n9 21 c

THE

LAWS OF COPYRIGHT.

AN EXAMINATION OF THE PRINCIPLES WHICH SHOULD REGULATE LITERARY AND ARTISTIC PROPERTY IN ENGLAND AND OTHER COUNTRIES.

BEING THE YORKE PRIZE ESSAY OF THE UNIVERSITY OF CAMBRIDGE FOR THE YEAR 1882, REVISED AND ENLARGED.

BY SIR THOMAS EDWARD SCRUTTON, M.A.,

LL.B. (LOND.), B.A., LL.B. (CAMB.); BARRISTER-AT-LAW; PROFESSOR OF CONSTITUTIONAL LAW AND HISTORY IN, AND FELLOW OF, UNIVERSITY COLLEGE, LONDON; SENIOR WHEWELL SCHOLAR, 1879; BARSTOW SCHOLAR, 1882; LATE SCHOLAR OF TRINITY COLLEGE, CAMBRIDGE.

"O IMITATORES, SERVUM PECUS."

HOR. 1., *Ep.* 19, 19.

O

8°

LONDON:
JOHN MURRAY, ALBEMARLE STREET.
1883.

S
UK
944
SCR

TP
S4353c°
Ed

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

Rec. Sept. 15, 1884

TO

SIR ARCHIBALD LEVIN SMITH,

ONE OF THE JUDGES OF THE QUEEN'S BENCH DIVISION

OF

HER MAJESTY'S HIGH COURT OF JUSTICE,

This Work is Dedicated,

IN GRATITUDE FOR HIS TEACHING AND INFLUENCE,

BY HIS FORMER PUPIL,

THE AUTHOR.

PREFACE.

THE Yorke Prize of the University of Cambridge, to the establishment of which this little work owes its existence, was founded *about ten years ago* by Edmund Yorke, late Fellow of St. Catherine's College, Cambridge, and, under a scheme of the Court of Chancery, is given annually to that graduate of the University, of not more than seven years' standing from his first degree, who shall be the author of the best essay on some subject relating to the "Law of Property, its Principles and History in various Ages and Countries." The subject prescribed for the year 1882 by the Adjudicators (John Rigby, Esq., Q.C., and F. Vaughan Hawkins, Esq., Barristers-at-Law), was "The Law of Property in Literary Compositions, Published and Unpublished; the Principles that ought to regulate it, and how far such Principles have been acted upon in different countries." The successful essay, bearing the motto "*O imitatores, servum pecus*," forms the greater part of the following work. In preparing it for publication it was suggested to me that greater completeness would be obtained if Artistic and Musical Copyright were included in the scope of the work. To this addition the Adjudicators kindly gave their consent, and Chapters VI., VIII., IX. have accordingly been written. It is my duty to state that these parts of the work have not been seen by the Adjudicators.

Though excusing is proverbially accusing, I may be pardoned a few words on the purpose, it is hoped, that these pages may serve. They risk the danger of falling between two stools. There may be too many statutes and cases for the general reader, too much history and theory for the lawyer. I have tried to make the account of the English law an accurate, plain, and concise statement, in which authors and publishers may find the information they want as to their legal positions, while lawyers may use it both as a handbook and a guide to statutes and decisions. To the general reader, I can only offer a subject interesting both in history and in policy, and trust that the merits of the subject may pardon the faults of its treatment.

The present condition of the English Copyright Law calls loudly for codification to a Legislature unfortunately somewhat deaf to such unsensational appeals. A strong Commission presented an exhaustive report on the subject in 1878, but no Government action has yet been taken, and the bills prepared by the Law Amendment Society, and brought into the House by Mr. Hastings, have met the usual fate of the bills of private members. The appointment of the Grand Committee on Trade affords some hope that the subject may be dealt with shortly.

A commencement has indeed been made in the Codification and Revision of the Law of Copyright in Designs, by the Patents Act of 1883, which repeals six Copyright Statutes of more or less complexity. The Musical Copyright Act of 1882, however, can only be described as a legislative fiasco. The main work of legislation is yet to be done, and the diplomatic energies of the Foreign Office and the Board of Trade might well be employed in furthering the recognition of International Copyright, *especially in the United States.*

My original subject only required the use of foreign Codes as an illustration of the theoretical treatment of the subject, and in consequence I have not attempted any complete statement of any Copyright Codes other than those of England and the United States. A very full account of the copyright laws of foreign countries will be found in the work of Mr. Copinger, to which, together with the smaller work of Mr. Sidney Jerrold, I must express my indebtedness in connection with this branch of my subject. In dealing with the law of the United States, while I have endeavoured to refer on all points to the original sources, I must acknowledge my obligation for references to cases and many valuable discussions to the work of Mr. Drone, in my opinion by far the best book on Copyright in existence. I have also to thank the Adjudicators for their kind permission to make several alterations in the original essay, and for many valuable suggestions, which I have endeavoured to carry out. To G. W. Hastings, Esq., M.P., I am indebted for information as to the recent Copyright Bills before Parliament.

It is a commonplace of criticism that no good thing can come out of a prize essay, the 'Holy Roman Empire' of my friend Professor Bryce supplying the exception that proves the rule. I dare hardly hope that the following pages may escape this sweeping judgment.

T. E. S.

6, Pump Court, Temple,
November, 1883.

CONTENTS.

PAGE

INDEX OF CASES CITED xv

LIST OF WORKS CITED xix

CHAPTER I.

INTRODUCTION.

§ 1. Introduction.—§ 2. Method to be pursued.—§ 3. Necessity for preliminary investigation obviated.—§ 4. Absolute rights dismissed.—§ 5. Fundamental question of law of Copyright. § 6. What is meant by "Property in literary productions." —§ 7. Questions to be answered 1–7

CHAPTER II.

THE FUNDAMENTAL QUESTION OF THE COPYRIGHT LAWS.

§ 8. Interests of the State in literary property.—§ 9. How they may be secured.—§ 10. *Direct results of the absence of State* protection.—§ 11. Indirect results of the absence of State protection.—§ 12. Evidence of Spencer and Huxley.—§ 13. Evidence from the United States.—§ 14. Will Copyright produce cheap books?—§ 15. The Royalty system.—§ 16. International Copyright 8–17

CHAPTER III.

THE PRINCIPLES ON WHICH THE LAW OF COPYRIGHT SHOULD BE BASED.

SECTION I. *What should be protected by the State* 19

§ 17. What should be protected?—§ 18. Unpublished Works.— § 19. Lectures and plays.—§ 20. Waiver.—§ 21. Recapitulation.

137

PAGE

SECTION II. *Nature of the Protection* 22

§ 22. Nature of protection to be afforded by the State.—§ 23. Monopoly system.—§ 24. Royalty system.

SECTION III. *Qualities to be required in a Protected Work* . . 28

§ 25. Qualities to be required.—§ 26. Immoral Works.—§ 27. Originality.—§ 28. New editions.—§ 29. Newspapers.

SECTION IV.—§ 30. *Quantity to be required in a Protected Work* 30

SECTION V.—§ 31. *To whom is Protection to be afforded?* . . 31

§ 32. Commissioned works.

SECTION VI. *Duration of Protection* 32

§ 33. Duration of protection.—§ 34. Problem of duration.—§ 35. Competing principles of duration.—§ 36. Result.—§ 37. What should be term of duration in England?—§ 38. Two-term Copyright.—§ 39. Recapitulation.—§ 40. Terms of Copyright in various countries.

SECTION VII. *Infringements of Copyright calling for Protection.* 42

§ 41. Classes of infringements.—§ 42. Class I. Open reproductions *simpliciter*.—§ 43. Class II. Open reproductions with other matter.—§ 44. Class III. Disguised reproductions.—§ 45. Works of fact.—§ 46. Works of fiction.—§ 47. Abridgments. § 48. Recapitulation.—§ 49. Class IV. Reproductions through other channels.—§ 50. Translations.—§ 51. Dramatisation of novels.—§ 52. Result.—§ 53. Laws of foreign countries.

SECTION VIII. *Investitive Facts of Protection* 54

§ 54. Investitive facts.—§ 55. Registration and deposit of copies: Law of foreign countries.—§ 56. Registration.—§ 57. Nationality of author and place of publication.—§ 58. Summary.

SECTION IX.—§ 59. *Transvestitive Facts* 60

SECTION X.—§ 60. *Divestitive Facts* 61

SECTION XI. *Remedies for Infringements* 62

§ 61. Remedies.—§ 62. Limitation of actions.—§ 63. Remedies against the author.

SECTION XII.—§ 64. *Codification* 65

PAGE

CHAPTER IV.

HISTORY OF THE ENGLISH LAW OF COPYRIGHT.

§ 65. Introduction.—§ 66. Questions at issue.—§ 67. Copyright before Statute of Anne.—§ 68. Early days of printing.—§ 69. Royal privileges.—§ 70. History of Stationers' Company.—§ 71. Registers of Stationers' Company.—§ 72. Resistance to the Company.—§ 73. Sources of the sole right of printing in 1623.—§ 74. History, 1625-1643. Decree of 1637.—§ 75. Protest of Authors: Ordinance of 1643.—§ 76. Ordinances of Long Parliament.—§ 77. Licensing Act of 1662.—§ 78. Position of Literary Property in 1660.—§ 79. Statutory protection ceases. By-law of 1681.—§ 80. Charter of 1684. By-law of 1694.—§ 81. Recapitulation of period previous to 1710.—§ 82. Cases prior to Statute of Anne.—§ 83. Result. § 84. Statute of Anne.—§ 85. Result of Statute of Anne.—§ 86. Cases under Statute of Anne.—§ 87. *Millar* v. *Taylor*.—§ 88. *Donaldson* v. *Beckett*.—§ 89. Effects of *Donaldson* v. *Beckett*.—§ 90. Subsequent legislation.—§ 91. Talfourd's Bill.—§ 92. Act of 1842.—§ 93. *Jefferies* v. *Boosey*.—§ 94. Colonial Copyright: Commission of 1875.—§ 95. Recapitulation of history.—§ 96. Common Law Copyright.—§ 97. Answers to questions in § 66.—§ 98. History in other countries 67–116

CHAPTER V.

ENGLISH LAW OF LITERARY COPYRIGHT. PART I.

INTRODUCTION 117

§ 99. Introduction.

SECTION I. *Unpublished Works* 118

§ 100. English law as to unpublished works.—§ 101. Nature and limits of right.—§ 102. Investitive facts.—§ 103. Transvestitive facts.—§ 104. Letters.—§ 105. Conditional communications.—§ 106. Divestitive facts.—§ 107. Infringements and remedies.—§ 108. Comparative summary.

SECTION II. *Oral Communications, Lectures* 126

§ 109. Nature of right.—§ 110. Investitive facts.—§ 111. Divestitive facts.—§ 112. Transvestitive facts.—§ 113. Remedies. § 114. Sermons.—§ 115. Recommendations of Commission. § 116. Foreign countries.

SECTION III. *Oral and Printed Communications, Plays*. . . 130

§ 117. Introduction.—§ 118. Faults of English Law of Dramatic Copyright.—§ 119. History before statutory protection, 1833. —§ 120. Statutory provisions.—§ 121. Author's rights in

PAGE

dramatic compositions.—§ 122. What is a dramatic piece?—§ 123. What is a place of dramatic entertainment?—§ 124. Infringements of author's rights. Dramatisation of novels.—§ 125. Duration of protection.—§ 126. Investitive facts.—§ 127. Transvestitive facts.—§ 128. Divestitive facts. § 129. Remedies for infringements.—§ 130. Laws of other countries.—§ 131. International Dramatic Copyright.—§ 132. Recommendations of the Copyright Commission.

CHAPTER VI.

MUSICAL COPYRIGHT IN ENGLAND.

§ 133. Introduction.—§ 134. Unpublished musical works.—§ 135. History till 1842.—§ 136. Statutory provisions.—§ 137. Performing right in music.—§ 138. Musical Copyright Act, 1882.—§ 139. Rights of the author.—§ 140. Registration. § 141. Subject of Copyright.—§ 142. Infringements of Copyright.—§ 143. Assignments.—§ 144. Remedies for infringement.—§ 145. Laws of foreign countries.—§ 146. Recommendations of Copyright Commission 155–164

CHAPTER VII.

ENGLISH LAW OF LITERARY COPYRIGHT. PART II.—BOOKS.

§ 147. Definitions.—§ 148. Newspapers.—§ 149. Maps.—§ 150. Crown copyright.—§ 151. Qualities required in copyright work.—§ 152. Literary value.—§ 153. Titles of books.—§ 154. Originality.—§ 155. New editions.—§ 156. Duration and extent of right.—§ 157. Persons who may acquire the right.—§ 158. Infringements of copyright.—§ 159. Literary piracy.—§ 160. Abridgments.—§ 161. Translations.—§ 162. Literary larceny.—§ 163. Rights of author.—§ 164. Duties of author.—§ 165. Investitive facts.—§ 166. Transvestitive facts.—§ 167. Divestitive facts.—§ 168. Remedies against infringements.—§ 169. Remedies against author.—§ 170. Recommendations of Commission 165–198

CHAPTER VIII.

PRINCIPLES OF ARTISTIC COPYRIGHT.

§ 171. Introduction.—§ 172. Is artistic copyright desirable?—§ 173. Arguments against artistic copyright.—§ 174. Sir J. F. Stephen's views.—§ 175. Defences of artistic copyright.—§ 176. Views of English art-world.—§ 177. Justification of artistic copyright.—§ 178. Examination of Stephen's view.

PAGE

—§ 179. Examination of other views.—§ 180. Unpublished artistic works. What is publication?—§ 181. Definition of publication in Artistic Copyright Bill of 1883.—§ 182. Registration of artistic work.—§ 183. Proposals of Copyright Commission as to registration.—§ 184. Effects of sale on copyright. Commissioned works.—§ 185. Photographs.—§ 186. Infringements.—§ 187. Search and seizure.—§ 188. Codification 199–219

CHAPTER IX.

ENGLISH LAW OF ARTISTIC COPYRIGHT.

English Statutes 220

§ 189. English statutes.

SECTION I. *Unpublished Works* 221

§ 190. Unpublished works of art.—§ 191. Cases on the subject: *Prince Albert* v. *Strange*.—§ 192. *Jeffreys* v. *Boosey*.—§ 193. *Turner* v. *Robinson*.—§ 194. Statute of 1862.—§ 195. Recent cases.—§ 196. Result.—§ 197. What is publication? *Turner* v. *Robinson*.—§ 198. General conclusions.

SECTION II. *Engravings, Prints, &c.* 231

§ 199. Statutes.—§ 200. Subject-matter of right.—§ 201. Nature of right.—§ 202. Investitive facts.—§ 203. Transvestitive facts.—§ 204. Divestitive facts.—§ 205. Infringements of copyright.—§ 206. Copies in pen and pencil.—§ 207. Principles of infringement.—§ 208. Remedies for infringement.—§ 209. International copyright.—§ 210. Recommendations of Commission.

SECTION III. *Paintings, Drawings, and Photographs* . . . 240

§ 211. Statutes.—§ 212. Subject-matter of the right.—§ 213. Nature of the right.—§ 214. Investitive facts. Registration.—§ 215. Transvestitive facts. *Tuck* v. *Canton*.—§ 216. Divestitive facts—§ 217. Infringements of the right.—§ 218. Remedies and penalties.

SECTION IV. *Sculptures* 251

§ 219. Statutes.—§ 220. Nature of the right.—§ 221. Investitive facts.—§ 222. Infringements of the right.—§ 223. Remedies for infringements.—§ 224. Recommendations of the Commission.

PAGE

SECTION V. 255

§ 225. Recommendations of the Copyright Commission.—§ 226. Proposals of the Artistic Copyright Bill of 1883.—§ 227. Laws of other countries.

CHAPTER X.

COLONIAL COPYRIGHT.

§ 228. History and present position of Colonial Copyright.—§ 229. Recommendations of the Commission.—§ 230. Summary of the recommendations of the Commission.—§ 231. Foreign and Colonial reprints.—§ 232. Result . . . 264–270

CHAPTER XI.

INTERNATIONAL COPYRIGHT.

§ 233. Introduction.—§ 234. English law.—§ 235. Should the royalty system be introduced in International Copyright?—§ 236. Criticisms of the existing law.—§ 237. Recommendations of the Commission.—§ 238. The American question. § 239. Present position of the United States on the question. —§ 240. Results of the attitude of the United States.—§ 241. The "Courtesy" of the American book-trade.—§ 242. Parties in the United States on the copyright question.—§ 243. Results 271–289

CHAPTER XII.

CONCLUSION.

§ 244. The Law of Copyright has a communistic character . . 290

ADDENDUM 292

APPENDIX.

PATENTS AND PRIVILEGES IN RYMER'S FŒDERA RELATING TO QUESTION OF LITERARY PROPERTY 293

PRIVILEGES AND DOCUMENTS RELATING TO HISTORY OF COPYRIGHT IN CALENDAR OF DOMESTIC STATE PAPERS . . . 298

INDEX 301

INDEX OF CASES CITED.

The figures refer to paragraphs, not pages.

Am. = American; *Sc.* = Scotch.

A.

Abernethy *v.* Hutchinson, 101, 103, 109
Atkins *v.* Stationers' Company, 82

B.

Bach *v.* Longman, 69, 134
Bartlett *v.* Crittenden (*Am.*), 100
Baskett *v.* Cambridge University, 68, 150
Beal, Ex parte, 182, 208, 213, 214, 217
Berenger, De *v.* Wheble, 205
Black *v.* Murray (*Sc.*), 155
Bogue *v.* Houlston, 202
Boosey *v.* Fairlie, 130, 142
Boucicault *v.* Chatterton, 131, 234
——— *v.* Delafield, 131, 234
——— *v.* Fox (*Am.*), 109
——— *v.* Hart (*Am.*), 130
——— *v.* Wood (*Am.*), 130
Bradbury *v.* Beeton, 153
——— *v.* Hotten, 160
Bramwell *v.* Halcomb, 162
Brown *v.* Cooke, 165
Burnett *v.* Chetwood, 161

C.

Cable *v.* Marks, 152
Campbell *v.* Spottiswoode, 159
Cary *v.* Longman, 154
Chappell *v.* Boosey, 121, 132, 134
——— *v.* Purday, 87, 135
——— v. Sheard, 141, 153
Chatterton *v.* Cave, 124
Clark *v.* Bishop, 122, 126
Clementi *v.* Golding, 135
Cobbett *v.* Woodward, 152
Coffeen *v.* Brunton (*Am.*), 159
Coleman *v.* Wathen, 119
Cooper *v.* Whittingham, 168
Coote *v.* Judd, 126, 140, 164
Correspondent News Co. *v.* Saunders, 164
Cox *v.* Land and Water Co., 148
Crowe *v.* Aiken (*Am.*), 130
Cumberland *v.* Copeland, 127
——— *v.* Planché, 127

D.

Dalglish *v.* Jarvie, 197
D'Almaine *v.* Boosey, 141, 142, 160
Daly *v.* Palmer (*Am.*), 122, 124
Dickens *v.* Lee, 160
Dicks *v.* Brooks, 205, 206, 213, 217
——— *v.* Yates, 153, 158
Dodsley *v.* Kinnersley, 160
Donaldson *v.* Beckett, 83, 88, 89, 119

The figures refer to paragraphs, not pages.

Am. = American; *Sc.* = Scotch.

Drury *v.* Ewing (*Am.*), 152
Duck *v.* Bates, Addendum, p. 292
Duke of Queensberry *v.* Shebbeare, 100, 195
Dupuy *v.* Dilkes, 214

E.

Emerson *v.* Davies (*Am.*), 162
Eyre *v.* Walker, 86

F.

Folsom *v.* Marsh (*Am.*), 103, 160, 162
Fores *v.* Johnes, 200
French *v.* Conolly (*Am.*), 130

G.

Gahagan *v.* Cooper, 219
Gambart *v.* Ball, 160, 201, 206
——— *v.* Sumner, 205
Gee *v.* Pritchard, 101
Grace *v.* Newman, 152
Graves' Case, 164, 211, 214
Graves *v.* Ashford, 201, 202
Gray *v.* Russell, 154, 160
Gyles *v.* Wilcox, 160

H.

Hatton *v.* Kean, 124
Hawkesworth *v.* Newberry, 160
Hedderwick *v.* Griffin (*Sc.*), 155
Hime *v.* Dale, 151
Hopps *v.* Long (*Sc.*), 151
Hotten *v.* Arthur, 152

J.

Jarrold *v.* Houlston, 154
Jefferys *v.* Boosey, 93, 101, 139, 157, 190, 192, 211

K.

Keene *v.* Clarke (*Am.*), 130
——— *v.* Kimball (*Am.*), 130
——— *v.* Wheatley (*Am.*), 130
Kelly *v.* Byles, 153
——— *v.* Hutton, 153
——— *v.* Morris, 154
Kiernan *v.* Manhattan Quotation Co., 106

L.

Lacy *v.* Rhys, 127
Laurence *v.* Smith, 151
Lawrence *v.* Dana (*Am.*), 154
Leader *v.* Purday, 141
Lee *v.* Simpson, 129
Levy *v.* Rutley, 126
Lewis *v.* Fullarton, 154
Leyland *v.* Stewart, 143, 166
Longman *v.* Winchester, 162
Lover *v.* Davidson, 141
Low *v.* Routledge, 164
Lucas *v.* Cooke, 201, 217
Lyon *v.* Knowles, 129

M.

Mack *v.* Petter, 153
Macklin *v.* Richardson, 119
Maple *v.* Junior Army Stores, 152, 202
Marsh *v.* Conquest, 127, 129
Martin *v.* Wright, 205, 217
Martinetti *v.* Maguire (*Am.*), 124
Matthewson *v.* Stockdale, 152
Maxwell *v.* Hogg, 153
Mayall *v.* Higbey, 197
Mayhew *v.* Maxwell, 148
Millar *v.* Taylor, 68, 71, 74, 79, 80, 81, 83, 84, 87, 89, 101
Moore *v.* Clarke, 205
Morris *v.* Kelly, 119

The figures refer to paragraphs, not pages.

Am. = American; *Sc.* = Scotch.

Morris *v.* Wright, 162
Morton *v.* Copeland, 127
Motte *v.* Falkner, 86
Murray *v.* Benbow, 151
——— *v.* Bogue, 155, 161
——— *v.* Elliston, 121
——— *v.* Heath, 217

N.

Newton *v.* Cowie, 202
Nottage *v.* Jackson, 64, 126, 140, 164, 185, 214
Novello *v.* Sudlow, 123, 142, 162

O.

Oertal *v.* Jacoby (*Am.*), 198
——— *v.* Wood (*Am.*), 198
Oliver *v.* Oliver, 103
Osgood *v.* Allen (*Am.*), 153

P.

Page *v.* Townsend, 202
—— *v.* Wisden, 152
Palmer *v.* De Witt (*Am.*), 102, 109, 130, 131
Percival *v.* Phipps, 103
Pike *v.* Nicholas, 162, 168
Planché *v.* Braham, 124, 142
Platt *v.* Button, 135
Pope *v.* Curl, 103
Powell *v.* Head, 127
Prince Albert *v.* Strange, 100, 105, 190, 191

Q.

Queensberry, Duke of, *v.* Shebbeare, 100, 195

R.

R. *v.* Closs, 218
R. *v.* Foote and Ramsay, 151
Reade *v.* Conquest (1st case), 124
——— *v.* ——— (2nd case), 124
——— *v.* Lacey, 124
Raper *v.* Streater, 82
Routledge *v.* Low, 139, 157, 159, 165, 228
Roworth *v.* Wilkes, 159
Russell *v.* Bryant, 129
——— *v.* Smith, 122, 123

S.

Scott *v.* Stanford, 159
Selligsen *v.* Legge, 195
Shelley *v.* Ross, 126
Shepherd *v.* Conquest, 126, 127
Shook *v.* Newendorf (*Am.*), 130
Singer Co. *v.* Wilson, 153
Southey *v.* Sherwood, 101, 151
Spiers *v.* Brown, 162
Stannard *v.* Harrison, 200, 201
——— *v.* Lee, 149, 200, 202
Stationers' Co. *v.* Carnan, 68, 150
——— *v.* Seymour, 82
Stockdale *v.* Onwhyn, 151
Storace *v.* Longman, 135
Story's Executors *v.* Holcombe (*Am.*), 160
Stowe *v.* Thomas (*Am.*), 50, 161
Strahan *v.* Graham, 148
Sweet *v.* Benning, 148, 154, 159, 165

T.

Thomson *v.* Stanhope, 103, 195
Tinsley *v.* Lacy, 121, 124
Tonson *v.* Collins, 86
——— *v.* Walkner, 86
Toole *v.* Young, 121, 124
Tuck *v.* Canton, 215, 217
Turner *v.* Robinson, 190, 193, 197

The figures refer to paragraphs, not pages.

Am. = American; *Sc.* = Scotch.

W.

Wall *v.* Martin, 120, 122, 123
—— *v.* Taylor, 120, 122, 123, 136, 137, 139, 140, 144
Walter *v.* Head, 153, 156
——— *v.* Howe, 148, 159, 165
Weldon *v.* Dicks, 153
West *v.* Francis, 205
Wheaton *v.* Peters (*Am.*), 98, 154
White *v.* Geroch, 106, 148
Wilkins *v.* Aikin, 162
Wood *v.* Boosey, 140, 141, 142
—— *v.* Chart, 131, 234, 236
Woolsey *v.* Judd (*Am.*), 101
Wright *v.* Tallis, 151
Wyatt *v.* Barnard, 154

LIST OF WORKS CITED

Other than Law Reports and Statutes, English and American; and State Papers.

Austin's Lectures on Jurisprudence. 4th edit. London, 1873.
Burn, J. S., on the Star Chamber. London, 1870.
Cobbett's Parliamentary Register.
Copinger on Copyright. 2nd edit. London, 1881.
Drone on Law of Property in Intellectual Productions. Boston, 1879.
Herbert and Ames' Typographical Antiquities. 3 vols. 1785.
(*Cited* Herb. Ames T. A.)
Holland on Jurisprudence. 1st edit. Oxford.
Jerrold, S., on English and Foreign Copyright. London, 1881.
Lowndes on Copyright. London, 1840.
Macaulay's Speeches. People's Edition. 1877.
Maine, Sir H., on Ancient Law.
Maugham on Law of Literary Property. London and Edin. 1828.
Rymer, Fœdera, &c. 20 vols. 1704.
Scobell's Acts and Ordinances of Parliament, 1640–1656: 1658.
Strype's Life of Archbishop Parker.
Trevelyan's Life of Macaulay. 2nd edit. 1877.

Also

Report of the Copyright Commission. Parl. Papers, 1878. C. 2036
(*Cited* C. C. R.)
Evidence of the Copyright Commission. Parl. Papers, 1878. C. 2036 I.
(*Cited* C. C. Ev.)

THE LAWS OF COPYRIGHT.

CHAPTER I.

INTRODUCTION.

§ 1. Introduction.—§ 2. Method to be pursued.—§ 3. Necessity for preliminary investigation obviated.—§ 4. Absolute rights dismissed.—§ 5. Fundamental question of law of Copyright.—§ 6. What is meant by "Property in literary productions."—§ 7. Questions to be answered.

§ 1. Introduction.

"THE question of Copyright, like most questions of civil prudence, is neither black nor white, but grey" (*a*). So said Mr. Macaulay, the member for Edinburgh, in the course of the celebrated debates on the Copyright Bill brought in by Serjeant Talfourd at the beginning of the present reign, and in view of the controversial history of the subject it is a maxim specially to be remembered. For attempts to reduce to principle the laws dealing with Copyright, or the similar laws of Patents and Trade-marks, at once lead the student into what has been called "the realm of legal metaphysics," a realm as fruitful in controversy and as fruitless in proportionate results as that other realm where "ignorant armies clash by night" over the debateable fields of Phænomena and Noümena, Destiny and Free Will.

When we read of the "absolute right of the author

(*a*) Macaulay's Speeches, p. 110.

§ 1. Introduction.

to the fruit of his labour," or of that assumed "dedication to the public" which destroys the absolute right; whether by a "question-begging epithet" we find literary property condemned as a "monopoly," and hear Lord Camden exclaim "that it is unworthy great authors to traffic with a dirty bookseller for so much a sheet of letterpress" (*b*), or learn from Professor Huxley that "if there be any foundation for rights of property, the right of an author in a book is as complete and extends as far as the right of any person to any property whatever" (*c*); we have through all the storm to bear in mind that the truth is not the black or white broadly painted by these controversialists, but the humble grey which emerges as the result of long controversy.

And this "grey" on investigation will be found startling enough. We have a commission, appointed by a Conservative Government and presided over by a Conservative peer, recommending a form of legislation with regard to literary property which is denounced as the most pernicious communism when applied to land; and, while the measures of our earlier history, concerning "forestallers and regraters," and fixing the price of bread and other material necessaries, are considered as monuments of the obsolete errors of our less enlightened ancestors, we find the same commission in effect advising that the price of literary commodities should be fixed by the State. A subject which causes such divergence in controversy, and leads to such startling results, clearly deserves the most careful investigation, to be conducted on a method as purely scientific as possible.

(*b*) Parliamentary Register, Cobbett, 17, 1000.
(*c*) C. C. Ev. q. 5553.

§ 2. Method to be pursued.

Such a method would naturally commence with an investigation of the nature of property in order to ascertain whether it existed apart from protection afforded by the State, or whether protection from interference, promised and afforded by the State, constituted property. If the latter position was found correct we should further proceed to discuss the grounds on which such protection should be afforded, before applying the general principles thus obtained to the particular case of literary productions.

§ 3. Necessity for preliminary investigation obviated.

Fortunately, however, the necessity for this general preliminary investigation is obviated by the fact that practical agreement prevails amongst modern jurists as to the answer to be obtained. Though Utilitarianism is making its way rapidly in the science of Ethics, it is by no means recognised as yet by all thinking men as the true system of moral practice, still less as affording a scientific explanation of the foundations of morality. In politics, however, the Utilitarian formula is almost universally accepted, not only as the test of legislation, but also as affording a scientific foundation for the art of legislation. As Sir Henry Maine says the principle of utility may be only "a clear rule of reform" (*d*). As is contended by the Utilitarian school, it may be the ultimate reason and justification of all laws and all authority. We need not discuss whether *chronologically* it has been so; whether nations in their legislation have consciously aimed at the "greatest happiness of the greatest number," or whether their laws have unconsciously been made to express the prevalent ideas of the age as to utility. We may be content to assume, what is almost universally admitted,

(*d*) Ancient Law, p. 78.

§ 3. Necessity for preliminary investigation obviated.

that, *logically*, Utilitarianism is the groundwork of the science and art of legislation, and that therefore the justification of any particular law, the reason which justifies its enactment, is the ultimate benefit to result to the community from its conformity to such a law.

§ 4. Absolute rights dismissed.

We may further dismiss from consideration the much vexed question of "Absolute Rights" by taking for granted the position of the Austinian jurisprudence that all "rights," in the strict sense of the word, result from the command of the Sovereign, and have no existence prior to such command. As Professor Holland has well pointed out (*e*), the phrase "a right" is used in two senses: where *public opinion* would view with approval a man's carrying out his wishes either by his own acts or by influencing the acts of others, and with disapproval any attempt to interfere with his so doing, the man has been said to have a "*moral right*" to act in such a manner. Where the *power of the State* will protect him in thus carrying out his wishes, and will compel other people to so regulate their conduct that his wishes may be carried out, he has a "*legal right*" to act in accordance with his wishes. When, therefore, it is said that a man has "a right" to do any act independently of the action of the State, all that can be meant is that people generally view with approval his performing that act; and that therefore his proposed conduct is presumably in accord with the general standard of morality. It may, however, be inexpedient to confer on him definite legal protection in such action. The interference of the State in certain departments of social life may be productive of more evil than good, or the general standard of

(*e*) Jurisprudence, p. 58.

morality may differ from the standard set up by legislation. A moral right therefore does not necessarily imply a legal right, and the existence of the popular approval constituting the moral right is only of importance to the legislator because a conflict of law and popular opinion is *primâ facie* a thing to be avoided. § 4. Absolute rights dismissed.

In taking this view of the matter we naturally reject the opposite theory as to absolute rights, founded on the Law of Nature and on justice, and in no way determined by considerations of utility.

Since then no legal rights exist apart from the commands of the Sovereign, and the Sovereign in granting rights is guided by considerations as to the benefits resulting to the community from his proposed grant, the *Fundamental Question of the Copyright Laws* is :— § 5. Fundamental question of Law of Copyright.

Is it desirable in the interests of the community that the State should create and protect property in literary productions or the results of intellectual labour?

And before answering this we are led to consider the meaning of the phrase "Property in literary productions." "Property" is defined by Austin as "the right to use or deal with some given subject in a manner or to an extent which, though not unlimited, is indefinite" (*f*). Such property is created by the State when it orders all persons to abstain from so acting as to interfere with certain uses of the thing by the person invested with the right. § 6. What is meant by "Property in literary productions."

This right being indefinite, cannot be exactly defined. It may be said to be a right to do what one likes with a thing subject to restrictions imposed by the State,

(*f*) Austin, i. 382.

§ 6. What is meant by "Property in literary productions."

which have mainly reference to the prevention of harm to other people. It has been divided roughly into—

1. The right to use.
2. The right to prevent others from using.
3. The right to destroy.
4. The right to alienate during life.
5. The right to alienate at death.

The State however in conferring protection may not confer all of these.

The creation of literary property is asked in the following way. It is found that literary compositions have or may have an exchange-value. People are willing to give money to listen to a lecture, or to obtain a copy of a book. There is in short a demand for literary labour, and this pecuniary demand is one of the motives which lead to literary supply. When an author has written a work, unless the State intervenes, his manuscript may be stolen and copies sold to the public by the thief. The return for the author's intellectual labour thus is obtained by the thief and not by the author; or when the author has communicated his work to the public others may reproduce his work by mechanical means, and so may intercept part of the effective pecuniary demand which otherwise would have come to him to be satisfied.

An author therefore asks that the State should protect him by creating literary property. He asks that the State should prevent others from multiplying copies of his work and communicating them to the public without his permission. He asks that such unauthorized communication be restrained, whether it be the communication of the whole or of a part of his work; as either professedly his or under a disguise; in its

original form, or abridged, or translated into other languages, or made by other channels than those by which his communication has been made.

§ 6. What is meant by "Property in literary productions."

This being the nature of the literary property which the State is asked to create, the questions to be dealt with in the first part of this essay are:—

§ 7. Questions to be answered.

I. *Shall the results of literary labour be protected at all? Shall the ideal "Corpus Juris" contain a Law of Copyright?*

II. *If so, what shall be the nature and limits of this protection: what shall be the provisions of the ideal Copyright Law?*

To the discussion of the first of these questions we now proceed.

CHAPTER II.

THE FUNDAMENTAL QUESTION OF THE COPYRIGHT LAWS.

§ 8. Interests of the State in literary property.—§ 9. How they may be secured.—§ 10. Direct results of the absence of State protection.—§ 11. Indirect results of the absence of State protection.—§ 12. Evidence of Spencer and Huxley.—§ 13. Evidence from the United States.—§ 14. Will Copyright produce cheap books?—§ 15. The Royalty system.—§ 16. International Copyright.

§ 8. Interests of the State in literary property.

WITH respect to literary productions, the interests of the State are:—

1. To obtain *good* literary work.

2. To obtain it at as *small a cost* to the community as possible.

The interest of *authors* is to obtain as large a return for their work as possible, both in reputation and in money.

The interest of *publishers* is to obtain as much security as possible for the capital they invest in supplying the public demand for literary productions.

And generally it is to the interest of the community to secure these ends *without legislative interference.*

§ 9. How they may be secured.

The interests of the State have been said to be two:—I. *Good* books: II. *Cheap* books. The best books will be secured if the best men can be induced to write them. So long as there is an efficient demand for good books, there will be in the long run a sufficient supply of them; but the demand, to be efficient, must furnish authors with the rewards for writing which they desire. And these

rewards—setting apart the case of those authors of genius "who write because they must"—are fame and money. § 9. How they may be secured.

It is perhaps unnecessary to prove that the State cannot make legislative provision for securing fame to an author, except in the very indirect way of providing that inferior works shall not be sold under the false pretence that they are his. But can the State secure that an author or his assigns shall secure his due return in money? And clearly it cannot secure this, in the sense of a return proportionate to the merits of his work. It can, however, secure to the author or his assigns the return that the community feel disposed to give for the privilege of reading or obtaining copies of his work.

The community *can* do so; whether it *should* do so depends on the question whether without such security the best works will be produced, or whether the inducement offered, even if no such protection be afforded, will be a sufficient attraction to lead qualified men to become authors.

If no such security is afforded, the author of a literary work will be in this position. Suppose his work a success; it will be open to anyone to mechanically and literally reproduce it, and to sell the copies thus reproduced at a lower price than the original, inasmuch as the cost of production of the copy does not include remuneration to the author. That portion of the price, which on the sale of the original edition goes to the author, on sale of the copied edition will either remain in the pockets of the public, who thus directly benefit, or will go into the pockets of the copier, who reaps a larger profit than the ordinary one. Competition among rival copyists, however, must reduce this larger profit, and leave as the final direct result that, in the case of successful works, the § 10. Direct results of absence of State protection.

§ 10. Direct results of absence of State protection.

author will only obtain a part of the total public demand, while the community will secure successful works at a price which omits remuneration to the author.

§ 11. Indirect results of absence of State protection.

But the indirect results of this have also to be considered. Very few authors supply all the capital to publish their works; this is furnished by the publisher, whose business it is to estimate the chances of success of the works submitted to him, and to invest his capital accordingly. In this business there are great risks, and there must be corresponding remuneration. But the effect of the absence of State protection will be that, in the case of unsuccessful works, the publisher will bear the full loss, and in the case of successful ones, he will not receive the full profit by which he reckons his losing ventures are to be recouped. Having thus to compete with publishers who give no remuneration to the author, he cannot afford to offer so much remuneration to authors who bring their works to him.

Authors who publish at their own risk will not secure the full return for their labour; authors who publish at the risk of another must not expect to receive any return. And this must result in lessening the supply of authors; publishers will be less willing to print the works of unknown men, and, when they print, less able to give remuneration for such work. The work produced will be naturally work for which an immediate success may be expected, in order that capital may not be too long locked up, exposed to the risks of piracy, and such work must be of an ephemeral nature. The time and labour necessary to produce great works of thought could not be given, except by the favoured few, and their social surroundings are not favourable for profound labour. Man must eat to live, and most men must earn to eat. If eating will

not follow from writing, the writing must in many cases be left undone, or done as subsidiary to other employment, which drains energy and vigour from the writer, but which wins him bread.

§ 11. Indirect results of absence of State protection.

No doubt, in answer to all this, we hear that the thought of sordid gain does not influence a noble mind. Lord Camden reminds us that Milton did not refuse to publish 'Paradise Lost' because he was only offered five pounds for it. "He knew that the price of his work was immortality, and that posterity would pay it." But "where are the tablets of the lost?" Where are the great works that might have been produced if the great minds that could have written them had not been forced to spend precious hours in uncongenial tasks, in the drudgery of earning a livelihood? With some born authors, hope and the sacred fire may overcome the difficulties of the world, but with how many others is the ending in Chatterton's garret?

§ 12. Evidence of Spencer and Huxley.

Very few thoughtful men will deny that a great loss would have been suffered by English and European thought, had Mr. Herbert Spencer's philosophical works remained unwritten. Yet his evidence before the Copyright Commission (*a*), which gives a full financial history of their productions, shews that without State protection they could never have seen the light. And with regard to works on physical science, Mr. Huxley's evidence is to the same effect. He says: "My impression is that a considerable diminution in the term of copyright" (much more therefore its total abolition) "would be altogether fatal to the production of works requiring time and research, and perhaps costly illustrations." (*b*)

(*a*) C. C. Ev. pp. 257, 281.
(*b*) C. C. Ev. q. 5608.

§ 13. Evidence from the United States.

We should expect then, from theoretical considerations, that absence of State protection to authors would materially lessen the supply of the best books, by putting obstacles in the way of the production of the most permanent and valuable classes of literature. And experience points to the same result. It is true that there is no civilized country which does not recognise literary property, in which we can study the effects of entire absence of protection. On the contrary, it forms a strong argument for the necessity of protection, that all civilized countries, with the doubtful exception of some of the South American republics, have recognised literary property, and that the tendency of legislation in these countries during this century has been rather to extend than to diminish this protection.

But in the case of the *United States* we obtain an actual experience which serves the same purpose. While recognising National, the United States do not recognise International, Copyright. The works of English authors are reprinted by American publishers without the necessity of paying anything to their authors; and as a consequence they compete on the most favourable terms with native American works, with, according to the most competent observers, two-fold results. In the first place, this competition has the direct effect of cramping and depressing purely American literature. Publishers cannot afford to give large remuneration to authors, and need very great inducements to lead them to bring out works by unknown men; the supply of authors is therefore restricted, and many of the best men seek success in other professions. In the second place, the leading publishers have practically adopted a species of "social or moral copyright," as distinguished from strict copyright granted by the State. They abstain from printing English

works first reprinted by any other house, and thus have recognised the advantages to themselves, and ultimately to the public, of a system which recognises literary property. **§ 13. Evidence from the United States.**

§ 14. Will Copyright produce cheap books?

It is therefore to the interests of the community to protect literary property, that one of the public wants, a supply of the best literature, may be satisfied. Whether the other requisite, cheap literature, can be obtained by State regulation, is a matter of more difficulty.

It may be accepted as a truism that where there is free competition, the price of the article supplied will in the long run be that at which it can be produced, together with the ordinary profit to the producer, and that State interference in fixing prices is, as a rule, worse than useless. Where there is not free competition or free bargaining, circumstances are altered, as in the case where from the nature of the article only one person can supply it, and he is therefore enabled to fix his price at the point where people say: "I will give so much for this, and no more." In the sale of books the author has such a "monopoly," and we have seen that the monopoly is desirable in the interests of the community. But it is also suggested that the community would defeat its own end, if after securing good literature by State protection, it allowed that literature to be rendered by high prices inaccessible to the people. This is a possible danger, indeed, but it does not seem in advanced communities a very practical one. For although there is no competition in the supply of any particular book, there is competition in the supply of works of a particular class; novels vie with novels; poetry competes with poetry for the favour of the public who read. There are very few books of sufficient importance to be bought at a high price, when

§ 14. Will Copyright produce cheap books?

other and similar works are offered for a much smaller sum. It is the interest of the author and publisher to publish their work at the price at which they can obtain the greatest return, and as a rule the lower the price is fixed the larger will be the sale. It follows from all this, that it is to the interest of the author and publisher to bring out editions at a price suitable to the mass of the reading community within a reasonable time of first publication; and so long as this is so, the State need not undertake the very difficult and unsatisfactory task of fixing the price at which tradesmen shall sell.

§ 15. Royalty system.

But besides direct regulation of prices by the State, a further suggestion has been made. It is proposed that, if after a reasonable time the author has not published a supply of his book at a reasonable price, it shall be open to any person to reprint the work on paying a *Royalty* to its author. By this plan it is contended that the public will obtain their books more cheaply, and the author will not be deprived of his fair remuneration. And this system in effect has been recommended for adoption in Colonial Copyright by the late Royal Commission. It is, of course, open to great objection on the ground of the difficulty of State decision as to what is a reasonable price, and as a general rule this is, I think, a sufficient argument against its adoption. But there are cases, notably the cases of International Copyright, and of Copyright in countries whose social organization is in its infancy, where its adoption with certain modifications seems desirable.

The consideration of these excepted cases will naturally come later, and we may content ourselves here with saying that the second end to be gained by the community, cheap books, should as a rule be attained by the

unfettered action of the author and publisher, their interest here being practically identical with that of the community; but that there are cases, depending on the varying circumstances of each community, where, if the author does not provide, within a reasonable time, a supply of his work at a reasonable price, other arrangements to procure that supply may fairly be sanctioned, provided that capital invested by the publisher is not unreasonably attacked, and that, except in special cases, due remuneration is secured to the author. § 15. Royalty system.

Before proceeding to the details of the ideal Law of Copyright, a few words may be said on the principle of *International Copyright*. The early history of Copyright law shews that it originally included the idea of protection of native industry. The doctrines of free trade, however, appear as applicable to intellectual as to physical commerce. It is to the interest of the community to secure the best foreign as well as the best native literature, and not only to secure it for themselves, but to encourage its further production by securing due remuneration for its authors. Foreign works reprinted without payment to their producers tend, by their competition, injuriously to affect the position of authors at home. § 16. International Copyright.

No reason therefore exists why the State should make a distinction between native and foreign literature, provided only that foreign authors make arrangements within a reasonable time of first publication for communicating their works to other countries. If they fail to do so, republication in those countries by others should clearly be allowed, the author under certain circumstances being secured his royalty. The community want good books as soon and as cheap as possible, and if no steps are

§ 16. International Copyright.

taken by the author to provide them with such a supply within a reasonable time, there is nothing unreasonable in allowing others to make provision for their wants.

For it is not here, as in the case of national or home Copyright, specially the interest of the author and publisher to supply the public of other countries at a price at which they will buy; an author may well be contented with the market of his own country without embarking on speculations in markets abroad, where he is probably ignorant both of the tastes of the reading public and of the best ways of creating demand. It is nevertheless desirable that he should be encouraged to himself republish abroad instead of simply waiting to receive a royalty on republication by others, and this end might be attained if the royalty were fixed at a lower figure than the author's ordinary profit on direct republication. For, in the first place, the author's quasi-parental fondness for his literary child is likely to secure that a work whose production he supervises will be produced in the most suitable way; and secondly, the increased remuneration for personal supply will tend to bring foreign works before the home public sooner than would otherwise be the case.

The foreign author, therefore, should be allowed a reasonable time during which to communicate his work to the home public in a suitable way, and during that time he should be protected from unauthorized reproduction in the country offering him protection. Should he make a suitable communication of his work, the protection should be continued; should he fail to do so, others should be allowed, on payment, as a rule, of a small royalty, to reproduce his work in that country, and, if they published a suitable reproduction, should be protected from competition therein.

§ 16. International Copyright.

The foreign author would thus obtain part of the benefit of a demand from other countries for his work, a privilege which could not but tend to encourage literary production and literary commerce all the world over.

The question of whether these privileges should be conferred on foreign literature absolutely, or as a return for reciprocal concessions made by foreign States, is one rather of policy than of principle. If, however, no concessions should be obtainable from foreign States, it seems that the ideal community should still grant copyright to the works of foreign authors. By doing so it will secure a better supply of foreign literature than if the reproduction of works produced abroad were open to everyone, without any regard to the claims of their authors, in which case only the more immediately popular and ephemeral works would be produced, as being works in which the capital invested was least exposed to the risks arising from unrestricted competition.

The question of *Colonial Copyright* is one raised by the peculiar circumstances of the British Empire, and does not demand separate treatment here.

We are thus brought to the consideration in detail of the principles on which the Law of Literary Copyright should be based.

CHAPTER III.

THE PRINCIPLES ON WHICH THE LAW OF COPYRIGHT SHOULD BE BASED.

PAGE

SECTION I. *What should be protected by the State* 19

§ 17. What should be protected?—§ 18. Unpublished works.—§ 19. Lectures and plays.—§ 20. Waiver.—§ 21. Recapitulation.

SECTION II. *Nature of the Protection* 22

§ 22. Nature of protection to be afforded by the State.—§ 23. Monopoly system.—§ 24. Royalty system.

SECTION III. *Qualities to be required in a Protected Work* . . 28

§ 25. Qualities to be required.—§ 26. Immoral works.—§ 27. Originality.—§ 28. New editions.—§ 29. Newspapers.

SECTION IV.—§ 30. *Quantity to be required in a Protected Work* 30

SECTION V.—§ 31. *To whom is Protection to be afforded?* . . 31

§ 32. Commissioned works.

SECTION VI. *Duration of Protection* 32

§ 33. Duration of protection.—§ 34. Problem of duration.—§ 35. Competing principles of duration.—§ 36. Result.—§ 37. What should be term of duration in England?—§ 38. Two-Term Copyright.—§ 39. Recapitulation.—§ 40. Terms of Copyright in various countries.

SECTION VII. *Infringements of Copyright calling for Protection.* 42

§ 41. Classes of infringements.—§ 42. Class I. Open reproductions *simpliciter*.—§ 43. Class II. Open reproductions with other matter.—§ 44. Class III. Disguised reproductions.—§ 45. Works of fact.—§ 46. Works of fiction.—§ 47. Abridgments. § 48. Recapitulation.—§ 49. Class IV. Reproductions through other channels.—§ 50. Translations.—§ 51. Dramatisation of novels.—§ 52. Result.—§ 53. Laws of foreign countries.

SECTION VIII. *Investitive Facts of Protection* 54

§ 54. Investitive facts.—§ 55. Registration and deposit of copies: Law of foreign countries.—§ 56. Registration.—§ 57. Nationality of author and place of publication.—§ 58. Summary. 54

SECTION IX.—§ 59. *Transvestitive Facts* 60

SECTION X.—§ 60. *Divestitive Facts* 61

SECTION XI. *Remedies for Infringements* 62

§ 61. Remedies.—§ 62. Limitation of actions.—§ 63. Remedies against the author.

SECTION XII.—§ 64. *Codification* 65

SECTION I.

What should be protected?

§ 17. What should be protected by the State?

The results of a man's intellectual labour as put into form by him, whether communicated to the public, either by writing or orally, or not, unless either expressly or impliedly he waives protection.

"*As put into form by him*": the State cannot protect ideas unembodied in some set or permanent form. The impossibility of State interference in such details of life as conversations or discussions far outweighs any possible advantage of encouraging men to think over topics. Putting into form must be a condition precedent to protection.

"*Whether or not communicated to the public*": an author may so deal with his work that every member of the public may obtain a copy either gratuitously or by purchase. He may on the other hand only communicate it to a limited circle, or he may wish to make no communication at all to the public. One who has communicated his work to the public should clearly be

§ 17. What should be protected by the State?

protected, the sole object of State protection being to make it worth while for authors to make such a communication. If however he restricts or prohibits the circulation of his work the case is a little different.

§ 18. Unpublished works.

Is the State to prevent others who may obtain a copy of an unpublished work from publishing it contrary to the wish of the author?

Though it is the aim of the State to obtain good literature, the objections to compelling authors to publish are too manifold to need explanation. I say nothing of the evils attending unauthorized publication of private letters, diaries, and memoirs, which the author has not written with a view to publication. Even in the case of works the publication of which would be a public boon, the impossibility of drawing the line where unauthorized publication shall first be allowed, renders manifest the necessity of leaving the question of publication to the initiation of the author. He knows his work best, and, as a class, men who write do not suffer from such overbashfulness in communicating their works to the public, that a friendly theft should be needed to bring them to light.

Both published and unpublished literary works therefore should be protected by the State from unauthorized reproduction.

§ 19. Lectures. Plays.

"*Communicated either by writing or orally.*" The result of intellectual labour may reach the public through various channels; it may be printed for the eye, or spoken to the ear. And the question here is whether the protection granted to printed works should also be extended to spoken lectures and dramatic performances, or shall a hearer be allowed to go away and in his

turn communicate to the public either by printing or speaking what he has heard. § 19. Lectures. Plays.

For the answer to this question we must turn to the fundamental reasons for protection of literary work. Is it to the interest of the State to secure good lectures and good plays, and is the protection suggested necessary to obtain them? And first, without going into a long disquisition on the educational and other effects of the Stage, it may be said that the State is not so much interested in lectures and plays as in books. It has this interest however in the Stage, that the plays performed thereon shall be good, and, while this cannot be directly secured, yet, by affording protection to the labour of men who write for the Stage, the State may encourage a better class of authors to devote their time to the production of dramatic works. Oral communications made from the Stage should therefore be protected from unauthorized reproduction.

Similarly with regard to lectures, the personal element in a lecture is attractive enough to give a good lecturer considerable influence, and a better class of work is likely to be produced if the lecturer can look forward to further communication of his work to the public in printed or oral form, without being exposed to unauthorized competition. Mr. Huxley, and any community might wish to secure lectures from men of his stamp, says (*a*):—"If I announce myself as ready to give a lecture to-morrow to which persons may be admitted at a certain fee, I make a contract with the persons who come that in consideration of their paying so much they shall hear me speak for an hour, and that is all. I do not sell my right to print and sell the lecture." Without dwelling on the rather strained claim of right Lecturers.

(*a*) C. C. Ev. q. 5571.

§ 19. Lectures. Plays.

made by the speaker, we may admit with him that a lecturer wishing for State protection should have it; while in view of the fact that many lecturers willingly waive protection, and indeed desire further publicity, it may well be provided that such oral communications shall be taken to be unconditional, unless the author expressly limits them by reserving his sole right to reproduce. In that case his reservation of rights should be protected.

§ 20. Waiver.

The further clause of the definition as to *express or implied waiver* will cover that class of intellectual productions where no protection is sought, conversations, political speeches, and the like. Here protection would have no end to serve, and could only work harm.

§ 21. Recapitulation.

Recapitulating; a man putting into a written or oral form results of intellectual labour should acquire protection. In the case of oral communications a reservation of his rights is to be implied in the case of the drama, but must be expressed in the case of lectures. The protection on principle should extend to all oral communications, but the doctrine of waiver of rights should be freely applied.

Section II.

Nature of the Protection to be afforded.

§ 22. Nature of protection to be afforded by the State.

We have now to consider in what way these results of intellectual labour should be protected.

The object of this protection is to secure the best class of literary works to the State. This may be indirectly attained by ensuring that the price which the public is willing to pay for a book should be paid to the author

or his representatives, and not to anyone who merely makes a mechanical and unauthorized copy of the work.

§ 22. Nature of protection to be afforded by the State.

Two ways have been suggested by which this result may be attained:—1. Protection by *Monopoly*; and 2. Protection by *Royalty*.

§ 23. Monopoly system.

I. *Protection by Monopoly.*—The author and his representatives may be protected from competition in the supply of the work, so that the public can only obtain it from them. They may be secured a "monopoly" of the book.

This system obviously secures the author the full return that the public is willing to pay, and, as it is to his interest to fix the price so as to obtain the greatest total return to himself, if he fixes the price too high, by checking the demand he will defeat his own ends. Some States which adopt the monopoly principle have also included in their code a proviso for regulating the price of books and ensuring a due supply of them. For the reasons stated above (*b*), these regulations are inadvisable; and the English proviso to that effect (*c*) is practically a dead letter.

This plan appears most suited to the public needs in countries where there is sufficient literary competition to prevent the literary monopoly of any particular class of works. The monopoly of a particular work in that class is then harmless. Under it the author and publisher have security that their capital invested will not have to compete with other capital embarked in the same venture, while the interest of the author is to find the price which will induce the largest number of the public to purchase, and also yield the largest return to himself.

(*b*) See p. 13.
(*c*) 5 & 6 Vict. c. 45, § 5.

§ 24. Royalty system.

II. *Protection by Royalty* is suggested as an alternative to the monopoly system. It is proposed that it should be open to any one to reprint the author's work on payment of a certain royalty or percentage to him; and the supporters of the system urge that it would provide due remuneration to the author, while securing to the public the advantages of competition in obtaining books at the lowest cost of production.

And in countries where there is a small demand for literature, or where a literary public is in the hands of a very few producers, this system may have its advantages. In countries where there is keen trade competition, its disadvantages are obvious.

Publishing is in such countries a very risky and speculative trade, and it is a difficult matter for unknown authors to obtain a publisher willing to invest his capital in the production of their works. The difficulty would be heightened, the risks increased, if, should the work prove a success, it were open to all publishers to compete in its supply on paying a royalty to the author. The original publisher would compete with such publications under the greatest disadvantages. He would have borne the additional expense of the corrections in printing from manuscript, and must allow in his price for the risk of original speculations. Other publishers could print direct from the corrected copy, and avoid all risk by waiting for the success of the work. No prudent man could undertake works involving much expenditure of capital with the prospect of such competition awaiting him.

To meet this objection it has been proposed to afford a certain limited period of protection to the original publisher before admitting publication by royalty as a competitor. This, however, would only be a protection in the case of light and ephemeral works, and would

afford no security in the case of scientific and philosophical publications of a more expensive character. In these much capital is invested, and the return is spread over a large number of years. It is not an uncommon thing to find £20,000 invested in a large literary venture, which cannot be repaid in less than twenty years. Protection is specially desirable to encourage the production of such works as these, and it must be a protection of some length.

§ 24. Royalty system.

Accordingly, the only circumstances in which the royalty system may be adopted, are—

(1.) In the case of communities of backward social organization.

(2.) As is argued elsewhere, in the case of International and Colonial Copyright, under due safeguards, where it is required to furnish a suitable supply of any book to the community in places where the author's interest does not immediately lead him to do so. In civilized communities like England and the United States, with large literary supply and demand, the author's interest may be relied on to furnish a supply of his work of a suitable character.

The more detailed consideration of the protection afforded will come most advantageously under the head of "Infringements" (*d*).

Section III.

Qualities to be required in a Protected Work.

§ 25. Qualities required in a protected work.

Although the object of State protection is to produce good literature, the State clearly cannot draw a line of literary quality, and only protect those works which attain to a certain standard of excellence. The enormous difficulty of such a task condemns it; and all

(*d*) See §§ 41–53.

§ 25. Qualities required in a protected work.

therefore that the State can do is to lay down certain conditions mainly negative.

The object of protection is certainly not to promote works of an injurious character. Most systems of law therefore contain a rule, that copyright cannot be obtained by a work of an immoral, seditious, libellous, or blasphemous character.

§ 26. Immoral books.

It is doubtful however whether this precaution does not defeat its own end; for the withdrawal of protection enables many people to commit the offence, but removes the power of checking its commission from the party most interested, the author of the pirated work. If protection is given to such works, only their author can publish them, and the State can deal with their circulation at once by prosecuting him, while both he and the State can prosecute unauthorized editions. If protection is withdrawn, the State will have far more difficulty in checking the circulation of an objectionable work, and will be deprived of the aid of a helper actuated by personal and pecuniary interest. The immoral character of a work should not therefore deprive it of copyright: its immorality can safely be left to the criminal law.

§ 27. Originality.

The object of the State is to promote intellectual labour, and thus to obtain works of some value. *Originality* is therefore a necessary quality for a copyright work. The English law however does not object to the presence of old matter, if enough labour in the way of arrangement recasting and addition has been bestowed on it to make it substantially a new work. And, while no definite rule can be laid down, we may say that so far as the work is new, so far as old materials

§ 27. Originality.

have been combined in new ways and with new labour, to that extent State protection may be afforded. It is to the interest of the State that light should be thrown upon old literary works by explanations, annotations, and additions; and these therefore may fairly claim protection. The fact however that old material is embodied in a work containing new matter, will not give any copyright in the old material. The State already has it and need not offer inducements to reproduce it; while still it protects new and valuable additional matter from unauthorized reproduction.

§ 28. New editions.

And from this follows the difficult question of *New Editions*, and the amount of protection to be afforded them.

It is to the interest of the community not only that an author should produce good books, but also that he should, even after first communication to the public, revise and improve them. He may therefore fairly claim copyright in his additions and alterations, provided they are of a substantial character. But this raises a further question. Under the system of copyright limited in duration from first publication, which has been adopted in various forms by many countries, the copyright of the first edition will expire before the copyright in the author's subsequent additions and alterations has lapsed (*e*). The first and crude edition may, therefore, compete with later and more mature ones, with the advantage on its side of not having to furnish any remuneration to the author. And this is an especially practical point in the case of scientific works and

(*e*) The evidence of Mr. Murray before the Copyright Commission, with reference to Hallam's History and Lyell's Geology, shews this to be a practical question. C. C. Ev. qq. 1242–1249, 1264–1271.

§ 28. New editions.

histories, which need frequent revision. The progress of discovery alters scientific conceptions, and the increased investigations of State papers and private manuscripts throw fresh light on history. The earlier editions of such works thus become obsolete or inaccurate, and it is clearly to the disadvantage of the community that, with the advantage of a smaller cost of production, they should compete with modern and revised editions. An author who has published a new edition of his work, in which substantial improvements have been made, should therefore be able to prevent the republication of earlier editions, which should be considered as cancelled.

The State however is not so much interested in the improvement, which would be only in diction, of works of poetry and fancy: "Belles Lettres" therefore might be fairly excepted from this proviso, which should apply only to works scientific or historical, or having as their object the communication of facts.

I do not pretend to overlook the fact that all these phrases:—"Substantial improvements," "original intellectual labour," and the like, only touch the difficulty of deciding what improvement is "substantial," and what is "originality." The question will however be dealt with more fully under the head of (*f*) "Infringements of Copyright," although any definite line of distinction appears impossible.

§ 29. Newspapers.

The question of originality also arises in a case where special provisions are necessary, the case of *Newspapers*. These contain statements of facts occurring at the time, and frequently articles of a literary character. So far as the latter are concerned, they are clearly entitled to protection; the State should encourage good newspapers

(*f*) See §§ 41–53.

§ 29. Newspapers.

as much as good books, and since the interest of this class of article is not ephemeral, but has a certain degree of permanency, it will be worth the while of competing papers, in the absence of protection, to copy such articles, even some time after their original publication.

In the case of mere announcements of fact the case is different; they are usually not repeated, because they are out of date the day after publication; competing papers must not be a day behind their rivals. Yet the enterprise of papers who provide early graphic and accurate news seems to need more encouragement than the appreciation of the buying public, and the barren flattery of rival journals who copy often without acknowledgment of the source. Telegrams from war correspondents, like those of Mr. Forbes in the *Daily News* and of the *Standard* correspondent during the late Egyptian war, surely deserve protection. At least acknowledgment of the source of copied matter should be compulsory, and it does not seem unfair to require some pecuniary return from papers reproducing. Undoubtedly, however, there is great difficulty in drawing the line between the facts and the literary articles, and no very precise principles can be laid down. With magazines, the matter is of more permanent interest, and the necessity for protection more obvious.

Law of England and other countries.

The law of *England* makes no special provisions as to the parts of newspapers which may not be reproduced, though the Copyright Commission recommend (*g*) that such a distinction be drawn.

Foreign countries (*h*) very commonly allow reproduction, if the source of the article is acknowledged. Thus *Belgium* allows such reproduction unless the right has

(*g*) C. C. Rep. § 88.
(*h*) Copinger on Copyright, pp. 500–600 *passim*.

