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TO

THE RIGHT HONOURABLE

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LORD CHIEF JUSTICE OF ENGLAND,

THE

ACCOMPLISHED SCHOLAR, GRACEFUL ORATOR,

AND WIDE AND LIBERAL THINKER,

WHO WORTHILY INHERITS

A NAME ILLUSTRIOUS IN THE REALMS

OF

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RESPECTFULLY DEDICATED

BY

THE AUTHOR.

PREFACE

TO

THE SECOND EDITION.

This edition will be found to embody all alterations in and additions to the law as formerly presented, which have been made by decision and by statute, down to the present week.

In the Law of Copyright, since the publication of the first edition, many new points of interest have been decided with respect to maps, newspapers, photographs lectures, and the right of dramatic and musical representation. The Legislature has modified the law as to musical compositions, and has substituted the Act of 1883 for all previous enactments relating to copyright in designs. In the Law of Libel considerable changes have been introduced by the Newspaper Libel and Registration Act of 1881; important principles have been laid down as to the granting of criminal informations; whilst the Law relating to Blasphemous Publications has received judicial interpretations so discordant as to necessitate a searching examination of the subject. Some points which have arisen since the body of the work was passed through the press will be found discussed in the Addenda.

2, Essex Court, Temple,
May 21, 1884.

PREFACE

TO

THE FIRST EDITION.

ABOUT *four years* ago it was proposed to the Author that he should collect in one book the various branches of law relating to works of literature and art, with a view of supplying not only the legal profession with such a work, but also those engaged in literary and artistic pursuits, whether as authors, editors, or publishers, with a complete statement of the law bearing on the subjects of their important labours. The work then begun has from time to time occupied the Author's attention ever since, and the present volume is the result of labours which other business has frequently interrupted.

It was originally not the intention of the Author to deal with the subject of Copyright in Designs; but, in order that the book might contain a complete treatise on the Law of Copyright, a chapter has been added in which this department of law is fully treated.

ESSEX COURT, TEMPLE,
July 18, 1871.

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ADDENDA.

LECTURES.

In the case of *Nicols* v. *Pitman* (50 L. T. N. S. 254), heard before Kay, J., on the 20th of March of this year, and only recently reported, an injunction was granted to restrain the defendant from publishing in the "Phonographic Lecturer," a report in shorthand of a lecture delivered by the plaintiff at the Working Men's College, Great Ormond Street, to which admission was given by tickets gratuitously issued by the committee of the College. The plaintiff had the manuscript of his lecture with him at the time of delivering it, but as he knew it by heart, it was seldom necessary to refer to it.

After quoting Lord Eldon's decision in *Abernethy* v. *Hutchinson* (*vide* pages 39, 40, *post*), Kay, J., observed: "It is quite true that the learned judge seems at one moment to refer to the ground of property and at another to that of implied contract. But I take his meaning to be that, when there is a lecture of this kind delivered to an audience, especially where that audience is a limited one admitted by tickets, the understanding between the lecturer and the audience must be that, whether the lecture has been committed to writing beforehand or not, the audience are quite at liberty to take the fullest notes they like for their own personal convenience; but they are not at liberty, having taken these notes, to use them afterwards for the purpose of publishing the lecture for profit. That is the ground on which I am going to decide this case. The case does not come within the statute of 5 & 6 Will. 4, c. 65, because notice in writing was not given to two justices under sect. 5 of that Act. I do not know whether it is a case in which notice could properly have been given, because it was a lecture delivered at a public college—for I think it is sufficiently proved before me that the place where it was delivered answers the description of a public college—and that is one of the cases in which it is not necessary to give notice. But if the notice be not given, or if the place be a public school or college, or any public foundation, then the law relating thereto is to remain the

same as if the Act had not passed. That will be the law as *laid down by Lord Eldon, which is the law I am bound to* administer in this particular case. . . . . I cannot regard the publication of the lecture in a system of shorthand—the key to which is in everybody's hands who chooses to buy it—as being different in any material sense from any other kind of publication."

The learned judge, it is submitted, read the enactment as to public schools, colleges, or public foundations in a sense different from that which the Legislature intended. There can be little doubt that the object of that enactment (whether its words sufficiently indicate it or not) was to give unrestricted liberty of publishing any of the lectures delivered at the places enumerated. When the original Bill came down from the House of Lords (where it passed without discussion) it had no such provision in it. In the debate on the second reading in the House of Commons, Mr. Wakley said that "if the Bill were intended to apply only to private lectures it would be a proper protection; but if it were meant to shield public as well as private from publication, he should consider that it ought not to receive the sanction of the House. In the present state of the law [*i.e.*, in 1835] no such protection is needed; for it was laid down by Lord Eldon [in 1825] that private lectures could be protected, if it were proved there was a breach of implied contract between the lecturer and the individual hearer. . . . . It was preposterous to see such a Bill as this passing the Lords without a word of discussion, and unless the Lord Advocate assured him that public lectures were not to be shielded from public notice, he should divide the House against the Bill." (30 Hans. 253.) In committee the same member urged the same views, and denied that lecturers at such places as St. Bartholomew's Hospital, who, he said, derived large incomes from it, were entitled to any such protection as was given to authors. (30 Hans. 977.) It was to meet these objections that the words "or to any lecture or lectures delivered in any university or public school or college, &c.," were inserted before the Bill was read a third time (90 Com. Journ. 605), and the amendment was accepted by the House of Lords.

How stands the Act now? Sect. 1 confers, for the first time, on the author or his assignee, "the sole right and liberty of printing and publishing" his lecture, and prohibits every one else from doing so; even those who pay for leave to attend (sect. 3). But this right is (by sect. 5) dependent—in the case of all lectures, wheresoever delivered—on the requisite notice to justices being given; and the right is not conferred

at all in the case of lectures delivered "in any university or public school or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation:" the law as to lectures of which notice has not been given, and as to lectures delivered in any university, &c., remaining "the same as if this Act had not been passed." If by these last words is meant that Lord Eldon's doctrine of implied contract remains applicable to such lectures, the result is this: every member of the limited audience which is admitted to a lecture delivered at 'any university or public school,' &c., is under an implied contract not to publish the lecture; equity will not permit any other person than the author to publish it; in other words, the author has 'the sole right and liberty of printing and publishing' it—the very thing which the statute distinctly refuses to give him in such a case.

It is submitted that, notwithstanding the concluding words of sect. 5, the doctrine of implied contract was intended to be done away with in the case of lectures delivered at public institutions of the kind mentioned, and, consequently, that if the Working Men's College in Great Ormond Street was an institution of such a kind, it was the intention of the Legislature that the author of a lecture delivered there should not have the right to restrain the publication of it.

A very strict interpretation of the words of the Act may lead to the conclusion drawn by the learned judge; but it will also make the provision as to lectures delivered at public schools, &c., a nullity.

BLASPHEMOUS LIBELS.

Since the chapter on Blasphemous Libels passed through the press, my attention has been directed(*a*) to the opinions given in 1842 by the Judges to the House of Lords in the matter of Lady Hawley's Charities,(*b*) opinions which confirm in the strongest manner the view of the law set forth in that chapter.

The litigation in this case was begun in 1830 by an information filed by the Attorney-General, for the purpose of administering certain charities founded in 1704 and 1707 by Lady Hawley, by distinct sets of deeds, and placed under

(*a*) By a pamphlet on the Law of Blasphemy, written by my friend Mr. L. M. Aspland.

(*b*) *Shore* v. *Wilson*, 9 Cl. & Fin. 355. A verbatim report of the judgment in the Courts below, and of the arguments in the House of Lords, was also published, from the shorthand notes of Messrs. Gurney & Son, in 1839, by Smallfield & Son, Newgate Street.

the direction of distinct sets of trustees. At the dates of the deeds all religious sects tolerated by law believed in the doctrine of the Trinity; but in process of time the estates became vested in trustees, of whom the majority were Unitarians, and they applied the rents for the benefit of Unitarians. We are only concerned with one of the points in the case. It having been contended, *inter alia*, on behalf of those who were attacking the trustees, that the teaching of Unitarians was still an offence at common law—it being agreed that Unitarians did not believe the doctrine of the Trinity, original sin, or the atonement—the House of Lords, in 1839, put six questions to the Judges, of which the last was in this form, viz.: "Whether, upon the true construction of the deed of 1704, ministers or preachers of what is commonly called Unitarian belief and doctrine, and persons of what are commonly called Unitarian belief and doctrine, are excluded from being objects of the charities of that deed?"

As to the effect of this question, Lord Brougham said: "I at one time had a little doubt upon the question which has been discussed by the learned Attorney-General in his reply, as to the criminality or non-criminality in the eye of the law of *denying decently and decorously the doctrine of the Trinity*; for as to any ribaldry, nobody can doubt the law upon that, and the Attorney-General has not himself disputed it; but upon the whole I think that it is unnecessary to be put as a separate question, and if unnecessary, it is better to avoid putting it." The Lord Chancellor: "*The last question embraces it*: whether such ministers, &c., are in the present state of the law incapable of partaking of such charities." Lord Brougham: "I think that covers it, and it is better than putting it separately."(*a*)

To this question, involving, as it was thus admitted to do, the criminality or non-criminality at common law of denying such doctrines of Christianity as Unitarians do not admit, seven judges (in 1842) gave the same reply.

Maule, J., said: "There is no statute now in force prohibiting the profession or preaching of Unitarian doctrines, *and I have not found any authority to show that it is prohibited at common law.*"

Erskine, J., said: "It is indeed still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, and no one would be allowed to give or to claim any pecuniary encouragement for such purpose; yet *any man may, without subjecting him-*

(*a*) Report published in 1839, pp. 262, 263.

self to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it, and I am not aware of any impediment to the application of any charitable fund for the encouragement of such inquiries."

Coleridge, J., said: "I apprehend that there is *nothing unlawful at common law* in *reverently doubting or denying doctrines, parcel of Christianity, however fundamental.* It would be difficult to draw a line in such matters according to perfect orthodoxy, or to define how far one might depart from it in believing or teaching without offending the law. The only safe and, as it seems to me, practical rule is that which I have pointed at, and which depends on *the sobriety and reverence and seriousness with which the teaching and believing, however erroneous, are maintained.*"

Williams, J., and Gurney, B., having expressed themselves as of the same opinion, Parke, B., added: "I agree entirely with all my brethren, that if Unitarians are not excluded by the true construction of the terms of the deeds, the present state of the law does not exclude them; that is, *the preaching of doctrines called Unitarian is not, on that account, illegal at common law;* and all the statutory penalties have been repealed." Tindal, C.J., concurred.

RIGHT OF DRAMATIC REPRESENTATION.

The judgment of the Court of Appeal (Brett, M.R., and Bowen, L.J., *dissentiente* Fry, L.J.), affirming the judgment of the Divisional Court in *Duck* v. *Bates*, was delivered on the 12th of May. See the facts of the case, and the judgment of the Divisional Court, *post* pp. 239, 240.

Brett, M.R.: "In this case, there being no doubt that what took place was a dramatic entertainment, inasmuch as it was the acting of a well-known play, the question is whether those who acted in the play, particularly the defendant, who seems to have been the person who instigated and managed it, are liable under 3 & 4 Will. 4, c. 15. I do not think that in this case we have anything to do with the Act of Victoria; I do not think that anything in the Act of Victoria can assist us in constructing the Act of 3 & 4 Will. 4. The defendant has been a party to the acting of a dramatic piece in which the plaintiff had the right given him by the Act of William IV. The only question is whether there has been such a breach of his rights as entitles him to sue under the Act. In order to construe the Act according to the mode in which I think

Acts of Parliament ought to be construed, I must apply myself to consider the phraseology used in it according to its ordinary meaning in the English language as used by people speaking of the subject-matter of the Act. The subject-matter of the Act is the right of the author of a dramatic entertainment to the exclusive property in that which he has himself invented and written. Besides that, which I always think is the primary rule for construing Acts of Parliament, I think one has a right to avail oneself, if one can, of other assistance also.

"Now, I agree with the defendant's contention, that what was intended to be protected by the Act was the value, from a commercial point of view, of the property in a dramatic invention. The author does not want a sentimental protection: he wants a business protection—a protection which secures to him the value of his invention. What is that? It is the right of himself representing or causing it to be represented; and the right of giving licences to other persons to represent it for value. That is the right to be protected. We must look, then, to see what would injure such a right, and interfere with such a value. This may furnish a help and a key to the construction of the different parts of the Act.

"If in the case of a play which the author himself has the right to have acted, and has had acted, any other person performs it under similar conditions, that would be an injury, and is probably the first that occurs to one's mind. This would lead the Legislature to protect the author against other persons acting his play for profit. But it is obvious that other modes of acting his play than acting it for profit may injure the author. If a rival company desiring to injure him, and to obtain an audience which would otherwise go to him for profit, allows the public to witness a performance of it gratis, that would be an even greater injury to the author than if the rival company acted it for profit. I should therefore expect to find in the Act a protection against persons acting the play, though not for profit. On this point the Act has already received a construction. It is not necessary, in order to constitute an infringement of the author's rights, that the rival performance should be for profit.

"The next point is, whether, in respect of such a commercial value in the author's production as I have referred to, it would be a sufficient protection to him to enact that other persons should not act his play in any place where plays are usually or habitually acted. If that were so, his right would

be infringed only by a performance in a regular theatre; for that is almost the only place where dramatic pieces are habitually performed. If that had been the intention of the Legislature it could have said so. But the author himself does not always have his play acted in a licensed theatre; and supposing he did, other persons, by taking a room, performing the play there, and admitting the same audience which would otherwise go to the theatre where the author himself is acting it, though from time to time they changed their place of performance—might injure him to a serious extent. I should not expect, therefore, that the places where the Legislature prohibited the acting of the author's play should be only places habitually used for such entertainments. I do not know whether this has actually been held, but I know it has been said; but whether it has been so held or said I cannot think that a right construction of the Act which would confine the prohibition to places habitually used for such a purpose.

"It has been supposed that I have said(*a*) that the mere fact of an entertainment being a dramatic one makes the place where it is given a place of dramatic entertainment within the meaning of the Act. I do not think I ever did say so . . . . but if I did, I am of opinion that what I said was wrong.

"I come now to consider what, to the best of my understanding, is the meaning of the Act as to the place in which a dramatic piece must be represented in order to make the representation an infringement of the author's rights. From the words 'any place or places of dramatic entertainment,' it seems to me that there must be some places where a performance may take place which does not infringe the author's rights, otherwise the words 'at any place or places of dramatic entertainment' would not have been put into the section at all. If the performance is given at a place which is not 'a place of dramatic entertainment,' there is no infringement. The statute requires that not only should there be a dramatic entertainment, but that it should be given in 'a place of dramatic entertainment.' . . . . What is the meaning of those words, as used by people ordinarily when talking of such a subject-matter? Did the Legislature mean to include the acting of a play by children in a drawing-room

(*a*) Referring doubtless to the language reported to have been used by the learned judge in *Wall* v. *Taylor*, L. R. 11 Q. B. D. 108, that the words "dramatic entertainment" are "words of supererogation; for performing a dramatic piece makes the place where it is performed a place of dramatic entertainment."

or in a nursery? It is impossible to think it could. No man using ordinary English language would call a nursery or a drawing-room a place of dramatic entertainment. Yet the Legislature meant something more than a theatre. A place of dramatic entertainment must therefore be something between the two. It is not necessarily a place where dramatic entertainments habitually take place; neither is it necessarily a place for admission to which people must pay. Why would nobody call a nursery or a drawing-room a place of dramatic entertainment? Because each is obviously private and domestic. . . . . Suppose you get some friends to act for some persons in your drawing-room, and admit your servants also, would your drawing-room be a place of dramatic entertainment? Everybody would say no, because it is still private and domestic.

"Now, let us see whether we can get any light from the nature of the protection which is given by the Act. What does the author want protection for? For his right—his right to act his play for value. . . . . We must see then what would injure such a right. A representation not for money might injure him, but it must be such a representation as would interfere with the same people as would otherwise go to his theatre for money. It seems to me, therefore, that a mere domestic representation in a man's house could not have been intended. If, instead of acting it in his own drawing-room, a man took for the purpose a house that happened to be unfurnished, could that make a difference? Obviously not. . . . . I come to the conclusion, therefore, that the place intended by the Act must be one where a dramatic entertainment is given otherwise than as a mere domestic or internal representation. It need not be paid for; but it must be public in this sense, that a sufficient part of the public is entertained there who would otherwise be entertained at the place where the author is acting his play as a commercial transaction. . . . . It does not follow, because you confine the audience to something less than the entire public, that the representation would not be public in the sense in which I use the word. If you were to give a representation, say in a country town, and expressed a desire that all the people in the neighbourhood or in the county—or, if you like, the people of a certain class—should come, they would not come simply as your friends or acquaintances, or as part of an audience which would constitute the entertainment a domestic one; they would really come as part of the public—a limited part no doubt; but just the class of people who would go to the author's own entertainment if he gave one

there. If a gentleman organized an entertainment for the amusement of all the voters in his constituency, ... the entertainment would be a public one. Were a number of ladies and gentlemen to go round the country and act a protected play in a town-hall or schoolroom, charging a price for admission, to be given to a charity, there can be no doubt about such a case, the payment of money being an important though not a necessary test of the public character of the entertainment. But if they were to go in the same way and issue tickets to the library of the town, saying that they might be given for nothing to any of the people round who wished to come and see the performance, this would not be an invitation to friends, but to a considerable portion of the public. . . . . The question is one of fact, then, in each particular case; and I would not advise anybody to try by manipulation to make that appear private and domestic which in truth is public in the sense which I have now described, though not open to all the public. The moment you have got at the fact that the entertainment is not private, domestic, or internal, but that it is practically public, in the ordinary sense of that word, then the place where it is given is 'a place of dramatic entertainment,' although it is used once only for the purpose, and although nothing is paid for admission."

[His Lordship, having referred to the remedies for the infringement of his right given by the Act to the author, then proceeded to apply the principles above enunciated to the facts of the particular case, and concluded by holding that the entertainment at Guy's Hospital was not a public one in the sense described, and that the place where it was given was not 'a place of dramatic entertainment' within the meaning of the Act.]

Bowen, L.J., after some preliminary observations, said: "The author is not to have the sole liberty of representing everywhere, but only 'at any place of dramatic entertainment.' Now these words must mean something. If the Legislature meant to protect him against all representations of his piece, those words would mean nothing, and would not have been added. It is not the representation before audiences that is forbidden, but the representation before audiences at particular places. Now, what, in the ordinary and natural meaning of the words in the year 1833, would be intended by the expression 'place of dramatic entertainment'? What would be meant by 'place of worship'? The two expressions seem to me to be framed in very much the same tone and key. I think, *primâ facie*, the Legislature

must have meant localities appropriated or assigned, more or less habitually, to dramatic entertainments—places which, if not licensed theatres, were at all events public or quasi places of amusement—places where the public was admitted and profit made, or, if not that, at all events where such publicity was given to the performances as would interfere with the representation at similar places on behalf of the author, and with the emoluments which naturally and properly are his due. But the language of the Act, as has been pointed out by the Master of the Rolls, is framed more widely than to admit of its being confined to places which are habitually used or ordinarily recognized as places of amusement. It is obvious that the Act might be easily evaded if persons were permitted, merely by changing the spot in which the representation is given, to attract the public to witness the performance of a protected piece. I daresay there are still travelling booths, as there were at the time the Act was passed, where dramatic representations are given. One can also imagine a place selected for the night's performance in some provincial town, which, by the very fact that it is so selected, contains every element which belongs to places of habitual entertainment, except the one element that it is not habitually so used. I think the person who makes a place for the nonce a place of dramatic entertainment cannot say, because it is not so used by others or not habitually so used, that it does not by his own action become for the occasion such a place. I think the true definition of 'a place of dramatic entertainment' is something like this: it must be a place appropriated for the nonce to dramatic entertainments in somewhat of the same way as places which are habitually used for the purpose; it must be appropriated for the nonce to dramatic entertainments of more than a domestic kind, appropriated for the entertainment of the public, or a limited portion of the public, or a species of the public. If that is so, it really comes in each case to be a question of fact whether the place selected is not for the time converted into a place of dramatic entertainment, though not so used before, and never perhaps to be so used again. Now what are the elements from which you have to judge? The element of profit would be a very important one: I do not say that it is an essential one. . . . . Then as to numbers, that is a very important matter, because I do not doubt that if, by whatever circuitous device, a performance substantially public was given—that is to say, a performance given to such a number of spectators as passed the reasonable limits of privacy or domesticity—the number

of the audience would be an important element to take into consideration in determining whether the place was used as a place of dramatic entertainment. The view which I have taken of the Act, and which the Master of the Rolls has taken, seems to me to be consistent with, and in a sense may be said to be the only view consistent with, the decision in *Russell* v. *Smith*. It is quite true that all the Court there held was, that where a place was open for profit and to a limited portion of the public, it became a place of dramatic entertainment, and that the Court did not hold that nothing less than this would do. But if the Court thought that anything would do, and that it was immaterial whether there was any audience beyond the mere family and salaried servants of the household, there would have been a short cut to the decision which was not taken." [His Lordship then noticed the particular facts of the case, and concluded that, though approaching very near the line, what took place at Guy's Hospital fell short of passing it.]

Fry, L.J., who dissented from the judgment of the other members of the Court, agreed with the Master of the Rolls that the question turned wholly on the interpretation of 3 & 4 Will. 4, c. 15. Having referred to the words of great generality used by the Legislature as to the productions protected, "any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment," his Lordship proceeded to consider the words "at any place or places of dramatic entertainment whatsoever" as follows: "In the first place, it is to be borne in mind that nothing is said as to its being an ordinary or habitual place of entertainment. Nothing could have been easier than for the Legislature to have so spoken of it if that had been its mind and intention. Again, nothing is expressly said as to its being a public place of entertainment. Lastly, nothing is expressly said as to the performance being for gain or profit. It has been said that we must have regard to the state of things in 1833, when the Act was passed; and that as plays were, for the most part, then acted in playhouses, we should conclude that the Legislature referred to playhouses only. That, it appears to me, would be misinterpreting the words of the Legislature. The Legislature must have known that great changes had taken place in the mode of acting dramatic pieces, and that, comparing the modes of dramatic performance in the reigns of Elizabeth or James I. with those in the reign of William IV., very considerable alterations had occurred. It is probable there were far more strolling players in the former reigns than in the latter. It is certain that in the Elizabethan period plays

were acted in many other places than regular theatres, and that masks prevailed which had fallen into desuetude in the reign of William IV. It seems to me, further, to be plain that the Legislature must have contemplated the probability of changes taking place also in the future. Therefore it is that such general words are used. Finally, I must observe that two words in the phrase used by the Act appear to me extremely important; they are the words 'any' and 'whatsoever.' What is the force of these words? In my judgment it is to exclude any limitation or qualification of the other words used, and to declare affirmatively that the genus of place described by the Legislature shall be taken in its utmost generality. In my opinion the words used negative qualification and affirm generality. I have come, therefore, to the conclusion that the place need not be a place habitually used for the performance of dramatic pieces, and I come to this conclusion for the reasons already given by my learned brethren. . . . . In the next place, I am unable to find any words which import that the performance must necessarily be for reward or hire. If such words were introduced, a distinguished body of amateurs who were willing to act for the mere pleasure of acting might rival a body who are endeavouring to earn their livelihood by acting for reward, and might defeat the right of the author of the dramatic piece. I therefore agree with my learned brethren in thinking that 'hire,' though an important, is not an essential element. But it has been said, and truly said, that the words 'any place or places of dramatic entertainment' import something different from a place where a dramatic piece happens to be represented; for they are added in the Act by way of qualification. I entirely agree in this, and I will inquire what are the notions involved in a dramatic entertainment. In the first place, I think there is no dramatic entertainment unless somebody is entertained or amused. I think, therefore, that the studies of the actors and the rehearsal—even before an audience where the main object is that of improving the performers in their parts, and not the amusement of the spectators—do not constitute a dramatic entertainment. I am therefore of opinion that the author of the piece could not interfere to prevent these preliminary studies or rehearsals, although they took place without his license, possibly in the expectation that a license for a public performance might be obtained from him. I think, further, that the notion of a dramatic entertainment involves to some extent the gathering of a meeting, assembly, or concourse of people for their amusement. If during the

rehearsal in a barn some persons who were casually outside looked through the door and saw what was going on, I should say there was no dramatic entertainment, because the amusement given would be accidental merely. . . . . In the next place, I think the notion of a dramatic entertainment involves this, that the performance is the result of a plan, design, or scheme; that the actors desire and design to amuse the spectators, and that the spectators come together for the purpose of being amused by the actors. Does it also involve the notion of publicity, or any particular mode of selecting the audience? I think not. According to my view of the usage of the English language, the performance of a dramatic piece in a large drawing-room, or in the hall of a large mansion, or at a castle in the country, although the public may not be invited to it, would be a dramatic entertainment. A lady who invites a number of musical performers, whether amateur or professional, to her drawing-room, and invites a number of her friends to come and listen to the music, in my opinion gives a musical entertainment. If you were asked what was going on there, you would say a musical entertainment. If you were asked whether it was a public or a private one, you might well say it was a private musical entertainment. In like manner, I cannot find a better illustration of a dramatic entertainment than that which is afforded by what took place in the board-room of Guy's Hospital on the evenings in question. If one nurse had asked another what amusement they were going to have that Christmas, and the other replied, 'We are going to have a dramatic entertainment,' I think the answer would have been in accordance with the ordinary usage of the English language. I differ, therefore, unfortunately from my learned brethren in their view that publicity is necessary.

"It has been said that it is absurd to extend the words of the Act to internal and domestic representations. It is quite true that there may be some internal and domestic representations which it would be absurd to suppose that the Legislature had in its mind. It is difficult to suppose that the acting of some children before their parents in the nursery or drawing-room would be a dramatic entertainment within the meaning of the Act. If my definition is right, such would not be a dramatic representation within the meaning of the Act. But, on the other hand, it seems to me that there may be internal and domestic representations which are well within the purview of the Act. Suppose, for instance, a nobleman possessed of a large mansion in the country, having his house full of distinguished guests, invites them, his servants and such of the residents in the county as are in the habit of

visiting him, to witness the representation of a dramatic piece, is not such a performance domestic and internal? But is it not at the same time a performance which it would be very reasonable to say interferes with the proprietary rights of the owner of the piece? What would be the chance of the next company which came to the adjoining town to perform the same piece, getting together so good an audience as they would get had the piece not been performed in the neighbouring mansion of the nobleman? It appears to me that the rights of the proprietor of the piece would have been seriously interfered with. . . . . Does the second section of the Act, which gives the author the right of receiving money from the offender, throw any light upon the nature of the right given, or show that it is of a more limited kind than that which I have described? What is the pecuniary benefit which the second section gives to the author? It is such a one of three as he may choose; either (1) 40s. for every representation, or (2) the amount of benefit derived by the offenders, or (3) the amount of injury sustained by himself. The Legislature has provided, therefore, for the case where there is neither benefit to the actor nor injury to the author. What can that be except such a case as I have mentioned, the case in which the proprietary right has been infringed by persons who derived no benefit from the infringement, and in such a degree as not to injure the author. In that case, the Legislature says that the author may still have 40s."

RECTIFICATION OF REGISTER AT STATIONERS' HALL.

In *re Poulton*, reported in *The Weekly Reporter* of the 17th May (vol. xxxii. p. 648), a Divisional Court (consisting of Denman, Manisty and Watkin Williams, J.J.), held that an order could be made under sect. 14 of 5 & 6 Vict. 45, on the application of the proprietor of copyright, to correct a mistake made by himself in the registration of his work at Stationers' Hall; in other words, that a person may be "aggrieved," within the meaning of the Act, by his own mistake.

THE LAW

RELATING TO

WORKS OF LITERATURE AND ART.

PART I.—LAW OF COPYRIGHT.

CHAPTER I.

LITERARY PROPERTY.

Foundation of Literary property.

THE foundation of Literary property is the same as that of all other property. "La propriété," says Bentham,(*a*) "n'est qu'une base d'attente; l'attente de retirer certains avantagesde la chose qu'on dit posséder, en conséquence des rapports où l'on est déjà placé vis-à-vis d'elle;" and this expectation of advantages to be derived is altogether the work of law.

Its constituent elements.

In the right of property two elements are involved, first, the power of using indefinitely the subject of the right, or of applying it to uses or purposes which are not positively and exactly circumscribed; and, secondly, a power of excluding others from using the same subject.(*b*) These are the advantages which the possessor of literary as well as other property enjoys, and which the law of the land secures to him. The sole right of originally giving to the world the results of his mental labours, and the power to hinder the infringement by others of his property therein, are guaranteed to every British subject by law, so far as law can accomplish that object; for the mental experiences of all of us have so much in common, the thoughts of most men resemble each other to so large an extent, that to determine and guard specific property in ideas merely—ideas which have not embodied themselves in a material form—is a task which no law-makers not pretending to omniscience

(*a*) "Traités de Legislation," par Dumont, p. 95.
(*b*) Austin Jur. iii. 19.

PART I. CHAPTER I.

could undertake to perform. Hence our law takes no cognisance of any claim to the ownership of ideas which have not found a material clothing, and refuses to preserve the most original of men from the annoyance of having published abroad, either by writing or by word of mouth, his most original ideas, which have been communicated to another in the course of conversation. The original ideas of a man on any subject, though they exist not out of relation to his mind, in one sense really belong as entirely to him as if they were reduced by him to writing, and hence it might be thought that he ought to be enabled to assert an equal claim to them in the one case as in the other. But the practical impossibility referred to, of dealing by means of legal proof with the former case, has rendered necessary the distinction which the law makes between the two. The intangible and incorporeal products of his mind, so long as they remain in that condition, are beyond the protection of law; when reduced into any material form, which can be produced in a court of justice, or be identified by proofs of a satisfactory kind, the author's right to them (called copyright) becomes enforceable by law.(*a*) And that right is two-fold: first, he has a right to them, and a property in them whilst the materials embodying them remain unpublished in his possession; and, secondly, after they are published he has a statutory exclusive property in them limited in point of duration.(*b*) This obvious division of the subject will be followed in dealing with the copyright belonging to individuals, and we shall treat separately of the property in unpublished works, or (as it is sometimes called) copyright before publication, and in published works, or copyright after publication. Before doing so, however, it will be advisable to determine the answers to the following two questions: first, in what kind of works this property exists? and, secondly, what class of persons are entitled to claim and enjoy the right? With these we shall now proceed to deal in order.

(*a*) "It is a well-known and established maxim (which, I apprehend holds as true now as it did 2000 years ago) 'that nothing can be the *object* of property which has not a *corporeal* substance':" (Yates, J., in *Millar* v. *Taylor*, 4 Burr. 2361.)

(*b*) "Copyright is not of a simple but a complex nature, involving two conditions, one of publication and the other of exclusion. An author claims the right of multiplying the copies of his work, and of thus securing to himself present reputation and distant fame; and he also claims the advantage of excluding by statute law, other persons from multiplying copies of the same work:" (*Arguendo* in *Prince Albert* v. *Strange*, 2 De. G. & Sm. 674.)

CHAPTER II.

CHARACTER OF THE WORKS IN WHICH COPYRIGHT EXISTS.

Who may possess.

THE author of every original work of literature, science, or art, which is innocent in its nature, has a copyright therein.

In what works.

Copyright exists in the case of books, periodicals, magazines, or prints, dramatic and musical compositions, paintings, drawings, and photographs, and sculptures, models, casts, or busts. The writer of letters and the author of lectures have also exclusive rights, which will be considered separately.

Work must be innocent.

If the work be not innocent in its nature, there is no property in it which the law will enforce or protect. Lord Eldon, in the case of *Southey* v. *Sherwood*,(*a*) observed, "If this publication is an innocent one, I apprehend that I am authorised by decided cases to say that, whether the author did or did not intend to make a profit by its publication, he has a right to an injunction to prevent any other person from publishing it. If, on the other hand, this is not an innocent publication, in such a sense as that an action would not lie in case of its having been published by the author and subsequently pirated, I apprehend that this Court will not grant an injunction."

It is a fundamental principle of our common law that no action can be maintained on any contract, expressed or implied, parol or under seal, which is in direct violation of law —whether statutory or unwritten—which is of an immoral tendency or contrary to sound policy.

When a contract is said to be void and incapable of being enforced as "opposed to sound or public policy," this is in accordance with the principle of law that "no subject can lawfully do that which has a tendency to be injurious to the public or against the public good—which may be termed, as it sometimes has been, the policy of the law, or 'public policy' in relation to the administration of the law."(*b*) The legal maxim on the subject is, *Nihil quod est inconveniens est licitum*.(*c*)

A work, then, may lack the character of innocence by

(*a*) 2 Meriv. 437. See also *Lawrence* v. *Smith* (Jac. 471).
(*b*) Per Lord Truro in *Egerton* v. *Brownlow* (4 H. L. Cas. 196).
(*c*) Co. Litt. 66*a*.

being opposed to any law, either unwritten or statutory, by being of an immoral tendency (a test, as applied, of a very comprehensive character) or by being contrary to what is called sound or public policy. If it offends against innocence in any of these respects, no action will lie to enforce any alleged right with reference to it.

Dr. Priestley brought an action against a hundred to recover damages sustained by him in consequence of the riotous proceedings of a mob at Birmingham. Amongst other property alleged to have been destroyed, and for the loss of which he claimed compensation, were certain unpublished MSS. It was alleged, by way of defence, on behalf of the hundred, that the plaintiff was in the habit of publishing works injurious to the government of the State, but no evidence was produced in support of that allegation. The Lord Chief Justice observed that if such evidence had been produced, he should have held it was fit to be received as against the claim made by the plaintiff. (*a*)

Where the work was of a criminal character the Court of Chancery, not being a court of criminal jurisdiction, would simply refuse to interfere in any way. It punished the author of a criminal, libellous, or immoral production no otherwise than by denying him any assistance in the assertion of a right of property in his work, or in the attempt to hinder the piracy of it. It stood quite neutral. "The Court does not interfere in the way of injunction to punish or to prevent injury done to the character of individuals; but it leaves the party to his remedy at law."(*b*)

One Lord Chancellor (Macclesfield), indeed, seems to have taken a different and much more lofty view of the province of courts of equity in dealing with books of the character above mentioned, being of opinion "that the Court of Chancery had a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality;"(*c*) and his lordship granted an injunction to restrain the publi-

(*a*) Cited 2 Meriv. 437. See also per Lord Eldon in *Walcot* v. *Walker*, 7 Vic. 1.

(*b*) Per Lord Eldon (*Southey* v. *Sherwood*, 2 Meriv. 438); see also the opinion of Lord Langdale, M.R., in *Clark* v. *Freeman* (11 Beav. 117, 119), but as to the decision in the latter case, see the remarks of Lord Cairns in *Maxwell* v. *Hogg* (L. Rep. 2 Ch. App. 310; 16 L. T. N. S. 130; 36 L. J. 433, Ch.).

(*c*) *Burnett* v. *Chetwood*, cited from a manuscript volume of cases, in a note, by the learned reporter to *Southey* v. *Sherwood* (*ubi supra*).

cation of a translation of two Latin works ("Archæologia Philosophica" and "De Statu Mortuorum et Resurgentium") written by Dr. Burnett, on the sole ground that "inasmuch as the book contained to his (the Chancellor's) knowledge (he having read it in his study) strange notions intended to be hid from the vulgar in the Latin language, in which language it could not do much hurt, the learned being better able to judge of it—it was proper to grant an injunction to the printing and publishing it in English." And Lord Ellenborough, in dealing with the case of a libellous picture said, that "upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition."(*a*) These opinions with regard to the extent of the jurisdiction of courts of equity in dealing with non-innocent publications have, as the cases already cited show, been long since abandoned, and our civil courts will now simply refuse to interfere in the matter at all. Lord Eldon, in *Lawrence* v. *Smith*,(*b*) in express words repudiates the jurisdiction asserted by Lord Macclesfield. In the judgment pronounced by him in that case, he says: "As this Court has no jurisdiction in matters of crime,(*c*) it has been said that if the injunction be refused it has the effect of increasing the number of copies. The answer to that is, I have nothing to do with it as a crime. The question relates only to a civil right of property. If the one party has that right, the other must not invade it; if he has not that right, the Court cannot give him the consequences that belong to it."

(*a*) *De Bost* v. *Beresford* (2 Camp. 511). Referring to this dictum of Lord Ellenborough, the editor of Howell's State Trials says (vol. xx. p. 799): "I have been informed by very high authority, that the promulgation of this doctrine relating to the Lord Chancellor's injunction excited great astonishment in the minds of all the practitioners in the Courts of Equity, and I had apprehended that this must have happened; since I believe there is not to be found in the books any decision or any dictum, posterior to the days of the Star Chamber, from which such doctrine can be deduced, either directly, or by inference, or analogy; unless, indeed, we are to except the proceedings of Lord Ellenborough's predecessor Scroggs and his associates, in the case of Henry Clare, in which case 'Ordinatum est quod liber intitulat. 'The Weekly Packet of Advice from Rome, or the History of Popery, non ulterius imprimatur vel publicetur per aliquam personam quamcunque.'" The learned editor does not appear to have known of the decision of Lord Macclesfield in *Burnett* v. *Chetwood*, above cited.

(*b*) Jac. 471. *Vide post*, pp. 7, 8.

(*c*) If a publication, which is criminal, tends also to the destruction or deterioration of property, the High Court of Justice has, since the Judicature Acts, jurisdiction to restrain the publication by injunction. This will be dealt with hereafter in treating of Libel.

There are other means of punishing the authors of criminal and libellous works, which will be treated of in a subsequent portion of this work.(*a*)

In *Southey* v. *Sherwood*(*b*) a motion was made on the part of the poet Southey to restrain the defendants from printing or publishing a poem called "Wat Tyler," which had been composed by the plaintiff about twenty-three years previously, and had lain unpublished during the whole of that period in the hands of the bookseller to whom Southey had first sent it for his perusal and consideration as to the advisability of publishing it. On the part of the defendant it was contended that the poem in question, from its libellous tendency, was of such a nature that there could be no copyright in it; and the case of *Dr. Priestley* and that of *Walcot* v. *Walker* were referred to. Lord Eldon, in refusing the injunction, stated that he remained of the same opinion as that which he entertained in deciding the case of *Walcot* v. *Walker*. "It is very true," he proceeded, "that in some cases it may operate so as to multiply copies of mischievous publications by the refusal of the Court to interfere by restraining them; but to this my answer is, that, sitting here as a judge upon a mere question of property, I have nothing to do with the nature of the property, nor with the conduct of the parties, except as relates to their civil interests: and if the publication be mischievous, either on the part of the author or of the bookseller, it is not my business to interfere with it."(*c*)

One of the most important cases decided on this subject

(*a*) See the chapters on "Libel," *post*.

(*b*) 2 Meriv. 435.

(*c*) An American writer (Curtis) on Copyright urges some weighty objections to the doctrine laid down by Lord Eldon in the above case. In the case of *Dr. Priestley* the owner of the manuscript was seeking damages for the destruction of what might have been the source of pecuniary profit, and the case goes only to this, that a work existing in manuscript may be of such a character that the author cannot make lawful profits by its publication; and in this sense it may be said that there can be no property in such a work. But this cannot justify the very different doctrine that the author of an unpublished manuscript of a character not innocent or doubtful cannot have the interposition of a court of equity to restrain its publication by a person who is about to publish it against his will. There is a wide difference between seeking protection for a published work of a non-innocent character and the mere assertion of a right to possess and control, to publish or not to publish one's own manuscript. There are two kinds or degrees of property in a literary work, one consisting in the right to take the profits of a book when published, the other in the right to the exclusive possession and control of a manuscript, or the right to publish or withhold from publication altogether. In no case has it been considered that the author's right depends on his

came before Lord Eldon in 1822. In *Lawrence* v. *Smith*,(a) the Lord Chancellor dissolved an injunction which had been obtained upon an *ex parte* motion, to hinder the publication of a pirated edition of certain "Lectures on Physiology, Zoology, and the Natural History of Man," which had been delivered by the plaintiff at the College of Surgeons, and afterwards published by him. In support of the motion to dissolve the injunction, it was urged that the nature and general tendency of the work were such, that it could not be the subject of copyright, as it contained several passages hostile to natural and revealed religion, impugning the doctrines of the immateriality and immortality of the soul. And on this ground Lord Eldon refused to continue the injunction, and left the plaintiff to bring his action at law, if he considered that he had any chance of succeeding there. "Looking," said his lordship, "at the general tenor of the work, and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt—I think a rational doubt—whether this book does not violate that law, I cannot continue the injunction. The plaintiff may bring an action, and when that is decided he may apply again." As to the injunction originally granted, *ex parte*, Lord Eldon said, "I take it for granted that when the motion for the injunction was made, it was opened as quite of course: nothing probably was said as to the general nature of the work, or of any part of it; for we must look *not only at the general tenor, but at the different parts*; and the question is to be decided, not merely by seeing what is said of materialism, of the immortality of the soul, and of the Scriptures, but by looking at the different parts and inquiring whether there be *any* which deny, or which appear to deny, the truth of Scripture, or which raises a fair question for a court of law to determine whether they do or do not deny it."

Two later instances of the application of the same doctrine

intention to publish and to make a profit; but the cases proceed upon the ground of a *right of property*, by which seems to be intended a right to the possession and control of the manuscript, and to publish or to withhold it from publication; and this holds equally in the case of a non-innocent and an innocent work. When, therefore, an author has not published, or does not intend to publish, a work existing in manuscript, but, on the contrary, desires and intends to withhold it from publication, the question as to its innocence does not arise, because that question affects only so much of his right of property as consists in the right to take the *profits* of the publication.

(b) Jac. 471.

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belonging to the said army, and to deter the liege subjects of our said lord the King from entering into the same, published the paper in question, and the question for you to try is, whether the publication has fairly the tendency imputed to it. If it has that tendency the persons must be punished who have published it, intending to produce that effect. If it shall appear to you that such is the obvious tendency of the paper which is in evidence, then what is incumbent on the prosecutor to prove will have been made out."(*a*)

Per Best, J.

In 1820 an information was filed against Sir Francis Burdett for writing and publishing a certain scandalous, malicious, and seditious libel of and concerning the Government of this realm, and of and concerning the troops of our lord the King, unlawfully and maliciously devising and intending to raise and excite discontent, disaffection, and sedition among the liege subjects of the King and amongst the soldiers of our said lord the King, and to move and excite the liege subjects of our said lord the King to hatred and dislike of the Government of this realm, and to insinuate and cause it to be believed by the liege subjects of our said lord the King that divers of the liege subjects of our said lord the King had been inhumanly cut down, maimed, and killed by certain troops of our said lord the King at Loughborough, in the county of Leicester, on the 16th of August, 1819; the libel being contained in an address to the electors of Westminster.(*b*) Best, J., told the jury that whether the address was published with the intention alleged in the information was peculiarly for their consideration, but added that the intention was to be collected from the paper itself, unless the import of the paper were explained by the mode of publication or any other circumstances; that if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to intend that which his act was likely to produce; and that if they should be of opinion that such was the intention of the defendant, the paper published with such an intent was a libel.(*c*) The jury found the defendant guilty, and on motion for a new trial the Court of King's Bench held that the question had been correctly left to the jury.(*d*)

Per Littledale, J.

A body of police having dispersed an assembly of people at Birmingham, an indictment for seditious libel was pre-

(*a*) 31 Howell's St. Tr. 408. The jury returned a verdict of not guilty.

(*b*) 4 B. & Ald. 95. (*c*) *Ibid.* 120.

(*d*) Sir Francis Burdett was sentenced to three months' imprisonment, and a fine of £2000.

ferred against the writer and publisher of certain resolutions agreed to by a body called the General Convention, condemning the act of the police as a "wanton, flagrant, and unjust outrage upon the people of Birmingham by a bloodthirsty and unconstitutional force from London, acting under the authority of men who, when out of office, sanctioned and took part in the meetings of the people, and now, when they share in the public plunder, seek to keep the people in social slavery and political degradation;" asserting that the people of Birmingham were "the best judges of their own right to meet in the Bullring or elsewhere, have their own feelings to consult respecting the outrage given, and are the best judges of their own power and resources to obtain justice;" and that the arrest of a particular individual (Dr. Taylor) "affords another convincing proof of the absence of all justice in England, and clearly shows that there is no security for life, liberty, or property till the people have some control over the laws they are called upon to obey."(*o*) Littledale, J., thus directed the jury as to the law: "You will first have to consider whether the statement at the commencement of the indictment, that there was an unlawful assembly which was dispersed by the police, be true or not, and, if it be true, you will then have to consider whether this publication was or was not a calm and temperate discussion of the events which had occurred; for if the object of it was merely to show that the conduct of the police was improper, that would not be illegal, because every man has a right to give every public matter a candid, full, and free discussion. If the language of this paper was intended to find great fault with the police force, even that might not go beyond the bounds of fair discussion; and you have to say, looking at the whole of this paper, whether or not it does so. With respect to the first resolution, if it contains no more than a calm and quiet discussion, allowing something for a little feeling in men's minds—for you cannot suppose that persons in an excited state will discuss subjects in as calm a manner as if they were discussing matters in which they felt no interest—that would be no libel; but you will consider whether the kind of terms made use of in this paper have not exceeded the reasonable bounds of comment on the conduct of the London police. With respect to the second resolution, it is no sedition to say that the people of Birmingham had a right to meet in the Bullring or anywhere else; but you are to consider

(*o*) *Rex* v. *Collins; Rex* v. *Lovett* (9 Car. & P. 456, 462).

whether the words that 'they are the best judges of their own power and resources to obtain justice,' meant the regular mode of proceeding by presenting petitions to the Crown or either House of Parliament, or by publishing a declaration of grievances; or whether they meant that the people should make use of physical force as their own resource to obtain justice, and meant to excite the people to take the power into their own hands, and meant to excite them to tumult and disorder. The third resolution refers to the arrest of *Dr. Taylor*; and if the arrest of *Dr. Taylor* was considered to be illegal, the defendant had a right to discuss it in a calm, quiet, and temperate manner; and if Dr. Taylor had been arrested in a manner wholly illegal and improper, we may allow for some warmth of expression. I have already said that the people have a right to discuss any grievance that they have to complain of, but they must not do it in a way to excite tumult. It is imputed that the defendant published this paper with that intent, and, if he did so, it is in my opinion a seditious libel."(*a*)

"With respect to the intent of the defendant," said the same learned judge, "a man must be taken to intend the natural consequences of what he has done; and if this paper has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, that is sufficient to bring it within the terms of this indictment, and it is a seditious libel."(*b*)

In applying the foregoing dicta, the observations already made as to the flexibility of our common law and the effect of altered circumstances(*c*) should be borne in mind.

Libels on the Constitution Generally.

What publications are libellous.

"If it be the highest crime known to our laws to attempt to subvert by force the Constitution and State, it is certainly a crime, though of inferior magnitude, yet of great enormity, to endeavour to despoil it of its best support—the veneration, esteem, and affection of the people. It is, therefore, a maxim of the law of England, flowing by natural consequence and easy deduction from the great principle of self-defence, to consider as libels and misdemeanours every species of attack by speaking or writing, the object of which is wantonly to defame or indecorously to calumniate that economy,

(*a*) 9 Car. & P. 460, 461.
(*b*) 9 Car. & P. 466. The jury returned a verdict of guilty in each case.
(*c*) *Ante*, pp. 378, 379.

order, and constitution of things which make up the general system of the law and government of the country."(*a*)

"It is scarcely necessary to point out," said Fitzgerald, J., with reference to certain seditious libels published at the time of the Fenian disturbances in Ireland,(*b*) "that to accomplish treasonable purposes, and to delude the weak, the unwary, and the ignorant, no means can be more effectual than a seditious press. With such machinery the preachers of sedition can sow widecast those poisonous doctrines, which, if unchecked, culminate in insurrection and rebellion. . . . . Words may be of a seditious character, but they might arise from sudden heat, be heard only by a few, create no lasting impression, and differ in malignity and permanent effect from writings."

Much of what has already been said in general as to the other kinds of seditious libels, applies also to the present class. Criticism on any part of the Constitution, made with a view to bring about improvements in it, are not interdicted; but attacks calculated to promote insurrection, and circulate discontent, to degrade and vilify the Constitution, to asperse its justice and anywise impair the exercise of its functions, are termed seditious libels, and punished as such.(*c*)

"It is open to the community and to the press," said Fitzgerald, J.,(*d*) "to complain of a grievance. Well, the mere assertion of a grievance tends to create a discontent, which in a sense may be said to be seditious; but no jury, if a real grievance was put forward, and its redress *bonâ fide* sought, although the language used might be objected to—no jury would find that to be a seditious libel. It might be the province of the press to call attention to the weakness or imbecility of a Government, when it was done for the public good. How closely that trenches on the law of sedition; and yet such writing, when *bonâ fide*, would receive protection from a jury."

State of country and public mind to be considered.

The state of the country and of the public mind when the publication takes place are material to be considered in determining whether the libel was published with a seditious intention.

"If," said the learned judge last referred to,(*e*) when dealing with a seditious publication in Ireland, "the country was free from political excitement and disaffection, was engaged in

(*a*) Holt's Law of Libel, 81 (2nd Edit.).
(*b*) *Reg.* v. *Sullivan* and *Reg.* v. *Pigot*, 11 Cox Crim. Cas. 46.
(*c*) *Ibid.* 86. (*d*) 11 Cox Crim. Cas. 57.
(*e*) 11 Cox Crim. Cas. 50. See also p. 59.

the peaceful pursuits of commerce and industry, the publication of such articles as have been extracted from American papers might be free from danger and comparatively innocent; but in a time of political trouble and commotion, when the country has just emerged from an attempt at armed insurrection, and whilst it is still suffering from the machinations and overrun by the emissaries of a treasonable conspiracy hatched and operating in a foreign land, the systematic publication of articles advocating the views and objects of that conspiracy seems to admit but of one interpretation. The intentions of men are inferences of reason from their actions where the action can flow but from one motive, and be the reasonable result of but one intention."

Which publication to be looked at.

A particular passage in a work may constitute a seditious libel: but although the jury are to form their judgment upon the particular passage charged as such, they may compare it with the whole book, and see how it is qualified by it.(*a*) So with regard to newspaper articles: the jury are to consider not isolated passages, but the whole of the articles complained of.(*b*)

Latitude allowed to political writers.

A considerable latitude is allowed to the publications of political writers. "In a free country like ours," said Lord Kenyon, C.J.,(*c*) "the productions of a political author should not be too hardly dealt with." And Fitzgerald, J., told the jury, in the case already referred to, not to pause, in dealing with the articles charged as seditious libels, upon an objectionable sentence here, or a strong word there; that it was not mere strong or turgid language that was to influence them; that to public political articles great latitude is given, dealing as they do with the public affairs of the day; such articles, if written in a fair spirit, and *bonâ fide*, often result in the production of great public good; and therefore the learned judge advised and recommended the jury to deal with the publications before them in a free, fair, and liberal spirit, and not to view them with an eye of narrow criticism.(*d*)

Seditious publications copied from foreign newspapers.

The fact that the seditious writings are only copies of articles published in foreign newspapers, does not exempt the publisher in this country from liability.

It was contended in *Reg.* v. *Pigott*(*e*) that the defendant was justified in publishing, as foreign news, articles of a

(*a*) *Per* Lord Kenyon, C.J., *R.* v. *Reeves* (2 Peake's N.P. Cas. 87). See also *Rex* v. *Lambert and Perry* (2 Camp. 400).
(*b*) *Per* Fitzgerald, J. (11 Cox Crim. Cas. 58).
(*c*) 2 Peakes' N.P. Cas. 86. (*d*) 11 Cox Crim. Cas. 59.
(*e*) 11 See Cox Crim. Cas. 46.

seditious and treasonable character, extracted from American newspapers. "I am bound," said Fitzgerald, J., to the grand jury, "to warn you against this very unsound contention; and I may now tell you, with the concurrence of my learned colleague (Deasy, B.), that the law gives no such sanction, and does not, in the abstract, justify or excuse the republication of a treasonable or seditious article, no matter from what source it may be taken. In reference to all such republications, the time, the object, and all the surrounding circumstances are to be taken into consideration, and may be such as to rebut any inference of a criminal intention in republication. If, for instance, one of the leading newspapers should, in good faith, publish the proceedings of a foreign conspiracy, with a view to communicate intelligence or a warning to the nation, accompanying it with proper editorial comments, the circumstances would, in every rational mind, negative the idea of any seditious design. If, on the other hand, at a period of great political excitement, where a treasonable confederacy existing amongst them was urging the deluded people to armed insurrection, a journal was found habitually devoting a considerable portion of its space to the republication from a foreign source of treasonable or seditious articles, addressed to the people of this country, without one word of warning, or one note of disapproval, then it would be reasonable to infer that the publisher intended what would be the natural consequences of his acts—namely, to promote some seditious object. If the law be powerless in the case of such publications, then we may as well blot out from the statute-book the chapter on seditious libel, which would take away from society the great protection which the law affords to their institutions."(*a*)

Whether a newspaper article is original or not, may, however, be a material consideration in determining the intention with which it was published.(*b*)

Summary of the older cases.

The following is a summary of the older cases decided under this head, which are not numerous, owing probably to the fact that in the early times of our history, libels of this class were considered as partaking of the nature of treason.(*c*)

(*a*) 11 Cox Crim. Cas. 46, 47. Compare the remarks of the same learned judge at the end of p. 56.

(*b*) See *per* Fitzgerald, J., *Ibid.* 56.

(*c*) Holt, L. L. 86. Williams, a barrister of the Middle Temple, was in the seventeenth year of James I. indicted, convicted, and executed for high treason, in writing two books, the one called "Balaam's Ass," and the other called "Speculum Regale," in which he predicted that the king would die in the year 1621 (2 Roll. Rep. 88).

One Brewster was indicted and convicted in the 15th Charles II., for printing and publishing a libel called "The Phœnix, or the Solemn League and Covenant," in which it was declared that a king abusing his power to the overthrow of religion, laws, and liberties, may be controlled and opposed; and if he sets himself to overthrow all these by arms, then they who have the power, as the estates of the land, may and ought to resist by arms.(*a*)

In the 29th Charles II., an information was filed against one Harrison, charging that he, maliciously and traitorously intending to stir up sedition and to create a disturbance between the King and his people, had published, uttered, and proclaimed of and concerning the Government and rule of England, and of and concerning the traitors who adjudged King Charles I. to death, that the Government of the kingdom consists of three estates, and that if a rebellion should happen in the kingdom, unless that rebellion was against the three estates, it was no rebellion. The Court, supposing that the words did tend to set on foot that position upon which the war levied in 1641 by the two Houses against the King was grounded, were much displeased that the counsel for the defendant would pretend to defend them, or to put any tolerable sense upon them, and gave judgment for the King.(*b*)

In the 5th Anne, Dr. Brown was convicted, on an information, of having published a libel entitled "Mercurius Politicus," reflecting on the State and Constitution, as settled at the Revolution, which he represented as the "destruction of the laws of England."(*c*)

A treatise on hereditary right, by Bedford, was held to be a libel, though it contained no reflection upon any part of the then Government, in the 12th Anne.(*d*)

An information was filed in 1754 against Richard Nutt for printing and publishing a certain false, wicked, scandalous, seditious, and malicious libel, entitled *The London*

(*a*) *Rex* v. *Brewster* (Hil. Term, 15 Car. 2; Dig. L. L. 76).

(*b*) *Rex* v. *Harrison* (3 Keb. 841; Vent. 324). Harrison was sentenced to pay a fine of £1000, to find surety for his good behaviour for seven years, and to renounce his error in open court.

(*c*) *Reg.* v. *Brown* (Trin. Term, 5 Anne; 11 Mod. 86). He was sentenced to the pillory, and to pay a fine of forty marks.

(*d*) *Reg.* v. *Bedford* (2 Str. 789). On this case Lord Coleridge, C.J., in his charge in *Reg.* v. *Poole* observed: "I need hardly say that if such a case arose now no judge would follow that authority, no jury would convict; the whole proceeding would be denounced, and rightly denounced, as altogether monstrous." (P. 13.)

Evening Post, tending to represent this kingdom in a miserable and wretched state and condition, and with a view to traduce the late happy Revolution, and to suggest that it was an unjustifiable and unconstitutional proceeding; and also to dispute and call in question the settlement and limitation of the succession of the Crown of this realm in the present most illustrious family; and to represent the same as illegal and unwarrantable, and to make it be believed that the said late most happy Revolution and the settlement of the Crown of this realm as now by law established had been attended with fatal and pernicious consequences to the subjects of this realm. He was found guilty, and sentenced to the pillory, a fine of £500, and imprisonment in the King's Bench for two years.(*a*)

Dr. John Shebbeare was convicted in 1758 of printing and publishing a certain false, wicked, scandalous, seditious, and malicious libel, entitled "A Sixth Letter to the People of England on the Progress of National Ruin, in which it is shown that the present Grandeur of France and the Calamities of this Nation are owing to the Influence of Hanover on the Councils of England;" tending to traduce the Revolution, and to represent it as the foundation of all those imaginary evils and calamities which the defendant would falsely insinuate the subjects of this kingdom did labour under; and also to asperse the memory of King William III. and of King George I.; and to represent the public measures which were taken and pursued during the course of their respective reigns as wicked, corrupt, and fatal measures to this kingdom; and also to asperse, scandalize, and vilify the late King and his administration of the government of this kingdom; and to make it thought that the public affairs of this kingdom were in a most unhappy and declining state; and that the subjects of this kingdom were unnecessarily and most intolerably loaded and oppressed with taxes, debts, and subsidies; and also to insinuate that the late King had no concern for the people of England, nor any regard for the interest, honour, or welfare of this kingdom, but that the treasure and riches of this kingdom were misapplied, wasted, and dissipated in support of the Electorate of Hanover and his German dominions.(*b*)

Thomas Paine was convicted in 1792 upon an information charging him with being the author and publisher of a sedi-

(*a*) Mich. Term, 27 Geo. 2, Dig. L. L. 68.

(*b*) *Rex* v. *Shebbeare* (Hil. Term. 31 Geo. 2, K.B. MSS.). The defendant was fined £5, sentenced to the pillory, and to be imprisoned three years.

tious libel, the tendency of which was "to traduce and vilify the late happy Revolution, the settlement of the Crown and regal Government as by law established, and also the Bill of Rights, the Legislature, Government, Laws, and Parliament of this kingdom."(*a*)

John Cuthell, a bookseller, was found guilty in 1799, of publishing a seditious libel written by the Rev. G. Wakefield; but, on filing his affidavit that he had no knowledge whatever of the contents or nature of the book, he was discharged on payment of a fine of thirty marks.(*b*)

General remarks as to older authorities.

As to libels upon the Constitution generally, it is beyond question that a number of the old decisions would not be regarded as binding precedents at the present day.(*c*)

CHAPTER V.

OTHER LIBELS NOT OF A PRIVATE CHARACTER.

Libels of a *quasi* public character.

BESIDES the libels of a public character which have hitherto engaged our attention, and which the State in its corporate capacity punishes, there are others of a *quasi*-public character which present themselves for consideration next in order before we enter on the discussion of libels on private individuals.

I.—LIBELS ON HOUSES OF PARLIAMENT.

Contempts of Houses of Parliament.

Of libels of this kind one class forms a division of the general head of offences called contempts. Libels on either House of Parliament have frequently been treated as breaches of privilege, and punished as such by the immediate action of the House itself. Oftentimes they have been dealt with by prosecutions in the Courts of common law, directed by the House which has been libelled either in its collective character or in the person of one of its members.

The general principle relating to contempts of this kind has thus been stated: "Whatever grossly reflects on the character of a member of either House, or whatever imputes to him what it would be a libel to impute to an ordinary

(*a*) *Rex* v. *Paine* (32 Geo. 3. K. B. MSS.) The defendant, not appearing to receive the judgment of the Court, was outlawed.

(*b*) *Rex* v. *Cuthell* (27 Howell's St. Tr. 642).

(*c*) See, for example, the remarks of Lord Coleridge, C.J., on *Reg.* v. *Bedford*, cited *ante*, p. 414, note (*d*).

person, is a contempt, and thereby breach of privilege; it is a direct assault upon his character, and through the odium presumed to be excited thereby, a consequential obstruction of his political duties."(*a*)

House of Lords.

The House of Lords formerly inflicted fine, imprisonment, and the pillory for offences of this kind against its members; but in more recent times commitment, with or without fine, has been the ordinary punishment inflicted by both Houses of Parliament.(*b*)

Punishments of the latter description were inflicted by the House of Lords in 1663 for a libel on Lord Gerard of Brandon; in 1688 for printing a paper reflecting on Lord Grey of Wark;(*c*) and in 1779 for a libel on the Bishop of Llandaff.(*d*) In 1722 persons were attached for printing libels concerning Lord Strafford(*e*) and Lord Kinnoul;(*f*) and in 1776 for sending an insulting letter to the Earl of Coventry, the offender in the last case being afterwards reprimanded and ordered to be continued in custody until he find security for his good behaviour.(*g*) For examples of the punishment of pillory, see the cases of Thomas Morley in 1623, for a libel on the Lord Keeper,(*h*) and William Carr in 1667, for dispersing scandalous and seditious printed papers against Lord Gerard of Brandon.(*i*)

In 1834, a leading article having appeared in the *Morning Post* reflecting upon the conduct of the Lord Chancellor

(*a*) Holt's Law of Libel, p. 118.

(*b*) 22 Lords' J. 351, 367, 380. "This summary proceeding is usually defended by a technical analogy to what are called attachments for contempt, by which every court of record is entitled to punish by imprisonment, if not also by fine, any obstruction to its acts or contumacious resistance of them. But it tended also to raise the dignity of Parliament in the eyes of the people, at times when the Government, and even the courts of justice, were not greatly inclined to regard it, and has been also a necessary safeguard against the insolence of power. The majority are bound to respect, and indeed have respected, the rights of every member, however obnoxious to them, on questions of privilege. Even in the case most likely to occur in the present age, that of libels, which by no unreasonable stretch come under the head of obstructions, it would be unjust that a patriotic legislator, exposed to calumny for his zeal in the public cause, should be necessarily driven to a troublesome and uncertain process at law, when the offence so manifestly affects the real interests of Parliament and the nation. The application of this principle must, of course, require a discreet temper, which was not perhaps always observed in former times, especially in the reign of William III." (Hallam, Const. Hist., chap. 16).

(*c*) 14 Lords' J. 144.
(*d*) 42 Lords' J. 129.
(*e*) 22 Lords' J. 129.
(*f*) *Ibid.* 149.
(*g*) 39 Lords' J. 314, 331.
(*h*) 3 Lords' J. 276.
(*i*) 12 Lords' J. 174.

(Lord Brougham) with reference to a case which had come before the House of Lords on appeal, the House resolved that the paragraph was a gross breach of their privileges, and committed the editor to the custody of the Usher of the Black Rod.(a)

House of Commons.

In the case of Arthur Hall in 1581, himself a member of Parliament, the House of Commons inflicted the threefold penalty of imprisonment, fine, and expulsion for a printed libel, "not only reproaching some particular good Members of the House, but also very much slanderous and derogatory to its general authority, power, and state, and prejudicial to the validity of its proceedings in making and establishing of laws."(b)

In 1805, Peter Stuart was committed to the custody of the Serjeant-at-Arms for a breach of privilege in printing and publishing in the *Daily Advertiser*, *Oracle*, and *True Briton*, certain libellous reflections on the character and conduct of the House.(c) In 1810, Sir F. Burdett, a member of the House, was sent to the Tower for publishing "a libellous and scandalous paper reflecting upon the just rights and privileges of the House."(d) In 1819, the House resolved that a certain pamphlet, of which Mr. Hobhouse acknowledged himself to be the author, was a "scandalous libel containing matter calculated to inflame the people into acts of violence against the Legislature, and against this House in particular," and that it was "an high contempt of the privileges and of the constitutional authority of this House;" and the writer of the pamphlet was committed to Newgate.(e)

Yarrington and Groome in 1680,(f) one Smelt in 1689,(g) and John Rye in 1696,(h) were committed for libellous attacks on members. The House committed one Woodfall in 1774 for publishing a letter reflecting on the character of the Speaker,(i) and, in 1821, the author of a paragraph in the *John Bull* newspaper containing a libel on one of the members.(j) In 1832, two solicitors were called to the bar of the House for a libel

(a) 66 Lords' J. 704, 737, 743, 764.

(b) D'Ewes, 219; Hatsell, 93: 1 Com. J. 125, 126. "This," says Hallam (Const. Hist., chap. 5), "is the leading precedent, as far as records show, for the power of expulsion, which the Commons have ever retained without dispute of those who would most curtail their privileges." This is the first instance of a libel punished by the House (*Per* Lord Ellenborough, C.J., 14 East. 142).

(c) 60 Com. J. 214, 216. (d) 65 Com. J. 252.

(e) 75 Com. J. 57. See also the case of O'Connell, who was reprimanded in his place by the Speaker for certain defamatory expressions contained in a speech delivered at a public meeting (93 Com. J. 307, 312, 316).

(f) 9 Com. J. 654, 656. (g) 10 Com. J. 244. (h) 11 Com. J. 656.

(i) 34 Com. J. 456. (j) 76 Com. J. 335.

contained in a printed handbill, being a copy of an official letter signed by them and addressed to a committee sitting on the Sunderland Wet Docks Bill, reflecting on the conduct of certain members of the committee, and containing a statement of the manner in which the members had voted in the committee. The writers having expressed regret for their offence, the House resolved that the letter contained libellous matter reflecting on the committee, and that the two solicitors had been guilty of a high breach of the privileges of the House; and that they should be admonished by the Speaker.(*a*) In 1858, the proprietor and publisher of the *Carlisle Examiner* and *North-Western Advertiser* was committed to the custody of the Serjeant-at-arms for publishing an article imputing partial and corrupt motives to the chairman of a committee on a railway bill, and containing reflections on other members of the committee. He was discharged from custody on unreservedly retracting all imputations contained in the article, and paying the fees.(*b*)

Complaint having been made to the House of Commons in 1873 of Mr. Plimsoll's book, "Our Seamen: an Appeal," as containing statements impugning the character of certain members of the House and threatening further exposure, in order to influence their conduct in Parliament, a motion was made that "to accuse in a printed book, members of this House of grievous offences, and to threaten them with further exposure if they take part in its debates, is conduct highly reprehensible and injurious to the honour and dignity of this House." Mr. Plimsoll having tendered to the House the sincere expression of his regret for his unintentional fault, and making the most ample apology, the motion was by leave withdrawn.(*c*)

The publication by the same gentleman in 1880 of placards addressed to the electors of Westminster, and denouncing the conduct of one of its representatives, was resolved to be a breach of the privileges of the House; but, Mr. Plimsoll having apologised and withdrawn the imputation made by him upon the member attacked, the House resolved that no further action on its part was necessary.(*d*)

The consciousness of full-grown power and irresistible strength has led the House in more recent times to pass by, as unworthy of its notice, many newspaper and other attacks upon the conduct of members which in olden times would have been seriously dealt with.(*e*)

(*a*) 87 Com. J. 278. 294.
(*b*) 113 Com. J. 189, 192, 203. See also 72 *Ibid.* 232; 93 *Ibid.* 436.
(*c*) 128 Com. J. 60, 61. (*d*) 135 Com. J. 46, 54.
(*e*) See, for example, the case of Mr. Aston's letter in 1872 with

PART IV. CHAPTER V.

In order that an attack on the character of a member should be a breach of privilege, the attack must be upon him in his capacity of member. "Aspersions," says Sir Erskine May,(*a*) "upon the conduct of members as magistrates, or officers in the army or navy, or as counsel, or employers of labour or in private life, or otherwise than in relation to Parliament, are within the cognisance of the Courts, and are not fit subjects for complaints to the House of Commons."

Resolutions of the House of Commons.

The following resolutions relating to this subject have at various times been passed by the House of Commons.

In 1699 (22nd April) it was resolved "that the publishing the names of the members of this House, and reflecting upon them, and misrepresenting their proceedings in Parliament, is a breach of the privilege of this House, and destructive of the freedom of Parliament."(*b*)

In 1701 (26th February) a resolution of a committee was agreed to by the House, "that to print or publish any books or libels reflecting upon the proceedings of the House of Commons, or any member thereof, for or relating to his service therein, is a high violation of the rights and privileges of the House of Commons."(*c*)

In 1790 (21st May) a general resolution was passed by the House, "that it is against the law and usage of Parliament, and a high breach of the privilege of this House, to write, or publish, or cause to be written or published, any scandalous and libellous reflection on the honour and justice of this House, in any of the impeachments or prosecutions in which it is engaged."(*d*)

Legality of commitment.

The legality of commitments by the House of Commons, on the Speaker's warrant, was discussed and fully recognised by the Court of King's Bench in the case of *Burdett* v. *Abbott*.(*e*) That was an action against the Speaker of the House of Commons for breaking and entering the house of the plaintiff (a member of Parliament), arresting him, taking him to the Tower of London, and imprisoning him there; acts which the defendant justified under a resolution of the House that a certain letter published by the plaintiff in *Cobbett's Weekly Register*, was "a libellous and scandalous paper, reflecting on the just rights and privileges of that House," and that the plaintiff had thereby been guilty of a breach of the privileges of the

reference to the Ecclesiastical Dilapidations Bill of that year (213 Hans. 560); the case of the *Pall Mall Gazette* attack upon the Irish members in 1873 (215 Hans. 530-542), and the case of Mr. O'Donnell and the *Globe* newspaper in 1878 (239 Hans. 1399).

(*a*) Parliamentary Practice, Ed. 9, p. 100. (*b*) 12 Com. J. 661.
(*c*) 13 Com. J. 767. (*d*) 45 Com. J. 508. (*e*) 14 East. 1.

House; whereupon it was ordered that the Speaker should issue his warrant to commit him to the Tower. "Can the High Court of Parliament," said Lord Ellenborough, C.J., in his judgment, "or either of the two Houses of which it consists, be deemed not to possess intrinsically that authority of punishing summarily for contempts which is acknowledged to belong, and is daily exercised as belonging, to every superior court of law, of less dignity undoubtedly than itself? And is not the degradation and disparagement of the two Houses of Parliament, in the estimation of the public, by contemptuous libels, as much an impediment to their efficient acting with regard to the public, as the actual obstruction of an individual member by bodily force, in his endeavour to resort to the place where Parliament is holden? And would it consist with the dignity of such bodies, or, what is more, with the immediate and effectual exercise of their important functions, that they should wait the comparatively tardy result of a prosecution in the ordinary course of law for the vindication of their privileges from wrong and insult? The necessity of the case would therefore, upon principles of natural reason, seem to require that such bodies, constituted for such purposes and exercising such functions as they do, should possess the powers which the history of the earliest times shows that they have in fact possessed and used."(*a*)

The Speaker, in issuing such a warrant, does not, according to Bayley, J.,(*b*) act in the character of a

(*a*) It has been held in America, by the Supreme Court of the United States, that the House of Representatives has, by necessary implication, a general power of punishing and committing for contempts, notwithstanding that the *lex scripta*, "the Constitution of the United States," had expressly conferred upon it a power to punish "its members;" thereby, as it was argued, on the principle that *enumeratio unius est exclusio alterius*, prohibiting the jurisdiction in the case of persons not members of the House. "It is true," said Johnson, J., delivering the judgment of the Court, "that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. . . . . That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness or repel insult, is a supposition too wild to be suggested" (*Anderson* v. *Dunn*, 6 Wheat. Rep. 204).

(*b*) 14 East. 159.

subordinate officer, but in that of a member of the House. "When the House make an order that their Speaker shall issue his warrant, they do not direct him to do it as a subordinate minister to them, but only as being the individual member of greatest dignity in the House, by whom on this and other occasions the House speaks and acts; and his act in this respect is not, I think, the act of an officer, but the act of a member of the House. But if," adds the learned judge, "it were the act of an officer of the House, acting under and by virtue of its judgment on the subject matter, I cannot help thinking that, where a Court has competent jurisdiction to decide upon a point, and has decided and given judgment upon it, and they direct their officer to carry that judgment into execution, the officer is protected by that judgment."(*a*)

This was so decided by the Court of Exchequer Chamber(*b*) (Parke, Alderson, and Rolfe, BB., Coltman, Maule, and Creswell, JJ.), reversing the decision of the majority of the Court of Queen's Bench, who held a Speaker's warrant void because it did not show a sufficient authority on the face of it to justify the defendant in all he admitted to have done. Parke, B., in delivering the unanimous judgment of the Exchequer Chamber, said: "If in these Courts the writ of attachment need not state any special grounds in order to show that the Court is acting duly, formally, and regularly, what good reason can be assigned for requiring the House of Commons to do so? If the writ of attachment in the general form used is a protection to the sheriff, the officer of the Court executing it (as it undoubtedly is), and he need state nothing in his plea but the issuing of the attachment—Levinz's Entries, p. 191; *Britton* v. *Cole* (1 Salk. 408; Com. Dig. "Pleader," 3 M. 24), why should not the warrant of the Speaker in a general form be equally a protection to the Serjeant-at-arms, the proper officer of the House? We are clearly of opinion that at least *as much* respect is to be shown and as much authority to be attributed to these mandates of the House as to those of the highest Courts in the country; and if the officers of the ordinary Courts are bound to obey the process delivered to them, and are therefore protected by it, the officer of the House of Commons is as much bound and equally protected."

(*a*) 14 East. 160. Sir Francis Burdett brought an action also against the Serjeant-at-arms of the House of Commons for an assault and false imprisonment in the execution of the Speaker's warrant, but did not succeed (*Burdett* v. *Colman*, 14 East. 163).

(*b*) *Howard* v. *Gosset* (10 Q. B. 359).

The warrant of commitment is not to be construed strictly as that of an inferior court or justice of the peace, but it is to be construed as a writ of a superior Court, not appearing on the face of it to be beyond the scope of its jurisdiction;(a) and therefore the warrant, though it does not specify the cause of arrest, furnishes a justification to the officer who executes it.(b)

Courts of law will not examine propriety of commitment.

Each House of Parliament is the sole judge whether its privileges have been violated, and whether thereby any person has been guilty of a contempt of its authority. The courts of common law will not inquire into or review its decision in this respect.(c)

A commitment by the House of Commons is not reversible for form by a court of common law.(d) "We cannot," says Lord Tenterden in *Reg.* v. *Hobhouse*,(e) "inquire into the form of the commitment, even supposing it open to objection on the ground of informality."

Where the commitment is for a libel, the Speaker's warrant need not set out what the libel is. "That point is perfectly settled in the case of *Burdett* v. *Abbott*, and it is also established by all the cases on this subject, that if one Court commit for a contempt, no other Court can inquire into that contempt."(f)

Colonial assemblies.

Colonial legislative assemblies have not the same power, in this respect, as the Imperial Parliament.

"The privilege of committing for contempt," said Lord Denman, C.J.,(g) "is inherent in every deliberative body

(a) *Howard* v. *Gosset* (10 Q. B. 359, 411). Powys, J., says in *Reg.* v. *Paty* (2 Ld. Ray. 1108) that "the House of Commons is a great court, and all things done by them are intended to have been *rité acta*, and the matter need not be so specially recited in their warrants; by the same reason as we commit people by a rule of court of two lines, and such commitments are held good because it is intended that we understand what we do." So Blackstone, J. (*Brass Crosbys' case*, 3 Wils. 205): "Little nice objections of particular words and forms and ceremonies of execution are not to be regarded in the acts of the House of Commons; it is our duty to presume the orders of that House and their execution are according to law." Hawkins (3 Pl. Cr. 219, B. 2, c. 15, s. 73) says: "There can be no doubt but that the highest regard is to be paid to all the proceedings of either of those Houses, and that wherever the contrary *does not plainly and expressly appear*, it shall be presumed that they act within their jurisdiction, and equally to the usages of Parliament, and the rules of law and justice."

(b) *Howard* v. *Gosset* (*ubi supra*).

(c) See *Stockdale* v. *Hansard* (9 A. & E. 169, 195).

(d) *Per* Gould, J., *Reg.* v. *Paty* (2 Ld. Ray. 1106).

(e) 2 Chit. Rep. 210. (f) *Per* Parke, B. (1 Moore's P. C. C. 80).

(g) See *Stockdale* v. *Hansard* (9 A. & E. 114).

invested with authority by the constitution." In similarly unqualified language, Parke, B., in *Beaumont* v. *Barrel*,(*a*) stated it "to be inherent in every assembly that possesses a supreme legislative authority, to have the power of punishing contempts, and not merely such as are a direct obstruction to its due course of proceeding, but such also as have a tendency indirectly to produce such an obstruction, in the same way as courts of record may not only remove or punish persons who actually are interrupting their functions, but may also repress those who indirectly impede the administration of justice by disparaging and weakening their authority." And on this ground chiefly, but partly on that of usage and acquiescence,(*b*) coupled with the adoption of the power in question by virtue of legislative enactment forming the Act of Settlement of the island, the Judicial Committee of the Privy Council held, in that case, that the Jamaica House of Assembly had the power of committing a person who had published certain libellous paragraphs which the House had resolved to be a breach of its privileges.(*c*)

The case last referred to so far as it lays it down that all assemblies possessed of supreme legislative authority have inherent in them the power of committing for contempts, must be taken to be distinctly overruled by subsequent decisions of the Privy Council and of the Court of Queen's Bench. In *Kielly* v. *Carson*(*d*) it was decided by the Privy Council, on appeal from the Supreme Court of Judicature of Newfoundland, that the House of Assembly of that island did not possess, as a legal incident, the power of arrest with a view of adjudication on a contempt committed out of the House; but only such powers as are reasonably necessary for the proper exercise of its functions and duties as a local legislature.

"It is said," said Parke, B., in delivering the judgment, "that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the common law, to an assembly with analogous functions. But the reason why the House of Commons has this power is not

(*a*) 1 Moore's P. C. C. 76.

(*b*) See also the language of Lord Ellenborough, C.J., in *Burdett* v. *Abbott* (14 East. 137).

(*c*) The members of the Judicial Committee present were Lord Brougham, Bosanquet and Erskine, JJ., and Parke, B.

(*d*) 4 Moore's P. C. C. 63. Present: Lord Lyndhurst, C., Lords Brougham, Denman, Abinger, Cottenham, and Campbell; the Vice-Chancellor of England (Sir L. Shadwell), the Lord Chief Justice of the Common Pleas (Tindal), Parke, B., Erskine, J., and Dr. Lushington.

because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which forms a part of the common law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one. . . . . Nor can the power be said to be incident to the legislative assembly by analogy to the English courts of record which possess it. This assembly is no court of record, nor has it any judicial functions whatever; and it is to be remarked that all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as incident to those which they possess, except only the House of Commons, whose authority in this respect rests upon ancient usage." And his Lordship thus referred to the judgment delivered by him in the previous case of *Beaumont* v. *Barrett*: "Their Lordships do not consider that case as one by which they ought to be bound on deciding the present question. The opinion of their Lordships, delivered by myself immediately after the argument was closed, though it clearly expressed that the power was incidental to every legislative assembly, was not the only ground on which that judgment was rested, and therefore was in some degree extra-judicial; but besides, it was stated to be and was grounded entirely on the dictum of Lord Ellenborough, in *Burdett* v. *Abbott*, which dictum, we all think, cannot be taken as an authority for the abstract proposition, that every legislative body has the power of committing for contempt. The observation was made by his Lordship with reference to the peculiar powers of Parliament, and ought not, we all think, to be extended any further."

The case of *Kielley* v. *Carson* was approved and followed in that of *Fenton* v. *Hampton*,(*a*) which had reference to the Legislative Council of Van Diemen's Land. In this case it was held also that there was no distinction, in respect of the power of commitment for contempt, between colonial legislative councils or assemblies whose power is derived by grant from the Crown, and those created under the authority of an Act of the Imperial Parliament.

Summary of the law as to local legislatures.

The effect of the preceding decisions has thus been stated by Cockburn, C.J.: "It has been decided by the Judicial Committee of the Privy Council that when the local legis-

(*a*) 11 Moore's P. C. C. 347.

lature has not by prescription or by statute the power of committing for contempt, that power is not necessarily inherent in it."(*a*)

Isle of Man.

The House of Keys (the legislative assembly of the Isle of Man) having committed for contempt the publisher of certain libels in a newspaper, it was held by the Court of Queen's Bench that the House of Keys had not inherent in it as a legislative body the power to commit for contempt.(*b*)

A provision in a Manx Act of 1817, "that the House of Keys, the Clerk of the Rolls, and the registrars of the ecclesiastical courts, when in the execution of their respective offices, have and shall have the power of punishing contempts in like manner as any court or magistrate within the said island," was construed by the Court of Queen's Bench as referring to the House of Keys when acting in its judicial and not in its legislative capacity.(*c*)

So, in the case of *Doyle* v. *Falconer*(*d*) it was held by the Privy Council that the Legislative Assembly of the island of Dominica had not the power of committing for a contempt, though committed in its presence and by one of its members. Reliance having been placed in argument on the common law maxim, *Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest*, Sir J. W. Colville, in delivering the judgment of the Privy Council, said: "It is necessary to distinguish between a power to punish for a contempt which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation. If a member of a colonial house of assembly is guilty of disorderly conduct in the house whilst sitting, he may be removed or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is, in their Lordships' judgment, all that is warranted by the legal maxim that has been cited, but the latter is not its legitimate consequence. If the good sense and conduct of the members of colonial legislatures prove, as in the present case, insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to

(*a*) 5 B. & S. 293.
(*b*) *Ex parte Brown* (5 B. & S. 280; 33 L. J. 193 Q. B.).
(*c*) *Ibid.* (*d*) L. Rep. 1 P. C. App. 328; 36 L. J. 33, P. C.

remove the person offending from the place of meeting, and to keep him excluded. The same rule would apply, *à fortiori*, to obstructions caused by any person not a member."

Victoria.

The Legislative Assembly of Victoria stands on a peculiar footing. Being constituted by a colonial Act (which was ratified by a subsequent imperial Act), by one enactment of which the legislature of Victoria was empowered to "define" the privileges, immunities, and powers to be held, enjoyed, and exercised by the council and assembly, and by the members thereof respectively, and having, in pursuance of this power, enacted that it, and the committees and members thereof respectively, should hold, enjoy, and exercise such and the like privileges, immunities, and powers as at the time of the passing of the imperial Act(*a*) were held, enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland, and by the committees and members thereof, it has the power of committing for contempt.(*b*) The printer and publisher of a newspaper containing an article upon the subject of the Police Committee of the Legislative Assembly, with particular reference to one member of the assembly, was arrested on the Speaker's warrant, and committed to the custody of the Serjeant-at-Arms.(*c*)

Duration of commitment.

Where the power of committing for contempt exists, the punishment can last only so long as the existing session of the body that inflicts it. "However flagrant the contempt," says Lord Denman, C.J.,(*d*) "the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known than this limitation of it. Though the party should deserve the severest penalties, yet, his offence being committed the day before a prorogation, if the House ordered his imprisonment but for a week, every court in Westminster Hall, and every judge of all the courts, would be bound to discharge him by *habeas corpus*."

So in America, the imprisonment terminates with the adjournment or dissolution of Congress. "Even to the duration of imprisonment," says an American judge (Johnson),(*e*) "a period is imposed by the nature of things,

(*a*) 18 & 19 Vict. c. 55.
(*b*) *Dill* v. *Murphy* (1 Moore's P. C. C. N. S. 487).
(*c*) *Ibid.*
(*d*) *Stockdale* v. *Hansard* (9 A. & E. 114).
(*e*) *Anderson* v. *Dunn* (6 Wheat's Rep. 231). "In England," says Kent (1 Com. Amer. Law, 236, n.), "libels upon the character or proceedings of either House of Parliament, or any of its members, are regarded as breaches of privilege, and punishable as for contempts by

since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the motion of its adjournment or periodical dissolution. It follows that imprisonment must terminate with that adjournment."

Prosecution instead of commitment.

Parliament has sometimes, instead of punishing the publishers of libels by commitment, prayed the Crown to direct the Attorney-General to prosecute either by indictment or criminal information.

One *Rainer* was convicted in 1733 of having printed a scandalous libel upon the Lords and Commons, and sentenced by the Court of King's Bench to pay a fine of £50, and to be committed for two years, and until he should pay the fine, and likewise till he should find security for his good behaviour for seven years.(*a*)

In 1752, William Owen, a bookseller, having published a pamphlet condemning the proceedings in the House of Commons with reference to the commitment of one of their members, Alexander Murray, for dangerous and seditious practices, the House of Commons resolved that the pamphlet was "an impudent, malicious, scandalous, and seditious libel," and that an address should be presented to his Majesty to give directions to the Attorney-General to prosecute the author, printers, and publishers. Owen was accordingly tried upon an information charging him with having published a wicked, false, scandalous, seditious, and malicious libel, "most unlawfully, wickedly, and maliciously devising, contriving, and intending to asperse, scandalise, and vilify the whole body of the Commons of this kingdom, in Parliament assembled, and most wickedly and audaciously to represent their proceedings in Parliament as cruel, arbitrary and oppressive; and to make it be believed and thought as if the Commons in Parliament assembled were a most wicked, base, and degenerate set of persons, and had acted in their legislative capacity in open violation of the constitution of this kingdom, and had most daringly prostituted their power and acted in defiance of those laws which had been made and provided for the security and welfare of the subjects of this kingdom; and also most unlawfully, wickedly,

imprisonment. But with us, such a course of redress has not been adopted, and the House that was injured would probably, if redress was sought, direct a public prosecution by indictment. The Act of Congress of 14 July, 1798, made it an indictable offence to libel the Government, Congress, or President of the United States."

(*a*) *Rex* v. *Rainer* (2 Barnard, 293).

and audaciously to represent the said House of Commons as a court of inquisition; and most impudently to insinuate as if the commitment of the said Alexander Murray to his Majesty's said goal of Newgate was founded in violence and oppression, and by that means to arraign the public justice and proceedings of the said House, and to bring all the Commons of this kingdom in Parliament assembled into an ill and bad opinion, and into the utmost hatred and contempt with all the subjects of this kingdom," &c. The Chief Justice (Lee), according to the report, delivered it as his opinion that the jury ought to find the defendant guilty; for he thought the fact of publication was fully proved; and if so, they could not avoid bringing in the defendant guilty.(*a*) The jury, however, returned a verdict of not guilty.

In pursuance of a similar resolution and address of the House of Commons, John Stockdale was tried in 1789 upon an information charging him with having published a certain false, scandalous, wicked, seditious, and malicious libel concerning the impeachment of Warren Hastings, intending to asperse, scandalise, and vilify the Commons of Great Britain in Parliament assembled, and most wickedly and audaciously to represent their proceedings in Palinment as corrupt and unjust, &c. After a brilliant speech on behalf of Mr. Stockdale by Erskine, who took the line of defence that the intention of the author was to charge with injustice, not the House of Commons as a body, but the *private accusers* of Mr. Hastings, Lord Kenyon, C.J., told the jury that he acceded to the doctrine that they must be convinced that the pamphlet "was meant as an aspersion upon the HOUSE OF COMMONS;" and the jury returned a verdict of not guilty.

In 1796, John Reeves was tried upon an information filed against him by the Attorney-General in consequence of a resolution of the House of Commons that a pamphlet published by him, entitled "Thoughts on the English Government," was a malicious, scandalous, and seditious libel, and was also a high breach of the privileges of the House, and that an address should be presented to his Majesty asking him to direct a prosecution of the publisher. The jury acquitted the defendant.(*b*)

(*a*) 18 Howell's St. Tr. 1203, 1228.
(*b*) 26 Howell's St. Tr. 530.

PART IV.
CHAPTER V.

II. LIBELLOUS CONTEMPTS OF COURTS OF JUSTICE.

Various kinds of libellous contempts.

Libellous contempts of courts of justice may consist in scandalising the Court itself; in the calumniation of the parties who are concerned in causes before the Court; or in prejudicing mankind against persons before the cause is heard.(*a*)

As such libels obstruct the law, and corrupt the very fountains of justice, the wisdom of the Constitution has enabled the Courts who are the subjects of such scandal, with a view to protect themselves and their suitors, to proceed immediately against the offenders by the summary remedy of an attachment.(*b*) It is, therefore, a rule, founded on the reason of the common law, that all contempts to the process of the Court, to its judges, juries, officers, and ministers, when acting in the due discharge of their respective duties, whether such contempts be by direct obstruction or consequentially; that is to say, whether they be by act or writing, are punishable by the Court itself, and may be abated *instanter*, as nuisances to public justice, and subject the party so offending to fine and imprisonment.(*c*)

Libels of this character are also punishable by indictment or by criminal information.(*d*)

Wilmot, C. J.

There is a full discussion of the whole subject of commitments for contempt in an elaborate judgment, referred to with approval in subsequent cases, of Lord Chief Justice Wilmot, which he had prepared, and intended to deliver in the case of an application made in 1765 by the Attorney-General for an attachment against J. Almon for publishing a pamphlet entitled, "A Letter concerning Libels, Warrants, Seizure of Papers, &c.," containing many libellous passages upon the Court of King's Bench, and the Chief Justice for his conduct both in court and out of it, and charging the Court, and particularly the Chief Justice, with having introduced a method of proceeding to deprive the subject

(*a*) *Per* Lord Hardwicke (2 Atk. 471).
(*b*) Holt. L. L. 153. (*c*) *Ibid.* 154.
(*d*) Lord George Gordon was tried upon an information in 1787, and found guilty of publishing a false, wicked, malicious, scandalous, and seditious libel on the judges and the administration of the law; and Thos. Wilkins was found guilty of printing and publishing the same. The libel was a pamphlet called "The Prisoners' Petition to the Right Honourable Lord George Gordon, to preserve their rights and liberties, and prevent their banishment to Botany Bay." The defendant was sentenced to three years' imprisonment in Newgate (*Rex* v. *Gordon*, 22 Howell's St. Tr. 177).

of the benefit of the Habeas Corpus Act.(*a*) The Chief Justice summarises the objections to the proceeding by commitment as follows: that it is an invasion upon the ancient simplicity of the law; that it took its rise from the Statute of Westminster (c. 2), and that Act applies only to persons resisting process; and though this mode of proceeding is very proper to remove obstructions to the execution of process, or to any contumelious treatment of it, or to any contempt of the authority of the Court, yet that papers reflecting merely upon the qualities of judges themselves are not the proper objects of an attachment; that judges have proper remedies to recover a satisfaction for such reflections by actions of *scandalum magnatum*; and that in the case of a peer the House of Lords may be applied to for a breach of privilege; that such libellers may be brought to punishment by indictment or information; that there are but few instances of this sort of libels on Courts or judges; that libels of this kind have been prosecuted by actions and indictments; and that attachments ought not to be extended to libels of this nature, because judges would be determining in their own cause; and that it is more proper for a jury to determine *quo animo* such libels were published.(*b*)

The Chief Justice, in the first place, denies that attachments derived their origin from the Statute of Westminster (c. 2). "The power which the Courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the Court acted in the face of it.(*c*) And the issuing of attachments by the supreme courts of justice in Westminster Hall for contempts out of court, stands upon the same immemorial usage as supports the whole fabric of the Common Law: it is as much the *lex terræ*, and within the exception of Magna Charta, as the issuing any other legal process whatsoever."

To the objection that there is not such necessity for summary punishment in the case of libels upon Courts or judges, as in the case of resistance of process, his lordship replies: "When the nature of the offence of libelling judges for what they do in their judicial capacity, either in court or out of

(*a*) The prosecution of Mr. Almon having dropped, in consequence, it is supposed, of the resignation of the then Attorney-General, Sir Fletcher Norton, the judgment prepared by Chief Justice Wilmot was not delivered in court; but it is frequently referred to as an authority.

(*b*) See Wilmot's Notes and Opinions, p. 253.

(*c*) 1 Vent. 1.

court, comes to be considered, it does, in my opinion, become more proper for an attachment than any other case whatsoever. . . . . The arraignment of the justice of the judges is arraigning the King's justice: it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current which it has for many ages found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth."(*a*)

After alluding to the action of *scandalum magnatum*, which only redresses the private injury, and the proceedings in the House of Lords for breach of privilege, the Chief Justice proceeds: "The Constitution has provided very apt and proper remedies for correcting and rectifying the involuntary mistakes of judges, and for punishing and removing them for any voluntary perversions of justice. But, if their authority is to be trampled upon by pamphleteers and news-writers, and the people are to be told that the power given to the judges for their protection is prostituted to their destruction, the Court may retain its power some little time, but I am sure it will instantly lose all its authority. The power of the Court will not long survive the authority of it."(*b*)

Libelling judge in chambers.

His Lordship then considers whether a judge making an

(*a*) In a later part of the judgment (Wilmot's Notes and Opinions, p. 270) his Lordship says: "The principle upon which attachments issue for libels upon Courts is of a more enlarged and important nature [than that upon which attachments are granted in respect of bailiffs] —it is to keep a blaze of glory around them, and to deter people from attempting to render them contemptible in the eyes of the public."

(*b*) "The word 'authority' is frequently used to express both the right of declaring the law, which is properly called jurisdiction, and of enforcing obedience to it, in which sense it is equivalent to the word power; but by the word 'authority' I do not mean that coercive power of the judges, but the deference and respect which is paid to them and their acts, from an opinion of their justice and integrity" (*Ibid.* p. 256).

order at his house or chambers is not acting in a judicial capacity as a judge of the court, and both his person and character under the same protection as if he were sitting in court. "It is conceded," he says, "that an act of violence upon his person when he was making such an order would be a contempt punishable by attachment: upon what principle? for striking a judge when walking along the streets would not be a contempt of the court. The reason, therefore, must be, that he is in the exercise of his office, and discharging the function of a judge of this court; and if his person is under this protection, why should not his character be under the same protection? It is not for the sake of the individual, but for the sake of the public, that his person is under such protection; and in respect of the public, the imputing corruption and the perversion of justice to him, in an order made by him at his chambers, is attended with much more mischievous consequences than a blow; and, therefore, the reason of proceeding in this summary manner applies with equal, if not superior, force to one case as well as the other. There is no greater obstruction to the execution of justice from the striking a judge, than from the abusing him, because his order lies open to be enforced or discharged, whether the judge is struck or abused for making it. . . . It may perhaps merit a less punishment to libel a single judge in court or out of court than to libel the whole court; but the question of the offence does not vary the mode of prosecuting it; it is an offence *ejusdem generis*, although *inferioris gradus*; and I cannot explore a single reason which can be urged to cover the judges in court against calumny and detraction for what they do there, which does not hold equally true, though in a less degree, when applied to what they do in their judicial capacities out of court; the *quantum* of the offence is different, but the quality of the offence is the same."

