thus, where different booksellers take copies of a spurious edition of a work for sale, there is no privity

[1] Dècret Impériale du Fevrier, 1861, art. 89.

[2] See Mawman v. Tegg, 2 Russ. 385; Pierpoint v. Fowle, 2 Wood & Min. 35; Little v. Gould, 2 Blatch. 181; per Abinger, C.B., in Chappell v. Purday, 4 Y. & C. 493; per Shadwell, V.C., in Bohn v. Bogue, 10 Jur. 420; and Sweet v. Cater, 11 Sim. 581.

[3] Colburn v. Duncombe, 9 Sim. 151. See Sweet v. Shaw, 3 Jur. 217; and Sweet v. Cater, 11 Sim. 581.

between them, and they must be proceeded against by separate bills.[1] Where a bill for an injunction prayed that the defendant might be restrained from publishing, selling, or otherwise disposing of a number of a periodical containing a piratical abridgment of a work of fiction, and from copying or imitating in whole or in part that work, the court granted the injunction as prayed, except as to the words "or imitating," for which there appeared to be no precedent.[2]

"The largest words," said the Vice-Chancellor, "that the registrar has furnished me with, are in a case of Faden v. Stockdale,[3] which are very large indeed." The words of the injunction in that case were: "To restrain the defendant, his servants, agents, and workmen from printing, upon a reduced scale or otherwise, and from publishing or selling, any copy or copies of the map of the Island of St. Domingo, compiled, drawn, or engraved by or for the use of the plaintiff, or any other of the like nature or kind, or upon any such or the like plan, until answer or further order."

"It has been observed that nothing, in general, can call forth a court of equity into activity but conscience, good faith, and personal diligence, and one of the leading maxims that guides its interference is—vigilantibus non dormientibus æquitas subvenit.[4] If one slumbers over his rights, instead of asserting them in proper time, or if one, by his conduct, acquiesces in or encourages the infringement of a right which he afterwards seeks to enforce, equity will not grant him its aid, but leave him to his remedy at law."

493. A leading case on this subject is Saunders **v.**

[1] Dilly v. Doig, 2 Ves. 486.
[2] Dickens v. Lee, 8 Jur. 185.
[3] Reg. Lib. A. 1796, fol. 32*.
[4] See 2 Sp. Eq. Jur. 60, 61; Story Eq. Jur. §. 959, **a.**

Smith,[1] in which, without pronouncing any judgment on the legal right of the defendant to publish, with notes annexed, certain legal cases previously published by the plaintiff, the Lord Chancellor (Cottenham) refused to grant an injunction to stay the publication by the defendant of a second volume of his "Leading Cases," on account of the line of conduct pursued by the plaintiffs. Smith had published his first volume of "Leading Cases" in 1837, containing some cases taken from the plaintiff's books, and he stated, in the preface, his intention to publish a second volume, which would carry the work down to the time he wrote. Mr. Smith proceeded with his second volume, and a communication on the subject of taking a share in it was made by his publisher (Mr. Maxwell) to the plaintiffs, and the plaintiffs made no remonstrance until the first part of the second volume was published, when they applied for an injunction to restrain its publication. Lord Cottenham, in refusing the injunction, said: "I do not give any opinion upon the legal question. I am only to decide whether the plaintiffs are entitled, under the circumstances, to the interposition of the court to protect their legal right, when that legal right has not yet been established. But I assume the existence of the legal right, and I say that whatever legal right the plaintiffs may have, the circumstances are such as to make it the duty of a court of equity to withhold its hand, and to abstain from exercising its equitable jurisdiction, at all events until the plaintiffs shall come here with the legal title established. In doing this, I am only doing what Lord Eldon did in Rundell v. Murray, and what is very generally done upon questions of patent right. The court always exercises its discretion whether it

[1] 3 My. & Cr. 711.

shall interfere by injunction before the establishment of the legal right."

494. The circumstances of the case of Rundell v. Murray,[1] referred to, were peculiar. The authoress gave her book to the defendant to publish, at his expense, on condition of giving her a few copies; and she stated in the book that it was given to the public in the idea that it might be useful, and as "she will receive from it no emolument, so she trusts it will escape without censure." The book proved a success, and the publisher sent her £150, which she acknowledged by letter to be a free gift. After the period of fourteen years had elapsed from the first publication, the authoress sought to restrain the further publication of the work by the defendant, but Lord Eldon held, that she was not entitled to do so. His lordship said: "There has often been great difficulty about granting injunctions where the plaintiff has previously, by acquiescing, permitted many others to publish the work; where ten have been allowed to publish, the court will not restrain the eleventh. A court of equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things that occasions the application; and therefore, without saying with whom the right is, whether it is in this lady, or whether it is concurrently in both, I think it is a case in which strict law only ought to govern."

In Platt v. Button,[2] Lord Eldon said, that where permission was given to some persons to publish, and then others copied, it was necessary for the proprietor

[1] 1 Jac. 311; see also Southey v. Sherwood, 2 Mer. 438; Heine v. Appleton, 4 Blatchf. 125.

[2] Coop. Ch. Cas. 304.

to bring his action at law before he could come to equity for an injunction.

If any delay occurs in the assertion of the title to a copyright infringed, the delay must be accounted for to the satisfaction of the court, otherwise no assistance will be given.[1]

The right to an account in equity appears to be entirely ancillary to the right to an injunction.[2]

"The court," says Sir John Leach, M. R.,[3] "has no jurisdiction to give to a plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of this court by injunction; and in such case, the court will also give him an account, that his remedy here may be complete. If this court do not interfere by injunction, then his remedy, as in the case of any other injury to his property, must be at law."

Neither has a court of equity any jurisdiction with reference to a mere question of damages, unless the primary right to an injunction exists.[4]

495. Commissions on the sale of a pirated work, received by a bookseller from the publisher of it, are profits which the bookseller must account for to the

[1] See Bailey v. Taylor, 1 R. & M. 76; S. C., Tamlyn, 295; Mawman v. Tegg, 2 Russ. 385, 393; Lewis v. Chapman, 3 Beav. 135; Lewis v. Fullarton, 2 Id. 6; Buxton v. James, 5 DeG. & Sm. 80, 84; per Wood, V. C., in Tinsley v. Lacy, 11 W. R. 877; 32 L. J. 539, Ch.; and the analogous cases as to patents, Bridson v. Benecke, 12 Beav. 3; per Lord Brougham, C., in Crossley v. Derby Gas Light Company, 4 L. J. 26, Ch., per Wood, V. C., in Smith v. London & South-western Railway Co., 1 Kay, 416, 417; Hogg v. Scott, L. R. 18 Eq. 444.

[2] 1 Kay, 417.

[3] Bailey v. Taylor, 1 R. & M. 75.

[4] 1 Kay, 415; Stevens v. Cady, 2 Curt. 200; and see the case of Monk v. Harper, 3 Edw. Ch. 114.

proprietor of the copyright, where a decree for an account has been made.[1]

Curtis, J., in such a case, after referring to the law relating to profits made by one member of a partnership, said: "The jurisdiction in cases of copyright rests upon a similar principle. If the proprietor will waive his action for damages, he may have an account of profits, upon the ground that the defendant has, by dealing with his property, made gains which equitably belong to the complainant. And I perceive no sound reason for restricting those gains to the difference between the cost and the sale price of the map or book, or limiting the right to an account to those persons who have sold the work solely on their own account. He who sells on commission does, in truth, sell on his own account, so far as he is entitled to a percentage on the amount of the sales. What he so receives is the gross profit coming to him from the proceeds of the sales, and what he so receives diminishes the net profit of the one who employs him to sell. That part of the profits of the sales being in the hands of the commission merchant, the consignor is not accountable for them. But why should not the commission merchant, who has them, account for them? He was liable to an action for damages for selling. That right is waived. I think he should pay over to the proprietor, in lieu of the damages, the gain he has made from the sales. It does not seem to me that the term 'profits' necessarily, or when construed in reference to the subject-matter, properly has so restricted a meaning as to exclude commissions received from the proceeds of sales of the property of the complainant."[2]

[1] Stevens v. Gladding, 2 Curt. 608.
[2] Id.

496. That the value of the property infringed is small does not disentitle the owner to an injunction;[1] though it may be of such trifling value that the court will not encourage litigation by interfering to protect it by injunction. Where some pages of an article on a subject under public discussion at the time, were extracted from a monthly periodical and commented on by a weekly newspaper, Lord Cottenham, in dissolving an injunction which had been obtained, said: "It is impossible to say there is any value in the nature of the property in what is here inserted; the question is so minute as a question of property or value—how far, in point of value, it interferes with the sale of the 'Monthly Chronicle.' The injunction is not to depend altogether on a question of account; but to what value the question in point of utility is to be carried. If no other danger were to arise from granting this application than what would be consequent on encouraging the litigation of such minute inquiries, it would be a sufficient ground to refuse it, that the court should not be so occupied to the exclusion of other matters which press upon it. The injunction is dissolved, each party paying their own costs."[2]

497. Where, however, the work, of which the copyright is infringed, is of value, the court will grant an injunction without proof of actual damage. When once the court has found that there is "injuria," the proprietor of the copyright will be allowed to judge of the "damnum."[3]

[1] Buxton v. James, 5 DeG. & Sm. 83.

[2] Bell v. Whitehead, 3 Jur. 68; see also per Lord Eldon in Matthewson v. Stockdale, 12 Ves. 275; and Cox v. Land and Water Journal Company, L. Rep. 9 Eq. 324; 21 L. T. N. S. 548; 39 L. J. 152, Ch.; 18 W. R. 207.

[3] Per Wood, V.C., in Tinsley v. Lacy, 32 L. J., 539, Ch.; 11 W. R. 876.

498. If copies pirated during the continuance of a term of copyright, are not published till after the expiration of the term, equity will, it seems, as in the similar case of patents, restrain such publication by injunction.[1]

Where part of a book only is pirated from another work, the extent to which an injunction goes will depend on the particular circumstances of the case. Lord Bathurst seems to have been of opinion that an injunction could not be granted against the whole of such a work, unless the part pirated was such that granting an injunction against that part necessarily destroyed the whole.[2]

Lord Eldon thought it was the business of the defendant, where a considerable portion of his work was shown to have been taken from that of the plaintiff, to separate and point out such pirated part.[3] The presiding judge has frequently made the comparison for *himself.*[4] *In some cases a reference has been* made to the master to report to what extent one book is pirated from another;[5] and in one case Lord Hardwicke held the best course was to get a report from two persons of learning in the law, chosen by the litigants themselves.[6]

[1] Compare the remarks of Wood, V.C., in Smith v. London & South-western Railway Co., Kay, 415, with the arguments in Sheriff v. Coates, 1 R. & M. 165, 166.

[2] Per Wood, V.C., in Jarrold v. Houlston, 3 K. & J. 719.

[3] Mawman v. Tegg, 2 Russ. 395.

[4] See the cases of Matthewson v. Stockdale, 12 Ves. 277; Whittingham v. Wooler, 2 Swanst. 460; Lewis v. Fullarton, 2 Beav. 8; Murray v. Bogue, 1 Drew, 368; Spiers v. Brown, 6 W. R. 352; Jarrold v. Houlston, 3 K. & J. 708; Pike v. Nicholas, 20 L. T. N. S. 906; 38 L. J. 529, Ch.; L. Rep. 5 Ch.App. 251.

[5] Carnan v. Bowles, 2 Bro. C. C. 85; Nicol v. Stockdale, 12 Ves. 277; Story's Executors v. Derby, 4 McLean, 160, 161.

[6] Gyles v. Wilcox, 2 Atk. 143

499. The effect of an injunction against the whole of a book is sometimes produced by an order against the publication of any copy or copies containing the portions pirated from another work, or any passages taken or colorably altered from such work.[1]

The extent to which the injunction ought to go, must, in each case, depend on the particular circumstances of that case.[2]

500. Equity suits for the infringement of a copyright are usually referred to a master before the final hearing, to ascertain whether the charge is proved, and, if so, for a final report as to the nature and extent of the infringement; and in such cases the general rule is, that the complainant, if he prevails in the suit, is entitled, if at all, to an injunction at the time the decretal order is entered, to restrain the respondent from any further violation of his rights, as the whole case is then before the court. Even when the case is heard before any such reference and report, if the charges of infringement are few and of a character that the extent of the infringement can be conveniently determined by the court, without sending the case to a master, the court, if the case be one where an injunction is the proper remedy, will order it at the same time that the decision is announced upon the merits. But where the cause comes to a final hearing without any such report, the court, if the charges of infringement are numerous, and of a character to require extended examination before the extent of the infringement can be ascertained, will ordinarily send the case to a master for further examination and report in respect to all matters not previously adjudged by the

[1] See Lewis v. Fullarton, 2 Beav. 6; Jarrold v. Houlston, 3 K. & J. 708.

[2] Per Lord Eldon, in Mawman v. Tegg, 2 Russ. 393.

court; and the general rule in such cases is, that the injunction will not be granted until the nature and extent of the infringement are fully ascertained and determined, as its effects and operation might work great injustice.[1]

The fourth section of the English act of 5 and 6 Victoria, c. 45, which made the copyright secure to an author or his representatives, in any case for at least forty-two years, enacted that all copyrights existing at the time of its passage, which had been acquired by any proprietor thereof for any other consideration than natural love and affection, should be admitted to the benefits of the act, but that in all other cases a new registry was necessary. And it has been recently held that no injunction against an alleged infringement of a copyright could issue to the executor of a survivor of seven compilers of "a collection of hymns for the use of the people called Methodists," which was published by and for the Wesleyan Society, a charity (such collection having been compiled by the seven, under the direction of trustees of that charity, in 1831, and before the passage of the above Act).[2]

[1] Lawrence v. Dana, Official Gazette of U. S. Patent Office, vol. vii., p. 81.

[2] Marzials v. Gibbons, L. R. 9 Ch. App. 518.

The two Italian chambers of parliament have passed a new artistic and literary law of proprietary rights. Exclusive right of publication and of representation is secured, and no person can execute or represent any work without the author's permission or that of his representatives. The duration of the right is eighty years from the day of execution or of publication; declaration and deposit of the works, necessary to guarantee rights, to take place within three months from performance or publication; but may be delayed to a later period, provided no claim be made for representations abroad or for edition already printed after the three months have expired. The "Royal Gazette" will publish quarterly the declarations of rights; disputes arising out of the application of the law to be settled by the law courts.

APPENDIX A.

THE LAW OF COPYRIGHT IN THE UNITED STATES.

Being the act approved of July 8, 1870, as revised in the revision of the statutes of the United States, in force December 1, 1873, together with the act approved June 18, 1874.

Section 4948. All records and other things relating to copyrights and required by law to be preserved, shall be under the control of the librarian of congress, and kept and preserved in the library of congress; and the librarian of congress shall have the immediate care and supervision thereof, and, under the supervision of the joint committee of congress on the library, shall perform all acts and duties required by law touching copyrights.

Sec. 4949. The seal provided for the office of the librarian of congress shall be the seal thereof, and by it all records and papers issued from the office, and to be used in evidence, shall be authenticated.

Sec. 4950. The librarian of congress shall give a bond, with sureties, to the treasurer of the United States, in the sum of five thousand dollars, with the condition that he will render to the proper officers of the treasury a true account of all moneys received by virtue of his office.

Sec. 4951. The librarian of congress shall make an annual report to congress of the number and description of copyright publications for which entries have been made during the year.

Sec. 4952. Any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns, of any

such person, shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and, in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others. And authors may reserve the right to dramatize or translate their own works.

Sec. 4953. Copyrights shall be granted for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed.

Sec. 4954. The author, inventor, or designer, if he still be living and a citizen of the United States or resident therein, or his widow or children if he be dead, shall have the same exclusive right continued for the further term of fourteen years, upon recording the title of the work or description of the article so secured a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term. And such person shall, within two months from the date of said renewal, cause a copy of the record thereof to be published in one or more newspapers, printed in the United States, for the space of four weeks.

Sec. 4955. Copyrights shall be assignable in law by any instrument of writing, and such assignment shall be recorded in the office of the librarian of congress within sixty days after its execution; in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice.

Sec. 4956. No person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the librarian of congress, or deposit in the mail addressed to the librarian of congress, at Washington, District of Columbia, a printed copy of the title of the book or other article, or a description of the painting, drawing, chromo, statue, statuary, or model or design for a work of the fine arts, for which he desires a copyright; nor unless he shall also, within ten days from the publication thereof, deliver at the office of the librarian of congress, or deposit in the mail addressed to the librarian of congress, at Washington, District of Columbia, two copies of such copyright book or other article, or, in case of a painting, drawing, statue, statuary, model or design for a work of the fine arts, a photograph of the same.

Sec. 4957. The librarian of congress shall record the name of such copyright book, or other article, forthwith in a book to be kept for that purpose, in the words following: "Library of Congress, to wit: Be it remembered that on the —— day of ——, ——, A. B., of ——, hath deposited in this office the title of a book (map, chart, or otherwise, as the case may be, or description of the article), the title or description of which is in the following words, to wit; (here insert the title or de-

scription) the right whereof he claims as author (originator, or proprietor, as the case may be), in conformity with the laws of the United States respecting copyrights. C. D., librarian of congress." And he shall give a copy of the title or description, under the seal of the librarian of congress, to the proprietor whenever he shall require it.

Sec. 4958. The librarian of congress shall receive from the persons to whom the services designated are rendered, the following fees: 1. For recording the title or description of any copyright book or other article, fifty cents. 2. For every copy under seal of such record actually given to the person claiming the copyright, or his assigns, fifty cents. 3. For recording and certifying any instrument of writing for the assignment of a copyright, one dollar. 4. For every copy of an assignment, one dollar. All fees so received shall be paid into the treasury of the United States.

Sec. 4959. The proprietor of every copyright book or other article, shall deliver at the office of the librarian of congress, or deposit in the mail addressed to the librarian of congress, at Washington, District of Columbia, within ten days after its publication, two complete printed copies thereof, of the best edition issued, or description or photograph of such article as hereinbefore required, and a copy of every subsequent edition wherein any substantial changes shall be made.

Sec. 4960. For every failure on the part of the proprietor of any copyright to deliver, or deposit in the mail, either of the published copies, or description or photograph, required by sections 4956 and 4959, the proprietor of the copyright shall be liable to a penalty of twenty-five dollars, to be recovered by the librarian of congress, in the name of the United States, in an action in the nature of an action of debt, in any district court of the United States within the jurisdiction of which the delinquent may reside or be found.

Sec. 4961. The postmaster to whom such copyright book, title, or other article is to be delivered, shall, if requested, give a receipt therefor; and when so delivered he shall mail it to its destination.

Sec. 4962. No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected or completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz.: "Entered according to act of congress, in the year ——, by A. B., in the office of the librarian of congress, at Washington;" or, at his option, the word "Copyright," together with the year the

copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 18—, by A. B."

Sec. 4963. Every person who shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, musical composition, print, cut, engraving, or photograph, or other article, for which he has not obtained a copyright, shall be liable to a penalty of one hundred dollars, recoverable one-half for the person who shall sue for such penalty, and one-half to the use of the United States.

Sec. 4964. Every person who, after the recording of the title of any book as provided by this chapter, shall within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, print, publish, or import, or, knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction.

Sec. 4965. If any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, photograph, or chromo, or of the description of any painting, drawing, statue, statutary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this chapter, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or, knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; one-half thereof to the proprietor, and the other half to the use of the United States.

Sec. 4966. Any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages therefor; such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court shall appear to be just.

Sec. 4967. Every person who shall print or publish any

manuscript whatever, without the consent of the author or proprietor first obtained (if such author or proprietor is a citizen of the United States, or resident therein), shall be liable to the author or proprietor for all damages occasioned by such injury.

Sec. 4968. No action shall be maintained in any case of forfeiture or penalty under the copyright laws, unless the same is commenced within two years after the cause of action has arisen.

Sec. 4969. In all actions arising under the laws respecting copyrights, the defendant may plead the general issue, and give the special matter in evidence.

Sec. 4970. The circuit courts, and district courts having the jurisdiction of circuit courts, shall have power, upon bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violations of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable.

Sec. 4971. Nothing in this chapter shall be construed to prohibit the printing, publishing, importation, or sale of any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph, written, composed, or made by any person not a citizen of the United States nor resident therein.

AMENDMENT OF JUNE 18, 1874.

An Act to amend the law relating to patents, trade-marks, and copyrights.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statute, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz.: "Entered according to act of congress, in the year——, by A. B., in the office of the librarian of congress, at Washington;" or at his option the word "copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out; thus—"Copyright, 18—, by A. B."

Sec. 2. That for recording and certifying any instrument of writing for the assignment of a copyright, the librarian of congress shall receive from the persons to whom the service is

rendered. one dollar; and for every copy of an assignment, one dollar; said fee to cover, in either case, a certificate of the record, under seal of the librarian of congress; and all fees so received shall be paid into the treasury of the United States.

Sec. 3. That in the construction of this act, the word "engraving," "cut," and "print," shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the patent office. And the commissioner of patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label not a trade-mark, six dollars, which shall cover the expense of furnishing a copy of the record under the seal of the commissioner of patents, to the party entering the same.

Sec. 4. That all laws and parts of laws inconsistent with the foregoing provisions be and the same are hereby repealed.

Sec. 5. That this act shall take effect on and after the first day of August, eighteen hundred and seventy-four.

Approved, June 18, 1874.

APPENDIX B.

BRITISH STATUTES.

8 Geo. 2, cap. 13.—An act for the encouragement of the arts of designing, engraving, and etching historical and other prints, by vesting the properties thereof in the inventors and engravers during the times therein mentioned.

Whereas divers persons have, by their own genius, industry, pains, and expense, invented and engraved, or worked in mez-

zotinto, or chiaro oscuro, sets of historical and other prints, in hopes to have reaped the sole benefit of their labors; and whereas printsellers and other persons have of late, without the consent of the inventors, designers, and proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing, or causing to be copied, engraved and published, base copies of such works, designs, and prints, to the very great prejudice and detriment of the inventors, designers, and proprietors thereof: for remedy thereof, and for preventing such practices for the future, may it please your majesty that it may be enacted; and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the twenty-fourth day of June, which shall be in the year of our Lord one thousand seven hundred and thirty-five, every person who shall invent and design, engrave, etch, or work in mezzotinto or chiaro oscuro, or from his own works and invention shall cause to be designed and engraved, etched, or worked, in mezzotinto or chiaro oscuro, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for the term of fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints; and that if any printseller or other person whatsoever, from and after the said twenty fourth day of June, one thousand seven hundred and thirty-five, within the time limited by this act, shall engrave, etch, or work as aforesaid, or in any other manner copy and sell, or cause to be engraved, etched, or copied, and sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause to be printed, reprinted, or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof first had and obtained in writing signed by him or them respectively in the presence of two or more credible witnesses, or, knowing the same to be so printed or reprinted without the consent of the proprietor or proprietors shall publish, sell, or expose to sale, or otherwise, or in any other manner dispose of, or cause to be published, sold, or exposed to sale, or otherwise or in any other manner disposed of, any such print or prints, without such consent first had and obtained as aforesaid, then such offender or offenders shall forfeit the plate or plates on which such print or prints are or shall be copied, and all or every sheet or sheets (being part of or whereon such print or prints are or shall be so copied or printed), to the proprietor or proprietors of such original print or prints, who shall forthwith destroy and damask the same, and further, that every such offender or offenders shall forfeit five shillings for every print which shall be found

in his, her, or their custody, either printed or published, and exposed to sale or otherwise disposed of, contrary to the true intent and meaning of this act, the one moiety thereof to the king's most excellent majesty, his heirs and successors, and the other moiety thereof to any person or persons that shall sue for the same, to be recovered in any of his majesty's courts of record at Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoign, privilege, or protection, or more than one imparlance, shall be allowed.

2. Provided nevertheless, that it shall and may be lawful for any person or persons who shall hereafter purchase any plate or plates for printing from the original proprietors thereof to print and reprint from the said plates without incurring any of the penalties in this act mentioned.

3. And be it further enacted by the authority aforesaid, that if any action or suit shall be commenced or brought against any person or persons whatsoever for doing or causing to be done anything in pursuance of this act, the same shall be brought within the space of three months after so doing; and the defendant and defendants in such action or suit shall or may plead the general issue, and give the special matter in evidence; and if upon such action or suit a verdict shall be given for the defendant or defendants, or if the plaintiff or plaintiffs become non-suited, or discontinue his, her, or their action or actions, then the defendant or defendants shall have and recover full costs, for the recovery whereof he shall have the same remedy as any other defendant or defendants in any other case hath or have by law.

4. Provided always, and be it further enacted by the authority aforesaid, that if any action or suit shall be commenced or brought against any person or persons for any offense committed against this act, the same shall be brought within the space of three months after the discovery of every such offence, and not afterwards, anything in this act contained to the contrary notwithstanding.

5. Clause relating to J. Pyne.

6. And be it further enacted by the authority aforesaid, that this act shall be deemed, adjudged, and taken to be a public act, and be judicially taken notice of as such by all judges, justices, and other persons whatsoever, without specially pleading the same.

3 Will. 4, cap. 15.—An act to amend the laws relating to dramatic literary property.

[10th June, 1833.]

Whereas by an act passed in the fifty-fourth year of the reign of his late majesty King George the Third, entituled "An act to amend the several acts for the encouragement of learning, by securing the copies and copyright of printed books to the authors of such books, or their assigns," it was

amongst other things provided and enacted, that from and after the passing of the said act the author of any book or books composed, and not printed or published, or which should thereafter be composed and printed and published, and his assignee or assigns, should have the sole liberty of printing and reprinting such book or books for the full term of twenty-eight years, to commence from the day of first publishing the same, and also if the author should be living at the end of that period, for the residue of his natural life; and whereas it is expedient to extend the provisions of the said act: be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, or which hereafter shall be composed, and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production, printed and published within ten years before the passing of this act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of passing this act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof; provided, nevertheless, that nothing in this act contained shall prejudice, alter, or affect the right or authority of any person to represent or cause to be represented, at any place or places of dramatic entertainment whatsoever, any such production as aforesaid, in all cases in which the author thereof or his assignee shall, previously to the passing of this act, have given his consent to or authorized such representation, but that such sole liberty of the author or his assignee shall be subject to such right or authority.

2. And be it further enacted, That if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this act, or right of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this act, to be recovered, together with double costs of suit, by such author or other proprietors, in any court having jurisdiction in such cases in that part of the said United Kingdom or of the British dominions in which the offence shall be committed; and in every such proceeding where the sole liberty of such author or his assignee as aforesaid, shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same.

3. Provided, nevertheless, and be it further enacted, That all actions or proceedings for any offence or injury that shall be committed against this act shall be brought, sued, and commenced within twelve calendar months next after such offence committed, or else the same shall be void and of no effect.

4. And be it further enacted, That whenever authors, persons, offenders, or others are spoken of in this act in the singular number or in the masculine gender, the same shall extend to any number of persons and to either sex.

5 & 6 Will. 4, cap. 65.—An act for preventing the publication of lectures without consent.

[9th September, 1835.]

Whereas printers, publishers, and other persons have frequently taken the liberty of printing and publishing lectures delivered upon divers subjects, without the consent of the authors of such lectures, or the persons delivering the same in public, to the great detriment of such authors and lecturers: Be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the first day of September, one thousand eight hundred and thirty-five, the author of any lecture or lectures, or the person to whom he hath sold or otherwise conveyed the copy thereof, in order to deliver the same in any school, seminary, institution, or

other place, or for any other purpose, shall have the sole right and liberty of printing and publishing such lecture or lectures; and that if any person shall, by taking down the same in shorthand or otherwise in writing, or in any other way, obtain or make a copy of such lecture or lectures, and shall print or lithograph, or otherwise copy and publish the same, or cause the same to be printed, lithographed, or otherwise copied and published, without leave of the author thereof, or of the person to whom the author thereof hath sold or otherwise conveyed the same, and every person who, knowing the same to have been printed or copied and published without such consent, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such lecture or lectures, shall forfeit such printed or otherwise copied lecture or lectures, or parts thereof, together with one penny for every sheet thereof which shall be found in his custody, either printed, lithographed, or copied, or printing, lithographing, or copying, published or exposed to sale, contrary to the true intent and meaning of this act, the one moiety thereof to his majesty, his heirs or successors, and the other moiety thereof to any person who shall sue for the same, to be recovered in any of his majesty's courts of record in Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoign, privilege, or protection, or more than one imparlance, shall be allowed.

2. And be it further enacted, That any printer or publisher of any newspaper who shall, without such leave as aforesaid, print and publish in such newspaper any lecture or lectures, shall be deemed and taken to be a person printing and publishing without leave within the provisions of this act, and liable to the aforesaid forfeitures and penalties in respect of such printing and publishing.

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

4. Provided always, That nothing in this act shall extend to prohibit any person from printing, copying, and publishing any lecture or lectures which have or shall have been printed and published with leave of the authors thereof, or their assignees, and whereof the time hath or shall have expired within which the sole right to print and publish the same is given by an act passed in the eighth year of the reign of Queen Anne, intituled "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies during the times therein mentioned," and by another act passed in the fifty-fourth year of the reign of King George the Third, intituled "An act to

amend the several acts for the encouragement of learning, by securing the copies and copyright of printed books to the authors of such books, or their assigns," or to any lectures which have been printed or published before the passing of this act.

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

5 & 6 Vict. cap. 45.—An act to amend the law of copyright.

[1st July, 1842.]

Whereas it is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world: Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from the passing of this act an act passed in the eighth year of the reign of Her Majesty Queen Anne, intituled "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies during the times therein mentioned;" and also an act passed in the forty-first year of the reign of His Majesty King George the Third, intituled "An act for the further encouragement of learning in the United Kingdom of Great Britain and Ireland, by securing the copies and copyright of printed books to the authors of such books, or their assigns, for the time therein mentioned;" and also an act passed in the fifty-fourth year of the reign of His Majesty King George the Third, intituled "An act to amend the several acts for the encouragement of learning, by securing the copies and copyright of printed books to the authors of such books, or their assigns," be and the same are hereby repealed, except so far as the continuance of either of them may be necessary for carrying on or giving effect to any proceedings at law or in equity pending at the time of passing this act, or for enforcing any cause of action or suit, or any right or contract, then subsisting.