§ 29. Newspapers.

been expressly reserved by the original author, and *Norway, Sweden,* and *Denmark* adopt similar provisions. *Austria* allows reproduction from an acknowledged source, if the extract is not more than a page in length. *France* protects literary articles in newspapers, if registered, but not news, though it is not clear how the dividing line is drawn.

Section IV.

Quantity to be required in a Protected Work.

§ 30. Quantity required in a protected work.

We have seen that the State should not investigate the literary merit of works, if they are original and not obnoxious to the criminal law. Should it further require a certain size or length as a condition precedent to protection? And here again it seems that, if the work is separately communicated, no other criterion of size can be insisted on. A word or a sentence by itself cannot be protected, or rather there would be no gain to the State in doing so. And this consideration appears decisive of the claim of *Titles of works* to copyright.

Book-titles.

There is no gain to the State in the invention of a good title; the gain is to the author, whose work may be sold with more readiness if denoted by a taking or original sign. And as the justification of copyright is the resulting gain to the State, if there is no need to encourage the invention of good titles there should be no copyright in them. This will not hinder the State from interfering to prevent *fraudulent* use of a title invented by another, where the result is to induce the public to buy one work under the impression that they are buying another; and this appears to be the only true ground on which titles of works can claim protection.

Briefly we can only repeat ourselves, and say that any original work of appreciable or substantial size or quantity can claim protection.

§ 30. Quantity required in a protected work.

Section V.

To whom is Protection to be afforded?

§ 31. To whom is protection to be afforded?

As it is the author whom the State encourages to produce, the author in the first place should have the benefit of protection. It is however a matter of indifference to the State whether the author capitalizes his returns by selling his copyright once for all, or waits to receive them as the public by degrees pay them. If he capitalizes, the State should help him to obtain a fair price for what he has to sell by protecting his goods, that is, by affording protection from unauthorized reproductions to his assigns. Copyright therefore should be obtained by *the author, his representatives, or assigns.*

§ 32. Commissioned works.

A question of some difficulty arises in the case of works produced by *commission* (*i*). When the *entrepreneur* of an encyclopædia, magazine, or newspaper, composed of articles by a large number of authors, sets them to work for his undertaking, giving, as it were, an order for a given article at a given price, to whom should protection be afforded? The stimulus of production is furnished by the *entrepreneur*; his commission sets the author to produce, and the hope of further employment, among other things, presumably leads the author to turn out his best work. In this case the *entrepreneur* produces, and he can certainly claim protection for, the complete work. But frequently individual articles from

(*i*) This difficulty is more felt in the case of *Artistic* Copyright.

§ 32. Commissioned works.

his collection merit reproduction in a more accessible form, and since from motives of personal interest the author is more likely to effect this reproduction than the proprietor of the original work, he should be allowed to do so, if due care is taken not to interfere with the sale of the original work. To effect this it should be provided, in the absence of any special agreement between the parties, that until a certain time has expired the consent of both author and *entrepreneur* should be required to the reproduction in a separate form of the commissioned work; after that time the author should be allowed to reproduce at his will. The time of joint consent would depend on the more or less permanent character of the complete collection; it would, for instance, be much less in the case of newspapers than of encyclopædias, which would be deprived of much of their selling value by the republication of their most important articles in a separate form.

Section VI.

Duration of Protection.

§ 33. Duration of protection.

We now have to consider for what length of time in the interests of the State this protection should be continued. And, since the object of protection is to secure the best class of literature, the *primâ facie* answer will be—so long as is necessary to secure such literature, and no longer. Further protection will benefit only the author, and at any rate will injure the community to this extent, that it will pay for a certain period more for its books than it otherwise would, the cost of production being increased by further remuneration to the author. This reasoning however is subject to modification from other considerations.

§ 33. Duration of protection. Unpublished works.

And, in the first place, it does not apply to the case of *unpublished works*; the considerations which protect them at first from unauthorized publication are valid while the author has representatives living, though their force is lessened with time. There seems no reason, however, to limit the protection afforded to them, and so long as the author or his representatives survive and do not publish, so long unauthorized publication should be forbidden.

In the case of published works we have seen that in strictness enough protection should be given to secure publication of the best class of works, and no more. But, as Bentham has pointed out, the provisions of a law should not conflict unnecessarily with popular feeling, and popular feeling in many States undoubtedly condemns any arrangement whereby an author's works become common property during his lifetime. In some countries it goes further and disapproves of any proposal which does not secure to the children of an author the benefit of his works. It is very ready to listen to arguments that any proposed term of copyright will have that effect, and is therefore wrong. Such a deprivation can of course only occur where the author has not sold his copyright once and for all. If he has done so, no lengthening of the term of copyright (*k*) beyond about thirty years from first publication will make very much difference in the price that the publisher is prepared to give, and so neither the author nor his children have really suffered from the shortness of the term. But the feeling of injustice is present, and must be reckoned with by the Legislature. For any law which weakens the popular sense of security is objectionable, and a law which destroys property where public

(*k*) C. C. Ev. qq. 310, 312, 975, 2913.

§ 33. Duration of protection.

opinion would favour its continuance has such a weakening effect. And if the community are willing to confer on authors increased privileges without any corresponding gain to the public, the Legislature can of course only give effect to their wishes.

§ 34. Problem of duration of copyright.

The problem before us then is: *What period of protection from unauthorized reproductions is sufficient, on the one hand to secure the due production of the best literary work, and on the other by satisfying the popular sense of justice, not to endanger the popular sense of security?* That some limited period is sufficient is attested by the fact that no State with a copyright law now confers protection unlimited in duration. This term of limitation we now proceed to discuss, and the two questions before us are:—

Questions.

1. *On what principle shall the term of copyright be based?*
2. *What shall be the precise duration of such term?*

§ 35. Competing principles of duration.

The two chief principles in competition are:—

I. *That there should be an equal term of protection for each work*, as in a copyright of forty-two years from first publication.

II. *That all an author's works should cease to be protected at the same time*, as in a copyright term of the author's life and thirty years from his death.

These are combined in the present English system, which provides that copyright in all an author's works shall at any rate last forty-two years from their first publication, and shall at any rate last till seven years after his death, but leaves it doubtful whether his copyrights will all expire at the same or at different times. The late Royal Commission recommend (*l*) the adoption

(*l*) C. C. R. § 40.

§ 35. Competing principles of duration.

of the second system pure and simple—a term of the life of the author and thirty years from his death. This system has already been adopted for varying terms by France, Germany, Holland, Belgium, Norway, Sweden, Denmark, Russia, Spain and Portugal. The United States, Canada (*m*) and Switzerland adopt the English system; Turkey and Greece carry out the first principle pure and simple; Mexico has perpetual copyright, and Italy adopts a curious combination of both systems, with an admixture of the royalty principle (*n*).

The first, or *Fixed-term* system, has the apparent advantage of giving an equal term of protection to each work, an arrangement easily understood; whereas in the second, or *Fixed-end* system, the earlier works obtain more protection than the later ones, an advantage which appears arbitrary. It is, however, urged against the Fixed-term system—

1. That as the copyrights under it of an author's works will expire at different times, difficulties will be put in the way of complete and uniform editions of all his works. This objection however seems of very slight importance.
2. That as the copyright of early and imperfect editions will expire before that of later and more mature ones, the author's crude work will compete at a great advantage with his more finished productions. This point would be met by the provision as to new editions suggested above (*o*).
3. That the date of publication being often uncertain, the lapse of copyright would be also uncertain, and obedience to the law would be difficult. But the force of this objection is destroyed if, as

(*m*) The U.S. and Canada, the earlier English system.
(*n*) See Table, p. 41.
(*o*) See p. 27.

§ 35. Competing principles of duration.

suggested below (*p*), a system of compulsory registration is adopted.

On the other hand, objections which have weight with popular feeling are urged against the second, or *Fixed-end* system, which terminates the copyright of all works alike at the same time. With Carlyle and Darwin in our memory, it is not unreasonable to say that works may be published when their author is seventy-five years old; Swinburne and Rossetti have shewn us that twenty-five is not an unreasonable age to fix for a writer's first work. Taking, then, the German, or proposed English, term of life and thirty years after, we see that under it, while one work of an author may have eighty years' protection, another may have only thirty, the difference being quite irrespective of the merits of the works in question. For though the earlier works of some authors are more popular than their later ones, it cannot be laid down as a rule that the earlier works of all authors have sufficiently superior merits to entitle them on that account only to such advantages. On the contrary, especially in the case of more thoughtful books, whose immediate reward is less, while their ultimate worth is more, than works of fiction or *vers de société*, the later works of a man's life are the most valuable, while on the proposed plan they are the least highly rewarded.

There are two reasons suggested by the Royal Commission in favour of this *Fixed-end* system (*q*):—

1. That its adoption will assimilate the law of literary to that of artistic copyright; and
2. That as most continental nations adopt this system, its adoption by England would facilitate international conventions.

Both these arguments are of course only of force in con-

(*p*) See § 56.
(*q*) C. C. R. § 33.

nection with the present or proposed English system. Its true justification seems to be that the adoption of such a term, while satisfying popular justice by extending the copyright of all books alike to the term thought right by any community, yet protects the State by destroying all monopolies alike at the earliest period consistent with that popular feeling. On any other system the copyright in many of the works must either exist beyond this time, to the injury of the State; or expire before it, thus creating popular feeling against the law.

§ 35. Competing principles of duration.

For the considerations set out above come in here. The general principles which are to guide us are that:—

§ 36. Result.

1. A minimum term of protection should be ensured for each work sufficient to induce its author to publish, that is sufficient to enable him to reap a fair reward during the protected period, if there is a fair demand on the part of the public.
2. No work should cease to be protected at such a time as to create a popular sense of injustice.

But as this "minimum term" and "popular feeling" will vary with the different conditions of every community, having stated the general principles we can go no further, except in illustrating them by application to particular communities as, for instance, England.

§ 37. What should be the term of duration in England?

In England then we find, according to the evidence of Mr. Herbert Spencer and others before the Royal Commission, a term of about forty years' protection is necessary in order to make it possible to publish thoughtful and philosophical works, but that such a length of term is sufficient as an inducement to production (*r*). Indeed publishers will not give an appreciably higher price for a copyright for forty-two years than for one for twenty-eight years.

(*r*) C. C. Ev. qq. 310, 312, 975, 2913.

§ 37. What should be the term of duration in England?

On the second point we find that popular sentiment views with dislike the idea of an author's work becoming common property in his lifetime, and with some disfavour the idea of his children losing the benefit of it.

The term recommended by the Commission for adoption, the author's life and thirty years after, has the advantages of affording at least thirty years' protection to every work, and of continuing the protection for, roughly, a generation from the author's death. Its disadvantage is the arbitrary amounts of protection afforded to different works, ranging from thirty to eighty years, according as they are late or early works of their author.

On the other hand a term of protection, the same for each book, must either run contrary to popular opinion by making some books common property during the life of their author, or give to each work a term of protection far longer than is necessary to secure production. It would have the advantage, on account of its apparent fairness to each book, of being easily intelligible.

The system recommended by the Commission seems to attain the desired ends at the least cost to the State, and is therefore the system which should be adopted for England. Duration of copyright for other countries must depend on their varying national conditions and opinions; it must be such as to encourage solid and valuable works as well as popular and light literature; subject to these conditions it should be determined on the principles suggested above.

§ 38. Two-Term Copyright.

A further modification of the term of copyright deserves attention, as having been adopted in the United States and in the early English statutes, and discussed, though rejected, by the Copyright Commission. It is what may be called the *Two-term copyright*

§ 38. Two-Term Copyright.

system. In England under the Statute of Anne the term of copyright was fourteen years, with a further fourteen years if the author was still living; and in the United States the term is twenty-eight years, with an extension of fourteen years to the author and his family on re-registration of the work.

The alleged advantages of this system are as follows: It is found by experience (*s*) that a publisher will not give appreciably more for a copyright of forty-two than of twenty-eight years; the value of the book so far ahead does not enter into his calculations. If, then, the author can only sell a copyright of twenty-eight years he will suffer no immediate loss, while if his book becomes famous and popular, when the second term of copyright reverts to him he can reap further fruits of his labour by a fresh sale of his copyright in which the benefit of his popularity will be felt: otherwise, as at present, he obtains all his remuneration from a sale made when the success of the book is a speculation and the author often unknown.

There are however considerations which rob this suggestion of much of its force. And in the first place it is only applicable to the case of authors who sell their copyright once and for all (*t*); it will not affect those who make separate arrangements for each edition of their works. And as far as England is concerned the evidence of Mr. Longman, and the examination of Mr. (now Sir T. H.) Farrer before the Commission (*u*), shew that as regards authors who have made a name, the latter arrangement is the usual one. The suggested "double term" would therefore only apply in the case of poor and unknown authors, whose poverty prevented

(*s*) C. C. Ev. qq. 310, 312, 975, 2913.
(*t*) C. C. Rep. § 36; C. C. Ev. qq. 313–316.
(*u*) C. C. Ev. qq. 3056, 5218, 5555.

§ 38. Two-Term Copyright.

their publishing at their own risk, and whose want of reputation made undertaking their first work a commercial speculation of a very risky character. And it does not seem unfair that in such cases the publisher should have the chance of increased value to compensate him for the risks his capital runs. Publishers expend a great deal of capital in what must necessarily, with the curious fluctuations of popular taste, be speculative risks, and they are entitled to make and must make large profits on some works to compensate them for the inevitable number of failures.

And in the second place (*x*) the *Two-term* system will not be operative unless the author is forbidden to assign his second term of copyright before it vests in him. The evidence taken before the Committee of the House of Commons in 1774 on the working of the Statute of Anne, shews that this is necessary (*y*). One of the witnesses there said that he never saw or heard of any assignment of copyright in which the second term of fourteen years was reserved to the author.

In view of these considerations it does not seem desirable to introduce into the Law of Copyright the modification known as the *Two-term* system, except possibly in countries where the custom of making separate arrangements for each edition of a work does not prevail.

§ 39. Recapitulation.

In recapitulation, then, we have seen that the general principles on which the term of copyright should be fixed for any country are two; that it be at least so long as to induce the production of the best and most permanent class of literary work, and that it do not expire at such a time as to cause a popular sense of injustice to the author. The result of the application

(*x*) C. C. R. § 36.
(*y*) Cobbett, Parl. Reg. 17, 1086.

of these principles will vary in every country with different national conditions; and for convenience of reference a table of the actual terms adopted by various countries is subjoined. § 39. Recapitulation.

Terms of Copyright in Various Countries. § 40. Terms of Copyright in various countries.

System.	Country.	Term.
I. No limits . .	Mexico . . . (formerly) England, France, Holland.	Perpetual.
II. *a. Fixed term* for each work.	Greece . . .	15 years from publication.
	Turkey . . .	40 „ „
b. Two-Term system.	United States . } Canada . . . }	28 years, second term of 14.
	Japan . . .	30 „ „ „ 15.
	(formerly) England.	
III. *Fixed End*; all copyrights expire at same time.	Chili	Life of author + 5 years.
	Brazil . . .	„ „ +10 „
	Venezuela . .	„ „ +14 „
	Holland . . .	„ „ +20 „
	Germany . . } Austria . . . } Portugal . . . }	„ „ +30 „
	France . . . } Belgium . . . } Norway . . . } Sweden . . . } Denmark . . . } Russia . . . }	„ „ +50 „
	Spain	Life of *owner* of copyright + 80 years.
IV. Combination .	England . . .	42 years, or life + 7 years, whichever is longer.
	Switzerland . .	30 years, or life of author, whichever is longer.
V. Peculiar . .	Italy . . .	1. A term of Monopoly Copyright for 40 years, or the life of the author, whichever is longer. 2. On its expiration, a further term of Royalty Copyright for 40 years.

Section VII.

Infringements of Copyright calling for Protection.

§ 41. Classes of infringements.

The general type of copyright law for advanced communities is, as we have seen, the Monopoly system, in which the author and his assigns, having the sole right of supplying the community with copies of the protected work, are protected by the State from all unauthorized reproductions thereof. We have now to consider what literary productions the State will hold to be reproductions of an author's work, and therefore infringements of his copyright.

They may be divided into four classes, (all of course only referring to reproductions during the term of protection):—

1. Open reproductions of the whole or a part of a work *simpliciter*, without extraneous matter.
2. Open reproductions of the whole or a part of a work together with other matter.
3. Disguised or altered reproductions of the whole or a part of the work, as abridgments, plagiarisms, and the like.
4. Reproductions of the whole or a part of the work through another channel than that chosen by the author, as dramatisations of novels.

§ 42. Class I. Open reproductions *simpliciter*.

1. Open reproductions of the whole or a part of the work *simpliciter*, and without extraneous matter.

Here no question can arise. Whether the reproduction is by native printing, or by the introduction of foreign reprints, it clearly tends to deprive the author of part of the return that would otherwise come to him, the ensuring of which to him is the object of State

protection. Even if the reproduction is only of a part, without additional matter, the object of the publisher or at any rate one effect of the publication must be the same. All such reproductions should therefore be treated as infringements of an actionable character.

§ 42. Class I. Open reproductions *simpliciter.*

2. Open reproductions of the whole or a part of the work in connexion with other matter.

§ 43. Class II. Open reproductions with other matter.

Here, even although a large quantity of other matter is added to the reprint, as in the case of encyclopædias or volumes of selections, the result is the same. The author is to some extent deprived of the return he might expect, and the reproduction is therefore an infringement.

The case is more difficult where only small parts of the work are reproduced, as in the case of illustrative quotations in a review or criticism, or in an argumentative refutation. The result of such reproductions frequently is to increase the sale of the author's work; they serve as advertisements and do no harm. On the other hand analysis and quotation may be carried to such a length as to supersede the original work, and this would clearly constitute an infringement. The dividing line, as in all this discussion, is difficult to draw; we can only say that any direct reproduction of the author's material which tends to supersede, or act as a substitute for, the original work is an infringement of his copyright, but that moderate quotation for the purpose of fair review or criticism is not such a reproduction.

3. Disguised or altered reproduction of a whole or part of the work.

§ 44. Class III. Disguised reproductions.

We now reach that class of infringements which presents the greatest difficulties in practice, and as each

§ 44. Class III. Disguised reproductions.

alleged infringement has usually to be dealt with by the consideration of a large number of details, it is clearly impossible to do more here than suggest the main points of importance in coming to a decision.

The immediate object of State protection is to secure that all who purchase an author's work shall during a certain period pay to that author or his assigns some remuneration. If, then, another work is published containing so much of the author's material that those who have purchased it have no necessity to purchase the original work; in other words if a work is published of such a character as to interfere with the sale of the original work, and directly indebted for that character to that work; in this case the end of State protection is defeated, and an infringement of copyright has taken place.

There are broadly two classes of works which may be plagiarised:—

1. Works, mainly of fact, compiled from sources open to all, such as directories, guide books, and works of scientific description.
2. Works of fiction and imagination where the material of the work is communicated to the public for the first time.

§ 45. Works of fact.

In the case of the first class of works, two compilations, the plan of which, as in the case of a directory, is common property, if produced from the same sources by original labour, must be almost identical. The second work must interfere to a certain extent with the sale of the first, and yet it may have been composed without its author's having even heard of the work of his predecessor. The State cannot discourage original work by regarding the second book as an infringement of a work to which it is in no way indebted. The author of the

first work can only claim protection if it appears that the second compiler has come to him, instead of seeking the original sources, and has thus availed himself of the results of the labour of another. In this case the second compiler obtains reward for what is really the work of the first; and this clearly constitutes an infringement. § 45. Works of fact.

In the case therefore of works of fact compiled from original sources open to all, a second work is only an infringement of a former work if it appears that the second compiler, instead of himself doing the work of compilation from the original sources, has made use of the copyright labours of a former author, or has appropriated from him novel features of arrangement, or the like. The English law allows the second compiler to make use of the work of the first as a signpost to the original sources, but this seems a deviation from principle. For here the second compiler, although his work is much lightened by the labours of the first, yet makes no recompense for the labour saved. No author should be allowed to produce a work competing with previous books, by making unauthorized use of the copyright labours of their authors; and this principle seems to exclude the English position.

§ 46. Works of fiction.

With regard to original works of fiction and fancy, the guiding principle is simpler, though its application is more complex.

When an author resorts to a copyright work for aid in the production of another work, if the result is that the second work competes injuriously with the original one, such resort should constitute an infringement. For the original author is deprived of profit which the public were presumably willing to pay him, and that by the competition of a work deriving part of its value from unauthorized appropriation from his own work.

§ 46. Works of fiction.

The question therefore is: Has the second author taken so much of the first work as to tend to diminish its sale by supplying a substitute-work? No definite rule can be laid down as to the amount of taking necessary to constitute an infringement; it must certainly be substantial, or enough to constitute a material part of the work from which it is taken. Where however there are only small takings but a general similarity, small takings may shew the intention to injure by appropriation. Another test of the substantial character of the matter used will be whether its appropriation affects the commercial or pecuniary value of the work from which it is taken.

The English law seems rather to lean towards the position that the point to be considered in deciding whether any reproduction is applicable or not is, not so much the proportion of the matter taken to the work from which it is taken, as its proportion to the new work of which it is made to form a part. It is said that if the second work contains such a proportion of original to borrowed matter as to constitute it, as a whole, a new and original work, it is not an infringement of copyright. It is submitted that this is wrong on principle.

For the State protects original works in order to secure good literature. It protects compilations from non-copyright sources, on account of labour expended in the compilation, though the sources remain open to all. But where the labour has been bestowed on matter already copyright, to grant protection to the result in its entirety is to protect matter which is not original, and to take away protection from matter which is. Part of the value of the work of the new author is presumably derived from the labour of his predecessor. That fresh matter has been added to the part appropriated does not alter

the fact of its appropriation without payment; and appropriation without payment defeats the end of protection. The question should not be whether "work and labour" has been bestowed on the portion appropriated, but whether a substantial portion of original and protected work has been taken without payment and without authority.

§ 46. Works of fiction.

These considerations seem conclusive in the case of *Abridgments*, which have sometimes by English law been held not to be infringements of copyright, on the ground that sufficient labour has been bestowed on them to create a new and valuable work. But certainly the whole value to a purchaser of an abridgment lies in the matter compressed; if this matter may be directly taken from a copyright work, the object of the State in protecting the author is thereby defeated. Abridgments should therefore be considered actionable infringements.

§ 47. Abridgments.

The *English* (*z*) Courts, however, have not interfered with abridgments which shew some intellectual labour, and in the *United States* the Courts (*a*), though with reluctance, have followed the English decisions, and held that a fair abridgment is not piracy.

France (*b*) more justly prohibits abridgments if they interfere with the sale of the original work, and the Courts have applied this to the sale of a much abridged version of a novel, interspersed with critical remarks. So in the kindred laws of *Norway*, *Sweden*, and *Denmark*, abridgments are treated as piracy unless they change the character of the work.

§ 48. Recapitulation.

Generally as to the third class of reproductions, where any book appears to derive a substantial part of its value

(*z*) See § 160.
(*a*) See § 160.
(*b*) Copinger on Copyright, pp. 500–600 *passim*.

§ 48. Recapitulation.

from matter forming a substantial part of a copyright work, and reproduced without the authority of its author, such book should, so far as the part appropriated is concerned, be considered an infringement of copyright.

§ 49. Class IV. Reproduction through other channels.

4. Reproductions, total or partial, open or disguised, of a work *through another channel* than that chosen by the author for its communication to the public.

Such reproductions occur where A. recites a copyright work written by B.; where a printed play of B.'s is performed on the stage by A.; or where a lecture delivered orally by B. is reproduced in a printed form by A. In all these cases a work is communicated to the public through a different channel from that in which the author first published.

It has been urged that the public is not so much interested in obtaining lectures, recitations, or plays, as it is in obtaining books, and that therefore to give extended protection, with a view to obtaining the production of works that may be used in such a way, is not desirable. On the other hand, the recitation of a poem or the performance of a play may satisfy a demand which would otherwise have purchased the original work, and thus the author may be deprived of part of the reward which the State intended to secure to him. But again, some recitations and readings serve to advertise the works from which they are taken, and their authors are only too glad to attain such further publicity. On the whole, it seems desirable that the matter should be left in the hands of each individual author, and that, if he wishes to reserve the right of reproducing his work through other channels, he should be required to give notice to that effect in his work if printed, or in some other sufficient way in the case of oral communications.

§ 50. Translations.

Further, the reproduction through different channels may be made in an altered form, or in conjunction with other matter. Somewhat of this nature is the case of *Translations.* The original work is transposed into a form in which it addresses itself to an entirely different class of readers. Apart from International Copyright, this question also arises in countries like the United States, where there is a mixed population, and a demand exists for English and German versions of a work. The American Courts decided (*c*) that a German translation of an English work was not an infringement of its copyright. Fortunately the Revised Copyright Statutes (*d*) altered this state of the law, which indeed seems opposed to all correct principles. For the main value of a translation is derived from the matter translated; and to translate without the authority of the author is to deprive him of part of his legitimate return, and so to defeat the end of protection. Unauthorized translations should therefore be treated as infringements of copyright.

While the law of the *United States* (*e*) is in accordance with this conclusion, it is doubtful whether the law of *England* (*f*) considers translations as infringements of copyright. *France* (*g*), however, forbids translations during the period of copyright without the consent of the author.

Germany requires that an author, to preserve his right of translation—

(1.) Should on the title-page of his work expressly reserve his right.

(*c*) *Stowe* v. *Thomas*, 2 Am Law Register, 210.
(*d*) § 4952.
(*e*) See § 161.
(*f*) See § 161.
(*g*) *Et seq.*, Copinger on Copyright, pp. 500–600.

§ 50. Translations.

(2.) Should commence his translation before the end of the year following that in which the original work appears.

(3.) Should complete his translation within five years from publication of the original work.

(4.) Should register his proceedings as to translations in a Government register.

On fulfilling these conditions, the authorized translation is protected from competition for five years.

Austria reserves the right of translation to the author for a year only.

Norway, *Sweden*, and *Denmark* make it piracy to translate without authority any work from one dialect of their languages into another, or from a dead language into a living one.

Spain very liberally grants to the owner of a foreign work the property in translations of his work, so long as he has property in the original by the laws of his own country.

Italy gives the author the sole right of translation for ten years from first publication.

§ 51. Dramatisation of novels.

The question is more difficult when portions of a copyright work are taken, original matter and arrangement are added to them, and the result is communicated to the public through a different channel from that by which the original work was produced. For instance, from a novel written by A., B. takes a certain amount of the plot and dialogue, such as his stage experience tells him will work into a good play; puts it into acting form, supplies new dialogue, and sometimes new characters, and orally represents the result in public, without the author's consent. Should this be treated as an infringement of the copyright in the novel?

§ 51. Dramatisation of novels.

If it is considered an infringement, the result will be that either certain novels will not be dramatised at all, and the demand for plays will be supplied by original work, or they will be dramatised with the consent of the author, and on such terms as he may impose. Neither of these results seem undesirable; on the contrary, there will be a benefit in the author's receiving remuneration for the use made of his work.

If however the State allows such reproductions, the author will not receive remuneration for value supplied, and the public will obtain a certain number of plays which otherwise might not have been produced; but—and this is a point specially pressed by authors of novels—their works may be seriously misrepresented by the versions of them produced on the stage. It must be admitted that the obvious evils attending such unauthorized reproductions are not very great.

It seems at least desirable to insist that the original author shall receive some return for the appropriation from his work, an appropriation which gives its value to the play. In France and the United States indeed the author is entirely protected from unauthorized dramatisation; and in England, though at present such dramatisations are allowed, the Copyright Commission has recommended their prohibition.

It was suggested to the Commission that this prohibition should at first only extend for a limited time; that if, during that time, the author dramatised his work or caused it to be dramatised, the protection should continue; but that if he did not, it should be open to others to make such a dramatisation. The Commission (*h*) however rejected the suggestion on the grounds of the convenience in legal uniformity, and the

(*h*) C. C. Rep. § 81.

§ 51. Dramatisation of novels.

small benefit accruing to the public from the representation of a story on the stage. These reasons seem by no means conclusive. There *is* some benefit to the public in having good novels represented on the stage, and there is also an advantage in having a dramatisation executed by stage-experts who understand the class of work required. Moreover, this seems a case where the Royalty system may be adopted without any of its characteristic evils. I should therefore suggest that, if the author fails to provide a dramatisation of his work within say, five years of first publication, it should be open to any one to do so on paying him a royalty for value received. This permission should apply to oral representation, and not to publication of the play in print; for while its representation on the stage will interfere with the circulation of the novel very slightly, if at all, the publication of the play could not but injuriously affect the demand for the original work.

Novelisation of dramas.

The case of "novelising" dramas, or turning a play into a novel, is rather different; it rarely occurs, and should, I think, be considered under any circumstances an infringement.

The Royalty system might perhaps be applied with advantage to other cases of reproduction of a work through channels other than the original one, as readings and recitations; but this must depend on the circumstances of particular countries.

§ 52. Result.

We have thus gone through the classes of unauthorized reproductions of literary work, and find the principle regulating them to be this:—

Principle of infringement.

Whenever a substantial part of an author's copyright work is reproduced without his authority, whether alone or in conjunction with new matter, whether by the same or a

different channel to the original, so as to tend to damage the sale of such original work, and thus to lessen the original author's return for his work, such reproduction is an infringement of copyright.

§ 52. Result. Principle of infringement.

The questions of "substantiality," and "tendency to injure," can only be settled by considering the details of each case. And this principle is also subject to the exceptions mentioned above in connection with reproductions through another channel, where the adoption of the Royalty system is suggested. This discussion and principle will equally apply to a code framed on the royalty system, if the offence is made, not "reproduction without authority," but reproduction "without payment of the prescribed royalty."

"Unauthorized reproduction" must cover not only printing and publishing, but also, in the case of foreign reprints, importation; and in all cases, sale or exposing for sale to the public. For unless unauthorized distribution is treated as an infringement of copyright, it will be practically impossible for the author to protect himself; he naturally does not become aware of the infringement of his copyright until the distribution of the unauthorized reproduction has commenced. The penalties for infringement by exposing for sale, however, will not be so heavy as those on the author, publisher, and printer of the piracy, and will take the form of confiscation of copies rather than of direct fine.

§ 53. Laws of foreign countries.

The law of foreign States (*i*) on the more important points has already been stated; and the legislation of England and the United States will be dealt with hereafter in detail. Foreign codes do not diverge much from the principles suggested above:—

(*i*) See Copinger on Copyright, pp. 500–600.

§ 53. Laws of foreign countries.

France forbids unauthorized reproductions "*en entier ou en partie*," and considers a servile imitation, or "*une copie servile*," of more than a quarter of a work, as piracy. It is piracy to copy the plot of a novel or the arrangement of a book, or to give to a work of similar character to the complainant's, a similar title. And the piracy is the same whatever means of communication to the public are used: "*elle est independante des moyens à l'aide desquels elle est produite*," and thus a novel may not be dramatised for the stage.

In *Germany*, piracy is "every mechanical multiplication of all or part of a work without the consent of the author." It is not however piracy to quote small portions of works, or to incorporate small works into large ones of a different character, if the source is acknowledged, or to reprint single articles from periodicals or newspapers.

By the laws of *Norway*, *Sweden*, and *Denmark*, it is not piracy to quote passages from any acknowledged source, or, (an unusual provision,) to reprint a copyright work which has been out of print for five years, unless the author announces his intention of reprinting it. *Switzerland* allows reproductions requiring intellectual labour, and does not consider a volume of selections from copyright works an infringement of copyright.

Section VIII.

Investitive Facts of Protection.

§ 54. Investitive facts of protection.

With respect to an *unpublished work*, the taking of any permanent form from which reproduction is possible will be the investitive (*k*) fact of copyright.

(*k*) The terms *Investitive*, *Transvestitive*, and *Divestitive*, introduced by Bentham, are used to denote those facts or events which the law

§ 54. Investitive facts of protection.

In regard to works *published*, or communicated to the public, the moment of such first communication, whether by printing or orally, should be the time from which the limited period of copyright should run. The author is granted the monopoly of the market for a certain time, and that time should commence when the market commences, that is, when any member of the public can obtain a copy of the work. In literary productions, where there is a definite and universal method of publication, the question of whether a work has been published, so important in artistic copyright, can rarely arise. It does sometimes, however, become important in the case of plays, and it seems that any communication to the public, so made that any member of the public on paying a certain price, or coming to a certain place, can receive the communication, should be considered publication.

§ 55. Registration and deposit of copies: law of foreign countries.

Other conditions, however, are frequently imposed, such as registration of the work and presentation of a certain number of copies to the State.

Most States, indeed, require registration of the work as an investitive fact of copyright, either directly or by requiring deposit of copies, or in both ways together.

Thus *France* (*l*) requires the deposit of two copies of the work at the Ministry of the Interior, in exchange for which a receipt is furnished, which serves as evidence of the copyright.

England requires registration at an unofficial registry, as a condition precedent to suing for infringements of

---

makes conditions precedent to the creation, transference, or destruction respectively of copyright. Thus publication is an investitive fact of statutory copyright; *i.e.* on publication the law gives certain rights to the person publishing, or *invests* him with certain rights.

(*l*) See Copinger on Copyright, pp. 500–600.

§ 55. Registration and deposit of copies: law of foreign countries.

copyright, and the presentation of five copies to various libraries.

The *United States* (*m*) require—(1.) Deposit before publication with a government official of a printed copy of the title of the work.

—(2.) Deposit within ten days from publication of two copies of the work, from which the government office can register.

Italy requires the deposit of three copies at a government office, together with a declaration that copyright is reserved.

Belgium, *Switzerland*, and *Portugal* all require deposit of copies. On the other hand, *Russia* requires registry, but no deposit of copies; and *Austria*, *Norway*, *Sweden*, and *Denmark* do not insist on any formalities of this sort.

§ 56. Registration.

The object of requiring *Registration* is to obtain evidence as to the existence and duration of copyright, the evidence as to duration being only necessary in those systems which have a fixed term of copyright for each work, commencing with first publication. Besides providing evidence for the Courts, it furnishes information as to copyright to the public at large. It may be made conclusive evidence of copyright, in which case the registration must be something more than formal, or it may be only treated as a *primâ facie* proof, throwing the burden of proving the absence of copyright on the other side.

The object of requiring a deposit of copies of a work, apart from facilitating registration, is to secure for the State or the National Library a complete collection of works published in the State.

(*m*) Revised Statutes, §§ 4956, 4957.

§ 56. Registration.

Though the State in creating property may fairly impose some condition on the author, these conditions should be framed so as to attain the ends sought with as much economy of burden as possible. A system is wanted which will provide evidence of copyright, and help to establish a National Library with as little trouble to the author as possible. This may be effected by requiring a deposit of *one* copy of a book with a government department which shall register it, give in exchange a certificate of registration to serve as *primâ facie* evidence of copyright, and forward the copy to the National Library.

The requirement of more than one copy from the author seems, especially in the case of expensive works, an unnecessary tax on him. For instance, some illustrated works are published at a cost of ten guineas or so, and only from 75 to 100 copies are produced. The English requirement of five copies to the libraries in these cases acts as a tax of from 5 to 8 per cent. on the undertaking. To avoid this, some great works are only published for private circulation.

Registration, being an important function of the State, should only be entrusted to a department under the direct control of the Government. The registration, however, cannot be made a complete investigation of the claims of each work to copyright without involving a great deal of unnecessary trouble and expense; and the certificate (*n*) therefore can only be taken as *primâ facie* evidence of copyright.

As the value of the register as a record, and of the library as a national one, lies in their completeness, registration should be made compulsory. Some nations, notably the United States, make failure to register de-

(*n*) C. C. Ev. qq. 489, 1043–1050.

§ 58. Registration.

structive of copyright; but this seems a penalty disproportioned to the offence. England does not allow the author to sue until his work has been registered, but after registration allows him to sue for infringements committed previous to his registering; this seems to err in the opposite direction, for there is then no inducement to register until copyright has been actually infringed. The mean suggested by the English Commission seems the right method; they propose that failure to register should not absolutely destroy copyright, but that the author should not be able to sue for infringements committed before registration. In the present and suggested English rules, the registration by deposit is in strictness an investitive fact of the remedy rather than of the right.

§ 57. Nationality of author and place of publication.

A third set of conditions of copyright found in the law of many States, relates to the *nationality* of the author or publisher, and the place of publication of the work. Thus, apart from International Copyright, in *England* (*o*), the work must be first published in the United Kingdom, but (probably) no restrictions are placed on the nationality of the author or publisher.

In the *United States* (*p*), the author or proprietor of the work must be a citizen of the States or resident therein, and the work must be first published in the United States.

France and *Belgium* grant copyright to works wherever published, and by authors of whatever nationality, on fulfilment of the conditions of deposit required in France and Belgium respectively.

Germany (*q*) protects all works of native authors,

(*o*) See § 165.

(*p*) Revised Statutes, § 4952.

(*q*) See Copinger on Copyright, pp. 500–600.

wherever published, and all works published by a German house.

§ 57. Nationality of author and place of publication.

Norway, *Sweden*, and *Denmark* grant copyright only to natives; but extend their copyright by reciprocity. *Spain* allows copyright to subjects of foreign States recognising literary property.

The conditions are thus exceedingly varied, ranging from the strict nationality of the United States, to the cosmopolitanism of France. As the object of the State is to attract good literature, it should encourage first publication within its territory by granting copyright to works so published, of whatever nationality their authors or publishers may be. The question of copyright in works first published abroad falls under the head of International Copyright; briefly, such publication should vest a limited copyright to be extended by further communication to the home-state.

§ 58. Summary of investitive facts.

Summarised, then, the *Investitive Facts* of Copyright should be—

I. *Publication within the State* of a work capable of copyright.

II. *Publication* of a similar work *abroad* (to a certain limited extent). In neither of these cases should the nationality of the author be a matter of importance.

III. *That at the time* of any *infringement*, the work infringed should have been *registered* by deposit of a copy at the proper government office; (which, however, is not strictly an investitive fact of copyright, but of the remedy against the infringement of the right.)

Section IX.

Transvestitive Facts of Protection.

§ 59. Transvestitive facts.

The question whether an author should be allowed to assign his copyright has been answered above (*r*) in the affirmative. Several States, and notably England, require that an assignment *inter vivos* should be in writing, and, in view of the importance of the property transferred, this does not seem unreasonable.

The assignment should be registered, the penalty being the inability of the assignee to sue for infringement before registration.

The death of the author will act as a transvestitive fact of his copyright to his legatees or representatives, and the change of proprietorship with the date of death should be registered under similar penalties. The register will thus afford a complete history of copyright works.

In those cases where the Royalty system is adopted, mainly in connection with International and Colonial Copyright, further modifications of the register are needed. Here omission to republish, or to provide a suitable supply of a work within a certain time, serves as a transvestitive fact of local copyright to a fresh *entrepreneur*. Permission to this latter to reproduce should be entered in the register, and must be obtained after an investigation of the case on evidence, with notice to the author, especially if the question is whether the supply provided is "suitable." It is clearly not fair to the author that his property should be transferred without his having an opportunity to object, and it is better for all parties that this opportunity should come before the reproduction has been issued, than when a certain amount of capital has been sunk by the reproducer.

(*r*) See p. 31.

Summarised, therefore, transvestitive facts are:— § 59. Transvestitive facts.

1. Assignment in writing *inter vivos*, with entry on the register.
2. Bequest or devolution on death of the owner of copyright, with entry.
3. (In the Royalty system), a license from the proper Court to publish a copyright work on account of the proprietor's failure to provide a suitable supply. This however only changes the original author's monopoly to a copyright by royalty.

SECTION X.

Divestitive Facts of Protection.

§ 60. Divestitive facts.

The transvestitive facts set out above are relatively divestitive facts; some person is divested of his right by them, though the right remains.

Absolute divestitive facts are:—

1. The expiration of the term of copyright.
2. Waiver of his rights by the owner of the copyright, which should be made by entry in the register, where the work is already registered.

These absolutely destroy the right.

Several countries adopt divestitive and transvestitive facts of greater strictness to the author, in order to secure an ample supply of literature to the State. Thus in *Norway, Sweden and Denmark*, if a work is out of print for five years, it is no piracy to reprint it unless the author supplies the want by bringing out a new edition, or announcing his intention of doing so. In *Italy*, after the death of an author the State may, on public grounds, and on making compensation to the parties interested, declare any of his works the property of the State, a power beneficial in theory, but likely to be very rarely

§ 60. Divestitive facts.

exercised. In *England*, the Judicial Committee of the Privy Council have power, (I believe never used,) to grant licenses to republish if a work is out of print after the death of its author, and the proprietor of the copyright refuses to republish.

In most civilized countries however the author's interest may be relied on to keep the public sufficiently supplied; and in countries which have not reached such a stage of literary development the application of the Royalty system will be sufficient.

SECTION XI.

§ 61.

Remedies for Infringements.

Remedies for infringement.

1. *Of the Author.*—Some countries impose arbitrary fines; some attempt to ascertain the amount of damage done, and many confiscate pirated works for the benefit of the author.

Thus English Courts give actions for damages or for penalties, confiscate unauthorized reproductions either for destruction or for the benefit of the author, and also endeavour to restrain the commission of the offence by granting injunctions against unauthorized printing or publication.

The United States confiscate pirated copies and give an action for damages.

France (s) makes illegal reproduction, with intent to injure, a criminal offence; without such intent, only a civil one.

Belgium imposes a fine and confiscation; so also *Holland*, which divides the benefit of the fine between the proprietor of the copyright and the poor.

Germany gives an action for damages or imposes a

(s) Copinger on Copyright, pp. 500–600.

§ 61. Remedies for infringement.

fine, and where the reproduction was *malâ fide*, adds imprisonment to the penalty. *Norway*, *Sweden*, *Denmark* and *Italy* impose a fine or damages with confiscation of copies; Italy makes the maximum fine £200. *Russia* gives an action for damages and confiscation.

The object in committing the offence being presumably pecuniary gain, the most appropriate and exemplary punishment is a pecuniary fine. As the result of the offence is pecuniary loss to the author, he should certainly be recouped the damage he has suffered, but the amount of the fine should not be limited to the actual damage, as otherwise the infringer might calculate his fine as a purely commercial item of expenditure, and put the author to the trouble of proving the exact damage he has sustained. This would virtually establish the Royalty system in the most objectionable form as far as the author is concerned. The most advantageous arrangement seems to be—

Author's remedies.

(1.) The imposition of a heavy fine, half to go to the State and half to the author.

(2.) Confiscation of the unsold copies for the author's benefit.

(3.) Damages, if the author can prove he has sustained more than the amount he receives from the two foregoing sources.

Under the Royalty system, a fine per copy unsold considerably exceeding the royalty payable, and a similar fine for the copies sold will be the appropriate penalties. Imprisonment does not seem a suitable penalty, except as an alternative where the fine is not paid. Heavier fines will naturally be imposed on the reproducer or importer than on the seller of pirated copies, in which latter case the confiscation of unsold copies will probably be sufficient.

§ 62. Limitations of actions.

Most States fix a time within which the author must sue for infringements, and such a limitation seems fully justifiable.

In *England* the action must be brought within twelve months of the date of the offence. Some States add a further limitation from the date when the offence came to the knowledge of the author. Thus in *Germany*, the action must be brought within three months of knowledge of the infringement, and within three years of the actual infringement, which time, in cases of infringement by sale, is to be dated from the last infringement. In *Norway*, *Sweden* and *Denmark* the action must be brought within twelve months of knowledge of the infringement, and within two years of the infringement itself.

This proviso as to the author's knowledge seems a very judicious one. It may often be some time before a piracy comes to the knowledge of the author, and the English term of one year seems too short. The term will of course vary in different countries, but ordinarily the German term seems a very suitable one, viz., that the action must be commenced within three months from the author's knowledge of the infringement, and three years from the infringement itself.

§ 63. Remedies against the author.

2. *Remedies against the Author.*—The only duty specially imposed upon the author is to deliver a copy of his work to the National Library. The Copyright Commissioners seem to have overlooked the fact that if this deposit is enforced, and a proper receipt filled in, registration is at once effected; and that, therefore, the temporary loss of copyright which the author sustains by non-registration is strongly reinforced if not superseded by the actual fine inflicted for not providing the materials of registration. The two penalties should probably,

§ 63. Remedies against the author.

however, continue concurrent. The State will avail itself of the remedy for non-deposit of copies, but as works published may easily be overlooked, the proviso as to temporary loss of copyright will make it the author's interest to deposit a copy of his work.

Where, as in international and colonial copyright, the State interferes to secure a suitable supply of works, the author's penalty for not providing such a supply will be the loss of his monopoly, a licence to publish on payment of a royalty being granted to another. As has been said, this licence must be obtained from the proper government department on full investigation with notice to the author affected.

Section XII.

Codification.

§ 64. Codification.

Before proceeding to the discussion of the English law in detail, a cardinal principle in which it is sadly deficient, and on which any copyright law should be founded, may be briefly alluded to. The English law has varying statutes and varying rules for almost every mode of communication of intellectual and artistic work to the public—books, engravings and maps, music, dramatic compositions, oral communications such as lectures, paintings, photographs, sculptures and designs; all are regulated by different statutes, based on different principles. Fifteen English Acts of Parliament deal with questions of copyright; six more constitute the law of designs, which is rather akin to the law of patents, whilst all this legislation is of the most unsystematic and haphazard character. The character of the English Copyright Acts has been frequently censured by the judges who have to interpret them, the most recent instance being in the judgment of the present Master of the Rolls

§ 64. Codification.

in *Nottage* v. *Jackson* (*t*), where the question was as to the meaning of the term "author of a photograph," and the Master of the Rolls said that the draughtsman of the Act appeared to have used terms in the sense in which nobody else used them.

But the general principles which should be applied to all these classes of intellectual property are the same. The variations are only in details and arise from the slight differences in the modes of communication of these different works to the public, and there is no reason why the whole legislation relating to Intellectual Productions, both Literary and Artistic, should not, with great gain in simplicity and brevity, be embodied in one code.

That this is practicable is shewn by the fact that most countries who have lately revised and recast their Copyright Laws, and especially the United States, Germany, and the Scandinavian countries, have included in one code or statute all the different branches of intellectual productions; while others, as France, have for many years had but one set of legal provisions, based on principles universally applicable.

The new Copyright Law then should be simple and unified in principle; the old English statutes should be reduced to one code dealing with all the branches of the subject. The admirable digest of Sir J. F. Stephen (*u*) shews with what comparative brevity even the present law may be treated, although the different branches of communication of intellectual work to the public are treated separately. But much greater brevity and clearness may be obtained if the different classes of literary productions are all expressly brought under the general principles which should regulate them. To shew that this is possible has been one of the aims of the foregoing pages.

(*t*) W. N., Aug. 11, 1883; Law Times, Aug. 11, 1883, pp. 274, 279.
(*u*) C. C. R. pp. 65–89.

CHAPTER IV.

HISTORY OF THE ENGLISH LAW OF COPYRIGHT.

§ 65. Introduction.—§ 66. Questions at issue.—§ 67. Copyright before Statute of Anne.—§ 68. Early days of printing.—§ 69. Royal privileges.—§ 70. History of Stationers' Company.—§ 71. Registers of Stationers' Company.—§ 72. Resistance to the Company.—§ 73. Sources of the sole right of printing in 1623.—§ 74. History, 1625–1643. Decree of 1637.—§ 75. Protest of Authors: Ordinance of 1643.—§ 76. Ordinances of Long Parliament.—§ 77. Licensing Act of 1662.—§ 78. Position of Literary Property in 1660.—§ 79. Statutory protection ceases. By-law of 1681.—§ 80. Charter of 1684. By-law of 1694.—§ 81. Recapitulation of period previous to 1710.—§ 82. Cases prior to Statute of Anne.—§ 83. Result.—§ 84. Statute of Anne.—§ 85. Result of Statute of Anne.—§ 86. Cases under Statute of Anne.—§ 87. *Millar* v. *Taylor*.—§ 88. *Donaldson* v. *Beckett*.—§ 89. Effects of *Donaldson* v. *Beckett*.—§ 90. Subsequent legislation.—§ 91. Talfourd's Bill.—§ 92. Act of 1842.—§ 93. *Jefferies* v. *Boosey*.—§ 94. Colonial Copyright: Commission of 1875.—§ 95. Recapitulation of history—§ 96. Common Law Copyright.—§ 97. Answers to questions in § 66.—§ 98. History in other countries.

§ 65. Introduction.

We have now reached the second part of our subject—the discussion of the English Law of Literary Property, published or unpublished. But before dealing with the law as it exists at the present day, the History of the English Law of Copyright claims our attention, not so much on account of its practical importance as of its interest as history, and by reason of the vigorous controversy which raged during the last century as to the legal interpretation to be placed on certain alleged facts which themselves were disputed. Pages of argument,

§ 65. Introduction.

metaphysical, historical and juridical, were devoted to "the common-law right" and the "Statute of Anne;" and though it is now settled that the Law of Copyright as to published literary productions rests entirely on statute, yet on account of the historical interest attaching to the growth of the law, especially on a question considered last century of the greatest importance, it is necessary for us to spend a little time in exploring this extinct volcano of controversy.

§ 66. Questions at issue.

The questions at issue were two:—

I. Was there, between the introduction of printing in 1471 and the passing of the Statute of Anne in 1710, either such a direct recognition of copyright by the judges, *or* such *a state of things* existing in the *custom* of authors and printers and recognised indirectly by statute, that the judges, if the question were brought before them, were bound to recognise copyright or literary property? In other words, did copyright at common law exist before the Statute of Anne?

II. If so, what was the effect on this common law right of the Statute of Anne?

§ 67. Copyright before Statute of Anne.

And with regard to the first question, we may say at once that there appears to be no direct creation of copyright by statute, or direct recognition of it by judicial decisions during the period named. This may be accounted for, and an attempt is made to explain it elsewhere, by the constitution and powers of the Stationers' Company, but the fact remains. When, however, a custom, having reached a certain degree of general acceptance and long duration, comes before the Courts, they are practically bound to recognise and give effect to it, unless it is clearly unreasonable. And it is con-

tended with great show of truth that such a general recognition of ownership in literary works had existed for a long period of time when the Statute of Anne was passed. § 67. Copyright before Statute of Anne.

The question is, however, complicated by the quasi-private position of the Stationers' Company and the doubtful character of its register. It is not clear whether it was compulsory on the company to register works published in England, or what means, if any, existed by which owners of copyright might ensure the accuracy of the entries in the register. Further, the king's "patents" for books which he claimed as his property by prerogative, and the numerous grants of "privileges" for different periods to private authors involve the discussion in some difficulty. That a certain amount of the custom of the time is founded upon decrees of the Star Chamber, and other part upon ordinances of the Long Parliament is used to create prejudice; while the whole matter is further complicated by the fact that the question of Literary Property is entirely subordinated in the history of the time to that of Licensing and the State Regulation of the Press. However to the discussion of the whole matter we now proceed.

Until means existed for rapid multiplication of copies of literary works the right of making copies was not of much pecuniary value. Such multiplication first became possible on the invention of printing, introduced into England by Caxton in 1474, or according to a very doubtful story (*a*), at the King's expense by Corsellis at Oxford in 1468. Some time naturally elapsed before the art took sufficient root in England for questions of piratical printing to arise. At first indeed the demand for the new printing outran the supply, § 68. Early days of printing.

(*a*) Lowndes on Copyright, p. 2.

§ 68. Early days of printing.

and an Act of 1485 (*b*) allowed the importation of printed books from abroad. This freedom of trade continued till 1534, when apparently the printers and binders were strong enough to obtain protection by an Act (*c*) prohibiting the importation of books, while protecting the interests of the public in the way then considered right by making provisions for fixing the price of books printed at home.

The position of authors in the first half of the sixteenth century is by no means clear. The Crown claimed prerogative rights (*d*) in certain classes of books, and granted the sole privilege of printing them by patent to its assigns. As head of the State, the King claimed the sole right of printing all Acts of State, Ordinances of the Council, and the like; as head of the Church, he alone could print the books of rites and ceremonies of the Church. The Bible had been translated in 1547 by Grafton at the King's expense; the Year-Books were reported at the expense of the Crown; and this labour expended was said to give the sole right of printing such works to the Sovereign. Further, almanacs (*e*) were claimed by the King as his prerogative, on the ground either that they were mechanical applications of the tables in the book of Common Prayer, which was his, or that being no man's property they were therefore the Crown's. The royal claims indeed went so far as to assert that all printing was the King's prerogative, on the ground that the first

(*b*) 1 Rich. III. c. 9, s. 12.
(*c*) 25 Hen. VIII. c. 15.
(*d*) *Basket* v. *Cambridge University*, 1 W. Blackstone, 105; Willes, J., in *Millar* v. *Taylor*, 4 Burrows, 2329; Mansfield C.J. (S.C.), 4 Burr. 2401.
(*e*) *Stationers' Co.* v. *Carnan*, 2 W. Bl. 1002, in which case the claim was rejected.

printer, Corsellis, had been brought to England at the King's expense. § 68. Early days of printing.

All, however, that these claims of prerogative right, together with the grants of "privileges" by the Crown to private persons, seem to shew is, that at a time when the Crown prerogative was very extensive and grasping the Sovereign attempted to secure the monopoly of what promised to be a new and valuable invention. But side by side with privileges of royal grant something very like a custom of property gradually grew up to form part of the common law. In its infancy it is not surprising that authors, and especially printers, should strengthen their position by the most obvious means in their power, a grant from a royal prerogative which had never been more powerful.

In 1504, a printer, William Faques by name (*f*), first describes himself on the title-page of his books as "*Regius Impressor*" (*g*); and in 1518, Richard Pynson,

(*f*) Herbert's Ames, Typ. Ant. i. 308.

(*g*) *Office of King's Printer.*—This continued to be held for many years, Richard Grafton (1553), Richard Jugge and John Cawood (1564), and Christopher Barker (1584), being among the occupants of the office. A full account of the holders of the office is given in the report of the case of *Basket* v. *Cambridge University*, 1 W. Bl. 105. Its tenure required the expenditure of considerable sums of money through various channels. In June, 1619 (S. P. Dom. 1619–1623, p. 55), John Bill presents a statement incidentally reciting that Bonham Norton and himself "had for many thousand pounds bought the office of King's Printer"; and in 1630, Bonham Norton is brought before the Star Chamber for alleging that the Lord Keeper had £600 out of this transaction (S. P. Dom. 1629–1631, p. 285). In July, 1630, the Council direct certain persons to aid the King's Printer in a search for "persons importing books of right belonging to him" (S. P. Dom. 1629-1631, p. 306). The position, however, had its disadvantages. In January, 1634, Barker and Lucas, the King's Printers, were fined £300 for "base and corrupt printing of the Bible," the fine being remitted at the instance of Laud, if they would provide Greek type and print a Greek work every year. The documents contain a recital that "the King's patentees for printing are great gainers by that patent" (S. P.

§ 68. Early days of printing.

who succeeds Faques as the King's printer, publishes the first book issued "*cum privilegio*" (*h*), bearing on the title-page the inscription, "cum privilegio impressa a rege indulto, ne quis hanc orationem intra biennium in regno Angliae imprimat aut alibi impressam et importatam in eodem regno Angliae vendat."

In 1519 a work of the same printer is printed "*cum privilegio*" without mentioning any restriction of time; and in 1520 (*i*) his books appear simply "*cum privilegio a rege indulto.*" In 1530 (*k*) a "privilege" for seven years is granted to an author in the consideration of the value of his works and the time spent on it, this being the first recognition of the nature of copyright as furnishing a reward to the author for his labour.

In 1537 (*l*) the author of an edition of the Bible petitions the Lord Cromwell that a privilege may be granted to his work till that edition be sold, which he suggests will not be for three years from that time, and his reasons might be used nowadays in favour of copyright; that he will be ruined by competition, that the competing works will be badly done, and "that it is a thing unreasonable to permit or suffer them" (the copyists) "to enter into the labours of them that had both sore trouble and unreasonable charges."

Meanwhile between 1523 and 1533 the first recorded dispute as to copyright had arisen (*m*): a work printed

---

Dom. 1633–1634, pp. 412, 480). In 1630, indeed, the question of "the propriety of maintaining the office of King's Printer" had been considered, and a memorandum of the services of the late John Bill in printing books was prepared, on which the office was continued (S. P. Dom. 1629–31, p. 271).

(*h*) Herb. Ames, T. A. i. 264; iii. 1782.

(*i*) Herb. Ames, T. A., sub nomine "Pynson."

(*k*) Herb. Ames, T. A. i. 470.

(*l*) Lowndes, p. 7.

(*m*) Herb. Ames, T. A. i. 186; Lowndes, p. 6.

in the former year by Wynkyn de Worde was reprinted by a printer named Trevers, and Worde's second edition, published in 1533, and protected by the privilege of the King, contains a vigorous attack on the former piracy. § 68. Early days of printing.

§ 69. Royal privileges.

Thenceforth for the next hundred years or more we find a large number of books protected by special privilege from the King, besides his grants by patent of books considered his own property, as to the University of Cambridge in 1534. And these "privileges" were co-existent with the keeping of the register of the Stationers' Company, entries in which conferred exclusive rights of printing on the persons in whose names the books were entered.

It has been urged that the existence of these royal grants was conclusive against the existence of copyright, as shewing that without them there was no literary property. And it may be granted that at their first appearance there was no custom strong enough to found a common law right. In the infancy of printing and the zenith of sovereign power authors and printers naturally came to the royal favour for protection. Thus in the case of musical copyright, as to which no definite legal decision was given till 1777 (*n*), as late as 1763 a royal licence for the sole printing of certain musical works for fourteen years was granted by the Crown. And it is interesting to note that in Wurtemberg so late as 1815, literary property was still founded on sole privileges to print granted by the Sovereign (*o*). But meanwhile in England the fact that the King's patents as to his prerogative of property in books were justified as rights acquired by labour and occupancy, and that

(*n*) *Bach* v. *Longman*, 2 Cowper, 623.
(*o*) Lowndes, p. 126.

§ 69. Royal privileges.

his grants to private persons of privileges were usually granted in consideration of the labours of the author or the expense of the printer, both served to justify the reasonableness of a custom of literary property, and thus might have recommended it to the judges as the foundation for a common law right. The age was one of monopolies and royal grants, and it was not therefore surprising that the monopolies should have continued after the necessity for any such extraordinary invention had passed. Besides, in days when licensing and patronage were all important, the royal favour acted both as a shield and an advertisement. A list of the patents collected by Rymer in his Fœdera, together with some of those contained in the calendars of domestic State papers, which however are only a small number of the mass of privileges granted, is set out in an appendix, and from their nature it will be seen that nearly all of them involve something more than a simple recognition of literary property. Documents contained in the calendars of State papers suggest that these royal privileges were used both as a means of rewarding the persons whom the King delighted to honour, and also for the purpose of lining the pockets of the King's servants. An application for a "privilege" made by Thomas Wilson to Sir Thomas Lake, the Latin Secretary in 1607 (*p*), after specifying the service required, winds up with the frank remark: "The gratuity I shall entreat you to accept of a poor man shall be forty or fifty angels to buy my lady a velvet gown, and a most devoted and thankful heart." In 1597 (*q*) a privilege to print certain school books for fourteen

(*p*) S. P. Domestic, Addenda, 1580–1625, p. 495, on date April 12, 1607.

(*q*) S. P. Domestic, 1595–97, p. 352.

§ 69. Royal privileges.

years had been granted to Henry Stringer, the Queen's footman; and in 1631 (*r*) G. R. Wackerlin petitions for a renewal of the grant of the sole right of printing certain Latin books (Virgil, Terence, Cicero, and Ovid) made to the late King's footman, to the petitioner for thirty-one years, "whereby he may get some small recompense, as the footman did, by letting the same grant to the Stationers' Company." In 1630 (*s*) the Attorney-General brings Bonham Norton and others before the Star Chamber for spreading a rumour that the Lord Keeper had £600 for making a decree between Norton and Barker for the King's Printer's office. These documents throw a suggestive light on the nature of many of the privileges, and the method of obtaining them.

§ 70. History of the Stationers' Company.

However in the early days of printing the royal grants of patents and privileges went side by side with the growth of the Stationers' Company, till at last the register of the Company superseded the privilege of the King; and to the growth of the Company therefore we must now turn.

In 1556 the records of the Star Chamber contain the entry (*t*):—

"Thos. Marsh, stationer, for selling books without license of the patentee: Ordered that the persons detected for the printing and corrupting of the Bishop of London's book shall be bound to print no more"; and a decree of the same date, constituting the *charter of the Stationers' Company*, ranks as the first great landmark in the history of Copyright in England.

Charter of Stationers' Company.

(*r*) S. P. Dom. 1629–1631, pp. 514, 537, on dates Feb. 20, and Mar. 21, 1631.

(*s*) S. P. Dom. 1629–1631, p. 285, on date June 17, 1630.

(*t*) Burn on Star Chamber, p. 55.

§ 70. History of the Stationers' Company. Purpose of early legislation.

But, while it occupies this position in our history, its immediate cause was very far from being the interest of authors. The chief motive of all these early Ordinances and Acts is the same; *the order and regulation of printing and printing presses in the interests of Church and State.* The charter or decree of 1556 recites (*u*): "That certain seditious and heretical books both in rhymes and tracts are daily printed, renewing and spreading great and detestable heresies against the Catholic doctrine of the holy Mother Church," and ordains that for the suppression of this evil ninety-seven persons, who are named, shall be incorporated as a society of the art of a stationer. No person in England shall practise the art of printing unless he be one of this society, and the master and warden are authorized to search for, seize, and burn all prohibited books, and to imprison anyone that should exercise the art of printing contrary to their direction.

Printing was thus confined to members of the Company; they had power to make by-laws so long as they were not repugnant to the statutes of the kingdom, and their by-laws, thus tacitly approved by the Crown, must have been considered part of the law of the land. Further, their summary powers of seizure, search, and imprisonment rendered it unnecessary for them to bring disputes before the ordinary Courts, and this, it is suggested, affords the explanation of the lack of early judicial recognition of copyright (*x*).

(*u*) Herb. Ames, T. A. iii. 1590; it was ratified in 1559 by Elizabeth; Herb. Ames, T. A. iii. 1600; Maugham, Lit. Prop., p. 12.