There is, however, no instance of a judge at chambers fining or imprisoning without the authority of the Court, for any insult offered to him there. We must distinguish in this respect between a judge of a court of record and the court of record itself. "No one of the rights, privileges, and incidents of a judge of a court of record," says Alderson, B.,(*a*) "necessarily carries with it the power of committing for contempt." And Lord Abinger, C.B., observes:(*b*) "A judge of a court of record very often is engaged in the per-

(*a*) *Rex* v. *Faulkner* (2 Mont. & Ayr. 344).
(*b*) 2 Mont. & Ayr. 338, 339.

formance of functions which are wholly unconnected with his power of committing. A judge of the Court of King's Bench who grants a warrant at chambers is protected, although he should mistake the jurisdiction. Nobody would imagine that a judge, because he might grant a warrant on an information laid before him, could, in his private capacity as a judge of a court of record, punish any man for a contempt by fining him. Suppose an application is made for a warrant, and at the moment he is about to grant it, any letter were presented to him, or any insult offered to him, I believe there is no case to be found where a judge has ventured to fine or imprison without the authority of the Court. Again, the judges of the different courts, who are discharging their judicial functions separately and in chambers, as ancillary to the general business of the court, have never yet ventured to act as courts of record; they are judges of record, but they do not, when they act individually, even when they are discharging part of their judicial functions, assume to themselves the power of a court of record, which is illustrated by the instance referred to, that an order of a judge at chambers cannot be enforced by attachment, but must be made first a rule of court, before there is any contempt in violating it."

An attorney of the King's Bench, in the reign of Edward III., was committed to the custody of the marshal, and had to find sureties for his good behaviour, for having written a letter to one of the King's Council, reflecting on the judges, saying: "That neither Sir William Scot, Chief Justice, nor his fellows the King's justices, nor their clerks, any great thing would do by the commandment of our lord the King, nor of Queen Philippa, in that place more than of any other of the realm."(*a*)

Discussion of judicial decisions not prohibited.

The temperate and respectful discussion, by the newspaper press, of the decisions of our courts of justice, is not interdicted; but mere invective or abuse, and still more the imputation of false, corrupt, or dishonest motives, to those who are engaged in the administration of justice, is punishable as a libel.

In a case of this sort, where the proprietor and printer of a newspaper were tried upon an information filed by the Attorney-General, for a libel upon Le Blanc, J., and the jury before whom the captain of a merchant-ship had been tried for murder at the Old Bailey Grose, J., said: "It certainly was lawful with decency and candour to discuss the

(*a*) 3 Inst. 174.

propriety of the verdict of a jury, or the decisions of a judge; and if the defendants should be thought to have done no more in this instance, they would be entitled to an acquittal; but, on the contrary, they had transgressed the law, and ought to be convicted, if the extracts from the newspapers set out in the information contained no reasoning or discussion, but only declamation and invective, and were written not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country."(*a*)

In similar language, Fitzgerald, J., directed the jury in dealing with a seditious libel which related, amongst other things, to the case of certain men who had been tried and executed for murder:(*b*) "The defendant had a right to discuss fairly and *bonâ fide* the administration of justice as evidenced at this trial. It is open to him to show that error was committed on the part of the judge or jury; nay, further, for myself, I will say that the judges invite discussion of their acts in the administration of the law, and it is a relief to them to see error pointed out, if it is committed; yet, whilst they invite the freest discussion, it is not open to a journalist to impute corruption."(*c*)

(*a*) *Rex* v. *White and another* (1 Camp. N. P. 359). According to the report, the libel in this case affirmed the prisoner to have been guilty of murdering one of his crew, and in a gross and abusive style censured the judge and jury for acquitting him. The defendants having been found guilty, were sentenced to three years' imprisonment.

(*b*) *Reg.* v. *Sullivan* (11 Cox Crim. Cas. 57).

(*c*) A lieutenant in the royal marines having, in the year 1743, been sentenced by a court martial to fifteen years imprisonment, brought an action against the president of the court martial, and recovered £1000 damages, and, in pursuance of what fell from the judge at the trial, commenced actions also against the other members of the court martial who had passed the sentence, and they were arrested by *capias* at the breaking up of a court martial against another officer, of which they were also members. This latter court martial then passed certain resolutions reflecting on Sir John Willes, Chief Justice of the Common Pleas, which were laid before the King. Upon this the Chief Justice caused every member of the court to be taken into custody, and was proceeding to assert and maintain the authority of his office, when a written and contrite submission, signed by all the members of the court, stayed the progress of justice. The submission transmitted to the Lord Chief Justice was ordered to be read in open court, and to be registered in the Remembrancer's office. It also appeared in the *London Gazette*, "a memorial (as observed by the Lord Chief Justice) to the present and future ages, that whoever set themselves up in opposition to the laws, or think themselves above the law will, in the end, find themselves mistaken" (C. Pl. M. S. 1743; Holt. L. L. 158, 159).

Though the libel be published whilst the Court is not sitting, and at a place somewhat distant, a court of record has still the power of punishing by commitment.(*a*)

Libel published when court is not sitting

The publisher and the writer of an article in a newspaper which reflected intemperately on certain proceedings of the Court of Chancery of the Isle of Man, were committed to prison for the contempt, though the Court was not sitting at the time of publication, and the publication took place in Douglas, ten miles distant from where the Court sat.(*b*) "It is objected," said Patterson, J., "that the Court could have no general power of commitment for a libel published out of court some time before. This point has not been expressly decided upon. In *Van Sandau's case*(*c*) the libel appears to have been published both in court and out of it. In *Rex* v. *Almon*(*d*) there was a very learned judgment by Chief Justice Wilmot, which he intended to deliver, though it was not delivered in fact, the case having dropped. He satisfactorily shows that a court of record has power to punish, by commitment for contempt, a libel published while the Court is not sitting." And Erle, J., added: "The commitment here was for a contempt in publishing, while the Court was not sitting, and perhaps at some distance of time and place, a libel on the proceedings of the Court. In the elaborate judgment to which my brother Patterson has referred, it is shown that such a publication may have a strong and immediate tendency to paralyse the proceedings of the Court. Such cases may easily be conceived; the propriety of the decision in the particular case is a question for the Court itself."

A case, which went further than any Court would now probably go, was that of *Rex* v. *Watson*,(*e*) where an information was granted in 1788, against the members of the corporation of Yarmouth, for having entered upon their books an order stating "that the assembly were sensible that Mr. W. [against whom an action had been brought for a malicious prosecution, and a verdict returned for £3000 damages, which the Court refused to disturb] was actuated by motives of public justice, of preserving the rights of the corporation to their admiralty jurisdiction, and of supporting the honour and credit of the chief magistrate; and therefore they vote him the sum of

(*a*) *Crawford's case* (13 Q. B. 613). (*b*) *Ibid.*
(*c*) *Van Sandau* v. *Turner* (6 Q. B. 773); *Ex parte Van Sandau* (1 Phill. 445, 605).
(*d*) Wilmot's Notes and Opinions, 243, 252, 291.
(*e*) 2 T. R. 199.

£2300."(a) "It is," said Butler, J., "a direct insinuation that the Court had judged wrong in all they have done in this case, and it is therefore clearly a libel on the administration of justice."(b)

Publication by person engaged in a suit.

A solicitor in a bankruptcy proceeding was held guilty of a gross contempt of Court in publishing a pamphlet containing insulting observations on the Court of Review, and on certain parties engaged in litigation before it. The pamphlet spoke of the judgment of the Chief Judge in Bankruptcy (Sir J. Knight Bruce) as "an elaborate production, wholly beside the merits of the case, free from all allusions to the facts or statements in the affidavits, which it was but charity to suppose were never referred to by the judge; free from all denunciations against fraud; and that the only object of it seemed to have been to deter solicitors from every attempt to expose and correct abuses in bankruptcy." The Judge of the Court of Review (Sir G. Rose) considered this to be a gross and scandalous contumacy of the learned judge, and a gross libel upon him, which ought to be visited as a contempt of that Court, and committed the writer to custody, from which he was released on humbly apologising and paying all the costs incidental to the application.(c)

Per Lord Cottenham.

A barrister and member of Parliament who wrote a letter in threatening and insulting terms to a Master in Chancery, before whom he had appeared in support of a petition presented by himself and others, the tendency of the letter being to induce the master to alter the opinion he was supposed to have formed upon the case, was committed by the Lord Chancellor (Cottenham) to the Fleet during pleasure.(d) "The power of committal," said his Lordship, "is given to courts of justice for the purpose of securing the better and more secure administration of justice. Every writing, letter, or publication which has for its object to divert the course of justice is a contempt of the Court. It would be strange, indeed, if the judges of the court were the only persons not protected from libels, writings, and proceedings, the direct object of which is to pervert the course of justice. Every insult offered to a judge in the exercise of the duties of his office is a contempt; but when the writing or publication proceeds further, and when, not

(a) *Rex* v. *Watson* (2 T. R. 199).
(b) See also the remarks of Ashurst and Grose, JJ., in the same case.
(c) *Ex parte Turner* (3 Mont. D. & De G. 523, 551, 558).
(d) *Mr. Lechmere Charlton's case* (2 My. & Cr. 316).

by inference, but by plain and direct language, a threat is used, the object of which is to induce a judicial officer to depart from the course of his judicial duty, and to adopt a course he would not otherwise pursue, it is a contempt of the very highest order."(*a*)

The writer of a letter to Lord Hardwicke relative to a threatened suit, and inclosing a bank-note, was held guilty of contempt;(*b*) and so was the writer of a letter to Chief Baron Parker, making mention of a cause depending in the Court of Exchequer, and containing a scandalous offer to his lordship.(*c*)

A threatening letter sent to one of the parties or witnesses in a suit is as much a contempt of court as one addressed to a judge or officer of the court.(*d*)

Lord Erskine, C., committed to prison the committee of a lunatic and his wife for having published a pamphlet, with a dedication to the Lord Chancellor, reflecting upon the conduct of certain persons acting, in the management of the affairs of a lunatic, under orders from the Court of Chancery. His lordship committed also the printer, and held that ignorance of the contents of the pamphlet would not excuse him.(*e*)

A judge of assize (Blackburn, J.,) having ordered part of the court to be cleared on account of the noise made by the persons assembled there, the High Sheriff of the county caused a placard, signed by him, to be posted up in the town opposite the court, in which he recorded his protest against "this unlawful proceeding" of the learned judge, and said: "I have given directions that the court shall be opened again to the public according to the custom and the

(*a*) *Ibid.* 339. Lord Abinger, C.B., and Alderson, B., seem to have taken a different (and it is submitted more sensible) view of the mode of dealing with insulting letters addressed to a judge, touching a matter under consideration. "I can only say," said Lord Abinger, "that if I received such a letter I should not consider myself at liberty to commit the writer." To which Alderson, B., added: "There would be a great many committals if such a course were pursued by the judges." "Do you mean to say," asked Lord Abinger of counsel, "that one of the judges has the power to fine a man for sending him a silly letter, or an impudent letter about any matter that he has decided? I can only say I should be very much afraid of exercising it." (See *Rex* v. *Faulkner*, 2 Mont. & Ayr. 321, 322.)

(*b*) *Martin's case* (2 Russ. & Myl. 674).

(*c*) *Macgill's case* (2 Fow. Ex. Prac. 404).

(*d*) *Smith* v. *Lakeman* (26 L. J. 305, Ch.); *Shaw* v. *Shaw* (31 L. J. Prob. 35; 6 L. T. N. S. 477; 2 S. & T. 515); *Re Mulock* (33 L. J. Prob. 205; 10 Jur. N. S. 1188).

(*e*) *Ex parte Jones* (13 Ves. 237).

law. All persons, so long as they conduct themselves with decorum, have a lawful right to be present in court; and I hereby prohibit my officers from aiding and abetting any attempt to bar out the public from free access to the court." For this contempt the High Sheriff was fined £500 by Cockburn, C.J., who was sitting in the next court.(a)

Scotch courts.

The Scotch courts exercise the same powers as to commitments for contempt which the English courts do. Hume,(b) after dealing with the case of contemptuous demeanour in court, says: "It is equally indispensable to repress in the like speedy and effectual manner all attempts which may be made with relation to any trial depending at the time, or which has recently been so, to slander the proceedings of the court, or depreciate the character, or sully the honour, of the judges; or to impose on their wisdom and pollute the demands of justice, to the prejudice of a fair and an impartial trial. In former times they scrupled not summarily to inflict high corporal pains for transgressions of the first of these kinds. As in the case of Donald Campbell, who, in the course of a trial, when standing among the multitude by the courthouse, had openly accused the Earl of Athol, Justice-General, of gross partiality and corruption in the case; he had sentence, therefore, to stand two hours upon the cuck-stool and make public confession of his fault, and to have his tongue bored by the common executioner. More lately, after the conviction of Nairn and Ogilvy, certain printers were rebuked (and, on account of their submission, were dismissed without further answer) for publishing an opinion of English counsel on the case, accompanied with notes highly injurious to the Court and the jury. In a still later instance, an account had been published of a certain trial, equally slanderous of the proceedings of the Court, and contemptuous of the persons of the judges; and here, as the offence was not followed with the like symptoms of contrition, the culprits Johnson and Drummond were sent to gaol for three months, and till they should find surety for their good behaviour for the future. In these several instances the Court guarded their own honour. In the following they were no less jealous of the interests of justice and a fair trial. One

(a) *In re the High Sheriff of Surrey* (2 F. & F. 237). The same gentleman having persisted in addressing the grand jury in court after a prohibition from the presiding judge, was fined £500, and threatened with commitment if he did not desist. This fine was remitted on his reading a written apology in court (*Ibid.* 234).

(b) 2 Com. 139.

Gilkie, a writer, agent for the prosecutor in a case of murder, was condemned to a month's imprisonment, and to find caution for his good behaviour: after execution of the criminal letters, he had published sundry memorials and other addresses commenting on the charge, and tending to prejudice the public against the accused. The Lords declared on this occasion 'that such publications are a high indignity to the Court, and most dangerous to the course of justice, as tending to prepossess and inflame the minds of the country against the persons accused, and thereby obstruct the course of a fair trial.' A fine was awarded, and the like censure of all such unfair practices was inserted in the record, on occasion of the trial of Ewan Macewen before the Lords Justice-Clerk and Eskgrove at Perth, in May, 1785: after service of the indictment, the agent for the pannel had rashly published and circulated in the neighbourhood, a sort of narrative on his part, giving an account of the charge, and the circumstances of the case."

In 1820, Gilbert M'Leod was sentenced to be imprisoned and find caution, under a penalty, for his good behaviour for three years, for having published, in a periodical called *The Spirit of the Union*, a false and slanderous account of what had passed in court at giving sentence of fugitation against George Kinloch, and one which was calculated to raise groundless doubts and jealousies of the due administration of justice in the Court of Justiciary.(*a*)

A newspaper having published (pending the trial of this Gilbert M'Leod, the same year, on a charge of sedition) a paragraph inserted by William Watson, which gave a false and exaggerated account of the charge against the accused, and made his case the subject of public discussion, the Court found "that such conduct is derogatory to the authority of this Court, dangerous to parties, whether prosecutors or pannels, and subversive of the principles of a fair trial;" but in respect of circumstances of extenuation stated by Watson, they dismissed him with a rebuke and a fine of five pounds.(*b*)

It appears that in those cases where the publication of statements having a tendency to interfere with the administration of justice, does not call for punishment, the Court may nevertheless interfere to prohibit such publication. Thus, in 1829, William Haire being charged with the murder of James Wilson, on the motion of the counsel for the accused with reference to an advertisement of a forthcoming

(*a*) Shaw's Cases, No. 4. (*b*) *Ibid.* No. 6.

publication of the confessions of William Burke, which had been announced in the *Edinburgh Evening Courant*, the Lords "prohibit the editor and publisher of the *Edinburgh Evening Courant* from publishing or circulating any statement relative to the alleged murder of James Wilson, or anything prejudicial to the prisoner, William Haire, in the said confession, or doing anything whereby the same may be published, till the proceedings now in dependence against the said William Haire shall be brought to a conclusion, and recommend to the publishers of all newspapers to abstain in like manner from doing so."(*a*)

Colonial courts.

Colonial courts of record possess the same power of commitment for contempt that the home courts do, and an appeal will not lie from such a commitment to the Privy Council.(*b*)

In these cases, however, it must appear clearly on the face of the order that the party had committed a contempt, that he had been duly summoned to make his defence, and that the punishment awarded for the contempt was an appropriate one.(*c*)

Where a barrister and attorney wrote a letter to the Chief Justice of Nova Scotia, reflecting on the judges and the administration of justice generally in the court, but wrote it not in his professional capacity, but in his private capacity as a suitor in respect of a supposed grievance and injury done him as a suitor, the Privy Council held that an order suspending the writer from practising in the court was not an appropriate punishment for the offence, and on that ground advised Her Majesty to discharge the order.(*d*)

"The letter," said Lord Westbury, in delivering the judgment of the Privy Council, "was a contempt of Court which it was hardly possible for the Court to omit taking

(*a*) Bell's notes, 165. See also *Edmond's case* (7 December, 1829, Shaw, 229). For Lord Cottenham's opinion as to the jurisdiction of the Court of Session to prevent by interdict the publication of libellous statements, see 1 H. L. Cas. 376.

(*b*) *McDermott* v. *The Judges of British Guiana* (L. Rep. 2 P. C. App. 341; 20 L. T. N. S. 47). See also *Rainy* v. *The Justices of Sierra Leone* (8 Moore's P. C. C. 47, 54), and *Hughes* v. *Porral* (4 Moore's P. C. C. 41).

(*c*) See *per* Lord Chelmsford (L. Rep. 2 P. C. App. 363), and *Re Wallace* (L. Rep. 1 P. C. App. 283; 14 L. T. N. S. 286; 36 L. J. 9, P. C. C.; 14 W. R. 609); *Re Pollard* (5 Moore's P. C. C. 111; L. Rep. 2 P. C. App. 106); *Re Downie and Arrindell* (3 Moore's P. C. C. 414).

(*d*) *Re Wallace* (*ubi supra*). See also *Re Downie and Arrindell ubi supra.*

cognisance of. It was an offence, however, committed by an individual in his capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor, and it had no connection whatever with his professional character, or anything done by him professionally either as an advocate or an attorney. It was a contempt of Court committed by an individual in his personal character only. To offences of that kind there has been attached by law and by long practice a definite kind of punishment—viz., fine and imprisonment. It must not, however, be supposed that a court of justice has not the power to remove the officers of the court if unfit to be entrusted with a professional *status* and character. If an advocate, for example, were found guilty of crime, there is no doubt that the Court would suspend him. If an attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the roll. But in this particular case there is no *delictum* brought forward or assigned, except that which results from the fact of addressing an improper and contemptuous letter to the chief justice of the Court, in respect of something supposed to have been done unjustly to the writer in his private capacity as a suitor. We think, therefore, there was no necessity for the judges to go further than to award to that offence the customary punishment for contempt of Court."(*a*)

(*a*) Besides contempts of Court committed by means of libellous writings (with which alone this work professes to deal), the Courts have frequently punished by attachment the utterance of contemptuous or contumelious words, and also the contemptuous demeanour of parties before it. Contempts of Court by means of words are also indictable. The following are examples of this general head of contempts: Calling a magistrate, in a court of justice, a fool, but not so speaking of him in his absence, and without reference to the execution of his office (*Simmons* v. *Swecte*, Cro. Eliz. 78; *Reg.* v. *Wrightson*, Salk. 698; see also 2 Roll. Rep. 78; 4 Inst. 181; *Ex parte The Mayor of Yarmouth*, 1 Cox Crim. Cas. 122); giving the lie to the steward of a manor holding a court leet (*Earl of Lincoln* v. *Fisher*, Cro. Eliz. 581; Ow. 113; Mo. 470), or telling him in court that he is forsworn (2 Rol. Abridg. 78); saying to justices in session "Though I cannot have justice here, I will have it elsewhere" (*Rex* v. *Mayo*, 1 Keb. 508; 1 Sid. 144); putting on one's hat in presence of the lord of a court leet, and saying he cared not what he could do (*Bathurst* v. *Coxe*, 1 Keb. 451, 465; Raym. 78); saying to a justice of the peace in the execution of his office that he was a rogue and liar (*Rex* v. *Revel*, 1 Str. 420); but not saying of a justice in his absence that he was a scoundrel and a liar (*Rex* v. *Wellje*, 2 Camp. 142). And a Court may be insulted by the most innocent words uttered in a peculiar manner and tone (*Per* Lord Denman, C.J., *Carus Wilson's case*, 7 Q. B. 1015). Wherever a justice may commit for such words, the offender may also be indicted for the misdemeanour (Str. 420). A justice can commit

Publications which tend to prejudice the hearing of a pending cause.

The calumniation of parties who are concerned in a cause before the Court, or any publication which attempts to create prejudice against any of them before the cause is heard, and thus tends to influence its result, constitutes a contempt.

The rules which have been laid down as to fair comment on matters of public interest and notoriety, do not extend to comments on matters still pending, waiting for argument and decision, which have a direct tendency towards directing and swaying the mind of the Court or jury, by whom the cause is to be determined.(*a*)

The publication by a newspaper of a paragraph taxing certain witnesses in a pending cause with "turning affidavit men," was held a contempt of Court by Lord Hardwicke. His lordship construed the words "affidavit men" to mean "persons who are ready upon all occasions to make affidavits without regarding whether they have any cognisance of the facts," and committed the printers to prison, observing(*b*) that "nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard. . . . . There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

The publication in a newspaper, pending a cause in Chancery, of articles reflecting on the plaintiff and his witnesses, and characterising the Chancery proceedings as vexatious and unprincipled, and representing the affidavits as containing glaring misrepresentations which the editor believed, and heartily hoped, would lead to an indictment for perjury, was held a contempt of Court by the Master of the Rolls (Lord Langdale). "If parties in the prosecution only where the contemptuous words are spoken in his presence; in other cases the remedy is by indictment of the offender (*Rex* v. *Revel*, *ubi supra*. See also *Rex* v. *Wrightson*, *ubi supra*, and 1 Vent. 169; 2 Keb. 249; Hutt. 131; 3 Mod. 139; *Rex* v. *Selby*, Mich. 4 Anne K. B.; *Rex* v. *Penny*, 1 Ld. Raym.; *Rex* v. *Pocock*, Str. 1157). A barrister may also commit a contempt of Court in the conduct of a cause (*Re Pater*, 33 L. J. 142 Q. B.); and so may one of the parties to the cause in the course of addressing the jury (*Rex* v. *Davison*, 4 B. & Ald. 329). As to contempts of county courts see sect. 113 of 9 & 10 Vict. c. 95, and the case of *Levy* v. *Moylan* (19 L. J. 308, C. P.); and as to contempts of ecclesiastical courts, see 2 & 3 Will. 4, c. 93.

(*a*) See *per* Wood, V.C., *Tichborne* v. *Mostyn* (17 L. T. N. S. 7; L. Rep. 7 Eq. 57).

(*b*) 2 Atk. 469.

of their rights," said his Lordship, "are to be exposed to this species of attack, and are to be placed in such a situation that they cannot safely proceed in the defence of their rights, and if witnesses are in this way deterred from coming forward in aid of legal proceedings, it will be impossible that justice can be administered. It would be better that the doors of the courts of justice were at once closed."(*a*)

It was held a gross contempt of Court to publish in a newspaper an article commenting on affidavits which had been filed on behalf of the plaintiff in a suit, but were not yet before the Court; and the publisher, after making an ample apology, was ordered to pay the costs of a motion to commit him.(*b*)

Reprint of article.

It is also a contempt to reprint in another newspaper an article of this sort. In the case last referred to, a motion to commit the publishers of two newspapers which had simply reprinted the article was refused, but the publishers had to pay their own costs. The printer of a newspaper which had gone beyond merely reprinting the article, was made to pay the costs of the motion.(*c*)

Vice-Chancellor Kindersley committed to prison the publisher of a newspaper, for having published a leading article commenting on affidavits made in a suit in Chancery, which had not yet come on for hearing, and holding up to ridicule the makers of the affidavits, and characterising their conduct as utterly disgraceful.(*d*)

Printing brief.

On a similar ground—viz., that the publication tended to prejudice the world with regard to the merits of the cause

(*a*) *Littler* v. *Thompson* (2 Beav. 129).

(*b*) *Tichborne* v. *Mostyn* (17 L. T. N. S. 5; L. Rep. 7 Eq. 55). See the language of Wood, V.C., on this subject, cited *ante*, pp. 57, 58.

(*c*) *Ibid.* See also *Tichborne* v. *Tichborne* (22 L. T. N. S. 55).

(*d*) *Felkin* v. *Herbert* (9 L. T. N. S. 635; 33 L. J. 294, Ch.). In this case the publisher was released from custody after ten days' confinement, on payment of costs and fees, and humbly apologising to the Court for the contempt which he had committed. The motion for his discharge was opposed on the ground that he should also have apologised to the persons who had made the affidavits, and whom he had injured by the reflections contained in the leading article. The Vice-Chancellor, however, thought that the making of such an apology could not be made a condition precedent to his discharge. "He was not," said his Honour, "committed for an offence against anything appertaining to the honour or character of the defendants, but because the language used was a contempt of this Court, and tending to impede the course of justice; not because it was an offence against any given individuals; and when he applies to be discharged, and expresses his contrition, how can the judge say he will not discharge him, unless he does something in respect of a matter for which he was not committed?" (*Ibid.*)

before it was heard—the act of a party who printed his brief before the cause came on, was held a contempt of Court, though there was nothing in the publication reflecting upon the Court in any way.(*a*)

Publishing a petition to wind up.

It was also held a contempt of Court for a newspaper to publish, before it was heard, a petition which had been presented to the Court of Chancery for the winding-up of a company, containing grave charges against the directors. It was contended, on behalf of the newspaper proprietor, that the case of a petition to wind-up was an exceptional one, because under the Act it must be advertised, and the advertisement must be accompanied by a statement that persons desiring to possess it might obtain copies from the solicitor by an ordinary application. Malins, V.C., said: "No doubt, every contributory and creditor can obtain such copies, but it is not open to any one of the public, strangers to the matter, and does not give a general licence to publish the petition. . . . . There is nothing in the Act or rules which sanctions the publication of a petition of this kind, any more than a Bill in Chancery."(*b*)

Order of Court prohibiting publication.

If a Court make an order prohibiting the publication of the proceedings pending a trial likely to continue for several successive days, it is a contempt of Court to disobey such order.(*c*)

Publication of letters by solicitor of one of the parties.

It is a contempt of Court for the solicitor of one of the parties in a suit to write letters for publication in a newspaper, which tend to influence the result of the suit.(*d*) "There is," said Lord Romilly, M.R.,(*e*) "one distinct line drawn, which is this, that gentlemen who are concerned for contending clients in this court, whether solicitors or counsel, should abstain entirely from discussing the merits of those questions in public print; if they do it at all, they ought to put their names to their communications. But to let the public suppose that it is merely done by a person who takes a great interest in, and has great knowledge of, the subject, and discusses it from a public point of view, when, if the fact were known, he is the solicitor of the defendant, and has the strongest possible interest in his success, is in my opinion, highly reprehensible."

Liability of editor for insertion of anonymous letters.

The letters published in this case were anonymous. The

(*a*) See *per* Lord Hardwicke (2 Atk. 471); S. C. *nom. Roach* v. *Garvan* (2 Dick. 794).

(*b*) *Re Cheltenham and Swansea Railway Carriage and Waggon Company* (L. Rep. 8 Eq. 580; 20 L. T. N. S. 169).

(*c*) See *Rex* v. *Clement* (4 B. & Ald. 218).

(*d*) *Daw* v. *Eley* (L. Rep. 7 Eq. 49).

(*e*) *Ibid.*

suit was to restrain the infringement of a patent, one of the issues raised being as to the novelty of the plaintiff's invention, and the letters written by the defendant's solicitor stated facts tending to disprove the novelty of the invention. On the appearance of the first letter, the plaintiff wrote to the editor referring to the suit, and suggesting that the writer of the published letter was an interested party. Notwithstanding this, the editor, besides refusing to insert the plaintiff's letter, as containing personal imputations, afterwards published a further anonymous letter from the defendant's solicitor, knowing that he was a solicitor, but not knowing that he was the solicitor in the pending suit. A motion was made to commit the editor also for a contempt of Court, but the motion was refused, the editor, however, having to pay his own costs. Lord Romilly said: "The case of the editor of a newspaper is very different from that of persons who write letters to the paper for publication. His duty is simply to take no part in matters purely personal between individuals, or in matters which are the subject of a lawsuit. But it often happens that private matters are so mixed up with public matters into which it is his duty to enter, that it is very difficult to draw the distinction between them. In this case, if the editor had inserted Mr. D.'s [the plaintiff's] letter, I should have thought that there was nothing in his conduct calling for the interference of the Court; but he did not insert it, and afterwards, with notice that a suit was pending, with the knowledge that the author of the letters was Mr. C., and that Mr. C. was a solicitor, which ought to have induced him to inquire further, and ascertain the exact position which Mr. C. occupied, he allowed further letters on both sides to be published. I am inclined to think, by what the plaintiff told him, he was put upon inquiry whether 'Copper Cap' [the *nom de plume* of the letter-writer] was connected with the suit."

Party supplying newspaper with information cannot complain of contempt.

If one of the parties to a suit has himself supplied the newspaper with the information upon which comments are made, he is not in a position to complain of the contempt.

Where the plaintiff in a suit procured the insertion in a local newspaper of a statement of his claim, and his agent gave the newspaper proprietor a copy of the bill, a motion having been made to commit the proprietor for contempt in publishing certain articles disparaging the plaintiff's claim, Bacon, V.C., refused to make any order whatever in the matter, saying: "I am not considering the offence committed against the Court by contempt, but the right which the plaintiff in the suit, who has endeavoured to make use of a

newspaper for his own purpose, has to come afterwards and complain of subsequent statements or comments, not malevolent and not libellous, upon the subject which he has submitted to the editor of that newspaper. What right has he to be here to complain? I cannot conceive that he has the slightest right in the world."(*a*)

Publication by one party does not justify publication by the other.

Though one of the parties to an action publish newspaper attacks on the conduct of his opponent, the latter will not be allowed, by way of defence, to publish, pending litigation, *ex parte* garbled accounts of any of the proceedings in court or before the examiner.(*b*)

In a case of this kind, Lord Hatherley (when Vice-Chancellor Wood) restrained, by injunction, the publication of a pamphlet containing an unfair account of the evidence of one of the witnesses, taken before the examiner, saying: "If the one party endeavours to prejudice the public in any way against the other litigant party, there is not the slightest justification for the other party doing the same; and this Court, in the administration of justice, always takes care that neither party shall do it. . . . . I quite agree with the respondent's counsel in thinking that the present times are very different from those of Lord Hardwicke, and that the present feeling and the general judgment of mankind as to what is or is not proper to be published, are exceedingly different to what they were at that time. That may at once be conceded; but at the same time, even as regards the publicity of proceedings in courts of justice, and when it is a question between parties who are not litigant, but between one of the parties litigant and the publisher of a newspaper, for instance; even as between these parties the Court, in these days, recognising in the highest possible degree the importance of the public being duly and fairly informed of all that takes place, yet does take care that there shall only be such proper information published in a fair and reasonable manner. I mean that courts of justice, in giving directions to a jury as to the ultimate result in that which is or is not a fair publication, always leaves it for the consideration of such jury whether or not an independent, or supposed to be independent, person, who has published a narrative of proceedings of a court of justice, has published them in a fair and reasonable manner, being anxious to inform the public; or whether there is evidence of malice in the modes in which

(*a*) *Vernon* v. *Vernon* (23 L. T. N. S. 697; 40 L. J. Ch. 118).
(*b*) *Coleman* v. *West Hartlepool Harbour and Railway Company* (2 L. T. N. S. 766; 8 W. R. 734).

the report was framed. Now, this Court, in dealing between litigants, takes care that the litigants shall not, by such foolish attempts as appear to me to have been made on both sides here, create public prejudice, each against his opponent, in the progress of the litigation, which ought to be conducted with all proper calmness and discretion, and for the purpose of eliciting truth."(*a*)

Distinction between publication by newspaper reporter, and publication by one of the litigants.

The publication of the proceedings in court, pending litigation, by a newspaper reporter, differs from a publication by one of the parties to the litigation in this, that there is a *primâ facie* presumption against the fairness of the latter publication. "Nobody," said Lord Hatherley, in the case last referred to,(*b*) "feels more sensibly than myself the advantage of having a fair publication of all that takes place in a court of justice; but I make this observation, that whenever one of the litigants is the party making the statement, that is a very strong *primâ facie* presumption against its being at all fair, and that in any case in which a litigant makes a publication, it is exceedingly different from that which a newspaper reporter would publish simply in the discharge of what was his duty. Such a case is widely different."

Advertisements of rewards for evidence.

On similar grounds, in a case(*c*) since questioned, the publication in a newspaper of an advertisement offering a reward to any one who should make legal proof of a marriage, in question before the Court of Chancery in a pending suit, was held by Lord Chancellor Parker to be a contempt of Court, as having a tendency to produce false evidence.

In the recent case of *Plating* v. *Farquharson*,(*d*) this decision was thus referred to by Jessel, M.R.: "I do not profess to understand it as it is reported. The advertisement seems to have been an advertisement for oral evidence to disprove a marriage, by showing that a marriage certificate which was alleged to refer to two persons not having the names mentioned in the certificate, applied in fact to two persons who really bore those names. That was treated by Lord Macclesfield as a direct inducement to subornation of perjury. Of course, if it was an attempt to suborn witnesses, it would be a contempt of Court, and an undue interference with the course of justice. With great respect, however, to that learned Lord Chancellor, I should not have come to the same conclusion on the same facts; and it does not appear to me

(*a*) 2 L. T. N. S. 767. (*b*) 2 L. T. N. S. 768.
(*c*) *Pool* v. *Sacheverel* (1 P. Wms. 675).
(*d*) L. R. 17 C. D. 55).

that an advertisement for a witness to prove a thing not in the knowledge of the man who advertises for it, but which he believes to be true, can be treated as subornation of perjury, because subornation of perjury means doing something to induce people to come forward to prove that which the person seeking to prove it believes to be false; and on that distinction, it appears to me, the case ought to turn."

In *Plating* v. *Farquharson*, the defendants, appealing against an injunction which had been granted against them for infringing a patent for nickel-plating, inserted in a newspaper an advertisement asking subscriptions from the trade towards the expenses of the appeal, and also offering a reward of £100 to any one who could produce documentary evidence that nickel-plating was done previously to 1869. The Court of Appeal could see nothing objectionable in either advertisement, and dismissed with costs an application to commit for contempt the publisher of the newspaper in which the advertisement was published.(*a*)

Injunction is in discretion of court.

It is not every unfair report that the Court will interfere to restrain by injunction.(*b*) "Every Court," said Turner, L.J., "has the power of preventing the publication of its proceedings pending litigation; but it is not to be exercised in all cases, and it is a question quite in the discretion of the Court."(*c*)

Publications concerning a person charged with a crime.

The exhibition in an assize town of inflammatory publications respecting a prisoner about to be tried for murder, was considered by Littledale and Gaselee, JJ., not to be a contempt which the judge of assize could interfere to stop by commitment, though they thought it "highly indecorous and improper, and one that might subject the man to punishment."(*d*) There is little doubt that a criminal information would be granted against him.

It was held a contempt of Court, pending the trial of an indictment, to address public meetings, alleging that the defendant was not guilty, that there was a conspiracy against him, and that he could not have a fair trial.(*e*)

Whether proceedings must be pending.

It was the opinion of Sir G. Rose, judge of the Court of Review in Bankruptcy, that the pendency of proceedings

(*a*) *Mrs. Farley's case* (2 Ves. Sen. 520), in which Lord Hardwicke committed to prison a person who had published "an advertisement" relating to the answer put in by the defendant in a Chancery suit, does not state what the nature of the advertisement was.

(*b*) *Brook* v. *Evans* (29 L. J. 616, Ch.). (*c*) *Ibid.*

(*d*) *Rex* v. *Gilham* (1 Mood. & Malk. 165).

(*e*) *Onslow's and Whalley's case* (L. R. 9 Q. B. 219); *Skipworth's case* (*Ibid.* 230).

was not necessary to give the Court jurisdiction to commit for contempt in publishing insulting observations respecting the parties to a proceeding before it.

In a case in which judgment had been finally pronounced upon a petition, but the order had not been drawn up when the libel was published, that learned judge said: "A distinction has been attempted to be maintained, that in this case the proceeding is not a pending proceeding, but a proceeding that has been concluded; but, even if this case could be so looked at, it is not in my humble opinion a right conclusion, that parties are at liberty to attack each other with abuse or libellous statements as to what has been done in any particular litigation, though that litigation has been brought to a close. And if the principle be the protection of the subject in all fair matter of litigation, in order that his mind may be unbiassed by threat or intimidation, and that he may go on freely through that course of proceeding which the laws of his country have provided for him, I cannot but consider it the duty of the Court to protect him against an impression, that when the proceeding is concluded he may be liable to imputations and abuse, and have no protection but by going into a court of law for damages in an action for libel. I apprehend it is the duty of the Court to the suitors, to tell them that, though the matter is ended with respect to them, the Court will still protect them, as if the litigation or the business of the court were still pending, and that the principle is not varied by the circumstance that the matter is altogether concluded. And I am rather fortified in that mode of dealing with the question, because, if the attention of the learned counsel be directed, I think, to that case in *Atkins*(*a*), unless I am mistaken, it will be found that the decree was pronounced, and that what took place did not take place until after the Court had dismissed the matter."(*b*)

A petition on which judgment had been finally pronounced, but on which the order had not been drawn up, was considered by the same learned judge to be a pending proceeding for the purpose of rendering a publication reflecting on any of the parties a contempt of Court, if the actual pendency of a proceeding were necessary to give the Court jurisdiction to commit.(*c*)

On a footing of its own stands the case of *Price* v.

(*a*) 2 Atk. 469.
(*b*) *Ex parte Turner* (3 Mont. D. & De G. 544, 545).
(*c*) *Ibid.*

Hutchinson,(a) in which Malins, V.C., committed to prison two persons, one of them the defendant to a Chancery suit, for using violent and abusive language towards the clerk of the firm of solicitors, who went to serve a copy of the bill upon the defendant.

Warrant of commitment.

A warrant of commitment by the judge of a superior court may be in general terms;(b) but it must be for a time certain.(c)

Attachment.

The Court may grant an attachment in the first instance, or a rule calling on the offender to show cause why an attachment should not issue against him.(d)

III.—Libels on Foreign Rulers, Ambassadors, etc.

Any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be, and treated as, a libel, and particularly where it has a tendency to interrupt the pacific relations between the two countries: if the publication contains a plain and manifest incitement and persuasion addressed to others to assassinate and destroy the persons of such magistrates, as the tendency of such a publication is to interrupt the harmony subsisting between two countries, the libel assumes a still more criminal complexion.(e)

Thus was the law laid down by Lord Ellenborough on the trial of Jean Peltier, in 1803, upon an information for a libel on Napoleon Bonaparte, first consul of the French Republic. The libel contained the following passages, amongst others: "Oh! eternal disgrace of France! Cæsar, on the banks of the Rubicon, has against him, in his quarrel, the Senate, Pompey, and Cato; and in the Plains of Pharsalia, if fortune is unequal—if you must yield to the destinies, Rome, in this sad reverse—at least there remains to avenge you a poniard among the last Romans:"(f) "He is proclaimed chief and

(a) L. R. 9 Eq. 534.
(b) *Ex parte Fernandez* (10 C. B. N. S. 3; 6 H. & N. 717).
(c) *Rex* v. *James* (5 B. & Ald. 894).
(d) See *Lechmere Charlton's case* (2 My. & Cr. 316); *Rex* v. *Clement* (4 B. & Ald. 218); Anon. (2 Barnard 43); *Rex* v. *Wyatt* (8 Mod. 123).
(e) *Per* Lord Ellenborough, C.J., *Rex* v. *Peltier* (28 Howell's St. Tr. 617).
(f) "De la France, ô honte eternelle!
César, au bord du Rubicon,
A contre lui dans sa querelle
Le Sénat, Pompée, et Caton.
Et dans les plaines de Pharsale,
Si la fortune est inégale—

consul for life. As for me, far from envying his lot, let him name—I consent to it—his worthy successor. Carried on the shield, let him be elected! Finally (and Romulus recalls the thing to mind), I wish that on the morrow he may have his apotheosis. Amen."(*a*) Lord Ellenborough, said that it appeared to him that the aim and tendency of these passages was to degrade and vilify, to render odious and contemptible, the person of the First Consul in the estimation of the people of this country and of France, and likewise to excite to his assassination and destruction. "That appearing to be the immediate and direct tendency of these publications, I cannot," said his Lordship, "in the correct discharge of my duty, do otherwise than state, that these publications, having such a tendency in respect of a foreign magistrate, and being published within this country, and the consequence of such publications having a direct tendency to interrupt and destroy the peace and amity between the two countries, are, in point of law, libels."(*b*)

In 1799, one Vint and others were found guilty on an information for publishing in the *Courier* newspaper the following libel upon the Emperor Paul I., of Russia: "The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency. He has now passed an edict prohibiting the exportation of timber, deals, &c. In consequence of that ill-timed law, upwards of 100 sail of vessels, are likely to return to this kingdom without freights." Lord Kenyon, C.J., told the jury that such a publication might provoke a call for satisfaction, as for a national affront, if it passed unreprobated by our Government and courts of justice.(*c*)

Lord George Gordon was found guilty, in 1787, on an information charging him with publishing, in the *Public Advertiser*, certain libels on the Queen of France, Marie Antoinette,

S'il te faut céder aux destins,
Rome, dans ce revers funeste—
Pour te venger au moins il reste
Un poignard aux derniers Romains."

(*a*) "Il est proclamé chef et consul pour la vie.
Pour moi, loin qu'à son sort je porte quelqu' envie,
Qu'il nomme, j'y consens, son digne successeur,
Sur le pavois porte qu'on l'elise Empereur.
Enfin, et Romulus nous rappelle la chose,
Je fais vœu—dès demain qu'il ait l'apothéose. Amen."

(*b*) The jury returned a verdict of guilty; but war between Great Britain and France being renewed soon after this trial, the defendant was never called upon to receive judgment.

(*c*) 27 Howell's St. Tr. 627, 643.

and on the French Ambassador in London, imputing to the former tyranny and oppression, and charging the latter with being the tool employed in carrying them on.(*a*)

An information was filed, in 1764, against D'Eon de Beaumont, for a libel upon a previous French Ambassador, principally consisting of some angry reflections on the public conduct of the ambassador, charging him with ignorance in his special capacity, and of having used stratagem to supplant and depreciate the defendant at the Court of Versailles.(*b*) A verdict of guilty was returned.

Johann Most was tried, in 1881, for having published in *The Freiheit* (a weekly German newspaper, published in London) an article upon the assassination of the late Emperor of Russia. The first two counts of the indictment charged the publication of a scandalous libel at common law, on which a verdict of guilty was taken. Other counts charged, as offences against 24 and 25 Vict. c. 100, s. 4, the encouraging certain persons unknown, and the endeavouring to persuade such persons, to murder the Emperors of Russia and Germany, and the sovereigns and rulers of Europe. The above enactment makes it a misdemeanour to "conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not," and also to "solicit, encourage, persuade, or endeavour to persuade, or . . . . propose to murder any other person, &c." Lord Coleridge, C.J., told the jury that if they thought that by the publication the accused "did intend to, and did encourage, or endeavour to persuade any person to murder any other person . . . . and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article, they should find the prisoner guilty" on the counts framed on the statute. The prisoner having been found guilty on these counts also, it was argued on his behalf before the Court for Crown Cases Reserved,(*c*) that though the publication was a seditious libel, it was not an offence against the statute, not being addressed to any definite person, but only to the public at large. The Court rejected the argument and sustained the conviction.(*d*) "An endeavour to persuade or an encouragement," said Lord Coleridge, C.J., "is none the less an endeavour to persuade or an encouragement, because the person who so encourages or

(*a*) 22 Howell's St. Tr. 175.
(*b*) *The King* v. *D'Eon* (W. Black Rep. 501, 517; Dig. L. L. 88).
(*c*) Lord Coleridge, C.J., Grove, Denman and Watkin Williams, J.J., and Huddleston, B.
(*d*) *Reg.* v. *Most*, 14 Cox C.C. 583.

endeavours to persuade does not, in the particular act of encouragement or persuasion, personally address the one or more persons whom the address which contains the encouragement or the endeavour to persuade reaches. The argument has been well put that an orator who makes a speech to two thousand people does not address it to any one individual amongst those two thousand; it is addressed to the whole number. It is endeavouring to persuade the whole number, or large portions of that number; and, if a particular individual amongst that number addressed by the orator is persuaded, or listens to it and is encouraged, it is plain that the words of this statute are complied with."

Scotland.

The Scotch law on this subject appears to be the same as the English.(*a*)

Libels on a body of persons.

The law will also punish a libel on a body of persons where no particular individual is reflected on. The Court of King's Bench in 1732, made absolute a rule for an information against the publisher of a paper, entitled "A true and surprising revelation of a murder and cruelty that was committed by the Jews lately arrived from Portugal; showing how they burnt a woman and a newborn infant the latter end of February, because the infant was begotten by a Christian."(*b*)

Publication of false news.

It seems that the publication of false news producing detriment to the public is indictable, such as false rumours to raise the price of provisions or other necessaries of life;(*c*) and, from a case in the 43rd Edw. 3,(*d*) that the attempt by words to enhance the price of merchandise was punishable by law.

In 1814, one De Berenger and others were indicted for conspiring by false rumours to raise the price of the public Government funds on a particular day, with intent to injure such of the subjects of the realm as should purchase on that day;(*e*) but the crime here lay in the act of conspiracy and combination to effect the illegal purpose.(*f*)

(*a*) Borthwick's Law of Libel, 74, 75.

(*b*) *Rex* v. *Osborne* (Kel. 30; 2 Barn. K. B. 138, 166). See also *Reg.* v. *Gathercole* (2 Lew. C. C. 237.

(*c*) 3 Inst. 196; Dig. L. L. 23; *Rex* v. *Waddington* (1 East, 143).

(*d*) Lib. Ass. Pl. 38.

(*e*) *Rex* v. *De Berenger* (3 M. & S. 67). The false rumour was that Napoleon Bonaparte, with whom we were then at war, was dead.

(*f*) *Ibid.* pp. 72, 74, 75.

CHAPTER VI.

LIBELS ON INDIVIDUALS.

Protection of character.

THE English law has been always and justly careful to preserve to every man that most valuable of all his possessions, his good character: and, as time rolls on, the need of legal intervention to secure this object becomes perhaps greater instead of less; for advancing civilization, whilst it produces increased refinement and sensitiveness to the aspersions of calumny, involves also a decay of those rude codes of honour which served a purpose that cannot be wholly ignored in an age of enlightenment.

Distinction between oral and written defamation.

Defamatory language, whether spoken or written, subjects the utterer to consequences, partly of a criminal and partly of a civil character. But, for a long time, there has existed an important distinction between the two kinds of defamation. The law—proceeding on the ground that words uttered orally, possibly in the heat of passion, are less likely to be in themselves malicious or productive of injury to reputation than those which are deliberately committed to writing and published—has treated the former kind of defamation in a much more lenient fashion than the latter. Many words which, if spoken, would not render the speaker liable to an action of slander, would, if written and published, lay him open to an action of libel; and, even where the words spoken do furnish a ground for a civil action, if written and published, they furthermore expose the writer to a criminal prosecution.

The soundness of the distinction which our law makes between oral and written defamation has been doubted by more than one authority entitled to respect;(*a*) and it is

(*a*) "I cannot, upon principle," said Mansfield, C.J., "make any difference between words written and words spoken as to the right which arises on them of bringing an action. For the plaintiff in error it has been truly urged, that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognised by the courts for at least a century back. . . . . In the arguments both of the judges and counsel, in almost all the cases in which the question has been whether what is contained in a writing is the subject of an action or not, it has been considered whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question whether it tends to produce a breach of the peace: but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows

certainly not easy to see why the imputation of disgraceful conduct to another person should be punishable by action if the imputation is contained in a letter addressed to a third party, though it be seen by nobody but the party to whom it is addressed, whilst the very same imputation may be made orally in the hearing of hundreds, and the slandered party have no remedy, in most cases,(*a*) unless he can prove that special damage has been thereby occasioned to him. The injury to reputation may be far greater in the latter case than in the former, and the tendency to produce a breach of the peace—the reason assigned for making written defamation punishable criminally—is indisputably greater in the case of a slanderous assertion made orally in the hearing of the slandered person, than in the case of a written or even a printed libel. But, whatever we may think of the soundness of the distinction, it is now well established.(*b*)

Definition of libel.

A libel of the kind we are now dealing with has been defined to be "a malicious defamation, expressed either in printing or writing, or by signs, pictures, &c., tending either to blacken the memory of one who is dead, or the

more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter: it is true that a newspaper may be 'very generally read,' but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law—Lord Hardwicke, Hale I believe, Holt, C.J., and others. . . . . If the matter were for the first time to be decided at this day, I should have no hesitation in saying that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken" (*Thorley* v. *Lord Kerry*, 4 Taunt. 364). So Best, C.J.: "It is not easy to perceive why any distinction should be made between written and oral slander; but the case referred to (*Lord Kerry* v. *Thorley*) has established it too firmly to be shaken" (*Archbishop of Tuam* v. *Robison*, 5 Bing. 21).

(*a*) The exceptions are where, first, the commission of an indictable offence or, secondly, the present possession of an infectious or contagious disorder is imputed; or, thirdly, where the imputation is made on a person in respect of his office, profession, trade, or calling, and has a tendency to injure him in respect thereof.

(*b*) See *per* Hale, C.B., *King* v. *Lake* (2 Vent. 28), *Austen* v. *Culpepper* (2 Show. 313; Skinner, 123); *per* Best, C.J. (*Archbishop of Tuam* v. *Robison* (5 Bing. 17); *per* Bayley, J., *Clement* v. *Chivis* (9 B. & C. 174).

reputation of one who is alive, and thereby exposing him to public hatred, contempt, or ridicule."(*a*) "But," says Hawkins, in his "Pleas of the Crown,"(*b*) "it is said that in a larger sense the notion of a libel may be applied to any defamation whatsoever, expressed either by signs or pictures,(*c*) as by fixing up a gallows against a man's door, or by painting him in a shameful and ignominious manner."

Various kinds of libel.

It is obvious that a definition of this wide character must include writings of very various kinds; and accordingly we find it laid down(*d*) that libels on private persons embrace all those "which by accusing a man of a crime,(*e*) bring him within the danger of the law;" or "which have a tendency to injure him in his office, profession, calling, or trade;" or "which by holding him up to scorn and ridicule, and still more to any stronger feeling of contempt or execration, impair him in the enjoyment of general society, and injure those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man."(*f*)

Immaterial in what language libel is conveyed.

It matters not in what language the libel is written, whether in grammatical or ungrammatical phraseology; whether the imputation be made directly or only insinuated, even by means of a question;(*g*) whether the language be ironical,(*h*) or figurative, or allegorical.(*i*) Whatever the character of the

(*a*) Bacon's Abridg. tit. Libel. (*b*) 8th edit. 542.

(*c*) The civil law made a distinction between defamation by pictures and by writing, treating the former as a real and the latter only as a verbal injury: (*Vide* Heineccius, Antiq. Rom. lib. 4, tit. 4, sect. 5).

(*d*) See Holt's Law of Libel, p. 75.

(*e*) "The expression 'indictable offence' seems to have crept into the textbooks; but I think that the passages in Comyn's Digest (Tit. Action on the Case for Defamation, D 5 & 9) are conclusive to show that words which impute any criminal offence are actionable *per se*." (*Per* Pollock, B., in *Webb* v. *Beavan*, L. R. 11 Q. B. D. 610).

(*f*) The civil code of the State of New York (sect. 29) defines libel to be "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." The Penal Code (sect. 309) defines it to be "any malicious publication, by writing, printing, picture, effigy, sign, or otherwise, which exposes any person, or the memory of any person deceased, to hatred, contempt, ridicule, or obloquy, or which causes any person to be shunned or avoided, or which has a tendency to injure any person or corporation or association of persons, in their occupation or business."

(*g*) *Gathercole's case* (2 Lew. C. C. 255).

(*h*) Hob. 215; 11 Mod. 86; *Boydell* v. *Jones* (4 M. & W. 446).

(*i*) See *Hoare* v. *Silverlock* (12 Q. B. 624, 632), and *Woodgate* v. *Rideout* (4 F. & F. 202).

language, provided the publication tends to convey an imputation injurious to the reputation of the person attacked, it is equally a libel.(*a*)

Words to be taken in their popular sense.

"The rule," says Lord Ellenborough, C.J., in dealing with a case of slander(*b*), "which at one time prevailed that words are to be understood in *mitiori sensu*(*c*) has been long ago superseded; and words are now construed by Courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them."(*d*)

The reason of the former rule and of the change was thus stated by the Court of Queen's Bench in *Harrison* v. *Thornborough*:(*e*) "In this kind of action for words, which are not of very great antiquity, the Courts did at first, as much as they could, discountenance them, and that for a wise reason, because generally brought for contention and vexation; and, therefore, when the words were capable of two constructions, the Court always took them *mitiori sensu*. But latterly these actions have been more discountenanced (? countenanced); for men's tongues growing more virulent, and irreparable damage arising from words, it has been by experience found, that unless men can get satisfaction by law, they will be apt to take it themselves. The rule, therefore, that has now prevailed is, that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them."

Libel badly spelt.

An indictment for libel was demurred to on the ground that, by reason of its bad spelling, it was unintelligible, and wanted a meaning. The libel as set out in the indictment was as follows: "Here is three *cockels* in this place (meaning *cuckolds*), we *now* (meaning *know*) them well, *he* (meaning *Lambert*) is a *nare* (meaning *knave*), he cheats and *rongs* (meaning *wrongs*) the county, and is the eur of the son of a whore." The indictment was held good, Raymond, C.J., saying: "The present libel is plain to all men and easily to be understood, and it would be hard that a Court of justice must not understand it is badly spelt, when all the world

(*a*) See *Fisher* v. *Clement* (10 B. & C. 472).

(*b*) *Roberts* v. *Camden* (9 East. 96). Cf. *Woolnoth* v. *Meadows* (5 East. 463); and *per* Holt, C.J., *Somers* v. *House* (Holt's Rep. 39).

(*c*) See for examples, Cro. Jac. 204; *Forster* v. *Browning* (Cro. Jac. 688); *Holland* v. *Stoner* (Cro. Jac. 315); and *King* v. *Bagg* (Cro. Jac. 331).

(*d*) Cf. the language of Pratt, C.J., Eyre, and Fortescue, JJ., in *Button* v. *Hayward* (8 Mod. 24); of Lord Mansfield in *Rex* v. *Horne* (2 Cowp. 672); and of Buller, J., in *Rex* v. *Watson* (2 T. R. 206).

(*e*) 10 Mod. 197.

besides make no scruple to find the signification of the words."(*a*)

Imputation only insinuated.

In a case(*b*) where a great portion of the libel consisted of insinuations by means of questions, Alderson, B., directed the jury that "if a man *insinuates a fact* in asking a question, meaning thereby to *assert it*, it is the same thing as if he asserted it in terms." The libel in that case contained the following passage: "We should be glad to know how many popish priests enter the nunneries at Scorton and Darlington each week? and also how many infants are born in them every year, and what becomes of them? whether the holy fathers bring them up or not, or whether the innocents are murdered out of hand or not?" The learned judge told the jury that if they thought that the defendant, by asking the questions, "meant to insinuate and to state that infants are born in the nunnery at Scorton, and that holy fathers bring them up or murder the innocents," then it was a libel on those persons.(*c*)

General language.

However general the language of the defamatory publication may be, if its application to a particular individual can be generally perceived, it is a libel upon him.

"If a party," said Lord Cottenham,(*d*) "can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known who they are; and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbours as being the parties alluded to; and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels." "Whether a man," said Lord Campell,(*e*) "is called by

(*a*) *Rex* v. *Edgar* (2 Sess. Cas. 29; 5 Bac. Abr. tit. Libel, 199).
(*b*) *Gathercole's case* (2 Lew. C. C. 255).
(*c*) Cf. *Hunt* v. *Thimblethorpe* (Moo. 418; 1 Vin. Ab. 429); *Earl of Northampton's case* (12 Rep. 134); *Delany* v. *Jones* (4 Esp. C. 191); *Woolnoth* v. *Meadows* (5 East. 463); *Hemming* v. *Power* (10 M. & W. 564).
(*d*) *Le Fanu* v. *Malcomson* (1 H. L. Cas. 664).
(*e*) 1 H. L. Cas. 668.

one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repented."

In the case in which the foregoing opinions were expressed, the libel consisted of a newspaper article imputing in general terms that "in some of the Irish factories" (the declaration adding an innuendo that thereby the plaintiff's factory was meant) cruelties were practised upon the workpeople. After verdict for the plaintiff, the declaration was held good by the House of Lords.

Ironical language.

A libel may be expressed in ironical language, the *quo animo* with which it is used being a question for the jury to determine.(*a*) It was held to be a libel to publish of an attorney the following *ironical*, false, malicious, and defamatory matter—"An honest lawyer. A person of the name of C. B., &c., was severely reprimanded the other day by one of the masters of the Queen's Bench, for what is called sharp practice in his profession."

Hieroglyphics, rebus, anagrams.

For similar reasons a libel disguised in hieroglyphics, if it be not really unintelligible, will be narrowly examined by a court of law and judged of according to the intention of the maker and the influence it may have upon the injured party's reputation.(*b*) And, on the same ground, not only an allegory, but a rebus or anagram may be a libel, and courts of law, notwithstanding its obscurity and perplexity, may judge of its meaning as well as other readers.(*c*)

Initials only used.

A defamatory writing expressing only one or two letters of a name in such a manner that, from what goes before and follows after, it must necessarily be understood to signify a *certain* person, in the plain, obvious, and natural construction of the whole, and would be nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large.(*d*) "All the libellers of the kingdom now know," said Lord Hardwicke, so far back as 1742,(*e*) "that printing initial letters will not serve their turn, for that objection has been long got over."

Libellous pictures, caricatures, &c.

On the same footing as written or printed libels stand those which are published by means of pictures, prints, or carica-

(*a*) See Holt's Rep. 425; *Reg.* v. *Brown* (11 Mod. 86; Hob. 215; Poph. 139).
(*b*) Holt's L. L. 235.
(*c*) Holt's L. L. 235.
(*d*) *Ibid.* 233.
(*e*) See the case of *Read* v. *Huggonson* (2 Atk. 470).

tures,(*a*) modes of publication which, it is obvious, may be quite as efficacious as any other in damaging the character. In the case *De Libellis Famosis*(*b*) it was resolved, amongst other things, that a "*famosus libellus sine scriptis* may be *picturis*, as to paint the party in any shameful and ignominious manner." "In case upon a libel," says Holt, C.J.,(*c*) "it is sufficient if the matter be reflecting: as to paint a man playing at cudgels with his wife."(*d*) Lord Ellenborough, C.J., said of a libellous picture of a gentleman and his lady, which was entitled "La Belle et la Bête," that the person who exhibited it in public was "both civilly and criminally liable for having exhibited it."(*e*)

Partners.

Partners may jointly maintain an action of libel for a publication defamatory of the partnership.(*f*)

A society of persons.

A publication defamatory of a society of persons, or a company, whether incorporated or not, is also a libel, *e.g.*, a publication insinuating that the members of a nunnery led immoral or depraved lives,(*g*) or one attacking the mode in

(*a*) There are other modes, with which we are not concerned here, in which a libel may be expressed, as by fixing a gallows or other reproachful and ignominious signs at a person's door, or elsewhere (5 Coke 125; see *Jefferies* v. *Duncombe*, 11 East. 226, where a lamp was set up in front of the plaintiff's house, and kept burning in the daytime, in order to defame him as the keeper of a bawdy-house); or by the custom known as "riding Skimmington" (see *Cropp* v. *Tilney*, 3 Salk. 225, 226, and *Bolton* v. *Dean*, referred to by the Court in *Austin* v. *Culpepper*, 2 Show. 314).

(*b*) 5 Cok. 125.

(*c*) Anon. 11 Mod. 99.

(*d*) According to Blackstone (in a statement omitted in the later editions of his "Commentaries"), in the case of signs or pictures, it seems necessary to show not only the import and application of the scandal, but also "that some special damage has followed;" and he gives as a reason—that "otherwise it cannot appear that such libel by picture was understood to be levelled at the plaintiff, or that it was attended with any actionable consequences" (see 3 Com. 126). There appears to be no authority whatever for the proposition that, in the case of signs or pictures, special damage must be shown to have followed from the publication; and there is as little force in the reason assigned for making a distinction between libellous signs or pictures and written or printed libels, for the former tell their tale, in general, even more unmistakably than the latter.

(*e*) *Du Bost* v. *Beresford* (2 Camp. 511). See also *Austin* v. *Culpepper* (2 Show. 314; Skin. 123), where the defendant was held liable in an action for having forged an order of the Court of Chancery defamatory of the plaintiff, and drawn on the bottom of it the picture of a pillory with the words subscribed, "For Sir J. Austin and his witnesses by him suborned."

(*f*) *Le Fanu* v. *Malcomson* (1 H. L. Cas. 637); *Haythorn* v. *Lawson* (3 C. & P. 196); *Ward* v. *Smith* (6 Bing. 749).

(*g*) *Reg.* v. *Gathercole* (2 Lew. C. C. 237).

which an insurance company carries on its business,(*a*) or imputing insolvency, mismanagement, and a dishonest carrying on of its affairs to a joint-stock company incorporated under 19 & 20 Vict. c. 47.(*b*)

It has been held that such a company can maintain an action against one of its own shareholders for a libel published by him.(*c*)

A society of persons, or company, are also themselves liable for any defamatory matter published by them; as, for example, the committee of a reform union for publishing a report charging a person with bribery at an election,(*d*) or a railway company for telegraphing that a bank had stopped payment.(*e*)

Meaning of malice.

When libel is described as a "malicious defamation," and when malice is said to be the gist of the action for libel, the legal import of the word malice must be borne in mind. "Malice," says Lord Campbell,(*f*) "in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another." "Malice," says Bayley, J.,(*g*) "in common acceptation, means ill-will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of *malice*, because I do it *intentionally*, and without just cause or excuse. If I maim cattle without knowing whose they are; if I poison a fishery without knowing the owner, I do it of *malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it of *malice*, because it is intentional, and without just cause or excuse. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces?" "If a

(*a*) *Williams* v. *Beaumont* (10 Bing. 260; 3 M. & Scott. 705).

(*b*) *Metropolitan Saloon Omnibus Company (Limited)* v. *Hawkins* (4 H. & N. 87; 28 L. J. 201, Ex.).

(*c*) *Ibid.* As to a Friendly Society, see *Hill* v. *Hart Davies* (L. R. 21 C. D. 798).

(*d*) *Wilson* v. *Reed and others* (2 F. & F. 149).

(*e*) *Whitfield* v. *South-Eastern Railway Company* (El. Bl. & E. 115; 27 L. J. Q. B. 229).

(*f*) *Ferguson* v. *Earl of Kinnoul* (9 Cl. & Fin. 321).

(*g*) *Bromage* v. *Prosser* (4 B. & C. 255).

person writes defamatory matter of another," says Bramwell, B.,(*a*) "however honestly he may believe it to be true, if it be in fact untrue the law implies malice."(*b*) And Alderson, B.: "The law implies malice from the publication of a libel, except where the occasion justifies the publication."(*c*) "A man," said Lord Denman, C.J., "may wilfully publish a mischievous libel without intending to injure the party, yet may be responsible."(*d*)

Instead of saying, in the case of a publication calculated to convey an actionable imputation, that the law implies malice, Lord Blackburn would prefer saying that the law holds him "responsible for the natural consequences of his act."(*e*)

Intention of writer immaterial.

The intention of the writer or publisher of the defamatory matter is then, in the case of unprivileged communications, wholly immaterial, except so far as it may affect the amount of damages which a jury will award. "Everything printed or written," says Parke, B.,(*f*) "which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been."

A judge who, in an action of libel left it to the jury to say whether the defendant intended by his publication to injure the plaintiff, was held to have wrongly directed them.(*g*) "If the tendency of the publication," said Littledale, J., "was injurious to the plaintiff, then the law will presume that the defendant, by publishing it, intended to produce that injury which it was calculated to effect. If it had that tendency, there can be no doubt it was a libel." "The judge," said Lord Tenterden, C.J., "ought not to have left it as a question to the jury whether the defendant *intended* to injure the plaintiff, for every man must be presumed to intend the natural and ordinary consequences of his own act."(*h*)

"The real question is not what was the intention with which the libel was published, but what was the tendency of the libel as published."(*i*)

(*a*) *Darby* v. *Ouseley* (1 H. & N. 9; 25 L. J. 230, Ex.).
(*b*) Cf. *per* Parke, B., *O'Brien* v. *Clement* (15 M. & W. 437).
(*c*) 1 H. & N. 9. (*d*) *Baylis* v. *Lawrence* (11 A. & El. 924).
(*e*) *Capital and Counties Bank* v. *Henty* (L. R. 7 App. Cas. 767).
(*f*) *Baylis* v. *Lawrence* (11 A. & El. 924).
(*g*) *Haire* v. *Wilson* (9 B. & C. 643).
(*h*) *Ibid.* 645. See also *Darby* v. *Ouseley* (*ubi supra*) and *Fisher* v. *Clement* (10 B. & C. 472).
(*i*) *Per* Lord Blackburn, *Capital and Counties Bank* v. *Henty* (*ubi supra*).

PART IV. CHAPTER VI.

What are privileged occasions will hereafter be considered.(*a*)

Scotch law as to malice.

By the Scotch law it is not necessary, in the case of a civil action for libel, that malice should be either proved or presumed; but it is necessary in the case of a criminal proceeding. "In general," says Hume,(*b*) "the criminal is herein distinguished from the civil process, that to warrant the inflicting of any punishment the *animus injuriandi*, or special malice of the act, must be shown; whereas mere petulance or indiscretion may be the just ground of an award for the reparation of damage, though the parties are not even known to each other, if the things said are naturally and in themselves of an injurious tendency."

Whole publication to be looked at.

The whole publication, however, is to be looked at; and if the jury think that the effect of one part of it, which if taken alone would be injurious to the plaintiff's character, is removed by the other part of it, they should find for the defendant.(*c*) The jury are to take the whole together and say whether the result of the whole is calculated to injure the plaintiff's character; if in one part of the publication something disreputable to the plaintiff is stated, but that is removed by the conclusion, the bane and antidote must be taken together.(*d*)

"In *Dicas* v. *Lawson*," says Alderson, B.,(*e*) "I directed the jury to look to the whole of the publication to see whether it was calculated to injure the plaintiff's character. The publication there complained of was the report of a trial in which there were strong observations on the character of the plaintiff, but in which the plaintiff had recovered a verdict for £30. It was said that the report was libellous, because it set forth the charge made on the trial against the plaintiff. I left it to the jury to say whether, taking the whole of the publication together, they thought it likely to depreciate his character. The jury thought not, and on application for a new trial, this Court (Exchequer) approved of my direction."

Falsehood.

The libellous matter, in order to be actionable, must be *falsely* as well as *maliciously* published of the plaintiff. The truth of an alleged defamatory publication is a complete answer to an action for it;(*f*) "not," according to Little-

(*a*) See chapter VII. on "Privileged Publications," *post*.
(*b*) 1 Com. 342. See Borthwick, 190, 195.
(*c*) See *Chalmers* v. *Payne* (2 C. M. & R. 156; 5 Tyrw. 766).
(*d*) *Ibid. per* Alderson, B. (*e*) *Ibid.*
(*f*) Something more is required in the case of criminal proceedings for libels. As to these, *vide post*.

dale, J.,(*a*) "because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages; for the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess."

Bonâ fide belief no justification.

If the libel be false it is no justification, even in the case of public criticism appearing in the leading articles of newspapers, that the writer *bonâ fide* believes in its truth.(*b*) "*Bonâ fide* belief in the truth of what is written," says Blackburn, J.,(*c*) "is no defence to an action; it may mitigate the amount, but it cannot disentitle the plaintiff to damages. Moreover, that honest belief may be an ingredient to be taken into consideration by the jury in determining whether the publication is a libel; that is, whether it exceeds the limits of a fair and proper comment; but it cannot in itself prevent the matter being libellous."

Publication is libellous if any material part be not true.

The publication, moreover, is actionable if any material part of it be not proved true, and a plea which, professing to justify the entire libel, fails to justify a material part of it, is a bad plea.(*d*)

Thus, if a libel imputes to a person that he has been guilty of murder in killing his opponent in a duel, and alleges further that the duel was supposed to have been fought under circumstances revolting to the ordinary notions of honour (it being suggested that the plaintiff had spent the whole of the night preceding the duel in practising pistol firing), it is not a sufficient defence to prove merely that the plaintiff had killed his antagonist, and had been tried for murder and acquitted.(*e*) "When an action is brought for a libel," said Maule, J., in this case(*f*) "to make a good plea to the whole charge, the defendant must justify everything that the libel contains which is injurious to the plaintiff. If the libel charges the commission of several crimes, or the commission of a crime in a particular manner, the plea must

(*a*) *McPherson* v. *Daniels* (10 B. & C. 272). See also *per* Holt, C.J. (Anon. 11 Mod. 99); *per* Parke, J., *Cockayne* v. *Hodgkisson* (5 C. & P. 548); *Weaver* v. *Lloyd* (2 B. & C. 678); *Tighe* v. *Cooper* (7 El. & B. 639); *Biggs* v. *The Great Eastern Railway Company* (18 L. T. N. S. 482).

(*b*) *Campbell* v. *Spottiswoode* (3 B. & S. 769; 8 L. T. N. S. 201; 32 L. J. 185, Q. B.).

(*c*) *Ibid.*

(*d*) See *per* Jervis, C.J., *Helsham* v. *Blackwood* (11 C. B. 128; 20 L. J. 187, C. P.).

(*e*) *Ibid.*

(*f*) *Ibid.* 129.

justify the charge as to the number of crimes(*a*) or the manner of committing the crime. If the crime is charged with circumstances of aggravation as here, the plea is clearly bad if it omit to justify that. . . . . If the libel had imputed murder *simpliciter*, it would have been enough to show in the plea that the plaintiff had committed murder. But if the libel goes further, and states something besides, which is injurious to the plaintiff's character, it is clear upon every principle of the law of libel that that must be justified as well as the rest, or the defence fails.(*b*)

Where the libel charged the plaintiff with having in *two* mayoralties bought coals at *6d.* a bushel, sold them to the poor at *4d.*, and charged the corporation *8d.*, thereby pocketing *2d.* a bushel, a plea that the plaintiff did this in his first mayoralty, and in his second altered his charges, buying the coals at *6d.*, selling them to the poor at *3d.*, and charging the corporation *6d.*, was held a bad plea.(*c*)

So where the libel alleged that the plaintiff, a proctor, had been suspended from practice three times for extortion, a plea in justification which alleged only one suspension was held bad.(*d*) It was urged on behalf of the defendant in this case, that it was sufficient if the sting and substance of the libel were answered by the plea, and that the discredit attaching to a single suspension from office was not substantially aggravated by a repetition of similar reproof; but the Court did not agree that a man's character would not fall into lower discredit by the imputation of repeated offences than by the imputation of one only, and held that the plea fell within that class which, professing to justify the whole of the libel, in effect justify only a part, and are therefore bad.

And where the libel consisted of a paragraph published in a newspaper, stating in substance that the plaintiff was a confederate of blacklegs: that he had sought admission into a yacht club; that he gave an entertainment in the expectation of being elected, but was blackballed, and the next morning *bolted*, and some of the tradesmen of the town had to lament the fashionable character of his entertain-

(*a*) See *Clarkson* v. *Lawson* (6 Bing. 266, 587); *Clarke* v. *Taylor* (2 Bing. N. C. 654: 3 Scott, 95).

(*b*) See also *Cuddington* v. *Wilkins* (Hob. 81); *Hilsden* v. *Mercer* (Cro. J. 676); *Upsheer* v. *Betts* (Cro. J. 578).

(*c*) *Goodburne* v. *Bowman* (9 Bing. 532). See also *Clarke* v. *Taylor* (2 Bing. N. C. 654) and *Johns* v. *Gittings* (Cro. Eliz. 239).

(*d*) *Clarkson* v. *Lawson* (6 Bing. 266).

ment; a plea of justification, which, after alleging facts to show that the plaintiff was the confederate of persons who had been guilty of cheating at cards, and the facts of his giving an entertainment, and being blackballed, &c., stated "that on the following morning he *quitted* the town and neighbourhood, leaving divers of the tradesmen to whom he owed money, unpaid," was held bad, because the *quitting* might be innocent and without any intention to defraud.(*a*) "The libel as stated in the declaration," said Parke, B., "imputes to the plaintiff a fraudulent evasion of his creditors, he being unable to pay them. The plea does not meet that; for the plaintiff might be unable to pay without being guilty of fraud, as imputed by the word '*bolting*' used in the libel. The expression charged the plaintiff with going away suddenly from Plymouth, leaving debts unpaid, and under such circumstances that the creditors could not find him, and therefore means more than the mere 'quitting,' which is stated in the plea. That would be an innocent departure, and consistent with proof that the plaintiff went out of the town for a day, but then returned and *paid* his debts."

And if the words declared upon impute an actual felony, a justification which merely sets out circumstances inducing suspicion is not sufficient. Thus, where the declaration stated that the defendant, intending to cause it to be believed that the plaintiff was guilty of feloniously stealing a horse, published a libel concerning him, which was headed "Horse stealer," and alleged that the plaintiff had been taken up, on suspicion of having stolen a horse, by a constable who was informed that "such a character" was at a certain public-house; the libel then going on to state circumstances of suspicion against the plaintiff, and alleging finally that having obtained permission to go out of the constable's

(*a*) *O'Brien* v. *Bryant* (16 M. & W. 168). See also *Wadsworth* v. *Bentley* (23 L. J. 3, Q. B.), where the declaration in an action of slander alleged that the defendant spoke of the plaintiff, *in the way of his trade*, the words, "He cheated me;" "He is a thief, and robbed me of £100;" and contained an averment of special damage, and the defendant pleaded a former judgment recovered for the same grievances. The record of the previous action showed the slanderous words to have been: "That thief is a villain, a scoundrel, and a rascal, and I can prove him a thief at any moment;" and it neither alleged that the words were *spoken* of the plaintiff in the way of his trade, nor contained an averment of special damage. This was held to be no bar to the action. "I cannot think," said Crompton, J., "that the cause of action in that record which contains words charging the plaintiff with felony, is the same cause of action as that in the present declaration, which imputes a charge against the plaintiff as a trader."

sight, he had made his escape, but was retaken and confined in gaol for examination; immendo that the plaintiff was guilty of stealing a horse: it was held that a plea setting out the several circumstances related in the libel, and justifying all the parts of it except the word "horse-stealer," was not a sufficient justification of the libel.(*a*)

But where the alleged libel, contained in a letter addressed to a person who employed the plaintiff as cashier, was, "I conceive there is nothing too base for him to be guilty of;" a plea alleging that the plaintiff signed and delivered to the defendant an I O U, and afterwards, on having sight thereof, falsely and fraudulently asserted that the signature was not his, and averring that the alleged libel was written and published solely in reference to this transaction, was held to be a sufficient justification.(*b*)

In a case where the libel charged the plaintiff (a newspaper editor) with being "a convicted felon," and called him a "felon editor," the defendant justified on the ground that the plaintiff had (many years previously) been convicted of felony and sentenced to twelve months' imprisonment for it, which was admitted to be the fact. Lord Blackburn (then Blackburn, J.), before whom the case was tried without a jury, gave judgment for the defendant on the ground that the meaning of the libel was that the plaintiff had been convicted of felony, which was literally true. The Divisional Court, consisting of Cleasby and Pollock, B.B., made absolute a rule for a new trial; giving judgment also for the plaintiff on demurrer to the paragraphs of the defence which justified the libel on the ground that the words "felon editor" meant that he was actually a felon, whereas 9 Geo. 4, c. 32, s. 3, which gives to the endurance of the sentence the same effect as a pardon under the Great Seal, made it untrue to call him any longer a felon. The Court was further of opinion that it was untrue to say of him that he was "a convicted felon," he being then in the same position as a pardoned one. The Court of Appeal affirmed this judgment; *per* Bramwell, L.J., on the ground that the words "felon editor" implied that he had been actually guilty (not merely convicted) of felony, and the justification did not allege this; *per* Brett, L.J., on the ground that after endurance of the punishment he was no longer a "felon," and that the charge of being a "felon editor," as well as that of being "a convicted felon," meant that he had been actually guilty; *per* Cotton, L.J., on the ground that the words "felon editor"

(*a*) *Mountney* v. *Watton* (2 B. & Ad. 673). See also *Chalmers* v. *Shackell* (6 C. & P. 475).

(*b*) *Tighe* v. *Cooper* (7 E. & B. 639; 26 L. J. 215, Q. B.).

meant that he was undergoing punishment for felony, and on the effect of 9 Geo. 4, c. 3.(*a*)

In an action for libelling the plaintiff by publishing in a newspaper an advertisement stating that a writ of *capias* had issued against him, that it had hitherto been impracticable to take him, and offering a reward for such information to be given to the sheriff's officer as would enable him to take the plaintiff; *immendo* that plaintiff was in indigent circumstances, incapable of paying his just debts, and keeping out of the way to avoid being served with process; it was held a sufficient defence to prove that a writ of *capias* had been issued against the plaintiff, indorsed for bail, and delivered to the sheriff; that the plaintiff had kept out of the way to avoid being taken; that the sheriff's officer had been unable to take him; and that the defendant had published the advertisement at the request of the party suing out the writ, within four calendar months of the date of the writ, to enable the sheriff and his officer to arrest.(*b*)

If substantial imputation be true, every expression need not be justified.

Though the truth of every material part of the alleged libel must be proved in order to constitute a defence to an action, if the truth of the substantial imputation contained in the libel be proved, the justification need not extend also to every epithet or term of general abuse which may be found in the description or statement of the imputation,(*c*) and which contains no ground of charge substantially distinct in its nature or character from that which forms the main charge or gist of the libel.

Thus, in action for libelling the plaintiffs in their business of sellers of medicine, by publishing that the defendants claimed "the merit of having crushed the self-styled hygeist system of wholesale poisoning, since they commenced exposing the homicidal tricks of those impudent and ignorant *scamps* who had the audacity to pretend to cure all diseases with one kind of pill;" and that "several of the *rot-gut rascals* had been convicted of manslaughter, and fined and imprisoned for killing people with enormous doses of their universal vegetable boluses," &c.; the defendants pleaded a justification of the libel on the ground of truth, but did not justify the expressions "scamps" and "rascals;" and they proved at the trial that two persons had died in consequence of taking large quantities of the plain-

(*a*) *Layman* v. *Latimer* (L. R. 3 Ex. Div. 15, 352). See also *Cuddington* v. *Wilkins* (Hob. 67 & 81), and *Searle* v. *Williams* (Hob. 293).

(*b*) *Lay* v. *Lawson* (4 A. & E. 795). See also *Carr* v. *Duckett* (29 L. J. 468, Ex.).

(*c*) See *per* Tindal, C.J., *Morisson* v. *Harmer* (3 Bing. N. C. 767; 4 Scott, 533).

tiff's pills, and that the parties who had administered the pills were tried, convicted, and imprisoned for manslaughter. The defence, after verdict, was held sufficient, though the plea contained no justification of the expressions "scamps" and "rascals," and though it had not been proved that the defendants had completely crushed the "self-styled hygeist system of wholesale poisoning."(*o*)

As to the objection grounded on the non-justification of the words "scamps" and "rascals," the Court said: "It must be admitted that if these terms of invective and reproach contain any ground of charge or imputation against the plaintiffs, substantially distinct in its nature or character from that which forms the main charge or gist of the libel, and the truth of which has been justified by the plea, the consequence contended for on the part of the plaintiffs would justly follow, for the plea upon that supposition would not contain an answer to so much of the declaration as by the commencement of the plea it expressly undertakes to justify. The main charge against the plaintiffs in the libel is, that they were the compounders and sellers of pills of a poisonous and deleterious nature; and the main and principal allegation in the plea of justification is 'that the pills sold by the plaintiffs, when administered and taken in the doses and quantities suggested and recommended by them, were of a highly dangerous, deadly, and poisonous nature, and in the highest degree injurious to the stomachs and bowels of persons using and taking the same.' The question therefore is, whether the terms of abuse which have been above referred to, carry the matter any further than this, the main charge. The words, themselves, in their vulgar use, convey no other meaning than that of general reproach and invective; and we can only discover whether they have any particular meaning in this libel by referring to the context of the libel and to the allegations on the record. As to the word 'scamps,' the plaintiffs themselves have given the meaning to it; for they allege in their declaration that it is intended to be applied to them 'in the way of their aforesaid trade, business, and occupation,' that is, as vendors of the pills, the making and selling of which by the plaintiffs is the main imputation against them. And the word 'rascals' is associated with an epithet or adjunct which appears to confine its general abusive quality to a description and designation of the persons who have been occupied in administering the pills spoken of in the libel, of whom two have been convicted of manslaughter.

(*o*) See per Tindal, C. J., *Morisson* v. *Harmer* (3 Bing. N.C. 767; 4 Scott, 533).

We cannot, therefore, understand these words, however offensive, as containing any charge different and distinct from that of which the truth has been justified in the first plea; and we are not aware of any authority by which it is determined that the justification of the truth of the substantial imputation contained in a libel is not sufficient, unless it extends also to every epithet or term of general abuse which may be found in the description or statement of such imputation."

In an action against the proprietor of the *Times* for publishing the following libel on the plaintiff, a dissenting minister:—"A serious misunderstanding has recently taken place amongst the Independent dissenters of Great Marlow and their pastor, in consequence of some personal invectives publicly thrown from the pulpit by the latter against a young lady of distinguished merit and spotless reputation. We understand that the matter is to be taken up seriously. —*Bucks Chronicle*," the defendant pleaded, as a justification, that the plaintiff, whilst officiating as minister, published from a part of a chapel assigned to him as minister for the delivery of a sermon, to and in the presence of his congregation, of and concerning Margaret Fair, a teacher of a certain Sunday School, the scandalous words following:—"I have something to say which I have thought of saying for some time, namely, the improper conduct of one of the female teachers. Her name is Miss Fair; her conduct is a bad example and disgrace to the school, and if any of the children dare ask her to go home, she shall be turned out of the school, and never enter it again. Miss Fair does more harm than good;" and thereby gave great offence to divers of the dissenters, to wit, one I. W., &c., and occasioned a serious misunderstanding amongst the said dissenters in the declaration mentioned. A verdict having been returned for the defendant upon this plea, the Court, upon motion to enter a verdict for the plaintiff *non obstante veredicto*, held that the plea was a sufficient answer to the libel charged.(*a*) It was urged on behalf of the plaintiff that the allegation that "the matter was about to be taken up seriously" implied that charges were about to be preferred against him by his congregation, and that the justification contained no answer to that part of the libel; but, said Gifford, C.J., "I do not see that the allegation necessarily conveys any such meaning; it is only alleged as that which naturally followed upon the plaintiff's conduct on the occasion in question; and the charge on the subject of his conduct is substantially met and answered in the justifica-

(*a*) *Edwards* v. *Bell* (1 Bing. 403).

tion." It was further objected that the libel alleged a misunderstanding to have arisen between the pastor and his congregation, while the justification alleged the misunderstanding to have existed only amongst the congregation; but the Court were of opinion that in that respect the plea substantially supported the statements contained in the libel. "In such a case," said Burrough, J., "it is sufficient if the substance of the libellous statement be justified; it is unnecessary to repeat every word which might have been the subject of the original comment. As much must be justified as meets the sting of the charge, and if anything be contained in a charge which does not add to the sting of it, that need not be justified."(*a*)

Slight inaccuracy.

A slight inaccuracy will not necessarily make a publication libellous, which can be proved substantially true. Thus, where the libel complained of was a notice published by a railway company to the effect that the plaintiff had been convicted of travelling by a train for which his ticket was not available, and fined a certain sum, with the alternative of three weeks' imprisonment in case of non-payment, whereas the period of imprisonment was a fortnight only, it was held that this inaccuracy did not necessarily make the notice libellous; it was a question for the jury whether the statement contained in it was not substantially true, or whether the inaccurate statement would have a different effect upon the public from that which the literal truth would produce.(*b*)

Where a libel charged the plaintiff with having been a "great defaulter" in his office of guardian of the poor during the preceding year, and evidence tending to show that he had been a defaulter was given under a plea of justification, it was held to be a question for the jury whether the facts proved amounted to a sufficient justification of the charge of having been a "great" defaulter.(*c*)

Imputations of criminal offences.

In the following cases, where an action of slander has been held to lie, without proof of special damage, against the utterer of the slanderous words, an action of libel would, *à fortiori*, lie, if the words were written or printed and published:—Saying that the plaintiff had done an act for which the defendant could transport him:(*d*) saying, "If you had your deserts, you had been hanged before now:"(*e*) saying that the plaintiff had murdered his first wife by administering improper medicines to her for a certain complaint:(*f*)

(*a*) *Edwards* v. *Bell* (1 Bing. 409).
(*b*) *Alexander* v. *North-Eastern Railway Company* (34 L. J. 152, Q. B.; 6 B. & S. 240).
(*c*) *Warman* v. *Hine* (1 Jur. 820).
(*d*) *Curtis* v. *Curtis* (10 Bing. 477).
(*e*) Cro. Eliz. 62.
(*f*) *Ford* v. *Primrose* (5 D. & R 287).

using the words, "I am thoroughly convinced that you (the plaintiff) are guilty (innuendo of the death of D.), and rather than you should go without a hangman, I will hang you:"(*a*) saying that the plaintiff was "a returned convict:"(*b*) that he had been "in gaol and tried for his life, and would have been hanged had it not been for L., for breaking open the granary of farmer A., and stealing his bacon:"(*c*) that he had been "in gaol and burnt in the hand for coining;"(*d*) though in none of the three last-mentioned cases was there any imputation of present or future liability to punishment: imputing bigamy to the plaintiff's wife:(*e*) saying either that the plaintiff or his wife kept a bawdy-house:(*f*) saying any of the following things: "You robbed me, for I found the thing you have done it with;"(*g*) "He (the plaintiff) is a thief, and robbed me of my bricks:"(*h*) "He robbed J. W.";(*i*) "You are a rogue, and broke open a house at Oxford;"(*j*) "You are a rogue, and I will prove you a rogue, for you forged my name:"(*k*) charging the plaintiff with having committed embezzlement,(*l*) or receiving goods, knowing them to be stolen:(*m*) calling him a "pickpocket:"(*n*) saying that the plaintiff was perjured,(*o*) or accusing him of subornation of perjury:(*p*) saying of the plaintiff, who was one of four Commissioners appointed by the Court of Chancery to examine witnesses and hear and determine a suit, "Sir G. M. (the plaintiff) is a corrupt man, and hath taken bribes of R. K." (one of the parties to the suit); "R. K. hath set Sir G. M. on horseback, with his bribes to pervert justice and equity,"(*q*) bribery having been an offence at common law

(*a*) *Peake* v. *Oldham* (Cowp. 275; 2 W. Bl. 960). See also *Button* v. *Hayward* (8 Mod. 24).

(*b*) *Fowler* v. *Dowdney* (2 M. & Rob. 119).

(*c*) *Carpenter* v. *Tarrant* (Rep. Temp. Hardwicke, 339).

(*d*) *Gainford* v. *Tuke* (Cro. Jac. 536).

(*e*) *Heming* v. *Power* (10 M. & W. 564). See *Delany* v. *Jones* (4 Esp. 191).

(*f*) Cro. Eliz. 643; 1 Roll. Ab. 44; 1 Buls. 138; *Huckle* v. *Reynolds* (7 C. B. N. S. 114). Cf. *Brayne* v. *Cooper* (5 M. & W. 249).

(*g*) *Rowcliffe* v. *Edmonds* (7 M. & W. 12; 4 Jur. 684).

(*h*) *Slowman* v. *Dutton* (10 Bing. 402). See also *Baker* v. *Pierce* (Ld. Raym. 959; Holt, 654; 6 Mod. 23); Cro. Jac. 687.

(*i*) *Tomlinson* v. *Brittlebank* (4 B. & Ald. 630; 1 N. & M. 455).

(*j*) *Somers* v. *House* (Holt's Rep. 39).

(*k*) *Jones* v. *Herne* (2 Wils. 87).

(*l*) See *Williams* v. *Stott* (3 Tyr. 688; 1 C. & M. 675).

(*m*) *Alfred* v. *Farlow* (8 Q. B. 854; 15 L. J. 260, Q. B.). See *Brigg's case* (Cod. 157).

(*n*) *Stebbing* v. *Warner* (11 Mod. 255, overruling 3 Salk. 326).

(*o*) *Holt* v. *Scholefield* (6 T. R. 691). See also *Ceeley* v. *Hoskins* (Cro. Car. 509); *Roberts* v. *Camden* (9 East. 93).

(*p*) *Harris* v. *Dixon* (Cro. Jac. 158).

(*q*) *Moor* v. *Foster* (Cro. Jac. 65).

punishable by indictment or information: saying at a Parliamentary election of the plaintiff, who was one of the candidates, "These guineas are Mr. B.'s (the plaintiff's) money, and were given me to vote for him: he has bought my vote, and he shall have it."(*a*)

To accuse a person of having committed fornication was also held to be actionable whilst the statute making it a temporal offence was in force;"(*b*) and so it seems was saying "Thou art a witch and a sorcerer," whilst the statutes against witchcraft remained in force.(*c*)

Imputation made indirectly.

The law is the same if the imputation be made, not directly, but by means of words of suspicion as (with reference to a crime of arson), "I cannot imagine who should do it but S."(*d*) or, "I do not doubt but within two days to arrest H. for suspicion of felony;":(*e*) or, "I will call him in question for poisoning my aunt, and I make no doubt to prove it;"(*f*) or by repeating a story heard from another as "A woman told me that she heard some one say that M., his wife, had poisoned G., her first husband, &c.;"(*g*) and though it should be only in alternative words as that "either the plaintiff or somebody else" committed the offence;(*h*) or that "A. or B. did it."(*i*)

Words imputing an attempt to commit a felony, as "He sought to murder me, and I can prove it;"(*j*) or a hiring or solicitation of another to commit a crime have also been held actionable.(*k*)

Charge in vulgar language.

The charge of a crime in the vulgar language is sufficient to ground an action. It is not necessary that the words should impute the crime in the technical terms known to the law: all that is requisite being that the intention to charge the plaintiff with its commission should plainly appear.(*l*)

(*a*) *Bendish* v. *Lindsay* (11 Mod. 194). See *Purdy* v. *Stacey* (Burr. 2699).

(*b*) Anon. 2 Sid. 21. (*c*) *Rogers* v. *Grand* (Cro. Eliz. 571).

(*d*) Mo. 142; 1 Vin. Abr. 435. See also *Smith* v. *Wisdome* (Cro. Eliz. 348).

(*e*) *Heal* v. *Yeomans* (4 Rep. 15; Poph. 210; 3 Bulst. 262).

(*f*) *Web* v. *Poor* (Cro. Eliz. 569). According to the old authorities, if the charge be of killing a person who is not really dead, an action cannot be maintained. See *Snag* v. *Gee* (4 Rep. 16); *Talbot* v. *Case* (Cro. Eliz. 823): 1 Vent. 117.

(*g*) See Cro. Eliz. 645; Mo. 408).

(*h*) *Harrison* v. *Thornborough* (10 Mod. 196).

(*i*) *Wiseman* v. *Wiseman* (Cro. Jac. 107).

(*j*) Cro. Eliz. 308; *Jaeknor* v. *Cruchley* (Cro. Car. 140).

(*k*) *Tibbott* v. *Haynes* (Cro. Eliz. 191; 4 Coke, 16; Cro. Eliz. 747); *Lady Cockaine's case* (Cro. Eliz. 49; Cro. Eliz. 710).

(*l*) See *Coleman* v. *Goodwin* (2 B. & Cr. 285, note) and *Francis* v. *Roose* (3 M. & W. 191). See also *Hankinson* v. *Bilby* (16 M. & W.

Ordinary sense to be given in words.

Whether defamatory words are uttered or printed, the ordinary sense of them is to be taken to be the meaning of the person who uses them. However, if anything can be shown to have taken place which may give a peculiar character to the expressions used, evidence of it may be given.(*a*)

Where the slanderous words complained of—"Thou art a thievish rogue, for thou hast stolen my faggots"—were spoken by the defendant's wife, who, as a married woman, could not have possessed the property in the faggots, the court held the words to be actionable, understanding them, according to common intendment, to mean a charge of having stolen her husband's faggots.(*b*)

Infectious or contagious disease.

On the same footing as an imputation of an indictable offence stands the imputation of being, *at the time the imputation is made*, afflicted with an infectious or contagious disease which would cause the person who had it to be shunned by society, such as leprosy or the *lues venerea*.(*c*)

Libels affecting office, profession, trade or calling.

Words spoken which would not otherwise be actionable, become so when they are, without justification, spoken of a person in respect of his profession, office, trade, or calling (provided it be not an unlawful one), and have a tendency to injure him in respect thereof, the law implying in such cases "actionable damage" without proof of any:(*d*) *à fortiori*, if the injurious imputation is conveyed by writing or printing, the defamation being in this case punishable criminally as well as by action.

Any unfounded imputation against a person who is in the enjoyment of an office, either public or private, whether of honour, profit, or trust, which imparts a charge of unfitness to administer the duties of that office, is a libel.(*e*)

442); *Woolnoth* v. *Meadows* (5 East. 463). Cf. *Sweetapple* v. *Jesse* (5 B. & Ald. 31). See also Hob. 126; Cro. Eliz. 250, 496; 1 Roll. Abr. 74; and 4 Rep. 13.

(*a*) See *per* Pollock, C.B., *Daines* v. *Hartley* (3 Exch. 200; 18 L. J. 81, Ex.); and cf. *Hankinson* v. *Bilby* (*ubi supra*), *Tempest* v. *Chambers* (1 Stark. 68); *Tomlinson* v. *Brittlebank* (4 B. & Ad. 630); *Harvey* v. *French* (1 C. & M. 17); *Thompson* v. *Bernard* (1 Camp. 48); *Christie* v. *Powell* (Peake's Cas. 4); 4 Rep. 13.