2. And be it enacted that in the construction of this act, the word "book" shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately pub-

lished; that the words "dramatic piece" shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment; that the word "copyright" shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied; that the words "personal representative" shall be construed to mean and include every executor, administrator, and next of kin entitled to administration; that the word "assigns" shall be construed to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise; that the words "British Dominions" shall be construed to mean, and include all parts of the United Kingdom of Great Britain and Ireland, the Islands of Jersey and Guernsey, all parts of the East and West Indies, and all the colonies, settlements, and possessions of the crown which now are or hereafter may be acquired; and that whenever in this act, in describing any person, matter or thing, the word importing the singular number or the masculine gender only is used, the same shall be understood to include and to be applied to several persons as well as one person, and females as well as males, and several matters or things as well as one matter or thing respectively, unless there shall be something in the subject or context repugnant to such construction.

3. And be it enacted, that the copyright in every book which shall after the passing of this act be published in the lifetime of its author shall endure for the natural life of such author, and for the further time of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: Provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns.

4. And whereas it is just to extend the benefits of this act to authors of books published before the passing thereof, and in which copyright still subsists; be it enacted, that the copyright which at the time of passing this act shall subsist in any book theretofore published (except as hereinafter mentioned) shall be extended and endure for the full term provided by this act in cases of books thereafter published, and shall be the property of the person who at the time of passing of this act shall be the proprietor of such copyright: Provided always that in all cases in which such copyright shall belong in whole

or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this act, but shall endure for the term which shall subsist therein at the time of passing of this act, and no longer, unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright, shall, before the expiration of such term, consent and agree to accept the benefits of this act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to this act annexed to be entered in the book of registry hereinafter directed to be kept, in which case such copyright shall endure for the full term by this act provided in cases of books to be published after the passing of this act, and shall be the property of such person or persons as in such minute shall be expressed.

5. And whereas it is expedient to provide against the suppression of books of importance to the public; be it enacted, that it shall be lawful for the Judicial Committee of Her Majesty's Privy Council, on complaint made to them that the proprietor of the copyright in any book after the death of its author has refused to republish or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a license to such complainant to publish such book, in such manner and subject to such conditions as they may think fit, and that it shall be lawful for such complainant to publish such book according to such license.

6. And be it enacted, that a printed copy of the whole of every book which shall be published after the passing of this act, together with all maps, prints, or other engravings belonging thereto, finished and colored in the same manner as the best copies of the same shall be published, and also of any second or subsequent edition which shall be so published with any additions or alterations, whether the same shall be in letter-press, or in the maps, prints or other engravings belonging thereto, and whether the first edition of such book shall have been published before or after the passing of this act, and also of any second or subsequent edition of every book of which the first or some preceding edition shall not have been delivered for the use of the British Museum, bound, sewed, or stitched together, and upon the best paper on which the same shall be printed, shall, within one calendar month after the day on which any such book shall first be sold, published, or offered for sale within the bills of mortality, or within three calendar months if the same shall first be sold, published or offered for sale in any other part of the United Kingdom, or within twelve calendar months after the same shall be first sold, published, or offered for sale in any other part of the British dominions,

be delivered, on behalf of the publisher thereof, at the British Museum.

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

8. And be it enacted, that a copy of the whole of every book, and of any second or subsequent edition of every book containing additions and alterations, together with all maps and prints belonging thereto, which after the passing of this act shall be published, shall, on demand thereof in writing, left at the place of abode of the publisher thereof, at any time within twelve months next after the publication thereof, under the hand of the officer of the company of stationers who shall from time to time be appointed by the said company for the purposes of this act, or under the hand of any other person thereto authorized by the persons or bodies politic and corporate, proprietors and managers of the libraries following (videlicet), the Bodleian Library at Oxford, the Public Library at Cambridge, the Library of the Faculty of Advocates at Edinburgh, the Library of the college of the Holy and Undivided Trinity of Queen Elizabeth near Dublin, be delivered upon the paper of which the largest number of copies of such book or edition shall be printed for sale in the like condition, as the copies prepared for sale by the publisher thereof respectively, within one month after demand made thereof in writing as aforesaid, to the said officer of the said company of stationers for the time being; which copies the said officer shall and he is hereby required to receive at the hall of the said company, for the use of the library for which such demand shall be made within such twelve months as aforesaid; and the said officer is hereby required to give a receipt in writing for the same, and within one month after any such book shall be so delivered to him as aforesaid to deliver the same for the use of such library.

9. Provided also, and be it enacted, that if any publisher shall be desirous of delivering the copy of such book as shall be demanded on behalf of any of the said libraries at such library, it shall be lawful for him to deliver the same at such library, free of expense, to such librarian or other person authorized to receive the same (who is hereby required in such case to receive and give a receipt in writing for the same), and such

delivery shall to all intents and purposes of this act be held as equivalent to a delivery to the said officer of the stationers' company.

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

11. And be it enacted, that a book of registry, wherein may be registered, as hereinafter enacted, the proprietorship in the copyright of books, and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licenses affecting such copyright, shall be kept at the hall of the stationers' company, by the officer appointed by the said company for the purposes of this act, and shall at all convenient times be open to the inspection of any person on payment of one shilling for every entry which shall be searched for or inspected in the said book; and that such officer shall, whenever thereunto reasonably required, give a copy of any entry in such book, certified under his hand, and impressed with the stamp of the said company, to be provided by them for that purpose, and which they are hereby required to provide, to any person requiring the same, on payment to him of the sum of five shillings; and such copies so certified and impressed shall be received in evidence in all courts, and in all summary proceedings, and shall be prima facie proof of the proprietorship or assignment of copyright or license as therein expressed, but subject to be rebutted by other evidence, and in the case of dramatic or musical pieces shall be prima facie proof of the right of representation or performance, subject to be rebuted as aforesaid.

12. And be it enacted, that if any person shall willfully make or cause to be made any false entry in the registry book of the stationers' company, or shall willfully produce or cause to be tendered in evidence any paper falsely purporting to be a copy of any entry in the said book, he shall be guilty of an indictable misdemeanor, and shall be punished accordingly.

13. And be it enacted, that after the passing of this act it shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published,

to make entry in the registry book of the stationers' company of the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright in the form in that behalf given in the schedule to this act annexed, upon payment of the sum of five shillings to the officer of the said company; and that it shall be lawful for every such registered proprietor to assign his interest, or any portion of his interest therein, by making entry in the said book of registery of such assignment, and of the name and place of abode of the assignee thereof, in the form given in that behalf in the said schedule, on payment of the like sum; and such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed.

14. And be it enacted, that if any person shall deem himself aggrieved by any entry made under color of this act in the said book of registry, it shall be lawful for such person to apply by motion to the court of Queen's Bench, court of common pleas, or court of exchequer, in term time, or to apply by summons to any judge of either of such courts in vacation, for an order that such entry may be expunged or varied; and that upon any such application by motion or summons to either of the said courts, or to a judge as aforesaid, such court or judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to such court or judge shall seem just; and the officer appointed by the stationers' company for the purposes of this act, shall, on the production to him of any such order for expunging or varying any such entry, expunge or vary the same according to the requisitions of such order.

15. And be it enacted, that if any person shall, in any part of the British dominions, after the passing of this act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession, for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in any court of record in that part of the British dominions in which the offense shall be committed: Provided always, that in Scotland such offender shall be liable to an action in the court of session in Scotland,

which shall and may be brought and prosecuted in the same manner in which any other action of damages to the like amount may be brought and prosecuted there.

16. And be it enacted, that after the passing of this act, in any action brought within the British dominions against any person for printing any such book for sale, hire, or exportation, or for importing, selling, publishing, or exposing to sale or hire, or causing to be imported, sold, published, or exposed to sale or hire, any such book, the defendant, on pleading thereto, shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action; and if the nature of his defense be, that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person who he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published; otherwise the defendant in such action shall not at the trial or hearing of such action be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objection stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice, or give in evidence in support of his defense, any other book than one substantially corresponding in title, time, and place of publication with the title, time, and place specified in such notice.

17. And be it enacted, that after the passing of this act, it shall not be lawful for any person, not being the proprietor of the copyright, or some person authorized by him, to import into any part of the United Kingdom, or into any other part of the British dominions, for sale or hire, any printed book first composed, or written, or printed and published, in any part of the said United Kingdom, wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions; and if any person, not being such proprietor or person authorized as aforesaid, shall import or bring, or cause to be imported or brought, for sale or hire, any such printed book, into any part of the British dominions, contrary to the true intent and meaning of this act, or shall knowingly sell, publish, or expose to sale or let to hire, or have in his possession for sale or hire, any such book,

then every such book shall be forfeited, and shall be seized by any officer of customs or excise, and the same shall be destroyed by such officer; and every person so offending, being duly convicted thereof before two justices of the peace for the county or place in which such book shall be found, shall also for every such offense forfeit the sum of ten pounds, and double the value of every copy of such book which he shall so import or cause to be imported into any part of the British dominions, or shall knowingly sell, publish, or expose to sale, or let to hire, or shall cause to be sold, published or exposed to sale, or let to hire, or shall have in his possession for sale or hire, contrary to the true intent and meaning of this act, five pounds to the use of such officer of customs or excise, and the remainder of the penalty to the use of the proprietor of the copyright in such book.

18. And be it enacted, that when any publisher or other person shall, before or at the time of the passing of this act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this act; except only that in the case of essays, articles, or portions, forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof, respectively, the right of publishing the same in a separate form, shall revert to the author for the remainder of the term given by this act: Provided always, that during the term of twenty-eight years, the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assigns: Provided also, that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid to publish any such his com-

position in a separate form, who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid.

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

20. And whereas an act was passed in the third year of the reign of his late majesty, to amend the law relating to dramatic literary property, and it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that act to the full time by this act provided for the continuance of copyright: And whereas it is expedient to extend to musical compositions the benefits of that act, and also of this act; be it therefore enacted, that the provisions of the said act of his late majesty, and of this act, shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the term in this act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book: Provided always, that in case of any dramatic piece, or musical composition in manuscript, it shall be sufficient for the person having the sole liberty of representing or performing, or causing to be represented or performed the same, to register only the title thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor thereof, and the time and place of its first representation or performance.

21. And be it enacted, that the person who shall at any time have the sole liberty of representing such dramatic piece or musical composition shall have and enjoy the remedies given and provided in the said act of the third and fourth years of the reign of his late majesty King William the Fourth, passed to amend the laws relating to dramatic literary property, during the whole of his interest therein as fully as if the same were re-enacted in this act.

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

23. And be it enacted, that all copies of any book wherein there shall be copyright, and of which entry shall have been made in the said registry book, and which shall have been unlawfully printed or imported without the consent of the registered proprietor of such copyright, in writing under his hand first obtained, shall be deemed to be the property of the proprietor of such copyright, and who shall be registered as such, and such registered proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same, or damages for the detention thereof, in an action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover.

24. And be it enacted, that no proprietor of copyright in any book which shall be first published after the passing of this act shall maintain any action or suit, at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made, in the book of registry of the stationers' company, of such book, pursuant to this act: Provided always, that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid: Provided also, that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the act passed in the third year of the reign of his late majesty King William the Fourth, to amend the laws relating to dramatic literary property, or of this act, although no entry shall be made in the book of registry aforesaid.

25. And be it enacted, that all copyright shall be deemed personal property, and shall be transmissible by bequest, or, in case of intestacy, shall be subject to the same law of distribution as other personal property, and in Scotland shall be deemed to be personal and movable estate.

26. And be it enacted, that if any action or suit shall be commenced or brought against any person or persons whomsoever for doing or causing to be done anything in pursuance of this act, the defendant or defendants in such action may plead the general issue, and give the special matter in evidence; and if upon such action a verdict shall be given for the defendant, or the plaintiff shall become non-suited, or discontinue his action, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant in any case by law hath; and that all actions, suits, bills, indictments, or informations for any offense that shall be committed against this act shall be brought, sued, and commenced within twelve calendar months next after such offense committed, or else the same shall be void and of none effect; provided that such limitation of time shall not extend or be construed to extend to any actions, suits, or other proceedings under which the authority of this act shall or may be brought, sued, or commenced for or in respect of any copies of books to be delivered for the use of the British Museum, or of any one of the four libraries hereinbefore mentioned.

27. Provided always, and be it enacted, that nothing in this act contained shall affect or alter the rights of the two universities of Oxford and Cambridge, the colleges or houses of learning within the same, the four universities in Scotland, the college of the Holy and Undivided Trinity of Queen Elizabeth, near Dublin, and the several colleges of Eton, Westminster, and Winchester, in any copyrights heretofore and now vested or hereafter to be vested in such universities and colleges respectively, anything to the contrary herein contained notwithstanding.

28. Provided also, and be it enacted, that nothing in this act contained shall affect, alter, or vary any right subsisting at the time of passing of this act, except as herein expressly enacted; and all contracts, agreements, and obligations made and entered into before the passing of this act, and all remedies relating thereto, shall remain in full force, anything herein contained to the contrary notwithstanding.

29. And be it enacted that this act shall extend to the United Kingdom of Great Britain and Ireland, and to every part of the British dominions.

30. And be it enacted, that this act may be amended or repealed by any act to be passed in the present session of parliament.

SCHEDULE TO WHICH THE PRECEDING ACT REFERS.

No. 1.

FORM OF MINUTE OF CONSENT TO BE ENTERED AT STATIONERS' HALL.

We, the undersigned, *A.B.* of the author of a certain book, intituled *Y.Z* [*or* the personal representative of the author, *as the case may be*], and *C.D.* of do hereby certify, that we have consented and agreed to accept the

benefits of the act passed in the fifth year of the reign of Her Majesty Queen Victoria, cap. for the extension of the term of copyright therein provided by the said act, and hereby declare that such extended term of copyright therein is the property of the said *A.B* or *C.D.*

Dated this day of 18

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

Witness

To the registering officer appointed by the stationers' company.

No. 2.

FORM OF REQUIRING ENTRY OF PROPRIETORSHIP.

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

TITLE OF BOOK.	NAME OF PUBLISHER, AND PLACE OF PUBLICATION.	NAME AND PLACE OF ABODE OF THE PROPRIETOR OF THE COPYRIGHT.	DATE OF FIRST PUBLICATION.
Y.Z.		A.B.	

Dated this day of 18

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

No. 3.

ORIGINAL ENTRY OF PROPRIETORSHIP OF COPYRIGHT OF A BOOK.

TIME OF MAKING THE ENTRY.	TITLE OF BOOK.	NAME OF THE PUBLISHER, AND PLACE OF PUBLICATION.	NAME AND PLACE OF ABODE OF THE PROPRIETOR OF THE COPYRIGHT.	DATE OF FIRST PUBLICATION.
	Y.Z.	A.B.	C.D.	

No. 4.

FORM OF CONCURRENCE OF THE PARTY ASSIGNING IN ANY BOOK PREVIOUSLY REGISTERED.

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

TITLE OF BOOK.	ASSIGNOR OF THE COPYRIGHT.	ASSIGNEE OF COPYRIGHT.
Y.Z.	A.B.	C.D.

Dated this day of 18

(Signed) *A.B.*

No. 5.

FORM OF ENTRY OF ASSIGNMENT OF COPYRIGHT IN ANY BOOK PREVIOUSLY REGISTERED.

DATE OF ENTRY.	TITLE OF BOOK.	ASSIGNOR OF THE COPYRIGHT.	ASSIGNEE OF COPYRIGHT.
	[Set out the title of the book, and refer to the page of the registry book in which the original entry of the copyright thereof is made.]	A.B.	C.D.

25 & 26 Vict. cap. 68.—An act for amending the law relating to copyright in works of the fine arts, and for repressing the commission of fraud in the production and sale of such works.

[29th July, 1862.]

Whereas by law, as now established, the authors of paintings, drawings, and photographs have no copyright in such their works, and it is expedient that the law should in that respect be amended: Be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same as follows:

1. The author, being a British subject or resident within the dominions of the crown, of every original painting, drawing, and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death; provided that when any painting or drawing, or the negative of any photograph, shall for the first time after the passing of the act be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or a valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof, unless it be expressly reserved to him by agreement in writing, signed, at or before the time of such sale or disposition, by the vendee or assignee of such painting or drawing, or of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing, or of such negative of a

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

2. Nothing herein contained shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object.

3. All copyright under this act shall be deemed personal or movable estate, and shall be assignable at law, and every assignment thereof, and every license to use or copy by any means or process the design or work which shall be the subject of such copyright, shall be made by some note or memorandum in writing, to be signed by the proprietor of the copyright, or by his agent appointed for that purpose in writing.

4. There shall be kept at the hall of the stationers' company, by the officer appointed by the said company for the purposes of the act passed in the sixth year of her present majesty, intituled "An act to amend the law of copyright," a book or books, entitled "The register of proprietors of copyright in paintings, drawings, and photographs," wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work, and in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph of the said work, and no proprietor of any such copyright shall be entitled to the benefit of this act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration.

5. The several enactments in the said act of the sixth year of her present majesty contained, with relation to keeping the register book thereby required, and the inspection thereof, the searches therein, and the delivery of certified and stamped copies thereof, the reception of such copies in evidence, the making of false entries in the said book, and the production in evidence of papers falsely purporting to be copies of entries in the said book, the application to the courts and judges

by persons aggrieved by entries in the said book, and the expunging and varying such entries, shall apply to the book or books to be kept by virtue of this act, and to the entries and assignments of copyright and proprietorship therein under this act, in such and the same manner as if such enactments were here expressly enacted in relation thereto, save and except that the forms of entry prescribed by the said act of the sixth year of her present majesty may be varied to meet the circumstances of the case, and that the sum to be demanded by the officer of the said company of stationers for making any entry required by this act shall be one shilling only.

6. If the author of any painting, drawing, or photograph in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colorably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colorably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offense shall forfeit to the proprietor of the copyright for the time being a sum not exceeding ten pounds; and all such repetitions, copies, and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright.

7. No person shall do or cause to be done any or either of the following acts; that is to say,

First, no person shall fraudulently sign or otherwise affix, or fraudulently cause to be signed or otherwise affixed, to or upon any painting, drawing, or photograph, or the negative thereof, any name, initials, or monogram:

Secondly, no person shall fraudulently sell, publish, exhibit, or dispose of, or offer for sale, exhibition, or distribution, any painting, drawing, or photograph, or negative of a photograph, having thereon the name, initials, or monogram of a person who did not execute or make such work:

Thirdly, no person shall fraudulently utter, dispose of, or put off, or cause to be uttered or disposed of, any copy or colorable imitation of any painting, drawing, or

photograph, or negative of a photograph, whether there shall be subsisting copyright therein or not, as having been made or executed by the author or maker of the original work from which such copy or imitation shall have been taken:

Fourthly, where the author or maker of any painting, drawing, or photograph, or negative of a photograph, made either before or after the passing of this act, shall have sold or otherwise parted with the possession of such work, if any alteration shall afterwards be made therein by any other person, by addition or otherwise, no person shall be at liberty, during the life of the author or maker of such work, without his consent, to make or knowingly to sell or publish, or offer for sale, such work or any copies of such work so altered as aforesaid, or of any part thereof, as or for the unaltered work of such author or maker.

Every offender under this section shall, upon conviction, forfeit to the person aggrieved a sum not exceeding ten pounds, or not exceeding double the full price, if any, at which all such copies, engravings, imitations, or altered works shall have been sold or offered for sale; and all such copies, engravings, imitations, or altered works shall be forfeited to the person, or the assigns or legal representatives of the person, whose name, initials, or monogram shall be so fraudulently signed or affixed thereto, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid: Provided always, that the penalties imposed by this section shall not be incurred unless the person whose name, initials, or monogram shall be so fraudulently signed or affixed, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid, shall have been living at or within twenty years next before the time when the offense may have been committed.

8. All pecuniary penalties which shall be incurred, and all such unlawful copies, imitations, and all other effects and things as shall have been forfeited by offenders, pursuant to this act, and pursuant to any act for the protection of copyright engravings, may be recovered by the person hereinbefore and in any such act as aforesaid empowered to recover the same respectively, and hereinafter called the complainant or the complainer, as follows:

In England and Ireland, either by action against the party offending, or by summary proceeding before any two justices having jurisdiction where the party offending resides:

In Scotland by action before the court of session in ordinary form, or by summary action before the sheriff of the county where the offense may be committed or the offender resides, who, upon proof of the offense or offenses

either by confession of the party offending, or by the oath or affirmation of one or more credible witnesses, shall convict the offender, and find him liable to the penalty or penalties aforesaid, as also in expenses, and it shall be lawful for the sheriff, in pronouncing such judgment for the penalty or penalties and costs, to insert in such judgment a warrant, in the event of such penalty or penalties and costs not being paid, to levy and recover the amount of the same by poinding: Provided always, that it shall be lawful to the sheriff, in the event of his dismissing the action and assoilzieing the defender, to find the complainer liable in expenses, and any judgment so to be pronounced by the sheriff in such summary application shall be final and conclusive, and not subject to review by advocation, suspension, reduction, or otherwise.

9. In any action in any of Her Majesty's superior courts of record at Westminster and in Dublin, for the infringement of any such copyright as aforesaid, it shall be lawful for the court in which such action is pending, if the court be then sitting, or if the court be not sitting, then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, and account, and to give such directions respecting such action, injunction, inspection, and account and the proceedings therein respectively, as to such court or judge may seem fit.

10. All repetitions, copies, or imitations of paintings, drawings, or photographs, wherein or in the design whereof there shall be subsisting copyright under this Act, and all repetitions, copies, and imitations of the design of any such painting or drawing, or of the negative of any such photograph, which, contrary to the provisions of this Act, shall have been made in any foreign State, or in any part of the British dominions, are hereby absolutely prohibited to be imported into any part of the United Kingdom, except by or with the consent of the proprietor of the copyright thereof, or his agent authorized in writing; and if the proprietor of any such copyright, or his agent, shall declare that any goods imported are repetitions, copies, or imitations of any such painting, drawing, or photograph, or of the negative of any such photograph, and so prohibited as aforesaid, then such goods may be detained by the officers of Her Majesty's customs.

11. If the author of any painting, drawing, or photograph, in which there shall be subsisting copyright, after having sold or otherwise disposed of such copyright, or if any other person, not being the proprietor for the time being of such copyright, shall, without the consent of such proprietor, repeat, copy, colorably imitate, or otherwise multiply, or cause or procure to be repeated, copied, colorably imitated, or otherwise multiplied, for sale, hire, exhibition, or distribution, any such work or the design thereof, or the negative of any such

photograph, or shall import or cause to be imported into any part of the United Kingdom, or sell, publish, let to hire, exhibit or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be sold, published, let to hire, exhibited, or distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of such work, or the design thereof, or the negative of any such photograph, made without such consent as aforesaid, then every such proprietor, in addition to the remedies hereby given for the recovery of any such penalties, and forfeiture of any such things as aforesaid, may recover damages by and in a special action on the case, to be brought against the person so offending, and may in such action recover and enforce the delivery to him of all unlawful repetitions, copies, and imitations, and negatives of photographs, or may recover damages for the retention or conversion thereof: Provided that nothing herein contained, nor any proceeding, conviction, or judgment, for any act hereby forbidden, shall affect any remedy which any person aggrieved by such act may be entitled to either at law or in equity.

12. This Act shall be considered as including the provisions of the Act passed in the session of Parliament held in the seventh and eighth years of Her present Majesty, intituled "An Act to amend the Law relating to international Copyright," in the same manner as if such provisions were part of this Act.

Other British statutes, now wholly or partially in force, are: 15 Geo. 3, cap. 53, an act for enabling the universities in England and Scotland, and the several colleges, to hold in perpetuity their copyright in books; 54 Geo. 3, cap. 56, an act to amend an act for encouraging the art of making new models and casts of busts [18th May, 1814]; 17 Geo. 3, cap. 57, an act for securing the property of prints to inventors and engravers; 6 & 7 Will. 4, cap. 59, an act to extend the protection of copyright in prints and engravings to Ireland [13th August, 1836]; 5 & 6 Vict. cap. 100, an act to consolidate and amend the laws relating to the copyright of designs [10th August, 1842]; 6 & 7 Vict. cap. 65, an act to amend the laws relating to the copyright of designs [22nd August, '43]; 7 Vict. cap. 12, an act to amend the law relating to international copyright [10th May, 1844]; 10 & 11 Vict. cap. 95, an act to amend the law relating to the protection in the colonies of works entitled to copyright in the United Kingdom [22nd July, 1847]; 13 & 14. Vict. cap. 104, an act to amend the acts relating to the copyright of designs [14th August, 1850]; 15 Vict. cap. 12, an act to carry into effect a convention with France on the subject of copyright [28th May, 1852]; 21 & 22 Vict. cap. 70, an act to amend the act relating to the copyright of designs [2nd August, 1858]; 24 & 25 Vict. cap. 73, an act to amend the law relating to the copyright of designs [6th August, 1861].

APPEN

LEGISLATION

DUREE

LOI
du 19–24 *juillet* 1793, *relative aux droits de propriété des auteurs, compositeurs de musique, peintres et dessinateurs.*

—

ART. 1.

Les auteurs d'écrits en tous genres, les compositeurs de musique, les peintres et dessinateurs, qui feront graver des tableaux ou dessins, jouiront durant leur vie entière du droit exclusif de vendre, faire vendre, distribuer leurs ouvrages dans le territoire de la République et d'en céder la propriété en tout ou en partie.

ART. 2.

Leurs héritiers ou cessionnaires jouiront du même droit durant l'espace de dix ans après la mort des auteurs.

ART. 7.

Les héritiers de l'auteur d'un ouvrage de littérature ou de gravure ou de toute autre production de l'esprit ou du génie qui appartiennent aux beaux-arts, en auront la propriété exclusif pendant dix ans.

DECRET
du 5 *février* 1810, *contenant règlement sur l'imprimerie et la librairie.*

—

ART. 39.

Le droit de propriété est garanti à l'auteur et à sa veuve pendant leur vie, si les conventions matrimoniales de celles-ci lui en donnent le droit, et à leurs enfants pendant 20 ans. (*Abrogé.*)

ART. 40.

Les auteurs, soit nationaux, soit étrangers, de tout ouvrage imprimé ou gravé, peuvent céder leur droit à un imprimeur ou libraire ou à toute autre personne, qui est alors substituée en leur lieu et place pour eux et leurs ayants-cause, comme il est dit à l'article précédent.

LOI
du 3 *aout* 1844, *relative au droit de propriété des veuves et des enfants des auteurs d'ouvrages dramatiques.*

—

ARTICLE UNIQUE.

Les veuves et les enfants des auteurs dramatiques auront à l'avenir le droit d'en autoriser la représentation et d'en conférer la jouissance pendant 20 ans, conformément aux dispositions des art. 39 et 40 du décret impérial du 5 février 1810. (*Abrogé.*)

DIX C.

FRANCAISE.

DU DROIT

LOI

du 8–15 avril 1854 sur le droit de propriété garanti aux veuves et aux enfants des auteurs, des compositeurs et des artistes.

ARTICLE UNIQUE.

Les veuves des auteurs, des compositeurs et des artistes jouiront pendant toute leur vie des droits garantis par les lois des 13 janvier 1791 et 19 juillet 1793, le décret du 5 février 1810, la loi du 3 août 1844 et les autres lois ou décrets sur la matière.

La durée de la jouissance accordée aux enfants par ces mêmes lois et décrets est portée à 30 ans à partir soit du décès de l'auteur, compositeur ou artiste, soit de l'extinction des droits de la veuve. (*Abrogé.*)

LOI

du 14–19 juillet 1866, relatives aux droits des heritiers ou ayants-cause des auteurs.

ART. 1.

La durée des droits accordées par les lois antérieures aux héritiers, successeurs irréguliers, donataires ou légataires des auteurs, compositeurs ou artistes est portée à cinquante ans à partir du décès de l'auteur.

Pendant cette périod de cinquante ans le conjoint survivant, quel que soit le régime matrimonial, et indépendamment des droits qui peuvent resulter en faveur de ce conjoint du régime de la communauté, a la simple jouissance des droits dont l'auteur prédécédé n'a pas disposé par act entre vifs ou par testament.

Toutefois, si l'auteur laisse des héritiers à réserve, cette jouissance est réduite, au profit de ces héritiers, suivant les proportions et distinctions établies par les art. 913 et 915 du code Napoléon.

Cette jouissance n'a pas lieu lorsqu'il existe, au moment du décès, une séparation de corps prononcée contre ce conjoint ; elle cesse au cas où le conjoint contracte un nouveau mariage.

Les droits des héritiers à réserve et des autres héritiers ou successeurs, pendant cette période de cinquant ans, restent d'ailleurs réglés conformément aux prescriptions de code Napoléon.

Lorsque la succession est dévolue à l'Etat, le droit exclusif s'éteint, sans préjudice des droits des créanciers et de l'exécution des traités de cession qui ont pu être consentis par l'auteur ou par ses représentants.

ART. 2.

Toutes les dispositions des lois antérieures contraires à celles de la loi nouvelle sont et demeurent abrogées.

LEGISLATION

CONSTATATION DES

(*Suite de la loi de* 1793.)	LOI *du* 25 *prairial an III* (13 *juin* 1795) *interprétative de celle du* 19 *juillet* 1793 *qui assure aux auteurs et artistes la propriété de leurs ouvrages.*	DECRET *du* 5 *février* 1810, *contenant règlement sur l'imprimerie et la librairie.*
—	—	—
ART. 3. Les officers de paix seront tenus de faire confisquer, à la réquisition et au profit des auteurs, compositeurs, peintres ou dessinateurs et autres, de leurs héritiers ou cessionnaires, tous les exemplaires des éditions imprimées ou gravées sans la permission formelle et par écrit des auteurs. (*Modifié.*)	ART. 1. Les fonctions attribuées aux officiers de paix par l'art. 3 de la loi du 19 juillet 1793 seront à l'avenir exercées par les commissaires de police et par les juges de paix dans les lieux où il n'y a pas de commissaire de police.	ART. 45. Les délits et contraventions seront constatés par les inspecteurs de l'imprimerie et de la librairie les officiers de police, et en outre par les préposés aux douanes pour les livres venant de l'étranger.

FRANCAISE (suite).

CONTRAVENTIONS.

LOI *du 21 octobre 1814, relative à la liberté de la presse.*	ORDONNANCE *du 24 octobre 1814, relative à l'impression, au dépot et à la publication des ouvrages.*	ORDONNANCE *du 13 septembre 1829, qui supprime les quatre inspecteurs de la librairie.*
—	—	—
ART. 20. Les contraventions seront constatées par des inspecteurs de la librairie et des *commissaires de police.*	ART. 7. En exécution de l'art. 20, les commissaires de police rechercheront et *constateront d'office* toutes les contraventions, et ils seront tenus aussi de déférer à toutes les réquisitions qui leur seront adressées à cette effet par les préfects, sous-préfects et maires et par les inspecteurs de la librairie. Ils enverront dans les 24 heures tous les procès-verbaux qu'ils auront dressés à Paris au directeur général de la librairie, et dans les départments aux préfects, qui les feront passer sur-le-champ au directeur générale seule chargé par l'art. 21 de dénoncer les contrevenants aux tribunaux. (*Abrogé.*)	ART. 1. Les quatre inspecteurs de la librairie actuellement existant à Paris sont supprimés ART. 2. Les commissaires de police dans toute l'étendue du royaume sont et demeurent investis des attributions légales que les inspecteurs de la librairie avaient reçues de l'art. 45 du décret du 5 février 1810, de l'art. 20 de la loi du 21 octobre 1814 et de l'art. 7 de l'ordonnance du 24 octobre de la même année.