(*x*) Thus the State Papers contain, in 1560, articles of the Stationers' Company against Wolfe, for unlawfully printing and infringing the patent of the Queen's Printer (S. P. Dom. 1547–1580, p. 167). In 1623 there appears a petition of William Stainsby, a printer, to Secretary Calvert, for pardon and restoration to his business, the Wardens of the Stationers' Company having, by warrant from the Council,

§ 70. History of the Stationers' Company.

In 1559 (*y*) the charter was confirmed by Elizabeth, and thus by patent a monopoly of printing was conferred on the society. In the same year an injunction (*z*) from the Queen enjoined that no book or paper should be printed unless *licensed* by the council or ordinary, and in 1566 a decree of the Star Chamber (*a*) forbade persons to print against the force and meaning

---

nailed up his printing-house and broken down his presses, for unlawful printing (S. P. Dom. 1623–25, p. 141). A large number of cases, mainly of unlicensed printing, came before the High Commission Court. On July 11, 1624, Locke writes to Carleton, "A poor man is in trouble for printing a book called *Votiva Anglia*; the High Commission Court were about to liberate him, when the King ordered him to be remanded and pay £1000 fine, as he was said to have gained £1000 by the book" (S. P. Dom. 1623–25, p. 298). A certain Sparkes however stands out as the Hampden of printing. Brought up in 1629 on articles of the Ecclesiastical Commissioners, he denied the present binding authority of the decree (of 1585) in the Star Chamber, for regulation of printing, as directly intrenching on the hereditary liberty of the subject's person and goods, and being contrary to Magna Charta, the Petition of Right, and other statutes (S. P. Dom. 1625–29, pp. 538, 569). In 1631, Sparkes again appears to answer his contempt before the Star Chamber, because when Barker and Lucas, the King's Printers, had seized his Bibles as printed contrary to their patents, Sparkes had brought a suit at Common Law against them for such seizure (S. P. Dom. 1629–31, p. 510, date Feb. 6, 1631). In the same year, four stationers, of whom Sparkes was one, were brought before the Council for selling unlicensed books (S. P. Dom. 1629–31, pp. 159, 166, 202, 203): and shortly afterwards Sparkes and others were before the High Commission Court on a charge of unlicensed printing (S. P. Dom. 1631–33, pp. 3, 35, 39, 231). Many cases appear in the records of the High Commission Court during the years 1630–35, for printing or selling unlicensed books (*e.g.*, S. P. Dom. 1634–35, pp. 265, 532). And though it is not pretended that cases in the Star Chamber or High Commission Court are authorities for the common law right, the existence of such a summary mode of enforcing the powers of search and seizure the Stationers possessed explains the absence of any direct acknowledgment of their rights in the ordinary Courts.

(*y*) Herb. Ames, T. A. iii. 1600.

(*z*) Strype's Parker, p. 221; Herb. Ames, T. A. iii. 1601.

(*a*) Herb. Ames, T. A. iii. 1620.

§ 70. History of the Stationers' Company.

of any ordinance, in any of the statutes or laws of the realm.

§ 71. Registers of the Stationers' Company.

From their foundation the Stationers' Company kept books or registers, and, though no legislative enactment with reference to registration appears till 1637, from 1558 it became apparently the universal practice for authors, or the printers to whom they sold their books, to enter such books in the register of the Company. Such entries were probably required by by-laws of the Company, infringements of which by its members were punished with fines by the Master and court. As only members of the Company could, except by special privilege, print books at all, entry of a work in the Company's register by one of them confirmed the property in him; the Company protected him from piracies by his fellow members or outsiders, and allowed him to assign his rights by entry in the register. Accordingly from 1576 to 1595 (*b*) above 2000 "copies" of books were entered either entirely, or in shares, as the property of particular persons. The first of such entries is in 1558; from 1559 (*c*) we find members fined for printing other men's copies; entries of the sale of a copy and its price appear in and after 1573; and from 1582 copies are entered with an express proviso that "if it be found that anyone has right to any of the copies, then the license touching such of the copies so entered to another shall be void."

In the subsequent controversy as to the existence of the "common-law right," it was attempted to set aside all this evidence as merely entries of private transactions between members of the Stationers' Company, which

(*b*) Carte; Maugham, Lit. Prop. p. 17.
(*c*) Willes, J., in *Millar* v. *Taylor*, 4 Burr. 2313.

§ 71. Registers of the Stationers' Company.

were no proof of the common law. But the common law right of an author to his unpublished work was universally admitted; and by the ordinances of the Star Chamber his work could only be printed and published by members of the Stationers' Company, so that regulations binding them bound all printing within the realm (*d*), and thus gave a practice sufficiently universal for the judges to found a common law right on. And when the ordinances of the Star Chamber were set on one side by means of the prejudice attaching to that ill-famed body, it should have been remembered that this was a matter not affecting the rights of the Crown in any way, but only dealing with the rights of private authors and printers; in it therefore there was no especial reason to distrust their decisions, which were held sufficient to found other branches of the common law, notably the law as to perjury.

§ 72. Resistance to the Company

The effect however of the Company's restrictive by-laws was that a large number of "copies" (*e*) became vested in the wealthier printers, while the poorer ones found themselves shut out from employment, and in consequence endeavoured to break down the restrictions and resisted the governing body of the Company (*f*). The Company accordingly petitioned the Crown for protection and enforcement of their by-laws, urging that if the monopolies were not enforced "no books at all would be printed within a short time. For com-

(*d*) Such regulation was easy, as in 1583, a return shewed only fifty-three presses in London (S. P. Dom. 1581–90, p. 111); and in 1634 there appear to have been only twenty-three master printers in London (S. P. Dom. 1634–35, p. 231).

(*e*) "*Copy*," the technical term then used for the right to produce copies—the *copyright*.

(*f*) Strype; Lowndes, p. 12.

§ 72. Resistance to the Company.

monly the first printer was at charge for the author's pains—whereas any other came to the copy gratis, and so he might sell cheaper and better than the first printer. . . . . These inconveniences seen, every man would strain courtesy who should begin so far that in the end all printing would decay in the land to the utter undoing of the whole Company of Stationers." The result was the confirmation of the charters of the Stationers' Company by a decree (*g*) dated June 23, 1585, providing that every book shall be licensed, "nor shall any person print any book, etc., against the form or meaning of any restraint contained in any statute or law of the realm, or *contrary to any allowed ordinance set down for the good government of the Stationers' Company.*

But this was only obtained by concessions on the part of the wealthier printers, whose monopoly of "copies" had roused the resistance by the poorer members of the Company, and the decree of 1585 is followed by a recital that (*h*) "Many of the richer members who had some licenses from the Queen granting them a property in the printing of some copies, exclusively to all others, yielded divers of their copies to the Company *for the benefit and relief of the poorer members thereof*," and then follows a list of some eighty or a hundred works of all classes of literature, Latin and English, prose and poetry, for which presumably the Queen's license or privilege had been granted. Mr. Barker, "Her Majesty's printer," yields certain testaments; Mr. Tottell, "the printer of the law books," who clearly did not confine his attention to law, surrenders, *inter alia*, "Romeo et Julietta," and "Songs and Sonnettes of the Earl of Surrey." Mr. Newberry, the warden, and Henry Denham

(*g*) Herb. Ames, T. A. iii. 1668.
(*h*) Herb. Ames, T. A. iii. 1672–1675.

yield, as "assigns to execute the privilege which belonged to Henry Bynneman deceased, as many of the following books as shall be found to have belonged to the said Henry Bynneman"; and Mr. Newberry himself yields certain books "when he hath sold these of the former impression which he hath on his hands."

§ 72. Resistance to the Company.

§ 73. Sources of sole right of printing in 1623.

The regulations were still evaded by printing beyond sea, and in 1623 a further decree (*i*) forbade the printing beyond sea of "such allowed books as have been imprinted within the realm by such *to whom the sole printing thereof by letters patent or lawful ordinances or authority doth appertain.*" Here the sources of the right of "sole printing" are recognised by statute as—

Sources of sole right of printing.

I. *Letters patent;* which are either *grants to Crown patentees* of Crown property, as in the case of Bibles and Law Books, or *special privileges* in books not specially the property of the Crown granted in exercise of an alleged prerogative to private persons. The peculiar position that these grants occupied is shewn by the fact that the celebrated *Statute of Monopolies* (*k*) excepts from its prohibition of monopolies other than patents to the authors of new inventions, *patents concerning printing*, saltpetre, gunpowder, great ordnance, and shot.

II. *Lawful Ordinances or authority*; that is, the rules and regulations of the Stationers' Company.

§ 74. History 1625–1643.

Proceeding in the history; in 1625 a Royal Proclamation (*l*), interesting in its anticipation of modern arguments, recites, "That divers books, written in Latin and

(*i*) Maugham, Lit. Prop. p. 13.
(*k*) 21 Jac. I. c. 3.
(*l*) Rymer, Fœdera, xviii. 8.

§ 74. History, 1625–1643.

well printed at Oxford and Cambridge, have afterwards in the parts beyond the seas been reprinted very erroneous, and sent back into our Kingdom and vended here as true copies at lower rates, in respect of the baseness of the paper and print, than the original here can be afforded, whereby the authors have been enforced to disclaim their own works, the first printers much impoverished, and our own people much abused in laying out their money upon falsified and erroneous copies; which hath discouraged our scholars from printing, and disabled printers from undertaking the charge of the presse for publishing;" wherefore such importation is again forbidden, and certain regulations in connection with the University presses are framed to check it.

Decree of 1637.

In 1637 came the great decree (*m*) of the Star Chamber, "touching the *Regulation* of Printers and founders of letters," still carrying out the original purpose of legislative interference. It recited that "divers decrees had been made for the better government and regulation of printing . . . and divers abuses had arisen . . . to the prejudice of the public, and divers libellous, seditious, and mutinous books had been unduly printed, and other books and papers without license, to the disturbance of the peace of the Church and State," and enacted, after dealing with "seditious, scismaticall and offensive books," that—

§ 2. Every book should be licensed *and entered into the Register's book of the Company of Stationers.*

§ 7. That no person within this kingdom or elsewhere shall imprint or import . . . any copy . . . which the said Company of Stationers, or any other person or persons, have or shall have, by *any letters patent, order, or entrance in their register book, or otherwise,* the right, privilege,

(*m*) Tracts, vol. xlviii., Middle Temple Library. Lowndes, p. 15; Maugham, p. 13.

authority or allowance solely to print, nor shall put to sale the same. § 74. History, 1625–1643.

Here again the sources of the "sole right to print" are set out as: 1. Letters patent and orders; 2. Entries in the register book; while the word "otherwise" was much relied on in *Millar* v. *Taylor* (*n*), as shewing a common-law right independent of entry in the register.

In 1640 the Court of Star Chamber fell a victim to the Long Parliament, and in 1641 the place of its Ordinances was temporarily taken by another (*o*), prohibiting printing without consent of the *owner*, or importing, upon pain of forfeiting the copies to the *owner or owners of the copies of the said books*. Here then is a clear statutory recognition of property in copy, which can only have been supported by a custom such that the common law should have recognised and incorporated it.

In the disturbed state of the country, and the embittered controversy between the Court and the Parliament, great licence was manifested in the Press—or, it would perhaps be more correct to say, was conceived by the party in power to exist in the works of their opponents—and much piratical printing occurred both inside and outside the Stationers' Company. It was even suggested that all "copies" should be laid open to any printer that pleased to publish them. This suggestion was opposed in a declaration (*p*), signed by several prominent divines, to the effect that "considerable sums of money had been paid by stationers and printers to many authors for the 'copies' of such useful books as

§ 75. Protest of authors, and Ordinance of 1643.

Protest of authors, 1643.

(*n*) 4 Burr. 2314.
(*o*) Maugham, Lit. Prop. p. 13.
(*p*) Carte's Letters, 1735; Maugham, Lit. Prop. p. 14; Lowndes, p. 16.

§ 75. Protest of authors, and Ordinance of 1643.

had been imprinted, in regard whereof we conceive it to be both just and necessary that they should enjoy a property for the sole imprinting of their copies; and we further declare that unless (*q*) they do so enjoy a property, all scholars will be utterly deprived of any recompense from the stationers and printers for their studies or labour in writing and preparing books for the press; and that if books were imported to the prejudice of those who bore the charge of impressions, the authors and buyers would be abused by vicious impressions, to the great discouragement of learned men, and extreme damage of all kinds of good learning."

Here the authors' view of restrictions on piracy, and their object as encouraging learning, is brought clearly before the Legislature. We need not infer that it was not recognised before; the petition to Lord Cromwell quoted above (*r*) takes the same ground; and Milton in his magnificent protest against the resultant Act of 1643, the Areopagitica, treats the matter as beyond question, when, alluding to the reasons urged for that enactment, he says, "one of the glosses used to colour that Ordinance, and make it pass, was the retaining of each man his several copy, *which God forbid should be gainsaid.*"

Ordinance of 1643.

However, on the 14th of June, 1643, the Long Parliament passed the celebrated "Act (*s*) for redressing Disorders in Printing." It recited "that the late orders had proved ineffectual for suppressing the great late abuses and frequent disorders in printing so many false and forged, scandalous, seditious, libelling and unlicensed papers . . . to the great defamation of religion and government . . . and notwithstanding the diligence of

(*q*) *i.e.*, they *do* enjoy, and it must not be taken away.
(*r*) See p. 72.
(*s*) Scobell, Acts and Ordinances, p. 44.

§ 75. Protest of authors, and Ordinance of 1643.

the Company of Stationers to put the orders in execution: . . . and further, that divers of the Stationers and others, contrary to former orders and *the constant custom used among the Stationers' Company*, have taken liberty to print, vend, and publish the most profitable and vendible copies of books *belonging to the Company and other Stationers*;" and enacted:—

1. "That no book shall be printed unless the same shall be licensed and entered in the register book of the Company of Stationers, *according to ancient custom.*

2. "And that no person shall hereafter print any book lawfully licensed and entered in the registers of the said Company for any particular members thereof, *without the license and consent of the owner or owners thereof*; nor yet import any such book formerly printed here from beyond the seas, upon pain 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 suitable penalties are provided.

Under this Act it will be seen that every book printed must have an owner, whose consent is necessary to its reprinting. A book printed without its owner's consent would not be licensed; a pirated book would be exposed both to the penalties for piracy and the penalties for unlicensed printing, and the distinction would not be too clearly marked in the minds of those owners of copy whose right was infringed.

§ 76. Ordinances of Long Parliament.

A further Act (*t*) against unlicensed pamphlets followed in 1647, and a second (*u*) in 1649. This latter starts with a lengthy preamble concerning "unlicensed and scandalous books and pamphlets;" the "ignorance and

(*t*) Scobell, p. 134.
(*u*) Scobell, ii. 88.

§ 76. Ordinances of Long Parliament.

assumed boldness of the weekly pamphleteer," and the "irregularity and licentiousness of printing, the art whereof in this Commonwealth and in all foreign parts hath been sought to be restrained from too arbitrary or general use or excuse." It then gives power to seize books being printed or reprinted *by such as have no lawful interest in them*; and enacts that no pamphlet shall be printed unless licensed and entered in the registrar's book of the said Company of Stationers. "For the encouragement of all regular printers and support of the said manufacture in the Commonwealth," it provides that printed books shall not be imported; and finally enacts that "No person shall print or reprint any book now entered in the register book of the said Company for any particular member thereof, *without the consent of the owner or owners thereof*; nor counterfeit the name, mark, or title of any *book or books belonging to the said Company* or particular members."

The Ordinance of 1649 having expired, is renewed by an Ordinance (*x*) in 1652, reciting "that it had appeared by experience to be a good and profitable law for the end therein expressed;" and providing regulations and licences for printers, "forasmuch as the life and growth of all arts and mysteries consisteth in a due regulation thereof."

§ 77. Licensing Act of 1662.

As the dissolution of the Star Chamber had led to the renewal of its licensing decrees by Ordinances of the Long Parliament, so the Restoration, and the dissolution of the Long Parliament were closely followed by the reconstruction of the Ordinance of 1643 and its followers in the Licensing Act (*y*) of 1662: "An Act for preventing

(*x*) Scobell, ii. 230. The Ordinances of 1647 and 1652 do *not* contain the "owner's clause," in that of 1649. Drone's statement (p. 59) is incorrect.

(*y*) 13 & 14 Car. II. c. 33.

the frequent abuses in printing seditious, treasonable, and unlicensed books and pamphlets, and for regulation of printing and printing-presses." The main purpose is still political; and the preamble recites that "the well-government of and regulating of printing is matter of public concern." Property in books is only recognised incidentally. § 77. Licensing Act of 1662.

§ 3. All books are "to be entered in the book of the register of the Company of Stationers in London." . . . The Universities are not "to meddle either with books of Common Law, or matters of State and Government" (which are the King's property), "*nor any book the right of printing whereof doth solely and properly belong to any particular person or persons*, without his or their consent."

§ 6. "No person shall print or import any book which any person by virtue of letters patent, or of entries duly made in the register book of the Company of Stationers or of either of the Universities, has or shall have the *right*, privilege, authority or allowance *solely to print* . . . *without the consent of* the *owner or owners*." The penalty for infringement of this clause is to go half to the King, and half to the *owner of such copy*.

§ 7. "The mark of the person who has the privilege, authority or allowance solely to print is not to be put on books without his consent, and the licenser is to return copies to the printer or owner": (thus contemplating that the owner may be other than the printer, and thus not necessarily a member of the Stationers' Company.)

The provisions of this statute have been set out at some length, and for this reason. When approaching the Copyright "Statute of Anne," which by its unfortunate wording roused one of the greatest controversies § 78. Position of literary property in 1660.

§ 78. Position of literary property in 1660.

in English legal history, it is important to notice how the whole of the Licensing Act, the main end of which is to regulate printing for political purposes, *is based on the supposition of existing literary property.* It does not create such property, but assumes it as existing and protects it: no previous statute can be shewn which does create it; the inference is therefore irresistible that such a universal custom of literary property existed prior to the Statute of Anne as to have ensured the recognition of such property as existing at common law.

But while the Act recognised the custom of literary property, the custom itself—or rather the way in which the custom worked—was strongly objected (*z*) to by authors and others. Though the author was obliged to register, there was no obligation on the Stationers' Company to make the entry; but, once an entry made, the person to whom it was entered became the owner. Complaint was heard that the Company asked large sums of money for making entries, and sometimes refused or neglected to make them; that they made erroneous entries, and erased or altered entries when made, and so injured the property of authors.

Indeed, a later protest of the Lords against the renewal of the Licensing Act gives as one of its reasons "that the Act destroys the property of authors in their copies." Similarly, in 1693, a Committee of the Commons gave as one of their reasons for not agreeing to the renewal of the Act, "that the said Company are empowered to hinder the printing of all innocent and useful books," (*i. e.*, by refusing an entry on the register), "and have an opportunity to enter a title to themselves and their friends for what belongs to and is the labour of others."

(*z*) Lowndes, pp. 25-27.

§ 78. Position of literary property in 1660.

Some petitioners so much objected to compulsory entry on the register, that they made statements which were directly reversed when the Licensing Acts were suffered to expire. They said (*a*): "The property of the author hath always been owned as sacred among the traders, and generally forborne to be invaded; but if any should invade such property *there is remedy* by laws already made, and no other were ever thought needful till 1662:" and again, "as for securing property, it's secured already as our own experience may show."

§ 79. Statutory protection ceases. By-law of 1681.

The Licensing Act after several renewals, and one lapse of six years (*b*), expired in 1694, and with it the statutory protection of literary property. Those in whom the "right, privilege, authority, or allowance of sole printing," was vested had now to be content with such remedies as the common law gave them. Instead of their statutory penalty per copy, they could only recover the actual damage proved to result from the piracy, a much less satisfactory mode of procedure. For copyright had been so long protected by Acts and Decrees, that any other mode of proceeding than the statutory one was almost unknown. The Stationers' Company had promptly endeavoured to meet the difficulty as far as its own members were concerned; the Licensing Act had temporarily expired in 1679, and in 1681, when we may suppose the disadvantages of rights only protected by the common law had begun to make themselves felt, they had passed the following by-law (*c*):—

By-law of Stationers' Company, 1681.

"Whereas several members of this Company have

(*a*) Lowndes, p. 30.
(*b*) 1679–1685.
(*c*) Quoted in *Millar* v. *Taylor*, 4 Burr. 2307.

§ 79. Statutory protection ceases. By-law of 1681.

great part of their estate in 'copies'; and by ancient usage of this Company when any book or copy is duly entered in the register book of this Company to any member thereof, such person to whom such entry is made is and always hath been reputed to be the proprietor of such copy, and ought to have the sole printing thereof, which privilege and interest is now of late often violated and abused, *it is therefore Ordained*, that where any entry is now, or hereafter shall be duly made of any book in the said register, by or for any member of this Company, that in such case, if any member shall thereafter without the license or consent of such member for whom such entry is duly made in the Register, or his assigns, print or import any such copy or sell the same, he shall forfeit to the Stationers' Company the sum of 12 pence per copy."

§ 80. Confirming Charter of 1684.

The members of the Company however possibly suffered from piratical competition on the part of outsiders, as well as within their own body, for in 1684, there being no Licensing Act in existence, a *new charter* (*d*) was granted them. After reciting "That divers members and brethren of the Company have great part of their estate in books and copies," (*i. e.*, stocks of printed books, and sole rights to print particular books), "and that for upwards of a century before they have had a public register kept in their common hall for the entry and description of books and copies," it confirmed former charters, and proceeded: "We, willing and desiring to confirm and establish every member in their (*sic*) *just rights and properties*, do well approve of the aforesaid register, and declare that every member of the Company who should be the *proprietor of any book*, should have

(*d*) Maugham, Lit. Prop. p. 17.

and enjoy the sole *right*, power, privilege, and authority of printing such book or copy *as in that case had been usual heretofore*" (*e*).

§ 80. Confirming Charter of 1684.

It will be seen that this charter does not profess to do more than "confirm just rights and properties," and declare "what had been usual heretofore." The Company seem to have so relied on the summary penalty per copy for piracies imposed by the Licensing Act, as hardly to have understood the strength of their position when that Act expired.

By-law of Stationers' Company, 1694.

The Act was renewed in 1685, only to expire in 1694; and its final lapse is immediately followed by the renewal of the by-law of 1681, with the additional recital that such copies were assigned, left by will, and used to make family provisions (*f*).

§ 81. Recapitulation of period previous to 1710.

We now reach the period immediately preceding the Statute of Anne, and in view of the momentous consequences to copyright resulting from that statute, it will be well to briefly sum up the existing state of things.

Since 1558, literary property "in books and copies" had been recognised by implication in nearly every statute dealing with printing. The precise relation of this property to the Stationers' Company and the entries in its register is not perfectly clear. It has been urged that such copyright as existed applied only to members of the Stationers' Company, and not to authors outside the Company. But the registers of the Company according to Carte (*g*), both in the 16th and 17th centuries,

(*e*) This Charter may possibly be only one of the set of charters resulting from the wholesale forfeitures by corporations, and their purchase of new charters in 1684. Its language however suggests that it is called forth by the five years lapse of the Licensing Act.

(*f*) Quoted in *Millar* v. *Taylor*, 4 Burr. 2308.

(*g*) Maugham, Lit. Prop. p. 17.

§ 81. Recapitulation of period previous to 1710.

contain entries in sufficient numbers to shew that up to 1695, and even later, "there was hardly a book in which property was not ascertained, and the sole right of printing secured by entries in the Stationers' Register." And the jury, in *Millar* v. *Taylor*, on the evidence before them, found, as part of their special verdict (*h*), "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 consideration, and to make the same the subjects of family settlements for the provision of wives and children."

It was clearly considered, therefore, that authors (*i*) had perpetual rights of property in their works, and that these rights could be assigned. No statute can be produced which creates these rights, though many allude to them as existing, and provide special means of protecting them. They constantly speak of the "owner of the copy," but no statute calls such owner into existence. If the right existed at all, it existed therefore by the Common Law, or was such a custom as should and would be recognised by the Common Law. Hardly any records however of protection to the right, afforded by the State, are in existence, and there seems to be no entry (*k*) of a prosecution in the ordinary Courts, for printing without licence. This may be explained by the fact that the Stationers' Company had, by their charter, summary rights of search, seizure, and imprisonment, and similar powers existed under the Licensing Acts. Here no recourse to the ordinary Courts was needed, and no entry of proceedings would exist.

(*h*) 4 Burr. 2307.
(*i*) Or more usually the printers, their assigns.
(*k*) 4 Burr. 2313.

§ 82. Cases prior to the Statute of Anne.

The cases which appear in the books are mainly where the alleged rights of the Stationers' Company, or of authors, clash with those of the King's patentees (*l*). Thus, in 1666 (*m*), Atkins, a patentee from the Crown of law books, sued the Stationers' Company for infringing his patent, and was successful. His counsel stated that the King had granted fifty-one patents. On appeal to the House of Lords, they seem to have held that a copyright was a thing acknowledged by the Common Law, that the King had this right, and had granted it to the patentees. One objection and answer during the hearing summarises a great deal of subsequent discussion. Counsel for the defence urged: "The price of books will be enhanced," to which the plaintiff's counsel replied: "As a matter of fact, no books are sold so cheap as are printed by the King's patentee, so my client informs me." Again, in *Roper* v. *Streater* (*n*), in 1670, the Lords protected the law patentee of the Crown against the assigns of the author. The right of copy *in some one* seems to have been almost taken for granted. In *Stationers' Co.* v. *Seymour*, in 1678 (*o*), where it was urged that prognostications added to the King's Almanac made a new property, the judges said that it no more did so than "if a man should claim a property in another man's copy, by reason of some inconsiderable additions of his own."

(*l*) These rights had clashed in cases which did not come before the ordinary Courts. A long struggle between the Stationers' Company and the University of Cambridge, lasting from 1583 to 1629, finally resulted in the triumph of the University. (See *inter alia* S. P. Dom. 1581–90, pp. 107, 111; Add. 1580–1625, p. 658; 1619–23; Nov. 25, 1621; 1625, p. 173; 1626, p. 343; 1627, p. 493; 1628, p. 546; 1629, pp. 496, 520.) The King's prerogative was stated, in an opinion given by Coventry, the Solicitor-General, in Nov. 1618, to override charters of previous sovereigns to the Stationers' Company. (S. P. Dom. 1623–25, p. 554.)

(*m*) Carter's Reports, pp. 89–92; 4 Burr. 2316.

(*n*) Skinner's Reports, 234; 4 Burr. 2317.

(*o*) 1 Mod. 256; 4 Burr. 2317.

§ 82. Cases prior to the Statute of Anne.

All these cases however only deal with a Crown right granted by express patent, and only by implication uphold a common law right. As has been pointed out, the summary proceedings and easily recoverable penalties under the charter of the Stationers' Company and the Licensing Act have left no trace on the law reports, though a few of them appear in the Calendars of Domestic State Papers and Records of the High Commission Court. Common law proceedings were far more cumbrous and less profitable, and the use of a bill in equity, subsequently so common, does not seem at this time to have been understood.

§ 83. Result.

There was then prior to the Statute of Anne no statute expressly creating, or judicial decision expressly recognising, copyright; there was such constant usage among authors and printers, recognised indirectly both by statutes and judicial decisions, that when the question arose for decision, a Court of Law might reasonably recognise literary property both before and after publication, as part of the Common Law; and such was the opinion of three judges against one in *Millar* v. *Taylor* (*p*), and of eight judges against four in *Donaldson* v. *Beckett* (*q*).

§ 84. Statute of Anne.

We now come to the celebrated *Statute of Anne*, which remains to all ages a warning of the care needed in parliamentary draftmanship, and of how great a fire little words may kindle.

After 1694, the lapse of the Licensing Act left authors and proprietors of copies without the protection summarily enforceable by penalties and seizure of copies, which they had previously enjoyed, and left them very

(*p*) 4 Burrows, 2303.
(*q*) 2 Bro. Cases in Parl. 129; 4 Burr. 2408.

§ 24. Statute of Anne.

discontented. As Lord Mansfield observed (*r*), they considered an action at law an inadequate penalty, and had no idea that a bill in equity could be maintained except on letters patent. Accordingly the booksellers and publishers, most of whose property consisted in valuable "copies," importuned Parliament for *further* protection. They petitioned in 1703, 1706, and 1709. They said that (*s*) "at common-law a bookseller can recover no more costs than he can prove damages; but it is impossible for him to prove the tenth or hundredth part of damage he suffers, because 1000 counterfeit copies may be dispersed into as many different hands, all over the kingdom, and he is not able to prove the sale of 10; the defendant is always a pauper;" and they therefore prayed "that the confiscation of counterfeit copies might be one of the penalties inflicted on offenders."

Amongst other heads of a bill suggested by some petitioners, were (*t*): (1.) That the proprietor of copy should be secured in his particular copies, by giving him a method of process, as treble costs and damages against the invader. (2.) That the register book of the Company of Stationers *should be duly rectified*, and all fraudulent and false entries, and entries of popish and other illegal and scandalous books therein entered, be expunged, and the true proprietor thus reinstated in his right.

This petitioning resulted in 1709 in the introduction of a bill which, with several material alterations, ultimately became law (*u*). The occasion of its introduction must be borne in mind; it originated with booksellers and publishers to further protect a property they already

(*r*) 4 Burr. 2406.
(*s*) Lowndes, p. 29-31.
(*t*) Lowndes, p. 29.
(*u*) 8 Anne, c. 19.

§ 84. Statute of Anne. Title.

conceived themselves to have. Its material parts, as finally settled, ran as follows:—

"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."

Note on Title.—(According to Willes, J., in *Millar* v. *Taylor* (*v*), the Bill went to Committee as "a Bill to *secure* the undoubted property of authors for ever." The Journals of the House for January 11, 1709, contain the entry that Mr. Wortley brought in a "bill for the encouragement of learning, and for *securing* the property of copies of books to the rightful owners thereof" (*x*).)

Preamble.

"Whereas printers &c. . . . have of late frequently (*a*) *taken the liberty* of printing, (*b*) *re*printing and republishing books without the consent of the authors or proprietors of such books . . . for preventing such practice and for the encouragement of learned men to compose and write useful books, be it enacted—

Notes on preamble (*a*): "*taken the liberty*," it was urged that this phrase was only applicable if a right existed previously, and the answer was made that the same phrase was used in the Hogarth Acts as to engravings, where no previous right existed. (*b*) "*re*printing": it was argued that *re*printing could only be objectionable if a sole right to print and reprint existed.

Clause 1.

§ 1. From the 10th of April, 1710, the author of any book already printed, who shall not have transferred the right, shall have the sole right and liberty of printing such book for the term of twenty-one years to commence from the said 10th day of April (*a*) AND NO LONGER, and that the author of any book not yet printed and his

(*v*) 4 Burr. 2333.

(*x*) Com. Journ. xvi. 260. Mr. Topham had, on Feb. 28, 1706, brought in a bill "For the better securing the rights of copies of printed books. —C. J. xv. 316.

assigns shall have a similar right for fourteen years from first publication (*a*), *and no longer*. § 84. Statute of Anne.

Note (*a*).—These three words were ultimately fatal to the Common Law right; whether it was intended that they should be so, or merely that they should decisively restrict the statutory term is doubtful; Clause 9 is quite inconsistent with them.

A penalty of a penny a sheet was imposed on piracy. *Clause* 2 enacted that no one should be subjected to penalties unless the title to the copy of books hereafter to be published should, *before such publication*, be entered in the register of the Stationers' Company, "*as hath been usual.*" *Clause* 4 contained a proviso for fixing the prices of books if they appear too high and unreasonable. *Clause* 5 requires nine copies of each work to be delivered to nine public libraries.

§ 9. "Provided that nothing in this Act contained shall extend or be construed to extend either to prejudice or confirm any right that . . . any person . . . claims to have to the printing or reprinting any book or copy of a book already printed or hereafter to be printed." Clause 9.

Note.—A large number of persons "claimed to have rights" at common law "to printing or reprinting books." This Act therefore by its ninth clause, should have left these rights as they were, without either "prejudicing or confirming them."

§ 11. Provided always, that after the expiration of the said term of fourteen years the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years. Clause 11.

Note.—This throws some light on the term "*and no longer*" in the first clause, and suggests that it should not be interpreted as overriding § 9.

§ 85. Result of Statute of Anne.

The phrases of this Act have been already sufficiently discussed by others. The result seems to be, that the bill as originally introduced provided perpetual statutory copyright; that, this being strongly opposed, a term of statutory protection was accepted, the words "and no longer" being added to exclude the possibility of a further statutory term, and that the 9th clause was intended to leave all rights existing or alleged to exist at the passing of the Act *in statu quo*. Though not the judicial interpretation of the Act, this seems on the whole to reconcile the phraseology of clause 9 and the preamble with that of clause 1.

The question as to the effect of this compromise, whether it gave a term of copyright protected both by statute and common law, and left the further common law right as before, or whether it abolished the common law right, replacing it by a limited statutory term, could not arise till 1731; for until that date, being twenty-one years from the date fixed in the statute, all books had statutory copyright. And after that date cases soon arose to test the effect of this legislation.

First, however, in 1735, an Act (*y*) was passed forbidding the importation of foreign reprints of English works, unless such works had not been printed or reprinted in England for twenty-one years previously, a restriction in the interests of the public recognising the rationale of literary property and the modifications it must submit to. The clause of the Act of Anne for fixing the price of books was also repealed, a recognition that "regulation" (*z*) is not always "consistent with the life and growth of all arts and mysteries."

The first cases to test the effect of the Act of Anne

(*y*) 12 Geo. II. c. 36.
(*z*) See Ordinance of 1652, p. 59.

arose in applications to the Court of Chancery for injunctions to prevent the printing of piratical books. It was subsequently urged against the importance of these precedents, that such injunctions were only granted till the final hearing, and were not final settlements of the question. In answer to this (*a*) it must be remembered that injunctions in the Court of Chancery were only granted in *questions of property*, and when the right was clear and unquestioned; and also that, though in form interlocutory, they were generally treated as a final settlement of the action, and when granted were made perpetual by consent of the defendants.

§ 85. Result of Statute of Anne.

The first case arose in 1735, when, in the case of *Eyre* v. *Walker* (*b*), Sir Joseph Jekyll restrained the defendant from publishing the 'Whole Duty of Man,' said to have been first assigned in 1657, and therefore outside the term of statutory copyright. This case however was rendered unsatisfactory by doubts as to the facts; the alleged assignment took place two years before the book was published, and the authorship is still an unsettled question.

§ 86. Cases under Statute of Anne.

In the same year, in the case of *Motte* v. *Faulkner* (*c*), the defendant was restrained from printing certain miscellanies of Pope's and Swift's, published in 1701, 1702, and 1708, and therefore outside the term of statutory copyright. After another case in 1736, Lord Hardwicke in 1739, in the case of *Tonson* v. *Walkner*, restrained the defendant from printing Milton's 'Paradise Lost,' the assignment of which was dated in 1667.

In 1760, in the similar case of *Tonson* v. *Collins* (*d*),

(*a*) 4 Burr. 2325.
(*b*) Id. 2325.
(*c*) Id. 2326.
(*d*) Id. 2326.

§ 86. Cases under Statute of Anne.

where the defence set up was that copyright only existed by statute, and that the statutory period had expired, the question was referred to a Court of common law, who ultimately refused to give a decision, on the suspicion of collusion, although it was understood that the judges were in favour of the plaintiff as far as the case had gone.

Up to this point, therefore, the Court of Chancery had recognised that a clear right of literary property existed in works not within the statutory protection. That this right was independent of the statute was further shewn by the fact (*e*) that though the statute required registration at Stationers' Hall as a condition precedent to protection, the Court gave relief in cases where the work pirated had not been so registered.

§ 87. *Millar* v. *Taylor.*

Under these circumstances the question was for the first time brought to a decision in the Courts of Common Law in the celebrated case of *Millar* v. *Taylor* (*f*). The poet Thomson had published a poem, 'The Seasons,' in the years 1726–1730; statutory copyright therefore expired in 1758. Thomson had sold the copyright to Millar; in 1763 Taylor pirated the work, and in 1766 Millar brought an action against him, which was heard before Lord Mansfield, C.J., Willes, Yates, and Aston, JJ., and decided in 1769.

The judges held by three against one that the copy of a book or literary composition belongs to the author by the common law, and that this common law right of authors to the copies of their own works is not taken away by the Statute of Anne.

Of the majority, Mr. Justice Willes delivered an

(*e*) 4 Burr. 2319.
(*f*) Id. 2303.

extremely (*g*) able historical survey of the question, to which all subsequent authors, not excluding the present essayist, are much indebted. Mr. Justice Aston agreed on general grounds, and Lord Mansfield, probably the greatest authority of the time on the Law of Copyright, or indeed on any other legal subject, contented himself with agreeing shortly with the judgments of his two puisnes (*h*). In opposition, Mr. Justice Yates delivered a lengthy and involved judgment against the common law right, based mainly on metaphysical considerations as to the nature of property. The effect of his arguments is much weakened by the fact that he admits an author to have *property at common law* in his unpublished works so as to prevent others from printing them. Thus the first discussion of the matter in Courts of Law resulted in the affirmation of a copyright at common law undisturbed by the statute.

§ 87. *Millar* v. *Taylor.*

In 1774, after a decision in the Scotch Courts denying the common law right, the question came up for decision on an appeal to the House of Lords in the case of *Donaldson* v. *Beckett* (*i*). The facts were the same as in *Millar* v. *Taylor*, except that Millar's executors had sold the "copy" to Beckett, who prosecuted Donaldson for piracy. The Lord Chancellor Bathurst granted a perpetual injunction against the defendant, from which he appealed. The House of Lords called in the judges to give their opinion on certain questions, which they did with the following

§ 88. *Donaldson* v. *Beckett.*

(*g*) It was subsequently said by Lord Abinger during the argument in *Chappell* v. *Purday*, that this judgment was really the work of Lord Mansfield.

(*h*) It was one of the *two* occasions on which Lord Mansfield's Court were not unanimous: 4 Burr. 2395.

(*i*) Brown, Cases in Parl. 129; 4 Burr. 2408; 17 Cobbett, Parl. Hist. 954, 1003.

§ 88. *Donaldson v. Beckett.*

results. (Lord Mansfield, as a peer of the realm, did not give his opinion with the judges, or take any part in the decision, a reticence much to be regretted.)

Answers of the judges.

The judges were asked:

I. Whether at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent?

Answer.—To this, ten judges (and Lord Mansfield) were of opinion that he had the sole right; one dissented. The judges were thus practically unanimous on the existence of the author's common law right before publication.

II. If the author had such a right originally, did the common law take it away upon his printing or publishing such book? And might any person afterwards reprint and sell for his own benefit such books against the will of the author?

Answer.—To this, eight judges (and Lord Mansfield) answered "*No*;" three judges "Yes;" a large majority thus holding that publication did not at common law divest copyright.

III. If such an action would have lain at common law, is it taken away by the Statute of 8th Anne; and is an author by the said statute precluded from every remedy, except on the foundation of the said statute, or on the terms and conditions prescribed therein?

Answer.—On this, the vital point, five judges (and Lord Mansfield) answered "No;" six judges answered "Yes."

IV. The fourth question was a combination of the first and second: Whether the author of any book, and his

assigns, had the sole right of printing and publishing the same in perpetuity by the common law?

§ 88. *Donaldson* v. *Beckett.* Answers of the Judges.

Answer.—To this, seven judges (and Lord Mansfield) answered "Yes;" four judges "No."

V. The fifth question practically repeated the third—Whether this common law right is in any way impeached, restrained, or taken away by the Statute of Anne?

Answer.—On this, after minute discussion of the wording and circumstances of the statute, six judges answered "Yes;" five (and Lord Mansfield) "No."

On these answers of the judges, Lord Camden moved the House to give judgment for the appellant and against the common law right.

He first dealt with the evidence of custom adduced to shew the existence of such a right, and summarily dismissed it as either illegal decrees of an unconstitutional tribunal, or private regulations of a company of monopolists. No authority could be produced for a common law right; and, on grounds of principle, literature once published was a matter *publici juris.* His Lordship indeed was mightily indignant at the idea of pecuniary gain resulting from literature (*k*). "It was not for gain," said he, "that Bacon, Newton, Milton, and Locke instructed the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of letterpress. When the bookseller offered Milton five pounds for his 'Paradise Lost,' he did not reject it and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labour; he knew that the real price of his work was immortality, and that posterity would pay it."

How could the peers resist such eloquence as this;

(*k*) 17 Cobbett, Parl. Hist., 1000.

§ 88. *Donaldson v. Beckett.*

indeed, the only fault to be found with such generosity and highmindedness is, that it is at other people's expense. Possibly, if applied to the remuneration of my Lord Camden's own intellectual labour, his Lordship might have considered immortality an unrealizable commodity for the wants of daily life. Concerning posterity, the lucid dicta (*l*) of that great lawyer and moralist, Mr. Thomas Hood, are applicable when he says: "The very law of nature protests against an unnatural law which requires an author to write for everybody's posterity except his own." And again: "By the present arrangement posterity is bound to pay everybody or anybody but the true creditor."

It is not clear what view Lord Camden took of the common law right in unpublished works, which he could hardly have denied to exist. Apart from all his rhetoric, while right in saying that there was no judicial decision expressly creating a common law right, he, apparently from imperfect understanding of the nature of the common law of England and its concealed character of judicial legislation, did not realise the importance of all these by-laws, proclamations, entries, and assignments, which he put aside as illegal and unworthy of notice, as forming a weighty reason for a decision in favour of a common law right. It is impossible however to overlook the fact that the persons who would have mainly gained by the existence of a common law right in perpetuity were the booksellers and not the authors.

§ 89. Effects of *Donaldson v. Beckett.*

The decision in *Donaldson* v. *Beckett* naturally caused great alarm in the ranks of publishers and owners of "copy." They instantly came to Parliament for relief.

(*l*) Drone on Copyright, note, p. 59.

§ 89. Effects of *Donaldson* v. *Beckett.*

On the 28th of February, 1774 (*m*), the booksellers presented a petition complaining that in reliance on their common law right, confirmed by the case of *Millar* v. *Taylor*, booksellers had invested several thousands of pounds in purchase of ancient copyrights not protected by the Statute of Anne; that this property was destroyed by the late decision; and praying for relief. The petition was referred to a committee to report on it, and they accordingly took evidence. The chief witness was a bookseller named Johnson, whose evidence (*n*) in view of past history and present controversies is very interesting. Although the Statute of Anne was introduced to give owners of copy further protection, the witness stated that it was not the custom of publishers to sue for penalties under that statute, since a shorter and more complete relief might be had by filing a bill in Chancery. He had never heard of any action being brought at common law, the bill in Chancery being the easier. In reference to the "reversionary," or "two-term" copyright, under the statute, a return to which has been proposed of late years, the witness stated that he never saw or heard of any assignment of copy where the second term of fourteen years was reserved to the author, the assignments being usually to booksellers and their assigns for ever; and that undoubtedly the bookseller gave more money for twenty-eight years' copy than he would for fourteen. With regard to the value of copyrights, he said that in the previous twenty years nearly £66,000 had been paid for copyrights by publishers. The facts he bore witness to however tended to shew that the evidence of property in a copyright required was not of the strictest, that

(*m*) 17 Cobbett, Parl. Hist. p. 1077.
(*n*) Id. p. 1086.

§ 89. Effects of *Donaldson* v. *Beckett.*

the assignment from the author was frequently assumed, and that there was some ground for calling the then system of copyright a mere trade arrangement.

On this and other evidence the Committee reported to the House, and a bill was brought in on the 22nd of April, 1774, and read a second time on the 10th of May; it was opposed by Attorney-General Thurlow and Charles James Fox, and supported by Edmund Burke (*o*). Counsel were heard for and against it: the interests of the public and of authors however are not very prominent; Scotch and country booksellers promote the opposition against the great London firms, mainly on petty trade grounds. The Bill ultimately passed the Commons, but in the House of Lords (*p*), on the motion of Lord Denbigh, supported by Lord Camden and Lord Bathurst, it was thrown out, and large and valuable properties in ancient copyrights were lost without compensation. The report significantly says; "Lord Mansfield did not attend the House on that occasion."

§ 90. Subsequent legislation.

Another and more powerful section of the community were affected by the decision, and were more fortunate in their endeavours. The Universities in 1775 obtained an Act granting (*q*) them perpetual copyright "in books given or bequeathed to the said Universities and colleges for the advancement of useful learning, and other purposes of education."

As the position of authors whose pen was their living became more honourable, it was felt that the Statute of Anne gave too short a term of remuneration, and

(*o*) 17 Cobbett, 1110.
(*p*) Id. 1402.
(*q*) 15 Geo. III. c. 53.

in 1814 an Act (*r*) was passed "to afford encouragement to literature." It substituted for the previous term of fourteen years, with a reversionary fourteen years to the author if living, an extended term of twenty-eight years, or, if the author were living at its expiration, his life. This clause however must be regarded rather as a bribe to outweigh the disadvantages of an increased supply of copies to public libraries, rendered obligatory by other clauses of the Act, than a disinterested recognition of the claims of literature.

§ 90. Subsequent legislation.

In 1837 however the matter was at last taken in hand purely in the interests of authors. In that year Serjeant Talfourd began the parliamentary battle which ended after his death in victory. Introducing his bill (*s*) in 1838 in an eloquent and lengthy speech, he was supported by Disraeli and Monckton Milnes, now Lord Houghton, and actively opposed, mainly in the interests of the public, by Hume, Grote, and the "philosophic Radicals," on the ground that any extension of copyright must enhance the price of books. During this debate Talfourd laid down the motive of the proposed change to be, "that the present term of copyright is much too short for the attainment of that justice which society owes to authors, especially those, few though they be, whose reputation is of slow growth and enduring character."

§ 91. Talfourd's Bill.

The year 1841 is memorable for the first interposition in these debates of Macaulay, in a (*t*) speech which must, like its successor in 1842, have had a very great effect on the House. Members generally were much moved

(*r*) 54 Geo. III. c. 156.
(*s*) Hansard, xlii. 557.
(*t*) Macaulay's Speeches, p. 108; Hansard, li. 341.

§ 91. Talfourd's Bill.

at the time by the hardships which had lately befallen prominent men of letters, and by petitions presented by writers then in full popular fame, or attaining to it. Scott had died just when the copyright of his earliest and most successful novels was expiring, leaving his family in great financial difficulties. Wordsworth's works were only becoming popular, when they ceased to bring him any return. Southey's literary career was known to have been much altered by his pecuniary needs, and the shortness of the copyright in his works. Alison presented a very important petition with reference to the remuneration for his 'History,' a work of great magnitude and expense and of slow returns (*u*). Thomas Hood wrote a petition, alluded to before, but unfortunately too long to quote, except as to one paragraph, which ran: "That cheap bread is as desirable and necessary as cheap books, but it hath not yet been thought necessary to ordain that after a certain number of crops all cornfields ought to be public property." The whole petition was drafted in a style quite new to the House, but unfortunately it was never presented. There was also a petition from "Thomas Carlyle (*x*), a writer of books," setting forth "that your petitioner has written certain books, being incited thereto by certain innocent and laudable considerations, that his labours have found hitherto in money or money's worth small recompense or none; but he thinks that if ever it is so, it will be at some distant time when he, the labourer, will probably no longer be in need of money, and those dear to him will still be in need of it, wherefore your petitioner humbly prays your honourable House to forbid ex-

(*u*) Drone on Copyright, p. 78.
(*x*) Trevelyan's Macaulay, ii. 133.

traneous persons, entirely unconcerned in this adventure of his, to steal from him his small winnings for a space of sixty years at the shortest. After sixty years, unless your honourable House provides otherwise, they may begin to steal."

§ 91. Talfourd's Bill.

Against these influences Macaulay rose in opposition. As Talfourd said: "Literature's own familiar friend in whom she trusted, and who has eaten of her bread, has lifted up his heel against her." And successfully; his nephew and biographer is justified in saying: "Never has any public man, unendowed with the authority of a minister, so easily moulded so important a piece of legislation into a shape which so accurately accorded with his own views as did Macaulay the Copyright Act of 1842."

In introducing his bill in 1841 (*y*), Talfourd proposed a copyright of sixty years from the death of the author, but professed himself willing to accept thirty years from death. Against this Macaulay delivered the first of his celebrated speeches on copyright (*z*). He argued that there was no natural right to property, or that if there was, it did not survive the original proprietor. Copyright was a monopoly, making books dear, and as such only to be justified within certain limits by expediency. He urged that extension of the term beyond the author's death would not benefit him, nor would the expectation of it be an inducement to labour. Copyright he defined as "a tax on readers for the purpose of giving a bounty to writers." He suggested that the descendants of a great author might frequently disapprove on various grounds of his works and so injure the public by refusing to reproduce them. All this

(*y*) Hansard, lvi. 340.
(*z*) Macaulay's Speeches, p. 109.

§ 91. Talfourd's Bill.

was enforced by copious historical illustrations, and was probably even more refreshing to listen to in the House, than it is to read in the wilderness of Hansard. The bill against which it was directed was, small wonder, rejected by forty-five votes to thirty-eight, in which minority there voted Sir E. L. Bulwer, Disraeli, W. E. Gladstone, Lord John Russell, Lord George Bentinck and Sheil, while Macaulay and Joseph Hume are the most conspicuous names in the majority.

§ 92. Act of 1842.

Before the next session of Parliament, Talfourd had died, and the late Lord Stanhope, then Lord Mahon (*a*), introduced the Bill. He proposed that the statutory period should be twenty-five years from the death of the author, and never less than twenty-eight years. Macaulay in committee brought forward as a counter proposal that the statutory period should be forty-two years or the life of the author, whichever was the longest. His speech (*b*) in proposing this had little to do with principles, but consisted of a graphic recital of the great works of literature which would receive longer copyright by his than by Lord Mahon's proposal. It was the controversy between, on the one hand, a fixed period from the death of the author for all his works, a varying period therefore for each of his works; and on the other a fixed period for each work from date of publication, the copyrights thus expiring one by one. The point is one of not very interesting detail, but Macaulay's vivid power and literary memory made the discussion so absorbing that the House was carried with him as by storm. When he sat down Sir Robert Peel told him that the last

(*a*) Hansard, lxi. 1349.
(*b*) Macaulay's Speeches, p. 118.

§ 92. Act of 1842.

twenty minutes of his speech had radically altered his views on the Law of Copyright. Macaulay's amendment was carried by sixty-eight votes to fifty-six (*c*.) Peel then suggested that the term should be extended to seven years after the author's death, for the benefit of his children; and in spite of Macaulay's opposition this was carried by a large majority. The statutory term thus stood at "forty-two years from publication, or till seven years from the death of the author, whichever shall be longest."

The Bill met with little opposition in the Lords (*d*); it was supported in Committee by Lord Lyndhurst, but met with considerable adverse criticism from Lord Brougham, who specially questioned whether the lengthened term would really benefit the author pecuniarily, or whether he would obtain more for his term of forty-two years than he would for one of twenty-eight years, (a point however only of importance when the author sells all his rights instead of arranging for each edition separately).

§ 93. *Jefferies* v. *Boosey*.

As this Act of 1842 is the foundation of our present Copyright Law, I do not propose to trace further the way in which it was patched and extended to different kinds of literary work in the piece-meal way in which alone English legislation seems able to proceed. Before however closing this historical sketch of Copyright in England, something must be said of the great case of *Jefferies* v. *Boosey* (*e*), which, though more directly concerned with international copyright and the extension of the Copyright statutes to cover it, yet raised a

(*c*) Hansard, lxi. 1398.
(*d*) Id. lxiii. 778.
(*e*) 4 H. L. C. 815.

§ 93. *Jefferies v. Boosey.*

question as to the existence and nature of common law copyright and the extent to which it was available to meet the case under discussion. The judges were called in to advise the House, and though the questions put to them did not directly raise the point, yet, amongst others, Erle and Coleridge, JJ., pronounced in favour of the existence of such a right. Pollock, C.B., however, gave it as his opinion that (*f*): "Copyright is altogether an artificial right, not naturally and necessarily arising out of the social rules that ought to prevail among mankind, but is a creature of the municipal laws of each country, to be enjoyed for such time and under such regulation as the law of each state may direct, and has no existence by the common law of England."

The Law Lords also were unanimous against a copyright at common law. Lord Campbell, L.C., said, "Copyright, if not the creature of our statute law, as I believe it to be, is now entirely regulated by it." Lord Brougham (*g*): "In my judgment it is unquestionable that the statutes alone confer the exclusive right"; while Lord St. Leonards (*h*) had "come to the conclusion long since that no common law right existed after publication."

§ 94. Colonial Copyright. Commission of 1875.

It only remains to add that, the national question being settled for a time by the Act of 1842, increased facilities for intercourse, and the spread of education led to knotty questions of International and Colonial Copyright. A Canadian Act of 1875, thought to clash with the Imperial Act of 1842, was the cause of the appointment of the Copyright Commission in 1875,

(*f*) 4 H. L. C. p. 935.
(*g*) Id. p. 962.
(*h*) Id. p. 977.

§ 94. Colonial Copyright Commission of 1875.

under the chairmanship of the late Lord Stanhope, who, as Lord Mahon, had introduced the Bill of 1842. After taking much valuable evidence it reported in May, 1878, and the changes in the Law of Copyright which it recommended still wait legislative enactment till the House of Commons shall set itself in order and make better arrangements for accomplishing the legislative work of the nation. A bill amending and codifying the Law of Artistic and Literary Copyright seems particularly suitable for the consideration of the Grand Committee on Trade, and it is to be hoped that the two bills on that subject introduced by Mr. Hastings, or some Government measure, may shortly be referred to that Committee.

§ 95. Recapitulation of history.

The History of Copyright in England therefore falls under four periods :—

I. *From the incorporation of the Stationers' Company in* 1556 (*i*) *to the expiration of the Licensing Act in* 1694; in which period there exists usage sufficient to ground a copyright at common law, side by side with a statutory system of licensing and regulation, which indirectly enforces it.

II. *From the expiration of the Licensing Act in* 1694 *to the passing of the Copyright Act in* 1709, copyright at common law exists alone.

III. *From the passing of the Copyright Act in* 1709 *to the decision in Donaldson* v. *Beckett in* 1774 there is statutory copyright for a limited term, with, as was believed, common law copyright in perpetuity extending beyond it.

IV. *From the decision in Donaldson* v. *Beckett to the present day*, statutory copyright exists alone, as far as

(*i*) Before 1556, copyright is only rudimentary.

§ 95. Recapitulation of history.

published works are concerned, and has been gradually extended in the interests of authors and the community.

§ 96. Common law copyright.

Whether or not there is now a common law copyright after publication in cases not provided for by statute, might be a question of importance in case of the discovery or invention of a new species of literary property. To this the common law might apply, not as founded on ancient custom, but in its character of judicial legislation as pointed out by Lord Lyndhurst, who says: "The common law applies itself to the varying circumstances of the time, and extends to every new species of property that springs up, the same protection that it has afforded to property previously existing."

§ 97. Answers to questions (see § 66).

Returning then to the questions put at the outset, we can answer—

I. Between the introduction of printing in 1471, and the passing of the Statute of Anne in 1709, there was no direct recognition by the judges of copyright as existing in the common law of England; nor was there any statute creating copyright. There was, however, such a state of things existing in the custom of authors and printers as to constitute a new species of customary property, which the judges would have been bound to recognise had the question come before them.

II. The Statute of Anne was an unfortunately worded compromise, not understood at the time, containing expressions favouring both the retention and the destruction of copyright at common law, and probably intended, by at least part of the House, to destroy such copyright. It should however have been construed as leaving such copyright *in statu quo*, and this was the opinion of Lord Mansfield.

§ 98. History in other countries.

History in other countries.—As the law of the *United States* on copyright has been much influenced by that of England, a few words on its growth will not be out of place.

Immediately after the Declaration of Independence, Connecticut and Massachusetts (*k*) passed Copyright Acts in the interests of authors; and in May, 1783, the old Congress recommended to the various States to secure by law to authors and publishers a term of copyright similar to that contained in the English statute of Anne, and several states followed this recommendation. In 1790 a copyright law was enacted for the whole of the States, and in 1831 this was re-enacted with extensions of the term.

In 1834 the Supreme Court of the United States had before it, in the case of *Wheaton* v. *Peters* (*l*), the question of the effect of the American statutes on the common law right, if any, and decided by three judges to two, that the Act of 1790 did not affirm an existing right; but created one. One of the majority put the case in this way (*m*): "The argument that a literary man is as much entitled to the fruits of his labour as any other member of society, cannot be controverted. And the answer is, that he realises this product by the transfer of his manuscript, or on the sale of books when first published."

In 1870 the Copyright Laws were consolidated, and in 1874 revised and re-enacted. They afford protection to unpublished as well as published works.

With regard to other countries, it will suffice to say that copyright laws exist in every European state, and most countries outside Europe of any degree of civi-

(*k*) Drone, p. 87.
(*l*) Drone, pp. 43–48; 8 Peters' Rep. 591.
(*m*) 8 Peters' Rep. 657.

§ 88. History in other countries.

lization, except Egypt and some of the South American republics. These laws mostly date from the first half of this century, and have in many cases been revised within the last fifteen years, the tendency of the revision having invariably been to increase the amount of protection afforded to authors. Usually the original copyright has been in perpetuity; and, after being cut down to a short term of protection, this has been gradually lengthened. This has been the case in England, France, Holland, Norway, Sweden, Denmark, and Spain. To take a typical instance, in *France* (*n*) before the Revolution, copyright was perpetual; a decree of 1793, gives a statutory term of "life + 10 years;" this is extended in 1810 to "life + 20;" in 1854, to "life + 30 years;" and finally, in 1866, the term is fixed at "life + 50 years."

(*n*) Lowndes, p. 12; Copinger, p. 508.

CHAPTER V.

ENGLISH LAW OF LITERARY COPYRIGHT. PART I.

INTRODUCTION . . . . . § 99
SECTION I. *Unpublished Works* . . . . . §§ 100–108
SECTION II. *Oral Communications, Lectures* . . . . §§ 109–116
SECTION III. *Oral and Printed Communications, Plays* . §§ 117–132

§ 99. Introduction.

WE now reach the consideration of the English law of Copyright as it exists at the present time. The author of a literary work may retain such work unpublished, or communicate it privately to certain persons under certain restrictions, or publish it in the ordinary sense of the word, so that all who choose to pay the price asked may obtain the work. Though the channels of communication may vary, the principles regulating each are nearly the same. The first communication to the public vests the statutory period of protection from unauthorized reproduction, whether oral or printed. For convenience of exposition, though not on account of difference of underlying principle, it is preferable to give separate attention to each different channel, and to deal with in order—

I. The law of *unpublished* works.

II. The law of works communicated *orally* to the public, as lectures and the drama.

III. The law of works communicated to the public *both orally and in print*, as printed lectures and plays.

IV. The law of works communicated to the public *in print only*.

§ 99. Introduction.

It is not easy however to carry out this division consistently in the English law, owing to the existence in it of Statutory and Common Law Copyright. There is *Statutory Protection*, the investitive fact of which is publication. It differs for books, plays, and lectures, owing to the English method of piecemeal legislation. There is further, the Common Law protection afforded to unpublished works, and works only communicated to others under certain restrictions, as in the case of works printed for private circulation, and lectures. The two kinds of protection slightly overlap; their differences have historical explanation; in the main, indeed, their principles are the same, but their co-existence is confusing.

We may, however, adopt the division set out on the previous page, bearing in mind that in dealing with oral communications we shall find statutory results from publication and common law results from publication for a *limited* purpose, side by side. We come first then to copyright existing purely by the Common Law, and having dealt with in turn the other branches of the Municipal Law, we can then consider *Colonial* and *International* Copyright, distinguishing in the latter case between countries with whom we have, and those with whom we have not, Copyright Treaties.

Section I.

Property in Unpublished Works according to Common Law.

§ 100. English law as to unpublished works.—§ 101. Nature and limits of right.—§ 102. Investitive facts.—§ 103. Transvestitive facts.—§ 104. Letters.—§ 105. Conditional communications.—§ 106. Divestitive facts.—§ 107. Infringements and remedies.—§ 108. Comparative summary.

§ 100. Unpublished works.

"The author or owner of any literary composition has a right so long as it remains unpublished to prevent the publication of it by another person" (*a*).

(*a*) Stephen's Digest, C. C. R. p. 65, art. 1.

§ 100. Unpublished works.

Thus in 1723 (*b*), Henry, Earl of Clarendon, delivered to Gwynne an original manuscript of his father's (Lord Clarendon's) History; in 1758, the administrator of Gwynne sold it to Shebbeare for publication, and the representatives of the Earl of Clarendon applied for and obtained an injunction against such publication, the Court saying that "it was not to be presumed that when Lord Clarendon gave a copy of his work to Gwynne he intended that he should have the profit of multiplying it in print.

In the celebrated case of *Prince Albert* v. *Strange* in 1849 (*c*), the Queen and Prince Albert made, for their own amusement and not for publication, drawings and etchings from which copies were printed for distribution amongst their friends. The defendant, obtaining copies of these, proposed to exhibit them, and to sell a descriptive catalogue. The Court restrained both the publication by exhibition, and "by descriptive catalogue." The principles applied however in this case, at least as regards the catalogue, are far wider than those applied to abridgments and dramatisations in the case of published works.

So in the American case of *Bartlett* v. *Crittenden* (*d*), the plaintiff taught in his school an original system of book-keeping; the defendant, a scholar and teacher in the school, having access to the manuscript of this, copied it, and inserted 92 pages thereof in a book which he published, consisting of 207 pages. The Court restrained publication, holding that, "No one can determine this essential matter of publication but the author. His MSS., however valuable, cannot, without his consent,

(*b*) *Duke of Queensberry* v. *Shebbeare*, 2 Eden, 329.
(*c*) 2 De G. & Sm. 652; 1 Mac. & Gor. 25.
(*d*) 5 McLean, 32, 37, 40.

§ 100. Unpublished works.

be seized by his creditors as property. Publication of a substantial part is piracy."

§ 101. Nature and limits of right.

The right is one of property, perpetual unless waived, in original literary productions, which need not be of any pecuniary or literary value, but must not be of an immoral, seditious, or blasphemous nature. It rests on the common law.