(*b*) *Stamp* v. *White* (Cro. Jac. 600). See also *Charnel's case* (Cro. Eliz. 279). The doctrine as to repugnancy laid down in 7 Bac. Abr. 296, 1 Roll. Abr. 74, cannot now be considered law (see sect. 61 of the C. L. P. A. 1852).

(*c*) 7 Bac. Abr. 266; Holt. 653; Cro. Eliz. 214, 289, 648; Cro. Jac. 144, 430; 1 Vin. Abr. 488. *Carslake* v. *Mapledoram* (2 T. R. 473; Str. 1189); *Bloodworth* v. *Gray* (7 M. & G. 334).

(*d*) See *per* Channell, B., *Foulger* v. *Newcomb* (L. Rep. 2 Ex. 330; 16 L. T. N. S. 596; 36 L. J. Ex. 169).

(*e*) See Buller, N. P. 4, 5.

Office one of honour only.

If the office is merely one of honour, as that of justice of the peace, the oral imputation, according to the old authorities,(*a*) must be of want of integrity, or charge a criminal breach of duty: an allegation of incompetency or want of ability is not of itself sufficient to ground an action of slander.

Where the defendant said of the plaintiff, a justice of the peace, "He is a fool, an ass, a beetle-headed justice," it was held by Foster, C.J., Wyndham and Twysden, JJ. (*dissentiente* Mallet, J.), that the words were not actionable, citing *Briscoe* v. *Hollis*(*b*) as a stronger case than this, and *Hammond* v. *Kingsmill*,(*c*) where for saying of a justice of the peace, "He is a debauched man, and unfit to be a justice,"(*d*) it was adjudged that no action lay; and Twysden, J., said that words which sound in *disability* only are not actionable, except they are spoken of one who gains his living by that thing (profession) wherein the words do disable him.(*e*) It does not follow, however, that an action of libel would not lie in these cases, if the words, instead of being spoken, had been written or printed and published.

The reason for making the above curious distinction has been given by Lord Holt, C.J., thus:(*f*) "It has been adjudged that to call a justice of the peace *blockhead*, *ass*, &c., is not a slander for which action lies, because he was not accused of any corruption in his employment, or any ill design or principle; and it was not his fault that he was a blockhead, for he cannot be otherwise than his Maker made him; but if he had been a wise man, and wicked principles were charged upon him when he had not them, an action would have lain; for though a man cannot be wiser, he may be honester than he is. If a person be in a place of profit, and he is accused of insufficiency, he shall have remedy by action: 'tis otherwise if he be only in a place of honour; though even there, if he is charged with ill principles, and as disaffected to the Government, he shall have an action for such scandal to his reputation." In this case it was held actionable to say of the plaintiff, who was a justice of the peace and deputy-lieutenant of the county of Surrey, and a candidate for Parliament, that he was a Jacobite, and for

(*a*) *Bill* v. *Neal* (1 Lev. 52); *per* Holt, C.J., *How* v. *Prin* (Holt, 652; 3 Salk. 694).

(*b*) Cro. Jac. 58. (*c*) 7 Jac. 1.

(*d*) This action, according to Twysden, J. (*Kerle* v. *Osgood*, 1 Vent. 50), was held not maintainable because spoken of the time past: if the words had been, "he is debauched," he said the action would lie.

(*e*) *Bill* v. *Neal* (*ubi supra*). (*f*) *How* v. *Prin* (*ubi supra*).

bringing in the Prince of Wales and Popery to destroy the nation, &c.

The words "You are a rascal, a villain, and a liar," applied to a justice of the peace, were held actionable, "for though *rascal* and *villain* were uncertain, yet, being joined with *liar*, and spoken of a justice of peace, they did import a charge of acting corruptly and partially." And so were the words, "He is a foresworn justice, and not fit to be a justice of peace; if I did see him, I would tell him so to his face."(*a*)

In one case(*b*) it was held actionable to say, "When thou wert justice, thou wert a bribing justice;"(*c*) in another, to say, "I have been often with Sir *J. J.* for justice, but could never get any at his hand, but injustice;"(*d*) in another, to say, "Mr. S. covereth and hideth felonies, and is not worthy to be a justice of peace;"(*e*) and in another case(*f*) it was said, "that where a man *had been* in an office of trust, to say that he had behaved himself corruptly in it, as it imported great scandal, so it might prevent his coming in to that or the like office again, and therefore was actionable." But the authority of the two latter cases is much weakened by what De Grey, C.J., says in *Onslow* v. *Horne*:(*g*) "I know of no case where ever an action for words was grounded upon eventual damages which may possibly happen to a man in a future situation, notwithstanding what the Chief Justice throws out in 2 Vent. 266. . . . . I think the Chief Justice went too far." There is no doubt, however, that an action of libel would lie, if such an imputation as the above were written or printed and published.

To say of a judge that a particular sentence pronounced by him "was corruptly given" is actionable,(*h*), or that he was "a corrupt judge."(*i*)

Imputations contained in a newspaper of partial and corrupt conduct on a person who occupied the office of mayor and justice of the peace for a borough are libellous, whether the public or private capacity of the person be regarded.(*j*)

(*a*) *Kerle* v. *Osgood* (1 Vent. 50).

(*b*) See Yelv. 153. The reason assigned for this decision is, "Car coment il referre a chose passe, uncore il defame luy a touts jours en l'opinion d'auters, et fait lui d'estre account unworthy a porter office enapres."

(*c*) *Aston* v. *Blagrave* (Str. 617).

(*d*) *Isham* v. *York* (Cro. Car. 15).

(*e*) *Stuckley* v. *Bulhead* (4 Rep. 16).

(*f*) *Walden* v. *Mitchell* (2 Vent. 266).

(*g*) 3 Wils. 188.

(*h*) *Cæsar* v. *Curseny* (Cro. Eliz. 305).

(*i*) See 4 Rep. 16 (*Birchley's case*).

(*j*) See Alderson, B., *Parmiter* v. *Coupland* (6 M. & W. 109).

It is laid down as a general rule by De Grey, C.J., in *Onslow* v. *Horne*,(*a*) "that words are actionable when spoken of one in an office of profit, which *may probably* occasion the loss of his office, or when spoken of persons touching their respective professions, trades, and business, and do or may probably tend to their damage;" or, as reported in Sir W. Blackstone's Reports (p. 753): "if the words may be of *probable* ill consequence to a person in a trade, a profession, or an office." The rule, as thus expressed, is, according to Bayley, B.,(*b*) objectionable, the words "probably" and "probable" being too indefinite and loose, and—unless considered as equivalent to *having a natural tendency to*, and confined within the limits of showing the want of some necessary qualification, or some misconduct in the office—not warranted by the authorities. "Every authority," he says, "which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business."

Professions, &c.

The law is the same in the case of imputations made against a member of any of the professions, having a tendency to injure him in respect thereof, whether the imputation be want of integrity or want of ability.

Thus it has been held actionable to say of a physician, "Thou art a drunken fool and an ass; thou wert never scholar, and art not worthy to speak to a scholar, and that I will prove and justify:"(*c*) or to say of a surgeon and accoucheur, "I wonder you had him to attend you. Do you know him? He is not an apothecary; he has not passed any examination; he is a bad character; none of the medical men here will meet him. Several have died that he has attended, and there have been inquests held on them."(*d*) The Court were of opinion, though it was not necessary to so decide, that the words, "he is a bad character; none of the medical men here will meet him," were of themselves actionable. In the case of a libel they would no doubt be held to be so.

But it was held to be no libel to publish in a medical paper (the *Lancet*) of a physician that he had met homœopathists in consultation, though it was alleged that, in the opinion of the profession, meeting homœopathists in consultation was improper and against etiquette.(*e*)

(*a*) 3 Wils. 186.
(*b*) *Lumley* v. *Allday* (1 Cr. & Jer. 305).
(*c*) *Cawdry* v. *Highley* (Cro. Car. 270; 1 Roll. Abr. 54).
(*d*) *Southee* v. *Denny* (1 Exch. 196).
(*e*) *Clay* v. *Roberts* (8 L. T. N. S. 397; 9 Jur. N. S. 580; 11 W. R. 649).

It was held actionable to say of a barrister, "He is a dunce, and will get little by the law;(*a*) or, "Thou art no lawyer, thou canst not make a lease; thou hast that degree without desert; they are fools that come to thee for law;"(*b*) or, "Thou art a daffidowndilly," with an averment that the words signify that he is an "ambidexter."(*c*)

So to say of an attorney that he is no lawyer was held to be actionable, such a statement, meaning that he does not understand his business, being a great reflection on him.(*d*)

It has also been held actionable to say of an attorney, "Thou art a false knave, a cozening knave, and hast got all that thou hast by cozenage; and thou hast cozened all those that have dealt with thee;"(*e*) or that he is a "common barrator."(*f*)

A publication headed, "An honest lawyer," and stating that the plaintiff (an attorney) had been reprimanded by one of the Masters of the Queen's Bench, "for what is called sharp practice in his profession," was held to be a libel, whether the plaintiff had his name still on the roll of attorneys or not(*g*).

A libel may be contained in the heading to the report of a case in one of the Superior Courts. Thus it was ruled by Byles, J., at Nisi Prius, that proof that an attorney treated his client badly in a particular case would not justify a heading to the report of that case "How lawyer B. treats his clients." "The libel," said his Lordship, "is in general terms. It is not how he treated them in this particular case, but how he treated them generally; and even if you succeed in proving that the report is correct, so as to justify the inference that in this instance he treated his client ill, that would not answer the implied charge in the libel that he so treats his clients generally."(*h*)

It has been observed that if one say to a counsel, "Thou didst disclose my counsel," or to a counsel or attorney, "Thou didst deliver my evidence to my adversary," an action lies.(*i*) The publication of a charge of disgraceful conduct in having disclosed, at an election, confidential

(*a*) *Peard* v. *Jones* (Cro. Car. 382).
(*b*) *Bankes* v. *Allen* (Roll. Abr. 54). (*c*) Roll. Abr. 35.
(*d*) *Day* v. *Buller* (3 Wils. 59).
(*e*) *Jenkins* v. *Smith* (Cro. Jac. 536). See also *Birchley's case* (4 Rep. 16). (*f*) *Taylor* v. *Starkey* (Cro. Car. 192).
(*g*) *Boydell* v. *Jones* (4 M. & W. 446).
(*h*) *Bishop* v. *Latimer* (4 L. T. N. S. 775). Cf. *Clement* v. *Lewis*, in error (7 Moore, 200; 2 Brod. & Bing. 297).
(*i*) *Per* Anderson and Bramond, JJ., *Wright* v. *Moorhouse* (Cro. Eliz. 358). *Sed vide Brown* v. *Kennedy* (33 L. J. 342, Ch.).

communications which he had acquired professionally, would be libellous.(*a*)

Imputations which reflect on a clergyman in his professional character are *per se* actionable.(*b*) A letter published in a newspaper stating that the vicar of the parish came to the performance of divine service in a towering passion, and that his conduct was calculated to make infidels of his congregation, was held to be a clear libel.(*c*)

A letter charging the clerk to the justices of a borough with corruption, even though written to the Secretary of State by an inhabitant of the borough, is a libel.(*d*)

To say of a midwife, "She is an ignorant woman, and of small practice, and very unfortunate in her way; there are few that she goes to, but lie desperately ill, or die under her hands," was held actionable.(*e*) Also to say, "many have perished for her want of skill."(*f*)

An imputation of insanity on a governess would be libellous.(*g*)

So in a variety of other cases, as saying of a churchwarden, "Thou art a cheating knave, and hast cheated the parish of £40;"(*h*) of a town clerk, "He hath taken 40s. for a bribe;"(*i*) of a constable, "He is not worthy the office of a constable; for he and his company, the last time he was constable, stole five of my swine and eat them;"(*j*) of a deputy of Clarencieux king of arms, that he was "a scrivener, and no herald," &c.;(*k*) of an apothecary, "It is a world of blood he has to answer for in this town, through his ignorance: he did kill a woman and two children at S.; he did kill J. P. at P.; he was the death of J. P.; he has killed his patient with physic."(*l*)

(*a*) *Moore* v. *Terrell* (4 B. & Ad. 870).

(*b*) *Pemberton* v. *Colls* (10 Q. B. 461; 16 L. J. Q. B. 403). See also *Drake* v. *Drake* (1 Vin. Abr. 463; *Hearne* v. *Stowell* (12 A. & E. 719); *Kelly* v. *Sherlock* (L. Rep. 1 Q. B. 686; 35 L. J. 209, Q. B.).

(*c*) *Walker* v. *Brogden* (19 C. B. N. S. 65).

(*d*) *Bligg* v. *Sturt* (10 Q. B. 899).

(*e*) *Wharton* v. *Brook* (1 Vent. 21).

(*f*) *Flowers' case* (Cro. Car. 211).

(*g*) *Morgan* v. *Lingen* (8 L. T. N. S. 800).

(*h*) *Strode* v. *Holmes* (Sty. 338; 1 Vin. Abr. 463). See also *Woodruff* v. *Wooley* (1 Vin. Abr. 463).

(*i*) Yelv. 142; 1 Vin. Abr. 463. See 1 Roll. Abr. 56.

(*j*) Cro. Eliz. 861; 1 Vin. Abr. 464.

(*k*) Cro. Eliz. 328, 329; 1 Vin. Abr. 464. &c. The following are similar cases: Cro. Eliz. 358; Dal. 45; Yelv. 153; Cro. Car. 563; Mar. 82, pl. 135; Style. 43; 2 Roll. R. 72.

(*l*) *Tutty* v. *Alewin* (11 Mod. 221). See also *Edsall* v. *Russell* (4 M. & Gr. 1090).

So in the case of any other lawful trade, business, or employment, however humble or menial, and though it be one of which the Court cannot take judicial notice,(*a*) words spoken, and *à fortiori*, words written or printed and published, of a person in relation to such employment, which have a tendency to injure him in respect thereof, are actionable *per se*.

"An action," it has been said,(*b*) "lies for speaking scandalous words of any man of any trade or profession, be it never so base, if they are spoken with reference to his profession." Thus, it has been held actionable to say of a servant in husbandry and bailiff, "Thou art a cozening knave, and hast cozened thy master of a bushel of barley;"(*c*) or of a tradesman, "Thou art a rogue, and thou hast cheated me of several pounds;"(*d*) of a person carrying on the business of a butcher that she had used false weights in her trade;"(*e*) of a cornseller, "You are a rogue and a swindling rascal; you delivered me one hundred bushels of oats worse by sixpence a bushel than I bargained for;"(*f*) of an auctioneer and appraiser employed by the defendant to value certain goods, "He is a damned rascal, he has cheated me out of a hundred pounds on the valuation;"(*g*) of an asphalte manufacturer, "The old materials have been relaid by your company in the asphalte work executed in front of the Ordnance Office, and I have seen the work done:" innuendo, that the plaintiff "had been guilty of *dishonesty* in the conduct of his said trade, by laying down again the old asphalte materials which had before been used at the entrance of the said Ordnance Office instead of new asphalte according to his contract;(*h*) or of a certificated master mariner that "during his stay at N. he was frequently drunk, and in that state had to be carried to his boat to reach his vessel, &c."(*i*) So it was held slanderous to say of a gamekeeper, that he had trapped foxes; the declaration stating that it was his duty as such gamekeeper not to kill

(*a*) *Foulger* v. *Newcomb* (L. Rep. 2 Ex. 327; 16 L. T. N. S. 596; 36 L. J. 169, Ex.).

(*b*) *Per* Kelynge, Wyndham, and Twysden, JJ., *Terry* v. *Hooper* (Lev. 115).

(*c*) *Seaman* v. *Bigg* (Cro. Car. 480).

(*d*) *Surman* v. *Shelleto* (Burr. 1688).

(*e*) *Griffiths* v. *Lewis* (7 Q. B. 61).

(*f*) *Thomas* v. *Jackson* (3 Bing. 104).

(*g*) *Byrant* v. *Loxton* (4 Moore, 344).

(*h*) *Babonneau* v. *Farrell* (13 C. B. 360).

(*i*) *Irwin* v. *Brandwood* (2 H. & C. 960; 9 L. T. N. S. 772; 33 L. J. 257, Ex.). See *Cockcnd* v. *Richards* (2 C. B. 569; 15 L. J. 278, C. P.); and *Harwood* v. *Green* (2 C. & P. 141).

foxes, and that he was employed on the terms of his not doing so, as the defendant knew.(*a*)

Where the plaintiffs, bag manufacturers, called one of their bags "The Bag of Bags," and a newspaper described the title as "very silly, very slangy, and very vulgar; and which has been forced upon the notice of the public *ad nauseam*," Lush, J., was of opinion that the words could not be deemed libellous, either upon the plaintiffs or their mode of carrying on business; but Mellor and Hannen, JJ., held that it was a question for the determination of a jury.(*b*)

A letter published in the *Times* newspaper stating that a ship of which the plaintiff was owner and master, and which was advertised as about to sail to the East Indies, was not seaworthy, and that some Jews had bought her for the purpose of taking out convicts, was held to be a libel on the plaintiff in his trade and business, and not a mere disparagement of the ship.(*c*) "This is not," said Coltman, J., "a case of mere disparagement of a chattel, but a libel on the plaintiff in the way of his business, and with reference to an intended voyage. It is impossible, therefore, to say that the action is not maintainable independently of malice. To say of a shipowner that he has sold his ship to carry convicts, when she was in a condition in which she must be expected to go to the bottom, is as bad as saying of a wine-merchant that his wine is poisoned; or of a tea-dealer that his tea is made green by drying it on copper." And Erskine, J., added: "I think there could not be a more flagrant personal libel than such a statement made with respect to the master of a ship."

In order that an action of slander shall be maintainable for words spoken of a man in his office, profession, trade, or calling, it must clearly appear that the words were spoken of him in relation to that office, profession, trade, or calling.(*d*)

Imputations injurious to the credit of a trader or merchant.

Imputations which would affect injuriously the credit of a trader or merchant are also actionable; and it is not necessary that actual bankruptcy should be imputed.

Thus it has been held actionable to use words of an im-

(*a*) *Foulger* v. *Newcomb* (*ubi supra*).
(*b*) *Jenner* v. *A'Beckett* (L. R. 7 Q. B. 11).
(*c*) *Ingram* v. *Lawson* (6 Bing. N. C. 212; 8 Scott. 471).
(*d*) *Sibley* v. *Tomlins* (4 Tyrw. 90). See 1 Vin. Abr. 464; 3 Salk. 328; *Ayre* v. *Craven* (2 A. & El. 7; 4 Nev. & Man. 220); *Doyley* v. *Roberts* (3 Bing. N. C. 835); *Lumley* v. *Allday* (1 Tyrw. 217; 1 C. & J. 301); *James* v. *Brook* (9 Q. B. 7; 16 L. J. 17, Q. B.); *Hopwood* v. *Thorn* (8 C. B. 293; 19 L. J. C. P. 94); *Morgan* v. *Lingen* (8 L. T. N. S. 800).

keeper imputing insolvency, although at the time they were spoken an innkeeper was not subject to the bankrupt laws.(*a*) "The single question is" said Abbott, C.J.,(*b*) "whether words imputing an inability to pay debts be injurious to a person who seeks his living by buying provisions upon credit and selling them again to his guests at a profit, he not being liable to the bankrupt laws. Now, such an imputation is calculated to prevent him from having that credit which is at least useful, if not necessary, in his business; the words, therefore, are likely to be injurious to him."

So to say of a trader that he is "A sorry, pitiful fellow, and a rogue; he compounded his debts at five shillings in the pound;"(*c*) or "If he does not come and make terms with me, I will make a bankrupt of him, and ruin him;"(*d*) of a brewer, "I will bet £5 to £1 that Mr. J. was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself;" &c.;(*e*) of a dyer that "He is a bankrupt knave, and is not worth three half-pence"(*f*); of a tailor, "I heard you were run away;"(*g*) of a husbandman, "He owes more money than he is worth; he is run away and is broke:"(*h*) of a carpenter, "He is broken and run away, and will never return again;(*i*) and even in cases where an expectation or opinion only was expressed, as "I believe all is not well with Daniel Vivian: there are many merchants who have lately failed, and I expect no otherwise of Daniel Vivian."(*j*)

(*a*) *Whittington* v. *Gladwin* (5 B. & C. 180); see also *Southam* v. *Allen* (Sir T. Ray. 231), where the words were, "Deal not with the plaintiff, for he is broke, and there is neither entertainment for man or horse."

(*b*) 5 B. & C. 181.

(*c*) *Stanton* v. *Smith* (Ld. Ray. 1480; Str. 762). See a case relating to a pawnbroker (Holt, 652).

(*d*) *Brown* v. *Smith* (13 C. B. 596; 22 L. J. 151, C. P.).

(*e*) *Jones* v. *Littler* (7 M. & W. 423). See as to calling a stock-jobber "a lame duck," *Morris* v. *Langdale* (2 Bos. & P. 284); and, as to imputing insolvency to a banker, *Robinson* v. *Marchant* (7 Q. B. 918).

(*f*) *Squire* v. *Johns* (Cro. Jac. 585).

(*g*) *Davis* v. *Lewis* (7 T. R. 17).

(*h*) *Dobson* v. *Thornistone* (3 Mod. 112).

(*i*) *Chapman* v. *Lanpshire* (3 Mod. 155). In this case it was argued for the defendant that the plaintiff might be broken and yet be as good a carpenter as before. "But," said the Chief Justice "the credit which the defendant (plaintiff?) has in the world may be the means to support his skill, for he may not have an opportunity to show his workmanship without those materials with which he is entrusted."

(*j*) 3 Salk. 326; Raym. 207. See also *Harrison* v. *Thornborough* (10 Mod. 196).

It was held actionable to say of an upholsterer, "You are a soldier; I saw you in your red coat doing duty; your word is not to be taken"—it having been a common practice for tradesmen to protect themselves against their creditors by a counterfeit enlisting.(*a*)

In one case, where it was said of a merchant with respect to an event which had occurred eight years previously, "He came a broken merchant from Hamburgh," the Court(*b*) held that an action would lie, the charge being of having been "once broken, *Et qui semel malus semper presumitur esse malus eodem genere*, or at least may have an inclination thereto; and it being alleged to be spoken *falso et malitiosè*, and to scandalise him in his profession, it is a great cause of discrediting and impairing him in his trade, whereas their credit is the principal means of their gain."(*c*)

And according to Kelly, C.B.,(*d*) it is libellous to impute untruly to any person pecuniary embarrassment and inability to purchase a certain property without the aid of a loan from a third party; even although it be at the same time stated that the loan was afterwards honourably repaid.

Where a firm of brewers, having had a quarrel with the manager of a branch of the Capital and Counties Bank, sent round to their own customers a printed notice that they would "not receive in payment cheques drawn on any of the branches" of the Bank, and there was in consequence a run on the Bank and loss inflicted, an action was brought by the Bank for libel, with an innuendo that the notice imputed insolvency. The jury could not agree, and were discharged. There was no proof of the innuendo beyond the notice itself. On this the Court of Appeal (Brett & Cotton, LJJ., *dissentiente* Thesiger, L.J.) reversing the judgment of the C. P. Division (Grove & Denman, J.J.), entered judgment for the defendants on the grounds (1) that there was no evidence that the notice was defamatory in either a primary or secondary sense; and (2) that the occasion was privileged, and there was no proof of express malice to rebut the privilege. This judgment was upheld by the House of Lords (Lord Selborne, C., Lords Blackburn, Watson, and Bramwell, *dissentiente* Lord Penzance), on the ground that the notice was not in itself libellous, that the innuendo was (at the utmost) only one of several possible meanings, that it was not the inference which reasonable

(*a*) *Arne* v. *Johnson* (10 Mod. 111).
(*b*) Croke, Jones, and Berkley, JJ., *dissentiente* Richardson, C.J.
(*c*) *Leycroft* v. *Dunker* (Cro. Car. 317).
(*d*) *Coe* v. *Lee* (L. Rep. 4, Ex. 284; 38 L. J. 219, Ex.; 21 L. T. N. S. 178). (*e*) *Ibid.*

persons would draw, and that the plaintiffs had failed to discharge the onus which lay upon them of proving that the notice had a libellous tendency.(*a*)

A notice was published in a newspaper that the plaintiff, who had been, but had ceased to be, a master in the Walsall Science and Art Institute, and who had set up another school of art in the town, had ceased to be connected with the Institute, and that he was not authorized to receive subscriptions on its behalf. An action for libel having been brought, with an innuendo that the plaintiff falsely pretended to be authorized to receive subscriptions on behalf of the Institute, a nonsuit was directed on the ground that there was no evidence to support the innuendo; and the nonsuit was upheld by a Divisional Court.(*b*)

If any libellous construction can reasonably be put upon the document, it is for the jury to say whether or not that is the true interpretation.(*c*)

Criticisms on works appealing to public.

Defamatory attacks on persons in the way of their trade, profession, or calling, must be distinguished from hostile criticisms fairly and temperately expressed on such of their works and performances as appeal to the public; for such criticisms, however severely they may condemn or effectually turn into ridicule the works of authors, painters, architects, actors, &c., or even the advertisements or handbills of a tradesman, may be justifiable, though not in all respects accurate; whereas publications which have for their object the private injury of the person attacked can only be justified by their substantial truth. This subject will be more fully dealt with by-and-by.(*d*)

Publications disparaging commodities of rival tradesmen.

Publications merely disparaging the commodities of a rival tradesman must also be distinguished from libels upon him in the way of his trade.

Where a person published a circular and report comparing his own goods with those of another tradesman, and describing his own as superior, but not making any false misrepresentations as to the quality and character of the latter, it was held, on demurrer to a declaration, that an action of libel could not be maintained by the tradesman whose goods were disparaged, notwithstanding an

(*a*) *The Capital and Counties Bank* v. *Henty* (L. R. 5 C. P. D. 514; 7 App. Cas. 740).

(*b*) *Mulligan* v. *Cole* (L. R. 10 Q. B. 549). See also *Miller* v. *David* (L. R. 9 C. P. 118).

(*c*) *Per* Lord Coleridge, C.J., *Hart* v. *Wall* (L. R. 2 C. P. D. 149).

(*d*) See the chapter on "Comments on Matters of Public Interest," *post*.

allegation in the declaration of special damage, though they might be superior to the goods of the other.(*a*) "I am far from saying," said Cockburn, C.J., "that if a man falsely and maliciously makes a statement disparaging an article which another manufactures or vends, although in so doing he casts no imputation on his personal or professional character, and thereby causes an injury, and special damage is averred, an action might not be maintained." "My own impression is," said Blackburn, J., "that where there is a written depreciation of an article, unless it is a slander actionable in itself, no allegation of special damage will render it actionable, except in the case of slander of title. But there may, as my lord says, be cases where there is a *scienter* on the part of the defendant who has made statements doing mischief and calculated to do it, in which an action would lie."

So where the defendant issued a notice cautioning the public that the "self-acting tallow syphons or lubricators" sold by the plaintiff were not good for their purpose, and that those who bought them would find that the tallow was wasted instead of being effectually employed as professed: the publication was held not to be a libel on the plaintiff in the way of his trade.(*b*) "A tradesman," said Lord Denman, C.J., "offering goods for sale, exposes himself to observations of this kind; and it is not by assuming them to be 'false, scandalous, malicious, and defamatory,' that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action." Patteson, J., said that if the caution had been against the plaintiff as a tradesman in *the habit* of selling goods which he knew to be bad, it would be a libel upon him personally.

The hypothetical case put by Cockburn, C.J., in *Young* v. *Macrae*, arose in the *Western Counties Manure Company* v. *Lawes' Chemical Manure Company*.(*c*) where the publication of a false and malicious statement, disparaging the plaintiff's goods and causing special damage, was held actionable by Bramwell and Pollock, BB.

Publications holding up to scorn or ridicule.

The third class of libels on individuals embraces those which, by holding up a man to scorn and ridicule, and still more to any stronger feeling of contempt or execration, impair him in the enjoyment of general society, and injure

(*a*) *Young* v. *Macrae* (3 B. & S. 264; 32 L. J. 6, Q. B.).
(*b*) *Evans* v. *Harlow* (5 Q. B. 624).
(*c*) L. R. 9 Ex. 218.

those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man.(*a*) Everything, also, which, by holding him up to that scorn and ridicule that might reasonably (that is, according to our natural passions) be considered as provoking him to a breach of the peace, is a libel.(*b*)

A libel of this kind may be briefly defined to be "any publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule.(*c*)

The following language of eminent judges may be cited in support of the preceding definition. "In a libel," says Best, C.J.,(*d*) "any tendency to bring a party into contempt or ridicule is actionable; and, in general, any charge of immoral conduct, although in matters not punishable by law."(*e*)

To charge a man with ingratitude was held libellous.(*f*)

"If any man," says Wilmot, C.J.,(*g*) "deliberately or maliciously,(*h*) publishes anything in writing concerning another which makes him *ridiculous*, or tends to hinder mankind *from* associating or having intercourse with him, an action well lies against such publisher." "Scandalous matter is not necessary to make a libel, 'tis enough if the defendant induces an ill opinion to be had of the plaintiff, or makes him contemptible and ridiculous."(*i*) "In case upon a libel it is sufficient if the matter be reflecting, as to paint a man playing at cudgels with his wife."(*j*)

Thus it was held libellous to publish of a man that he stank of brimstone and had the itch.(*k*)

It is chiefly with respect to the class of libels with which we are now dealing that the distinction between oral and written or printed defamation becomes important.

To publish, even orally, of any one that he has committed an indictable offence, or that he has—*i.e.*, at the time the words are spoken of him—some contagious or infectious disorder which may exclude from society,(*l*) or anything

(*a*) Holt, L. L. 210.

(*b*) *Ibid.* 213.

(*c*) *Per* Parke, B., *Parmiter* v. *Coupland* (6 M. & W. 108).

(*d*) *Archbishop of Tuam* v. *Robeson* (5 Bing. 21).

(*e*) See as to imputations of immoral or unfeeling conduct, *Clement* v. *Chivis* (9 B. & C. 172); *Churchill* v. *Hunt* (1 Chit. 480).

(*f*) *Cox* v. *Lee* (L. R. 4 Ex. 284).

(*g*) *Villers* v. *Monsley* (2 Wils. 403).

(*h*) As to the meaning of malice, *vide ante*, pp. 462, 463.

(*i*) *Per* Holt, C.J., *Cropp* v. *Tilney* (3 Salk. 226).

(*j*) *Per* Holt, C.J. (11 Mod. 99).

(*k*) *Villers* v. *Monsley* (*ubi supra*).

(*l*) 7 Bac. Abr. tit. Slander, p. 266; 1 Roll. Abr. 44; *Carslake* v.

referring to his trade, office (be it one of profit or not), or profession, and calculated to injure him therein, (*a*) is actionable.(*b*) But where the imputation of an offence against the law is made orally, in order to be actionable, it must, in the absence of special damage resulting from it, be of some offence liable to punishment in a criminal court otherwise than merely by fine, with imprisonment in default of payment.(*c*)

Calling a man a scoundrel, rascal, blackleg, or even rogue or swindler, will not support an action of slander without proof of special damage caused by the utterance.(*d*)

Neither will the oral imputation of unchastity to a woman, married or unmarried, however gross it may be, entitle her to maintain an action, unless she can prove that the slander has caused her special damage.(*e*)

The publication, however, by writing or printing, of any

Mapledoram (2 T. R. 473); *Bloodworth* v. *Gray* (7 M. & Gr. 334). See also Cro. Eliz. 214, 289, 648; Cro. Jac. 430.

(*a*) 1 Vin. Abr. 463; Cro. Eliz. 328, 358; 1 Roll. Abr. 50; *Herle* v. *Osgood* (1 Vent. 50); *Parrat* v. *Carpenter* (Cro. Eliz. 502); *Seaman* v. *Bigg* (Cro. Car. 480); *Peard* v. *Jones* (Cro. Car. 382); *Aston* v. *Blagrave* (Str. 617); *How* v. *Prin* (Holt, 652); *Thomas* v. *Jackson* (3 Bing. 104); *Soul* v. *Denny* (1 Ex. 196); *Tutty* v. *Alcorn* (11 Mod. 221); *Robinson* v. *Marchant* (7 Q. B. 918); *Morris* v. *Langdale* (2 B. & P. 84); *Brown* v. *Smith* (13 C. B. 596); *Babonneau* v. *Farrell* (15 C. B. 360); *Irwin* v. *Brandwood* (2 H. & C. 960).

(*b*) *Gainsford* v. *Tuke* (Cro. Jac. 536); *Boston* v. *Tatam* (*Ibid.* 623); *Carpenter* v. *Tarrant* (Cas. Temp. Lord Hardwicke. 339); *Cuddington* v. *Wilkins* (Hob. 81); *Moor* v. *Foster* (Cro. Jac. 65); *Beadish* v. *Lindsey* (11 Mod. 194); *Roberts* v. *Camden* (9 East. 93); *Fowler* v. *Dowdney* (2 M. & Rob. 119); *Alfred* v. *Farlow* (8 Q. B. 854); *Williams* v. *Stott* (1 C. & M. 675); *Colman* v. *Godwin* (3 Doug. 90); *Richardson* v. *Allen* (2 Chit. 657); *Tomlinson* v. *Brittlebank* (4 B. & Ad. 630); *Huckle* v. *Reynolds* (7 C. B. N. S. 114. 337) *Lawson* v. *Stuart* (1 T. R. 748); *Barnett* v. *Allen* (3 H. & N. 381). As to the imputation of a mere fineable offence, see *Ogden* v. *Turner* (Salk. 696; 6 Mod. 104); *M'Cabe* v. *Foot* (15 L. T. N. S. 115).

(*c*) 4 Rep. 15; 2 Bulst. 150; 1 Vin. Abr. 404, 417; 1 Roll. Abr. 40, &c.; *Holt* v. *Scholefield* (6 T. R. 691).

(*d*) *Barnett* v. *Allen* (3 H. & N. 376; 27 L. J. 412, Ex.); *Richardson* v. *Allen* (2 Chit. 657); *Saville* v. *Jardine* (2 H. Bl. 531, &c.).

(*e*) *Slainton* v. *Jones* (Selw. N. P. 12th edit. 1259); *Willy* v. *Elston* (8 C. B. 142; 18 L. J. 320, C. P.); *Roberts* v. *Roberts* (33 L. J. 249, Q. B.; 10 L. T. N. S. 602); *Lynch* v. *Knight* (9 H. L. Cas. 577).

The state of our law on this subject is really disgraceful. Lord Campbell, a good while ago (*Lynch* v. *Knight*, *ubi supra*), considered it "unsatisfactory;" Lord Brougham, in the same case (p. 594), stigmatised it as "barbarous;" and Cockburn, C.J., in another case, as "very cruel" (33 L. J. 250, Q. B.); notwithstanding which it still continues as above stated. The only exception is the calling a woman a whore within the city of London, that being by the custom of the city actionable. See *Brand* v. *Roberts* (4 Burr. 2418, and cases there

of these things is actionable *per se*, without proof of special damage, on account of the greater mischief said to be produced by this mode of publication, as well as the greater malice which it indicates on the part of the defamer. "A libel," it has been said,(*a*) "is punishable both criminally and by action, when mere speaking the words would not be punishable in either way."(*b*)

By the Scotch law the oral imputation of unchastity to a woman is actionable, without proof of special damage.(*c*)

For speaking the words *rogue* and rascal of any one, an action, as already observed, will not lie. "But if those words," says Gould, J., (*d*) "were written and published of any one, I doubt not an action would lie."

So, to publish of any one that he is a *swindler* is a libel, and actionable,(*e*) or that he is "a dishonest man,"(*f*) or a

cited); *Robertson* v. *Powell* (2 Selw. N. P. 1259, 5th edit.). See also 1 Str. 741; 1 Vin. Abr. 395; Holt's Rep. 40; 12 Mod. 106. Loss of the hospitality of friends is sufficient special damage (*Davies* v. *Solomon*, L. R. 7 Q. B. 112). See also *Riding* v. *Smith* (L. R. 1 Ex. Div. 91).

(*a*) *Per* Gould, J., *Villers* v. *Monsley* (2 Wils. 404). See also *Thorley* v. *Lord Kerry* (2 Taunt. 358), and the note in 3 Camp. 214.

(*b*) "The common law, in respect to our natural passions, gives no action for mere defamatory words, which it considers as transitory abuse, and not having substance and body enough to constitute an injury by affecting the reputation. It confines, therefore, the action for slander to such of the grosser kind of words as impute positive crimes, or, by charging a man with contagious disorders, tends to expel him from society; and to words which injure him in his profession and calling. It does not consider words amounting to a breach of the peace, and, therefore, gives neither indictment nor information for unwritten slander, except in the case of seditious language or words reflecting on a magistrate in the immediate execution of his office. The reason of the law in this distinction is simple enough. It was necessary to punish the grosser and more palpable injuries, and it was equally convenient to pass over the less. The law, therefore, by classing the greater injuries, established the *criteria* of this distinction, and adhered to it closely in its practice. This reason, however, ceased when the words, by being written, could no longer be considered as the results of transitory passion or venial levity, but therein gained the shape and efficacy of a mischievous malignity. The act of writing is in itself an act of deliberation, and the instrument of a permanent mischief. What before was mere *convitium* and contumely grew into a deliberate charge and accusation. The law, therefore, both with respect to the public peace and the prevention of private injury, allowed an indictment and information, as well as an action on the case, for words written which it denied to words spoken" (Holt, L. L. 211, 212).

(*c*) Borthwick's Law of Libel, p. 185.

(*d*) *Villers* v. *Monsley* (2 Wils. 403).

(*e*) *l'Anson* v. *Stuart* (1 T. R. 748).

(*f*) *Per Cur.*, *Austin* v. *Culpepper* (Skin. 124; 2 Show. 314).

"black-leg" or "black sheep,"(*a*) or that he was black-balled at a club, and "bolted" the next morning, whilst some of the poor tradesmen had to lament the fashionable character of an entertainment which he had given.(*b*) So also is a letter written to a third party calling a person a *villain*.(*c*)

It was held to be a libel to publish of a Protestant archbishop that he had attempted to convert a Roman Catholic priest (against whom a charge of seduction had been made) by offers of money and preferment.(*d*) The libel in this case was contained in a letter from Dublin, published in the *Morning Herald*; and it was contended, on motion to set aside the verdict which had been given for the plaintiff, that there was no imputation on the plaintiff's character in the conduct ascribed to him: that to make converts, even by purchase, is a praiseworthy effort of religious zeal, sanctioned by Act of Parliament, and warranted by the practice of our own and other Christian establishments; that the imputation, if any, on the plaintiff was only of extraordinary zeal. But Best, C.J., after laying it down that, in general, any charge of immoral conduct in a libel is actionable, although in matters not punishable by law, said: "Would it be immoral in the archbishop if he attempted to bribe a man to renounce his religion, and to endow such a proselyte with a Church of England preferment? Would it be immoral to employ in making hypocrites funds destined to the support of the Protestant Church? If the seduced be guilty it is impossible to say that the seducer is innocent. But it has been urged that nothing immoral is imputed, since the legislature has held out to Catholic priests the same kind of temptation to become Protestants. Even if that were so, it would not persuade me that such a course was moral. But the Legislature has not done this; it has only said that if a man be converted he shall not be left to starve in the midst of a hostile community." "If," said Burrough, J., "we are to understand the language of this attack as the rest of the world would do, there can be no doubt it is a gross and infamous libel. The plaintiff is charged with having sought to induce an improper person to abandon his religious creed, not by reasoning but by a gross bribe." "As to the merits, said Gaselee, J., "this is equally a libel whether it proposed to impute to the plaintiff indiscretion or

(*a*) *O'Brien* v. *Clement* (16 M. & W. 159). (*b*) *Ibid.*
(*c*) *Bell* v. *Stone* (1 Bos. & P. 331).
(*d*) *Archbishop of Tuam* v. *Robeson* (5 Bing. 21).

dishonesty; the manifest object of it was to bring him into disrepute."

A publication which charged an overseer of a parish with oppressive conduct towards paupers in compelling them to receive payment of their weekly allowance in orders for flour upon a particular tradesman, was held to be a libel;(*a*) and so was a placard stating of an overseer that when out of office he had advocated low rates, and when in office he had advocated high rates, and that the defendant would not trust him with £5 of his property.(*b*)

In another case where an action was held maintainable, the important part of the libel was, "I sincerely pity the man" (meaning the plaintiff) "that can so far forget what is due, not only to himself, but to others, who, under the cloak of religious and spiritual reform, hypocritically and with the grossest impurity deals out his malice, uncharitableness, and falsehoods."(*c*)

It has also been held libellous to publish of any man that he has been guilty of gross misconduct, and insulted females in a barefaced manner.(*d*) The individual libelled in this case was a coachman, but the publication was not held libellous, because published of him in that capacity, the Court considering it only necessary to inquire whether the publication in question held up the plaintiff to public hatred, contempt, or ridicule: the imputation was a very serious and contumelious one, clearly calculated to bring the plaintiff into contempt by some persons, and hatred by others, and, therefore, according to established rule, the publication was libellous.

So it has been held libellous to publish of a person seeking assistance from a charitable society that she prefers unworthy claims, which it is hoped the members will reject for ever, and that she has squandered away money already obtained by her from the benevolent in printing circulars abusive of the society's secretary.(*e*)

A person was found guilty of publishing a libel for having caused the insertion in a newspaper of a paragraph imputing that the "myrmidons" of the prosecutor had poisoned some foxes in a country hunted over by the hounds of Sir W. M. S., and had hung their bodies up by the

(*a*) *Woodard* v. *Dowsing* (2 M. & Ry. 74).
(*b*) *Cheese* v. *Scales* (10 M. & W. 488). Cf. *Warman* v. *Hine* (1 Jur. 820).
(*c*) *Thorley* v. *Lord Kerry* (4 Taunt. 355).
(*d*) *Clement* v. *Chivis* (9 B. & C. 192).
(*e*) *Hoare* v. *Silverlock* (12 Q. B. 624).

neck; and that the tenantry of Sir W. M. S., by way of retaliation, had hung up effigies of the prosecutor and his brother, with foxes' tails appended.(*a*)

The publication in a newspaper of a paragraph stating that, although the plaintiff was aware of the death of a lady occasioned by his furious and careless driving a carriage against that in which she had been driving, he nevertheless, on the very evening of the catastrophe, attended a public ball, was held actionable.(*b*)

Even a publication alleging that a person has for years, without cause, systematically done everything to annoy another, and had unnecessarily dragged that other into the Court of Chancery, and put him to great expense, may be libellous.(*c*)

It has been held a libel to publish of a person in a newspaper that he had entered a horse to run for certain stakes at a race, and had afterwards fraudulently withdrawn it for the purpose of obtaining an unfair advantage over other persons with whom he had laid wagers on the expected race.(*d*) It was contended in this case that horse racing was illegal, and therefore that the plaintiff had no right to sue; but the Court held that "even if running a race without fraud were altogether prohibited by the law, still the party infringing its provisions would not thereby be deprived of all protection to his character in other matters connected with the transaction; but, moreover, the fact of engaging in a horse race is not in itself an illegal act."

It was held libellous to publish the following paragraph, which appeared in a newspaper: "K. D. has had a tolerable run of luck this season. He is still here, and keeps—I assure you friend Sat.—a well-spread sideboard; but, curse the fellow! I always consider myself in a family hotel when my legs are singing duets under his table; for the bill is sure to come in sooner or later, although, as you know, I rarely dabble in the mysteries of ecarté, or any other game. The fellow is as deep as Crockford, and as knowing as the Marquis. I do dislike this leg-al profession;" the Court being of opinion that, apart from any innuendo, it imputed something disgraceful to the plaintiff.(*e*)

To publish of a person who had been an attorney that

(*a*) *Reg.* v. *Cooper* (8 Q. B. 533; 15 L. J. 206, Q. B.).
(*b*) *Churchill* v. *Hunt* (1 Chit. 480).
(*c*) *Fray* v. *Fray* (17 C. B. N. S. 603; 34 L. J. 45, C. P.).
(*d*) *Greville* v. *Chapman* (5 Q. B. 731).
(*e*) *Digby* v. *Thompson* (4 B. & Ald. 821).

whilst he practised he had been guilty of "sharp practice," would be a libel.(*a*)

The following paragraph inserted in a newspaper was also held to be libellous, without any innuendo to explain its meaning: "Threatening letters.—The Middlesex grand jury have returned a true bill against a gentleman of some property named French."(*b*) In reply to an argument urged on behalf of the defendant, that the Court could not intend that the bill of indictment found by the grand jury was a bill of indictment for sending threatening letters, Lord Tenterden, C.J., said:(*c*) "We are all agreed, and it is quite clear from all the modern authorities, that a Court must read these words in the sense in which ordinary persons, or in which we ourselves out of court, reading this paragraph, would understand them; and that it cannot be read otherwise than that the grand jury had found a true bill against the plaintiff for sending threatening letters. A bill of indictment for sending a threatening letter must import an unlawful threatening letter."

A general charge of ingratitude published in a newspaper has been held to be libellous,(*d*) even where the facts upon which the charge is grounded were also stated, and were insufficient to support the charge;(*e*) for, according to Bramwell, B., a doubt is raised whether there are not some other facts which, if mentioned, would justify the charge.(*f*)

Though a man should tell a ludicrous story concerning himself, the unauthorised publication of it in a newspaper will be libellous.(*g*) "There is a great difference," said Tindall, C.J., "between a man's telling a ludicrous story of himself to a circle of his own acquaintance, and a publication of it to all the world through the medium of a newspaper."(*h*)

Repeating story told by plaintiff.

A libel is not the less actionable because the defamatory imputation is made by reference or comparison, direct or indirect, to some character in history or fiction, or to some animal which suggests the injurious idea.

Defamation by reference or comparison.

Thus, it was held a libel to publish, in a newspaper, of the plaintiff, who was an applicant for assistance from a charitable society, that her warmest friends, in giving up the advocacy of her claims, stated that they had realised the fable of the "Frozen Snake."(*i*) To an objection, grounded on the

(*a*) *Boydell* v. *Jones* (4 M. & W. 450), *Per* Parke, B.
(*b*) *Harvey* v. *French* (1 Cr. & M. 11). (*c*) *Ibid.* 18.
(*d*) *Cox* v. *Lee* (L. Rep. 4 Ex. 284; 21 L. T. N. S. 178; 38 L. J. 219, Ex.) (*e*) *Ibid.* (*f*) *Ibid.*
(*g*) *Cook* v. *Ward* (6 Bing. 409). (*h*) *Ibid.*
(*i*) *Hoare* v. *Silverlock* (12 C. B. 624; 17 L. J. 306, Q. B.).

absence of an innuendo in the declaration, explaining the meaning of the allusion to the "Frozen Snake," Coleridge, J., replied,(*a*) "The jury and Court in such a case as this are in an odd predicament, if they alone of all persons are not to understand the allusion complained of. Suppose the libel had said that the plaintiff acted like Judas: must the history of Judas have been given and referred to by innuendo? We ought to attribute to a Court and jury an acquaintance with ordinary terms and allusions, whether historical or figurative, or parabolical. If an expression, originally allegorical, has passed into such common use that it ceases to be figurative, and has obtained a signification almost literal, we must understand it as it is used. Half of our language is founded upon allegorical allusion: 'vinegar' is talked of in describing a bad temper: even the word 'sour' is figurative. We must understand such terms according to the sense which has become familiar." "Nothing is easier," said Erle, J., "than to bring persons into contempt by allusion to names well known in history, or by mention of animals to which certain ideas are attached: and I may take judicial notice that the words 'Frozen Snake' have an application very generally known indeed, which application is likely to bring into contempt a person against whom it is directed."

See also the case of *Woodgate* v. *Ridout*,(*b*) where part of the libel consisted in a comparison of the conduct of the plaintiff, an attorney, in reference to a particular case, with that of the firm of Quirk, Gammon, and Snap, in the novel of "Ten Thousand a Year."

Libel on the dead.

A libel on a dead person is also, according to Lord Coke, punishable: for it stirs up others of the same family, blood, or society, to revenge, and to break the peace.(*c*) The chief cause for which the law so severely punishes all libels is, says Hawkins,(*d*) the direct tendency of them to a breach of public peace, by provoking the parties injured, and their friends and families to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which of all others are most sensibly felt.

No very definite principle can be extracted from the reported cases on this subject. *Rex* v. *Paine*(*e*), sometimes referred to, was really a case of seditious libel. The indictment was for a scandalous libel upon the King (Will. III.) and late Queen and their Government, and the indictment

(*a*) 12 C. B. P. 633. (*b*) 4 F. & F. 202. (*c*) Co. 5, 124 b.
(*d*) P. C. Book 1, c. 28, Libels. (*e*) Carth. 405.

charged that the defendants published it "seditiously" and with intent to subvert the Government.

In the curious case of *Rex* v. *Critchley* (Hil. 7 Geo. 2) an information was granted against one Critchley for publishing a libel reflecting on Sir C. G. Nicoll, Lady Dartmouth's father, and (so says the report) on the Government.

The libel said of the deceased: "He could not be called a friend to his country, for he changed his principles for a red ribbon, and voted for that pernicious project, the excise."(*a*) Here, however, the information charged a malicious intent "to stir up the hatred and evil will of the subjects of the King against the family and posterity" of the deceased, a point emphasized by Lord Kenyon(*b*) in his reference to the case.

In libel on dead malevolent intention to injure the living family must be shown.

No attack upon the character of a deceased person, however gross it be, can be dealt with as a libel, unless it is shown to have been published with the malevolent intention of bringing contempt upon his family, and is of a nature to stir up his relations to a breach of the peace. "To say in general that the conduct of a dead person can at no time be canvassed; to hold that, even after ages are passed, the conduct of bad men cannot be contrasted with the good—would be," in the words of Lord Kenyon,(*c*) "to exclude the most useful part of history. And, therefore, it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, as in *Rex* v. *Critchley*, then it comes within the rule stated by Hawkins: then it is done with a design to break the peace, and then it becomes illegal."(*d*)

For the reasons thus stated by Lord Kenyon, the Court of King's Bench, in 1791, held bad, after a verdict of guilty, an indictment charging the defendant that he, "wickedly and maliciously contriving and intending to injure, defame, disgrace, and vilify the memory, reputation and character of George Nassau Clavering, Earl Cowper, then deceased, and to cause it to be believed that the said earl in his lifetime was a person of a vicious and depraved mind and disposition, and destitute of filial duty and affection, and of all honourable and virtuous sentiments and inclinations, and that the said earl had led a wicked and profligate course of life, and had addicted himself to the practice and use of the most criminal and unmanly vices and debaucheries, &c., wickedly, maliciously, and unlawfully did print and publish

(*a*) Cited 4 T. R. 129.
(*b*) *The King* v. *Topham* (4 T. R. 127). (*c*) *Ibid* (*d*) 4 T. R. 129.

and cause to be printed and published, in a certain newspaper called *The World*, a certain false, scandalous, and malicious libel of and concerning the said Earl Cowper, &c." The Court made absolute a rule to arrest the judgment, because the indictment did not allege that the libel had been published with an intent to create any ill blood or to throw any scandal on the family and posterity of Lord Cowper, or to induce them to break the peace in vindicating the honour of the family.(*a*)

There is no instance of an action for libel by the representative of a deceased person; and, according to the judgment of the Queen's Bench Division in a recent case,(*b*) "it must be some very unusual publication to justify an indictment or information for aspersing the character of the dead."

Liability for libel which one person requests another to publish.

A person is answerable for a libel which he either requests or directs another to write or publish for him, even where the publication differs in some respects from what he has suggested, provided the direction be in substance followed out.

Thus, where the evidence was that the defendant told the reporter of a newspaper a story defamatory of the plaintiff, saying that "it would make a good case for the newspaper," and afterwards gave the reporter a more detailed account, for the express purpose of inserting it in the newspaper; whereupon the reporter, from the particulars thus furnished to him, drew up an account, which, after some slight alterations, not affecting the sense, were made in it by the editor, was published in the newspaper, Abbott, C.J., held that what the reporter published in consequence of what passed with the defendant might be considered as published by the defendant.(*c*)

And where the defendant asked the editor of a newspaper to "show up" the prosecutor and his brother, telling him a ludicrous story concerning them; and the editor told the story to a reporter for the paper, and the story appeared in the paper, with comments added; the defendant, before the publication, having remarked on the delay, and, after the publication, expressed approbation of it, it was held that the jury (who had found the defendant guilty) might, on this

(*a*) *The King* v. *Topham* (4 T. R. 129).

(*b*) *Reg.* v. *Labouchere* (not yet reported). The judgment cites with approval the following passage from Hawkins (P. C. Bk. i. ch. 28, Libels, note 1): "The Court will not grant this extraordinary remedy by information, nor should a grand jury find an indictment, unless the offence be of such signal enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community. In such a case the public are justly placed in the character of an offended prosecutor, to vindicate the common right of all, though violated only in the person of an individual," &c.

(*c*) *Adams* v. *Kelly* (1 Ry. & M. 157).

evidence, find that the defendant authorised the publication of the particular libel, notwithstanding the comments added, and although it appeared that the editor had heard the story before the defendant told it to him.(*a*)

"If," said Lord Denman, C.J., "a man requests another generally to write a libel, he must be answerable for any libel written in pursuance of his request: he contributes to a misdemeanour, and is therefore responsible as a principal. He takes his chance of what is to be published. Here the defendant first desires the newspaper editor to 'shew up' the prosecutor, and communicates to him the particulars of the story, which afterwards appear in the newspaper. Having given this general authority, he meets the editor and says that the article has not appeared. That which did, in fact, form the foundation of the libel, and which the editor communicated to the reporter, was what the defendant communicated to the editor; and, after the publication, it was approved of by the defendant. It is observed that there were additions; but the editor said that what the defendant communicated was substantially what was published. If we held this not to be a publication by the defendant, we must go the length of exonerating a party who gives instructions for a libel, in every case where the libel published departs from the instructions by a single word. It is enough that there is a substantial identity. I have no doubt that a man who employs another generally to write a libel must take his chance of what appears, though something may be added which he did not state." Wightman, J., added: "It would be very dangerous to allow a man to direct a libel to be published on a particular subject, and, after he has approved of what is published, to defend himself on the ground that something has been added to his original communications."(*b*)

In the case just referred to there was, in addition to a previous request, a subsequent approval of the libel as published. But if a request be made, and the publication take place in pursuance of the request, that is sufficient to fix with liability.

Request to reporters to notice a speech.

And in the case of a speech, made at a meeting, which the speaker requests the newspaper reporters present to "take notice of," he is liable not only for a *verbatim* report, but also for a published outline or summary of it.(*c*)

(*a*) *Reg.* v. *Cooper* (8 Q. B. 533; 15 L. J. 206, Q. B.). (*b*) *Ibid.*
(*c*) *Parkes* v. *Prescott* (L. Rep. 4 Ex. 169; 20 L. T. N. S. 537; 2 L. J. 105, Ex.; 17 W. R. 773).

In an action against the chairman, and E., a member, of a board of guardians, for a libel published in a newspaper report of one of the meetings of the board, it appeared that a discussion having taken place at the meeting respecting the case of the plaintiff's daughter, then an inmate of the workhouse, and reporters of the local newspapers being present in the ordinary discharge of their duty, the defendant E. said "he hoped the local press would take notice of this very scandalous case," and requested the chairman to "give an outline of it," which was done accordingly. The chairman, in the course of his statement of the case, said: "I am glad gentlemen of the press are in the room, and I hope they will take notice of it," to which E. added, "and so do I;" the chairman further expressing a hope that publicity would be given to the matter. The libel was contained in what was proved to be a correct but condensed summary of what took place at the meeting, published in a local newspaper, and containing matter defamatory of the plaintiff. The learned judge (Martin, B.) who presided at the trial was of opinion that there was not sufficient evidence for the jury of the publication of the libel by the defendants, and directed a verdict to be entered for them. A bill of exceptions was tendered to this ruling; and the majority of the Court of Exchequer Chamber (Keating, Montague Smith, and Hannen, JJ.) held that the ruling was incorrect, Byles and Mellor, JJ., dissenting.(*a*)

It was contended, on behalf of the defendants in this case, that the words used by them did not amount to a request to the reporters to publish the proceedings, but were merely the expression of a wish or hope that they would do so, nor to an authority to publish the particular reports in the words in which they, in fact, appeared; but the majority of the Court of Error were of opinion that the facts proved afforded evidence, fit, at all events, to be laid before the jury, of a request by the defendants to the reporters to publish an outline, or summary, of the proceedings, and to publish the report in such a way as to show the conduct of the plaintiff to have been disgraceful; the disclosure to the local public of what was called the plaintiff's disgraceful conduct being the avowed object of the request made by the defendants to the reporters.

"I agree with the learned counsel for the defendants," said Montague Smith, J., in whose judgment Keating and Hannen, JJ., concurred, "that loose expressions of a mere

(*a*) *Parkes* v. *Prescott* (L. Rep. 4 Ex. 169; 20 L. T. N. S. 537; 38 L. J. 105, Ex.; 17 W. R. 773).

wish or hope that proceedings should be published, would not be sufficient to fix liability on the defendants in cases like the present. I think the words must be of such a kind, and used in such a manner, as to satisfy the jury that they amounted to, and were in fact, a request to publish. If the words do amount to such a request, and the publication be made in pursuance of it by the persons to whom it was addressed, then it seems to me the persons making such request would be responsible for the libellous matter so published. Whether the libellous matter published is in pursuance of, and in accordance with, the request, or a departure from it, and so unauthorised, would be a question to be considered on the circumstances of the particular case. It is, of course, plain that if a man gives a copy of his speech to another to publish, he is answerable as a publisher. It cannot be contended that he would not be equally answerable, if he desired a reporter to take down his speech as he delivered it, and to publish it. Then, can it make any difference in his liability, that he requests the reporter, instead of publishing the whole speech, to make and publish an outline or summary of it? Surely, in reason and principle, there can be none, where the request is acted on, and a correct outline or summary made and published. It was strongly urged for the defendants that they could not be liable, unless they authorised the libel in the very words in which it was published. If this argument is correct, then it must follow that a man could never be liable when he desired another to make and publish an outline or summary of a speech or writing; because such an outline or summary necessitates condensation and consequent alteration of language. But the argument cannot, as it seems to me, be correct. The man who requests another to make and publish an outline or summary of a speech, writing, or proceedings, must know that the words will be, to some extent, those of him who makes such summary or outline; and he must, therefore, be taken to constitute him an agent for the purpose, and be answerable for the result, subject always to the question whether the authority has been really followed. If this be not so, a man might become a libeller with impunity. Again, if the very words of the libel, and not its substance, are in these cases to be regarded, a man who gives the manuscript of a libel to an agent to print and publish, would not be answerable if, by accident or negligence, there were variations in some of the words, although not in the substance of the libel. . . . . In the result, I come to the conclusion that on principle it is correct to

Condensed report.

hold that where a man makes a request to another to publish defamatory matter, of which, for the purpose, he gives him a statement, whether in full or in outline, and the agent publishes that matter, adhering to the sense and substance of it, although the language be, to some extent, his own, the man making the request is liable to an action as the publisher. If the law were otherwise, it would, in many cases, throw a shield over those who are the real authors of libels, and who seek to defame others under, what would then be, the safe shelter of intermediate agents."(*a*)

Byles and Mellor, JJ., dissented from the judgment in this case. Byles, J., very much doubted "whether the expression of a hope that the press would take notice of the case, or give publicity to it, or that the chairman would give an outline of the proceedings, amounts to an authority to publish in a newspaper defamatory and unjustifiable matter spoken at a meeting." The learned judge pointed out that the libel must be proved as laid; and that though a variance is now amendable, none was in this case asked for or made, or could be made so as to cure the objection that the evidence did not show what particular facts or what particular defamatory expressions were or were not authorised by the defendant. His Lordship also remarked on the great difference between the authority which will make a man liable criminally for the acts of his agents(*b*) and that which will make him liable civilly; a principal not being civilly liable unless the agent duly pursues his authority, though liable criminally even where the agent has widely deviated from the authority. Mellor, J., said: "I think that in order to make a man responsible for a report printed and published by a third person, it ought to be shown that he had seen or heard or dictated the report itself, or approved of the libellous statements therein. . . . . I think that in order to support the allegation that the defendants caused to be printed and published the libels set out in the declaration, there ought to have been evidence of a communication either verbal or written, of the entire substance of the libel to the reporter, as the libel to be published; or that either before or after the publication thereof, the defendants, sought to be charged, saw and approved of the particular libel; and that, inasmuch as in the present case the expressions used only indicate a wish that gentlemen of the press present would notice the case, or call attention to it, or give publicity thereto, leaving

(*a*) *Parkes* v. *Prescott* (L. Rep. 4 Ex. 169; 20 L. T. N. S. 537: 38 L. J. 105, Ex.; 17 W. R. 773).

(*b*) As in *Reg.* v. *Cooper* (8 Q. B. 533; 15 L. J. 206, Q. B.).

the mode and manner to the absolute discretion of the reporters, I am of opinion that my brother Martin was justified in holding the evidence not to be sufficient to be submitted to the jury in support of the issue joined upon the pleadings."(*a*)

Publication of libel received from another disclosing author's name.

And it is no defence to an action for libel that the defendant received the libellous statement from another, and upon publication disclosed the author's name.(*b*)

"We do not hesitate to say," observed Best, C.J., delivering the judgment of the Court of Common Pleas in *De Crespigny* v. *Wellesley*, "that even if we were to admit, what we beg not to be considered as admitting, that in oral slander, when a man at the time of his speaking the words names the person who told him what he relates, he may plead to an action brought against him that the person whom he names did tell him what he related, such a justification cannot be pleaded to an action for the publication of the libel. If the person receiving a libel may publish it at all, he may publish it in whatever manner he pleases; he may insert it in all the journals, and thus circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter case, what has been said is known only to a few persons, and if the statement be untrue, the imputation cast upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser and the previous character of the accused will be estimated. But if the report is to be spread over the world by means of the press, the malignant falsehood of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove. . . . . Of what use is it to send the name of the author with a libel that is to pass into a country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character, whether he is a person entitled to credit for veracity or not; whether his statement was made in earnest or by way of joke; whether it contains a charge made by a man of sound mind or the delusion of a lunatic. . . . . If, without any allegation that its contents were true, or that the publisher had any

(*a*) *Parkes* v. *Prescott* (*ubi supra*). Cf. *Pierce* v. *Ellis* (6 Ir. L. Rep. 55).

(*b*) *De Crespigny* v. *Wellesley* (5 Bing. 392).

reason to believe them to be true, we were to hold that these pleas were a justification, we should establish a mode by which men might indulge themselves in ruining the characters of any persons they might be disposed to calumniate; there will be no difficulty in getting wretches, who would be better off within the walls of a prison than they are without, to furnish such as will pay for them with any statements they may desire respecting the character of any person whatsoever."(*a*)

Where a newspaper copied a libellous paragraph from another newspaper, and added the word "fudge" at the end of it, Lord Lyndhurst, C.B., on the trial of an action of libel against the publisher, left it to the jury to say with what motive the paragraph was copied, and what was meant by the addition of the word "fudge;" if that word were added only for the purpose of making an argument at a future day it would not take away the effect of the libel.(*b*)

CHAPTER VII.

PRIVILEGED PUBLICATIONS

Occasion may justify publication.

INJURIOUS reflections on the character and conduct of a person may be rendered justifiable by the occasion on which, or the circumstances under which, they are uttered or published; and this, it would appear, in some cases, however malicious the motive which may have prompted the utterance or publication. Occasions which justify such publications are called *privileged*; and the privilege may be either of an *absolute* or a *qualified* character.

Absolute privilege.

It is essential to the due performance of certain duties that the fear of legal liability for statements which may possibly affect injuriously the characters of individuals should not check the most outspoken criticisms and reflections on the part of those whose position calls upon them to pronounce on the conduct of others; and in such cases the privilege furnished by the occasion would seem to be of an

(*a*) See *M'Gregor* v. *Thwaites* (3 B. & C. 24); *M'Pherson* v. *Daniels* (10 B. & C. 263); *Watkin* v. *Hall* (9 B. & S. 279; L. Rep. 3 Q. B. 396; 37 L. J. 125, Q. B.; 18 L. T. N. S. 561).

(*b*) *Hunt* v. *Algar* (6 C. & P. 245).

absolute character. How malicious soever the motive which may prompt the untrue and injurious reflection, the privilege afforded by the occasion appears to be an absolute bar to an action.

Thus, it is necessary to the due administration of justice that judges, jurors, suitors, and witnesses should enjoy an absolute immunity for all words spoken or written in the course of any judicial proceeding, and relating thereto. Of this kind also is the privilege accorded to the utterances in Parliament of members of either House.

A judge enjoys this absolute immunity, whether he be judge of a superior court, judge of a county court, or coroner;(*a*) so does an advocate when acting as such, whether he be counsel or solicitor.(*b*)

An action of libel will not lie for defamatory allegations in pleadings,(*c*) defamatory bills or proceedings filed in Chancery or in the ecclesiastical courts,(*d*) or defamatory statements in an affidavit;(*e*) or in the witness box,(*f*) and a want of jurisdiction of the Court, to which application is *bonâ fide* made, will not take away the privilege.(*g*)

The same privilege is accorded to the judgment of a court-martial.(*h*)

As to communications made by military men in the course

(*a*) *Scott* v. *Stansfield* (L. Rep. 3 Ex. 220; 18 L. T. N. S. 572); *Floyd* v. *Barker* (Co. Rep. part 12, p. 24); *Rex* v. *Skinner* (Lofft. 55); *Miller* v. *Hope* (2 Shaw, Sc. App. Cas. 125); *Jekyll* v. *Moore* (2 B. & P. N. R. 341); *Revis* v. *Smith* (18 C. B. 126); *Henderson* v. *Broomhead* (4 H. & N. 569); *Fray* v. *Blackburn* (3 B. & S. 576); *Thomas* v. *Charlton* (2 B. & S. 475; 31 L. J. 139, Q. B.); *per* Kent, C.J., in the American case of *Yates* v. *Lansing* (5 Joh. 282; 9 Joh. 395). But see *per* Cockburn, C.J. (2 B. & S. 479).

(*b*) *Munster* v. *Lamb* (L. R. 11 Q. B. D. 588), in which the Court of Appeal (Brett, M.R., and Fry, L.J.) dissented from the opinion of Lord Denman, C.J., expressed at *Nisi Prius* in *Kendillon* v. *Maltby* (1 Car. & Mar. 409).

(*c*) 1 Roll. 33; Dyer, 285; 2 Burr. 808, 817; *Weston* v. *Dobniet* (Cro. Jac. 432).

(*d*) *Ram* v. *Lamley* (Hutt. 113); *Weston* v. *Dobniel* (Cro. Jac. 432); *Astley* v. *Younge* (2 Burr. 809, 817).

(*e*) *Revis* v. *Smith* (18 C. B. 126); *Astley* v. *Younge* (2 Burr. 817); *Henderson* v. *Broomhead* (4 H. & N. 569; 28 L. J. 360, Ex.); *Doyle* v. *O'Doherty* (1 C. & Mar. 418). See *Maloney* v. *Barley* (3 Camp. 210), and *M'Gregor* v. *Thwailes* (3 B. & C. 24).

(*f*) *Seaman* v. *Netherclift* (L. R. 1 C. P. D. 540; 2 C. P. D. 53). See also *Goffin* v. *Donnelly* (L. R. 6 Q. B. D. 307).

(*g*) See *Lake* v. *King* (1 Vin. Abr. 389); Hawk. Pl. Cr. 73, s. 8); *Hare* v. *Meller* (3 Lev. 169).

(*h*) *Jekyll* v. *Moore* (2 B. & P. N. R. 341), *Home* v. *Bentinck* (2 Brod. & Bing. 130). See *Oliver* v. *Bentinck* (3 Taunt. 456), and *Dawkins* v. *Lord Rokeby* (L. R. 7 H. L. 744).

of their duty, see the cases of *Dawkins* v. *Paulett*;(*a*) *Dickson* v. *The Earl of Wilton*;(*b*) and *Keighley* v. *Bell*,(*c*) and as to an official publication in the *Gazette* by a Secretary of State, *Grant* v. *Secretary of State for India*.(*d*)

Scotch law.

The Scotch law on this subject is in general the same as the English.(*e*) In case of an action of libel against a judge or witness there is a *præsumptio juris et de jure* in favour of the defendant, the effect of which cannot be traversed by any contrary evidence. Proof of actual malice will, however, take away the privilege from a litigant party.(*f*)

Qualified privilege.

In other cases the privilege is of a qualified character: the occasion on which the untrue and injurious imputation is made excuses everything but actual malice. "In such cases," said Parke, B.,(*g*) "the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence, depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or inquiry, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." The same learned judge elsewhere(*h*) observes: "The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made." To the same effect Lord Campbell:(*i*) "The rule is, that if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice: if he gives no such evidence, it is the office of the judge to say that there is no question for the jury, and to direct a nonsuit or a verdict for the defendant."

(*a*) 9 B. & S. 768; L. Rep. 5 Q. B. 94; 21 L. T. N. S. 584; 39 L. J. 53, Q. B. (*b*) 1 F. & F. 419. (*c*) 4 F. & F. 763.
(*d*) L. R. 2 C. P. D. 445.
(*e*) See Borthwick's Law of Libel, chap. 5, sect. 1.
(*f*) *Ibid.* p. 217.
(*g*) *Toogood* v. *Spyring* (1 Cr. M. & R. 193). See also *Somerville* v. *Hawkins* (10 C. B. 583); *Croft* v. *Stevens* (7 H. & N. 570); *Whiteley* v. *Adams* (15 C. B. N. S. 419); *Coules* v. *Potts* (34 L. J. 247, Q. B.).
(*h*) *Wright* v. *Woodgate* (2 Cr. M. & R. 577).
(*i*) *Taylor* v. *Hawkins* (16 Q. B. 321).

Why proof of actual malice destroys the privilege is well explained by Brett, L.J., in *Clark* v. *Molyneux*:(*a*) "If the occasion is privileged, it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged."

To what cases privilege extends.

This qualified privilege extends to all cases where the publication of the injurious statement is made by a person fairly in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.(*b*)

Whether actual malice is present or absent is a question of fact for the jury to determine.(*c*) Whether the occasion makes the publication privileged, is a question of law for the judge or Court to determine.(*d*)

General rule as to what are privileged communications.

It was laid down by the Court of Queen's Bench, in the case of *Harrison* v. *Bush*, (*e*) that a communication made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation. And the Court was of opinion, though it was not necessary to decide so expressly in that case, that the same privilege would be accorded to a communication made to a person who had not *in fact* such a corresponding interest or duty as referred to, but who might reasonably be, and is, supposed by the party making the communication to have such interest or duty.(*f*)

Scotch law.

The cases in which the law of Scotland accords this

(*a*) L. R. 3 Q. B. D. 246.

(*b*) *Per* Parke, B., *Toogood* v. *Spyring* (1 Cr. M. & R. 193); *Davies* v. *Snead* (L. R. 5 Q. B. 608). See *Hannan* v. *Falk* (L. R. 4 App. Cas. 247), and *Waller* v. *Loch* (L. R. 7 Q. B. D. 619).

(*c*) *Taylor* v. *Hawkins* (16 Q. B. 321); *Cooke* v. *Wildes* (5 El. & Bl. 335); *Dickson* v. *Earl of Wilton* (1 F. & F. 426); *Hancock* v. *Case* (2 F. & F. 711).

(*d*) *Ibid.* *Whiteley* v. *Adams* (15 C. B. N. S. 392; 33 L. J. 89, C. P.).

(*e*) 5 El. & Bl. 344. See also *Davies* v. *Snead* (L. R. 5 Q. B. 608).

(*f*) See also *Fairman* v. *Ives* (5 B. & Ald. 642). *King* v. *Bayley*. cited by Bayley, J. (5 B. & Ald. 647); *Searll* v. *Dixon* (4 F. & F. 250).

qualified privilege are those of counsel, litigants, masters giving characters of servants, literary criticisms, and communications to persons having an interest in the matters made known.

Examples of privileged communications.

Some examples of the general rule, which do not, however, properly fall within the scope of this work, may here be given. The following have been held communications privileged by the occasion of their publication: a letter written by a person to his mother-in-law, giving her advice on the subject of her proposed marriage, and containing imputations upon the person whom she was about to marry;(*a*) a letter written by a tenant who had been asked by his landlord to tell him if he saw or heard anything respecting game, informing the landlord that his gamekeeper sold game;(*b*) information given to a party asking for it, as to the respectability of a tradesman with whom that party is about to deal;(*c*) a letter written confidentially to persons employing a particular solicitor, containing charges as to his professional conduct in the management of certain matters intrusted to him by the writer, and in which the writer was interested;(*d*) a letter written *bonâ fide* and confidentially to the employer of a steward, informing him of certain supposed malpractices on the part of the steward;(*e*) a character given by a master or mistress of a servant,(*f*) or a retractation of a character formerly given;(*g*) a letter written by a subscriber to a charitable institution to the committee, reflecting on the conduct of the secretary;(*h*) a communication made by one director of a company to his co-directors respecting the conduct of one of its officers;(*i*) a communication addressed by a ratepayer to a parish meeting reflecting on the parish constable;(*j*) a letter addressed to

(*a*) *Todd* v. *Hawkins* (2 M. & Rob. 20; 8 C. & P. 88).

(*b*) *Cockayne* v. *Hodgkisson* (5 C. & P. 543).

(*c*) *Storey* v. *Challands* (8 C. & P. 234). See *Bennett* v. *Deacon* (2 C. B. 628); *King* v. *Watts* (8 C. & P. 614).

(*d*) *M'Dougall* v. *Claridge* (1 Camp. 267). See also *Dunman* v. *Bigg* (3 Camp. 260).

(*e*) *Cleaver* v. *Seamade*, referred to by Lord Ellenborough, 1 Camp. 267.

(*f*) Burr. 2425; *Edmondson* v. *Stephenson* (Bull. N. P. 8); *Child* v. *Affleck* (9 B. & C. 403); *Pattison* v. *Jones* (8 B. & C. 578); *Fountain* v. *Boodle* (3 Q. B. 11); *Dixon* v. *Parsons* (1 F. & F. 24).

(*g*) *Gardner* v. *Slade* (13 Q. B. 796; 18 L. J. 334, Q. B.).

(*h*) *Maitland* v. *Bramwell* (2 F. & F. 623). See *Hartwell* v. *Vesey* (3 L. T. N. S. 275).

(*i*) *Harris* v. *Thompson* (13 C. B. 333). See *Brooks* v. *Blanshard* (1 Cr. & M. 779; 3 Tyrw. 844).

(*j*) *Spencer* v. *Amerton* (1 M. & Rob. 470). See *George* v. *Goddard* (2 F. & F. 689).

a bishop informing him of a report affecting the character of an incumbent in his diocese;(*a*) a bishop's charge replying to animadversions upon his own conduct;(*b*) *bonâ fide* applications to the proper authorities for redress for wrongs suffered;(*c*) letters written by the defendant in answer to a letter from a friend of the plaintiff who had been in correspondence with the defendant on the subject of certain charges against the plaintiff, with the sanction and concurrence of the latter;(*d*) a memorial from an elector and inhabitant of a borough complaining of misconduct on the part of a magistrate of the county in which the borough was situated, although addressed not to the Lord Chancellor, but to the Home Secretary.(*e*)

Advertisement for information, &c.

If a person advertises in a newspaper *bonâ fide*, in order to find out the truth of something in which he is really interested, the privilege furnished by the occasion would seem to afford a defence to an action for any defamatory imputation contained in the advertisement.

Where an action of libel was brought for an advertisement, published in a newspaper, offering a reward to any person who could give notice to the defendant of the marriage of James Delany previous to a certain date, there being an innuendo that the defendant meant thereby to insinuate that J. D., the plaintiff, had been and was married before the time mentioned in the advertisement, and had another wife then living; and the defence relied upon was that the advertisement had been inserted by the authority of the plaintiff's wife, for the purpose of making a discovery which it was important for her to know, namely, whether the plaintiff had another wife then living, Lord Ellenborough, C.J., told the jury that, though that which is spoken or written may be injurious to the character of the party, yet if done *bonâ fide*, with a view of investigating a fact in which the party making it was interested, it was *not* libellous; and, therefore, if the investigation had been set on foot and the advertisement published by the plaintiff's wife, either from

(*a*) *James* v. *Boston* (2 C. & Kir. 4).

(*b*) *Laughton* v. *Bishop of Sodor and Man* (4 P. C. 495).

(*c*) *Johnson* v. *Evans* (3 Esp. 32); *Woodward* v. *Lander* (6 C. & P. 548).

(*d*) *Hoopwood* v. *Thorn* (8 C. B. 293; 19 L. J. 94, C. P.). If a person, writing to another, to whom a communication would be privileged, by mistake puts the letter into an envelope addressed to a third person who receives and reads it, the privilege is not lost (*Per* Williams and Mathew, JJ., *Tompson* v. *Dashwood*, L. R. 11 Q. B. D. 43).

(*e*) *Harrison* v. *Bush* (5 E. & B. 344; 25 L. J. 28, Q. B.).

anxiety to know whether she was legally the wife of the plaintiff or whether he had another wife living when he married her, it was justifiable, though done through the medium of imputing bigamy to the plaintiff.(*a*) The soundness of this law, however, was doubted by Lord Denman, C.J., in a subsequent case.(*b*) "I have great doubt," said that learned judge, "whether the interest which the wife had in the inquiry could justify the offering a reward in a newspaper."

Publication to vindicate character of writer.

A publication which has for its *bonâ fide* object the vindication of the character of the writer against charges brought against him is privileged.

Thus, where the plaintiff, a policy-holder in an insurance company, published a pamphlet accusing the directors of fraud, Cockburn, C.J., held privileged, if the jury should be of opinion that it was published without malice,(*c*) a pamphlet published in reply by the directors, declaring the charges contained in the plaintiff's pamphlet to be false and calumnious, and also asserting that in a suit he had instituted he had sworn, in support of those charges, in opposition to his own handwriting. On the question of privilege his Lordship thus directed the jury: "The law is that a publication is privileged which is called for either by the duty or the fair and honest interest of the party who has made it. And I am of opinion that the answer here was privileged, and that the publication was privileged. If you are of opinion that it was *bonâ fide* for the purpose of the defence of the company, and in order to prevent these charges from operating to their prejudice, and with a view to vindicate the character of the directors, and not with a view to injure or lower the character of the plaintiff—if you are of that opinion and think that the publication did not go beyond the occasion, then you ought to find for the defendants on the general issue."(*d*)

Publications not privileged.

The publication in a newspaper, by a voter at an election, of statements reflecting on the character of one of the candidates, is not privileged.(*e*) "However large the privilege of electors may be," said Lord Denman, C.J.,(*f*) "it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens

(*a*) *Delany* v. *Jones* (4 Esp. 191).
(*b*) *Lay* v. *Lawson* (4 A. & E. 795).
(*c*) *Kœnig* v. *Ritchie* (3 F. & F. 413).
(*d*) *Ibid.* See also *Ree* v. *Veley* (4 F. & F. 1117).
(*e*) *Duncombe* v. *Daniell* (8 C. & P. 222). (*f*) *Ibid.* 229.

to stand in the situation of a candidate." The same would apply to defamation of his agent.(*a*)

Neither is a letter written to the Secretary of State by an inhabitant of a borough, imputing to a person holding the offices of town-clerk and clerk to the justices of the borough, corruption in the latter office;(*b*) nor a letter written to Lloyd's by an officer in the navy, imputing to a captain of a transport ship misconduct and incapacity in the management of it;(*c*) nor a letter written by an opposing creditor to a judge of the Bankruptcy Court, previous to the hearing of an insolvent's case;(*d*) nor a letter written to a newspaper by members of a town council, charging certain contractors for the erection of a borough gaol with misconduct in the performance of their contract;(*e*) nor an advertisement in a newspaper, addressed to the creditors of B. and Co., who had been declared bankrupts, and containing imputations on B. of fraudulent conduct, published by the solicitor who had acted under the commission of bankruptcy.(*f*)

Exaggerated language.

In cases where the occasion would render privileged a communication otherwise defamatory, the privilege may be lost by the use of language so exaggerated as to be clearly in excess of the occasion.(*g*)

Newspaper reports.

The character of the privilege accorded to fair and *bond fide* newspaper reports of judicial, parliamentary, and other proceedings, will be treated of in a subsequent chapter.(*h*)

Comments upon matters of public interest.

The nature of the protection afforded to the writers of fair comments on matters of public interest, will be considered in the next chapter.

(*a*) *Dickeson* v. *Villiard* (L. R. 9 Ex. 79).
(*b*) *Blagg* v. *Sturt* (10 Q. B. 899; 16 L. J. 39, Q. B.).
(*c*) *Harwood* v. *Green* (3 C. & P. 141).
(*d*) *Gould* v. *Hulme* (3 C. & P. 625).
(*e*) *Simpson* v. *Downs* (16 L. T. N. S. 391). But see *Harle* v. *Catherall* (14 L. T. N. S. 801).
(*f*) *Brown* v. *Croome* (2 Stark. N. P. 297).
(*g*) *Wright* v. *Woodgate* (2 Cro. M. & R. 573); *Cooke* v. *Wildes* (5 E. & B. 335): *per* Erle, J., *Fryer* v. *Kinnersley* (15 C. B. N. S. 422; 33 L. J. 96, C. P.); *Toogood* v. *Spyring* (1 Cro. M. & R. 194).
(*h*) See chapter ix., *post*.

CHAPTER VIII.

COMMENTS ON MATTERS OF PUBLIC INTEREST

Newspaper criticism on public men, and matters of public interest.

The vast benefits which accrue to the community at large from the close and searching supervision exercised by the newspaper press over all matters of public or general interest, and its criticisms on the conduct of men occupying prominent positions, might seem to justify, in its case, some relaxation of the strict rules which it has been found necessary to apply in other cases, for the purpose of preserving the reputation of individuals from defamatory attacks. It might be thought that the duty which the public expects from a writer for the press, of watching and making generally known the acts of all public servants, and censuring them when deserving of censure, of commenting freely on all matters which touch the public welfare, of fearlessly exposing whatever is corrupt, oppressive, or otherwise deserving of reprobation, and of acting, in general, as a kind of censor of the morals of the time, would have given him immunity in all cases where he writes honestly and *bonâ fide* in the discharge of his public duty: and that actual malice alone should render an action against him sustainable. The newspaper writer, however, stands in this respect in no different position from any other member of the community, save so far as a jury may be inclined to deal more leniently with defamatory matter contained in his publications. The law with regard to him is the same as in the case of other men; he is no way privileged, in the strict sense of the word privileged.(*a*)

A much greater latitude, however, is allowed to criticisms on persons occupying a public capacity than to criticisms on private individuals; and publications which would be clearly libellous if levelled against the latter may be innocent, and even commendable, when directed against the former. "That criticism," says Alderson, B.,(*b*) "may reasonably be applied to a public man in a public capacity which might not be applied to a private individual. The same thing might be no libel on one which might be a very grievous and injurious libel on another."

(*a*) The word "privileged" is, however, in a looser sense, frequently applied to such publications, especially in the reports of cases decided at Nisi Prius.

(*b*) *Parmiter* v. *Coupland* (6 M. & W. 108).

Every person has a right to discuss all matters of public interest, and to comment publicly and even hostilely upon, or to ridicule the acts of, public men; but there is a limit beyond which neither the newspaper writer nor anybody else may go: and that limit appears, from the cases decided on the subject, to be this:—The writer must not make the occasion one for the gratification of personal malice and vindictiveness: in commenting on public matters he must not make imputations of base, sordid, or corrupt motives, or dishonest conduct: though he is not called upon to justify to the very letter everything that he writes, his erroneous inferences must not be reckless: he must not, in short, go beyond what a jury shall consider the limits of fair and honest, though it may be hostile or severe, or even, in some respects, inaccurate criticisms. If he does, even though he may *bonâ fide* believe in the truth of his imputations, the publication is a libel.

"There is a difference," says Parke, B.,(*a*) "between publications relating to public and private individuals. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander; but any imputation of wicked or corrupt motives is unquestionably libellous."

"The right," says Cockburn, C.J.,(*b*) "of public discussion on matters of public interest is important, and it requires for its beneficial exercise that it should be exercised fully and freely, without being subject to too harsh or strict a limitation. And, so long as it is exercised fairly and honestly, it is protected or excused, even although it may incidentally involve the publication of defamatory matter. But at the same time the comments must be fair, that is, conceived in a fair spirit—in the spirit of fair discussion—and not in a spirit of reckless or inconsiderate imputation. That which is recklessly defamatory can hardly be deemed fair."

Whether honest belief justifies defamatory publication.

An honest belief in the justice of the comments made is not sufficient of itself to justify a defamatory publication: for such belief might originate in the blindness of party zeal, or in personal or political aversion. A person taking upon himself publicly to criticise and to condemn the conduct or motives of another, must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and

(*a*) *Parmiter* v. *Coupland* (6 M. & W. 108).
(*b*) *Hedley* v. *Barlow* (4 F. & F. 230.

moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of censure.(*a*)

In a case where a newspaper article imputed to the editor and part proprietor of another newspaper that in putting forth to the public the sacred cause of the dissemination of religious truth among the heathen he was acting as an impostor, and that his purpose was to put money into his own pocket by obtaining contributions to his newspaper: and also that he had not only published in his newspaper the name of a fictitious person as the authority for his statements, but also, with a view to induce people to contribute, published a fictitious subscription list, the article was held to be libellous, although the jury found that the writer believed the imputations contained in it to be well founded.(*b*)

"It is said, on behalf of the defendant," said Cockburn, C.J., "that as the plaintiff addressed himself to the public in a matter, not only of public, but of universal, interest, his conduct in that matter was open to public criticism; and I entirely concur in that proposition. If the proposed scheme were defective, or utterly disproportionate to the result arrived at, it might be assailed with hostile criticism. But then a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation. . . . . It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men: and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation. I think the fair position

(*a*) *Per* Cockburn, C.J., *Wason* v. *Walter* (L. Rep. 4 Q. B. 96; 19 L. T. N. S. 409; 38 L. J. 34, Q. B.).

(*b*) *Campbell* v. *Spottiswoode* (3 B. & S. 769; 8 L. T. N. S. 201; 32 L. J. 185, Q. B.).

in which the law may be settled is this: That where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives, which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest." "I should be unwilling," said Mellor, J., "to limit the right of a writer in a newspaper, or any other individual, to canvass any scheme, even though it be a scheme of public benevolence. But, giving full latitude to fair comment, so soon as a writer imputes that the person proposing the scheme is doing it from a base and sordid motive, and is putting forth a list of fictitious subscribers, in order to delude others to subscribe, it cannot be said to be within the limits of fair criticism."

The rule is much more loosely laid down in the directions given to juries at Nisi Prius by more than one judge, making the test of legal liability the honesty and *bona fides* of the writer, even in cases where his criticisms and inferences are erroneous. Thus Erle, C.J.: "The rule in these cases is that the comments are justified, provided the defendant *honestly* believes that they were fair and just; with that limitation the law allows the publication."(*a*) In another case,(*b*) Martin, B., told the jury that there was no limit except malice to comments upon a man who claimed a public office. And in a case(*c*) where the alleged libel consisted of a newspaper article commenting in the severest manner upon certain advertisements of a medical practitioner, and representing him as an impostor and scoundrel, Cockburn, C.J., thus directed the jury on the second ground of defence relied on by the defendant—viz., that the publication was justifiable as a fair comment on a matter of public interest:—"Under that head of defence he (the defendant) says that it was a matter of public interest and public concern; that the plaintiff by his advertisements invited people to submit to his system of treatment; and that if he (the defendant) really believed it to be a delusion, then he had a right to maintain that it was so; and that even if, in drawing inferences of imposture and bad inten-

(*a*) *Turnbull* v. *Bird* (2 F. & F. 524). See the language of the same learned judge in *Paris* v. *Levy* (2 F. & F. 74, 75).
(*b*) *Horle* v. *Cathcrall* (14 L. T. N. S. 801).
(*c*) *Hunter* v. *Sharp* (4 F. & F. 1005).

tion, he fell into error, yet, if he wrote honestly and with the intention of exercising his vocation as a public writer fairly and with reasonable moderation and judgment, he is entitled to the verdict. And I entirely agree in that view. Here is a man challenging public criticism by bringing forward what professes to be a new system of treatment, and inviting the public to adopt it as the only means of curing the most destructive disease known among us. In doing this he challenges public criticism; and if a public writer, using a reasonable degree of temper and moderation, as behoves any one who makes imputations upon others—if a public writer, thus discussing the subject in the exercise of his vocation, falls into error as to the facts or the inferences, and goes beyond the limits of strict truth, he is, nevertheless, privileged. The occasion is a privileged(*a*) one, and if the privilege is exercised honestly, faithfully, and with reasonable regard to what truth and justice require, then, though he may exceed the limits of what he can legally prove to be the truth, he is protected from liability. It is not, therefore, necessary that the justification should appear to you to be made out, if you think that the defendant or the writer was in the reasonable and honest exercise of his vocation as a public writer, even although he was not fully warranted in drawing the inferences he did as to the conduct of the plaintiff, and although it may be that he was not entirely justified by the absolute truth." The authority of these *dicta*, so far as they place the test of freedom from liability in the mere *bona fides* and honest belief of the writer, must, however, be considered as outweighed by the deliberate decision of the Court of Queen's Bench, in *Campbell* v. *Spottiswoode*,(*b*) that the belief, however honest, of the writer, will not justify defamatory imputations which are erroneous in point of fact.

Privilege.

"The word 'privilege,'" said Blackburn, J., in the case last referred to,(*c*) "is often used loosely and in a popular sense when applied to matters which are not, properly speaking, privileged. But for the present purpose, the meaning of the word is that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else. For instance, a master giving a character of a servant stands in a

(*a*) See further as to privilege, the observations of the same learned judge in *Davies* v. *Snead* (L. R. 5 Q. B. 608, 611), and the remarks of Jessel, M.R., Brett and Cotton, L.JJ., in *Waller* v. *Loch* (L. R. 7 Q. B. D. 621, 622).

(*b*) 3 B. & S. 769; 8 L. T. N. S. 201; 32 L. J. 185, Q. B.

(*c*) 3 B. & S. 780.

privileged relation; and the cases of a memorial to the Lord Chancellor or the Home Secretary on the conduct of a justice of the peace,(*a*) and of a statement to a public functionary reflecting upon some public officer,(*b*) rank themselves under that class. In *Maitland* v. *Bramwell*(*c*) the *bona fides* of the defendant was left to the jury, because she was privileged by her position to say what she believed to be true. So in *Eastwood* v. *Holmes*(*d*) when properly understood, Willes, J., must have considered that there was a privilege of this kind when he nonsuited the plaintiff in an action against the publisher of a report of the proceedings of *The British Archæological Association*, in which it was stated that some supposed antiquities offered for sale by the plaintiff were of recent fabrication. In these cases no action lies unless there is proof of express malice. If it could be shown that the editor or publisher of a newspaper stands in a privileged position, it would be necessary to prove actual malice. But no authority has been cited for that proposition; and I take it to be certain that *he has only the general right which belongs to the public to comment upon public matters;* for example, the acts of a Minister of State; or, according to modern authorities somewhat extending the doctrine, where a person has done or published anything which may fairly be said to invite comment, as in the case of a handbill or advertisement.(*e*) In such cases every one has a right to make fair and proper comment; and so long as it is within that limit it is no libel." "It is necessary," said Crompton, J., in the same case, "to confine privilege, as the law has always confined it, to cases of real necessity or duty, as that of a master giving a servant a character, or of a person who has been robbed charging another with robbing him."

The case of *Campbell* v. *Spottiswoode* must be regarded as an express and distinct authority for the proposition that there is no *privilege*, in the strict sense of that term, in the case of comments by public writers on matters of public interest, and on persons occupying public positions, though the expression "privileged publication" has been frequently applied by eminent judges to such writings. For *privilege*, where it exists, excuses, in the absence of actual malice, every statement, however false in itself, or injurious to the person respecting whom it is made. Thus, a letter written by a master giving the character of a servant, is privileged,

(*a*) *Harrison* v. *Bush* (5 E. & B. 344).
(*b*) *Beatson* v. *Skene* (5 H. & N. 838).
(*c*) 2 F. & F. 623.
(*d*) 1 F. & F. 347.
(*e*) *Paris* v. *Levy* (9 C. B. N. S. 342; 30 L. J. 11, C. P.).

though it may contain a specific charge of fraud against the servant which is utterly false. To enable the servant to maintain an action of libel in respect of it, he must prove the existence of actual malice on the part of the master;(a) whereas the case of *Campbell* v. *Spottiswoode* has distinctly decided that neither the absence of actual malice nor the *bonâ fide* belief of the public writer in the truth of the imputations which he makes, will justify him in making such imputations as there complained of, if they are not true, in point of fact. In this strict sense, then, of the term *privileged*, the public writer, when dealing with matters and characters of public interest, is not privileged. He is, however, treated with more indulgence than a private individual who publishes defamatory matter of another, in that slight errors will in his case be excused, where he writes honestly in the interest of the public and not with the malicious design of doing a personal injury.

Result of the cases.

Perhaps the result of the various *dicta* on this subject, taken along with the decision of the Court of Queen's Bench in *Campbell* v. *Spottiswoode*, might be expressed in the language of Pollock, C.B., in *Gathercole* v. *Miall*,(b)—that all *bonâ fide* and honest remarks upon persons occupying public positions may be freely made "without being questioned *too nicely* for either truth or justice."(c)

Or perhaps the rule might be laid down thus: that *bonâ fide* comments *not in every respect* justifiable, and honest inferences *not altogether* correct as to conduct or motives, may be excused, provided the matter be one of public interest, that the circumstances of the case render comments and inferences of such a character not unnatural, and that there is no considerable margin of unsubstantiated defamatory imputation;(d) whilst, on the other hand, as expressly decided in *Campbell* v. *Spottiswoode*,(e) unfounded imputations of base

(a) *Weatherston* v. *Hawkins* (1 T. R. 110); *Edmondson* v. *Stephenson* (Bull. N. P. 8; and see *Rex* v. *Cator* (4 Esp. 117); *Dunman* v. *Bigg* (1 Camp. 269).

(b) 15 M. & W. 332.

(c) His lordship calls comment upon matters of a public nature "*licentious* comment, as opposed to a comment that must be based in truth."

(d) In *Morrison* v. *Belcher* (3 F. & F. 619), Cockburn, C.J., told the jury that "it was not because a public writer might not be able to prove to the letter all he had stated that therefore he was liable; but the jury must be of opinion that his observations and inferences were fair and legitimate under the circumstances, or that they were *not so unfair as to be reckless, and thus in law, malicious.*"

(e) Compare the language of Cockburn, C.J., at the end of the judgment in *Wason* v. *Walter* (L. Rep. 4 Q. B. 73; 19 L. T. N. S. 409).

and sordid motives are unjustifiable, however honestly their truth may be believed in by the writer who publishes them.