LEGISLATION

PEINES APPLICABLES

(*Suite de la loi de* 1793.)	CODE DE PENAL DE 1810.	(*Suite du code pénal.*)
ART. 4. Tout contrefacteur sera tenu de payer au véritable propriétaire une somme équivalente au prix de 3,000 exemplaires de l'édition originale. (*Abrogé.*) ART. 5. Tout débitant d'édition contrefaite, s'il n'est pas reconnu contrefacteur, sera tenu de payer au véritable propriétaire une somme équivalente au prix de 500 exemplaires de l'édition originale. (*Abrogé.*)	ART. 425. Toute édition d'écrits, de composition musicale, de dessin, de peinture ou de toute autre production imprimée ou gravée en entier ou en partie, au mépris des lois et règlements relatifs à la propriété des auteurs, est un contrefaçon, et toute contrefaçon est un délit. ART. 426. Le débit d'ouvrages contrefaits, l'introduction sur le territoire français d'ouvrages qui, après avoir été imprimés en France, ont été contrefaits chez l'étranger, sont un délit de la même espèce. ART. 427. La peine contre le contrefacteur ou contre introducteur sera une amende de 100 fr. au moins et de 2,000 fr. au plus ; et contre le débitant une amende de 25 fr. au moins et de 500 fr. au plus. La confiscation de l'édition contrefaite sera prononcée tant contre le contrefacteur que contre l'introducteur et le débitant. Les planches, moules ou matrices des objets contrefaits seront aussi confisqués.	ART. 428. Tout directeur, tout entrepreneur de spectacle, toute association d'artistes, qui aura fait représenter sur son théâtre des ouvrages dramatiques au mépris des lois et règlements relatifs à la propriété des auteurs, sera puni d'une amende de 50 fr. au moins, de 500 fr. au plus et de la confiscation des recettes.

FRANCAISE (suite).

AU CONTREFACTEUR.

(Suite du code pénal.)

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ART. 429.

Dans les cas prévus par les quatre articles précédents, le produit des confiscations, ou les recettes confisquées, seront rémis au proprietaire pour l'indemniser d'autant du préjudice qu'il aura souffert ; le surplus de son indemnité, ou l'entière indemnité, s'il n'y a eu ni vente d'objets confisqués, ni saisie de recettes, sera réglé par les voies ordinaires.

(Suite du code pénal.)

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ART. 463, revisé en 1863.

....Dans tous les cas où la peine de l'emprisonnement et celle de l'amende sont prononcées par le code pénal, si les circonstances paraissaient atténuantes, les tribunaux correctionnels sont autorisés, même en cas de récidive, à réduire ces deux peines comme il suit :

Si la peine prononcée par la loi soit à raison de la nature du délit, soit à raison de l'état de récidive du prevenu, est un emprisonnement, dont le minimum ne soit pas inférieur à un an, ou une amende, dont le minimum ne soit pas inférieur á 500 fr., les tribunaux pourront réduire l'emprisonnement jusqu'à six jours, et l'amende jusqu'à 16 fr.

Dans tous les autres cas ils pourront réduire l'emprisonnement même au-dessous de six jours et l'amende même au-dessous de 16 fr. ; ils pourront aussi prononcer séparément l'une ou l'autre de ces peines et même substituer l'amende á l'emprisonnement, sans qu'en aucun cas, elle puisse être au-dessous des peines de simple police.

DECRET

du 28–31 mars 1852 sur la contrefaçon d'ouvrages étrangers.

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ART. 1.

La contrefaçon sur le territoire français d'ouvrages publiés á l'étranger et mentionés en l'art. 425 du code pénal, constitue un delit.

ART. 2.

Il en est de même du débit, de l'exportation et de l'expédition des ouvrages contrefaits. L'exportation et l'expédition de ces ouvrages sont un délit de la même espèce que l'introduction sur le territoire français d'ouvrages qui, après avoir été imprimés en France, ont été contrefaits chez l'étranger.

ART. 3.

Les délits prévus par les articles précédents seront réprimés conformément aux art. 427 et 429 du code pénal.

L'art. 463 du même code pourra être appliqué.

ART. 4.

Néanmoins la poursuite ne sera admise que sous l'accomplissement des conditions exigées relativement aux ouvrages publiés en France, notamment par l'art. 6 de la loi du 19 juillet 1793.

LEGISLATION

DEPOT

(*Suite de la loi de* 1793.)

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ART. 6.

Tout citoyen qui mettra au jour un ouvrage ou de littérature ou de gravure, dans quelque genre que ce soit, sera obligé d'en déposer deux exemplaires à la bibliothèque nationale ou au cabinet des estampes de la République, dont il recevra un reçu signé par le bibliothécaire ; faute de quoi il ne pourra être admis en justice pour la poursuite des contrefacteurs.

(*Modifié.*)

DECRET

du 5 *février* 1810 *sur le droit des auteurs et leur responsabilité ainsi que sur les règles prescrites aux imprimeurs et libraires.*

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ART. 48.

Chaque imprimeur sera tenu de déposer à la préfecture de son department et à Paris à la préfecture de police cinq exemplaires de chaque ouvrage savoir :

Un pour la bibliothèque impériale, un pour le ministère de l'intérieur, un pour la bibliothèque de notre conseil d'Etat, un pour le directeur général de ... librairie.

(*Abrogé.*)

LOI

du 21 *octobre* 1814, *relative à la liberté de la press*

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ART. 14.

Nul imprimeur ne pourra imprimer un écrit avant d'avoir déclaré qu'il se propose de l'imprimer, ni le mettre en vente ou le publier de quelque manière que ce soit avant d'avoir déposé le nombre prescrit d'exemplaires savoir : à Paris au secrétariat de la direction générale et dans les départments au secrétariat de la préfecture.

FRANCAISE (suite).

D'EXEMPLAIRES

ORDONNANCE	ORDONNANCE	DECRET
du 24 octobre 1814, relative à l'impression au dépot et à la publication des ouvrages.	*du 9 janvier 1828 qui modifie celle du 24 octobre 1814 et relative au dépot des exemplaires, des écrits, imprimés et des épreuves des planches et des estampes.*	*du 17-23 février 1852 organique sur la presse.*
—	—	—
ART. 4.	ART. 1.	ART. 22.
Le nombre d'exemplaires qui doivent être déposés, ainsi qu'il est dit à l'art. 14 de la loi du 21 octobre 1814, reste fixé à cinq, lesquels seront répartis ainsi qu'il suit : un pour notre bibliothèque, un pour notre amé et féal chevalier le chancelier de France, un pour notre ministre secrétaire d'Etat au départment de l'intérieur, un pour le directeur générale de la librairie et le cinquième pour le censeur qui aura été ou qui sera chargé d'examiner l'ouvrage. (*Abrogé*)	Le nombre des exemplaires, des écrits, imprimés et des épreuves des planches et estampes, dont le dépôt est exigé par loi et qui avait été fixé à cinq par les art. 4 et 8 de l'ordonnance royale du 24 octobre 1814, est réduit, outre l'exemplaire, et les deux épreuves destinées à notre bibliothèque conformément à la même ordonnance, à un seule exemplaire et une seule épreuve pour la bibliothèque du ministère de l'intérieur.	Aucuns dessins, aucunes gravures, lithographies, médailles, estampes ou emblèmes, de quelque nature ou espèce qu'ils soient, ne pourront être publiés, exposés ou mis en vent sans l'autorisation préalable du ministre de la police á Paris ou des préfects dans les départements.—En cas de contravention les dessins, gravures, lithographies, médailles, estampes ou emblèmes pourront être confisqués, et ceux qui les auront publiés seront condamnés à un emprisonnement d'un mois à un an et à une amende de 100 à 1,000 fr.

APPENDIX D.

GESETZ

betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken.
Vom 11. Juni 1870.

Wir WILHELM, von Gottes Gnaden König von Preussen etc. verordnen im Namen des Norddeutschen Bundes, nach erfolgter Zustimmung des Bundesrathes und des Reichstages, was folgt:

I. SCHRIFTSTUECKE.*

a. Ausschliessliches Recht des Urhebers.

§ 1.

Das Recht, ein Schriftwerk auf mechanischem Wege zu vervielfältigen, steht dem Urheber desselben auschliesslich zu.

§ 2.

Dem Urheber wird in Beziehung auf den durch das gegenwärtige Gesetz gewährten Schutz der Herausgeber eines aus Beiträgen Mehrerer bestehenden Werkes gleich geachtet, wenn dieses ein einheitliches Ganzes bildet.

Das Urheberrecht an den einzelnen Beiträgen steht den Urhebern derselben zu.

§ 3.

Das Recht des Urhebers geht auf dessen Erben über. Dieses Recht kann beschränkt oder unbeschränkt durch Vertrag oder durch Verfügung von Todeswegen auf Andere übertragen werden.

b. Verbot des Nachdrucks.

§ 4.

Jede mechanische Vervielfältigung eins Schriftwerkes, welche ohne Genehmigung des Berechtigten (§§ 1, 2, 3) hergestellt wird, heisst Nachdruck und ist verboten.

Hinsichtlich dieses Verbotes macht es keinen Unterschied, ob das Schriftwerk ganz oder nur theilweise vervielfältigt wird.

Als mechanische Vervielfältigung ist auch das Abschreiben anzuzehen, wenn es dazu bestimmt ist, den Druck zu vertreten.

§ 5.

Als Nachdruck (§ 4.) ist auch anzusehen:

a) der ohne Genehmigung des Urhebers erfolgte Abdruck von noch nicht veröffentlichten Schriftwerken (Manuskripten).

Auch der rechtmässige Besitzer eines Manuskrip-

* Lies: Schriftwerke.—Vergl. S. 11.

tes oder einer Abschrift desselben bedarf der Genehmigung des Urhebers zum Abdruck;

b) der ohne Genehmigung des Urhebers erfolgte Abdruck von Vorträgen welche zum Zwecke der Erbauung, der Belehrung oder der Unterhaltung gehalten sind;

c) der neue Abdruck von Werken, welchen der Urheber oder der Verleger dem unter ihnen bestehenen Vertrage zuwider veranstaltet;

d) die Anfertigung einer grössern Anzahl von Exemplaren eines Werkes Seitens des Verlegers, als demselben vertragsmässig oder gesetzlich gestattet ist.

§ 6.

Uebersetzungen ohne Genehmigung des Urhebers des Originalwerkes gelten als Nachdruck:

a) wenn von einem, zuerst in einer todten Sprache erschienenen Werke eine Uebersetzung in einer lebenden Sprache herausgegeben wird;

b) wenn von einem gleichzeitig in verschiedenen Sprachen herausgegebenen Werke eine Uebersetzung in einer dieser Sprachen veranstaltet wird;

c) wenn der Urheber sich das Recht der Uebersetzung auf dem Titelblatte oder an der Spitze des Werkes vorbehalten hat, vorausgesetzt, dass die Veröffentlichigung der vorbehaltenen Uebersetzung nach dem Ersheinen des Originalwerkes binnen einem Jahre begonnen und binnen drei Jahren beendet wird. Das Kalenderjahr, in welchem das Originalwerk ershienen ist, wird hierbei nicht mitgerechnet.

Bei Originalwerken, welche in mehreren Bänden oder Abtheilungen erscheinen, wird jeder Band oder jede Abtheilung im Sinne dieses Paragraphen als ein besonderes Werk angesehen, und muss der Vorbehalt der Uebersetzung auf jedem Bande oder jeder Abtheilung wiederholt werden.

Bei dramatischen Werken muss die Uebersetzung innerhalb sechs Monaten, vom Tage der Veröffentlichigung des Originals an gerechnet, vollständig erschienen sein.

Der Beginn und beziehungsweise die Vollendung der Uebersetzung muss zugleich innerhalb der angegebenen Fristen zur Eintragung in die Eintragsrolle (§§ 39 ff.) angemeldet werden, widrigenfalls der Schutz gegen neue Uebersetzungen erlischt.

Die Uebersetzung eines noch ungedruckten gegen Nachdruck geschützten Schriftwerkes (§ 5, Littr. a. und b.) ist als Nachdruck anzusehen.

Uebersetzungen geniessen gleich Originalwerken den Schutz dieses Gesetzes gegen Nachdruck.

c. Was nicht als Nachdruck anzusehen ist.

§ 7.

Als Nachdruck ist nicht anzusehen:

a) das wörtliche Anführen einzelner Stellen oder kleine-

rer Theile eines bereits veröffentlichten Werkes oder die Aufnahme bereits veröffentlichter Schriften von geringerem Umfang in ein grösseres Ganzes, sobald dieses nach seinem Hauptinhalt ein selbstständiges wissenschaftliches Werk ist, sowie in Sammlungen, welche aus Werken mehrerer Schriftsteller zum Kirchen-, Schul- und Unterrichtsgebrauch oder zu einem eigenthümlichen literarischen Zwecke veranstaltet werden. Vorausgesetzt ist jedoch, dass der Urheber oder die benutzte Quelle angegeben ist;

b) der Abdruck einzelner Artikel aus Zeitschriften und anderen öffentlichen Blättern mit Ausnahme von novellistischen Erzeugnissen und wissenschaftlichen Ausarbeitungen, sowie von sonstigen grösseren Mittheilungen, sofern an der Spitze der letzteren der Abdruck untersagt ist;

c) der Abdruck von Gesetzbüchern, Gesetzen, amtlichen Erlassen, öffentlichen Aktenstücken und Verhandlungen aller Art;

d) der Abdruck von Reden, welche bei den Verhandlungen der Gerichte, der politischen, kommunalen und kirchlichen Vertretungen, sowie der politishen und ähnlichen Versammlungen gehalten werden.

d. Dauer des ausschliesslichen Rechtes des Urhebers.

§ 8.

Der Schutz des gegenwärtigen Gesetzes gegen Nachdruck wird, vorbehaltlich der folgenden besonderen Bestimmungen, für die Lebensdauer des Urhebers (§§ 1. und 2.) und dreissig Jahre nach dem Tode desselben gewährt.

§ 9.

Bei einem von mehreren Personen als Miturhebern verfassten Werke erstreckt sich die Schutzfrist auf die Dauer von dreissig Jahren nach dem Tode des letztlebenden derselben.

Bei Werken, welche durch Beiträge mehrerer Mitarbeiter gebildet werden, richtet sich die Schutzfrist für die einzelnen Beiträge danach, ob die Urheber desselben genannt sind oder nicht (§§ 8, 11).

§ 10.

Einzelne Aufsätze, Abhandlungen &c., welche in periodischen Werken, als: Zeitschriften, Taschenbüchern, Kalendern &c., erschienen sind, darf der Urheber, falls nichts Anderes verabredet ist, auch ohne Einwilligung des Herausgebers oder Verlegers des Werkes, in welches dieselben aufgenommen sind, nach zwei Jahren vom Ablauf des Jahres des Erscheinens an gerechnet, anderweitig abdrucken.

§ 11.

Bei Schriftwerken, welche bereits veröffentlicht sind, ist die im § 8 vorgeschriebene Dauer des Schutzes an die Bedingung geknüpft, dass der wahre Name des Urhebers auf dem

Titelblatte oder unter der Zueignung oder unter der Vorrede angegeben ist.

Bei Werken, welche durch Beiträge mehrerer Mitarbeiter gebildet werden, genügt es für den Schutz der Beiträge, wenn der Name des Urhebers an der Spitze oder am Schluss des Beitrags angegeben ist.

Ein Schriftwerk, welches entweder unter einem anderen, als dem wahren Namen des Urhebers veröffentlicht, oder bei welchem ein Urheber gar nicht angegeben ist, wird dreissig Jahre lang von der ersten Herausgabe an gerechnet, gegen Nachdruck geschützt (§ 28).

Wird innerhalb dreissig Jahre, von der ersten Herausgabe an gerechnet, der wahre Name des Urhebers von ihm selbst oder seinen hierzu legitimirten Rechtsnachfolgern zur Eintragung in die Eintragungsrolle (§§ 39 ff.) angemeldet, so wird dadurch dem Werke die in § 8 bestimmte längere Dauer des Schutzes erworben.

§ 12.

Die erst nach dem Tode des Urhebers erschienen Werke werden dreissig Jahre lang, vom Tode des Urhebers an gerechnet, gegen Nachdruck geschützt.

§ 13.

Akademien, Universitäten, sonstige juristische Personen, öffentliche Unterrichtsanstalten, sowie gelehrte oder andere Gesellschaften, wenn sie als Herausgeber dem Urheber gleich zu achten sind (§ 2), geniessen für die von ihnen herausgegebenen Werke einen Schutz von dreissig Jahren nach deren Erscheinen.

§ 14.

Bei Werken, die in mehreren Bänden oder Abtheilungen erscheinen, wird die Schutzfrist von dem ersten Erscheinen eines jeden Bandes oder einer jeden Abtheilung an berechnet.

Bei Werken jedoch, die in einem oder mehreren Bänden eine einzige Aufgabe behandeln und mithin als in sich zusammenhängend zu betrachten sind, beginnt die Schutzfrist erst nach dem Erscheinen des letzten Bandes oder der letzten Abtheilung.

Wenn indessen zwischen der Herausgabe einzelner Bände oder Abtheilungen ein Zeitraum von mehr als drei Jahren verflossen ist, so sind die vorher erschienenen Bände, Abtheilungen &c. als ein für sich bestehendes Werk und ebenso die nach Ablauf der drei Jahre erscheinenden weiteren Fortsetzungen als ein neues Werk zu behandeln.

§ 15.

Das Verbot der Herausgabe von Uebersetzungen dauert in dem Falle des § 6, Littr. b, fünf Jahre vom Erscheinen des Originalwerkes, in dem Falle des § 6, Littr. c. fünf Jahre vom ersten Erscheinen der rechtmässigen Uebersetzung ab gerechnet.

§ 16.

In den Zeitraum der gesetzlichen Schutzfrist (§§ 8 ff.) wird das Todesjahr des Verfassers, beziehungsweise das Kalenderjahr des ersten Erscheinens des Werkes oder der Uebersetzung nicht eingerechnet.

§ 17.

Ein Heimfallsrecht des Fiskus oder anderer zu herrenlosen Verlassenschaften berechtigter Personen findet auf das ausschliessliche Recht des Urhebers und seiner Rechtsnachfolger nicht statt.

e. Entschädgigung und Strafen.

§ 18.

Wer vorsätzlich oder aus Fahrlässigkeit einen Nachdruck (§§ 4 ff.) in der Absicht, denselben innerhalb oder ausserhalb des Norddeutschen Bundes zu verbreiten, veranstaltet, ist den Urheber oder dessen Rechtsnachfolger zu entschädigen verpflichtet und wird ausserdem mit einer Geldstrafe bis zu Eintausend Thalern bestraft.

Die Bestrafung des Nachdrucks bleibt jedoch ausgeschlossen, wenn der Veranstalter desselben auf Grund entschuldbaren, thatsächlichen oder rechtlichen Irrthums in gutem Glauben gehandelt hat.

Kann die verwirkte Geldstrafe nicht beigetrieben werden, so wird diesselbe nach Maassgabe der allgemeinen Strafgesetze in eine entsprechende Freiheitsstrafe bis zu sechs Monaten umgewandelt.

Statt jeder aus diesem Gesetze entspringenden Entschädigung kann auf Verlangen des Beschädigten neben der Strafe auf eine an den Beschädigten zu erlegende Geldbusse bis zum Betrage von zweitausend Thalern erkannt werden. Für diese Busse haften die zu derselben Verurtheilten als Gesammtschuldner.

Eine erkannte Busse schliesst die Geltendmachung eines weiteren Entschädigungsanspruches aus.

Wenn den Veranstalter des Nachdrucks kein Verschulden trifft, so haftet er dem Urheber oder dessen Rechtsnachfolger für den entstandenen Schaden nur bis zur Höhe seiner Bereicherung.

§ 19.

Darüber, ob ein Schaden entstanden ist, und wie hoch sich derselbe beläuft, desgleichen über den Bestand und die Höhe einer Bereicherung, entscheidet das Gericht unter Würdigung aller Umstände nach freier Ueberzeugung.

§ 20.

Wer vorsätzlich oder aus Fahrlässigkeit einen Anderen zur Veranstaltung eines Nachdrucks veranlasst, hat die im § 18 festgesetzte Strafe verwirkt, und ist dem Urheber oder dessen Rechtsnachfolger nach Maassgabe der §§ 18 und 19 zu entschädigen verpflichtet, und zwar selbst dann, wenn der Veran-

stalter des Nachdrucks nach § 18 nicht strafbar oder ersatzverbindlich sein sollte.

Wenn der Veranstalter des Nachdrucks ebenfalls vorsätzlich oder aus Fahrlässigkeit gehandelt hat, so haften Beide dem Berechtigten solidarisch.

Die Strafbarkeit und die Ersatzverbindlichkeit der übrigen Theilnehmer am Nachdruck richtet sich nach den allgemeinen gesetzlichen Vorschriften.

§ 21.

Die vorräthigen Nachdrucks-Exemplare und die zur widerrechtlichen Vervielfältigung ausschliesslich bestimmten Vorrichtungen, wie Formen, Platen, Steine, Stereotypabgüsse &c., unterliegen der Einziehung. Dieselben sind, nachdem die Einziehung dem Eigenthümer gegenüber rechtskräftig erkannt ist, entweder zu vernichten oder ihrer gefährdenden Form zu entkleiden und alsdann dem Eigenthümer zurückzugeben.

Wenn nur ein Theil des Werkes als Nachdruck anzusehen ist, so erstreckt sich die Einziehung nur auf den als Nachdruck erkannten Theil des Werkes und die Vorrichtungen zu diesem Theile.

Die Einziehung erstreckt sich auf alle diejenigen Nachdrucks-Exemplare und Vorrichtungen, welche sich im Eigenthum des Veranstalters des Nachdrucks, des Druckers, der Sortimentsbuchhändler, der gewerbsmässigen Verbreiter und desjenigen, welcher den Nachdruck veranlasst hat (§ 20), befinden.

Die Einziehung tritt auch dann ein, wenn der Veranstalter oder der Veranlasser des Nachdrucks weder vorsätzlich noch fahrlässig gehandelt hat (§ 18). Sie erfolgt auch gegen die Erben desselben.

Es steht dem Beschädigten frei, die Nachdrucks-Exemplare und Vorrichtungen ganz oder theilweise gegen die Herstellungskosten zu übernehmen, insofern nicht die Rechte eines Dritten dadurch verletzt oder gefährdet werden.

§ 22.

Das Vergehen des Nachdrucks ist vollendet, sobald ein Nachdrucks-Exemplar eines Werkes den Vorschriften des gegenwärtigen Gesetzes zuwider, sei es im Gebiete des Norddeutschen Bundes, sei es ausserhalb desselben, hergestellt worden ist.

Im Falle des blossen Versuchs des Nachdrucks tritt weder eine Bestrafung noch eine Entschädigungsverbindlichkeit des Nachdruckers ein. Die Einziehung der Nachdrucksvorrichtungen erfolgt auch in diesem Falle.

§ 23.

Wegen Rückfalls findet eine Erhöhung der Strafe über das höchste gesetzliche Maass (§ 18) nicht statt.

§ 24.

Wenn in den Fällen des § 7, Littr. a die Angabe der Quelle oder des Namens des Urhebers vorsätzlich oder aus Fahrlässig-

keit unterlassen wird, so haben der Veranstalter und der Veranlasser des Abdrucks eine Geldstrafe bis zu zwanzig Thalern verwirkt.

Eine Umwandlung der Geldstrafe in Freiheitsstrafe findet nicht statt.

Eine Entschädigungspflicht tritt nicht ein.

§ 25.

Wer vorsätzlich Exemplare eines Werkes, welche den Vorschriften des gegenwärtigen Gesetzes zuwider angefertigt worden sind, innerhalb oder ausserhalb des Norddeutshen Bundes gewerbemässig feilhält, verkauft oder in sonstiger Weise verbreitet, ist nach Maassgabe des von ihm verursachten Schadens den Urheber oder dessen Rechtsnachfolger zu entschädigen verpflichtet und wird ausserdem mit Geldstrafe nach § 18 bestraft.

Die Einziehung der zur gewerbemässigen Verbreitung bestimmten Nachdrucks-Exemplare nach Maassgabe des § 21 findet auch dann statt, wenn der Verbreiter nicht vorsätzlich gehandelt hat.

Der Entschädigungspflicht, sowie der Bestrafung wegen Verbreitung unterliegen auch die Veranstalter und Veranlasser des Nachdrucks, wenn sie nicht schon als solche entschädigungspflichtig und strafbar sind.

f. Verfahren.

§ 26.

Sowohl die Entscheidung über den Entschädigungsanspruch, als auch die Verhängung der im gegenwärtigen Gesetze angedrohten Strafen und die Einziehung der Nachdrucks-Exemplare &c. gehört zur Kompetenz der ordentlichen Gerichte.

Die Einziehung der Nachdrucks-Exemplare &c. kann sowohl im Strafrechtswege beantragt, als im Civilrechtswege verfolgt werden.

§ 27.

Das gerichtliche Strafverfahren ist nicht von Amtswegen, sondern nur auf den Antrag des Verletzten einzuleiten. Der Antrag auf Bestrafung kann bis zur Verkündigung eines auf Strafe lautenden Erkenntnisses zurückgenommen werden.

§ 28.

Die Verfolgung des Nachdrucks steht jedem zu, dessen Urheber- oder Verlagsrechte durch die widerrechtliche Vervielfältigung beeinträchtigt oder gefährdet sind.

Bei Werken, welche bereits veröffentlicht sind, gilt bis zum Gegenbeweise derjenige als Urheber, welcher nach Maassgabe des § 11, Absatz 1, 2, auf dem Werke als Urheber angegeben ist.

Bei anonymen und pseudonymen Werken ist der Herausgeber, und wenn ein solcher nicht angegeben ist, der Verleger berechtigt, die dem Urheber zustehenden Rechte wahrzunehmen. Der auf dem Werke angegebene Verleger gilt ohne

weiteren Nachweis als der Rechtsnachfolger des anonymen oder pseudonymen Urhebers.

§ 29.

In den Rechtstreitigkeiten wegen Nachdrucks, einschliesslich der Klagen wegen Bereicherung aus dem Nachdruck, hat der Richter, ohne an positive Regeln über die Wirkung der Beweismittel gebunden zu sein, den Thatbestand nach seiner freien, aus dem Inbegriff der Verhandlungen geschöpften Ueberzeugung festzustellen.

Ebenso ist der Richter bei Entscheidung der Frage: ob der Nachdrucker oder der Veranlasser des Nachdrucks (§§ 18, 20) fahrlässig gehandelt hat, an die in den Landesgesetzen vorgeschriebenen verschiedenen Grade der Fahrlässigkeit nicht gebunden.

§ 30.

Sind technische Fragen, von welchen der Thatbestand des Nachdrucks oder der Betrag des Schadens oder der Bereicherung abhängt, zweifelhaft oder streitig, so ist der Richter befugt, das Gutachten Sachverständiger einzuholen.

§ 31.

In allen Staaten des Norddeutschen Bundes sollen aus Gelehrten, Schriftstellern, Buchhändlern und anderen geeigneten Personen Sachverständigen-Vereine gebildet werden, welche, auf Erfordern des Richters, Gutachten über die an sie gerichteten Fragen abzugeben verpflichtet sind. Es bleibt den einzelnen Staaten überlassen, sich zu diesem Behufe an andere Staaten des Norddeutschen Bundes anzuschliessen, oder auch mit denselben sich zur Bildung gemeinschaftlicher Sachverständigen-Vereine zu verbinden.

Die Sachverständigen-Vereine sind befugt auf Anrufen der Betheiligten über streitige Entschädigungsansprüche und die Einziehung nach Maassgabe der §§ 18 bis 21 als Schiedsrichter zu verhandeln und zu entscheiden.

Das Bundeskanzler-Amt erlässt die Instruktion über die Zusammensetzung und den Geschäftsbetrieb der Sachverständigen-Vereine.

§ 32.

Die in den §§ 12 und 13 des Gesetzes, betreffend die Errichtung eines obersten Gerichtshofes für Handelssachen vom 12 Juni 1869 (Bundesgesetzbl. S. 201), geregelte Zuständigkeit des Bundes-Oberhandelsgericht zu Leipzig wird auf diejenigen bürgerlichen Rechtsstreitigkeiten ausgedehnt in welchen auf Grund der Bestimmungen dieses Gesetzes durch die Klage ein Entschädigungsanspruch oder ein Anspruch auf Einziehung geltend gemacht wird.

Das Bundes-Oberhandelsgericht tritt auch in den nach den Bestimmungen dieses Gesetzes zu beurtheilenden Strafsachen an die Stelle des für das Gebiet, in welchem die Sache in erster Instanz anhänging geworden ist, nach den Landesgesetzen bestehehenden obersten Gerichtshofes, und

zwar mit derjenigen Zuständigkeit, welche nach diesen Landesgesetzen dem obersten Gerichtshofe gebührt.

In den zufolge der vorstehenden Bestimmung zur Zuständigkeit des Bundes-Oberhandelsgerichts gehörenden Strafsachen bestimmt sich das Verfahren auch bei diesem Gerichtshofe nach den für das Gebiet, aus welchem die Sache an das Bundes-Oberhandelsgericht gelangt, geltenden Strafprocessgesetzen. Die Verrichtungen der Staatsanwaltschaft in diesen Strafsachen werden bei dem Bundes-Oberhandelsgericht von dem Staatsanwalt wahrgenommen, welcher dieselben bei dem betreffenden obersten Landesgerichtshofe wahrzunehmen hat. Der bezeichnete Staatsanwalt kann sich jedoch bei der mündlichen Verhandlung durch einen in Leipzig angestellten Staatsanwalt oder durch einen in Leipzig wohnenden Advokaten vertreten lassen.

Strafsachen, für welche in letzter Instanz das Bundes-Oberhandelsgericht zuständig ist, und Strafsachen, für welche in letzter Instanz der oberste Landesgerichtshof zuständig ist, können in Einem Strafverfahren nicht verbunden werden.