Mr. Justice Yates, the vigorous opponent of literary property after publication at common law, said, in *Millar* v. *Taylor* (*e*), "Most certainly the sole proprietor of any copy may determine whether he will print it or not. . . . . It is certain every man has a right to judge whether he will make his sentiments public, or commit them only to the sight of his friends. In that state the manuscript is in every sense his peculiar property, and no man can take it away from him, or make any use of it which he has not authorized, without being guilty of a violation of his property." And the nature and extent of the right is well summarised by Lord Brougham in *Jefferies* v. *Boosey* (*f*), where he says, "The right of the author before publication we may take to be unquestionable; he has the undisputed right to his manuscript; he may withhold or he may communicate it, and, communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases on the use of it; and the fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation."

In character, the work, to be property, must be the result of the intellectual labour of the claimant or his predecessor in title. Otherwise there can be no pro-

(*e*) 4 Burr. 2379.
(*f*) 4 H. L. C. 962.

perty. Neither will the law protect productions of an immoral or injurious tendency. Thus in *Southey* v. *Sherwood*, in 1817 (*g*), though the ground of the decision is not very clear, Lord Eldon refused to prohibit the defendant from publishing 'Wat Tyler,' an early work of Southey's, on the ground apparently that it was an immoral work, and that the State would afford no protection to works of such a character. However, there was also a question whether Southey, by leaving the manuscript in the hands of a publisher for twenty-three years, had not waived his rights. The regulation as to immorality is subject to the criticism (*h*) bestowed on the law with regard to published works of that character, a criticism which has even more force where by hypothesis without the piracy the matter would not be made public.

§ 101. Nature and limits of right.

The work need not be of any pecuniary value or literary merit (*i*).

§ 102. Investitive facts.

Putting in writing the result of intellectual work is sufficient to vest the common law right in the author, but it does not appear essential. For instance, there is probably a common law right to prevent the publication of lectures of which no manuscript exists. In *Abernethy* v. *Hutchinson* (*k*), Abernethy, the celebrated physician, gave a course of lectures open only to students attending by his permission. One of these took notes of the lectures, and proceeded to republish them in the *Lancet*. Lord Eldon restrained publication on the ground that a breach of trust had been committed, holding that a student had a right, for purposes of information, to take

(*g*) 2 Merivale, 435.

(*h*) See § 26.

(*i*) *Gee* v. *Pritchard*, 2 Swanston, 402; *Woolsey* v. *Judd* (Am.), 4 Duer. N.Y. 379.

(*k*) 1 Hall & Tw. 28.

§ 102. Investitive facts.

down the whole lecture in shorthand, but no right to make such notes in order to publish them for profit. But he seems to have doubted as to the foundation of his jurisdiction, for he said (*l*): "Where a lecture is orally delivered, it is difficult to say that an injunction could be granted upon the same principle upon which literary compositions are protected; because the Court must be satisfied that the publication complained of is an invasion of the written work; and this can only be done by comparing the composition with the piracy."

A man putting into written or oral form the results of his intellectual labour, acquires protection for such results. Free application of the principle of waiver, and the reasons underlying the maxim, "De minimis non curat lex," hinder this proposition from having the unfortunate result of establishing copyright in conversation, jests, and the like.

§ 103. Transvestitive facts.

The author may deal with his copy as with any other piece of property. He may assign copies under express or implied undertaking not to publish, when property in the original manuscript will pass, but not the right to publish. In the words of an American case (*m*): "This property in manuscript is not distinguishable from other personal property. It is governed by the same rules of transfer and succession, and is protected by the same process, and has the benefit of all the remedies accorded to other property so far as applicable.

Thus in *Thompson* v. *Stanhope* (*n*) Lord Chesterfield's celebrated letters to his son having been sold by his

(*l*) 1 Hall & Tw. p. 39.
(*m*) *Palmer* v. *De Witt*, 47 N. Y. 532, 538. (1872).
(*n*) Ambler, 737.

son's widow to Dodsley, the latter published them, and Lord Chesterfield's executors applied for an injunction to restrain publication. The Lord Chancellor granted it, holding that the widow had no right to print without the consent of Lord Chesterfield, and that when Lord Chesterfield declined receiving the letters from her and said she might keep them, he did not mean to give her leave to publish them. So in *Abernethy* v. *Hutchinson* (*o*) it was held that a right was given to hear and take a copy for information and instruction, but not to publish such a copy.

§ 103. Transvestitive facts.

In the case of *Letters*, the writer retains copyright in the letter, so as to hinder the receiver from publishing it, except under special circumstances. It has been suggested (*p*) that the receiver of a letter may publish it without the consent of the writer for purposes of personal vindication. In the case of *Pope* v. *Curl*, in 1741, the poet Pope applied for an injunction against Curl, the bookseller, to restrain him from publishing letters to and from Pope. Lord Hardwicke granted it as to letters written by Pope, but not as to those written to him, saying (*q*): "The receiver has only a special property possibly in the paper, but this does not give a license to any person whatsoever to publish letters to the world, for at most the receiver has only a joint property with the writer," who could therefore restrain publication. In *Oliver* v. *Oliver* (*r*) it was held that the receiver of a letter might maintain an action for detinue against a person into whose possession the letter had passed.

§ 104. Letters.

(*o*) 1 Hall & Tw. 28.

(*p*) *Percival* v. *Phipps*, 2 Ves. & B. 19; *Folsom* v. *Marsh* (Am.), 2 Story, 100, 111.

(*q*) 2 Atk. 342.

(*r*) 11 C. B. N.S. 139.

§ 105. Conditional communications.

Communication of a work may be only partial, restricted, and conditional, for a limited purpose, and the donor may prevent the donee from transgressing the conditions of the communication. In the words of Lord Cottenham, in *Prince Albert* v. *Strange* (*s*): "In most of the cases which have been decided, the question was not as to the original right of the author, but whether what had taken place did not amount to a waiver of such right; as in the case of letters, how far the sending of the letters; in the case of dramatic compositions, how far the permitting the performance; and in the case of Mr. Abernethy's lecture, how far the oral delivery of the lecture had deprived the author of any part of his original right or property."

§ 106. Divestitive facts.

Publication destroys the common law right, and if according to the statute, vests statutory copyright; if not according to the statute, all copyright may be lost. Publication is defined as "making a thing public in any manner in which it is capable of being communicated to the public." Though not necessarily so, it is generally for sale, or at any rate, so as to be accessible to all who choose to obtain it, on conditions imposed not by the author but by the law. Publication "for private circulation only," that is, on conditions imposed by the author, does not divest the common law right (*t*).

Waiver of rights is a divestitive fact of copyright.

The late American case of *Kiernan* v. *Manhattan Quotation Company* (*u*) shews the difficulties of drawing the line as to what constitutes publication. A., the plaintiff, had bought the exclusive right to use foreign

(*s*) 1 Macn. & Gor. 25, 42.
(*t*) *White* v. *Geroch*, 2 B. & Ald. 298.
(*u*) 50 How. Pr. N. Y. 194 (cited by Drone, p. 122).

financial news supplied by B., and telegraphed it to his customers, where it was exposed to public view on printed tape connected with stock indicators. C. used A.'s news for transmission to C.'s customers. A. sued C., and it was held that giving news to the public in this way was not such publication as to defeat A.'s common law rights.

§ 106. Divestitive facts.

The right will be infringed by any use of an intellectual production without the consent of the owner, or not warranted by the conditions of its communication by him. The remedies are the ordinary common law action for damages sustained, and the right to an injunction to restrain publication.

§ 107. Infringements and remedies.

The law of England and the United States is practically the same, except that while in England the property in unpublished MSS. rests on common law only, in the United States the protection is by statute (*x*). European nations practically agree in similar protection. *Denmark* (*y*) limits the right to a term of thirty years from the author's death. The Courts in *France* (*z*) have decided that MSS. cannot be published by an author's creditors without his consent. *Russia* (*a*) provides that private letters cannot be published without the consent of author and receiver. The German (*b*) proviso is a fair sample of the rest, and is to the effect that printing MSS. without the consent of the author, even by the legal owner, is piracy. This right is perpetual.

§ 108. Comparative summary.

(*x*) U.S. Rev. St. § 4967.
(*y*) Copinger, p. 554.
(*z*) Cop. p. 514.
(*a*) Cop. p. 564.
(*b*) Cop. p. 531.

SECTION II.

Works communicated Orally. Overlapping Statutory and Common Law Rights. Lectures.

§ 109. Nature of right.—§ 110. Investitive facts.—§ 111. Divestitive facts.—§ 112. Transvestitive facts.—§ 113. Remedies.—§ 114. Sermons.—§ 115. Recommendations of Commission.—§ 116. Foreign countries.

§ 109. Nature of right.

The author of a lecture, sermon or address, in communicating orally his work to the public, may do so for a limited purpose and conditionally, and obtain a common law right. If he goes through certain formalities he may obtain statutory protection from printed reproductions, still having probably common law protection from oral ones. On the other hand, he may waive all rights, and authorize all reproductions.

Nature of Rights.—The author has the right, if his communication is only for a limited purpose, to enforce any agreement that the matter communicated should only be used for such limited purpose. For a lecture delivered but not printed there is probably a common law copyright in perpetuity (*c*). For a printed lecture (*d*), fulfilling statutory conditions, the duration of copyright is twenty-eight years, or the life of the author, whichever is longest. The lecture need not be delivered from a written manuscript (*e*). No case exists in English law expressly deciding that unauthorized oral redelivery of a lecture infringes copyright, but it would almost certainly be held to do so, and the Copyright Commission (*f*) recommend a definite enactment to that effect. American cases, though not directly deciding the point, appear to

(*c*) 5 & 6 Will. IV. c. 65, ss. 1 and 5.
(*d*) Id. § 4.
(*e*) *Abernethy* v. *Hutchinson*, 1 Hall & Tw. 28.
(*f*) C. C. Rep. § 84.

cover it; thus in *Boucicault* v. *Fox* (*g*) it is said: "Suppose Mrs. Kemble were to read a drama of her own production, would the reading be a dedication to the public and authorize any elocutionist to read it who could obtain a copy against the consent of the author?" and the question is answered emphatically in the negative. § 109. Nature of right.

The author's rights therefore are:—

1. At common law, to prevent unauthorized printing and publication of his lecture in perpetuity.

2. At common law (probably), to prevent oral delivery by unauthorized persons in perpetuity.

3. By statute to use a certain procedure during a limited term against persons printing without authority.

The investitive facts of the right are:— § 110.

I. *Of Statutory Protection* (*h*).—Delivery of the lecture, and notice in writing to two justices of the peace, living within five miles of the place of delivery, at least two days before delivery. This will not vest copyright in the cases of universities or other endowed foundations, or in the case of endowed lectures. Investitive facts.

II. *Of Common Law Protection.*—Delivery for a limited purpose, the limitation being presumed in the absence of direct announcement. The Commission suggest that notice by the lecturer that he prohibits reproduction shall be required to vest his right. The presumption here would be of waiver of his rights in the absence of any direct prohibition to reproduce.

The transvestitive facts of this right are the ordinary ones for personal property. Presumably an author may assign to another the sole right of oral redelivery. § 111. Transvestitive facts.

(*g*) 5 Blatchford, 87, 98. See also *Palmer* v. *De Witt*, 47 N. Y. 530; 2 Sweeny, 530, 543.

(*h*) 5 & 6 Will. IV. c. 65, s. 5.

§ 112. Divestitive facts.

The divestitive facts of the right are:—

1. Of statutory protection, the expiration of the term of copyright, which can only occur in the case of printed lectures.

2. Of both protections, waiver of rights.

Publication does not in itself divest the right of oral redelivery. The Commission (*i*) suggest that it should; but it seems unreasonable that the author's making his work more accessible in one mode to the public should deprive him of the exclusive right of communicating it in another way.

It was also suggested by Mr. Farrer (*k*) before the Commission that if the author did not print his lecture within, say, three years of delivery, his right should be divested. There seems no more ground for this than for withdrawal of protection from any other unpublished manuscript, and the Commission rightly declined to adopt the proposal.

§ 113. Remedies.

The remedies for infringement of the right are:—

1. Statutory action for penalties, under 5 & 6 Will. IV. c. 65, if statutory conditions of notice are fulfilled.

2. Common law action for damages, the amount of which must be proved.

3. Injunction against unauthorized printing or delivery.

§ 114. Sermons.

Sermons delivered in endowed places have certainly no statutory copyright, and possibly no common law protection. Elsewhere they have copyright at common law, and probably, if due notice is given, statutory protection.

(*i*) C. C. Rep. § 84.
(*k*) C. C. Ev. q. 3100.

The Copyright Commission recommend (l):— § 115. Recommendations of Commission.

1. That the author's copyright should extend to prevent oral redelivery without his consent, unless the lecture has been published in print.

2. That the term of copyright should be, in all cases, the author's life + thirty years.

3. That newspaper reports of the lecture should be allowed unless the author expressly reserved his rights of reproduction.

Sir J. F. Stephen drafts the proposed law as follows (*m*):—

The author of any lecture and his assigns shall have—

(1.) The exclusive right of delivering such lecture for the term of copyright, commencing from the first delivery thereof, provided that if he publish such lecture his exclusive right of delivering it shall thereupon determine.

(2.) The exclusive right of publishing such lecture as a book; provided that no report of any lecture published in a newspaper shall be deemed to be an infringement of such right, unless at the time of delivering such lecture the lecturer gives public notice that he prohibits the publication thereof in newspapers.

Foreign countries generally protect lectures, sermons, and orations from unauthorized reproduction, except in the case of political speeches. § 116. Foreign countries.

The United States has no statutory protection for oral delivery, but rests it on the common law.

(*l*) C. C. Rep. § 84.

(*m*) Digest, § 19; C. C. Rep. p. 74.

Section III.

The Law of Works communicated to the Public both Orally and in Print, as Plays, Lectures, &c.

§ 117. Introduction.—§ 118. Faults of English Law of Dramatic Copyright.—§ 119. History before statutory protection, 1833.—§ 120. Statutory provisions.—§ 121. Author's rights in dramatic compositions.—§ 122. What is a dramatic piece?—§ 123. What is a place of dramatic entertainment?—§ 124. Infringements of author's rights. Dramatisation of novels.—§ 125. Duration of protection.—§ 126. Investitive facts.—§ 127. Transvestitive facts.—§ 128. Divestitive facts.—§ 129. Remedies for infringements.—§ 130. Law of other countries.—§ 131. International Dramatic Copyright.—§ 132. Recommendations of the Copyright Commission.

§ 117. Introduction.

Though strictly plays as merely acted, and lectures as merely delivered should have been treated under the last head, it has been more convenient, in view of the mainly oral character of lectures, to group all that has to be said with regard to them together there, and reserve the case of plays for the following head. This is more especially advantageous, because the law as to lectures is largely Common Law, whereas the law of the drama is entirely statutory. Here however the statutory law has dealt with both the performing right, or the right of representation on the stage, and the printing right. Both are in English law known as "*Copyright*," an extensive use of the term which only confuses; and it will be better to limit the term "Copyright" to the right of publishing in print, and to use for the performing or acting right either the term "Play-Right," as suggested by Drone, or "Stage-Right," as suggested by Charles Reade, the former being preferable.

§ 118. Faults of English law of Dramatic Copyright.

The English Law of Playright and Dramatic Copyright suffers from two great faults. In the first place,

playright and copyright, which are merely protections of different modes of communicating the same intellectual results to the public, are treated in different ways, and may begin and end at different times: Secondly, the fault of the English law alluded to above, that in questions of infringement it seems rather to consider whether new work has been added than whether old work has been taken, is specially prominent in the case of dramatisation of novels. These two faults render it difficult to give a satisfactory and clear statement of the English law of the drama.

§ 118. Faults of English law of Dramatic Copyright.

The first statute directly dealing with "Playright" in England is 3 Will. IV. c. 15. Before that Act, playright rests on the common law. In *Macklin* v. *Richardson* (*n*) in 1770, the plaintiff was the author and proprietor of a popular farce called 'Love à la Mode,' which was often performed but had never been printed. The defendant published it from a shorthand report of it. The Court granted an injunction, saying that the plaintiff had a right of profit from the performance of his composition, and also from printing and publishing it, and should be protected in both. This case decided that public representation did not forfeit the author's common law right to restrain unauthorized printing, and in *Morris* v. *Kelly* (*o*), where Lord Eldon restrained the unauthorized representation of a play, which had been performed in public but not printed, it was further decided that such representation did not forfeit the author's common law playright.

§ 119. History before Statute of 1833.

That playright stood apart from the Statute of Anne was decided in the case of *Murray* v. *Elliston* (*p*), where

(*n*) Ambler, 694.
(*o*) 1 Jac. & W. 481.
(*p*) 5 B. & Ald. 657.

§ 119. History before Statute of 1833.

it was held that representation of an abridged version of Lord Byron's printed tragedy of 'Marino Faliero' did not infringe his statutory copyright, and in *Coleman* v. *Wathen* (*q*), which decided that representation was not publication within the meaning of the Statute of Anne.

§ 120. Statutory provisions.

English dramatic law now rests on the Act of 3 Will. IV. (*r*), and the Copyright Act of 1842 (*s*). The first of these provided that:—

I. The author of any dramatic piece (1) composed and not printed by the author thereof or his assigns, or (2) which should thereafter be composed but not printed, should have as his own property the liberty of representing such piece at any place of dramatic entertainment in the United Kingdom.

II. As to any such piece (3) printed and published within ten years before the passing of the Act by the author or his assigns, or (4) which should thereafter be printed and published, the author should have, in case (3) from the passing of the Act, in case (4) from the time of publication, a similar playright for the limited term of twenty-eight years, or his life, whichever should be longest.

This Act therefore gave statutory playright in perpetuity in the case of pieces performed, but not printed; playright for a term in the case of pieces printed or to be printed.

The 20th (*t*) section of the Act of 1842 however has thrown the law into confusion. It recites that it is expedient to *extend* the term of playright of dramatic pieces given by the Act of William IV., to the full term

(*q*) 5 T. R. 245.
(*r*) 3 Will. IV. c. 15.
(*s*) 5 & 6 Vict. c. 45, ss. 20, 24.
(*t*) 5 & 6 Vict. c. 45, s. 20.

given by the Copyright Act, and therefore enacts that the playright of any dramatic piece shall be the property of the author for the same term as that of book-copyright; and that the same provisions as to registration shall apply, except that the first public representation of any piece shall be deemed equivalent to the first publication of any book. By clause 21, proprietors of playright are to have all the remedies provided in the former Act, and by clause 24, after enacting that owners of copyright in books should not sue for infringements before registration, it further provided that this enactment should not affect an unregistered owner of playright under the Act of William IV.

§ 120. Statutory provisions.

There are two interpretations possible of the resulting law. Either: 1. The Legislature did not intend the Act to apply to pieces performed but not printed. Playright in these therefore remains perpetual; but the playright in printed plays is, as the Act recites, *extended* to forty-two years, or the life of the author + seven years, whichever shall be the longer. Or: 2. The legislature intended the Act to apply to both printed and unprinted compositions. Misunderstanding the previous Act, they recited "*extension*" when their clause really *cut down* the term of protection. In this case, copyright and playright will be for the same term, and will begin to run respectively on the first publication of the piece as a book, and on its first representation in public as a play.

The second view will probably be taken by a Court of Law as to the duration of playright in pieces not printed; but the question is by no means free from doubt. It is also probable, though there is no express decision to that effect, that the Court, following *Donaldson* v. *Beckett* (*u*), would hold the common law right

(*u*) 2 Bro. Cases in Parl. 129.

§ 120. Statutory provisions.

destroyed after first performance in public by the statutory provisions. And in the late cases of *Wall* v. *Taylor* and *Wall* v. *Martin* (*x*), Field and Cave, JJ., held with reference to musical compositions (which stand on very much the same footing), that "the proprietor of a musical composition has no other right of performing than that given by the statute;" a statement, it is submitted, at any rate inaccurate as regards unpublished compositions.

§ 121. Author's rights in dramatic compositions.

Hence the *Author's Rights* are as follows:—

I. In play neither printed nor acted.

I. A dramatic piece in manuscript *neither printed nor represented* is the perpetual property of the author at common law.

II. In play acted but not printed.

II. *If represented but not printed;* (1.) As regards *playright*, the author has the sole playright for the statutory term dating from the first performance. (2.) As regards *copyright*, the author has the right, which may be perpetual, of restraining unauthorized publication in print of his unpublished MSS.

III. In play printed but not acted.

III. *If printed but not represented;* (1.) As regards *playright*, the author has the right which may be perpetual, of restraining unauthorized performances until he himself first performs it. This serves as an investitive fact of statutory playright. (2.) As regards *copyright*, the author has it in his work from first publication for the statutory term.

Sir J. F. Stephen, however, in his 'Digest' is, with doubt, of opinion that playright (*y*) cannot be gained if the dramatic piece has been previously published in print,

(*x*) 51 L. J. Q. B. 547; L. R. 11 Q. B. D. 102.
(*y*) C. C. Rep. p. 63, §§ 14, 16.

and the Commission in their report (*z*), also speaks of the point as doubtful. With all the deference due to such authorities, the point seems clear. At common law before the statute, although the case of *Murray* v. *Elliston* (*a*) appears to decide that representation of a printed work is not an infringement of its playright, the authority of the case is weakened by the fact that the piece performed was an abridgment or adaptation. The statutes however seem to leave no doubt upon the matter. The Act of William IV. clearly gives playright for a term to the author of a printed dramatic composition, without imposing any condition that representation should precede publication in print, and the Act of 1842 contains nothing restricting the right.

§ 121. Author's rights in dramatic compositions.

The case on which the statement appears to be based, that of *Toole* v. *Young* (*b*), really turns on another point. A. published in print, a novel, nearly (*c*) in dramatic form; he subsequently dramatised it, or adapted it for dramatic performance, and sold the playright of the adaptation to B.; C. also adapted A.'s novel, and represented his dramatic adaptation. B. sued C., and it was held that C. had a right to dramatise A.'s novel, and that his representation of his dramatisation did not infringe A.'s copyright in the novel, or B.'s playright in the authorized dramatic version.

Without going into the correctness of this decision on principle, or on precedent, it will be seen that it turned

(*z*) C. C. Rep. § 73.
(*a*) 5 B. & Ald. 657.
(*b*) L. R. 9 Q. B. 523.
(*c*) Mr. Hollingshead's (A.'s) account of his novel was that "it was so arranged that it could be produced almost verbatim on the stage"; but *some* adapting work was evidently necessary, as he says "that the piratical author *turned it in a few hours* into an acting drama." (C. C. Ev. q. 2596.)

§ 121. Author's rights in dramatic compositions.

on the fact that intellectual labour, alteration, adaptation, was necessary to represent A.'s novel on the stage. But assume that A.'s work had been published, as was possible, in acting form, with all the dialogue and stage directions, so that it could be represented on the stage without any alterations; it is clear that its previous publication in print would not, at common law or by statute, divest A. of playright in his work. C. in representing it would be representing something on which he had bestowed no intellectual labour whatever, and as will be seen, it is only the presumed intellectual labour in dramatisations of novels that hinders them from being held infringements of playright or copyright. The late Lord Hatherley in *Tinsley* v. *Lacy* (*d*) clearly stated this. He said, "The only way in which an author can prevent other persons from representing as a drama the whole or any part of a work of his composition, is himself to publish his work *in the form of a drama*, and so to bring himself within the scope of dramatic copyright." In consequence of the decision in *Toole* v. *Young* (*e*), this publication in the form of a drama must precede all other publication in a printed form, such as a novel.

This view is confirmed by the recent case of *Chappell* v. *Boosey* (*f*). There the defendants were sued for performing in public a song published by the plaintiffs, and pleaded that by publication in print the plaintiffs had lost the performing right, citing Stephen's 'Digest' and the report of the Commission. North, J., held that publication in print did *not* divest playright, and that the two rights (play- and copy-right) were dis-

(*d*) 1 Hem. & Miller, 747, 751.
(*e*) L. R. 9 Q. B. 523.
(*f*) 51 L. J. Ch. 625; 46 L. T. N.S. 854; L. R. 21 Ch. D. 232.

tinct in their times of commencement and terms of protection. § 121. Author's rights in dramatic compositions.

IV. A dramatic piece *first represented and then printed;* the author has: IV. Play first acted and then printed.

(1.) *Playright* for the statutory term from first representation.

(2.) *Copyright* for the statutory term from first publication in print. During a certain time at the end of his term he will have copyright only.

V. A dramatic piece *first printed and then represented;* the author has: V. Play first printed and then acted.

(1.) *Copyright* (statutory), from first publication in print.

(2.) *Playright* (statutory), from first representation. During a certain time at the end of his term he will have playright only.

§ 122. What is a dramatic piece?

The term "dramatic piece" is defined in the Act of 1842 as "Every tragedy, comedy, play, opera, farce, or other scenic .... or dramatic entertainment." In *Russell* v. *Smith* (*g*) Lord Denman defined it as "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, though this definition sins considerably against the laws of logic in containing "the term defined," not once only, but even twice, yet in connection with the facts of the case it throws some light upon the meaning of the term. A song, 'The Ship on Fire,' containing a descriptive account of a recent wreck, was sung by a performer in plain clothes, accompanying himself at the piano, without any aid from scenery. The

(*g*) 12 Q. B. 217, 236.

§ 122. What is a dramatic piece?

song was intended to express various emotions, and the performer assumed to a limited extent certain characters. It was held a "dramatic piece." So in the case of *Clark* v. *Bishop* (*h*), a song, 'Come to Peckham Rye,' sung in costume and accompanied by characteristic dances and gestures, was held a dramatic piece. The dramatic character consists in the *representative* (*i*) as opposed to the *narrative* element, and may exist without any aids to personation from scenery, costume, or other performers. It is in each case a question of degree or of fact. Thus, in a very recent case, the jury (*k*) found that a song, in which the dramatic element consisted in 'laughing Ho-Ho,' in mild imitation of the storm-fiend, was not a dramatic piece.

§ 123. What is a "place of dramatic entertainment"?

The definition of a "place of dramatic entertainment" was also considered in *Russell* v. *Smith* (*l*), where it was defined as "a place used *for the time* for the public representation for profit of a dramatic piece." In the case in question, the "place" was Crosby Hall, used for various educational and literary meetings and the like, and on that occasion used for an entertainment held to be dramatic. The clause "for profit" appears a wrong limitation (*m*);" the statute gives the author the sole right of performing, and if the representation is unauthorized, that right is infringed, whether or not the performer makes a profit from the performance.

(*h*) 25 L. T. N.S. 908.

(*i*) *Daly* v. *Palmer* (Am.), 6 Blatchford, 256, 264.

(*k*) *Wall* v. *Martin*, *Wall* v. *Taylor*, 51 L. J. Q. B. 547; L. R. 11 Q. B. D. 102.

(*l*) 12 Q. B. 217, 237.

(*m*) In the case of books, it was held in *Novello* v. *Sullow*, 12 C. B. 177, that gratuitous distribution of unauthorized copies was an infringement of copyright.

This consideration appears to cover the case of so-called "private theatricals;" the fact of their audience being limited by certain regulations should not protect them from infringing the author's rights. Here again the question is one of degree. The importance of this term, however, is much diminished by the recent decision in the musical cases of *Wall* v. *Taylor* (*n*) and *Wall* v. *Martin*. These were actions by the well-known Mr. Wall, to recover damages for unauthorized performance of a song in public. The plaintiff alleged that the song was also a dramatic composition. The defendants pleaded that the proviso of the Act of William IV., giving the sole right of performance at places of dramatic entertainment, was extended by the Act of 1842 to musical performances, which therefore were only protected from unauthorized performance in respect of "places of dramatic entertainment." But it was held by Field and Cave, JJ., that the right conferred, both with reference to musical and dramatic compositions was, "the sole right of representing in public," and was not limited to "places of dramatic entertainment." And this decision was affirmed by the Court of Appeal.

§ 123. What is a place of dramatic entertainment?"

Infringements of the Author's Rights are :—

§ 124. Infringement of author's rights. Dramatisation of novels.

I. Unauthorized representation of a dramatic piece in public during the statutory or common-law term of playright.

II. Unauthorized publication in print of such piece during the author's statutory or common-law term of copyright.

It is not an infringement of an author's playright to dramatise and represent a novel he has printed (*Reade*

(*n*) L. J. 51 Q. B. 547; L. R. 11 Q. B. D. 102.

§ 124. Infringement of author's rights.

v. *Conquest*, first case (*o*), *Toole* v. *Young* (*p*)). To print such dramatisation is an infringement of his copyright in the novel. (*Tinsley* v. *Lacy* (*q*); *Reade* v. *Lacy* (*r*).)

Dramatisation of novels.

If the novel dramatised be founded on a play, the acting of such dramatisation is an infringement of the playright in the play (*Reade* v. *Conquest*, second case (*s*)), though not of the copyright in the novel. Printing such dramatisation infringes both the copyright in the novel and the copyright in the play. (*Reade* v. *Lacy* (*r*).) But a dramatisation of a novel does not necessarily infringe the playright of another dramatisation of the same novel (*Toole* v. *Young* (*p*)).

This curious mixture is the result of decided cases; but some possible combinations of facts have not yet been brought forward for adjudication. For instance, A. represents a play; B. founds a novel on that play; does B. by printing his novel violate A.'s copyright in his play? C. dramatises B.'s novel, he thereby does not infringe B.'s copyright, but he (*t*) apparently infringes A.'s playright; by printing his dramatisation he infringes B.'s copyright; does he infringe A.'s copyright?

Novelisation of dramas.

On the principles of English law apparently the "novelisation" of a play is not an infringement of the rights of its author. But if the printing of a dramatisation infringes the copyright of the author of the novel, surely also the printing of a "novelisation" should infringe the copyright of the author of the play. There is as much original work requiring in novelising as in

(*o*) 9 C. B. N.S. 755.
(*p*) L. R. 9 Q. B. 523.
(*q*) 1 Hem. & M. 747.
(*r*) 30 L. J. Ch. 655.
(*s*) 11 C. B. N.S. 479.
(*t*) *Reade* v. *Conquest*, 2nd case, 11 C. B. N.S. 479.

dramatising; but the case seems never to have arisen in English Courts. The consent of the author is however in practice sometimes obtained (*u*).

§ 124. Infringement of author's rights.

All this confusion results from the English doctrine that the dramatisation of a novel produces a new and original work capable of copyright; while yet the Courts are forced to recognise that it is not original by treating the printed dramatisation as a possible infringement of the copyright in the novel.

Novelisation of dramas.

An author communicates to the public the results of intellectual labour. Whether in making other communications to the public any other person infringes his rights should be tested by the principle laid down as between plays and plays in *Chatterton* v. *Cave* (*x*): *Has there been a substantial and material taking of these results?* In the case of most dramatisations of novels, there certainly has, and the law has recognised this by prohibiting in some cases the printing of such dramatisations. In acted plays, we have the text, the actors' abilities, and the stage accessories, costumes, and scenery; these last two being additions founded and based on the text. But the text is the most important part of the play, so important that it has been doubted whether there can be copyright in anything but the actual words of the play. Surely then in the case of dramatisations of novels there has been "a substantial and material taking" of the labour of an author, and where there has been such taking, every reason on which literary property is based is a reason for protection against such infringements. The English law here is another example of the English position referred to above, that addition condones subtraction, the question

(*u*) See Tom Taylor's evidence, C. C. Ev. q. 2652.
(*x*) L. R. 10 C. P. 572, 575; L. R. 3 App. Cases, 483.

§ 124. Infringement of author's rights.

in the English Courts being not so much "Has old and valuable work been taken?" as "Has new and valuable work been added?"

Novelisation of dramas.

It is an infringement of an author's right to perform parts of his play or opera (*y*), as for instance single songs from an opera, subject to the principle of *Chatterton* v. *Cave* (*z*), that the part taken must be substantial and material.

Infringement may also be committed by taking scenic effects and dramatic situations, without any accompanying words. Thus Brett, J., in *Chatterton* v. *Cave* (*z*) said, "I think scenic effects and situations are more peculiarly the subject of copyright than the words themselves," and in an American case (*a*) it was held that "written work consisting wholly of directions set in order for conveying the ideas of the author on a stage by means of characters who represent the narrative wholly by action is as much a dramatic composition as any other." But on the other hand, in *Martinetti* v. *Maguire* (*b*), the 'Black Crook' was not protected from piracy, apparently on the ground that it was a "mere spectacle." In this case however it was in evidence that great part of the scenery consisted in the "female form divine," and the learned judge's morality appears to have overpowered his grasp of the general law.

Immorality and blasphemy in plays prevent protection from vesting; and it is also required that there should be some amount of original work in the play claiming protection. Dramatisations of novels have playright of their own. Playright can also be obtained in the adaptation of a play in which there is no playright, as in the

(*y*) *Planché* v. *Braham*, 4 Bing. N. C. 17.
(*z*) L. R. 10 C. P. 575; L. R. 3 App. Cases, 483.
(*a*) *Daly* v. *Palmer*, 6 Blatchford, 256, 264.
(*b*) 1 Deady 216 (Am.)

case of *Hatton* v. *Keen* (*c*), where the defendant established a playright in adapted plays of Shakespeare. Copyright and playright can also be obtained in translations of a foreign play in which there is no copyright, but this does not hinder others from making their own translations from the common source.

§ 124. Infringement of author's rights.

The duration of the protection afforded is perpetual at common law. By statute for both copyright (*d*) and playright (*e*), it is forty-two years from first publication, or life + seven years, whichever is longer.

§ 125. Duration of protection.

The investitive facts of the right are :—

§ 126. Investitive facts.

I. *Of playright.*

At common law :

1. Intellectual production in some form permanent or capable of permanence.

Under the Statute :

2. First representation in public.
3. (Condition precedent to suing.) Registration under 5 & 6 Vict. c. 45, ss. 20-24.

II. *Of copyright.*

At common law :

1. Intellectual production in a permanent form.

Under the Statute :

2. First printing and publication.
3. Registration under 5 & 6 Vict. c. 45, ss. 13, 24.

One (*f*) who employs another to write a play for him, and even goes so far as to suggest the subject, does not by that alone acquire copyright; nor (*g*) do minor

(*c*) 7 C. B. N.S. 268.

(*d*) 5 & 6 Vict. c. 45, s. 3.

(*e*) 5 & 6 Vict. c. 45, s. 20.

(*f*) *Shepherd* v. *Conquest*, 17 C. B. 427.

(*g*) *Levy* v. *Rutley*, L. R. 6 C. P. 523. See also *Shelley* v. *Ross*, L. R. 6 C. P. 531.

§ 128. Investitive facts.

alterations or additions with or without the consent of the author necessarily constitute joint authorship. Registration (*h*) is necessary before infringement of copyright can be sued for; a modified form of registration is desirable as evidence (*i*) of playright, but is not a condition precedent to an action for infringement (*k*).

§ 127. Transvestitive facts.

The transvestitive facts of the right are:—

1. Consent of author (*l*), which must be in writing.

(*h*) 5 & 6 Vict. c. 45, s. 24.

(*i*) Ibid. s. 20. *Clarke* v. *Bishop*, 25 L. T. N.S. 908.

(*k*) In the case of a play which has been printed, the proprietor of the copyright must make entry in the register of—

1. The title of such play;
2. The time of first publication thereof;
3. The name and place of abode of the publisher thereof;
4. The name and place of abode of the proprietor of the copyright, or of any portion (5 & 6 Vict. c. 45, s. 13);

on the form given in the schedule of the Act of 1842, a copy of which is supplied at Stationers' Hall. The publisher whose "name and abode" is registered must be the *first* publisher of the work: *Coote* v. *Judd*, L. R. 23 Ch. D. 727. The place of abode of the publisher may be his place of business: *Nottage* v. *Jackson* (not yet fully reported). A fee of 5*s.* is payable to the Registrar.

In the case of an assignment of such copyright, there must be registered—

1. The assignment;
2. The name and place of abode of the assignee.

A form for registration is given in the schedule, and a similar fee of 5*s.* is payable. (5 & 6 Vict. c. 45, s. 13.)

In the case of a play acted, but not printed, it is sufficient to register—

(1.) The title of the play.
(2.) The name and place of abode of the author.
(3.) The name and place of abode of the proprietor of the copyright.
(4.) The time and place of first representation or performance.

(5 & 6 Vict. c. 45, s. 20.) Any failure to register will not deprive the author of any remedies to which he may be entitled under 3 Will. IV. c. 15.

A play neither acted nor printed of course needs no registration.

(*l*) 3 Will. IV. c. 15, s. 2; *Shepherd* v. *Conquest*, 17 C. B. 427.

The writing of the agent of an author will suffice as evidence of assignment, and the Secretary (*m*) of the Society of Dramatic Authors is treated as his agent. The transfer need not be witnessed (*n*), or under seal (*o*). § 127. Transvestitive facts.

A part owner cannot assign the whole (*p*) copyright or playright without the consent of his co-owners.

2. In the event of death intestate, copyright and playright descend as personal property.

3. Registration of the transfer is a condition precedent to the bringing of an action. By 5 & 6 Vict. c. 45, s. 22, an assignment of copyright does not transfer playright unless the intention to do so is expressly entered on the register. This clause is the result of the decision in *Cumberland* v. *Planché* (*q*), where it was held that the assignment of the copyright of a drama passed the sole right of representing it, as incidental to the copyright. The clause was, however, held in *Lacy* v. *Rhys* (*r*) not to apply to an unregistered deed expressly conveying both copy and acting right. Cockburn, C.J., *arguendo* suggested that possibly an unregistered assignee would not have the benefit of the Act of Victoria, but only of the Act of William IV.

The Divestitive Facts of the Right are— § 128. Divestitive facts.

1. Expiration of the statutory term, which may be at different times for playright and copyright.

2. Waiver by the author, which (possibly) must under the Act of William IV. be in writing.

(*m*) *Morton* v. *Copeland*, 16 C. B. 517.
(*n*) *Cumberland* v. *Copeland*, 1 Hurl. & C. 194.
(*o*) *Marsh* v. *Conquest*, 17 C. B. N.S. 418.
(*p*) *Powell* v. *Head*, 12 Ch. D. 686.
(*q*) 1 A. & E. 580.
(*r*) 4 B. & S. 873; and see *Marsh* v. *Conquest*, *supra*.

§ 128. Remedies for infringement.

Remedies. I. *For Infringement of Playright.* 1. (*s*) A penalty of forty shillings, or the full amount of benefit derived or damage sustained by the plaintiff from the infringement, whichever shall be greater, to be recovered by the author from anyone representing or causing to be represented without the authority of the author any dramatic piece. No one is liable to penalties unless he or his agent actually takes part in the representation (*t*). Thus owners of theatres, who let their theatre and apparatus to travelling companies, are not therefore liable for penalties for infringement incurred by such companies. But in *Marsh* v. *Conquest* (*u*) the proprietor of a theatre who let his theatre for one night to one of his company, his son, for a benefit was held liable.

In the evidence of dramatic authors (*x*) before the Commission this was complained of as working considerable injustice in the case of country theatres, taken by strolling companies for a week or less. They perform copyright pieces without consent, and are off before they can be reached, while the owners of the theatre are not responsible. Though the Commission do not refer to the matter in their report, the suggested liability of the owner seems desirable.

2. An injunction to restrain unauthorized performance.

II. *For Infringements of Copyright the Author has:*

1. An action for damages under s. 15 of Act of 1842,
2. Seizure of piratical copies under Act of 1842. § 23, or damages in case of their non-delivery.
3. An injunction to restrain unauthorized printing.

(*s*) 3 Will. IV. c. 15, § 2.

(*t*) *Russell* v. *Bryant*, 8 C. B. 836; *Lyon* v. *Knowles*, 3 B. & S. 556.

(*u*) 17 C. B. N.S. 418.

(*x*) Mr. Palgrave Simpson, C. C. Ev. qq. 2381–8, 2441.

III. For infringements of the common law right in an unpublished or unrepresented play, a common law action for damages and an injunction. § 129. Remedies for infringement.

Actions (*y*) must be brought within a year of the infringement. It is not necessary that the infringement should be committed knowingly (*z*).

Law of other Countries.—United States. By § 4952 of the Revised Statutes the author of any drama shall have the sole right of printing and performing the same on complying with the provisions as to deposit of printed title and copies. Statutory playright (*a*) therefore depends on statutory copyright; the play must be printed to give the author the statutory sole right of performing it. The duration of the term is twenty-eight years from the registration of the title of the work, with, on its expiration, a further fourteen years on re-registration of the work by the author and his widow. The author must be a resident citizen of the United States. The author has, however, a common law (as well as statutory) right in an unpublished manuscript, and public performance (*b*) of a manuscript play does not divest this right, or defeat a statutory copyright afterwards secured. Neither will unauthorized publication divest the right (*c*), and the defendant must prove the authorization, not compel the plaintiff to prove the want of authority. § 130. Laws of other countries.

(*y*) 3 Will. IV. c. 15, s. 3.
(*z*) *Lee* v. *Simpson*, 3 C. B. 871.
(*a*) *Boucicault* v. *Hart*, reversing several previous decisions, 13 Blatchford, 47.
(*b*) *Keene* v. *Wheatley*, 9 Am. Law Reg. 33; *Palmer* v. *De Witt*, 47 N. Y. 532.
(*c*) *Shook* v. *Neuendorf*, 11 D. R. N. Y. 985; *Boucicault* v. *Wood*, 2 Biss. 34, 39, 40.

§ 130. Laws of other countries.

A curious theory (*d*), if not now part of the law, for some time found support in *dicta* of judges, to the effect that reproduction of a dramatic performance, not resulting from a breach of contract or confidence, or from a shorthand report, but merely from the exercise of memory is not an infringement of play- or copy- right. This however was disapproved as to copyright in the case of *Keene* v. *Kimball* (*e*), and completely reversed in *French* v. *Conolly* (*f*), where it was held that reproduction of a play on the stage by the aid of memory or stenographic notes is illegal. The proposition finds some slight support in English law in an *obiter dictum* of Bacon, V.C., in *Boosey* v. *Fairlie* (*g*), that apart from the statute it would be allowable to carry an opera away by memory, and perform it. It seems however utterly untenable on the ground of principle. Mental powers no more justify a literary, than physical strength a physical, robber; if it is allowable to pirate a play from memory, piracy of copyright should be justifiable if the compositor could set up the type from memory and without copy.

Authors may reserve the right to dramatise or translate their works, and unauthorized dramatisation are therefore piracy (§ 4952).

The penalties for infringement are to be assessed by the Court, and are not (*h*) to be less than one hundred dollars for the first, and fifty for every subsequent performance.

(*d*) *Keene* v. *Wheatley* (v.s.); *Keene* v. *Clarke*, 5 Rob. N. Y. 38; *Crowe* v. *Aiken*, 2 Biss. 208.

(*e*) 82 Mass. 545.

(*f*) 1 N. Y. Weekly Digest, 196.

(*g*) L. R. 7 Ch. D. 301, 309.

(*h*) § 4966.

§ 130. Laws of other countries.

France (*i*). Playright and copyright rest on the same law, and have the same duration, the life of the author and fifty years after his death. Unpublished MSS. however are protected apart from statutory penalties even though performed on the stage. The right of publication does not necessarily carry with it playright.

It is piracy under the French law:

(1.) To take down an unpublished play by shorthand during representation for the purpose of printing.

(2.) To publish an abridgment of a play so as to interfere with its sale.

(3.) To dramatise a novel without the author's consent.

(4.) To imitate a play in any language without the consent of the author of the original.

The Law of Germany (*k*) draws a distinction between dramatic and dramatico-musical works on the one hand, and purely musical works on the other. The former can only be represented with the consent of the author. The latter, if printed, can be performed by anyone (*l*), unless the author has reserved his right by a notice on the title-page of the published work. The duration of the right is for the life of the author and thirty years after his death. The penalties for infringement vary with the defendant's state of mind; knowing infringement is punished by a fine of the gross receipts of the performance; infringement in ignorance by a fine of the net profits only.

(*i*) Copinger, p. 518.

(*k*) Id. p. 534.

(*l*) This corresponds to the change in the law recommended by the Copyright Commission, and attempted to be effected by the Musical Copyright Act of 1882.

§ 130. Laws of other countries.

In *Italy*, while copyright is based half on the monopoly and half on the royalty system, playright is for a continuous period of eighty years as a monopoly.

Russia has no provisions regulating playright.

§ 131. International copyright (dramatic).

It will be more convenient here to deal with that part of international copyright relating to the drama. It has so far been assumed that the dramatic composition is communicated to the public, whether by printing or performance, for the first time in the United Kingdom. We have further to deal with the case where such first communication takes place abroad. The International Copyright Act (*m*) allows the Crown to grant playright to dramas first performed abroad on the terms of the previous English Dramatic Acts (*n*), subject to such limitations of the author's right as may seem good, and to certain provisions as to registration. Another clause (*o*) provides that the authors of works "first published out of Her Majesty's dominions shall have no copyright" (or playright) "therein other than such, if any, as they may become entitled to under this Act." The object was to enable the English Government to make terms with foreign countries for the mutual recognition of national copyright, and several conventions were concluded under the Act. The question of its effect with regard to countries with which no convention existed was brought before the English Courts in the case of *Boucicault* v. *Delafield* (*p*). B., a British subject, wrote a play and performed it in public in the United States, with which country England had not a copyright

(*m*) 7 & 8 Vict. c. 12.
(*n*) Id. § 5.
(*o*) Id. § 19.
(*p*) 1 Hem. & Miller, 597.

convention. A. performed the play in England. The question of the effect of first publication abroad thus arose, and B.'s counsel pleaded:—(1) that the Act only applied to foreigners, and not to British subjects, and therefore that an English author had the benefit of English copyright wherever he first published; (2) that "first published" in the Act only referred to publication by printing, and not to representation on the stage. On both these points however the Court decided against the plaintiff (*q*), thus settling that first publication outside Her Majesty's dominions, apart from conventions, prevents the author from acquiring copyright in England. The question was again raised in *Boucicault* v. *Chatterton* (*r*), on similar facts, there being no doubt that the only communication to the public abroad had been by representation on the stage. The Court of Appeal affirmed the law as laid down in *Boucicault* v. *Delafield*; thus settling that to obtain play- or copy- right in the United Kingdom, apart from copyright conventions, the author must make first publication, either by printing or performance, in the United Kingdom.

§ 131. International copyright (dramatic).

The law of the United States on this point is to the contrary effect, as was decided in the case of *Palmer* v. *De Witt* (*s*). R., a British subject residing in England, wrote a play and caused it to be performed for some time in London, but did not print it. A., an American citizen, printed and sold copies of it in New York. The Courts granted an injunction to restrain him on the ground that R.'s common law rights in the unpublished

(*q*) The decision was weakened by an allegation during the case that the play had been *printed* as well as *performed* in America.

(*r*) L. R. 5 Ch. D. 267.

(*s*) 47 N. Y. 532.

§ 131. International copyright (dramatic).

MSS. had not been destroyed by the performance in London.

A further Act (*t*) empowered the Crown to grant to foreign authors the right of preventing publication in the United Kingdom of translations of their works during a limited period of five years, but provided that nothing in the Act should be (*u*) construed to prevent fair imitations or adaptations for the English stage of any drama published abroad. To vest the right the authorized translation of a play must be published within three months of registration of the original in England, which registration again must be made within three months of first publication abroad. In *Wood* v. *Chart* (*x*) the Court held that the authorized translation published, to secure the sole right, must be literal and unabridged; and, as "fair imitations and adaptations" were expressly declared not to be infringements, foreign authors did not gain much advantage. Three months was too short a time in which to decide on the success of a piece and make and publish a translation; while the forms of registration and deposit required were burdensome, and their omission fatal. Consequently another Act (*y*) gave power to the Crown to abolish, in the case of any particular country or countries, the exception as to "fair imitations and adaptations." This and the previous Act are both connected with negotiations with France.

The questions as to the abolition of the formalities of deposit and registration (*z*), the lengthening of the time

(*t*) 15 & 16 Vict. c. 12.
(*u*) Id. § 6.
(*x*) L. R. 10 Eq. 193.
(*y*) 38 Vict. c. 12.

(*z*) The provisions of 5 & 6 Vict. c. 45, as to registration of plays (see § 126 *supra*), apply to the registration of foreign works for which International Copyright is sought (7 & 8 Vict. c. 12, ss. 6–9). Provi-

within which an authorized translation must be published to vest the sole right, and the duration of such sole right when vested, are dealt with elsewhere (*a*). It need only be added here that if part publication of the translation of a book within one year of first publication is too short a time in the case of foreign books, complete publication of a translated play within three, or at most six months of the appearance of the original is certainly too short a period in the case of foreign plays.

§ 131. International copyright (dramatic).

Recommendations of the Commission:—

§ 132. Recommendations of the Copyright Commission.

1. That the duration of both playright and copyright be the same as that of the term for books, life + thirty years (§ 74).

2. That publication either in print or by performance shall vest playright and copyright simultaneously for the proposed term (§ 75). (At present it is submitted that playright and copyright by statute have separate investitive facts, and may commence and end at separate times (*b*).)

3. That the right of dramatising a novel be vested in its author for the term of his copyright (§§ 80–81).

4. That first performance of a dramatic piece out of the British dominions should not destroy the performing right in this country (§ 61).

As to *International* Copyright. 5. That the present requirements as to registration and deposit of original foreign plays and authorized translations be abolished (§ 276).

6. That the sole right to translate his play be reserved

---

sions as to the registration of authorized translations will be found in 15 & 16 Vict. c. 12, s. 8.

(*a*) See § 236.

(*b*) *Chappell* v. *Boosey*, 51 L. J. Q. B. 625; L. R. 21 Ch. D. 232.

§ 132. Recommendations of the Copyright Commission.

to a foreign dramatist for three years from first publication or performance (§ 290).

7. That should he not publish an authorized translation or adaptation in England, within such three years, it shall be open to anyone to acquire copyright in such a translation or adaptation as if it were an original work (§ 293).

8. That should the author so publish a translation of his work, he should be protected against unauthorized translations, imitations or adaptations in this country for a period of ten years from its publication or first public representation in this country (§ 292).

9. That copyright in the translation or adaptation should be the same as in the case of original works, and include playright (§ 291).

10. That where the foreign author has an adaptation made for him, the rights in such dramatisation shall belong to him and not to the adaptor, unless the latter is a British subject adapting for himself under a licence or assignment (§ 292).

Note.—The difference between recommendations 8 and 9 is this. For ten years from the publication of an authorized translation, not only are others to be forbidden to make any unauthorized use of such translation, but also to make any use of the original play, the source of the translation. At the end of ten years they may translate or adapt the original play, but must not in so doing make any use of the authorized translation or adaptation.

CHAPTER VI.

MUSICAL COPYRIGHT IN ENGLAND.

§ 133. Introduction.—§ 134. Unpublished musical works.—§ 135. History till 1842.—§ 136. Statutory provisions.—§ 137. Performing *right in music.*—§ 138. *Musical Copyright Act*, 1882.—§ 139. Rights of the author.—§ 140. Registration.—§ 141. Subject of copyright.—§ 142. Infringements of copyright.—§ 143. Assignments.—§ 144. Remedies for infringement.—§ 145. Laws of foreign countries.—§ 146. Recommendations of Copyright Commission.

§ 133. Introduction.

MUSICAL compositions in the English law go hand in hand with the drama, probably on account of the double nature of each as adapted to printing and to public performance, and also because they shade into each other gradually through operas and songs in character. I therefore deal with the law regulating them here, although by so doing the exposition of the English law of literary copyright is interrupted.

§ 134. Unpublished musical works.

Unpublished musical compositions have the common law protection extended to all unpublished work. As explained in the case of dramatic compositions, the author has protection at common law from public performance until his first public performance of his work, when statutory "playright" begins; he has also protection at common law from reproductions in print until the first authorized publication of his work in print, when statutory copyright begins, the two rights being distinct with different beginnings and different endings (*a*).

§ 135. History till 1842.

The first decision on the subject of statutory copyright is *Bach* v. *Longman* (*b*) in 1777, where Lord Mansfield

(*a*) *Chappell* v. *Boosey*, L. R. 21 Ch. D. 232.
(*b*) 2 Cowper, 623.

§ 135. History till 1842.

held that a musical composition came within the statute of Anne, and that its author was therefore entitled to protection from unauthorized printing. It is interesting to notice, as bearing on the history of privileges and patents granted by the Crown where the grantees felt that their alleged rights needed further protection, that this case recites that "by royal licence dated 15th December, 1763, his Majesty did grant unto the plaintiff his royal licence for the sole printing and publishing the works mentioned in the licence for fourteen years from the date of the same." This class of licence appears to have survived much longer than the licence for books, probably because the right of property was more doubtful. Licences for printing music had been granted in the reign of Elizabeth, as in 1598 (*c*), when a licence was granted to Thomas Morley "to print set song books in any language, to be sung in church or chamber, and to print ruled paper for printing songs;" infringements being punished by the forfeiture of £10.

The decision in *Bach* v. *Longman* was followed with regard to copyright in music in several other cases (*d*), but the Act under which they were decided having now been superseded by Talfourd's Act (*e*), which also extended to musical compositions the sole right of performance, which Bulwer Lytton's Act (*f*) had given to plays, it is unnecessary to notice them more particularly.

§ 136. Statutory provisions.

Talfourd's Act in 1842 (*g*) defined "dramatic piece" to include "every tragedy, &c. . . . or other scenic, musical or dramatic entertainment." But the latter part of this

(*c*) Cal. S. P. Dom. 1598–1601, p. 94.

(*d*) *Storace* v. *Longman*, 2 Camp. 27; *Clementi* v. *Golding*, 2 Camp. 25; *Platt* v. *Button*, 19 Vesey, 447; *Chappell* v. *Purday*, 4 Y. & C. Exch. 485.

(*e*) 5 & 6 Vict. c. 45.

(*f*) 3 & 4 Will. IV. c. 15.

(*g*) 5 & 6 Vict. c. 45.

definition has been interpreted by Brett, M.R., as only referring to a "whole concert or entertainment," and not to individual pieces in the programme (*h*). Clause 20 expressly extends to musical compositions the benefit of that Act and the Act of Will. IV. (*i*). As the provisions with regard to musical compositions are almost identical with those just set out as applicable to plays, I do not propose to repeat them, but only to give briefly the effect of the leading cases in which a musical work has been the subject of controversy, and to add a few remarks on the latest legislation on the subject.

§ 136. Statutory provisions.

It will be noted that there are certainly three distinct parts of copyright in a song—the right to print the music; the right to print the words; and the right to perform the music. As all three of these may be in different hands, great inconvenience and injustice have arisen through the fact that a statutory penalty of 40*s.* is imposed on every one performing a dramatic or musical composition in public without the consent of the owner of the copyright. This proviso was made use of to obtain penalties from singers at country concerts and other entertainments who sang copyright songs or words in public in ignorance of the penalty attaching thereto. Their only means, indeed, of ascertaining the copyright character of such songs or words was by searching the London register, for no warning appeared on the copy of the song they had bought. And the popular feeling against this mode of procedure was heightened by the fact that these penalties were frequently not exacted by the author or composer of the song, but were often demanded by a so-called association, in reality a Mr. Wall, who had bought up the rights of

§ 137. Performing rights in music.

(*h*) *Wall* v. *Taylor*, L. R. 11 Q. B. 102, 108.
(*i*) 3 & 4 Will. IV. c. 15.

§ 137. Performing rights in music.

relatives of the composers. Evidence was given before the Copyright Commission (*k*) that Mr. Wall's society were the assignees of, or acted as agents for the owners of, the copyright or the right in the words of, amongst others, songs of Wallace and Balfe; and that they refused to give any information to inquiries as to the songs over which they held rights unless a payment of twenty-one guineas was made. Mr. Wall's method of procedure may be judged of by the fact that in the recent case of *Wall* v. *Taylor* (*l*) Mr. Justice Day ordered him, though partly successful, to pay the costs of the defendant, and the Court of Appeal, while giving judgment in his favour, ordered him to pay his own costs, as a mark of disapproval of his conduct.

§ 138. Musical Copyright Act, 1882.

To meet this objectionable course of procedure, the Musical Copyright Act, 1882 (*m*), was passed. This Act is an extraordinary specimen of the ability of Parliament; and its character cannot be imputed to oversight, for it was much altered and amended by the House of Lords.

Clause 1 provides that the proprietor of the copyright in any musical composition first published after August 10, 1882, who shall be entitled to or desirous of retaining in his own hands exclusively the right of public performance, shall print on the title-page of every copy a notice that the right of public performance is reserved.

Clause 2, which is very complicated, deals with the situation where the copyright, or right of printing and the right of performance are in different hands, with the following result (*n*):—

(*k*) C. C. Ev. qq. 2093, 2211, 2263, 2276, &c.

(*l*) L. R. 11 Q. B. D. 102.

(*m*) 45 & 46 Vict. c. 40.

(*n*) I give this interpretation with considerable diffidence, as the clause, which is exceedingly intricate, admits of another interpreta-

§ 138. Musical Copyright Act, 1882.

I. In the case of music—

(1.) First published after August 10, 1882.

(2.) Where the performing right and copyright have come into separate hands between August 10, 1882, and the date of first publication, *i.e.*, *before* first publication.

(3.) If the owner of the performing right desire to reserve rights of sole performance—

(4.) He shall give the owner of the copyright notice in writing before the date of first publication, to print a notice on each copy that the right of performance is reserved; and

(5.) By clause 3, if the owner of the copyright then fails to print such a notice, he shall be liable to pay £20 to the owner of the performing right.

II. In the case of music—

(1.) First published after the 10th August, 1882.

(2.) In which the performing right and copyright came into different hands *after* first publication thereof.

(3.) If the notice of reservation has been duly printed on each copy published *before* the separation of rights.

(4.) The proprietor of the performing right, if he desire to retain the sole right, shall give notice in writing to the owner of the copyright, *before* any further copies are printed, to print a notice on each copy that the right of performance is reserved.

(5.) On failure to print such a notice, the owner of the copyright shall forfeit £20 to the owner of the performing right.

---

tion on the basis of its applying to compositions first published *before* August 10, 1882, of which—

I. No copy shall have been published between August 10, 1882, and the separation of playright and copyright in them.

II. Copies shall have been published between the two dates referred to, but the statutory notice of reservation shall have been printed on each copy.

For the reason hereafter referred to, the point is not of very great importance.

§ 138. Musical Copyright Act, 1882.

Clause 4 relates solely to costs.

It will hardly be believed that after all this elaborate machinery, the Act contains no clause inflicting any loss of copyright or penalty on an owner of the performing right who does *not* print the notice of reservation on each copy. And, except that possibly he is guilty of a misdemeanour in disobeying a statutory provision, there is nothing to stop such an owner from recovering penalties precisely as he did before the Act! Such is the wisdom of our legislators.

§ 139. Rights of the author. (1.) Performing right.

The author of a musical composition and his assigns have—

(1.) The sole right of performing such compositions *in public* for forty-two years from the first performance, or for the life of the author and seven years after his death, whichever shall be the longer term.

This right is not limited to performance at places of dramatic entertainment (*o*), but extends to all public performances or representations. Brett, M.R., says in the case cited (*p*): "There must be a performance or representation according to the ordinary acceptation of those terms. Singing for one's own gratification without intending thereby to represent anything, or to amuse anyone else, would not, I think, be either a representation or performance according to the ordinary meaning of these terms, nor would the fact of some other person being in the room at the time of such singing make it so; but where to give effect to the song it is necessary that the singing should be made to represent something, or where it is performed for the amusement of other persons, then I think when this takes place it would be in each case a question of fact."

It is submitted that this must be taken with the

(*o*) *Wall* v. *Taylor*, L. R. 9 Q. B. D. 727.
(*p*) L. R. 11 Q. B. D. 107 (C. A.).

§ 139. Rights of the author. (II.) Copyright.

further limitation that the performance, to be an infringement of the right of another must be such as to affect the commercial value of that right.

(2.) He has the sole right of publishing such compositions in print for the same period (*p*), dating from first publication in print.

To obtain such a right, the work must be first published or performed in this country, and, (probably,) the author must be temporarily residing in the British dominions at the time of publication (*q*). This, of course, does not apply to International Copyright.

§ 140. Registration.

The work must be registered; but it will be sufficient to register—

(1.) The title thereof.

(2.) The name and place of abode of the author or composer.

In the case of a pianoforte arrangement of an opera, the name of the arranger, and not of the composer of the opera must be entered (*Wood* v. *Boosey* (*r*)).

(3.) Name and place of abode of proprietor. The place of business of the proprietor may be registered as his "place of abode" (*s*).

(4.) Time and place of first performance.

It may possibly be argued that as under clause 24 of the Act (*t*) registration is not necessary to give the proprietor of playright in a dramatic piece the remedies he has under the Act of Will. IV., and that as "dramatic piece" is defined by the preamble to cover "musical

(*p*) Forty-two years, or life of author + seven years.

(*q*) *Jefferies* v. *Boosey*, 4 H. L. C. 815; *Routledge* v. *Low*, L. R. 3 H. L. 100.

(*r*) L. R. 3 Q. B. 223.

(*s*) *Nottage* v. *Jackson* (not yet fully reported).

(*t*) 5 & 6 Vict. *c.* 45.

§ 140. Registration.

entertainment," therefore registration is not necessary to enable the proprietor of the performing right in a musical composition to sue for infringements. The judgment of Brett, M.R., in *Wall* v. *Taylor* (*u*), however, by defining "musical entertainment" as "the whole concert or performance, and not detached portions of it," *i.e.* not individual musical compositions in the programme of a concert, seems fatal to this argument.

§ 141. Subject of copyright.

The subject of copyright is any original musical composition. Copyright may also be had in a piece of music, where the claimant has adapted words of his own to an old air, adding thereto a prelude and accompaniment (*v*). So where (*w*) a non-copyright air was furnished with words and a preface by B., who also procured a friend to compose an accompaniment, the result, under the name of 'Pestal,' was held copyright.

There can be copyright in a pianoforte arrangement from a non-copyright opera (*x*).

§ 142. Infringements of copyright.

Copyright will be infringed by any public performance or publication of a whole or part of the musical composition, or of a composition substantially the same as the original, *i.e.*, which, though adapted to a different purpose, can still be recognised by the ear (*y*). Such performance or publication must tend to damage the commercial value of the property.

Thus IT IS PIRACY—

To perform songs out of a copyright opera (*Planché* v. *Braham* (*z*)).