Matters of public interest.

Where a petition was presented to the House of Lords charging a high judicial officer with having been guilty of dishonourable conduct many years before, and praying for an inquiry, and that he should be removed from his high office if the charge were proved true, and a debate took place on the subject, when the charge was utterly refuted, it was held by the Court of Queen's Bench that this was a matter of great public concern, on which a newspaper had a right to comment, and that its comments, though reflecting strongly on the person who presented the petition, were not actionable if they were honest and fair, and made with a reasonable degree of judgment and moderation.(*a*)

College or hospital.

The working of a public institution, such as a college or hospital, is a matter of public interest, which may freely be discussed by and through the medium of the press.(*b*)

An inspector sent by the Charity Commissioners to institute an inquiry into the working of a medical college at Birmingham, made a report to the commissioners of the results of his inquiry (which was an open and public one), in which was set forth a letter addressed to the bishop of the diocese, and complaining of "the arbitrary, tyrannical, and overbearing conduct" of the plaintiff, a professor in the college, as well as of "his complete inefficiency in every office" which he held in the college. The college still continuing in an unsatisfactory state, the defendant, about three years after the report was made, published the whole of it in a newspaper, of which he was the proprietor, and the plaintiff brought an action for the libel contained in the letter. The publication of the report was introduced by an article in the newspaper, stating that appeals on behalf of the college had been frequently made in its columns, and that the institution was known to be in an unsatisfactory state. "We therefore," it proceeded, "feel it our duty to assist the council in the arduous labours they have undertaken, by laying before the public the materials necessary to the foundation of a sound judgment on the condition and prospects of the college. As we cannot do this well more completely or impartially than by publishing the report, we have obtained an official copy of it, and publish it in portions," &c. It was contended, on behalf of the plaintiff, that the publication of the report

(*a*) *Wason* v. *Walter* (L. Rep. 4 Q. B. 73; 19 L. T. N. S. 409).
(*b*) *Fox* v. *Feeney* (4 F. & F. 13).

nearly three years after it was made could not be for public information; that the matter had become stale, and that the publication of the report revived it wantonly; but Cockburn, C.J., left it to the jury to say whether (1) the matter was one which it interested the public to know, and (2) whether the defendant published it with the honest desire to afford the public information, and not with a sinister motive to injure the plaintiff; and directed them, if they answered both these questions in the affirmative, to find a verdict for the defendant.

As to the former question, his Lordship said, "There can be no doubt whatever that this institution, with reference to which these questions have arisen, is one of public concern. Although it may have been founded, in the first place, by private contributions, it has also been founded for public purposes; so far as the hospital is concerned, with a view to the assistance of the poor inhabitants of Birmingham who may stand in need of medical or surgical aid; so far as the college is concerned, for the instruction of the students in the important branches of knowledge there taught. It appeals to the public, and holds out expectations with reference to the students whom their parents or guardians send there. It is, therefore, a public concern to the inhabitants of Birmingham and its district. That being so, the public have an interest in its government, its management, its discipline, and, what is essential, the management of its financial concerns. What is said with reference to its discipline, to its means of imparting instruction, to its means of fulfilling the objects for which it exists, have all of them great interest in the eyes of the people of the great town in which it exists. Has it been well conducted or ill conducted? Has it been prudently and well managed, or has it been suffered to fall into a state of decay and comparative uselessness in consequence of defective management? You have before you abundant materials for forming your judgment upon this question. You find from the report of the commissioner sent down to inquire and report—the accuracy and fidelity of which Mr. Cox (the plaintiff) himself has been constrained to admit—that the finances of the college have become embarrassed, and its authorities, to whom its management is committed, careless. . . . . I take it that at that time the report made by the commissioner, and which seems to have embodied the result, at all events, of the whole inquiry and proceedings which had been carried on,—I take it that if that report had been published at the time, no man could say that

it was beyond the province of a public journalist, whose business—ay, and whose duty—it is to bring before the public information which may be useful to them. It would be his duty to publish the report from beginning to end for the information of the general public and inhabitants of Birmingham, who are so deeply interested in this hospital and college, which are two of the principal institutions of the town." His Lordship then, referring to the argument founded on the lapse of time, said to the jury: "The system of bad management which appears to have been the origin of the whole, seems to be perpetuated; and in addition, when we find that the warden and the professor and tutor in the theological department have filed a bill and taken the whole body into Chancery, does it seem to you that the people of Birmingham ought to have before them the whole history of the system whereby the present condition of the hospital has been brought about? This is a matter for you. If you can see a sufficient reason why a public journalist should, in the honest discharge of his duty, feel it incumbent on him to bring before the public this information, it will be for you to find for the defendant. . . . . If you can see no public duty, no matter of public interest or moment which can have properly influenced the defendant in publishing this, you ought to say so by your verdict. Or if you can see your way to the conclusion that he has been acting under the influence of some sinister motive, with a desire of doing personal injury to the plaintiff, your verdict ought to be for the plaintiff. But if you see nothing more than what a journalist in the discharge of his duty might have done, even with a view to what took place five years ago, then look only at the actuating motive. If the defendant had singled out the letter and published it alone, I should have thought there was good ground for the complaint. If he had given garbled passages, then also I should have thought so; but he professed the intention of bringing the whole report before the public for the purpose of enabling them to see what had been the radical and inherent defects in the constitution and management of this institution, and he did so."(a)

Parochial charity.

It has been held by the Court of Exchequer that the conduct and management, by the clergyman of a parish, of a clothing charity in the parish, from the benefits of which Dissenters are by his sanction excluded, is not a matter of public interest, so as to justify, under the plea of not guilty,

(a) *Cox* v. *Feeney* (4 F. & F. 20, 21).

the publication in a newspaper of defamatory matter respecting the clergyman in relation to the charity.(*a*)

"I think," said Pollock, C.B., "that a parochial charity, with the vicar at the head of it, among other persons in the parish, not for parochial purposes, but for some exclusive purpose, with reference either to religious opinion or to anything else, is a private matter, and is not open to what may be called *licentious* comment, as opposed to a comment that must be based in truth. It really seems to me that licentious comments cannot be applied to a case of this sort, without extending such comments to almost every transaction in society." And Alderson, B., said: "It is no part of his peculiar ministerial duty to have a clothing club, though it is a very proper thing for him or any other charitable man to do. I am at a loss to see how his case differs from that of any other individual who chooses to institute a private charity within particular limits. If so, then the criticism and observations that are to be made upon him are the criticism and observations which are to be made upon any other private individual, and are to be judged by the same rules and subject to the same limits." Rolfe, B., added: "It seems to me preposterous to say that the act of a clergyman in sanctioning some individuals in his parish, in giving relief to some, and excluding a large class of others who are not to partake of it, can be considered in the light of a public act. The act does not become a public act, because half a dozen or a dozen join in it. It is essentially private; they may manage it as they please."

Unpublished sermons.

There was a difference of opinion amongst the learned judges who decided the last case, on the point (which it was not necessary to decide) whether sermons preached in a church, but not published, are the lawful subject of public comment; Alderson and Rolfe, B.B., leaning to the opinion that they are; Pollock, C.B., and Parke, B., inclining the other way.

Judicial sentences and decisions.

If a sentence is pronounced upon any person by a competent authority, a public writer may comment upon it, and assume it to be correct, at least if the matter be one of public interest and public observation.

"The person affected," said Cockburn, C.J., in a case of this sort,(*b*) "might have the sentence revoked, or he might have the verdict set aside, but the decision pronounced by

(*a*) *Gathercole* v. *Miall* (15 M. & W. 319).
(*b*) *Seymour* v. *Butterworth* (3 F. & F. 385).

competent authority must be taken to be the fact until the contrary appeared; and a public writer, who commented upon what was public property, ought not to be held responsible in an action, and bound to take upon himself the burthen of proof as to the whole of the matters upon which the decision rested, involving, as it probably would, an inquiry of great magnitude and great expense;" the question was not whether the sentence was properly pronounced, but whether the writer had gone beyond the limits of fair comment.

"The administration of justice," said the same learned judge in another case,(*a*) "is matter of universal interest to the whole public. The direction of the judge, the verdict of the jury, the decree of a Court of Equity, may be all made subjects of free comment. It is the interest of all of us that it should be so. But, in commenting on such matters, a public writer as much as a private writer is bound to attend to the truth, and to put forward the truth honestly and in good faith, and to the best of his knowledge and ability. It is not to be expected that in discharging this duty of a public journalist, he will always be infallible. His judgment may be biassed one way or the other, without the slightest reflection upon his good faith; and, therefore, if his comments are fair, no one has a right to complain. But it is for the jury to say whether a given comment upon proceedings of a court of justice is a fair comment upon them, or the result of them, or not. . . . On the one hand, let it not be supposed that the law imposes any undue restraint upon the freest and fullest comments upon all that passes in public courts of justice; for, that the administration of justice should be made a subject for the exercise of public discussion is a matter of the most essential importance. But, on the other hand, it behoves those who pass judgment, and call upon the public to pass judgment, on those who are suitors to or witnesses in courts of justice, not to give reckless vent to harsh and uncharitable views of the conduct of others; but to remember that they are bound to exercise a fair and honest and an impartial judgment upon those whom they hold up to public obloquy."(*b*)

On this ground, the hearing of a case upon a charge of felony or a fair report of it in a newspaper is a proper subject for comment in the press; and a public writer would not be liable to an action for discussing the conduct of the magis-

(*a*) *Woodgate* v. *Ridout* (4 F. & F. 216). (*b*) *Ibid.* 223.

trates in dismissing the charge without fully hearing the evidence, and even in commenting upon the evidence given, in support of the view that the charge ought not to have been dismissed. If, however, the writer goes further, and not only argues upon the effect of the evidence given, but speaks of "evidence which might have been adduced," and makes statements of matters of fact not in evidence, and tending to show that the accused was guilty of the felony, the publication is a libel.(*a*)

Evidence of witnesses.

Comments may be made in the press on the evidence given by a particular witness in any inquiry on a matter of public interest, even, it seems, to the extent of imputing that the evidence is unfounded, incautious, or careless; but an unfounded imputation that the evidence is "maliciously" or "recklessly" false would be libellous.(*b*)

Management of church.

A correspondence between a churchwarden and the incumbent of a parish on the subject of an alleged desecration of the church, by allowing books to be sold in it during service and turning the vestry room into a cooking apartment, is a matter of public interest, and may be commented upon in the press, provided the language made use of be not stronger than a jury will consider justified by the occasion.(*c*) "The maintenance of decency and propriety in conducting public worship, and of the sanctity of the sacred edifice and all connected with it," said Cockburn, C.J.,(*d*) "is surely a matter of the greatest public concern. The very use of the term 'public worship' shows this."

Advertised new medical cure.

So, it has been held, is the publication in a newspaper, by a medical practitioner, of an advertisement of a new mode of treating and curing consumption.(*e*) The alleged libel in this case was contained in a leading article, and represented the advertiser as a quack and impostor, and also—by reason of his describing himself as an M.D., on account of a diploma obtained in America—as like scoundrels who pass bad coin. The libel having been justified on the ground of its being true in substance and effect, the jury were told by Cockburn, C.J., "that even if the plea of justification were not made out, the defendant would still be entitled to their verdict if he had written honestly and with the intention of exercising his vocation as a public writer fairly, and with reasonable moderation and judgment."(*f*)

(*a*) *Hibbins* v. *Lee* (4 F. & F. 243).
(*b*) *Hedley* v. *Barlow* (4 F. & F. 224).
(*c*) *Kelly* v. *Tinling* (L. Rep. 1 Q. B. 699; 13 L. T. N. S. 255; 35 L. J. 231, Q. B.).
(*d*) *Ibid.*
(*e*) *Hunter* v. *Sharpe* (4 F. & F. 983).
(*f*) 4 F. & F. 1005.

Election meetings.

The conduct of persons present at a Parliamentary election meeting is a matter of public interest, though the conduct criticized is that of persons who did not attend it in any public capacity.(*a*)

Other matters of public interest.

A minute of the Admiralty prepared for presentation to Parliament, contained a letter addressed to the Admiralty by the Controller of the Navy, reflecting upon "the known antecedants" of the plaintiff in connection with the conversion of wooden ships into ironclads. This minute was by order of the Admiralty printed, by the Queen's Printer, and copies were sold before the meeting of Parliament. In an action against the Queen's Printer, the plaintiff was nonsuited on the ground that it was a fair criticism on a matter of public interest; and the Court (Willes, Byles and Brett, JJ., dissentiente Grove, J.) held that the nonsuit was right.(*b*)

A newspaper paragraph giving an account of some proceedings at the British Archæological Association, and describing certain leaden figures reported to have been found in the Thames, and sold by the plaintiff as antiquities, the sale of which it stigmatized as an attempt at extortion and fraud, was held by Willes, J., to be, in the absence of malice, protected by the privilege of fair discussion on a matter of public interest. His lordship held the action to be not maintainable on another ground also—viz., that the alleged libel reflected only on a class of persons dealing in such objects, and there was nothing to show that the article was inserted with any special reference to the plaintiff.(*c*)

It is, according to Cockburn, C.J.,(*d*) a perfectly fair subject for discussion by the press (in dealing with a particular appointment to a recordership of a barrister who was also a member of Parliament)—whether it is desirable that members of the Bar, being also in the House of Commons, should receive appointments to subordinate offices, as the reward of parliamentary adhesion, from one or other of the political parties of the State; although an unfounded imputation of corruption in the particular case would be libellous. "Not only," says his Lordship, "was this a fair matter for discussion, and within the province of a public writer, but a public writer was fairly entitled, if in his opinion such a

(*a*) *Davis* v. *Duncan* (L. R. 9 C. P. 396).
(*b*) *Henwood* v. *Harrison* (L. R. 7 C. P. 606).
(*c*) *Eastwood* v. *Holmes* (1 F. & F. 347). See, as to the second ground of this ruling, *Le Fanu* v. *Malcolmson* (1 H. L. Cas. 637).
(*d*) *Seymour* v. *Butterworth* (3 F. & F. 376, 377).

course of proceeding was detrimental to the independence of the bar, to the independence of Parliament, and to the independence of the representatives of the people, to animadvert with severity upon the conduct of those who gave and of those who received such patronage. But if he went beyond that, and asserted that a member of Parliament had bargained to sell his vote upon a corrupt contract, or that a member would not have voted or spoken as he did but for a corrupt understanding that he should receive a reward, it became a most serious charge, and one which no man, writing, whether in public or private, should venture to make against another." "At the same time," added his Lordship, "those who filled a public position must not be too thin-skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they knew from the bottom of their hearts were undeserved and unjust; yet they must bear with them and submit to be misunderstood for a time, because all knew that the criticism of the press was the best security for the proper discharge of public duties."

The plaintiff, a clergyman, having in the course of a public controversy with another clergyman, published a document purporting to be a collection of *Opinions of the Press* on a pamphlet written by the plaintiff, and, amongst others, an incorrect extract from an article published in the defendant's newspaper, the defendant published another article in his newspaper stating that the concoctor of the paragraph, purporting to be extracted from it, had been guilty of adding to the article offensive and insulting expressions which it never did and never should have suffered to appear, and of suppressing other passages so as to alter the sense, changing one passage "with a malice which evidently overcame his sense of truth and honesty." On the trial of an action for libel the jury were told by Erle, C.J., that if they were of opinion that the defendant wrote what he did for the purpose of maintaining the truth, sincerely having that object in view without any corrupt motive, and that the language he used, even although it might be exaggerated, was prompted by the desire to maintain the truth, and that the exaggerated language was provoked by similar language on the other side, which might well have accounted for the use of strong expressions, they might find a verdict for the defendant."(*a*)

The committee of a Reform Union published in a newspaper a report stating—"The first exposures of the union

(*a*) *Hibbs* v. *Wilkinson* (1 F. & F. 608).

having failed to produce any improvement in the mode of conducting elections in Berwick, and the persons there who traffic in votes being utterly impervious to public opinion, we have submitted the evidence to the best legal advice we could obtain, and in accordance with that advice have issued writs against the following persons," mentioning the plaintiff amongst others, and adding amongst the comments, "In a few days writs will be issued against another list of offenders." An action of libel having been brought, Hill, J., after stating to the jury that, as a general rule, "it is lawful to discuss in the columns of a public journal matters of public interest, provided it be done *bonâ fide*, without actual malice or the unnecessary making of personal imputations on any individual;" added, that the defendants had no right, in doing so, to make a personal imputation on an individual. "I suggest to you," continued the learned judge, "that any self-constituted body which sets itself up for the reform of the public, whether in religious, in commercial, or in political points of view, must be extremely cautious, in all their publications and writings concerning private individuals, not to reflect on private character. A man stands at fearful odds when he has to contend with a public body. If they publish that which reflects on the private character of individuals, they should be very careful of the contents of what they put forth."(*a*)

Where the writer of a letter published in a newspaper, replying to a question asking who was Zadkiel, gave the name of the plaintiff, who was the proprietor and editor of "Zadkiel's Almanac," and stated that Zadkiel's mischievous propensities were "not solely involved in that foolish publication, 'Zadkiel's Almanac,'" but that he had "gulled" many of the nobility by means of a magic ball of crystal, by which he pretended to tell what was going on in the other world, and that he took money for "these profane acts, and made a good thing of it;" for which letter an action of libel was brought, Cockburn, C.J., directed the jury, that the privilege accorded to public writers would extend to a denunciation of the almanac and the use of the ball as an imposture, but not to an unfounded statement that the plaintiff had made money by a conscious and fraudulent imposture by the use of the magic ball. "If the system," said his Lordship, "was mischievous, and calculated to delude the unwary and the credulous, it was, no doubt, fit subject for indignant denunciation. But it was another

(*a*) *Wilson* v. *Reed and Ors* (2 F. & F. 151, 152).

thing to say that because a man put forward such a publication or such a system, a public writer could go back into his past history and state facts which were not true and were calculated to do him injury. His system might be described as an imposture, but facts must not be invented or misstated as to his past life with a view to destroy the credit of it." His Lordship further told the jury that, in order to find a verdict for the defendant, they must be satisfied "not only that he honestly believed that the plaintiff had taken money for a fraudulent exhibition, but that he had such fair grounds for his imputation that his inference was not so unfair as to be reckless."(*a*)

An action having been brought for an alleged libel contained in the following paragraph, published in a newspaper: "Riot at Preston.—From the *Liverpool Courier*.—It appears that Hunt pointed out Counseller Seager to the mob, and said, 'There is one of the black sheep.' The mob fell upon him and murdered him. In the affray Hunt had his nose cut off. The coroner's inquest have brought in a verdict of wilful murder against Hunt, who is committed to gaol.—Fudge"—the plaintiff contended that the word "fudge" was merely introduced with reference to the future, in order that the defendants might afterwards, if the paragraph were complained of, be able to refer to it, as showing that they intended to discredit the statement. Lord Lyndhurst, C.B., told the jury that the question was, with what motive the publication was made. It was not disputed that if the paragraph, which was copied from another paper, stood without the word "fudge," it would be a libel. If they were of opinion that the object of the paragraph was to vindicate the plaintiff's character from an unfounded charge, the action could not be maintained; but if the word "fudge" were only added for the purpose of making an argument at a future day, then it would not take away the effect of the libel.(*b*)

Criticisms on theatrical and musical performances.

The performances at theatres, and other such places of public entertainment, may be freely criticized by the press, under the same limitations as before stated with regard to other matters of public interest.

In an action for libel, brought by the proprietor of a place of public entertainment (where he sang songs supposed to be written and composed by himself), against the editor and printer of a newspaper, for a paragraph insinuating that the songs were not in fact written by the plaintiff, that on the

(*a*) *Morrison* v. *Belcher* (3 F. & F. 614).
(*b*) *Hunt* v. *Algar* (6 C. & P. 247, 248).

first night of the performance there had been a very thin audience, and that composed of persons admitted by orders, and that they alone had applauded the music of the songs, which was of a very inferior kind; Lord Kenyon stated the law on this subject to be "that the editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment, but it must be done fairly and without malice or view to injure or prejudice the proprietor in the eyes of the public; that if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, that such is a libel, and therefore actionable."(*a*)

Criticism on floral exhibition.

Where a newspaper published of an exhibitor of flowers at a horticultural show, that "the name of G. is to be rendered famous in all sorts of dirty work; the tricks by which he and a few like him used to secure prizes, seem to have been broken in upon by some judges more honest than usual. If G. be the same man who wrote an impudent letter to the Metropolitan Society, he is too worthless to notice; if he be not the same man, it is a pity two such beggarly souls could not be crammed into the same carcase," the Court at once held that such observations did not fall within the limits of fair criticism on G.'s floral exhibition.(*b*)

Reviews.

The published productions of authors are, of course, also matters of public interest, which the press may freely discuss and criticize. The only limit which the law places to the exercise of this right is, that it be not made the occasion for the indulgence of private spite or malice, or a defamatory attack on the personal character of the author whose work is criticized. *Bonâ fide* strictures, however unsparing their character—ridicule, however poignant—may be employed, provided the limits above mentioned be not exceeded; and, as it is difficult, if not impossible, always to separate the author from his work, criticisms and ridicule which affect him personally, but only in his character of author, and are not directed against his private life, are not libellous.

"Liberty of criticism," says Lord Ellenborough,(*c*) "must be allowed, or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel which

(*a*) *Dibdin* v. *Swan* (1 Esp. 28).
(*b*) *Green* v. *Chapman* (4 Bing. N. C. 92).
(*c*) *Tabart* v. *Tipper* (1 Camp. N. P. 351).

has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality."

"Every man," says the same learned judge, in another case,(*a*) "who publishes a book commits himself to the judgment of the public, and anyone may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. . . . . The critic does a great service to the public who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism; and this everyone has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider an injury; because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profits to which he was never entitled." "Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuriâ*. Where is the liberty of the press if an action can be maintained on such principles? . . . . We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule if their compositions be ridiculous; otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on personal character is another thing. Show me an attack on the moral character of the plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule."(*b*) His Lordship added, that if, in the case before him, the party writing the criticism followed the plaintiff into domestic life, for the purposes of slander, that would have been libellous.

In language of like import, Lord Tenterden, C.J., directed a jury, on the trial of an action for an alleged libel published in the *Lancet*, relating to the plaintiff as the editor of another medical journal:(*c*) "Whatever is fair and can

(*a*) *Carr* v. *Hood* (1 Camp. N. P. 358).
(*b*) 1 Camp. N. P. 357.
(*c*) *Macleod* v. *Wakley* (3 C. & P. 313).

be reasonably said of the authors of works, or of themselves as connected with their works, is not actionable, unless it appear that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author; and then it will be a libel. That there is in this publication a great deal of ridicule must be admitted by every one; and I think that there appears also to be some rancour; still, if you think that what is said here was fairly called for by what the plaintiff had done as the editor of another publication, the defendant is entitled to a verdict; but if you think the remarks were not fairly called for, you will find for the plaintiff."

Where the alleged libel was contained in a critique (published in the *Athenæum*) on a novel, describing the work as characterized by vulgarity, profanity, and indelicacy, bad French, bad German, and bad English, and abuse of persons living and dead, Cockburn, C.J., directed the jury thus as to the critique: "That it was severe there could not be a doubt; but the question was whether, severe as it was, it was not warranted by the nature of the work. It was of the last importance to literature, and, through literature, to good taste and good feeling, to morality and to religion, that works published for general perusal should be such as were calculated to improve, and not to demoralize, the public mind; and, therefore, it was of vast importance that criticism, so long as it was fair and reasonable and just, should be allowed the utmost latitude, and that the most unsparing censure of works which were fairly subject to it should not be held libellous. A man who publishes a book challenges criticism; he rejoices in it if it tends to his praise, and if it is likely to increase the circulation of his work; and, therefore, he must submit to it if it is adverse, so long as it is not prompted by malice, or characterized by such reckless disregard of fairness as indicates malice towards the author. You must say whether in this case you think the critique was the fair and genuine result of the judgment of the critic upon the work, or whether it was prompted by reckless disregard of the author's feelings, for the sake of displaying the writer's powers of denunciation. It was all very well for the plaintiff's counsel to contend that literature should be free and unfettered. Be it so. But then, if you give on the one hand the utmost latitude to literary composition, there ought to be at least the same latitude to literary criticism. Those who, in their capacity as literary critics, are, so to speak, prosecutors on behalf of the public, should be allowed to bring to the bar of public opinion those who are guilty of

delinquencies against good taste, against morality, or against religion. The critic who sits in judgment upon the works of others, is, no doubt, bound to be impartial; but, on the other hand, he cannot pretend to be infallible; and, even although you should be of opinion that the work did not wholly deserve the description given of it, still that is not the question. The plaintiff's counsel, in his reply, adroitly endeavoured to show that there were parts of the critique which were not sustained. But the question is whether, as a whole, it was fair, or prompted by motives of another character; and you must say whether, on the whole, you think this was a fair or a malicious piece of criticism."(*a*)

The defendants in the case last referred to, having consented to the withdrawal of a juror, afterwards published an article commenting on the proceedings in the action, and suggesting as a reason for assenting to the withdrawal of a juror the inability of the plaintiff to pay costs if the verdict had been against him. Another action of libel having been brought for the publication of this article, Cockburn, C.J., said to the jury: "It was urged by the plaintiff's counsel, truly enough, that, in criticising a man's work, it is not proper to allude to his private circumstances. But in this instance the object was to explain how the defendants came to consent to waive a verdict, and to show that they had substantially attained the same result; because, if they had got a verdict, in all probability they would not have obtained their costs. If you think that the allusion was brought in only to make an attack upon the circumstances or character of the plaintiff, it would be malicious and actionable; but if it was adverted to merely in order to explain and vindicate the course taken by the defendants, then you would probably think that it was not unfairly introduced."(*b*)

The plaintiff (Sir John Carr) in the case before Lord Ellenborough, had written, amongst other books, one called "The Stranger in Ireland;" and the alleged libel consisted of a book entitled "My Pocket Book, or Hints for a Ryghte merrie and conceited Tour, in quarto, to be called, The Stranger in Ireland in 1805, by a knight errant," and contained a frontispiece entitled "The Knight leaving Ireland with regret." The declaration alleged that this frontispiece contained a false, scandalous, malicious, defamatory, and ridiculous representation of the said Sir John in the form of a man of ludicrous and ridiculous appearance, holding a pocket-handkerchief to his face and appearing to be weeping,

(*a*) *Strauss* v. *Francis* (4 F. & F. 1113).

(*b*) 4 F. & F. 1116. The jury returned a verdict for the defendant.

and also containing therein a certain false, malicious, and ridiculous representation of a man of ludicrous and ridiculous appearance, following the said representation of the said Sir John, and representing a man loaded with and bending under the weight of three large books, &c., and a pocket-handkerchief in one of his hands, the corners thereof appearing to be held or tied together, as if containing something therein, with the printed word "wardrobe" depending therefrom, thereby falsely, scandalously, and maliciously meaning and intending to represent, for the purpose of rendering the said Sir John ridiculous, and exposing him to laughter, ridicule, and contempt; that one copy of the said first-mentioned book, and two copies of the said book of the said Sir John, secondly mentioned, were so heavy as to cause a man to bend under the weight thereof; and that his, the said Sir John's wardrobe was very small, and capable of being contained in a pocket-handkerchief, &c. The declaration laid as special damage that Sir John had lost the sale of the copyright of a book of his, giving an account of a tour through part of Scotland, owing to the publication of the alleged libel. Lord Ellenborough said, in reference to the special damage laid: "If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuriâ*. Where is the liberty of the press if an action can be maintained on such principles? Perhaps the plaintiff's 'Tour through Scotland' is now unsaleable; but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer after he had been refuted by Mr. Locke? But shall it be said that he might have sustained an action for defamation against that great philosopher, who was labouring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works." And his Lordship concluded, after laying down the general principles above cited, by directing the jury that if the writer of the publication complained of had not travelled out of the work he criticised, for the purpose of slander, the action would not lie; but if they could discover in it anything personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action.(*a*)

(*a*) The jury returned a verdict for the defendants. This case is constantly referred to in later cases as a *leading* authority on the subject. The only subsequent reference not entirely approving of it is

PART IV.
CHAPTER VIII.
False imputation of authorship.
Criticisms on advertisements, circulars, &c.

Falsely to impute to a person the publication of any immoral or absurd literary production, would be libellous.(*a*)

A tradesman's handbill, circular, or advertisement stands, in respect of the right of commenting upon it, on the same footing as a book, and may be made the subject of fair and reasonable criticism in the public press or otherwise.

"I can see no distinction," said Byles, J.,(*b*) "between a handbill or a circular or advertisement which is published to all the world, and a book: both are literary productions, and are addressed to the public, and both are subject to the same comment and criticism. The shape in which they are published makes no difference; many advertisements indeed are issued in the form of books. Two-thirds of the daily newspapers are usually taken up with advertisements of various sorts. It is plain, therefore, that the form in which the publication appears can make no difference."

A marine store-dealer having published and extensively circulated a handbill setting forth the prices which he was prepared to give for a variety of articles, an alderman, sitting as a magistrate at Guildhall, called the attention of a newspaper reporter to it, and stigmatised the system as most pernicious in its effects, as offering great inducements to servants to rob their masters and mistresses. The observations of the alderman, together with the handbill itself, were published in the newspaper, with the heading "Encouraging Servants to Rob their Masters." A leading article was also published, commenting upon the handbill and ending as follows: "Will Mr. P. (the plaintiff) allow us to put this simple question to him—are not these unheard-of high prices, these clamorous demands for rags, bones, kitchen stuff, plated metal and old copper—are not these clap-trap announcements, that flare on the door-jamb of five hundred dolly-shopkeepers such as he, a premium offered to dishonesty? a direct incentive to servants to rob their masters and mistresses? The high prices which the Clapham rag-merchant vaunts his ability to give, the ready money he is so charmingly anxious to pay—these read very much like invitations to servants, when their legitimate and allowed perquisites run short, to make perquisites for themselves. How many

by Best, C.J. (in *Thompson* v. *Shackell*, 1 M. & Mal. 188), who says, "I have myself acted on the doctrine of my Lord Ellenborough, in the case referred to, though I do not go quite so far as he did in that case, because I think no personal ridicule of the author is justifiable."

(*a*) *Tabart* v. *Tipper* (1 Camp. N. P. 350).

(*b*) *Paris* v. *Levy* (9 C. B. N. S. 362; 3 L. T. N. S. 324; 30 L. J. 11, C. P.). See also *Hunter* v. *Sharpe* (*ante*, p. 522).

visits to Mr. P.'s *omnium gatherum* does it take for one to Wandsworth Police Court? Mr. P. may be a very upright man, and his business may be conducted in a perfectly legitimate manner; but it is the duty of all employers to warn their servants against the specious placards that throw out baits to the weak and ignorant, and tempt the most trustworthy to pilfering and malversation. The servant may begin with a surreptitious piece of fat or a few rags; she may end by rifling her mistress's wardrobe, and running away with her best moire antique dresses. The footpage may take an old buckle to the ragman to begin with, and end by breaking open the plate chest. The climax of Mr. P.'s unprecedentedly high prices may be penal servitude."

On the trial of an action of libel for the foregoing publication, Erle, C.J., told the jury that if the plaintiff put forward and drew public attention to a handbill which, in the opinion of the editor of the newspaper, was most dangerous to honesty, and held out a temptation to servants to depart from their duty, the editor might be able strictly to excuse, before a jury, the remarks which he made, if in their judgment those remarks were well founded and called for by the occasion; but, had the defendant said one word against the plaintiff with reference to his private life or his mode of managing his business, he (the learned judge) would have felt bound to say that there was no pretence of justification.(*a*) The jury having returned a verdict for the defendant, a rule *nisi* was obtained for a new trial on the ground of misdirection, but the rule was afterwards discharged.(*b*) "The real question was," said Byles, J., "did the remarks exceed the fair licence of criticism, and degenerate into reflections upon the private character of the plaintiff." "I think," said Keating, J., "my Lord was perfectly right in telling the jury that there was no distinction as to fair comment and criticism between a handbill and a book or any other publication; as also in telling them that if they thought that the language of the alleged libels was that of fair criticism, and free from personal imputation, the defendant was entitled to their verdict."

Books privately circulated.

It has been doubted (by Pollock, C.B.) whether the rules which have been laid down, in the decided cases, as to criticisms on published works (which invite criticism) would

(*a*) Cf. the language of Lord Abinger, C.B., in *Fraser* v. *Berkeley* (7 C. & P. 625): "If a critic, in criticising a book, goes out of his way, and attacks the private character of the author, this cannot be justified, and the author may recover damages."

(*b*) *Paris* v. *Levy* (*ubi supra*).

apply to works not published but only circulated among friends.(*a*)

Pictures.

The law is the same as to comments on works of other kinds which appeal to the public.

Thus, it has been held that a picture publicly exhibited may be criticised in the press; and, however strong the terms of censure, no action for libel will lie, provided the work be fairly and honestly criticised and the criticism be not made the vehicle of personal malignity towards the painter.(*b*) "If this be really an honest criticism and no more," said Best, C.J., to the jury, "the defendant is entitled to your verdict. If he has exceeded the limits of fair and honest criticism, then you will find for the plaintiff."

Architecture.

And where an architect and professor of architecture in the Royal Academy brought an action for an alleged libel upon him, in the way of his profession, contained in a publication which professed to give an account of the principles of a new order of architecture, called the Beotian order of architecture, stating it to have been invented by the plaintiff, whom it termed the Beotian professor, and setting forth several absurd principles as the rules of the new order, which it illustrated by examples of buildings, all of which were the works of the plaintiff, Lord Tenterden, C.J., thus directed the jury: "This publication professes in substance to be a criticism on the architectural works of the plaintiff. On such works, as well as on literary productions, any man has a right to express his opinion; and, however mistaken in point of taste that opinion may be, or however unfavourable to the merits of the author or artist, the person entertaining it is not precluded by law from its fair, reasonable, and temperate expression. It may be fairly and reasonably expressed, although through the medium of ridicule. In the present case the censure is certainly strong; nevertheless, if you think the criticism fair, reasonable, and temperate, although it may not be correct, the defendant will be entitled to your verdict; if you think it unfair and intemperate, and written with the intention and for the purpose of injuring the plaintiff in his profession, by imputing to him that he acts on absurd principles of art, you will find for the plaintiff."(*c*)

(*a*) *Gathercole* v. *Miall* (15 M. & W. 334).
(*b*) *Thompson* v. *Shackell* (4 M. & Mal. 187).
(*c*) *Soane* v. *Knight* (1 M. & Mal. 75).

CHAPTER IX.

NEWSPAPER REPORTS.

I. REPORTS OF JUDICIAL PROCEEDINGS.

Reports of trials and judicial investigations.

IT may now be considered as established beyond possibility of doubt that an impartial, correct (although not *verbatim*) and *bonâ fide* report, and though published from day to day, of any proceedings (at any rate, if not *ex parte*) of a court of justice, is privileged; unless the publication be prohibited by the Court itself, or the nature of the trial unfits it for publication; and the privilege is not confined to reports of the proceedings of the superior courts.

"It has been adjudged," says Lord Campbell, C.J.,(*a*) "that, if the due administration of justice is supposed so to require, the Court has authority to make an order against publishing any part of the trial till the whole is concluded. Nevertheless, where no such order has been made, the practice has long existed of daily publishing, without any disapprobation from the Court, each day's proceedings till the trial is concluded. And in several instances this practice—which, in reality, only extends the area of the Court—has been found highly beneficial in the discovery of material evidence. . . . . The law upon such a subject must bend to the approved usages of society, though still resting upon the same principle, that what is hurtful and indicates malice should be punished, and that what is beneficial and *bonâ fide* should be protected."

Grounds for immunity.

The reason for allowing this liberty of publication is stated by the same learned judge in another case,(*b*) to be—that the balance of public benefit from the publicity is great: it is of great consequence that the public should know what takes place in Court, and the proceedings are under the control of the judges; the inconvenience, therefore, arising from the chance of the injury to private character, is infinitesimally small as compared to the convenience of publicity. To the same effect Lawrence, J., in *Rex* v. *Wright*:(*c*) "The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to private persons whose conduct may be the subject of such proceedings."

(*a*) *Lewis* v. *Levy* (El. Bl. & El. 560; 27 L. J. 282, Q. B.)
(*b*) *Davison* v. *Duncan* (7 El. & Bl. 231). (*c*) 8 T. R. 298.

Reports of judicial proceedings do, in fact, only extend that publicity which is so important a feature of the administration of the law in England, and thus enable to be witnesses of it, not merely the few whom the Court can hold, but the thousands who can read the reports.(*a*) "The Courts," says Lord Campbell,(*b*) "are open to all; but they are of limited extent, and only a small number of persons can be present in them; but, by means of the press, the whole nation is informed of what takes place, and is put in a position to form an opinion upon the conduct of the jury, the judge, and the witnesses."

According to Cockburn, C.J., the immunity enjoyed by publications of the proceedings of courts of justice rests upon a twofold ground. "In the English law of libel," says his Lordship,(*c*) "malice is said to be the gist of an action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal, and not actual, malice is meant—while by legal malice, as explained by Bayley, J., in *Bromage* v. *Prosser*,(*d*) is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act, without any proof of malice in fact—yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published; and if this should be the case, though the character of the party concerned may have suffered, no right of action will arise. 'The rule,' says Lord Campbell, in the case of *Taylor* v. *Hawkins*,(*e*) 'is that if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice.' It is thus that, in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned, but solely to afford information to the public, and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged. The other, and the broader, principle on which this exception to the general law of libel is founded is, that the advantage to the community, from publicity being given

(*a*) *Per* Wilde, B., delivering the judgment of the Court of Exchequer in *Popham* v. *Pickburn* (7 H. & N. 898; 5 L. T. N. S. 846; 31 L. J. 133, Ex.).

(*b*) *Andrews* v. *Chapman* (3 Car. & Kir. 289).

(*c*) *Wason* v. *Walter* (L. Rep. 4 Q. B. 87). (*d*) 4 B. & C. 255.

(*e*) 16 Q. B. 321; 20 L. J. 314, Q. B.

to the proceedings of courts of justice, is so great, that the occasional inconvenience to individuals arising from it must yield to the general good."

Publication prohibited or improper.

With reference to the last of the qualifications stated at the beginning of this chapter, of the general right to publish the proceedings of courts of justice, Bayley, J., says, in *Rex* v. *Creevey*:(*a*) "It has been argued that the proceedings of courts of justice are open to publication. Against that, as an unqualified proposition, I enter my protest. Suppose an indictment for blasphemy, or a trial where indecent evidence was necessarily introduced, would every one be at liberty to poison the minds of the public by circulating that which, for the purposes of justice, the Court is bound to hear? I should think not; and it is not true, therefore, that in all instances the proceedings of a court of justice may be published."

And it was expressly decided in *Rex* v. *Carlile*(*b*) that it is not lawful to publish even a correct report of the proceedings in a court of justice, if it contain matter of a scandalous, blasphemous, or indecent nature. "We are bound," said Bayley, J.,(*c*) "for the purpose of justice, to hear evidence in the course of judicial proceedings, the publication of which, at any distant period of time, or at any time afterwards, may have the effect of an utter subversion of the morals and religion of the people. It very often happens that, for the purposes of justice, our ears may be shocked with extremely offensive and indelicate evidence. But though we are bound, in a court of justice, to hear it, other persons are not at liberty afterwards to circulate it at the risk of those effects, which, in the minds of the young and unwary, such evidence may be calculated to produce." To the same effect Maule, J., in a later case:(*d*) "Matters may appear in a court of justice that may have so immoral a tendency, or be so injurious to the character of an individual, that their publication could not be tolerated."

In *Rex* v. *Carlile*(*e*) the defendant had published, with the heading "The Mock Trial of Mr. Carlile," a full and correct report of the trial of an indictment for publishing "Paine's Age of Reason," in the course of which Mr. Carlile had read over to the jury the whole of that book. The Court were unanimous in holding that the republication of the book could not be justified on the ground that it was part of a true report of what took place at the trial.

(*a*) 1 M. & S. 281.
(*b*) 3 B. & Ald. 169.
(*c*) 3 B. & Ald. 167.
(*d*) *Hoare* v. *Silverlock* (9 C. P. 23).
(*e*) 3 B. & Ald. 167.

The publication of a report of a prosecution for selling an obscene libel ("The Confessional Unmasked," *ante*, pp. 387, 388), which set forth the whole of the obscene work, was held to be itself an obscene libel.(*a*)

Subject to the qualifications that the publication be not of matters blasphemous, seditious, or indecent, and that it be not forbidden by the Court, it is justifiable to publish a fair and accurate report of any trial or other proceeding, in any court of justice; and no action of libel can be maintained for a statement, occurring in such report, of the charges made against any of the parties.

Publication of proceedings not *ex parte*.

In the first reported case on this subject,(*b*) which was an action against the publisher of the *Times* for an alleged libel contained in a report of an application made to the King's Bench for an information against two justices for conspiracy, the defendant pleaded only the general issue, and at the trial proved that the report was a true and faithful account of what had passed in the King's Bench upon the motion. The Court were of opinion that the action could not be maintained; but, some doubts being entertained whether the matter of justification should not have been specially pleaded, the case stood over, and no judgment was ever given.

The *dicta* of many learned judges in subsequent cases are clear on the subject. "As a general rule," says Maule, J.,(*c*) "it may be assumed that the publication of a fair account of what passes in a court of justice, not *ex parte*, is justifiable, unless there be something to take it out of that rule." "It is a good defence to an action of libel," says Lord Campbell, C.J.,(*d*) "that it consists of a fair and impartial (though not *verbatim*) report of a trial in a court of justice."

The same protection has been extended to a fair report, published in a newspaper, of the proceedings held in gaol before a registrar in bankruptcy, under sects. 101 and 102 of the Bankruptcy Act, 1861, upon the examination of a debtor in custody.(*e*) "The only question," said Pollock, C.J., "is whether the registrar's court was, under the circumstances, a public court. I think that it was. We ought, in my opinion, to make as wide as possible the right of the public to know what takes place in any court of justice, and to protect a fair, *bonâ fide* statement of proceedings there."

(*a*) *Steele* Appt., *Brannan* Respt. (L. R. 7 C. P. 261).
(*b*) *Curry* v. *Walter* (1 Bos. & P. 525).
(*c*) *Hoare* v. *Silverlock* (9 C. B. 23).
(*d*) *Lewis* v. *Levy* (El. Bl. & El. 553).
(*e*) *Ryalls* v. *Leader* (L. Rep. 1 Ex. 296; 14 L. T. N. S. 563; 35 L. J. 185, Ex.).

The proceedings before examiners appointed under 9 Geo. 4, c. 22, s. 7, to examine into the sufficiency of the sureties on the trial of an election petition, were also held to be proceedings before a legal court, of which a fair and accurate report might be published.(*a*)

It was held by the House of Lords,(*b*) on appeal from the Scotch Court of Session, that the publication, in a book called "The Scottish Mercantile Society's Record" (known amongst the trading community as the "Black List"), of a copy of the register of protests for non-acceptance and non-payment of bills of exchange and promissory notes, established by the Scotch Acts of 1681 and 1696, and the 12 Geo. 3, c. 72, and 23 Geo. 3, c. 18, was not libellous, the contents of the register being public property, and the publication of them authorized; and the result of the various Acts of Parliament being to give the registration the effect of a decree or judgment of the Court of Session. "It is equivalent," said the Lord Chancellor, "to what in this country we call a judgment upon a warrant of attorney. In neither case does the Court interfere, but in both, as in cases of judgment by default and decreet in absence, the party having a right to the authority of the Court to confirm his claim, obtains the judgment as of course. Whether that judgment is obtained by authority of Parliament, or by the consent of parties, or by the practice of the Court, appears to me to be immaterial. It is for all purposes a judgment of the Court until altered or reversed, and entitled to all the attributes of any judgment after the longest and most contested litigations. . . . . Is it, then, unlawful to state or publish the decreet or judgment of courts of justice? If their proceedings are public, so must be the result of such proceedings—namely, the judgment. For, although the steps preliminary to the judgment are not transacted in open court (the whole being incontestable in that stage), yet the whole is supposed to be the result of regular proceedings in court."(*c*)

If, however, the publisher of such a "Black List" inserts in it, as a still existing liability, a judgment which has been satisfied by payment, he is, according to a decision of the Irish Court of Queen's Bench,(*d*) liable to an action of libel, and, if special damage has been caused by the publication, also to an action for a false representation.

(*a*) *Cooper* v. *Lawson* (8 A. & El. 746).
(*b*) *Fleming* v. *Newton* (1 H. L. Cas. 363).
(*c*) 1 H. L. Cas. 377, 378.
(*d*) *McNally* v. *Oldham* (8 L. T. N. S. 604).

"He would have been justified," said Lefroy, C.J., "if he had published the judgment as it stood in reality, as a judgment annulled and satisfied; but if, instead of that—if instead of availing himself of a legal right, which none of us mean to question, the right of publishing a judgment, a true copy of a judgment, so long as the party does not add a sting to it—if he adds the sting that it is an unsatisfied judgment, this becomes an exercise of a legal right with an addition which makes that injurious to the plaintiff, in a way that it would not have been, if he represented the truth of the transaction. . . . . The case in Scotland was very different from the present one. The party there acted under an Act of Parliament, and what he did, he did *bonâ fide* and according to the truth of the transaction. The very contrary has been the *case here*."

Reports of *ex parte* proceedings and preliminary investigations before magistrates.

With regard to reports of *ex parte* proceedings and preliminary investigations the law does not seem to be quite free from doubt.

Where the *ex parte* proceeding or preliminary investigation, though it lasts during several days, is also the end of the matter as terminating in the discharge of the person accused, it may be taken as settled that a correct and impartial report of it may be published.

Thus, in a case where, a charge of perjury having been preferred against the plaintiff, the investigation before a magistrate was adjourned from time to time, and the defendant published in his newspaper a report of each day's proceedings in next day's impression—one on the 26th of June, stating that the plaintiff was charged with perjury, and an adjournment, but reserving the report; another on the 4th of July, also stating an adjournment, in language intimating that there would be a report of the proceedings of the day to which the proceedings were adjourned; and the third on the 18th of July, stating that "the magistrate dismissed the summons, there not being sufficient evidence to secure a conviction," the two former reports being headed "Wilful and Corrupt Perjury;" it was held by the Court of Queen's Bench, after verdict finding that the reports were fair and correct, that an action of libel could not be maintained by the plaintiff for their publication.(*a*)

In reply to an argument, urged on behalf of the plaintiff, that the privilege of reporting legal proceedings must be confined to the superior courts of law and equity, the Court said: "On such a question the dignity of the Court cannot be regarded; and we must look only to the nature of the

(*a*) *Lewis* v. *Levy* (El. Bl. & El. 537; 27 L. J. 287, Q. B.).

alleged judicial proceeding which is reported. For this purpose no distinction can be made between a court of *pie poudre* and the House of Lords sitting as a court of justice."

"Proceedings before magistrates under stat. 11 & 12 Vict. c. 43," said Lord Campbell, C.J., in delivering the judgment of the Court, "with respect to summary convictions and orders in which, after both parties are heard, a final judgment is given, subject to appeal, are, we think, strictly of a judicial nature: the place in which such proceedings are held is an open court; the defendant as well as the prosecutor, has a right to the assistance of an attorney and counsel, and to call what witnesses he pleases; and both parties having been heard, the trial and the judgment may lawfully be made the subject of a printed report, if that report be impartial and correct."

The Court had no hesitation, in this case, in holding the defence sufficient as to the reports of the first and third day's proceedings; the great doubt was as to the report of the second day's proceedings, which set out evidence injurious to the plaintiff, whilst the charge against him was still pending. "If the whole inquiry," said Lord Campbell, "had taken place before a magistrate during one hearing, would an impartial and correct report of the proceeding published in a newspaper next morning have been actionable? We think not. . . . . And for the same reasons an impartial and correct report of the proceedings at the three different hearings would have been privileged, if published simultaneously on the 18th of July. We have, therefore, only to consider the effect, under the circumstances of the case, of there having been three publications instead of one. Considering that the three taken together are found by the jury to have been a true and faithful and *bonâ fide* report of the proceedings against the plaintiff on this charge of wilful and corrupt perjury, we think that the second cannot be selected and taken separately to be a libel. Had there been no other notice of the charge in the defendant's journal, it might well have been deemed malicious and actionable. But the number of 26th of June, after stating the adjournment, says 'as the publication of what transpired might frustrate the ends of justice, we reserve our report until the next hearing.' From the number of the 4th of July it might reasonably be inferred that a report would subsequently be given of what should be done at the adjourned meeting: and the number of 18th of July concludes the history by stating that the magistrate

dismissed the summons. We do not see how, on principle, this is to be distinguished from the daily report in a newspaper of a criminal trial, which lasts several days, before the Court of Queen's Bench or the Central Criminal Court, or at the assizes. . . . . The decision of Lord Chief Justice Eyre and his brethren, in *Curry* v. *Walter*(*a*) rested on sound legal principles, and is now almost universally approved of. On the same principles, we think, we ought to hold in this case that no action can be maintained for any part of the impartial and correct and *bonâ fide* report of the proceedings against the plaintiff before the magistrate, which ended in the charge being dismissed; although, the proceeding being adjourned from day to day, the report appeared in portions in different numbers of the defendant's journal."

Examination ending in committal or holding to bail.

Where, however, the result of the preliminary proceedings before the magistrate is that the person charged with an indictable offence has been committed for trial, or held to bail, the publication of a report of the proceedings is, according to several authorities, a libel. In the more recent cases, however, on the subject, the publication of such reports is regarded with greater favour; and the older cases, when the particular circumstances of each come to be examined, are not quite so strong the other way as they are sometimes thought to be.

In the first case, indeed, on the subject, that of *Rex* v. *Lee*,(*b*) tried before Heath, J., in 1804, being an information against the printers of the *Sussex Journal* for publishing the depositions, taken before a justice, against a person accused of murder, the statement of the depositions, according to the meagre report of the case,(*c*) containing "several expressions and representations prejudicial to the character of" the accused, the learned judge refused to admit evidence of the correctness of the report, being "of opinion that the mere

(*a*) 1 Bos. & P. 525. Lord Campbell pointed out in a previous part of his judgment that the proceeding reported in *Curry* v. *Walter* (*vide ante*, p. 538), was an *ex parte* one, "whereas," said his Lordship, "in the case which we have to consider, the present plaintiff was fully heard before the magistrate, and had an opportunity to call what witnesses he chose on his behalf. Nor was the proceeding more final there than here; for the application to the King's Bench for a criminal information might have been renewed on an affidavit of notice given to the magistrates; and an indictment for the conspiracy might have been found by a grand jury."

(*b*) 5 Esp. 123.

(*c*) As to the general character of Espinasse's Reports, see 13 Q. B. 840, 844, and 5 El. & Bl. 453.

publication of *ex parte* evidence, before a trial, was of itself highly criminal."

In *Rex* v. *Fisher*,(a) which was an indictment for a libel, tried before Lord Ellenborough in 1811, the captain of a vessel was charged before a magistrate with a felonious assault on a lady on board his own ship, and was held to bail to take his trial for the offence. The report, published in the defendant's newspaper, was not a mere statement of the nature of the charge and the evidence given on the examination before the magistrate, but a highly coloured narrative of the transaction, interspersed with comments of the writer tending to inflame violently the public against the accused. It told of the assistance rendered by a passenger who, having his attention attracted by the cries of the lady, "instantly rushed to the spot in time to prevent the perpetration of the vile and dishonourable intentions of the captain, from whose loathsome embrace he extricated his almost senseless victim;" stated that immediate application was made for a warrant, "in consequence of which the criminal is likely to meet the legal punishment of his villainy;" described the accused as not seeming "the least affected at his disgraceful situation, or feeling in the slightest degree the very contemptuous manner in which he was regarded by all who were aware of his unmanly conduct;" and continued—"He employed a shorthand writer, a barrister, and a phalanx of friends, if possible to intimidate his accuser by the publicity of her exposure. Notwithstanding these attempts, however, to screen himself behind her delicacy, she gave her testimony in the clearest and most collected manner, which conscious innocence and innate virtue could only have enabled her to accomplish."

Such an inflammatory account of the preliminary investigation before the magistrate could not, of course, be regarded as an impartial and dispassionate report of what had taken place, and we can feel no surprise at its being held a libel. "Does this publication," said Lord Ellenborough,(b) "leave the mind in a state of equipoise as to his guilt or innocence? No one with the feelings of a man can read it without being roused to indignation against the person whose misconduct is depicted in such glowing colours. Even if a fair and dispassionate account of the examination were allowed, is this account fair and dispassionate? It comes to conclusions which would only be fair after verdict. It assumes everything that the woman said to be true, and represents

(a) 2 Camp. 563. (b) 2 Camp. 571.

the accused as conscious of his guilt. It talks of 'the contemptuous manner in which he was regarded by all who were aware of his unmanly conduct,' and triumphantly asserts that 'he is likely to meet the legal punishment of his villainy.' Allowing the utmost latitude to fair and candid statement, is this to be tolerated? Jurors and judges are still but men; they cannot always control feelings excited by such inflammatory language. If they are exposed to be thus warped and misled, injustice must sometimes be done."

Lord Ellenborough, indeed, lays down the rule broadly, that all publications of preliminary proceedings before magistrates are illegal. "The publication," he said, "of proceedings in courts of justice, where both sides are heard and matters are finally determined, is salutary, and therefore it is permitted. The publication of these preliminary examinations has a tendency to pervert the public mind, and to disturb the course of justice; and it is therefore illegal. . . . . Trials at law, fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged. But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice. "But," added his Lordship, "what defence can be made for a publication like this, which, besides containing an *ex parte* statement of evidence before a magistrate, against a man who has had no opportunity to defend himself, actually denominates him a *criminal* and describes him as a monster?" This case can hardly be regarded as a decisive authority against the lawfulness of publishing a bare and impartial report of preliminary examinations before magistrates.

The next case on the subject of *ex parte* examinations(*a*) was also one in which comments on the conduct of the parties were added to the report. A riot having taken place at Brighton, the high constable called for the assistance of the military, who charged the mob, and one person was killed. An inquest was held before the coroner, which lasted some days and ended in a verdict of wilful murder against the high constable, one of his assistants, and the soldier who caused the death of the deceased. The defendant, before the jury had finished their labours, published in his newspaper a statement of the evidence, accompanied with remarks tending to cast blame on the high constable and the other peace officers for imprudently and unnecessarily

(*a*) *Rex* v. *Fleet* (1 B. & Ald. 379).

calling out the military for the purpose of suppressing the tumult which had arisen. The Court made absolute a rule for a criminal information.

In *Duncan* v. *Thwaites*(*a*) the plaintiff had been charged before a magistrate with indecently assaulting a female child, and the report contained a statement that the evidence of the child herself and her cousin "displayed such a complication of disgusting indecencies that we cannot detail it." The Court of King's Bench held (on demurrer to a plea) that the report could not be justified on the ground of being a correct report of the proceedings which took place in the course of a preliminary inquiry before a magistrate; and there is no doubt that the judgment of the Court, which was delivered by Abbot, C.J., proceeds on the general ground that *any* publication of such proceedings is unlawful. The Chief Justice said of the case of *Curry* v. *Walter*(*b*) that, though of great authority in itself and deriving additional weight from the manner in which it is mentioned by Lawrence, J., in *The King* v. *Wright*,(*c*) "it has not, however, received the sanction of subsequent judges; and it differs in some important facts from the present case. It was an account of a proceeding in this Court, a Court instituted for final determination as well as preliminary inquiry, and whose doors are, as they ought to be, open to so many of the public as can be conveniently accommodated within its walls. The proceeding now in question was before justices of the peace, and was of a kind which they may lawfully conduct in *private* whenever they may think fit to do so. That proceeding terminated by a refusal of the application, and not by putting the subject into a train for further inquiry and trial. The proceeding in question terminated, in the first instance, by holding the accused to bail for his future appearance before the justices, and finally by holding him to bail to take his trial before a jury. Such a trial, therefore, might be expected at the time of each of the publications. This Court has, on more than one occasion within a few years, been called on to express its opinion judicially on the publication of preliminary and *ex parte* proceedings, and has on every occasion delivered its judgment against the legality of such proceedings, as was done by Mr. Justice Heath in the year 1804, in the case of *The King* v. *Lee*.(*d*) Other judges have delivered opinions to the same effect, and it is well known that many other persons have lamented the

(*a*) 3 B. & C. 556. (*b*) 1 Bos. & P. 525.
(*c*) 8 T. R. 293. (*d*) 5 Esp. 123.

inconvenience and the mischievous tendency of such publications. They were, within the memory of many persons now living, rare and unfrequent; they have gradually increased in number, and are now unhappily become very frequent and numerous; but they are not on that account the less unlawful, nor is it less the duty of those to whom the administration of justice is entrusted to express their judgment against them;" and his Lordship added, that the Court wished it not to be inferred from the preceding remarks that they thought the publication of *ex parte* proceedings even in that court was a matter allowable by law.

Later cases.

Lord Campbell(*a*) points out that, in all the cases relied on in support of the proposition that the publication of any preliminary proceeding before a magistrate is unlawful, there were vituperative comments accompanying the statement of the evidence, or some aggravation attending the publication of the report, or some peril which was likely to be caused to the person complaining of it, and that the same objection could not exist in the case of a report of a preliminary inquiry before a magistrate, which turned out to be unfounded and was dismissed.

"We are not prepared," said his Lordship, in delivering the judgment of the Court of Queen's Bench in the case of *Lewis* v. *Levy*, "to lay down for law that the publication of preliminary inquiries before magistrates is universally lawful; but we are not prepared to lay down for law that the publication of such inquiries is universally unlawful;" and of the case of *Curry* v. *Walter* he says that it "has been often criticized, but never overturned, and often acted upon."

The legality of publishing an accurate and impartial report of the preliminary proceeding, where it has ended in the dismissal of the charge, must, as before stated, be taken to be now settled by the decision in *Lewis* v. *Levy*;(*b*) and some eminent judges have recently refused to join in unqualified disapprobation of accurate and impartial reports of proceedings which do not so end, but in which the accused is held to bail or committed for trial.

"We give no opinion," said Lord Campbell, in the case last referred to, "in favour of the general legality of publishing reports of preliminary examinations before a magistrate, where the party accused has been committed or held to bail for an indictable offence; but we cannot join in the sweeping condemnation of police reports

(*a*) *Lewis* v. *Levy* (El. Bl. & El. 557; 27 L. J. 287, Q. B.
(*b*) El. Bl. & El. 537; 27 L. J. 287, Q. B.

which has been pronounced *obiter*, before the benefit arising from those reports had been fully experienced. We believe that they often lead to the detection and punishment of crime, and that they sometimes assist in the vindication of character. Against the severe denunciations of police reports by several eminent judges may be placed the following opinion of Lord Denman, C.J., solemnly delivered by him before a select committee of the House of Lords, in the year 1843, on the law of libel: 'I have no doubt that' police reports 'are extremely useful for the detection of guilt, by making facts notorious, and for bringing those facts more correctly to the knowledge of all parties interested in unravelling the truth. The public, I think, are perfectly aware that those proceedings are *ex parte*, and they become more and more aware of it in proportion to their growing intelligence; they know that such proceedings are only in course of trial, and they do not form their opinion till the trial is had. Perfect publicity of judicial proceedings is of the highest importance in other points of view, but in its effects on character I think it desirable. The statement made in open court will probably find its way to the ears of all in whose good opinion the party assailed feels an interest, probably in an exaggerated form, and the imputation may often rest on the wrong person: both these evils are prevented by correct reports.'"

And Cockburn, C.J., in a still more recent case,(*a*) referring to the modern growth of the right to publish reports of judicial proceedings, said: "Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of Courts upon points of law. Even in quite recent days judges, in holding publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this Court—as, for instance, on applications for criminal informations—are published every day, but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of; and if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is, not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent

(*a*) *Wason* v. *Walter* (8 B. & S. 730; L. Rep. 4 Q. B. 94; 19 L. T. N. S. 418; 38 L. J. 34, Q. B.).

of all intention to do injury to the reputation of the party affected."(*a*)

Result of older cases.

Having regard to these remarks of judges so distinguished, it appears exceedingly doubtful whether a correct, impartial, and dispassionate report of proceedings before a magistrate, which end in the accused being held to bail or committed for trial, would now be held a libel. We know, as a matter of fact, that such reports are daily published with impunity.

Since the preceding was written (1871), a great forward step (in the opinion of the author) has been taken by the Common Pleas Division in *Usill* v. *Hales*,(*b*) holding that the report of an *ex parte* application to a magistrate, which he declined to entertain on the ground that he had no jurisdiction, was privileged. Lord Coleridge, C.J., indeed, was of opinion that the decision in *Lewis* v. *Levy* (*ante*, pp. 540, 541) covered the case. "I am of opinion," said his lordship, "that this is a case in which there was a judicial proceeding, terminating, not in the discharge of the party accused, because there was no such person before the magistrate, but terminating in a refusal to proceed with the charge, and to set the criminal process in motion. I am unable to distinguish the principle of *Lewis* v. *Levy* from that involved in the present case." A surer ground on which to rest the decision is (it is respectfully submitted) supplied by what is stated in a previous part of his lordship's judgment—viz., "that there is a certain elasticity in the rules which apply to questions of privilege (development is perhaps the more correct expression), and that the courts have from time to time applied, as best they may, what they think is the good sense of the rules which exist to cases which have not been positively decided to come within them."(*c*)

Proceedings before magistrate in matter over which he has no jurisdiction.

If a matter which he has no jurisdiction to deal with in any way is brought before a magistrate, the publication of a report of the proceedings, containing defamatory matter, cannot be justified on the ground of its being a correct and fair report of the proceedings of a legal court.

"As to magistrates," said Lord Campbell in *Lewis* v. *Levy*,(*d*) "if, while occupying the bench from which magisterial business is usually administered, they, under pretence

(*a*) See the case of *Pinero* v. *Goodlake* (15 L. T. N. S. 676).
(*b*) L. R. 3 C. P. D. 319. (*c*) P. 327.
(*d*) El. Bl. & El. 554: 27 L. J. 287, Q. B. Cf. *Hibbins* v. *Lee* (4 F. & F. 243), where Cockburn, C.J., laid it down that a public writer was privileged in discussing the conduct of magistrates in dismissing a charge of felony without fully hearing the evidence, and even in commenting upon the evidence given, in support of the view that the charge ought not to have been dismissed.

of giving advice, publicly hear slanderous complaints over which they have no jurisdiction, although their names may be in the commission of the peace, reports of what passes before them are as little privileged as if they were illiterate mechanics assembled in an alehouse. Hence the well-decided case of *McGregor* v. *Thwaites*."

In *McGregor* v. *Thwaites*,(a) a Mr. Prince and a Captain Antrim waited upon the lord mayor elect (who sat for the lord mayor) to request his advice as to three orphan children who had been brought home to England by Captain Antrim from Poyais on the Mosquito Shore in America, to which place a large number of persons had emigrated from Great Britain. A report of what occurred before the magistrate was published in a newspaper, of which the following was the important part: "Mr. Prince stated that about 200 of the victims of delusion had returned from the Mosquito Shore to Honduras in a state of utter destitution, and of disease which terminated the sufferings of a great part of them soon after. They must have all died but for the charity of the people and the authorities of Honduras. The poor creatures had been led by Mr. McGregor to expect a land where they would live in the greatest plenty, where everything was flourishing, and but little labour would be required: it was mentioned to them as a mark of the improvement of the place, that a fine theatre had been established and other establishments formed, indicative, not merely of civilization and comfort, but of luxury. Captain Antrim mentioned a charge which the poor creatures had preferred to him against McGregor. Most of those who sailed from Leith were poor people, who had by their frugality saved small sums of money of from £15 to £30; McGregor learned the property which the settlers had with them, and, telling them that Scotch money would not pass at the settlement, persuaded them to give it all up to him, and take his drafts for the amounts upon his bankers at Poyais. The savings were all given up to him, and it is perhaps unnecessary to add, that the settlers, on their arrival at the houseless wilds of Poyais, found that no such thing as a banking house was in existence. Captain Antrim regretted that he had not arrived sooner, as another ship had sailed with settlers for the same place just before his arrival, who, he feared, would also fall a sacrifice. He had thought it his duty to make the statement publicly, that the poor might be put on their guard." To an action of libel for the publication of this report, the publisher pleaded

(a) 3 B. & C. 556.

that Mr. Prince and Captain Antrim did go before the magistrate and make the statements charged as libellous, and that the alleged libel contained a correct and fair account of the proceedings before the magistrate, and that the facts charged in it were true. The jury having found that the report was a true, fair, and correct report of the proceedings before the lord mayor elect, but that the facts charged in it were not true, the Court held that the publication could not be justified on the ground of its being a correct and fair report of what took place before the lord mayor elect, as the matter was not brought before him in his judicial character or in the discharge of his magisterial functions.

"I think," said Littledale, J., "that the lord mayor elect had no legal authority to inquire into the matter brought before him by Captain Antrim; that he was not then exercising his office of magistrate, and that this case is to be considered in the same light as if the communication had been made to him in his private room. It is unnecessary, therefore, to decide in this case, whether the defendant would have been justified in publishing this matter in a newspaper, if it had contained a correct report of a proceeding which had taken place before a magistrate acting in a judicial capacity."

The Court also held, in this case, that the defendant was not justified by reason of his having mentioned in the libel the names of the parties who stated the matter of it to the magistrate; because, as to part of the slanderous matter, no action would lie against the party who stated it to the magistrate: it had become actionable only by reason of its being published in print, and, therefore, by stating the names of the persons who uttered it, no right of action was given against them.

Distinction between inherent and resulting want of jurisdiction.

On the subject of want of jurisdiction, an important distinction was pointed out by Lord Coleridge, C.J., in *Usill* v. *Hales*(*a*) between "a real and inherent want of jurisdiction on account of the nature of the complaint, and what may be called a resulting want of jurisdiction because the facts do not make out the charge." "It has long been held," said his lordship, "and I think most properly held, that it is not the result but the nature of the application made to the magistrate which founds his jurisdiction; and, wherever an application is made to a magistrate as to a matter over which, supposing the facts to bear out the statement, he has jurisdiction, he then has jurisdiction to ascertain whether the facts make out a case for the exercise of that jurisdiction which, if the facts make out the case, undoubtedly he has;" and his lordship referred

(*a*) L. R. 3 C. P. D. 323.

in support of this view to *Reg.* v. *Bolton*,(a) and the judgment of Sir John Richardson in *Brittain* v. *Kinnaird*.(b)

Report of irrelevant matter.

A newspaper reporter of the proceedings at a trial cannot be expected to discriminate nicely between what is strictly relevant and what is irrelevant to the issue; and a fair and full report would be held protected, though it contained some defamatory matter not relevant to the issue; at any rate where it is not wholly and palpably irrelevant.

"I do not concur," said Bramwell, B., in *Ryalls* v. *Leader*,(c) "in the suggestion made to us, viz., that what is irrelevant and libellous on a third person is not protected. There are cases where an individual must suffer for the public good, and it is difficult to draw the line between relevancy and irrelevancy." "Wherever," said Channell, B., in the same case, "the report is of something not wholly irrelevant, then, at any rate, the fact that it contains reflections on a third person does not prevent the reporter from being protected."

Report must not contain injurious comments.

The report of judicial proceedings, whatever the tribunal before which they take place, must, in order to be protected, be free from comments injurious to the character of any of the persons named in it, and must be accurate as well as fair. "The moment comments are made," said Lord Campbell,(d) "the immunity is gone."

"If any comments are made," said the same learned judge in another case,(e) "they should not be made as part of the report. The report should be confined to what takes place in court, and the two things, report and comment, should be kept separate."

Report should not be merely of effect of evidence.

The report of preliminary proceedings before justices ought to state nakedly, and without any high colouring, the facts as they appear in evidence; it should not describe their effect merely, as pointing to or establishing the guilt of the accused, or confirming or negativing the account of the matter given by him.

Thus, a report of the proceedings upon the hearing of a summons before a magistrate, charging a person with having committed perjury, which stated simply that the evidence before the magistrate "entirely negatived" the story of the accused, was held not to be protected; and a plea, justifying it on the ground that it was a fair and correct report of the

(a) 1 Q. B. 66. (b) 1 B. & B. 432.
(c) L. Rep. 1 Ex. 300; 14 L. T. N. S. 563; 35 L. J. 185, Ex.
(d) *Lewis* v. *Levy* (El. Bl. & El. 544). Cf. *Behrens* v. *Allen* (3 F. & F. 135).
(e) *Andrews* v. *Chapman* (3 Car. & Kir. 288).

proceedings which had taken place, was held bad, even after verdict for the defendant.(a) "The reporter," said Lord Campbell, "takes upon himself to aver that the evidence adduced against the plaintiff entirely negatived his story. Such conclusions are wholly unjustifiable. And, where the report of law proceedings has mixed up with it commentaries reflecting upon any of the parties whose names appear in it, it entirely loses the privilege which it might otherwise claim."

Comments on Evidence.

This observation of Lord Campbell's must, of course, be limited, in its application, to remarks of a defamatory character which cannot be justified as fair and *bonâ fide* comments on a matter of public interest; such fair and *bonâ fide* comments being, as we have before seen,(b) protected.

It must also be borne in mind that not all comments require a justification. Some comments are little more than another mode of stating what has gone before. "It would be extravagant," said Lord Denman, C.J., in *Cooper* v. *Lawson*,(c) "to say that in cases of libel, every comment upon facts requires a justification. But a comment may introduce independent facts, a justification of which is necessary. A comment may be the mere shadow of the previous imputation; but if it infers a new fact, the defendant must abide by that inference of fact, and the fairness of the comment must be decided upon by the jury."

A highly coloured account of the trial of a prosecution against an attorney and judge of a Court of conscience for an assault—headed "judicial delinquency," calling him "our hero," describing, amongst other similar things, how, on the instant of being pronounced guilty, he bustled out of court, "reduced to a condition in which ordinary manners or brutality might be expected to excite some little compassion;" how he was pursued by hisses, and "the feelings of disgust and indignation triumphed over the decorum of the court;" and adding that "though it clearly appeared from the testimony of every person that was in the room" when the assault was committed *except* him, that no violence had been used against him, yet he had sworn to a violent assault committed upon him by the prosecutor—was attempted to be justified by a plea, referring generally to "such parts of the supposed libel as purport to contain an account or statement of the trial," and stating that such parts contained a just and faithful account of the trial; but the Court gave judgment for the plaintiff.(d) Lord Ellenborough, C.J., said that the case of

(a) *Lewis* v. *Levy* (El. Bl. & El. 544).
(b) See the preceding chapter. (c) 8 A. & El. 753.
(d) *Stiles* v. *Nokes* (7 East, 453).

Curry v. *Walter*(*a*) only shows that a fair, plain, unvarnished account of proceedings in a court of justice is not a libel; but not that a highly-coloured picture, mixed up with insinuations of perjury is not a libel.(*b*)

Report must not insinuate a charge of perjury.

The report must not even insinuate that any of the witnesses had committed perjury.

Thus, where an account of the proceedings under a commission of lunacy, in which the plaintiff had been examined as a witness (to prove the insanity of Mr. W.), did not set out his evidence, but stated shortly that "it was *attempted to be proved* by the testimony of Mr. R., the plaintiff, that Mr. W. had conversed in a peculiar manner with him on a certain day;" that "on this evidence it was *meant to be inferred* that Mr. W. was insane at that time and on that day; but Mr. R.'s testimony being *unsupported* by that of any other person, it failed to have any effect on the jury;" that "the *object of fixing* on *the 22nd of September* was to set aside a will supposed to be made on that day;" and concluded thus: "Mr. Jervis made a splendid speech of two hours' duration in favour of Mr. W.'s sanity, and commented with cutting severity on the testimony of Mr. R.," it was held that the whole publication, taken together, was libellous, and that a plea justifying the concluding sentence only was bad on demurrer.(*c*) "Reading the whole of the libel together," said Tindal, C.J., "it is impossible not to perceive that the intention of the writer was not simply to convey an idea that the speech made on the occasion alluded to was cutting and severe, but that the severity was deserved. . . . . The statements that 'it was attempted to be proved,' &c., that 'it was meant to be inferred,' that the plaintiff's testimony was 'unsupported,' and that the 'object' of fixing on the day named was to set aside a will—all clearly show that the writer of the paragraph intended to convey the imputation that the plaintiff's testimony was untrue, and got up for the occasion, and discredited by the jury. Then the conclusion that Mr. Jervis 'made a splendid speech, and commented with *cutting severity* on the testimony of the plaintiff,' was calculated, in conjunction with what had gone before, to impress the reader with the notion that the severity was deserved, and the force of it felt by the plaintiff, from a consciousness of its justice." Parke, J., added: "I think it impossible to read the publication in question without coming to the conclusion that it is libellous, inasmuch as it imputes

(*a*) 1 Bos. & P. 525. (*b*) 7 East, 504.
(*c*) *Roberts* v. *Brown* (4 Moo. & S. 407; 10 Bing. 519).

perjury to the plaintiff; and a defendant has no right to select for justification a part of a libel which, standing alone, would possibly not be actionable."(*a*)

A newspaper report of an examination into the sufficiency of the sureties on an election petition, before the examiners appointed under 9 Geo. 4, c. 22, s. 7, set forth affidavits stating circumstances to show that the plaintiff, who had sworn to his own sufficiency as one of the sureties, was embarrassed in his affairs, unable to pay his debts, and an insufficient surety; and, after asking why, being unconnected with the borough, he should take so much trouble about the matter, proceeded—"There can be but one answer to these very natural and reasonable queries: *he is hired* for the occasion." The publisher of the newspaper, against whom an action of libel was brought, having pleaded that the publication was a correct report of proceedings in a legal court, together with a fair and *bonâ fide* commentary thereon, it was held that the statement as to the plaintiff's being hired for the occasion, not being mere inference from the previous statement, but introducing a substantive fact, required a distinct justification; and, therefore, that, on the trial of an issue on a replication *de injuriâ* to the above plea, it was properly left to the jury to say, not only whether the evidence made out the facts first alleged, but also whether the imputation that the plaintiff had been hired was a fair comment.(*b*) "I do not say," said Patteson, J., "that in all cases where an alleged libel consists partly of comment, it should be left to the jury to say whether the comment is fair, because if, as the Attorney-General has put it, the words were 'he has murdered his father, and therefore is a disgrace to human nature,' it would be ridiculous to ask whether the observation was or was not a fair comment. But where the comment raises an imputation of motives which may or may not be a just inference from the preceding statement, it is a distinct libel. That is so here; and therefore the question put to the jury related to a material part of the issue." "The plea," said Lord Denman, C.J., "is perfectly good, justifying the libel; partly as the report of proceedings before a Court, partly as stating that which is in itself true, and partly as giving a fair and *bonâ fide* commentary on the proceedings stated. Now, a comment may be the mere shadow of the previous imputation; but if it infers a new fact, the defendant must

(*a*) See also *Stiles* v. *Nokes* (7 East, 453).
(*b*) *Cooper* v. *Lawson* (8 A. & El. 746).

abide by that inference of fact, and the fairness of the comment must be decided upon by a jury. The defendant here cannot say that if the plaintiff became bail under the circumstances stated, it followed as a necessary inference that he was hired."

Report must be accurate.

The report, in order to be protected, must be not only *bonâ fide*, but also accurate, that is, substantially accurate. It need not be a *verbatim* report, or set out fully all that occurred at the trial; but, if it summarizes or abridges, it must do so fairly, and not give a one-sided complexion to the narrative.

Condensed Report.

On this subject Lord Campbell, C.J.,(*a*) thus explained the law to a jury: "The privilege—a valuable privilege for the public—of publishing reports of proceedings in courts of justice would be useless if it were necessary to set out every word of the evidence and of the speeches, and of what was said by the judge. However, that is not necessary; if what is stated is substantially a fair account of what took place, there is an entire immunity for those who publish it."

Another learned judge (Byles, J.) directed a jury that newspapers had a full right to publish either a *verbatim* or an abridged or condensed report of what passed in courts of justice; and, however it might affect the character of an individual, he had no ground for an action of libel unless it was an unfair report. In reporting the proceedings of courts of justice omissions and abridgments were essential, but they must not be such as to change the complexion of the transaction; if they did, there would not be a fair and just report.(*b*)

Where the report of a trial professed to give a short summary of the facts of the case, and stated that the counsel for the defendant was both extremely severe and amusing at the expense of the plaintiff's attorney; and then, without setting out the evidence, professed to give an outline of the speech of defendant's counsel, the part set out containing some very severe reflections on the conduct of the plaintiff's attorney in advising the form of action with a view to his own profit, a plea justifying the report as being *in substance* a true report of the trial was held bad on demurrer.(*c*)

Report setting out facts as stated by counsel for one party.

A report is not justifiable which merely sets out the circum-

(*a*) *Andrews* v. *Chapman* (3 C. & Kir. 289).
(*b*) *Turner* v. *Sullivan* (6 L. T. N. S. 130).
(*c*) *Flint* v. *Pike* (4 B. & C. 473).

stances of the case "as stated by the counsel for" one of the parties, and does not give the evidence.

Such a report, said Tindal, C.J., does "not even profess to be an account taken from evidence given at the trial, nor even to be an account taken from counsel's statement, but afterwards corrected by the evidence given in the cause. Everybody knows that the statement of a counsel is *ex parte*, and that he is often instructed to make allegations which it is afterwards impossible to support in proof. Would it be either safe or proper that after a cause has been tried, a statement which the evidence has not at all supported should be published in a newspaper; and then, merely because that statement had been made by a counsel, it should be held to be privileged? Ought such a publication to be considered a fair report of what had passed in court, although the evidence afterwards given might not only not support, but might even to some extent contradict it? Ought such a publication to be privileged? I conceive not; and I think that such will not be held to be the law of the land."(*a*)

Still less can a report be justified which not only does not give the evidence, but adds to the speech of counsel, which it sets out, that all that he stated was proved.

Thus, where a report of the trial of the plaintiff (an attorney) and two other persons for a conspiracy to defraud the under-sheriff of Hants, set out the speech of the counsel for the prosecution, and then continued: "The first witness was R. P., who proved all that had been stated by the counsel for the prosecution; Mr. J. G., the attesting witness to the bill of sale from the sheriff to Messrs. W., was next called, but not being able to prove a deputation from the under-sheriff for that year, the jury, under the directions of the learned judge, were obliged to give a verdict of acquittal, to the great regret of a crowded court, on whom the statement and the evidence, so far as it went, made a strong impression of their guilt;" a plea justifying the report on the ground that in fact such a speech had been made, and that the witness called proved all that had been so stated, but not setting out the evidence or justifying the truth of the charges made in the counsel's speech, was held bad on demurrer.(*b*) "The objection," said Abbott, C.J.,(*c*) "taken to the plea seems to me to be unanswerable. It is asserted

(*a*) *Saunders* v. *Mills* (6 Bing. 218).
(*b*) *Lewis* v. *Walter* (4 B. & Ald. 605). (*c*) *Ibid.* 612.

in the libel that a certain witness proved the allegations contained in a speech made by counsel in stating a case to the jury. Now that justification cannot be supported. The defendant ought to have detailed and transcribed in the publication the evidence of the witness. If he had done so, his readers might then have judged for themselves. If a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence." "It is no justification," said Bayley, J., "that a defendant has truly stated, in his publication, the speech made by counsel in stating a case to the jury; he must go further, and show the truth of the facts there stated. It is the duty of a counsel to state facts, although they may be injurious to the character of individuals, and he is privileged so to do, if he speaks conscientiously according to his instructions:(*a*) but if it were to follow that others might repeat what he says, it might be most injurious to the character of individuals; for, as to them, the reason for the privilege, which is the advancement of public justice, does not apply."

Slight errors must sometimes occur in reports of trials; and if any one of the parties in a case complains of the tendency of a report to injure him, the jury will be asked to determine whether, under all the circumstances of the case, the publication amounts to a libel. Slight errors in reports.

Where the writer of a treatise on the "Law of Attorneys" referred in his book to the case of the plaintiff as that of of an attorney who had been struck off the rolls, whereas he had only been suspended for two years, as appeared from the very report of the case cited by the writer, Cockburn, C.J., after pointing out to the jury the important distinction between the two punishments, and that the misstatement was an unintentional mistake, left it to them to say whether it was a statement reasonably fair of that which was contained in the report, and whether it was a mistake which arose from want of reasonable diligence and care.(*b*)

The plaintiff and M. having been convicted of a conspiracy to extort money from a third person, an action of libel was brought against the publisher of a report of the trial, for publishing that the counsel who moved for judgment had stated the plaintiff to have been the writer of one letter, which

(*a*) See *Hodgson* v. *Scarlett* (1 B. & Ald. 232). The privilege of counsel is absolute, *vide ante*, p. 502.

(*b*) *Blake* v. *Stevens* (11 L. T. N. S. 544; 4 F. & F. 239).

was not in fact written by him, but by his co-conspirator. The plaintiff's evidence on the trial proving the great probability of the counsel alluded to having in fact made the statement reported, it was held that it was properly left to the jury to say whether the publication was a libel, and, the jury having found a verdict of not guilty, that this was not contrary to the evidence.(*a*)

Report of action for libel setting out the libel.

An action of libel was brought against the proprietors of a newspaper for publishing what purported to be a report of the trial of another action of libel, brought by the same plaintiff against the proprietors of another newspaper, who justified the libel on the ground of its truth. The report stated the libel on which the original action was brought, the defendant's proofs on the justification, and the judge's summing up, and ended by stating that the plaintiff had a verdict for £30. No proof was given that such a trial had taken place, or whether, if it had, the report in question was a fair and impartial report of it. Lord Abinger, C.B., told the jury that if, in their opinion, the report was so worded as to indicate a malicious motive against the plaintiff, or to be injurious to his character by misstatement, or by conveying an insinuation of his being actually guilty of the matter originally imputed, notwithstanding he was stated to have obtained damages for the imputation, or if the report of such a trial having taken place was pure fiction invented by the defendants, their verdict should be for the plaintiff; but if they thought otherwise, or that the report, though containing some allegations prejudicial to the plaintiff, yet when taken altogether, with the alleged verdict in his favour, was not on the whole injurious to him, the verdict should be for the defendants. The jury having found for the defendants, the Court refused a rule for a new trial on the ground of misdirection.(*b*)

"In *Dicas* v. *Lawson*," said Alderson, B., "the plaintiff complained of the report of a trial containing strong observations on his character, but also stating that he had obtained a verdict for £50 damages. The report was said to be libellous, because it set out the charge made against the plaintiff in the first publication. At the trial I told the jury to look at the whole publication and to consider whether, taking the whole of it together, it was such as would be likely to depreciate the plaintiff's character; and the jury decided that it was not, because

(*a*) *Stockdale* v. *Tarte* (4 A. & El. 1016).
(*b*) *Chalmers* v. *Payne* (5 Tyrw. 766).

they found that the damages awarded to the plaintiff took away the impression which would otherwise arise from the statement. On an application for a new trial, the Court approved my direction. I perfectly agree that the law will infer malice from the act of uttering or publishing slanderous matter actionable in itself and not justified by sufficient cause; but the question here for a jury is, whether slanderous matter has or has not been published. That question has been decided by them, under a direction to take the whole together and consider whether the result is calculated to injure the plaintiff's character. If the whole be not slanderous matter, and prejudicial to the plaintiff, it is not actionable; for, though in one part of the publication something disreputable be imputed to him, it is removed by the conclusion which the jury, sworn to judge of its tendency, have arrived at; the 'bane and antidote' are together, and for the jury to consider. Nor can we suppose, without proof, that the occurrence of such a trial was mere invention, or that newspapers publish reports of merely imaginary trials."(*a*)

In an old case (1732) one Lofield, having recovered £1 100 damages in an action against a person named Bankcroft for maliciously charging him with felony, published in the news "that Bankcroft had conspired to charge him with this felony, that in vindication of his character he had brought an action against Bankcroft for so doing, and had recovered £1 100 damages against him." The Court of King's Bench made absolute a rule for a criminal information against Lofield for this publication, because it falsely represented the fact; for Lofield did not bring his action for a conspiracy, but for Bankcroft's maliciously charging him with felony, and a conspiracy requires an infamous judgment.(*b*)

Heading to report.

Care must be taken not to put a general heading of a libellous character to what may be in other respects a fair report of a judicial proceeding. A particular case, in which an attorney has treated his client badly will not, according to Byles, J.,(*c*) justify the prefixing to the report of that case a general heading in the words "How Lawyer B. treats his clients."

So, where a newspaper published a report of proceedings in the Insolvent Debtors' Court headed "Shameful Conduct of an Attorney," a plea stating that the alleged libel contained a correct account of what took place in court was, even after

(*a*) *Chalmers* v. *Payne* (5 Tyr. 769).
(*b*) *Rex* v. *Lofield* (2 Barn. Rep. 128).
(*c*) *Bishop* v. *Latimer* (4 L. T. N. S. 775).

verdict for the defendant, held bad, on motion *non obstante veredicto*, on the ground that by the prefatory words the defendant had taken upon himself to make the allegation of shameful conduct against the plaintiff.(*a*)

Malice.

It must not be forgotten that the privilege of a report in the case of legal proceedings is not absolute but only qualified; and that it is lost if actual malice is proved, even, it would seem, according to *Stevens* v. *Sampson*, in the case of a fair and accurate report.(*b*) In this case, however, the report held not privileged was not sent to the newspaper by its ordinary reporter, but by the solicitor for one of the parties; and the judgment of Bramwell, L.J., seems to have proceeded wholly on this ground.

II.—Reports of Parliamentary Proceedings.

Reports of Parliamentary debates privileged.

Reports of proceedings in Parliament(*c*) may now be

(*a*) *Lewis* v. *Clement* (3 B. & Ald. 702). See *Lewis* v. *Levy* (El. Bl. & El. 537; 27 L. J. 287, Q. B.).

(*b*) L. R. 5 Ex. Div. 53.

(*c*) For our reports of such fragments of the parliamentary debates of earlier times as have come down to us, we are indebted to the private labours of such compilers as Sir Symonds D'Ewes, in his journal of Queen Elizabeth's Parliament; Sir Benjamin Rudyard (time of Charles I.); Burton, who made reports of the Commonwealth Parliaments; Anchitell Grey, who recorded the proceedings of Charles II.'s Parliaments; and Somers, who took pencil notes of the debates of the Convention. The first who ventured on the practice of publishing regular reports for general readers, appear to have been the publishers of "The Political State of Great Britain." Various resolutions had from time to time been passed by both Houses against publishing reports of their debates. There is a standing order of the House of Lords of the 27th of February, 1698, declaring "that it is a breach of the privilege of this House, for any person whatsoever to print, or publish in print, anything relating to the proceedings of the House, without the leave of the House;" and that House, in 1801, fined one Allen Macleod £100, and committed him to Newgate for six months for publishing in *The Albion and Evening Advertiser* certain paragraphs ordered to be expunged from the journals of the House, and also a report of the debate thereupon (43 Lords' J. 105); and, in the same year, the printer and the publisher of the *Morning Herald* were committed to the custody of the Black Rod, for publishing in that paper what purported to be an account of a debate, which the House resolved to be a scandalous misrepresentation of what had passed (43 Lords' J. 60). The House of Commons ordered, in 1641, "That no member shall either give a copy or publish in print anything that he shall speak here, without leave of the House" (2 Com. J. 209); and in 1642 resolved, "That what person soever shall print or sell any act or passages of this House, under the name of a diurnal or otherwise, without the particular licence of this House, shall be reputed a high contemner and breaker of the privilege of Parliament, and so punished accordingly" (2 Com. J. 220). In 1694 the House resolved "That no

regarded as standing on the same footing with reports of proceedings in courts of justice.

For a long time the law on the subject remained in a

news-letter writers do in their letters, or other papers that they disperse, presume to intermeddle with the debates or any other proceedings of this House" (11 Com. J. 193): and repeated the same resolution in 1695 (*Ibid.* 439), 1697 (12 Com. J. 48), 1703 (14 Com. J. 270), and 1722 (20 Com. J. 99). In the last-mentioned year the Commons also resolved, "That no printer or publisher, of any printed newspapers, do presume to insert in any such papers any debates or any other proceedings of this House or any committee thereof" (*Ibid.*). In 1728 the House resolved, "That it is an indignity to, and a breach of the privilege of, this House, for any person to presume to give, in written or printed newspapers, any account or minutes of the debates or other proceedings of this House, or of any committee thereof;" and "that upon discovery of the authors, printers, or publishers of any such written or printed newspaper, this House will proceed against the offenders with the utmost severity" (21 Com. J. 238). See further orders, 23 Com. J. 148; 23 Com. J. 754; 29 Com. J. 207). In a debate which took place on the subject in 1738, Mr. Pulteney said he thought no appeals should be made to the public with regard to what was said in the House, "and to print or publish the speeches of gentlemen in this House, even though they were not misrepresented, looks very like making them accountable without doors for what they say within. Besides, sir," added the honourable member, "we know very well that no man can be so guarded in his expressions as to wish to see everything he says in this House in print" (Parl. Hist. vol. x. p. 283). Sir Robert Walpole, in the same debate, complained (p. 285) that in some of the reports he had been made to speak the very reverse of what he meant; and that in others, all the wit, the learning, and the argument had been thrown into one side, and into the other nothing but what was low, mean, and ridiculous; and yet, when it came to the question, the division has gone against the side which upon the face of the debate, had reason and justice to support it, so that, had he been a stranger to the proceedings and the nature of the arguments themselves, he must have thought this to be one of the most contemptible assemblies on the face of the earth. The debate ended in a resolution, "That it is a high indignity to, and a notorious breach of the privilege of this House, for any news-writer, in letters or other papers (as minutes, or under any other denomination), or for any printer or publisher of any printed newspaper of any denomination, to presume to insert in the said letters or papers, or to give therein, any account of the debates or other proceedings of this House, or any committee thereof, as well during the recess as the sitting of Parliament; and that this House will proceed with the utmost severity against such offenders." It must be remembered that there was considerable ground for complaining of the manner in which the debates were at this time misrepresented in the reports which appeared; language and sentiments being frequently attributed to members which they never used or entertained. We are told in Hawkins's "Life of Johnson," that the parliamentary reports written by him (for the *Gentleman's Magazine*) were the only part of his writings which gave him any compunction; being frequently written from very slender materials, and often from none at all—the mere coinage of his own imagination. Of Pitt's famous speech in reply to Horace

PART IV. CHAPTER IX.

doubtful state, but the decision of the Court of Queen's Bench in the leading case of *Wason* v. *Walter*(*a*) may be considered to have placed beyond doubt(*b*) the right to publish, without liability to civil action or criminal proceeding, a full and fair report of parliamentary debates, even though they contain matter defamatory of an individual.(*c*)

Wason v. Walter.

In that case an action was brought against the publisher of the *Times* newspaper, for an alleged libel contained in a report of a debate, which took place in the House of Lords, on the presentation of a petition by the plaintiff, charging a high judicial officer with having been guilty of dishonourable conduct many years previously. Cockburn, C.J., directed the jury that if they were satisfied that the matter charged as a libel was a faithful and correct report of the proceedings in the House of Lords, and of the speeches delivered on the occasion, it was in point of law a privileged publication, and one which was not the subject of a civil action. The jury having found a verdict for the defendant,

Walpole, we learn from Boswell's "Life of Johnson" that the Doctor avowed his having written it in a garret in Exeter Street; adding, "I saved appearances tolerably well; but I took care that the Whig dogs should not have the best of it." In order to evade the resolutions of the Houses of Parliament against the publication of their debates, recourse was had to the expedient of publishing them as the debates in the senate of Magna Lilliputia, or as the debates in the Roman Senate, with Roman names adapted to the several speeches. In 1771, Colonel George Onslow made a complaint to the House of Commons of a number of newspapers, as misrepresenting the speeches and reflecting on several of the members of the House, in contempt of the order, and in breach of the privilege of the House, and moved that the printers should be brought to justice. Warm and long-continued debates ensued; orders were issued for the arrest of the printers; the city was in a ferment; mobs assembled around the House; and ultimately the offending printers were wrested by force from the hands of the parliamentary messengers. Since this time no attempt has been made to check the publication of debates of either House.

(*a*) L. Rep. 4 Q. B. 73; 19 L. T. N. S. 409; 38 L. J. 34, Q. B.

(*b*) A bill of exceptions was tendered to the ruling of the learned judge (Cockburn, C.J.), who presided at the trial at Nisi Prius; but the matter has not since been carried any further.

(*c*) Lord Campbell tried in 1843 (see Hansard's Parliamentary Debates, 3rd series, vol. lxx. p. 1254), and again in 1858 (see Hansard, vol. cxlix. p. 947), but on both occasions unsuccessfully, to give, by Act of Parliament, an immunity to faithful reports of any proceedings in either House of Parliament, at which strangers were permitted to be present. One of the main grounds insisted on for resisting Lord Campbell's Bill was that there was no necessity for legislation, inasmuch as no action had ever been brought in respect of the publication of a parliamentary debate (see *per* Cockburn, C.J., *Wason* v. *Walter*, *ubi supra*, and the remarks of Lord Brougham in the 70th vol. of Hansard, p. 1225).

a rule *nisi* was obtained for a new trial on the ground of misdirection, which was afterwards discharged. The decision of the Court was delivered by Cockburn, C.J., in an elaborate judgment.