Die Bestimmungen der §§ 10, 12, Absatz 2, § 16, Absatz 2, §§ 17, 18, 21 und 22 des Gesetzes vom 12. Juni 1869 finden auch auf die zur Zuständigkeit des Bundes-Oberhandelsgerichts gehörenden Strafsachen entsprechende Anwendung.

g. Verjährung.

§ 33.

Die Strafverfolgung des Nachdrucks und die Klage auf Entschädigung wegen Nachdrucks, einschliesslich der Klage wegen Bereicherung (§ 18), verjähren in drei Jahren.

Der Lauf der Verjährung beginnt mit dem Tage, an welchem die Verbreitung der Nachdrucks-Exemplare zuerst stattgefunden hat.

§ 34.

Die Strafverfolgung der Verbreitung von Nachdrucks-Exemplaren und die Klage auf Entschädigung wegen dieser Verbreitung (§ 25) verjähren ebenfalls in drei Jahren.

Der Lauf der Verjährung beginnt mit dem Tage, an welchem die Verbreitung zuletzt stattgefunden hat.

§ 35.

Der Nachdruck und die Verbreitung von Nachdrucks-Exemplaren sollen straflos bleiben, wenn der zum Strafantrage Berechtigte den Antrag binnen drei Monaten nach erlangter Kenntniss von dem begangenen Vergehen und von der Person des Thäters zu machen unterlässt.

§ 36.

Der Antrag auf Einziehung und Vernichtung der Nachdrucks-Exemplare, sowie der zur widerrechtlichen Vervielfältigung ausschliesslich bestimmten Vorrichtungen (§ 21), ist so lange zulässig als solche Exemplare und Vorrichtungen vorhanden sind.

§ 37.

Die Uebertretung, welche dadurch begangen wird, dass in den Fällen des § 7, Littr. a, die Angabe der Quelle oder des Namens des Urhebers unterblieben ist, verjährt in drei Monaten.

Der Lauf der Verjährung beginnt mit dem Tage, an welchem der Abdruck zuerst verbreitet worden ist.

§ 38.

Die allgemeinen gesetzlichen Vorschriften bestimmen, durch welche Handlungen die Verjährung unterbrochen wird.

Die Einleitung des Strafverfahrens unterbricht die Verjährung der Entschädigungsklage nicht, und eben so wenig unterbricht die Anstellung der Entschädigungsklage die Verjährung des Strafverfahrens.

h. Eintragsrolle.

§ 39.

Die Eintragsrolle, in welche die in den §§ 6 und 11 vorgeschriebenen Eintragungen stattzufinden haben, wird bei dem Stadtrath zu Leipzig geführt.

§ 40.

Der Stadtrath zu Leipzig ist verpflichtet, auf Antrag der Betheiligten die Eintragungen zu bewirken, ohne dass eine zuvorige Prüfung über die Berechtigung des Antragstellers oder über die Richtigkeit der zur Eintragung angemeldeten Thatsachen stattfindet.

§ 41.

Das Bundeskanzler-Amt erlässt die Instruktion über die Führung der Eintragsrolle. Es ist Jedermann gestattet von der Eintragsrolle Einsicht zu nehmen und sich beglaubigte Auszüge aus derselben ertheilen zu lassen. Die Eintragungen werden im Börsenblatt für den Deutschen Buchhandel und, falls dasselbe zu erscheinen aufhören sollte, in einer anderen vom Bundeskanzler-Amte zu bestimmenden Zeitung öffentlich bekannt gemacht.

§ 42.

Alle Eingaben, Verhandlungen, Atteste, Beglaubigungen, Zeugnisse, Auszüge u. s. w., welche die Eintragung in die Eintragsrolle betreffen, sind stempelfrei.

Dagegen wird für jede Eintragung, für jeden Eintragsschein, sowie für jeden sonstigen Auszug aus der Eintragsrolle eine Gebühr von je 15 Sgr. erhoben, und ausserdem hat der Antragsteller die etwaigen Kosten für die öffentliche Bekanntmachung der Eintragung (§ 41) zu entrichten.

II. GEOGRAPHISCHE, TOPOGRAPHISCHE, NATURWISSENSCHAFTLICHE, ARCHITEKTONISCHE TECHNISCHE UND AEHNLICHE ABBILDUNGEN.

§ 43.

Die Bestimmungen in den §§ 1–42 finden auch Anwendung

auf geographische, topographische, naturwissenschaftliche, architektonische, technische und ähnliche Zeichnungen und Abbildungen, welche nach ihrem Hauptzwecke nicht als Kunstwerke zu betrachten sind.

§ 44.

Als Nachdruck ist es nicht anzusehen, wenn einem Schriftwerke einzelne Abbildungen aus einem anderen Werke beigefügt werden, vorausgesetzt, dass das Schriftwerk als die Hauptsache erscheint und die Abbildungen nur zur Erläuterung des Textes u. s. w. dienen. Auch muss der Urheber oder die benutzte Quelle angegeben sein, widrigenfalls die Strafbestimmung im § 24 Platz greift.

III. MUSIKALISCHE KOMPOSITIONEN.

§ 45.

Die Bestimmungen in den §§ 1 bis 5, 8 bis 42 finden auch Anwendung auf das ausschliessliche Recht des Urhebers zur Vervielfältigung musikalischer Kompositionen.

§ 46.

Als Nachdruck sind alle ohne Genehmigung des Urhebers einer musikalischen Komposition herausgegebenen Bearbeitungen derselben anzusehen, welche nicht als eigenthümliche Kompositionen betrachtet werden können, insbesondere Auszüge aus einer musikalischen Komposition, Arrangements für einzelne oder mehrere Instrumente oder Stimmen, sowie der Abdruck von einzelnen Motiven oder Melodien eines und desselben Werkes, die nicht künstlerisch verarbeitet sind.

§ 47.

Als Nachdruck ist nicht anzusehen: das Anführen einzelner Stellen eines bereits veröffentlichten Werkes der Tonkunst, die Aufnahme bereits veröffentlichter kleinerer Kompositionen in ein nach seinem Hauptinhalte selbstständiges wissenschaftliches Werk, sowie in Sammlungen von Werken, verschiedener Componisten zur Benutzung in Schulen, ausschliesslich der Musikschulen. Vorausgesetzt ist jedoch, dass der Urheber oder die benutzte Quelle angegeben ist, widrigenfalls die Strafbestimmung des § 24 Platz greift.

§ 48.

Als Nachdruck ist nicht anzusehen: die Benutzung eines bereits veröffentlichten Schriftwerkes als Text zu musikalischen Kompositionen, sofern der Text in Verbindung mit der Komposition abgedruckt wird.

Ausgenommen sind solche Texte, welche ihrem Wesen nach nur für den Zweck der Komposition Bedeutung haben, namentlich Texte zu Opern und Oratorien. Texte dieser Art dürfen nur unter Genehmigung ihres Urhebers mit den musikalischen Kompositionen zusammen abgedruckt werden.

Zum Abdruck des Textes ohne Musik ist die Einwilligung des Urhebers oder seiner Rechtsnachfolger erforderlich.

§ 49.

Die Sachverständigen-Vereine, welche nach Maassgabe des § 31 Gutachten über den Nachdruck musikalischer Kompositionen abzugeben haben, sollen aus Komponisten, Musikverständigen und Musikalienhändlern bestehen.

IV. OEFFENTLICHE AUFFUEHRUNG DRAMATISCHER, MUSIKALISCHER ODER DRAMATISCH-MUSIKALISCHER WERKE.

§ 50.

Das Recht ein dramatisches, musikalisches oder dramatisch-musikalisches Werk öffentlich aufzuführen steht dem Urheber und dessen Rechtsnachfolgern (§ 3) ausschliesslich zu.

In Betreff der dramatischen und dramatisch-musikalischen Werke ist es hierbei gleichgültig, ob das Werk bereits durch den Druck &c. veröffentlicht worden ist oder nicht. Musikalische Werke, welche durch Druck veröffentlicht worden sind, können ohne Genehmigung des Urhebers öffentlicht aufgeführt werden, falls nicht der Urheber auf dem Titelblatte oder an der Spitze des Werkes sich das Recht der öffentlichen Aufführung vorbehalten hat.

Dem Urheber wird der Verfasser einer rechtmässigen Uebersetzung des dramatischen Werkes in Beziehung auf das ausschliessliche Recht zur öffentlichen Aufführung dieser Uebersetzung gleich geachtet.

Die öffentliche Aufführung einer rechtswidrigen Uebersetzung (§ 6) oder einer rechtswidrigen Bearbeitung (§ 46) des Originalwerkes ist untersagt.

§ 51.

Sind mehrere Urheber vorhanden, so ist zur Veranstaltung der öffentlichen Aufführung die Genehmigung jedes Urhebers erforderlich.

Bei musikalischen Werken, zu denen ein Text gehört, einschliesslich der dramatisch-musikalischen Werke, genügt die Genehmigung des Komponisten allein.

§ 52.

In Betreff der Dauer des ausschliesslichen Rechts zur öffentlichen Aufführung kommen die §§ 8 bis 17 zur Anwendung.

Anonyme und pseudonyme Werke, welche zur Zeit ihrer ersten rechtmässigen öffentlichen Aufführung noch nicht durch den Druck veröffentlicht sind, werden dreissig Jahre vom Tage der ersten rechtmässigen Aufführung an, posthume Werke dreissig Jahre vom Tode des Urhebers an gegen unbefugte öffentliche Aufführung geschützt.

Wenn der Urheber des anonymen oder pseudonymen Werkes oder sein hierzu legitimirter Rechtsnachfolger innerhalb der Frist von dreissig Jahren den wahren Namen des Urhebers vermittelst Eintragung in die Eintragsrolle (§ 39) bekannt macht, oder wenn der Urheber das Werk innerhalb der-

selben Frist unter seinem wahren Namen veröffentlicht, so gelangt die Bestimmung des § 8 zur Anwendung.

§ 53.

Bei dramatischen, musikalischen und dramatisch-musikalischen Werken, welche noch nicht mechanisch vervielfältigt, aber öffentlich aufgeführt worden sind, gilt bis zum Gegenbeweise derjenige als Urheber, welcher bei der Ankündigung der Aufführung als solcher bezeichnet worden ist.

§ 54.

Wer vorsätzlich oder aus Fahrlässigkeit ein dramatisches, musikalisches oder dramatisch-musikalisches Werk vollständig oder mit unwesentlichen Aenderungen unbefugter Weise öffentlicht aufführt, ist den Urheber oder dessen Rechtsnachfolger zu entschädigen verpflichtet und wird ausserdem mit einer Geldstrafe nach Maassgabe der §§ 18 und 23 bestraft.

Auf den Veranlasser der unbefugten Aufführung findet der § 20 mit der Maassgabe Anwendung, dass die Höhe der Entschädigung nach § 55 zu bemessen ist.

§ 55.

Die Entschädigung, welche dem Berechtigten im Falle des § 54 zu gewähren ist, besteht in dem ganzen Betrage der Einnahme von jeder Aufführung ohne Abzug der auf dieselbe verwendeten Kosten.

Ist das Werk in Verbindung mit anderen Werken aufgeführt worden, so ist, unter Berücksichtigung der Verhältnisse, ein entsprechender Theil der Einnahme als Entschädigung festzusetzen.

Wenn die Einnahme nicht zu ermitteln oder eine solche nicht vorhanden ist, so wird der Betrag der Entschädigung vom Richter nach freiem Ermessen festgestellt.

Trifft den Veranstalter der Aufführung kein Verschulden, so haftet er dem Berechtigten auf Höhe seiner Bereicherung.

§ 56.

Die Bestimmungen in den §§ 26 bis 42 finden auch in Betreff der Aufführung von dramatischen, musikalischen und dramatisch-musikalischen Werken Anwendung.

V. ALLGEMEINE BESTIMMUNGEN.

§ 57.

Das gegenwärtige Gesetz tritt mit dem 1. Januar 1871 in Kraft. Alle früheren, in den einzelnen Staaten des Norddeutschen Bundes geltenden, rechtlichen Bestimmungen in Beziehung auf das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken treten von demselben Tage ab ausser Wirksamkeit.

§ 58.

Das gegenwärtige Gesetz findet auf alle vor dem Inkrafttreten desselben erschienenen Schriftwerke Abbildungen, musikalischen Kompositionen und dramatischen Werke Anwendung, selbst wenn dieselben nach den bisherigen Landes-

gesetzgebungen keinen Schutz gegen Nachdruck, Nachbildung oder öffentliche Aufführung genossen haben.

Die bei dem Inkrafttreten dieses Gesetzes vorhandenen Exemplare, deren Herstellung nach der bisherigen Gesetzgebung gestattet war, sollen auch fernerhin verbreitet werden dürfen, selbst wenn ihre Herstellung nach dem gegenwärtigen Gesetz untersagt ist.

Ebenso sollen die bei dem Inkrafttreten dieses Gesetzes vorhandenen, bisher rechtmässig angefertigten Vorrichtungen, wie Formen, Platten, Steine, Stereotypabgüsse &c., auch fernerhin zur Anfertigung von Exemplaren benutzt werden dürfen.

Auch dürfen die beim Inkrafttreten des Gesetzes bereits begonnenen, bisher gestatteten Vervielfältigungen noch vollendet werden.

Die Regierungen der Staaten des Norddeutschen Bundes werden ein Inventarium über die Vorrichtungen, deren fernere Benutzung hiernach gestattet ist, amtlich aufstellen und diese Vorrichtungen mit einem gleichförmigen Stempel bedrucken lassen. Ebenso sollen alle Exemplare von Schriftwerken, welche nach Maassgabe dieses Paragraphen auch fernerhin verbreitet werden dürfen, mit einem Stempel versehen werden.

Nach Ablauf der für die Legalisirung angegebenen Frist unterliegen alle mit dem Stempel nicht versehenen Vorrichtungen und Exemplare der bezeichneten Werke, auf Antrag des Verletzten, der Einziehung. Die nähere Instruktion über das bei der Aufstellung des Inventariums und bei der Stempelung zu beobachtende Verfahren wird vom Bundeskanzler-Amte erlassen.

§ 59.

Insofern nach den bisherigen Landesgesetzgebungen für den Vorbehalt des Uebersetzungsrechts andere Förmlichkeiten und für das Erscheinen der ersten Uebersetzung andere Fristen, als im § 6, Littr. c vorgeschrieben sind, hat es bei denselben in Betreff derjenigen Werke, welche vor dem Inkrafttreten des gegenwärtigen Gesetzes bereits erschienen sind, sein Bewenden.

§ 60.

Die Ertheilung von Privilegien zum Schutze des Urheberrechts ist nicht mehr zulässig.

Dem Inhaber eines vor dem Inkrafttreten des gegenwärtigen Gesetzes von dem Deutschen Bunde oder den Regierungen einzelner jetzt zum Norddeutschen Bunde gehörigen Staaten ertheilten Privilegiums steht es frei, ob er von diesem Privilegium Gebrauch machen oder den Schutz des gegenwärtigen Gesetzes anrufen will.

Der Privilegienschutz kann indess nur für den Umfang derjenigen Staaten geltend gemacht werden, von welchen derselbe ertheilt worden ist.

Die Berufung auf den Privilegienschutz ist dadurch bedingt, dass das Privilegium entweder ganz oder dem wesentlichen Inhalte nach dem Werke vorgedruckt oder auf oder hinter dem Tittelblatt desselben bemerkt ist. Wo dieses nach der Natur des Gegenstandes nicht stattfinden kann, oder bisher nicht geschehen ist, muss das Privilegium, bei Vermeidung des Erlöschens, binnen drei Monaten nach dem Inkrafttreten dieses Gesetzes zur Eintragung in die Eintragsrolle angemeldet und von dem Kuratorium derselben öffentlich bekannt gemacht werden.

§ 61.

Das gegenwärtige Gesetz findet Anwendung auf alle Werke inländischer Urheber, gleichviel ob die Werke im Inlande oder Auslande erschienen oder überhaupt noch nicht veröffentlicht sind.

Wenn Werke ausländischer Urheber bei Verlegern erscheinen, die im Gebiete des Norddeutschen Bundes ihre Handelsniederlassung haben, so stehen diese Werke unter dem Schutze des gegenwärtigen Gesetzes.

§ 62.

Diejenigen Werke ausländischer Urheber, welche in einem Orte erschienen sind, der zum ehemaligen Deutschen Bunde, nicht aber zum Norddeutschen Bunde gehört, geniessen den Schutz dieses Gesetzes unter der Voraussetzung, dass das Recht des betreffenden Staates den innerhalb des Norddeutschen Bundes erschienenen Werken einen den einheimischen Werken gleichen Schutz gewährt; jedoch dauert der Schutz nicht länger als in dem betreffenden Staate selbst. Dasselbe gilt von nicht veröffentlichten Werken solcher Urheber, welche zwar nicht im Norddeutschen Bunde, wohl aber im ehemaligen Deutschen Bundesgebiete staatsangehörig sind.

Urkundlich unter Unserer Höchsteigenhändigen Unterschrift und beigedrucktem Bundes-Insiegel.

Gegeben BERLIN, den 11. Juni 1870.

(L. S.) WILHELM.

Gr. v. Bismarck-Schönhausen.

INDEX.

Abandonment—of action for piracy, what will be.
See DELAY.
Abridger—who will be construed to be, i.
May be an author, i. 319.
Abridgment—how far permitted, i. 319, 343; ii. 4.
How far encouraged by the law, i. 350.
When bona fide, will not infringe copyright, i. 319. 343, 351, 354.
of a legal work, i. 352.
of a work of fiction, i. 339. 355.
of a biography, i. 341.
doctrine of, applied to dramatic work, ii. 344, 347.
to pictures, i. 359.
Abstracts—of indices of title, literary property in, i. 384.
Right to publish will not pass by seizure of, under execution, i. 385.
Accessions—LITERARY.
Doctrine of, i. 368, 369, 370; ii. 363.
In the case of drawings, i. 369.
Illustrated by analogy in the case of an inventor, i. 370.
Where an actor, in the employ of a manager, interpolates matter in his part, ii. 326, 362.
Doctrine of, applied to manuscripts, i. 414.
But if the actor write a play, doctrine does not apply, i. 374; ii. 347.
Even where employer suggests the subject, i. 375.
See PROPRIETARY COPYRIGHT.
Accident—newspaper liable for libel published by, ii. 457.
Account—See REMEDIES FOR PIRACY.
Right to an, ii. 714.
Acquiescence—in a piracy, how far estops from action,
See DELAY.
Acts—public, legislative and judicial, no copyright in, ii. 566.
See STATUTES.
Action, adjective words—may be actionable, i. 110.
See LIBEL.
For infringement of copyright, none unless notice of copyright inserted in each copy or volume of work,
Of dramatic copyright, ii. 189.
Limitation of, ii. 189.
General issue pleadable in, ii. 189.
See NOTICE.
Actionable words—See LIBEL *passim*.
Actor—equity will not compel an, to act, ii. 353.
Though it might restrain him from acting at a particular theatre, ii. 353.
Contract of an, unassignable, ii. 363, 364.
Libel of, i. 147.

Administrators—See EXECUTORS.
Infringement upon, ii. 703.
Advertisement—not an original literary composition, ii. 696.
Libellous, i. 219
Tradesman's, sometimes commentable upon as matter of public interest, ii. 446.
Contempt of court by, i. 256.
Libel by, i. 219.
Newspaper, when responsible for words contained in, ii. 428.
When not, ii. 427, 428.
Disparaging a rival work, when courts will not enjoin, ii. 705.
See COMMENTS ON MATTERS OF PUBLIC INTEREST.
Affidavits—none required in entering a copyright, ii. 191.
Agent—liability for libel, published by.
See NEWSPAPERS.
Agreements—between authors and publishers to assign copyright, ii. 228, 645.
Not to publish, will not be implied, ii. 656.
See CONTRACTS.
Alien—acquisition of copyright by, ii. 191.
To what protection entitled, ii. 197, 198, 200.
See CITIZEN.
Allegory—libel by means of, i. 164.
Almanacs—decree of star chamber against selling, ii. 13.
Criticism upon the proprietor of an, ii. 437.
Penalty for printing, in England, ii. 129.
Provisional injunction in case of, might not be granted, ii. 709.
Alteration—of author's work before publication, ii. 363.
One purchasing manuscript for publication, may alter, ii. 631.
Verbal, not a subject of litigation, ii. 363.
Amateur theatricals—piracy by means of, ii. 345.
Ambassador—libel of an, i. 86, 89.
Amendment—of registry of copyright, ii. 232, 261.
See CORRECTION.
American author living abroad, may obtain copyright in U. S., ii. 196.
Animus furandi—whether essential to piracy, ii. 665.
Annotations—of precedent works, i. 378, 666, 667, 687, 688.
Need not be original, if skillfully collected, i. 378.
Anagram—libel by means of, i. 164.
"And"—and "for," legal meaning of, i. 110.
Antiques—i. 82.
Appeal—in suits concerning literary property, ii. 247.
Architect—libel of, i. 147.
Architecture—criticism of, ii. 448.
Arranger—may be an author, i. 319.
Arrangement—when original, i. 344.
Archæological Association—comments upon proceedings of, ii. 418.
Areopagitica—of John Milton, ii. 13, 18.
Circumstances under which written, i. 19, *n.*
Article—for publication in periodical, ii.
Artist—criticism on the works of, ii. 448.
Assignee—power of—See ASSIGNMENT.
Legal, of author may take out copyright, ii. 191.
Of a non-resident alien may not, ii. 191.
May take renewal in his own name, ii. 191.
Assignor—of copyright may continue to sell copies, ii. 656.
Assignment of copyright—form of, ii. 263.
Must be in writing, ii. 366.
Of right to represent dramatic production, ii. 366.
Of right to dramatize work, ii. 648.
Does not carry right to print, ii. 366.
Of right to use title, ii. 387.

Assignment of copyright— *Continued.*
Recording of, ii. 230.
See CONTRACTS.
Austria—Copyright between Prussia and, ii. 154.
Author—cannot be compelled to write, ii. 352.
Who will be considered an, i. 303, 318, 364.
Of musical composition, i. 364.
Joint, i. 375.
Unknown, copyright belongs to publisher, ii. 207.
Cannot copyright his manuscript after selling it, ii. 632.
Nor the published work, ii. 632.
Difficulty of determining who is, ii. 701.
Cannot copyright manuscript which he has already sold to a publisher, ii. 632.
Widow of, ii. 227.
Cannot have injunction in certain cases, ii. 630.
Child of, ii. 227.
Not entitled to borrow from another, to save himself labor, ii. 680.
Wrongful use of name of, ii. 396.
Right to first publish his own work, ii. 649.
Right to dramatize his own work, ii. 188.
Living abroad, ii. 196.
Libel of, i. 147.
Criticism on works of, i. 179 et seq. and *n.*
Has action for publication of inaccurate edition of his work, ii. 631.
Whether there must be a known, ii. 208.
In another's employment, i. 368.
Rights of, upon bankruptcy of publisher, ii. 654.
Posthumous, works of an, copyright in. See POSTHUMOUS.
Right to perpetuate and conserve his works. See PERPETUATE.
To appoint literary executor, ii. See LITERARY EXECUTOR.
See JOINT AUTHORSHIP; CONTRACTS; LITERARY CRITICISM; CITIZEN; ALIEN; COPYRIGHT; RIGHT; ACCESSIONS; BANKRUPTCY.

B.

Bankrupt—is an actionable word, i. 116, 146.
Bankruptcy—effect of, upon ownership of copyright, ii. 644, 654.
Of newspaper, ii. 644.
Of his publisher, rights of author upon, ii. 654.
Bar association—opposition to code amendments, i. 303.
Report of committee of, as to the law reports, ii. 532.
See CONTEMPT OF COURT.
Base copy—meaning of term, ii.
Bavaria—copyright in, ii. 154, 161.
"Bersoglisvisur"—custom of the, i. 96.
Bible—copyright in English translation of, ii. 128.
Decrees of star chamber against buying, receiving, or selling, ii. 13.
Report of trials in, ii. 519.
Reading of, prohibited, ii. 121.
Attempts to expurgate, ii. 121, *n.*
Injunction to prevent printing, denied, ii. 131, *n.*
granted, ii. 705.
Blasphemous contract—cannot be enforced, i. 81.
Blasphemy—In what the offense may consist, i. 33, 44.
Common law decisions as to, i. 33, 34.
Legislative acts in relation to, i. 39
How far latitude of discussion allowed, i. 90.
Prosecution of Shelley's Poems for, i. 51.
Law of, in the United States, i, 40, 44.
in England, i. 33, 40.

Book—See WORK.
Privately printed, is not a matter of public interest, ii. 451.
What the term inclusive of i. 343.
Meaning of, in copyright act, ii. 222.
How far must be original, i. 324. See AUTHOR.
Who will be considered author of, i. 333.
Copyright in, when subject is common, i. 317, 319.
in engravings forming part of, i. 343.
may be in portions of, ii. 343.
Proclamations against certain books, i. 119.
Book of common prayer—crown copyright in, ii. 128.
British copyright—obtainable by residence in Canada, ii. 202.
Burden of Proof—in suits for piracy, ii. 701.

C.

Calendar—See ALMANAC.
Camden—Lord, his idea of the rewards of authorship, i. 176; ii. 619.
Great speech against literary property, ii. 675.
Canada—author by residence in, may obtain British copyright, ii. 264.
Copyright statute of, ii.
Caricature—libel by, means of, i. 167.
Casts—sculptor may distribute casts of his work without using right to first publish,
Caveat emptor—rule of applicable to contracts concerning literary matter, ii. 633.
Censorship of press—See LICENSERS OF THE PRESS.
Certificate—of entry of copyright, optional, ii. 257.
Chancery—See EQUITY.
Charitable institutions—comments on management of, ii. 422.
Piracy for printing in England, ii. 130.
Chesterfield—Lord, letters of, i. 463.
Children of author—rights of, ii. 227.
Christianity—parcel of the common law, i. 32.
of England, i. 32.
How far of the United States, i. 40, 44.
Circular—a tradesman's, may be a matter of public interest, ii. 446.
So far as to justify comments upon it, ii. 146.
Citizen—entitled to copyright, ii. 187, 191, 362.
See ALIEN; RESIDENT.
Classical fragments, i. 82.
Clarendon—Lord, MS. of his history, i. 406.
College copyright—See UNIVERSITIES.
Colorable alteration—See PIRACY.
Comments on matters of public interest—publications protected as being, ii. 409.
Responsibility of newspaper for, ii. 415.
In what sense privileged, ii. 410.
And to what extent, ii. 199, 410, 411.
How far justified by honest belief, ii. 412.
Criticism of a tradesman's handbill, circular or advertisement, ii. 446.
Debates of English parliament, ii. 419.
Management of a parochial charity, ii. 422.
of a public institution, ii. 420.
of a church, ii. 436.
Unpublished sermons, quære, ii. 447.
Judicial decisions, &c. See CONTEMPT OF COURT.
Advertisement of a medical discovery, ii. 415.
Proceedings of an archæological association, ii. 418.
Public appointments by government, ii. 433.
Public meeting, ii. 431, *n*.
Public discussion, ii. 433.
Report of a committee to a union, ii. 434.

Comments on matters of public interest—*Continued.*
Upon the proprietor of an almanac, ii. 437.
Theatrical and musical performances, ii. 438, 441.
Floral exhibition, ii. 438.
Architecture, ii. 448.
Pictures publicly exhibited, ii. 448.
Upon literary works, ii. 441.
Books publicly circulated are not matters of public interest, ii. 751.
Nor the personal misunderstandings of individuals, ii. 435.
Responsibility of newspapers for, ii. 415.
Right of, to expose impostor, ii. 436.
Advertisements disparaging wares, ii. 428.
Attacking personal character, ii. 428.
Privilege of newspaper in regard to, how construed, ii. 417.
See MATTERS OF PUBLIC INTEREST; REPORTS (NEWSPAPER); LITERARY CRITICISM; NEWSPAPERS.
Committee—report of, ii. 434.
Common law—literary property at, ii. 171, 174, 298.
Comparison—will sometimes be made by the judge, ii. 717.
Sometimes made by a master, ii. 717.
Compilation—copyright in, i. 318.
Compiler—is an author, i. 319.
Congress—no copyright in act or official report of, ii. 213.
Power of, to punish for contempt, i. 299.
Libel of, indictable, i. 76.
Connecticut—early copyright statute of, ii. 143.
Consent—early ordinance of English parliament against publishing without author's, ii. 18.
Necessary under the present statute, ii. 238, 239.
When must be in writing, ii. 539.
Of proprietor to representation of dramatic work, ii. 242.
Of author to dramatize his work, qære, ii. 648.
Conservation—of author's text. See PERPETUATE.
Constitution of the United States—clause in, ii. 146.
Contempt of courts—by publishing reports of, theory of, i. 227, 235, 288.
Rule founded in the reason of the common law, i. 22.
Not contrary to its spirit, i. 226.
Origin of power to imprison for, i. 227.
Four methods of committing, i. 236.
Enactments of congress as to, i. 290.
If no right or remedy impaired by, i. 288.
Real and constructive, i. 261.
Libeling judge at chambers, i. 240, 242.
In general, proceedings must be pending, i. 225.
Though this not absolutely necessary, i. 255.
Enactments of congress as to, i. 290.
Punishment for, entirely discretionary, i. 265.
Tendency of the times to construe the offense liberally, i. 280.
By a letter written by a solicitor, i. 254.
By a handbill, i. 277.
By publications which tend to prejudice the hearing of a cause, i. 251, 252, 258, 260, 262, 282, 285.
Or the judgment of the public, i. 260.
Publication by parties, i. 255.
by one party does not justify publication by the other, i. 255.
by advertisement, i. 278, *n.*
of a reward for evidence, i. 256.
by defamatory statements concerning offense of the court, i. 238.
Source of judicature, i. 223.
Courts must maintain the respect of society, i. 224.
Doctrine of appeals to authors, i. 224.
of the court itself, i. 239.