To distribute gratuitously copies of a musical com-

(*u*) L. R. 11 Q. B. D. 102.
(*v*) *Lover* v. *Davidson*, 1 C. B. N.S. 182.
(*w*) *Chappell* v. *Sheard*, 2 K. & J. 117; *Leader* v. *Purday*, 7 C. B. 4.
(*x*) *Wood* v. *Boosey*, L. R. 3 Q. B. 223.
(*y*) *D'Almaine* v. *Boosey*, 1 Younge & Collyer, 289.
(*z*) 4 Bing. N. C. 17.

position, as by distributing lithographed copies to a musical society (*Novello* v. *Sudlow* (*a*)). § 142. Infringements of copyright.

To make a pianoforte arrangement from a copyright opera (*Wood* v. *Boosey* (*b*)).

To found quadrilles and waltzes on a copyright opera, though only parts of the melodies be taken (*D'Almaine* v. *Boosey* (*c*)).

To construct a full score from the non-copyright pianoforte arrangement of a copyright opera (*Boosey* v. *Fairlie* (*d*)).

§ 143. Assignments.

Any assignment must be in writing; and therefore a registered written assignment overrides a previous parol assignment (*Leyland* v. *Stewart* (*e*)).

§ 144. Remedies for infringements.

The owner of the performing right in music can recover 40s., or the full value either of the benefit resulting to the infringer, or of the loss to the plaintiff, whichever shall be the greater (*f*), from each person infringing his performing right in public (*Wall* v. *Taylor* (*g*)).

The owner of the copyright has an action for damages after registration as provided in the case of books.

Injunctions can also be obtained to prevent piratical performance or printing.

§ 145. Laws of other countries.

The laws of other countries generally place the right of printing musical works on the same footing as literary compositions, but occasionally make variations in dealing with the right of performance, which is usually vested in the author and his assigns for a lengthy term. Such is the law in France, Austria, Spain, Portugal, and

(*a*) 12 C. B. 177.
(*b*) L. R. 3 Q. B. 223.
(*c*) 1 Y. & C. 289.
(*d*) L. R. 7 Ch. D. 301.
(*e*) L. R. 4 Ch. D. 419.
(*f*) 3 Will. IV. c. 15, s. 2.
(*g*) L. R. 11 Q. B. D. 102.

§ 145. Laws of other countries.

Italy. The United States (*h*) do not give any sole right of performance in musical compositions which are not dramatic; Germany requires a note of reservation of the right to be printed on the title-page of each piece of music, in order to secure such right, and the Scandinavian States appear to allow performances of any music without scenery or dramatic accompaniments (*i*).

§ 146. Recommendations of Copyright Commission.

The only special recommendations of the Copyright Commission with regard to musical works, other than those already set out with reference to dramatic compositions, are—

1. (*k*) That the author of the words of songs, as distinguished from the music, should have no copyright in their representation or publication with the music, except by special agreement.

2. (*l*) That to prevent abuse of the 40*s.* penalty for infringement of musical copyright, every musical composition should have printed on it a note of the reservation of the right of public performance, and the name and address of the person who may grant permission for such performance.

3. That unless such note was printed, the owner should not be able to recover any penalty or damages for infringement.

4. That the Court should have power to award compensation for damage suffered, instead of the minimum 40*s.* penalty, in case of infringement.

The second and third recommendations have been dealt with by the Musical Copyright Act of 1882 (*m*); how inadequately, owing to the omission of the third recommendation, has been seen.

(*h*) S. 4952, Rev. Stat.
(*i*) Copinger, pp. 500–600.
(*k*) C. C. Rep. § 75.
(*l*) C. C. Rep. § 171.
(*m*) 45 & 46 Vict. c. 40.

CHAPTER VII.

ENGLISH LAW OF LITERARY COPYRIGHT.

PART II.—BOOKS.

§ 147. Definitions.—§ 148. Newspapers.—§ 149. Maps.—§ 150. Crown copyright.—§ 151. Qualities required in copyright work.—§ 152. Literary value.—§ 153. Titles of books.—§ 154. Originality.—§ 155. New editions.—§ 156. Duration and extent of right.—§ 157. Persons who may acquire the right.—§ 158. Infringements of copyright.—§ 159. Literary piracy.—§ 160. Abridgments.—§ 161. Translations.—§ 162. Literary larceny.—§ 163. Rights of author.—§ 164. Duties of author.—§ 165. Investitive facts.—§ 166. Transvestitive facts.—§ 167. Divestitive facts.—§ 168. Remedies against infringements.—§ 169. Remedies against author.—§ 170. Recommendations of Commission.

§ 147. Definitions.

THE English Act of 1842 defines "*Copyright*" as:—"The sole and exclusive liberty of printing or otherwise multiplying copies of any 'book,'" and the term "*book*" is defined as, "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published." In *White* v. *Geroch* (*a*), Abbot, C.J., laid down that any literary composition, whether large or small, was a book within the Act.

§ 148. Newspapers.

Newspapers.—In *Cox* v. *Land and Water Company* (*b*), where the proprietor of the *Field*, a newspaper whose first number was not registered under s. 18 of the Act of 1842, brought an action against the defendants

(*a*) 2 B. & Ald. 298.
(*b*) L. R. 9 Eq. 324.

§ 148. Newspapers.

for piracy, they pleaded that the newspaper was not registered, and consequently that the plaintiff could not sue. Malins, V.C., held that a newspaper was not a "book" under Clause 2; was not mentioned in s. 19; did however come under s. 18, but did not require registration, and that its right to protection rested either on s. 18, or on the "general rules of property," presumably the common law right. In support of his position he quoted the cases of *Mayhew* v. *Maxwell* (*c*) and *Strahan* v. *Graham* (*d*), in neither of which was there registration. But in both these cases the question was not as to general copyright, but of restraint from publication contrary to the terms of a special contract, and it was therefore held that registration was not necessary (*e*).

A similar question recently came before Jessel, M.R., in *Walter* v. *Howe* (*f*), where the *Times*, an unregistered newspaper, published an article, and the defendant reprinted it. The question of copyright in the particular article was the material point, but the Master of the Rolls also held that a newspaper, being a "sheet of letterpress," was a "book" under s. 2 of the Act, and also a "periodical work" under s. 19, and that therefore under s. 19 its non-registration prevented the plaintiff from suing. He refused to follow the case of *Cox* v. *Land and Water Company* (*g*), saying that it practically repealed the Act of Parliament.

(*c*) 1 J. & H. 312.

(*d*) 16 L. T. N.S. 87.

(*e*) With reference to *Sweet* v. *Benning*, 16 C. B. 459, the V.-C. says, "I suppose the *Jurist* was not registered at all;" whereas the first page of the report of the case states that the *Jurist* was registered before action brought.

(*f*) L. R. 17 Ch. D. 708.

(*g*) L. R. 9 Eq. 324.

In *Stannard* v. *Lee* (*h*) the Court of Appeal held, reversing the decision of Bacon, V.C., that *maps* were books under the Act of 1842, and not engravings under the Engravings Acts, and that they must therefore be registered. § 149. Maps.

It is probable that the *Crown* (*i*) has still special copyright in perpetuity in the authorized version of the Bible, the Book of Common Prayer, and possibly in Acts of Parliament. The origin of this has been dealt with elsewhere. § 150. Crown copyright.

For an intellectual work to be capable of protection as copyright it must be— § 151. Qualities required in copyright work.

I. *Innocent*, that is—

1. *Not seditious or libellous* (*k*) (the libel being against the State).
2. *Not immoral* (*l*); a work bearing on the love adventures of a courtesan was not protected.
3. *Not blasphemous* (*m*); thus Lord Eldon refused protection to Laurence's 'Lectures on Physiology,' as "hostile to revealed religion, and the doctrine of the immortality of the soul." The same Chancellor (*n*) refused protection to Lord Byron's 'Cain,' and in 1823 Sir J. Leach took a similar course with regard to 'Don Juan.' In the Scotch case of *Hopps* v. *Long* (1874) (*o*), a Unitarian discussion of the life of Jesus was considered copyright, as a decent discussion not endangering the public peace, safety, or morality.

(*h*) L. R. 6 Ch. 346.

(*i*) *Baskett* v. *Univ. of Cambridge*, 1 W. Blackstone, 105; *Stationers' Coe* v. *Carnan*, 2 W. Blackstone, 1002.

(*k*) *Hime* v. *Dale*, 2 Camp. 27; *Southey* v. *Sherwood*, 2 Mer. 435.

(*l*) *Stockdale* v. *Onwhyn*, 5 B. & C. 173.

(*m*) *Laurence* v. *Smith*, 1 Jacob, 471.

(*n*) *Murray* v. *Benbow*, 1 Jacob, 474.

(*o*) Cited in Copinger, p. 91, 2nd edit.

§ 151. Qualities required in copyright work.

If the law as to blasphemy is correctly laid down by the Lord Chief Justice in his summing-up in the recent case of *R.* v. *Foote and Ramsay*, a fair, honest, and moderate discussion of the truth of Christianity or of religion, resulting in a denial of their authority, will not be "blasphemous," so as, among other consequences, to deprive it of copyright. If, on the other hand, the view advocated by Stephen, J., and by North, J., in the recent case at the Old Bailey, is correct, it would be blasphemous, and therefore not the subject of copyright.

With reference to these three heads, it has already been pointed out (*p*) that the present state of the law is unsatisfactory, in destroying a check on the free circulation of these works which might be valuable, namely, the author's interest in preventing unauthorized reproductions.

4. *Not fraudulent*, or professing to be what it is not with intent to deceive. Thus a work of devotion professing falsely to be translated from the work of a celebrated German writer (*q*), was not protected.

§ 152. Literary value.

II. *The work must have literary value.* This limitation is not required in the case of unpublished MSS. The purpose of the Act is to protect "useful books," and very little "usefulness" or material value will suffice to obtain protection. But in the recent case of *Cable* v. *Marks* (*r*) in which an attempt was made to obtain copyright for a perforated card, with some verses on it, which, throwing the "Shadow of the Cross" on the wall,

(*p*) Above, § 26; C. C. Rep. §§ 65–66.
(*q*) *Wright* v. *Tallis*, 1 C. B. 893.
(*r*) 47 L. T. N. S. 432; 52 L. J. Ch. 107.

went by the name of the Christograph, Bacon, V.C., held it "not a literary production in any sense of the word." *Catalogues* will be protected unless they are "merely a dry list of names." Where the catalogue infringed partook of the nature of a bibliography (*s*), the Court said "they could not protect a mere dry list of names like a postal directory, court guide, etc., which must be substantially the same, by whatever numbers of persons issued, and however independently compiled"; and again, the work there protected was "not a mere dry list of books, but such a sketch of their history and contents as would be calculated to be of intrinsic value."

§ 152. Literary value. Catalogues.

In *Cobbett* v. *Woodward* (*t*), an injunction to restrain publication of an illustrated catalogue of furniture was refused as to the illustrations, but granted as to certain parts of the letterpress. In *Grace* v. *Newman* (*u*) however the piracy of a stonemason's illustrated catalogue was restrained, and this case was followed, *Cobbett* v. *Woodward* being disapproved, in *Maple* v. *Junior Army and Navy Stores* (*x*), a recent case before the Court of Appeal, where an illustrated catalogue of furniture was protected as to the illustrations, though it was held there was no copyright in the letterpress, which was a simple announcement of the sale of goods which everyone might sell and announce for sale.

As a general rule there is no copyright in *Advertisements* or labels. In the American case of *Coffeen* v. *Brunton* (*y*), where the plaintiff's label on a medicine

Advertisements.

(*s*) *Hotten* v. *Arthur*, 1 H. & M. 603.
(*t*) L. R. 14 Eq. 407.
(*u*) L. R. 19 Eq. 623.
(*x*) 21 Ch. D. 369. See also *Bogue* v. *Houlston*, 5 De G. & Sm. 267.
(*y*) 4 McLean, 516.

§ 152. Literary value. Advertisements.

had been pirated, it was held that, not having complied with the patent laws, he had not property in the medicine; that he had no copyright in the label, as it was not a "book" within the provisions of the American statute; but that he had an equitable ground for protection if the defendant had represented his medicine to be the same as the plaintiff's to the injury of the plaintiff. In the American case of *Drury* v. *Ewing* (*z*) copyright was recognised in a large printed sheet of dressmaking patterns; but in the English case of *Page* v. *Wisden* (*a*) it was refused in a cricket scoring sheet where the only novelty introduced by the plaintiff appeared to be a line for recording the runs at the fall of each wicket.

§ 153. Titles of books.

With respect to *Titles*, the recent case of *Dicks* v. *Yates* (*b*), in the Court of Appeal, must be taken as finally deciding that, except in very rare cases, there cannot be any copyright in the title of a book; and the remedy for its use, if any exists, will be that for common law fraud. In that case the title claimed was 'Splendid Misery'; the plaintiff's novel was published in *Every Week*; the defendant's, an entirely different novel, written by Miss Braddon, in the *World*. The defendant proved that a novel bearing a similar title had been published in the early part of the century. In refusing an injunction, Jessel, M.R., after commenting on the lack of originalty in the title, said, "I do not say that there could not be copyright in a title, as for instance in a whole page of title, or something of that kind requiring invention. I am of opinion

(*z*) 1 Bond, 540.
(*a*) 20 L. T. N. S. 435.
(*b*) L. R. 18 Ch. D. 76, 89.

§ 153. Titles of books.

that there cannot be copyright at all in these common English words. Their adoption as the title of a novel might make a trade-mark, and entitle the owner of the novel to say, '*You cannot sell a novel under the same title so as to lead the public to believe they are buying my novel when they are actually buying yours.*'" James, L.J., said, "Where a man sells a work under the name or title of another man, or another man's work, that is not an invasion of copyright, it is a common law fraud," and at the end of the case "there cannot be in general any copyright in the title or name of a book," in which opinion the Master of the Rolls concurred.

This case may be regarded as putting on the right ground the law as to protection of titles, and settling a long and confused controversy. The dispute as to whether the right to a trade-mark was founded on property in the trade-mark or fraud on the property in the goods denoted by the trade-mark, which has been partially dealt with by the House of Lords (*c*), is not yet decided; this question as to copyright in titles is of a similar nature. Previous cases shew great confusion between copyright, trade-mark, and fraud, as grounds of jurisdiction. In *Mack* v. *Petter* (*d*), Lord Romilly held the plaintiff entitled to the use of a certain title, and restrained the defendant from publishing a work with any title such as to be a colourable imitation. In *Weldon* v. *Dicks* (*e*), the plaintiff published a novel 'Trial and Triumph,' and the defendant an entirely different novel under that name; and it was proved that other novels under the same name had been published in 1834, 1849, and 1865;

(*c*) *Singer Machine Manufacturing Company* v. *Wilson*, L. R. 3 App. Cases, 376.

(*d*) L. R. 14 Eq. 431.

(*e*) L. R. 10 Ch. D. 247.

§ 153. Titles of books.

Malins, V.C., nevertheless held that "the title of a book was material and valuable property and was therefore protected." In *Chappell* v. *Sheard* (*f*), the name and description of a song were held to be property. On the other hand, in *Maxwell* v. *Hogg* (*g*), it was held that there was no copyright in a title registered alone before the book bearing it was published, and that copyright could only be in words in the nature of a volume or part of a volume. The plaintiff's claim on the ground of trade-mark also failed. In *Kelly* v. *Hutton* (*h*) it was held that there was nothing analogous to copyright in the name of a newspaper, but that the proprietor could prevent its application to any *similar* production, and that this right was a chattel capable of assignment. In *Bradbury* v. *Beeton* (*i*), where the plaintiffs published *Punch*, a threepenny periodical, and the defendants *Punch and Judy*, a penny one, Malins, V.C., said, "The defendants have clearly no right to use a name calculated to mislead or deceive in purchasing persons of ordinary intelligence, but I am clearly of opinion that here the mass of mankind would not be so misled;" and refused an injunction. And in a late case of *Walter* v. *Head* (*k*) the sale of a mock edition of the *Times* of 1981 was restrained by the Court of Appeal, the defendants having copied in an enlarged form the well-known heading of the *Times*. In *Kelly* v. *Byles* (*l*) the Court of Appeal refused an application by the publisher of the 'Post Office Directory for West Yorkshire' to restrain the publication of a work called the 'Bradford Post Office Directory,'

(*f*) 2 K. & J. 117.
(*g*) L. R. 2 Ch. 307.
(*h*) L. R. 3 Ch. 703.
(*i*) 18 W. R. 33.
(*k*) Weekly Notes, July 29, 1881, not fully reported.
(*l*) L. R. 13 Ch. D. 682.

§ 153. Titles of books. Results.

the Court saying that the claim was not analogous to copyright, but an extravagant extension of trade-mark.

These later cases, finally confirmed by *Dicks* v. *Yates* (*m*), clearly shew that protection against appropriation of a title cannot be obtained on the ground of literary property. The Court will interfere, if at all, on the ground of injury to the property denoted by the title, by its use to denote a work liable to be mistaken for the plaintiff's. Fraud is probably necessary as a ground for interference, and it may be presumed if the second publisher of the title refused to change it on receiving warning from the first publisher of the injury done.

The law of the *United States* is similar. In *Osgood* v. *Allen* (*n*) the Court said, "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 the name and title given to it. When the title itself is original, and the product of an author's own mind, and is appropriated by infringement, as well as the whole or part of the literary composition itself, in protecting the other portions . . . Courts would probably 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."

A registry of titles in alphabetical order would obviate many of the difficulties which publishers and authors find in the choice of a title.

§ 154. Originality.

III. *The work must be original.* Works that lack the originality necessary for copyright are almost always

(*m*) L. R. 18 Ch. D. 76.
(*n*) 1 Holmes, 185, 191.

§ 154. Originality.

infringements of the rights of other authors, and it is difficult to separate the two views of the case.

Where there is a common source of information or ideas, itself not copyright, it is open to all to use it, and to obtain copyright in the results of labour so bestowed. From the nature of the case results obtained by different workers having a similar end must be very similar, but the likeness of one man's work to that of his predecessor in the same field, does not hinder it from obtaining copyright, provided it is the result of his independent labours. He is, however, only allowed a very limited use of the copyright labours of his predecessors. Thus in *Kelly* v. *Morris* (*o*), a case having reference to directories, two of which, if correct, must be nearly identical, Page Wood, V.C., laid down the law as follows: "In the case of a dictionary, map, guide-book, or directory, 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 set about doing for himself that which the first compiler has done; in case of a road book he must count the milestones for himself . . . generally he is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use he can legitimately make of a previous publication is to verify his own calculations and results when obtained."

So in *Lewis* v. *Fullarton* (*p*), in reference to a gazetteer, the Master of the Rolls said, "Any man is entitled to publish a topographical dictionary, and to avail himself

(*o*) L. R. 1 Eq. 697, 701.
(*p*) 2 Beav. 6.

§ 154. Originality.

of the labours of all former writers whose works are not subject to copyright, and of all public sources of information; but while all are entitled to resort to public sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit of other men's works still subject to copyright and entitled to protection.

The case of *Jarrold* v. *Houlston* (*q*) furnishes a good application of these principles. There the plaintiff had published a 'Guide to Science' in the form of question and answer dealing with the common phenomena of nature. The defendant published a similar work under a different title. The Court held (*r*) that the plaintiff's work had an original value, and was copyright, as reducing certain common matter to a systematic form of instruction; but that another person might originate another work in the same general form provided he did so from his own resources, and made the work he so originated a work of his own by his own labour bestowed on it. He might, however—

(1.) Use all common sources of information.

(2.) Use the work of another as a guide to these common sources.

(3.) Use another work to test the completeness of his own.

Translations.

There is copyright in each independent *Translation* of a non-copyright work (*s*), if it appears to have been made from the original by independent labour. So there may be copyright in *compilations*, if independent

(*q*) 3 K. & J. 708.

(*r*) In this case it was also held that conveying information by way of question and answer was not an original arrangement which could be copyrighted.

(*s*) *Wyatt* v. *Barnard*, 3 Ves. & B. 77.

§ 154. Originality. Translations.

work gives an original result. In *Sweet* v. *Benning* (*t*) it was held that there was copyright in certain original parts of a law reporter's work, such as the digested head-notes and abridged speeches of counsel; but not in the verbatim reports of the judgments of the Court.

Annotations.

An author republishing a non-copyright work with *annotations* and additions, may obtain copyright in his additions, if they are of a substantial nature. Thus, in *Cary* v. *Longman* (*u*), where the plaintiff had published Paterson's 'Roadbook,' with original additions, Lord Kenyon held it clear that he had a copyright in such additions and alterations, many of which were material and valuable; but that he certainly had no title to that part of the work which he had taken from Mr. Paterson. In an American case (*x*), the plaintiff claimed and obtained copyright in his annotations to Wheaton's 'International Law,' though they consisted largely of compilations from and references to official documents.

§ 155. New editions.

The question as to the effect of a publication of a *new edition*, with alterations, on the original copyright, arose in the Scotch case of *Black* v. *Murray* (*y*). There the plaintiffs had reprinted, with notes, illustrative quotations, and alterations in the text, a work the copyright in which had expired, and sued for an infringement of their copyright in the reprint. The Lord President said:—

"A new edition of a work may be a mere reprint of an old edition, and plainly that would not entitle the author to a new term of copyright running from the

(*t*) 16 C. B. 459. See also *Wheaton* v. *Peters* (Am.), 8 Peters, 591; *Gray* v. *Russell*, 1 Story, 11, 21.

(*u*) 1 East, 358. See *Gray* v. *Russell*, *v.s.*

(*x*) *Lawrence* v. *Dana*, 2 Am. L. T. R. N. S. 402.

(*y*) 9 Scotch Sessions Cases, 3rd Series, 341.

§ 155. New editions.

date of the last edition. On the other hand the new edition may be so enlarged and improved as to constitute in reality a new work, and that just as clearly will entitle the author to a copyright running from the date of the new edition. The difficulty will be to lay down any general rule as to what amount of addition, of alteration, or new matter will entitle a second or new edition of a book to the privilege of copyright, or whether the copyright extends to the book as amended or improved, or is confined only to the additions and improvements themselves, distinguished from the rest of the book."

Kindersley, V.C., dealt with the same question in the English case of *Murray* v. *Bogue* (*z*). He said, "Publishing another edition of his work does not affect an author's copyright in his first edition; but if he prints a second edition, not a mere reprint of the first, but containing material alterations and additions, *quoad* these it is a new work, and to enable him to sue in respect of any infringement of his rights in those portions of the second edition which are new, he must register the edition before suing. The extent however of the alterations is immaterial; to whatever extent a new edition is made a new work, the new part cannot be protected by suit until registration; but that effect of the Act has no operation as to the old parts (of the second edition); as to them the copyright is left as it was."

An author therefore has copyright in the new matter of a second edition for the statutory term of its first publication, in the old matter only from its original publication. As has been pointed out (*a*), this results in obsolète editions becoming common property, while revised ones are still the subject of copyright, but

(*z*) 1 Drewry, 353, 365.
(*a*) See § 28.

§ 155. New editions.

exposed to the competition of former editions to the detriment of the public; and it has been suggested that this should be remedied by continuing the copyright of all scientific and historical works to the lapse of the statutory term of the last edition in which substantial improvements have been made.

The additions must be of some material value to secure copyright. Thus in the Scotch case of *Hedderwick* v. *Griffin* (*b*), Scotch publishers issued a complete edition of the works of Dr. Channing, an American divine, with some slight revision by himself; but the Court held that the original matter introduced by the revision was too slight to obtain protection.

§ 156. Duration and extent of right.

Duration of Right (*c*).—Forty-two years from first publication, or the author's life and seven years from his death, whichever term shall be the longer.

Extent of Right.—(*d*) Throughout the British dominions (thus extending to the colonies as well as the United Kingdom).

§ 157. Persons who may acquire the right.

Persons who may acquire the Right.—1. British subjects, wherever resident at the time of publication.

2. Alien friends resident in the British dominions at the time of publication.

3. (Possibly). Alien friends wherever resident.

The last two classes rest on the authority of *Routledge* v. *Low* (*e*), which as to the 3rd head is in conflict with *Jefferys* v. *Boosey* (*f*). This last case was decided on the construction of the Copyright Statutes before 1831, the date of publication of the work in which copyright was

(*b*) 3 Sc. Sess. Cases, 2nd Series, 383.
(*c*) 5 & 6 Vict. c. 45, s. 3.
(*d*) Ibid. s. 29.
(*e*) L. R. 3 E. & I. Ap. 100.
(*f*) 4 H. L. C. 815.

claimed. The work was assigned in manuscript by an alien friend resident abroad, and first published in England, *the author continuing his foreign residence*; it was decided that neither statute nor common law copyright extended to such a publication.

§ 157 Persons who may acquire the right.

In *Routledge* v. *Low*, which was decided on the construction of the Act of 1842, A., a domiciled subject of the United States, before publishing his work went to reside for a short time in Canada, by arrangement with his publishers, Messrs. L., who thereupon published the work in London, the copyright being assigned to them and due registration taking place. Defendants reprinted the book, and Messrs. L. sued them for infringement of copyright. The case, being taken to the House of Lords, was heard before Lords Cairns, Westbury, Cranworth, and Chelmsford, who agreed that publication in the United Kingdom, together with temporary residence of the author in Her Majesty's dominions at the time of publication, conferred copyright on a foreigner. Lords Cairns and Westbury further held that residence in Her Majesty's dominions was not a necessary condition, and that publication in the United Kingdom was sufficient; Lords Chelmsford and Cranworth however expressed doubt as to this, and the matter must be considered doubtful. Copyright however is personal property, and under the Naturalisation Act (*g*), an alien friend may acquire and hold personal property in the same way in all respects as a British subject. Non-residence in the British dominions is not a necessary condition of a British subject's acquiring copyright, and from this, as pointed out by Mr. Justice Stephen (*h*), it seems probable that the view of the law taken by Lord Cairns is the right one.

(*g*) 33 Vict. c. 14, s. 2.
(*h*) C. C. Rep. p. 69, note.

§ 158. Infringements of copyright.

Infringements of Copyright have been well and shortly summarised by James, L.J., in *Dicks* v. *Yates* (*i*), as follows :—

"Literary property can be invaded in three ways, and in three ways only—

1. Where a publisher in this country publishes an unauthorized edition of a work in which copyright exists, or where a man introduces to sell a foreign reprint of such a work, that is open *Piracy*.

2. Where a man pretending to be the author of a book illegitimately appropriates the fruits of a previous author's literary labour, that is *Literary Larceny*.

Those are the only two modes of invasion against which the Copyright Acts have protected an author.

3. There is another mode which, to my mind, is wholly irrespective of any copyright legislation, and that is where a man sells a work under the name and title of another man or another man's work. That is not an invasion of copyright; it is *common law fraud*, and can be redressed by common law remedies."

§ 159. Literary piracy.

As to open *Piracy* of the whole of a work, there is very little to say; it generally occurs, as in *Routledge* v. *Low* (*j*), where there is some doubt as to the legal right; the case of *Walter* v. *Howe* (*k*) was a case of successful moral piracy not forbidden by the law. Partial piracy however is more common, as in the case of extracts from an acknowledged source. In *Sweet* v. *Benning* (*l*), a case of verbatim extracts from law reports, Jervis, C.J., spoke of "the fair right of extract which

(*i*) L. R. 18 Ch. D. 76, 90.
(*j*) L. R. 3 Eng. & Ir. Ap. 100.
(*k*) L. R. 17 Ch. D. 708.
(*l*) 16 C. B. 459, 481.

§ 159. Literary piracy.

the law allows for the purpose of comment, criticism, or illustration," but said that in the case before him there was no thought or skill brought to bear on the matter complained of; it was "a mere mechanical stringing together of marginal or side-notes which the labour of the author had fashioned ready to the compiler's hands." In *Campbell* v. *Spottiswoode* (*m*) the defendant had published a volume of 790 pages, 34 of which were taken up with a critical essay on English poetry, and the remaining 758 were taken up with complete pieces and extracts as illustrative specimens. Six poems and extracts, 733 lines in all, were taken from copyright works of the plaintiff; and he obtained an injunction against their publication, on the ground that no sufficient critical labour or original work on the defendant's part was shewn to justify his selection. So in *Roworth* v. *Wilkes* (*n*), where 75 pages out of 118, composing a work on fencing, had been inserted in a large encyclopædia, the extract forming a material part of the plaintiff's work, he obtained a verdict.

Honest and *bonâ fide* extraction with no *animus furandi*, will not necessarily protect the taker; thus in *Scott* v. *Stanford* (*o*), A. was in the habit of collecting and publishing, at a cost of three guineas, a statistical return of London imports of coal; B., *bonâ fide*, and with a full acknowledgment of his indebtedness to A., published these returns as part of a work on the mineral statistics of the United Kingdom. The extracted matter formed a third of defendant's work. Page Wood, V.C., granted an injunction, saying, "if in effect a large and vital portion of the plaintiff's work and labour has been

(*m*) 11 Simons, 31.
(*n*) 1 Campbell, 94.
(*o*) L. R. 3 Eq. 718.

§ 159. Literary piracy.

appropriated and published in a form that will materially injure his copyright, *mere honest intention on the part of the appropriator will not suffice*, as the Court can only look at the result, and not at the intention; the appropriator must be presumed to intend all that the publication of his work effects. . . . . No man is entitled to avail himself of the (copyright) labours of another for the purpose of conveying to the public the same information, although he may append additional information to that already published."

This shews that the *animus furandi* is not essential to piracy, though some previous cases lay stress on its importance. If however there are signs of its presence, attempts to conceal indebtedness, colourable alterations, or servile imitations, a smaller amount of appropriation will suffice to make the offence.

§ 160. Abridgments.

The theory of *Abridgments* (*p*) has been previously dealt with. The absence of recent cases on the subject in the English law renders it a little uncertain. It has been decided however that there are fair abridgments which are not infringements of copyright, and unfair abridgments which are, but the line between them is not very distinct. In *Gyles* v. *Wilcox* (*q*), in 1740, the first reported case on the subject, where the original consisted of 275 sheets, and the abridgment of 35, Lord Hardwicke said, "Where books are colourably shortened only, they are a mere evasion of the statute, and cannot be called abridgments. But this must not be carried so far as to restrain persons from making a real and fair abridgment, for an abridgment may, with great propriety, be called a new book, because not only of the

(*p*) See § 47.
(*q*) 2 Atkyns, 141.

§ 160. Abridgments.

paper and print, but the invention, learning, and judgment of the author are shewn in them, and in many cases are extremely useful." One of the chief early cases on the subject is that of *Dodsley* v. *Kinnersley* (*r*) in 1761, relating to the celebrated abridgment of 'Rasselas,' in which the compiler "left out all the moral reflections." The Court held that no certain line could be drawn to distinguish a fair abridgment, and seemed to hint that the quantity printed, and the possible injury to the book abridged, were the points to be considered. *In a case* (*s*) in 1774, where Newberry abridged Hawkesworth's voyages, Apsley, L.C., having consulted with Mr. Justice Blackstone, expressed his views at some length. He held that, "to constitute a true and proper abridgment of a work the whole must be preserved in its sense, and then the act of abridgment is an act of understanding employed in carrying a larger work into a smaller compass, and rendering it less expensive and more convenient, both to the time and use of the reader, which made an abridgment in the nature of a new and meritorious work. That this had been done by Mr. Newberry, whose edition might be read in a fourth part of the time, and all the substance preserved and conveyed in language as good or better than the original and in a more agreeable and useful manner. That he and Mr. Justice Blackstone were agreed that an abridgment where the understanding is employed in retrenching unnecessary and uninteresting circumstances which rather deaden the narration (!), is not an act of plagiarism upon the original work, nor against any property of the author in it; but an allowable and meritorious work."

Later cases however have not taken quite so favour-

(*r*) Amb. 403.
(*s*) Lofft. 775.

§ 160. Abridgments.

able a view of the merits of the abridger. In *D'Almaine* v. *Boosey* (*t*), a musical case, Lord Lyndhurst, speaking on the general question, said, "An abridgment is in its nature original, the compiler intends to make of it a new use, not that which the author proposed to make. *An abridgment must be bonâ fide, because if it contains many chapters of the original work or such as made that work most saleable, the maker of the abridgment commits a piracy.*" And in *Dickens* v. *Lee* (*u*), Knight Bruce, V.C., expressed himself with great doubt: he said, "I am not aware that a man has the right to abridge the work of another; on the other hand I do not mean to say that there may not be an abridgment which may be lawful, which may be protected; but to say that one man has the right to abridge, and so publish in an abridged form, the work of another without more is going much beyond my notion of what the law of this country is;" but again, "there may be such an use of another man's publications as, involving the exercise of a new mental operation, may fairly and legitimately involve it."

Results.

These cases do not easily yield a clear rule; the later ones materially narrow the former, and it is doubtful what decision one of the higher Courts might come to in the absence of any recent authority. A mere mechanical abridgment, or one containing the most saleable part of the author's work, will not apparently be allowed; but it seems that there may be an abridgment which by the amount of intellectual work expended on it will be protected, possibly if it is of such a different size and character as in no way to compete with the original author's work (*x*). This however is all that can be said,

(*t*) 1 Younge & Collyer, Exch. 288, 301.

(*u*) 8 Jurist, 183.

(*x*) In the Fine Arts however abridgments or reductions have been prevented. In *Gambart* v. *Ball* (14 C. B. N.S. 306), the sale of a

and the Commission have recognised the unsatisfactory state of the law by recommending that no copyright work be abridged without the author's consent. § 160. Abridgments.

The law of the *United States* is practically the same. The Courts, following the English cases, have reluctantly held, "contrary to principle," that a fair abridgment is not piracy. In *Gray* v. *Russell* (*y*) however the question was fairly put: "Will the abridgment in its present form prejudice or supersede the original work?" And in another case (*z*) McLean, J., said with justice: "An abridgment, if fairly made, contains the principle of the original work, and this constitutes its value." But the decisions have followed the English cases. In *Folsom* v. *Marsh* (*a*), Story, J., explained the nature of a fair and *bonâ fide* abridgment as follows: "It is clear that a mere selection or different arrangement of parts of the original work, so as to bring the whole into a smaller compass, will not be held to be such an abridgment. There must be real substantial condensation of the materials, and intellectual labour and judgment bestowed thereon, and not merely the facile use of the scissors, or extracts of the essential parts constituting the chief value of the work." And this perhaps expresses satisfactorily the present position of the English law. United States.

The question of *Translations* as infringements of copyright, naturally will rarely arise in England apart from the International question. There is no market in England for the translation into a foreign tongue of an § 161. Translations.

---

reduced photograph of a painting was forbidden; and in *Bradbury* v. *Hotten* (L. R. 8 Ex. 1) *reduced* copies of cartoons in *Punch* met the same fate.

(*y*) 1 Story, 11.

(*z*) *Story's Exors.* v. *Holcombe*, 4 McLean, 306.

(*a*) 2 Story, 100.

§ 161. Translations.

English work. On principle however such a translation would clearly be an infringement of copyright in the original. The question arose indirectly in *Burnett* v. *Chetwood* (*b*) in 1720, where the author of a Latin work applied to restrain the publication of an English translation, and the Lord Chancellor decided the case on the curious ground that the book was not fit to be published in English, but said that "a translation might not be the same with the representing the original, on account that the translator has bestowed his care and pains on it, and so not within the prohibition of the Act." In *Murray* v. *Bogue* (*c*) however the Court said that if A. had published an English book, B. in Germany had translated it into German, and C. in England had retranslated B.'s translation into English, the law would protect A.'s book from C.'s retranslation. As a matter of inference it would also be protected from B.'s translation if published in England.

United States.

The Courts of the *United States*, before the Revised Statutes of 1870 and 1874, had decided very positively against the author's claim to protection. In *Stowe* v. *Thomas* (*d*) in 1853, A. wrote and copyrighted a work in English; she also had a German translation made, and copyrighted it. B. also translated the original work into German, and the Court refused to restrain him from publishing what Grier, J., declared to be "a transcript or copy of her thoughts or conceptions, but in no correct sense capable of being called a copy of her book" (!) He continued: "The author's exclusive property in the creations of his mind cannot be vested in him as abstractions, but only in the concrete form which he has given

(*b*) 2 Merivale, 441.
(*c*) 1 Drewry, 353, 368.
(*d*) 2 Am. Law Reg. 210.

§ 161. Translations. United States.

them and the language in which he has clothed them. When he has sold his book, the only property which he reserves to himself, or which the law gives him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eye of another the ideas intended to be conveyed." It need hardly be pointed out that this extraordinary doctrine would protect all piracy which did not consist in literal extracts; it would prohibit the literary plagiarist from compilations by scissors and paste, but allow him to construct his piracy by aid of a dictionary of synonyms.

The Revised Statutes (*e*) however allow the author to reserve the rights of translation, and, if he does so, protect him against unauthorized translations.

§ 162. Literary larceny.

II. *Literary Larceny*, where parts of the work are stolen verbatim, or under colourable disguise, to form part of another work. The test applied by English law is generally that laid down by Lord Eldon (*f*), that if there is "a legitimate use of a publication in the fair exercise of a mental operation deserving the character of an original work," there is no piracy. As has been pointed out, the English law lays too much stress on new matter added, too little on old matter taken. In a question of originality as against subsequent authors, the matter added is of importance; but in a question of piracy raised by previous writers, the matter taken is the point to be considered.

The English view of the matter received a good illustration in the case of *Spiers* v. *Brown* (*g*). The defendant

(*e*) § 4952.

(*f*) *Wilkins* v. *Aikin*, 17 Vesey, 422. See also *Longman* v. *Winchester*, 16 Vesey, 269; *Matthewson* v. *Stockdale*, 12 Vesey, 270.

(*g*) 6 W. R. 352; commonly known as "the French dictionary case."

§ 162. Literary larceny.

admitted that he had made considerable use of the plaintiff's dictionary in the compilation of his own, but alleged that he had corrected errors, compared it with other dictionaries, and really used independent labour in his compilation. Page Wood, V.C., said that where a work of an entirely original character was concerned, questions of copyright were very simple; but that there was a class of cases where the work related to a subject common to all mankind, and where the modes of expression and language were necessarily common. Then, applying Lord Eldon's test, he came to the conclusion that "though a good deal had been taken from the plaintiff, a good deal of labour had been bestowed on what was taken;" and therefore there was no infringement of copyright.

Piracy from original works is usually, as said by Lord Hatherley, easy to detect; the difficulty lies in the cases where there are common materials, and the question is whether one worker on them has availed himself unfairly of the results of his fellow-worker's labour. *Where the work is of a nature such that its sources are common to all, so that independent work for a similar purpose must end in similar results, each worker has copyright in the result of his independent labour and research; and his work is not an infringement of the results obtained by another, unless he has used those results instead of going to the original sources of information.*

Principle.

These principles are illustrated by the case of *Pike* v. *Nicholas* (*h*). The plaintiff had written a work in competition for a prize at the Eisteddfod, on the origin of the English people, which had obtained honourable mention and was published; the defendant had written a work on the same subject for a similar competition.

(*h*) L. R. 5 Ch. 251.

§ 162. Literary larceny.

He referred to plaintiff's work as an authority, and admitted that he had used it as a guide to older authorities. James, V.C., held his work to be an infringement of the plaintiff's right, but on appeal the Lords Justices held that common features of structure were inevitable and allowable when two men wrote upon a common subject; that an author who has been led by a former writer to refer to older works may without piracy quote passages from them, to which he has been referred by their quotation in his predecessor's work, and that on the whole there was not sufficient evidence of unfair use to constitute an infringement.

A similar illustration is found in the "directory case" of *Morris* v. *Wright* (*i*), where it was held that the compiler of a new directory was not justified in using slips cut out from one previously published, for the purpose of deriving information from them for his own work without any original inquiry, but that he might use them for the purpose of directing him to the parties from whom such information was to be obtained.

The question of piracy or no piracy must depend on a number of differing considerations of detail in each particular case, and principles laid down can be but vague. To Lord Eldon's test (*k*) however may be added the *dictum* in *Bramwell* v. *Halcomb* (*l*), that in questions of piracy "it is not only quantity but value that is always looked to," which is well expanded in the American case of *Folsom* v. *Marsh* (*m*) as follows: "*It* is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or substance. If so much is taken that the value of the original is sensibly diminished, or

(*i*) L. R. 5 Ch. 279.
(*k*) *Wilkins* v. *Aikin*, 17 Vesey, 422.
(*l*) 3 My. & Cr. 737.
(*m*) 2 Story, 100, 115.

§ 162. Literary larceny.

the labours of the original author are substantially to an injurious extent appropriated by another, that is sufficient in point of law to constitute a piracy *pro tanto*. It is no defence that one has appropriated part and not the whole of the property. Neither does it necessarily depend on the quantity taken, but on other considerations, the value of the materials taken, and their importance to the sale of the original work. . . . *We must look then to the nature and object of the selections made, the quantity and value of the materials used, and the degree to which the use may prejudice the sale, or diminish the profits, or supersede the object of the original work.*" And the whole question is neatly summed-up in the American case of *Emerson* v. *Davies* (*n*) as follows:—

"The clear result of the authorities in cases of this nature is, that the true test of piracy or not is to ascertain whether the defendant has in fact used the plan, arrangement and illustrations of the plaintiff as the model of his own book, with colourable alterations and variations only to conceal the use thereof; or whether his work is the result of his own labour, skill, and use of common materials open to all men, and the resemblances are either accidental, or arising from the nature of the subject."

It may be added that the unauthorized reproduction of copies need not be for sale, or for the benefit of the reproducer. In *Novello* v. *Sudlow* (*o*) gratuitous distribution was held an infringement of copyright.

§ 163. Rights of authors.

I. *Rights of an Author.* (*p*) 1. Solely and exclusively by himself or his assigns to print or otherwise multiply copies of his book in the British dominions.

2. Solely and exclusively by himself or his assigns, or persons thereto authorized by him, to sell, publish,

(*n*) 3 Story, 768, 793.
(*o*) 12 C. B. 177.
(*p*) Nos. 1, 2, 3, see 5 & 6 Vict. c. 45, ss. 2, 3, 15.

§ 163. Rights of authors.

or expose to sale or hire in the British dominions copies of his book.

3. Solely and exclusively by himself or his assigns to import copies of his book printed abroad into the British dominions.

4 (*q*). If his "book" is published as part of an encyclopædia, review, magazine, or periodical publication.

(a.) In the absence of express or implied agreement to the contrary the author has rights 1, 2, 3, above, with regard to its publication in a separate form from the date of its first publication in any manner.

(b.) If there is an agreement express or implied that the publisher of the review or magazine shall have copyright in the article singly and as a part of his work, such publisher has the right to reprint the article as a part of the work for which it was written for twenty-eight years from first publication, but may not reprint it singly without the consent of the author or his representatives.

(c.) At the end of such term of twenty-eight years the author or his assigns have rights 1, 2, 3, for a further term of fourteen years.

(d.) While the copyright in the magazine or periodical belongs to its proprietor, the author may by express contract reserve himself the right of separate publication during such twenty-eight years (*r*).

(e.) In the case of encyclopædias, probably the division into twenty-eight and fourteen years does not exist, but the proprietor may reprint the work for forty-two years from first publication, the consent of the author being still required for the reprinting of his article in a separate form.

(*q*) 5 & 6 Vict. c. 45, ss. 18, 19.
(*r*) Ibid. s. 18.

§ 163. Rights of authors.

For the copyright in such articles to pass to the proprietor, he must pay for the article on the terms that the copyright shall belong to him. Mere payment will not imply such terms (*s*).

5 (*t*). The proprietor of a work first published after the author's death has the same rights as the author for a term of forty-two years from first publication.

6 (*u*). The person who employs another to write a book on the terms that copyright in such book shall belong to the employer and not to the author, has for the statutory terms the same rights as the author would have had in the absence of such agreement.

§ 164. Duties of authors.

II. *Duties of Author.* 1. To present a certain number of copies of his book of a certain quality to certain libraries specified in the Act (*v*) (*w*).

2. To register his book in the forms required by the Act, as a condition precedent of suing to protect his copyright (*x*). Registration need not precede the infringement complained of.

The register is kept at Stationers' Hall, and entries therein shall contain :—

(1) The title of the book.

(2) The date of first publication.

A registration cannot take place before publication.

(*Correspondent Newspaper Co.* v. *Saunders* (*y*).)

(*s*) *Walter* v. *Howe*, 17 Ch. D. 708.

(*t*) 5 & 6 Vict. c. 45, s. 3.

(*u*) Ibid. s. 18.

(*v*) Ibid. ss. 6–9.

(*w*) *i.e.* A copy of the best class of every book and new edition to the British Museum, within a month of first publication. A copy of the class of which the largest number are printed for sale, within one month after demand in writing, to the following libraries : Bodleian at Oxford, University at Cambridge ; Advocates' Library, Edinburgh ; Trinity College, Dublin.

(*x*) 5 & 6 Vict. c. 145, ss. 11–13, 24.

(*y*) 12 L. T. N. S. 540.

(3.) The name and place of abode of the publisher. The "place of abode" may be the place of business. (*Nottage* v. *Jackson* (*z*).) The first publisher's name must be registered. (*Coote* v. *Judd* (*a*).)

§ 164. Duties of authors.

(4.) The name and place of abode of the proprietor of the copyright.

If any of these particulars are incorrectly registered, both the registration itself and subsequent assignments of the work incorrectly registered are invalid. (*Low* v. *Routledge* (*b*).) This case however seems to conflict in principle with a case in artistic copyright where it was held that if the assignment sued under was registered, it was not necessary that the original work or previous assignment should be registered. (*Graves' case* (*c*).)

A fee of five shillings is payable on registering the original work, and each assignment of copyright, and the register may be inspected on payment of one shilling per entry.

In the case of periodical works it is sufficient to enter the date of publication of the first number, the name and place of abode of the proprietor, and of the publisher.

Investitive Facts.

§ 165. Investitive facts.

I. Publication—

1. Of a book capable of copyright.
2. In the United Kingdom.
3. By either:—
   (a.) A British subject resident anywhere.
   (b.) An alien friend resident in British dominions.
   (c.) (Possibly) by an alien friend resident abroad (*d*).

(*z*) Weekly Notes, Aug. 4, 1883.
(*a*) L. R. 23 Ch. D. 727.
(*b*) 10 L. T. N. S. 838.
(*c*) L. R. 4 Q. B. 715.
(*d*) *Routledge* v. *Low*, L. R. 3 Eng. & Ir. Ap. 100.

§ 165. Investitive facts.

4. Which book has not been previously published (*e*)—

(a.) In a foreign country.

(b.) In the United Kingdom.

(c). (probably) in the rest of Her Majesty's dominions (*f*).

II. (*g*) License to republish granted by the Judicial Committee of the Privy Council acts as a partial investment of copyright to the grantee.

III. (*h*) Registration in the register at Stationers' Hall is not an investitive fact of copyright, but is an investitive fact of the right to sue to protect such copyright.

In the case of *newspapers* (*i*) and other periodicals it is sufficient to register the first number. As copyright under the statute only vests in publication, employment by the proprietor of such a work to write on the terms that copyright shall belong to him, must be taken as an investitive, and not transvestitive fact. These terms need not be in writing; they may be implied not expressed (*j*).

Transvestitive Facts.

§ 166. Transvestitive facts.

The transvestitive facts of literary copyright are:—

1. (*k*) Assignment *in writing* from the author or owner.

2. (*l*) (subject to No. 1). All modes which pass personal property *inter vivos*, or on the death of the owner.

(*e*) 7 & 8 Vict. c. 12, s. 19.

(*f*) *Routledge* v. *Low* (*v.s.*); but 7 & 8 Vict. c. 12, s. 19, uses the language, "first published *out of Her Majesty's dominions.*"

(*g*) 5 & 6 Vict. c. 45, s. 5.

(*h*) Ibid. s. 24.

(*i*) Ibid. s. 19.

(*j*) *Sweet* v. *Benning*, 16 C. B. 459; *Brown* v. *Cooke*, 16 L. J. Ch. 140, where it was said *obiter* that payment presumed employment on such terms, but *contra per* Jessel, M.R., *Walter* v. *Howe*, 17 Ch. D. 708.

(*k*) 5 & 6 Vict. c. 45, s. 23; *Leyland* v. *Stewart*, L. R. 4 Ch. D. 419.

(*l*) 5 & 6 Vict. c. 45, s. 25.

3. (*m*) Registration of such assignment at Stationers' Hall is a condition precedent to suing for infringement, § 166. Transvestitive facts.

4. (*n*) (partial). License to republish from the Judicial Committee.

5. (*o*) There may be a partial assignment of copyright, as of a share in it.

Divestitive Facts. § 167. Divestitive facts.

1. Expiration of statutory term of copyright.
2. Waiver of rights, which must probably be in writing.

Remedies for Rights infringed. I. *Of Authors.* § 168. Remedies against infringements.

1. (*p*) Action of detinue by registered proprietor after demand in writing for copies of his books unlawfully printed or imported, or damages for their detention.

2. (*p*) Action of trover for damages for conversion of such books.

3. (*q*) Seizure and destruction by custom-house officer of books unlawfully imported; fine of £10 and double the value of the books on the importer; of which £5 is to go to the officer, the rest to the proprietor of the copyright. Case to be heard before the justices of the peace for the county or place in which such book shall be found.

4. (*r*) Action for damages for infringement of copyright by unlawful printing and publishing.

5. Action for damages for importing unlawfully printed books for sale: (knowledge of the nature of the books is not necessary to constitute this offence) (*s*).

6. Action for damages for selling, publishing, or

(*m*) 5 & 6 Vict. c. 45, s. 24.
(*n*) Ibid. s. 5.
(*o*) Ibid. s. 13.
(*p*) 5 & 6 Vict. c. 45, s. 23.
(*q*) Ibid. s. 17.
(*r*) Ibid. ss. 15, 16.
(*s*) *Cooper* v. *Whittingham*, L. R. 15 Ch. D. 501.

§ 168. Remedies against infringements.

exposing for sale or hire, or having in one's possession for sale or hire, unlawfully printed or imported books, *knowing them to be such* (*t*).

7. Action for an injunction to restrain the committal of such offences.

Measure of Damages.—The defendant must account for each copy of his work sold as if it had been the plaintiff's, and pay the amount of profit which would have resulted from the sale of so many copies of the plaintiff's work (*u*).

Limitation of Actions.—Legal proceedings must be commenced within twelve months of the date of the offence (*v*).

§ 169. Remedies against author.

II. *Remedies against Author or Publisher.*—1. *For non-delivery of copies* within one month after demand in writing made by the libraries, or in certain cases within one month after publication, a fine not exceeding £5, and the value of the book, recoverable summarily (*w*).

2. *For non-registration*, loss of actions to protect copyright, until registration takes place (*x*).

3. *For false registration*,—(a)—*if wilful*, it is a misdemeanour, indictable criminally (*y*);—(b)—if *bonâ fide*, alteration of the entry by the Court on the motion of the person aggrieved (*z*).

There are a number of special penalties for infringement of University copyrights. As these are practically obsolete, Oxford having only six copyrights, Cambridge none, and as their abolition as far as special rights and privileges are concerned is recommended by the Commission (*a*), I have not thought it necessary to set them out.

(*t*) 5 & 6 Vict. c. 45, ss. 15–16.
(*u*) *Pike* v. *Nicholas*, L. R. 5 Ch. 251, 260.
(*v*) 5 & 6 Vict. c. 45, s. 26.
(*w*) Ibid. ss. 6, 9, 10.
(*x*) Ibid. s. 24.
(*y*) Ibid. s. 12.
(*z*) Ibid. s. 14.
(*a*) C. C. Rep. §§ 45–48.

Amendments proposed by Commission in Book Copyright. **§ 170.**

Recommendations of Copyright Commission.

1. That the law on the subject be codified (§ 13).

2. That the term of copyright be extended to the author's life, and thirty years after, in the case of works published with the author's name; thirty years from publication in the case of posthumous and anonymous works and encyclopædias, the author of an anonymous work to obtain full privileges by printing an edition with his name attached (§§ 40, 41).

3. That the term of twenty-eight years during which the author of an article in a periodical cannot republish without the *entrepreneur's* consent be reduced to three years (§ 43).

4. That during such three years the author shall have a right to sue to prevent unauthorized publications. At present only the proprietor can sue (§ 44).

5. That all special privileges to University copyright be abolished (§ 48).

6. That publication *within Her Majesty's dominions* shall vest Imperial copyright, instead of, as now, *publication in the United Kingdom only* (§ 58).

7. That first publication by a British author out of the British dominions shall not divest his power of obtaining copyright in this country, provided he republishes in the British dominions within three years of first publication (§ 61).

8. That aliens resident out of Her Majesty's dominions, but first publishing in them, be allowed copyright (§ 64).

9. That no abridgments of copyright works be allowed without the author's consent (§ 69.)

10. That a definition of the copyright parts of a newspaper, distinguishing between announcements of fact and literary work, be included in the statute (§ 88.)

§ 170. *As to Registration.*

Recommendations of Copyright Commission.

11. That registration of published works be made compulsory (§ 139).

As to registration.

12. That, if registration be continued at Stationers' Hall, effective power to regulate it be given to the Stationers' Company (§ 144).

13. That registration be effected by a deposit of a copy of the book at the British Museum, and the taking of an official receipt (§ 145).

14. That the registry and registrar be under Government control, and responsible to Government (§ 148).

15. That if the registry cannot be placed at the British Museum it be transferred to a Government office (§ 150).

16. That no owner of copyright should be able to sue for infringements of his copyright preceding registration, or for penalties for dealing with the results of such infringements even after registration, unless such registration has taken place within a month of publication (§§ 152, 154).

17. That compulsory presentation of copies to libraries be abolished, except in the case of the British Museum (§ 164).

18. That a copy of each issue of every newspaper be deposited at the British Museum.

19. That the provisions for piracy of books be extended to oral lectures pirated in print (§ 181).

This concludes our survey of the English Law of Copyright, so far as the United Kingdom alone is concerned. We are now in a position to treat of the English method of dealing with the problems of Artistic Copyright before dealing with Colonial and International Copyright.

CHAPTER VIII.

PRINCIPLES OF ARTISTIC COPYRIGHT.

§ 171. Introduction.—§ 172. Is artistic copyright desirable?—§ 173. Arguments against artistic copyright.—§ 174. Sir J. Stephen's views.—§ 175. Defences of artistic copyright.—§ 176. Views of English art-world.—§ 177. Justification of artistic copyright.—§ 178. Examination of Stephen's view.—§ 179. Examination of other views.—§ 180. Unpublished artistic works. What is publication?—§ 181. Definition of publication in Artistic Copyright Bill of 1883.—§ 182. Registration of artistic work.—§ 183. Proposals of Copyright Commission as to registration.—§ 184. Effects of sale on copyright. Commissioned works.—§ 185. Photographs.—§ 186. Infringements.—§ 187. Search and seizure.—§ 188. Codification.

§ 171. Introduction.

THE problems of Artistic Copyright are different in many ways from those which we have hitherto been considering in the case of Literary Property. Till now we have been occupied with productions the value of which to the public and to their author consists almost entirely in their communication by print or speech to the world, that is, in the mechanical reproductions of them which are distributed; the original manuscript in itself has only a fancy value; its main importance is as the text to be reproduced in a form accessible to the many. But in the case of works which are of the highest merit when in their original form; works of which any reproduction in the same medium or material is rare, while copies in other materials or modes are of a very different kind, the problem assumes a new form. Sculptures and paintings are of the greatest value as individual

§ 171. Introduction.

works; their reproductions by engraving, lithography, or photography are only made for the purpose of communicating in some degree, however inadequate, the merits of the original work, to those of the public who cannot see that original.

§ 172. Is artistic copyright desirable?

And the first great point of difference between the two classes of productions, Literary and Artistic, is, that it is possible to contend with far more force than in the case of literary works, that the institution of copyright in works of Fine Art is not desirable. It is not by any means clear at first sight what benefit the community will gain by State protection of works of art, or what harm the public will suffer by refusing to create artistic property.

No copy in the same material of the original painting can equal that original in merit, unless the copier possesses such talent that he would obtain far more return from original work. If the work professes to be a copy, its price is much smaller than that of the original, because the element of personal skill, which cannot be reproduced, is absent. While some ideas or designs of the author of the original picture are appropriated by the copyist, yet on the other hand, the increase of copies, by increasing the notoriety of the original author, may tend to increase the commercial value of his work. And if such copies are sold as originals, or if works, not copies, are sold as signed pictures of the original artist, the ordinary law as to forgery and obtaining money by false pretences seems sufficient to deal with such cases without creating a special class of property in artistic work.

Then as to engravings of an original work, it is true that money which might come to the artist may be paid to others for unauthorized engravings of the original

picture; but on the other hand it may be said that the public obtain more widespread knowledge of works of art, and more opportunities of æsthetic improvement if free trade in reproductions is allowed.

§ 172. Is artistic copyright desirable?

It has been argued before that the aim of the institution of literary property is to obtain good books at a very slight extra expense to the public. Will the result of the establishment of artistic copyright be to obtain better works of art than would be produced under a system of free reproduction, without a large increase in their price? And it may be urged that the tendency of a system of protection to artistic work will be to increase the price of all those reproductions of the original by which mainly it becomes accessible to the bulk of the community, without giving the public a corresponding benefit by drawing forth fresh talent to an artistic career.

§ 173. Arguments against artistic copyright.

This view of the matter has been put very forcibly by Sir James Stephen in the note appended to his signature as a member of the Copyright Commission, which, so far as it bears on the subject, I make no apology for reproducing:

§ 174. Sir J. F. Stephen's views.

"I dissent," says Sir James Stephen (*a*), "from all the suggestions made for extending copyright in works of art, and rendering the remedies against persons who infringe existing rights more efficacious. All these proposals appear to me to be founded upon a mistaken view of the principle on which the law of copyright ought to be based. They assume that the author of a work of art ought to be considered to have a right to every advantage which can possibly be derived from that work

(*a*) C. C. Rep. p. 57.

§ 174. Sir J. F. Stephen's views.

of art, even indirectly and by the exercise of independent ability. . . . . A painter is not to copy the painting of another painter, although the copy may require great *labour and skill. Casts are not to be made of statuary*, nor is a statue to be photographed, drawn, or engraved, without the leave of the owner of the copyright. It is admitted that in many instances these acts inflict no money loss on the author of the work of art, but it is said that they may hurt his reputation, and it is assumed that he is entitled to appropriate to himself every indirect advantage which may be obtained from his work."

"I think artistic reputation is too delicate a matter to be made the subject of legal protection. The law of copyright ought, in my opinion, to protect money interests only; and I think that the only money interests which it should protect are those which it creates; that is to say, the money interests of the author of a work of literature or art capable of being reproduced in such a manner that every copy is as valuable as the original.

"I approve of copyright in books, because the MS. has no money value till it is printed, and because when it has been printed, every copy is of equal value, so that unless a copyright law existed, the author of the most valuable book would have no money reward for writing it. For the same reason I approve of copyright in engravings, photographs, and other works of art capable of being mechanically reproduced in large numbers, each copy being of the same or nearly the same value as the original.

"I do not approve of copyright in pictures and statues, because a picture or statue has a value of its own, which is not affected by its being copied, and copies of it are themselves works of art of various degrees of merit. I think that such reproductions are sufficiently protected by

the ordinary law of property. No copy or cast of a picture or statue can be made without the consent of the owner, both of the picture and of the place in which it is kept, and I cannot see why, if the owner consents, the artist should have a right to object."

§ 174. Sir J. F. Stephen's views.

And certainly the weakness of some of the defences of copyright put forward by artists would compel us to make a more extended examination of the question.

§ 175. Defences of artistic copyright.

With regard to sculptures for instance, Mr. Woolner, R.A., says (*b*), "I do not know that sculptors have suffered from engravings, pictures, or photographs being taken of their designs. . . . . This has often happened to me. I cannot say that I have suffered, because I may say that it has been so much advertisement. But that is not the point: the point is that, the work being the property of the sculptor, no one has a right to copy it:" (a statement which, as an argument for the existence of artistic copyright, is a good example of the fallacy known as "begging the question"). Mr. Woolner complains further on of inaccurate casts and engravings of sculptures, as damaging the sculptor's reputation; but he admits that he has never heard complaints on the subject, and he repeats (*c*), "My private opinion is, that photographs do no harm to the artist—rather good than otherwise."

So again, Mr. Basil Field, the solicitor to a large number of the artistic societies, says (*d*), "A photograph, or an engraving from it, if well done, or done as the artist would do it, really enhances the value of the original work to the proprietor:" and again (*e*), "a well

(*b*) C. C. Ev. q. 4077.
(*c*) Ibid. q. 4096.
(*d*) Ibid. q. 3689.
(*e*) Ibid. q. 3631.

§ 175. Defence of artistic copyright.

engraved work is worth very much more in the market. (You will see "engraved," when it comes to Christie's, put in the catalogue.) The artist gets the advantage of having his work well engraved, which is a capital advertisement." (*f*)

§ 176. Views of English art-world.

On the other hand it is clear that in England the mass of artists and art publishers consider that the absence of the protection afforded by a system of copyright would be very injurious to them, and that the present English law, through its defects, is really injurious to the progress of art.

For instance, to take the evidence given before the Copyright Commission, Mr. Faed, R.A., said (*g*), "I have suffered a good deal through the practice of the multiplication of photographs myself. I remember some eighteen or twenty years ago, that I was in receipt of many hundreds a year for copyrights, but I get very little now. Mr. Graves" (the fine art publisher) "says that he cannot afford to pay so much for the copyright now, that the pictures are no sooner engraved than they are pirated, and sold in every quarter of Great Britain, and the result is, that he is incapable of paying the sums which he used to pay."

Sir Francis Grant, the late President of the Royal Academy, confirmed this. He said (*h*), "What I am most conscious of is, the immense deterioration in the value of copyrights, which has existed for many years past in consequence of photographic piracy. A publisher dares not risk a large sum; in fact, he is afraid

(*f*) Of course here stress should be laid on the *good* engraving, which advocates of artistic property contend will not be obtained without the intervention of copyright.

(*g*) C. C. Ev. q. 3482.

(*h*) Ibid. q. 3416.

to engrave a work, because no sooner is it engraved than he is undersold by piratical photographs. This piracy has deteriorated the value of copyright to an immense extent. In former years, for instance, a publisher would estimate a work at 300*l.*, which now he only estimates at 100*l.* He says, 'In the very first week that I bring out a picture, it is photographed.'" § 176. Views of English art-world.