"The main question for our decision," said his Lordship, "is, whether a faithful report in a public newspaper of a debate in either House of Parliament, containing matter disparaging to the character of an individual as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question. We are of opinion that it is not. Important as the question is, it comes now for the first time before a court of law for decision. Numerous as are the instances in which the conduct and character of individuals have been called in question in Parliament, during the many years that parliamentary debates have been reported in the public journals, this is the first instance in which an action of libel, founded on a report of a parliamentary debate, has come before a court of law. There is, therefore, a total absence of direct authority to guide us. There are, indeed, *dicta* of learned judges having reference to the point in question, but they are conflicting and inconclusive, and, having been unnecessary to the decision of the cases in which they were pronounced, may be said to be extra-judicial. . . . . Both the principles on which the exemption from legal consequences is extended to the publication of the proceedings of courts of justice, appear to us to be applicable to the case before us. The presumption of malice is negatived in the one case as in the other by the fact that the publication has in view the instruction and advantage of the public, and has no reference to the party concerned. There is also in the one case as in the other a preponderance of general good over partial and occasional evil. We entirely concur with Lawrence, J., in *Rex* v. *Wright*,(*a*) that the same reasons which apply to the reports of the proceedings in courts of justice apply also to proceedings in Parliament. It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the Houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls; seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the Government of the country, or in the Legislature by which our laws are framed, and to whose charge the great interests of the country are committed; where would be our attachment to the consti-

(*a*) 8 T. R. 298.

tution under which we live, if the proceedings of the great council of the realm were shrouded in secrecy, and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in Parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either House? Can any man bring himself to doubt that the publicity given in modern times to what passes in Parliament, is essential to the maintenance of the relations between the Government, the Legislature, and the country at large? It may, no doubt, be said that, while it may be necessary as a matter of national interest that the proceedings in Parliament should in general be made public, yet that debates in which the character of individuals is brought into question ought to be suppressed. But to this, in addition to the difficulty in which parties publishing Parliamentary reports would be placed if this distinction were to be enforced, and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is, perhaps, no subject in which the public have a deeper interest than in all that relates to the conduct of public servants of the State—no subject of Parliamentary discussion which more requires to be made known than an inquiry relating to it. . . . . Lastly, what greater anomaly or more flagrant injustice could present itself than that, while from a sense of the importance of giving publicity to their proceedings, the Houses of Parliament not only sanction the reporting of their debates, but also take measures for giving facility to those who report them; while every member of the educated portion of the community, from the highest to the lowest, looks with eager interest to the debates of either House, and considers it a part of the duty of the public journals to furnish an account of what passes there, we were to hold that a party publishing a Parliamentary debate is to be held liable to legal proceedings, because the conduct of a particular individual may happen to be called in question?"(*a*)

Standing orders. To an argument urged against the legality of publishing parliamentary proceedings as being in contravention of the

(*a*) L. Rep. 4 Q. B. 82, 89, 90; 19 L. T. N. S. 415, 416; 38 L. J. 38, 41, 42, Q. B.

standing orders of both Houses of Parliament, his Lordship replied: "The fact, no doubt, is that each House of Parliament does, by its standing orders, prohibit the publication of its debates. But, practically, each House not only permits, but also sanctions and encourages the publication of its proceedings, and actually gives every facility to those who report them. Individual members correct their speeches for publication in Hansard, or the public journals; and, in every debate, reports of former speeches contained therein are constantly referred to. Collectively, as well as individually, the members of both Houses would deplore, as a national misfortune, the withholding their debates from the country at large. Practically speaking, therefore, it is idle to say that the publication of Parliamentary proceedings is prohibited by Parliament. The Standing Orders which prohibit it are obviously maintained only to give to each House the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded. Independently of the orders of the Houses, there is nothing unlawful in publishing reports of Parliamentary proceedings. Practically, such publication is sanctioned by Parliament; it is essential to the working of our parliamentary system, and to the welfare of the nation. Any argument founded on its alleged illegality appears to us, therefore, entirely to fail. Should either House of Parliament ever be so ill-advised as to prevent its proceedings from being made known to the country —which certainly never will be the case—any publication of its debates made in contravention of its orders would be a matter between the House and the publisher. For the present purpose, we must treat such publication as in every respect lawful, and hold that, while honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected."(*a*)

Report must not be partial or garbled.

The report, in order to be protected, must be a full and fair one of the entire debate, setting out whatever is said in favour of, as well as what is said against, the individual whose conduct may be the subject of discussion. A report of only that part of a debate which reflects on an individual, or one which unfairly and injuriously represents its bearing upon him, would not be justifiable. "The analogy between the case of reports of proceedings of courts of justice and those of proceedings in Parliament being complete, all the limitations placed on the one, to prevent injustice to indi-

(*a*) L. Rep. 4 Q. B. 95; 19 L. T. N. S. 418; 38 L. J. 45, Q. B.

viduals, will necessarily attach to the other. A garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection. . . . . Whatever would deprive a report of the proceedings in a court of justice of immunity will equally apply to a report of proceedings in Parliament."(*a*)

Publication by a member of a single speech.

Though a member of either House may, with impunity, make, in the House, a speech defamatory of an individual, the publication of that speech alone, whether by himself or by another person, is libellous; unless, perhaps, where it is published *bonâ fide* for the information of his constituents.

In *Rex* v. *Lord Abingdon*,(*b*) tried before Lord Kenyon, in 1774, the defendant had, in the House of Lords, read from a written paper a speech highly defamatory of an attorney, and afterwards had it published in several newspapers; for which a criminal information was filed against him. On the trial he argued that, as his privilege of Parliament gave him immunity for the delivering of the speech in the House, he was also dispunishable for its publication; but Lord Kenyon held that, although the defendant was not amenable to the jurisdiction of the Court for a speech delivered in Parliament, yet he was liable for its publication, if it contained defamatory matter, remarking, "that a member of Parliament had certainly a right to publish his speech, but that speech should not be made the vehicle of slander against any individual; if it was, it was a libel."

Rex v. *Creevey*(*c*) was a stronger case. There the defendant, a member of the House of Commons, had made, in the course of a debate, a speech containing several charges against a man named Kirkpatrick. An incorrect report of the debate having appeared in the Liverpool and other papers, the defendant sent a correct report of his speech to the editor of a Liverpool paper, with a request that he would publish it, which was done. On the trial of a criminal information, Le Blanc, J., told the jury, on the authority of *Rex* v. *Lord Abingdon*, that a member of Parliament was answerable for publishing what he has delivered in his speech in Parliament, if it contains defamatory matter. The jury having found the defendant guilty, a motion was made in the King's Bench for a new trial, on the ground of misdirection, but the Court unanimously refused

(*a*) *Per* Cockburn, C.J., *Wason* v. *Walter* (*ubi supra*).
(*b*) 1 Esp. 226. (*c*) 1 M. & S. 273.

to grant a rule. Lord Ellenborough, C.J., said: "A member of the House of Commons has spoken what he thought material, and what he was at liberty to speak in his character as a member of that House. So far he was privileged: but he has not stopped there; but, unauthorised by the House, has chosen to publish an account of that speech in what he has pleased to call a more corrected form; and in that publication has thrown out reflections injurious to the character of an individual. The only question is, whether the occasion of that publication rebuts the inference of malice arising from the matter of it. Has he a right to reiterate these reflections to the public; and to address them as an *oratio ad populum*, in order to explain his conduct to his constituents? There is no case in practice, nor, I believe, any proposition laid down by the best text writers upon the subject, that leads to such a conclusion." To the same effect, Le Blanc, J.: "Every member had privilege of speech in Parliament; but when he published his speech to the world, it then became the subject of common law jurisdiction; and the circumstances of its being accurate or intended to correct a misrepresentation, would not the less make him amenable to the common law in respect of the publication."

Authority of *Rex* v. *Creevey* considered.

The authority of *Rex* v. *Creevey*, so far as it is understood to decide that the publication of his speech by a member of Parliament can, under no circumstances, be justified, if it contains matter defamatory of an individual, is much weakened by the opinions expressed with reference to it by eminent judges in two recent cases.

In *Davison* v. *Duncan*,(*a*) Lord Campbell, C.J., said: "As *Rex* v. *Creevey* has been mentioned, I will add that, though I perfectly concur in the doctrine of *Rex* v. *Lord Abingdon*, that a malicious publication of his speech by a member of either House of the Legislature is not privileged, I should think that a publication of a report of his speech by a member of the House of Commons, *bonâ fide* addressed to his constituents, would be privileged;" and Crompton, J., added that, "The privilege in such a case would arise because the publication was as a communication between a member and his constituents, and not because it was a report of what took place in Parliament."

In the more recent case of *Wason* v. *Walter*,(*b*) Cockburn, C.J., in delivering the judgment of the Court of Queen's Bench, said: "Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose, or with the effect of, injuring an individual, will be

(*a*) 7 El. & Bl. 233; 26 L. J. 107 Q. B. (*b*) L. R. 4 Q. B. 94.

unlawful, as was held in the cases of *Rex* v. *Lord Abingdon* and *Rex* v. *Creevey*. At the same time it may be as well to observe that we are disposed to agree with what was said in *Davison* v. *Duncan*, as to such a speech being privileged, if *bonâ fide* published by a member for the information of his constituents."

III. Reports of Public Meetings.

Law previous to Act of 1881.

Fair and correct reports of the proceedings at public meetings were not by our Courts held entitled to the same privilege as similar reports of judicial or parliamentary proceedings.

This was so held as to meetings of Improvement Commissioners,(*a*) as to public meetings called to petition Parliament,(*b*) as to meetings of Boards of Guardians(*c*) and Vestry Boards,(*d*) and as to Commissioners of Inquiry respecting Corporations.(*e*)

Newspaper Libel and Registration Act of 1881.

An important alteration in the law has been effected by the Newspaper Libel and Registration Act, 1881,(*f*), sect. 2 of which provides that "any report published in any newspaper of the proceedings of a public meeting shall be privileged if such meeting was lawfully convened for a lawful purpose and open to the public, and if (1) such report was fair and accurate, and (2) published without malice, and if (3) the publication of the matter complained of was for the public benefit."

But "the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor."(*g*)

The important provisions of the Act as to criminal proceedings for libel will be dealt with subsequently.

(*a*) *Davison* v. *Duncan* (7 El. & Bl. 231; 26 L. J. 106, Q. B.).

(*b*) *Hearne* v. *Stowell* (12 A. & E. 719).

(*c*) *Purcell* v. *Sowler* (L. R. 1 C. P. D. 781; 2 C. P. D. 215). See also *Pierce* v. *Ellis* (6 Ir. L. Rep. N. S. 65, 66). In this case the defendant handed to the newspaper reporter a correct report of his own speech, and the Court was of opinion that it appeared on the defence itself, that the report of the proceedings was not a fair one.

(*d*) *Popham* v. *Pickburn* (7 H. & N. 891; 5 L. T. N. S. 846; 31 L. J. 133, Ex.).

(*e*) *Charlton* v. *Watton* (6 C. & P. 385).

(*f*) 44 & 45 Vict. c. 60, an Act not extending to Scotland.

(*g*) Sect. 2.

CHAPTER X.

PUBLICATION OF PARLIAMENTARY PAPERS.

Case of *Stockdale* v. *Hansard.*

With regard to papers published by order of either House of Parliament, the decision of the Court of Queen's Bench, in the case of *Stockdale* v. *Hansard*,(a) led to an important alteration of the law by Act of Parliament.

The Court of Queen's Bench decided, in that celebrated case, that it was no defence to an action for publishing a libel, that the defamatory matter was part of a document which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by order of the House, printed and published by the defendant, and that the House of Commons had resolved, declared, and adjudged "that the power of publishing such of its reports, votes, and proceedings, as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially to the Commons House of Parliament, as the representative portion of it."

The libel complained of in this case by the plaintiff (a bookseller and publisher of books) was contained in a book entitled "Reports of the Inspectors of the Prisons of Great Britain," and in a printed paper containing a copy of the reply of two of the Inspectors of Prisons for the Home District to a report of the Court of Aldermen, to whom it had been referred, to consider the first report of the inspectors, so far as related to the gaol of Newgate; and the libel consisted of statements made by the inspectors, with reference to a physiological and anatomical book published by the plaintiff, to the effect that it was of a most disgusting nature; that the plates were indecent and obscene in the extreme, and not calculated only to attract the attention of persons connected with surgical science; that the inspectors had applied to several medical booksellers, who all gave it the same character, and described it as one of Stockdale's (the plaintiff's) obscene books.

The defendants, Messrs. Hansard, printers to the House of Commons, in a long plea, which was demurred to, pleaded that the report of the Inspectors of Prisons was laid before the House of Commons pursuant to Act of Parliament, and that

(a) 9 A. & E. 1.

the House had ordered the report to be printed; that a copy of the report made by the Committee of the Court of Aldermen had also, by the order of the House of Commons, been laid before it and printed; that the reply of the inspectors to this report had also been ordered by the House to be laid before it and printed;(*a*) that the defendants had published the report of the inspectors and their reply by the authority of the House of Commons, and as directed and ordered by the orders and resolutions of the House, and not otherwise; and, further, that the House had resolved, declared, and adjudged that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially to the Commons House of Parliament as the representative portion of it.

After long and elaborate arguments, lasting several days, the Court held that the plea set out no defence to the action. The judgments, which are proportionately long and elaborate, and deal fully with the important constitutional questions involved in the case, will well repay a careful perusal.(*b*)

With regard to the first ground of defence relied on in argument—viz., that the grievance complained of was an act done by order of the House of Commons, a court superior to any court of law, and none of whose proceedings were to be questioned in any way, Lord Denman, C.J., said:(*c*) "It is a claim for an arbitrary power to authorize the commission of any act whatever, on behalf of a body which, in the same argument, is admitted not to be the supreme power in the State. The supremacy of Parliament, the foundation on which the claim is made to rest, appears to me completely to overturn it, because the House of Commons is not the Parliament, but only a co-ordinate and component part of the Parliament. That sovereign power can make and unmake the laws; but the concurrence of the three legislative estates is necessary; the resolution of any one of them cannot alter the law or place any one beyond its

(*a*) The reports were printed, not only for the use of members of the House, but also for public sale, the proceeds to be applied to the general expenses of printing by the House.

(*b*) Cockburn, C.J., says of the masterly judgments of Lord Denman and his colleagues in this case, that they "will secure to the judges who pronounced them admiration and reverence so long as the laws of England and a regard for the rights and liberties of the subject shall endure" (Judgment in *Wason* v. *Walter*, L. Rep. 4 Q. B. 86; 19 L. T. N. S. 416; 38 L. J. 40, Q. B.).

(*c*) 9 A. & El. 107.

control. The proposition, therefore, is wholly untenable, and abhorrent to the first principles of the constitution of England." As to the next ground of defence—viz., that the defendant committed the grievance by order of the House of Commons in a case of privilege, and that each House of Parliament is the sole judge of its own privileges—Lord Denman, after referring generally to the subject of privilege, observed, "For speeches made in Parliament by a member, to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete immunity. For any paper signed by the Speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a Court of Justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So, if the Speaker, by authority of the House, order an illegal act, though that authority shall exempt *him* from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer."

The learned judge added in a subsequent portion of his judgment :(*a*) "It can hardly be necessary to guard myself against being supposed to discuss the expediency of keeping the law in its present state, or introducing any and what alterations. It is, no doubt, susceptible of improvement; but the improvement must be a legislative act. If we held that any improvement, however desirable, could be effected under the name of privilege, we should be confounding truth, and departing from our duty; and if, on such considerations either House should claim as matter of privilege what was neither necessary for the discharge of their proper functions, nor ever had been treated as a privilege before, this would be an enactment, not a declaration; or, if the latter name were more appropriate, it would be the declaration of a general law, to be disregarded by the courts, though never, I hope, treated with contempt."

The subsequent history of this celebrated case, which decided that an order of the House of Commons cannot render lawful that which is contrary to law, and that still less can a resolution of the House supersede the jurisdiction of a court of law by clothing an unwarranted exercise of power with the garb of privilege,(*b*) is as follows:

(*a*) 9 A. & El. 153.
(*b*) *Per* Cockburn, C.J., *Wason* v. *Walter* (L. Rep. 4 Q. B. 87; 38 L. J. 40, Q. B.; 19 L. T. N. S. 416).

Proceedings consequent on decision in *Stockdale v. Hansard.*

The plaintiff having recovered judgment against the defendants, a writ of inquiry was executed; damages were assessed, and a *fi. fa.* issued; and, on the sheriff returning that he had the money in court, he was called upon to show cause why the money should not be paid to the plaintiff. It was stated on the sheriff's behalf, that the House of Commons had passed the following resolutions: "That it appears to this House that execution in the cause of *Stockdale* v. *Hansard* has been levied to the amount of £640 by the sale of the property of Messrs. Hansard, in contempt of the privileges of this House, and that such money now remains in the hands of the Sheriff of Middlesex. That the said sheriff be ordered to refund the said amount forthwith to Messrs. Hansard." The House also resolved that the sheriff had been guilty of a contempt and breach of the privileges of the House, and that he should be committed to the custody of the Sergeant-at-Arms, which was done. Notwithstanding this, the Court of Queen's Bench made absolute the rule, commanding the sheriff to pay over the money to the plaintiff. Afterwards, a rule *nisi* was obtained for an attachment against the sheriff for not paying over the money, and the rule was made absolute, Lord Denman, C.J., observing that the Court, having put the law in motion for the plaintiff, was bound to enforce it for him, and there was unfortunately no other mode of doing so than the proceeding adopted.

The two persons who filled the office of Sheriff of Middlesex, having been taken into custody of the Sergeant-at-Arms pursuant to the resolution of the House of Commons, sued out a writ of *habeas corpus*, to which the Sergeant-at-Arms made return—that he had taken them into custody and detained them by virtue of a warrant from the Speaker of the House of Commons, reciting that the House had resolved that they had been guilty of a contempt and breach of the privileges of the House, and that they should be committed to the custody of the Sergeant-at-Arms, and ordering him to take them into custody. The Court of Queen's Bench held the return sufficient, and the sheriffs were remanded into custody; but Lord Denman was careful to state that he adhered in all respects to the view of the law laid down in *Stockdale* v. *Hansard*, as to defamatory publications issued by order of the House of Commons.

Statute 3 & 4 Vict. c. 9.

This dispute between the House of Commons and the Court of Queen's Bench led to the passing of the Act 3 & 4 Vict. c. 9, entitled "An Act to give summary protection to persons employed in the publication of Parliamentary papers." This Act recites that "it is

essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament, as such House of Parliament may deem fit or necessary to be published:" and that "obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by, or acting under the authority of, the Houses of Parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner" provided by the Act.

Provision for staying proceedings.

Sect. 1 provides for the stay of all proceedings commenced against persons for publication of papers printed by order of either House of Parliament, upon delivery to the Court or a judge of a certificate and affidavit, to the effect that such publication is by order of the House.

It enacts that "it shall and may be lawful for any person or persons who now is or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceeding, commenced or prosecuted in any manner soever, for or on account or in respect of the publication of any such report, paper, votes, or proceedings, by such person or persons, or by his, her, or their servant or servants, by or under the authority of either House of Parliament, to bring before the Court in which such proceeding shall have been, or shall be, so commenced or prosecuted, or before any judge of the same (if one of the superior courts in Westminster) first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords, for the time being, or of the Clerk of the Parliaments, or of the Speaker of the House of Commons, or of the Clerk of the same House, stating that the report, paper, votes, or proceedings, as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons, or by his, her, or their servant or servants, by order or under the authority of the House of Lords, or of the House of Commons, as the case may be, together with an

affidavit verifying such certificate; and such Court or judge shall thereupon immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be, and shall be deemed and taken to be, finally put an end to, determined, and superseded by virtue of this Act."

Publication of copies of reports, &c.

As to the publication of copies of reports or other papers, sect. 2 enacts "that in case of any civil or criminal proceeding hereafter to be commenced or prosecuted for, or on account or in respect of, the publication of any copy of such report, paper, votes, or proceedings, it shall be lawful for the defendant or defendants, at any stage of the proceedings, to lay before the Court or judge such report, paper, votes, or proceedings, and such copy, with an affidavit verifying such report, paper, votes, or proceedings, and the correctness of such copy; and the Court or judge shall immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be, and shall be deemed and taken to be, finally put an end to, determined, and superseded by virtue of this Act."

Publication of extracts or abstracts.

As to the publication of abstracts of any such papers, or extracts from them, sect. 3 provides, "that it shall be lawful, in any civil or criminal proceeding, to be commenced or prosecuted for printing any extract from or abstract of such report, paper, votes, or proceedings, to give in evidence under the general issue, such report, paper, votes, or proceedings, and to show that such extract or abstract was published *bonâ fide*, and without malice; and, if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant or defendants."

Sect. 4 adds, "that nothing contained in the Act is to be deemed, or taken, or held, or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever."

Object of notice.

The object of giving twenty-four hours' notice, to the plaintiff or prosecutor,(*a*) of the intention to bring the certificate before the court, is not quite clear. It is doubtful whether it gives the plaintiff or prosecutor a right to show cause, and may have been prescribed only to enable him to avoid incurring more costs.(*b*)

The only reported case on this Act is that of *Stockdale* v. *Hansard*,(*c*) where proceedings were stayed upon a certificate of the Speaker of the House of Commons, verified by affidavit,

(*a*) Sect. 1.
(*b*) *Per* Lord Denman, C.J., *Stockdale* v. *Hansard* (11 A. & E. 299).
(*c*) 11 A. & E. 297.

that the publication mentioned in the declaration (a description of which it gave) and in respect of which the action was brought, was published by order and under the authority of the House of Commons. The declaration was verified by affidavit, and appeared to be for the publication of an alleged libel, the description of which corresponded with that in the Speaker's certificate.

Older cases.

In 1686,(*a*) an information having been filed against Sir William Williams, for publishing a libel called "Dangerfield's Narrative," the defendant pleaded that he was at the time of publication(*b*) Speaker of the House of Commons, and as such had a right to publish the votes and acts of the House, and that the "Narrative" in question was printed and published as parcel of the proceedings; but the Court called the plea an idle, insignificant one, and gave judgment for the King, inflicting a fine of £10,000 on the defendant; the Lord Chief Justice (Wright) asking the defendants' counsel whether an order of the House of Commons could justify a scandalous, infamous, and flagitious libel.(*c*)

This case of Sir William Williams happened, as observed by Lord Kenyon, C.J.,(*d*) in the worst of times, and the publication was a paper of a private individual published by another individual, under pretence of sanction of the House of Commons. Gross, J., said of the same case(*e*) that it was declared by a great authority to be a disgrace to the country.

In 1799 a criminal information was refused against a bookseller for printing a report of the Committee of Secrecy of the House of Commons, though it reflected on the character of an individual,(*f*) Lord Kenyon, C.J., observing that as the publication was a true copy of the report, there was not the least pretence for the motion. His Lordship said further: "This is an application for leave to file a criminal information against the defendant for publishing a libel; so that the application supposes that this publication is a libel. But the inquiry made by the House of Commons was an inquisition taken by one branch of the Legislature to enable them to proceed further, and adopt some regulations for the better government of the country: this report was first made by a committee of the House of Commons,

(*a*) 2 Jac. 2.
(*b*) He was not Speaker at the time the case was adjudged.
(*c*) 10 St. Tr. App. p. 34, n.; Dig. L. L. 75; Show. Rep. 471.
(*d*) *Rex* v. *Wright* (8 T. R. 296). (*e*) *Ibid.* 297.
(*f*) *Ibid.* 293.

then approved by the House at large, and then communicated to the other House, and it is now *sub judice*; and yet it is said that this is a libel on the prosecutor. It is impossible for us to admit that the proceedings of either of the Houses of Parliament is a libel." "Though the defendant," said Lawrence, J.,(*a*) "was not authorized by the House of Commons to publish the report in question, yet, as he only published a true copy of it, I am of opinion that the rule ought to be discharged."

CHAPTER XI.

CRIMINAL PROSECUTIONS FOR LIBEL.

HAVING considered what constitutes a libel, we have now to inquire how the law against libels is put into motion; what evidence is necessary to prove the charge of publishing a libel; by what means the accused may defend himself; and what penalties are incurred by the guilty.

Twofold liability of publisher.

The liabilities of the publisher of a libel are twofold: he is liable to a criminal prosecution and to a civil action.

The present chapter will be devoted to the criminal branch of the subject.

Criminal prosecution.

Every publication of a libel, be it on the Christian religion, on morality, on the Crown, on the Government, on the administration of justice, or on a private person, is a criminal offence; and it may be broadly laid down that wherever an action would lie, there an indictment would lie also. But the converse of this proposition is not strictly accurate; for no individual has a right of action against another for publishing a blasphemous, obscene or seditious libel, unless it contain something reflecting on himself. Again, a libel on a dead man may,(*b*) under certain circumstances, be indictable, as tending to excite to a breach of the peace, but in no case would an action lie for such a libel, for *Actio personalis moritur cum personâ.*

Various methods of criminal prosecution.

The criminal law may be set in motion by the Attorney-General filing an *ex officio* information; by an application to the Court of Queen's Bench to order the master of the Crown Office to file an information, by summoning the libeller before a magistrate; or by going direct to the grand jury at the assizes or Central Criminal Court.

(*a*) 8 T. R. 293. (*b*) *Vide ante*, pp. 494, 495.

The offence is not triable at sessions.

Necessity of fiat in case of newspaper prosecutions

Sect. 3 of the Newspaper Libel and Registration Act, 1881, (44 & 45 Vict. c. 60) provides that "No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first had and obtained."

A fiat in the following form—"I hereby allow the prosecution of the publisher, proprietor, or editor of the *Freethinker*, or any other person responsible for the publication therein of blasphemous articles between the dates of March 26 and June 11, 1882," was objected to as quite general and mentioning no name; but it was held sufficient by Lord Coleridge, C.J., at the trial, and by a Divisional Court.(*a*)

I. Criminal Informations.

Ex officio information by Attorney-General.

The Attorney-General has, at common law, the right to file a criminal information for any misdemeanour.(*b*)

Sect. 3 of the Newspaper Libel and Registration Act of 1881 (*supra*) does not apply to such a case.(*c*)

This right has several times been attacked in Parliament without success. The House of Commons agreed in 1688, on the recommendation of a committee, that a clause should be inserted in the Bill of Rights abolishing informations in the Court of King's Bench; but it would seem that the House of Lords objected to it.(*d*) On the 27th of November, 1770, a motion made by Mr. Phipps in effect to take away the power of the Attorney-General to file criminal informations, was rejected by 164 against 72 votes.(*e*) And again in 1812, Lord Holland, in the House of Lords, moved the second reading of a Bill having the same object in view.(*f*) The debates on these occasions are well worthy of attention, showing the strong arguments used by men like Burke, Dunning, Lords Erskine, Holland, and Stanhope, against this extraordinary prerogative in cases of libel.

The Attorney-General exercises this right on his own responsibility. The Court will never grant an information

(*a*) *Reg.* v. *Bradlaugh* (15 Cox. C. C. 221, 222).
(*b*) See *Prynn's case* (5 Mod. Rep. 459); Show. 106.
(*c*) *Reg.* v. *Yates* (L. R. 11, Q. B. D. 750); *per totam curiam.*
(*d*) 13 St. Tr. 1370. (*e*) 16 Parl. Hist. 1175.
(*f*) 23 Parl. Debates, 1070.

upon his application, in cases prosecuted by the Crown, as he has himself a right, *ex officio*, to exhibit one.(*a*)

He may, if he thinks proper, summon the parties before him to show cause why the information should not be exhibited, before he signs it.(*b*)

In what cases *ex officio* information granted.

The only libels against which the Attorney-General uses his power are those which we have elsewhere termed *public*, such as blasphemous, seditious, or obscene publications, or libels reflecting on persons exercising public functions.

The last instance of such a prosecution, which, after examination, we have been able to find, occurred so far back as 1830, when the Attorney-General, Sir James Scarlett, filed three informations against the proprietors and printer of the *Morning Journal* for libels on the King, the House of Commons, the Lord Chancellor, and the Duke of Wellington. These prosecutions were received with universal dislike by all parties in the country.(*c*)

The Solicitor-General, during the vacancy of the office of Attorney-General, may file an *ex officio* information, and the record need not aver the vacancy.(*d*)

Nolle prosequi.

The Attorney-General, if he find the information defective, may enter a *nolle prosequi*, and prefer a new charge; therefore the Court refuses to quash an information, on his motion.(*e*)

Bringing on of trial of *ex officio* information by defendant.

Before the stat. 60 Geo. 3 & 1 Geo. 4, c. 4, the Attorney-General might keep the information hanging over the head of the unfortunate defendant as long as he pleased, but by the ninth section of that statute it is enacted: "That in case any prosecution for a misdemeanour, instituted by the Attorney or Solicitor General, shall not be brought to trial within twelve calendar months next after the plea of not guilty shall have been pleaded therein, it shall be lawful for the Court in which such prosecution shall be depending, upon application to be made on the behalf of any defendant in such prosecution, of which application twenty days' previous notice shall have been given to the Attorney or Solicitor General, to make an order, if the said Court shall see just cause so to do, authorising such defendant to bring on the trial in such prosecution; and it shall thereupon be lawful for such defendant to bring on such trial accordingly, unless a *nolle prosequi* shall have been entered in such prosecution."

By the same statute (sect. 8) the Court are, if required, to

(*a*) *Rex* v. *Phillips and others* (3 Burr. 1565 and 4 Burr. 2090).
(*b*) *Ibid.* (*c*) 72 Annual Reg. 4.
(*d*) *Rex* v. *Wilkes* (4 Burr. 2577, and in error 4 Brown's P. C. 360).
(*e*) *Rex* v. *Stratton* (Doug. 240).

order a copy of the information to be delivered, after appearance, to the defendant or his attorney or clerk, in court, free of expense, provided no copy has previously been given.

Delivery of copy of information to defendant.

The trial is generally at the Nisi Prius sittings of the Queen's Bench, and is conducted in the same way as an indictment for a misdemeanour at the assizes; but the Attorney-General may demand a trial at Bar if he prefers it.(*a*)

Trial of *ex officio* information.

The Attorney-General is entitled to reply although the defendant call no witnesses. This privilege was strongly opposed by Horne on his trial for libel,(*b*) but without effect.

Attorney-General's right to reply.

Whether a counsel who appears for the Attorney-General has the right of reply, is not quite clear. Kelly, C.B., at the trial of a woman named Waters at the Old Bailey for murder, decided that the learned serjeant who represented the Attorney-General was entitled to reply, even if no evidence were called for the prisoner.(*c*) Lord Tenterden held, in the case of *Rex* v. *Marsden*,(*d*) that wherever the King's Counsel appears officially he is entitled to the reply.(*e*) Pollock, C.B., and Mellor, J.,(*f*) have also extended the right to counsel representing the Attorney-General. On the other hand, Martin, B.,(*g*) and Byles, J.,(*h*) held that the right is confined to the Attorney-General in person; and Martin, B., said he thought a prosecution by the Crown ought to be conducted like any other prosecution.

Sentence in case of *ex officio* information.

The only other point in which the proceedings under an *ex officio* information differ from those under an information filed by order of the Court, is, that the Attorney-General may elect whether the sentence shall be passed by the judge who tries the case or postponed to the ensuing term;(*i*) whereas the sentences on other informations must be passed by the Court of Queen's Bench.

Informations filed by order of Queen's Bench.

We now proceed to notice informations filed by order of the Court of Queen's Bench.(*k*)

(*a*) 1 Str. 644. (*b*) See 20 How. St. Tr. 660; Cowp. 672.
(*c*) *Ex relatione amici.*
(*d*) M. & M. 439. (*e*) *Reg.* v. *Gardner* (1 C. & K. 628).
(*f*) *Reg.* v. *Toakley* (10 Cox Crim. Cas. 406).
(*g*) *Reg.* v. *Christie* (1 F. & F. 75).
(*h*) *Reg.* v. *Taylor* (1 F. & F. 535).
(*i*) 11 Geo. 4 and 1 Will. 4, c. 70, s. 9.
(*k*) For cases in which informations have been granted see, in addition to those referred to in the following notes: *Rex* v. *Watson* (2 T. R. 199, cited *ante*, pp. 436, 437); *Rex* v. *White and another* (1 Camp. 359, cited *ante*, p. 435): *Rex* v. *Jolliffe* (4 T. R. 285, for publishing in the assize town, shortly before his trial, handbills reflecting on the character of the prosecutor and vindicating his own); *Rex* v. *Wake-*

PART IV. CHAPTER XI.

Whether sect. 3 of Newspaper Libel Act, 1881, is applicable.

It is not necessary (under sect. 3 of the Newspaper Libel and Registration Act of 1881), in these cases (according to Field, Denman and Mathew, JJ., *dissentientibus* Lord Coleridge, C.J. and Hawkins, J.), to get the written fiat of the Director of Public Prosecutions before instituting proceedings.(*a*) The question is to be again raised before the Court of Appeal.

Former practice.

Formerly these informations were filed by the Clerk of the Crown, who did so upon any application, as a matter of course.(*b*)

4 & 5 Will. & M. c. 18.

In consequence of the injustice and oppression caused by the number of frivolous and vexatious informations which were thus issued, at the instance of malicious persons who, even if defeated at the trial, escaped costs under the shelter of the King's name, the statute 4 & 5 Will. & M. c. 18, was passed; the preamble to which recited that divers malicious and contentious persons had, more of late than in times past, procured to be exhibited and prosecuted informations against persons in all the counties of England; that after the persons so informed against appeared and pleaded to issue, the informers very seldom proceeded any further; and that thereby the persons so informed against were put to great charges for their defence, and that, although verdicts were given for them, or a *nolle prosequi* entered against them, they had no means for obtaining costs against such informers.(*c*)

The first section enacts that the Clerk of the Crown shall not, without express order, to be given by the Court in open Court, file any information.

field (1 Salk. 405; 1 Vent. 67; for publishing that a certain jury was suspected of bribery in giving their verdict); *Reg.* v. *Grey* (10 Cox Crim. Cas. 184, for publications tending to prejudice the fair trial of certain prisoners); *Rex* v. *Osborne* (Kel. 30; 2 Barn. K. B., 138, 166, cited *ante*, p. 454); *Reg.* v. *Gathercole* (2 Lew. C. C. 254. a publication imputing immoral practices to the inmates of a nunnery); *Rex* v. *Staples* (And. 228; Dig. L. L. 80, a publication reflecting on a magistrate); *Rex* v. *Thicknesse* (Dig. L. L. 86. for publishing a ludicrous account of an alleged marriage of a married peer with an actress); *Rex* v. *Nutt* (Dig. L. L. 78; 2 Barn. K. B., 114, libels on a company).

(*a*) *Reg.* v. *Yates* (L. R. 11. Q. B. D. 750).

(*b*) *Rex* v. *Robinson* (1 W. Bl. 542).

(*c*) "But two years before the passing of this Statute their [criminal informations'] legality had been denied in the case of Mr. Prynne (5 Mod. Rep. 459) by Sir Francis Winnington, who, in the course of a very learned argument, stated that Lord Hale himself had said that on argument they could not stand. Lord Holt decided, however, to the contrary, intimating that Lord Hale must have been speaking only against the abuse of them" (Judgment in *Reg.* v. *Labouchere*, 50 L. T. N. S. 182).

General principles, as to granting informations.

The principles which ought to guide the Court in granting criminal information were elaborately discussed last year in the case of *Reg.* v. *Labouchere*,(*a*) heard before five judges of the Queen's Bench Division (Lord Coleridge, C.J., Denman, Field, Hawkins and Mathew, JJ.). The judgment of the Court, unanimous except as to one not very important point, was recently delivered by Lord Coleridge, and lays down in considered language (which, on account of the great importance of the case, will be quoted at length), the general principles on which the Court will doubtless act in future in granting or refusing criminal informations.

The application, in this case, was made on behalf of a foreign nobleman (the Duke of Vallombrosa) residing abroad, in respect of a libel upon his deceased father published in an English newspaper.

The information was refused on several grounds; and first on the ground that as a general rule a criminal information will not be granted, where the applicant is neither resident nor sojourning in this country.

Effect of applicant being resident abroad.

"As to the point," said Lord Coleridge, "that the present Duke of Vallombrosa, the applicant, is neither resident nor sojourning in this country, it may be sufficient to observe that we do not intend to lay it down as a rule of law that this Court will not interfere, under any circumstances, by way of criminal information, on the application of a person so situate. Cases may be put, or may actually arise in fact, in which this Court would so interfere beyond all question, if the person applying to it were an English subject, or were resident in England. And the single fact that the applicant was situated as the applicant is situated here might not, in such a supposable case, be an answer to the application. But it is obvious that, if we have regard to the principles on which, from very early times, this Court has acted, the non-residence of the applicant in England is a very cogent argument against the interference of the Court. It makes it, as a general rule, very unlikely that there should be any intention to provoke a breach of the peace on the part of him who publishes the defamatory matter, and also, generally speaking, very unlikely that in fact any breach of the peace will follow. It is a matter, therefore, very important for the Court to consider when the appeal is to its discretion—a reason, further, why, in the exercise of that discretion, the Court should be unwilling to interfere. We do not preclude the Duke from his remedy, if he thinks fit to pursue it, by

(*a*) L. T. N. S. 177. Not yet published in any of the other Reports.

Not granted where libel is on a deceased person.

way of action or indictment; but in this particular case we should be prepared on this ground to discharge the rule."

It was refused next on the ground that the libel was on a deceased person. "Next, as to the point that the subject of the libel is dead, the authorities are not absolutely conclusive; but it seems to us that the weight of authority inclines upon the whole in favour of the objection. The *locus classicus* upon this subject is the judgment of Lord Kenyon in *R.* v. *Topham*, 4 T. R. 126. He points out (p. 128) that the general statement in 5 Rep. in the case *de libellis famosis*,(*a*) that publications defamatory of dead persons are libellous, was a statement extra-judicial, that it was not the point in judgment, and that the judgment might well have been sustained without going into it. He shows, further, that the passage in Hawkins (1 Hawk. P. C. c. 28, s. 3), which deals with informations as well as ordinary indictments, puts the whole criminality of libels (as distinguished from the civil liability of those who publish them) on private persons on their tendency to disturb the public peace. Hawkins, indeed, in a passage immediately following the words quoted by Lord Kenyon, puts his own view beyond all doubt, and shows that he would have discouraged, or even disallowed, many of the indictments for libel—to say nothing of informations—with which the Courts of late years have been occupied. For he says: 'The Court will not grant this extraordinary remedy, nor should a grand jury find an indictment, unless the offence be of such signal enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community. In such a case the public are justly placed in the character of an offended prosecutor to vindicate the common right of all, though violated only in the person of an individual; for the malicious publication of even truth itself'—this was written when truth could not be pleaded to an indictment—'cannot in true policy be suffered to interrupt the tranquillity of any well-ordered society.' The case in Carthew, 405(*b*) (a strange and unsatisfactory case, and very loosely reported), Lord Kenyon explains, as he does also *R.* v. *Critchley*,(*c*) by stating that in both cases an intention to subvert and slander the Government of the country was charged in the indictment, and supports both cases distinctly on this ground. It may be doubted, if the cases are looked at, whether Lord Kenyon did not support the decisions (what the actual decision in the case in Carthew was does not appear) upon grounds which the judges who decided

(*a*) 5 Co. Rep. 125. (*b*) *Ree* v. *Paine*.
(*c*) 4 T. R. 128, in note.

them did not think of, which most certainly they did not state. The libel in *R.* v. *Paine* (Carth.) was on King William, who was alive, and Queen Mary, who was dead; the case, therefore, is a very weak one on the point now before us in any view of it.(*a*) The libel in *Rex* v. *Critchley* stated of a certain Sir Charles Nicoll, who was dead, that 'he changed his principles for a red ribund, and voted for that pernicious project, the excise.' This was the whole libel, and Lord Kenyon may well have been puzzled to uphold the propriety of a criminal information in respect of it, even though the deceased Sir Charles was the father of the wife of a Secretary of State. But in the case itself in which the libel on a deceased Lord Cowper was of the most virulent possible description, imputing to him 'unmanly vices and debaucheries,' Lord Kenyon, after time taken to consider, with the assent of Mr. Justice Buller, who had tried the case, arrested the judgment on the ground that it was not the subject-matter of indictment for libel to asperse the memory of the dead, unless it was done with a design to break the peace. The Court of King's Bench, in the case of *Rex* v. *Topham*,(*a*) appears to assent to the principle laid down by Hawkins, that private character is to be vindicated by private action, and that an indictment or information for libel is then only to be justified where there are some incidents in it which concern the public, such as an attempt to injure the Government, or an intention or tendency to break the public peace. This necessity of the person who applies for the criminal information being himself individually aspersed, is laid down in very strong terms by Mr. Justice Patteson in *Reg.* v. *Mead* (4 Jur. N. S., 1014). There is no instance of an action for libel by the representative of a deceased person; it must be some very unusual publication to justify an indictment or information for aspersing the character of the dead. If such a case should ever arise, it must stand upon its own footing. But this is not that case; and on this ground also we should, in our discretion, decline to interfere."

Libel on a peer, &c., as a private individual.

The Court next considered the more general objection that the social position of the applicant, however lofty, was not a ground for granting a criminal information where the libel is one affecting his private character only, and does not reflect upon him in the exercise of any public office.

On this point the judgment sketches the practice of the Court from the time of Lord Hale, and points out the increasing facility, reaching its greatest height in the time of Lord

(*a*) See the remarks on this case, *ante*, p. 494. (*b*) 4 T. R. 126.

Tenterden, with which these informations were obtained. "It is impossible," proceeds the judgment, "for any one not to see the great change which had come over the feeling of the Court between the days of Lord Hale, Lord Holt, and Hawkins, and those of Lord Tenterden. But the general dissatisfaction of the profession with this state of things led, in the time of Lord Denman and Lord Campbell, to a much stricter practice in the Court in the granting of these informations. I am quite aware that *Reg.* v. *Gregory*,(a) *Reg.* v. *Latimer*,(b) and some few cases of this sort occurred during this period of time; but there can be no doubt that the cases were rare, except where some person in a public or official position was attacked in relation to such position, or where the attack was of so cruel and outrageous a sort as to make it, according to the view of Hawkins, a matter which interested the public, and called for interference of the Court, as representing the public and charged with the defence of its interests. So it was during the greater part of the time of Sir Alexander Cockburn, though towards the close of his life the practice of the Court became somewhat easier and laxer. I have, however, by the kindness of a learned friend, been furnished with the reports of fifty cases of criminal information, running over the years from 1860 to 1880 inclusive, and, out of these fifty cases, four only were cases of informations granted at the suit of persons who were not in some public office or position. And during that time there were repeated declarations by various members of the Court, not indeed that as matter of law the information would not be granted at the suit of private persons, but that the Court would, as a general rule, leave private persons to their private remedies. For example, in *Reg.* v. *Lord Winchilsea*, 1865, Mr. Justice Blackburn says the remedy had usually and properly been confined to cases of magistrates, ministers, public officers, and persons in a high position whose character was of such public importance as to require immediate vindication. The Lord Chief Justice (Sir A. Cockburn) adds that 'the extraordinary intervention by means of a criminal information was a procedure of a high prerogative character reserved for cases of public importance.' In the case of *Reg.* v. *Headley*, in 1875, I find Mr. Justice Blackburn reported as saying 'It is not enough that it should appear that there has been a libel' (differing apparently in terms from Lord Tenterden, who seems, if rightly reported, to have thought it was enough); 'it must also appear that it is a publication as to which we ought to put the prerogative process of the Court in operation against the

(a) 8 A. & E. 907. (b) 15 Q. B. 1077.

writer. It should not be done too lightly, or otherwise our jurisdiction to grant criminal informations, though very useful, may be brought into odium. Again, in 1877, in the matter of a gentleman named Middleton, in which the libel was very gross, the rule was refused, and I find Mr. Justice Mellor, with the concurrence of Mr. Justice Lush, saying this: 'We must be chary of making the high jurisdiction of this Court a sort of substitute for the ordinary jurisdiction of the magistrates. The Court used to be far more strict in the exercise of its extraordinary jurisdiction in granting criminal informations than it has been perhaps in later times; but this is hardly a case for its exercise. It is not like the case of a serious imputation on a magistrate or a public officer, like a town clerk, for misconduct in his office.' Again, in 1878, in the case of an application on the part of the musical critic of the *Times* newspaper against the present defendant for imputing to the applicant personal corruption, the rule was refused by Mr. Justice Mellor and Baron Huddleston, the Court saying that 'the libel was one which might well warrant an indictment or an action, but it did not follow that it was the fit subject of a criminal information. That was an exercise of the extraordinary jurisdiction of the Court, which, as a general rule, was reserved for cases of libel upon persons in an official or judicial position, and filling some office or post which made it for the public interest necessary that such jurisdiction should be exercised for the refutation of the libellous charges made.' Examples might be multiplied, but these are sufficient. Very few of these cases are to be found in the volumes of reports. They are cases of discretion, and turn generally upon facts and have seldom been reported; and the passages which I have been reading have been furnished me by a gentleman of the Bar(*a*) who reported them for the newspapers, and who is able to vouch for the substantial correctness of his own reports. . . . . I am able from my own recollection to state two cases, each of them, I think, important. This Court in the time of Lord Campbell refused Sir Charles Napier a criminal information for a libel imputing to him great misconduct in regard to his conquest of Scinde, on the ground, among others, that he had ceased to be Commander-in-Chief in India and was at the time of his application to the Court only a private person; and a rule in the case of *Reg.* v. *Plimsoll*, in which I was myself counsel, for a criminal information for a libel, in which a member of Par-

(*a*) Referring to Mr. W. F. Finlason, the very learned reporter of the *Times*, and one of the editors of Foster and Finlason's Reports, so often referred to in this work.

liament was accused of sending his ships to sea overloaded in order that they might sink and he might gain the insurances on them, was discharged, after argument; and it was discharged without costs, inasmuch as the applicant had cleared his character; but the Court left him to his ordinary remedy as a shipowner against any one who libelled him in that character. We are thus brought down to the last case upon the subject, with the authority of which we were pressed very properly. I mean *Reg.* v. *Yates*. I know nothing of the merits of that case, and if I did, as the litigation is still depending, it would be unfit to say a word upon it. But a libel upon the private character of Lord Lonsdale, certainly not so aggravated as some of those as to which informations have been refused, was made the subject of an application to this Court, and the rule for a criminal information was made absolute. It is said that it was granted almost as of course, because the applicant was a peer. The case is as yet unreported, (*a*) and I am unaware of what my learned brothers may have said; but if this was the ground, I must respectfully dissent from it."

The judgment then proceeds to deal broadly with the question as affecting peers:—"I can find nowhere any trace of the doctrine that a peer, as such, is entitled to exceptional and most important privileges in the administration of the law. If a peer is libelled, as a peer, for his conduct in Parliament, or as Lord Lieutenant (if he is one), or as magistrate, or as the holder of a public office, it would undoubtedly be almost of course (all other legal conditions being fulfilled) that the Court would interfere in his behalf. But that a peer in private matters is entitled to any interference at the hands of this Court—which the Court would not exercise in favour of the humblest subject of the Queen—I respectfully but emphatically deny. I am not aware of any authority for such a proposition. *Reg.* v. *Gregory* is certainly no such authority; and I decline to make one. It is said, on the other hand, that the point now under consideration was not taken, or, at any rate, not pressed upon the Court in *Reg.* v. *Yates*; and the probable explanation of this, which I understand on the best authority to be the fact is this—namely, that with several of the cases decided in the latter years of Sir A. Cockburn it was felt that a Divisional must act on those later authorities, which no doubt formed a complete justification for the course taken by this Court. I have said, however, that it is not possible to reconcile the cases; it is not

(*a*) Reported on another point, L. R. Q. B. D. p. 750.

easy, perhaps it is not possible, to lay down any rule which can guide discretion amid the ever-varying facts to which discretion has to be applied. If we go back to principle we find it well stated by Blackstone, book iv., c. 23, p. 309, as follows: 'The objects of the other species of informations filed by the Master of the Crown office upon the complaint or relation of a private subject, are any gross or notorious misdemeanours, riots, batteries, libels, and other immoralities of an atrocious kind, not particularly tending to disturb the Government (for those are left to the care of the Attorney-General), but which, on account of their magnitude or pernicious example, deserve the most public animadversion;' and if the passage of Mr. Starkie be looked at, in which he defends the proceeding by way of criminal information, which he calls 'a proceeding irreconcilable with the ordinary principles of jurisprudence on which the law of libel in England is founded,' it will appear at once that that great writer would have met this application before us with a summary refusal and as not at all within those considerations which, in spite of the anomaly of the proceeding, bring about a result far more beneficial than might have been expected. It is under these circumstances that, acting under the powers conferred by the Judicature Acts, I have ventured to bring together five judges of the High Court to establish, if possible, upon unusual authority some principles for our guidance in future. My colleagues, with a slight exception to be presently noticed, concur in this judgment, and I trust that the full discussion which this rule has received may be of some advantage, and that, the grounds on which we discharge it becoming generally known, the practice of the Court may be brought back to that greater and more wholesome strictness which prevailed for at least a generation and a half, and that criminal informations may hereafter be granted only in cases which come fairly within the language of Sir William Blackstone already quoted, which I will not repeat and which I certainly cannot improve."

Denman, J., while concurring in the judgment thus delivered, had written a few words which he desired to add and which Lord Coleridge then read:—"I agree with the Lord Chief Justice that the rule ought to be discharged on the first two grounds upon which he rests his judgment, but I desire to add that I cannot accept the passage from Blackstone upon which he comments as being quite an exhaustive description of the cases in which the Court ought to interfere; for example, if a newspaper or an individual were to show by repeated attacks and by wide circulation of these attacks upon a private individual, whether a British subject or a foreigner, whether

resident in England or abroad, a persistent determination to persecute, I, as at present advised, should think it would be the duty, in many cases, of this Court to protect the individual by granting a rule, and even, in case of further persistence, by making it absolute." To grant a rule in respect of an existing libel with the intention of not making the rule absolute except in case of 'further persistence' would be a recurrence to the practice, condemned by Cockburn, C.J., of using the machinery of the Court merely to obtain a retractation or apology, the rule being then discharged on payment of costs by the libeller."

Motion must be made by counsel.

To obtain this order, counsel must be instructed to move upon proper affidavits, which must not be entitled or they cannot be read,(*a*) for a rule *nisi* calling upon the libeller to show cause why the information should not issue.

The Court will not permit the motion to be made by the prosecutor in person, as it is a general rule applicable to all proceedings in the name of the Sovereign, that no private person can be heard as an advocate in a court of justice.(*b*)

Affidavit improperly sworn.

Where the affidavit on which the rule had been obtained was not properly sworn, the Court refused to enlarge the rule in order that the affidavit might be resworn.(*c*) "The Court," said Lord Denman, C.J., "have been looking for some time for a precedent for such an application, and can find no precedent in cases of criminal information. There are some cases with reference to bail. The party ought to have come properly prepared in the first instance. No injustice will be done, as the party can still prefer an indictment."

The Court requires to be satisfied upon various points before it even calls upon the defendant to show cause why the information should not go.

Prosecutor must swear to his innocence.

The first requisite is, that the prosecutor should swear directly and pointedly to his innocence of the charge contained in the libel, unless the subject-matter is general imputation, or the party libelled is abroad at a great distance.

This was laid down in the case of *Rex* v. *Haswell and Bate*, on the prosecution of the Duke of Richmond,(*d*) as an invariable rule, upon which the Court acts without

(*a*) *Rex* v. *Robinson*, cited 6 T. R. 642.
(*b*) *Rex* v. *Lancashire* (*Justices*) (1 Chitty, 602); *Rex* v. *Brice* (2 B. & Ald. 606).
(*c*) *Rex* v. *Cockshaw* (2 N. & Man. 378).
(*d*) *Rex* v. *Haswell and Bate* (1 Doug. 387).

distinction of person. The libel in that case had appeared in the *Morning Post*, imputing to the Duke a variety of treasonable practices and designs, among other things that he had, in his speeches in the House of Lords, opposed the increase of the military strength of the kingdom, in order to facilitate a descent in this country by the French; and also charging him with having conveyed intelligence to the Ministers of France. The rule was granted against Huswell, the printer of the paper, on the joint affidavit of the Duke and another person. The Duke swore that he believed himself to be the person meant in the libel, and that it contained false, scandalous, and malicious aspersions and insinuations against him. On a subsequent day a rule was moved for against Bate as the publisher, when Lord Mansfield, C.J., said there was an objection to both rules, inasmuch as the prosecutor had not specifically denied the particular charges; but he thought the nature of the libel might be an exception to the general rule; that as to what was supposed to have been said by his Grace in Parliament, it was certainly unnecessary to answer that, because what passed there could be questioned nowhere else, and the rest of the libel, being general imputations, did not seem within the rule. Willes, J., said he did not well see how the Court could make any distinction between the Duke and the lowest individual; if the rule were general, it ought to be adhered to in that case, and no instance had been stated where it had been dispensed with. The other judges agreed, and ultimately the rule was granted as to that part of the libel referring to the Duke's conduct in the House of Lords. Subsequently the Duke filed an affidavit expressly denying all the specific charges in the libel.(*a*)

Where libel reflects on several persons.

Where, however, the libel reflects on several persons, the Court will grant the information, although the person moving for it may not be blameless;(*b*) and the Court will grant it for a libel on a public body of men without requiring an exculpatory affidavit.(*c*)

Delay in making application.

There must be no unnecessary delay in coming to the Court. In *Rex* v. *Jollie*,(*d*) Littledale, J., said: "The rule is, that the application must be made within two terms after the publication, sufficiently early to enable the defendant to show cause within that term."

(*a*) See also *Rex* v. *Wright* (2 Chitty, 162); *Rex* v. *Draper* (3 Smith, 390); *Rex* v. *Bickerton* (1 Str. 498).

(*b*) *Reg.* v. *Gregory* (8 A. & E. 907).

(*c*) *Rex* v. *Williams* (5 B. & Ald. 595), where the libel was on the clergy of a particular diocese.

(*d*) 1 N. & M. 484; 4 B. & Ad. 867.

If there is further delay, it must be reasonably accounted for; as, for instance, that the libel had not come to the knowledge of the prosecutor until some time after it was published.(*a*)

Other proceedings must not have been instituted.

The party who applies for the information must come to the Court in the first instance, as the Court will not assist him if he has instituted other proceedings.(*b*) He must place himself entirely in the hands of the Court for the vindication of his character; and if it appears that he has put himself in communication with the publisher for the purpose of retorting, or with a view of gaining redress, the court will not interfere.(*c*)

Trivial cases.

The Court will not grant an information in trivial cases.(*d*)

Where defendant is very poor.

Lord Mansfield laid it down that a proceeding by information was not proper against a very poor person.(*e*) We can find no later decision as to this, but in all probability it would be followed, if the attention of the Court were called to the circumstances of the defendant and to the authority just cited; as it is an undoubted hardship to compel him to incur the additional expense consequent upon that mode of prosecution, when the prosecutor may adopt the less cumbrous one of presenting a bill at the assizes.

Primâ facie evidence of publication, by defendant, not sufficient.

The affidavit must prove the publication by the defendant; and the Court will not be satisfied with merely *primâ facie* evidence where conclusive evidence is easily obtainable;(*f*) nor will the Court in any case accept less evidence than would warrant a grand jury in finding a bill.(*g*)

Proof of publication of newspapers.

Formerly, conclusive evidence of the publication of newspapers was readily obtainable from the Stamp Office; as the 6 & 7 Will. 4, c. 76, provided, under heavy penalties, that no person should print or publish any newspaper before there had been delivered to the Commissioners of Stamps, or to the properly authorized officer at the head office for stamps in Westminster, Edinburgh, or Dublin, or to the officer appointed by the said commissioners in and for the district within which the newspaper should be intended to be published, a declaration in writing setting forth the title of the paper, a description of the building wherein it was to

(*a*) See *Rex* v. *Robinson* (1 W. Bl. 542); *Prideaux* v. *Arthur* (Lofft. 393); *Rex* v. *Murray* (1 Jur. 37); *Reg.* v. *Hext* (4 Jur. 339); *Ex parte Hopper* (23 L. T. 164); *Rex* v. *Bishop* (5 B. & Ald. 612).

(*b*) *Rex* v. *Marshall* (4 E. & B. 475); *Reg.* v. *Gwilt* (11 A. & E. 587).

(*c*) *Reg.* v. *Lawson* (1 Q. B. 486).

(*d*) *Ex parte Beauclerk* (7 Jur. 373); *Reg.* v. *Proprietors of Nottingham Journal* (9 Dowl. 1044); *Rex* v. *Mead* (4 Jur. 1014).

(*e*) Anon. Lofft. 156. (*f*) *Reg.* v. *Baldwin* (8 A. & E. 168).

(*g*) *Rex* v. *Willett* (6 T. R. 294); *Ex parte Williams* (5 Jur. 1133).

be printed, and of the building wherein it was to be published; the name, addition, and abode of every person who was intended to conduct the actual printing, and of every person who was intended to be the publisher, and of the proprietor, &c.

After the repeal of this enactment it was sometimes very difficult to prove the publication.

By purchase of a copy in defendant's shop. By affidavit of accomplice.

Sometimes the proof was by affidavit of a person who had purchased a copy of the newspaper in defendant's shop. Or, the publication was proved, as in the case of *Rex* v. *Haswell and Bate*,(*a*) by the affidavit of an accomplice.

And where a rule had been granted on insufficient evidence of publication, the Court afterwards discharged it, although the affidavits filed by the defendant in opposition to the rule admitted the publication.(*b*)

44 & 45 Vict. c. 60.

The Newspaper Libel and Registration Act of 1881 (44 & 45 Vict. c. 60), has now established a register of newspapers, in which the names and addresses of the proprietors are to be entered, and copies of entries in or extracts from which are made evidence.(*c*)

Improper or irrelevant matter in affidavits.

It is necessary to guard against inserting improper or irrelevant matter in the affidavits, as there is danger of the Court refusing, on that ground, to interfere.

In the case of *Rex* v. *Burn*,(*d*) Lord Denman, C.J., said: "The prosecutor has stated a sufficient case for a criminal information; but he has, in the early part of his affidavit, introduced words irrelevant and reflecting on the character of the party against whom he applies; and afterwards, in explanation of something which he states to have passed, he goes into a narrative of matters impertinent to the cause, and calculated only to prejudice the minds of the Court. Parties who come before the Court with affidavits, are to confine themselves to the simplest statement of that which induces them to make the application, and not to enter upon discussions like this, unless the nature of the subject makes them absolutely necessary." The Court discharged the rule solely upon this ground.

Drawing up rule.

When the rule is obtained, care must be taken that it is properly drawn up. No documents can be referred to upon

(*a*) 1 Doug. 387. See also *Rex* v. *Steward* (2 B. & Ad. 12).
(*b*) *Reg.* v. *Baldwin* (8 A. & E. 168).
(*c*) Sects. 8, 9, 15. See the provisions of the Act set forth at length, *ante*, p. 315, 316.
(*d*) 7 A. & E. 193, and see *Reg.* v. *Doherty* (1 Arn. & Hodg. New Term Reports, 16).

the argument which are not referred to in the rule.(*a*) It must be drawn up "upon reading" the publication, which must be annexed to the affidavits and marked as an exhibit.

Service of rule.

The rule must be obtained from the Crown Office, and a copy of it served on the defendant personally, or by leaving it with some member of his family at his residence. The original should be shown to the person who is served with the copy.(*b*)

Showing cause against rule.

In showing cause against the rule, the defendant may urge the truth of the libel; for, as before stated, although the truth is, by itself, no answer to an *indictment*, the Court will not grant its aid, by information, to a tainted person.

In the case of *Rex* v. *Lee*,(*c*) a rule *nisi* had been granted against the publishers of the *Satirist* and the *Censor of the Times*, for the following libel: "Simon, but more commonly known in the play world as King Digby, from his skill in palming that card at écarté, and who long enjoyed an unenviable notoriety among the legs at the club at Brighton, is living in obscurity in Devonshire. He has been, however, recently in town, and was seen at Epsom during the races, *sharply* upon the look-out, it was presumed, for *flats*." Digby made an affidavit that he was never guilty of palming the king at "écarté," nor of unfair play at cards or any other game, and that he had not been at Epsom races for about seven years. The only affidavit in opposition was by one Thomas Shepard, who swore that he was intimately acquainted with Digby, and that on one occasion when Digby dined with him at defendant's residence in Shaftesbury Terrace, Pimlico, Digby played at écarté with him, won of him from £80 to £85, was detected by him in palming the king, confessed the fact, and returned the money. Upon this affidavit the Court discharged the rule. But afterwards a new rule was granted, and made absolute, on affidavits deposing that Shepard had, on oath, in the Consistory Court in London, contradicted his affidavit, and that Digby had preferred an indictment for perjury against him, and that the bill was found on Digby's oath denying the truth of the statements in Shepard's affidavits, and on the testimony of several other witnesses; that a warrant had been obtained for Shepard's arrest, but that he could not be found, and was believed to have left the country.

New rule.

The circumstances of the last cited case were peculiar. In general, where a rule for a criminal information has been

(*a*) *Rex* v. *Baldwin* (8 A. & E. 168); *Reg.* v. *Woolmer* (12 A. & E. 422).

(*b*) Cole on Criminal Informations, 59.

(*c*) 5 A. & E. 780. According to the principles laid down in *Reg.* v. *Labouchere*, *ante*, pp. 584, 585, an information would not now be granted in such a case.

discharged on the merits, the Court will not grant a new rule on a second application, in the same case, even upon additional affidavits. "A party moving for a criminal information," says Lord Denman, C.J.,(*a*) "has some great advantages, and he may reasonably be required to collect all the necessary materials for his application when he first makes it." To grant a new rule in such a case, would be, according to Parke, J.,(*b*) "a precedent for re-inquiry in almost every instance where a criminal information was moved for without success. It would rarely happen that the party would not be able to mend his case on a second motion. The prosecutor has another remedy."

The defendant may also submit that the affidavits on which the rule was granted fail, in substance or form, to satisfy the requirements of the Court, or that they are answered by affidavits made on his behalf.

Costs.

If the rule be discharged on a preliminary objection, the defendant will not generally obtain his costs;(*c*) but if it be discharged on the merits, the Court generally grants costs.

Recognisance on rule being made absolute.

On the rule being made absolute, the prosecutor must enter into the necessary recognisance, pursuant to 4 & 5 Will. & M. c. 18, s. 2, which enacts "that the clerk of the Crown shall not issue out process upon the information until he shall have taken, or had delivered to him, a recognisance from the person or persons procuring such information, to be exhibited with the place of his, her, or their abode, title, or profession, to be entered to the person or persons against whom such information or informations is or are to be exhibited, in the penalty of twenty pounds, that he, she, or they, will effectually prosecute such information or informations, and abide by and observe such orders as the said court shall direct, which recognisance the said clerk of the Crown, and every justice of the peace of any county, city, franchise, or town corporate (where the cause of any such information shall arise), are hereby empowered to take."

The security required by the statute is only in the penalty of £20. The Court will not require it for a larger amount.(*d*)

Form of information.

In substance, the information is the same as an indictment. Whatsoever certainty is requisite in an indictment, the same, at least, is necessary in an information; and consequently, as all material parts of the crime must be

(*a*) *Rex* v. *Smithson* (4 B. & Ad. 862). (*b*) *Ibid.*
(*c*) *Reg.* v. *Proprietors of Nottingham Journal* (9 Dowl. 1043).
(*d*) *Rex* v. *Brooke and others* (2 T. R. 190).

PART IV. CHAPTER XI.

precisely found in the one, so must they be precisely alleged in the other, and not by way of argument or recital.(a)

A form of a criminal information will be found in the Appendix; and, as to the substance, the reader is referred to Section III. (*post*), where the requisites of an indictment are set out.

Subpœna and appearance.

After filing the information and taking the security mentioned above, the Crown Office issues a subpœna, which is made out by the prosecutor's attorney and a copy served on the defendant, who has four days (exclusive of Sunday) from the day of the return to appear.

Under 48 Geo. 3, c. 58, s. 1, a judge's warrant may be issued to bring the defendant before him, or some other judge of the Queen's Bench, in order to his being bound, with two sufficient sureties, in such sum as shall be expressed in the warrant, with condition to appear in the said court at the time mentioned in the warrant, and to answer to all and singular indictments or informations for any such offence.

Non-appearance of defendant.

It is more usual, however, to subpœna the defendant; and if he does not cause an appearance to be entered within the time allowed, the attorney for the prosecutor may, upon filing an affidavit of service of the subpœna, issue an attachment; and if the defendant cannot be found, he may be outlawed.

Rule to plead.

After appearance, the prosecutor may give a rule to plead within ten days after service, as well in term as in vacation;(b) and in case no plea is entered within the time allowed, judgment for want of such plea may be signed at the opening of the office on the following morning, unless an order of the court or of a judge, extending the time, shall have been obtained.(c)

Sending down record for trial.

When the plea has been entered, the record is made up and sent down, by a writ of *nisi prius*, into the county where the libel was published.

Trial.

The trial is conducted as an ordinary civil action, subject to the rules of evidence applicable to a criminal prosecution.

What evidence is admissible and sufficient to bring home the charge to the defendant; what pleas he may put on the record, and the evidence necessary to support them, are set out in Section III. (*post*).

(a) Hawkins' P. C. Bk. ii. c. 26, tit. "Informations," s. 4.
(b) See No. 17 of Rules of Court under 6 Vict. c. 20.
(c) Rule 19.

II.—JURISDICTION OF JUSTICES OF THE PEACE.

Ordinary mode of inquiring into crimes.

In the last section we dealt with the extraordinary means which may be invoked to protect society from blasphemous, seditious, or immoral publications, and, in some cases, to punish defamatory attacks upon private character. Those means are in addition to, and not a substitution for, the machinery by which all crimes are inquired into.

Summons or warrant.

Upon complaint that any person has published a libel, a justice of the peace may either summon the accused to appear before him or some other magistrate; or he may, if he think fit, issue his warrant for his apprehension. The more usual course is, in the first instance, to grant a summons, and if the defendant do not obey it, then to issue a warrant.

In the case of *Batt* v. *Conant*(*a*) it was argued that a magistrate had no authority to issue a warrant for the arrest and commitment of a person charged with having published a libel; but the Court were unanimous in deciding that he had. And, independently of that judgment, the matter is now set at rest by 11 & 12 Vict. c. 42, s. 1, which empowers any justice of the peace, upon a complaint being made before him that any person has committed, or is suspected of having committed, "any indictable offence whatsoever," within the limits of the jurisdiction of such justice, to issue a warrant for his apprehension; or he may, in the first instance, issue a summons.

Defence before magistrate.

Upon the inquiry before the magistrate, if the prosecution establish a *prima facie* case, the defendant may call witnesses to prove that he did not publish the libel, or, in some cases, that it is true.

There are, as will hereafter be seen, two charges upon which a person accused of publishing a defamatory libel, may be committed—viz., the common law offence, and the offence created by 6 & 7 Vict. c. 96, s. 4—*i.e.*, "maliciously publishing any defamatory libel, knowing the same to be false;" and, if he proved to the magistrate that the libel were true, he could not well be committed on this latter charge. This view was taken by the Court of Queen's Bench in the unreported case of *Ex parte* Ellisson,(*b*) where a mandamus was granted to the Lord Mayor of London to hear such evidence; and the decision in *Reg.* v. *Carden*(*c*) is not opposed to it, as the information there did not charge the libel to have been published by the defendants knowing it to be false; and Lush, J., in

(*a*) 1 B. & B. 548. (*b*) Referred to in Folkard's Starkie, 592.
(*c*) L. R. 5 Q. B. D 1.

that case distinctly says(*a*) that *Ex parte* Ellisson was well decided. "It was competent to the defendant," said that learned judge, "before the magistrates, to endeavour to get rid of the major charge by proving the libel to be true."

If, however, the charge be one of simply publishing a libel (not in a newspaper), the magistrate cannot receive evidence of the truth of the libel. This was decided by the Queen's Bench Division in *Reg.* v. *Carden*.(*b*) Cockburn, C.J., said, that even if evidence sufficient to prove the truth of the libel were given, the magistrate would still be bound to convict, "because by the statute(*c*) the truth of the libel does not constitute a defence until the statutory conditions are complied with; and they cannot be complied with at that stage of the inquiry. There must first be commitment or holding to bail, then indictment, and then a plea such as may satisfy the exigency of the statutory conditions."

A similar view had previously been taken by Montagu Smith, J., on circuit.(*d*)

Advantages of going into evidence for defence.

There are several advantages gained by going into evidence before the magistrate, supposing there to be a legitimate defence. The witnesses are bound over to appear at the trial; and, their evidence having been taken down in the same way as the evidence for the prosecution, there is less risk of their being tampered with in the meantime. In case of their death before, or serious illness at the time of, the trial, their depositions may be put in evidence; and, if they appear at the trial, the judge has power to allow their expenses, which could not be done unless they had been bound over.

Bail.

If the justices decide to send the case to trial, the defendant is entitled, as a matter of right, to be bailed; as at common law every misdemeanour is bailable, and libel is not one of those which have been excepted by statute.(*e*)

The bail demanded must be reasonable; and the only question the justices have to determine is, the sufficiency of the sureties: they cannot enter into any investigation of the character or opinions of the sureties.(*f*)

Requiring sureties for good behaviour.

Besides the power of demanding bail from the accused, to answer an indictment for libel, justices have claimed the right to determine themselves whether the defendant has been guilty of publishing a libel; and, instead of sending him to trial, to require sureties of good behaviour, and in default to commit him to prison.

Lord Camden, in the case of *Rex* v. *Wilkes*,(*g*) strenu-

(*a*) L. R. 3 Q. B. D. p. 13. (*b*) *Ibid.* (*c*) 6 & 7 Vict. c. 96.
(*d*) *Reg.* v. *Townsend* (10 Cox C. C. 356; 4 F. & F. 1089.
(*e*) 11 & 12 Vict. c. 42, s. 23. (*f*) *Reg.* v. *Badger*) 4 Q. B. 472).
(*g*) 2 Wils. 151. See also *per* Pratt, C.J., in *Rex* v. *Shuckburgh*. 1 Wils. 29.

ously denied that a libeller could be bound to find surety of the peace, saying there was only one authority for the proposition—"the case of the seven bishops, where three judges said that surety of the peace was required in the case of libel; Judge Powell, the only honest man of the four judges, dissented; and I am bold to be of his opinion, and to say that the case is not law. Upon the whole, it is absurd to require surety of the peace in the case of a libeller." In *Bult* v. *Conant*,(*a*) the authority of this statement was denied, Park, J., being very wroth with Lord Camden for his "denunciation of dishonesty against men who, from no other part of their lives, nor from anything appearing in the particular case, deserved such a stigma:" but the only point decided in *Bult* v. *Conant* was, that a justice of the peace has power to issue his warrant for the arrest of a person charged with having published a libel, and, in default of bail, to commit him for trial.

There is, so far as we have been able to discover, only one modern authority in support of the doctrine that justices may demand sureties of good behaviour from persons whom they may adjudge guilty of defamatory libels. *Haylock* v. *Sparke*,(*b*) the case which evoked this decision, was an action of trespass brought against the late Chancellor of the Diocese of Ely, who was justice of the peace for the Isle of Ely. Upon the plaintiff being brought before him, charged with having written on the pavement "Donkey Watt, the Railway Jackass," referring to a Mr. Watt, the master of the railway station at Ely, the justice ordered him to find two sureties, and to enter into his recognisance to keep the peace for three months, and, upon his refusing to do so, committed him to gaol. The warrant was signed on the 30th of April, 1852, and on the 6th of May, the plaintiff was brought up on *habeas corpus* before Coleridge, J., and discharged. The warrant was afterwards brought up by *certiorari* and quashed, and this action was then commenced; the defendant pleading not guilty (by statute). On the trial before Pollock, C.B., among other points which were taken for the defendant, it was argued that he had acted within his jurisdiction, and, the declaration not being in case, and not averring malice, that the action failed under stat. 11 & 12 Vict. c. 44, s. 13. The learned Chief Baron held that there was no jurisdiction, but directed a verdict for the defendant, on the ground that the notice of action required by the statute ought to have been given after the warrant was quashed. The Court of Queen's Bench held that the notice was properly given, but that a justice of the

(*a*) 1 B. & B. 548. (*b*) 1 E. & B. 471.

peace *has* jurisdiction to require sureties for good behaviour in some cases of libel(*a*) against private individuals; and that, if that were true, the defendant had jurisdiction in the matter out of which the action arose; and, though the proceedings were informal, and there was, in the opinion of the Court, a great want of discretion in requiring sureties upon such an occasion, the action would not lie.

We are not aware that since this case there has been another instance of an alleged libeller being required to find sureties for good behaviour; and it by no means follows, because the Court has decided that justices of the peace have a bare jurisdiction, and that, to support an action against them for its indiscreet exercise, malice must be alleged and proved, that the judges would not find reasons for nullifying any actual exercise of such a jurisdiction. Be that as it may, the power has only to be brought into use to be abolished, either by the Legislature or by the force of public opinion, as it would never be tolerated that in a matter so essentially concerning the liberty of the subject, magistrates should usurp the functions of the jury, and establish a new censorship of the press.

Obscene publications.

The powers given to stipendiary magistrates and to any two justices of the peace by the Act, "for more effectually preventing the sale of obscene books, pictures, prints, and other articles," have been sufficiently pointed out, *ante*, pp. 384–386.

III. INDICTMENTS.

Indictment need not be preferred before arrest of libeller.

In the last section it was observed that the power of justices of the peace to commit for trial on a charge of publishing a libel had been disputed in the case of *Bull* v. *Conant*.(*a*) It was there contended by Vaughan, Sergt., in a very instructive argument, that the law required an indictment to be found before the justices of the peace could cause the accused to be apprehended. It has been pointed out that this contention did not prevail with the Court; and a modern statute (Jervis's Act, 11 & 12 Vict. c. 42) removes all doubt upon the point.

Preferring indictment before grand jury direct.

Originally, when it was desired to indict a libeller, the prosecutor went directly before the grand jury and preferred a bill, without the intervention of the magistrates; and that course of procedure was frequently adopted, as the offence of libel was not, before 1881, included in the Vexatious Indict-

(*a*) Those which are calculated to produce a breach of the peace.
(*b*) 1 B. & B. 548. *Vide ante*, p. 597.

ment Act.(*a*) By section 6 of the Newspaper Libel and Registration Act, 1881(*b*) they are now made subject to the provisions of the Vexatious Indictment Act.

Power of inquiry by Court of Summary jurisdiction in newspaper prosecutions.

On the hearing of any charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, a Court of Summary Jurisdiction may now, by section 4 of the Newspaper Libel and Registration Act, 1881, receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate and published without malice, and as to any matter which under this or any other Act, or otherwise, might be given in evidence by way of defence by the person charged on his trial or indictment; and the Court, if of opinion, after hearing such evidence, that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case.

Dealing summarily with the case.

In such a case also, by sect. 5, the Court of Summary Jurisdiction, if of opinion that though the person charged is guilty, the libel was of a trivial character, and that the offence may be adequately punished by virtue of the powers of this section, shall cause the charge to be reduced to writing and read to the person charged, and then address a question to him to the following effect: "Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?" And if such person assents to the case being dealt with summarily, the Court may summarily convict him, and adjudge him to pay a fine not exceeding £50.

The decision in *Reg.* v. *Carden*(*c*) that a magistrate has no jurisdiction to hear evidence as to the truth of the libel, is, it must not be forgotten, still the law in all cases of common law libel which do not come within the provisions of the Newspaper Libel and Registration Act, 1881.

Juri-diction of Quarter Sessions.

An indictment for composing, printing, or publishing blasphemous, seditious, or defamatory libels cannot be tried at sessions;(*d*) but obscene libels are within their jurisdiction.

Framing indictment.

The points which it is necessary to keep in mind in drawing an indictment or criminal information for libel will now be considered.

Venue.

The bill must be preferred in the county where the publication which is relied on was made; but it often happens that the defendant has, by one act, published the libel in two counties. Thus, in *Rex* v. *Burdett*,(*e*) the Court (Bayley, J.,

(*a*) 22 & 23 Vict. c. 17. (*b*) 44 & 45 Vict. c. 60.
(*c*) L. R. 5 Q. B. D. 1; 49 L. J. M. C. 1.
(*d*) 5 & 6 Vict. c. 38. See *Re Armstrong* (9 Cox Crim. Cas. 342).
(*e*) 4 B. & Ald. 95.

PART IV. CHAPTER XI.

dubitante) held that posting a sealed letter was a publication in the county where the post-office was situate, and that where a defendant writes a letter in one county with the intent to publish it in another, and does afterwards publish it there, he may be indicted in either county.

The most convenient course is to lay the indictment in the county where the libel was made manifest, or "published" in the popular sense of that word.(*a*)

Indictment must charge "publication"

The indictment must charge that the defendant "did publish;" as merely writing a libel is not a misdemeanour.(*b*)

How libel must be set out.

The libel itself must be accurately set out, either by transcribing it verbatim or by setting out the particular words complained of; and if there are several libellous passages in different parts of the writing, they should be set out in the following manner: "In a certain part of which said libel there was and is contained," &c., "and in a certain other part of the said libel there was and is contained," &c.(*c*)

It was held that an indictment for publishing an obscene libel, "to wit, an indecent, lewd, filthy, and obscene book called 'Fruits of Philosophy,'" which did not set out the obscene words, was bad either upon arrest of judgment or upon error, and that the defect was not cured by a verdict of guilty.(*d*)

Of the reasons assigned for the necessity of setting out in the indictment the words of the alleged libel, one, at any rate, according to Bramwell, L.J., delivering the judgment in that case of the Court of Appeal (which reversed the decision of the Queen's Bench Division), is to this day substantial, and cannot be disregarded. It is, "that a defendant is entitled to take the opinion of the Court, before which he is indicted, by demurrer, or by motion in arrest of judgment, or the opinion of a Court of Error by writ of error, on the sufficiency of the statements contained in the indictment."

In this case reference was made to a rule of practice said to prevail in the United States,(*e*) that when an indictment

(*a*) As to the venue in the case of indictments preferred at the Central Criminal Court, see 4 & 5 Will. 4, c. 36, s. 3; and *Reg.* v. *Gregory* (7 Q. B. 274; 14 L. J. 82, M. C.).

(*b*) *Reg.* v. *Burdett* (4 B. & Ald. 95).

(*c*) 1 Camp. 353; *Cook* v. *Coe* (3 M. & S. 116). See also *R.* v. *Sparling* (1 Str. 497); *R.* v. *Popplewell* (2 Str. 686); *R.* v. *Chaveney* (2 Ld. Raym. 1368); *R.* v. *Horne* (2 Cowp. 672); *Wright* v. *Clements* (3 B. & Ald. 503).

(*d*) *Bradlaugh* v. *The Queen* (L. R. 3 Q. B. D. 607).

(*e*) *The Commonwealth* v. *Holmes* (17 Massach. 336); *The Same* v. *Turbue* (1 Cush., Mass., 66; *The People* v. *Girardin* (1 Mann., Mich., 90).

contains an averment that the words are so obscene that if set forth they would pollute the records of the Court, it is unnecessary to set them forth. Brett, L.J.(*a*), and Cotton, L.J.(*b*), were of opinion that this was not the law of England, and that no statement relevant to the issue to be tried could be removed from the records of the Court merely because it was impure.

Libel in foreign language.

If the words complained of are in a foreign language, they must be set out in the original, with a correct translation.(*c*) A mistranslation may vitiate the indictment.(*d*)

Indictment must charge publication "of and concerning" person libelled.

The indictment should charge the libel to have been written and published "of and concerning" the person libelled.

In the case of *Rex* v. *Marsden*(*e*) the omission of those words was held fatal, upon the ground that, without them, it did not conclusively appear that no other person than the prosecutor could have been intended, although it was averred that the defendant intended to vilify the prosecutor, he having been Mayor of Colchester, and to cause it to be believed that he, "as such mayor," had practised corruption, and been guilty of abuse in respect to granting a licence to one J. L. to retail beer; and although innuendoes pointed the different parts of the libel to the prosecutor, and to the granting of the licence.

Innuendoes.

The indictment must contain averments of any facts which are necessary to connect it with the prosecutor or the subject of the libel.

An innuendo means nothing more than the words "*id est*," "*videlicet*," or "meaning," or "aforesaid," as explanatory of a subject-matter sufficiently expressed before; as—"such a one," meaning the defendants, or "such a subject," meaning the subject in question.

Inasmuch as an innuendo is only used as a word of explanation, it cannot extend the sense of the expressions in the libel beyond their own meaning, unless something is put on the record for it to explain.

Thus, in an action upon the case against a man for saying of another, "He has burnt my barn," the plaintiff cannot there, by way of innuendo, say, "meaning his barn full of corn," because that is not an explanation of what was said before, but an addition to it. But if, in the introduction, it had been averred that the defendant had a barn full of corn, and that, in a discourse about that barn, the defendant had spoken the words charged in the libel of the plaintiff, an

(*a*) L. R. 3 Q. B. D. p. 638. (*b*) *Ibid.* p. 641.
(*c*) *Zenobio* v. *Axtell* (6 T. R. 162). *Rex* v. *Golstein* (3 B. & B. 201).
(*d*) 1 Wms. Saunders, 242; Sty. 263. (*e*) 4 M. & S. 164.

innuendo of its being the barn full of corn would have been good, says De Grey, C.J., delivering the unanimous opinion of all the judges to the House of Lords in the case of *Rex* v. *Horne*.(*a*)

Where innuendo is unnecessary.

Where the writing itself imports a libel no innuendo is necessary.

Thus, where it was contended that the words "Frozen Snake" could not be deemed libellous unless shown to be so by an innuendo, Coleridge, J., said: "As to the necessity of an innuendo, the jury and Court, in such a case as this, are in an odd predicament if they alone, of all persons, are not to understand the allusion complained of. Suppose the libel had said the plaintiff acted like a Judas, must the history of Judas have been given, and referred to by innuendo? We ought to attribute to a Court and jury an acquaintance with ordinary terms and allusions, whether historical, or figurative, or parabolical."(*b*)

Innuendo bad or repugnant to words of libel.

If an innuendo is bad, and on the face of it repugnant to the words of the libel, it may be rejected as surplusage, and, if the words are libellous in themselves, the indictment remains good;(*c*) but if the words are capable of two senses, and the innuendo ascribes one meaning to them, and is good on the face of it, then it cannot be rejected, but must be proved.(*d*)

Removal of indictment by *certiorari*.

The indictment is frequently removed by *certiorari* into the Queen's Bench, so as to secure the advantage of a special jury, and the opportunity of moving the Court, in case of a verdict being found against the defendant.

The Court of Queen's Bench may order any indictment removed into that court by *certiorari*, to be tried at the Central Criminal Court.(*e*)

Proofs of publication.

The first allegation in the indictment which it is necessary for the prosecutor to prove is, that the defendant published the matter which is charged against him.

Who is a publisher.

This leads us to consider what constitutes a publication, and we cannot find a more comprehensive definition than that given

(*a*) Cowp. 682. See also the case of *Rex* v. *Burdett* (4 B. & Ald. 316). Abbott, C.J., says, with reference to the above-cited language of De Grey, C.J.: "The judgment of which the above is part has universally been considered the best and most perfect exposition of the law upon this subject."

(*b*) *Hoare* v. *Silverlock* (12 Q. B. 633); see *Harvey* v. *French* (2 Tyr. 585; 1 C. & M. 11).

(*c*) *Harvey* v. *French* (1 C. & M. 11; 2 Tyr. 585). *Barrett* v. *Long* (3 H. L. Cas. 413).

(*d*) *Williams* v. *Stott* (3 Tyr. 688; 1 C. M. 675).

(*e*) 19 Vict. c. 16, s. 1.

by Bayley, J., in the case of *Rex* v. *Carlile*.(*a*) He there says: "It is right that it should be known, not only that the party who originally prints, but that every party who utters, who sells, who gives, or who lends, a copy of an offensive publication will be liable to be prosecuted as a publisher."

Proof of publication when proceeding is against publisher.

Publication may be proved by evidence that the libel was bought in defendant's shop; and this is, perhaps, the readiest proof when the prosecution is directed against the person who, in the common acceptation of the word, is the publisher.

In the case of *Rex* v. *Almon*,(*b*) Lord Mansfield, in answer to one of the jury, said: "I have always understood, and take it to be clearly settled, that evidence of a public sale, or public exposal to sale, in the shop, by the servant or anybody in the house or shop, is sufficient evidence to convict the master of the house or shop, though there was no privity or concurrence in him, unless he proves the contrary, or that there was some trick or collusion." A new trial was moved for on the ground that a master is not answerable, in a criminal case, for the conduct of his servant where his privity is not proved; but the Court upheld Lord Mansfield's ruling, and refused to grant a rule.

When proceeding is against author.

If, however, the author, and not the publisher, is the defendant, it will be sufficient proof of publication against him to show that the manuscript is in his handwriting, and that it is printed and published, although there be no evidence that he directed the one or the other.(*c*)

Lord Holt held that where a libel is produced, written by a man's own hand, and the author of it is not known, he is taken in the mainer,(*d*) and that throws the proof upon him; and, if he cannot produce the composer, the verdict will be against him.(*e*)

Proof of handwriting.

Where the guilt of the defendant is to be established by proof of his handwriting, persons should be called who have seen him write, or who are acquainted with the character of his handwriting by receiving or seeing letters or papers which have purported to be written by him, the authenticity of which has not been disputed.

(*a*) *Rex* v. *Carlile* (3 B. & Ald. 169), and see *Lamb's case* (9 Coke, 59). (*b*) 20 How. St. Tr. 838.

(*c*) *Reg.* v. *Lovett* (9 C. & P. 463).

(*d*) Mainer, mainour, manour, or meinour, from the French *manier* —*i.e.*, *manu tractare*, in a legal sense denotes the thing taken away, found in the hand of the thief who took it.

(*e*) *Rex* v. *Beare* (1 Raym. 417; 12 Mod. 221; 2 Salk. 417).

Thus, a clerk in a merchant's office may be called to identify the writing, by his knowledge of letters of the defendant received at his master's counting-house.(*a*)

By comparison.

Formerly the law did not allow the comparison, by the jury or by witnesses, of the libel with other writings of the defendant; but now by 28 & 29 Vict. c. 18, s. 8, "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury, as evidence of the genuineness or otherwise of the writing in dispute."

Experts may make this comparison as well as witnesses who have personal knowledge of defendant's handwriting. In the recent case of *Reg.* v. *Waters*,(*b*) the evidence on which the Court made the rule absolute for a criminal information was the affidavit of an expert, who had compared the handwriting of an authentic paper with that of the letter in question.

Newspapers.

As to newspapers, *ride ante*, p. 591.

Requesting or procuring another to write libel.

It is not necessary to prove that the defendant put pen to paper; or with his own hands sold, gave, or lent the libel, or a copy thereof, to any person. If he requested or procured any other person to write or publish the libel he is equally guilty.

Thus in the case of *Reg.* v. *Cooper*,(*c*) the evidence against the defendant was that of the editor of the paper in which the libel was published. He stated that the defendant had expressed a wish to him that he would show up the prosecutor and his brother, and had told witness the story which formed the foundation of the libel; that the witness had told it to a reporter for the paper, and that the libel was substantially what was so communicated; that afterwards the defendant had remarked that the article had not appeared; that after its appearance defendant said he had seen it, and that he liked it very much; that the witness had heard the tale before the defendant told it him. Wightman, J., left it to the jury upon this evidence to say whether the defendant had caused the libel to be published, remarking that his approbation of it, after publication, was evidence to show that it was such an article as he wished to be published.

The jury convicted the defendant, and the Court refused a rule for a new trial, Denman, C.J., saying: "If a man

(*a*) *Rex* v. *Slaney* (5 C. & P. 213). (*b*) MS.
(*c*) *Reg.* v. *Cooper* (8 Q. B. 533; 15 L. J. 206, Q. B.).

request another generally to write a libel he must be answerable for anything written in pursuance of his request. He contributes to a misdemeanour, and is therefore responsible as a principal. He takes the chance of what is to be published. . . . That which did in fact form the foundation of the libel, and which the editor communicated to the reporter, was what the defendant communicated to the editor: and after the publication it was approved of by the defendant. . . . If we held this not to be a publication by the defendant we must go the length of exonerating a party who gives instructions for a libel in every case where the libel published departs from the instructions by a single word. . . . Here I have not the slightest doubt. There is, first, an employment; secondly, an identity of subject matter; thirdly, a complaint of delay in the publication; fourthly, an approval; fifthly, evidence that the libel is substantially that which was communicated." Coleridge and Wightman, J.J., concurred, principally on the ground that the defendant had approved of the article.

The case of *Parkes* v. *Prescott and another*, already referred to,(*a*) is still more conclusive upon this point. There an action of libel was brought against two guardians of the poor for defamatory statements which were made at a meeting of guardians, and afterwards published in two newspapers.

The only witnesses examined were the reporters who had been present at the meeting in the ordinary course of their duty. They proved the substantial accuracy of the reports, and that during the discussion the defendant Ellis said: "He hoped the local press would take notice of this very scandalous case," and requested the defendant Prescott to give an outline of it. This Prescott, who was in the chair, did, saying, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it;" upon which the defendant Ellis added, "And so do I." Prescott also said he hoped publicity would be given to the matter. Martin, B., directed a verdict for the defendants on the ground that there was no evidence of publication. To this ruling a bill of exceptions was tendered, and the Court of Exchequer Chamber held it to be a misdirection, and awarded a *venire de novo*. The Court were not unanimous, the majority of the Court (Keating, Montague Smith, and Hannen, J.J.) holding that the case ought to have been left to the jury, on the ground that where a man requests another to publish defamatory matter of which, for the

(*a*) *Ante*, pp. 497–500, L. Rep. 4 Ex. 169; 38 L. J. 105, Ex.; 20 L. T. N. S. 537.

purpose, he gives him a statement, whether in full or in outline, and the agent publishes the sense and substance of it, although to some extent in his own language, the man making the request is liable to an action as the publisher.

Byles and Mellor, JJ., dissented, and to the learned judgment of Byles, J., we will call attention, as showing the distinction between the civil and criminal responsibility of a principal for the tortious acts of his agent.

Distinction between criminal and civil responsibility for act of agent.

Stated shortly, the grounds on which the learned judge supported the ruling of Martin, B., were: That there was no evidence of a direction to publish the precise words; that he doubted whether the expression of a hope that the press would take notice of the case, &c., amounted to an authority to publish in a newspaper defamatory and unjustifiable matter spoken at a meeting; that it is not sufficient at common law that expressions equivalent to those in the declaration were written and published by the defendant, but the libel must be proved as laid, and a variance is fatal; and, though a variance is now amendable, no amendment could cure the objection, as the evidence does not show what particular defamatory expressions were or were not authorized by the defendants. The learned judge threw out an opinion that an action on the case against the defendants for inciting the reporters to defame the plaintiff, would have been the proper remedy, without charging them with the words published by the reporters. He distinguished the case of *Reg.* v. *Cooper*(*a*) on the double ground that the defendant had expressed his approval of the article after it was published, and that *Reg.* v. *Cooper* was a criminal case. The learned Judge, upon this last point, said: "That case was, moreover, a criminal case. It was an indictment for libel; and there is a great distinction between the authority which will make a man liable criminally and the authority which will make him liable civilly. A principal is not *civilly* liable for the acts of his agent unless the agent's authority be by the agent duly pursued; but the principal may be *criminally* liable, though the agent have deviated very widely from his authority, or, as Lord Bacon puts it: 'Lawful authority is to receive a strict interpretation, *Mandata licita recipiunt strictam interpretationem, sed illicita latam et extensam.*' . . . . It is true that a libel is a criminal act; but in this case the plaintiff does not proceed for the criminal act, but for the civil injury. Reading the case of *Reg.* v. *Cooper* with the light of this distinction between civil and criminal proceedings, which distinction is clear law and

(*a*) *Ante*, p. 604.

sound sense, it may well be that when a defendant tells the editor of a newspaper, as he did in that case, to 'show another up,' and the editor of the newspaper does so in gross terms, unauthorized and not intended by the defendant, the latter may, nevertheless, be criminally liable, though he might not be *civilly liable*."(*a*)

Questions to witness.

A witness may be asked if he knows who wrote the libel, but, if he answer in the affirmative, he is not bound to name the person, because it may be himself.(*b*)

Proof of place of publication.

A publication must be proved at the venue laid in the indictment. We have seen that where a man writes a libel in one county, and is a party to its publication in another, he may be indicted in either.(*c*)

Putting in the libel.

After proving the publication, the next step is to put the libel in and have it read.

If the original is proved to be in the possession of the defendant, and notice has been given to him to produce it, and he fail to do so, a copy may be read.(*d*)

When a libel is printed, it would seem that all the impressions are original; and if the defendant is connected with the libel after it was printed, a copy may be put in, or rather dupliate, which he has not seen.(*e*)

Variance between libel and indictment.

The libel read must agree in all respects, save mere clerical errors—such as the misspelling of a word—with the indictment. If there is the slightest disagreement in the sense it will be fatal.(*f*)

It is no variance that only part of the libel is set out; but if any part qualifies the rest it may be given in evidence.(*g*)

Where the defendant was charged in several counts of the indictment with having "composed, printed, and published" a libel which, as set out in the indictment, differed from the printed libel, but agreed with the MS. which the defendant had delivered to the printer, it was held that he might be found guilty of the composing and publishing, and acquitted of the printing.(*h*)

Power to amend variance.

The Court has power to amend any variance which may appear between the written evidence and the recital thereof on the record, in matters not material to the merits of the case,

(*a*) See now *Reg.* v. *Holbrook* (L. R. 4 Q. B. D. 42, *post*, p. 612–614.
(*b*) *Rex* v. *Slaney* (5 C. & P. 215).
(*c*) *Ante*, pp. 599, 600, and see *Rex* v. *Johnson* (7 East, 65).
(*d*) *Rex* v. *Watson* (2 T. R. 201).
(*e*) *Rex* v. *Watson* (2 Camp. 129).
(*f*) *Rex* v. *Beach* (1 Leach, 135); and *Rex* v. *Hart* (1 Leach, 145).
(*g*) *Rex* v. *Beare* (2 Salk. 417; Ray. 414; 12 Mod. 221).
(*h*) *Rex* v. *Williams* (2 Camp. 646).

and where the defendant cannot thereby be prejudiced in his defence on the merits.(a)

Proof of introductory averments.

After the libel has been read by the officer of the Court, the prosecutor proceeds to prove the introductory averments which are necessary to connect the libel with him.

For instance, if the libel reflects upon a man in any office or profession which may belong to many, it is necessary to aver that he acted in that capacity, and to prove it accordingly; and, though it suffices to allege that he held the particular office, yet, if the indictment state he was duly appointed, the appointment must be proved as laid.(b)

So, where an information stated "that before the publishing of the libel the King had issued a proclamation; that after the said proclamation and before the publishing of the libel thereinafter mentioned, divers addresses had on occasion of such proclamation been presented to his said Majesty, and that the defendant, well knowing the premises, but maliciously and seditiously intending to bring the said proclamation into contempt, &c., and to stir up sedition," published the libel in question, it was held necessary to prove the King's proclamation; but, *per* Buller, J., "the prosecutor need not have given any evidence at all of these addresses; the averment respecting these addresses seems unnecessary; for the information, after stating the proclamation and the addresses, charges the defendant with a seditious intent to bring the said proclamation into contempt, without noticing the addresses again. The distinction between material and immaterial averments is perfectly well settled; if the averment be material, that is, if it be connected with the charge, it must be proved; but if it be totally immaterial, and if the libel be not connected with the averment, it need not be proved."(c)

When introductory averments are necessary.

In short, it may be laid down that introductory averments are only essential when they make applicable to the prosecutor, and show to be libellous, statements which, on their face, do not naturally or inevitably refer to him or appear defamatory.