Contempt of courts—*Continued.*
By threatening letters, i. 244, 245.
By insulting letters, i. 245.
By bribing letters, i. 248.
By misrepresentation of discussions of a court, i. 292.
By an attack upon witnesses, i. 266.
By protest addressed to a judge, i. 246.
By writing letter to foreman of a grand jury, i. 277, *n.*
The truth no defense to a contempt, i. 255.
By newspapers, i. 280.
By members of a municipal corporation, i. 286, 287.
When place of public is distant, i. 260.
Distinction between libelous and contemptuous matter, i. 249.
English law as to, i. 251.
Summary punishment in cases of, i. 241.
By imprisonment without a fine, i. 276.
Legislative bodies of parliament, i. 293. *et seq.*
of congress, i. 299, 300, 301.
Commitments for, by congress, i. 299, 300, 301, 302, *n.*
Power of congress to control reports of its own proceedings, i. 302.
See LEGISLATIVE BODIES.
Continuation—of a work, author's right to publish, ii. 629.
Contracts—BETWEEN AUTHORS, PUBLISHERS, PRINTERS, &C.
Agreement not to be performed within a year, see STATUTE OF FRAUDS.
Contract may be collected from a number of papers, ii. 642.
Defective form of agreement, i. 270.
Duty of fixing price and choosing embellishments, ii. 634, 635.
Right to fix time and mode of publication, ii. 634, 635.
How agreement for division of profits after payment of expenses may be regarded, ii. 648.
Power to put an end to agreement, ii. 637.
Meaning of "edition," ii. 637.
License to publish cannot be assigned, ii. 637.
Representatives of deceased author entitled to payment for unfinished work, ii. 659.
For composition of a work, specific performance of not decreed, ii. 626.
But either party may be made liable in damages for breach of, ii. 630.
Not to sell under a certain price, i. 279.
To print within a specified time, i. 279.
Specific performance of, ii. 624.
Warranty on sale of copyright, ii. 641.
Contracts between joint owners of copyright, ii. 631.
Alteration of work by publisher, i. 281.
Injunction not granted to restrain publication on account of non-payment of author, ii. 630.
Right of author to publish continuation of his work, ii. 630.
Contract not to compose for any other than a particular theatre, ii. 626.
not to publish a work which would prejudice another work, ii. 625, 627, 630.
Agreement for use by one newspaper of matter and type of another, ii. 502, *n.*
A sale of goods, ii. 633.
Printer's lien for general balance, ii. 661.
Customs of trade between printers and publishers, ii. 661.
Much will depend upon, ii. 641.
Contract by printer to insure against loss by fire, ii. 660.
Of an illegal or immoral character, ii. 633, 642.
Specific performance of agreement between authors and publishers, will not be decreed, ii. 626, 627, 628.
Literary property of an author not seizable by his creditors, ii. 650.
See PUBLISHER; PARTNERSHIP.
Contributors—to periodicals. See PERIODICALS.

Contributors—*Continued.*
When assignable, ii. 646.
Publisher may continue to sell copies of work published by him, during continuance of contract, ii. 639.
Or may sell stereotype plates, ii. 640.
Chattel mortgage on copyright of a work, ii. 641.
Mechanic's lien, ii. 641.
Who may put an end to, ii. 608.
For transfer of copyright, ii. 642.
May be by parol if registered in the proper office, ii. 642.
Otherwise must be in writing, ii. 642.
Printer has no lien on stereotype plates put into his hands to be printed from, ii. 663.
To publish when a partnership, ii. 635.
When a mere license, ii. 687.
To periodicals, rights of, ii. 404.
See LIEN; PERIODICALS.
Copy, author's—means his right to copyright or literary property, i. 134, *n.*
Copyright—See AUTHOR, BOOKS, PERIODICALS, &C., and PROPRIETARY COPYRIGHT.
Earliest instance of a statute of, ii. 6.
Formerly regarded as a perpetuity, ii. 7.
Is personal property, ii. 225.
Statutes of, simply refer to a multiplication of copies, ii. 174.
&c., do not affect an author's right to his MS., ii. 174.
Origin of, in star chamber, ii. 8.
Waiver of certain common-law rights to secure, ii. 174.
Of titles, ii. 232, 305, 308, 314, 383, 384.
Notice of, when and how given, ii. 189.
Penalty for wrongful notice, ii. 189.
Correction of entry of, ii. 224.
In England, ii. 224.
Extension of term of, ii. 227.
Renewal of, ii. 230, 231.
When considered as secured, ii. 231.
When equity will protect an incomplete, ii. 231.
Peculiarities of English law of, ii. 248.
None in matter itself copied, ii. 696.
American law of, considered by sections, ii. 187, 266.
One advantage of over English, ii. 257.
Right to take out does not pass on execution, ii. 255, 650.
In whose name to be taken out, ii. 263.
Certain contracts in violation of, void, ii. 633.
First act of, ii. 132.
Second, ii. 138.
Third, ii. 141.
Earliest litigation concerning, ii. 170.
Earliest American acts of, ii. 143.
In Connecticut, ii. 143.
In Massachusetts, ii. 143.
In Virginia, ii. 145.
In New York, ii. 145.
Status of acts of congress concerning, ii. 162, 182.
Powers of congress concerning, ii. 183, 184, 185.
Not in derogation of certain powers in the states themselves, ii. 183, 184, 185.
Twofold nature of, i. 1.
May exist in innocent works only, and passim, i. 21, 90; ii. 184.
Of work of unknown author belongs to publisher, ii. 207.
Will not exist in works published in name of one not the author, i. 83.
if so published with intent to deceive, i. 83.
Innocent representations of authorship will not invalidate, ii. 85.

Copyright—*Continued.*
Exists in letters, whether of a private or literary character, i. 445.
Or whether or not written for profit, i. 445.
Who may possess, ii. 1, 187, 190.
Early settlement as to, i. 19; ii. 4, 5.
Of the crown, see PREROGATIVE CASES.
Of the state, in the United States, see LEGAL REPORTS; ACTS; STATUTES.
In unpublished works, when may exist, see DRAMATIC MANUSCRIPTS; MANUSCRIPTS.
Property not monopoly, i. 1; ii. 2.
Laws of, beneficial to the public, ii. 3.
To obtain protection of, works must be innocent. See INNOCENCE.
American, English, French, and German statutes of—APPENDIX.
Must be such as are protectable under no other act, ii. 221.
Three classes of writers recognized by acts of, i. 323.
Congress has power to alter at will, ii 162.
Duration of, ii. 162, 188, 227.
See ALIEN; CITIZEN; RESIDENT; DURATION OF COPYRIGHT.
Corporation—libel of, i. 203.
Correction—of copyright entry, ii. 224, 247, 370.
Counsel—contempt of court by, i. 246, 259.
Courts—of United States, jurisdiction of, ii. 189.
Clerk of United States district, formerly a copyright officer, ii. 187.
In cases of dramatic infringement, have never abandoned their right to restrain publication of their reports, ii. 564, 565.
Not open to the public as matter of right, except by statute, ii. 474.
Will not curtail fair use of literary material, ii. 676.
Criminal work—no copyright in, i. 40, 44.
Criticism—See COMMENTS ON MATTERS OF PUBLIC INTEREST.
What is fair and candid, ii. 414.
On public and private individuals, ii. 411, 413, *n.*
Of motives, ii. 412.
One who challenges public, must abide by result, if fair and honest, ii. 416.
Of books, see LITERARY CRITICISM.
Of tradesman's handbill, circular, or advertisement, ii. 446.
Crebillon—the poet, first to assert doctrine that products of the mind not seizable by creditors, ii. 650.
Crown copyright—prerogative cases concerning, ii. 129.
In English translation of the bible, ii. 128.
In book of common prayer, ii. 128.
In Lily's Latin Grammar, ii. 128.
In acts of parliaments and other state documents, i. 129.
No similar claim of the state in the United States, except in the case of law reports, ii. 211.
Custom—of trade between publishers, authors, &c., what will depend upon, ii.
Cut—definition of a, ii. 222.
See PLATES.

D.

Dead—libel on the, i. 174.
Intent must be proved in prosecutions for, i. 175.
Dedication—of literary work to the public, what will amount to, ii. 359.
Defamation—offense formerly cognizable by the ecclesiattical courts, i. 93.
Defamatory matter—published at the request of another, is libel, i. 180.
See LIBEL.
Decree—of Louis XV., concerning author's property, ii. 650.
Delay—of owner of copyright to sue for piracy, ii. 698.
Must be accounted for to the court, ii. 714.
Otherwise will estop recovery for piracy, ii. 714.
Denmark—copyright in, ii. 154.

Deposit--of title-page, ii. 231.
Of copies of books copyrighted, ii. 232, 233.
Of copies of painting or statue, ii. 232.
Of copyright matter in the post office, ii. 230.
Design—meaning of under former copyright act, ii. 192.
Under present acts, ii. 192.
Difference between American and English understanding of the term, ii. 193, 194.
The material not protected by the design, ii. 195.
The appearance to the eye constitutes in the United States, ii. 196.
English act of Anne extended to, ii 139.
Damage—Equity has no jurisdiction of question of, without an injunction, ii. 714.
Minuteness of, disentitles to relief, ii. 716.
Devolution—of copyright, see TRANSFER OF COPYRIGHT.
Dictionary—infringement of copyright in, i. 349.
Digests—when bona fide, do not infringe copyright, ii. 586.
Copyright, if not infringed by using names of cases contained in, ii. 586.
Directory—piracy of, i. 344, 346.
Disloyal devices—nothing bearing, allowed in the mail, i. 505.
Divisibility—of, ii. 696.
Of copyright, ii. 643.
Dramatic author—common-law rights of alien in the United States, ii. 295, 297.
Protection of, against publication of composition by printing, ii. 298.
By representation, ii. 299.
Assignee of alien, cannot copyright, ii. 300.
Equity will not compel to compose plays, ii. 353.
Though it might restrain him from composing, ii. 353.
See EQUITY.
Dramatic composition—Definition of, ii. 288.
What copyright of, will cover and include, ii. 319.
will include incidents, but not a mechanism designed to express them, ii. 319.
Manuscripts of, ii. 407, 469.
Not dedicated by representation, i. 333, 339, 341.
Introduction to pantomime contained in a, ii. 289.
Assignment of copyright in, does not convey right to represent in England, ii. 648.
Copyright in musical composition accessory to, ii. 289, 290, 291.
Penalty for wrongful representation of, ii. 189.
What is a publication, ii. 287.
Publication of, when not a publication of the play, ii. 243.
Remedies for infringement of copyright in, ii. 328.
Transfer of, ii. 366.
Infringement of, burden of proof as to, ii. 345.
What is place of dramatic entertainment under the English act, ii. 349.
No person liable for representation, unless actually a participant therein, ii. 349.
What is a representation of, a question for the jury, ii. 352.
Remedies for infringement of, see PIRACY.
Piracy of, may be by publication, representation, or imitation, ii. 697.
Within what time action for infringement must be commenced, ii. 3[illegible].
Penalty for infringement of, ii. 348.
Assignee of, ii. 243.
Incident in a, copyrightable with, ii. 221.
Wrongful representation of, ii. 189.
Antiquity of, ii. 267.
Popularity of, ii. 269.
Early suppression of, ii. 278.
Plagiarism of, ii. 280.
Large and immediate value of, ii. 282.

Dramatic Composition—*Continued.*
Large and immediate value of, is dependent upon power to prevent a multiplication of copies, ii. 284.
Does not lose its literary, on account of its dramatic character, ii. 285.
Rights of last literary rights to be recognized by statute, ii. 286, 287.
Sometimes called stageright, ii. 286.
Dramatic representations—See THEATRICAL PERFORMANCES.
Dramatize—their own works, authors have right to, ii. 190.
Drawings—See PICTURES.
Duration of copyright—in the United States, i. 187.
In other countries, see the names of those countries.

E.

Ecclesiastical courts—jurisdiction of, in suits of defamation, abolished in England, i. 93.
Echo verses—Palm executed for writing i. 88, *n.*
Edition—what will be considered an, i. 374, 380, ii. 201, 204, 637.
Reprint of copies destroyed by fire is not a new, ii. 201, 204.
Inaccurate authors, remedy for, ii. 631.
Embellishment—of text will not divest owner's right, ii. 689.
Of a work, right to choose—See PUBLISHERS.
Encyclopædias—piracy by, ii. 687.
England—copyright in, obtainable by American authors, ii. 201, 207.
Engravings—See PICTURES.
Equity—sometimes refuses an injunction while acknowledging the right, ii. 713.
Will refuse to interfere in relation to non-innocent works, i. 28.
No jurisdiction in matters of crime, ii. 29.
When will protect an incomplete copyright, ii. 231.
When will take jurisdiction of, ii. 2[illegible]
Will not compel authors to compose, ii. 353, 624.
Though it might restrain him from composing for a particular theatre, ii. 353.
When will interfere between author and publisher, ii. 629, 630, 631, 635.
Or an actor from acting, il. 353.
Has no jurisdiction as to damages, unless plaintiff entitled to injunction, ii. 714.
Suits for infringement of copyright usually referred to a master, ii. 714.
Court of, called into activity, by conscience, good faith and diligence, ii. 711.
Evidence—in action for piracy, ii. 699, 701, 704.
In an action against a newspaper for services, ii. 503.
As to the contents of a newspaper, ii. 505.
Newspapers, when they are, ii. 507.
Obituary notice in, not evidence of death, ii. 508.
Of definite publication, when necessary, ii. 702.
What advertisements in a newspaper may be, ii. 510.
Execution—literary property not seizable in, ii. 650.
Executors—early enunciation of this doctrine, ii. 650.
Copyright passes to, ii. 190–7.
Extension—of copyright, ii. 227.
See COPYRIGHT; RENEWALS.
Extracts—Piracy by means of—See QUOTATION.
Book of poetical—See POETICAL EXTRACTS.

F.

False news—publication of, ii. 459, 511.
Fees—of Librarian of Congress—See LIBRARIAN OF CONGRESS.
Felony—words imputing an attempt to commit, libelous, i. 152.

Fictitious—names, libel by use of, i. 164.
Persons, when letters addressed to will be delivered, i. 504.
Fire—effect of loss by, on contract of printer—See INSURANCE.
Reprint of copies lost by, does not constitute a new edition, ii. 201, 207.
Foreigner—See ALIEN, CITIZEN, RESIDENT.
Forfeitures—jurisdiction of courts as to, ii 247.
Forms—Of entry of copyright, ii. 261, *n.*
Of certificate of entry, ii. 261, *n.*
Of receipt of deposit of copies, ii. 262, *n.*
Of receipt of copyright matter by postmaster, if mailed, ii. 264.
Of notice of entry to be inserted in book, ii. 259.
Of words not copyrightable, ii. 253.
France—copyright in, ii. 147, 148, 364.
Newspaper writer's name must appear in, ii. 459.
Freedom of the press—commensurate only with freedom of the individual, ii. 410, 512.
Statement of the, ii. 512.
See COMMENTS ON MATTERS OF PUBLIC INTEREST; CONTEMPT OF COURT; CRITICISM; LIBEL.

G.

General issue—pleadable in action for infringment of copyright, ii. 189.
Does not deny copyright in plaintiff, ii. 701.
Germany—copyright in, ii. 151, 161.
"Glory"—not the sole reward of authorship, ii. 619.
Governm—entpublications which attack, see SEDITIOUS PUBLICATIONS.
Greece—copyright in, ii. 161.
Guicciardini—his history scarred by the licensers, ii. 117.

H.

Haberdashers—Star-chamber decree against, ii. 13.
Handbills—comments on, protected, ii. 446.
Heading—to a report, newspaper liable for if libelous, ii. 490, 491.
Holland—copyright in, ii. 157.
Homer—report of a trial in, ii. 517.

I.

Ideas—without material clothing, no copyright in, ii. 217, 669.
Analogy to the patent law concerning, ii. 669.
Illegal—works, no copyright in, i. 21. See INNOCENCE.
Action cannot be maintained on, i. 633, 642.
See INNOCENCE; CONTRACT.
Immoral—work, no copyright in, i. 21, 22.
See INNOCENCE.
Impostor—newspaper has a right to expose, ii. 436.
See COMMENTS ON MATTERS OF PUBLIC INTEREST; NEWSPAPERS.
Inaccuracy—of entry of copyright, ii. 237.
Severity of the English rule, ii. 238.
Incident—dramatic, when copyrightable, ii. 221.
Mechanism used to express is not copyrightable, ii. 221, 319.
Inconvenient—nothing which is, is law, i. 21.
Indecent—publications, see OBSCENE PUBLICATIONS.
Index—difference between and indices expurgata, ii. 113.
Insertion in an, a valuable advertisment for a book, ii. 115.
Lord Campbell's idea that every book should have, ii.
See INDICES EXPURGATA.
Informer—under copyright act of 1831, ii. 238.

Indices expurgata—what were, ii. 113.
In England, ii. 118.
See INDEX.
Infringement of copyright—See PIRACY
Initials—libel expressed in, i. 165.
Injunction—name of, ii. 706.
Will not lie to restrain publication until author paid, ii. 630.
Principles upon which obtainable, ii. 601, 705.
Two sorts of, ii. 705, 708.
Provisional, might do more harm than it was intended to remedy, ii. 708.
Granted, without proof of damage, when work of value, ii. 716.
When denied, ii. 716.
Against publishing a Bible, ii. 705.
See REMEDIES.
Innocence—what is, generally, i. 21 et seq.
Necessary to work, in order to copyright, i. 24.
Test of, when equity is called upon to restrain piracy, i. 24 et seq.
In dramatic compositions, ii. 292.
Discrimination between lawful and unlawful publications in respect to, not a statutory one, i. 22.
Doctrine of, mainly a negative one, i. 23.
Exists only in published works, i. 25.
No property by common law in non-innocent matter, i. 26.
Public libels seditious, i. 26.
Christianity parcel of the law of England, i. 32, 41.
of the United States, i. 41, 45.
Examples of works not, at common law, i. 47, 84.
Works seditiously libelous, i. 57.
obscene, i. 77.
immoral, i. 78, 84.
Distinction between works that harmfully, and those that innocently deceive the public, i. 85, 86.
Libels on public personages, in the nature of seditious libels, are not, i. 86.
Convenience a cardinal principle of the common law, i. 21.
Reasons why this policy of the law appeals particularly to authors, i. 21.
Intention—not necessary to constitute piracy, ii. 665.
How far material in questions of libel, i. 239.
Essential in case of libel on the dead, i. 175.
International copyright—expediency of, ii. 302, *n.*
Project to evade effect of absence of, ii. 369, 370.
Enactments of, ii. 58.
Between Great Britain and the United States, discussed, ii. 62.
Henry Clay's report as to, ii. 65, *n.*
Mr. Morril's, ii. 69, *n.*
See JOINT AUTHORSHIP.
Interrogatories—when court will allow, ii. 703.
"Ipswich—News From,"—prosecution for publishing, ii. 12.
Ironical language—libel by, i. 133.
Innuendo—definition of, i. 134, 135, 136.
Insurance—no custom of trade requiring printers to insure for publishers, ii. 660.
Where there is an express contract for, how terminated, ii. 660.
Companies will not insure author's literary property in manuscripts, ii. 661.
But only as chattels, or relics, or antiques, by special contract, ii. 661.
Ironical language—libel may be conveyed by, ii. 43.
Irreligious work—no copyright in, i. 33, 44.
See INNOCENCE.
Italy—copyright in, ii. 154, 155, 719.

J.

Joint authorship—See AUTHOR.
Project of, to evade international difficulties, ii. 369.

Joint authorship—*Continued.*
Must be in good faith, ii. 93, *n*, 369, 370, *n*.
Joint ownership—of copyright, ii. 631.
Judicial proceedings—See COURTS; CONTEMPT; COMMENTS ON MATTERS OF PUBLIC INTEREST; NEWSPAPER REPORTS.
Jus Tertii—in the people, when may arise, ii. 305.
Jurisdiction—See COURTS.
Jury—question of publication a question for, ii. 700.
Justices of the peace—libels on, i. 149, 151, 152.

K.

Knickerbocker—history of New York, example of innocent deception, i. 186.

L.

Label—See TRADE-MARK.
Labor—author note ntitled to save himself, by borrowing from another, ii. 680.
Laches—of owner of copyright, ii. 698.
Will estop recovery, unless explained, ii. 714.
See DELAY.
Latin Grammar—crown copyright in, ii. 128.
Laureates—See POETS LAUREATE.
Law Reports—crown copyright in, in England, ii. 128.
In the people, ii. 547.
Origin of, ii. 516.
Early records and instances of reports of trials, ii. 519.
Theory of precedents, ii. 525.
Early reports, ii. 527.
Sir Edward Coke's prophecy concerning, ii. 528.
Early appointment of law reporters, i. 528.
Extent and magnitude of legal literature, ii. 530.
Embarrassments and bulkiness of the system, ii. 532.
Report to New York Bar Association, concerning, i. 532, *n*.
How far a reporter may obtain copyright in, ii. 565.
Annotations of legal works—See LEGAL WORKS.
Law suit—at Athens, ii. 519.
At Rome, ii. 521.
Lawyer's bill—libel by, i. 106, *n*.
Not slanderous to say it was kept back, i. 144.
Lectures—copyright in, i. 393, 396; ii. 360.
Legal literature—extent and magnitude of, ii. 530.
Inaccuracies of, ii. 532.
Copyright in, how far belongs to people, ii. 547.
See LAW REPORTS.
Legal reports—See LAW REPORTS.
Legislative bodies—contempt of, i. 293.
Contempt of parliament, i. 293, *et seq*.
Contempt of congress, i. 299, 300, 301.
Power of congress to control reports of its own proceedings, i. 302.
Commitments for contempt by congress, i. 299, 300, 301, 302, *n*
Letter carrier, ii. 515.
See POST OFFICE.
Letters—origin of, ii. 415.
Early instances of, i. 429.
An object of property, i. 443.
A receiver of, has no right to publish them, i. 444.
General and special property therein, i. 445.
Of what control the receiver of, has over them, i. 448.
Rights of the sender, i. 451.
The publishing of private, an offense against public policy, i. 452.

Letters—*Continued.*
Former rule as to literary character of, i. 453.
not entirely abandoned, i. 444, 455–458.
Receiver's property in, discussed, 459–467.
Doctrine of literary accessions applicable to, i. 467.
Joint property in, i. 444.
Material upon which written, i. 453.
Postal card regarded as a, i. 497.
In a post-office are in legal custody of the government, i. 509.
See MANUSCRIPTS; POST-MASTER; POSTAL CARD; POST-OFFICE.
Libel—no copyright in libelous works, see INNOCENCE.
Star-chamber maxim, "the greater the truth, the greater the libel," no longer governing, i. 117, 118.
Variance between words and facts, i. 118, 122.
If material part not proved, i. 122.
What will not justify a—That it is a repetition of a former, i. 123.
True in part and false in part, i. 125, 126.
What is meant by "the truth" of a, i. 128.
Belief in the truth of a, how far a defense, i. 129.
Suspicion, no justification, i. 131.
Mitiori sensu, former policy of the law to construe all words in, i. 132.
Greater or less degree of truth in a, i. 133.
Innuendoes, i. 135.
Malice, i. 138, 140.
Words sounding in disability, i. 141.
Of a lawyer, i. 143.
Attacks upon persons of a particular calling generally, i. 144.
Roman law of, i. 91, 221.
Difference between, and slander, i. 92.
Other forms of language, i. 93.
Difficulties in defining the word, i. 94.
Punishment for, i. 95, 97.
Example of a, being deliberately chosen as a means of promoting public interests, i. 96.
Definitions of, i. 97.
Law of, a positive one, contemplating both civil and criminal remedies, i. 103.
Nothing in nature which cannot be converted into an instrument of mischief, i. 104.
Scandalum magnatum, none in the United States, i. 107.
Tendency of all laws to become complex and unwieldly, i. 108.
An examination of the jus et norma loquendi imposed upon courts in construing the law of, i. 110.
The law regards reputation as capital, i. 112.
General rule as to damage by, i. 113.
By a corporation, i. 203.
Privileged publications, i. 204.
Letter to a superior officer libeling a subordinate, i. 210.
By a mercantile agency, i. 220.
By publishing report of a coroner's inquest, i. 211.
Statements concerning candidates for office, i. 211.
Instances of privileged cases, i. 215.
By advertisement for evidence of the marriage of a certain person, i. 219.
Justification of, i. 221.
Evidence of provocation of, i. 221.
Responsibility of newspapers for, see NEWSPAPERS; COMMENTS ON MATTERS OF PUBLIC INTEREST.
By accident, newspaper liable for, ii. 456.
By inaccuracy in published work, i. 202, 203.
By republication, ii. 511.

Libel—*Continued.*
Printer cannot recover for printing, ii. 656.
Nor shopkeeper price of, ii. 656.
Report of an ungranted petition derogatory to an individual may be, ii. 494.
No relaxation of the law in favor of newspapers, ii. 409, 410.
See CONTEMPT; COMMENTS ON MATTERS OF PUBLIC INTEREST; CRITICISM; LITERARY CRITICISM; LEGISLATIVE BODIES; NEWSPAPERS.
Open and general charges, i. 150.
Charge of a crime, i. 152–157.
Or of an evil disease, i. 153.
Slander by way of joke, i. 163.
By initials, or badly spelled, i. 165.
By asking a question, i. 166.
By pictures, i. 167.
Charge of heartlessness, i. 169.
Court will inform itself of local and other meanings attached to words, i. 170.
Or of analogy, i. 171.
Or by comparison, i. 172.
Preposterous charges when not, i. 173.
On the dead, i. 174.
Publishing obituary notice of one yet alive, i. 175.
On things, i. 176.
Criticism on a literary production, i. 179.
Giving details to a newspaper reporter, i. 182.
Matter received from another, i. 193,
By letter, i. 194.
By postal cards, i. 201, 511.
By theatrical representation, i. 202.
By telegraph, i. 201, 222, *n*.
When will constitute a contempt, i. 249.
When contempt will constitute, i. 249.
See LITERARY CRITICISM.
Librarian of congress—a ministerial officer, ii. 263.
Only copyright officer in the United States, ii. 187, 190.
Duties of, ii. 188, 223, 233, 248.
Fees of, ii. 188, 234.
Salary of, ii. 187.
Must keep record, ii. 233.
Copy of pamphlet issued by, i. 258, *n*.
Libraries—entitled to copies of publications, ii. 231.
Library of congress—statistics of, ii. 258, *n*.
One copy for, ii. 258.
Records of, ii. 264.
Inquiries addressed to, ii. 264.
Matter from district courts filed in, ii. 263, 264.
Library tax—so called, reasons for, ii. 181.
License—to publish, not when assignable, ii. 646.
When contract between author and publisher amounts to, ii. 635.
Licensers of the press—their whole career ridiculous and ineffectual, ii. 122.
History of, ii. 20, 121.
Licensing acts—various, ii. 16, 123, 124, 126, 127.
Lien—of printer for services, ii. 641, 660.
None on stereotype plates, ii. 662.
Limitations—of time within which to bring action—See DELAY.
Of duration of copyright, resaons for, ii. 178.
Napoleon's reasons for, ii. 179.
See DURATION OF COPYRIGHT.
Literary accessions—See ACCESSIONS, LITERARY.
Literary criticism—how far permitted, ii. 441.

Literary Criticism—*Continued.*
Must include comments upon private life of author, ii. 441.
Or attack or ridicule, ii. 444.
His circumstances or character, ii. 444, 446.
Or introduce fictitious incidents, ii. 443.
Must not be unfair or intemperate, ii. 449.
Is matter of opinion and is stated at peril if gratuitous, ii. 451.
Doctrine as to, summed up, ii. 455.
Tradesman's advertisement, hand-bill, or circular, stands upon same footing as a book in relation to, ii. 446.
Literary executor—author may appoint, ii. 96.
To do what, ii. 96.
Literary property—foundation of, i. 1.
Idea of, reconciled, i. 20.
Only valuable to author in so far as he can dispose of it for value, ii. 629.
Courts will take cognizance of difference between, and other property, ii. 627.
Does not exist in a physical substance, ii. 175.
The physical substance necessary, however, to confine the property, so that courts can protect it, i. 75.
Quære, as to whether subject to taxation, i. 184.
Louis XV., decree of, ii. 650.
Literary proprietor—See PROPRIETARY COPYRIGHT.
Lithographs—See PICTURES.
Long Parliament—See PARLIAMENT.
Lottery—what is a legal, i. 505.

M.

Magazine—See PERIODICALS.
Mails—See POST-OFFICE.
Malice—Meaning of, in actions for libel, i. 137, 138, 139, 140.
Scotch law as to, i. 138.
Actual, i. 140.
Legal, i. 140.
Sometimes inferred from falsity, i. 140.
Malicious attempt to marry, i. 106.
Manuscripts—the first tangible form which literary property assumes, i. 381.
Difference between, and a book, i. 381, 383.
Protected in the United States by statute, i. 385.
An author's right to the contents of his, ceases upon his dedication of them to the public, i. 389.
Parting with the manual possession of a, will not be such a dedication, i. 392.
Nor the delivery of its contents by word of mouth, i. 393.
Nor by translation, summary, abridgment, or review, i. 399.
Prior publication by the author himself, in a foreign country or at home, without a copyright, may be a dedication, i. 406.
Sent to newspaper, becomes property of, ii. 511.
Author who has sold his, cannot copyright it in his own name, ii. 632.
Mechanical contrivance used in representing, not protected by copyright of, ii. 221, 224.
Two copies of, need not be filed, ii. 367.
Doctrine of literary accessions applied to, i. 414.
Dramatic, i. 406.
Going through the press is at owner's risk, i. 415.
Purchaser of, for publication may alter, ii. 631.
Maps—copyright in, ii. 190.
Injunction against printing, ii. 711.
Sale of copperplate of, does not carry copyright, ii. 653.
Marriage—loss of, no special damage to man, i. 107, *n.*

Marry—malicious attempt to, ii. 106.
Massachusetts—early act of copyright in, ii. 145.
Matter in chancery—reference to, i. 717, 718.
Medical advertisement—comments upon, ii. 415.
Meetings—reports of public, ii. 437.
See COMMENTS ON MATTERS OF PUBLIC INTEREST.
Mechanic's lien—See LIEN.
Memoirs—published, might be libelous, i. 174.
Memorization—piracy by, ii. 330.
The rule as to, doubted, ii. 330.
Merchants—decree of star-chamber against importing by, ii. 13.
Forbidden to open packages of books, ii. 13.
Method—by which matter is pirated makes no difference as to the piracy, ii. 666, 684.
See PIRACY.
Milton—his Areopagitica, i. 19.
Sale of Paradise Lost, i. 10, *n.*
Copyright to that poem subject of litigation, ii. 672.
Minuteness—of damage, see DAMAGE; QUOTATION.
Models—See CASTS.
Monopoly—copyright is not, ii. 2, 664.
Mother-in-law—incurring ill-will of, a special damage, i. 107, *n.*
Mortgage—of copyright, i. 641.
Moses—first law reporter, ii. 531.
Musical compositions—copyright of, ii. 187, 690.
Piracy of, ii. 690.
Titles of, ii. 393, 691.
Adaption of words to old air, i. 342.
Pianoforte score of an opera, i. 342, *n*; ii. 291.
Gratuitous distribution of copies of, ii. 667.
A peculiarity of piracy of, ii. 689.
No injunction for piracy of, when title is in doubt, ii. 707.
See DRAMATIC COPYRIGHT.
Name—use of another's, with wrongful interest, i. 83.
Copyright in a title, see TITLES.
Piracy of, see TITLES.
List of, more than one—in a directory, ii. 696.
Author's right to enjoin use of his own, ii. 396.
Names of cases, in digest, no copyright in, ii. 583.
Trademark in, of a town, ii. 390.
See INNOCENCE.
Napoleon—libel upon, i. 87.
His reasons for a limitation of copyright, ii. 178.
Newspapers—whether a "book" within the copyright act, ii. 223, 381, 398, 402.
Registration of, not necessary, ii. 223.
Proprietor of, responsible for whatever appears in, ii. 472.
See COMMENTS ON MATTERS OF PUBLIC INTEREST; CRITICISM; LIBEL; CONTEMPT OF COURT; FREEDOM OF THE PRESS.
Action against proprietor of, for article published in, ii. 511.
Origin of, ii. 371.
Earliest English, ii. 372, 376.
Principles of the law of literature, applicable to, ii. 380.
Impracticability of copyrighting each issue, ii. 381.
Tax rules as to quotation from, ii. 382.
Title of, the principal property in, ii. 383.
Their relation to the post-office, i. 490, ii. 499, *n.*
When carried by the mails, ii. 491.
Mail regulations as to, i. 498, 499.
Who is a "regular subscriber," i. 499.
For gratuitous circulation, i. 499.
Penalty for mailing to persons not regular subscribers, i. 499.
Duties of postmaster in such case, i. 500.