This evidence is confirmed by other witnesses. Mr. Field says (*i*), that when an artist has habitually omitted to register his paintings, the market is so flooded with copies and imitations, that the price of his genuine work at auctions is materially diminished owing to the suspicion attaching to all work alleged to be his.

§ 177. Justification of artistic copyright.

It is admitted, that the chief pecuniary value of copyright in the fine arts lies in the right of engraving pictures (*k*); and as Mr. Graves says, a valuable picture does not necessarily imply a valuable copyright. All artists and publishers agree, that without protection good engravings can hardly be produced, as the competition of cheap and inferior copies will render the risk to the publisher very great. Some artists add, that the reputation of the artist is seriously damaged by the circulation of inferior representations of his work; but this does not seem in itself a sufficient reason for the institution of artistic property.

As far as paintings, drawings, and sculptures by themselves are concerned, the presence or absence of copyright will make very little difference; its justification, if at all, lies in the encouragement of engravings, whether from pictures or not. These are expensive when

(*i*) C. C. Ev. q. 4185.

(*k*) See evidence of Sir Francis Grant, C. C. Ev. § 3421; Mr. Graves, § 3171.

§ 177. Justification of artistic copyright.

produced well, of great value when good, and liable to be driven from the field by inferior competition. One result of the institution of artistic copyright will certainly be that the public will get better engravings and, indirectly, better pictures; the artist will obtain larger sums for his work, and the skilled engraver will be encouraged.

§ 178. Examination of Stephen's view.

Sir James Stephen's position as to the desirability of copyright in engravings and photographs seems fully justified by the evidence of practice; but it may be respectfully suggested that a copyright in engravings without a copyright in the paintings which are engraved, would be a little difficult to give legal effect to. Sir James Stephen would give A., the engraver of a painting, a copyright in his engraving, and that copyright would enable A. to prevent all other engravers from reproducing his engraving; but how would it interfere with another engraving or photograph made from the original painting by B., without any use of A.'s engraving. On the principles of English law, for example, it is open to any one to avail himself of matter contained in sources not copyright, and to obtain copyright in the results of his labour, without thereby infringing the copyright of other and prior borrowers from the same sources, if only he has made no use of their work. Here, according to Sir James Stephen, there is a painting not the subject of copyright. It is open therefore to all the world to engrave it, and to obtain copyright in each result obtained, which will not be an infringement of any other work. Yet this free competition in engravings would destroy the whole benefit of copyright in them. It is as if no books were held infringements of copyright, unless it was proved that their type was set up from

the printed work infringed, and not from a manuscript copy. § 178. Examination of Stephen's view.

But it may be said the remedy of the maker of the first engraving will be against the owner of the picture. No engraving or photograph from the picture could well be made without the consent of the owner, and though the maker of the first engraving cannot sue the infringer directly, yet he can recover the damage he has suffered from the proprietor of the picture, who must have given his consent to a second engraving in breach of his covenant to assign the sale right. But what if the artist or proprietor sells the picture? Is he to be bound to do so with restrictive covenants to each purchaser against allowing engravings of the picture to be made? Will the remedy against competitive and piratical engravings be a long series of actions through the chain of purchasers of a picture, each enforcing the covenant made to him? And again, what is to happen if a copy of the picture is painted, which, as there is no copyright in the picture, may easily happen? How can engravings from that copy be prevented, unless a second series of restrictive covenants is initiated, a series probably inadequate, and certainly ludicrously cumbersome? And yet, if pictures are not the subjects of copyright, the whole benefit of copyright in engravings is lost, unless some such plan as this is adopted.

Result. While agreeing in the main therefore with Sir James Stephen's distinction between engravings and paintings, I think that a partial copyright in engravings only would entirely fail in its effect; there would be as much competition as if no copyright existed, with the additional burden of useless restrictions. For this reason I should advocate copyright or the establishment of property in all works of art, while endeavouring to

induce artists to avail themselves of the ordinary law as to fraud and forgery, in dealing with the abuses of forged signatures and spurious "originals."

§ 178. Examination of Stephen's view. Result.

§ 179. Examination of other views.

A further ground indeed for artistic copyright is urged by some witnesses, as Mr. Woolner, R.A., and Mr. Graves, and is expressed in this way (*l*): "the work being the property of the artist, no one has the right to copy it;" and again, "in any case I hold that no person is justified in copying the work of an artist without his permission."

This, no doubt, represents a popular feeling that "the labourer is worthy of his hire," that when an author has produced a literary or artistic composition, he should be entitled to some remuneration for any use made of the ideas contained in that composition: as is said, "he has a right to his work;" "no one has a right to copy it without his consent."

As a *reason* for the establishment of copyright, this is clearly fallacious if the "right" referred to is a legal one; and if the right be moral, is anything else meant by the phrase than that possession of copyright by the artist is either desirable in the interests of the State, or approved by the mass of the community? In each of these cases the question must be finally decided by considerations of the benefit to be directly or indirectly gained by the community.

§ 180. Unpublished artistic work. What is publication?

Assuming however that artistic property is to be established by law, there are two or three points in which the conditions differ from those of literary property, and on these only I propose to dwell.

And in the first place the position of unpublished

(*l*) C. C. Ev. qq. 4077, 5444.

§ 180. Unpublished artistic work. What is publication?

artistic work differs very materially from that of unpublished literary work, and publication is of a different character. In literary property we have seen (*m*) that a work is "published," when the author makes such a communication of it to others that any member of the public, or a certain number of the public, determined merely by priority of application, may obtain a copy of the work either by purchase or gift. (This shuts out such cases as "printing for private circulation.") And in this process, there is a regular stage of the production known as "publishing" a book, and a regular section of producers, known as "publishers." But in many sections of artistic work it is difficult to say what is publication. Engravings and photographs are published, like books, by striking off or printing copies and offering them for sale; but what constitutes publication of a picture? Is it when an artist exhibits his work at the Royal Academy? Does he publish it, by merely shewing it to his friends at a private view? Or if at his private view he sells it to a friend, who keeps it on the walls of his private house, has publication taken place? Or is the work published when it hangs unsold in the artist's studio, visible to everyone who comes in?

And though the importance of these questions is mainly in view of the problem of registration, and of the English distinction of statutory and common law copyright, I think they will be solved more easily by leaving registration out of the question for the present.

It seems that until the work has been in some way exposed or shewn, so that it is possible for the public to view it unreservedly, it should be considered an unpublished work. Till such exhibition takes place, whether gratuitously or on payment, the artist should be taken

(*m*) See § 165.

§ 180. Unpublished artistic work. What is publication?

to reserve the work to the sight of himself and his licensees. Mere sale or exhibition to friends should not be considered such "publication" as divests the artist's rights, unless he chooses to take certain legal steps. Similarly any conditional exhibition might be held not to amount to publication, as for instance exhibition in a public gallery where no copying was allowed, and admission to which was therefore obtained by the public on an implied contract not to copy; or perhaps exhibition under similar conditions for the purpose of obtaining subscribers for a subsequent engraving.

On the other hand, exhibition in public galleries, without restrictions as to copying, offering of engravings or photographs for sale, or exposure of sculpture to the public, appear to be "publication" in any ordinary sense of the word.

The class of unpublished works then will be far larger than in the case of literary works, and much more profitable to the public. The manuscripts that do not see the light are perhaps numerous, but probably not of great value. But the pictures which are not exhibited, the sketches, drawings, paintings which are never open to public view, but remain with the artist or pass to some private buyer who does not exhibit them, are very numerous. Until the Winter Exhibition of 1882–1883, nearly all the paintings of D. G. Rossetti were, in this sense, unpublished; and though it is the practice in England for most leading artists to exhibit at one or other of the summer galleries, yet undoubtedly a large amount of good work is never communicated to the public, but remains for the private edification of the owner and his friends. And this suggests another argument against the institution of artistic copyright, that it may deprive the public of acquaintance with many really meritorious works of art, whose producers or owners do

not choose to expose them to public view. The strength of this however is lessened by the consideration that in most cases it would only be possible to engrave or photograph these unpublished works by stealth or fraud and that such engravings would almost inevitably be of an inadequate and inferior quality, thus both misrepresenting the works in question and lowering the public taste.

§ 180. Unpublished artistic work. What is publication?

The criterion of publication, in the Artistic Copyright Bill of the session of 1883, is only introduced with regard to engravings and photographs, the interpretation clause reading:

§ 181. Definition of publication in Artistic Copyright Bill of 1883.

"Publication shall mean:—

"In the case of engravings and photographs the first act of offering for sale or for delivery to a purchaser, or of advertising, notifying or exposing as ready for sale to the public, or for delivery to a purchaser, any copy of a work, or delivering at the Hall of the Stationers' Company a written request for the registration of such work," and the term of copyright is to be a fixed term of years, practically commencing with publication.

Drawings, paintings, and sculpture, it is proposed to treat in a different way. The copyright in these works of art is to be regulated by the life of the artist or owner of the copyright, and is to commence on "execution" of any work. The effect of this proposal would *apparently be to destroy all common law copyright* in unpublished paintings and works of that class, and with it all questions of publication. The only objection to this proposal would be, if registration were required to commence at a correspondingly early period; for such a requirement would be burdensome in the extreme. But the Bill, while requiring registration for

§ 181. Definition of publication in Artistic Copyright Bill of 1883.

engravings and photographs on penalty of inability to sue for infringements occurring or commencing before registration, does not make registration of drawings, paintings, or sculpture, compulsory, or require it as a condition precedent to actions for infringement of copyright. This leads us to consider whether registration can, in the interests of the community, be, as proposed by this Bill, dispensed with.

§ 182. Registration of artistic work.

Against compulsory registration of artistic work a most vigorous protest is raised by artists. They strongly object to the trouble of registering every sketch picture or drawing made by them, and this trouble is a far more serious matter than in the case of books. Registration is also far more effective as a history of literature, and a guide to the owners of literary copyright. There is a fairly definite line to be drawn between published and unpublished literary works, and a definite class of business men who publish books, and can see to the formalities of registration. Of course in the case of engravings, and other mechanical reproductions from an artistic original, the same considerations apply as in the case of books, but paintings, sculptures, and drawings, stand on a very different footing.

An enormous number of works of art are yearly produced, which remain in the artists' possession; which have no particular name, or no name which would serve to identify them to a stranger, and of which the vast majority will never be pirated. It is difficult to see what purpose an entry of these works in the register can serve; in the case of most of them it will be to the artist an expensive useless and worrying form, while it rarely can be made definite enough to be of assistance to the public searching the register. And indeed I do not

§ 182. Registration of artistic work.

regard the argument that the public are entitled to know what works they may copy with safety as of much weight. If once the principle of literary and artistic property is adopted, the presumption should be in favour of its owners and not of its would-be appropriators.

The present Lord Bramwell took a similar view of the use of registration in his judgment in the case of *Ex parte Beal* (*n*). He said: "In almost all cases a man who copies a work without the authority of the owner, must know that he is pirating the work of somebody. There may be a conceivable case in which a man has been deceived, having been told by a person, who pretended to be the owner of the copyright, that he might copy the picture. It is possible that in such a case a man might have been acting innocently;" but as a rule the register is for the intentional wrongdoer.

Registration really only becomes important when a dispute has arisen to copyright, and the artist or owner wishes for *primâ facie* evidence of his right; that is when, publication of the original having taken place, the issuing of copies by other than the artist or his assignees may be looked upon as a probable contingency. Before that time any unauthorized copy must be obtained by some kind of stealth or fraud, and to require registration by the author or owner as a condition precedent to his remedy would be to favour the pirate at the expense of the public. For, as is suggested, a copy made in such a way could rarely be of much merit, and the public as purchasers would suffer correspondingly.

§ 183. Proposals of Copyright Commission as to registration.

The Copyright Commission (*o*) have suggested compulsory registration in the case of engravings, prints and

(*n*) L. R. 3 Q. B. 387, 392.
(*o*) C. C. Rep. §§ 156–159.

§ 183. Proposals of Copyright Commission as to registration.

photographs, which, (subject to some qualifications in the case of photographs,) are as a rule made for sale to the public; and in these cases none of the difficulties suggested above arise. The Commission propose however, that in the case of paintings, drawings and sculptures, registration should only be required when the copyright and the picture are in different hands; that is to say, when the owner of the picture or his predecessors have assigned to others the right to reproduce it. This amounts to a proposal that if the owner of the picture has still the right to reproduce it, no registration need take place, even though he has published it; but, on the other hand, that when the picture and the right to reproduce it have been separated, the assignment shall be registered, even though no publication has taken place, and the right to reproduce has not been used. More logical distinctions would seem to be either that only published works need be registered, or that no registration at all should be required for paintings or drawings. For in the first case, until the artistic work is published by the author or his assigns, no one else can have any pretence of a right to reproduce. When it is published, it needs protection, and it may be said that it is important to the public to know whether the right of reproduction in connection with it is reserved, and that registration may therefore justly be required. On the other hand, as suggested by Lord Bramwell, the cases where genuine purchasers, as distinguished from intending pirates, would invoke the register must be very rare. The same view is held by Mr. Field, who puts the matter very forcibly in his evidence before the Commission. He said (*p*): "Not one private collector in a hundred does want the copyright in a picture which he buys at a sale, (they

Evidence as to uselessness of registration.

(*p*) C. C. Ev. q. 4185.

§ 183. Proposals of Copyright Commission as to registration.

as a rule, buy direct from the artist if they want the copyright,) as he cannot profitably engrave it; . . . and unless he is a pirate, he does not want to make copies for sale. I will state, also—and I have it from the lips of the best known publishers in London—that they who want the copyright for the purpose of engraving, never consult, and would never think of consulting the register, but would, and always do write direct to the artist, whom they would wish to superintend the plate, if living, or to his family if he were dead. But, I am bound to assume that the purchaser would wish to consult the register, *otherwise I leave no use whatever for compulsory registration.* Well, what is he to do? Is he to go up to London and consult the register?" And after suggesting the difficulties in the way of this course, chiefly arising from the necessarily vague description of the work in the register, he answers his question (*q*): "Of course the intending purchaser would do nothing so foolish; he would simply write to the artist, whose name he must know in order to consult the register, and to whom a very loose description of the picture . . . would suffice to identify the particular work, . . . he would inquire into the title of the vendor . . . and upon the answer given to these inquiries he would determine to bid, or not to bid. *Compulsory registration is worse than useless to him.*"

Publications of pictures or drawings without reserve are very rare; registration of every private sale would be both cumbersome and useless. In my opinion, therefore, the most advantageous proposal is that of the Copyright Bill, that no registration be required for works of the class of paintings and drawings. Result.

(*q*) C. C. Ev. q. 4185.

§ 184. Effect of sale on copyright. Commissioned works.

The next question of difficulty as to the nature of artistic property arises as to the effect on copyright of the making on commission, or the first sale, of a picture or photograph. Artists generally, though inclined to recognise exceptions in the cases of portraits and works painted on commission, express a wish to retain the copyright in themselves, if no express agreement on the subject is come to. But it is very difficult to distinguish where the portrait or commissioned picture begins, and the ordinary painting leaves off. The present English law, which provides that if no agreement in writing is made on the sale with respect to the copyright, that right is destroyed, is indefensible. Artists urge that if they retain the copyright, they will be able to secure that any engraving or reproduction of the picture which may be made is a good one; while there will be no security for this if the private purchaser alone may regulate reproductions. The advantages of their proposal cannot be put higher than this, for their copyright is of no positive value, unless the owner of the picture gives them leave and ample opportunity to have the picture reproduced, good engravings being a work of great time and labour; on the other hand, though purchasers of pictures generally object to buying a picture without the copyright, if such a suggestion is made to them, and though they would object to reproduction by others, yet private purchasers rarely use the copyright themselves.

The Copyright Commission, after (*r*) giving up in despair the attempt to define a "portrait" or a "commission," came (*s*) finally to the conclusion that in the absence of express stipulation the copyright should belong to the purchaser.

(*r*) C. C. Rep. §§ 109, 110.
(*s*) Ibid. § 115.

§ 184. Effect of sale on copyright. Commissioned works.

The Copyright Bill, on the other hand, puts forward the artists' view of the question by proposing, though not in express words, that the copyright shall, in the absence of express agreement, remain in the painter, except that, in the case of portraits executed on commission, the painter shall not be entitled to make any reproduction whatever without the consent of the owner; and similarly apparently the owner is not to be entitled to make any copy without the consent of the painter, which in the case of family portraits seems a rather unfortunate proviso. In other words, the proposal is this: In the case of all verbal sales of pictures, the artist will retain the right to publish, and receive the profits from, engravings, photographs, and other reproductions of such picture (except copies in the same material); the new proprietor or buyer will, except in the case of portraits, have no check on the circulation of copies, and no share in the profits resulting from reproductions.

This would of course be a very satisfactory position for the artistic world; but it is unfortunate that it would frequently arise from the ignorance of the purchaser, who would imagine he was buying what really, for the want of express stipulation, did not pass to him. I incline, Result. therefore, on the whole to the opinion that the solution proposed by the Copyright Commission is the best one for the interests of the public. Then it would require an express stipulation in writing, which must be distinctly brought to the notice of the purchaser, to retain a copyright in the artist, which would otherwise pass to the buyer of his picture.

§ 185. Photographs.

With regard to the copyright in photographs, the Copyright Bill proposes the same rule as for paintings, with the exception that in the case of portraits executed

§ 185. Photographs.

on commission, it shall be unlawful for anyone, even the owner of the copyright, to sell or exhibit in public copies of such portrait without the consent of the person who gave the commission.

The Commissioners recommend that the copyright shall vest in the "proprietor of the negative," instead of, as in the Bill, the "author or maker of the negative;" they insert, however, the same proviso as to the necessity of the consent of the sitter to the exhibition or sale of his portrait.

The proposal of the Bill seems clear, and, with its safe-guarding proviso, satisfactory (*t*). The proposal of the Commission errs a little, in my opinion, in its failure to define who is the "proprietor of the negative." Some proviso is surely needed to the effect that where the negative is made as the result of a commission or order, it shall belong to the person giving such order.

§ 186. Infringements.

As to infringements, the English rule seems a satisfactory one. Any unauthorized reproduction, which may diminish the artist's reputation by being taken for his original work, or for a representation of his work, or which may diminish the commercial value of his artistic productions by interfering with their sale, should be treated as an infringement. But such a result will not take place unless there is either exposure for sale, or public exhibition, a limitation which prevents interference with private copies made for amusement or purposes of artistic education.

§ 187. Search and seizure.

The only other point that calls for notice is the special importance in dealing with piratical copies, of full powers

(*t*) The recent case of *Nottage* v. *Jackson* (Weekly Notes, Aug. 11, 1883) shews the necessity however of a clearer definition of the "author or maker" of a negative or of a photograph.

§ 187. Search and seizure.

of search and seizure. The piratical publisher spreads his wares through travelling pedlars, who have no money to pay penalties, and whom imprisonment does not deter, while the real offender remains behind unknown. Ample power of prompt seizure of piratical copies will in some degree counteract this evil.

§ 188. Codification.

Finally, the Law of Artistic Copyright may be based on, at the most, two sets of principles, and dealt with very shortly. Paintings, drawings, sculptures, and works where the original is of the greatest value, fall under one head; engravings, photographs, and other mechanical reproductions, all of nearly equal value, from a common original, rank beneath the other. There is clearly no need for the separate and accidental legislation at present applied in England to each variety of artistic work, and codification and unification of the law on this head should be effected as quickly as possible.

CHAPTER IX.

ENGLISH LAW OF ARTISTIC COPYRIGHT.

English Statutes . . . . . § 189
SECTION I. *Unpublished Works* . . . . . §§ 190–198
SECTION II. *Engravings, Prints, &c.* . . . . . §§ 199–210
SECTION III. *Paintings, Drawings, and Photographs.* . §§ 211–218
SECTION IV. *Sculptures* . . . . . §§ 219–224
SECTION V. § 225. Recommendations of the Copyright Commission.—§ 226. Proposals of the Artistic Copyright Bill of 1883.—§ 227. Laws of other countries.

§ 189. English statutes.

THE English Law as to Copyright in Works of Fine Art is even more complicated than the law which establishes literary property. Three separate sets of statutes deal with copyright in prints and engravings, sculptures, and paintings drawings and photographs, respectively, and deal with them in a very confusing way. The law as to engravings is to be found in 8 Geo. II. c. 13, amended by 7 Geo. III. c. 38, and 17 Geo. III. c. 57, and in 6 & 7 Will. IV. c. 59, and 15 & 16 Vict. c. 12, s. 14. Sculptures are regulated by 54 Geo. III. c. 56, and paintings, drawings, and photographs by 25 & 26 Vict. c. 68. During the present session a codifying and amending Bill, having been prepared by a committee of the Law Amendment Society appointed for the purpose, was brought into the House by Mr. G. W. Hastings. It passed its second reading but was then persistently blocked, and succumbed in the "Massacre of the Innocents" in July.

NOTE.—The six Acts, which formerly regulated Copyright in Designs have been repealed by the Patents Act, 1883 (46 & 47 Vict. c. 57); which provides new law on the subject, see §§ 47–61.

SECTION I.

Unpublished Works.

§ 190. Unpublished works of art.—§ 191. Cases on the subject: *Prince Albert* v. *Strange*.—§ 192. *Jefferys* v. *Boosey*.—§ 193. *Turner* v. *Robinson*.—§ 194. Statute of 1862.—§ 195. Recent cases.—§ 196. Result.—§ 197. What is publication? *Turner* v. *Robinson*.—§ 198. General conclusions.

§ 190. Unpublished works of art.

But before endeavouring to reduce the existing chaos of legislation into order, we must first deal with the question of property in unpublished works of art.

The owner of a picture, engraving, drawing, photograph, sculpture, or other work of fine art, has a right before publication to prevent any copy being made of it (*a*).

I should not have thought it necessary to set out at any length the authorities for this proposition had not the Act of 1862 (*b*), which was passed two years after the last of the cases cited as authorities, led off with the startling preamble: "Whereas by law, as now established, the authors of paintings, drawings, and photographs *have no copyright* in such their works," I think the explanation must clearly be that the phrase "copyright" is used in the restricted sense in which it had been used in the great case of *Jefferys* v. *Boosey* (*c*) (1854), namely, as defined at p. 954, as "the exclusive right of multiplying copies of a work already published." However, in a very recent case at *Nisi Prius*, before Day, J., that learned judge expressed considerable doubt as to the effect of the preamble. The present Mr. Justice Stephen also, in his admirable

(*a*) *Turner* v. *Robinson* (1860), 10 Ir. Ch. Rep. 121, 510; *Prince Albert* v. *Strange* (1849), 1 McN. & G. 25.

(*b*) 25 & 26 Vict. c. 68.

(*c*) 4 H. L. C. 815.

§ 190. Unpublished works of art.

digest of the law appended to the report of the Copyright Commission, when speaking of (*d*) "the assumption on which the Act is based, that apart from it there is no copyright in paintings, etc.," says: "This assumption is however not absolutely correct . . . It can hardly have been intended to abolish the common law principles as to unpublished compositions by this statute, but I am not sure that that is not its effect."

It is therefore desirable to go a little more in detail into the authority for the original proposition.

§ 191. Cases: *Prince Albert* v. *Strange*.

It is unnecessary to refer again to the cases in support of unpublished literary property, which however are based on the same principle. The case in which the question first arose is the celebrated one of *Prince Albert* v. *Strange* (*e*) (1849).

In that case the Queen and Prince Albert had been in the habit of making etchings and drawings for their own amusement, and of having copies struck off from the etched plates by workmen. They had no intention of publishing these works, and designed the copies for their private use and for presentation to a few intimate friends. The workman they employed struck off copies on his own account, and retained them; he afterwards parted with the collection he had thus formed, which finally came into the hands of Strange, who proposed to exhibit it to the public, and to publish a descriptive catalogue. Prince Albert applied for an injunction as to both the exhibition and the catalogue, which was granted by Vice-Chancellor Shadwell, whose order was affirmed on appeal by Lord Cottenham. The Lord

(*d*) C. C. Rep. p. 75, note.
(*e*) 2 De G. & Sm. 652: (on appeal), 1 McN. & G. 25.

Chancellor based his decision on the two grounds of property infringed, and breach of trust. He said (*f*), "The property of an author or composer of any work, whether of literature, art, or science, in such work, unpublished and kept for his private use or pleasure, cannot be disputed, after the many decisions in which that proposition has been affirmed or assumed, I say assumed, because in most of the cases which have been decided, the question was not as to the original right of the author, but whether what had taken place did not amount to a waiver of such right . . . a question which could not have arisen if there had not been such original right or property;" and, again, "the exclusive rights in the author of unpublished compositions, which depend entirely upon the common law right of property." The Lord Chancellor also laid stress on the breach of trust in the workman who printed the copies, in retaining some impressions for himself, and finally granted the injunction on both grounds, the right of property infringed, and the breach of trust.

§ 191. Cases: *Prince Albert* v. *Strange.*

The next case which may indirectly throw some light on the question is the case of *Jefferys* v. *Boosey* (*g*), in which, though the main question was as to whether English copyright could exist in the work of a foreign author, first published in England by his assignee, yet the Law Lords, after hearing the judges, were led to deal with the question of copyright at common law. And Lord Cranworth, the Lord Chancellor, at the beginning of his judgment, says (p. 954): "The right now in question is not the right to publish, or to abstain from publishing a work not yet published at all, *but*

§ 192. *Jefferys* v *Boosey* (1854).

(*f*) 1 McN. & G. 42.
(*g*) 4 H. L. C. 815.

§ 192. *Jefferys* v. *Boosey.*

the exclusive right of multiplying copies of a work already published." Copyright, *thus defined,* if not the creature, as I believe it to be, of our own statute law, is now entirely regulated by it. Lord Brougham again says (p. 962): "The right of the author before publication we may take to be unquestioned . . . But if he makes his composition public, can he retain the exclusive right which he had before?" Lord St. Leonards also holds (p. 977) "that no common law right to copyright exists after publication," and again (p. 979), "The common law does give a man who has composed a work a right to that composition, just as he had a right to any other part of his personal property; but the question of the right of excluding all the world from copying, and of himself claiming the exclusive right of for ever copying his own composition, *after he has published it to the world,* is a totally different thing."

All the *dicta* therefore in *Jefferys* v. *Boosey* are addressed to the proposition that copyright *after publication* rests entirely on the statute law; the common-law property before publication is unhesitatingly admitted, and nothing is said to qualify the direct decision in *Prince Albert* v. *Strange* (*h*).

§ 193. *Turner* v. *Robinson.*

And the later Irish case of *Turner* v. *Robinson* (*i*) (1860), as affirmed on appeal, while of most importance on the question of what constitutes publication, also fully confirms the common law right. The question in that case is not whether the right exists, but whether it has been waived or lost. The defendant's counsel commence their argument (p. 511) by the admission that the owner of a work has a right "to keep it secret." The Lord

(*h*) 1 McN. & G. 25.
(*i*) 10 Ir. Ch. 121, 510.

Chancellor confirms this, and remarks on the ambiguity of the word "copyright," as applicable both to the common law right of ownership before publication, and the statutory right of control after publication. § 193. *Turner* v. *Robinson.*

Down to 1862 therefore there are clear decisions of the highest authority for a common law "copyright" in unpublished artistic property; and the only authority to the contrary is the preamble of the statute of 1862 (*k*), "Whereas by law as now established, the authors of paintings, drawings, and photographs have no copyright in such their works." This is, as a statement of the existing law, untrue, unless "copyright" is used in the limited sense in which it was used in *Jefferys* v. *Boosey* and which was referred to in *Turner* v. *Robinson*, viz., the exclusive right to multiply copies of a work after publication. § 194. Statutes of 1862.

And it is submitted that the preamble must be clearly interpreted in that sense rather than in the broader sense, which would state incorrectly the result of three decisions of the highest authority within the previous thirteen years, and in effect reverse those decisions.

If so therefore the doubts of Mr. Justice Stephen and Mr. Justice Day are unfounded. The case before the latter learned judge was *Selligsen and Sommerfeld* v. *Legge and Judd & Co.*, a short report of which appears in the *Daily News* of the 23rd of June, 1883. An artist named Cowie had painted a picture of 'The Finding of the Body of the Prince Imperial,' and on March 28th, 1882, had assigned the copyright of the picture, together with the possession of the picture, for three years, to the plaintiffs, who were art publishers, § 195. Recent cases.

(*k*) 25 & 26 Vict. c. 68.

§ 195. Recent cases.

for the purpose of exhibition. The plaintiffs proposed to engrave the work, and to use the exhibition of the picture as a means of selling their engravings. The painter exhibited the picture to the Queen on the 10th of May, and soon after that it was exhibited in a gallery in London for the London season, admission being obtained by payment. There was apparently no express prohibition from copying the picture shewn to visitors. On July 13th the proprietor of the *Whitehall Review* published as a supplement to their journal a lithograph of the picture, made from a sketch supplied by the artist, and on July 17 the picture was registered at Stationers' Hall. The plaintiffs sued for damages for violation of their property in the unpublished picture, being unable to sue for penalties for violation of statutory copyright, owing to the publication complained of having preceded registration. The defendants contended that there was no property before registration (on the strength of the preamble of the Act of 1862); that the plaintiffs had published the picture; that if there was property before publication the right to prevent reproductions could not be separated from the property of the picture; and that the publication in the *Whitehall Review* was by the license of the plaintiffs. On this last point the jury found against the plaintiffs, thus avoiding any real argument of the legal points, but Mr. Justice Day however expressed an opinion against the plaintiffs so far as the case had gone, an opinion which it is respectfully suggested would have been modified on further consideration and argument. That property in unpublished works of art exists seems clear, and there seems no reason why the property in the work on the one hand, and the sole right to reproduce it with the consequent right of preventing others from reproducing it on the other hand,

§ 195. Recent cases.

may not be in different persons. Such a separation was admitted in the cases of *Duke of Queensberry* v. *Shebbeare* (*l*), and *Thompson* v. *Stanhope* (*m*), in each of which the property in the work, or a copy of it, was distinguished from a right to publish it, and it was held that the proprietor of the right to publish could restrain the proprietor of the manuscript from printing it. It is true that in each of these cases the proprietor of the right to publish was also the author, but it is submitted that the reversal of the relation makes no difference. Possibly where the proprietor of the right to publish is not the author, he can only exercise his right through the author, or by an action against the author, but the result is the same.

§ 196. Result.

In recapitulation therefore the author or proprietor of an unpublished work of art has by the common law of England the right to prevent any copy of such work being made or published without his consent.

§ 197. What is publication?

This right ceases on publication, after which the position of the author or proprietor is regulated entirely by the statute law. Before therefore dealing with the statutory provisions of the English law on the subject, we may consider the rather difficult question of what constitutes publication.

And, curiously enough, the English law is almost devoid of authority on the subject. Sir J. F. Stephen, in his Digest, says (*n*): "As to what amounts to a publication of a work of art, I know of no precise authority." This probably overlooks the Irish case of *Turner* v.

(*l*) 2 Eden, 329.
(*m*) Amb. 737.
(*n*) C. C. Rep. p. 90.

§ 197. What is publication?

Robinson (*o*), and there are also one or two scattered *dicta* on the subject, but the point is certainly by no means clear.

Turner v. *Robinson*.

Turner v. *Robinson* was decided on appeal in Ireland by the Lord Chancellor, the Master of the Rolls, and the Lord Justice of Appeal in 1860, two years before the English Act which gave copyright to paintings. The facts of the case were shortly these. In 1856, Henry Wallis painted a picture representing the 'Death of Chatterton,' and in the same year sold it to Egg; in 1859 Turner purchased from Egg "the sole right to engrave and publish an engraving of the picture," with possession of the picture for a certain time for the purpose of exhibiting it to obtain subscriptions for his engravings. While Turner was thus exhibiting it in Dublin, Robinson, the defendant, having seen the picture at the exhibition, arranged models to represent the picture in his studio, and from them obtained a stereoscopic photograph, which he offered for sale. Turner applied for an injunction to restrain the sale. There was no statutory copyright in pictures existing; the only ground therefore for the injunction must be at common law, and the defendant's counsel accepted the position that a common law right existed, but contended that it had been lost by publication. The sole question before the Court was whether the prior dealings with the picture constituted a publication, and these prior dealings were as follows:—

Alleged publications.

The picture had been exhibited by Wallis at the Royal Academy in 1856.

In the same year, by Wallis' permission, a wood engraving of the picture had been published in the 'National Magazine,' with a descriptive article.

(*o*) I. R. 10 Ch. 121, 510.

The picture had also been exhibited at the Manchester Exhibition in 1857, and by Turner in Dublin in 1859.

§ 197. What is publication?

With regard to the exhibition at the Academy and at Manchester, it appeared that, at each gallery, copying the pictures exhibited was absolutely forbidden, and with regard to the exhibition at Dublin, though there was no express rule as to copying, the plaintiff had published a general notice against photographic infringements of his pictures before the exhibition commenced.

These facts were held both by the Master of the Rolls and the Court of Appeal not to constitute such publication as divested the common-law copyright; they agreed that there had been in the case of the exhibitions limited or conditional publication, the condition being that the inspection by members of the public was not to be used by them for the purpose of reproducing copies of the picture; but they held that such a limited publication was not fatal to the plaintiff's rights. As to the wood engraving, the Master of the Rolls held that its publication could not affect the copyright in the picture, *though the artist or proprietor of the picture could not* sue if the engraving were pirated.

The judgments contain no very clear principle of publication; but it would seem that it must consist in unconditional exhibition of a work to the public, or such of the public as choose to come to inspect it. A *dictum* of Lord Langdale's, in *Dulglish* v. *Jarvie* (*p*), rather supports this by suggesting that it is a publication of a design for a shopkeeper to shew it to a customer. The Sculpture Act, 54 Geo. III. c. 56, gives copyright "from the first putting forth and publishing" the sculpture in question, which is explained by the Lord Chancellor in *Turner* v. *Robinson* as "the moment when the eye of the

(*p*) 2 McN. & G. 231, 235.

§ 197. What is publication?

public first rests upon it." Similarly copyright under the Engraving Acts dates from "first publication" of the engravings, which appear to mean exposure to the public, whether for sale or not. *Mayall* v. *Higbey* (*q*) (1862) seems to be an authority for the proposition that a loan of photographs, in order that engravings may be made from them and published, does not amount to publication of the photographs.

§ 198. General conclusions.

On the other hand, the Act of 1862 (*r*), giving statutory copyright to paintings and drawings, the term being for the life of the author and seven years after his death, throws considerable difficulties in the way of the above conception of publication as the divestitive fact of copyright at common law. The copyright which is created by that statute belongs to "the author of every original painting, drawing, or photograph," wherever made, and apparently quite independent of the question of publication. For the mere making of a painting, which is kept in privacy in the same way as a manuscript poem, cannot be called "publication" without great straining of language. We are reduced apparently to these two alternatives:—

1. Either there is a common law copyright in all works of art till publication; and a statutory copyright commencing in the case of sculptures, engraving, and prints on their publication, and in the case of drawings, paintings, and photographs on their making, thus giving in the latter case, as in the case of lectures, an overlapping statutory or common law right till publication.

2. Or there is in sculptures, engravings, and prints a common law copyright till their publication, when statu-

(*q*) 6 L. T. N. S. 362.
(*r*) 25 & 26 Vict. c. 68.

tory copyright commences; while in paintings, drawings, and photographs there is no common law copyright; there is a statutory copyright commencing on their making, but requiring their registration before it can be enforced. § 198. General conclusions.

It is with great diffidence submitted that the former is the more correct view of the law, as best agreeing with the principles of unpublished property, which undoubtedly applied, prior to the Act of 1862, to paintings, drawings, and photographs until their publication (*s*).

Section II.

English Law as to Engravings and Prints.

§ 199. Statutes.—§ 200. Subject-matter of right.—§ 201. Nature of right.—§ 202. Investitive facts.—§ 203. Transvestitive facts.—§ 204. Divestitive facts.—§ 205. Infringements of copyright.—§ 206. Copies in pen and pencil.—§ 207. Principle of infringement.—§ 208. Remedies for infringement.—§ 209. International copyright.—§ 210. Recommendations of Commission.

The statutes at present regulating copyright in engravings and similar works of art are— § 199. Statutes.

8 Geo. II. c. 13 (1735).
7 Geo. III. c. 38 (1766).
17 Geo. III. c. 57 (1777).
6 & 7 Will. IV. c. 59 (1836), and
15 & 16 Vict. c. 12, s. 14 (1852).

A "*print*" is defined as being "any historical print or prints, or any other print or prints of any portrait, conversation, landscape or architecture [map, chart or plan], or any other print or prints whatsoever" (*t*). It includes § 200. Subject matter of right.

(*s*) Questions of a similar nature came under discussion in the American cases of *Oertel* v. *Wood*, 40 How. Pr. N.Y. 10; and *Oertel* v. *Jacoby*, 44 How. Pr. N.Y. 179, cited by Drone, p. 287, note, in which contradictory decisions were given.

(*t*) 7 Geo. III. c. 38, s. 1.

§ 200. Subject matter of right.

"prints taken by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely (*u*).

It was decided in the case of *Stannard* v. *Lee* (*x*) by the Court of Appeal, reversing the decision of Bacon, V.C. (*y*), that maps being defined as "books" in the Act of 1842 (*z*), are no longer to be treated as works of art, but as literary works, and must therefore be registered under the Act of 1842. Bacon, V.C., expressed subsequently in *Stannard* v. *Harrison* (*a*) his dissent from that decision.

There is probably no copyright in obscene, blasphemous, seditious or libellous prints. (*Fores* v. *Johnes* (*b*).)

§ 201. Nature of the right.

Any person has the sole right or liberty of multiplying, by any mechanical or other process, copies of any print, which he has

(I.) Invented or designed, graved, etched or worked in mezzotinto or chiaro-oscuro.

(II.) Or from his own work, design or invention has caused or procured to be designed, &c.

(III.) Or which he has engraved or caused to be engraved, &c., from any picture, drawing, model or sculpture, whether ancient or modern (*c*).

Any process by which pictures or engravings may be imitated or copied may come within the express words the legislature have used (*d*). Thus the words include

(*u*) 15 & 16 Vict. c. 12, s. 14.
(*x*) 24 L. T. N. S. 459.
(*y*) 23 L. T. N. S. 306.
(*z*) 5 & 6 Vict. c. 45, s. 2.
(*a*) 24 L. T. N. S. 570.
(*b*) 4 Esp. 97.
(*c*) 8 Geo. II. c. 13, s. 1; 7 Geo. III. c. 38, ss. 1, 2; Stephen's Digest, § 22; C. C. Rep. p. 67.
(*d*) Kelly, C.B., in *Graves* v. *Ashford*, L. R. 2 C. P. 410, 421.

§ 201. Nature of the right.

the right of producing reduced photographic copies of an engraving (*e*).

Where it was proved that the plaintiff gave an engraver a rough sketch of a map, with directions as to its size and contents, and furnished him with information to be recorded on it from time to time, he was held entitled to the copyright in the engraving, as being one who from his own invention had caused it to be designed (*f*).

The right is a separable one; that is to say, the right of producing engravings "of one size" can be assigned, the right of producing all other sizes of prints remaining in the original proprietor (*g*).

Duration of right.

The duration of the right is for twenty-eight years from the day of first publication of the print (*h*).

§ 202. Investitive facts.

The *Investitive Fact* of copyright in engravings is publication of such a work as specified above.

To be the subject of copyright the print must be engraved, etched, drawn or designed in Great Britain. Mere publication in Great Britain will not suffice (*i*).

There is no limitation as to the nationality of the engraver or designer.

No formalities as to registration are required. The day of first publication, with the name of the proprietor, must be truly engraved on each plate and printed on each print (*k*).

Both the date and the name of the proprietor must appear on the plate and print, but it is sufficient if the

(*e*) *Gambart* v. *Ball*, 14 C. B. N. S. 306.
(*f*) *Stannard* v. *Harrison*, 24 L. T. N. S. 570.
(*g*) *Lucas* v. *Cooke*, L. R. 13 Ch. D. 872.
(*h*) 7 Geo. III. c. 38, s. 6.
(*i*) 17 Geo. III. c. 57, s. 1; *Page* v. *Townsend*, 5 Simons, 395.
(*k*) 8 Geo. II. c. 13, s. 1.

§ 202. Investitive facts.

proprietor be named; he need not also be described as "proprietor."

Thus, "Newton del. 1st May 1826, Gladwin sculp.," was held a compliance with the requirements of the Act (*l*); as was also, "London, published by Henry Graves & Company, May 1st 1861, Printsellers to the Queen, 6 Pall Mall" (*m*).

If the engravings are included as illustrations in a book, the book must be registered under the Act of 1842 (*n*), and the requirements as to name of proprietor and date of publication need not be complied with (*o*).

So also maps, charts and plans must be registered, and need not comply with the formalities of the Engraving Acts (*p*).

§ 203. Transvestitive facts.

Transvestitive Facts of Copyright. A licence to reproduce an engraving, to bind the proprietor, must be in writing, and signed by the proprietor, in the presence of and attested by two or more credible witnesses (*q*).

§ 204. Divestitive facts.

Divestitive Facts of Copyright:—

1. Waiver.
2. Expiration of the statutory term.

§ 205. Infringements of copyright.

Infringements of Right.

The question to be decided is whether the defendant's print is substantially a copy of the plaintiff's, and published without the plaintiff's consent (*r*); a copy has

(*l*) *Newton* v. *Cowie*, 4 Bing. 234.
(*m*) *Graves* v. *Ashford*, L. R. 2 C. P. 410.
(*n*) 5 & 6 Vict. c. 42.
(*o*) *Bogue* v. *Houlston*, 5 De G. & S. 267; *Maple* v. *Jun. Army and Navy Stores*, L. R. 21 Ch. D. 369.
(*p*) *Stannard* v. *Lee*, 24 L. T. N. S. 459, C.A.
(*q*) 17 Geo. III. c. 57.
(*r*) *Moore* v. *Clarke*, 9 M. & W. 692.

§ 205. Infringements of copyright.

been also defined as "that which comes so near the original as to give to every person seeing it the idea created by the original" (*s*). If the making of such a copy without licence is proved, it is immaterial whether the seller or maker knew that his print was pirated or not (*t*).

In the above statement these limitations must however be made. The object of the Acts is twofold:

(1.) The protection of the reputation of the engraver.

(2.) His protection against any invasion of his commercial property in the print.

The work complained of as an infringement must therefore be a copy, either exact or colourable, of the plaintiff's engraving, or of that part of the plaintiff's engraving which constitutes the real merit and labour of the engraver (*u*).

It is not therefore a piracy of an engraving to make another engraving from the original picture, though it may be a piracy of the picture (*x*).

Similarly it has been held that a Berlin wool pattern made from an engraving is not a violation of copyright in the engraving (*y*).

The exhibition of a larger coloured diorama made from a print does not infringe the copyright in the print (*z*).

In *Dicks* v. *Brooks* in the Court of Appeal, Lord Justice Baggallay expressed a doubt whether or not a chromo-lithograph was an infringement of a print; and Lord Justice Bramwell said: "I do not say that if this

(*s*) *West* v. *Francis*, 5 B. & Ald. 737.
(*t*) *West* v. *Francis* (*v.s.*); *Gambart* v. *Sumner*, 5 H. & N. 5.
(*u*) *Dicks* v. *Brooks*, L. R. 15 Ch. D. 22.
(*x*) *De Berenger* v. *Wheeble*, 2 Stark. N. P. C. 548.
(*y*) *Dicks* v. *Brooks*, L. R. 15 Ch. D. 22.
(*z*) *Martin* v. *Wright*, 6 Simons, 297.

§ 205. Infringements of copyright.

were an ordinary engraving with no picture in the case, a lithograph taken from it would not be a copy. I think that a photograph taken from it would be a copy."

§ 206. Copies in pen and pencil.

The cases are not very clear as to how far copying by pen or pencil is an infringement. Chief Justice Erle laid down the rule in *Gambart* v. *Ball* (*a*), as prohibiting any mode of copying or multiplication of copies which depreciates the commercial value of the engraving to its proprietor. The distinction therefore seems a question of degree. Several of the judges seem to have felt great difficulty as to the case of individual copies made, as it were, for private use. Lord Justice Baggallay in *Dicks* v. *Brooks* (*b*), said "the statutes cannot have been intended to apply to a lady copying a print or a part of a print upon a china plate, or to a person who for his own amusement makes an etching, drawing, or water colour sketch from an engraving;" and Willes, J., in *Gambart* v. *Ball* (*c*), "felt a difficulty as to copying by hand," and "was not disposed to concur, if it had been necessary, in the view we take of the statute, to hold that a copy made by pen or pencil would be an infringement;" while Byles, J., also suggested doubts as to the case of "a man's making and selling a pen and ink copy of a print," and "transferring the design to a carpet, or a piece of Berlin woolwork, or a porcelain table service," without solving the doubts he suggested.

The recent case of *Dicks* v. *Brooks* (*d*) has dealt with the last suggestion of Mr. Justice Byles, and it is submitted that the true line of distinction on the other

(*a*) 14 C. B. N. S. 306.
(*b*) L. R. 15 Ch. D. p. 36.
(*c*) 14 C. B. N. S. p. 318.
(*d*) L. R. 15 Ch. D. 22.

points is whether the copies, howsoever made, will compete commercially with the engraving by tending to lessen its sale. A skilful copyist in pen and ink or pencil might find a large market for his sketches, and it is submitted that if made for sale, or sold, they would be infringements of the copyright in the engraving of which they were copies. On the other hand, it would be ridiculous to hold that a young lady making one copy of an engraving for her own amusement was infringing copyright, although she might happen to sell her copy afterwards.

§ 206. Copies in pen and pencil.

The principle of infringement seems therefore to be that any unlicensed copy of an engraving which may affect the sale or commercial value of the print copied will be held an infringement of copyright; but that a reproduction of the design, which cannot be held either likely to affect the sale of the engraving or such as to reproduce the engraving, will not be actionable.

§ 207. Principle of infringement.

Copyright is therefore infringed by—

1. In any manner copying and selling, or causing to be copied and sold, a copyright print [provided that the copy is of the print, and is such as to affect its commercial value].

2. Importing or causing to be imported for sale any such print.

3. Publishing, selling, or otherwise disposing of or causing to be published, sold, &c., any such print (*e*).

If the consent of the owner of copyright is pleaded, it must be produced in writing, signed by him, and attested by two witnesses (*f*).

The assignee of copyright in a print is not compelled

(*e*) 8 Geo. II. c. 13; Stephen's Digest, § 37; C. C. Rep. 85.
(*f*) 17 Geo. III. c. 57.

§ 207. Principle of infringement.

to prove a *written* assignment, in order to recover damages against the infringer.

The sale of engravings printed surreptitiously from the proprietor's plate is not an infringement of copyright, but may probably be a breach of contract (*g*).

§ 208. Remedies for infringements.

Remedies for Infringements.

The proprietor of copyright has—

1. An action for damages against the offender (*h*).

Any member of the public has—

2. An action for penalties; viz., 5*s*. for each print found in the offender's possession, half to go to the Crown and half to the person suing for the penalty. The plate and prints are to be forfeited to the proprietor of the copyright, who shall destroy the same (*i*).

This penalty is payable per print, and not per parcel or set of prints (*k*).

The action for penalties must be brought within six months after the commission of the offence (*l*).

The penalties recoverable and copies liable to forfeiture under these Acts may be recovered in England or Ireland either by action or by summary procedure before two magistrates having jurisdiction where the party offending resides, and in Scotland as set out in the Act (*m*).

This mode of procedure is open to the two objections set out more fully hereafter, viz. (1) that it is very difficult to proceed in the "places of residence" of the

(*g*) *Murray* v. *Heath*, 1 B. & Ad. 804.
(*h*) 17 Geo. III. c. 57.
(*i*) 8 Geo. II. c. 13, s. 1; 7 Geo. III. c. 38, s. 5.
(*k*) *Ex parte Beal*, L. R. 3 Q. B. 387.
(*l*) 7 Geo. III. c. 38, s. 7.
(*m*) 25 & 26 Vict. c. 68, s. 8.

hawkers, who by selling piratical engravings and photographs are the chief instruments in infringements; and (2) that no power of search for, or seizure of piratical copies is given to any one, and the section therefore loses much of its effect. § 208. Remedies for infringements.

By 7 & 8 Vict. c. 12, ss. 2 and 4, the provisions of the English Acts as to engravings may be extended to engravings published abroad on such terms as the Crown may by order in Council determine, and engravings have been accordingly included in most of the conventions with foreign states. § 209. International copyright in engravings.

Besides the general recommendations as to uniformity of law in all branches of Fine Art, dealt with hereafter, the Commission specially recommend with regard to engravings:— § 210. Recommendation of the Copyright Commission as to engravings.

1. That the transfer of copyright in engravings should be on the same basis as that of photographs, *i.e.*, that the copyright in a print should belong to the owner of the plate from which it is printed, but that, in the case of engravings, &c., made on commission, no copies be sold or exhibited without the sanction of the person who ordered them (§§ 121, 122).

2. That engravings and prints be subject to compulsory registration, as in the case of books, *i.e.*, that no action shall be brought in respect of anything made or done before registration, or in respect of any dealings after registration, with anything so made or done before registration, unless registration has been effected within a month of publication (§§ 154, 159).

3. The general provisions giving power to search for and seize piratical copies are to be applied to engravings and prints.

SECTION III.

Paintings, Drawings, and Photographs.

§ 211. Statutes.—§ 212. Subject-matter of the right.—§ 213. Nature of the right.—§ 214. Investitive facts. Registration.—§ 215. Transvestitive facts. *Tuck* v. *Canton*.—§ 216. Divestitive facts. —§ 217. Infringements of the right.—§ 218. Remedies and penalties.

§ 211. Statutes.

STATUTORY copyright in paintings, drawings, and photographs was first given by an Act of 1862 (*n*), the preamble of which recited, that "by law as now established, the authors of paintings, drawings, and photographs have no copyright in such their works." The meaning of this has been already discussed (*o*), and it is submitted that it only refers to the sole right of multiplying copies after publication of the original work, as defined in *Jefferys* v. *Boosey* (*p*), and that copyright in common law probably exists until the publication of the work in question. It may be noticed also that this statute covers classes of works which stand on a slightly different footing; paintings and drawings are naturally classed with sculptures, as works of which the original has most value, while copies are either rare, or inadequately represent the original; photographs on the other hand naturally fall into the class of works where mechanical reproduction gives a large number of copies of almost equal value, and the original negative or plate is analogous to the type from which a book is printed.

§ 212. Subject matter of the right.

Subject-matter of the Right.—Copyright may exist in every original painting, drawing, and photograph which

(*n*) 25 & 26 Vict. *c.* 68.
(*o*) §§ 194, 196.
(*p*) 4 H. L. C. 815.

shall be or shall have been made anywhere by a British subject, or person resident within the dominions of the Crown, and which shall not have been sold or disposed of before the 29th July, 1862 (*q*). § 212. Subject-matter of the right.

The phrase "original photograph" is rather contradictory, as all photographs are, in one sense, "copies" of something, but it has been decided that there is copyright in a photograph taken from a picture (*Graves' case* (*r*)). Of course, if there is no copyright in the picture copied, a second photograph taken from it will not infringe the copyright of the first photograph, and will have copyright of its own.

It is submitted, that if pictures sold before the 29th July, 1862, have never been published, copyright at common law, at any rate, exists in them until publication.

Nature of the Right.—Copyright in a painting, drawing, or photograph is 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 in any size (*s*). § 213. Nature of the right.

It has been suggested that the right is merely *ipso genere*, *i.e.*, that, to use the words of Mr. Justice Blackburn, in the case of *Ex parte Beal* (*t*) "the enactment might merely mean" (to forbid) "the imitation of a painting by a painting, of a drawing by a drawing, and of a photograph by a photograph, and that a photograph of a drawing would not be within the meaning of the

(*q*) 25 & 26 Vict. c. 68, s. 1.
(*r*) L. R. 4 Q. B. 715.
(*s*) 25 & 26 Vict. c. 68, s. 1.
(*t*) L. R. 3 Q. B. 387, 394.

§ 213. Nature of the right.

Legislature." But the Court in that case unanimously rejected this in favour of the wider interpretation, making "reproduction of the design" the only thing necessary to constitute an infringement of the right. This, however, must be qualified by the doctrine of *Dicks* v. *Brooks* (*u*), to the effect that the reproduction must be such as either injures the reputation of the artist, or affects the commercial value of his work. But this point falls more naturally under the head of infringements of copyright.

The right is treated as personal or movable estate (*x*).

Duration of the right.

Copyright in paintings, drawings, or photographs, lasts for the natural life of the author, and seven years after his death, if the necessary conditions are complied with (*y*).

§ 214. Investitive facts.

The investitive facts of copyright in paintings, drawings, and photographs are—

(1.) Of the right;—the making of a work, the subject of copyright, by a British subject or a person resident within the British dominions (*z*).

Registration.

(2.) Of the remedy:—No action shall be sustainable, nor any penalty be recoverable in respect of anything done, before registration at Stationers' Hall of the work in respect of which copyright is claimed under the Act (*a*).

All subsequent assignments must also be registered, the entry containing—

(1.) Date of assignment.

(2.) Names of parties thereto.

(*u*) L. R. 15 Ch. D. 22.

(*x*) 25 & 26 Vict. c. 68, s. 3.

(*y*) *Ibid.* s. 1.

(*z*) *Ibid.* s. 1.

(*a*) *Ibid.* s. 4.

(3.) Name and place of abode of assignee.
(4.) Name and place of abode of author of work.
(5.) Short description of name and subject of work.
(6.) Optional, a sketch, outline, or photograph of such work.

§ 214. Investitive facts.

If the assignment of copyright sued under was registered before the act complained of, it is not necessary that the original copyright, or its previous assignments, if any, should have been registered. (*Graves' Case* (*b*)).

The person to sue for an infringement must be the proprietor when the infringement is committed. (*Dupuy* v. *Dilke* (*c*)).

Place of Abode.—It was decided in *Nottage* v. *Jackson* (*d*) that the place of business of art publishers may be for the purposes of registration their place of abode; the object of the information being to tell searchers in the register where the owner of the copyright is to be found.

Short Description of Name and Subject.—What is required here has been laid down by Mr. Justice Blackburn, in the case of *Ex parte Beal* (*e*), as follows: "I do not think that it is necessary to make the description so precise as the registration of a specification of a patent, in order that all may know what it is they are prohibited from copying; or such as to give information to persons who had never heard or known of the picture, what it was they were not to copy.... The object of the Legislature, as pointed out by the statute, is that there shall be such a description of the picture as to enable a person who has it before him to judge whether or not

(*b*) L. R. 4 Q. B. 715.
(*c*) W. N. 1879, p. 145.
(*d*) Weekly Notes, Aug. 11, 1883; L. T. paper, Aug. 11, 1883, pp. 274, 279.
(*e*) L. R. 3 Q. B. 387, 392.

§ 214. Investitive facts.

the registration applied to the picture he was about to copy. It will be sufficient to describe the subject by some conventional name, and the particulars of the subject need not be given in detail." For example, the titles: 'Ordered on Foreign Service,' representing an officer taking leave of a lady; 'My First Sermon,' representing a little child awake, sitting in a pew; and 'My Second Sermon,' representing the same child asleep, were held sufficient for registration, the name alone being used (*f*). Some doubt was expressed in the same case as to the sufficiency of the registration of the name only, of pictures entitled 'A Distinguished Member of the Royal Humane Society,' representing a dog; and 'A Piper and Pair of Nutcrackers,' representing a bullfinch and two squirrels; and though the point was raised subsequently in *Graves' case* (*g*), the case was decided on another issue.

Author of a Photograph.—The question as to the person answering this description was raised in the recent case of *Nottage* v. *Jackson* (*h*). The large photographic firms had been in the habit of registering the firm or the employer as the "author," and many thousands of photographs had been registered in this way. At last the question as to the sufficiency of such registration came before the Courts, and Mr. Justice Field held that such a registration was invalid, his ruling being affirmed by the Court of Appeal. All the judges rather shrank from the problem of finding the "author" of a photograph, though they were agreed that the photographers had not found him. It was suggested however by the

(*f*) *Ex parte Beal*, L. R. 3 Q. B. 387, 392.

(*g*) L. R. 4 Q. B. 715.

(*h*) L. T. paper, Aug. 11, 1883, pp. 274, 279; Weekly Notes, Aug. 11, 1883.

Master of the Rolls, that the person who is actually present when the photograph is taken, who superintends the arrangements, places the person to be photographed, and gives the necessary orders, is probably the "author" of the photograph. His name therefore should be registered as such author, and his life will furnish the term of copyright. This ridiculous result follows from the practice of draftsmen, condemned by the Master of the Rolls, of using words in a sense in which no one else uses them.

§ 214. *Investitive facts.*

The provisions of the Copyright Act (*i*) as to the manner of keeping the register of books, and its production in evidence, apply also to the register of works of art, the fee for making any entry therein is however reduced to one shilling.

Amongst these provisions is one (*j*), that if any person shall deem himself aggrieved by any entry in the register, he may apply to one of the Superior Courts for an order that such entry may be expunged or varied. "A person aggrieved" was defined by Mr. Justice Hannen (*k*) as "a person who can shew 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."

§ 215. *Transvestitive facts.*

The *Transvestitive Fact* of Copyright is:—

Assignment in writing, signed by the proprietor of the copyright, or his agent appointed in writing for that purpose. Such an assignment must be registered (*l*).

It has been however recently decided in the case of

(*i*) 5 & 6 Vict. c. 45, ss. 11–13; 25 & 26 Vict. c. 68, s. 5.
(*j*) 5 & 6 Vict. c. 45, s. 14.
(*k*) *Graves' Case*, L. R. 4 Q. B. 715, 724.
(*l*) 25 & 26 Vict. c. 68, s. 3, 4.

§ 215. Trans-vestitive facts.

Tuck v. *Canton* (*m*) that a document, said not to be an assignment of the entire copyright, but a licence to imitate the picture in chromo-lithography, or any form of colour-printing, does not need registration under the statute. This decision however seems open to very grave doubt. The document in question ran: "The sole right to reproduce the picture and chromos, or in any other form of colour printing, to be vested in you for the term of two years," and on certain other conditions —absolutely. This seems a clear assignment of part of the copyright; the Act therefore requires it to be in writing (§ 3); and the words of section 4 direct registration "of every assignment of every copyright to which any person shall be entitled under this Act. It is the 3rd section, therefore, which creates a copyright assignable at law, and it is submitted that without that section even a partial assignment could not take place so as to enable the assignee to sue in person; that therefore the right of the plaintiff in that case was a copyright "to which he was entitled under the Act," and that it therefore required registration under the 4th section. Moreover, the decision seems open to this further objection; the registered proprietor of copyright may assign all his copyright in parts, or give licences covering all methods of reproduction, so that no right remains in him; yet none of these will need be registered, and so the purpose of the Act may be defeated.

If *Tuck* v. *Canton* is rightly decided (*m*) a partial assignment or a license to reproduce in a certain manner, need not be registered.

To pass the copyright to the buyer when the original painting, or drawing, or negative of a photograph is first sold, disposed of, or made, or executed for or on behalf of

(*m*) 51 L. J. Q. B. 363.

any other person for a good or valuable consideration, there must be an express agreement in writing at or before such sale or disposition, signed by the seller or his agent (*n*). § 215. Transvestitive facts.

Similarly on such a sale, the vendor cannot reserve the copyright to himself, while parting with the picture, without an express reservation of the copyright in writing, signed at or before the sale, by the vendee, assignee, or person in whose behalf the painting is made (*n*).

The effect of this is, that when a picture, drawing, or negative of a photograph first changes hands without any agreement in writing as to the copyright, all copyright in the picture is lost, unless the picture is made for or on behalf of any other person for a good and valuable consideration; that is to say, is executed on commission, in which case the copyright belongs to the person giving the commission, unless there is an express reservation in writing of copyright by the artist.

§ 216. Divestitive facts.

The *Divestitive Facts* of Copyright are .—

1. Lapse of the term of copyright.
2. First sale of the work without a written agreement, as has just been explained.
3. Waiver of rights.

Infringements of Right.—As has been seen (*q*), the elements for infringement of the right, are—

1. A reproduction of the design by any means and in any size.
2. Interference by such reproduction with either (a) the artist's reputation, (b) or the commercial value of his work (*r*).

(*n*) 25 & 26 Vict. c. 68, § 1.
(*q*) § 207.
(*r*) *Ex parte Beal*, L. R. 3 Q. B. 289; *Dicks* v. *Brooks*, 15 Ch. D. 22.

§ 217. Infringements of the right.

This last condition requires that the reproduction should be made for sale, or used so as to compete with a copyright work; and also that it should be of such a nature as to be mistaken for or to imitate such a work. Thus, in *Dicks* v. *Brooks* (*s*) a Berlin-wool work pattern was held not to infringe the copyright in an engraving; and in *Martin* v. *Wright* (*t*) a dioramic exhibition in colours was held not to infringe copyright in an engraving.

It should be borne in mind that in the case of a picture which has been engraved or otherwise reproduced, there are two methods of procedure against infringements: one for infringement of the copyright in the painting, when the formalities of the Act of 1862 (*u*) must be complied with; the other, in compliance with the provisions of the Engraving Acts (*x*), for infringement of copyright in the engraving. To sustain this latter it must be proved that the piratical copy is made from the engraving; as a second engraving made direct from the picture does not infringe the copyright in the first engraving.

In the case of *Tuck* v. *Canton* (*y*), where the assignee of the right to reproduce a picture in chromo-lithography sued an infringer of his right, it was objected that his prints did not comply with the provisions of the Engraving Acts, and *Mathew, J.*, held that as the assignment was of the right of reproducing the picture, the plaintiff might sue for infringement of his right to reproduce the picture in a particular way, and so avoid the question as to his print. This appears to be inconsistent

(*s*) L. R. 15 Ch. D. 22.
(*t*) 6 Simons, 297.
(*u*) 25 & 26 Vict. c. 68.
(*x*) See § 208.
(*y*) 51 L. J Q. B. 363.

§ 217. Infringements of the right.

with the case of *Lucas* v. *Cooke* (*z*), in which case the partial assignment was of the right to produce an engraving in one size, while the infringement was a chromolithograph, and Fry, J., held that the plaintiff must shew that the infringement was derived from his engraving in order to succeed in his suit.

§ 218. Remedies and penalties.