Where the statements are clearly libellous all explanatory averments may be rejected as surplusage.

Intent.

It has already been pointed out(d) that in a prosecution for libel on a dead person, it is essential to aver

(a) See 9 Geo. 4, c. 15; 11 & 12 Vict. c. 46, s. 4; 12 & 13 Vict. c. 45, s. 10; 14 & 15 Vict. c. 100, ss. 1, 24, 25.
(b) *Rex* v. *Martin* (2 Camp. 101). See *Rex* v. *Budd* (5 Esp. 230).
(c) *Rex* v. *Holt* (5 T. R. 446). (d) *Ante*, p. 495.

and prove that it was published with intent to bring contempt on the family of the deceased, and to stir up the hatred of the King's subjects against them, and to excite the relations of the deceased to a breach of the peace.(*a*)

This intent will generally be sufficiently proved by the libel.

Where the libellous words assume the existence of the extrinsic facts, they operate as an admission, and no further proof is needed.(*b*)

Proof of application of libel to prosecutor.

To prove the application of the libel to the prosecutor, witnesses should be called who are acquainted with him and with the circumstances which gave occasion to the libel, and who have read the libel; and they should be asked to whom they referred it.

In *Du Bost* v. *Beresford*, Lord Ellenborough held that the declarations made by spectators, while they looked at a picture, were evidence to show whom the figures were meant to represent.(*c*)

Malice.

Malice will be presumed from the act of publication; for, in the language of Lord Campbell, "malice, in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in the conscious violation of the law to the prejudice of another. . . . . And it is a well-established maxim that every one must be taken to intend the necessary consequence of his deliberate acts."(*d*)

Sometimes, however, it becomes material to prove express malice, and, for this purpose, other publications by the defendant may be given in evidence.(*e*)

Falsehood need not be shown.

No evidence is required to show that the libel is false; for, at common law, "the truth or falsehood of a written or printed paper is not material to be left to the jury, upon the trial of an *indictment or information* for a libel. The epithet false is not applied to the proposition contained in the paper, but to the aggregate criminal result, *libel*. We say *falsus libellus* as we say *falsus proditor* in high treason."(*f*)

6 & 7 Vict. c. 96, s. 4.

The Legislature has, however, created a new offence by 6 & 7 Vict. c. 96, s. 4, which enacts: "That if any person shall maliciously publish any defamatory libel *knowing it to be false*, every such person on being convicted thereof shall

(*a*) *Rex* v. *Topham* (4 T. R. 126).

(*b*) See *Jones* v. *Stevens* (11 Price, 235); *Berryman* v. *Wise* (4 T. R. 366); *Yrisarri* v. *Clement* (3 Bing. 441). (*c*) 2 Camp. 512.

(*d*) *Ferguson* v. *Earl of Kinnoull* (9 Cl. & F. 321). See *Rex* v. *Harvey* (2 B. & C. 257); *Rex* v. *Burdett* (4 B. & Ald. 95).

(*e*) *Stuart* v. *Lovell* (2 Starkie N. P. 95).

(*f*) See opinion of the Judges delivered to the House of Lords (22 How. St. Tr. 297); and *Rex* v. *Burke* (7 T. R. 4).

be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the Court shall award."

And, although the prosecutor need not burden himself with the proof of the falsehood, to secure a conviction without alleging the *scienter*; yet it will be seen hereafter that the defendant may, under certain circumstances, give evidence of the truth of the matters charged.

Publishing or threatening to publish or abstain from publishing with intent to extort money.

By sect. 3 of the Act last referred to, it is enacted that "if any person shall publish or threaten to publish any libel upon any other person, or shall directly or indirectly threaten to print or publish, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing, of any matter or thing touching any other person with intent to extort any money, or security for money or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years."

Defence.

We come now to consider what answer the defendant can make to the indictment or information.

At common law he was restricted to the plea of not guilty.

Publication by mistake.

Under this plea the defendant may prove that he published the libel by mistake.

The cases which are sometimes quoted in support of this proposition do not, however, bear it out, and we are left to the dicta of judges; but there can be no doubt that, in the present day, proof that the only connection of the defendant with the libel was in innocently publishing it, would entitle him to the verdict.

In *Rex* v. *Topham*,(a) Lord Kenyon says: "There may indeed be cases, and so it was admitted in *Rex* v. *Nutt*, of a publication in point of law, where no criminal intention can be imputed to the party; as where a party delivers a letter without knowing its contents, or delivers one paper instead of another."

Rex v. *Nutt*(b) was the case of a criminal information against a woman for publishing a treasonable libel; and the evidence was, that the defendant kept a pamphlet shop, and that the libel was sold by her servant in her absence, and

(a) 4 T. R. 127.

(b) Fitzgib. 47; Barnard. 308. See also *Rex* v. *Paine* (5 Mod. 163).

that the defendant did not know the contents of it, "nor of its coming in or going out." Raymond, C.J., held that the defendant was guilty of publishing it, and that it would be very dangerous if the law were otherwise. And, in answer to a question from defendant's counsel as to whether a post-boy who carried a libel, sealed up, into the country, could be punished for it, the Chief Justice answered, "That there the question would be, whether the carrying by a post-boy should be deemed in law a publication; and in all those cases the mischief is equal, though the party's intention do not concur." The jury, however, in this case, could not agree to give a general verdict, and desired to give a special one, and eventually the Attorney-General consented to the withdrawal of a juror.

There is also a dictum of Lord Kenyon's in *Rex* v. *Lord Abingdon*, that an inadvertent publication would not be a libel.(*a*)

In a civil case, Patteson, J., ruled, that a porter who, in the course of his business, delivered parcels containing libellous handbills, was not liable to an action, if he were shown to be ignorant of their contents.(*b*)

Evidence to rebut presumption of publication.

It was always competent to the defendant to rebut the *primâ facie* presumption of publication, which is raised by the fact that the libel, importing on its title-page to be printed for him, was bought in his shop;(*c*) and now, by the 7th section of Lord Campbell's Act (6 & 7 Vict. c. 96): "Whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall be given which shall establish a presumptive case of publication against the defendant, by the act of any other person by his authority, it shall be competent for such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from any want of due care or caution on his part."

There seems to have been some oversight in framing this section, as it contains no statement of what the effect of the evidence, which it allows to be given, shall be; nor does it appear to allow any evidence which was not formerly admissible at common law.

Before the passing of Lord Campbell's Act, the state of the law was this: "The proprietor of a newspaper which contained a personal libel was treated as a criminal, though he had not himself committed the criminal act, nor procured

(*a*) 1 Esp. 228. (*b*) *Day* v. *Bream* (2 Moo. & Rob. 55).
(*c*) *Rex* v. *Almon* (5 Burr. 2689).

or incited another to commit it, nor aided in its commission, nor knew that it was about to be committed."(*a*)

When the last edition of this work was published (1871), no decided case was to be found in which the defendant had succeeded in rebutting the presumption arising from the publication by his servants or agents.

In *Rex* v. *Walter*,(*b*) evidence was given that, though the defendant was proprietor of the paper in which the libel appeared, he lived entirely in the country, and that his son conducted the paper without interference on his part. Lord Kenyon told the jury that the defendant was liable.

In the case of *Rex* v. *Gutch and others*,(*c*) the libel was published in a London newspaper, and a witness for the defendant proved that, at the time of the publication, Gutch was living in Worcester, in an ill state of health, and was not interfering in the conduct of the paper at all. The counsel for Gutch (the late Sir F. Pollock), in a powerful argument, in which he reviewed all the cases, contended that his client could not be found guilty; but Lord Tenterden directed the jury that as the defendant derived profit from and found means to carry on the concern, and selected the person to conduct the publication, he was guilty of publishing what appeared in the paper, although it could not be shown that he was individually concerned in the particular publication, and that it would be exceedingly dangerous to hold otherwise; and the jury found him guilty. On the following day, another *ex officio* information was tried(*d*) against the same defendants, when Lord Tenterden said he did not mean that some possible case might not occur in which the proprietor of a newspaper would not be criminally answerable for what appeared in it.

In a note to Hawkins' "Pleas of the Crown,"(*e*) the possible case is suggested of the printer being confined in prison, to which his servants have no access, and their publishing a libel without his privity; in which case, it is there said, the libel shall not be imputed to him.

The point was distinctly raised in the recent case of *Reg.* v. *Holbrook*,(*f*) and the Queen's Bench Division (Cockburn, C.J., and Lush, J., *dissentiente* Mellor, J.) held that since Lord Campbell's Act (sect. 7) the proprietor of a newspaper is not criminally responsible for a libel published in it if he has given no authority, express or implied, for the publication;

(*a*) *Per* Lush, J., *Reg.* v. *Holbrook* (L. R. 4 Q. B. D. 49).
(*b*) 3 Esp. 21. (*c*) 1 M. & M. 433.
(*d*) 1 M. & M. 438. See also *Colbourn* v. *Patmore* (1 C. M. & R. 73).
(*e*) 1 Hawkins, bk. i. ch. 28 (tit. "Libels"), sect. 10, note 3.
(*f*) L. R. 4 Q. B. D. 42.

and that employing an editor with general authority to conduct the paper, and leaving it to his direction what should appear in it, did not *per se* amount to evidence of consent or authority for the publication of the libel.

"The effect of sect. 7 of Lord Campbell's Act, read by the light of previous decisions, and read so as to make it remedial, must be," according to Lush, J., "that an authority from the proprietor of a newspaper to the editor to publish what is libellous is no longer to be, as it formerly was, a presumption of law, but a question of fact. Before the Act, the only question was whether the defendant authorized the publication of the paper; now it is whether he authorized the publication of the libel. It is true that the production of the paper which contains the libel, coupled with proof that the defendant is the proprietor, is *primâ facie* evidence that he caused the publication of the libel, and the onus is on him to prove the negative. But when he has proved that the literary department was entrusted entirely to an editor, the question what was the extent of the authority which that employment involved is to be tried upon the principle which is applicable to all other questions of authority, and I think the jury ought to be told, in this as in every other case, that criminal intention is not to be presumed, but is to be proved; and that, in the absence of any evidence to the contrary, a person who employs another to do a lawful act is to be taken to authorize him to do it in a lawful, and not in an unlawful, manner."(*a*)

Cockburn, C.J., referred to the notorious fact that in many, perhaps in the majority of instances, public journals are carried on for the benefit of proprietors who find the necessary capital, by editors employed by them, and to whom the conduct of the paper is committed without any immediate control or interference of the principals; and in his opinion it was intended to exempt principals so circumstanced, if able to satisfy a jury that they had not authorized, directly or indirectly, the insertion of libellous matter, from being held criminally liable.(*b*)

Cockburn, C.J., was clearly of opinion that it would not be enough for the principal to show that he had not specifically authorized the insertion of the matter complained of, if it should appear that he had given authority to insert matter, whether libellous or not, at the discretion of the editor. His Lordship considered it clear that "though in the authority originally given to the editor, no licence to

(*a*) *Ibid.* p. 50. Quoted with approval by Lord Coleridge, C.J., in his charge to the jury in *Reg.* v. *Foote and others.* 1 Cab & El. 132.
(*b*) *Ibid.* p. 60.

publish libellous matter may have been contained, still such an authority may be inferred from the conduct of the parties, as, for instance, from the fact that other libels have been published in the paper, which have come to the knowledge of the proprietor, and without his remonstrance or interference, or the removal of the editor, from which the assent of the proprietor might well be inferred."(*a*)

Lord Coleridge, C.J., held that the 7th section is applicable in the case of a prosecution for blasphemous libel.(*b*)

Privilege.

The defendant may likewise give evidence to show that the libel was privileged. As to this, we need only refer the reader to what has been said, in preceding chapters of this work, upon privileged publications.

Other grounds of defence.

The defendant may also prove that the libel is not capable of the innuendoes laid in the indictment, and that it does not refer to the prosecutor or to the transactions averred; and he may negative the material facts averred.

Other passages from book, &c. may be read.

For the purpose of showing the intention of the defendant, and explaining the meaning of the libel, he is entitled to have other passages from the book or newspaper which contains the libel read: and it is doubtful whether he may not explain his meaning by other works of his.(*c*)

So much as to the defences allowed by the common law.

Plea justifying libel.

Now, under Lord Campbell's Act, the defendant may, at his peril in case he fail, plead a justification of the libel, in addition to the plea of not guilty.

The 6th section of that Act(*d*) enacts "that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged, in the manner now required in pleading a justification to an action for defamation, and, further, to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after such plea the defendant shall be convicted on such indictment or

(*a*) *Ibid.* p. 61. (*b*) *Reg.* v. *Bradlaugh* (15 Cox, C. C. 227).
(*c*) *Rex* v. *Lambert and Perry* (2 Camp. 398). (*d*) 6 & 7 Vict. c. 96.

information, it shall be competent to the Court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: Provided always that the truth of the matters charged in the alleged libel complained of by such indictment or information, shall in no case be inquired into without such plea of justification; Provided, also, that in addition to such plea it shall be competent to the defendant to plead a plea of not guilty; Provided, also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent for the defendant to make, under such plea, to any action or indictment or information for defamatory words or libel."

Applies only to personal libels.

It is obvious, from the very nature of the case, that this section only applies to libels of a personally defamatory character; for the words require not only that the matter should be true, but that it should be for the public benefit that it should be published; and it would be absurd for any court of justice gravely to inquire whether the publication of blasphemous, obscene, or seditious matter were conducive to the public good.(*a*)

Contents and proof of plea.

The plea must set out the particular facts which are relied upon as proving the truth of the libel, and also the facts which render the publication for the public benefit; and the defendant must prove all the material allegations of the plea to the satisfaction of the jury, or the prosecutor will be entitled to the verdict. So that, if the libel contain several imputations, and the plea alleges the truth of all, if the evidence fail as to any of them, the verdict must be entered generally against the defendant, although the jury should find some of the imputations true.(*b*)

"It has uniformly been held that, even in a civil action for libel, the plea of justification is one and entire. It raises only one issue; and, unless the whole plea is proved, that issue must be found for the plaintiff. Some difference of opinion has prevailed as to how far a partial proof of the justification ought to operate in reduction of damages; but all authorities agree that there can be no partial finding for the defendant on the ground that the justification is partially established. In a criminal prosecution for a libel, had liberty been given by the Legislature to plead the truth as a defence, without any special direction as to the proceedings in case the whole plea is not proved, the jury could have had no right to

(*a*) See *Reg.* v. *Duffy* (2 Cox Crim. Cas. 45), followed in *Ex parte O'Brien* (15 Cox C. C. 180).

(*b*) *Reg.* v. *Newman* (1 E. & B. 558).

find that a part of the justification is proved; for there are no damages to be assessed, and the sentence to be pronounced rests exclusively with the Court. But all doubt upon the subject is removed by the express enactment that, wherever there is a conviction after a plea of justification, 'the court, in pronouncing sentence,' shall 'consider whether the guilt of the defendant is aggravated or mitigated by the said plea and by the evidence given to prove or disprove the same.' . . . . It is quite clear that the opinion expressed by the jury on any particular parts of the plea (the whole not being proved) could not be entered on the record."(*a*)

In the next chapter will be seen more fully the "manner now required in pleading a justification to an action."

Proof not allowed of libel having been previously published without proceedings taken.

It is not competent to the defendant to prove that the imputations contained in the libel have been previously published by other persons, and that the prosecutor, knowing of them, has not taken proceedings against the publisher.

Lord Campbell, C.J., refused to admit evidence of this nature on the trial of Dr. Newman for libelling Dr. Achilli;(*b*) and Coleridge, J., on motion for a rule for a new trial on the ground that the evidence was wrongly rejected, said, "It is said that you are to infer the truth of the statement made by one set of witnesses against the statement made by another set, because the same circumstances with respect to the same party have been stated before, and that this, having been brought to the knowledge of the party, he submitted. The fallacy is in the word 'submission.' It comes to this only, that he did not prosecute. There may have been many reasons for that—the anonymous nature of the article, the inability to fix on any particular person, the ignorance whether the charge proceeded from a man of character, the poverty of the party himself, and many other circumstances that might be suggested, preventing a man from instituting proceedings in a court of justice on the first occasion on which the charge was made."(*c*)

Defendant allowed to call co-defendant as witness.

Where of three persons jointly indicted for publishing blasphemous libels in a newspaper, two (the editor and publisher) had already been convicted of publishing similar libels in a previous number of the paper, and the case of the third was that he was not connected with the newspaper at all, Lord Coleridge, C.J., acceded to an application on his part that he should be tried separately, as this could not embarrass the prosecution, and a contrary course might prejudice his defence.(*d*)

This defendant was also allowed to call the other two defen-

(*a*) *Per* Lord Campbell, C.J., 1 El. & Bl. 577. (*b*) 1 E. & B. 269.
(*c*) *Ibid.* 272. (*d*) *Reg.* v. *Bradlaugh* (15 Cox, C. C. 221, 222).

dants as witnesses on his behalf, though it was contended, on the authority of *Reg.* v. *Winsor and Harris*(*a*) that this could not be done unless a verdict of acquittal was taken against them; and that by being called they would subject themselves to a cross-examination which might make them criminate themselves. Lord Coleridge pointed out that the case cited was not applicable, as there the fellow-prisoner was called on behalf of the Crown, and not, as here, for the defendant. As to the other ground of objection, his Lordship said that as the co-defendant was to be called simply to disprove publication by the defendant who called him, "any questions to show publication by anybody else would either not be admissible, or if they tended to criminate the witness, he would not be compelled to answer."

Fox's Libel Act.

The causes which led to the passing of Fox's Libel Act are matter of history. Erskine, by his intrepid and persistent defence of the Dean of St. Asaph, contributed perhaps more than any man, save Lord Camden, to gain this security for the Press, which, according to Lord Campbell, in effect defines a libel to be "a publication which, in the opinion of twelve honest, independent and intelligent men, is mischievous, and ought to be punished."(*b*)

Jury may give a general verdict on whole matter in issue.

The first section declares and enacts "That on every such trial" (*i.e.*, trial of an indictment or information for the making or publishing any libel), "the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the Court or judge, before whom such indictment or information shall be tried, to find the defendant or the defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information."

Court or judge may give opinion on matter in issue.

Sect. 2 provides, "That on every such trial the Court or judge before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the king and the defendant or defendants in like manner as in other criminal cases."

This enactment does not oblige the judge to give his opinion as to whether the publication is a libel, but leaves it to his discretion in each particular case.(*c*)

Special verdict.

By the 3rd section the jury are empowered to find a special verdict, as in other criminal cases.

General effect of Act.

"The onus always was on the prosecutor or plaintiff to show

(*a*) L. R. 1 Q. B. 289. (*b*) 5 Lives of the Chancellors, 350.
(*c*) *Baylis* v. *Lawrence* (11 A. & E. 920).

that the words conveyed the libellous imputation, and if he failed to satisfy that onus, whether he had done so or not being a question for the Court, the defendant was always entitled to go free. Since Fox's Act, at least, however the law may have been before, the prosecutor or plaintiff *must also satisfy a jury* that the words are such and so published as to convey the libellous imputation. If the defendant can get *either* the Court or the jury to be in his favour, he succeeds. The prosecutor or plaintiff cannot succeed unless he gets both the Court and the jury to decide for him."(*a*)

Commitment.

Where a defendant is convicted on a criminal information, unless the prosecutor consents to his being bailed, it is a matter of course that he should be committed pending the consideration of the judgment.(*b*)

Acquittal is final.

Should the jury acquit the defendant, the matter is determined for ever; for the Court will never grant a new trial, after an acquittal upon an indictment or information for a felony or misdemeanour, even where there has been a misdirection,(*c*) except where the case is of the nature of a civil action, such as an indictment for the non-repair of a highway.

Lord Campbell, in discharging a rule for a new trial, on an indictment for obstructing the navigation of a stream or sheet of water, said:(*d*) "The ground of my decision is that this is a criminal proceeding, and that the defendant ought not to be put twice in peril for the same cause. That rests upon a maxim of English law which will, I hope, always be held sacred. I, for my own part, reprobate the recent speculations as to the propriety of granting a new trial after acquittals for felony or murder. If there be an improper conviction, it should be set aside; but I hope the same practice will never prevail in the case of an acquittal. When an indictment is instituted purely to raise a question of civil right, I agree with the doctrine which I have found established. . . . . But where a real offence is charged, it would be creating a dangerous precedent to grant a new trial after an acquittal." We have quoted this judgment because some textbooks lay it down as the better opinion that the Court may grant a new trial after an acquittal in all cases of misdemeanour. There are certainly no modern cases to support this view; and so far back as the 12th Car. 2, its correctness was denied.(*e*)

(*a*) *Per* Lord Blackburn, *Capital and Counties Bank* v. *Henty* (L. R. 7 Ap. Cas. 775, 776).
(*b*) *Rex* v. *Waddington* (1 East. 159).
(*c*) *Rex* v. *Cohen and Jacob* (1 Starkie, 516).
(*d*) *Reg.* v. *Russell* (3 E. & B. 942, 950).
(*e*) See *Rex* v. *Read* (1 Lev. 9; see also 2 Burr. 665; *Rex* v. *Mann*, 4 M. & S. 337; *Rex* v. *Wandsworth* (1 B. & Ald. 63).

When Fox's Bill was before the House of Lords, Lord Thurlow wanted to introduce a clause authorizing the Court to grant a new trial, if it should be dissatisfied with the verdict given for the defendant; but Lord Camden, who had charge of the Bill in the Upper House, emphatically refused to consent.(a)

Motion in arrest of judgment or for new trial.

While, however, the Act gave to the Press the security of a real trial by jury, it did not take away such protection as the judges might give, on motions in arrest of judgment, and for a new trial.

The 4th section provides, that in case the jury finds the defendant or defendants guilty, he or they may move in arrest of judgment, on such ground and in such manner as by law might have been done before the passing of the Act.

This motion must be grounded on some objection appearing on the face of the record.

Grounds of motion.

Mere formal defects cannot be taken advantage of on such a motion; for, by the 25th section of 14 & 15 Vict. c. 100, every objection to any indictment for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash the indictment, before the jury shall be sworn, and not afterwards; and every Court before which such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.

Arrest of judgment.

Where, from want of proper introductory averments and innuendoes, the matter on the record does not appear to be libellous, the Court will arrest judgment; and it may be that in some cases, where prosecutions are instituted for alleged libels, no innuendoes or averments could put a libellous gloss on the matter.

The Dean of St. Asaph succeeded upon a motion in arrest of judgment, upon the ground that the indictment did not contain a sufficient charge of libel of and concerning the King and his Government. Mr. Justice Willes intimated an opinion that if the indictment had been properly drawn it might have been supported; but Lord Mansfield and Buller, J., gave no opinion upon the point.(b) So, in *Rex* v. *Topham*,(c) after verdict of guilty on an indictment for a libel on a dead man, judgment was arrested for want of an allegation that the libel was published with a design to bring contempt on the family of the deceased, and to stir up the hatred of the King's subjects against them, and to excite his relations to a breach of the peace.

(a) 29 Parl. Hist. 1537. (b) 21 St. Tr. 1043.
(c) 4 T. R. 126.

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CHAPTER XI.

When motion in arrest of judgment must be made.

Where an indictment or information contains several counts, if any one of them is good the judgment will stand.(*a*)

The defendant must move before sentence, and if the indictment or information be not in the Queen's Bench, the motion must be made after verdict, at the Assizes; and the judge may, under 11 & 12 Vict. c. 78, reserve the point for the consideration of the Court of Crown Cases Reserved.

Arrest of judgment by court itself.

Although the defendant do not move, the Court will of itself arrest the judgment, if it appear that the defendant has not been found guilty of any offence at law.(*b*)

Effect of arrest of judgment.

The arrest of judgment sets aside all the proceedings, but is no bar to a fresh indictment.(*c*)

Motion for new trial.

When the information or indictment originated in the Court of Queen's Bench, or has been removed there by *certiorari*, the defendant may move for a new trial within the first four days of the next term.(*d*) If the motion cannot be made within those days, an intimation must be given, on one of them, that counsel is prepared to make the motion.(*e*)

The defendants must be present in Court when the motion is made, even though the counsel for the prosecution consent to their absence.(*f*)

Grounds on which new trial granted.

A new trial may be granted for misdirection, or the wrongful reception or rejection of evidence, or on the ground that the verdict was contrary to evidence, or on the ground of surprise,(*g*) or the misbehaviour of the jury.(*h*)

Where evidence, inadmissible for the purpose for which it is tendered, but admissible for another purpose not alluded to at the trial, has been rejected, the Court will not grant a new trial on the ground of an improper rejection of evidence.(*i*)

Venire de novo.

Where the verdict is imperfect, so that judgment cannot be given upon it, the Court will award a *venire de novo*.

Thus, in the case of *Rex* v. *Woodfall*, where the jury returned a verdict of "guilty of the printing and publishing *only*," the Court awarded a *venire de novo*, because it was impossible to say what the jury meant by the word "only."(*j*)

(*a*) *Rex* v. *Benfield and others* (2 Burr. 980, 985).
(*b*) *Rex* v. *Waddington* (1 East, 146).
(*c*) 4 Rep. 45. *Reg.* v. *Larkin* (23 L. J. 126, M. C.; Dears, C. C. 365).
(*d*) *Rex* v. *Holt* (5 T. R. 436). As to "terms," see now Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 26).
(*e*) *Reg.* v. *Newman* (1 Ell. & Bl. 270).
(*f*) *Rex* v. *Askew* (3 M. & S. 9); *Rex* v. *Fielder* (2 D. & R. 46).
(*g*) *Reg.* v. *Whitehouse and another* (Dears, C. C. 1). See *Reg.* v. *Richardson* (8 Dow. 511).
(*h*) *Reg.* v. *Fowler* (4 B. & Ald. 273); see Hawkins' P. C., bk. ii. ch. 47, s. 12.
(*i*) *Rex* v. *Grant* (3 Nev. & Man. 106).
(*j*) *Rex* v. *Woodfall* (5 Burr. 2661).

Should the defendant fail to have the verdict set aside by any of the above means, he will be brought up for judgment.

Judgment.

Where the case is not in the Court of Queen's Bench, the sentence will be passed as in other cases of misdemeanour tried at the assizes; and, of course, the defendant may urge any topic in mitigation which would be available in the Queen's Bench, and support it by witnesses or affidavits. We shall, therefore, pass on to the practice of the Court of Queen's Bench.

The rule of procedure laid down by Lord Kenyon, in *Rex* v. *Bunts*,(a) appears to be still in force—viz., that "When any defendant shall be brought up for sentence on any indictment or information *after verdict*, the affidavits produced on the part of the defendant, if any such be produced, shall be first read, and then any affidavits produced on the part of the prosecution shall be read; after which the counsel for the defendant shall be heard; and, lastly, the counsel for the prosecution. And when any defendant shall be brought up for sentence after judgment *by default*, the prosecutor's affidavits shall be first read, then the defendant's affidavits; after which the counsel for the prosecution shall be heard; and, lastly, the counsel for the defendants. If no affidavits should be produced, the counsel for the defendants shall be first heard, and then the counsel for the prosecution."(b)

"It is not the practice in general to give the defendant an opportunity of answering at a future time the affidavits produced by the prosecutor. . . . . When a defendant is brought up for judgment, the only object which the Court have in view is to discover the real truth of the transaction; and it is much more probable that that object will be attained by the practice which has hitherto prevailed, which requires that each party should come prepared to disclose all the circumstances of his case, than by a contrary practice, which would prove a source of infinite perjury. In the case of *Rex* v. *Archer*,(c) where the prosecutor produced affidavits, in aggravation, to show a continuance of the defendant's malice, by expressions used subsequent to the time of the indictment, the Court thought it reasonable to allow the defendant an opportunity of answering those affidavits, because it could not be supposed that he could come prepared to answer that which was not contained in the indictment."(d)

(a) 2 T. R. 683.

(b) The affidavits to be used on either side should be entitled "In the Queen's Bench, *The Queen* against *S.S.*"

(c) 2 T. R. 203, *in notis*.

(d) *Per Curiam*, *Rex* v. *Wilson* (4 T. R. 487).

Affidavits in mitigation of punishment.

The defendant was allowed, even so far back as 1774, to urge in mitigation that he was absent when the paper was published, and that on reading a copy he was much hurt with the contents, and immediately forbade the sale, and refused to let anybody see it. In consideration of these circumstances the defendant escaped with the (for those times) very light sentence of £100 fine and one month's imprisonment.(*a*)

Hone was allowed, on his trial at the Guildhall, to give evidence, in order to avoid the expense of an affidavit, that he had stopped the sale of the libellous work.(*b*)

Sir Francis Burdett was allowed, in mitigation of punishment, to put in an affidavit that he read statements in the newspapers which induced him to publish the libel; but affidavits that those statements were founded on truth were refused.(*c*)

And the Court will receive affidavits stating that, at the time of publication, the defendant believed the charges to be true, and setting forth reasonable grounds for such belief.(*d*)

In the case of *Reg.* v. *Shimmin* (not reported), affidavits from numerous inhabitants of Liverpool to the effect that the defendant's paper had always been well conducted, and had been the means of bringing about sanitary and other reforms in the town, were received. A memorial, not sworn, to the same effect was mentioned, but not allowed to be read.

Where defendant pleaded a justification under Lord Campbell's Act, an affidavit deposing that before and at the time of publication, and at the time of pleading, he believed the truth of the charges contained in the libel and plea, and that before the pleading he had received from Viterbo, in Italy, an affidavit made by a person named in the plea of justification, to the effect that she had been seduced by the prosecutor under the circumstances mentioned in the libel, was admitted to show why the plea was pleaded. "This part of the affidavit," said Lord Campbell, C.J., "is clearly admissible under the statute, to show why this part of the plea was placed on the record; the fact of the plea being one to be considered by the Court in apportioning the punishment."(*e*) But an affidavit which was rejected at the trial, for want of authentication by the place

(*a*) *Rex* v. *Williams* (Loft. 759).
(*b*) See 3 Burns' Justice, 350 (13th edition).
(*c*) 4 B. & Ald. 321. See also *Rex* v. *Halpin* (9 B. & C. 66), and *Rex* v. *Bradley* (2 Man. & Ry. 152).
(*d*) *Rex* v. *Halpin*, *ubi supra*.
(*e*) *Reg.* v. *Newman* (1 E. & B. 581, 582.

of custody or otherwise, was held inadmissible in confirmation of defendant's own affidavit that such a document was communicated to him before plea pleaded.(*a*)

Affidavits in aggravation punishment.

In aggravation, the prosecutor may produce affidavits showing that defendant, after the trial, has published other libels, or otherwise misconducted himself; but the defendant will be allowed time to answer such affidavits.(*b*)

In the case of *Rex* v. *Archer*(*c*) the Court received affidavits of expressions made use of by defendant, confirming and aggravating his guilt, which had been uttered in the hearing of two persons, and by them afterwards related to the persons making the affidavits, the prosecutor swearing to an application to those persons to come forward with their testimony, which they had refused; and it was strongly insinuated that they were under the influence of the defendant. The Court considered that they were under the influence of the defendant, but allowed them and the defendant an opportunity of answering such affidavits.

Affidavits of this kind will not be received unless they show that the persons to whom the libel was repeated, and who refuse to join in the affidavits, are under the control or influence of the defendant.(*d*)

Where the defendant, editor of a newspaper, pleaded guilty to an indictment for libel, on condition of being discharged on entering into his own recognisance to appear and receive judgment when called upon, and of not being called upon at all if he discontinued the publication of libels on the prosecutor, the Court refused to pass judgment unless the prosecutor produced an affidavit stating that the defendant had, since the trial, published libels respecting him.(*e*)

Punishment.

The Court has, at common law, absolute discretion as to the amount of punishment which it will inflict upon the defendant.(*f*) This may consist of fine, imprisonment, and even, it would appear, corporal punishment,(*g*) together with sureties for good behaviour for such period as the Court may deem fit.(*h*)

Security for good behaviour.

The right of the Court to adjudge a misdemeanant to give

(*a*) *Reg.* v. *Newman*, 1 E. & B. 581, 582.

(*b*) *Rex* v. *Withers* (3 T. R. 432); *Rex* v. *Archer* (2 T. R. 203, *in notis*).

(*c*) *Ubi supra.* (*d*) *Rex* v. *Pinkerton* (2 East, 357).

(*e*) *Reg.* v. *Richardson* (8 Dow. 511).

(*f*) As to amendment of the sentence and the record as to it, see *Gregory v. The Queen* (15 Q. B. 970), and *O'Connell* v. *The Queen* (11 Cl. & Fin. 155). (*g*) See Bac. Abr. tit. "Libel."

(*h*) It is true that corporal punishment has not been made part of the sentence in modern times; but there is no statute abolishing it as a common law punishment, save as regards women, although it is popularly thought to be abrogated.

security for his good behaviour, after the expiration of his imprisonment, was discussed before the House of Lords, on a writ of error, in 1810; and the question was put to the judges—Whether, by law, the Court of King's Bench can adjudge a person convicted of misdemeanour to give security for his good behaviour for a reasonable time, to be computed from and after the expiration of his imprisonment, himself in a sum named in such judgment, with two sufficient sureties each in a sum therein also mentioned? The unanimous opinion of the judges was in the affirmative.(*a*)

The question answered by the judges, it will be observed, was as to the power of adjudging security to be given for a reasonable time; but, nine years later, the Court sentenced Carlile, for two blasphemous libels, to pay a fine of £1,500, to be imprisoned for three years, and to find sureties for good behaviour *for the term of his life*.(*b*)

Term of imprisonment.

Lord Campbell's Act(*c*) limits the time of imprisonment for the publication of a defamatory libel to one year, except where the defendant published it, knowing it to be false, in which case double the length of imprisonment may be given.

Seizure of copies of blasphemous or seditious libels.

In case of verdict, or judgment by default, against any person for composing, printing, or publishing any blasphemous or seditious libel, the Court may make an order for the seizure, carrying away, and detaining in safe custody, all copies of the libel which shall be in the possession of the defendant, or in the possession of any other person named in the order for his use; evidence upon oath having been previously given, to the satisfaction of the Court or judge, that a copy or copies of the libel are in the possession of such other person for the use of the defendant.(*d*)

In case the judgment is reversed or arrested, the copies so seized are forthwith to be restored to the person from whom they have been taken, free of all charges and fees.(*e*)

If final judgment be entered upon the verdict against the defendant, then all copies seized are to be disposed of as the Court in which judgment is given shall order and direct.(*f*)

Costs.

If the Court imposes a fine upon the defendant, the prosecutor will be allowed his costs out of it to the extent of one-third of the fine.(*g*)

(*a*) *Rex* v. *Hart and White* (30 How. St. Tr. 1344; 47 H. of L. Journals, p. 271).

(*b*) 3 B. & Ald. 167; *sed vide Prickett* v. *Gratrex* (8 Q. B. 1029, 1030).

(*c*) 6 & 7 Vict. c. 96, ss. 4 and 5.

(*d*) 60 Geo. 3 and 1 Geo. 4, c. 8, s. 1. See *Rex* v. *Cator* (2 East, 361).

(*e*) *Ibid.*, s. 2. (*f*) *Ibid.*

(*g*) Cole on Crim. Inform. 109; 1 Ch. Crim. L. 871.

As a rule, the Crown neither gives nor receives costs in criminal cases; but, in addition to the practice of allowing a private prosecutor his costs out of the fine, the 8th section of Lord Campbell's Act provides "that in case of any indictment or information *by a private prosecutor*(*a*) for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover *from the prosecutor* the costs sustained by the said defendant by reason of such indictment or information."

On acquittal defendant entitled to costs.

The same section provides "that on a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs, so to be recovered by the defendant or prosecutor respectively, to be taxed by the proper officer of the court before which the said indictment or information is tried."

If issue on special plea be found for prosecutor, he is entitled to costs of such plea.

Under 4 & 5 Will. & M. c. 18, s. 2, a defendant to a criminal information, who obtained a verdict, was entitled to costs, unless the judge at the trial, in open court, certified upon the record that there was reasonable cause for exhibiting the information; but by the later statute of 6 & 7 Vict. c. 96, a successful defendant is entitled to his costs, in spite of the judge's certificate.(*b*)

Costs on criminal information.

It appears that the proprietor of a newspaper, who has been convicted and fined for the publication of a libel in the paper, inserted without his knowledge and consent by the editor, cannot recover against the editor the damages sustained by such conviction.(*c*)

Newspaper proprietor fined cannot recover against editor

CHAPTER XII.

CIVIL REMEDY OF THE LIBELLED.

EVERY person of whom a libel is published has a right of action, although his only injury be that which the law presumes from the publication of the defamatory matter.(*d*)

Who may sue.

(*a*) See *Reg.* v. *Duffy* (2 Cox C. C. 49).
(*b*) *Reg.* v. *Latimer* (15 Q. B. 1077).
(*c*) *Colburn* v. *Patmore* (1 Cr. M. & R. 73).
(*d*) *Thorley* v. *Lord Kerry* (4 Taunt. 355); *Craft* v. *Boite* (1 Wms. Saunders, 246, b).

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CHAPTER XII.

Libel by or on married woman.

As to married women, it is now provided by 45 & 46 Vict. c. 75,(*a*) s. 1, subsection 2, that "a married woman shall be capable of entering into, and rendering herself liable in respect of, and to the extent of her separate property, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *femme sole*, and her husband need not be joined with her as plaintiff or defendant . . . . and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

Partners.

Where a libel is published of persons in their trade, all the partners of the firm may join in the action;(*b*) but in such action they cannot recover damage for their private feelings, but only for the injury to their trade.(*c*)

In general, however, a joint action cannot be maintained, although many persons may be defamed by one and the same libel, as the wrong done to any one of them is not the wrong done to the others;(*d*) for, what one man may suffer from such a cause may altogether be different from the injury which will accrue to another.

Joint-stock companies and corporations.

The chairman of a joint-stock company, not incorporated, but having powers under an Act of Parliament to use the name of their chairman in actions for recovery of debts or enforcing claims or demands then due, or which thereafter might become due or arise to the company, and indictments for offences, was held entitled to sue for a libel on the company.(*e*)

"That a corporation at common law can sue in respect of a libel," says Pollock, C.B., "there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title through which they lost a great deal of money. It could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption; for a corporation cannot be guilty of corruption, although the individuals composing it may. But it would be very odd if a corporation had no means of protecting itself against wrong, and if its property is injured by slander,

(*a*) The Married Women's Property Act, 1882.
(*b*) *Foster and others* v. *Lawson* (11 Moo. 361; 3 Bing. 452); *Maitland* v. *Goldney* (2 East, 425).
(*c*) *Haythorn and another* v. *Lawson* (3 C. & P. 196).
(*d*) *Barratt* v. *Collins* (10 Moo. 451).
(*e*) *Williams* v. *Beaumont* (10 Bing. 260).

it has no means of redress except by action. Therefore it appears to me clear that a corporation at common law may maintain an action for a libel by which its property is injured. Then has a corporation created under the 19 & 20 Vict. c. 47, the same power? . . . . In order to carry on business, it is necessary that the reputation of such a corporation should be protected, and therefore, in case of libel or slander, it must have a remedy by action."(*a*) This reasoning clearly applies to all joint-stock companies, under whatever statutes they may be constituted.

Aliens.

An alien friend, though domiciled abroad, may maintain an action for a libel on him published in England.(*b*)

Joinder of parties.

No cause or matter is now to be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every case deal with the matter in controversy, so far as regards the rights and interests of the parties actually before it.(*c*)

The Court or a judge may, further, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary, in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.(*d*)

Where a plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants to the intent that the question as to which, if any of them, is liable, and to what extent, may be determined as between all parties.(*e*)

As to the course of procedure where a defendant is added or substituted, see Order xvi. R. 13 of the Supreme Court Rules, 1883.

Time within which action must be brought.

The action must be brought within six years next after the publication relied upon;(*f*) but such publication need not be the first or substantial publication of the newspaper or book.

Thus, where a libel appeared in a newspaper, published

(*a*) *Metropolitan Saloon Omnibus Company* v. *Hawkins* (4 H. & N. 90; 28 L. J. 201, Ex.).
(*b*) *Pisani* v. *Lawson* (6 Bing. N. C. 90).
(*c*) Supreme Court Rules, 1883, Order xvi. R. 11.
(*d*) *Ibid.* (*e*) Order xvi. R. 7. (*f*) 21 Jac. 1, c. 16, s. 3.

in 1830, and at the trial, in 1849, two copies of the paper were produced, one of which copies came from the British Museum, and the other had been purchased before the commencement of the action, in 1848, at the newspaper office of the defendant, by a witness who had been sent by the plaintiff to make the purchase, and who had handed the paper so purchased to the plaintiff, the Court held this latter publication, although to the plaintiff's agent, sufficient to disprove the plea of the Statute of Limitation.(*a*)

Venue.

The action is transitory, and therefore the venue may be laid in any county the plaintiff elects for the trial, subject to the defendant's obtaining an order to change it.(*b*)

Change of venue.

This the defendant cannot often do, as the general affidavit, upon which an order to change the venue in transitory actions is made, does not usually apply to actions of libel; at any rate, not when the libel is in a book or newspaper, as the publication, which is the cause of action, is made in divers counties.(*c*)

In one case the Court made the rule absolute to change the venue, in an action for a libel contained in a Newcastle paper, from London to Newcastle, upon an affidavit of the defendant that several pleas of justification were to be pleaded, and that all the witnesses resided at Newcastle; that the paper was published there; that the expense would be greatly increased if the action were tried in London; and that the cause of action, if any, arose in Newcastle, and not elsewhere.(*d*)

Where the venue had been changed, upon the common affidavit, from Cumberland to Lancashire, the Court made absolute a rule to move it back again, upon an affidavit that the newspaper was published as much in one county as the other.(*e*)

Persons liable as defendants.

Whoever makes a publication of the libel, is liable to be sued, and cannot escape by alleging that other publishers are or have been sued for the same libel.(*f*)

Joint publication.

Where there has been a joint publication by several, the

(*a*) *Duke of Brunswick* v. *Harmer* (14 Q. B. 186).

(*b*) *Smith* v. *O'Brien* (26 L. J. 30, Ex.). See *Begg.* v. *Forbes* (13 C. B. 614). Local venue is now abolished. Supreme Court Rules of 1883, Order xxvi. R. 1.

(*c*) *Clissold* v. *Clissold* (1 T. R. 647); *Pinkney* v. *Collins* (1 T. R. 571; 1 Wils. 178).

(*d*) *Robson* v. *Blackwell* (2 Dow. 645).

(*e*) *Hobart* v. *Wilkins* (1 Dow. 460).

(*f*) *Harrison* v. *Pearce* (1 F. & F. 567); *Freecoe* v. *May* (2 F. & F. 123).

plaintiff may exercise a choice as to suing them all in one action or in several, as there is no contribution between wrongdoers;(*a*) but the Court might order them to be consolidated, unless reasons could be given why they should not.(*b*)

Infant.

An infant may be made defendant to an action for libel, as his nonage is no defence to those actions of tort which are not founded on contract.(*c*)

Corporations and joint-stock companies.

Corporations aggregate and joint-stock companies may be sued for libels published by their servants or agents.(*d*) Great injustice would be suffered by individuals if their remedy for libels published by authority of the company or corporation were limited to the agents employed. It is no answer to say that a corporation has no soul, and therefore cannot be guilty of malice; because, in the first place, as we have already seen, express malice need not be alleged; and, secondly, even if it need, there would be great difficulty in saying that, under certain circumstances, express malice may not be imputed to, and proved against, a corporation.(*e*)

Husband and wife.

Formerly it was necessary to join husband and wife as defendants in actions for libels by the wife, whether published before(*f*) or during coverture, and although the husband and wife might be permanently living apart.(*g*) See now 45 & 46 Vict. c. 75, s. 1, subsection 2, *ante* p. 626.

After a divorce *a vinculo matrimonii*, or a decree of judicial separation, the wife must be sued alone, though the libel were published before the divorce.(*h*)

The judgment of Erle, C.J., in the case which establishes this proposition, explains the reasons for the old rules as to joinder of husband and wife, as defendants, in suits arising solely out of the wife's conduct. The learned Judge said:(*i*) "During coverture the wife has no such existence as to enable her to be a suitor, in her own right, in any court; neither can she be sued alone. For any wrong committed by her she is liable, and her husband

(*a*) *Frescoe* v. *May* (*ubi supra*).

(*b*) See *Jones* v. *Pritchard* (6 D. & L. 529; 18 L. J. 104, Q. B.).

(*c*) *Defries* v. *Davies* (3 Dow. K. B. 629); Dicey on Parties, 474.

(*d*) *Whitefield* v. *South-Eastern Railway Company* (E. B. & E. 115; 27 L. J. 229, Q. B.); *Alexander* v. *North-Eastern Railway Company* (34 L. J. 152, Q. B.; 11 Jur. N. S. 619).

(*e*) See E. B. & E. 121.

(*f*) Bac. Abr. "Baron and Feme" (L); Com. Dig. "Baron & Feme" (Y).

(*g*) *Head* v. *Briscoe et ux.* (5 C. & P. 485, and 2 L. J. N. S. 101, C. P.).

(*h*) *Capel* v. *Powell* (17 C. B. N. S. 743; 34 L. J. 168, C. P.; 11 L. T. N. S. 421).

(*i*) 17 C. B. N. S. 748.

cannot be sued without her; neither can she be sued without joining her husband. Seeing that all her personal property is vested in the husband, it would be idle to sue the wife alone: the action would be fruitless. Where the husband is joined for conformity, if he dies, the action goes on against the wife; but if the wife dies, the action abates. It is clear to demonstration, therefore, that there is no cause of action against the husband. He is not liable for the wrong; but he is joined only by reason of the universal rule, that the wife during coverture cannot be either a sole plaintiff or a sole defendant. The reason does not apply where there has been a divorce *a vinculo matrimonii*. The woman is no longer under coverture. She is remitted to her former name and station, and is perfectly capable of suing and being sued as if she had never been married: consequently, the necessity of joining the husband no longer exists. One can well recognise the expediency of making a legislative provision" (20 & 21 Vict. c. 85, ss. 25, 26) "for the case of a decree of judicial separation; for there, notwithstanding the sentence, the relation of husband and wife is not entirely dissolved. But there was no need of legislation in the case of a sentence which dissolves the marriage."

Introductory averments.

The first Common Law Procedure Act (1852) rendered the declarations in actions of libel much less technical than indictments and criminal informations are, even at the present day.

The reader will remember what was said(*a*) as to the necessity of introductory averments in indictments, and the failures of prosecutions for the want of averments to support the innuendoes, as, for instance, the innuendo that the libel meant to charge the prosecutor with setting fire to the defendant's barn full of corn, which was bad for want of an averment that the prosecutor had a barn and full of corn.

The 61st section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76) enacts, that "in actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense; and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged

(*a*) *Ante*, pp. 601, 608, 609.

meaning, show a cause of action, the declaration shall be sufficient."

Form of pleading.

In the schedule B. No. 33, is given the following form of declaration in libel: "That the defendant falsely and maliciously printed and published of the plaintiff in a newspaper called '————,' the words following, that is to say, 'he is a regular approver under bankruptcies;' the defendant meaning thereby that the plaintiff had proved and was in the habit of proving fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious."

Such a form satisfies very well the requirements of the New Rules as to Statements of Claim; and it may safely be used.

Allegation of malice not necessary.

The pleading would, it seems, be good without the allegation of malice.

This was decided in two very early cases. The report of the first case(*a*) does not contain the grounds of the judgment, but in the second(*b*) "it was adjudged no error because the words themselves were slanderous and malicious."

Allegation of falsehood.

The publication should be alleged to be false; although there are authorities which tend to show that even that is not necessary.

In an anonymous case in Styles (p. 392), Rolle, C.J., is reported to have said "that in an indictment a thing must be expressed to be done *falso et malitiose*, because that is the usual form; but in a declaration these words are not necessary." By some writers it is supposed that all he meant was, that, after verdict, the omission of those words would be helped in a declaration.(*c*) In an action for slander of title, it was objected that the declaration did not allege the publication to be false, but Lord Ellenborough held that the allegation that the paragraph or advertisement was "malicious, injurious, and unlawful," was sufficient.(*d*)

Although the omission of the words "falsely and maliciously" may not be fatal to the declaration, yet they are in the form given in the schedule to the Common Law Procedure Act, 1852; and it has always been usual, and is proper, to insert them.

Publication.

The Statement of Claim should show a publication, but no technical words are necessary: it is sufficient if such matter

(*a*) *Arkingsal* v. *Denny* (Moore, 459).
(*b*) *Mercer* v. *Sparke* (Ow. 51, S. C. Noy. 35).
(*c*) See Wms. Saunders, 242, *a* (n. 2); 2 Saunders' Pl. & Ev. by Lush, 914.
(*d*) *Rowe* v. *Roach* (1 M. & S. 309).

be stated as amounts to a publication, without the formal word "published."

In the case of *Baldwin* v. *Elphinston*(*a*) it was held that an allegation of "printing and causing to be printed" was a sufficient allegation of publication, on the ground that, though printing a libel may be an innocent act, yet, unless qualified by circumstances, it shall *primâ facie* be understood to be a publishing, as it must be delivered to the compositor and the other subordinate workmen. Lord Denman, however, in *Watts* v. *Fraser*,(*b*) upon a question of rejection of evidence, refused to act upon that case, saying that it "did not follow, as of course, from a work being printed, that the party sending it forth employed a compositor or other workman."

"Of and concerning" the plaintiff.

It should also be stated that the libel was published "of and concerning the plaintiff;" and this *colloquium* was held necessary, even where it was stated that the defendant published the libel with intent to impute the offence charged in it to the plaintiff.(*c*)

The Common Law Procedure Act seems to have made no difference in this respect. The statement in the marginal note to *Hemmings* v. *Gasson*,(*d*) that a declaration need state no *colloquium*, refers to the *colloquium* of the inducement and not of the plaintiff.

Setting out libel.

The libel itself should be set out. It was held insufficient to state its purport,(*e*) or substance merely.(*f*) The reason of the rule was, that the defendant was entitled to demur on the ground that the words did not amount to a libel.(*g*)

The words of the libel should still be set out, notwithstanding the abolition of demurrers,(*h*) and notwithstanding Order xix. R. 2 of the Supreme Court Rules, 1883; as the point of law may still be raised in the statement of defence, and may, by order of the Court or a judge, be heard and disposed of before the trial.(*i*)

(*a*) 2 W. Bl. 1037.

(*b*) 7 A. & E. 232. In this case it was held that the printer as well as the editor of a magazine was liable for a lithographic print, of a libellous character, contained in the magazine, though it was not printed by the printer; it being referred to in a part of the letter-press which was also libellous (S. C. 7 C. & P. 369).

(*c*) 1 Wms. Saunders, 242, *b* (n. 3), and *Clement* v. *Fisher* (7 B. & C. 459).

(*d*) E. B. & E. 346.

(*e*) *Wood* v. *Brown* (6 Taunt. 169); *Gutsole* v. *Mathers* (1 M. & W. 502).

(*f*) *Wright* v. *Clements* (3 B. & Ald. 503).

(*g*) See, in addition to the cases referred to in the two preceding notes, *Cook* v. *Cox* (3 M. & S. 110); *Solomon* v. *Lawson* (8 Q. B. 823); *Wood* v. *Adam* (6 Bing. 481).

(*h*) Rules of 1883, Order xxv. R. 1.

(*i*) *Ibid.* R. 2.

It was held unnecessary to set forth the whole of the libel; any passage complete in itself might be selected.(*a*)

Whole libel need not be set forth.

Thus it was held sufficient to set out part of the index of the *Quarterly Review*, which professed to relate to a work published by the plaintiff; although it was objected that, as the index was only a reference to the body of the work, it was necessary that the count should contain a reference to the whole, as otherwise that would appear to be unqualified which was, in fact, subject to a material qualification. Abbott, C.J., ruled that there was no ground for the objection, saying: "If one part of a book cannot be understood without reference to another, then you must set out both; but if it is intelligible without, then you need not. Suppose the matter referred to in the index had not been found in the volume. The index may contain a separate libel."(*b*)

But if two separate and divided parts of the publication are set out, they must not appear to be an entire and continuous part of the writing from which they are taken, but should be introduced after this manner: "in a certain part of which said libel there was and is contained, &c., and in a certain other part of which said libel there was and is contained, &c."(*c*)

Part material to sense must not be omitted.

It must, however, be borne in mind that the libel cannot be garbled by omitting that which is material to the sense of the part inserted. If the setting out the whole would enable the defendant to move in arrest of judgment, the omission of any part was considered a fatal variance.(*d*)

Where the plaintiff, in an action against a newspaper proprietor, averred that the defendant printed and published a libel on him—"as and purporting to be a letter written from A. to R. O'C., viz., 'I have sold all my property to B.; yet it may still go on in my name: and the rents are to be transmitted to H. Bell, Esq., 40, Charterhouse Square. *Mr. Bell has been for some time past confined in England on a charge of high treason;*' "—and it appeared at the trial that the paragraph in the newspaper which contained the libel stated that in a debate in the Irish House of Commons, several years before, the Attorney-General had read a letter from A. to R. O'C. in which were the words, "I have sold all my property to B., yet it may still go on in my name, and the rents are to be transmitted to Hugh Bell, Esq., 40, Charterhouse Square;" and then followed

(*a*) *Rex* v. *Brereton* (8 Mod. 328); *Rutherford* v. *Evans* (6 Bing. 458, 459).
(*b*) *Buckingham* v. *Murray* (2 C. & P. 47).
(*c*) *Tabart* v. *Tipper* (1 Camp. 353).
(*d*) *Rutherford* v. *Evans* (6 Bing. 459; 4 C. & P. 74).

the libellous words italicised above, without any parenthesis or brackets to distinguish them from the letter, in the middle of which they were printed—it was held by the Court that the libellous words were part of the speech of the Irish Attorney-General, and were not stated in the newspaper to be part of the letter, and that the publisher had not made a substantive statement of his own respecting the libellous fact stated of the plaintiff, but only asserted that the Irish Attorney-General had made such a declaration; and that the true description of the libel should have been, that the defendant purported to publish a speech of the Attorney-General of Ireland, in which was contained the libellous matter. Bailey, J., said: "The question is not whether the declaration might not have been so framed as to entitle the plaintiff to recover upon the facts proved at the trial, but whether he has made out in proof that which is stated in this declaration. It is a very different thing to assert a thing as in the party's own knowledge, and to say that another, whom he names, has told him so. The persons who hear the one must conclude that the party pledges his own knowledge of the fact, which in the other case they do not. Now, here the plaintiff takes upon himself, in the first four counts, to prove that the libel purported to be contained in a letter from A. to R. O'C.; but the libel proved does not state that there was any such letter containing such a charge, or that the writer pledged his own knowledge of there being such a letter, but only that the Attorney-General in Ireland had asserted the fact of the plaintiff having been confined, &c. . . . . There is no assertion by the defendant that the letter so read was a genuine letter, or that he pledged his knowledge of there being such a letter containing the libellous charge. Still less is the general allegation made out, that the defendant had asserted that the plaintiff had been for some time past confined in England on a charge of high treason; for, looking at the paper, it only appears that the defendant had stated that the Attorney-General for Ireland had said so. Now, though it may be libellous to state that another person said such and such things of the plaintiff—and in some cases it may be an aggravation of the libel to state it in that way—yet still it is a different libel, and the charge is open to a different defence."(*a*)

To the same effect is the case of *Carturight* v. *Wright*.(*b*) There the declaration omitted two references, which were contained in the libellous paragraph, to Cobbett's writings, and it was held a fatal variance; as that which appeared in

(*a*) *Bell* v. *Byrne* (13 East. 554, 563).
(*b*) 5 B. & Ald. 615.

the declaration to be the defendant's observation was, in fact, Mr. Cobbett's assertion respecting the plaintiff.(*a*)

When a publication is set out which is only libellous by reference to the language of another publication, that other publication should be set out *verbatim*, and not merely in substance.(*b*).

Several libels in one publication.

As to several libellous paragraphs contained in one publication, it was considered, under the old form of pleading, that they might all be declared upon in one count; but that paragraphs in different numbers of a newspaper should form the subject of separate counts.(*c*)

Libel in foreign language.

If the libel be written in a foreign language, it must be set forth in the original; for the Court will arrest judgment if only a translation be given.(*d*)

At one time it was considered that a translation need not be given, and that it was better not to attempt one, as a mistranslation might jeopardize the action.(*e*) This view is supported by an anonymous case in Hobart (p. 126), where the Court gave judgment for the plaintiff in an action for slander in Welsh, although the declaration did not aver what the word meant; but the Court took information by Welshmen as to the meaning thereof. The learned reporter quotes two earlier cases where like judgment was given. However, Lord Kenyon, in the case of *Zenobio* v. *Axtell*,(*f*) said the plaintiff should have set out the original words, and then have translated them. And the case of *Rex* v. *Goldstein*(*g*) seems decisive upon the point. That was an indictment for the forgery of a Prussian treasury note, and there being no translation of the note in the indictment, the Court, upon that ground, arrested the judgment.

Innuendoes.

Although the Common Law Procedure Act of 1852 did away with the necessity for prefatory statements and inducements, innuendoes are still necessary where the words do not *primâ facie* and necessarily convey an imputation on the plaintiff.

The effect of the change brought about by the Act of 1852 is explained by Mr. Justice Blackburn in the case of *Cox* v. *Cooper*.(*h*) His Lordship there says: "The 61st section of the Common Law Procedure Act was intended to alter the form of pleading in an action of libel, but it was never intended to alter the law of libel. The law is that, where-

(*a*) See also *Tabart* v. *Tipper* (1 Camp. N. P. 353).
(*b*) *Solomon* v. *Lawson* (8 Q. B. 823; see pp. 838, 839).
(*c*) *Hughes* v. *Rees* (4 M. & W. 204).
(*d*) *Zenobio* v. *Axtell* (6 T. R. 162).
(*e*) Wms. Saunders, 242, n. (1); *Ross* v. *Lawrence* (Styles, 263).
(*f*) *Ubi supra*. (*g*) 3 B. & P. 201; S. C., 7 Moore, 1.
(*h*) 12 W. R. 76; 9 L. T. N. S. 329.

ever there are written words which tend to bring a man into contempt, they disclose a cause of action. By the old rules of pleading, the words used, if unexplained, ought to be taken in their ordinary sense; and if, in their ordinary sense, they did not disclose a cause of action, the pleader was obliged to explain them, and set out the circumstances under which they were written, and make averments that they were written of and concerning certain facts and in a particular sense—and this needed great care and particularity. I remember that there was an instance, a great many years ago, where there were numerous actions in which the libel consisted solely of these words, 'A. B. is a person fit to be a member of a certain society.' These words were not in themselves actionable; but it was averred in the declaration and proved at the trial, that the person who sent round the circular containing these words was the secretary of a society for the protection of tradesmen against swindlers, and that when he wrote round to warn his correspondents against any person, he said, 'He is a fit person to be a member of our society.' The declaration set out all these facts, and was so expressed as to be held perfectly good. But by the new form of proceeding, under the 61st section, it would have been sufficient to say, 'He is fit to be a member of our society,' meaning thereby 'He is a swindler,' and all the circumstances would have been admitted in proof at the trial, which formerly would have had to be set out with great particularity. But it would not have been sufficient to set these words out and say that they were used for the purpose of conveying some bad impression. There must be a distinct averment that the words, if they are not actionable in themselves, bear a specific meaning which is in itself actionable."

The conclusion to be drawn from this judgment, supported by the words of the Act itself, and subsequent authorities which will be noticed hereafter, is that it left innuendoes still necessary where they would have been required previously, but that in no case was the support of an inducement or prefatory averment requisite.

As to this latter proposition, we would refer the reader to what has been already said in this and the preceding chapter on the subject of prefatory averments, and also to the cases, to be presently cited, which illustrate the change which the Common Law Procedure Act of 1852 introduced in pleading.

Cases in which innuendoes are needed.

The cases in which innuendoes are needed may be divided into two classes—viz., (1) where the language, though purporting on the face of it to be written of the

plaintiff, is ambiguous, and capable of an innocent construction; or where apparently it can only bear an innocent meaning, but, taken in connection with extrinsic circumstances may be proved to be defamatory: (2) where the publication is plainly defamatory, but requires the aid of explanatory matter to make it appear that it was written or published of and concerning the plaintiff.

To explain ambiguity in language.

We shall notice first the cases in which innuendoes are required to explain a patent or latent ambiguity in the language.

"The Court," says Parke, B., "will inform itself of the meaning of English words, though unusual and peculiar to a particular country; a strong instance of which is the case in which the term 'Healer of Thieves' was expounded to mean a furtherer of felons, without any averment as to the local use of those terms (1 Roll. Abr. 86, L. Pl. 1). And such is the rule as to Welsh words: (Hob. 126). But the case of *Angle* v. *Alexander*,(*a*) in the analogous case of slander, decides that a distinct averment that particular English words had acquired some sense different from their natural one, was necessary, and that an innuendo without such averment was insufficient; and on the authority of that case, which was decided in the Exchequer Chamber. . . . we think that the averment of the meaning of the term 'black-sheep' is properly introduced by way of inducement."(*b*)

In the cases just cited from Rolle's Abr. and Hobart, there was neither introductory averment, nor innuendo as to the meaning of the Welsh or provincial terms used. But in the case from which Parke, B.'s, judgment is quoted there was an introductory averment that "the defendant used the word 'black-sheep' for the purpose of expressing and meaning, and the said word used by him was by divers, to wit, all the persons to whom the libel thereinafter mentioned was published, understood as expressing and meaning a person notorious by reason of bad character, and of stained and sullied reputation; and the defendant then also used the word 'black-legs' for the purpose of expressing and meaning, and the said last-mentioned word so used by him was by divers persons, to wit, all the persons to whom the libel thereinafter mentioned was published, understood as expressing and meaning a person guilty of cheating and defrauding others."(*c*)

The innuendo after the words "black-sheep" was—

(*a*) 7 Bing. 123; 1 C. & J. 143.

(*b*) *Per* Parke, B., *McGregor* v. *Gregory* (11 M. & W. 295). See also *Hoare* v. *Silverlock*, *ante*, p. 493.

(*c*) 11 M. & W. 287.

"meaning thereby that the plaintiff was a 'black-sheep' in the sense and meaning in which that word was so used by the defendant as aforesaid." That after "black-legs" was — "meaning thereby that the plaintiff was a black-leg in the sense and meaning in which that word was so used by the defendant as aforesaid."(*a*)

In contrast with these pleadings is the case of *Barnett* v. *Allen*,(*b*) which was litigated after the passing of the Common Law Procedure Act, 1852. It was an action for slander; but, as prefatory averments were required in slander equally with libel, it shows the change effected by that Act. The slanderous imputation was that the plaintiff was a "black-leg;" and the declaration simply stated that the defendant, contriving to injure the plaintiff, falsely and maliciously spoke of the plaintiff the words following, "I am surprised Mr. Reynolds should allow a black-leg (meaning the plaintiff) in this room" (meaning that the plaintiff obtained his living by dishonest gambling, and was a professed gamester, and a fraudulent gamester, &c.). The Court was equally divided as to whether the word "black-leg" was capable of meaning a *fraudulent* gamester.

In the case of *Angle* v. *Alexander*,(*c*) the last count of the declaration charged the defendant with speaking and publishing these words: "You (meaning the said plaintiff) are a regular prover under bankruptcy (meaning that the said plaintiff was accustomed to prove fictitious debts under commissions of bankruptcy)." The Court held that the natural meaning of the words did not bear out this innuendo, and that, as there was no prefatory averment that the defendant had been accustomed to employ the words in that sense, the innuendo could not enlarge the sense of the words. These words still require an innuendo; and it is given in the schedule (B.) to the Common Law Procedure Act, 1852, as follows: "The defendant, meaning thereby that the plaintiff had proved, and was in the habit of proving, fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious."

To say of a person that he has wilfully set his own premises on fire, is not defamatory without an innuendo; as he may have done the act with an innocent purpose. Therefore, if the imputation intended be that he had done it to defraud an insurance company, or for some other in-

(*a*) 11 M. & W. 288.
(*b*) 3 H. & N. 376; 27 L. J. 412, Ex.
(*c*) 7 Bing. 122; 1 C. & J. 143.

proper purpose, such meaning must be pointed out by an innuendo.(*a*)

Where the libel complained of was that the plaintiff was a "Man Friday" to another, the count was held bad, for want of an averment that, by the term "Friday," subserviency and degradation were intended.(*b*) Lord Denman, distinguishing this case from *Hoare* v. *Silverlock*(*c*), where the term "Frozen Snake" was held not to require an innuendo, says: "The 'Friday' alluded to was a very respectable person. Black men have not been declared to be criminal by any Act of Parliament."(*d*)

Goldstein v. *Foss*(*e*) is a good example of the change introduced in the mode of pleading. The libel there complained of was a letter from the secretary of a trade protection society, to the following effect: "I am directed to inform you that the persons undernamed, or using the firms of Goldstein (meaning the plaintiff), Castles and Co., 31, Mark Lane, and Benjamin Porter Baker, Hackney Road, are reported to this Society as improper to be proposed to be balloted for as members thereof." The Court held that the letter, without an innuendo, was not libellous, Abbott, C.J., saying: "There may be so many reasons why a person may be deemed unfit to become a member of the Society without casting any injurious reflection upon him, that I think we cannot possibly say with any degree of certainty that such was the intention with which this alleged libel was published." This, no doubt, would be held by the Court at the present day. But the hardship of the judgment consisted in this, that the declaration contained an innuendo,(*f*) and also introductory averments, which the Court held would have constituted a good cause of action, but for the fact that the innuendo was not properly connected with the introductory averment. Now, as we have seen, introductory averments are not necessary.

Where libel is ironical.

Where the libel is ironical there should, of course, be an innuendo alleging that the defendant meant the opposite of what he wrote; and it might be as well to charge the pub-

(*a*) *Sweetapple* v. *Jesse* (5 B. & Ad. 27). See *Capel* v. *Jones* (4 C. B. 259); and *Rawlings* v. *Norbury* (1 F. & F. 341).

(*b*) *Forbes* v. *King* (1 Dowl. 672).

(*c*) *Vide ante*, p. 493; and see *Homer* v. *Taunton* (5 H. & N. 661; 29 L. J. 318, Ex.).

(*d*) 12 Q. B. 632; 17 L. J. 306, Q. B. See also *Cox* v. *Cooper* (9 L. T. N. S. 329; 12 W. R. 75). (*e*) 6 B. & C. 154.

(*f*) The innuendo was "thereby then and there meaning that the said plaintiff was a swindler and sharper, and an improper person to be a member of the said Society."

lication in this form—"that defendant published a certain ironical, false, &c., libel;"(a) but this cannot be considered necessary since the Common Law Procedure Act of 1852.

The foregoing cases will sufficiently show the use of the innuendo to explain the nature of ambiguous imputations.

Innuendo to connect libel with plaintiff.

We have next to inquire when innuendoes should be inserted to apply the libel to the plaintiff.

The leading case upon this point is *Le Fanu* v. *Malcolmson*,(b) which came before the House of Lords on a writ of error from the Irish Court of Exchequer Chamber. The libel complained of was an article in the *Warder* newspaper upon "The Factory Question in Ireland," containing a letter from a correspondent, who complained of the tyranny which was carried on "in some of the Irish factories." Many alleged acts of cruelty and tyranny were mentioned, but there was no direct allusion to the plaintiffs. The declaration contained introductory averments that the plaintiffs were the owners of an extensive factory at Portlaw, in the county of Waterford; and that the defendants did publish of and concerning the said plaintiffs, and of and concerning the said factory, and of and concerning the manufacturing of cottons, linens, and other fabrics, carried on in the said factory, and of and concerning the said trade and calling of the said plaintiffs, the libel containing the false, &c., matter of and concerning the said plaintiffs, their factory, and the manufactory carried on therein, and of and concerning their conduct towards, and their treatment of, the persons employed by them in their said factory. Innuendoes applied the words "some factories," and the other ambiguous terms in which the plaintiff's factory was spoken of, to the factory of the plaintiffs, and the House of Lords held that the innuendoes did not extend the sense of the libel, but merely pointed out the particular individuals to whom, in fact, the libel applied, and that the declaration was good.

Lord Campbell, in the course of his judgment, said:(c) "Mr. Ellis relies on *Solomon* v. *Lawson*;(d) but the proposition there laid down, and which I adopt, is this—that where

(a) *Boydell* v. *Jones* (4 M. & W. 446); *Rex* v. *Dr. Brown* (11 Mod. 86; Holt. Rep. 425).

(b) 1 H. L. Cas. 637. (c) *Ibid.* 668.

(d) 8 Q. B. 823. The declaration in this case contained two counts. The first count, after reciting that the plaintiff was employed in supplying fresh water to ships at St. Helena, and had for that purpose fitted up a schooner with wooden tanks, and that the ship M. being at St. Helena, the plaintiff conveyed fresh water to her in the wooden tanks of his schooner, complained that the defendant published (in a letter to the *Times* newspaper, set out in the count) of and concerning

there is a publication, or a sentence spoken verbally, which clearly conveys an imputation of crime on some person, that in that case it may, by innuendo, be applied to the plaintiffs: if that proposition is well supported in law, the objection made here fails, because in this there clearly is a gross imputation on some individuals, and the question is whether it may not be applied to the plaintiffs. What is there to show that that proposition is not well founded according to authority? There is *Solomon* v. *Lawson*; but there it was an historical fact that was narrated: all that was there stated might be true without imputing blame to any person. There was no charge brought against either a class or an individual, and by mere innuendo you cannot give a new sense to words which they do not naturally bear. It comes round to the old rule that you cannot by innuendo extend the natural meaning of the words which are spoken or written, but by the innuendo you may point out the particular individual to whom these words apply; those words in themselves clearly imputing a crime upon the part of some individual."

The same observation applies to this case as well as to the others we have cited—viz., that the introductory averments would not, since the C. L. P. A., 1852, be necessary, and that it would be sufficient to add, after the words "some factories," "meaning the factories of the plaintiffs;" and after the words "the cruelties of the slave trade or the Bastile are not equal to those practised in some of the Irish factories," "meaning the factories of the plaintiffs, and meaning thereby that the

the plaintiff in his said employment, and concerning the water so supplied to the M., a statement that persons on board the M. had become ill soon after leaving St. Helena, where they had taken in fresh water, which illness was caused by the water; that the water was run into a copper tank, whence the casks were filled alongside; that the poison was imbibed from the tank, and that it behoved the authorities to order its removal and replace it with an iron one: thereby meaning that the plaintiff had been guilty of supplying bad and unwholesome water to the M. The Court arrested judgment on this count, because there was nothing in the letter which warranted the innuendo applying the imputation of misconduct to the plaintiff (see p. 838). The second count recited that defendant published a statement "in substance as follows" (setting out the publication charged in the first count), and charged that defendant afterwards published (in a further letter to the *Times*) of and concerning the plaintiff, &c., and of and concerning the first publication, a statement that the copper tank was fitted up in a schooner belonging to the plaintiff. The Court arrested judgment on this count also, on the ground that where a publication is not libellous, unless by reference to the language of a previous publication, such previous publication must be set out in the declaration *verbatim*, and not merely in substance.

plaintiffs had treated the persons in their employment in said factory with cruelty."

To a like effect is the subsequent case of *Turner* v. *Merry-weather*.(a) There the libel was as follows: "Extraordinary case in the Ecclesiastical Court by a barrister-at-law. . . . . Yet in defiance of all the watching there is strong reason for believing that a considerable sum of money was transferred from Mr. Turner's name in the books of the Bank of England, by power of attorney obtained from him by undue influence, after he became wholly incompetent to perform any act requiring reason or understanding." The declaration contained the proper introductory averments, and the following innuendo: "meaning thereby that the said plaintiff and the said J. H. Turner, had transferred or caused to be transferred the said money from the said W. Turner's name in the said books of the said Bank, by means of a power of attorney obtained by them from the said W. Turner, by undue influence exercised by them over the said W. Turner, at a time when the said W. Turner had become and was mentally incompetent to give a power of attorney and to perform any act requiring reason and understanding." This innuendo was held by the Court of Common Pleas and by the Exchequer Chamber to be well laid. Coltman, J.,(b) said, "The old decisions which support the argument that an innuendo cannot be allowed to make persons certain who were uncertain before, are not now sustainable."

Innuendo may put any construction on words of libel.

The Court of Queen's Bench decided, in the case of *Hemmings* v. *Gasson*,(c) "that sect. 61 of the Common Law Procedure Act, and the two forms in schedule B to that Act, enable the pleader to put any construction he pleases upon the words complained of, by innuendo; and that it is for the jury to say whether the words were spoken with such meaning."

If jury negative meaning put by innuendo.

But suppose the plaintiff's pleading put a meaning on the words of the libel which the jury negatived, could the plaintiff then fall back upon their natural meaning, and say they were libellous without any innuendo?

In answering this question, it may be well to state what the rule was under the old system of pleading. This is luminously stated by Parke, B., in delivering the unanimous opinion of the Judges to the House of Lords, in the case of *Barrett* v. *Long*.(d) He says, that if the innuendo "is more

(a) 7 C. B. 251; 18 L. J. 155, C. P.; and in error 19 L. J. 10, C. P.
(b) 18 L. J. 158, C. B. (c) E. B. & E. 346.
(d) 3 H. L. Cas. 395. See p. 413.

extensive than the words will bear, and therefore unwarranted by them, we are of opinion that it may be rejected as repugnant and void; and the words are libellous, and therefore actionable without its aid. That an innuendo which is bad, and on the face of it repugnant to the words, may be rejected, was decided, in the cases of *Corbett* v. *Hill*(*a*) and *Smith* v. *Cooker*;(*b*) and if the words are sufficient without the innuendo, the action is maintainable.(*c*) The same rule prevails where the innuendo unnecessarily introduces new matter, as in *Harvey* v. *French*.(*d*) The case would be different if the words are capable of two senses, and the innuendo ascribes one meaning to them, and is good on the face of it. *Williams* v. *Stott*(*e*) is an authority that in such a case it could not be rejected."

Common Law Procedure Act, 1852, s. 61.

The law was altered, in this respect, by sect. 61 of the Common Law Procedure Act, 1852, which enacted that "where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient." The change is thus described by Blackburn, J.: "Sometimes it was not easy to frame a declaration to meet this [*i.e.* the former] state of the law, which was a trap for nonsuits; and therefore the Legislature enacted the provision in sect. 61. The effect of the first clause is, that an innuendo cannot be rejected, as formerly, because not supported by the prefatory averment. And the last clause enacts, that instead of a declaration with many counts, with as many innuendos, a count for libel or slander, with an innuendo that the words were used in a particular sense, may be read as two counts, one with the innuendo and the other without it; and proof of either is sufficient."(*f*)

New form of pleadings.

Before statements of claim were substituted for declarations, wherever the precise words of the libel and the meaning to be attached to them were doubtful, it was considered prudent to insert several counts, because, although the plaintiff might obtain a verdict upon the libel, read without the innuendoes, he could not at the trial adopt a fresh innuendo.(*g*)

(*a*) Cro. Eliz. 609. (*b*) Cro. Car. 512.
(*c*) See also *Roberts* v. *Camden* (9 East, 93), cited by Parke, B., in *Wakley* v. *Healy* (7 C. B. 604, 605).
(*d*) 1 Cr. & M. 11. (*e*) 1 C. & M. 675, 687.
(*f*) *Watkin* v. *Hall* (9 B. & S. 286; S. C., L. Rep. 3 Q. B. 396; 18 L. T. N. S. 561; 37 L. J. 125, Q. B.; 16 W. R. 857).
(*g*) See *per* Willes, J., *Bremridge* v. *Latimer* (12 W. R. 879; S. C., 10 L. J. N. S. 816).

The abolition of declarations, with their counts, and the substitution of a short statement of facts in ordinary language has deprived the foregoing considerations of some, but not all, of their importance.

Everything must be pleaded which if not raised would be likely to take the opposite party by surprise.(*a*)

Claim of damages.

Damages need not be particularly stated unless the plaintiff claims special damage. The latitude allowed to juries, as to the amount of general damages which may be given, is so wide that in practice special damages are seldom if ever claimed in actions of libel; but, if it is desired to claim them, they should be particularized.(*b*)

Defence.

We have, in the next place, to consider the defences which it is open to the defendant to make.

His defence may be (1) a specific denial of each material allegation in the statement of claim; (2) that the occasion of publication was privileged; (3) a payment into court of a sum of money by way of satisfaction, in manner provided by Order xxii. R. 1; or (4) a justification of the libel as true; (5) an apology, coupled with the payment of a sum of money into court; (6) that the plaintiff has, either before or after the commencement of the action, agreed to accept certain acts of the defendant in full satisfaction and discharge of his right of action, and the damages and costs sustained by him in respect thereof, with an averment that the defendant has duly performed such agreement. The defendant may (7) set off, or set up, by way of counter-claim against the claim of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and this set-off or counter-claim is to have the same effect as a cross action.(*c*)

There was formerly another defence, by demurrer, which is now abolished.(*d*)

Old plea of not guilty.

The old plea of not guilty, technically called the general issue, denied the publication of the libel, the publication of it maliciously and in the defamatory sense imputed, and that the matter charged was libellous.(*e*) It threw upon the plaintiff the onus of proving all the material allegations in the declaration. Under this plea the defendant might contend that the publication was privileged,

(*a*) Supreme Court Rules, 1883, Order xix. R. 15.
(*b*) See the old Rule. 1 Wms. Saunders, 243, *d* (5).
(*c*) Rules of 1883, Order xix. R. 3.
(*d*) Supreme Court Rules, 1883, Order xxv. R. 1.
(*e*) *O'Brien* v. *Clement* (15 M. & W. 435; 3 D. & L. 676; 15 L. J. 285, Ex.); Rules of Pleading of Trin. Term, 1853, Rule 16.

because the fact of its being privileged rebuts the *prima facie* presumption of malice.(*a*) In *Wason* v. *Walter*,(*b*) the defence that the matter charged to be a libel, in the first count of the declaration, was a faithful report of a debate in the House of Lords, and that the matter complained of in the second count was a fair comment on such debate as a matter of public interest, was allowed under the plea of not guilty, which was the only plea on the record.

The plea of not guilty is now available only where expressly allowed by statute.(*c*)

New Rules.

The defendant must now specifically deny each allegation of fact, except damages, in the plaintiff's pleading which he means to contest; otherwise he will be taken to admit it.(*d*) And a denial of any allegation of fact must not be evasive, but must answer the point of substance.(*e*)

Privilege.

The defence of privilege if intended to be relied on should now be specially pleaded. The defendant must now raise by his pleading all matters which show the action not to be maintainable, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise.(*f*)

Publication of parliamentary reports, &c.

The Legislature has provided a defence for persons who are sued for the publication of the proceedings, reports, papers, and votes of either House of Parliament, or extracts or abstracts therefrom.

3 & 4 Vict. c. 9.

By 3 & 4 Vict. c. 9, s. 1,(*g*) it is enacted that proceedings criminal or civil, against persons for the publication of papers, &c., under the authority of either House of Parliament shall be stayed upon the production in court (after twenty-four hours' notice) of the certificate of the Lord Chancellor, Speaker, Clerk of the Parliament, Speaker of the House of Commons, or the clerk thereof, stating that the paper complained of was published by order or authority of the House of Lords or House of Commons, together with an affidavit verifying such certificate.

The second section of the same statute enacts that proceedings for publishing a copy of any parliamentary paper, &c., shall be stayed at any stage thereof, upon the defendants laying before the Court or judge such report and such

(*a*) *Hoare* v. *Silverlock* (9 C. B. 20, 26). See also *Lillie* v. *Price* (5 A. & E. 645). See also *The Earl of Lucan* v. *Smith* (1 H. & N. 483; 26 L. J. 94, Ex.

(*b*) 8 B. & S. 671; L. Rep. 4 Q. B. 73; 19 L. T. N. S. 409; 38 L. J. 34, Q. B.; 17 W. R. 169).

(*c*) Rules of 1883, Order xix. R. 12.

(*d*) Rules of 1883, Order xix. Rs. 13 and 17.

(*e*) Order xix. R. 19.

(*f*) Order xix. R. 15.

(*g*) *Vide ante*, pp. 572, 573.

copy, with an affidavit verifying such report and the correctness of such copy.

The third section enacts that in any civil or criminal proceedings for printing any extract from, or abstract of, such report, &c., it shall be lawful, under the general issue, to give in evidence that such extract or abstract was published *bonâ fide* and without malice, and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant.

Justification on ground of truth.

If the defendant desires to justify the libel on the ground that it is true, he must raise the point specially by his pleading.

Caution should be exercised in setting up such a defence, as, unless it is made out to the satisfaction of the jury, they will probably consider the futile attempt as an aggravation of the original wrong; and there are *dicta* to show that they would be justified in so regarding it.(*a*)

Justification where charge is general.

Where the libel, as set forth by the plaintiff, consists of general charges of criminal or improper conduct, the defence should justify by specifying the particular acts which support the imputations, so that the plaintiff may be aware of the defence which is to be set up.

Before the Common Law Procedure Act of 1852 a plea containing general charges of fraud or felony was bad on special demurrer; and since that Act the practice was either to strike it out, or to order particulars of the charges intended to be justified, to be delivered to the plaintiff.

In the case of *T'Anson* v. *Stuart*(*b*) the declaration was for printing of the plaintiff that he was a swindler; and the defendant pleaded that the plaintiff had been illegally, fraudulently, and dishonestly concerned and connected with, and was one of, a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons with whom he had dealings and transactions. Upon special demurrer, the Court of King's Bench, reversing the judgment of the Common Pleas, held that the plea was bad, for not stating the particular instances of fraud upon which the defendant relied in support of it.

Buller, J.,(*c*) said: "If this plea were to be suffered, it would be to allow any person to libel another more on the records of the court than he could do in a public newspaper. If the plaintiff has been guilty of any acts of swindling, the de-

(*a*) See *Wilson* v. *Robinson* (7 Q. B. 68; 14 L. J. Q. B. 196); *Simpson* v. *Robinson* (12 Q. B. 514).

(*b*) 1 T. R. 748. (*c*) *Ibid.* 753.

fendant must be taken to know them. He could not prove the justification, as he had pleaded it, by general evidence; but he has no justification, unless he can prove the special instances; and, knowing them, he ought to put them on the record, that the plaintiff might be prepared to answer them. It has been said that this case is different from the case of *Newman* v. *Bailey*,(a) because that was a specific charge. But that is not so; for there the plaintiff was charged with pocketing *all the fines*, &c., which was as general as possible; and there the Court said it was necessary to specify the particular acts."

So in *Holmes* v. *Catesby*,(b) where the libel charged an attorney with gross negligence, falsehood, and prevarication, and excessive bills of costs in the business he had conducted for the defendant, a plea simply repeating the charges in the libel, without specifying particular acts of misconduct, was held bad on demurrer.

To a declaration for words imputing to the plaintiff, a pawnbroker, that he had committed the unfair and dishonourable practice of "dulling"—*i.e.*, of replenishing or doing up goods, being in his hands in a damaged or worn-out condition, and pledging them with other pawnbrokers—the defendant pleaded that the plaintiff did replenish and do up divers goods, being in his hands in a damaged or worn-out condition, and pledged them with other pawnbrokers. This plea was specially demurred to upon the ground that it did not state what goods or what kind of goods were so "dulled," nor with what pawnbroker they were pledged. And the Court held the plea bad.(c)

Parke, B., said: "It is a perfectly well-established rule in cases of slander that where the charge is general in its nature, the defendant, in a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff. That is settled by the cases of *l'Anson* v. *Stuart*, *Newman* v. *Bailey*, and *Holmes* v. *Catesby*. In some of those cases, perhaps, the statement in the plea was not so specific as it is here, but still this is not specific enough: the plea should have stated the description of the goods, or at least the names of the pawnbrokers with whom they were pledged; as it is, the statement is so general that the plaintiff cannot know with what he is intended to be charged. The defendant is bound to give him information of some specific acts

(a) 2 Chitty R. 665; cited *arguendo* by Wood. See 1 T. R. 750.
(b) 1 Taunt. 543.
(c) *Hickinbotham* v. *Leach* (10 M. & W. 361).

with which he intends to charge him. This plea does not do that, and is therefore bad."

And Alderson, B., in the same case, referring to the argument used by the counsel for the defendants, that it must be peculiarly within the plaintiff's own knowledge what the goods were which he had replenished, and with what pawnbrokers he pledged them, said: "What the plaintiff has actually done in the course of his business is within his knowledge, but not what the defendant mistakenly or wickedly means to charge him with having done: that is peculiarly within the defendants' knowledge, and it is because it is so that he is to plead it.(*a*)

General plea of justification.

More laxity has been allowed in these pleas since the abolition of special demurrers; and even a general plea, that the matters in the declaration complained of are true in substance and fact, has been allowed, on condition that the defendant should furnish particulars of the charges intended to be justified.

The Court of Common Pleas allowed such a plea in the case of *Behrens* v. *Allen*,(*b*) where the libel consisted of charges against the plaintiff's honesty in having, at divers dates (which were specified), bought goods below cost price from a bankrupt firm. Willes, J., in the course of the argument, said: "*D'Anson* v. *Stuart* adverts to the distinction between the case where the plea states in justification an indictable matter, and where it states what is not of that character. In the latter case I have always, at chambers, allowed the plea, the defendant furnishing particulars." And Erle, C.J., said: "It is much the same question, to my mind, whether the plea or the particulars set out all the facts."(*c*)

In giving judgment in the same case, Willes, J., said: "*D'Anson* v. *Stuart* makes it clear that before the Common Law Procedure Act, 1852, a general plea of justification in these circumstances was not allowed, with the exception, possibly, of a case of a specific charge in the declaration, and a plea alleging the charge to be true. In such a case as this, where the charges are mostly specific, the real question may be raised by allowing a general plea of the part specified —a general plea to that part, and a special plea to the

(*a*) See also *O'Brien* v. *Clement* (16 L. J. Ex. 76; 16 M. & W. 159); *Jones* v. *Stevens* (11 Price, 235). (*b*) 8 Jurist, N. S. 118.

(*c*) See *Gourley* v. *Plimsoll* (L. R. 8 C. P. 362); where leave to administer interrogations to the plaintiff, for the purpose of enabling the defendant to supply particulars of his general plea of justification, was refused in the absence of an affidavit disclosing circumstances warranting a departure from the general rule.

other part. Nevertheless, I do not mean to say that on any future case I shall not reserve to myself to allow a plea of justification in libel, on such terms as will oblige the parties to try the real question between them, in the clearest possible form."

In an earlier case(*a*) the Court had refused to allow the defendant to plead one general justification to a declaration containing three counts for three separate libels, charging the plaintiff with swindling, although the defendant offered to deliver full particulars of the intended defence. The grounds of the refusal were stated by Williams, J., as follows: "The difficulty is this: If you set out in your pleas the facts upon which you rely, the Court has an opportunity of judging whether they do amount to a justification or not; whereas, by the course proposed, you prevent the matter from getting on the record at all."

An example of vagueness in pleading a justification carried to its furthest limits is furnished by the case of *Jones* v. *Bewicke*.(*b*) There the first count of the declaration stated that the defendant spoke and published of the plaintiff, as an attorney and solicitor, the words, "he is a bankrupt swindler." The second count charged the following libel: "Old Perjury Jones, of Goring Place, Llanelly, South Wales." "Mr. Bewicke has only to repeat that the attorney Jones did perjure himself. An action for libel will only prove the truth of the above facts, and clearly demonstrate to the public the gross perjury of the above parties." To this the defendant pleaded, first, "not guilty," and secondly, "that the defamatory matter in the declaration mentioned and complained of was and is true in substance and fact." Cleasby, B., dismissed a summons calling upon the plaintiff to show cause why he should not give particulars of the facts and matters relied on to justify the libels, and why, in default, the plea should not be struck out. But, on appeal to the Court of Common Pleas, the rule was made absolute in the term of the summons; Keating, J., doubting "whether such a plea should be allowed at all," and Montague Smith, J., saying, "The plea is clearly an embarrassing one, and ought not to be allowed without particulars."

Where charge in libel is specific.

Where the charge in the libel is specific, the defence need only allege that it is true.

This was the case even under the ancient system of pleading; as, where the words were "he stole two sheep of J. S.," a

(*a*) *Honess and another* v. *Stubbs* (7 C. B. N. S. 555; 29 L. J. 220, C. P.; 6 Jur. N. S. 682).

(*b*) L. Rep. 5 C. P. 32.

plea "that the plaintiff stole the said sheep" was held sufficient.(*a*) But a plea that the libel "is true in substance and effect," means that it is true in every material particular; so that where the libel charged the plaintiff with various acts of cruelty to a horse, and, amongst others, with knocking out an eye, and the defendant pleaded that the matters contained in the supposed libel were true in substance and effect, it was held that the justification was not sustained by a verdict that the libel was true in all respects, except that the eye was not knocked out.(*b*)

Where the publication complained of did not make a direct charge against the plaintiff, but reported defamatory statements made by others, a plea that the several matters and things contained in the alleged libel are true, was held bad; as such a plea might mean either that the report in the newspaper was a true report of what had been said by others, or that the facts mentioned were true.(*c*)

A libel imputing specific misdeeds to the plaintiff cannot be justified by a plea alleging that he was guilty of other misdeeds of the same nature. So that where, to an action for saying, "She is a thief to you and to me, and hath stolen twenty pounds from me, and forty pounds from you," the defendant pleaded that the plaintiff was a thief, and stole two hens from her on such a day feloniously, the plea was held bad.(*d*)

Justification to part of declaration.

The defendant might limit his plea of justification to part of the declaration:(*e*) but if it did not justify the whole of what it purported to answer, it would have been demurrable.(*f*)

Where the libel stated that the plaintiff's ship was unseaworthy, and had been bought by Jews to take out convicts, a plea to the whole declaration, that the allegation of unseaworthiness was true, was held bad for not justifying the allegation that she had been sold to Jews to take out convicts.(*g*)

And where the declaration was for a libel which imputed to the plaintiff that he had been guilty of murder in killing his opponent in a duel, and stated in reference to his trial upon the charge, "It was understood that the counsel for the

(*a*) Brooke's Abr. Action sur le case, Pl. 3 (27 H. 822).
(*b*) *Weaver* v. *Lloyd* (2 B. & C. 678).
(*c*) *Duncan* v. *Thwaites* (3 B. & C. 556).
(*d*) *Hilsden* v. *Mercer* (Cro. Jac. 677). See also *Johns* v. *Gittings* (Cro. Eliz. 239).
(*e*) *Clarke* v. *Taylor* (3 Scott, 95; 2 Bing. N. C. 654).
(*f*) 1 Wms. Saunders, 28, *a* (note 3), and 244, *b* (note *q*).
(*g*) *Ingram* v. *Lawson* (5 Bing. N. C. 66).

prosecution were in possession of a damning piece of evidence, viz., that the prisoner (meaning the plaintiff) had spent the whole of the night immediately preceding the duel in practising pistol firing," a plea alleging merely that the plaintiff killed his antagonist and was tried for murder, was held bad.(*a*)

Jervis, C.J., said,(*b*) "The whole Court is of opinion that the plea, which professes to justify the entire libel, but fails to justify what we hold to be a material part of it, is a bad plea. The libel, in substance, charges that the plaintiff was guilty of murder under circumstances of grave and malignant aggravation; and the justification states simply that the plaintiff committed murder by killing his antagonist in a duel. It does not lie in the mouth of the defendant to say that it matters not whether the murder was committed under one state of circumstances or another, because the very terms in which the libel is conceived—speaking of the plaintiff's conduct anterior to the meeting, and calling it 'a damning piece of evidence'—show that the defendants intended to impute to the plaintiff something which, in their estimation, was very much more culpable than murder under the circumstances which usually attend a hostile meeting of the kind alluded to. I think we should be doing a serious injury to public morals if we permitted ourselves to be influenced by the argument of Mr. Peacock, that it makes no difference, as to the quality of the libel, whether the alleged duel was fought fairly, as it is called, or unfairly. It certainly could not be said, upon a trial for killing in a duel, in a criminal court, that the question of murder or no murder was to depend upon whether or not the affair had been conducted with a due regard to the laws of honour. But to say that the Court is not at liberty to take the circumstance into consideration, when called upon to determine the question of libel or no libel, is quite a different matter. When the question is murder or no murder, in ascertaining the innocence or the guilt of the party charged, the Court cannot enter into an investigation of extenuating circumstances; but in a case like this, the circumstances must necessarily form a very large portion of the inquiry. If it were otherwise, the most opprobrious and defamatory language might be uttered of a man who had had the misfortune which is said to have befallen this gentleman, and the law would give him no redress." And Maule, J., in the same case, tersely

(*a*) *Helsham* v. *Blackwood and another* (11 C. B. 111).
(*b*) *Ibid.* p. 128.

Sufficient to justify substance of libel.

laid down the rule of law in a passage cited *ante*, pp. 465, 466.(*a*)

On the other hand, if the defence justifies the gist and substance of the libel, it is sufficient, although it may not cover every epithet or term of general abuse which may be found in the libellous imputation.

Thus, where the substantial charge in the libel was that the plaintiffs compounded and sold poisonous and deleterious pills, and that the defendant had crushed the system of poisoning pursued by the scamps and rascals, a plea to the whole declaration was held good, although it contained no justification of the terms scamps and rascals.(*b*)

A statement that the plaintiff was convicted of a special offence, and received a certain sentence, was held not justified by a plea alleging that he was convicted of the offence, and received a less sentence; because the Court could not, as a matter of law, say that the difference could not be libellous. But in the case of *Alexander* v. *The North-Eastern Railway Company*,(*c*) the defendants were allowed to amend such a plea by setting out the same sentence as the libel stated, although such statement was in fact false. To this amended plea the plaintiff replied by setting out the conviction verbatim; and the defendants rejoined that the conviction was described with sufficient accuracy and truth, both in the libel and the plea, and that the words, so far as they were libellous, appeared, from the allegations in the plea, to be and were true in substance. On demurrer to this rejoinder, the Court held the rejoinder good, as the substitution, in the alleged libel, of three weeks' for a fortnight's *imprisonment* (*the actual sentence*) was not necessarily libellous.(*d*)

It is a good defence to an action for libelling the plaintiff's character that a certain transaction took place, and that the libel was published of the plaintiff solely in reference to that transaction, and was justified by it.(*e*)

(*a*) See also *Macgregor* v. *Gregory* (11 M. & W. 287); *Clarkson* v. *Lawson* (6 Bing. 266); *Goodburne* v. *Bowman* (9 Bing. 532, 667); *O'Brien* v. *Bryant* (16 M. & W. 168); *Smith* v. *Parker* (13 M. & W. 459); *Mountney* v. *Watton* (2 B. & Ad. 673).