Newspapers—*Continued.*
No writing except address allowed on wrappers of, i. 500.
Wrapper must be such as to allow inspection of contents, i. 501.
Allowed to cover bills for subscription, or supplement, i. 501.
Pound rates for, i. 501, 502.
Patent outsides to, i. 502.
Delivery of, i. 502.
Postmaster is judge of which has the largest circulation, ii. 509.
No action against postmaster by proprietor of, ii. 509.
Whether subscription list of, can be seized in execution, ii. 651, *n.*
Property in, passes to assignee in bankruptcy, ii. 644.
Responsibility for negligent statement to persons of whom they are made, ii. 511.
But not to casual readers, ii. 511.
New York—early copyright act of, ii. 145.
Norway—copyright in, ii. 152.
Notice—of copyright, what is a sufficient, ii. 234.
Of copyright of a photograph, ii. 235.
Of map, chart, engraving, statue, &c., ii. 234.
Penalty for fraudulent use of, ii. 235.
Form of, ii. 235.
Must be printed in every copy of book, ii. 234.
Or of every volume of work, ii. 236.
No action for piracy unless inserted, ii. 234.
Obituary—See OBITUARY NOTICE.
Novelty—proof of not necessary to obtain copyright, ii. 705.

O.

Obituary notice—Libel by, i. 174.
Of one yet alive, i. 176.
Not evidence of death of person, ii. 508.
Obscene publications—no copyright in, i. 31, 32, 76.
Jurisdiction of courts to punish for prints, pamphlets, pictures, circulation of, i. 23, 81, 82.
Books, circulars, not permitted in United States mails, i. 96, 508.
Work, no action lies to recover value of, i. 76; ii. 656.
Nor for printing, ii. 656.
See INNOCENCE.
Occasion—when will justify publication, see COMMENTS ON MATTERS OF PUBLIC INTEREST.
Office, profession, or trade—defamation of person in any, see LIBEL.
Opera—piano-forte score, whether infringement of copyright in, i. 342, *n.*
Originality—question of, the last the law will ask, i. 306.
Not without its difficulties, i. 306.
Exists independent of possession or of statutory formalities, i. 306.
Legal, not a popular signification of, must be sought, i. 307.
Dr. Johnson's statement, i. 308.
Homer, Horace, Cicero, and Milton imitators, i. 309
So Shakespeare, Byron, and Tennyson, i. 310.
Legal definition, i. 310.
Who is an author, i. 313.
Analogy drawn from legal reports, i. 315.
Property exists in three kinds of authors, i. 318.
Definition of an author, i. 319.
Of a compiler, i. 319.
Translator, i. 320.
Two great classes of productions, original and secondary, i. 320.
Work of a translator, i. 321.
Who is author under the statute, i. 323.
Must be able to identify his labor, i. 324, 327.
Difference between a compilation and an abridgment, i. 350.

Originality—*Continued.*
Principle applied to cartoons, i. 358.
School and college text-books, i. 358.
Dramatist who borrows incidents, i. 364.
Translations, i. 365.
Doctrine of literary accession, i. 365, 369.
Proprietary copyright, i. 374.
What will constitute a new edition of a book, i. 375.
Subject-matter need not be new, i. 325.
Rule illustrated as to a manual of legal forms, i. 333.
Of a directory, i. 334, 345.
Of a map, i. 334.
Of a guide-book, i. 335.
Rule as to quotation, i. 336.
abridgments, i. 338.
legal abridgments, i. 339.
What will be a proper abridgment, i. 340.
A mere selection is not an abridgment, i. 341, 344.
Of quotations, i. 342.
Of musical productions, i. 342.
Of directories, i. 345.
What use a second compiler may make of the labors of a former, i. 347.
"Outsides" Patent—See PATENT OUTSIDES.

P.

"Patent outsides"—not considered as newspapers, i. 502.
Paintings, drawings and photographs—See PICTURES.
Piracy—engraving of a picture, i. 413.
Exhibition of libelous, i. 147.
Public exhibition of not a dedication to the public, i. 407.
No copyright in immoral, i. 126, 167.
Definition of engraving, ii. 222, 241.
Requisites to copyright in, i. 82.
Works of the old masters, i. 236.
Print, cut, or engraving, penalty for wrongful use of copyrighted, ii. 238.
When equity will protect copyright in, ii. 231.
Libel by, i. 165.
Pantomime—written introduction to, protected as a dramatic composition, ii. 289.
Parliament—long, decree of, ii. 20.
Contempt of, i. 291, 296.
Libel of, i. 292.
Parol—assigment of copyright by, valid if registered, ii. 644.
See CONTEMPT.
Partnership—when author's contract with publisher is a, ii. 635.
Patent—none of an abstract idea,
Analogy drawn from the law, ii. 624.
No. of, i. 370.
No copyright in a picture of a, ii. 254.
Penalties—Action for, ii. 240.
Must be commenced within two years, ii. 242.
For wrongful use of notice of copyright, ii. 238.
For wrongful use of copyrighted musical composition, map, chart, for print, cut, engraving, drawing, model, statuary, ii. 238.
For neglect to deliver copies of copyrighted book, ii. 189, 233.
Recoverable by action of debt, ii. 240.
People—third right of the, in certain cases ii. 305.
of copyrights, ii 305.
of patents, ii. 303.
Copyright in legal reports belongs to, ii. 549, 550, 559, 570.

Performance—See THEATRICAL PERFORMANCE.
Periodicals—See NEWSPAPERS.
Piracy in case of, ii. 694.
Copyright of contributors to, ii. 694, 695.
In England, 684.
Minuteness of damage resulting by quotation from, will disentitle to relief, ii. 716.
Perpetuate and conserve his own works, right of author to, ii. 94.
Petition—report of students to a faculty, may be libelous to print, ii. 494.
Plagiarism—is not piracy, ii. 668, 679.
Photographs—See PICTURES.
Copyright in, ii. 406.
No copyright is libelous, immoral or irreligious, i. 26, 48, 82.
Of the old masters, i. 82.
Of copyrightable matter must be of cabinet size, ii. 233.
Two photographs of same object do not infringe upon each other, ii. 666.
Of copyrighted pictures, ii. 696.
Picture—copyright of, ii. 241.
No copyright in irreligious, immoral, or libelous, i. 26, 48, 82.
Public exhibition of painting not a dedication of it to public,
Process of manufacture not protected by copyright of, ii. 224.
Of a patent, no copyright in, ii. 254.
Publicly exhibited—comments on, protected, ii. 448.
Of copyrighted picture of engraving, ii. 696.
See PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.
Piracy—colorable imitation, ii. 240.
Definition of, ii. 664, 666.
Question of, involves the question of originality, i. 379.
May be gratuitous, ii. 345, 347.
None, where there is no copyright, ii. 679.
By amateur theatrical performances, ii. 347.
Translation, not a, ii. 240.
Whether animus furandi is necessary to, ii. 665, 666.
What is a copy, ii. 241.
Each act of printing is a, ii. 240.
Action for, ii. 240.
Work infringing in part only, ii. 240.
Dramatist who borrows incidents, i. 364.
None in bona fide abridgment, i. 840.
What use second compiler may make of labors of former, i. 347.
On the case of legal reports, ii.
By quotation or extracts, ii. 668, 684, 685, 686, 687.
Intention not necessary to constitute, i. 684.
Where damage is minute no action for, ii.
Plagiarism is not, ii. 668, 679.
By member of philharmonic society, ii. 667.
Of "Whole Duty of Man," action for, ii. 671.
In reviewing books, ii. 685.
The damage, or of the animus furandi, not the quantity of matter used—the question as to, ii. 679, 680.
What is fair use of preceding labors, ii. 680.
Author is not entitled to save himself labor by use of another's, ii. 680, 681.
Place from which pirated matter is procured, makes no difference, ii. 684.
In action for definite publication should be shown, ii. 702.
Averments necessary on actions for, see PLEADING.
What will constitute a, a question of fact for the jury, ii. 700.
But court must instruct jury as to law of, ii. 700.
See REMEDIES FOR PIRACY.
Place—from which pirated matter obtained, ii. 648.

Plates—addition of, to a work will not divest copyright, ii. 684.
Plea—special, to deny copyright, ii. 701.
Pleading—in actions for piracy, ii. 698.
Political Extracts—book of, may infringe copyright, ii. 688.
Plan—or system, no copyright in a, apart from the work itself, ii. 216.
Poets Laureate—appointment of, ii. 621.
Poland—"gag law," discussion of, ii. 499, 500.
Posthumous work—copyright of, ii. 710.
Postage—must be paid on copyright matter ii. 188.
Postal card—what is a, i. 497.
Treated as sealed letters, i, 497.
Not sent to dead letter office, i. 497.
Must be written upon one side only, i. 497.
Scurrilous or indecent, not allowed in the mails, i. 497, 498.
Bill of indebtedness may be written upon, i. 497.
Libel by, i. 510, 511, *n.*
Communications upon, may be written or printed, i. 497.
Postmasters may read, i. 497.
But must not disclose contents of, i. 497, 498.
Used a second time, must pay letter postage, i. 498.
Postmaster—who suspects wrongful use of his department, i. 499.
May read postal cards, i. 497.
May retain non-mailable matter, i. 505.
Not responsible to individuals for his own, or his deputies' default, i. 505, 508.
Deputies of, responsible, i. 508.
Only judge of newspaper circulation, i. 509.
When must give receipt for copyright matter, ii. 264.
Post-office—its origin, i. 470.
In modern times, i. 480.
In England, i. 481.
In the colonies, i. 484.
Under the Confederacy, i. 484.
Under Washington, i. 485.
Present regulations of, i. 487.
A part of the government, and not privately liable to individuals, i, 508.
Doctrine of innocence as applied to, i. 510.
Schemes of illegal lotteries not allowed in, ii. 505.
See LETTERS; NEWSPAPERS; POSTAL CARD; POSTMASTER.
Prayer-Book—crown copyright in, in England, ii. 128.
Matter spoken in derogation of, i. 35, *n.*
Press—freedom of the statement of the, i. 257; ii. 512.
See COMMENTS ON MATTERS OF PUBLIC INTEREST; CONTEMPT OF COURT; NEWSPAPERS.
Price—of a book regulated by act of Anne, ii. 135.
When published, may fix, ii. 634, 635.
Price current—not a book, ii. 223.
Primers—decree of star chamber against selling, ii. 13
Printer—lien of, ii. 256.
No action for cost of printing obscene or libelous matter, ii. 656.
Cannot recover for work until done, ii. 663.
No lien on stereotype plates not manufactured by him, ii. 662.
See LIEN.
Printing—every act of, may be a piracy, ii. 240.
Invention of, ii. 429, *n.*
Precipitated the necessity of copyright statutes, ii. 6.
Decree of star chamber against, ii. 13.
Prints—See PICTURES.
Privileged Publication—See COMMENTS ON MATTERS OF PUBLIC INTEREST; CONTEMPT OF COURT; NEWSPAPERS.
Justified by the occasion, i. 204, 214; ii. 433.
Absolute or qualified, i. 205, 207; ii. 433

Privileged publication—*Continued.*
Examples of what are and are not, i. 205, 215, 221.
To vindicate character of a writer, ii. 435.
Property—copyright is, and not monopoly, ii. 2.
Proprietary copyright—what is, i. 374.
Proprietor—of a work not original and not purchased, i. 367.
Of a newspaper, liable for what appears therein, ii. 472.
See ACCESSIONS; NEWSPAPERS.
Provisions—certain of, in copyright law, directory and not mandatory, ii. 110.
Prussia—copyright in, ii. 161.
Public—libel of the, seditious, i. 26.
Publication—private circulation among friends is not, i. 413.
A definite, should be shown, ii. 702.
When will amount to dedication, i. 413.
Publisher—must assign contract to publish upon original terms, ii. 640.
May sell stereotype plates, purchaser to account, ii. 640.
Of newspapers—See NEWSPAPERS.
Of libel, who is liable as, i. 180, 214.
See LIBEL.

Q.

Quotation—piracy by, ii. 648, 685, 686.
In reviewing books, ii. 685.
Intention to pirate, ii. 680, 684.
What is a fair, i. 342; ii. 680.
No remedy for where damage is minute, ii. 716.

R.

Reader—public, ii. 347.
Receipt—evidence of intent to assign copyright, ii. 642.
Form of postmasters', for copyright matter, ii. 262, *n.*
Record—of copyright, must be accurate, ii. 236, 237.
Strict English rule as to, ii. 236.
Re-entry—of copyright, when necessary, ii. 190.
Religion—publications against, i. 32, 58.
See BLASPHEMY.
Religious opinion—in action for libel, no justification by showing, i. 221.
Remedies for piracy—distinction between, and suit for penalty, ii. 240.
By writ of injunction, ii. 706.
Two sorts of injunction, ii. 706.
Not granted where title is in doubt, ii. 707.
Injunction when granted without proof of damage, ii. 716.
When preliminary or provisional injunction will be granted, ii. 708.
None where damage is too minute, ii. 716.
Parties to the suit for, ii. 710.
Reference to a master for comparison, ii. 717.
for report, ii. 717.
Right to an account, ii. 714.
Extent of injunction, ii. 710.
Sometimes refused although court acknowledges the right, ii. 713.
Nothing will call a court of equity into activity by conscience, good faith, and personal diligence, ii. 711.
When portion of volume pirated,
When injunction will be denied, ii. 716.
Renewal of copyright—claim under, involves validity of original entry, ii. 230.
Reporter—law-, has no copyright in opinions of judges, ii 565.

Reporter—*Continued.*
But may have in resumes, annotations, or indices prepared by them, ii. 565.
Unless done while in employ of the public, ii. 569.
Reporting—law, origin of, ii. 517.
Disadvantages of present system, ii. 532.
Reports—of decisions of courts of justice—See LAW REPORTS.
Newspaper—See COMMENTS ON MATTERS OF PUBLIC INTEREST; NEWSPAPERS.
Legal, are evidence of what is law, ii. 525.
See CONTEMPT OF COURT.
Representation—See THEATRICAL PERFORMANCES.
Reputation—under protection of the law, i. 113, 114.
A man's is his capital, i. 112, 113.
Resident—Who is a, ii. 191.
When entitled to copyright—See ALIEN; CITIZEN.
English rule as to, ii. 201.
Review—invention of, ii. 372.
Quotation in, not piracy, ii. 685.
Literary works—See LITERARY CRITICISM.
Romantic works—borrowing incidents from, for drama, i. 364.
Rowlie poems—examples of innocent deception, i. 86.
Rumors—rules as to dramatization of, ii. 321, 322.
Libel by newspaper publication of, i. 458.
See COMMENTS ON MATTERS OF PUBLIC INTEREST.
Publication of false, by individuals, ii. 459.
Russia—copyright in, ii. 149.

S.

Sale—of physical substance will not carry copyright, ii. 653.
Saxony—copyright in, ii. 154.
Score—pianoforte, of an opera protected, i. 132, *n*; ii. 291.
Sardinia—copyright in, ii. 154.
Satire—difference between libel and, i. 93, 94.
Seditious publication—in the United States. i. 76.
Libel of congress indictable, i. 76.
See INNOCENCE.
Seizure—of manuscript on execution conveys no right to publish it,
Selections—from standard works, when might be obscene, i. 82.
Shakespeare—reason why no authoritative text of, exists, ii. 3.
Ship masters—Star-chamber decree concerning, ii. 13.
Shopkeepers—cannot recover price of immoral prints, ii. 656.
Similar publication—what is, see TITLES.
Slander—definition of, i. 91.
Specific performance—when not decreed in case of literary contracts, ii. 352, 626.
In case of actors, ii. 353.
Stamps—mutilated currency not receivable for postage, i. 496.
Star chamber—origin of, ii. 9.
Origin of statutes of copyright in, ii. 8.
Décrees of, against printing, ii. 12, 13, 17, 25.
Commitments and prosecutions by, i. 12.
Decree of, against certain trades, ii. 13.
abolition of, i. 17.
Stationers' company—organization of, ii. 14.
Career of, ii. 14, 15.
Fac similie of record of, ii. 20
Statute of frauds—application of, to literary contracts, ii. 633, 703.
Statutes—of copyright, ii. 134, 267.
See APPENDIX.

Statutes—*Continued.*
In America, i. 182.
Power of congress to pass, ii. 183.
An analysis of American, i. 187, 267.
English, French and German—See APPENDIX.
In various states and countries—See the names of those countries.
Stereotype plates—when printer has no lien on, ii. 662.
Subject-matter—of a work, not copyrightable, i. 328 ; ii. 219.
Supplement—can be inclosed in newspaper, i. 501.
Sweden—copyright in, ii. 152.

T.

Tax—library, ii. 181.
Telegraph—libel by, i. 201, 222 *n*.
Doctrine of innocence applied to, i. 571.
Term—of copyright in various countries, see those countries.
Thompson's seasons—piracy of, ii. 170.
Theatrical performances—early instances of, ii. 267.
Suppression of, in England, ii. 274.
Amateur piracy by, ii. 345.
Right to criticise, ii. 439. 441.
Immoral, not protected, i. 31.
Place of, in England, ii. 367.
Who are liable for illegal, ii. 349, 352.
What is, a question for jury, ii. 351.
Tinker—a rogue by statute, i. 115.
Title—slander of, i. 177.
No such thing as libel of, i. 177.
Title-page—must be deposited in mail or delivered, ii. 230, 232.
Rule of equity, as to, ii. 389.
Must be printed, ii. 230.
No particular form of, or style of type required, ii. 261.
Change in words of description do not invalidate, ii. 262, 326.
Deposit of, in France by American, ii. 205.
Titles—When copyrightable, ii. 219.
As to delay in producing subject of the, ii. 386.
Of newspapers, ii. 232, 383.
Of dramatic works, ii. 305, 308.
Question of good faith as to, ii. 314.
When considered as trademarks, ii. 386.
Right to, is a chattel interest, ii. 387.
Protection of, ii. 384.
Piracy of, ii. 691.
Similar publication as to, ii. 388.
To long use of, ii. 390.
Prospective use of, ii. 391.
Separated from subject of, ii. 394, 395.
Trade—slander or libel of one's, i. 144.
Trademarks—of articles, ii. 249.
When titles so considered, ii. 386.
Now recordable in patent office, ii. 252.
Trades—immoral not protected, i. 31.
Transfer of copyright—SEE CONTRACTS.
Translator—is an author, i. 319.
Translation—reservation of right to, ii. 223.
Original works, i. 365.
Piracy by, ii. 366.
Trial—of Jesus, ii. 521.
Of St. Paul, ii. 521.
Truth—of libel a defense to action, i. 113, 135.
Greater or less degree of, i. 133.

Type—no particular form of required for deposited title-page, ii. 261.
Type founders—decree of star chamber against, ii. 261.

U.

Unchastity—imputation of, to a woman, i. 107.
Universities—entitled to works in Great Britain, ii. 736.
Unknown author—See AUTHOR.
Unpublished works—See MANUSCRIPTS.

V.

Variation—in form of title-page, must be a new copyright for every, ii. 261.
Virginia—early act of copyright in, ii. 145.
Volume—each should be separately copyrighted, ii. 223.

W.

Washington—piracy of letters of, i. 446.
Warranty—on sale of copyright, ii. 641.
Widow—of author, ii. 227.
Wife—of author—See WIDOW.
Will—libel by, i. 106, *n*.
Witchcraft—charge of, formerly libelous, i. 167.
Words—See LIBEL.
Work—right to dramatize, how assigned, ii. 648.
Writing—is an act, i. 105.

TABLE OF CASES CITED.

Abernethy v. Hutchinson, i. 394.
Ackerman v. Jones, i. 31 ; ii. 459.
Abrams v. Smith, i. 124, 170.
Adshire v. Cline, i. 124, 158, 203.
Adecock v. Marsh, i. 159.
Adlard v. Booth, ii. 641, 661, 663.
Allerton v. Moore, i. 152.
Aldearman v. French, i. 407.
Albert (Prince) v. Strange, i. 16, 19, 328, 399, 413 ; ii. 665, 684.
Alexander v. Hard, ii. 542.
v. Mackenzie, i. 332, 344 ; ii. 681–682.
Alexander v. Northwestern Railway Co., i. 294.
Alfred v. Farlow, i. 155.
Allensworth v. Coleman, i. 165.
Alois v. Kohler. ii. 197.
Alsop v. Alsop, i. 116, 138.
Amann v. Damm, i. 174.
Anderson v. Dunn, i. 300, 301.
Anon v. Eaton, i. 558.
Anson v. Stuart, i. 117.
Andres v. Wells, ii. 195, 496.
Andrews v. N. Y. Bible Society, i. 44, 46.
Andrews v. Chapman, i. 288 ; ii. 478, 490.
Andrews v. Van Deuzer, i. 117, 119.
Appleton v. Heine, i. 370.
Archbold v. Sweet i. 415 ; ii. 631.
Arrington v. Jones, i. 57.
Arion v. Smith, i. 145.
Ashlyn v. Billington, i. 170.
Ashworth v. Kittredge, ii 511.
Astley v. Younge, i. 206 ; ii. 482.
Aslop v. Aslop, i. 132.
Aston v. Blagrave, i. 149, 151.
Atcherley v. Vernon, ii. 644.
Atkins' Case, ii. 129, 567.
Atkinson v. Bell, ii. 594.
v. Hartley, i. 171.
Attorney v. Pierson, i. 46.
Atwill v. Ferrett, i. 320, 332 ; ii. 238, 240, 565, 594.
Atwood's Case,
Atwood v. Small, ii. 590.
Audenreid v. Belletey, ii. 588.
Aurman v. Veal, i. 171.
Austen v. Cullpeper, i. 104, 167, 168.
Austin v. Hanchett, i. 124.
Ayre v. Craven, i. 159.

B.

Babonneau v. Farrell, i. 115. 142, 186.
Bach v. Longman, ii. 402.
Backus v. Gould, ii. 241.
Backiss v. Richard, i. 132.
Baker v. Hart, i. 289.
v. Taylor, ii. 231, 237, 238.
Bailey v. Taylor, i. 317, 326 ; ii. 231, 714.
Baker v. Pierce, i. 111, 155, 171.
Banker v. Caldwell, i. 326 ; ii. 651, 652.
Bank of Virginia v. Groves, ii. 587.
Bankes v. Allen, i. 145, 158.
Barbour v. Archer, ii. 510.
Barfield v. Keily, ii. 599.

Barfield v. Nicholson, i. 397; ii. 615, 695.
Barrows v. Carpenter, i. 121.
Barnes v. McCrate, ii. 482.
Barnett v. Allen, i. 145, 158.
Barrett v. Jarvis, i. 171.
Bartlett v. Crittenden, i. 415, 416, 448; ii. 175, 334, 360.
Basket v. Cunningham, ii. 567, 568.
v. University of Cambridge, ii. 471, 567, 672.
Bartholomew, W. N., ii. 196, 197.
Bash v. Sommer, i. 132, 133, 172.
Bathurst v. Coxe, i. 305.
v. Kearsley, ii. 562, 563.
Bayliss v. Lawrence, i. 102, 138.
Bayley v. Promays, i. 138.
Bayard v. Passmore, i. 249, 262. 284, 285.
Beach v. Bay State, ii. 541.
Beardsley v. Tappan, i. 170, 210, 211.
v. Dibblee, i. 171.
Beatson v. Skene, ii. 417.
Beamont v. Hastings, i. 152.
Beardsley v. Bridgman, i. 159.
Becket v. Donaldson, ii. 173.
Beebe v. De Baun, ii. 510.
Bedford v. Charity, i. 46.
v. Powell, i. 116.
Beggs v. Great Eastern R. R. Co., i. 118.
Behrens v. Allen, ii. 426.
Bell v. Whitehead, ii. 615.
Bellamy v. Burch, i. 114.
Bell v. Locke, ii. 388, 389.
v. Walker, i. 339, 350.
v. Whitehead, i. 337; ii. 716.
Bendish v. Lindsay, i. 156.
Benn v. Cheeney, ii. 390, 394.
Bennett v. Bennett, i. 124.
Benn v. LeClerc, ii. 316.
Bennett v. Deacon, i. 216.
v. Fry, 451.
v. Mathans, i. 214.
v. Williams, i. 132.
Berns v. McCoyle, i. 126.
Bentley v. Foster, ii. 197.
Benting v. Bratt, i. 175.
Berghs' case, i. 31, 147.
Beardsley v. Bridgman, i. 159.
Bedford v. Charity, i. 46.
Bissky v. Shaw, i. 117, 133.
Bill v. Neal, i. 141, 148, 154.
Billing v. Russel, i. 210.
Benney v. Canal Co., ii. 595.
Birch v. Walsh, i. 284.
Binns v. Woodruff, i. 374; ii. 112.
Birchley's Case, i. 150.
Bissel v. Conell, i. 170.
Bishop v. Latimer, ii. 491.
Black v. Murray, i. 375; ii. 637.
v. Stevens, i. 120.
Blackstone v. Justice, ii. 7.
Blackwood v. Brewster, ii. 637.
Blake v. Nicholson, ii. 641, 661, 662.
v. Stevens, ii. 490.
Blakie v. Aikman, ii. 630.
Bleadon v. Hancock, ii. 641, 662, 663.
Blenerhassett v. Raspoole, i. 152.
Blinkenstaff v. Perrin, i. 159.
Bloodworth v. Gray, i. 102, 158, 160.
Bloss v. Topey, i. 171.
Bloomer v. McQuewan, ii. 185.
v. Stolley, ii. 185.
Blunt v. Patten, i. 344; ii. 3, 222.
Bodwell v. Swan, i. 118.
Bogardus v. Trinity Church, ii. 510.
Boyne v. Houlston, ii. 691.
Bohn v. Bogue, ii. 646, 685, 686, 710.
Bolton v. Dean, i. 168.
Booth v. Leach, i. 110.
Boosey v. Davidson, ii. 197, 199, 701, 703.
Boosey v. Purday, ii. 197, 199.
Bostwick v. Bogardus, ii. 510.
Boucicault v. Delafield, i. 409; ii. 197, 296.
Boucicault v. Fox, ii. 345.
v. Hart, ii. 322.
v. Wood, ii. 287, 297, 345, 349, 364.
Boucicault v. Woods, ii. 510.
Boydell v. Drummond, ii. 633.
v. Jones, i. 115, 135.
Boynton v. Remington, ii. 428.
Brace v. Wehnert, ii. 624.
Bracebridge v. Watson, i. 107.

Boys v. Boys, i. 160.
Bracigirdle v. Orford, i. 105.
Bradbury v. Dickens, ii. 388.
v. Hotton, i. 355, 357.
Bramwell v. Halcomb, i. 337 ; ii. 613, 614, 617, 700.
Brand v. Brand, ii. 538.
Brandreth v. Lance, i. 460.
Brandt v. Towsley, i. 116, 117.
Breage v. Sarls, i. 108.
Bryant v. Foxton, i. 115.
Brellesworth v. Robinson, i. 339.
Brewer v. Day, i. 115.
Bridson v. Benecke, ii. 714.
Briggs' Case, i. 155.
Brittridge's Case, i. 170.
Broomage v. Prosser, i. 213 ; ii. 426.
Bronson's Case, i. 31.
Brook v. Evans, i. 265.
Brooke v. Chitty, ii. 625.
v. Wentworth, ii. 629.
Brooker v. Coffin, i. 159, 187.
Brooks v. Bryan, i. 124.
v. Blanchard, i. 216.
Brown v. Cooke, ii. 696.
v. Croome, i. 218.
v. Mims, i. 115.
v. Smith, i. 146.
Bryant v. Laxton, i. 142, 186.
v. Jackson, i. 164.
Buckley v. Kierman, i. 206.
Buddington v. Davis, ii. 451.
Buel, Re, ii. 501.
Burdett v. Abott, i. 301.
Burton v. Tokin, i. 159.
Burdett v. Cobett, i. 186.
Burgher v. Columbia Fire Ins. Co., ii. 543.
Bunns v. Webb, i. 117.
Burnett v. Chetwood, i. 29, 30.
Bush v. Brosset, i. 183, 184.
Butterworth v. Robinson, ii. 564.
Butterfield v. Buffam, i. 136.
Button v. Haward, i. 133, 136, 154.
Buxton v. James, ii. 714.
Byron (Lord) v. Johnston, i. 84 ; ii. 396.
Byson v. Elmer, i. 159.

C.