I. Every one who, without the consent of the proprietor (*a*),

1. Repeats, copies, colourably imitates, or otherwise multiplies for sale, hire, or exhibition and distribution, or causes to be repeated, etc., any copyright work or the design thereof;

2. Knowing any copy to be unlawfully made, imports into the United Kingdom, sells, publishes, lets to hire, exhibits, distributes; or offers for sale, etc.; or causes or procures to be imported, etc., any such copy:—

Forfeits a sum of £10 per copy to the owner of the copyright.

All such copies and the negatives of piratical photographs are to be forfeited to the proprietor of the copyright.

The Custom House officers are authorized to seize all piratical copies imported without the consent of the owner of the copyright (*b*).

Every person who:

1. Fraudulently signs, or causes to be signed, any name, initial, or monogram, upon any painting, etc.;

2. Fraudulently sells or exhibits, or offers for sale, etc., any painting, etc., having thereon the signature of a person who did not execute such work;

3. Fraudulently utters or causes to be uttered any

(*z*) 13 Ch. D. 872.
(*a*) 25 & 26 Vict. c. 68, s. 6.
(*b*) *Ibid.* s. 10.

§ 218. Remedies and penalties.

colourable copy of any painting, etc., whether copyright or not, as the work of the author of the original;

4. Fraudulently makes or sells any altered copy of a painting, etc., which has left the possession of the author as an unaltered copy:—

Forfeits a sum not exceeding £10, or double the full price at which such fraudulent copies were offered for sale; such copies are forfeited to the person or his assigns or representatives to whom such work is fraudulently ascribed (*c*). To enable these penalties to be recovered, the person to whom the painting, etc., is fraudulently attributed must have been living within twenty years previous to the alleged infringement.

The case of *R.* v. *Closs* (*d*), shews that, apart from this statute, such signature would not be forgery, but might be a cheat at common law, if it was alleged that through the false token the prisoner sold the picture and obtained the money.

All penalties and forfeitures may be recovered:

In England and Ireland—

1. By action.
2. By summary proceeding before any two justices having jurisdiction where the party offending *resides.*

In Scotland as provided by the Act (*e*).

The proprietor may recover also, in addition to the penalties, damages and forfeiture of the copies by an action against the infringers (*f*).

These penalties are not mere debts, but in the nature of a punishment, so as to prevent them being barred by a composition deed with defendant's creditors (*g*).

(*c*) 25 & 26 Vict. c. 68, s. 7.
(*d*) 27 L. J. M. C. 54.
(*e*) *Ibid.* s. 8.
(*f*) *Ibid.* s. 11.
(*g*) *Ex parte Graves, In re Prince,* L. R. 3 Ch. 642.

There is no special time fixed within which actions must be brought, as is the case in the other Copyright Acts. § 218. Limitation of actions.

SECTION IV.

Copyright in Sculpture.

§ 219. Statutes.—§ 220. Nature of the right.—§ 221. Investitive facts. —§ 222. Infringements of the right.—§ 223. Remedies for infringements.—§ 224. Recommendations of the Commission.

STATUTORY Copyright in sculpture was first given in England in 1798 (*h*); and much strengthened in 1814 (*i*). The former Act has now been repealed (*j*), and the law on the question now rests on the Act of 1814 (*k*). As appeared in the evidence of Mr. Woolner before the Commission, the copyright in sculpture is of very small importance; only one case is reported under any of the Acts, and a few scattered *obiter dicta* are found in cases dealing with other classes of artistic property. The case in question is that of *Gahagan* v. *Cooper* (*l*) (1811), for piracy of a bust of C. J. Fox, but owing to the bad wording of the Act of 1798, the plaintiff failed, Lord Ellenborough saying, "These artists must again apply to Parliament for protection; and they had better not model the new Act themselves, as they seem to have done the old." § 219. Statutes.

Some fatality however seems to attend the draftsmanship of Acts relating to sculpture. The Act of 1814 (*m*) contains in its 1st clause a definition of works pro-

(*h*) 38 Geo. III. c. 71.
(*i*) 54 Geo. III. c. 56.
(*j*) 24 & 25 Vict. c. 101.
(*k*) The provisions as to Copyright in Sculpture contained in 13 & 14 Vict. c. 104, §§ 6, 7, have been repealed by the Patents Act, 1883, 46 & 47 Vict. c. 57, §§ 60, 113, as to all sculptures made after the 25th of August, 1883.
(*l*) 3 Camp. N. P. 111.
(*m*) 54 Geo. III. c. 56, s. 1.

§ 219. Statutes.

tected, of which Sir James Stephen says (*n*): "This section is a miracle of intricacy and verbosity. It also contains an 'of,' which may be a misprint, as it seems to make nonsense of several lines, and a most puzzling 'such' . . . The section forms a sentence of thirty-eight lines, the first half of which is repeated in the second half in so intricate a way that the draftsman appears to have lost himself in the middle of it. It admits of a doubt whether a cast from nature of an animal is the subject of copyright at all, and whether it must not be a cast from a cast from nature."

§ 220. Nature of right.

The subject matter of the right is any "new and original sculptures, models, copies, or casts" of a large number of things enumerated at great length in the Act. What a "new and original copy" may be is not very clear, but it is hardly worth while attempting to elucidate an Act on which no case has arisen in nearly seventy years.

Persons entitled to the right.

The persons entitled to the right are: Whoever makes or causes to be made any sculpture the subject-matter of copyright, or purchases such right from its proprietors by deed in writing signed by the proprietor in the presence of and attested by two witnesses (*o*).

Duration of the right.

The duration of the right is fourteen years from the first putting forth or publishing the sculpture in question (*p*), with a further term of fourteen years if the maker of the original sculpture shall be living at the end of the first fourteen years (*q*).

The investitive fact of copyright in sculpture is "Publication, or first putting forth." What constitutes

(*n*) C. C. Rep. p. 75, note.
(*o*) 54 Geo. III. c. 56, s. 1.
(*p*) *Ibid.* § 1.
(*q*) *Ibid.* § 6.

publication has been treated of in *Turner* v. *Robinson* (*r*) by Lord Chancellor Brady, where he says: "The *terminus a quo* from which the protection to works of sculptures commences, is the publication of the work, that is from the moment the eye of the public is allowed to rest on it. Many large works in this branch of art which decorate public squares and other places are of course so published; but there are others not designed for such a purpose, which could never be published in any other way than by exhibition; therefore I apprehend that these works of sculpture must be considered as 'published' by exhibition at such places as the Royal Academy and Manchester, so as to entitle them to the protection of the statutes from the date of such publication."

§ 221. Investitive fact.

Infringements of the right (*s*) are: Making or importing, or causing to be made or imported or exposed for sale, or otherwise disposed of, any pirated copy or cast of anything protected by the Act, whether by moulding, copying from, or imitating in any way the original, to the damage of the proprietor of the work so pirated.

§ 222. Infringements of the right.

The remedies for infringements (*t*) are (1)--an action for damages.

§ 223. Remedies.

(2) If the sculpture has been registered in accordance with § 6 of the Designs Act (*u*), and all copies published after registration have been marked with the word "registered" and the date of registration; the proprietor

(*r*) 11 Ir. Ch. 510, 516.
(*s*) 45 Geo. III. c. 56, § 3.
(*t*) *Ibid.* § 3.
(*u*) 13 & 14 Vict. c. 104, ss. 6, 7. This remedy, owing to the repeal of the Designs Act by the Patents Act, 1883, only applies to copyright sculptures published before 25th August, 1883.

§ 223. Remedies.

may for every infringement after registration recover a penalty not less than £5 or more than £30; either by action or by summary proceeding before two justices having jurisdiction where the offender resides. In which case the penalty inflicted shall be leviable by distress (*x*).

Limitations of actions.

All actions must be brought within six months of the discovery of the offence complained of (*y*).

It is a condition precedent of the right and remedy that the proprietor shall put his name and the date, (what date is not clear,) on every sculpture, cast, etc., before it shall be put forth or published (*z*).

§ 224. Recommendations of Commission.

The Copyright Commission, while assimilating the law as to sculpture to that of paintings and drawings, specially recommend—

(1.) That every form of copying sculpture, whether by sculpture, modelling, photography, drawing, engraving, or otherwise, should be included in the protection of copyright. A proviso is added to this that if the sculpture is only copied as an accessory in a scene, such copying shall not be an infringement (C. C. R. § 99).

(2.) That copyright should exist in copies or casts from the antique (C. C. R. § 100).

(3.) That the powers to search for and seize piratical copies of sculptures should be the same as those recommended for paintings and other works of fine art (C. C. R. § 180).

The Commission therefore proposes in effect the extension of copyright in sculpture; this recommendation is based mainly on the damage to the reputation of the sculptor by incorrect copying, and the money value of

(*x*) As provided in 5 & 6 Vict. c. 100, s. 8.
(*y*) 54 Geo. III. c. 56, s. 5.
(*z*) *Ibid.* § 1.

photographs of sculptures. I think it very doubtful however whether the entire absence of copyright in sculpture would harm anybody; the rights given are very little used at present, and copying, except by photographs, appears to be rare; while it is disputed whether copying by photographs does not benefit the artist as an advertisement more than it harms him by the pecuniary loss he may sustain.

§ 224. Recommendations of Commission.

Section V.

§ 225. General recommendations of Commission as to artistic copyright.

The recommendations of the Copyright Commission as to the Law of Artistic Copyright are as follows:—

1. That the law with respect to the different branches of artistic work should be as far as possible assimilated; when distinctions are made, they are between the processes of indefinite multiplication such as photographs and engravings, and those classes of works of individual value such as paintings, drawings, and sculpture (C. C. R. §§ 94, 118).

2. That the term of copyright for all works of fine art except photographs be the life of the artist and thirty years after his death. For photographs it is to be thirty years from publication, except when part of a book, when the term of literary copyright is to apply (C. C. R. § 95, § 119).

3. That it should be open to British subjects and aliens domiciled in the British dominions to obtain copyright in works wherever published (C. C. R. § 96).

4. That other aliens should only obtain national copyright for works first published in the British dominions (C. C. R. § 98).

5. That every form of copying sculpture, whether by sculpture, modelling, photography, drawing, engraving, or otherwise, should be considered an infringement of

§ 225. General recommendations of Commission as to artistic copyright.

copyright, unless the sculpture was merely an accessory in the copying of a scene (C. C. R. § 99).

6. That copies of non-copyright statues should be susceptible of copyright (C. C. R. § 100).

7. It being found impossible to distinguish between portraits and other pictures, or to decide what constitutes a work executed on commission, the Commission recommend that in the absence of a written agreement to the contrary the copyright in a picture or drawing (§ 117) should follow the ownership of the picture, belonging to the purchaser, or person for whom the picture is made (C. C. R. §§ 108–110, 115).

8. That the copyright in engravings or photographs should belong to the owner of the plate or negative, but in the case of works executed on commission no work should be exhibited or sold without the sanction of the person who ordered them (C. C. R. §§ 121, 122).

9. That, if he has not the power at present, an artist be empowered to sell his sketches and studies for a finished picture without infringing the copyright in the picture.

10. With regard to the registration of paintings and drawings, that it be optional so long as the property in the picture, and the copyright, are vested in the same person, but that if they are separated, registration should be compulsory.

11. That in these cases the register should contain :—

(a.) The date of the agreement separating copyright.

(b.) Names of parties thereto.

(c.) Names and places of abode of artist and proprietor of copyright.

(d.) Description of nature and subject of work, and if described, a sketch (C. C. R. §§ 151).

12. That registration of engravings, prints, and photographs be compulsory (C. C. R. § 159).

13. The Commission, while wishing to strengthen the power to seize piratical copies, do not feel able to recommend that a magistrate should have power to issue a search warrant for houses on evidence of reasonable cause to suspect the existence of piratical copies therein (C. C. R. § 175).

§ 225. General recommendation of Commission as to artistic copyright.

14. They recommend that power be given to seize piratical copies on the persons of hawkers, &c., by peace officers without warrant, acting under the orders and responsibility of the proprietor of copyright or his agent (C. C. R. § 178).

It may be useful here to give some account of the provisions of the Bill to codify and amend the Law of Artistic Copyright, prepared by a specially appointed Committee of the Society for the Amendment of the Law, and introduced into the House of Commons by Mr. G. W. Hastings, M.P.

§ 226. Artistic Copyright Bill of 1883, proposals of.

While it follows in many points the recommendations of the Commission, it yet leans strongly to the artists' view of the question. It has the great merit of proposing to repeal the six previous Acts dealing with the question, and to furnish in one statute of thirty clauses the whole law of the subject. All kinds of works of art are as far as possible treated similarly, one broad distinction being made between mechanical reproductions, as engravings and photographs, and valuable originals, as paintings, drawings, and sculptures.

The Bill is to apply to all works of fine art executed or first published after the passing of the Act (§ 4, s. 3).

I. With regard to *engravings and photographs*:—

The Bill proposes a copyright of fifty years dating from the first day of the calendar month in which they shall be published (§§ 5, 9).

§ 226. Artistic Copyright Bill of 1883, proposals of.

"Publication" is to mean the first act of offering for sale or of delivering to a purchaser, or advertising or exposing as ready for sale to the public, or for delivery to a purchaser, any copy of a work, or delivering at Stationers' Hall a written request for registration (§ 3).

The copyright shall vest in any person being a British subject or domiciled in the United Kingdom at time of first publication, on his :—

(*a.*) Executing or causing to be executed from his original design an engraving (§ 4, s. 1).

(*b.*) Executing an engraving from the design of another, without infringing any copyright, if not ordered or employed to do so (§ 4, s. 2).

(*c.*) Employing another to execute an engraving, which does not infringe copyright.

(*d.*) Making a photograph or a negative from which a photograph is first published after the passing of the Act (§ 9).

(*e.*) Ordering a photographic copy to be made of a work of fine art in which he is the owner of the copyright, when the copyright shall belong to him, and not to the photographer (§ 9).

(*f.*) Employing others as paid assistants to take or assist in taking engravings or photographs (when the copyright shall belong to him and not to the assistants) (§ 11) (*a*).

When a photographic portrait is executed on commission, copies shall not be sold or exhibited without the consent in writing of the commissioner, and powers of search and seizure are given to enforce the clauses (§ 10.)

There shall be no copyright in an engraving of an engraving (§ 4. s. 2).

II. As to *paintings, drawings and sculpture,* the term of copyright shall be the life of the person to whom

(*a*) This clause is prophetic of the decision in *Nottage* v. *Jackson.*

copyright in them is given, and thirty years after his death (§ 5). § 226. Artistic Copyright Bill of 1883, proposals of.

Copyright, "being the sole right of copying, reproducing, repeating, multiplying copies of the work, and of the design thereof of any size, and either in the same material or by the same kind of art in which such work shall have been first executed, or in other form or material, or by any other kind of art in which such work shall have been first executed, or in any other form or material or by any other kind of art" (§ 4, s. 1), is given to every person, being a British subject, or domiciled in the United Kingdom either at the time of execution or first sale of the work:

(a.) Who shall execute or cause to be executed a work of *fine* art (§ 4, s. 1).

(b.) Who shall execute a work of fine art from the design of another, without infringing copyright, unless employed to do so by the author of the design (§ 4, s. 2).

(c.) Who shall employ others as paid assistants to execute or make any work of fine art (when the copyright shall belong to him *and not to the* assistants) (§ 11).

This copyright is to commence at the execution of the work, or its sale, if being executed before the passing of the Act, or out of the British dominions, it is first sold in them after the coming into operation of the Act (§ 4, ss. 1, 3).

The painter of a portrait on commission shall not be entitled to repeat the portrait in any way without the consent of the owner for the time being of the painting (§ 6).

The artist when retaining the copyright of a picture he has sold shall not be entitled to make or sell any

§ 226. Artistic Copyright Bill of 1883, proposals of.

replica, or copy in the same material, but shall be entitled to sell or make use of his sketches, models, &c., used in making the original work (§§ 7, 8).

III. *General provisions of the Act.*

Copies may be made direct from a non-copyright work without infringing copyright in copies previously made (§ 12).

A copyright work may be copied as part of a scene, if it is accessory and not principal (§ 13).

All assignments of copyright and licences to copy must be in writing, signed by the owner of copyright or his agent appointed in writing (§ 14) (*b*).

Penalties.

Any person—

(a.) Copying in any manner without the written consent of the owner, a work of fine art or the design thereof.

(b.) Selling, importing, exporting, exhibiting, distributing, or causing to be sold any such copy, knowing or having reasonable cause for believing such copy to be an infringement, unless he is the owner or has the written consent of the owner (§ 15), is liable to a penalty of not exceeding £20, and double the full price at which these copies are offered for sale, to go to the owner.

This penalty is recoverable either by action or by summary jurisdiction before two justices.

The owner may also—

(a.) Recover damages and obtain an injunction.

(b.) Obtain a penalty of £5 by summary jurisdiction.

For offence (b) above, although the infringement is not *knowing*; provided it is not with the written consent of the proprietor (§ 16).

(*b*) To meet the decision in *Tuck* v. *Canton*, 51 L. J. Q. B. 363.

§ 226. Artistic Copyright Bill of 1883, proposals of.

All copies and the plates, &c., from which such copies are taken shall be the property of the owner of the copyright, and may be recovered by him (§ 17).

On proof by evidence of one credible witness before two justices of the peace, &c., summarily, that there is reasonable cause to suspect that any one has in possession piratical copies or falsely signed works of art (s. 22), a search warrant, with power to enter houses and seize such copies, may be issued (§ 18) (*c*).

Piratical copies may be seized without warrant elsewhere than at the possessor's own house by any peace officer, at the request and risk of the owner of the copyright or his agent, and adjudicated upon by a court of summary jurisdiction (*d*).

The owners of works of art who do not own the copyright, may nevertheless obtain an injunction against piratical infringements, and the seizure of all piratical copies and means for their manufacture (§ 20).

The provisions as to fraudulent signatures and copies are practically the same as in the existing law, with an increase of penalties and more minuteness of definition (§ 21).

Procedure generally is summary throughout the United Kingdom (§§ 23–27). The Act is extended to the Channel Islands, thus extirpating a nest of artistic piracy (§§ 1, s. 3; 27).

Registration.

All copyrights in engravings and photographs, and all assignments and licences of such copyrights, shall be entered at Stationers' Hall, in forms prescribed (§ 28, ss. 1, 2).

No legal proceedings shall be taken by the owner or licensee till the copyright or licence is registered. If it

(*c*) This proposal is disapproved of by the Copyright Commission.
(*d*) This proposal is approved of by the Copyright Commission.

§ 226. Artistic Copyright Bill of 1883, proposals of.

is not registered before the last day of the calendar month following the month in which it is published, no legal proceedings shall be taken in respect of any copy made before registration, even though dealt with by sale, &c., after registration (§ 28, s. 3).

Copyrights in paintings and sculpture, and assignments and licences thereof, may be registered at Stationers' Hall, if the owners so desire. No penalty shall follow non-registration (§ 29).

§ 227. Laws of other countries as to artistic copyright.

Foreign countries (*e*) usually either deal with artistic and literary copyright in the same law, as is done by the United States, Switzerland, Spain, and Austria, or, while using separate statutes, yet make but slight differences in their treatment of the subject. The tendency is to give the artist full protection, the term of copyright being usually the same as for books, but in some features the laws are more favourable to the public than the English law. Thus Russia, Norway, Austria and Germany allow sculptures to be made from paintings, or paintings from sculptures, without infringing copyright; Austria requires that the artist, to obtain copyright in his work, must expressly reserve the right at the time of publication, and must exercise it within two years of first publication. Norway and other countries allow reproductions of a work of art, as illustrations of a literary work. In some matters the artist is more favoured. Thus Germany and Norway provide that the artist shall retain the copyright on the sale of a work of art without special agreement. Portugal, on the other hand, provides that it shall pass to the purchaser. Italy gives absolute monopoly copyright for ten years, after which, though reproduction by the same method is forbidden,

(*e*) Copinger, 500–600 *passim*.

§ 227. Laws of other countries as to artistic copyright.

it may take place by different methods, as by engraving a picture, or by making a drawing of a statue. The usage varies as to the requirements of registration and deposit of copies; Germany, Spain and Russia require registration, but no deposit; France, deposit of engravings; Italy, the deposit of three copies, which may be photographs; while Portugal exacts six copies of engravings and drawings, two of sculptures and paintings; Austria and the Scandinavian States require neither registration nor deposit; the United States, that before publication a description of the painting or work of fine art shall be deposited with the Librarian of Congress, and a photograph of the actual work within ten days of the publication.

It should be added that most of the nations which specially reserve copyright to the artist, make an exception in the case of portraits made to order, in which the right cannot be exercised without the consent of the person giving the commission.

CHAPTER X.

COLONIAL COPYRIGHT.

§ 228. History and present position of Colonial Copyright.—§ 229. Recommendations of the Commission.—§ 230. Summary of the recommendations of the Commission.—§ 231. Foreign and Colonial reprints.—§ 232. Result.

History and present position of colonial copyright.

§ 228. ALTHOUGH the relations of the English law of Copyright to special colonial laws, and the position of colonial authors and publishers, have only as yet been brought into prominence in practice with regard to Canada, questions of importance must sooner or later arise with regard to all the colonies, and must therefore be treated generally (*a*).

Legislation on the subject at present has the following results. The Imperial Act of 1842, in conjunction with the decision of the House of Lords in *Routledge* v. *Low* (*b*), provides that Imperial Copyright can only be secured by publication in the United Kingdom, but, when secured, extends over the whole of the British dominions. A colonial author publishing in the colony, if there is any colonial law of copyright, obtains the copyright provided by that law, which only extends over the colony of publication. If there is no colonial law, he has no protection. This naturally was, and still is a great grievance to the colonial author and publisher. But further, the

(*a*) See generally C. C. Rep. §§ 187–201; C. C. Ev. qq. 5345–5387, 5800–5841.

(*b*) L. R. 3 Eng. & Ir. Ap. 100

§ 228. History and present position of colonial copyright.

colonial public suffered from the unsuitable or insufficient supply of English copyright works. The scattered population of an infant colony, lacking the distributive organizations of advanced civilization, were unable to purchase the high-priced editions which the mechanism of circulating libraries enabled English authors and publishers to issue. Yet colonial publishers were debarred from printing cheap and suitable editions of English works unless the author's consent were obtained, and were prevented from importing the cheap foreign reprints which other countries, especially the United States and Germany, provided. English publishers naturally did not consider it worth while to publish a cheap colonial edition, whose import into the United Kingdom might spoil their English market.

The special pressure of the North American colonies on these grounds led in 1847 to the passing of the *Foreign Reprints Act* (*c*), which enabled the Crown to suspend the Act of 1842 so as to admit foreign reprints into particular colonies, if proper provision were made for securing remuneration to the authors of these reprinted works, by collecting a duty or royalty on their import. Though this Act was passed to meet the special case of Canada, nineteen colonies have under it obtained the benefit of special Orders in Council, by making what were supposed to be suitable arrangements for the protection of British authors. From 1866 to 1876 (*d*) Canada paid to the British Government under this Act the sum of £1084 13*s*. 3½*d*., the remaining eighteen colonies only contributing £70 19*s*. 11*d*., and seven of them paying nothing at all. It is admitted that the measures for protection are absolutely inefficient, and

(*c*) 10 & 11 Vict. c. 95.
(*d*) C. C. Rep. § 193.

§ 228. History and present position of colonial copyright.

that large numbers of reprints are smuggled in without paying duty.

The decision in *Routledge* v. *Low* (*e*) in 1868 called attention to the unsatisfactory position of colonial authors and publishers, and the Canadian Government in 1869 proposed that Canadian publishers should be allowed to reprint the works of English authors without their consent, on paying them a royalty of 12½ per cent. on the published price. After much discussion however this proposal fell to the ground, and in 1875 the Canadian Legislature passed a Copyright Act giving power to any person domiciled either in Canada or any part of the British dominions, or in any country having a copyright treaty with Great Britain, to obtain copyright in Canada for twenty-eight years, with a second term of fourteen years by either publication or republication of his work in Canada. This colonial copyright was concurrent, but not co-terminous with the imperial right. Under the Act, up to November 1876, thirty-one works of British authors were published with their consent in Canada, at a price not only far lower than that of the English copyright edition, but also lower than that of the competing reprints from the United States, which were thus practically excluded from Canada.

In consequence of doubts as to the effect of the Imperial Act of 1842 on the Canadian Act (*f*), a special English Act in 1878 gave power to her Majesty to assent to the Canadian Act; and, a question having arisen as to whether these Canadian reprints should be allowed to enter the United Kingdom, a clause was added prohibiting such foreign imports. Such is the present state of the matter, the Canadian question being complicated

(*e*) L. R. 3 Eng. & Ir. Ap. 100.
(*f*) 38 & 39 Vict. *c.* 53.

by the proximity of the United States, and the consequent intermixture in discussion of the "American question." India has already a Copyright Act, containing similar provisions to those of the English Act of 1842; and the question will become of great importance to all the colonies as their literary civilization increases.

§ 228. History and present position of colonial copyright.

The Commission recommend a series of measures which, if adopted, will have the effect of greatly improving the position both of colonial authors and publishers, and of the colonial public. The British reader will at any rate be no worse off, and it is a matter of great debate whether his position would not be improved thereby.

§ 229. Recommendations of Commission.

With regard to works published in the British dominions and outside any particular colony, the Commission recommend:—

1. (*g*) That a certain time be allowed to the author or owner of such work in which either (a) by republication of his work in such colony; or (b) by importation of copies of his work, he may provide for the colony a supply of his work, *suitable in price, and "sufficient for general sale and circulation."*

Note.—Though the Commission do not expressly deal with the question of suitability of price, yet, taken in connection with subsequent provisions, regulation of price must be implied. For the supply of a high-priced English edition would be utterly unsuitable for the majority of the colonies, and, in the words of the Commission, "insufficient for general sale and circulation" therein.

2. If the owner or author provides such a "suitable

(*g*) C. C. Rep. § 207.

§ 228. Recommendations of Commission.

supply," the Commission recommend that he be protected both against colonial republication and foreign reprints.

3. But should the author fail to provide this suitable *supply within the specified time, the Commission recommend* that the Colonial Government be empowered to grant to others licences to republish his work in the colony, subject to payment of a specified percentage on the retail price as royalty to the author or owner of the copyright.

4. Should such republication by licence take place, foreign reprints are to be excluded.

5. Should neither the author nor colonial licensees furnish a suitable supply, the Commission recommend that foreign reprints be admitted as now, greater safeguards being obtained for the author's royalty returns (*h*).

6. The Commission further recommend that first publication in any part of the British empire should vest copyright over the whole of the British dominions (*i*).

7. As regards the spread of licensed reprints of copyright works, colonial reprints are not to be imported into the United Kingdom, and *ex converso* English reprints of colonial works are not to be imported into the colony of first publication without the author's consent.

The Report is silent as to the importation of colonial reprints of English works into some other colony than the one where the licence for them was obtained; apparently they should be treated as foreign reprints, but exempted from payment of duty, the royalty on the original licence being the author's remuneration.

I presume, though the Report does not say so, that the Commission recommend the introduction of the royalty

(*h*) C. C. Rep. § 215.
(*i*) C. C. Rep. § 58.

system into the United Kingdom, so far as regards colonial works of which the author has not provided a suitable supply in a reasonable time in England; otherwise the term "English reprints" in the seventh recommendation can only refer to reprints by the consent of the author, a limitation disadvantageous to the English public.

§ 229. Recommendations of Commission.

Briefly, therefore, the results of the Commission's scheme are these:—*The end* for each colony and country is to secure a supply of every work suitable and sufficient for general sale and circulation in such country. This end is to be obtained—

§ 230. Summary of the Commission's recommendations.

1. By direct supply by the author.
2. Failing that, by colonial republication on licence, protected from competition, and paying the author a royalty.
3. Failing these two, by importation of foreign reprints, also paying a royalty.

The recommendation of the Commission which has excited most controversy is that relating to the exclusion of foreign and colonial reprints of English works from the United Kingdom, though published abroad by the author or with his consent.

§ 231. Foreign and colonial reprints.

It is said on the one hand that it is unfair to the public to allow an author to sell at a high price without competition in England, while he publishes at a much lower price in the colonies. The colonial price proves the English price too high. On the other hand, authors and publishers urge that the English high price is necessary to protect capital invested; and that colonial low prices are possible because only successful works are reprinted, and reprinted at a cost of production much

§ 231. Foreign and colonial reprints.

smaller, because from an already printed copy; because, also, colonial editions are treated as subsidiary and unimportant.

I think that the recommendations of the Commission should be upheld. English publishers defeat their own end by fixing their English prices too high, and they have always expenses of production, not incurred in colonial reprints. English prices may therefore fairly be left to the operation of ordinary economical laws, without competition from foreign reprints produced under more favourable circumstances. For we have to consider not only the publisher's production of a particular work, but also his continuance in the trade of publisher. He must recoup himself for unsuccessful ventures by successful ones; it is not for the State to interfere with his successful productions and thus destroy the possibility of his continuing to produce.

§ 232. Result.

The system of colonial copyright recommended by the Commission thus resolves itself into an approximation to the ideal system. The author has copyright in the colony of production, and is protected during a reasonable time all over her Majesty's dominions. If at the expiration of that time he has taken no steps to provide any section of the empire with a suitable supply of his works, it is open to others to do so, on paying him remuneration for value received. Failing this further supply, the empire must look to foreigners, taxing them in like manner for the benefit of the author. The primary object throughout is the supply of the public with good books; as a means to this, due remuneration is secured to the author, but he is not allowed to hinder the public from securing his works at a reasonable price.

CHAPTER XI.

INTERNATIONAL COPYRIGHT.

§ 233. Introduction.—§ 234. English law.—§ 235. Should the royalty system be introduced in International Copyright?—§ 236. Criticisms of the existing law.—§ 237. Recommendations of the Commission.— § 238. The American question.—§ 239. Present position of the United States on the question.—§ 240. Results of the attitude of the United States.—§ 241. The "Courtesy" of the American book-trade.—§ 242. Parties in the United States on the copyright question.—§ 243. Results.

§ 233. Introduction.

BEFORE proceeding to the English solution of the problem, we may briefly recapitulate the conclusions arrived at in an earlier part of this essay (*a*).

Intellectual productions which do not conform to the conditions required by the State as grounds for affording protection, have no copyright. One of these conditions has usually been, that either first publication shall take place within the territory of the State, or one of its subjects shall be the author. In days when nations were more isolated, and intellectual communication less rapid, one of the chief aims of a State was to secure to its subjects the first benefit of literary labour. It also protected the works of its own subjects even if first published abroad, because in their case there was some security for further publication at home.

Greater freedom of intercourse in the republic of letters made the value of foreign literary labour more evident, and it became desirable to offer inducements for its speedy communication to a public more extensive

(*a*) See § 16.

§ 233. Introduction.

than that of its State of production. Publications unauthorized by the foreign owner or author effected such communication, but offered no inducement to foreign authors to help in spreading their work; and when the principle, "that the intellectual labourer is worthy of his hire," had been grasped at home, it was seen to be no less applicable abroad. No State however took the course of offering local copyright to all works wherever published, without compliance on their part with conditions prescribed by the local law. France by the decree of 1852 gave copyright to foreign works, wherever published, on their authors depositing in France the two copies required by the local law, and the new Belgian code adopts nearly the same principle. But the majority of European States, England, Germany, the Scandinavian States, and Switzerland adopt the principle of reciprocity, and give local copyright to works published in foreign States if those States afford reciprocal advantages to works published at home. Spain adopts a modified reciprocity, and gives protection on fulfilling certain conditions, if the law of the State of production recognises literary property. France and Belgium also dispense even with their local formalities in the case of States securing similar advantages by convention.

At the present time therefore international recognition of copyright on conditions is general throughout Europe. The problem of non-recognition of International Copyright by a State which makes great use of the literary property to which it refuses protection, arises only in the case of the United States, and there the local features of the question demand separate study.

§ 234. English law.

International Copyright in England at present rests on an Act of 1844 (*b*), which enables her Majesty to grant,

(*b*) 7 & 8 Vict. c. 12.

by Order in Council, copyright to works first published in a particular foreign country :— § 234. English law.

1. If due protection has been secured by such country for similar works of British subjects first published in England (*c*).

2. For a period to be named in the order, not exceeding the English term for similar works (*d*).

3. If the following conditions as to registration and deposit of copies are fulfilled :—

I. The following schedule, taken from Sir J. F. Stephen's Digest (*e*), will shew the formalities of REGISTRATION required in International Copyright :—

The register must shew, if the work is—

1. A book *or translation.*	The title . .	Name and place of abode of author (unless the book is anonymous, 7 & 8 Vict. c. 12, s. 7).	Name and place of abode of proprietor of copyright.	Time and place of first publication.
2. A dramatic piece or musical composition, whether printed or in manuscript.	Do. . . .	Do. . . .	Do. . .	Do., and time and place of first representation or performance.
3. Engraving or print.	Do. . . .	Do. of inventor, designer, or engraver.	Do. . .	Do. of first publication in the foreign country.
4. Sculpture .	Descriptive title	Do. of maker .	Do. . .	Do.
5. Paintings, drawing, or photograph.	Short description of nature and subject of work, and a sketch outline or photograph thereof, if the person registering pleases.	Name and abode of author.	Do. . .	*Nil.*

(*c*) 7 & 8 Vict. c. 12, § 14.
(*d*) *Ibid.* § 2.
(*e*) C. C. Rep. p. 87, note.

§ 234. English law.

II. *Deposit of copies.* A copy of the first edition, and of any subsequent edition containing additions or alterations, must be deposited at Stationers' Hall within a time specified in each Order in Council.

Foreign authors are however exempt from the English duty of presentation to libraries (*f*).

And no copyright (*g*) can be secured in the United Kingdom in any work published outside her Majesty's dominions except under this Act. Any suggestion of common law copyright is thus specially negatived; and this clause was the ground of the dramatic decisions in *Boucicault* v. *Delafield* (*h*) and *Boucicault* v. *Chatterton* (*i*), referred to elsewhere.

Nothing in the Act however was to prevent the publication of translations of any book whose author might be entitled to the benefit of the Act. As the English nation obtains most of its knowledge of foreign works through translations, this reservation deprived the grant to foreign authors of much of its value. The negotiation of the Convention with France in 1852 made this practically felt, and accordingly an Act of 1852 (*j*) repealed the former clause, and provided that the Order in Council might give protection to authorized translations of a foreign work for a period not exceeding five years, on certain conditions. This protection consisted of the right to prevent other translations being published. The conditions which the author was required to fulfil, were briefly (*k*):—

(*f*) 7 & 8 Vict. c. 12, §§ 3, 6.
(*g*) *Ibid.* § 19.
(*h*) 1 Hem. & Miller, 597.
(*i*) L. R. 5 Ch. D. 267. See p. 99.
(*j*) 15 & 16 Vict. c. 12, ss. 1, 2, 3.
(*k*) *Ibid.* § 8.

(1.) Conditions as to registration and deposit of the original work as above. § 234. English law.

(2.) That the author should notify in the original work his reservation of the right of translation.

(3.) That the author should publish a part or the whole of his translation within one year after fulfilment of condition 1, and the complete translation within three years (*l*).

(4.) Conditions as to registration and deposit of the translation as above.

In the dramatic case of *Wood* v. *Chart* (*m*) it was decided that a "translation" under this Act must be literal and full; an abridged and adapted work was held not to fulfil the conditions.

The position of foreign authors with whose country England has a copyright convention is therefore this:—

1. By registration and deposit in England of the original work, they obtain copyright in it for the term specified in the convention. This being fulfilled,

2. By publication of an authorized translation within three years of such deposit, followed by registration and deposit of such translation, they obtain the right to prevent other translations being issued for a term of five years from such publication.

3. At the expiration of such five years, the foreign author still has copyright in his translation, but independent translations may be made from the original work.

England has concluded a large number of conventions under these Acts; and as France has treaties with thirty-seven States, and other countries with smaller members, a network of International Copyright exists over Europe. The general result is, that if an author in

(*l*) Three months, in the case of a dramatic piece
(*m*) L. R. 10 Eq. 193.

§ 234. English law.

an European State wishes to secure protection and the fruits of his labour in any other European State, he can do so by complying with certain not very onerous conditions; if he does not choose to do so, it is open to anyone to supply that State with his work. In some States, as in England, he must provide his work in a form accessible to the inhabitants, *i.e.*, in their native tongue, within a certain time, or else others may do so without making the author any return.

§ 235. Should the royalty system be introduced into international copyright?

The aim of International Copyright, as explained elsewhere, is that the public shall have all published works placed within their reach. The first chance of doing this should be given to the author, and he should be allowed a reasonable time to effect the communication. *If he fails to do so, others should be allowed to publish* his work on condition of paying him a royalty for value received.

This last point appears to be absent in all International Copyright conventions; it is however recommended by the Copyright Commission for adoption in Colonial Copyright. Whether it should be adopted or not must depend on the circumstances of the particular community. Each State wishes to secure good and cheap books for its subjects by securing a reward to their author, and all States should give the author the first chance of communicating his work to them, and directly securing his reward. But if he fails to do so, the problem of action is a difficult one.

A State amply supplied with good books need not specially facilitate the communication of foreign works apart from their author's wish. It desires to encourage authors all over the world, and may therefore fairly secure the return of a small royalty to all authors whose

books are read by its people, even at the risk of shutting out some foreign books by handicapping the home "*entrepreneur*." Its loss by shutting out one book or a few will not be much; the loss to the world by withdrawing some of the encouragement given to authors may be considerable.

§ 235. Should the royalty system be introduced into international copyright?

But a small, imperfectly-developed State will want all the books it can obtain. Its small royalty, if established, will not lead immediately to publication by foreign authors, and it may prevent the home publisher from producing. Here the immediate loss from the imposition of a small royalty outweighs the ultimate gain, and it should not be imposed.

The conclusion thus reached is, that in literary and advanced States the royalty should be imposed, even if the foreign author does not himself communicate his work, but that it should be abandoned in imperfectly developed civilizations.

The latter however is the position adopted by England. An author may have—

(1.) Copyright by first publication in England under its copyright laws.

(2.) Copyright by first publication in another country with which England has a copyright convention, if he fulfils certain conditions.

(3.) Copyright in an English version of his work if he takes steps to provide the English people with such a version within a reasonable time. If he does not, others may do what he has neglected to do. He is not allowed to prevent them, or entitled to receive any reward for the work which they have appropriated.

§ 236. Criticisms of the existing law.

Apart from this question of principle, some minor points dealt with by the Commission require considera-

§ 236. Criticisms of the existing law. Registration and deposit.

tion. At present, foreign authors are under the obligation of registering both their original work and the authorized translation at Stationers' Hall, and of depositing there a copy of each, which is forwarded to the British Museum. Foreign Governments, especially France and Germany, complain that these restrictions are an unnecessary burden on their subjects; they are, in fact, not required by the majority of States. Registration in England is used as an evidence of copyright in case of disputes; but a copy of the foreign register, attested by an English official, would serve the purpose equally well and remove a burden from the foreign author.

For deposit of a copy of the work in England there is more to be said; it is an advantage to the National Library to secure as complete a set as possible of foreign works, and if this proviso helped that end it would be desirable to retain it. But experience has shewn that the number of works deposited is neither large, nor of the class specially sought by the British Museum (*n*): the obligation acts as a tax and a deterrent formality on the foreign author, and its abolition is therefore recommended by the Commission. Possibly an exception might be made in the case of authorized translations and their deposit still required.

Time allowed for translation.

A further point on which complaints have been received from the French Government has reference to the period of time allowed the author in which to translate his work, so as to secure the sole right of translation. At present, at least part of an authorized and literal translation must be published within a year of publication of the original: it is however urged that this is too short a period in which to judge of the success of a work, and to secure an efficient translation of it; the Commission

(*n*) C. C. Ev. q. 1660.

§ 236. Criticisms of the existing law.

therefore with reason recommend the omission of the regulation as to part publication, thus merely requiring that the translation be published within three years of first registration abroad. It may be noted that this really shortens the term granted to the author; the previous term of three years dated from English registration, the abolition of which is suggested, and this was always subsequent to registration abroad. On principle however it seems fair that the "reasonable time to communicate" should date from first registration in the country of first publication.

Time during which right of sole translation is reserved.

In the second place, complaint was made that the five years during which the right of sole translation was reserved was too short a term to ensure the author his fair return. The Commission suggest an extension of the term to ten years; the justification even of this restriction must be sought in the extreme difficulty of making a good translation, a task requiring literary labour far exceeding mere mechanical translation. The author's translation may very inadequately represent his original, and must be literal (*o*); for this reason it may be desirable that he should not be allowed too extensive a right of sole translation. But the suggested term of ten years errs, if at all, on the ground of inadequacy rather than of excess.

The Commission suggest that these concessions should only be made to foreign authors where English authors obtain reciprocal privileges, and though reciprocity is generally a dangerous game to play at in the interests of the public at large, the objections to using it in this case seem slight. The reciprocal concessions will probably only too readily be made, as England is behind

(*o*) *Wood* v. *Chart*, L. R. 10 Eq. 193.

§ 236. Criticisms of the existing law.

most continental countries in the protection afforded to literary property, and in liberality to authors.

§ 237. Recommendations of Commission.

The Copyright Commission recommend:—

1. That the obligation on foreign authors: (a) to register their works; (b) to deposit a copy in England, be abolished, if English authors are relieved of the corresponding duties of the countries with whom we have conventions (C. C. R. §§ 264, 267).

2. That the foregoing recommendation shall also apply to authorized translations when made abroad, but not when made in England (C. C. R. §§ 275, 276).

3. That the necessity to publish part of the authorized translation within one year of registration of the original in England be abolished (C. C. R. § 279).

4. That the period of five years from publication of an authorized translation during which the sole right of translation may be reserved be extended to ten years (C. C. R. §§ 281, 283).

§ 238. The American question.

The preceding sections have dealt with our relations with countries with whom we have International Copyright on the basis of International Conventions. But a few, amongst whom unfortunately is that nation which makes most use of the works of British authors, the United States, refuse to protect the works of foreign authors, or, in other words, to recognise International Copyright. We have argued in a previous part of the essay that the question of what shall be protected as property must be determined by considerations of ultimate expediency or utility; all ideas of abstract rights apart from positive law, and of natural laws apart from good and evil consequences, must be set aside, and the

problem solved solely by considering the interests of the community at large. From this point of view, when a nation says, as the United States practically do say, that they do not consider it to their interest to recognise literary property in the works of foreign authors published abroad, it will serve no useful purpose to indulge in rhetorical sentences about "national robbery," or "national dishonesty"; we can only endeavour to shew that such a nation has mistaken its true interests, and is in reality injuring instead of benefiting itself. And as on a superficial view of the matter the United States do not seem to be suffering from their copyright policy, we have to inquire more carefully into the conditions of the problem, and to try to discover an acceptable compromise between the two nations.

§ 238. The American question.

The position of affairs in the United States is as follows. They recognise national copyright, although a branch of the vigorous opposition to property in inventions or the patent law also attacks even domestic literary property. Indeed, they are even more liberal than England in their recognition of some classes of works published abroad; for instance, copyright can be obtained in the United States, though not in England, for a play that has been previously publicly represented abroad, but not printed. But with regard to the works of foreigners printed abroad, there is no protection; anyone may publish them in the States without any payment to the author, and there is no local copyright of any kind in them even when published by an United States citizen. As a consequence, the United States are flooded with cheap reprints of successful English works; and, although the actual cost of production of a book is greater in the States than in England, English com-

§ 239. Present position of the United States on the question.

§ 239. Present position of the United States on the question.

petition is rendered practically impossible by several causes (*p*):—

(1.) Books imported into the States pay an *ad valorem* duty of 25 per cent.

(2.) A British publisher pays his author, while an American republisher of English works is free from this item of expenditure.

(3.) The American publisher is saved the expense of corrections in proofs, said to be 40 per cent. of the whole cost of printing in England, by his ability to reprint direct from the printed book.

(4.) The American publisher has not the speculative risks which the English publisher has to allow for; he can choose the works he will publish by the test of actual success, instead of having to guess at the effect they will produce on the public.

These four causes enable American publishers to issue reprints of English copyright works at a price far below that at which they are issued in England, though this price is not apparently lower, and indeed generally higher than the ultimate price of a really successful work in England. In the case of books copyrighted in the States, the price appears to be about the same as that of the original English editions of similar works. This however does not apply in the case of works such as novels, to which the peculiar English system of circulating libraries attaches an entirely fictitious price. *At any rate, English reprints are far cheaper than original American works.*

§ 240. Results of the attitude of the United States.

To this pecuniary advantage in competition there must be ascribed as a result to a certain extent the undoubted fact that English reprints are on the average better as

(*p*) C. C. Ev. q. 1277, evidence of Mr. Murray.

literary works than the American originals. Publishers cannot afford to pay authors highly when the works they publish have to compete with books produced by a system which offers greater attractions to authors to write, but published at a price which does not include any remuneration to those authors. It is said (*q*) by Americans that a publisher expects to lose money over the first work he publishes of any unknown author. Where there is such small lucrative demand for literary work there will naturally be slight literary work produced. It will not pay the best men to devote their time to literature, and so the average literary standard will be lower. Sir Julius Benedict (*r*) suggests that the failure of America to produce any original musician is probably partly due to the fact that, owing to the enormous competition of foreign music, as to which the foreign author has not the protection of copyright, no sufficient remuneration can be offered to the home producer. In literature, one of the best educated people in the world, and one of the largest reading populations, yet can shew very few names of more than third-class merit in the different branches of literary production. Indeed, so far back as 1833 a report (*s*) was made by Mr. Clay to the United States Government as to the injury done to American literature by the competition of English reprints, which, he said, made the trades of publishing and of writing American literature almost impossibilities. This then is one serious evil, resulting from the present system, which the United States must consider, and accept responsibility for, if they continue such a system.

§ 240. Results of the attitude of the United States.

(*q*) C. C. Ev. q. 1840.
(*r*) C. C. Ev. q. 1466.
(*s*) C. C. Ev. q. 1847.

§ 241. The "courtesy" of the American book trade.

Before however dealing with the position that the American nation or its specially interested classes take up in this controversy, it will be well to examine the actual working of the present American book trade. At first there was *unlimited competition, house outbidding house* in the cheapness of the edition it offered. "The state of Nature was a state of War;" but as in Hobbes' world, so here, in practice the evils of a state of war were felt, and a "Social Compact" of an indefinite kind was come to among the leading houses. By this "courtesy of the trade"(*t*) it was understood that the house first publishing a reprint of any foreign work should be left in undisturbed possession, without competitive issues from the other houses. This appears only to apply to the larger firms, and there are in consequence perpetual piracies *by the small, and occasional quarrels among the larger* houses. But the fact remains that the interest of publishers has established a species of International Copyright in practice, although the author does not necessarily obtain anything by it. This system has however brought some small return to the author; for it becomes the interest of the American publisher to secure as early as possible "advance-sheets" of any English work likely to be popular, and for these advance-sheets he is willing to pay the English author or publisher sums which occasionally form an adequate remuneration for the foreign circulation. *For instance* (*u*), £300 was paid for the advance-sheets of a novel by an author of very moderate capacity; £1000 was paid to Livingstone's family for the advance-sheets of his 'Last Journals,' and Mr. Putnam(*x*), a member of one of the leading publishing firms of New

(*t*) C. C. Ev. q. 1494.
(*u*) C. C. Ev. q. 1855.
(*x*) C. C. Ev. q. 1855.

§ 241. The "courtesy" of the American book trade.

York, says that the average payment for advance-sheets is from £25 to £100, and that the price increased considerably between 1871 and 1876. Mr. Herbert Spencer (*y*) obtains fair remuneration for his American circulation, Messrs. Appleton, his publishers, being protected by the "courtesy of the trade;" Professor Tyndall (*z*) and Dr. Huxley obtain a percentage in a similar way. On the other hand, many English authors, especially Mr. Tennyson, Mr. Charles Reade, and our most popular poets and novelists, obtain no return from the circulation of their works in the States. Canon Farrar (*a*) received £50 for the advance-sheets of his 'Life of Christ,' of which a small American firm immediately issued a competing edition; and Mr. Matthew Arnold (*b*) has only obtained in return for a large circulation of his works, the sum of £50 from American publishers. The publishers who make arrangements as to advance-sheets (*c*) also obtain stereotyped plates, and blocks for engravings, and thus have an advantage over their rivals. Being houses of considerable capital and power, they can ruin smaller rivals by competition; the fear of this protects most of their issues from the small houses, the "courtesy of the trade" from the larger ones.

The result of the present system thus is that English authors are dependent on the generosity of American publishers for remuneration for their work; and that they frequently do obtain such remuneration owing to the fact that American publishers have in their own interests established a sort of copyright in reprints,

(*y*) C. C. Ev. q. 5629.
(*z*) C. C. Ev. qq. 5610, 5791.
(*a*) C. C. Ev. q. 2671.
(*b*) C. C. Ev. q. 3863.
(*c*) C. C. Ev. q. 5793.

§ 241. The "courtesy" of the American book trade.

the investitive fact being first republication in the States.

The opposition which hinders this system from becoming universal and obtaining legal recognition comes from those American publishing houses, who are also printers and binders, and from the representatives in Congress of the Western States, who equally object to the law of patents. The long delay in the conclusion of a copyright treaty results almost entirely from the great influence brought to bear on Congress by the Typographical Union of the United States. The history of this opposition, and its degrees and divisions, are well set out in the evidence of Mr. Appleton, a member of that large New York firm, who deal most liberally with British authors, and Mr. Edward Dicey, before the Copyright Commission (*d*). It is not necessary to go minutely into the history of the different bills brought before Congress, or into the various shades of opinion on the copyright question said to exist in the States, and it will therefore be sufficient to state briefly the general effect of the evidence.

§ 242. Parties on the copyright question in the United States.

International Copyright is only supported vigorously by American authors, and those publishing houses which are not also manufacturing and printing houses. It is vigorously opposed by the publishing and printing firms, and by that school of speculative economists of which the late Mr. Carey was the chief; there is also a passive opposition by the Western population, who object equally to the law of patents, and there is a general fear on the part of readers that the price of books will be enormously raised by such a system. This reading population is very large, and is accustomed to cheap editions; its expecta-

(*d*) C. C. Ev. qq. 1431–1512 (Dicey); 3521–3608 (Appleton).

§ 242. Parties on the copyright question in the United States.

tion of high-priced books as a result of International Copyright is therefore an important factor in the problem. The opposition of the printing publishers is however the chief obstacle; their power in the press places at their disposal great opportunities of influencing Congress, and they have at their back the feeling in favour of protection existing in all protected trades. It is with them that a compromise must be made; if they can be satisfied, an international copyright treaty may be obtained, and their views and requirements must therefore be carefully considered.

American publishers fear (*e*) that the English author will either reprint his work in England, or prevent its reprinting in America, unless he obtains his own terms from the American publishers. They therefore insist on the book's being "*manufactured and published in the United States*," and some of them carry this so far as to wish to forbid the importation of English stereotype plates, which effect a great saving in cost of printing. Mr. Dicey (*f*) thinks that the arrangement must be on the basis of a royalty, any publisher having liberty to republish on paying a certain percentage to the author, who is without any right of *veto*. Mr. Appleton (*g*), on the other hand, probably a better authority as to American opinion, thinks that such a basis is not favoured in the States, on the ground mainly that if every publisher may reprint, there is no security for capital invested by the first publisher, and no encouragement to advertise. This would hinder the production of costly books, which require great expenditure of capital to publish them, and would therefore check rather than

(*e*) C. C. Ev. q. 1468.
(*f*) C. C. Ev. q. 1479.
(*g*) C. C. Ev. qq. 3562, 3586.

§ 242. Parties on the copyright question in the United States.

increase the supply of foreign works. American publishers will probably be content with an arrangement by which foreign authors might obtain copyright in the United States on entering into a contract with an American citizen to manufacture and republish the work in all its parts in the United States. We may admit at once that this plan is mainly in the interest of the American publisher, and that, if the importation of stereotype plates is forbidden, the cost of books will be increased to the American buyer, but American re-manufacture appears to be a *sine quâ non* with American publishers, and must therefore be accepted by English authors.

§ 243. Results.

The English Government therefore should enter into negotiations for a copyright treaty on this basis, endeavouring if possible to obtain concessions as regards the importation of stereotype plates. The author should also be allowed a reasonable time from first publication in which to republish in America, and to provide for the case of his failing to do so the United States might be asked to accept the "Sherman proposal" (*h*) of liberty to all to print on paying a royalty to the author, if at the expiration of the "reasonable time" he had not made separate arrangements for reprinting.

It will be seen that this arrangement, if adopted (and if the point of "American manufacture" is conceded such a result does not seem impossible), is not very different from that recommended previously as the ideal system of International and Colonial Copyright, and there need therefore be no hesitation in accepting it. It must however be borne in mind that the immediate gain from a copyright treaty is all on our side, the immediate loss on

(*h*) C. C. Ev. q. 3560.

§ 243. Results.

that of the States. English authors will at once gain largely, while some increase in the price of books in the States to the reading public is inevitable. The benefit to America, which is great and certain, can only shew itself in course of time when the greater encouragement to American authors has resulted in greater development of American literature. To make the United States see the benefit to them of a treaty is therefore difficult, while it is to our great and immediate advantage to obtain one. It is we, then, who must make the concessions, and be prepared to yield much if we can only ensure that the vast American demand for English literature shall necessarily result in a return, however inadequate, to the real producers of that literature. And since France, which previously suffered in a similar way from Belgian piracy, has succeeded in concluding a treaty which puts an end to "*la contrefaçon Belge*," there seems no reason why England may not hope for the same good fortune in negotiations with the United States.

CHAPTER XII.

CONCLUSION.

The law of copyright has a communistic character.

§ 244. THE limits of our subject have now been reached. We have endeavoured to set out in detail the principles which should regulate the Law of Property in Literary and Artistic Compositions, and to consider more generally the grounds on which such property should be based. We have investigated, minutely with regard to England and the United States, and more briefly with regard to other countries, the extent to which these or other principles have been acted upon in the Law of Copyright, and in the case of England we have traced the historical growth of such a law.

And the whole of this discussion has tended to shew the "communistic" character of the Law of Copyright. Literary and artistic productions are treated as property, but that property is created in, and limited by, the interests of the community. Strictly dealt with, it should be limited until further limitation defeats its own end. The term of protection is to be made long enough to induce the best authors to produce the best classes of works, and in strictness should be no longer. But if, as often happens, it appears unjust to popular opinion that an author should lose the fruits of his labour during his lifetime, or, as in some cases, that his immediate descendants should suffer, an arbitrary term is sug-

gested, without reference to the value of particular works, but ensuring that at least all literary property shall last till no one will be specially grieved by its abolition.

§ 244. The law of copyright has a communistic character.

This of course is nothing else than reversion of a man's property to the community on his death, a system which was one of the first steps by which individual property was carved out of the property of the community, and which is one of the suggestions of Communism or Socialism (*a*) at the present day. I do not point this out as an objection to the system, for I think it the right one, but rather that its true character may be seen. For discussions of the Laws of Literary and Artistic Property have been so fruitful both in arguments from analogy and in arguments which, if analogically applied, would lead to results startling and unwelcome to those who put them forward, that it is important that the principles on which the law rests should be clearly grasped. By all means let it be acknowledged that literary property is a creation of the State, and that the State in creating it may impose conditions and limitations, even though the acknowledgment is used as the basis for a suggestion that no book should obtain copyright unless it has a good index! (*b*) But let us remember that the position is applicable to all kinds of property. Limit in the interests of the State the duration of property in books, if you like, but recognise that the same arguments may be used to limit the duration of property in land, the power of bequest at death, and the devolution of the property of an intestate. And above all, a caution which is most necessary in arguing the matter, and dealing with questions of so-called "justice," "right," and "utility," let us be careful

(*a*) J. S. Mill, Pol. Econ. Bk. II. c. 2, §§ 3, 4.
(*b*) C. C. Ev. q. 2777.

§ 244. The law of copyright has a communistic character.

that we understand what we mean by these terms, for though such an investigation may be tedious to our lofty intellects, perhaps even fatal to our pet arguments, it will certainly result in greater clearness and brevity, and less idle declamation.

ADDENDUM.

A Divisional Court, consisting of the Lord Chief Justice and Stephen, J., has just decided the important case of *Duck* v. *Bates* (November 20). The infringement of copyright complained of was the performance of Byron's play 'Our Boys' by an amateur dramatic club in the Boardroom of Guy's Hospital, and an audience composed mainly of nurses and patients. The representation was not public, nor for profit. Lord Coleridge held that this did not constitute an infringement of copyright, on the ground that the particular facts shewed no benefit or advantage to the performers, or injury or loss to the complainant. Mr. Justice Stephen concurred. In view of the importance of the case, leave to appeal was given. Both learned judges carefully guarded themselves from determining that no free performance would be an infringement of copyright, and only said that representation for profit, though not essential, was an important element to be considered. In the course of the argument it was intimated from the Bench, that Brett, M.R., was not satisfied with some of his expressions in the case of *Wall* v. *Taylor*, on the subject of infringements of copyright. (See §§ 124 *et seq*).

APPENDIX.

THE following twenty-seven patents and privileges are, I believe, all those contained in Rymer's Fœdera which relate to the question of Literary Property; they clearly, however, do not exhaust the list of royal grants. For instance, in *Atkins* v. *The Stationers' Company* (*a*), the counsel for the king's patentee speaks of fifty-one patents granted by the Crown; and in the remarkable cesser of "privileges" by the richer printers to the Stationers' Company cited above (*b*) and set out in Ames, some eighty or ninety books, as to which such printers "had licenses from the Queen granting them a property in the printing of copies," are recited.

The examples contained in Rymer are partly "patents," relating to works in which the Crown claimed prerogative property; partly "privileges" in works in regard to which there was no such alleged Crown property. After 1617 many of them are granted by a "common form" of grant of a lengthy nature. It will be noted that some of them relate to works in which there would be no copyright at the present time; some involve the notion of licensing; some border on monopolies to inventions, and very few afford simple instances of copyright as it is now, created by direct royal grant.

CASES.	NOTES.	
1. *Nov.* 12, 1539.—A proclamation to printers and booksellers forbidding the printing of any *Bible* in the English tongue for the next five years, except such as shall be approved of by Thomas, Lord Cromwell.	1. This relates to licensing, not copyright.	1. Rymer, 14, 649.
2. *March* 12, 1542.—Licence to Anthony Marlar to be sole printer of the *Bible* in our English tongue, as authorized, for the next four years.	2. A grant by patent of prerogative property of the Crown.	2. R. 14, 745.

(*a*) Carter's Rep. 89.
(*b*) Herb. Ames T. A. iii. 1672–1675. See above, p. 80.

	Cases.	Notes.
3. R. 14, 766.	3. *Jan.* 28, 1543.—Licence to Richard Grafton and Edward Whitchurch to solely print such *service books* as shall be in use for seven years next ensuing; forfeiture the penalty of infringement: the reasons given, that such books have hitherto been printed abroad, and the authority of the Bishop of Rome therein set out.	3. As head of the Church, the King claimed the books of church ritual as his prerogative property. The origin of this grant, however, is clearly politico-ecclesiastical.
4. R. 15, 150. See above, § 68, note.	4. *April* 19, 1547.—Appointment of Reginald Wolff as the *King's* bookseller and *printer*, and a warning to other printers not to print books issued by him.	4. The first book published *cum privilegio* was by Richard Pynson, the *King's printer* in 1519; this protection made the post of some value, and the necessity for it was probably the origin of the royal "privileges."
5. R, 15, 255.	5. *April* 18, 1551.—Privilege to Lawrence Torrentinus of Germany solely to print the *Pandects*, for the encouragement of learning.	5. There would now be no copyright in a repriut of the Pandects: Edward VI.'s scholastic tastes would naturally lead him to encourage learning.
6. R. 15, 628.	6. 1563.—Thomas Cooper granted the exclusive privilege to print an *English dictionary*, corrected and augmented by him, for twelve years.	6. Privilege granted for the whole of the work of another on account of Cooper's corrections.
7. R. 16, 97.	7.—Richard Wright granted the exclusive privilege to print a *translation of Tacitus* for his life.	7. For encouragement of learning.
8. R. 17, 15.	8. *May* 5, 1617.—Nicholson Hillyard granted exclusive privilege to invent, engrave, and print *portraits of the king* for twelve years; leave to set up a press, and protection from counterfeits.	8. Privilege for engravings, and protection against the charter of the Stationers' Company.

Cases.	Notes.	
9. *April* 29, 1617. — Privilege to Fynes Morrison to exclusively print his *Itinerary* for twenty-one years; power to obtain fines and seize copies: the Stationers' Company called on to assist.	9 and 10. Possibly simple examples of modern copyright, unless the printing was licensed apart from the Stationers' Company. Both these "privileges" are granted on the "common form" of grant, which here appears for the first time.	9. R. 17, 10.
10. *Mar.* 11, 1618. — Privilege to Samuel Daniel to exclusively print a *History of England*, collected by himself, for ten years.		10. R. 17, 72.
11. *Mar.* 11, 1618.—Licence to Rathburne and Burgess to exclusively print *maps* of the chief towns in England for twenty-one years, and to set up printing presses.	11. Privilege for maps, and protection against the charter of the Stationers' Company.	11. R. 17, 74.
12. *March* 20, 1618.—Grant to Marriott of exclusive privilege of printing the *Pharmacopœia*, which had been compiled by the College of Physicians.	12. There is nothing like copyright for merit here. Marriott had not even compiled the work.	12. R. 17, 77. See also Cal. Dom. 1611–1618, p. 536.
13. *April* 4, 1618.—Privilege to Sibdale to exclusively print a work on the *translations of the Bible* written by Fulke, then *deceased, for the profit of Hester, his daughter.*	13. Possibly a Crown patent; at any rate there would ordinarily be no copyright in Sibdale; the "children clause" is novel.	13. R. 17, 80.
14. *Feb.* 13, 1621.—Licence to John Legate the son to exclusively print and sell *Thomas Thomas his dictionary*, which had been augmented by John Legate the father.	14. Same as No. 6, with addition of grant to children.	14. R. 17, 283. See also Cal. Dom. 1619–1623. *Feb.* 13.
15. *Feb.* 17, 1623.—Grant to Withers of exclusive privilege of printing and selling *Hymns etc. of the Church translated by him* into lyric verse, for *fifty-one* years, and no Prayer Book to be sold unless his work was bound with it; powers to seize piracies.	15. Probably patent of Crown property, or at any rate connected with it; unusually lengthy term; proviso as to binding novel. The motive assigned (Cal. Dom. 1619–1623, p. 502), is that "his Majesty has taken special notice of the book and conceives it to tend to the glory of God."	15. R. 17, 454.