(*b*) *Morrison* v. *Harmer* (4 Scott, 524; see p. 534; 3 Bing. N. C. 759). See the passage from the judgment of the court cited *ante*, pp. 470, 471. See also *Edwards* v. *Bell* (1 Bing. 403); *Biggs* v. *Great Eastern Railway Company* (18 L. T. N. S. 482).

(*c*) 34 L. J. 152, Q. B.; 11 Jur. N. S. 619; 13 W. R. 651.

(*d*) *Ibid.*

(*e*) *Tighe* v. *Cooper* (7 E. & B. 641; 26 L. J. 215, Q. B.); see *Cromwell's case* (4 Rep. 13).

Plea or demurrer to part of libel.

Although the defendant might formerly demur or plead to part of a libel, he could only do so when it contained distinct imputations; "but no case has been, nor can any be, produced, in which, where many statements tend to one conclusion and imputation, a single sentence or portion of a sentence may be selected and separately dealt with, either by plea or demurrer."(*a*)

Justification of words with or without meaning in innuendo.

Where the libel is set out by the plaintiff with innuendoes, the defendant may deny that the words have the meaning given by the innuendo, and justify as to them without the meaning; or he may justify as to them with the meaning in the innuendo, and also as to them without the meaning;(*b*) but care should be taken to limit the defence to that construction which it is intended to answer.

Where all imputations in libel are not set out.

Where a libel contains several distinct imputations on the plaintiff, and the plaintiff sets out only some of them, the defendant will not be allowed to plead that the other charges were also contained in the libel, and to justify the whole article.(*c*)

Previous publication by another no justification.

It is no justification to an action for libel that the libellous matter has previously been published by a third person —notwithstanding the fourth resolution in the Earl of Northampton's case,(*d*) viz.: "In a private action for slander of a common person, if J. L. publish that he hath heard J. N. say that J. G. was a traitor, or thief, in an action on the case, if the truth be such, he may justify." Pollock, C. B., in the case of *Tidman* v. *Ainslie*,(*e*) said that this doctrine, "assuming it to be law, has never been applied to written slander, in which the repetition, by being more largely circulated, produces a greater injury to the individual slandered."

Privilege specially pleaded.

Although, as has already been seen, it was formerly not necessary or usual to plead specially the defence of privilege, yet it was sometimes done, in order to raise the question on the record by demurrer.

In one of those cases it was held that a plea that the alleged libel was a report of a trial, should aver that it was a true and accurate account, and not merely that it was in substance a true report;(*f*) although it would suffice to *prove*

(*a*) *Per* Lord Abinger, C.B., *Eaton* v. *Jones* (1 Dowl. N. S. 608).
(*b*) See *Watkin* v. *Hall* (L. Rep. 3 Q. B. 396; 18 L. T. N. S. 561; 37 L. J. 125, Q. B.; 16 W. R. 857).
(*c*) *Brembridge* v. *Latimer* (12 W. R. 878). (*d*) 12 Rep. 133.
(*e*) 10 Ex. 66. See also *M'Pherson* v. *Daniels* (10 B. & C. 270; 1 Wms. Saunders, 244).
(*f*) *Flint* v. *Pike* (4 B. & C. 473); *Lewis* v. *Walter* (4 B. & A. 605).

that it was a fair and impartial (though not verbatim) report.(*a*)

If the publication contain comment on the trial, the defence must justify that as well as the report.(*b*)

In strictness, a defence on the ground of privilege ought to aver that the matter was published *bonâ fide*, and without malice.(*c*)

So, in the old days of pleading, a plea of justification which did not formally confess the publication of the libel was bad.(*d*)

Payment of money into court by way of satisfaction.

The defendant may now, in every action for debt or damages, either before or at the time of delivering his defence, or at any later time by leave of the Court or a judge, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; but in the case of libel or slander, he cannot do this with a defence denying liability.(*e*)

Defence of apology and payment into court.

The next defence which requires notice is that specially provided by the Legislature for the protection of the liberty of the Press.

The 6 & 7 Vict. c. 96, s. 2, enacts "that in an action for a libel contained in any public newspaper, or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; and that every such defendant shall, upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained by the

(*a*) *Lewis* v. *Levy* (E. B. & E. 537; see p. 553).
(*b*) *Cooper* v. *Lawson* (8 A. & E. 746).
(*c*) *Smith* v. *Thomas* (2 Bing. N. C. 372).
(*d*) *Johns* v. *Gillings* (Cro. Eliz. 239; see 1 Wms. Saunders, 244, *a*); but long before the New Rules of Pleading, this formality had ceased to be considered requisite, and in practice it was never observed. See Stephens on Pleading, 185.
(*e*) Rules of 1883, Order xxii. R. 1. Before the Rules of 1883, payment of money into court, with a denial of liability, was allowed in actions of libel. See *Hawkesley* v. *Bradshaw*, L. R. 5 Q. B. D. 302.

publication of such libel, and such payment into court shall be of the same effect, and be available in the same manner, and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court, ... and that to such plea to such action it shall be competent to the plaintiff to reply generally,(*a*) denying the whole of such plea."

Unless the defendant pay money into court at the time of pleading the above plea, the plaintiff is empowered by 8 & 9 Vict. c. 75, s. 2, to treat the plea as a nullity.

The payment into court is conditional on the plea being proved, and is not to be taken as an absolute admission of liability.(*b*)

Whether other pleas could be pleaded with plea of apology and payment into court.

It was considered doubtful whether it was allowable to the defendant to plead any other plea, together with this special plea, to the same part of the declaration.

In *O'Brien* v. *Clement*,(*c*) the defendant obtained a judge's order, allowing the following pleas—viz., first, not guilty to the whole declaration; secondly, a justification as to part of the libel; and thirdly, the statutory plea of an apology and payment of money into court. The Court of Exchequer amended the order by confining the general issue to such part of the declaration as the plea of payment into court did not apply to.

Parke, B., in delivering the judgment of the Court, said: "It seems to me that we ought not to allow this special plea together with the general issue; for if it were, and the verdict for the general issue should be for the defendant, there would be a difficulty as to the judgment. What would become of the damages paid into court? because the special plea would show, on the record, a cause of action in

(*a*) This means that the plaintiff shall be at liberty to deny the whole *or any part* of such a plea: the plaintiff is not bound to deny the whole of the plea: (*Chadwick* v. *Herepath*, 3 C. B. 885.) A replication which admitted that the libel was inserted in a newspaper, and the payment of money into court, and traversed the insertion of the libel without actual malice, and without gross negligence, and the sufficiency of the money paid into court as amends, was held good (*Ib.*).

(*b*) *Lafone* v. *Smith* (4 H. & N. 158; 28 L. J. 33, Ex.); *Jones* v. *Mackie* (L. Rep. 3 Ex. 1; 17 L. T. N. S 151; 37 L. J. 1, Ex.; 16 W. R. 109).

(*c*) 15 M. & W. 435; 3 D. & L. 676.

respect of which the plaintiff ought to recover them. . . . . The only respect in which payment of money into court under this statute differs from a payment into court in cases under the new rules is, that those rules give a *general* plea, applicable to all cases except such as are therein specified; whereas this statute makes that general form insufficient, in cases to which the statute applies; and if you pay money into court under it, you must bring your case within the description of libel to which it refers. The intention plainly was to extend to certain actions of libel the benefit of the plea of payment of money into court, as it existed in other forms of action."

The difficulty of disposing of the money paid into court arises, however, in those cases which we have just noticed, where the jury find that the plea of apology is not proved, and give a less amount than the defendant has paid into court. In the case of *Jones* v. *Mackie*,(*a*) Channell, B., said that the defendant, by his plea of apology and payment into court, "in effect says, 'I published this libel without malice or negligence, and if you will accept my apology, I will give you £5;' but he does not bind himself to give anything if his terms are not accepted." If this be so, the reasons of the Court for refusing to allow other pleas would seem not to apply.

Evidence of apology in mitigation of damages.

The first section of the Act just mentioned contains a provision, which is not limited to actions for libels contained in newspapers or other periodicals, but applies to any action for defamation, and enacts that "it shall be lawful for the defendant (after notice in writing of his intention so to do duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology." This section rather tends to support the view taken by some, that the Legislature intended to allow the general issue, or other pleas, together with the plea of apology and payment into court, as it expressly allows a man to take advantage of an apology and to plead to the declaration at the same time.

Defence of accord and satisfaction.

A plea in accord and satisfaction is a good defence to an action for libel, and may be pleaded to its further

(*a*) *Ubi supra.*

maintenance when the matter has taken place after action brought.

Thus, an agreement by the plaintiff to waive his action in consideration that the defendant would destroy certain documents in his possession, imputing the same crime to the plaintiff as the slander, is a bar to the action.(*a*)

So, a parol agreement after action, between the plaintiff and defendant, to accept the publication of mutual apologies, in satisfaction and discharge of the causes of action, damages, and costs, executed by the defendant, is a good accord and satisfaction.(*b*)

Statute of Limitations.

In addition to a defence on the merits of the case, the Statute of Limitations may sometimes furnish an answer to the plaintiff's suit;(*c*) but it must be pleaded specially.(*d*)

A plea of the Statute of Limitations, to an action for a libel published in a newspaper seventeen years before, was held to be negatived by proof that a copy had been purchased from the defendant, by an agent of the plaintiff, within the six years.(*e*)

Defence in actions for libel on wife.

Before the Common Law Procedure Act of 1860 it was a good plea in bar to an action by husband and wife for defamation of the wife, that the female plaintiff was not the wife of the other plaintiff, "inasmuch," according to Pollock, C.B., "as it shows that the alleged husband, if he be not such in fact, has no right to sue at all. It is not a plea in abatement, giving the wife a better writ; but matter in bar, showing that he who is in one sense the substantial plaintiff, if he be not in fact the husband, has no right to sue at all."(*f*) And now, if the supposed husband joined a claim for special damage to himself, no doubt such a defence would still be good, so far as regards the claim of the supposed husband.

No question of the like kind can now arise in an action for defamation of a female plaintiff as, if married, she can sue or be sued in tort, contract, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by, or taken against

(*a*) *Lane* v. *Applegate* (1 Starkie, 97). In the marginal note it is said "when executed by the burning of the papers;" but the judgment of Lord Ellenborough does not contain those words.
(*b*) *Boosey* v. *Wood* (3 H. & C. 484; 34 L. J. 65, Ex.).
(*c*) *Vide ante*, p. 627.
(*d*) See Rules of the Supreme Court, 1883, Order xix. R. 15.
(*e*) *Duke of Brunswick* v. *Harmer* (14 Q. B. 185).
(*f*) *Chantler and Wife* v. *Lindsey* (16 M. & W. 82).

her; and any damages or costs recovered against her in any such action or proceeding, shall be payable out of her separate property, and not otherwise.(*a*)

Plea in abatement.

A plea in abatement, on the ground of the nonjoinder of a party who ought to be a co-plaintiff, was rarely available in actions of libel; for, even in the case of libels upon mercantile or trading firms, the defamation of the firm was generally a libel upon each member of it, and entitled him to a remedy for his individual injury. And, even if one partner in such action had claimed damages for the injury to the firm, a plea in abatement would have been bad, as being a plea to the damages and not to the cause of action.(*b*)

Pleas and defences in abatement are now abolished.(*c*)

Demurrer.

The defendant might formerly demur to the statement of claim, on the ground that it stated no libel; for it was not enough to entitle a plaintiff to judgment that he should charge malicious motives and a calumnious tendency; he must also show that there was a libel.(*d*)

There are not many instances to be found of demurrers to libels, because, where the words were capable of a calumnious meaning, the jury were the proper judges as to whether they bore it.

Reeves v. *Templar*,(*e*) however, was such a case. There the court, *dubitante* Parke, B., gave judgment for the defendant, on the ground that the letter set out in the declaration was not libellous. Parke, B., said the rule to be applied in deciding the demurrer was, whether judgment could be arrested after verdict.

The effect of a demurrer was to submit the whole record to the judgment of the Court; so that if the plaintiff demurred to the defendant's plea, he might be called upon to support his own declaration, and in this way might sometimes be hoist with his own petard. See for an example of such a case, *Clay* v. *Roberts*(*f*).

Demurrers abolished. Proceedings in lieu of demurrer.

Demurrers are now abolished in all cases.(*g*)

But any party is entitled to raise by his pleading any point of law, and any point so raised is to be disposed of by the judge who tries the cause at or after the trial. If the

(*a*) 45 & 46 Vict. c. 75. s. 1 subsection 2.

(*b*) *Robinson* v. *Marchant* (7 Q. B. 918; 15 L. J. 134, Q. B.). See also *Forster* v. *Lawson* (3 Bing. 452).

(*c*) Rules of 1883, Order xxi. R. 20.

(*d*) *Per* Lord Denman, C.J., *Hearne* v. *Stowell* (12 A. & E. 731).

(*e*) 2 Jur. 137. See also *Cox* v. *Cooper* (12 W. R. 75; 9 L. T. N. S. 329).

(*f*) 11 W. R. 649; 8 L. T. N. S. 397; 9 Jur. N. S. 580).

(*g*) Rules of 1883, Order xxv. R. 1.

parties consent, or the court, or a judge, on the application of either party, so orders, the point of law so raised may be set down for hearing and disposed of at any time before the trial.(*a*)

If in the opinion of the Court or a judge the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counter-claim, or reply therein, the Court or judge may thereupon dismiss the action, or make such order therein as may be just.(*b*)

Replication.

The plaintiff usually replies to defendant's statement of defence by joining issue; but occasion may render it advisable to reply specially.

Alexander v. *North-Eastern Railway Company*(*c*) furnishes an example of a replication, setting out the conviction relied upon in the plea as a justification, a rejoinder, and a demurrer to the rejoinder.

If the justification in the plea were that the plaintiff had committed a certain crime, a replication pleading a pardon would be good;(*d*) but when the libel was, that the plaintiff was convicted of a crime, Blackburn, J., in the case of *Alexander* v. *North-Eastern Railway*, said: "It is perfectly immaterial whether the conviction is still subsisting or not; for if the plaintiff was convicted, the libel is true."

New assignment.

Where the declaration charged a publication generally, and the defendant pleaded that he had published it lawfully, as to the members of a committee of the House of Commons, and the plaintiff proceeded for a publication to other persons, it was formerly necessary for him to new assign such illegal publication.(*e*) The plea of not guilty to the new assignment raised the same issue precisely as if the libel new assigned had been set out in the declaration, and the defendant had pleaded not guilty only.(*f*)

New assignments are now abolished. Everything which was formerly alleged by way of new assignment may now be introduced by amendment of the statement of claim, or by way of reply.(*g*)

Discovery.

After joinder of issue is the proper time for the plaintiff to seek the aid of the Court in obtaining information from

(*a*) Rules of 1883, Order xxv. R. 2. (*b*) *Ibid.* R. 3.
(*c*) 34 L. J. 152, Q. B.; 11 Jur. N. S. 619; 13 W. R. 651. *Vide ante*, p. 652.
(*d*) *Cuddington* v. *Wilkins* (Hobart, 81).
(*e*) See 2 Lush's Saunders, 945; 1 Wms. Saunders, 133.
(*f*) *Duke of Brunswick* v. *Pepper* (2 C. & K. 685).
(*g*) Rules of 1883, Order xxiii. R. 6.

the defendant, which may be necessary or material to prove his case.

It will be seen, however, that this assistance will only be granted under very special circumstances.

The Newspapers, Printers, and Reading-rooms Act, 1869 (32 & 33 Vict. c. 24), repealing many former enactments, left certain statutory provisions for assisting the plaintiff in proving the publication by the defendant of the newspaper containing the libel.

39 Geo. 3, c. 79, s. 29,(*a*) renders it obligatory (under a penalty) on every printer to keep, for six months after the printing thereof, a copy of every paper printed by him, with the name of his employer written or printed thereon; which he is to show to any justice of the peace who, within the six months, may require to see it. 6 & 7 Will. 4, c. 76, s. 19, provided for the discovery of the proprietors, printers, or publishers of newspapers, by filing a bill for discovery in equity;(*b*) but the whole of this Act has been repealed by 33 & 34 Vict. c. 99.

Register of newspaper proprietors.

And now the Newspaper Libel and Registration Act of 1881,(*c*) which does not extend to Scotland, provides(*d*) for the establishment of a register of newspaper proprietors for England and Ireland, showing the title of the newspaper, the names of the proprietors, and the places of business and of residence of the proprietors.(*e*)

Every certified copy of an entry in, or extract from, the register, is in all proceedings, civil or criminal, to be accepted as sufficient *primâ facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown.(*f*)

Interrogatories.

The plaintiff may also, if so minded, administer interrogatories to the defendant.

For the present practice, see the various rules of Order xxxi. of the Supreme Court Rules, 1883.

In *Tupling* v. *Ward*(*g*) the Court of Exchequer held that it was unfair to submit questions which a party is clearly not bound to answer, the object being either to compel him to answer when not bound, or to refuse, and so create a preju-

(*a*) See the enactment set out, *ante*, pp. 312, 313.

(*b*) The only reported case in which the power given by 6 & 7 Will. 4. c. 76 s. 19 has been used, is that of *Dixon* v. *Enoch* (L. R. 13 Eq. 392).

(*c*) 44 & 45 Vict. c. 60. (*d*) Sect. 8.

(*e*) See the provisions of the Act set forth, *ante*, pp. 315–318.

(*f*) Sects. 14 & 15.

(*g*) 6 H. & N. 449; 30 L. J. 222. Ex. See also *Baker* v. *Lane* (3 H. & C. 544; 34 L. J. 57, Ex.).

dice against him. On this ground the Court refused to allow interrogatories to be put to the defendant, as to whether he composed the article complained of? whether he knew who composed it? whether the name on the title-page was real or fictitious? whether he had been, or expected to be, indemnified? with other questions of a like kind.

Two years later, the Court of Common Pleas rescinded an order made by Keating, J., allowing interrogatories to be put to the defendant, as to whether he spoke the slander charged in the declaration, Erle, C.J., saying: "I do not mean to say that in no case will the Court allow interrogatories in an action of slander; but, before I will consent to allow them, I must be satisfied that there are very peculiar circumstances of grievance and oppression to justify so novel a proceeding."(*a*)

These cases were followed in the case of *Edmunds* v. *Greenwood*,(*b*) the Court there holding that very special circumstances ought to appear before interrogatories, the express object of which was to make the defendant criminate himself, were allowed.

But in an action for sending to the *Times* newspaper a libellous extract from a letter, to which the defendant pleaded not guilty, and a justification, Blackburn, J., without any affidavit showing special circumstances, allowed the following interrogatory, and others of a like nature: "Did you, on or about the 10th March, 1870, write, and send to the *Times* for publication, a letter signed 'Z.,' accompanied by what purported to be an extract from the letter from a Halifax merchant?" and the Court refused to interfere with the discretion of the judge.(*c*)

The question may be taken to have been settled by the decision of the Court of Appeal in *Fisher* v. *Owen*,(*d*) that an interrogatory as to the commission of an indictable offence, if relevant, could not be struck out, and that the defendant's only remedy was to decline to answer, on the ground that his answer might tend to criminate him. "It does not appear to me," said Jessel, M.R., "that the ancient practice of the Court of Chancery on this head has been abolished or interfered with by the Judicature Act, or by the Orders." In the sub-

(*a*) *Stern* v. *Sevastopulo* (14 C. B. N. S. 737). See also *Villeboisnet* v. *Tobin*, L. R. 4 C. P. 184.

(*b*) L. Rep. 4 C. P. 70; 19 L. T. N. S. 423; 38 L. J. 115, C. P.; 17 W. R. 142.

(*c*) *Inman* v. *Jenkins* (L. Rep. 5 C. P. 738; 22 L. T. N. S. 659; 39 L. J. 258, C. P.; 18 W. R. 897).

(*d*) L. R. 8 C. D. 645.

sequent case of *Allhusen* v. *Labouchere*,(a) James, L.J., said: "I am bound to say from my experience of interrogatories in the Courts of Chancery, that the decision in *Fisher* v. *Owen* was entirely in accordance with everything that has been decided here. Nobody was ever allowed to object to a relevant question because that question tended to criminate himself. He might object to answer it, but it was never a ground of demurrer to an interrogatory, or a ground for striking it out, that the answer might involve him in a crime." Cotton, L.J., pointed out(b) that what had always been the practice of the Court of Chancery was now, by s. 25 subsection 11 of the Judicature Act of 1873, the universal practice in all Divisions of the High Court. Brett, L.J., doubted whether the equity doctrine was properly applicable in common law cases; but he added: "That, however, is past controversy; and the question has been settled by a Court of Appeal."(c)

Refusal to give answers tending to criminate.

If, however, the defendant refuses to answer the interrogatories of the plaintiff, or any of them, on the ground that the answers would tend to criminate him, the Court cannot compel him to do so.

Thus, in *Bourden* v. *Allen*,(d) the defendant declined, on this ground, to say whether he was the publisher of the newspaper containing the libel; and Bramwell, B., dismissed a summons for further and better answers. On appeal, the Court of Common Pleas held that he was right in so doing, as sect. 19 of the 6 & 7 Will. 4, c. 76 (re-enacted by 32 & 33 Vict. c. 24) was confined to a bill of discovery in Chancery, and did not apply to interrogatories at common law, and the Court had no power to supply the omission.

An incorporated company, however, would probably be compelled to answer, as it could not be made criminally responsible for the publication.(e)

An objection to answer on the ground that the answers "might tend to criminate" the defendant, was held sufficient in the recent case of *Lamb* v. *Munster*.(f) It was contended in that case that the defendant should have sworn that he was "advised" or "believed" that his answers would have the effect of criminating him; but the Court was of opinion that no particular form of words was necessary, provided it is satisfied on the oath of the witness, that he does object on

(a) L. R. 3 Q. B. D. 654.
(b) See p. 666. (c) See p. 662.
(d) 39 L. J. 217, C. P.; 22 L. T. N. S. 342; 18 W. R. 695.
(e) *King of the Two Sicilies* v. *Wilcox* (1 Simon, N. S. 335).
(f) L. R. 10 Q. B. D. 110.

the ground mentioned by him, and that his objection is *bonâ fide*.

Inspection of documents by plaintiff.

If the defendant justifies the libel, and has in his possession documents which tend to disprove the truth of such justification, the plaintiff will be allowed inspection of them.(*a*)

Commission to examine witnesses.

The defendant sometimes desires the assistance of the Court to enable him to procure evidence material to the issues which lie upon him to prove.

If the libel relates to transactions which occurred abroad, the defendant is entitled to a commission for the examination of witnesses on the spot;(*b*) but the Court may make it a condition of the order that the defendant state what he expects them to prove.(*c*)

Inspection by defendant.

On an affidavit denying that he is the author, the Court will allow him, his attorney, and witnesses (without naming them) to inspect and take facsimile copies of the documents referred to in the plaintiff's pleading.(*d*)

The Court will not, however, allow him to inspect books and papers in the custody of the plaintiff in order to establish the truth of the libel. *Macaulay* v. *Shackell*(*e*) is often quoted as an authority to the contrary; but Pollock, C.B., stated in the case of the *Metropolitan Saloon Omnibus Company* v. *Hawkins*,(*f*) that that case merely decided that the defendant was entitled to a commission to examine witnesses at the place where the events happened. He added: "A person who ventures to publish a libel, or utter slander, should be in a condition to justify his conduct, and not come to the court to ask for assistance to get up some proof." Martin, B., in the same case, said: "Looking at the case of *Macaulay* v. *Shackell*, although it is difficult to collect from it any distinct proposition as to the right of a defendant in an action for libel, I am not prepared to say that in no case would he be entitled to an inspection; but he would be bound to give the tribunal to which he applied reason to believe that there was some particular document, which he could specify and put his hands upon, which would support his case; and neither a court of law or equity would give him an opportunity of searching the plaintiffs' books, in order to get up a defence."(*g*)

(*a*) *Collins* v. *Yates and another* (27 L. J. 150, Ex.).

(*b*) *Thorpe* v. *Macaulay* (5 Madd. 230); *Macaulay* v. *Shackell* (2 Sim. & Str. 79); S. C., Dom. Proc. 1 Bl. N. S. 96; *Metropolitan Saloon Omnibus Company* v. *Hawkins* (4 H. & N. 146).

(*c*) *Barry* v. *Barclay* (15 C. B. N. S. 849).

(*d*) *Davey* v. *Pemberton* (11 C. B. N. S. 628).

(*e*) *Ubi supra.*

(*f*) *Ubi supra.*

(*g*) 4 H. & N. 150, 151.

CHAPTER XIII.

PROCEEDINGS AT AND AFTER TRIAL OF ACTION.

Right to begin.

THE plaintiff, at the trial, is always entitled to begin, even where the onus of proving all the issues lies on the defendant.

The practice upon this point remained for a long time unsettled;(*a*) but in the year 1833 a resolution was come to by the judges that "In actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on the defendant."(*b*) In *Mercer* v. *Whall*, Lord Denman said that this was not at all intended to introduce a new practice, but was limited to a declaration of that rule, which they never would have promulgated if they had not believed it to be law.(*c*)

Proof of publication.

Where the publication is not admitted, the plaintiff's first step will be to give *primâ facie* evidence of the publication, by the defendant, of the libel. As to this, there is little to add to what has been said in Chapter XI. upon the evidence sufficient to sustain an indictment.(*d*)

Comparison of handwriting.

Sect. 27 of the Common Law Procedure Act, 1854, provides that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute."

Admission of defendant.

Publication may be proved by the admission of the defendant; but an admission of writing the libel is no evidence of publishing; and an admission that the defendant was the editor of a periodical at a certain date is not evidence to connect him with a libel published in that periodical subsequently to that date.(*e*)

Where libel is lost.

If the libel is lost, secondary evidence may be given to connect the defendant with its publication.(*f*)

(*a*) *Cooper* v. *Wakley* (3 C. & P. 474; 1 M. & M. 248); *Cotton* v. *James* (3 C. & P. 505, and 1 M. & M. 278, where see a learned note by the reporter).

(*b*) *Carter* v. *Jones* (6 C. & P. 64; 1 M. & R 281.

(*c*) 5 Q. B. 463. (*d*) *Vide ante*, pp. 576 *seq.*

(*e*) *The Seven Bishops' case* (4 St. Tr. 300); *Macleod* v. *Wakley* (3 C. & P. 311). (*f*) See *Gathercole* v. *Miall* (15 M. & W. 319).

Thus, in the case of *Johnson* v. *Hudson and Morgan*,(*a*) where the libel complained of was a song, which had been published by singing in the street. The copy which was sung had been destroyed, but it appeared that it had been sung from a printed paper taken from the defendant Hudson's shop from a parcel containing about 300 copies. The person who sang it swore that it corresponded with a printed song which was produced, and which had Morgan's name on it as printer; and one of Morgan's journeymen swore that the printed song produced corresponded with that which Morgan had printed and delivered to Hudson. This was held sufficient secondary evidence to connect Morgan with the libel.

So, in the case of *Gathercole* v. *Miall*,(*b*) after proof that a newspaper had been left at a literary institution, and had been removed without authority, and was believed to have been lost or destroyed, secondary evidence was admitted to identify it with the paper containing the libel. But in this case the evidence was offered, not to connect the defendant with the publication of that particular copy, but to show that the libel had obtained an extensive circulation.

Evidence that the libel was in the handwriting of the daughter of the defendant, who usually wrote his letters of business, was held to be no evidence of publication by the defendant, in the absence of evidence to show that it was written by his procurement; and it was held that the daughter could not be called to say by whose authority she wrote it, as it might criminate her.(*c*) This latter proposition, however, is not law now. The daughter would be obliged to take the oath; but, when the question was put to her, she would be allowed to refuse to answer if the answer might tend to criminate her.

Libel addressed to State officer or department.

Where the libel is contained in a communication to a State officer or department, the judge must decide first whether it is privileged from being produced on grounds of public policy; and if he decides that it is, then no evidence can be given of its contents.

In the case of *Anderson* v. *Hamilton*,(*d*) Lord Ellenborough observed: "It is said that the fact that there

(*a*) 7 A. & E. 233, *in notis*.
(*b*) 15 M. & W. 319. (*c*) *Harding* v. *Greening* (1 Moore, 479).
(*d*) 2 B. & B. 157, n.; cited by Lord Chelmsford in *Stace* v. *Griffith* (L. Rep. 2 P. C. 428; S. C., 6 Moore, P. C. C. N. S. 18; 20 L. T. N. S. 197).

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has been a complaint made against the defendant by the plaintiff to Lord Liverpool, is the only fact sought to be put in evidence on this occasion; but it is not competent for the defendant to get at that fact, if it be embodied in an official letter. Neither can an extract of such a letter be admitted, for the plaintiff must be entitled to the whole or none."

Putting in the libel.

After sufficient evidence has been given to connect the defendant with the publication, the libel should be put in and read.

Amendment of variance.

Should there appear to be any variance in the libel read from the matter charged in the statement of claim, the Court or the judge has ample power to amend the record, as in his discretion he may think most conducive to the ends of justice.(*a*)

Where the declaration merely set out the effect of a libellous letter, Wightman, J., allowed it to be amended by setting out the letter *verbatim*, with the words "meaning thereby" immediately before the libel charged in the declaration, and offered to postpone the trial to enable the defendant to justify the amended declaration; but the defendant declined to avail himself of the offer, and the jury found a verdict for the plaintiff. On a motion for a new trial, the Court of Exchequer held that the amendment was properly made.(*b*)

Where the declaration stated that the defendant published a libel "contained in, and being an article, in a certain weekly publication or paper called the *Paul Pry*," and at the trial the publication proved was that the defendant had given a printed slip of paper, appearing to have been cut from the *Paul Pry*, to several persons to read, the declaration was amended by striking out the words quoted above.(*c*)

Introductory averments.

As introductory averments are no longer necessary, it is apprehended that, if inserted, they may be treated as surplusage, and need not be proved.

Proof of innuendoes.

To prove that the words have the meaning which is attached to them by the innuendoes, and that they refer to the plaintiff, it often becomes necessary to call witnesses who are acquainted with the circumstances out of which the libel arose, and who are therefore capable of saying to whom it applies, and what meaning it bears when read by the light

(*a*) Rules of 1883, Order xxviii. R. 1.
(*b*) *Saunders* v. *Bate* (1 H. & N. 402).
(*c*) *Foster* v. *Pointer* (9 C. & P. 718).

of surrounding circumstances.(*a*) For the purpose of identifying the plaintiff with the subject of the libel, evidence of his having been laughed at at a public meeting is admissible.(*b*)

But where a meaning is sought to be put upon words which differs from their ordinary construction, a foundation must be laid for it by showing that something occurred which gave them a special meaning, and then the witnesses may be asked, with reference to those occurrences, what was the sense in which they understood the words.(*c*)

It is not necessary to give evidence of the meaning of words which are in common use, although they may not have existed long enough to be found in the last edition of the English dictionary ;(*d*) nor is it necessary to explain by evidence ordinary historical, figurative, or parabolical terms and allusions.(*e*)

It is the duty of the judge to say whether the publication is capable of the meaning ascribed to it by the innuendo ; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it.(*f*)

Evidence of malice to rebut privilege.

When the inference of malice is rebutted by the occasion of the publication, it will be necessary for the plaintiff, in order to avoid a nonsuit, either to show that the libel contains intrinsic evidence of malice, or to give extrinsic proof of it.

Once the judge has ruled that the occasion of the publication is privileged, the onus is upon the plaintiff of showing that the defendant acted maliciously.(*g*) This is not proved by showing that the defendant had no reasonable grounds for his belief, if as a matter of fact he did believe in the truth of his assertions.(*h*) For "a man," as observed by Cotton, L.J., "may be wanting in reasoning power, or he may be very stupid ; still he may be acting *bonâ fide*, honestly intending to discharge a duty."(*i*)

It is a matter of law to be decided by the judge whether

(*a*) See 2 Starkie on Evidence, 628.
(*b*) *Cook* v. *Ward* (4 M. & P. 99; 6 Bing. 412); and see *Du Bost* v. *Beresford* (2 Camp. 512).
(*c*) See *Daines* v. *Hartley* (3 Ex. 200); *Broome* v. *Gosden* (1 C. B. 728); *Barnett* v. *Allen* (3 H. & N. 376; 27 L. J. 412, Ex.); *Brunswick (Duke of)* v. *Harmer* (3 C. & K. 10).
(*d*) *Homer* v. *Taunton* (5 H. & N. 661).
(*e*) *Hoare* v. *Silverlock* (12 Q. B. 624).
(*f*) *Blagg* v. *Sturt* (10 Q. B. 899. See p. 908).
(*g*) *Clark* v. *Molyneux* (L. R. 3 Q. B. D. 237).
(*h*) *Ibid.* (*i*) *Ibid.* p. 249.

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the legal presumption of malice is rebutted; but when there is any evidence of malice the matter must be left to the jury to determine.(*a*)

The language of the libel is sometimes evidence of express malice—*e.g.*, if, in a report of facts, the writer goes out of his way to impute motives which are not a necessary inference from the facts;(*b*) and therefore the libel itself should be submitted to the jury, so that they may judge from it, as well as from the extrinsic circumstances, whether it is malicious.(*c*)

"It is no doubt true," said Montagu Smith, J., delivering the judgment of the Privy Council in *Hurd* v. *Grampuch*,(*d*) "that malice may in some cases be inferred from the defamatory statements themselves; but where representations, if *bonâ fide*, are privileged by the occasion on which they are made, the mere circumstance that they are defamatory does not furnish that proof. It must be shown, either from the nature of the language employed, or by extrinsic evidence, that they were prompted by bad feeling or wrong motives, and it is not sufficient in such cases that the representations are consistent with the existence of malice: they must be inconsistent with *bonâ fides* and honesty of purpose."

Proof that the libel is false in a part of the statement, is evidence for the jury to renew the presumption of malice which has been rebutted by the occasion of the publication.(*e*)

Evidence that the plaintiff and defendant lived on bad terms is evidence from which the jury may infer malice, and this, whether the provocation was given by the defendant or the plaintiff.(*f*)

A communication which would be privileged if made by letter may lose its privilege by being unnecessarily sent by telegram.(*g*) It is in this respect like the case of a libel contained on the back of a post card.(*h*)

Acts done by the defendant subsequently to the publication

(*a*) *Cooke* v. *Wildes* (5 E. & B. 328); *Somerville* v. *Hawkins* (10 C. B. 583); *Taylor* v. *Hawkins* (16 Q. B. 308); *Stace* v. *Griffith* (L. Rep. 2 P. C. 429); 20 L. T. N. S. 197; 6 Moore P. C. C. N. S. 18).

(*b*) *Cooke* v. *Wildes* (5 E. & B. 332); *Gilpin* v. *Fowler* (9 Ex. 516; 23 L. J. 152, Ex.); *Tuson* v. *Evans* (12 A. & E. 733); *Wright* v. *Woodgate* (2 C. M. & R. 573).

(*c*) *Gilpin* v. *Fowler* (*ubi supra*); *Fryer* v. *Kinnersley* (15 C. B. N. S. 422; 33 L. J. 96, C. P.; 9 L. T. N. S. 415; 12 W. R. 155).

(*d*) L. R. 4 P. C. 460.

(*e*) *Blagg* v. *Sturt* (10 Q. B. 899).

(*f*) *Simpson* v. *Robinson* (12 Q. B. 511). See also 15 C. B. N. S. 431.

(*g*) *Williamson* v. *Freer* (L. R. 9 C. P. 393).

(*h*) *Per* Brett, J. (*Ibid.* 395).

of the libel may indicate the existence of motives at a former period; and therefore where the plaintiff expressed in court his willingness to accept an apology and nominal damages, if the defendant would withdraw his plea of justification, and the defendant refused to do so, but offered no evidence in support of it, it was held that the judge was right in leaving this to the jury as evidence of express malice;(*a*) but such evidence would not be admissible upon the issue as to whether the communication was privileged.(*b*)

But where the action is brought against the bookseller or trade publisher, evidence of the personal malice of the writer of the libel is not admissible.(*c*)

By letters from defendant to plaintiff.

Letters of the defendant, addressed to the plaintiff about the same period as the publication of the libel, may be given in evidence to show *quo animo* the libel was published;(*d*) and anonymous letters have been admitted for this purpose.(*e*)

By evidence of other defamatory publications or statements of defendant.

At one time it was a moot question whether other libels or actionable slanders could be received in evidence to prove express malice. There were numerous *nisi prius* cases which supported the affirmative and negative of the proposition. These will be found reviewed by the Court of Common Pleas in the case of *Pearson* v. *Le Maitre*,(*f*) where that Court decided that, even in cases where there was no pretence for saying that the publication was privileged, the plaintiff might show the spirit and intention of the party publishing a libel, although the evidence tending to prove it disclosed another and different cause of action. And in the case of *Barrett* v. *Long*(*g*) it was held by the House of Lords that where the defendant pleaded the general issue, and also a plea under the statute 6 & 7 Vict. c. 96, denying actual malice, and stating the publication of an apology set forth in the plea, the plaintiff might give in evidence other publications by the defendant—some of them more than six years before the publication complained of—of and concerning the plaintiff, in order to prove malice on the part of the defendant.

Parke, B., in delivering the opinion of the judges upon this question, in the case last referred to, said: "We are all of opinion that, under such a plea, the publication of previous libels on the plaintiff by the defendant, is admissible

(*a*) *Simpson* v. *Robinson* (12 Q. B. 511). See also 15 C. B. N. S. 431.
(*b*) *Wilson* v. *Robinson* (7 Q. B. 68).
(*c*) *Robertson* v. *Wylde* (2 M. & Rob. 101).
(*d*) *Tarpley* v. *Blaby* (2 Scott, 642).
(*e*) *Hughes* v. *Lady Dinorben* (32 L. T. 271).
(*f*) 5 M. & G. 700. See p. 719.
(*g*) 3 H. L. C. p. 395. See p. 413.

evidence to show that the defendant wrote the libel in question, with actual malice against the plaintiff. A long practice of libelling the plaintiff may show in the most satisfactory manner, that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote from the time of the publication of that in question, merely affects the weight, not the admissibility, of the evidence."(*a*)

Where evidence is given of statements made by the defendant a long time after the publication of the libel charged in the declaration, the judge should point out to the jury distinctly the interval between the libel and the subsequent statements, and suggest to them to take into their consideration the possibility that such statements might refer to something which happened after the libel, so as not to show malice at the time of the publication.(*b*)

By reference to defendant's pleas.

It has sometimes been sought to prove express malice by reference to the defendant's pleas.

In the case of *Wilson* v. *Robinson*(*c*) the Court of Queen's Bench held that the fact that the defendant had pleaded a justification of the libel, which he abandoned at the trial, was no evidence of malice, for the purpose of depriving him of the protection which he derived from the libel being a privileged communication, and that, at the utmost, the plea could only have been urged in aggravation of damages, if the jury had found that the libel was not a private communication in the course of business.

In the case of *Simpson* v. *Robinson*,(*d*) the plaintiff expressed in court his willingness to accept an apology and nominal damages, the defendant not persisting in a justification of the truth which he had pleaded. The defendant refused this offer; and, though he gave no evidence in support of the justification, he did not withdraw the charge. Erle, J., told the jury that they might consider the whole of the defendant's conduct, with reference to the question of malice, and that acts, although subsequent, might indicate the existence of motives at a former time; and, with reference to the question of damages, he remarked that the jury should consider the nature of the imputation, how it had

(*a*) 3 H. L. C. p. 414.
(*b*) *Hemmings* v. *Gasson* (El. Bl. & El. 346; 27 L. J. 252. Q. B.).
(*c*) 7 Q. B. 68. (*d*) 12 Q. B. 511.

been made, and how it had been persisted in down to the time of the verdict, and they should calmly consider what damages would reinstate the plaintiff's character; and the Court of Queen's Bench upheld this direction. Lord Denman, C.J., in delivering the judgment of the Court, said: "The defendant's conduct in putting a justification on the record which he does not attempt to prove, and will not abandon, may be taken into consideration as proving malice and aggravating the injury. And, if the defendant's conduct in that respect may at all affect the verdict, every other part of his conduct showing the same disposition may equally be laid before the jury: refusing to make reparation for unjustifiable slander may have that effect; and the malice proved to exist at the time of the trial, but connected with the subject matter of it, may well be believed to have existed at the time of speaking the words."(*a*)

Some strong observations of Willes, J., to a contrary effect, are to be found in *Caulfield* v. *Whitworth*(*b*) (an action for slander), where his Lordship said: "The other circumstance relied on was the plea of justification; but the rule is clear that when there are more issues than one, the pleadings on one of them cannot be used as evidence to establish the opponents' case on another. It would be astonishing if the plea of justification of itself were sufficient to establish the allegations in the declaration. . . . . The decision in *Simpson* v. *Robinson* does not come up to the statement in the marginal note, for it had reference to the damages only. I am free to say that I consider that the decisions on this subject which were given about the time of the case of *Simpson* v. *Robinson* are not creditable to the law, and I hope that they will at some time be revised."

When question of express malice should be left to jury.

The question of express malice ought not to be left to the jury, unless the evidence raises a probability of malice, and is more consistent with its existence than with its non-existence; for the onus of proving malice lies on the plaintiff.(*c*)

Where, however, the question of privilege involves matters of fact, which are disputed, it will be for the jury to find the

(*a*) 12 Q. B. 513, 514.
(*b*) 18 L. T. N. S. 527; 16 W. R. 936.
(*c*) *Somerville* v. *Hawkins* (10 C. B. 590); *Taylor* v. *Hawkins* (16 Q. B. 308); *Caulfield* v. *Whitworth* (18 L. T. N. S. 527); *Lawless* v. *Anglo-Egyptian Cotton Company* (L. Rep. 4 Q. B. 262: 38 L. J. 129, Q. B.); *Spill* v. *Maule* (L. Rep. 4 Ex. 232; 38 L. J. 138, Ex.; 20 L. T. N. S. 675; 17 W. R. 805).

facts, and for the judge to decide whether the facts so found make the publication privileged.(*a*)

Evidence of damage.

The next part of the plaintiff's case which requires to be considered is the evidence to be offered in respect to the damages claimed.

The amount of general damages is entirely a matter for the jury, who may assess the damages, on proof of the publication of the libel, without any evidence of actual damage.(*b*)

The plaintiff may rest his case upon the character of the imputations, or he may offer evidence, in aggravation, of the injury he has sustained. For the latter purpose he may prove that the libel has been extensively circulated, although such circulation be not traced to the defendant;(*c*) or that the libel has caused him to be the subject of laughter;(*d*) and he may prove the manner of the publication.(*e*)

Where there are actions pending against other parties for publishing the same libel, the jury are not to take them into account, as the plaintiff has a right to recover against the defendant all the damage which arose from his wrongful act.(*f*)

The conduct of the defendant may also influence the amount of the verdict; and, therefore, the plaintiff may give evidence of express malice, the nature of which has already been treated of.(*g*) But, where other libels are read for this purpose, the jury should be cautioned not to give damages in respect of them, but only to consider them so far as they prove the malicious nature of the libel which is the subject of the action they have to try.(*h*) The omission of the judge to do this is not, however, a misdirection.(*i*)

Not only is express malice a proper matter for the jury to consider, in determining the amount of damages, but gross negligence in inserting a libel in a newspaper is also a reason for giving a substantial sum.(*j*)

(*a*) *Beatson* v. *Skene* (5 H. & N. 838; 29 L. J. 430, Ex.); *Stace* v. *Griffith* (L. Rep. 2 P. C. 420; 6 Moore, P. C. C. N. S. 18; 20 L. T. N. S. 197).

(*b*) *Tripp* v. *Thomas* (3 B. & C. 427); *Ingram* v. *Lawson* (6 Bing. N. C. 212); *Shepheard* v. *Whitaker* (L. R. 10 C. P. 502).

(*c*) *Gathercole* v. *Miall* (15 M. & W. 319).

(*d*) *Cook* v. *Ward* (6 Bing. 409).

(*e*) *Vines* v. *Serrell* (7 C. & P. 163).

(*f*) *Fresco* v. *May* (2 F. & F. 122); *Harrison* v. *Pearce* (1 F. & F. 567).

(*g*) *Vide ante*, p. 668, 699.

(*h*) *Pearson* v. *Le Maitre* (5 M. & G. 700).

(*i*) *Darby* v. *Ousley* (1 H. & N. 1; 25 L. J. 229; Ex.).

(*j*) *Smith* v. *Harrison* (1 F. & F. 565).

Evidence of pecuniary damage sustained.

Where the libel is published of the plaintiff in the way of his trade, he may give general evidence of a decrease in his trade, even after the commencement of the action, and although his pleading contains no allegation of special damage. Thus, where the declaration averred generally that, by reason of the libel, the plaintiff was injured in his reputation as shipowner and master mariner, and it was believed that his ship was unfit for freight and passengers of respectability, and that he had conducted himself dishonestly and improperly in relation to an intended voyage, the plaintiff was allowed to prove what was the average profit to a captain of a ship upon an East India voyage, and that, upon the first voyage which he took after the publication of the libel, and after the commencement of the action, his profits were nearly £1,500 below the average. On a motion for a new trial, on the ground of misdirection, the Court held that the evidence was properly admitted. Coltman, J., said: "With respect to the damages, the jury must have some mode of estimating them; and they could not be in a condition to do so unless they knew something of the nature of the plaintiff's business, and of the general return from his voyages." And Maule, J., who had tried the case, said the evidence was admitted "only that the jury might know what sort of business the plaintiff carried on; for the same amount of damages ought not to be given in respect of a libel on a plaintiff in the way of his business, where his trade is small, as where his trade is large."(*a*)

And in the more recent case of *Harrison* v. *Pearce*,(*b*) which was an action for libel upon a newspaper proprietor, the Court of Exchequer held that Martin, B., had properly admitted evidence to prove that the circulation of the plaintiff's papers had greatly declined after action brought, as "the damage proved was general damage, not special; the action was maintainable without it; and in many ready-money businesses it was impossible to give evidence of specific customers lost." "If," said Pollock, C.B., in this case,(*c*) "a period has elapsed between the commencement of the action and the trial of the cause, which has disclosed circumstances calculated to throw light upon the question of general damage, the plaintiff, in my opinion, has a right to give it in evidence, in order that the

(*a*) *Ingram* v. *Lawson* (6 Bing. N. C. 212).

(*b*) 1 F. & F. 567. See p. 570, *in notis*, and 32 L. T. Rep. 298. See also *Ashley* v. *Harrison* (1 Esp. 48); *Evans* v. *Harries* (1 H. & N. 251).

(*c*) 32 L. T. 298.

jury may be able more correctly and satisfactorily to judge."(*a*)

It should be noted here that, although written slander is actionable without proof of special damage, or of its having been published of the plaintiff in the way of his trade, cases may occur where there is no imputation upon the plaintiff's character, and nothing in the libel which could injure him in the esteem of those who might believe the statements complained of, but in which, nevertheless, the publication may be defamatory of, and damaging to, the plaintiff in the exercise of his profession, trade, or occupation. In cases such as these the averment of the plaintiff's avocation is material, and, if traversed, must be proved,(*b*) unless it is admitted on the face of the libel.(*c*) It is sufficient to prove that the defendant acted in the capacity in which he is libelled, and he need not burden himself with proof that he was duly appointed or is legally qualified, unless the libel charges the contrary.(*d*)

The plaintiff will not be allowed to give any evidence of special damage which is not stated in his pleading; and the special damage must be the legal and natural result of the publication of the libel.(*e*)

Evidence to rebut defence.

The foregoing is an outline of the evidence which is necessary to prove the issues which lie upon the plaintiff; and it is usual for him to rest his case there, and call upon the defendant, if there are pleas of justification on the record, to establish his defence, reserving the right to rebut such defence by fresh evidence; but he may anticipate the justification if he thinks fit, and give all his evidence at the outset. He will not, however, be allowed to give part of such evidence in the first instance, and reserve the remainder for the reply.(*f*)

Defence.

At the close of the plaintiff's case the defendant's counsel frequently finds it advisable to abstain from calling evidence, so as to gain the advantage of making the last speech to the jury. The defendant should, however, be prepared, so

(*a*) As to remoteness of damage, see *Chamberlain* v. *Boyd* (L. R. 11 Q. B. D. 407).

(*b*) *Manning* v. *Clement* (7 Bing. 362); *Wakley* v. *Healey and another* (4 Ex. 53).

(*c*) *Visard* v. *Clement* (3 Bing. 441; *Jones* v. *Stevens* (11 Price, 235).

(*d*) *Rutherford* v. *Evans* (6 Bing 451); *Jones* v. *Stevens* (*ubi sup.*); *Bergman* v. *Wise* (4 T. R. 366); *Long* v. *Chubb* (5 C. & P. 55).

(*e*) See 1 Wms. Saunders, 243 d.; and *Vicars* v. *Wilcocks* (8 East, 1; 2 Smith's L. C. p. 487).

(*f*) *Browne* v. *Murray* (1 Ry. & Moo. 254).

far as the facts will allow him, to rebut the plaintiff's proofs by evidence.

Omission of part of publication.

Where the case made out against the defendant is, that he was the author of the libellous publication, he may prove that the publisher of it has omitted portions of his manuscript which materially qualify and render less offensive the part which has been published. But the omission of matter which does not qualify or diminish the libellous tendency of the remainder does not make the defendant less responsible than he would have been if the whole had been printed.(*a*)

Publication brought about by plaintiff.

It is doubtful how far evidence that the publication was brought about by the plaintiff's contrivance will bar the action. The cases would seem to show that, to establish such a defence, it is necessary to prove that the plaintiff caused both the creation of the libel and the particular publication of it for which he sues.

In the case of *Rex* v. *Waring*,(*b*) Lord Alvanley held that where the libel was written in answer to a letter sent not with a view to obtaining a character, but with the intention of obtaining such an answer as should be the ground of an action for libel, the action could not be sustained. And where it was sought to prove the publication of a libellous caricature by a witness who, having heard that the defendant had a copy of it, had gone to his house and requested to see it, Lord Ellenborough ruled that this was not sufficient evidence of publication to support an action.(*c*)

In a contrary direction are the cases of *Cook* v. *Ward*,(*d*) and the *Duke of Brunswick* v. *Harmer*.(*e*) In the first of these it was held that the fact that the plaintiff had put in circulation a ridiculous story of himself, did not justify the defendant's publishing it in a newspaper. In the second case the only evidence of publication was the sale of a copy of the newspaper to a person who had been sent by the plaintiff to purchase it, and who had handed it when purchased to the plaintiff. But a copy of the same paper, purporting to have been published more than six years before the commencement of the action, was also produced from the British Museum. The Court held that the publication was proved, and Coleridge, J., in delivering the judgment of the Court,(*f*) said: "The defendant, who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the

(*a*) *Tarpley* v *Blabey* (2 Scott. 655, 656).
(*b*) 5 Esp. 14.
(*c*) *Smith* v. *Wood* (3 Camp. 323).
(*d*) 6 Bing. 409.
(*e*) 14 Q. B. 185.
(*f*) *Ibid.* 189.

purpose of procuring the work by that third person. So far as in him lies, he lowers the reputation of the principal in the mind of the agent, which, although that of an agent, is as capable of being affected by the assertions as if he were a stranger. The act is complete by the delivery; and its legal character is not altered, either by the plaintiff's procurement or by the subsequent handing over of the writing to him."

In the case last referred to there could be no doubt that the plaintiff had not caused the original publication of the libel, but had only adopted a ruse to procure evidence which might disprove the plea of the Statute of Limitations. Had the plaintiff entrapped the defendant into composing the libel, it is submitted that the maxim *Volenti non fit injuria* would have furnished the defendant with a complete answer to the action.

Proof that defendant was not author, and that he published innocently.

The defendant may prove that he was not the author of the libel, and that he published it innocently, as, for instance, that it was inserted in a magazine which he sold without knowledge of the contents,(*a*) or that he delivered it as a porter.(*b*) But it is doubtful whether such evidence would entitle him to the verdict, although it would materially affect the damages, as well as (possibly) the plaintiff's title to costs.

Privilege.

When the defence to be established is that the publication is privileged, the defendant should be prepared with evidence of the circumstances under which it was published. As a rule, however, literary publications, when privileged, are their own witnesses to the fact.

It is not necessary to repeat here what has been said in former chapters(*c*) as to the essential requisites of a privileged publication.

Denial of plaintiff's trade.

In the last chapter it was stated that the plea of not guilty threw upon the plaintiff the onus of proving all the material allegations in the declaration; but there was an exception to this rule; for, where the averment of the plaintiff's trade or business was material, the defendant was obliged to traverse it specially if he intended to question it at the trial. When such a plea was on the record, the defendant might give evidence to prove that the plaintiff did not carry on the business or follow the avocation alleged in the declaration; and it was no objection to such evidence that it also showed the libel

(*a*) *Chubb* v. *Flannagan* (6 C. & P. 431).
(*b*) *Day* v. *Bream* (2 M. & Rob. 54).
(*c*) *Vide ante*, chaps. vii., viii., and ix.

to be true.(*a*) The new rules make no alteration in this respect.

Justification.

If the old plea of justification was not proved in every material part the plaintiff was held entitled to the verdict upon the entire issue;(*b*) but where the part not sustained by the evidence related to only a small portion of the libel, the judge might amend the plea by limiting it to so much of the libel as was justified by the evidence; the effect being to entitle the plaintiff to some damages on the part not covered by the plea, and the defendant to the verdict on the remainder.(*c*)

Where libel charges commission of crime.

Where the libel imputes the commission of a crime to the plaintiff, the evidence to support the defence of justification must be such as would warrant a verdict of guilty on an indictment for the crime.(*d*) And it would appear that if the jury find that the charges in the libel are proved, the plaintiff may be put on his trial for the offence, without the intervention of a grand jury.(*e*)

The record in a criminal case is not admissible evidence either to prove or disprove the truth of the libel, because it is *res inter alios acta*: the parties are not the same, neither are the rules of decision and the course of proceedings.(*f*)

In an action for saying of the plaintiff that he was a thief and a murderer, Lord Kenyon said that if there had been a plea of justification on the record, he would have tried the truth of the charges, notwithstanding the acquittal.(*g*) But if the libel charges that the plaintiff was convicted of the offence, the fact must be proved by producing a copy of the record, omitting the formal parts thereof, certified under the hand of the officer having the custody of the records of the court, or his deputy.(*h*) It will then be a question for the jury whether the libel substantially agrees with the conviction.(*i*)

(*a*) *Manning* v. *Clement* (7 Bing. 368). See also *Eastwood* v. *Holmes* (1 F. & F. 347).

(*b*) *Weaver* v. *Lloyd* (2 B. & C. 678).

(*c*) *Cory* v. *Bond* (2 F. & F. 241).

(*d*) *Chalmers* v. *Shackell and others* (6 C. & P. 475); *Wilmett* v. *Harmer and another* (8 C. & P. 695).

(*e*) See note (*b*) to *Prosser* v. *Rowe* (2 C. & P. 422), and *Cook* v. *Field* (3 Esp. 133).

(*f*) *Justice* v. *Gosling* (12 C. B. 39); 2 Taylor on Evidence, sect. 1505.

(*g*) *England* v. *Bourke* (3 Esp. 80). See also *Cook* v. *Field* (3 Esp. 133).

(*h*) 14 & 15 Vict. c. 99, s. 13.

(*i*) *Alexander* v. *North-Eastern Railway Company* (34 L. J. 152, Q. B.; 6 B. & S. 240); 13 W. R. 651).

Evidence must justify sting of libel.

The gist and sting of the libel must be justified by the facts brought forward in support of the defence. Proof of one act done by the plaintiff is not sufficient to justify the imputation of a certain character to him. So that where the defendants pleaded by way of justification to the words "libellous journalist," that the plaintiff, intending to injure one B. B. Cooper, in his profession as a surgeon, published of him a false, scandalous, malicious and defamatory libel (setting out the libel), the Court held that the plea was not proved by the production of the record in the case stated in the plea, which showed that £100 damages had been recovered against the plaintiff. Parke, B., said: "I am perfectly satisfied that the words 'libellous journalist' do not mean that the plaintiff had been guilty, upon one occasion only, of having merely published a libel, but that he has been guilty of gross misconduct as a journalist, by the habit of libelling others. . . . . I take it to be clear that the publication of a libel which may make a man civilly liable only, does not necessarily lead to the conclusion that he has been guilty of any moral misconduct. The words 'libellous journalist,' may be understood in that sense; but it appears to me that the plea does not convey a charge of libelling, but an imputation that the plaintiff published from the malicious motive of injuring Mr. Cooper. With regard, therefore, to the last point, as to the effect of the production of the record in the case of *Cooper* v. *Wadley*, I think it would only go to show that an action had been brought, and that the plaintiff in that case had obtained a verdict for so much; but it did not prove the plaintiff to be a libellous journalist within the meaning of the words of the fifth plea."(*o*)

Where the moral quality of the act is ambiguous, and the libel puts a bad construction upon it, the evidence must prove circumstances which justify the complexion given to it.

An article imputed to the plaintiffs that they had bought goods from bankrupt traders under the market price, and while they were insolvent, and that the plaintiffs must have known they were insolvent, and were disposing of the goods in fraud of their creditors: immendo that they had been guilty of dishonest dealings. The defendants pleaded that the libels were true in substance and effect; and in support of the plea proved that a bankrupt had sold to the plaintiffs a large quantity of cloth, which was not usually sold at all,

(*o*) *Wakley* v. *Cooke and another* (4 Ex. 511, 517).

worth about £12,000 at prices greatly under the market value, and at a loss of about £1,300; and that such sales were on a promise by the plaintiffs not to resell them in the Manchester market, and were not in the usual way in the markets, but by private arrangements, and that the last purchase was a few days before the bankruptcy. There was no express evidence that the plaintiffs knew the circumstances of the bankrupts at the time, or supposed them to be insolvent; and, on the contrary, people generally supposed them to be solvent. Erle, C.J., left it to the jury to say whether it was proved that the plaintiffs had bought the goods knowingly, under such circumstances as that they were guilty of dishonest dealings, and the jury found a verdict for the plaintiffs.(*a*)

In *Warman* v. *Hine*(*b*) the libel accused the plaintiff of being a "great defaulter" in his accounts as poor law guardian, and not paying the balance due from him till an execution to levy it was issued. In support of a plea of justification, it was proved that the plaintiff had used the parish money; that when he went out of office he made himself debtor to the parish in about £130; that he was applied to for payment repeatedly by his successors; and that he finally borrowed money, or a subscription was made for him by his friends, and with this money he at last paid the parish; but no execution was issued. Lord Denman, C.J., left it to the jury to say whether the facts proved came up to the imputation of the plaintiff's being a "great defaulter;" and they found a verdict for the plaintiff. On a motion being made for a new trial, the Court refused to grant a rule, on the ground that the fact that the plaintiff was a defaulter did not prove him to be a "great defaulter." Patteson, J., said: "Taking the plea altogether, it means that the plaintiff did not pay over the money, but made great default and paid in small sums, and did not till a long time. The question, therefore, was, whether there was a criminal default. The jury have found for the plaintiff on this issue, being of opinion, I presume, that the defendant was not a criminal defaulter. I cannot say the jury were wrong: therefore I can see no ground for setting aside the verdict, and I do not see how the judge could, on this evidence, have told the jury that they must find for the defendant."

In order to prove the plea of apology and payment into court under Lord Campbell's Act, the defendant must prove that the libel was inserted in the newspaper

Apology and payment into court.

(*a*) *Behrens* v. *Allen* (3 F. & F. 135). (*b*) 1 Jur. 820.

without actual malice or gross negligence, and that the apology is sufficient.(*a*)

The apology must be printed in proper type, and placed in a part of the paper where ordinary readers would be likely to see it.

In the case of *Lafone* v. *Smith*(*b*) the apology was in small type, amongst the notices to correspondents; and the jury found that, though it was sufficient in its terms, the type should have been larger, and the apology should have been inserted in a more prominent part of the newspaper; they also found that the forty shillings paid into court was sufficient to cover the damages, whereupon Martin, B., directed a verdict for the plaintiffs with one shilling damages, but reserved to the defendants leave to move to enter the verdict for them or to strike out the damages; but the court refused to grant a rule, on the ground, as stated by Pollock, C.B., that "an apology means the insertion of something which may operate as an apology. Inserting an expression of regret in small type, suitable only to a notice to correspondents, amounts to this, that the defendant did not insert an apology."

Accord and satisfaction.

The evidence to support the defence of accord and satisfaction must depend entirely upon the nature of the case.

Evidence to rebut express malice and in mitigation of damages.

The defendant is not confined to evidence in proof of his pleas, but is at liberty to offer certain matters in mitigation of damages, and to negative actual malice. To this end he is entitled to have read, as part of the plaintiff's case, other passages of the publication from which the words declared on are taken;(*c*) but this right is subject to certain limits. In the case of *Darby* v. *Ousley*,(*d*) a passage from a subsequent number of the defendant's newspaper having been given in evidence by the plaintiff, for the purpose of showing actual malice, the defendant's counsel proposed to read as part of the same evidence another paragraph in the same paper, relating to the action, but Willes, J., ruled that it could not be so read, as it did not in any degree mitigate, modify, or explain the article put in as evidence of actual malice. On appeal to the Court of Exchequer it was held that the learned judge had properly refused to allow it to be read. In the course of the argu-

(*a*) *Risk Allah Bey* v. *Johnstone* (18 L. T. N. S. 620); *Jones* v. *Mackie* (L. Rep. 3 Ex. 1; 17 L. T. N. S. 151; 37 L. J. 1, Ex.; 16 W. R. 109).

(*b*) 3 H. & N. 735.

(*c*) *Cooke* v. *Hughes* (1 R. & M. 112). See also *Hedley* v. *Barlow* (4 F. & F. 227).

(*d*) 25 L. J. 227, Ex.; S. C., 1 H. & N. 1.

ment, Pollock, C.B., stated the rule to be "that other paragraphs or passages of a document put in by the plaintiff, are to be read as part of his evidence, if they are connected with, or construe, or control, modify, qualify, or explain the passages which have been read by the plaintiff; but that was not the case in the present instance. Not only was the article an entirely distinct one, but it did not at all interpret, modify, or explain the passages put in by the plaintiff, and it was entirely irrelevant to it; except that it related to the plaintiff, it was upon a different subject. It did not in the least control the sense of the libel or of the article put in as evidence of the malice of the libel."(*a*)

Where the alleged libel consists entirely of a criticism on the plaintiff's book, the book ought to be put in as part of his case, and if he refuses to do so he will run the risk of not keeping his verdict.(*b*)

The defendant may prove in mitigation of damages that he did not originate the libel, but copied it from a newspaper.(*c*)

Evidence of existence of rumours to same effect as libel.

Though it would seem that evidence of the plaintiff's general bad reputation may be given by the defendant, evidence that at the time of the publication of the libel there were rumours and reports afloat to the same effect as the libel, is, it is submitted, not admissible.

It is true that such evidence has sometimes been admitted: thus in the case of *The Earl of Leicester* v. *Walter*(*d*) a witness was allowed to prove that, before and at the time of the publication of the libel, there was a general suspicion of the plaintiff's character and habits; that it was generally rumoured that such a charge as the libel imputed had been brought against him; and that his relations and former acquaintances had on this ground ceased to visit him. The counsel for the plaintiff objected that, if such evidence were admitted, no plaintiff ought to come into court, since a malicious and artful defendant might ruin his character by shaping the defence a little short of a justification. The learned judge, Sir Jas. Mansfield, C.J., admitted that he never could answer to his own satisfaction this objection, but said: "At the same time, as it appears to have been decided in several cases that, if you do not justify, you may give in evidence anything to mitigate the damages, though not to prove the crime which is charged in the libel, I do not know how to

(*a*) 25 L. J. 229. Ex.

(*b*) *Per* Erle, C.J., and Cockburn, C.J., *Strauss* v. *Francis* (4 F. & F. 941, 1109).

(*c*) *Pearson* v. *Le Maitre* (5 M. & G. 719); *Saunders* v. *Mills* (6 Bing. 213).

(*d*) 2 Camp. 251.

reject these witnesses. Besides, the plaintiff's declaration says that he had always preserved a good character in society, from which he had been driven by the insinuations in the libel. Now the question for the jury is, whether the plaintiff actually suffered this gravamen or not. Evidence to prove that his character was in as bad a situation before as after the libel must therefore be admitted." This case was followed by the King's Bench, in an action for words imputing to the plaintiff unnatural practices.(*a*) The declaration contained an averment, as in the preceding case, of the plaintiff's good character, and, to contradict this, Grose, J., allowed a witness, on cross-examination, to be asked whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of similar practices. Upon this, the plaintiff's counsel submitted to a nonsuit, and afterwards moved the Court to set it aside on the ground that the evidence was improperly received, to contradict that which was matter of inducement only and immaterial. The Court conceded that the inducement was immaterial, but said that the evidence was not admitted in bar, but in diminution of damages, and Lord Ellenborough, C.J., added: "And certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished: and it is competent to show that by evidence." The rule was refused.(*b*)

But the later cases are against admitting such evidence. In *Thompson* v. *Nye*.(*c*) the declaration, without any previous averment of the plaintiff's good character, charged the defendant with speaking words imputing to the plaintiff the practice of unnatural crimes. At the trial the defendant's counsel proposed to ask a witness, in cross-examination, whether he had not heard from other persons that the plaintiff was addicted to practices of this kind. Wilde, C.J., ruled that the question could not be put. On a motion for a new trial, on the ground of the wrongful rejection of this evidence, the Court, without expressly deciding the general point, held that the question was rightly rejected, as it was not confined to reports existing before and at the time of the uttering of the slander, and, therefore, the reports might have been set on foot by the defendant himself. Although the Court based its judgment upon this narrower ground, it is clear from the report which way the

(*a*) —— v. *Moor* (1 M. & S. 284).

(*b*) See also *Richards* v. *Richards* (2 M. & Rob. 557); *Eamer* v. *Merle* (referred to *arguendo* in *Leicester* v. *Walter*); *Williams* v. *Callender* (Holt, N. P. 307); *Moore* v. *Oastler* (2 St. on Evid. 641).

(*c*) 16 Q. B. 175.

opinion of the judges leaned. Coleridge, J., said: "I am clearly of opinion that the question was here proposed in too general a form, and is liable to the objection stated by my brother Patteson, whose example I shall follow in abstaining from an opinion on the general point. I will go only so far as to say, that I do not wish it to be supposed that I am in favour of allowing the question to be put even in its most limited form; my present impression is against doing so." And Erle, J., said: "It is not necessary to give any opinion as to the admissibility of the question in a qualified form; many learned judges have admitted it; but they all acted on a decision at *Nisi Prius*, *Earl of Leicester* v. *Walter*, which it was not worth the plaintiff's while to question.(*a*) But in *Jones* v. *Stevens*,(*b*) the point was brought before the full Court of Exchequer; and there the question was held to be inadmissible in its general form."

Byles, J., after consulting Willes, J., rejected questions of this nature at *Nisi Prius*. The action was for slander imputing forgery: and, at the close of the plaintiff's case, the plaintiff himself was put into the box and tendered for cross-examination. The counsel for the defendant proposed to ask him questions as to his past conduct and life; but Byles, J., said that, as there was no plea of justification, no question could be asked which would go to the justification; and, after consulting with Willes, J., his Lordship held "that no evidence of bad character or questions relating to the plaintiff's previous life or habits, or tending to discredit him and to mitigate damages, were admissible either on cross-examination or examination in chief."(*c*)

The question was distinctly raised before Mathew and Cave, JJ., in the recent case of *Scott* v. *Sampson*(*d*), in which Lord Coleridge, C.J., rejected the evidence at *Nisi Prius*. This ruling was upheld by the Divisional Court, *per* Mathew, J., on the ground that the older authorities to the contrary have no application to the pleadings required by the Judicature Acts, which must set forth the material facts on which the defendant intends to rely; *per* Cave, J., after an elaborate examination of all the cases, also on the further ground that the weight of authority and principle was against the admission of such evidence.(*e*)

(*a*) In that case the jury, notwithstanding the evidence, returned a verdict for the plaintiff for £1,000 (1 Campb. 255).

(*b*) 11 Price, 235. See *Snowden* v. *Smith* (1 M. & S. 286, *note*).

(*c*) *Bracegirdle* v. *Bailey* (1 F. & F. 538). See also *Waithman* v. *Weever* (11 Price, 257, *n*).

(*d*) L. R. 8 Q. B. D. 491).

(*e*) See also *per* Fitzgerald and Hughes, B.B., in *Bell* v. *Parke* (11 Ir. C. L. Rep. 413).

As to a third kind of evidence sought to be given in this case—viz., evidence of particular facts tending to show the character and disposition of the plaintiff, Cave, J., was of opinion that not a single authority could be cited in support of its admissibility.

Apart from these authorities, there appears to be very good reason why such evidence should be rejected, as the plaintiff is not allowed to give evidence of his good character,(*a*) nor (unless the defence set up be that the charges are true, or that the publication is privileged) to prove that the libel is false.(*b*)

When defendant may prove imputations to be true.

Where, the occasion of publication being privileged, the plaintiff, to show actual malice on the part of the defendant, gives evidence of the falsity of the imputations, the defendant is bound to show that he believed them to be true,(*c*) and, as the most conclusive evidence of that, may, of course, prove that in fact they are so.

Defendant not allowed to inquire into plaintiff's religious opinions.

The defendant will not be allowed, for the purpose of mitigating damages, or of justifying the libel, to inquire into the plaintiff's religious opinions, even where the libel concerns his religious creed.(*d*)

Nor will he be allowed to read, in his address to the jury, specific books and documents, as proofs of what the doctrines of the plaintiff's co-religionists are. These are matters of fact, and must be proved by witnesses.(*e*)

Evidence of plaintiff's conduct to mitigate damages.

The conduct of the plaintiff in provoking the libel is a fit subject for the jury to take into account, in estimating the amount of compensation for his injured feelings.(*f*)

And evidence may be given of libels on the defendant, published by the plaintiff, respecting the same subject-matter. In the words of Sir James Mansfield, C.J., "If a man is in the habit of libelling others, he complains with a very bad grace of being libelled himself; and he cannot be supposed to suffer much injury from this source."(*g*) But before such publications are read, it must be shown that they are connected with the libels proceeding from the defendant: for it is not a proper ground for mitigating damages that, on other occasions, the plaintiff has written

(*a*) *Cornwall* v. *Richardson* (1 Ry. & Moo. 305).
(*b*) *Stuart* v. *Lovell* (2 Starkie, 93); *Thompson* v. *Nye* (16 Q. B. 175).
(*c*) *Fountain* v. *Boodle* (3 Q. B. 5); *Brown* v. *Croome* (2 Starkie, 297).
(*d*) *Darby* v. *Ouseley* (1 H. & N. 1); *sed vide Turnbull* v. *Bird* (2 F. & F. 508).
(*e*) *Ibid.*
(*f*) *Kelly* v. *Sherlock* (L. Rep. 1 Q. B. 686; 35 L. J. 209, Q. B.).
(*g*) *Finnerty* v. *Tipper* (2 Camp. 72).

libels on the defendant on some other matter unconnected with that which is the subject of the action;(*a*) and it must also be proved that they came to the defendant's knowledge before he libelled the plaintiff.(*b*)

Evidence of apology.

Lastly, the defendant may (after notice in writing of his intention so to do, duly given to the plaintiff at the time of delivering his defence) give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff, before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action was commenced before he had such opportunity.(*c*)

Judge not bound to state his opinion.

The judge is not bound to state to the jury his opinion whether the publication be libellous or not. Fox's Libel Act (32 Geo. 3, c. 60) in terms applies only to criminal cases; but there is no distinction between the law in criminal and that in civil cases in this respect; and that Act leaves it to the discretion of the judge to give his opinion, or not, as he thinks proper.(*d*)

Functions of court and jury.

"In principle the only difference made by that statute is, that if the written instrument can be a libel, then it is for the jury to say whether it is a libel."(*e*)

"Though no doubt the Court has more power to set aside verdicts in civil cases, there is no reason why the functions of the Court and jury should be different in civil proceedings for a libel and in criminal proceedings for a libel. And accordingly it has been for some years generally thought that the law in civil actions for libel was the same as it had been expressly enacted that it was to be in criminal proceedings for libel."(*f*)

Question for jury.

The proper question for the jury is, not whether the intention of the publisher was to injure the plaintiff, but whether the tendency of the publication is injurious to him(*g*).

Bill of exceptions abolished.

Before the Judicature Acts, when it was desired to except to the ruling of the judge, a bill of exceptions might be

(*a*) *May* v. *Brown* (3 B. & C. 113); *Tarpley* v. *Blaby* (2 Bing. N. C. 437); *Wakley* v. *Johnson* (1 Ry. & Moo. 422).

(*b*) *Watts* v. *Fraser and another* (7 Ad. & E. 223).

(*c*) *Vide ante*, p. 656.

(*d*) *Baylis* v. *Lawrence* (11 Ad. & E. 920); *Parmiter* v. *Coupland* (6 M. & W. 105).

(*e*) *Per* Brett, L.J., *Bradlaugh* v. *The Queen* (L. R. 3 Q. B. D. 433); and see *Fray* v. *Fray* (34 L. J. C. P. 45): and *per* Lord Coleridge, C.J., in *Hird* v. *Wall* (L. R. 2 C. P. D. 149). See also *Miller* v. *David* L. R. 9 C. P. 118).

(*f*) *Per* Lord Blackburn, *Capital and Counties* v. *Henty* (L. R. 7 App. Cas. 775).

(*g*) *Fisher* v. *Clement* (10 B. & C. 472), cited with approval by Lord Blackburn in *Capital and Counties Bank* v. *Henty* (*ubi supra*).

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tendered before verdict; but bills of exceptions were rarely in modern times resorted to in actions in the superior courts, their object being in most cases obtained by a motion for a new trial.(*a*) They were abolished altogether, as well as proceedings in error, by Order lviii. R. 1 of the Rules of Court, 1875. Though this rule is now itself repealed, sect. 6 of the Statute Law Revision Act of 1883(*b*) prevents the revival of the old procedure.

Assessing damages.

If the jury find the plea of apology under Lord Campbell's Act not proved, they must assess the damages irrespectively of the amount paid into court.(*c*)

Costs.

The costs of, and incident to, all proceedings in the Supreme Court, are now (subject to the provisions of the Judicature Acts and Rules) in the discretion of the Court or judge: provided that where any action, cause, matter or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court shall, for good cause, otherwise order.(*d*)

By force of this provision, a plaintiff to whom a jury awards any sum, however small, in an action for libel, will be entitled to his costs, unless the judge or Court shall, for good cause, otherwise order. For sect. 67 of the Judicature Act of 1873 makes applicable sects. 5, 7, 8, and 10 of the County Courts Act, 1867, only to those actions in the High Court "in which any relief is sought which can be given in a County Court;"(*e*) and an action for libel cannot be brought in a County Court,(*f*) (9 & 10 Vict. c. 95, s. 58).

The discretion now given is of the widest possible kind; and it has been held that a judge has power, for good cause, even to order a plaintiff who recovers but a nominal sum, in an action tried before a jury, to pay the defendant's costs.(*g*)

Remitting action to County Court.

Though an action for libel cannot be commenced in a county court, it may be remitted to that court for trial by an order of a judge of the superior court in which it is brought, upon the application of the defen-

(*a*) See 2 Lush's Practice, 654.

(*b*) 46 & 47 Vict. c. 49.

(*c*) *Jones* v. *Mackie* (L. Rep. 3 Ex. 1; 17 L. T. N. S. 151; 37 L. J. 1, Ex.; 16 W. R. 109); *Lafone* v. *Smith* (3 H. & N. 735; 28 L. J. Ex. 33).

(*d*) Rules of 1883, Order lxv. R. 1.

(*e*) The effect of the cases of *Sampson* v. *Mackay* (L. R. 4 Q. B. 643), and *Gray* v. *West* (L. R. 4 Q. B. 175), is done away with by sect. 67 of the Judicature Act, 1873. *Supra.*

(*f*) See *Garnett* v. *Bradley* (L. R. 3 app. cas. 944); *Parsons* v. *Tinling* (L. R. 2 C. P. D. 119).

(*g*) *Harris* v. *Petherick* (L. R. 4 Q. B. D. 611); *Fane* v. *Fane* (L. R. 13 C. D. 307). Cf. *Cooper* v. *Whittingham* (L. R. 15 C. D. 501).

dant, supported by an affidavit that the plaintiff has no visible means of paying the costs of the defendant, should a verdict not be found for the plaintiff. The order to be thereupon made is, that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs, to the satisfaction of one of the masters of the said court, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior court, all proceedings in the action shall be stayed, or, in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the judge as aforesaid, that the cause be remitted for trial before a county court to be therein named.(*a*)

The county court has also jurisdiction to try the action by the consent of both parties, given in writing, signed by them or their respective attorneys.(*b*)

Jury should not be told what damages will carry costs.

The jury ought not to be told what amount of damages will carry costs; and it was held that if the counsel for the plaintiff informed them that the plaintiff would probably not get his costs unless they gave a verdict for so much, the Court would grant a new trial without imposing terms.(*c*) "The Legislature," observes a learned judge, "in express terms, says that it is the judge, and not the jury, who shall have the power of deciding whether or not the plaintiff shall have costs. . . . . It is most important that the province of the judge and that of the jury should be kept distinct. . . . . I think it would lead to a most inconvenient inequality in the administration of the law, if the question of costs were in any shape left to the consideration of the jury."(*d*)

Costs, where several issues.

The party entitled to the general costs of the cause was held entitled to the costs of all such witnesses as were not called exclusively on the issues which were found against him; so that where all the witnesses called were material to both the issues of *not guilty* and a justification, and the verdict was found for the plaintiff on the second issue, and for the defendant on the first, it was held that the plaintiff was not entitled to the costs of any witness, and that the defendant was entitled to the costs of all the witnesses called by him.(*e*)

(*a*) 30 & 31 Vict. c. 142, s. 10.
(*b*) 19 & 20 Vict. c. 108, s. 23.
(*c*) *Poole* v. *Whitcomb* (12 C. B. N. S. 770; and see *Kelly* v. *Sherlock* (L. Rep. 1 Q. B. 691; 35 L. J. 209, Q. B.).
(*d*) *Per* Willes, J., 12 C. B. N. S. 775.
(*e*) *Harrison* v. *Bush* (5 E. & B. 344; 25 L. J. 99, Q. B.).

The next subject to be considered is, under what circumstances the defeated party may prevail upon the Court *in banc* to set aside the verdict which has been given against him.

The Court will grant a new trial when the jury have found a verdict for the defendant upon the general issue, in a case in which no question is made as to the fact of publication of the libel, or as to its application to the plaintiff, and when there can be no doubt that the matter complained of is libellous.

The leading case upon this point is *Halsevell* v. *Ingram*.(*a*) The libel was contained in a newspaper article, on the subject of the want of some efficient protection to married women. The writer mentioned two cases as showing the necessity for legislation; one case being described as that of a husband who acted towards his wife like "a sot and a brute." The article then proceeded: "The other is that of Mrs. H." (meaning the wife of the plaintiff), "who, having been restored to her husband's protection by a decree of the Ecclesiastical Court, found her misery so aggravated by the restitution of her conjugal rights that she was compelled to resort to the police-court for the little help the law gives:" and it concluded by saying that the law did not meet such cases; and that "the condition of woman, when the brute intervenes, is more oppressive than that of the negro." It was not disputed at the trial that the passage applied to the plaintiff, and Crowder, J., told the jury that, in his opinion, the passage was a libel, but that the question was for them. The jury found a verdict for the defendant.

On showing cause against a rule for a new trial, on the ground that the verdict was against the evidence and was perverse, it was contended for the defendant that it was for the jury alone to say whether the matter was libellous. The Court, however, held otherwise, and made the rule absolute. Jervis, C.J., said: "The true effect of the statute(*b*) was this: before the statute it was the habit of the judges to state their opinion whether the paper was a libel, as a matter of law, and confine the jury to the question of publication. And the statute said that the case of libel shall be like any other case of criminal proceeding, the judge defining the law, and the jury having a right to determine, by a general verdict, upon the whole question, guilty or not guilty. Although the Act is confined in its terms to criminal proceedings, yet, as Lord Chief Justice Best stated in the case cited, 'It is in principle a practice applicable to

(*a*) 2 C. L. Rep. 1397. (*b*) Fox's Libel Act.

civil cases.' In *Dormiler* v. *Copland*,(*a*) Parke, B., points out that; and though, in criminal proceedings for libel, there may be no review, in civil matters there are cases in which verdicts for the defendant are set aside, upon the ground that the matter was a libel, though the jury found that it was not. A case was referred to in which that course was taken; and there is no technical rule to prevent us from applying the ordinary practice of reviewing the decision of the jury, when they have come to a wrong conclusion." Maule, J., although he dissented from the judgment of the rest of the Court upon the particular case, concurred as to the power of the Court to grant a new trial, when it could "say with certainty that the jury must have miscarried in finding a verdict of not guilty."

In an earlier case, where the jury had inquired whether a shilling would carry costs, and, being answered in the affirmative, had found a verdict for the defendant, notwithstanding that the matter was clearly libellous, the Court granted a new trial.(*b*)

A new trial will not, however, be granted, unless it appears to the Court that the jury have done manifestly wrong in finding the publication not to be libellous.(*c*)

New trial not granted merely because damages too low.

The Court will not grant a new trial merely because the damages are low, unless there has been some misdirection on the part of the judge, or a mistake of their duty on the part of the jury, or unfair practice on the part of the defendant. We have not found any case reported where a new trial has been ordered, on this ground, in an action for libel, although in one case the Court of Queen's Bench went so far as to grant a rule *nisi* which was finally discharged, Shee, J., dissenting.(*d*) In an unreported case of *Moyell* v. *Gambier*, the Court of Common Pleas held that the practice was so inexorable as to preclude the Court from entertaining the motion.(*e*) On the other hand, it is a very rare thing for

(*a*) 6 M. & W. 105. (*b*) *Levi* v. *Milne* (4 Bing. 195).

(*c*) See *per* Tindal, C.J., *Broome* v. *Cossden* (1 C. B. 731).

(*d*) *Kelly* v. *Sherlock* (L. Rep. 1 Q. B. 686; 35 L. J. 209, Q. B.). See *Randall* v. *Hayward* (3 Bing. N. C. 424); *Forsdike* v. *Stone* (L. Rep. 3 C. P. 607: 37 L. J. 301, C. P.; 18 L. T. N. S. 722; 16 W. R. 976); *Armytage* v. *Haley* (L. R. 4 Q. B. 917).

(*e*) Since the last edition of this work, the Court of Queen's Bench (Quain and Archibald, JJ.), made absolute a rule for a new trial on the ground of inadequacy of damages, in an action for slander, imputing to the plaintiff that he had been convicted of perjury and fined, when the jury returned a verdict for the plaintiff with one farthing damages. The Court considered that under the circumstances of the case the verdict was a species of compromise and no true verdict at all (*Falvey* v. *Stanford*, L. R. 10 Q. B. 54).

the Court to interfere on behalf of the defendant, when the damages are excessive.

Or because jury have expressed opinion inconsistent with verdict.

A new trial will not be granted on the ground that the jury have, after the close of the evidence, and during the summing up, expressed an opinion inconsistent with their formal verdict.(*a*)

Leave to move.

The most common applications to the court *in banc*, have been with reference to the question of privilege; and it was not an unfrequent practice for the judge, at *Nisi Prius*, to reserve leave to the party against whom he decided, to move to enter a nonsuit or a verdict, if the Court should be of opinion that the direction to the jury was wrong, or that the verdict was contrary to the evidence; the advantage of this leave being that, if the rule were made absolute, no second trial was required.(*b*)

Arrest of judgment.

When the statements charged in the declaration appeared on their face not to be libellous, and yet the jury found a verdict for the plaintiff, the practice before the Judicature Acts was for the defendant to move the Court in arrest of judgment. The same objections might be taken to the declaration, upon a motion in arrest of judgment, that could have been taken by demurrer; and Lord Coke's advice to the pleader was not to demur in actions of slander, but just to take advantage of the matters of fact, and leave the matters in law, which always arise upon the matters in fact, *ad ultimum*.(*c*)

Judgment for defendant.

Motions in arrest of judgment in civil cases may now be considered obsolete, as the Court has power upon motion for judgment, or upon an application for a new trial, if satisfied that it has before it all the materials necessary for determining the questions in dispute, to give judgment for the defendant.(*d*)

It was said in *Shepheard* v. *Whitaker*,(*e*) that the judgment would be arrested only where the words cannot by possibility amount to a libel; but Lord Blackburn, in the latest case of *Capital and Counties Bank* v. *Henty*,(*f*) expressed the opinion that though the words might by

(*a*) *Napier* v. *Daniel* (3 Bing. N. C. 77).

(*b*) *Gardner* v. *Slade* (13 Q. B. 796); *Lewis* v. *Levy* (E. B. & E. 562; 27 L. J. 282, Q. B.); *Harrison* v. *Bush* (5 E. & B. 344; 25 L. J. 28, Q. B.).

(*c*) 4 Reports, 14 *a*. For examples of cases where judgment has been arrested, see *Hearne* v. *Stowell* (12 Ad. & El. 719); *Goldstein* v. *Foss* (6 B. & C. 154).

(*d*) Order xl. R. 10.

(*e*) L. R. 10 C. P. 502). See also *Mulligan* v. *Cole* (L. R. 10 C. P. 559).

(*f*) L. R. 7 App. Cas. 782.

possibility be libellous, yet (it being no longer necessary to place on the record the materials for deciding the question whether the words were used in the defamatory sense charged) when the proof is complete, and all that can properly be found on that proof in favour of the plaintiff is found for him, if the Court is of opinion that, if all which could be found had been put on the record under the old system, the judgment would have been arrested, it should now give judgment for the defendant.

Motion for judgment *non obstante veredicto.*

The motion for judgment *non obstante veredicto* was made by the plaintiff, when the plea of justification was defective in point of law, and the plaintiff, instead of demurring to it, had joined issue upon it, and that issue had been found for the defendant.(*a*)

Appeal.

It has already been pointed out, *ante*, p. 686, that bills of exceptions and proceedings in error have been abolished. All appeals to the Court of Appeal are now by way of rehearing, and are to be brought by notice of motion in a summary way, no case or formal proceeding other than such notice of motion being necessary.(*b*)

Injunction in cases of libel.

The doctrine was well established that the Court of Chancery had no jurisdiction to restrain the publication of a libel.(*c*). Malins, V.C., however, held, in two cases,(*d*) that the Court could restrain any libellous publication which tended to the destruction of property. In a third case, which came before the Court of Appeal, Lord Cairns and Mellish and James, L.JJ., overruled these cases and laid it down in the broadest terms that the Court had no jurisdiction to restrain the publication of a libel, even though it was injurious to property.(*e*). This was on the 20th of January, 1875, before the Judicature Act of 1873 came into operation.

Sect. 25, sub-section 8 of the Act of 1873,(*f*) gives the High Court of Justice power to grant an injunction "in

(*a*) *Clement* v. *Lewis* (10 Price, 184); *Morrison* v. *Harmer* (3 Bing. N. C. 759); 2 Wms. Saunders, 319 *d*.

(*b*) Rules of 1883, Order lviii., R. 1.

(*c*) *Gee* v. *Pritchard* (2 Sw. 402, 413), *per* Lord Campbell, *Emperor of Austria* v. *Day* (3 D. F. & J. 217); *per* Lord Langdale (*Clark* v. *Freeman* (11 Beav. 112); *Wright* v. *Martin* (6 Sim. 297); *Fleming* v. *Norton* (1 H. L. Cas. 363); *Mulkern* v. *Hall* (L. R. 13 Eq. 619).

(*d*) *Springhead Spinning Co.* v. *Riley* (L. R. 6 Eq. 551); *Dixon* v. *Holden* (L. R. 7 Eq. 488).

(*e*) *Prudential Assurance Company* v. *Knott* (L. R. 10 Ch. App. 142).

(*f*) 36 & 37 Vict. c. 66, the period of its coming into force having been postponed to the 1st November, 1875, by 37 & 38 Vict. c. 83, s. 2.

all cases in which it shall appear to the Court to be just or convenient." Since this enactment came into force injunctions have frequently been granted to restrain the publication of libels injurious to property. The Court of Appeal (James, Baggallay, and Bramwell, L.JJ.,), affirming Malins, V.C., in the case of *Thorley's Cattle Food Company* v. *Massam*,(*a*) held that the publication of an advertisement warning customers against the course pursued by the plaintiff's company "in seeking to foist upon the public an article which they pretend is the same as that manufactured by the late Joseph Thorley," ought to be restrained, at it contained untrue representations calculated to injure the company in their trade. On similar grounds an injunction was granted by Fry, J., in *Thomas* v. *Williams*,(*b*) holding that proof of actual special damage was not necessary where the libel was calculated to injure the plaintiff in his trade.

In a case(*c*) where the publication injurious to trade had been found by a jury to be libellous, the Common Pleas Division (Lord Coleridge, C.J., and Lindley, J.,) also granted an injunction to restrain the further publication of it. Both these learned judges appear to have rested their judgment on the fact that a jury had already found the publication to be libellous, and that it was injurious to the plaintiff's property. But, according to the two last previously cited cases, it is not necessary that that question should have been determined by a jury.

An injunction was granted by Kay, J., to restrain the publication of a circular containing inaccurate statements as to the financial condition of a friendly society, likely to injure it in its business.(*d*)

Injunction refused where occasion privileged.

Although, however, a publication be injurious to the trade of the plaintiff and be untrue in point of fact, an injunction will not be granted if the occasion is privileged.

If the holder of a patent issues notices warning purchasers against certain articles as infringements of his patent, *bonâ fide*, though erroneously, believing them to be so, it was held by Jessel, M.R., affirmed by the Court of Appeal (Lord Coleridge, C.J., Baggallay and Lindley, J.J.,), that such publication would not be restrained by injunction. If, however, after they are proved to be unfounded in fact, a further publication of them is threatened, it would, in the opinion of Jessel, M.R., and (*semble*) Lindley, L.J., be restrained.(*e*)

(*a*) L. R. 14 C. D. 763. (*b*) L. R. 14 C. D. 864.
(*c*) *Saxby* v. *Easterbrook* (L. R. 3 C. P. D. 338.)
(*d*) *Hill* v. *Hart Davies* (L. R. 21 C. D. 798).
(*e*) *Halsey* v. *Brotherhood* (L. R. 15 C. D. 514; 19 C. D. 386).

Interlocutory application for injunction.

The Court of Appeal has held that there is jurisdiction to restrain, even on interlocutory application, the publication of a libel, though great caution is to be used in the exercise of it.(*a*)

As a general rule, the applicant for such an interlocutory injunction must prove the falsity of the alleged libel: and where there is a case to try and no immediate injury to be expected from the further publication of the libel, it would be very dangerous to restrain it by interlocutory application.(*b*)

(*a*) *Quartz Hill Co.* v. *Beall* (L. R. 20 C. D. 501; 51 L. J. Chy. 874).

(*b*) *Per* Jessel, M.R., *ibid.*

APPENDIX.

8 GEO. 2, CAP. 13.

An Act for the Encouragement of the Arts of designing, engraving, and etching historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers during the Time therein mentioned.

8 Geo. 2, c. 13.

WHEREAS divers persons have, by their own genius, industry, pains, and expense, invented and engraved, or worked in mezzotinto, or chiaro oscuro, sets of historical and other prints, in hopes to have reaped the sole benefit of their labours; and whereas printsellers and other persons have of late, without the consent of the inventors, designers, and proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing, or causing to be copied, engraved, and published, base copies of such works, designs, and prints, to the very great prejudice and detriment of the inventors, designers, and proprietors thereof: for remedy thereof, and for preventing such practices for the future, may it please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the twenty-fourth day of June, which shall be in the year of our Lord one thousand seven hundred and thirty-five, every person who shall invent and design, engrave, etch, or work, in mezzotinto or chiaro oscuro, or from his own works and invention shall cause to be designed and engraved, etched, or worked, in mezzotinto or chiaro oscuro, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for the term of fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints; and that if any printseller or other person whatsoever, from and after the said twenty-fourth day of June, one thousand seven hundred and thirty-five, within the time limited by this Act, shall engrave, etch, or work, as aforesaid, or in any other manner copy and sell, or cause to be engraved, etched, or copied and sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause to be printed, reprinted, or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof first had and obtained in writing signed by him or them respectively in the presence of two or more credible witnesses, or, knowing the same to be so printed or reprinted without the consent of the proprietor or proprietors, shall publish, sell, or expose to sale, or otherwise or in any other manner dispose of, or cause to be published, sold, or exposed to sale, or otherwise or in any other manner disposed of, any such print or prints, without such consent first had and obtained as aforesaid, then such offender

After 24th June, 1735, the property of historical and other prints vested in the inventor for fourteen yea

Proprietor's name to be affixed to each print.

Penalty on printsellers or others pirating the same.

9 Geo. 2, c. 13.

or offenders shall forfeit the plate or plates on which such print or prints are or shall be copied, and all and every sheet or sheets (being part of or whereon such print or prints are or shall be so copied or printed), to the proprietor or proprietors of such original print or prints, who shall forthwith destroy and damask the same, and further, that every such offender or offenders shall forfeit five shillings for every print which shall be found in his, her, or their custody, either printed or published, and exposed to sale or otherwise disposed of, contrary to the true intent and meaning of this Act, the one moiety thereof to the King's most excellent Majesty, his heirs and successors, and the other moiety thereof to any person or persons that shall sue for the same, to be recovered in any of his Majesty's courts of record at Westminster, by action of debt, bill, plaint, or information, in which no wager of law essoign, privilege, or protection, or more than one imparlance, shall be allowed.

Not to extend to purchasers of plates from the original proprietors.

2. Provided nevertheless, that it shall and may be lawful for any person or persons who shall hereafter purchase any plate or plates for printing from the original proprietors thereof to print and reprint from the said plates without incurring any of the penalties in this Act mentioned.

Limitation of actions for anything done in pursuance of Act.

General issue.

3. And be it further enacted by the authority aforesaid, that if any action or suit shall be commenced or brought against any person or persons whatsoever for doing or causing to be done anything in pursuance of this Act, the same shall be brought within the space of three months after so doing; and the defendant and defendants in such action or suit shall or may plead the general issue, and give the special matter in evidence; and if upon such action or suit a verdict shall be given for the defendant or defendants, or if the plaintiff or plaintiffs become nonsuited, or discontinue his, her, or their action or actions, then the defendant or defendants shall have and recover full costs, for the recovery whereof he shall have the same remedy as any other defendant or defendants in any other case hath or have by law.

Limitation of actions for offences against this Act.