Cadell v. Stewart, i. 457.
v. Robertson, ii. 172.
Cæsar v. Curreny, i. 150.
Caincross v. Lorimer, ii. 601.
Calkins v. Sumner, ii. 482.
Calvin's Case, ii. 197, 198.
Camp v. Martin, i. 148.
Campbell v. Fleming, ii. 590.
v. Scott, i. 342 ; ii. 611, 689.
v. Spottiswoode, i. 118, 125, 129 ; ii. 410, 412, 415, 417, 418, 419, 496.
Canahan v. Jones, ii. 252.
Canfield v. Squire, ii. 510.
Cardigan, Earl of, Re, ii. 564.
Case's Case, i. 30.
Carey v. Collier, i. 190, 191.
v. Kearsley, ii. 613.
Carell v. White, i. 136, 148.
Carnan v. Bowles, i. 344 ; ii. 348, 616, 689.
Carman v. Ledbetter, ii. 348.
Carpenter v. Tarrant, i. 155.
v. Dennis, i. 114.
Carr v. William S., ii. 308.
v. Ducket, i. 178.
v. Hood, i. 182 ; ii. 441.
Carslake v. Mapledorum, i. 153.
Carter v. Andrews, i. 151.
v. State, ii. 511.
Cary v. Grant, ii. 538.
v. Faden, i. 330 ; ii. 613, 617.
v. Kearsley, ii. 680, 685, 687.
v. Longman, i. 344 ; ii. 594, 652.
Castle v. Ballard, ii. 607.
Cathercole's Case, i. 166.
Calt v. Towle, ii. 625.
Cavel v. Birket, i. 159.
Cawdry v. Highly, i. 48
v. Tutly, i. 144.
Ceeley v. Hoskins, i. 110.
Challercomb's Case, i. 50.
Chalmers v. Payne, i. 139.
v. Shackell, i. 122, 125.
Chamberlain's Case, i. 201.
Chambers v. Payne, i. 288 ; ii. 492.
Chapman v. Lamshire, i. 146.

Chapman v. Pickersgill, i. 104.
Chappell v. Davidson, ii. 691, 693.
v. Purday, i. 197, 198; ii. 646, 710.
Charlotte v. Chouteau, ii. 510.
Charlton v Watton, ii. 468.
Charton's (Lechmere) Case, i. 245, 259.
Charnel's Case, i. 153.
Cheese v. Scales, i. 168.
Chase v. Sanborn, ii. 570.
Chiment v. Chivis, i. 168.
Chetwind v. Marton, i. 151.
Child v. Affleck, i. 216.
Chipman v. Cook, i 115, 151.
Christie v. Powell, i. 110, 153, 170.
Chubb v. Flanagan, ii. 657.
v. Westley, i. 186.
Churchill v. Hunt, i. 160, 169.
Cincinnati, &c. Co. v. Timberlake, i. 288.
Clark v. Bonsfield, ii. 196.
v. Holdridge, ii. 538.
v. Mayor, &c., ii. 544.
v. Southwick, ii. 600, 602.
Clarke, Re, ii. 505.
v. Bishop, ii. 291.
v. Freeman, i. 29.
v. Price, ii. 624.
v. Osborne, ii. 308.
v. Spence, ii. 594.
v. Taylor, i. 121, 123.
Clarkson v. Lawson, i. 120, 123.
Classon v. Bailey, i. 104.
Clarkson v. McCarty, i. 124.
Clay v. Gates, ii. 658.
v. Roberts, i. 148.
v. Yates, ii. 641, 660.
Clayton v. Stone, i. 4, 173, 222, 223; ii. 173, 222, 223, 381, 383, 387, 398.
Cleaver v. Senande, i. 216.
Clement v. Chivis, i. 160.
v. Madick, ii. 666, 692.
Clementi v. Goulding, ii. 292.
v. Walker, i. 412; ii. 197, 642.
Cleveland v. Barrows, ii. 538.
Cliquots v. Champagne, ii. 510.
Cluseret, Matter of, ii. 633.
Clutterbuck v. Chaffers, i. 201.
Coachraine v. Butterfield, i. 203.
Cobbett v. Woodward, ii. 696.
Coburn v. Whiting, ii. 451.
Cockaine's (Lady) Case, i. 152.
Cockaine v. Hopkins, i. 115, 216.
Cockayne v. Hodkisson, i. 118.
Cocks v. Purday, i. 370, 412; ii. 197, 198.
Caffeen v. Brunton, ii. 221.
Coddy v. Barlow, i. 184.
Colburn v. Duncombe, ii. 594, 598, 710.
Colby v. Duncombe, ii. 601.
Cole v. Fisher, i. 104.
Coleman v. Fraizer, i. 508.
Coles v. Haviland, i. 164.
Coleman v. Goodwin, i. 152.
v. Matthews, ii. 286.
v. Wathen, i. 16, 450; ii. 329, 344, 358, 678, 700.
Coleman v. West, i. 263.
Collender v. Griffith, ii. 196, 254, 255, 696.
Collender, W. H., ii. 197.
Cook v. Ward, ii. 506.
Collinson v. Lister, ii. 659.
Commonwealth v. Clapp, ii. 100, 211.
v. Blanding, i. 199, 507.
Commonwealth v. Kneeland, ii. 472, 495.
Commonwealth v. Knowlton, ii. 143.
v. Landis, ii. 664.
v. Odell, i. 213, 214.
v. Robinson, ii. 510.
v. Runnels, i. 165.
Comstock v. Buckannan, ii. 538.
Cornelius v. Van Slyck, i. 164, 166.
Constable v. Brewster, i. 326, 358; ii. 387.
Cook v. Barkley, i. 124.
v. Ward, i. 124, 158.
Cooke v. Tribune, i. 121.
v. Wilder, i. 182, 212.
Cooper v. Barbour, ii. 511.
v. Barber, i. 121.
v. Greeley, i. 100, 163.
v. Lawson, ii. 452, 480, 488.
v. Perry, i. 170.
v. Stone, ii. 449, 451.

Cornish v. Upton, i. 347.
Correspondent Newspaper Co. v. Saunders, ii. 348, 384, 386.
Cotes v. Michill, i. 299.
Cots v. Gilbert, i. 132.
Cowan v. Milbourn, i. 38, 53.
Cowen v. Banks, ii. 228.
Cowles v. Potts, i. 207, 212.
Cox v. Bunger, i. 159.
v. Cooper, i. 214.
v. Cox, i. 414, 415; ii. 630, 631.
v. Feeney, ii. 420.
v. Land & Water Journal Company, ii. 402, 683, 716.
Cox v. Lee, i. 147, 169.
Coxhead v. Richards, i. 14.
Crain v. Cavana, ii. 541.
Cramer v. Riggs, i. 150.
Crane v. Dougless, i. 124.
Crandel v. Walden, i. 116.
Crane v. Juson, ii. 196.
v. Walker, i. 510.
Crawford's Case, i. 260.
Crawford v. Middleton, i. 123.
Creevy v. Carr, i. 129.
Croft v. Stevens, i. 207.
Cropp v. Tilney, i. 162, 167.
Crossley v. Derby Gaslight Company, ii. 714.
Crossman v. Bradley, ii. 538.
Crowe v. Aiken, i. 469; ii. 286, 295, 343, 363.
Croix v. Thevenot, i. 174.
Crutwell v. Lye, ii. 388, 389.
Cumberland v. Copeland, ii. 642.
v. Blanche, ii. 648.
Cummerford v. McAvoy, i. 124.
Cunningham v. Brown, ii. 482.
v. Fonblanque, ii. 641.
Curry v. Walter, ii. 475, 481, 484, 489.
Curtis v. Mussey, i. 495.
Cuthercole's Case, i. 133.
Curtis v. Curtis, i. 106, 154.
v. Murray, i. 211; ii. 472.
Cutler v. Friend, i. 171.

D.

Dabol's Case, ii. 233.
Daines v. Hartley, i. 152.
Da Costa v. Paz, i. 46.
Dailey v. Reynolds, i. 154.
Dale v. Lyons, i. 203.
D'Almaine v. Boosey, i. 197, 290, 291.
Daly v. Hooley, ii. 314.
v. Palmer, ii. 221, 296, 322, 354.
v. Smith, ii. 336, 353, 625.
Damport v. Sympson, ii. 482.
Dan v. Elsy, i. 254.
Darby v. Ousley, i. 102, 129, 130, 138, 221.
Darry v. People, i. 140, 141.
Darcy v. Muskhams, i. 187, 203.
Darvy v. Markham, i. 141.
Davidson v. Bohn, ii. 642, 644.
David v. Davis, i. 115.
Davidson v. Isham, i. 104.
Davis v. Lewis, i. 123, 146.
Davis v. Miller, i. 115.
Davison v. Duncan, ii. 410, 467, 496.
Davis v. Gardner, i. 159.
Davison, Ex parte, i. 225.
Davis v. Peabody, ii. 542.
Day v. Buller, i. 143, 144.
v. Hemming, ii. 660.
v. Robinson, i. 169.
v. Saunders, ii. 544.
Dawkins v. Paulett, i. 207.
De Crespigny v. Wellesley, i. 182, 193.
Delaware v. Pawlet, i. 152.
Delegal v. Highley, ii. 513.
Delany v. Jones, i. 133, 166.
Delondre v. Shaw, i. 197.
Demarest v. Haring, i. 116, 133, 136.
Denis v. Leclerc, i. 443, 458.
Denn v. Pond, ii. 510.
De Penna v. Polhill, ii. 292, 642.
De Witt v. Brooks, i. 320, 332.
v. Palmer, i. 450.
Dibdin v. Swan, ii. 439, 451.
Dicar v. Lawson, ii. 427.
Diar v. Short, i. 136.
Dickens v. Lee, i. 339, 355; ii. 711.
Dickson (Earl of) v. Wilton, i. 292
Digby v. Thompson, i. 102, 169.
Dilby v. Doig, ii. 710.
Dimmock v. Fawsett, i. 170.

Dixon v. Holder, i. 113.
Dickinson v. Barber, i. 184.
Douge v. Pearce, i. 117.
Dobson v. Thornistone, i. 146.
Dorland v. Patterson, i. 135, 170.
Dob v. Rensseliar, i. 170.
Dodsley v. Kinnersley, i. 308, 337, 355; ii. 609, 687.
Dodsley v. McFargular, i. 457.
Dolloway v. Turrell, i. 131, 212.
Donaldson v. Becket, i. 3, 4; ii. 171.
v. Mississippi, &c. R. R. Co., ii. 510.
Dossey v. Whipps, i. 135.
Donohue v. Hayes, i. 163.
Doolittle, B. T., ii. 197.
Dorecote v. Dorecote, ii. 482.
Douglass, Matter of, ii. 541.
Dowd v. Malony, i. 182.
Dox v. Postmaster, i. 508.
Dole v. Lyon, i. 124.
Doyle v. O'Doherty, i. 206.
Drake v. Drake, i. 363.
Du Bost v. Beresford, i. 26, 29, 82, 102, 164, 167, 463.
Dudley v. Mayhew, i. 4, 173; ii. 173.
Duncan v. Brown, i. 129, 136.
v. Thwaites, ii. 484.
Duncombe v. Daniel, i. 218.
v. Lowndes, i. 232.
Dunlap v. Gladding. ii. 482.
Dunlop v. Munroe, i. 508.
Dunman v. Begg, i. 216; ii. 419.
Dunn v. Hall, ii. 472, 495.
Dutton v. Slowman, i. 399.
Dwight v. Appleton, 232, 233, 236, 240, 241, 596.
Dyer v. Morris, i. 145, 169.

E.

Eagleton v. Duchess, i. 247.
Eastwood v. Holmes, ii. 418, 437.
v. Quinn, i. 124.
Earl Northampton's Case, i. 166.
Eastland v. Galdwell, i. 118.
Eastlake of Mapledoran, i. 160.
Edgar v. McCuthen, i. 173.
Eden v. Legare, i. 171.
Edmond's Case, i. 260.
Edmondson v. Stevenson, i. 216; ii 419.
Edsall v. Russell, i. 148.
v. Brooks, i. 288.
Edwards v. Bell, i. 116.
v. Chapman, ii. 587.
Egan, Matter of, ii. 538.
Eicolt v. Bannister, ii. 601.
Egerton v. Brownlow, i. 121.
Elam v. Badger, i. 173.
Else v. Evanse, i. 117.
Eliot v. Ailsburg, i. 159.
Emerson v. Davies, i. 325, 326, 336, 344, 358, 367; ii. 322, 608, 679.
Emery v. Miller, i. 110.
Erie & Susquehanna suit, ii. 538.
Evans v. Harlow, i. 175.
Ewer v. Cox, i. 232, 595.
Executors v. Holcombe, i. 352.
Eyre v. Carnan, ii. 130, 215, 567.
v. Higbee, i. 446, 458.
v. Walker, ii. 671

F.

Faden v. Stockdale, ii. 711.
v. Fairchild, ii. 197.
Fairman v. Ives, i. 208.
Fallenstein v. Booth, i. 133, 136.
Farina v. Silverlock, ii. 251, 601.
Farley's Case, i. 256, 291.
Farnham v. Mallory, ii. 538.
Farnam v. United States, i. 509.
Fann v. Malconson, i. 165, 166.
Fenn v. Dixe, i. 58, 157, 161, 173.
Felkin v. Herbert, i. 252.
Fendin v. Westacre, i. 220.
Fenno, R. E., ii. 196.
Ferren v. O'Hara, ii. 545.
Fero v. Buscoe, i. 121, 187.
Fidman v. Ainslie, i. 124.
Finden v. Westlake, i. 494.
Finnegan v. Carahan, ii. 538.
Finnerty v. Tipper, i. 221; ii. 504.
Fitzgerald v. Burrill, i. 508, 509.
First Bap. Ch. v. Sch. R. R. Co., i. 104.
Fisher v. Clement, i. 104, 108, 133.

Fisher v. Clement, i. 102, 104.
Rex v., ii. 477, 478.
Fitzgerald v. Burrill, i. 508, 509.
Flagg v. Mann, ii. 588.
Fletcher v. Morey, ii. 601, 602.
Fleetwood v. Curley, i. 174.
Fleming v. Newton, i. 214.
Flint v. Pike, i. 288, 289 ii. 474, 488.
Flower's Case, i. 148.
Floyd v. Barker, i. 205.
Folger v. Hoagland, i. 284.
Folsom v. Marsh, i. 341, 342, 446, 610, 611, 613, 686.
Fonville v. Nease, i. 201.
Foot v. King, i. 117.
Forbes v. King, i. 173.
Ford v. Primrose, i. 154.
Fores v. Johnes, i. 82; ii. 641, 656.
Foss, ex parte, ii. 382, 383, 387.
Fosgate v. Herkimer Mfg. Co., ii. 509.
Foss v. Hildreath, i. 137.
Foster v. Dawber, ii. 587.
v. Goddard, ii. 598.
v. McKibben, i. 509.
v. Smal, i. 171.
v. Wood, ii. 317.
Foulger v. Newcomb, i. 113, 143, 153.
Fountain v. Boodle, i. 216.
Fowler v. Dowdney, i. 155.
v. Bowen, i. 115, 186.
v. Lewis, ii. 510.
Foxler's Case, ii. 575.
Fradilla v. Weller, ii. 348.
Francis v. Rose, i. 152.
Fraser v. Berkeley, ii. 441.
Fray v. Blackburn, i. 205.
v. Teray, i. 102, 169.
Freligh v. Thompson & Carroll, ii. 221, 319.
Freeman v. Cooke, ii. 582.
v. Price, i. 159.
v. Taylor, i. 159.
Frescoe v. May, i. 203.
Frisbie v. Fowler, i. 159.
Fry v. Bennett, i. 129, 186, 213; ii. 439, 451.
Fullarton v. McPhron, ii. 625, 695, 705.
Furness v. Anderson, i. 338.
Fuler v. Fenner, i. 117.

G.

Gainford v. Tooke, i. 155.
Gallvey v. Marshall, i. 108.
Gallager v. Brumell, i. 175.
Gale v. Leckie, ii. 629, 631, 633, 641, 658.
Garrett v. Ferrand, i. 271, 289.
Gardner v. Williams, i. 135.
Garr v. Seldon, i. 143.
Gardner v. Slade, i. 216.
Gasset v. Gilbert, ii. 494.
Gaskin v. Anderson, ii. 538.
Gates v. Bowker, i. 114.
Gathercole v. Miall, 102, 148; ii. 417, 422, 447, 452.
Gay v. Homes, i. 115.
Geary v. Phystic, i. 104.
Gee v. Pritchard, i. 446, 454, 461, 463.
George v. Goddard, i. 212, 216.
Germaine's Case, i. 59.
Getting v. Foss, i. 210.
Gibbons v. Ogden, ii. 184, 186.
Gibson v. Williams, i. 164.
Giles v. Wilcox, ii. 609.
Gilbert v. Gilbert, ii. 542.
v. People, i. 209.
Gilman v. Lowell, i. 124.
Gillett v. Mawman, ii. 641, 663.
Gilet v. Bulevant, i. 129.
Gilliner v. Snagg, ii. 708.
Ginnet v. Mitchell, i. 120.
Girard v. Beach, i. 204.
Girard's Case, i. 46.
Goodrich v. Davis, i. 165
v. Stone, i. 165.
Gould v. Banks, ii. 228, 631.
W. Henry, ii. 197.
v. Hulme, i. 247, 247.
Granard (Earl of) v Dunkin, i. 449.
Grant v. Johnson, ii. 543.
Graves v. Ashford, ii. 676, 696.
Graves's Case, ii. 225.
Gray v. Russell, i. 325, 344, 358; ii. 240, 608, 609.
Greene v. Telfair, i. 211.

Green v. Bishop, ii. 608, 616, 687.
Green v. Chapman, i. 186; ii. 438.
Green v. Groce, ii. 510.
Gregory v. Brunswick (Duke of), i. 104; ii. 440.
Grierson v. Jackson, ii. 131.
Grimes v. Coyle, i. 127.
Grove v. Brandenburg, ii. 482.
Groves v. Logan, ii. 704.
Guiana (Judges of British) M. Dermott,
Guard v. Risk, i. 159.
Gulford's Case, i. 110.
Gurney v. Longman, ii. 561.
Guichard v. Mori, i. 412.
Gutsole v. Mathers, i. 178.
Gyles v. Wilcox, i. 339. 340, 344, 350; ii. 611.

H.

Hager v. Tibbits, i. 183.
Haire v. Wilson, i. 102.
Haine v. Willing, i. 124.
Hall v. Barrows, ii. 251.
Hales v. Pettit, ii. 523.
Hamilton v. Walters, i. 175
Hammond v. Kingsmill, i. 149.
Hancock's Case, i. 212.
Hancock v. Stephens, i. 136.
Hankinson v. Bilby, i. 152, 153, 170.
Hardin v. Comstock, ii. 496.
Harding v. Bullman, ii. 482.
Hare v. Miller, i. 207.
Hargrave v. De Breton, i. 177, 212.
Harle v. Catherall, i. 218; ii. 415.
Harmer v. Morris, ii. 510.
Harman v. Delaney, i. 73.
Harper v. Delph, i. 173.
Harris v. Dixon, i. 156.
v. Panama R. R. Co., ii. 510.
v. Porter, i. 107.
v. Thompson, i. 216.
Harrison v. Bush, i. 208; ii. 417.
v. Findley, i. 170.
v. Rivington, i. 165.
v. Thornborough, i. 132, 133, 146, 159, 171, 217.
Hart v. Gumbach, i. 204.
Hart v. Cleis, ii. 346.
v. Little, ii. 308.
Harte v. De Witt, i. 84; ii. 390, 396.
Hartley v. Tatham, ii. 542.
Hartwell v. Vesey, i. 216.
Harvey v. French, i. 136, 153.
v. Brand, i. 173.
Harwood v. Astley, i. 212.
v. Green, i. 143, 217.
Hatten v. Arthur, i. 344.
Hatton v. Kean, i. 368, 369; ii. 289.
Hawes v. Marchant, ii. 586.
Hayden v. Crane, ii. 539.
Haynes v. Tibbott, i. 124.
Hayes v. Mitchell, i. 145, 169, 170.
v. Willis, ii. 365.
Hazlitt v. Templeman, ii. 626.
Hearne v. Stowell, i. 288; ii. 469, 474.
Heck v. De Groot, i. 203.
Hedderwick v. Griffin, i. 112; ii. 207.
Hedley v. Barlow, ii. 412, 494.
Heine v. Appleton, i. 370; ii. 213, 713.
Heirs v. Holcombe, ii. 217.
Helsham v. Blackwood, i. 123.
Hemming v. Power, i. 133, 155, 166, 170.
Henderson v. Broomhead, i. 205
Henkle v. Smith, ii. 510.
Hennessey's Case, ii. 494.
Hereford (Bishop of) v. Griffin, ii. 695.
Herr v. Bamburg, ii. 15.
Herle v. Osgood, i. 149.
Herne v. Appletons, ii. 213.
Heriot v. Stewart, i. 178; ii. 450, 451.
Hext v. Teamans, i. 156.
Hibbins v. Lee, ii. 494.
Hibbs v. Wilkinson, ii. 435, 451.
Hickey, Ex parte, i. 31, 249.
Hicks v. Hollingshead, i. 159.
Hirsh v. Ringwalt, i. 124.
Hillard v. Constable, i. 149, 150.
Higgins v. Sparkman, ii. 196.
Hill's Case, i. 77, 78.
Hills v. University of Oxford, ii. 471.
Hill v. Waid, i. 178.

Hine v. Dale, i. 26, 381, 383.
Hinton v. Donaldson, ii. 172.
Hoare v. Silverlock, i. 133, 157, 168, 169, 171, 173, 288; ii. 427.
Hobbs v. Wilkinson, ii. 496.
Hodges v. Welsh, ii. 569, 613, 654, 698.
Hogg v. Dorrah, i. 136.
v. Kirby, i. 329, 468; ii. 250, 315, 384, 386, 387, 389, 511, 692, 707.
Hogg v. Maxwell, ii. 384, 385.
v. Scott, ii. 698.
v. Vaughan, i. 116.
v. Wilson, 136.
Hollingsworth v. Duane, i. 31, 243, 255, 284.
Hollis v. Briscoe, i. 149, 152.
Holt v. Passon, i. 129.
Holt v. Scholefield, i. 113 156.
Hotchkisson v. Porter, i. 129.
Home v. Bentinck, i. 206, 207.
Homer v. Taunton, i. 170, 173.
Hookman v. Pottage, ii. 251.
Hopwood v. Thorn, i. 217.
Horner v. Marshall, i. 164.
Horeman v. Lovland, i. 211.
Hotten v. Arthur, ii. 703.
Hotchkiss v, Oliphant, i. 124.
Howard v. Gossett, i. 98, 306, 460.
v. Hudson, ii. 588.
v. Sexton, i. 212.
How v. Prin, i. 141, 149.
Howell v. Howell, i. 164.
Howe v. Hartford, i. 113.
Howitt v. Hall, ii. 639, 653.
Hoyt v. McKenzie, i. 384, 386.
Hubbard v. Schoening, ii. 538.
Huff v. Bennett, ii, 472, 495.
Hughly v. Hughly, i. 136.
Hunt v. Abgar, i. 173; ii. 458.
v. Bennett, ii. 211.
v. Goodlake, i. 204.
v. Thimblethorpe, i. 133, 166.
Hunter v. Sharp, i. 137; ii. 436, 446, 487.
Hutchinson v. Breket, i. 508.
Hutton v. Kelly, ii. 383, 387, 388.

I.

Ingram v. Lawson, i. 175, 203.
v. Stiff, ii. 692.
Inman v. Foster, i. 124.
Irwin v. Brandwood, i. 142.
Isaacs v. Daly, i. 221; ii. 220, 221, 305, 306, 307. 395.
Islip v. Adams, i. 233.
Irland v. Smith, i. 71.
Isham v. York, i. 152.
Isley v. Loveyage, i. 164.

J.

James v. Boston, i. 217.
Jarrold v. Houlston, i. 325, 330, 344; ii. 614, 616, 680, 681, 696.
Jarigan v. Fleming, i. 124.
Jeffreys v. Bowles, ii. 348.
v. Baldwin, i. 19, 374; ii. 304.
v. Boosey, ii. 191, 203, 339, 643, 644.
Jeffreys v. Duncumbe, i. 98, 167 393.
Jefferson R. R. v. Rogers, i. 204.
Jekyll v. Moore, i. 205, 206, 207.
Jennings v. Broughton, ii. 590.
Jerrold v. Houlston, ii. 304.
Johnson v. Dodgson, ii. 633.
Johnson v. Evans, i. 217.
v. Hathorn, ii. 543.
Johnston v. Dilke (The London Athenæum), ii. 452, 453.
Jollie v. Jacques, ii. 231, 235, 312, 384, 389, 393, 690.
Jones, re, i. 259.
Jones v. Chapman, i. 124.
v. Given, i. 139.
v. Herne, i. 155.
v. Joice, i. 114.
v. Littler, i. 146.
Joslyn v. Fiske, ii. 542.

K

Kane v. Mulvaney, ii. 410, 496.
Keene v. Clarke, i. 369, 469; ii. 340, 342, 357, 360.

Keene v. Harris, ii. 255, 383, 387, 389, 390.
Keene v. Kimball, i. 400, 411, 469; ii. 344, 357, 358.
Keene v. Ruff, i. 173, 174, 195, 199.
v. Wheatley, i. 369, 370, 410; ii. 191, 229, 231, 242, 243, 247, 290, 300, 326, 357, 358, 359, 368.
Keeney v. Grand Trunk Railway Co., ii. 539.
Keighley v. Bell, i. 207.
Keiler v. Lessford, i. 159.
Kelly v. Dillon, i. 117, 724.
v. Hutton, ii. 383, 387, 388, 641.
Kelly v. Morris, i. 329, 344, 348, 360; ii. 614, 616.
Kelly v. Sherlock, i. 116, 221.
v. Tinling, ii. 436.
Kennedy v. Gifford, i. 173.
Kendillon v. Maltby, i. 205.
Kent v. Pocock, i. 151.
Kendall v. Stone, i. 117.
v. United States, ii. 502.
Kerle v. Osgood, i. 149, 151.
Kerr v. Sheddon, i. 175.
Killick v. Brues, i. 110.
King v. Bagg, i. 131.
v. Bayley, i. 208.
v. Boot, i. 213.
v. Lake, i. 173.
v. Peet, i. 325.
v. Townshead, i. 206.
v. Watts, i. 216.
v. William, ii. 196.
v. Woot, i. 171.
Kindred v. State, ii. 338.
Kinnersley v. Dodsley, i. 186, 193.
Knight v. Knight, i. 289.
Kennedy v. Gifford, i. 161.
Kirby v. Hogg, i. 329, 418.
Knight v. Gibbs, i. 107, 130.
Knott v. Morgan, ii. 250, 252.
Kleizer v. Aymmes, i. 209.
Kyle v. Jeffries, ii. 366, 367, 641.

L.

Lanson v. Stewart, i. 169.
Lacy v. Toole, ii. 642, 649.
Laidler v. Burlinson, ii. 594.
Lanahan v. People, ii. 510.
Langdon v. Dowd, ii. 588.
Langlin v. Bishop, i. 204.
Laning v. State, ii. 510.
Lassels v. Lassels, i. 151.
Lattimer v. West Morning News Co., ii. 450, 451.
Lawrence v. Dana, ii. 576, 719.
v. Smith, i. 27, 28, 29, 32.
Lay v. Lawson, i. 220.
Lazarus v. Charles, i. 249.
Leader v. Purday, i. 342, 364, 375; ii. 642, 701.
Leather Cloth Co. v. American Leather Cloth Co., ii. 252, 696.
Lee v. Bennett, ii. 504.
Lee v. Flemingsburgh, ii. 510.
Lee v. Hudson, i. 186.
v. Simpson, ii. 288, 289, 679, 685.
Leech v. Freligh, ii. 305.
Leister v. Smith, i. 123.
Lennie v. Pillans, i. 326, 358.
Leonard v. Allen, i. 164.
Levi v. Rutey, i. 375; ii. 326, 369, 642.
Levy v. Lewis, ii. 426, 427, 476, 480.
Lewis v. Chapman, i. 141, 182, 209.
v. Clement, ii. 491, 513.
v. Fenn, ii. 482.
v. Fullarton, i. 335, 341; ii. 608, 614, 619, 714.
Lewis v. Levy, ii. 426, 427, 476, 480, 489, 491, 513.
Lewis v. Walter, i. 124, 182, 183, 513.
Lewknor v. Crucley, i. 152, 177.
Leycroft v. Dunker, i. 147.
Like v. McKinstry, i. 178.
Lidde v. Hodges, i. 212.
Lincoln (Earl of) v. Fisher, i. 304.
Lindemeier v. People, i. 46.
Linsey v. Smith, i. 151.
Lindon v. Graham, i. 177.
Link v. Kelley, i. 159.
Little v. Dean, ii. 542.
v. Hall, ii. 229, 570, 637.
v. Gould, ii. 192, 211, 565, 594, 601, 710.

Littlejohn v. Greeley, i. 150, 213.
Littler v. Thompson, i. 252.
Livingston v. Van Ingen, ii. 183, 184, 186.
London v. Eastgate, i. 115.
Long v. Brougher, i. 129, 131, 203.
Longman v. Tripp, ii. 255, 383, 387, 644.
Longman v. Winchester, i. 334, 335, 336; ii. 607, 652, 683, 692.
Lonby v. Hafner, i. 104.
Lonson v. Collins, ii. 173.
Lover v. Davidson, i. 364, 375.
Low v. Routledge, ii. 191, 197, 202, 205, 237.
Low v. Warde, i. 202.
Loundes v. Hague, ii. 204, 348.
Lumley v. Allday, i. 114.
Lule v. Hole, i. 115.
Lyle v. Classon, i. 201.
Lumley v. Wagner, ii. 625, 652.
Lyons v. Knowles, ii. 349, 351.

M.