	Cases.	Notes.
16. R. 17, 484.	16. *April* 24, 1623.—Grant to Speede to solely print his Genealogies and Scripture Maps: term extended from seven to twenty-eight years, inadequate remuneration having been received. No Bible to be sold unless this is bound with it.	16. Similar to No. 15. The extension of term new, and shews motives of grant. The first grant for ten years was made in 1610 (Cal. Dom. 1603–1610, p. 639); this was renewed for seven years in 1617 (Cal. Dom. 1611–1618, p. 431); a further grant is made in 1634.
17. R. 18, 676.	17. *April* 24, 1626.—Grant to Sandys of exclusive privilege to print his *translation of Ovid* into English verse for twenty-one years.	17. Similar to Nos. 9 and 10; made on the "common form of grant."
18. R. 18, 680.	18. *April* 26, 1626.—Grant to Webb of exclusive privilege of *teaching languages on his method*, and *printing* books for that purpose for thirty-one years.	18 and 19. Copyright subsidiary to monopoly of inventions.
19. R. 18, 857.	19. *March* 9, 1627.—Licence to Morley to solely *print books for teaching* English and Latin *on a method invented by him*, with conditional monopoly of teaching.	19. See also S. P. Dom. 1623–25, p. 364.
20. R. 19, 161.	20. *April* 26, 1630.—Licence to Willett to exclusively print "Synopsis Papismi" written by his father, the late Dr. Willett. The licence recites "that the stationer who heretofore had the copy thereof is not able, or at least not willing, to disburse or expend so much moneys as the charge of reprinting the same will require; that he has utterly relinquished the same, and that thereupon few or none at all of the said books are to be procured." The sole reimprinting and reimpressing for twenty-one years is granted.	20. This is analogous to a licence to republish on ground of refusal of owner to reprint after author's death; combined with a grant to children.

Cases.	Notes.	
21. *April* 5, 1631.—Licence to Wackerlin solely to print a number of *Latin classics*, on the expiration of a grant which had been made to the Stationers' Company in 1613.	21 and 22. Ordinarily there would be no copyright in Latin classics. In the State Papers we find that Wackerlin petitioned for a grant for thirty-one years, which he might let to the Stationers' Company, and thereby make a small profit.	21. R. 19, 269. See also Cal. Dom. 1629–1631, pp. 514, 557.
22. *April* 6, 1632.—Licence to Farnaby to exclusively print other *Latin classics* for twenty-one years.		22. R. 19, 366.
23. *Nov.* 12, 1632.—Licence to University of Oxford to appoint three printers.	23. Protection against the charter of the Stationers' Company.	23. R. 19, 393.
24. *Nov.* 1, 1634.—Licence to John Day, fishmonger, to print *weekly bills of the price of foreign commodities* for fourteen years.	24. In the nature of an invention.	24. R. 19, 577.
25. *Aug.* 18, 1635.—Licence to Braithwaite to print *books for teaching to sing on a method invented* by him.	25. Invention; similar to Nos. 18 and 19.	25. R. 19, 656.
26. *July* 4, 1635.—Licence to Holyocke to print and sell a *dictionary* compiled by him; provisions for seizure of piratical *imitations*.	26. Apparently a simple case of copyright.	26. R. 19, 642.
27. *Dec.* 14, 1635.—Licence to George Sandys to print and sell his paraphrase of Scripture psalms for fourteen years.	27. A simple case of copyright, unless connected with Crown prerogative in the Bible.	27. R. 19, 708.

We can perhaps conclude from this list that grants from the Crown were as a rule confined either to patents of prerogative property, or to privileges to private individuals where special rights were conferred, either on others than authors, or in opposition to the privileges of the Stationers' Company, or of the nature of patents to inventions. These grants were initiated apparently by the creation of the post of "*Regius Impressor*." We may note the very varying times for which protection was conferred—four, seven, ten, twelve, fourteen, twenty-one, twenty-eight, thirty-one, fifty-one years, and the life of the author. We may

also note as a curious fact that fifteen out of the twenty-seven instances quoted—all those from 1617 to 1632—are dated between the 13th of February and the 5th of May, eight of them being in the month of April; the reason why literary privileges should be granted at that period of the year not being clear.

The following privileges and documents relating to the History of Copyright, *inter alia*, are found in the Calendars of Domestic State Papers.

1560.—Warrant for a licence to John Bodleigh to print the English Bible faithfully translated with annotations in the year 1560. (S. P. Dom. 1547–1580, p. 166.)

1566 (?)—The Queen to all printers, booksellers, and stationers: There having been a great number of primers and prayer-books printed in the realm, through every man's having leave to print them, we have granted, for the sake of uniformity in private prayer, to William Seres, stationer of London, the sole licence for ten years of printing all books of private prayer, hitherto permitted to be printed. (S. P. Dom. 1566–1579, Addenda, p. 25.)

1585.—The petition of the printers of London, complaining of the conduct of Joseph Barnes, printer of Oxford, in reprinting the book called 'The Revolution,' and praying restitution of their *property seized at Barnes' suit* for their printing and publishing a book compiled by Dr. Bilson. (S. P. Dom. 1581–1590, p. 296.)

Here evidently the powers of search and seizure had been exercised to protect literary property, as in the following case.

1585.—Petition of poor artificers occupying the trade of printing, who complain of wrongs done them by a few privileged persons, by whom *many of the petitioners have been cast into prisons.* (S. P. Dom. 1581–1590, p. 299.)

1592.—Grant to Richard Field, printer, of the sole licence of printing 'Orlando Furioso,' translated into English verse by John Harrington. (S. P. Dom. 1591–94, p. 179.)

As Harrington had died in 1582, this is apparently not a simple case of copyright, but the creation of a monopoly not for the benefit of the author.

1597.—Privilege to Henry Stringer, the Queen's footman, for fourteen years, to print certain school-books, after the expiration of a former privilege to Thomas Marsh. (S. P. Dom. 1595–7, p. 352.)

1604, Feb. 2.—Licence to Robert Barker in reversion after John Norton to print all books in Latin, Greek, and Hebrew, Trimelius' Latin Bible, and all charts and maps. (S. P. Dom. 1603–1610, p. 74.)

This is a clear case of monopoly apart from literary property.

1605, June 26.—Grant to James Ryme, bookseller, of the sole privilege of printing and selling certain Latin works of H. Zanchius for fourteen years, *the price of them to be fixed by the Archbishop of Canterbury.* (S. P. Dom. 1603-10, p. 226.)

The provision as to price is novel: the books are such as could not be the subject of copyright.

1607, Jan. 5.—Licence to Wm. Stallenge for twenty-one years to print a book called 'Instructions for the planting and increase of mulberry trees, breeding of silk-worms and making of silk.' (S. P. Dom. 1603-10, p. 344.)

A monopoly akin to patent.

1608, Feb. 18.—Grant to M. Bradwood of the sole privilege of printing 'Jewell's Defence of the Apology of the Church of England, and his book of Articles.' (S. P. Dom. 1603-10, p. 406.)

Jewell died in 1571; so this is another instance of monopoly created not for the author's benefit.

1608, April 29.—Grants to G. Humble of privilege for twenty-one years to print a book compiled by John Speed, called the 'Theatre of the Empire of Great Britain, with cartes and maps.' (S. P. Dom. 1603-10, p. 425.)

Aug. 13, 1608.—Licence for ten years to Sir W. Woodhouse to print reports, &c., of the case between Robt. Calvin and R. Smith, concerning the question of the Postnati of Scotland. (S. P. Dom. 1603-10, p. 452.)

This is a grant of Crown property, the law reports being the King's.

Jan. 1610.—Licence to John and Jane Danyell to print and publish the works entitled 'Danyell's Disasters.' (S. P. Dom. 1603-1610, p. 584.)

Feb. 20, 1611.—Licence to J. Minsham of the sole printing for twenty-one years of a Dictionary Etymological of twelve languages. (S. P. Dom. 1611-18, p. 10.)

It is not stated whether he was its author.

April 2, 1613.—Licence to the Warden and Company of Booksellers of London to print and sell Cate's distichs and other books for twenty-one years. (S. P. Dom. 1611-18, p. 179.)

Not a case of author's copyright.

Mar. 3, 1615.—Grant to Jordan and Hooker of London, *nominees of Edw. Lord Morley*, of the sole printing of a small book, entitled 'God and the King,' with instructions for the same to be taught in Latin and English in all schools. (S. P. Dom. 1611-18, p. 484.)

This is a monopoly with compulsory purchase of the monopolised article. The "nominee" clause is common in other grants of the period, but unusual in privileges of printing.

July 19, 1618.—Licence to W. Alley, at nomination of T. Middleton,

of the sole printing and publishing of 'The Peacemaker,' a book by Middleton, for seven years. (S. P. Dom. 1611–18, pp. 556, 564.)

Here the author nominates.

June 1619.—Statement by John Bill of the right acquired by Bonham Norton and himself . . . in the copyright of a work called 'The Confutation of the Rheimish Testament,' written by the late Dr. Fulke, which his daughter, Mrs. Ogden, has obtained a license to print. (S. P. Dom. 1619–23, p. 55.)

Here the licence from the Crown conflicts with prior rights in the King's printers.

Sept. 14, 1623.—Grant of sole licence of printing and publishing the 'Attorney's Academy' to J. Parish. (S. P. Dom. 1623–25, p. 75.)

Oct. 28, 1624.—The King asks the Bishop of London's opinion on a new alphabet invented by William Morley, a minister, for the more easy attaining of languages, for the sole printing and publishing of which he requests a patent. (S. P. Dom. 1623–25, p. 364.)

1625.—Petition of R. Young, *assignee of his Majesty's printer for the Latin tongue.* (S. P. Dom. 1625–6, p. 211.)

This is an example of the way in which the sole rights of printing were used to make lucrative places. There is also a grant of the office of King's Printer in the Admiralty and Ecclesiastical Courts for life. (S. P. Dom. 1603–1610, p. 131.)

1630, July 14.—Robert Barker, King's Printer. Council direct certain persons to aid him in search for persons importing books of right belonging to him. (S. P. Dom. 1629–31, p. 306.)

1629, Sept. 8.—Grant to Clement Cotton for twenty-one years of sole privilege of printing a Concordance to the Bible. (S. P. Dom. 1629–31, p. 53.)

Petition of Cotton, reciting that being poor he has assigned his privilege to Bourne for a sum of money, against Order of Council restraining the binding of the Concordance with the Bible. (S. P. Dom. 1629–31, p. 138.)

Oct. 28, 1633.—"Lady Eleanor Davies was last Thursday fined £3000 in the High Commission Court, and committed close prisoner to the Gate House for printing books at Amsterdam of the interpretation of part of the new laws and some of the prophets." (S. P. Dom. 1633–34, p. 261.)

March 1634.—Petition by Withers that his privileges may be enforced against the Stationers.

INDEX.

The figures refer to paragraphs, not to pages.

A.

Abernethy, Dr., his lectures, case as to, 102, 103, 105
Abode, place of, what, for registration, 214
Abridgments, theory as to, 47.
English law as to, 160
recommendations of Commission as to, 160
law of United States as to, 160
Absence of State protection, result of, 10, 11
Absolute right of the author, 1
destroyed by dedication, 1
consideration of, dismissed, 4
Acts of State, King claimed sole right of printing, 68
Actions, limitation of, 62
in Dramatic Copyright to be brought within a year of infringement, 129
in Literary Copyright to be brought within a year of infringement, 168
Adaptations of music, copyright in, 141
Advance-sheets, payment for, by American publishers, 241
Advertisements, copyright in, 152
Aggrieved, person with registration, 214
Albert's, Prince, engravings, case as to, 191
Aliens, when they may acquire copyright at English law, 157
Alison, Sir A., petition of, in favour of Copyright Bill, 91
Almanacks, claimed by King as his prerogative, 68
American question in International Copyright, 238
Animus furandi, not necessary to constitute infringement, 159
effects of, if present, 159
Anne, Statute of, period preceding, 81
cases prior to, 82
passing, and contents of, 81

The figures refer to paragraphs, not to pages.

Anne, Statute of—continued.
its title, 84
results of, 85
first cases under, 85
conclusions as to, 97
Annotations, copyright in, 154
Appleton, Mr., evidence as to International Copyright in United States, 242
Areopagitica, protest in, against Act of 1643 .. 75
Arnold, M., payments to, from America, 241

ARTISTIC COPYRIGHT,
how it differs from literary, 171
whether desirable at all, 172
arguments against, 173
view of Sir J. Stephen on, 174
defences of, 175
effect of reproduction of works of art in, 175
view of English art world on, 176
evidence before Copyright Commission on, 176
evidence as to piracy in, 176
justification of, 177
value of, what, 177
examination of Stephen's views on, 178
useless in engravings alone, 178
examination of other views, 179
in unpublished works, 180
what is publication in, 180, 197
registration, whether necessary in, 182
proposals of Commission as to registration, 183
in works executed on commission, 184
effect of sale of works of art on, 184
infringements of, 186
search and seizure of piratical copies in, 187
codification desirable in English law of, 188
in England, statutes governing, 189
in unpublished work in England, 190, 198
Sir J. Stephen's view of, 190
recommendations of Commission as to, 225
Artistic Copyright Bill of 1883
definition of publication in, 181
copyright to commence at execution of artistic work, 181
proposals as to registration, 181
proposals as to effect of sale on copyright, 184

The figures refer to paragraphs, not to pages.

Artistic Copyright Bill of 1883—*continued.*
as to photographs, 185
history of, 189
general proposals of, 226
Assignment of copyright, 59
of dramatic copyright must be in writing, 127
must be registered, 127
does not pass playright, 127
of musical copyright must be in writing, 143
of literary copyright must be in writing, 166
of copyright in engravings must be in writing to bind assignor, 203, 207
of copyright in paintings, &c., registration of, 214
must be in writing, 215
whether partial assignment need be in writing, 215
Assigns of author, 31
Austin's, John, position assumed as to rights, 4
definition of property, 6
Austria, law of, as to newspapers, 29
as to duration of copyright in, 40.
as to translations, 50
as to registration and deposit of copies, 55
as to musical copyright, 145
as to artistic copyright, 227
AUTHOR,
absolute right of, 1
Lord Camden's view of, 1
Huxley's view of his rights, 1
asks for creation of Literary Property, 6
his interest in literary productions, 8
his position, if no security for return of his labour is afforded, 10
his monopoly, nature of, 14
his assigns should have copyright, 31
nationality of, law of foreign countries, 57
what should be his remedies for infringement, 61
remedies against, 63
position of, 1500 to 1550 .. 68
his work first recognised as ground for copyright, 1530 .. 68
protest of, in 1643 .. 75
his rights in oral communication, 109
his rights in dramatic pieces, 121
his rights in musical compositions, 139
his rights in literary compositions, 163

The figures refer to paragraphs, not to pages.

AUTHOR—*continued.*
his duties, 164
must present copies to libraries, 164
must register his work, 164
nationality of, at English law, 165
his remedies for infringements, 168
remedies against, 169
of a photograph, who is, for registration, 214
his remuneration under Foreign Reprints Act, 228
English, payments to, from America, 241
American, support International Copyright, 242
Author, foreign, his position, 16
his position in England, 234
Authors, joint, who are, in plays, 126
Authorized translation of foreign plays, how to be published, 131

B.

Barker, King's printer, yields *copy* in books to poor, 72
Bathurst, Lord Chancellor, in *Donaldson* v. *Beckett,* 88
opposes Copyright Bill, 89
Belgium, law of, as to newspapers, 29
as to duration of copyright in, 40.
as to registration and deposit of copies, 55
as to nationality of author, and place of publication, 57
as to remedies for infringements, 61
as to International Copyright, 233
Benedict, Sir J., on position of United States in International Copyright, 240
Benefit to community, justification of legislation, 3
Bible, translated in 1547 by Grafton, at King's expense, 68
author of edition of, petition for copyright, 68
Bill, Artistic Copyright, of 1883: see *Artistic Copyright Bill.*
'Black Crook,' case as to, 124
Blasphemous work, no copyright in, at English law, 151
Books, State wants good and cheap, 9
copyright will secure good, 13
will copyright secure cheap, 14
definition of, in English law, 147
presentation of, to libraries, in English law, 164
production of, cheaper in England than in United States, 239
see *Literary Copyright.*
Bramwell, Lord, on registration in Artistic Copyright, 182
Britain, Great, engravings must be produced in, to obtain copyright, 202

The figures refer to paragraphs, not to pages.

Brougham, Lord, opposes Bill of 1841 .. 92
his judgment in *Jefferys* v. *Boosey*, 93
on unpublished works, 101
Bulwer, Sir E. L., supports Talfourd's Bill of 1841 .. 91
Burke, Edmund, supports Copyright Bill, 89
By-laws, power of Stationers' Company to make, 70
resistance to, 72
of Stationers' Company (1681), 79
(1694), 80
Bynneman, Henry, rights of printing, 72
Byron's, Lord, 'Marino Faliero,' case as to, 119

C.

Cambridge, University of, grants of printing rights to, 1534 .. 69
contest with Stationers' Company, 82, *note*
Camden, Lord, judgment in *Donaldson* v. *Beckett*, 88
on authors, 1, 11
opposes Copyright Bill, 1774 .. 89
Campbell, Lord, judgment in *Jefferys* v. *Boosey*, 93
Canada, Copyright Act of, 1875 .. 94
Copyright laws in, 228
Carey, Mr., views on International Copyright, 242
Carlyle, T., petition of, in favour of Copyright Bill, 91
Catalogues, copyright in, at English law, 152
Caxton introduces printing into England, 1471 .. 68
Charter of Stationers' Company, 70
confirmed by Elizabeth, 70
again confirmed, 1585 .. 72
confirmed 1684 .. 80
Chatterton, death of, case as to picture of, 197
Chesterfield's, Lord, letters, case as to, 103
Chromo-lithograph, probably infringement of engraving, 205
Church, books of, sole right to print claimed by the King, 68
Clarendon's, Lord, History, case as to, 100
Clay, Mr., report to U.S. Government on International Copyright, 240
Codification of English law desirable, 64, 188
recent tendency of foreign legislation to, 64
Coleridge, J., opinion in *Jefferys* v. *Boosey*, 93
COLONIAL COPYRIGHT,
royalty system recommended by Commission for, 15
present position of, 228

The figures refer to paragraphs, not to pages.

COLONIAL COPYRIGHT—*continued.*
recommendations of Commission as to, 229
regulation of price by the State, apparently recommended by Commission in, 229
foreign and colonial reprints in, 231

COMMISSION, COPYRIGHT,
startling results of, 1
as to newspapers, 29, 170
as to duration of copyright, 35, 170
as to registration, 56, 170
appointed 1875 .. 94
reports, 1878 .. 94
recommendations still undealt with, 94
as to lectures, 109, 115
doubts whether playright is destroyed by previous printing, 121
recommendations as to Dramatic Copyright, 132
as to dramatization of novels, 132
as to Musical Copyright, 146
as to abridgments, 160, 170
recommend abolition of University Copyright, 169
as to Literary Copyright, 170
evidence on Artistic Copyright, 176
as to registration in Artistic Copyright, 183
as to effects of sale on copyright in works of art, 184
fail to define portrait or commission, 184
as to photographs, 185
as to engravings, 210
as to sculptures, 224
as to Artistic Copyright, 225
as to Colonial Copyright, 229
as to International Copyright, 237

COMMISSIONED WORKS,
copyright in, 32
in Dramatic Copyright, 126
in Literary Copyright, 163
in Artistic Copyright, 184
Copyright Commission fail to define, 184

COMMON LAW COPYRIGHT,
questions as to, 66
evidence as to, 71
at expiration of Licensing Act, 79
before Statute of Anne, 83

The figures refer to paragraphs, not to pages.

COMMON LAW COPYRIGHT—*continued.*
effect of Statute of Anne on, 85
affirmed in *Millar* v. *Taylor*, 87
negatived in *Donaldson* v. *Beckett*, 88
discussed in *Jefferys* v. *Boosey*, 93
whether non-existing, 96
conclusions as to, 97
what applied to, in English law, 99
not divested by publication for private circulation, 106
in oral communications, 109
investitive facts of, in oral communications, 110
ground of playright till 1833 .. 119
destroyed in plays by first public representation, 120
in musical compositions, 120
infringement of, in plays, 129
in unpublished works of art, 198
inapplicable to International Copyright, 234
Commons, House of, Committee in 1774 .. 38, 89
Communication of works to the public, 17
English law as to conditional, 104
Communism, copyright a form of, 1, 243
Community, benefit to, the justification of a law, 3
interest of, in literary works, 8, 9
will obtain good books by copyright, 14
Compilations, copyright in, 154
Conflict of law and public opinion, 4
Copy of book, law of foreign countries as to deposit of, 55
justification of deposit of, 56
presentation to libraries by English law, 164
piratical, forfeited to proprietor of copyright, 168
Copy of engraving, what is, 205, 206
Copyright, Artistic: see *Artistic Copyright.*
Copyright, Colonial: see *Colonial Copyright.*
Copyright, what should be: see *Ideal Copyright.*
Copyright, Dramatic: see *Dramatic Copyright.*
Copyright in Drawings: see *Drawings.*
Engravings: see Engravings.
Copyright, International: see *International Copyright.*
Copyright, Musical: see *Musical Copyright.*
Copyright, Literary: see *Literary Copyright.*
Copyright in *Paintings*: see Paintings.
in *Photographs*: see Photographs.
in *Sculptures*: see Sculptures.

The figures refer to paragraphs, not to pages.

COPYRIGHT,
Macaulay's view of, 1
realm of legal metaphysics, 1
form of communism, 1, 243
fundamental questions of, 5
social or moral, in United States, 13, 241
waiver in, 20
whether there should be, in immoral works, 26
in new editions, what should be, 28
in newspapers, what should be, 29
in titles, what should be, 30
to whom it should be given, 31
Fixed-Term System of, 35
Fixed-End System of, 35
what should be its duration in England, 37
Two-Term System of, 38
terms of, in various countries, 40
what should be considered infringements of, 41
history of, in England, 65 et seq.
first created by statute in 1710 .. 67
first dispute as to, 1523–33 .. 68
value of, in time of Queen Anne, 89
Bill of 1842, brought in by Lord Mahon, 92
periods in English history of, 95
meaning of term as applied to dramas, 117
in newspapers in English law, 148
in *advertisements* in English law, 152
in *directories* „ „ 154
in *translations* „ „ 154
in *compilations* „ „ 154
in *annotations* „ „ 154
in *new editions* „ „ 155
in magazines, encyclopædias, periodicals, in English law, 163
two meanings of term in English law, 190
Corsellis, said to have introduced printing in 1468 .. 68
said to be brought to England at King's expense, 68
Cost of production of books, cheaper in England than in United States, 239
Cottenham, Lord, on conditional communication, 105
"Courtesy of the trade" in copyright in United States, 241
Coventry, S. G., opinion as to prerogative, 82, *note*
Cowie, Mr., case as to painting by, 195
Cromwell, Lord, petition to, for copyright, 68

The figures refer to paragraphs, not to pages.

Crosby Hall, place of dramatic entertainment, 123
Crown claimed prerogative rights in books, 68
granted privileges for printing, 68
copyright in English law, 150
Custom-house officers may seize piratical engravings, 218

D.

Damages, measure of, for infringement of Literary Copyright, 168
Day, Mr. Justice, opinion on copyright in unpublished works of art, 195
Dedication to the public, 1
Definitions of copyright and book in English law, 147
Denham, Henry, his rights of printing, 72
Denman, Lord, defines a dramatic piece, 122
Denmark, law of, as to newspapers, 29
as to duration of copyright, 40
as to registration and deposit of copies, 55
as to remedies for infringement, 61
as to unpublished works, 108
see *Scandinavian Countries.*
Deposit of Copies, law of foreign countries as to, 55
justification of, 56
in English law, 164
in International Copyright, 234
whether desirable in International Copyright, 236
recommendations of Commission as to, 237
Description of paintings, what suffices for registration, 214
Dicey, Mr. E., evidence as to copyright in United States, 242
Directories, copyright in, at English law, 153
Disraeli, B., supports Copyright Bills, 91
'Distinguished Member of Royal Humane Society,' whether sufficient title for registration, 214
Distribution of copies, should infringe copyright, 52
Divestitive Facts, meaning of term, 54, *note*
of copyright, what should be, 60
of copyright in unpublished works, 106
of copyright in oral communications, 112
of Dramatic Copyright, 128
of Literary Copyright, 167
of copyright in engravings, 204
of copyright in paintings, &c., 216

The figures refer to paragraphs, not to pages.

Donaldson v. *Becket*, opinion of judges in, 83
case of, 88
answers of judges in, 88
effects of decision in, 89
petition of booksellers against, 89
application of, to Dramatic Copyright, 120
Drama, novelisation of, 51
in English law, 124
Dramatic Authors, Secretary of Society of, author's agent, 127

DRAMATIC COPYRIGHT,
mainly statutory, 117
faults of English law of, 118
history of, before statute of William IV., 119
statutes regulating, 120
Sir J. Stephen on, 121
infringements of, 124
infringed by performing a work, 124
effect of immorality on, 124
in translations of foreign play, 124
duration of, 125
investitive facts of, 126
commissioned works in, 126
registration, 126
transvestitive facts of, 127
is personal property, 127
assignment of, does not pass play-right, 127
divestitive facts of, 128
remedies for infringements, 129
infringements of, need not be with knowledge, 129
law of other countries as to, 130
international, 131
lost by first publication outside the United Kingdom, 131
recommendations of Commission as to, 132
Dramatic entertainment, place of, what is? 123
Dramatic piece, author's rights in, at English law, 121
what is a, 122
Dramatic situations, subject of play-right, 124
Dramatisation of novels, discussed, 51
English law as to, 124
Commission on, 132

DRAWINGS,
value of copyright in, 177

The figures refer to paragraphs, not to pages.

DRAWINGS—*continued.*
proposal of Artistic Copyright Bill as to copyright in, 181, 226
proposal of Commission as to registration of, 183
English statutes regulating, 189
see *Paintings.*
Duration of Copyright, what should be, 33, 36
in unpublished works, 33
competing principles in, 34
law of foreign countries, 35, 40
what should be, in England, 37
under statute of Anne, 84
extended by Act of 1814 .. 90
of Dramatic Copyright, 125
in music, 139
in books, 156
in books, Commission on, 170
in engravings, 201
in paintings, drawings, photographs, 213
in sculpture, 220
in sculpture, Commission on, 224
in artistic property, Copyright Commission on, 225
in artistic property, Artistic Copyright Bill as to, 226
Duties of author of copyright book, 164

E.

Ear, recognition by, test of musical piracy, 142
Edition, New, copyright in, 28
copyright in, at English law, 155
Eldon, Lord, his decision as to Southey's 'Wat Tyler,' 101
on copyright in lectures, 102
Ellenborough, Lord, on Sculpture Acts, 219
Encyclopædia, copyright in, 32
copyright in articles in, 163
Endowed places, sermons and lectures delivered in, 114
ENGLAND, COPYRIGHT LAW OF,
as to newspapers, 29, 148
what should be duration of copyright in, 37
Two-Term Copyright in, 38
as to infringements of works of fact, criticism of, 45
infringements, principle of, 46
abridgments, 47, 160

The figures refer to paragraphs, not to pages.

ENGLAND, COPYRIGHT LAW OF—*continued.*
translations, 50, 154
as to dramatisation of novels, 51, 124
as to registration and deposit of copies, 55, 56, 163, 164
as to nationality of author, and place of publication, 57, 165
unsystematic character of copyright in, 64
history of copyright in, 65 *et seq.*
early legislation founded on licensing, 70
of Dramatic Copyright,
of Dramatic Copyright, faults of, 118
history of Dramatic Copyright in, 119
of Dramatic Copyright, statutes as to, 120
as to translations of foreign plays, 131
of Musical Copyright, 133
of Literary Copyright,
branches of, 99
statutory protection in, 99
common law protection in, 99
as to unpublished works, 100
as to letters, 104
as to conditional communications, 104
as to oral communications, 109
as to plays, mainly statutory, 117
as to lectures, mainly common law, 117
definitions of copyright in, 147
as to maps, 149
as to Crown Copyright, 150
qualities required in copyright work, 151
requires some literary value in work, 152
in catalogues, 152
in advertisements, 152
in Book-Titles, 153
requires originality in work, 154
in annotations and compilations, 154
in new editions, 155
extent of copyright in, 156
duration of copyright in, 156
who may acquire copyright under, 157
infringements of copyright in, 158
duties of author in, 164
rights of author in, 163
in encyclopædias, 163
in magazines and periodicals, 163

The figures refer to paragraphs, not to pages.

ENGLAND, COPYRIGHT LAW OF—*continued.*
investitive facts in, 165
see *Literary Copyright.*

ENGLISH LAW OF ARTISTIC COPYRIGHT,
as to effects of sale on copyright in, 184
as to infringements in, 186
codification desirable in, 188
statutes governing, 189
as to unpublished works in, 190, 198
as to *engravings*, 199 *et seq.*
as to *paintings, drawings, and photographs*, 211 *et seq.*
as to *sculpture*, 219 *et seq.*
English Law of International Copyright, 234
English Artists, views on Artistic Copyright, 176
English Authors, payments received by, from United States, 241

ENGRAVINGS, PRINTS, ETCHINGS, &c.,
of works of art, effect of, 175
effect of copyright in, 177
justification of copyright in, 177
copyright in, uselcss if alone, 178
what is publication of, 180
publication of, defined by Bill of 1883 .. 181
registration of, 182, 202
Commission as to registration of, 183
English statutes regulating, 189, 199.
case as to Prince Albert's, 191
what constitutes publication of, 197
definition of, 200
no copyright in immoral, 200
maps are not, 200
nature of copyright in, 201
who has copyright in, 201
infringed by photographic copies, 201
copyriglit in, is separable, 201
duration of copyright in, 201
investitive facts of copyright in, 202
must be produced in Great Britain, 202
what must be printed on them, 202
in book, book must be registered, 202
transvestitive facts of copyright in, 203
divestitive facts of copyright in, 204

The figures refer to paragraphs, not to pages.

ENGRAVINGS—*continued.*
infringements of copyright in, 205
assignments of copyright in, must be in writing, 203, 207
copy of, what, 205
Acts as to, object of, 205
chromo-lithograph, probably infringement of, 205
Berlin wool pattern, not infringement of, 205
pen and pencil copies, whether infringements of, 206
true test of infringements of, 206
principle of infringement of, 207
surreptitious, from proprietor's plate, not infringements of, 207
remedies for infringements of, 208
forfeiture of piratical, 208
actions for infringements of, to be brought within six months of infringement, 208
summary proceedings to recover penalties for infringements of, 208
International Copyright in, 209
proposals as to, in Artistic Copyright Bill of 1883 .. 226
Entrepreneur, copyright of, 32
Erle, Mr. Justice, in *Jefferys* v. *Boosey*, 92
Etchings: see *Engravings.*
Ethics, utilitarianism in, 1
Execution of artistic work, investitive fact of copyright in Bill of 1883 .. 181
Extent of Literary Copyright in English Law, 156
Extracts, when infringements of copyright, 159

F.

Fact, works of, infringements of copyright in, 45
Faed, Mr., R.A., evidence as to artistic copyright, 176
Faques, W., first King's Printer, 1504 .. 68
Farrar, Canon, payments to, from America, 241
Farrer, Sir T. H., evidence of, on value of copyright, 38
evidence as to lectures, 112
Fiction, works of, infringement of copyright in, 46
Field, Mr. B., evidence as to photographs and engravings of works of art, 175, 176
evidence as to registration of works of art, 183
Fixed-End system of copyright, 35
Fixed-Term system of copyright, 35
Footman, Queen's, privilege to print to, 69

The figures refer to paragraphs, not to pages.

Foreign Authors, position of, in England, 234, 235
FOREIGN COUNTRIES, LAWS OF,
principle of duration of copyright adopted in, 35
terms of copyright in, 40
as to infringements of copyright, 53
as to registration, 55
as to nationality of author, 57
as to place of publication, 57
as to transvestitive and divestitive facts of copyright, 60
as to remedies for infringement, 61
as to time within which action must be brought, 62
history of copyright in, 98
as to unpublished works, 108
as to oral communications, 116
as to Dramatic Copyright, 130
as to Musical Copyright, 145
as to Artistic Copyright, 227
as to International Copyright, 233
Foreign Plays, English law as to translations of, 131
Recommendation of Commission as to, 132
Foreign Reprints Act, 228
remuneration to author under, 228
Foreign Reprints, whether to be imported into England, 231
Forfeiture of piratical engravings 208
of piratical copies of paintings, 218
Fox, C. J., opposes Copyright Bill, 89
case as to bust of, 219
FRANCE, LAW OF,
as to newspapers, 29
duration of copyright in, 40
as to abridgments, 47
as to translations, 50
as to dramatisation of novels, 51
as to infringements of copyright, 53
as to registration and deposit of copies, 55
as to place of publication, 57
as to remedies for infringement, 61
history of copyright in, 98
as to unpublished works, 108
as to Dramatic Copyright, 130
as to Musical Copyright, 145
as to Artistic Copyright, 227
as to International Copyright, 233

The figures refer to paragraphs, not to pages.

France complains of Engiish formalities of deposit and registration, 236
Fraud, not necessary for infringements of copyright, 159
Fraudulent paintings, remedies against, 218

G.

GERMANY, LAW OF,
as to duration of copyright, 40
as to abridgments, 50
as to infringements of copyright, 53
as to nationality of author and place of publication, 57
as to remedies for infringements, 61
as to limitation of actions, 62
as to unpublished works, 108
as to Dramatic Copyright, 130
as to Musical Copyright, 145
as to Artistic Copyright, 227
as to International Copyright, 233
Germany complains of English formalities of deposit and registration, 236
Gladstone, W. E., supports Copyright Bill of 1841 .. 91
Grafton translates Bible at King's expense, 1547 .. 68
Grant, Sir Francis, on Artistic Copyright, 176
Graves, Mr., on Artistic Copyright, 176, 179
Grote, Mr., opposes Copyright Bill, 91

H.

Hastings, Mr., brings in Artistic Copyright Bill of 1883 .. 189
Hatherley, Lord, on Dramatic Copyright, 121
Hawkesworth's voyages, abridgment of, 160
High Commission Court, cases in, 70, *note.*
History of English Law of Copyright, 65
of English Copyright, periods of, 95
of copyright in foreign countries, 98
of Musical Copyright, 135
Holland, law of, as to remedies for infringement, 61
as to duration of copyright, 40
Holland, Professor, on nature of right, 4
Hollingshead, John, case as to dramatised novel of, 121
Hood, Tom, on copyright question, 88, 91
Houghton, Lord, supports Copyright Bill of 1841 .. 91

The figures refer to paragraphs, not to pages.

Hume opposes Copyright Bill of 1841 .. 91
Huxley, Prof., on author's right, 1
on production without protection, 12
on lectures, 19
payments to, from America, 241

I.

IDEAL COPYRIGHT
works protected in, 17
in unpublished works, 18
in oral communications, 19
nature of protection in, 22
qualities required in work in, 25
quantity required in work in, 30
in abridgments, 47
in translations, 50
in dramatisations of novels, 51
investitive facts of, 54, 58
registration under, 56
transvestitive facts in, 59
divestitive facts in, 60
remedies for infringements, 61
Immoral works, 26
plays, no copyright in, 124
books, no copyright in, 151
engravings, no copyright in, 200
Importation of printed books allowed by Act of 1485 .. 68
prohibited by Act of 1534 .. 68
forbidden by Act of 1735 .. 85
of piratical copies, remedies against, 168
India, copyright law in, 228
INFRINGEMENTS OF COPYRIGHT,
classes of, 41
in works of fact, 45
in works of fiction, 46
criticism of English law as to, 45, 46
principle of, 52
in unpublished works, 107
in Plays, 126
remedies for, 129
who commit, 129
need not be knowing, 129

The figures refer to paragraphs, not to pages.

INFRINGEMENTS OF COPYRIGHT—*continued.*
in Music, 139, 142
test of recognition by ear, 142
remedies against, 144
in Books, in English law, 158
need not be fraudulent, 159
Infringements of Copyright in Books, whether abridgments are, 160
whether translations are, 161, 162
remedies for, 168
Infringements of Artistic Copyright, 186
in engravings, 205
test of, 206
principle of, 207
remedies for, 208
actions for, to be brought within six months of infringement, 208
in paintings, drawings, and photographs, 217
method of procedure against, 217
in sculpture, 221
remedies for, 223
commission as to, 224
Injunction to restrain piratical printing, 129
against infringements of Literary Copyright, 168
Innocence required in copyright work at English law, 151
Interference of State, may be desirable, 4
INTERNATIONAL COPYRIGHT,
position of United States as to, 13, 238
principle of, 16
in plays, 131
in plays, commission on, 132
in engravings, 209
English law as to, 234
registration and deposit of copies in, 234
no common law right in, 234
in translations, 234
should the royalty system be introduced in, 235
criticism of present English law as to, 236
reciprocity in, 236
recommendations of Commission as to, 237
parties in United States on, 242
American publishers oppose, 242
American authors support, 242
possible basis for, with United States, 243

The figures refer to paragraphs, not to pages.

INVESTITIVE FACTS OF COPYRIGHT,
what should be, in Copyright, 54, 58
meaning of term, 54, *note*
in unpublished works, 102
in plays, 126
in oral communications, 110
in lectures, 110
in books, 165
in engravings, 202
in paintings, drawings, and photographs, 214
in sculpture, 221
ITALY, LAW OF,
as to duration of copyright, 40
as to translations, 50
as to divestitive facts of copyright, 60
as to plays, 130
as to music, 145
as to Artistic Copyright, 227

J.

Jefferys v. *Boosey*, case of, 93, 157
answers of judges in, 93
as bearing on Artistic Copyright, 192
Johnson, evidence of, before Commons in 1774 .. 89
Joint-authorship of play, what is, 126
Judicial Committee, licences to print from, 60, 165
Justices of the peace, notice of lecture to, 110
Justification of any law, benefit to community, 3

K.

Keeper, Lord, said to have taken bribe for grant of King's Printer's office, 69
King's patents, justified as acquired by labour and occupancy, 69
King's prerogative, all printing claimed as, 68
King's Printer, W. Faques first, in 1504 .. 68
R. Pynson, 68
office of, 68, *note*
money paid for office of, 68, *note*
fined, 68, *note*
King's proclamation of 1625, against importation of books, 74
Knowledge not necessary to constitute infringement of Dramatic Copyright, 129

The figures refer to paragraphs, not to pages.

L.

Lake, Sir T., bribe offered to, for grant of copyright, 69
Larceny, literary, what is, 158, 162
tests of, 162
Laurence's lecture, case as to, 151
Law, justification of, benefit to community, 2
Law of nature, theory founded on, rejected, 4
Law Reports, copyright in, 154
LECTURES,
should they be protected, 19
Professor Huxley on, 19
common law copyright in, 102
Dr. Abernethy's case as to, 102
Lord Eldon on, 102
English law as to, 109
delivered, but not printed, common law copyright in perpetuity, 109
if printed, twenty-eight years' copyright, 109
recommendations of Commission as to, 115, 170
Sir J. F. Stephen on, 115
see *Oral Communications.*
Legal metaphysics, copyright in, 1
Legal rights, Holland on, 4
Letters, English law as to, 104
Libraries, presentation of copies to, at English law, 164
penalty for failure to present copies to, 169
Licence, Royal, for sole printing of music, 69, 135
from Judicial Committee to reprint, 165
Licensing in interests of Church and State, the foundation of copyright in England, 70
required for every book, 1559..70
Licensing Act of 1662..77
based on existing literary property, 78
lapsed 1679–1685..79
expired 1694..79
protest of Lords against renewal of, 78
report of Commons' Committee against, 78
Limitations of Actions in copyright, 62
for injury to Literary Copyright, 168
for injury to copyright in paintings, 218
for injury to copyright in sculpture, 223

The figures refer to paragraphs, not to pages.

LITERARY COPYRIGHT,
established by all civilised nations, 12
tendency of legislation to extend, 12
position of, in 1660..78
position of, in 1700..81, 83
definition of, in English law, 147
work must be innocent to obtain, 151
work must not be seditious or libellous, 151
not granted to immoral works, 151
not granted to blasphemous works, 151
not granted to fraudulent works, 151
work must have some literary value, 152
granted to original book, 154
duration of, in English law, 156
extent of, in English law, 156
who may acquire, at English law, 157
infringements of, 158
infringements of, need not be fraudulent, 159
in commissioned work, 163
duties of author in, 164
registration in, 164
investitive facts of copyright in, 165
assignment in, must be in writing, 166
tranvestitive facts of, 166
divestitive facts of, 167
remedies for infringements of, 168
recommendations of Commission in, 170
how it differs from Artistic Copyright, 171
Literary Property, a monopoly, 2
creation of, how asked, 6
interest of community in, 8
interest of authors in, 8
interest of publishers in, 8
class of works produced, if not existing, 12
Lithographs: see *Engravings*.
Long Parliament, ordinance of 1641..74
ordinance of 1643..75
ordinances of 1647, 1649, 1652..76
Longman, Mr., evidence of, on value of copyright, 38
Lords, House of, throw out Copyright Bill in 1774..89
Love à la Mode, case as to, 119
Lyndhurst, Lord, supports Bill of 1842..92
on the nature of common law, 96

The figures refer to paragraphs, not to pages.

M.

Macaulay, Lord, his view of question of copyright, 1
his speech in 1841..91
his definition of copyright, 91
votes against Talfourd's Bill, 91
his amendment to bill of 1842..92
Magazines, copyright in articles in, 163
Mahon, Lord, introduces Bill in 1842..92
Maine, Sir H., on utility, 3
Mansfield, Lord, on copyright before Statute of Anne, 84
in *Millar* v. *Taylor*, 87
in *Donaldson* v. *Beckett*, 88
on musical copyright, 135
Maps, copyright in, at English law, 149
not treated as engravings, but as books, 200
must be registered as books, 200, 202
designer of, who is, 201
Marsh, T., before Star Chamber, 70
Measure of damages for infringements of literary copyright, 168.
Method to be pursued in this work, 1
Millar v. *Taylor*, verdict in, 81
opinion of judges in, 83
case of, 87
Milton and 'Paradise Lost,' 11
protests against decree of 1643..74
Monopoly, literary property a, 1
of author, nature of, 14
system, protection by, 22
Statute of, exempts patents for printing, 73
Moral rights, Holland on, 4
Murray, Mr., evidence as to American publishing, 239
Music, license for sole printing of, 69
MUSICAL COPYRIGHT,
at common law, 120
English law of, 133
in unpublished works, 134
performing and printing, rights in, 134, 137, 138
history till 1842..135
same as Dramatic Copyright, 136
Act of 1882..138, 146
author's rights as to, 139

The figures refer to paragraphs, not to pages.

MUSICAL COPYRIGHT—*continued.*
duration of, 139
what constitutes performance in, 139
registration in, 140
subject of, 141
in arrangements and adaptations, 141
infringements of, 142
assignments of, 143
remedies for infringements, 144
laws of foreign countries as to, 145
Commission as to, 146

N.

Nationality of author, as condition of copyright, 57
at English law, 165
Nature, law of, rejected, 4
New Edition: see *Edition*.
Newberry, his rights of printing, 72
Newspapers, copyright in, 29
English law as to, 148
registration of, 165
Norton, before Star Chamber, 69.
Norway, law of, as to newspapers, 29
see *Scandinavian Countries*.
Novel, dramatisation of, 51
English law as to, 124
Commission as to, 132
Novelisation of dramas, 51, 124

O.

Oral communications should be protected, 19
in English law, 109
author's rights in, 109
investitive facts of copyright in, 110
transvestitive facts in, 111
divestitive facts in, 112
remedies against infringements of, 113
see *Lectures*.
'*Ordered on Foreign Service*,' title sufficient for registration, 214
Originality required in copyright work, 27, 154
required in plays, 124

The figures refer to paragraphs, not to pages.

P.

PAINTINGS,
effect of copyright in, 177
what is publication of, 180
proposal of Artistic Bill of 1883, as to, 181
registration of, 182, 214
Commission as to registration of, 183
English Statutes regulating, 189, 211
subject matter of copyright in, 212
nature of copyright in, 213
duration of copyright in, 213
investitive facts as to, 214
who may obtain copyright in, 214
registration of assignments of copyright in, 214
short description of, what suffices for registration, 214
transvestitive facts of copyright in, 215
transfer of copyright must be in writing, 215
copyright in, lost at first sale, unless transferred or retained in writing, 215
divestitive facts of copyright in, 216
infringements of copyright in, 217
remedies against infringements of, 218
fraudulent, remedies against, 218
piratical, forfeiture and seizure of, 218
Artistic Copyright Bill as to, 226
'*Paradise Lost*' and Milton, 11
case as to, 86
Parliament, Long: see *Long Parliament.*
Part of a work, infringement of copyright to perform, 124
Patent, letters, to print, 73
Peel, Sir R., on Macaulay's copyright speech, 92
amendment to Copyright Bill of 1842 .. 92
Pen, copies by, whether infringements of engravings, 206
Penalty for piratical performance of music, 40s., 137
see *Remedies.*
Pencil, copies in, whether infringements of engravings, 206
Performance of music, what is, 139
Performing right in music, 134, 137, 139
duration of, 139
Periodical work, copyright in articles in, 163
Perpetual copyright granted to universities, 90
Personal property, dramatic copyright and playright are, 127

The figures refer to paragraphs, not to pages.

'*Pestal*,' case as to copyright in music of, 141
Petitions resulting in Statute of Anne, 84
PHOTOGRAPHS
of works of art, evidence as to effect of, 175, 176
what is publication of, 180
publication of, defined in Copyright Bill of 1883 .. 181
registration of, whether necessary, 182
Commission as to registration of, 183
of persons, copyright in, 184, 185
Commission as to, 185
Copyright Bill of 1883, as to, 185, 226
English Statutes regulating, 189, 211
of engravings, infringe copyright in engravings, 201
when subject of copyright, 212
who is author of, for registration, 214
Commission as to duration of copyright in, 226
see *Paintings*.
Pianoforte arrangement, copyright in, 141
of opera, registration of, 140
'*Piper and pair of Nutcrackers*,' whether sufficient title for registration, 214
Piracy, literary, what is, 158, 159
Piratical copies, forfeited to proprietor of copyright, 168.
Place of dramatic entertainment, what is a, 123
Place of publication, as giving copyright, 165
Play, should it be protected, 19
immorality in, 124
copyright in translation of foreign, 124
joint authorship of, what is, 126
see *Dramatic Copyright* and *Playright*.
PLAYRIGHT,
meaning of term, 117
regulated by common law till 1833 .. 119
statutes regulating, 120, 121
not destroyed by previous printing, 121
is the sole right of representing in public, 123
duration of, 125
registration to secure, 126
transvestitive facts of, 127
investitive facts of, 126
is personal property, 127
not passed by assignment of copyright, 127
divestitive facts of, 128

The figures refer to paragraphs, not to pages.

PLAYRIGHT—*continued.*
remedies for infringements of, 129
law of foreign countries as to, 130
lost by first publication outside the United Kingdom, 131
Commission as to, 132
see *Dramatic Copyright.*
Politics, utilitarianism in, 3
Pollock, C.B., his opinion in *Jefferys* v. *Boosey*, 93
Pope's Miscellanies, 86
letters, case as to, 104
Portraits, Commission fail to define, 184
copyright in, 184
Portugal, law of, as to duration of copyright, 40
as to registration of copies, 55.
as to musical copyright, 145
as to artistic copyright, 227
Prerogative, rights in books claimed by Crown, 68
all printing claimed as, 68
opinion of Coventry, S.G., as to, 82, *note.*
Price of books, not to be fixed by State, 14, 23
to be fixed by Act of 1534..68
fixed by Statute of Anne, 84
proviso of Statute of Anne as to, repealed 1735..85
apparently to be fixed by State in Colonial Copyright, 229
Prince Albert's drawings, case as to, 100
Printers, regulation of, by Decree of 1637..74
master, 23 in London in 1634..71, *note.*
Printing, introduced into England by Caxton, 1471..68
all, claimed as King's prerogative, 68
confined to members of the Stationers' Company, 70
sources of sole right to, in 1623..73
Printing Presses, 53 in London in 1583..71, *note.*
Prints: see *Engravings.*
Privileges for printing, granted by Crown, 68
first book with, 1518..68
granted for seven years, 1530..68
large numbers of, 1530–1630..69
said to be incompatible with existence of copyright, 69
bribe offered for, 69
Profit not necessary to constitute infringement of copyright, 123
Property, defined by Austin, 4.
in artistic works, whether desirable, 172
in artistic works, arguments against, 173, 174

The figures refer to paragraphs, not to pages.

Protection, to what the State should afford, 17
nature of, afforded to books, 22
by *Monopoly system*, 23
by *Royalty system*, 24
to whom afforded, 31
duration of, 34, 35, 36.
Protection by Statute in England, 99
by common law in England, 99
Protest of authors in 1643 .. 75
PUBLICATION,
investitive fact of copyright, 54, 165
place of, as a condition of copyright, 57, 165
of unpublished works, can be prevented by author or owner, 100.
divestitive fact of common law right, 106
definition of, 106
for private circulation does not divest common law right, 106
in print does not divest playright, 121
licence from Judicial Committee for, 165
of artistic works, what is, 180, 197
definition of, in Copyright Bill of 1883 .. 181
Turner v. *Robinson* on, 197
of sculpture, what is, 197
of engravings, what is, 197
investitive fact of copyright in sculpture, 221
Publishers, interest of, in literary productions, 8
how affected by absence of State protection, 10.
injured by Royalty system, 24
American, oppose International Copyright, 242
American, what they want, 242
'*Punch*,' case as to title of, 153
Putnam, Mr., evidence as to advance sheets sent to America, 241
Pynson, published first book *cum privilegio*, 68.

Q.

Qualities required in copyright work, 25, 151
Quantity required in copyright work, 30
Queen Victoria's etchings, case as to, 191
Question of Copyright, Macaulay's view of, 1
fundamental, 5, 8
Quotations, whether infringements of copyright, 43

The figures refer to paragraphs, not to pages.

R.

'*Rasselas*,' abridgment of, case as to, 160
Reade, Charles, payments to, from America, 241
Reciprocity in International Copyright, 236
Registers of Stationers' Company, 71
complaints as to condition of, 78
number of entries in, 81
REGISTRATION,
investitive fact of literary copyright, 54
justification of, for books, 56
of assignments of copyright, 59
first English Act requiring, 1637 .. 71
from 1550–1650 .. 71
in Dramatic Copyright, 126
necessary to secure playright, 130
in Musical Copyright, 140
of books, English law as to, 164, 165
of newspapers, 165
penalty for failure to make, 169
penalty for making false, 169
Commission as to, 170
of Works of Art, Copyright Bill of 1883, as to .. 181, 226
whether necessary, 182
Commission as to, 183, 225
evidence as to uselessness of, 183
of engravings, Commission on, 210
of paintings, drawings, and photographs, 214
of place of abode, what is, 214
of short description of painting, what suffices, 214
who is author of photograph for, 214
person aggrieved with, 214
in International Copyright, 234
whether desirable in International Copyright, 236
in International Copyright, Commission as to, 237
Regulation of price by State inadvisable, 23
REMEDIES FOR INFRINGEMENT OF COPYRIGHT, 61
in unpublished works, 107
in oral communications, 113
in plays, 130
in music, 144

The figures refer to paragraphs, not to pages.

REMEDIES FOR INFRINGEMENT OF COPYRIGHT—*continued.*
in books, 168
in engravings, 208
in paintings, &c., 218
in sculpture, 223
in Works of Art, Copyright Bill of 1883, as to, 226
REMEDIES,
against author, 63, 169
for non-delivery of copies to libraries, 169
for non-registration, 169
for false registration, 169
against fraudulent paintings, 218
Reports, Law, Copyright in, 154
Reprints, Foreign and Colonial, whether to be imported, 231
Reproductions, what should be considered infringements, 41
by other channels, whether infringements, 48
unauthorized, what are, 52
Reviews, copyright in articles in, 163
Right, absolute, consideration of dismissed, 3
Austinian position as to, assumed, 4
Prof. Holland as to, 4
meaning of "man has a," 4
of author of copyright work, 163
to artistic work, meaning of, 179
Rossetti, D. G., pictures of, 180
Routledge v. *Low*, case of, 157, 228
ROYALTY SYSTEM,
meaning of, 15
partially recommended by Commission for Colonial Copyright, 15, 229
in International Copyright, 16, 235
when applicable, 24
applied to reproductions through other channels, 51
infringements of copyright under, 52
registration under, 59
remedies under, 61
Russell, Lord John, supports Talfourd's Bill of 1841..91
RUSSIA, LAW OF, as to duration of copyright, 40
as to registration and deposit of copies, 55
as to unpublished works, 108
as to playright, 130
as to Artistic Copyright, 227

The figures refer to paragraphs, not to pages.

S.

Sale of piratical copies, must be knowing, to be an infringement, 168
remedies against, 168
Sale of works of art, effect on Copyright, 184, 215
Commission as to, 184
Copyright Bill of 1883, as to, 184
Scandinavian Countries, law of, as to duration of copyright, 40
as to abridgments, 47
as to translations, 50
as to infringements, 53
as to registration and deposit of copies, 55
as to nationality of author, and place of publication, 57
as to divestitive facts, 60
as to remedies, 61
as to limitation of actions, 62
as to Musical Copyright, 145
as to Artistic Copyright, 227
as to International Copyright, 233
see Norway, Sweden, Denmark.
Scenic effects, subject of playright, 124
Scott, Walter, copyright in works of, 91
SCULPTURE,
evidence of Mr. Woolner as to copyright in, 175, 219
effect of photographs and engravings of, 175
value of copyright in, 177
proposal of Copyright Bill of 1883, as to, 131
registration of, whether necessary, 182
registration of, Commission as to, 183
English statutes regulating, 189, 219
publication of, what constitutes, 197
cases concerning, 219
Acts, Lord Ellenborough on, 219
Acts, Sir J. F. Stephen on, 219
copyright in,
subject-matter of, 220
persons entitled to, 220
duration of, 220
investitive facts of, 221
remedies for infringement of, 223
limitation of actions in, 223
Commission as to, 224
Copyright Bill of 1883, on, 226

The figures refer to paragraphs, not to pages.

Search for piratical copies of works of art, 187
Commission as to, 225
Copyright Bill as to, 226
Seizure of piratical copies of books, 139, 168
of works of art, 187
of paintings, 218
of works of art, Commission as to, 225
of works of art, Copyright Bill as to, 226
Sermons, English law as to, 101
in endowed places, 114
Sermon, my First, title for registration, 214
my Second, title for registration, 214
Shakespeare, adaptation of plays of, 124
Sherman, proposal as to International Copyright in United States, 243
Simpson, Palgrave, evidence as to Dramatic Copyright, 129
Song, out of copyright opera, piracy to perform, 142
may be three copyrights in, 137
Southey, copyright in works of, 91
'Wat Tyler,' case as to, 100
SPAIN, LAW OF,
as to duration of copyright, 40
as to translations, 50
as to nationality of author, and place of publication, 57
as to Musical Copyright, 145
as to Artistic Copyright, 227
as to International Copyright, 233
Sparkes, charged with unlicensed printing, 70, *note*
denies power of Star Chamber, 70, *note*
Spencer, Herbert, on production without protection, 12
as to duration of copyright, 37
American payments to, 241
St. Leonards, Lord, in *Jefferys* v. *Boosey*, 93
Stage-Right, meaning of term, 117
Stanhope, late Lord, introduces Copyright Bill of 1842 .. 92
STAR CHAMBER,
records of, Marsh prosecuted in, 70
ordinance of, against printing, 1566 .. 70
ordinance to restrict printing to Stationers' Company, 71
decree of, in 1637, for regulation of printers, 74
cases in, 70, *note*
State, interference of, may be undesirable, 4
wants good and cheap books, 9

The figures refer to paragraphs, not to pages.

State—continued.
cannot secure fame to author, 9
protection, results of absence of, 10, 11
not to fix price, 14, 23
STATIONERS' COMPANY,
constitution of, and its results, 67
quasi-private position of, 67
history of, 70
charter of, 1556 .. 70
members of, had sole right to print, 70
its power to make by-laws, 70
its powers of search and seizure, 70
kept registers, 71
resistance to by-laws of, 72
petition the Crown for protection, 72
charters confirmed 1585 .. 72
concessions by wealthy members of, 72
regulations of, evaded by printing beyond sea, 73
complaints as to registers of, 78
passes by-law in 1681 .. 79
charter confirmed in 1684 .. 80
passes by-law in 1694 .. 80
contests with King's patentees, 82
contest with Cambridge University, 82, *note*
Statutes as to copyright in oral communications, 109, 110
as to Dramatic Copyright, 120
as to Artistic Copyright, 189
as to paintings, &c., 211
as to sculpture, 219
Stephen, Sir J. F., digest of copyright law, 64, 190
on unpublished works, 100
on lectures, 115
doubts whether playright is destroyed by previous printing, 124
on Artistic Copyright, 174
examination of his views on Artistic Copyright, 178
as to unpublished works of art, 190
on Sculpture Acts, 219
Stringer, H., Queen's footman, privilege granted to, 69
Summary procedure under Engraving Acts, 208
under Painting Acts, 218
Sweden, law of, as to newspapers, 29
as to duration of copyright, 40
see *Scandinavian countries.*

The figures refer to paragraphs, not to pages.

Switzerland, law of, as to duration of copyright, 40
as to infringement of copyright, 53
as to registration and deposit of copies, 55
as to Artistic Copyright, 227
as to International Copyright, 233

T.

Talfourd, Serjeant, his Bills of 1838 and 1841 .. 91
dies before session of 1842 .. 92
Taylor, Tom, evidence as to novelising dramas, 124
Tennyson, Mr., American payments to, 241
Term of Copyright, what should be, 33
Thomson's 'Seasons,' case as to, 87
Thurlow, Lord, opposes Copyright Bill, 89
Times newspaper, cases as to copyright in, 148, 153
Titles of books, copyright in, 30, 153
Tottell, Mr., his printing rights, 72
TRANSLATIONS,
whether infringements of copyright, 50, 161
law of foreign countries as to copyright in, 50
of foreign play, copyright in, 124
of foreign play, English law as to, 131
of foreign plays, Commission as to, 132
English law as to, 154
in International Copyright, 234
time allowed for, in English law too short, 236
Commission as to International Copyright in, 237
Transvestitive facts of copyright, meaning of term, 54, *note*
what should be, 59
in unpublished works, 103
in oral communications, 111
in dramas, 127
in books, 166
in engravings, 203
in engravings, Commission as to, 210
in drawings, paintings, and photographs, 215
Trevers, his dispute as to copyright, 68
Turner v. *Robinson*, case of, 193, 197
TWO-TERM COPYRIGHT, 38
granted by Statute of Anne, 84
evidence as to working of, 89

The figures refer to paragraphs, not to pages.

Tyndall, Professor, payments to, from America, 241
Typographical Union of United States, its views on International Copyright, 242

U.

UNITED STATES, LAW OF,
does not recognise International Copyright, 13
as to duration of copyright, 40
as to abridgments, 47, 160
as to translations, 50, 161
as to dramatisation of novels, 51
as to registration and deposit of copies, 55, 56
as to nationality of author, and place of publication, 57
as to remedies for infringements, 61
history of, as to copyright, 98
as to unpublished works, 108
as to oral communications, 116
as to Dramatic Copyright, 130, 131
as to Musical Copyright, 145
as to titles of books, 153
as to unpublished artistic work, 198
as to Artistic Copyright, 227
UNITED STATES,
argument in favour of literary property from, 13
their position as to International Copyright, 238, 239
results of their position, 240
courtesy copyright in, 241;
payment to English authors from, 241
parties in, as to International Copyright, 242
Western states of, oppose International Copyright, 242
views of publishers in, 242
views of authors in, 242
Universities, obtain perpetual copyright, 90
copyright of, 169
UNPUBLISHED WORKS, COPYRIGHT IN, 18
duration of, 33
investitive facts of, 54, 102
English law as to, 100
nature and limits of, 101
none in immoral, 101
transvestitive facts of, 103
divestitive facts of, 106
infringements of, 107

The figures refer to paragraphs, not to pages.

UNPUBLISHED WORKS, COPYRIGHT IN—*continued.*
remedies for infringements of, 107
of music, 134
works of art, 180
English law as to, 190, 198
Sir J. F. Stephen's views on, 190
cases as to, 191
Jefferys v. *Boosey*, as bearing on, 192
statute of 1862, its effect on, 194
opinion of Day, J., on, 195
Utilitarianism, in politics and ethics, 3
Sir H. Maine on, 3

V.

Value of copyright in time of Queen Anne, 89
Votiva Anglia, fine for printing, 70, *note*

W.

Wackerlin, petitions for privilege, 69
Waiver, in ideal copyright, 20, 60
divestitive fact of copyright, 106
Wall, Mr., in Musical Copyright, 123, 127
War correspondence, copyright in, 29
Wheaton v. *Peters*, American case of, 98
'*Whole Duty of Man*,' case as to, 86
Willes, Mr. Justice, his judgment in *Millar* v. *Taylor*, 87
Wilson, offers money for privilege, 69
Wolfe, infringes patent of Queen's printer, 70, *note*
Wool-pattern not infringement of engraving, 205
Woolner, Mr., R.A., evidence as to copyright in sculpture, 175, 219
evidence as to Artistic Copyright, 179
Worde, Wynkyn de, his dispute as to copyright, 68
Wordsworth, copyright in works, 91
Wortley, Mr., introduces Copyright Bill of 1709..84
Writing, necessary for assignment of copyright, 127, 166
Wurtemberg, Crown grants of copyright in, 69

Y.

Yates, Mr. Justice, in *Millar* v *Taylor*, 87
on unpublished works, 101
Year-books, reported at expense of Crown, 68

Bx. L. Q. A.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.