Macarmey v. Corry, i. 262.
Macgill's Case, i. 248.
Macklin v. Richardson, i. 339, 389; ii. 286, 299, 328, 336.
Macleod v. Wakeley, ii. 444.
Maguire v. Martinetti, ii. 292.
Maitland v. Bramwell, i. 216.
Makepiece v. Jackson, i. 369.
Malack v. Roper, i. 176.
Maloney v. Bartley, i. 177, 178, 203.
Manby v. Owen, i. 384.
Mansfield v. Lord, ii. 7.
Man v. Russel, ii. 509.
Manners v. Blair, ii. 214, 215.
Manning v. Clement, i. 119.
Marsh v. Keating, ii. 575.
Malony v. Stewart, i. 158, 159.
Markham v. Bridges, i. 149, 150.
Marsh v. Conquest, ii. 351.
v. Marsh, i. 106.
Marshall v. Broadhurst, ii. 659.
v. McGregor, ii. 538.
Marten v. Van Schaick, i. 795.
Martkin v. Nutkin, i. 104.
Martin v. Wright, ii. 687.
Matinetti v. Maguire, i. 31, 63; ii, 292, 665.
Marzials v. Gibbons, ii. 719.
Marzetti v. Williams, i. 105.
Matteson v. New York, &c. R. R. Co., ii. 541.
Matthieson v. Harrod, ii. 234, 404.
Matthewson v. Stockdale, i. 326, 347; ii. 652, 709, 716.
Mawman v. Feof, i. 342.
v. Gillett, i. 415; ii. 627, 641, 660.
Mawman v. Tegg, ii. 255, 594, 598, 601, 607, 616, 617, 646, 685, 710, 714.
Mayne v. Fletcher, ii. 495.
Maxwell v. Hogg, ii. 250, 384, 385.
v. Mellroy, i. 508.
May v. Brown, i. 221; ii. 504.
Mayhew v. Maxwell, ii. 406, 593, 602, 695.
Maynard v. Williams, i. 105.
v. Richardson, i. 203, 211.
Mayor, &c. v. Erben, ii. 541.
McBrayer v. Hill, i. 159.
McClaughier v. Wetmor, 135.
McClurg v. Kingsland, ii. 185.
McCorkle v. Binns, ii. 510.
McDaniel v. Brace, i. 177.
McDougall v. Claridge, i. 218.
McGregor v. Gregory, i. 100.
v. Thwaites, i. 194, 206.
McLeod v. Wakeley, ii. 451, 485.
McKinly v. Robb, i. 121.
McKinnon v. Bliss, ii. 510.
McNally v. Oldham, i. 121, 214.
McPherson v. Daniels, i. 118, 184.
McGee v. Wilson, i. 159.
v. Injalbs, i. 163, 164.
Meckle v. State, ii. 510.
Midwinter v. Hamilton, ii. 172.
Millar v. Taylor, i. 15, 132. 173, 383, 415, 417, 418, 433, 436, 443, 446; ii. 132, 134, 170, 171, 173, 610, 645, 673, 674, 684.
Miler v. Van Hahn, i. 70, 389.
Miller v. Butler, i, 164, 184, 203.
v. Hope, i. 205.

Miller v. Maxwell, i. 170.
v. Parish, i 159.
v. Sillsbee, i. 397.
Millett v. Snowden, ii. 239, 241, 666.
Mills v. Monday, i. 174, 197.
v. Stewart, ii. 543.
Mississippi v. Fleming, i. 124.
Mitchell v. Jenkins, i. 140.
v. Hawley, ii. 575.
Mix v. Woodward, i. 164.
Moberly v. Preston, i. 124, 159.
Molt v. Couston, ii. 348.
Monk v. Harper, ii. 241.
Moor v. Foster, i. 156.
Moore v. Crofton, ii. 586, 588.
v. Stevenson, i. 129.
Moreton v. Copeland, ii. 649.
Morchland v. Cadell, i. 165.
Morgan v. Livingston, i. 164.
Morris v. Ashbee, i. 347, 348; ii. 697.
v. Coleman, ii. 335, 353, 624, 626.
Morris v. Harmer, ii. 511.
v. Kelly, i. 389; ii. 343, 344, 358, 366, 641.
v. Langdale, i. 114, 115, 158.
v. Wright, i. 348.
Morrison v. Belcher, ii. 419, 438.
v. Harmer, i. 126.
v. Moot, i. 285, 287, 288, 292, 294.
Morrison v. More, i. 244.
Motte v. Faulkner, ii. 671.
Moulton v. Chapman, i. 244.
Mountney v. Watton, i. 121, 123, 125.
Mowry v. Sheldon, ii. 588.
Moyer v. Pone, i. 129, 131.
Mumler's Case, i. 47.
Murray v. Benlow, i. 32.
v. Bogue, i. 335; ii. 607, 680, 684.
Murray v. Elliston, ii. 343, 344, 347, 359, 700.
Murray v. McFargilhar, ii. 687.
v. Maxwell, ii. 695.

N.

Neel v. State, i. 224, 229, 231, 238.
Newbraugh v. Cinsy, i. 99.
Nevins v. Bank, i. 509.
Newton v. Cowle, i. 325.
Newsberry's Case, ii. 610
Newton v. Stiles, i. 151.
Nichols v. Ruggles, ii. 232, 239, 653.
Nicholls v. Packard, i. 135.
Nicholson v. Lyms, i. 116.
Nicol v. Stockdale, ii. 217, 594, 747.
Neidringhaus' Case, ii. 197.
Northampton's Case, i. 133.
Norton v. Ladd, i. 170.
Novello v. Sudlow, ii. 667, 682.
Nutt's Case, ii. 657.

O.

O'Brien v. Bryant, i. 102, 121, 126.
v. Clement, i. 102.
O'Brion v. People, i. 164.
Obaugh v. Tinn, i. 115.
O'Connell v. McCovern, i. 209, 213.
Odger v. Mortimer, i. 204.
Odcom v. Bacon, i. 115, 121.
Odgon v. Reiler, i. 136.
Oglesby, B. T., ii. 197.
Olmstead v. Brown, i. 117.
Oliver v. Bentinck, i. 206, 207.
Ollendorf v. Black. ii. 197, 199, 200.
Onslow v. Horne, i. 143, 147, 150.
Onsly v. Douglas, i. 210.
Oram v. Franklin, i. 151.
Osgood v. Allen, ii. 308, 318, 389, 390, 394.
Ostram v. Calkins, i. 114.
Oswald's Case, i. 305.

P.

Paige v. Banks, i. 470; ii. 565, 632.
Page v. Fawcet, i. 173.
v. Wisden, ii. 348.
Palmer v. DeWitt, i. 2, 16, 19; ii. 173, 174, 295, 298, 333, 339, 700.
Palmer v. Edwards, i. 149, 150.
v. Thorne, ii. 364.
Parham v. Methersole, i. 135.
Paris v. Levy, ii. 418, 446.

Park v. Johnson, ii. 590
v. Muggridge, ii. 602.
Parker v. Stationers' Company, C. P., ii. 196.
Parker v. Prescott, i. 192.
v. Brevcoll, i. 184.
Parks v. Comstock, ii. 538.
Parmiter v. Coupland, i. 162; ii. 410, 411.
Parsons v. Marmaduke, ii. 33.
Passaic Mfg. Co. v. Hoffman, ii. 545.
Paterson's Case, i. 33, 56.
Pattison v. Jones, i. 216.
Paulett v. Halferty, i. 177.
Payne v. Anderson, ii. 172.
v. Moore, ii. 305.
Payson v. Everitt, ii. 507.
Peake v. Oldham, i. 154.
Peard v. Jones, i. 143.
Perret v. New Orleans Times, ii. 428.
Perty v. Mann, i. 117, 170.
Pemberton v. Colls, i. 102.
Penfold v. Westcote, i. 170.
People v. Crosswell, i. 100, 163, 186.
v. Gardner, ii. 538.
v. Gates, ii. 538.
v. Freer, i. 243, 284, 285.
v. Mumler, i. 48.
v. Lake, i. 184.
v. Mallon, ii. 539.
v. Morton, ii. 538.
v. Rathum, i. 105.
v. Parkes, ii. 548.
v. Ruggles, i. 35, 40, 44, 45.
v. Story, 260.
v. Sturtevant, i. 287.
v. Tweed, i. 246.
v. Wilson, i. 251, 258, 262, 305.
Percival v. Phipps, i. 452, 461, 463.
Perkins v. Mitchell, ii. 482.
Pettyjohn v. Pettyjohn, ii. 510.
Philadelphia R. R. Co. v. Quigly, i. 205.
Phillimore v. Barry, ii. 633.
Pickard v. Sears, ii. 586.
Pierce v. Ellis, ii. 469.
Pierpoint v. Fowle, i. 371, 374; ii. 2, 227, 228, 229, 230, 247, 664.
Pierrepont v. Barnard, ii, 588.
Pike v. Nicholas, i. 348; ii. 680, 683, 708.
Pillock v. Onell, i. 288.
Pisani v. Lawson, i. 182, 197.
Planche v. Braham, ii. 291, 352.
v. Colburn, ii. 629, 630.
Platt v. Button, ii. 348, 714.
v. Walter, ii. 381, 383, 387, 502.
Polk v. Daly, ii. 366.
Pool v. Sacheverel, i. 256.
Pope v. Curl, i. 384, 444, 462, 463.
Popham v. Pickburn, ii. 470, 474.
Poplett v. Stockdale, i. 35; ii. 633, 641, 642, 657.
Porral v. Rice, i. 508.
Powell v. Plunkett, i. 131.
Power v. Shaw, i. 158.
v. Walker, ii. 343, 642.
Priestley's (Dr.) Case, i. 25, 29, 388.
Prowett v. Mortimer, ii. 692.
Prudham v. Tuker, i. 149.
Pulte v. Derby, ii. 231, 234, 639.
Purchase v. Call, ii. 511.
Purdy v. Stacy, i. 156.

Q.

Queensberry (Duke of) v. Shebbeare, i. 398, 406.
Quick's (Juliana) Case, i. 59.

R.

Roan v. Lawley, i. 206.
Randall v. Holsenback, i. 121.
Ranger v. Goodworth, i. 159.
Read v. Huggonson, i. 164.
Reade v. Bentley, ii. 632, 634, 635, 636, 638, 646.
Reade v. Conquest, ii. 574.
v. Lacy, ii. 304, 610, 612, 613, 614, 677.
Reade v. Hodges, i. 444.
v. French, i. 697.
v. Sweetzer, i. 118, 179; ii. 441, 444.
Reed v. Carusi, i. 325; ii. 241, 242.

Rees v. Bullock, ii. 308.
Reeves v. Templar, i. 144.
Reid v. Harper, i. 164.
Reg. v. Bussell, ii. 193, 194.
v. Bull, i. 203.
v. Foxley, i. 194.
v. Gathercole, i. 38, 40.
v. Hetherington, i. 35, 40, 56.
v. Hicklin, i. 56; ii. 451.
v. Langley, i. 93, 103.
v. Gofield, ii. 493.
Reg. v. Recorder of Wolverhampton, i. 56.
Reg. v. Skipworth, ii. 514.
v. Varier, i. 135.
v. Velley, ii. 197.
v. Uhrightson, i. 304.
Rerick v. Kern, ii. 602.
Rex v. Abingdon, ii. 466, 467.
v. Almon, ii. 495, 657.
v. Alwood, i. 39.
v. Beach, i. 203.
v. Brewster, i. 71.
v. Brown, i. 72.
v. Burdett, i. 63. 68, 199.
v. Carlisle, i. 36, 39; ii. 481.
v. Cator, ii. 419.
v. Clement, i. 252, 265, 289, 291.
v. Cobbett, i. 63, 67.
v. Cochrane, i. 115.
v. Collins, i. 69.
v. Cooper, i. 190.
v. Creevey, ii. 466, 467, 483.
v. Curl, i. 77, 187.
v. Cuthell, i. 74, 193.
v. De Berenger, ii. 459.
v. De Eon, i. 89.
v. Dodd, ii. 657.
v. Drake, i. 203.
v. Eaton, i. 34, 461.
v. Edgar, i. 133, 164, 166.
v. Faulkner, i. 246.
v. Fisher, ii. 424, 477, 478, 495.
v. Fleet, i. 259; ii. 484.
v. Franklin, i. 65.
v. Gathercole, ii. 459.
v. Gordon, i. 89.
v. Greepe, i. 135.
Rex v. Harvey, i. 160.
v. Horne, i. 66, 67, 133, 135.
v. Johnson, i. 199; ii. 507.
v. Jolliffe, i. 259.
v. Lambert, i. 61.
v. Lee, i. 285.
v. Lofield, ii. 493.
v. Lovett, i. 69.
v. Mayo, i. 304.
v. Middleton, i. 199.
v. Moxon, i. 56.
v. Nutt, i. 102.
v. Onslow & Whalley, ii. 514.
v. Osborne, ii. 459.
v. Paine, i. 40, 74, 203.
v. Peltier, i. 86.
v. Penny, i. 305.
v. Pierce, ii. 506.
v. Pocock, i. 305.
v. Reeves, i. 295.
v. Revel, i. 305.
v. Roberts, ii. 428.
v. Robinson, i. 36.
v. Shebbeare, i. 72.
v. Skinner, i. 205; ii. 482.
v. Selby, i. 305.
v. Taylor, i. 32, 33, 39.
v. Thicknesse, i. 502.
v. Topham, i. 174, 175.
v. Tutchin, i. 64; ii. 449.
v. Veley, i. 219.
v. Vint, i. 89.
v. Waddington, i. 35, 37, 7; ii. 458.
Rex v. Watson, i. 133, 199, 287.
v. Webster, i. 40.
v. Weje, i. 305.
v. White, i. 40, 251.
v. Williams, i. 34, 36, 40, 71, 20
v. Woolsten, i. 34, 40.
v. Wright, i. 288; ii. 487.
v. Wrighton, i. 305.
Respublica v. Passmore, i. 31.
v. Oswalt, i. 31, 256, 284.
Rhodes v. Bell, ii. 502.
Richardson v. Allen, i. 145.
Rice v. Atwater, ii. 588.
v. Railroad, ii. 595.
Richardson v. Gilbert, ii. 696.

Richardson v. Robert, ii. 506.
Richmond v. Dayton, i. 284.
Rickett v. Stanly, i. 159.
Ring *v.* Huntington, ii. 508.
Risk Allah Bay v..Whithorn, i. 388.
Roach v. Garvan, i. 254, 259.
Roberts v. Brown, ii. 478.
v. Camden, i. 132, 133, 136, 155.
Roberts v. Myers, i. 374, 383, 469; ii. 229, 231, 232, 237, 242, 243, 296, 345, 347, 352.
Robertson v. Powell, i. 158, 160.
Robins v. Treatway, i. 51.
v. Flint, ii. 538.
Robinson v. Harvy, i. 124.
v. Keyser, i. 170.
v. Marchant, i. 106, 158.
Rodgers v. Hollingsworth, i. 154, 170.
Rock v. Lazarus, ii. 237.
Rogers v. Gravat, i. 857.
v. Jewett, ii. 241.
Rollin v. Steward, i. 115.
Rooney v. Kelly, ii. 699, 702.
Romayne v. Duane, i. 126.
Root v. Ball, ii. 196.
v. King, i. 100, 159, 163, 212; ii. 469.
Root v. Lunders, i. 186.
v. Sownder, i. 213.
Roper v. Streater, ii. 129, 567.
Rossiter v. Hall, ii. 235.
Routledge v. Low, ii. 197, 325.
Rowcliffe v. Edmonds, i. 155.
Rowe v. Harwood, i. 113,
v. Roach, i. 178.
Roworth v. Wilkes, i. 358.
Rubber Pencil Co. v. Howard, ii. 669.
Rundall v. Murray, i. 325, 397, 406, 713.
Runkle v. Meyers, i. 124.
Rusch v. Camphenaugh, i. 115.
Russell v. Briant, ii. 349.
Rumsey v. Webb, i. 117.
Russell v. Smith, ii. 291, 367.
Rustell v. Magnister, i. 186.
Rutland's (Countess of) Case, i. 299.
Ryckman v. Delavan, i. 164, 165.
Ryalls v. Leader, i. 288; ii. 425, 427, 474, 475.

S.

Sadgrone v. Kirby, i. 11.
Sallee v. Walker, ii. 651.
Samuel v. Bond, i. 117.
Sanford v. Bennett, i. 187, 285.
Sanderson v. Jackson, i. 104.
Saunders v. Mills, i. 129, 288; ii. 489.
Saunders v. Smith, ii. 564, 615, 688, 712.
Saus v. Joerries, i. 124.
Saville v. Jarndine, i. 145.
Sawyer v. Corse, i. 510.
v. Coral, i. 508.
Say v. Bream, i. 201.
Sayre v. Moore, i. 325.
Scarll v. Dixon, i. 208.
Schenck v. Schenck, i. 175.
Schuschardt v. Mayor, &c., ii. 542.
Schroyer v. Linch, i. 505.
Scott v. Stanfield, i. 205.
v. Stanford, ii. 613, 617, 676.
v. McKinnish, i. 33.
Seaman v. Bigg, i. 142.
Seeley v. Fisher, ii. 633, 691, 705.
Self v. Gardner, i. 118.
Sellers, Geo. H., ii. 196.
Semple v. Harison, i. 115.
Sempsy v. Levy, i. 195.
Sewall v. Catlin, i. 115.
Seymour v. Butterworth, ii. 424, 432, 493.
Shaw v. Cases, i. 260.
v. Shaw, i. 244.
Sheckell v. Jackson, ii. 410, 496.
Shecut v. McDowell, i. 170.
Shepherd v. Conquest, i. 371; ii. 594, 649.
Shepheard v. Whittaker (The "Bookseller" Case), ii. 457.
Sherman v. Champlain Co., ii. 601.
Sherwood v. Gilbert, i. 210.
Shields v. Cunningham, i. 159.
Sidgreaves v. Myatt, i. 118, 159.
Simmons v. Sweete, i. 304.
Simpson v. Downs, i. 218.
Sims v. Marryat, ii. 593, 602, 631, 641.
Simmons v. Holster, ii. 506.

Skinner v. Grant, i. 120, 124.
v. Rex, i. 129.
Slowman v. Dutton, i. 155.
Smalley v. Anderson, i. 159.
Smaley v. Stark, i. 165.
Smart v. Bement, ii. 544.
Smith, Re, Mary, ii. 538.
Smith v. Howard, i. 141.
v. Lakeman, i. 244.
v. Lewis, ii. 482.
v. London & Southwestern Ry. Co., ii. 714.
Smith v. Buckecker, i. 131.
v. Scott, i. 288 ; ii. 513.
v. Silence, i. 159.
v. Spooner, i. 177.
v. Steward, i. 124.
v. Thomas, ii, 11.
v. Wisdome, i. 156.
v. Wood, i. 111.
v. Wyman, i. 205.
Snag v. Gee, i. 156.
Snow v. Witcher, i. 159, 203.
Snowden v. Noah, ii. 388.
Snyder v. Andrews, i. 117.
Soane v. Knight, i. 179 ; ii. 449.
Solomon, B. L., ii. 196.
Soltan v. De Held, i. 104.
Somers v. House, i. 132, 136, 137.
Somerville v. Hawkins, i. 182.
Somerwell v. Hart, ii. 509.
Southam v. Allen, i. 207.
Southee v. Denny, i. 115, 148.
Southey v. Sherwood, i. 17, 19, 27, 28, 30, 306, 384, 415.
Spaulding v. Strang, ii. 541.
Spencer v. Amerton, i. 216.
v. Masters, i. 159.
v. Southwick, i. 130.
Sperry, W. E., ii. 196.
Spiers v. Brown, ii. 611, 613, 614, 683.
Spottiswoode v. Clark, ii. 390, 391, 691, 709.
Sprague's Appeal, ii. 224.
Springhead Spinning Co. v. Riley, i. 294.
Squire v. Johns, i. 146.
Stamp v. White, i. 155.
Standly v. Obarty, i. 165.
Stanfield v. Boyer, i. 159.
Stanton v. Smith, i. 145.
Stark v. Chetwood, i. 117.
State v. Daniels, ii. 510.
v. Farley, i. 101.
v. Gardner, i. 116.
v. Jendall, i. 100, 164.
v. Linkham, ii. 338.
v. Southwick, i. 163.
Stationers' Company v. Parker, i. 56 ; ii. 129, 567.
Stationers' Company v. Carman, ii. 129.
Stationers' Company v. Patridge, ii. 216.
Stationers' Company v. Seymour, ii. 129, 215.
Stebbing v. Warner, i. 155.
Stelle v. Carroll, ii. 502.
Stelle v. Southwick, i. 100.
Stephens v. Cady, ii. 610.
Stevens v. Benning, ii. 628, 632, 635.
v. Cady, ii. 173, 714.
v. Gladding, ii. 247, 593, 652, 653, 715, 716.
Stevens v. Handley, i. 170.
Stevens v. Wildy, ii. 710.
Steward v. Black, ii. 595.
Stillwell v. Barter, i. 121.
Stiles v. Comstock, i. 118.
v. Nokes, ii. 475, 478.
Stockdale v. Hanford, i. 301.
v. Onwhyn, i. 27, 30.
v. Tarte, ii. 492.
Stondenmeier v. Williamson, ii. 510.
Storace v. Longman, ii. 292.
Stone v. Clark, i. 151.
Storey v. Challands, i. 214.
v. People, i. 266.
Story v. Derby, ii. 717.
v. Holcombe, i. 350, 351 ; ii. 217, 240, 608, 610, 614, 616, 679, 685.
Stowe v. Thomas, i. 348 ; ii. 2, 3, 4, 240, 610, 700.
Strahan v. Graham, ii. 614.
Strange v. Prince Albert, i. 16, 384, 385, 387, 393, 399, 413, 415.
Strauss v. Francis, i. 181 ; ii. 444, 449.
Stringer v. Davis, ii. 510.

Streety v. Wood, i. 209.
Strode v. Holmes, i. 145.
Strong v. Campbell, i. 509.
Strouse v. Francis, i. 186.
Struve v. Schwedler, ii. 231, 335.
Stuart v. Bridge, ii. 196.
v. Lovell, i. 186; ii. 450.
v. People, i. 31, 290.
Stubbs v. Holywell, ii. 659.
Stuckley v. Bulhead, i. 149, 151.
Sugdale's Case, i. 77.
Swadling v. Tarpey, i. 106.
Swan v. Rary, i. 120.
v. Tappan, i. 175.
Sweet v. Avenant, ii. 507.
v. Archbold, i. 702.
v. Benning, i. 369; ii. 407, 593, 696.
Sweet v. Cater, ii. 593, 594, 600 614 646, 647, 686, 710.
Sweet v. Lee, ii. 633.
v. Maugham, ii. 706.
v. Shaw, i. 339; ii. 598, 646, 686, 710.
Sweetapple v. Jesse, i. 152.
Sweetman v. Prince, ii. 538, 540.
Swergart v. Lowmarter, ii. 500.
Sykes v. Sykes, i. 199.

T.

Tabart v. Tipper, i. 191; ii. 441, 444, 451.
Talbot's Case, i. 156.
Tanner v. Hughes, i. 509.
Tarpley v. Blabey, ii. 504.
Tarleton v. McGawley, i. 104.
Tate v. Humphrey, i. 186.
Taylor's Case, i. 40.
Taylor v. Church, i. 187, 210.
v. Hawkins, i. 182, 208, 212; ii. 426.
Taylor v. Millar, i. 3, 15, 19, 390, 436, 446.
Taylor v. Pillow, ii. 656.
v. Robinson, i. 118.
v. Richardson, i. 133.
v. Starkey, i. 143.
Teagle v. Deboy, i. 118.
Tempest v. Chambers, i. 152.
Tenney's Case, i. 258.
Terrey v. Bright, i. 159.
v. Field, i. 121.
Terwilliger v. Wands, i. 116.
Terry v. Hooper, i. 115, 142.
Thirman v. Matthews, i. 136.
Thomas v. Churton, i. 205.
v. Cresswell, i. 135.
v. Jackson, i. 115, 142.
Thompson v. Barnard, i. 133, 170.
v. Schackell, i. 179; ii. 440, 449.
Thompson v. Stanhope, i. 463.
v. Symonds, ii. 649.
Thorley v. Kerry, i. 168.
Thorne v. Blanchard, i. 213.
Thorn v. Hotwood, i. 408, 431.
Tibbett v. Haynes, i. 152.
Tichborne v. Mostyn, i. 252, 253, 254, 292.
Tighe v. Cooper, i. 118, 121, 122, 170.
Tilton v. Beecher, i. 265; ii. 519.
Tinsley v. Tracy, i. 351; ii. 611, 614, 682, 701, 714.
Tobias v. Harland, i. 182.
Todd v. Hawkins, i. 215.
Tomlinson v. Brittlebank, i. 153, 155.
Tonson v. Collins, i. 127, 337, 215; ii. 127, 173, 673.
Tonson v. Walker, ii. 594, 672, 689.
Toogood v. Spyring, i. 207, 209.
Toole v. Young, ii. 296, 366.
Tapham v. Rex, i. 174, 175.
Torrance v. Hurst, i. 99.
Trabue v. Mayo, i. 124, 170.
Tozer v. Marshford, i. 191.
Train, Matter of, i. 82.
Treat v. Browning, i. 117, 124.
Trenton Ins. Co. v. Perrine, i. 203.
Truex v. Erie Railway Co., i. 510.
Truman v. Taylor, i. 136.
Trusler v. Murray, i. 344; ii. 304.
Trustees, &c. v. Utica, &c., i. 104.
v. Calhoun, ii. 538.
Tuam (Archbishop of) v. Robinson, i. 104, 160, 168.
Tuerlotte v. Morrison, i. 182.
Turnbull v. Bird, i. 221.

Turnbull v. Gibbons, i. 200.
Turner v. Filgate, i. 299.
v. Pullman, i. 288.
v. Robinson, i. 308, 385, 413.
v. Sullivan, ii. 513.
Tutle v. Bishop, i. 136.
Tyler, L. W., ii. 196.

U.

United States v. Belsing, i. 509.
v. Bond, i. 509.
v. Bromley, i. 510.
v. Bromn, i. 509.
v. Collins. i. 509.
v. Crow, i. 509.
v. David, i. 509.
v. Driscoll, i. 509.
v. Eddy, i. 509.
v. Emerson, i. 509.
v. Hedger, i. 509.
v. Hart, i. 509.
v. Fisher, i. 509.
v. Frey, i. 509.
v. Kirby, i. 509.
v. Morris, ii. 509.
v. Mulvaney, i. 509.
v. Roberts, i. 509.
v. Simms,. ii. 502.
v. Wiltberger, ii. 509.
Underwood v. Parker, i. 111.
Updegarth v. Commonwealth, i. 138.
Upman v. Elkan, ii. 305.
Universities v. Richardson, ii. 214.
Underhill v. Welton, i. 117, 159.

V.

Van Cleef v. Lawrence, i. 201.
Van Ness v. Pacard, i. 230 ; ii. 143.
Van Tassel v. Capron, i. 149.
Van Ness v. Packart, ii. 143.
Van Rensselaer v. Kearney, ii. 586.
Van Sandan v. Turner, i. 261.
Vernon v. Vernon, i. 262.
Vechten v. Hopkins, i. 135, 164.
Viela v. Gray, i. 130, 186.
Vickery v. Dickson, ii. 541.
Villers v. Monsley, i. 148, 160.

W.

Wadsworth v. Bentley, i. 146.
Wagner v. Halbrimer, i. 117, 133.
Wait v. Green, ii. 541.
Wakley v. Cooke, i. 121.
v. Healy, i. 133.
v. Johnson, i. 222 ; ii. 504.
Walcot v. Hand, i. 169.
v. Walker, i. 25, 27, 28, 39.
Walden v. Mitchell, i. 150, 171.
Wale v. De Witt, ii. 510.
Wallack v. Williams, i. 16 ; ii. 299, 337.
Waller v. Harris, ii. 346.
Wallerstein v. Herbert, ii. 290, 292.
Walrath v. Nellis, i. 136.
Walthoe v. Walker, ii. 672.
Walton v. Singleton, i. 159.
Ware v. United States, i. 509.
Ward v. Smith, i. 173.
Ward v. Thorne, i. 110.
Ward v. Weeks, i. 186.
Ware v. United States, i. 509.
Warman v. Hine, i. 168.
Warne v. Routledge, ii. 653, 656.
Washington Medalion Sen. Co. v. Esterbrook, ii. 252, 390.
Waron v. Walter, i. 113, 114; ii. 412, 420, 466, 467.
Wasburne v. Cooke, i. 206, 213.
Watkins, Ex parte, ii. 502.
Watkira v. Hall, i. 12.
Watson v. Nicholaes, i. 170.
v. Reynolds, i. 177.
v. Reg. i. 194.
Watts v. Frasser, i. 203, 222.
Watts v. Greenley, i. 159.
Weatherston v. Hawkins, ii. 419.
Weaver v. Lloyd, i. 118, 121.
Webb v. Powers, ii. 228, 643, 679 685.
Webb v. Rose, i. 384, 394.
Webster v. Dillon, ii. 625.
Weed v. Bibbin, i. 135.
Weinberg, Philip, ii. 196.
Weir v. Hoss, ii. 495.
Wenman v. Ash, i. 173, 197.
Werner v. Humphreys, ii. 659.

We-ton v. Dobniet, i. 265; ii. 482.
Wetmore v. Scoville, i. 448, 460.
Wharton v. Brook, i. 248.
Wheaton v. Peters, i. 129, 238; ii. 129, 146, 173, 230, 565, 574, 595, 617.
White v. Delaware, &c. R. R. Co., ii. 548.
White v. Nicholas, i. 99, 129.
Whitfield v. Southeastern Railway Co., i. 203.
Whittmore v. Carter, i. 397.
Whittingham v. Wooler, i. 337; ii. 717.
Whittington v. Gladwin, i. 114.
Whyte v. Williams, ii 196.
Wiggins v. Hathaway, i. 508.
Wilcox v. Green, ii. 543.
Wilder v. Chapman, ii. 587.
Wilkins v. Aikin, i. 325, 337, 314; ii. 706.
Williams v. Condy, i. 170.
v. Holdridge, i. 159, 160.
v. Slott, i. 155.
Willis v. Tibbals, ii. 650.
Wilson v. Beigler, i. 121.
v. Galt, i. 130.
v. Goit, i. 116.
v. Reed, ii. 434.
v. Runyon, i. 158, 159.
v. Robbins, i. 159.
Wilson's (Carns) Case, i. 305.
Wingate v. McNamar, i. 510.
Wolcott v. Walten, i. 25.
Wood v. Abbott, ii. 235.
v. Boosey, i. 342; ii. 290, 291.
v. Chart, ii. 257.
v. Russell, ii. 594.
Woodfall's Case, ii. 495.
Woodgate v. Rideout, i. 133, 172; ii. 424.
Woodruff v. Richardson, i. 124, 129.
v. Weoley, i. 145.
Woodward v. Lander, i. 212.
v. Downing, i. 168.
Woolnoth v. Meadows, i. 123, 132, 133, 136, 152, 166.
Woosley v. Judd, i. 386, 448, 466.
Wooster v. Crane, i. 196.
Worth v. Butler, i. 135, 159.
Wren v. Wield, i. 178.
Wright v. Britton, ii. 506.
v. Goodlake, ii. 703.
v. Moorehouse, i. 143, 151.
v. Rowland, ii. 538.
v. Tallis, i. 185.
v. Thomas, ii. 135.
v. Woodgate, i. 208.
Wyatt v. Barnard, i. 374; ii. 254, 695.
v. Gore, i 173, 187.
Wythe v. Stone, i. 397.

Y.

Yates v. Lansing, i. 205, 258.
Yeates v. Reed, i. 164.
Young v. McCrae, i. 176.