4. Provided always, and be it further enacted by the authority aforesaid, that if any action or suit shall be commenced or brought against any person or persons for any offence committed against this Act, the same shall be brought within the space of three months after the discovery of every such offence, and not afterwards, anything in this Act contained to the contrary notwithstanding.

5. Clause relating to J. Pyne. (Repealed 30 & 31 Vict. c. 59.)

Public Act.

6. And be it further enacted by the authority aforesaid, that this Act shall be deemed, adjudged, and taken to be a public Act, and be judicially taken notice of as such by all judges, justices, and other persons whatsoever, without specially pleading the same.

15 Geo. 3, cap. 53.

15 Geo. 3, c. 53.

An Act for enabling the two Universities in England, the four Universities in Scotland, and the several colleges of Eton, Westminster, and Winchester, to hold in perpetuity their Copyright in Books, given or bequeathed to the said Universities and Colleges for the advancement of useful learning and other purposes of education; and for amending so much of an Act of the eighth year of the reign of Queen Anne, as relates to the delivery of books to the warehouse keeper of the Stationers' Company, for the use of the several libraries therein mentioned.

Preamble.

WHEREAS authors have heretofore bequeathed or given, and may hereafter bequeath or give, the copies of books composed by them, to

or in trust for one of the two universities in that part of Great Britain called England, or to or in trust for some of the colleges or houses of learning within the same, or to or in trust for the four universities in Scotland, or to or in trust for the several colleges of Eton, Westminster, and Winchester, and in and by their several wills or other instruments of donation, have directed or may direct that the profits arising from the printing and reprinting such books shall be applied or appropriated as a fund for the advancement of learning and other beneficial purposes of education within the said universities and colleges aforesaid: and whereas such useful purposes will frequently be frustrated, unless the sole printing and reprinting of such books, the copies of which have been or shall be so bequeathed or given as aforesaid, be preserved and secured to the said universities, colleges, and houses of learning respectively in perpetuity; may it therefore please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the said universities and colleges respectively shall, at their respective presses, have, for ever, the sole liberty of printing and reprinting all such books as shall at any time heretofore have been, or (having not been heretofore published or assigned) shall at any time hereafter be bequeathed or otherwise given by the author or authors of the same respectively, or the representatives of such author or authors, to or in trust for the said universities, or to or in trust for any college or house of learning within the same, or to or in trust for the said four universities in Scotland, or to or in trust for the said colleges of Eton, Westminster, and Winchester, or any of them, for the purposes aforesaid, unless the same shall have been bequeathed or given, or shall hereafter be bequeathed or given, for any term of years, or other limited term; any law or usage to the contrary hereof in anywise notwithstanding.

Universities, &c. in England and Scotland to have, for ever, the sole right of printing, &c. such books as have been, or shall be, bequeathed to them,

unless the same have been, or shall be, given for a limited time.

2. And it is hereby further enacted that if any bookseller, printer, or other person whatsoever, from and after the twenty-fourth day of June, one thousand seven hundred and seventy-five, shall print, reprint, or import, or cause to be printed, reprinted, or imported, any such book or books; or knowing the same to be so printed or reprinted, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such book or books; then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets, being part of such book or books, to the university, college, or house of learning respectively, to whom the copy of such book or books shall have been bequeathed or given as aforesaid, who shall forthwith damask and make waste paper of them; and further, that every such offender or offenders shall forfeit one penny for every sheet which shall be found in his, her, or their custody, either printed or printing, published or exposed to sale, contrary to the true intent and meaning of this Act; the one moiety thereof to the King's most excellent Majesty, his heirs and successors, and the other moiety thereof to any person or persons who shall sue for the same; to be recovered in any of his Majesty's courts of record at Westminster, or in the Court of Session in Scotland, by action of debt, bill, plaint, or information, in which no wager of law, essoin, privilege, or protection, or more than one imparlance, shall be allowed.

After June 24, 1775, persons printing or selling such books shall forfeit the same and also 1*d.* for every sheet;

one moiety to his Majesty, and the other to the prosecutor.

3. Provided, nevertheless, that nothing in this Act shall extend to grant any exclusive right otherwise than so long as the books or

Nothing in this Act to extend to

15 Geo. 3. c. 53.

grant any exclusive right *longer than* such books are printed at the presses of the universities,

copies belonging to the said universities or colleges are printed only at their own printing-presses within the said universities or colleges respectively, and for their sole benefit and advantage; and that if any university or college shall delegate, grant, lease, or sell their copyrights, or exclusive rights of printing the books hereby granted, or any part thereof, or shall allow, permit, or authorise any person or persons, or bodies corporate, to print or reprint the same, that then the privileges hereby granted are to become void and of no effect, in the same manner as if this Act had not been made; but the said universities and colleges, as aforesaid, shall nevertheless have a right to sell such copies so bequeathed or given as aforesaid, in like manner as any author or authors now may do under the provisions of the statute of the eighth year of her Majesty Queen Anne.

Universities may sell copyrights in like manner as any author.

No person subject to penalties for printing, &c. books already bequeathed, unless they be entered before June 24, 1775.

4. And whereas many persons may through ignorance offend against this Act, unless some provision be made whereby the property of every such book as is intended by this Act to be secured to the said universities, colleges, and houses of learning within the same, and to the said universities in Scotland, and to the respective colleges of Eton, Westminster, and Winchester, may be ascertained and known, be it therefore enacted by the authority aforesaid, that nothing in this Act contained shall be construed to extend to subject any bookseller, printer, or other person whatsoever, to the forfeitures or penalties herein mentioned, for or by reason of the printing or reprinting, importing, or exposing to sale, any book or books, unless the title to the copy of such book or books, which has or have been already bequeathed or given to any of the said universities or colleges aforesaid, be entered in the register-book of the Company of Stationers kept for that purpose, in such manner as hath been usual, on or before the twenty-fourth day of June, one thousand seven hundred and seventy-five; and of all and every such book or books as may or shall hereafter be bequeathed or given as aforesaid, be entered in such register within the space of two months after any such bequest or gift shall have come to the knowledge of the vice-chancellors of the said universities, or heads of houses and colleges of learning, or of the principal of any of the said four universities respectively; for every of which entries so to be made as aforesaid, the sum of sixpence shall be paid, and no more; which said register-book shall and may, at all seasonable and convenient times, be referred to and inspected by any bookseller, printer, or other person, without any fee or reward; and the clerk of the said Company of Stationers shall, when and as often as thereunto required, give a certificate under his hand of such entry or entries, and for every such certificate may take a fee not exceeding sixpence.

All books that may hereafter be bequeathed, must be entered within two months after such bequest shall be known.

6d. to be paid for each entry in the register-book,

which may be inspected without fee.

Clerk to give a certificate being paid 6*d.*

If clerk refuse or neglect to make entry, &c.

5. And be it further enacted, that if the clerk of the said Company of Stationers for the time being shall refuse or neglect to register or make such entry or entries, or to give such certificate, being thereunto required by the agent of either of the said universities or colleges aforesaid, lawfully authorized for that purpose, then either of the said universities or colleges aforesaid, being the proprietor of such copyright or copyrights as aforesaid (notice being first given of such refusal by an advertisement in the *Gazette*), shall have the like benefit as if such entry or entries, certificate or certificates, had been duly made and given; and the clerk so refusing shall, for every such offence, forfeit twenty pounds to the proprietor or proprietors of every such copyright; to be recovered in any of his Majesty's courts of record at Westminster, or in the Court of Session in Scotland, by action of

Proprietor of such copyright to have like benefit as if such entry had been made,

and the clerk shall forfeit 20*l.*

debt, bill, plaint, or information, in which no wager of law, essoin, privilege, protection, or more than one imparlance, shall be allowed. 15 Geo. 3, c. 53.

6. [Repealed by Statute Law Revision Act, 1861.]

7. [And be it further enacted by the authority aforesaid, that if any action or suit shall be commenced or brought against any person or persons whatsoever, for doing, or causing to be done, anything in pursuance of this Act, the defendants in such action may plead the general issue, and give the special matter in evidence;] and if upon such action a verdict, or if the same shall be brought in the Court of Session in Scotland, a judgment be given for the defendant, or the plaintiff become nonsuited, and discontinue his action, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant in any case by law hath. Costs.

The part within brackets is repealed by the Statute Law Revision Act, 1861.

8. And be it further enacted by the authority aforesaid, that this Act shall be adjudged, deemed, and taken to be a public Act; and shall be judicially taken notice of as such, by all judges, justices, and other persons whatsoever, without specially pleading the same. Public Act.

17 Geo. 3, cap. 57.

An Act for more effectually securing the Property of Prints to Inventors and Engravers, by enabling them to sue for and recover Penalties in certain Cases. 17 Geo. 3, c. 57

WHEREAS an Act of Parliament passed in the eighth year of the reign of his late Majesty King George the Second, intituled "An Act for the Encouragement of the Arts of designing, engraving, and etching Historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers, during the Time therein mentioned:" And whereas by an Act of Parliament passed in the seventh year of the reign of his present Majesty, for amending and rendering more effectual the aforesaid Act, and for other purposes therein mentioned, it was (among other things) enacted, that from and after the first day of January one thousand seven hundred and sixty-seven, all and every person or persons who should engrave, etch, or work in mezzotinto or chiaro oscuro, or cause to be engraved, etched, or worked, any print taken from any picture, drawing, model, or sculpture, either ancient or modern, should have, and were thereby declared to have, the benefit and protection of the said former Act and that Act, for the term thereinafter mentioned, in like manner as if such print had been graved or drawn from the original design of such graver, etcher, or draughtsman: And whereas the said Acts have not effectually answered the purposes for which they were intended, and it is necessary, for the encouragement of artists, and for securing to them the property of and in their works, and for the advancement and improvement of the aforesaid arts, that such further provisions should be made as are hereinafter mentioned and contained: May it therefore please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from Recital of Acts Geo. 2, and Geo. 3.

17 Geo. 3, c. 57.

After June 24, 1777, if any engraver, &c. shall, within the time limited by the aforesaid Acts, engrave or etch, &c. any plate, without the consent of the proprietor, he shall be liable to damages [and double costs]

and after the twenty-fourth day of June one thousand seven hundred and seventy-seven, if any engraver, etcher, printseller, or other person, shall, within the time limited by the aforesaid Acts, or either of them, engrave, etch, or work, or cause or procure to be engraved, etched, or worked, in mezzotinto or chiaro oscuro, or otherwise, or in any other manner copy in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause or procure to be printed, reprinted, or imported for sale, or shall publish, sell, or otherwise dispose of, or cause or procure to be published, sold, or otherwise disposed of, any copy or copies of any historical print or prints, or any print or prints, of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, which hath or have been, or shall be engraved, etched, drawn, or designed, in any part of Great Britain, without the express consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of and attested by two or more credible witnesses, then every such proprietor or proprietors shall and may, by and in a special action upon the case, to be brought against the person or persons so offending, recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry thereon, shall give or assess [together with double costs of suit].

The part within brackets is repealed by the Statute Law Revision Act, 1861.

32 GEO. 3, CAP. 60.

[Fox's Libel Act.]

32 Geo. 3, c. 60.

An Act to remove Doubts respecting the Functions of Juries in Cases of Libel.

Preamble.

WHEREAS doubts have arisen whether on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the king and the defendant or defendants, on the plea of not guilty pleaded, it be competent to the jury impanelled to try the same to give their verdict upon the whole matter in issue: Be it therefore declared and enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that, on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed, by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.

On trial of an indictment for a libel, jury may give a general verdict upon the whole matter put in issue, and shall not be required by the court to find the defendant guilty merely on proof of publication, and of the sense ascribed to it in the information.

2. Provided always, that, on every such trial, the court or judge before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases.

But court shall give their opinion and directions on matter in issue, as in other criminal cases.

3. Provided also, that nothing herein contained shall extend or be construed to extend, to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases. 52 Geo. 3, c. 60. Jury may find a special verdict.

4. Provided also, that in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this Act; anything herein contained to the contrary notwithstanding. Defendants may move in arrest of judgment, as before passing this Act.

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54 Geo. 3. cap. 56.

An Act to amend and render more effectual an Act of His present Majesty, for encouraging the Art of making new Models and Casts of Busts, and other things therein mentioned; and for giving further Encouragement to such Arts.—[18th *May*, 1814.] 54 Geo. 3, c. 56.

Whereas by an Act, passed in the thirty-eighth year of the reign of his present Majesty, intituled "An Act for encouraging the Art of making new Models and Casts of Busts, and other things therein mentioned;" the sole right and property thereof were vested in the original proprietors, for a time therein specified: And whereas the provisions of the said Act having been found ineffectual for the purposes thereby intended, it is expedient to amend the same, and to make other provisions and regulations for the encouragement of artists, and to secure to them the profits of and in their works, and for the advancement of the said arts: May it therefore please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this Act, every person or persons who shall make or cause to be made any new and original sculpture, or model, or copy, or cast of the human figure or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals, or of any part or parts of any animal combined with the human figure or otherwise, or of any subject being matter of invention in sculpture, or of any alto or basso relievo representing any of the matters or things hereinbefore mentioned, or any cast from nature of the human figure, or of any part or parts of the human figure, or of any cast from nature of any animal, or of any part or parts of any animal, or of any such subject containing or representing any of the matters and things hereinbefore mentioned, whether separate or combined, shall have the sole right and property of all and in every such new and original sculpture, model, copy and cast of the human figure or human figures, and of all and in every such bust or busts, and of all and in every such part or parts of the human figure, clothed in drapery or otherwise, and of all and in every such new and original sculpture, model, copy and cast, representing any animal or animals, and of all and in every such work representing any part or parts of any animal combined with the human figure or otherwise, and of all and in every such new and original sculpture, model, copy and cast of any subject, being matter of invention in sculpture, and of all and in every such new and original sculpture, model copy and cast in alto or basso

38 Geo. 3, c. 71.

The sole right and property of all new and original sculpture, models, copies, and casts, vested in the proprietors for fourteen years.

54 Geo. 3, c. 56.

reliefo, representing any of the matters or things hereinbefore mentioned, and of every such cast from nature, for the term of fourteen years from first putting forth or publishing the same; provided, in all and in every case, the proprietor or proprietors do cause his, her, or their name or names, with the date, to be put on all and every such new and original sculpture, model, copy or cast, and on every such cast from nature, before the same shall be put forth or published.

Works published under the recited Act, vested in the proprietors for fourteen years.

2. And be it further enacted, that the sole right and property of all works, which have been put forth or published under the protection of the said recited Act, shall be extended, continued to and vested in the respective proprietors thereof, for the term of fourteen years, to commence from the date when such last-mentioned works respectively were put forth or published.

Persons putting forth pirated copies or pirated casts, may be prosecuted.

3. And be it further enacted, that if any person or persons shall, within such term of fourteen years, make or import, or cause to be made or imported, or exposed to sale, or otherwise disposed of, any pirated copy or pirated cast of any such new and original sculpture, or model or copy, or cast of the human figure or human figures, or of any such bust or busts, or of any such part or parts of the human figure clothed in drapery or otherwise, or of any such work of any animal or animals, or of any such part or parts of any animal or animals combined with the human figure or otherwise, or of any such subject being matter of invention in sculpture, or of any such alto or basso relievo representing any of the matters or things hereinbefore mentioned, or of any such cast from nature as aforesaid, whether such pirated copy or pirated cast be produced by moulding or copying from, or imitating in any way, any of the matters or things put forth or published under the protection of this Act, or of any works which have been put forth or published under the protection of the said recited Act, the right and property whereof is and are secured, extended and protected by this Act, in any of the cases as aforesaid, to the detriment, damage, or loss of the original or respective proprietor or proprietors of any such works so pirated; then and in all such cases the said proprietor or proprietors, or their assignee or assignees, shall and may, by and in a special action upon the case to be brought against the person or persons so offending, receive such damages as a jury on a trial of such action shall give or assess, together with double costs of suit.

Damages and double costs.

Purchasers of copyright secured in the same.

4. Provided nevertheless, that no person or persons who shall or may hereafter purchase the right or property of any new and original sculpture or model, or copy or cast, or of any cast from nature, or of any of the matters and things published under or protected by virtue of this Act, of the proprietor or proprietors, expressed in a deed in writing signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of and attested by two or more credible witnesses, shall be subject to any action for copying or casting, or vending the same, anything contained in this Act to the contrary notwithstanding.

Limitation of actions.

5. Provided always, and be it further enacted, that all actions to be brought as aforesaid, against any person or persons for any offence committed against this Act shall be commenced within six calendar months next after the discovery of every such offence, and not afterwards.

An additional term of fourteen years, in case the maker of the

6. Provided always, and be it further enacted, that from and immediately after the expiration of the said term of fourteen years, the sole right of making and disposing of such new and original

sculpture, or model, or copy, or cast of any of the matters or things hereinbefore mentioned, shall return to the person or persons who originally made or caused to be made the same, if he or they shall be then living, for the further term of fourteen years, [excepting in the case or cases where such person or persons shall by sale or otherwise have divested himself, herself or themselves, of such right of making or disposing of any new and original sculpture, or model, or copy, or cast of any of the matters or things hereinbefore mentioned, previous to the passing of this Act.] 54 Geo. 3, c. 56. original sculpture, &c. shall be living.

The part within brackets is repealed by the Statute Law Revision Act, 1873.

60 Geo. 3, cap. 8.

An Act for the more effectual Prevention and Punishment of Blasphemous and Seditious Libels.—[30*th December*, 1819.] 60 Geo. 3, c. 8.

Whereas it is expedient to make more effectual provision for the punishment of blasphemous and seditious libels; be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act, in every case in which any verdict or judgment by default shall be had against any person for composing, printing, or publishing any blasphemous libel, or any seditious libel, tending to bring into hatred or contempt the person of his Majesty, his heirs or successors, or the Regent, or the Government and Constitution of the United Kingdom as by law established, or either House of Parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in Church or State as by law established, otherwise than by lawful means, it shall be lawful for the judge, or the court before whom or in which such verdict shall have been given, or the court in which such judgment by default shall be had, to make an order for the seizure and carrying away and detaining in safe custody, in such manner as shall be directed in such order, all copies of the libel which shall be in the possession of the person against whom such verdict or judgment shall have been had, or in the possession of any other person named in the order for his use; evidence upon oath having been previously given to the satisfaction of such court or judge, that a copy or copies of the said libel is or are in the possession of such other person for the use of the person against whom such verdict or judgment shall have been had as aforesaid; and in every such case it shall be lawful for any justice of the peace, or for any constable or other peace officer acting under any such order, or for any person or persons acting with or in aid of any such justice of the peace, constable, or other peace officer, to search for any copies of such libel in any house, building, or other place whatsoever belonging to the person against whom any such verdict or judgment shall have been had, or to any other person so named, in whose possession any copies of any such libel, belonging to the person against whom any such verdict or judgment shall have been had, shall be; and in case admission shall be refused or not obtained within a reasonable time after it shall have been first demanded, to enter by force by day into any such house, building, or place whatsoever, and to carry away all copies of the libel there found, and to

Court to make order for the seizure of copies of the libel in possession of the persons against whom verdicts shall have been had, &c.

60 Geo. 3, c. 9.

detain the same in safe custody until the same shall be restored under the provisions of this Act, or disposed of according to any further order made in relation thereto.

Copies of libels so seized to be restored, if judgment for defendant; otherwise to be disposed of as the court shall direct.

2. And be it further enacted, that if in any such case as aforesaid judgment shall be arrested, or if, after judgment shall have been entered, the same shall be reversed upon any writ of error, all copies so seized shall be forthwith returned to the person or persons from whom the same shall have been so taken as aforesaid, free of all charge and expense, and without the payment of any fees whatever; and in every case in which final judgment shall be entered upon the verdict so found against the person or persons charged with having composed, printed, or published such libel, then all copies so seized shall be disposed of as the court in which such judgment shall be given shall order and direct.

Court of Justiciary in Scotland to make order for seizing copies of libels, &c.

3. Provided always, and be it enacted, That in Scotland, in every case in which any person or persons shall be found guilty before the court of justiciary, of composing, printing, or publishing any blasphemous or seditious libel, or where sentence of fugitation shall have been pronounced against any person or persons, in consequence of their failing to appear to answer to any indictment charging them with having composed, printed, or published any such libel, then and in either of such cases, it shall and may be lawful for the said court to make an order for the seizure, carrying away, and detaining in safe custody, all copies of the libel in the possession of any such person or persons, or in the possession of any other person or persons named in such order, for his or their use, evidence upon oath having been previously given to the satisfaction of such court or judge, that a copy or copies of the said libel is or are in the possession of such other person for the use of the person against whom such verdict or judgment shall have been had as aforesaid; and every such order so made shall and may be carried into effect, in such and the same manner as any order made by the Court of Justiciary, or any circuit Court of Justiciary, may be carried into effect according to the law and practice of Scotland: Provided always, that in the event of any person or persons being reponed against any such sentence of fugitation, and being thereafter acquitted, all copies so seized shall be forthwith returned to the person or persons from whom the same shall have been so taken as aforesaid; and in all other cases, the copies so seized shall be disposed of in such manner as the said court may direct.

Punishment of persons convicted of second offence.

4. And be it further enacted, that if any person shall, after the passing of this Act, be legally convicted of having after the passing of this Act composed, printed, or published any blasphemous libel or any such seditious libel as aforesaid, and shall, after being so convicted, offend a second time, and be thereof legally convicted before any commission of oyer and terminer or gaol delivery, or in his Majesty's Court of King's Bench, such person may, on such second conviction, be adjudged, at the discretion of the court, either to suffer such punishment as may now by law be inflicted in cases of high misdemeanors [or to be banished from the United Kingdom, and all other parts of his Majesty's dominions, for such term of years as the court in which such conviction shall take place shall order].

The part within brackets is repealed by 11 Geo. 4 and 1 Will. 4, c. 73.

5. Repealed by 11 Geo. 4 and 1 Will. 4, c. 73.

6. Repealed by 11 Geo. 4 and 1 Will. 4, c. 73.

Certificate to be given of conviction of former libel.

7. And be it further enacted, that the clerk of assize, clerk of the peace, or other clerk or officer of the court having the custody of the records where any offender shall have been convicted of having composed, printed, or published any blasphemous or seditious libel, shall, upon request of the prosecutor on His Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, to the justices of assize, oyer and terminer, great sessions, or gaol delivery, where such offender or offenders shall be indicted for any second offence of composing, printing, or publishing any blasphemous or seditious libel, for which certificate six shillings and eightpence and no more shall be paid, and which certificate shall be sufficient proof of the conviction of such offender.

Limitation of actions.

General issue may be pleaded.

8. And be it further enacted, that any action and suit which shall be brought or commenced against any justice or justices of the peace, constable, peace officer, or other person or persons, within that part of Great Britain called England, or in Ireland, for anything done or acted in pursuance of this Act, shall be commenced within six calendar months next after the fact committed, and not afterwards; [and the venue in every such action or suit shall be laid in the proper county where the fact was committed, and not elsewhere; and the defendant or defendants in every such action or suit may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon]; and if such action or suit shall be brought or commenced after the time limited for bringing the same, or the venue shall be laid in any other place than as aforesaid, then the jury shall find a verdict for the defendant or defendants; and in such case, or if the jury shall find a verdict for the defendant or defendants upon the merits, or if the plaintiff or plaintiffs shall become nonsuit, or discontinue, his, her, or their actions after appearance, or if, upon demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall have double costs, which he or they shall and may recover in such and the same manner as any defendant can by law in other cases.

Double costs.

From the words "and the venue" to "thereupon" is repealed by the Statute Law Revision Act, 1873, and also the whole section so far as relates to justices of the peace.

Limitation of actions, &c. in Scotland.

9. And be it further enacted, that every action and suit which shall be brought or commenced against any person or persons in Scotland, for anything done or acted in pursuance of this Act, shall in like manner be commenced within six calendar months after the fact committed, and not afterwards, and shall be brought in the Court of Session in Scotland; and the defender or defenders may plead that the matter complained of was done in pursuance of this Act, and may give this Act and the special matter in evidence; and if such action or suit shall be brought or commenced after the time limited for bringing the same, then the same shall be dismissed; and in such case, or if the defender or defenders shall be assoilzied, or the pursuer or pursuers shall suffer the action or suit to fall asleep, or a decision shall be pronounced against the pursuer or pursuers upon the relevancy, the defender or defenders shall have double costs, which he or they shall and may receive in such and the same manner as any defender can by law recover costs or expenses in other cases.

Double costs.

Not to alter the law of Scotland

10. Provided always, and be it further enacted, that nothing in this Act contained shall be held or considered as in any respect altering the

6o Geo. 3, c. 8. In respect to punishment for libels.

law or practice of Scotland regarding the punishment of persons convicted of composing, printing, publishing, or circulating any blasphemous or seditious libel.

11. Repealed; Statute Law Revision Act, 1873.

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3 Will. 4, cap. 15.

3 Will. 4, c. 15.

An Act to amend the Laws relating to Dramatic Literary Property.
[10*th June*, 1833.]

54 Geo. 3, c. 156.

Whereas by an Act passed in the fifty-fourth year of the reign of his late Majesty King George the Third intituled "An Act to amend the several Acts for the Encouragement of Learning, by securing the Copies and Copyright of printed Books to the Authors of such Books, or their Assigns," it was amongst other things provided and enacted, that from and after the passing of the said Act the author of any book or books composed, and not printed or published, or which should thereafter be composed and printed and published, and his assignee or assigns, should have the sole liberty of printing and reprinting such book or books for the full term of twenty-eight years, to commence from the day of first publishing the same, and also, if the author should be living at the end of that period, for the residue of his natural life: and whereas it is expedient to extend the provisions of the said Act: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, or which hereafter shall be composed, and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production, printed and published within ten years before the passing of this Act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of passing this Act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof: provided nevertheless, that nothing in this Act contained shall prejudice, alter, or affect the right or authority of any person to represent or cause to be represented, at any place or places of dramatic entertainment whatsoever, any such production as aforesaid, in all cases in which the author thereof or his assignee shall, previously to the passing of this Act, have given his consent to or authorised such representation, but that such sole liberty of the author or his assignee shall be subject to such right or authority.

The author of any dramatic piece shall have as his property the sole liberty of representing it or causing it to be represented at any place of dramatic entertainment.

Proviso as to cases where, previous to the passing of this Act, a consent has been given.

2. And be it further enacted, That if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act, or right of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this Act, to be recovered, together with double costs of suit, by such author or other proprietors, in any court having jurisdiction in such cases in that part of the said United Kingdom or of the British Dominions in which the offence shall be committed; and in every such proceeding where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same. 3 Will. 4, c. 15. Penalty on persons performing pieces contrary to this Act.

3. Provided nevertheless, and be it further enacted, That all actions or proceedings for any offence or injury that shall be committed against this Act shall be brought, sued, and commenced within twelve calendar months next after such offence committed, or else the same shall be void and of no effect. Limitation of actions.

4. And be it further enacted, That whenever authors, persons, offenders, or others are spoken of in this Act in the singular number or in the masculine gender, the same shall extend to any number of persons and to either sex. Explanation of words.

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5 & 6 Will. 4, cap. 65.

An Act for preventing the Publication of Lectures without Consent. [9th *September*, 1835.]

5 & 6 Will. 4, c. 65.

Whereas printers, publishers, and other persons have frequently taken the liberty of printing and publishing lectures delivered upon divers subjects without the consent of the authors of such lectures, or the persons delivering the same in public, to the great detriment of such authors and lecturers: Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the first day of September, one thousand eight hundred and thirty-five, the author of any lecture or lectures, or the person to whom he hath sold or otherwise conveyed the copy thereof, in order to deliver the same in any school, seminary, institution, or other place, or for any other purpose, shall have the sole right and liberty of printing and publishing such lecture or lectures; and that if any person shall, by taking down the same in shorthand or otherwise in writing, or in any other way, obtain or make a copy of such lecture or lectures, and shall print or lithograph or otherwise copy and publish the same, or cause the same to be printed, lithographed, or otherwise copied and published, without leave of the author thereof, or of the person to whom the author thereof hath sold or otherwise conveyed the same, and every person who, knowing the same to have been printed or Authors of lectures, or their assigns, to have the sole right of publishing them. Penalty on other persons publishing, &c. lectures without leave.

5 & 6 Will. 4, c. 65.

copied and published without such consent, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such lecture or lectures, shall forfeit such printed or otherwise copied lecture or lectures, or parts thereof, together with one penny for every sheet thereof which shall be found in his custody, either printed, lithographed, or copied, or printing, lithographing, or copying, published, or exposed to sale, contrary to the true intent and meaning of this Act, the one moiety thereof to his Majesty, his heirs or successors, and the other moiety thereof to any person who shall sue for the same, to be recovered in any of his Majesty's Courts of Record in Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoign, privilege, or protection, or more than one imparlance, shall be allowed.

Penalty on printers or publishers of newspapers publishing lectures without leave.

2. And be it further enacted, that any printer or publisher of any newspaper who shall, without such leave as aforesaid, print and publish in such newspaper any lecture or lectures, shall be deemed and taken to be a person printing and publishing without leave within the provisions of this Act, and liable to the aforesaid forfeitures and penalties in respect of such printing and publishing.

Persons having leave to attend lectures not on that account licensed to publish them.

3. And be it further enacted, That no person allowed for certain fee and reward, or otherwise, to attend and be present at any lecture delivered in any place, shall be deemed and taken to be licensed or to have leave to print, copy, and publish such lectures only because of having leave to attend such lecture or lectures.

Act not to prohibit the publishing of lectures after expiration of the copyright.

4. Provided always, That nothing in this Act shall extend to prohibit any person from printing, copying, and publishing any lecture or lectures which have or shall have been printed and published with leave of the authors thereof or their assignees, and whereof the time hath or shall have expired within which the sole right to print and publish the same is given by an Act passed in the eighth year of the reign of Queen Anne, intituled "An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such copies during the times therein mentioned," and by another Act passed in the fifty-fourth year of the reign of King George the Third, intituled "An Act to amend the several Act for the Encouragement of Learning, by securing the Copies and Copyright of printed Books to the Authors of such Books, or their Assigns," or to any lectures which have been printed or published before the passing of this Act.

8 Anne c. 19.

54 Geo. 3. c. 156.

Act not to extend to lectures delivered in unlicensed places, &c.

5. Provided further, That nothing in this Act shall extend to any lecture or lectures, or the printing, copying, or publishing any lecture or lectures, or parts thereof, of the delivering of which notice in writing shall not have been given to two justices living within five miles from the place where such lecture or lectures shall be delivered two days at least before delivering the same, or to any lecture or lectures delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation; and that the law relating thereto shall remain the same as if this Act had not been passed.

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6 & 7 Will. 4, cap. 59.

6 & 7 Will. 4, c. 59.

An Act to extend the Protection of Copyright in Prints and Engravings to Ireland.—[13*th August*, 1836.]

17 Geo. 3, c. 57.

Whereas an Act was passed in the seventeenth year of the reign of his late Majesty King George the Third, intituled "An Act for more

effectually securing the Property of Prints to Inventors and Engravers, by enabling them to sue for and recover Penalties in certain cases:" and whereas it is desirable to extend the provisions of the said Act to Ireland; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this Act all the provisions contained in the said recited Act of the seventeenth year of the reign of his late Majesty King George the Third, and of all the other Acts therein recited, shall be and the same are hereby extended to the United Kingdom of Great Britain and Ireland.

6 & 7 Will. 4, c. 59.

Provisions of recited Act extended to Ireland.

2. And be it further enacted, That from and after the passing of this Act, if any engraver, etcher, printseller, or other person shall, within the time limited by the aforesaid recited Acts, engrave, etch, or publish, or cause to be engraved, etched, or published, any engraving or print of any description whatever, either in whole or in part, which may have been or which shall hereafter be published in any part of Great Britain or Ireland, without the express consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him, her or them respectively, with his, her, or their own hand or hands, in the presence of and attested by two or more credible witnesses, then every such proprietor shall and may, by and in a separate action upon the case, to be brought against the person so offending in any court of law in Great Britain or Ireland, recover such damages as a jury on the trial of such action or on the execution of a writ of inquiry thereon shall give or assess, together with double costs of suit.

Penalty on engraving or publishing any print without consent of proprietor.

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3 Vict. cap. 9.

An Act to give summary Protection to Persons employed in the Publication of Parliamentary Papers.—[*14th April*, 1840.]

3 Vict. c. 9.

Whereas it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament as such House of Parliament may deem fit or necessary to be published: And whereas obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by or acting under the authority of the Houses of Parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner hereinafter mentioned: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall and may be lawful for any person or persons, who now is or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceeding commenced or prosecuted in any manner soever, for or on account or in respect of the publication of any such report, paper, votes, or proceedings by such person or persons, or by his, her, or their

Proceedings, criminal or civil, against persons for publication of papers printed by order of Parliament, to be stayed, upon

3 Vict. c. 9.

delivery of a certificate and affidavit to the effect that such publication is by order of either House of Parliament.

servant or servants, by or under the authority of either House of Parliament, to bring before the court in which such proceeding shall have been or shall be so commenced or prosecuted, or before any judge of the same (if one of the superior courts at Westminster), first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords, for the time being, or of the Clerk of the Parliaments, or of the Speaker of the House of Commons, or of the Clerk of the same House, stating that the report, paper, votes, or proceedings, as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons, or by his, her, or their servant or servants, by order or under the authority of the House of Lords or of the House of Commons, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be, and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act.

Proceedings to be stayed when commenced in respect of a copy of an authenticated report, &c.

2. And be it enacted, That in case of any civil or criminal proceeding hereafter to be commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes, or proceedings, it shall be lawful for the defendant or defendants at any stage of the proceedings to lay before the court or judge such report, paper, votes, or proceedings, and such copy, with an affidavit verifying such report, paper, votes, or proceedings, and the correctness of such copy, and the court or judge shall immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act.

In proceedings for printing any extract or abstract of a paper, it may be shown that such extract was *bonâ fide* made.

3. And be it enacted, that it shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any extract from or abstract of such report, paper, votes, or proceedings, to give in evidence under the general issue such report, paper, votes, or proceedings, and to show that such extract or abstract was published *bonâ fide* and without malice; and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant or defendants.

Act not to affect the privileges of Parliament.

4. Provided always, and it is hereby expressly declared and enacted, that nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever.

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5 & 6 Vict. cap. 45.

5 & 6 Vict. c. 45. *An Act to amend the Law of Copyright.*—[*1st July*, 1842.]

1. Repealed by Statute Law Revision (2) Act of 1874, 37 & 38 Vict. c. 96.

Interpretation of Act.

2. And be it enacted, that in the construction of this Act the word "book" shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published; that the words "dramatic piece" shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment; that the word "copyright" shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied;

that the words "personal representative" shall be construed to mean and include every executor, administrator, and next of kin entitled to administration; that the word "assigns" shall be construed to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise; that the words "British Dominions" shall be construed to mean and include all parts of the United Kingdom of Great Britain and Ireland, the Islands of Jersey and Guernsey, all parts of the East and West Indies, and all the colonies, settlements, and possessions of the Crown which now are or hereafter may be acquired; and that whenever in this Act, in describing any person, matter, or thing, the word importing the singular number or the masculine gender only is used, the same shall be understood to include and to be applied to several persons as well as one person, and females as well as males, and several matters or things as well as one matter or thing, respectively, unless there shall be something in the subject or context repugnant to such construction.

Endurance of term of copyright in any book hereafter to be published in the lifetime of the author;

3. And be it enacted, that the copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further time of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: Provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns.

If published after the author's death.

In cases of subsisting copyright, the term to be extended, except when it shall belong to an assignee for other consideration than natural love and affection; in which case it shall cease at the expiration of the present term, unless its extension be agreed to between the proprietor and the author.

4. And whereas it is just to extend the benefits of this Act to authors of books published before the passing thereof, and in which copyright still subsists; Be it enacted, that the copyright which at the time of passing this Act shall subsist in any book theretofore published (except as hereinafter mentioned) shall be extended and endure for the full term provided by this Act in cases of books thereafter published, and shall be the property of the person who at the time of passing of this Act shall be the proprietor of such copyright: Provided always, that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this Act, but shall endure for the term which shall subsist therein at the time of passing of this Act, and no longer, unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright, shall, before the expiration of such term, consent and agree to accept the benefits of this Act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to this Act annexed to be entered in the book of registry hereinafter directed to be kept, in which case such copyright shall endure for the full term by this Act provided in cases of books to be published after the passing of this Act, and shall be the property of such person or persons as in such minute shall be expressed.

Judicial Committee of the

5. And whereas it is expedient to provide against the suppression of books of importance to the public; be it enacted, that it shall be

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Privy Council may license the republication of books which the proprietor refuses to republish after death of the author.

lawful for the Judicial Committee of Her Majesty's Privy Council, on complaint made to them that the proprietor of the copyright in any book after the death of its author has refused to republish or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a licence to such complainant to publish such book, in such manner and subject to such conditions as they may think fit, and that it shall be lawful for such complainant to publish such book according to such licence.

Copies of books published after the passing of this Act, and of all subsequent editions, to be delivered within certain times at the British Museum.

6. And be it enacted, that a printed copy of the whole of every book which shall be published after the passing of this Act, together with all maps, prints, or other engravings belonging thereto, finished and coloured in the same manner as the best copies of the same shall be published, and also of any second or subsequent edition which shall be so published with any additions or alterations, whether the same shall be in letter-press, or in the maps, prints, or other engravings belonging thereto, and whether the first edition of such book shall have been published before or after the passing of this Act, and also of any second or subsequent edition of every book of which the first or some preceding edition shall not have been delivered for the use of the British Museum, bound, sewed, or stitched together, and upon the best paper on which the same shall be printed, shall, within one calendar month after the day on which any such book shall first be sold, published, or offered for sale within the bills of mortality, or within three calendar months if the same shall first be sold, published, or offered for sale in any other part of the United Kingdom, or within twelve calendar months after the same shall first be sold, published, or offered for sale in any other part of the British dominions, be delivered, on behalf of the publisher thereof, at the British Museum.

Mode of delivering at the British Museum.

7. And be it enacted, that every copy of any book which under the provisions of this Act ought to be delivered as aforesaid shall be delivered at the British Museum between the hours of ten in the forenoon and four in the afternoon on any day except Sunday, Ash-Wednesday, Good Friday, and Christmas Day, to one of the officers of the said museum, or to some person authorized by the trustees of the said museum to receive the same, and such officer or other person receiving such copy is hereby required to give a receipt in writing for the same, and such delivery shall to all intents and purposes be deemed to be good and sufficient delivery under the provisions of this Act.

A copy of every book to be delivered within a month after demand to the officer of the Stationers' Company, for the following libraries: the Bodleian at Oxford, the Public Library at Cambridge, the Faculty of Advocates at Edinburgh, and that of Trinity College, Dublin.

8. And be it enacted, that a copy of the whole of every book, and of any second or subsequent edition of every book containing additions and alterations, together with all maps and prints belonging thereto, which after the passing of this Act shall be published, shall, on demand thereof in writing, left at the place of abode of the publisher thereof, at any time within twelve months next after the publication thereof, under the hand of the officer of the Company of Stationers who shall from time to time be appointed by the said company for the purposes of this Act, or under the hand of any other person thereto authorized by the persons or bodies politic and corporate, proprietors and managers of the libraries following (*videlicet*), the Bodleian Library at Oxford, the Public Library at Cambridge, the Library of the Faculty of Advocates at Edinburgh, the Library of the College of the Holy and Undivided Trinity of Queen Elizabeth near Dublin, be delivered, upon the paper of which the largest number of copies of such book or edition shall be printed for sale, in the like condition as the copies prepared for sale by the publisher

thereof respectively, within one month after demand made thereof in writing as aforesaid, to the said officer of the said Company of Stationers for the time being, which copies the said officer shall and he is hereby required to receive at the hall of the said company, for the use of the library for which such demand shall be made within such twelve months as aforesaid; and the said officer is hereby required to give a receipt in writing for the same, and within one month after any such book shall be so delivered to him as aforesaid to deliver the same for the use of such library.

Publishers may deliver the copies to the libraries, instead of at the Stationers' Company.

9. Provided also, and be it enacted, that if any publisher shall be desirous of delivering the copy of such book as shall be demanded on behalf of any of the said libraries at such library, it shall be lawful for him to deliver the same at such library, free of expense, to such librarian or other person authorized to receive the same (who is hereby required in such case to receive and give a receipt in writing for the same), and such delivery shall to all intents and purposes of this Act be held as equivalent to a delivery to the said officer of the Stationers' Company.

Penalty for default in delivering copies for the use of the libraries.

10. And be it enacted, that if any publisher of any such book, or of any second or subsequent edition of any such book, shall neglect to deliver the same, pursuant to this Act, he shall for every such default forfeit besides the value of such copy of such book or edition which he ought to have delivered, a sum not exceeding five pounds, to be recovered by the librarian or other officer (properly authorized) of the library for the use whereof such copy should have been delivered, in a summary way, on conviction before two justices of the peace for the county or place where the publisher making default shall reside, or by action of debt or other proceeding of the like nature, at the suit of such librarian or other officer, in any court of record in the United Kingdom, in which action, if the plaintiff shall obtain a verdict, he shall recover his costs reasonably incurred, to be taxed as between attorney and client.

Book of registry to be kept at Stationers' Hall.

11. And be it enacted, that a book of registry, wherein may be registered, as hereinafter enacted, the proprietorship in the copyright of books, and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licenses affecting such copyright, shall be kept at the hall of the Stationers' Company, by the officer appointed by the said company for the purposes of this Act, and shall at all convenient times be open to the inspection of any person, on payment of One shilling for every entry which shall be searched for or inspected in the said book; and that such officer shall, whenever thereunto reasonably required, give a copy of any entry in such book, certified under his hand, and impressed with the stamp of the said company, to be provided by them for that purpose, and which they are hereby required to provide, to any person requiring the same, on payment to him of the sum of five shillings; and such copies so certified and impressed shall be received in evidence in all courts, and in all summary proceedings, and shall be *primâ facie* proof of the proprietorship or assignment of copyright or license as therein expressed, but subject to be rebutted by other evidence, and in the case of dramatic or musical pieces shall be *primâ facie* proof of the right of representation or performance, subject to be rebutted as aforesaid.

Making a false entry in the book of registry a misdemeanour.

12. And be it enacted, that if any person shall wilfully make or cause to be made any false entry in the registry book of the Stationers' Company, or shall wilfully produce or cause to be tendered in evidence any paper falsely purporting to be a copy of any entry in

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the said book, he shall be guilty of an indictable misdemeanour, and shall be punished accordingly.

Entries of copyright may be made in the book of registry.

13. And be it enacted, that after the passing of this Act it shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the registry book of the Stationers' Company of the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright, in the form in that behalf given in the schedule to this Act annexed, upon payment of the sum of five shillings to the officer of the said company; and that it shall be lawful for every such registered proprietor to assign his interest, or any portion of his interest therein, by making entry in the said book of registry of such assignment, and of the name and place of abode of the assignee thereof, in the form given in that behalf in the said schedule, on payment of the like sum; and such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed.

Persons aggrieved by any entry in the book of registry may apply to a court of law in term, or judge in vacation, who may order such entry to be varied or expunged.

14. And be it enacted, that if any person shall deem himself aggrieved by any entry made under colour of this Act in the said book of registry, it shall be lawful for such person to apply by motion to the Court of Queen's Bench, Court of Common Pleas, or Court of Exchequer, in term time, or to apply by summons to any judge of either of such courts in vacation, for an order that such entry may be expunged or varied; and that upon any such application by motion or summons to either of the said courts, or to a judge as aforesaid, such court or judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to such court or judge shall seem just; and the officer appointed by the Stationers' Company for the purposes of this Act shall, on the production to him of any such order for expunging or varying any such entry, expunge or vary the same according to the requisitions of such order.

Remedy for the piracy of books by action on the case.

15. And be it enacted, that if any person shall, in any part of the British dominions, after the passing of this Act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession, for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in any court of record in that part of the British dominions in which the offence shall be committed. Provided always, that in Scotland such offender shall be liable to an action in the Court of Session in Scotland, which shall and may be brought and prosecuted in the same manner in which any other action of damages to the like amount may be brought and prosecuted there.

In actions for piracy the defendant to give notice of the objections to the plaintiff's title on

16. And be it enacted, that after the passing of this Act, in any action brought within the British dominions against any person for printing any such book for sale, hire, or exportation, or for importing, selling, publishing, or exposing to sale or hire, or causing to be imported, sold, published, or exposed to sale or hire, any such book,

the defendant, on pleading thereto, shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action; and if the nature of his defence be, that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person who he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published, otherwise the defendant in such action shall not at the trial or hearing of such action be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objection stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication with the title, time, and place specified in such notice.

Which he means to rely.

17. And be it enacted, that after the passing of this Act it shall not be lawful for any person, not being the proprietor of the copyright, or some person authorized by him, to import into any part of the United Kingdom, or into any other part of the British dominions, for sale or hire, any printed book first composed or written or printed and published in any part of the said United Kingdom, wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions; and if any person, not being such proprietor or person authorized as aforesaid, shall import or bring, or cause to be imported or brought, for sale or hire, any such printed book, into any part of the British dominions, contrary to the true intent and meaning of this Act, or shall knowingly sell, publish, or expose to sale or let to hire, or have in his possession for sale or hire, any such book, then every such book shall be forfeited, and shall be seized by any officer of customs or excise, and the same shall be destroyed by such officer; and every person so offending, being duly convicted thereof before two justices of the peace for the county or place in which such book shall be found, shall also for every such offence forfeit the sum of ten pounds, and double the value of every copy of such book which he shall so import or cause to be imported into any part of the British dominions, or shall knowingly sell, publish, or expose to sale or let to hire, or shall cause to be sold, published, or exposed to sale or let to hire, or shall have in his possession for sale or hire, contrary to the true intent and meaning of this Act, five pounds to the use of such officer of customs or excise, and the remainder of the penalty to the use of the proprietor of the copyright in such book.

No person except the proprietor, &c. shall import into the British Dominions for sale or hire any book first composed, &c. within the United Kingdom, and reprinted elsewhere, under penalty of forfeiture thereof, and also of 10*l.* and double the value.

Books may be seized by officers of customs or excise.

18. And be it enacted, that when any publisher or other person shall, before or at the time of the passing of this Act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles,

As to the copyright in encyclopædias, periodicals, and works published in a series, reviews, or magazines.

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or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act; except only that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act: Provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assigns: Provided also, that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid.

Proviso for authors who have reserved the right of publishing their articles in a separate form.

Proprietors of encyclopædias, periodicals, and works published in a series, may enter at once at Stationers' Hall, and thereon have the benefit of the registration of the whole.

19. And be it enacted, that the proprietor of the copyright in any encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts, shall be entitled to all the benefits of the registration at Stationers Hall under this Act, on entering in the said book of registry the title of such encyclopædia, review, periodical work, or other work published in a series of books or parts, the time of the first publication of the first volume, number, or part thereof, or of the first number or volume first published after the passing of this Act in any such work which shall have been published heretofore, and the name and place of abode of the proprietor thereof, and of the publisher thereof, when such publisher shall not also be the proprietor thereof.

The provisions of 3 & 4 Will. 4, c. 15, extended to musical compositions, and the term of copyright, as provided by this Act, applied to the liberty of representing dramatic pieces and musical compositions.

20. And whereas an Act was passed in the third year of the reign of his late Majesty, to amend the law relating to dramatic literary property, and it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that Act to the full time by this Act provided for the continuance of copyright: And whereas it is expedient to extend to musical compositions the benefits of that Act, and also of this Act; be it therefore enacted, that the provisions of the said Act of his late Majesty, and of this Act, shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof and his assigns, for the term in this Act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copy-

right, and of registering the same, shall apply to the liberty of repre- 5 & 6 Vict. c. 45.
senting or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this Act, to the first publication of any book: Provided always, that in case of any dramatic piece, or musical composition in manuscript, it shall be sufficient for the person having the sole liberty of representing or performing, or causing to be represented or performed the same, to register only the title thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor thereof, and the time and place of its first representation or performance.

Proprietors of right of dramatic representations shall have all the remedies given by 3 & 4 Will. 4, c. 15.

21. And be it enacted, that the person who shall at any time have the sole liberty of representing such dramatic piece or musical composition shall have and enjoy the remedies given and provided in the said Act of the third and fourth years of the reign of his late Majesty King William the Fourth, passed to amend the laws relating to dramatic literary property, during the whole of his interest therein, as fully as if the same were re-enacted in this Act.

Assignment of copyright of a dramatic piece not to convey the right of representation.

22. And be it enacted, that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment.

Books pirated shall become the property of the proprietor of the copyright, and may be recovered by action.

23. And be it enacted, that all copies of any book wherein there shall be copyright, and of which entry shall have been made in the said registry book, and which shall have been unlawfully printed or imported without the consent of the registered proprietor of such copyright, in writing under his hand first obtained, shall be deemed to be the property of the proprietor of such copyright, and who shall be registered as such, and such registered proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same, or damages for the detention thereof, in an action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover.

No proprietor of copyright commencing after this Act shall sue or proceed for any infringement before making entry in the book of registry.

24. And be it enacted, that no proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action or suit, at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made, in the book of registry of the Stationers Company, of such book, pursuant to this Act: Provided always, that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid: Provided also, that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the Act passed in the third year of the reign of his late Majesty King William the Fourth, to amend the laws relating to dramatic literary property, or of this Act, although no entry shall be made in the book of registry aforesaid.

Proviso for dramatic piece.

Copyright shall be personal property.

25. And be it enacted that all copyright shall be deemed personal property, and shall be transmissible by bequest, or, in case of intestacy, shall be subject to the same law of distribution as other personal pro-

5 & 6 Vict. c. 45. perty, and in Scotland shall be deemed to be personal and movable estate.

General issue. 26. And be it enacted, that if any action or suit shall be commenced or brought against any person or persons whomsoever for doing or causing to be done anything in pursuance of this Act, the defendant or defendants in such action may plead the general issue, and give the special matter in evidence; and if upon such action a verdict shall be given for the defendant, or the plaintiff shall become non-suited, or discontinue his action, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant in any case by law hath; and that all actions, suits, bills, indictments, or informations for any offence that shall be committed against this Act shall be brought, sued, and commenced within twelve calendar months next after such offence committed, or else the same shall be void and of none effect; provided that such limitation of time shall not extend or be construed to extend to any actions, suits, or other proceedings which under the authority of this Act shall or may be brought, sued, or commenced for or in respect of any copies of books to be delivered for the use of the British Museum, or of any one of the four libraries hereinbefore mentioned.

Limitation of actions;

not to extend to actions, &c. in respect of the delivery of books.

Saving the rights of the Universities, and the Colleges of Eton, Westminster, and Winchester.

27. Provided always, and be it enacted, that nothing in this Act contained shall affect or alter the rights of the two universities of Oxford and Cambridge, the colleges or houses of learning within the same, the four Universities in Scotland, the College of the Holy and Undivided Trinity of Queen Elizabeth, near Dublin, and the several colleges of Eton, Westminster, and Winchester, in any copyrights heretofore and now vested or hereafter to be vested in such universities and colleges respectively, anything to the contrary herein contained notwithstanding.

Saving all subsisting rights, contracts, and engagements.

28. Provided also, and be it enacted, that nothing in this Act contained shall affect, alter, or vary any right subsisting at the time of passing of this Act, except as herein expressly enacted; and all contracts, agreements, and obligations made and entered into before the passing of this Act, and all remedies relating thereto, shall remain in full force, anything herein contained to the contrary notwithstanding.

Extent of the Act.

29. And be it enacted, that this Act shall extend to the United Kingdom of Great Britain and Ireland, and to every part of the British dominions.

30. Repealed by Statute Law Revision (2) Act, 1874.

SCHEDULE TO WHICH THE PRECEDING ACT REFERS.

No. 1.

Form of Minute of Consent to be entered at Stationers' Hall.

We the undersigned, *A. B.* of the author of a certain book, intituled *Y. Z.* [*or* the personal representative of the author *as the case may be*], and *C. D.* of do hereby certify, that we have consented and agreed to accept the benefits of the Act passed in the fifth year of the reign of Her Majesty Queen Victoria, cap. , for the extension of the term of copyright therein provided by the said Act, and hereby declare that such extended term of copyright therein is the property of the said *A. B.* or *C. D.*

Dated this day of 18 .

(Signed) *A. B.*
C. D.

Witness .

To the Registering Officer appointed by the Stationers' Company.

5 & 6 Vict. c. 45.

No. 2.

FORM OF REQUIRING ENTRY OF PROPRIETORSHIP.

I *A.B.* of do hereby certify, that I am the proprietor of the copyright of a book, intituled *Y.Z.*, and I hereby require you to make entry in the register book of the Stationers' Company of my proprietorship of such copyright, according to the particulars underwritten.

Title of Book.	Name of Publisher, and Place of Publication.	Name and Place of Abode of the Proprietor of the Copyright.	Date of First Publication.
Y.Z.		*A.B.*	

Dated this day of 18 .

Witness, *C.D.*

(Signed) *A.B.*

No. 3.

ORIGINAL ENTRY OF PROPRIETORSHIP OF COPYRIGHT OF A BOOK.

Time of making the Entry.	Title of Book.	Name of the Publisher, and Place of Publication.	Name and Place of abode of the Proprietor of the Copyright.	Date of First Publication.
	Y.Z.	*A.B.*	*C.D.*	

No. 4.

FORM OF CONCURRENCE OF THE PARTY ASSIGNING IN ANY BOOK PREVIOUSLY REGISTERED.

I *A.B.* of being the assignor of the copyright of the book hereunder described, do hereby require you to make entry of the assignment of the copyright therein.

Title of Book.	Assignor of the Copyright.	Assignee of Copyright.
Y.Z.	*A.B.*	*C.D.*

Dated this day of. 18 .

(Signed) *A.B.*

No. 5.

FORM OF ENTRY OF ASSIGNMENT OF COPYRIGHT IN ANY BOOK PREVIOUSLY REGISTERED.

Date of Entry.	Title of Book.	Assignor of the Copyright.	Assignee of Copyright.
	[*Set out the title of the book, and refer to the page of the registry book in which the original entry of the copyright thereof is made.*]	*A.B.*	*C.D.*

5 & 6 Vict. c. 100.

5 & 6 Vict. cap. 100.

Copyright of Designs, repealed by Patents, Designs and Trade Marks Act, 1883.

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6 & 7 Vict. cap. 65.

6 & 7 Vict. c. 65.

An Act to amend the Laws relating to the Copyright of Designs.
[*22nd August*, 1843.]

Repealed by Patents, Designs, and Trade Marks Act, 1883.

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6 & 7 Vict. cap. 96.

6 & 7 Vict. c. 96.

An Act to amend the Law respecting defamatory Words and Libel.
[*24th August*, 1843.]

For the better protection of private character, and for more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

Offer of an apology admissible in evidence in mitigation of damages.

2. And be it enacted, that in an action for a libel contained in any public newspaper or other periodical publication it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; and that every such defendant shall upon filing such plea be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel, and such payment into court shall be of the same effect and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court under an Act passed in the session of Parliament held in the fourth year of his late Majesty, intituled "An Act for the further Amendment of the

In an action against a newspaper for libel, the defendant may plead that it was inserted without malice and without neglect, and may pay money into court as amends.

3 & 4 Will. 4, c. 42.

Law and the better Advancement of Justice;" and that to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea. 6 & 7 Vict. c. 96.

3. And be it enacted, that if any person shall publish or threaten to publish any libel upon any other person, or shall directly or indirectly threaten to print or publish, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing, of any matter or thing touching any other person, with intent to extort any money or security for money, or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years: provided always, that nothing herein contained shall in any manner alter or affect any law now in force in respect of the sending or delivery of threatening letters or writings. Publishing or threatening to publish a libel, or proposing to abstain from publishing anything, with intent to extort money, punishable by imprisonment and hard labour.

4. And be it enacted, that if any person shall maliciously publish any defamatory libel knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the court shall award. False defamatory libel punishable by imprisonment and fine;

5. And be it enacted, that if any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment or both, as the court may award, such imprisonment not to exceed the term of one year. Malicious defamatory libel, by imprisonment or fine.

6. And be it enacted, that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after such plea the defendant shall be convicted on such indictment or information it shall be competent to the court, in pronouncing sentence to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: Provided always, that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification: Provided also, that, in addition to such plea, it shall be competent to the defendant to plead a plea of not guilty: Provided also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel. Proceedings upon the trial of an indictment or information for a defamatory libel. Double plea. Proviso as to plea of Not Guilty in civil and criminal proceedings.

7. And be it enacted, that whensoever, upon the trial of any indict-

6 & 7 Vict. c. 96.

Evidence to rebut *prima facie* case of publication by an agent.

ment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.

On prosecution for private libel defendant entitled to costs on acquittal.

8. And be it enacted, that in the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the court before which the said indictment or information is tried.

Interpretation of Act.

9. And be it enacted, that wherever throughout this Act, in describing the plaintiff or the defendant, or the party affected or intended to be affected by the offence, words are used importing the singular number or the masculine gender only, yet they shall be understood to include several persons as well as one person, and females as well as males, unless when the nature of the provision or the context of the Act shall exclude such construction.

Commencement and extent of Act.

10. [And be it enacted, that this Act shall take effect from the first day of November next; and that] nothing in this Act contained shall extend to Scotland.

The part within brackets is repealed by the Statute Law Revision (2) Act, 1874.

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7 Vict. cap. 12.

7 Vict. c. 12.

An Act to amend the Law relating to International Copyright.
[10*th May*, 1844.]

1. Repealed by the Statute Law Revision (2) Act, 1874.

Her Majesty, by Order in Council, may direct that authors, &c., of works first published in foreign countries shall have copyright therein within Her Majesty's dominions.

2. And be it enacted, that it shall be lawful for Her Majesty, by any order of Her Majesty in Council, to direct that, as respects all or any particular class or classes of the following works (namely), books, prints, articles of sculpture, and other works of art, to be defined in such order, which shall after a future time, to be specified in such order, be first published in any foreign country to be named in such order, the authors, inventors, designers, engravers, and makers thereof respectively, their respective executors, administrators, and assigns, shall have the privilege of copyright therein during such period or respective periods as shall be defined in such order, not exceeding, however, as to any of the above-mentioned works, the term of copyright which authors, inventors, designers, engravers, and makers of the like works respectively first published in the United Kingdom may be then entitled to under the hereinbefore recited Acts respectively, or under any Acts which may hereafter be passed in that behalf.

If the order applies to books the copyright law as to books

3. And be it enacted, that in case any such order shall apply to books, all and singular the enactments of the said Copyright Amendment Act, and of any other Act for the time being in force with

7 Vict. c. 12.

relation to the copyright in books first published in this country, shall, from and after the time so to be specified in that behalf in such order, and subject to such limitation as to the duration of the copyright as shall be therein contained, apply to and be in force in respect of the books to which such order shall extend, and which shall have been registered as hereinafter is provided, in such and the same manner as if such books were first published in the United Kingdom, save and except such of the said enactments, or such parts thereof, as shall be excepted in such order, and save and except such of the said enactments as relate to the delivery of copies of books at the British Museum, and to or for the use of the other libraries mentioned in the said Copyright Amendment Act.

First published in this country shall apply to the books to which the order relates, with certain exceptions.

4. And be it enacted, that in case any such order shall apply to prints, articles of sculpture, or to any such other works of art as aforesaid, all and singular the enactments of the said Engraving Copyright Acts and the said Sculpture Copyright Acts, or of any other Act for the time being in force with relation to the copyright in prints or articles of sculpture first published in this country, and of any Act for the time being in force with relation to the copyright in any similar works of art first published in this country, shall, from and after the time so to be specified in that behalf in such order, and subject to such limitation as to the duration of the copyright as shall be therein contained respectively, apply to and be in force in respect of the prints, articles of sculpture, and other works of art to which such order shall extend, and which shall have been registered as hereinafter is provided, in such and the same manner as if such articles and other works of art were first published in the United Kingdom, save and except such of the said enactments or such parts thereof as shall be excepted in such order.

If the order applies to prints, sculptures, &c., the copyright law as to prints or sculptures first published in this country shall apply to the prints, sculptures, &c., to which such order relates.

5. And be it enacted, that it shall be lawful for Her Majesty, by any order of Her Majesty in Council, to direct that the authors of dramatic pieces and musical compositions which shall after a future time, to be specified in such order, be first publicly represented or performed in any foreign country to be named in such order, shall have the sole liberty of representing or performing in any part of the British dominions such dramatic pieces or musical compositions during such period as shall be defined in such order, not exceeding the period during which authors of dramatic pieces and musical compositions first publicly represented or performed in the United Kingdom may for the time be entitled by law to the sole liberty of representing and performing the same; and from and after the time so specified in any such last-mentioned order the enactments of the said dramatic Literary Property Act, and of the said Copyright Amendment Act, and of any other Act for the time being in force with relation to the liberty of publicly representing and performing dramatic pieces or musical compositions, shall, subject to such limitation as to the duration of the right conferred by any such order as shall be therein contained, apply to and be in force in respect of the dramatic pieces and musical compositions to which such order shall extend, and which shall have been registered as hereinafter is provided, in such and the same manner as if such dramatic pieces and musical compositions had been first publicly represented and performed in the British dominions, save and except such of the said enactments or such parts thereof as shall be excepted in such order.

Her Majesty may, by Order in Council, direct that authors and composers of dramatic pieces and musical compositions first publicly represented and performed in foreign countries shall have similar rights in the British dominions.

6. Provided always, and be it enacted, that no author of any book, dramatic piece or musical composition, or his executors, administra-

Particulars to be observed as to Registry and to

7 Vict. c. 12.

delivery of copies.

tors, or assigns, and no inventor, designer, or engraver of any print, or maker of any article of sculpture, or other work of art, his executors, administrators, or assigns, shall be entitled to the benefit of this Act, or of any Order in Council to be issued in pursuance thereof, unless, within a time or times to be in that behalf prescribed in each such Order in Council, such book, dramatic piece, musical composition, print, article of sculpture, or other work of art, shall have been so registered, and such copy thereof shall have been so delivered as hereinafter is mentioned; (that is to say,) as regards such book, and also such dramatic piece or musical composition (in the event of the same having been printed), the title to the copy thereof, the name and place of abode of the author or composer therof, the name and place of abode of the proprietor of the copyright thereof, the time and place of the first publication, representation, or performance thereof, as the case may be, in the foreign country named in the Order in Council under which the benefit of this Act shall be claimed, shall be entered in the register book of the Company of Stationers in London, and one printed copy of the whole of such book, and of such dramatic piece or musical composition, in the event of the same having been printed, and of every volume thereof, upon the best paper upon which the largest number or impression of the book, dramatic piece, or musical composition shall have been printed for sale, together with all maps and prints relating thereto, shall be delivered to the officer of the Company of Stationers at the Hall of the said Company; and as regards dramatic pieces and musical compositions in manuscript, the title to the same, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor of the right of representing or performing the same, and the time and place of the first representation or performance thereof in the country named in the Order in Council under which the benefit of the Act shall be claimed, shall be entered in the said register book of the said Company of Stationers in London; and as regards prints, the title thereof, the name and place of abode of the inventor, designer, or engraver thereof, the name of the proprietor of the copyright therein, and the time and place of the first publication thereof in the foreign country named in the Order in Council under which the benefits of the Act shall be claimed, shall be entered in the said register book of the said Company of Stationers in London, and a copy of such print upon the best paper upon which the largest number or impressions of the print shall have been printed for sale, shall be delivered to the officer of the Company of Stationers at the hall of the said company; and as regards any such article of sculpture, or any such other work of art as aforesaid, a descriptive title thereof, the name and place of abode of the maker thereof, the name of the proprietor of the copyright therein, and the time and place of its first publication in the foreign country named in the Order in Council under which the benefit of this Act shall be claimed, shall be entered in the said register book of the said Company of Stationers in London; and the officer of the said Company of Stationers receiving such copies so to be delivered as aforesaid shall give a receipt in writing for the same, and such delivery shall to all intents and purposes be a sufficient delivery under the provisions of this Act.

In cases of books published anonymously, the name of the publisher to be sufficient.

7. Provided always, and be it enacted, that if a book be published anonymously it shall be sufficient to insert in the entry thereof in such register book the name and place of abode of the first publisher thereof, instead of the name and place of abode of the author thereof, together with a declaration that such entry is made either on behalf

of the author or on behalf of such first publisher, as the case may require.

The provisions of the Copyright Amendment Act as regards entries in the register book of the Company of Stationers, &c., to apply to entries under this Act.

8. And be it enacted, that the several enactments in the said Copyright Amendment Act contained with relation to keeping the said register book, and the inspection thereof, the searches therein, and the delivery of certified and stamped copies thereof, the reception of such copies in evidence, the making of false entries in the said book, and the production in evidence of papers falsely purporting to be copies of entries in the said book, the applications to the courts and judges by persons aggrieved by entries in the said book, and the expunging and varying such entries, shall apply to the books, dramatic pieces, musical compositions, prints, articles of sculpture, and other works of art, to which any Order in Council issued in pursuance of this Act shall extend, and to the entries and assignments of copyright and proprietorship therein, in such and the same manner as if such enactments were here expressly enacted in relation thereto, save and except that the forms of entry prescribed by the said Copyright Amendment Act may be varied to meet the circumstances of the case, and that the sum to be demanded by the officer of the said Company of Stationers for making any entry required by this Act shall be one shilling only.

As to expunging or varying entry grounded in wrongful first publication.

9. And be it enacted, that every entry made in pursuance of this Act of a first publication shall be *primâ facie* proof of a rightful first publication; but if there be a wrongful first publication, and any party have availed himself thereof to obtain an entry of a spurious work, no order for expunging or varying such entry shall be made unless it be proved to the satisfaction of the court or of the judge taking cognisance of the application for expunging or varying such entry, first, with respect to a wrongful publication in a country to which the author or first publisher does not belong, and in regard to which there does not subsist with this country any treaty of international copyright, that the party making the application was the author or first publisher, as the case requires; second, with respect to a wrongful first publication either in the country where a rightful first publication has taken place, or in regard to which there subsists with this country a treaty of international copyright, that a court of competent jurisdiction in any such country where such wrongful first publication has taken place has given judgment in favour of the right of the party claiming to be the author or first publisher.

Copies of books wherein copyright is subsisting under this Act printed in foreign countries other than those wherein the book was first published prohibited to be imported.

10. And be it enacted, that all copies of books wherein there shall be any subsisting copyright under or by virtue of this Act, or of any Order in Council made in pursuance thereof, printed or reprinted in any foreign country except that in which such books were first published, shall be and the same are hereby absolutely prohibited to be imported into any part of the British dominions, except by or with the consent of the registered proprietor of the copyright thereof, or his agent authorised in writing, and if imported contrary to this prohibition, the same and the importers thereof shall be subject to the enactments in force relating to goods prohibited to be imported by any Act relating to the customs; and as respects any such copies so prohibited to be imported, and also as respects any copies unlawfully printed in any place whatsoever of any books wherein there shall be any such subsisting copyright as aforesaid, any person who shall in any part of the British dominions import such prohibited or unlawfully printed copies, or who, knowing such copies to be so unlawfully imported or unlawfully printed, shall sell, publish, or expose to sale or hire, or shall cause to be sold, published, or exposed

7 Vict. c. 12.

to sale or hire, or have in his possession for sale or hire, any such copies so unlawfully imported or unlawfully printed, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought and prosecuted in the same courts and in the same manner, and with the like restrictions upon the proceedings of the defendant, as are respectively prescribed in the said Copyright Amendment Act with relation to actions thereby authorized to be brought by proprietors of copyright against persons importing or selling books unlawfully printed in the British dominions.

Officer of Stationers' Company to deposit books, &c., in the British Museum.

11. And be it enacted, that the said officer of the said Company of Stationers shall receive at the hall of the said company every book, volume, or print so to be delivered as aforesaid, and within one calendar month after receiving such book, volume, or print, shall deposit the same in the library of the British Museum.

Second or subsequent editions.

12. Provided always, and be it enacted, that it shall not be requisite to deliver to the said officer of the said Stationers' Company any printed copy of the second or of any subsequent edition of any book or books so delivered as aforesaid, unless the same shall contain additions or alterations.

Orders in Council may specify different periods for different foreign countries and for different classes of works.

13. And be it enacted that the respective terms to be specified by such Orders in Council respectively for the continuance of the privilege to be granted in respect of works to be first published in foreign countries may be different for works first published in different foreign countries and for different classes of such works; and that the times to be prescribed for the entries to be made in the register book of the Stationers Company, and for the deliveries of the books and other articles to the said officer of the Stationers' Company, as hereinbefore is mentioned, may be different for different foreign countries and for different classes of books or other articles.

No Order in Council to have any effect unless it states that reciprocal protection is secured.

14. Provided always, and be it enacted, that no such Order in Council shall have any effect unless it shall be therein stated, as the ground for issuing the same, that due protection has been secured by the foreign power so named in such Order in Council for the benefit of parties interested in works first published in the dominions of Her Majesty similar to those comprised in such order.

Orders in Council to be published in Gazette, and to have same effect as this Act.

15. And be it enacted, that every Order in Council to be made under the authority of this Act shall as soon as may be after the making thereof by Her Majesty in council be published in the *London Gazette*, and from the time of such publication shall have the same effect as if every part thereof were included in this Act.

Orders in Council to be laid before Parliament.

16. And be it enacted, that a copy of every Order of Her Majesty in Council made under this Act shall be laid before both Houses of Parliament within six weeks after issuing the same, if Parliament be then sitting, and if not, then within six weeks after the commencement of the then next session of Parliament.

Orders in Council may be revoked.

17. And be it enacted, that it shall be lawful for Her Majesty by an Order in Council from time to time to revoke or alter any Order in Council previously made under the authority of this Act, but nevertheless without prejudice to any rights acquired previously to such revocation or alteration.

Translations.

18. Provided always, and be it enacted, that nothing in this Act contained shall be construed to prevent the printing, publication, or sale of any translation of any book the author whereof and his assigns may be entitled to the benefit of this Act.

This section is repealed so far as is inconsistent with the provisions of 15 Vict. c. 12. (See sec. 1 of the latter Act.)

19. And be it enacted, that neither the author of any book, nor the

author or composer of any dramatic piece or musical composition, nor the inventor, designer, or engraver of any print, nor the maker of any article of sculpture, or of such other work of art as aforesaid, which shall after the passing of this Act be first published out of Her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act. 7 Vict. c. 12. Authors of works first published in foreign countries not entitled to copyright except under this Act.

20. And be it enacted, that in the construction of this Act the word "book" shall be construed to include "volume," "pamphlet," "sheet of letter-press," "sheet of music," "map," "chart," or "plan:" and the expression "articles of sculpture" shall mean all such sculptures, models, copies, and casts as are described in the said Sculpture Copyright Acts, and in respect of which the privileges of copyright are thereby conferred; and the words "printing" and "re-printing" shall include engraving and any other method of multiplying copies; and the expression "Her Majesty" shall include the heirs and successors of Her Majesty; and the expression "Order of Her Majesty in Council," "Order in Council," and "Order," shall respectively mean Order of Her Majesty acting by and with the advice of Her Majesty's most honourable Privy Council; and the expression "Officer of the Company of Stationers" shall mean the officer appointed by the said Company of Stationers for the purposes of the said Copyright Amendment Act; and in describing any persons or things any word importing the plural number shall mean also one person or thing, and any word importing the singular number shall include several persons or things, and any word importing the masculine shall include also the feminine gender; unless in any of such cases there shall be something in the subject or context repugnant to such construction. Interpretation clause.

21. Repealed by Statute Law Revision (2) Act, 1874.

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8 & 9 Vict. cap. 75.

An Act to amend an Act passed in the Session of Parliament held in the Sixth and Seventh Years of the Reign of Her present Majesty, intituled "An Act to amend the Law respecting defamatory Words and Libel."—[31st *July*, 1845.] 8 & 9 Vict. c. 75.

Whereas by an Act passed in the session of Parliament held in the sixth and seventh years of the reign of Her present Majesty, intituled "An Act to amend the Law respecting defamatory Words and Libel," it is, amongst other things, enacted and provided, that the defendant in an action for a libel contained in any public newspaper or other periodical publication may plead certain matters therein mentioned, and may upon filing such plea be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel; and it is thereby further enacted, that such payment into court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts thereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court, under an Act passed in the session of Parliament held in the fourth year of his late Majesty, intituled "An Act for the further Amendment of the Law, and the better Advancement of Justice:" And whereas the said Act of the fourth year of the reign of his 6 & 7 Vict. c. 96. 3 & 4 Will. 4, c. 42.

8 & 9 Vict. c. 75. into Majesty relates only to proceedings in the superior courts in England, but by an Act passed in the session of Parliament held in the third and fourth years of the reign of Her present Majesty, intituled "An Act
3 & 4 Vict. c. 105. for abolishing Arrest on Mesne Process in civil Actions, except in certain Cases, for extending the Remedies of Creditors against the Property of Debtors, and for the further Advancement of Justice, in Ireland," a like provision is made for payment of money into court in all personal actions pending in any of the superior courts in Ireland as is contained in the said Act of the fourth year of the reign of his late Majesty in regard to actions pending in the superior courts in England, with a like exception of actions for libel; and it is expedient to prevent any doubts as to the application of the said recited Act of the sixth and seventh years of the reign of Her present Majesty to actions pending in the superior courts in Ireland, which may be created by reason of the omission of a reference in the last-mentioned Act to the said Act of the third and fourth years of the reign of Her present Majesty: Be it therefore enacted and declared by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that when in any action pending in the superior courts in Ireland for a libel contained in any public newspaper or other periodical publication the defendant shall plead the matters allowed to be pleaded by the said first-mentioned Act, and shall on filing such plea pay money into court as provided by such Act, such payment into court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations now in force or hereafter to be made as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts so required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court under the said recited Act of the third and fourth years of the reign of Her present Majesty.

In cases of action for libel in Ireland, where defendant shall plead matters allowed by 3 & 4 Will. 4, c. 42, and pay money into court, such payment to be of same effect as if required by said Act.

2. And be it declared and enacted, that it shall not be competent to any defendant in such action, whether in England or in Ireland, to file any such plea, without at the same time making a payment of money into court by way of amends [as provided by said Act], but every such plea so filed without payment of money into court shall be deemed a nullity, and may be treated as such by the plaintiff in the action.

Defendant not to file such plea without paying money into court by way of amends.

The words within brackets are repealed, as to the Supreme Court of Judicature in England, by 42 & 43 Vict. c. 59.

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10 & 11 VICT. CAP. 95.

10 & 11 Vict. c. 95. *An Act to amend the Law relating to the Protection in the Colonies of works entitled to Copyright in the United Kingdom.*—[*22nd July*, 1847.]

WHEREAS by an Act passed in the session of Parliament holden in the fifth and sixth years of Her present Majesty, intituled "An Act
5 & 6 Vict. c. 45. to amend the Law of Copyright," it is amongst other things enacted, that it shall not be lawful for any person not being the proprietor of the copyright, or some person authorized by him, to import into any part of the United Kingdom, or into any other part of the British dominions, for sale or hire, any printed book first composed or written or printed or published in any part of the United Kingdom

wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions: And whereas by an Act passed in the session of Parliament holden in the eighth and ninth years of the reign of Her present Majesty, intituled "An Act to regulate the Trade of the British Possessions abroad," books wherein the copyright is subsisting, first composed or written or printed in the United Kingdom, and printed or reprinted in any other country, are absolutely prohibited to be imported into the British possessions abroad: And whereas by the said last-recited Act it is enacted, that all laws, byelaws, usages, or customs in practice, or endeavoured or pretended to be in force or practice in any of the British possessions in America, which are in anywise repugnant to the said Act or to any Act of Parliament made or to be made in the United Kingdom, so far as such Act shall relate to and mention the said possessions, are and shall be null and void to all intents and purposes whatsoever: Now be it enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that in case the Legislature or proper legislative authorities in any British possession shall be disposed to make due provision for securing or protecting the rights of British authors in such possessions, and shall pass an Act or make an ordinance for that purpose, and shall transmit the same in the proper manner to the Secretary of State, in order that it may be submitted to Her Majesty, and in case Her Majesty shall be of opinion that such Act or Ordinance is sufficient for the purpose of securing to British authors reasonable protection within such possession, it shall be lawful for Her Majesty, if she think fit so to do, to express her royal approval of such Act or ordinance, and thereupon to issue an Order in Council declaring that so long as the provisions of such Act or ordinance continue in force within such colony the prohibitions contained in the aforesaid Acts, and hereinbefore recited, and any prohibitions contained in the said Acts or in any other Acts against the importing, selling, letting out to hire, exposing for sale or hire, or possessing foreign reprints of books first composed, written, printed, or published in the United Kingdom, and entitled to copyright therein, shall be suspended so far as regards such colony; and thereupon such Act or ordinance shall come into operation, except so far as may be otherwise provided therein, or as may be otherwise directed by such Order in Council, anything in the said last-recited Act or in any other Act to the contrary notwithstanding.

10 & 11 Vict. c. 75.

8 & 9 Vict. c. 93.

Her Majesty may suspend in certain cases the prohibitions against the admission of pirated books into the colonies in certain cases.

2. And be it enacted, that every such Order in Council shall, within one week after the issuing thereof, be published in the *London Gazette*, and that a copy thereof, and of every such Colonial Act or ordinance so approved as aforesaid by Her Majesty, shall be laid before both Houses of Parliament within six weeks after the issuing of such order, if Parliament be then sitting, or if Parliament be not then sitting, then within six weeks after the opening of the next Session of Parliament.

Orders in council to be published in Gazette.

Orders in Council and the Colonial Acts or ordinances to be laid before Parliament.

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13 & 14 Vict. cap. 104.

An Act to extend and amend the Acts relating to the Copyright of Designs.—[14*th August*, 1850.]

13 & 14 Vict. c. 104.

Repealed by Patents, Designs and Trade Marks Act, 1883.

15 VICT. CAP. 12.

15 Vict. c. 12.

An Act to enable Her Majesty to carry into effect a Convention with France on the Subject of Copyright; to extend and explain the International Copyright Acts; and to explain the Acts relating to Copyright in Engravings.—[28*th May*, 1852.]

7 & 8 Vict. c. 12.

WHEREAS an Act was passed in the seventh year of the reign of Her present Majesty, intituled "An Act to amend the Law relating to International Copyright," hereinafter called "The International Copyright Act:" and whereas a convention has lately been concluded between Her Majesty and the French Republic, for extending in each country the enjoyment of copyright in works of literature and the fine arts first published in the other, and for certain reductions of duties now levied on books, prints, and musical works published in France: and whereas certain of the stipulations on the part of Her Majesty contained in the said treaty require the authority of Parliament: and whereas it is expedient that such authority should be given, and that Her Majesty should be enabled to make similar stipulations in any treaty on the subject of copyright which may hereafter be concluded with any foreign power: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Translations.

Partial repeal of 7 & 8 Vict. c. 12, s. 18.

1. The eighteenth section of the said Act of the seventh year of Her present Majesty, chapter twelve, shall be repealed, so far as the same is inconsistent with the provisions hereinafter contained.

Her Majesty may by Order in Council, direct, *that the authors* of books published in foreign countries may for a limited time prevent unauthorized translations.

2. Her Majesty may, by Order in Council, direct that the authors of books which are, after a future time, to be specified in such order, published in any foreign country, to be named in such order, their executors, administrators, and assigns, shall, subject to the provisions hereinafter contained or referred to, be empowered to prevent the publication in the British Dominions of any translations of such books not authorized by them, for such time as may be specified in such order, not extending beyond the expiration of five years from the time at which the authorized translations of such books hereinafter mentioned are respectively first published, and in the case of books published in parts, not extending as to each part beyond the expiration of five years from the time at which the authorized translation of such part is first published.

Thereupon the law of copyright shall extend to prevent such translations.

3. Subject to any provisions or qualifications contained in such order, and to the provisions herein contained or referred to, the laws and enactments for the time being in force for the purpose of preventing the infringement of copyright in books published in the British dominions shall be applied for the purpose of preventing the publication of translations of the books to which such order extends which are not sanctioned by the authors of such books, except only such parts of the said enactments as relate to the delivery of copies of books for the use of the British Museum, and for the use of the other libraries therein referred to.

Her Majesty may by Order in Council direct that the authors of dramatic works represented in foreign countries may

4. Her Majesty may, by Order in Council, direct that authors of dramatic pieces which are, after a future time, to be specified in such order, first publicly represented in any foreign country, to be named in such order, their executors, administrators, and assigns, shall, subject to the provisions hereinafter mentioned or referred to, be empowered to prevent the representation in the British dominions of

any translation of such dramatic pieces not authorized by them, for such time as may be specified in such order, not extending beyond the expiration of five years from the time at which the authorized translations of such dramatic pieces hereinafter mentioned are first published or publicly represented.

for a limited time prevent unauthorized translations.

5. Subject to any provisions or qualifications contained in such last-mentioned order, and to the provisions hereinafter contained or referred to, the laws and enactments for the time being in force for ensuring to the author of any dramatic piece first publicly represented in the British dominions the sole liberty of representing the same shall be applied for the purpose of preventing the representation of any translations of the dramatic pieces to which such last-mentioned order extends, which are not sanctioned by the authors thereof.

Thereupon the law for protecting the representation of such pieces shall extend to prevent unauthorized translations.

6. Nothing herein contained shall be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country.

Adaptations, &c. of dramatic pieces to the English stage not prevented.

7. Notwithstanding anything in the said International Copyright Act or in this Act contained, any article of political discussion which has been published in any newspaper or periodical in a foreign country may, if the source from which the same is taken be acknowledged, be republished or translated in any newspaper or periodical in this country; and any article relating to any other subject which has been so published as aforesaid may, if the source from which the same is taken be acknowledged, be republished or translated in like manner, unless the author has signified his intention of preserving the copyright therein, and the right of translating the same, in some conspicuous part of the newspaper or periodical in which the same was first published, in which case the same shall, without the formalities required by the next following section, receive the same protection as is by virtue of the International Copyright Act or this Act extended to books.

All articles in newspapers, &c., relating to politics may be republished or translated; and also all similar articles on any subject, unless the author has notified his intention to reserve the right.

8. No author, or his executors, administrators, or assigns, shall be entitled to the benefit of this Act, or of any Order in Council issued in pursuance thereof, in respect of the translation of any book or dramatic piece, if the following requisitions are not complied with: (that is to say),

No author to be entitled to benefit to this Act without complying with the requisitions herein specified.

1. The original work from which the translation is to be made must be registered and a copy thereof deposited in the United Kingdom in the manner required for original works by the said International Copyright Act, within three calendar months of its first publication in the foreign country.
2. The author must notify on the title page of the original work, or if it is published in parts, on the title page of the first part, or if there is no title page, on some conspicuous part of the work, that it is his intention to reserve the right of translating it:
3. The translation sanctioned by the author, or a part thereof, must be published either in the country mentioned in the Order in Council by virtue of which it is to be protected or in the British dominions, not later than one year after the registration and deposit in the United Kingdom of the original work, and the whole of such translation must be published within three years of such registration and deposit:
4. Such translation must be registered, and a copy thereof deposited in the United Kingdom within a time to be mentioned in that behalf in the order by which it is protected, and in the manner provided by the said International Copyright Act for the registration and deposit of original works:

15 Vict. c. 12.

5. In the case of books published in parts, each part of the original work must be registered and deposited in this country in the manner required by the said International Copyright within three months after the first publication thereof in the foreign country:

6. In the case of dramatic pieces the translation sanctioned by the author must be published within three calendar months of the registration of the original work:

7. The above requisition shall apply to articles originally published in newspapers or periodicals if the same be afterwards published in a separate form, but shall not apply to such articles as originally published.

Pirated copies prohibited to be imported, except with consent of proprietor;

9. All copies of any works of literature or art wherein there is any subsisting copyright by virtue of the International Copyright Act and this Act, or of any Order in Council made in pursuance of such Acts or either of them, and which are printed, reprinted, or made in any foreign country except that in which such work shall be first published, and all unauthorized translations of any book or dramatic piece the publication or public representation in the British dominions of translations whereof not authorized as in this Act mentioned shall for the time being be prevented under any Order in Council made in pursuance of this Act, are hereby absolutely prohibited to be imported into any part of the British dominions, except by or with the consent of the registered proprietor of the copyright of such work or of such book or piece, or his agent authorized in writing; and the provision of the Act of the sixth year of Her Majesty "to amend the law of Copyright," for the forfeiture, seizure, and destruction of any printed book first published in the United Kingdom wherein there shall be copyright, and reprinted in any country out of the British dominions, and imported into any part of the British dominions by any persons not being the proprietor of the copyright, or a person authorized by such proprietor, shall extend and be applicable to all copies of any works of literature and art, and to all translations the importation whereof into any parts of the British dominions prohibited under this Act.

Provisions of 5 & 6 Vict. c. 45, as to forfeiture, &c., of pirated works, &c. to extend to works prohibited to be imported under this Act.

Foregoing provisions and 7 & 8 Vict. c. 12, to be read as one Act.

10. The provisions hereinbefore contained shall be incorporated with the International Copyright Act, and shall be read and construed therewith as one Act.

French translations to be protected as hereinbefore mentioned, without further Order in Council.

11. And whereas Her Majesty has already, by Order in Council under the said International Copyright Act, given effect to certain stipulations contained in the said convention with the French republic; and it is expedient that the remainder of the stipulations on the part of Her Majesty in the said convention contained should take effect from the passing of this Act without any further Order in Council: during the continuance of the said convention, and so long as the Order in Council already made under the said International Copyright Act remains in force, the provisions hereinbefore contained shall apply to the said convention, and to translations of books and dramatic pieces which are, after the passing of this Act, published or represented in France, in the same manner as if Her Majesty had issued her Order in Council in pursuance of this Act for giving effect to such convention, and had therein directed that such translations should be protected as hereinbefore mentioned for a period of five years from the date of the first publication or public representation thereof respectively, and as if a period of three months from the publication of such translation were the time mentioned in such order as the time within which the same must be registered and a copy thereof deposited in the United Kingdom.

12. Repealed by Statute Law Revision Act, 1875. 15 Vict. c. 12.

13. Repealed by Statute Law Revision Act, 1875.

Lithographs, &c.

14. And whereas by the four several Acts of Parliament following: (that is to say) an Act of the eighth year of the reign of King George the Second, chapter thirteen; an Act of the seventh year of the reign of King George the Third, chapter thirty-eight; an Act of the seventeenth year of the reign of King George the Third, chapter fifty-seven; and an act of the seventh year of King William the Fourth, chapter fifty-nine, provision is made for securing to every person who invents, or designs, engraves, etches, or works in mezzotinto or chiaro-oscuro, or, from his own work, design, or invention, causes or procures to be designed, engraved, etched, or worked in mezzotinto or chiaro-oscuro, any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, and to every person who engraves, etches, or works in mezzotinto or chiaro-oscuro, or causes to be engraved, etched, or worked any print, taken from any picture, drawing, model, or sculpture, notwithstanding such print has not been graven or drawn from his own original design, certain coprights therein defined: And whereas doubts are entertained whether the provisions of the said Acts extend to lithographs and certain other impressions, and it is expedient to remove such doubts: Recital of 8 Geo. 2, c. 13. 7 Geo. 3, c. 38. 17 Geo. 3, c. 57. 6 & 7 Will. 4, c. 59.

For removal of doubts as to the provisions of the said Acts including lithographs, prints, &c.

It is hereby declared that the provisions of the said Acts are intended to include prints taken by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely, and the said Acts shall be construed accordingly.

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18 & 19 Vict. cap. 41.

An Act for abolishing the Jurisdiction of the Ecclesiastical Courts of England and Wales in Suits for Defamation.—[*26th June*, 1855.] 18 & 19 Vict. c. 41.

Whereas the jurisdiction of the Ecclesiastical Courts in suits for defamation has ceased to be the means of enforcing the spiritual discipline of the Church, and has become grievous and oppressive to the subjects of this realm: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Jurisdiction of ecclesiastical courts in England, &c., in suits for defamation abolished.

1. From and after the passing of this Act it shall not be lawful for any ecclesiastical court in England or Wales to entertain or adjudicate upon any suit for or cause of defamation, any statute, law, canon, custom, or usage to the contrary notwithstanding.

2. Repealed by Statute Law Revision Act, 1875.

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20 & 21 Vict. cap. 83.

An Act for more effectually preventing the Sale of Obscene Books, Pictures, Prints, and other Articles.—[*25th August*, 1857.] 20 & 21 Vict. c. 83.

Whereas it is expedient to give additional powers for the suppression of the trade in obscene books, prints, drawings, and other obscene articles: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

20 & 21 Vict. c. 83.

Justices, &c., may authorize search of suspected premises.

1. It shall be lawful for any metropolitan police magistrate or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them upon oath that the complainant has reason to believe, and does believe, that any obscene books, papers, writings, prints, pictures, drawings, or other representations are kept in any house, shop, room, or other place within the limits of the jurisdiction of any such magistrate or justices, for the purpose of sale or distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain, which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid, at or in connection with such place, so as to satisfy such magistrate or justices that the belief of the said complainant is well founded, and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanour, and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house, shop, room, or other place, with such assistance as may be necessary, to enter in the daytime, and, if necessary, to use force, by breaking open doors or otherwise, and to search for and seize all such books, papers, writings, prints, pictures, drawings, or other representations as aforesaid found in such house, shop, room, or other place, and to carry all the articles so seized before the magistrate or justices issuing the said warrant, or some other magistrate or justices exercising the same jurisdiction; and such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house or other place which may have been so entered by virtue of the said warrant to appear within seven days before such police stipendiary magistrate or any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and such magistrate or justices shall be satisfied that such articles or any of them are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required, to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal as hereinafter mentioned be given, and such articles shall be in the meantime impounded; and if such magistrate or justices shall be satisfied that the articles seized are not of the character stated in the warrant, or have not been kept for any of the purposes aforesaid, he or they shall forthwith direct them to be restored to the occupier of the house or other place in which they were seized.

Tender of amends, &c

2. No plaintiff shall recover in any action for any irregularity, trespass, or other wrongful proceeding made or committed in the execution of this Act, or in, under, or by virtue of any authority hereby given, if tender of sufficient amends shall have been made by or on behalf of the party who shall have committed such irregularity, trespass, or other wrongful proceeding before such action brought; and in case no tender shall have been made it shall be lawful for the defendant in any such action, by leave of the court where such action shall depend, at any time before issue joined, to pay into court such sum of

money as he shall think fit, whereupon such proceeding, order, and adjudication shall be had and made in and by such court as in other actions where defendants are allowed to pay money into court. 20 & 21 Vict. c. 83.

3. No action, suit, or information, or any other proceeding, of what nature soever, shall be brought against any person for anything done or omitted to be done in pursuance of this Act, or in the execution of the authorities under this Act, unless notice in writing shall be given by the party intending to prosecute such action, suit, information, or other proceeding, to the intended defendant one calendar month at least before prosecuting the same, nor unless such action, suit, information or other proceeding shall be brought or commenced within three calendar months next after the act or omission complained of, or in case there shall be a continuation of damage, then within three calendar months next after the doing such damage shall have ceased. Limitation of actions.

4. Any person aggrieved by any act or determination of such magistrate or justices in or concerning the execution of this Act, may appeal to the next general or quarter sessions for the county, riding, division, city, borough, or place in and for which such magistrate or justices shall have so acted, giving to the magistrate or justices of the peace whose act or determination shall be appealed against notice in writing of such appeal, and of the grounds thereof, within seven days after such act or determination and before the next general or quarter sessions, and entering within such seven days into a recognizance, with sufficient surety, before a justice of the peace for the county, city, borough, or place in which such act or determination shall have taken place, personally to appear and prosecute such appeal, and to abide the order of and pay such costs as shall be awarded by such court of quarter sessions or any adjournment thereof, and the court at such general or quarter sessions shall hear and determine the matter of such appeal, and shall make such order therein as shall to the said court seem meet; and such court, upon hearing and finally determining such appeal, shall and may, according to their discretion, award such costs to the party appealing or appealed against as they shall think proper; and if such appeal be dismissed or decided against the appellant or be not prosecuted, such court may order the articles seized forthwith to be destroyed: Provided always, that it shall not be lawful for the appellant on the hearing of any such appeal to go into or give evidence of any other grounds of appeal against any such order, act, or determination than those set forth in such notice of appeal. Appeal

5. This Act shall not extend to Scotland. Act not to extend to Scotland.

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21 & 22 Vict. cap. 70.

An Act to amend the Act of the fifth and sixth Years of Her present Majesty, to consolidate and amend the Laws relating to the Copyright of Designs for ornamenting Articles of Manufacture.--[*2nd August*, 1858.] 21 & 22 Vict. c. 70.

Repealed by Patents, Designs, and Trade Marks Act 1873.

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24 & 25 Vict. cap. 73.

An Act to amend the Law relating to the Copyright of Designs. [*6th August*, 1861.] 24 & 25 Vict. c. 73.

Repealed by Patents, Designs, and Trade Marks Act, 1883.

25 & 26 Vict. cap. 68.

25 & 26 Vict. c. 68.

An Act for amending the Law relating to Copyright in Works of the Fine Arts, and for repressing the Commission of Fraud in the Production and Sale of such Works.—[*29th July*, 1862.]

WHEREAS by law, as now established, the authors of paintings, drawings, and photographs have no copyright in such their works, and it is expedient that the law should in that respect be amended: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

Copyright in works hereafter made or sold to vest in the author for his life and for seven years after his death.

1. The author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death; provided that when any painting or drawing, or the negative of any photograph, shall for the first time after the passing of this Act be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or a valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof, unless it be expressly reserved to him by agreement in writing, signed, at or before the time of such sale or disposition, by the vendee or assignee of such painting or drawing, or of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing, or of such negative of a photograph, or to the person for or on whose behalf the same shall have been made or executed; nor shall the vendee or assignee thereof be entitled to any such copyright, unless, at or before the time of such sale or disposition, an agreement in writing, signed by the person so selling or disposing of the same, or by his agent duly authorized, shall have been made to that effect.

Copyright not to prevent the representation of the same subjects in other works.

2. Nothing herein contained shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object.

Assignments, licences, &c. to be in writing.

3. All copyright under this Act shall be deemed personal or movable estate, and shall be assignable at law, and every assignment thereof, and every licence to use or copy by any means or process the design or work which shall be the subject of such copyright, shall be made by some note or memorandum in writing, to be signed by the proprietor of the copyright, or by his agent appointed for that purpose in writing.

Register of proprietors of copyright in paintings, drawings, and photographs to be kept at Stationers' Hall as in 5 & 6 Vict. c. 45.

4. There shall be kept at the Hall of the Stationers' Company, by the officer appointed by the said company for the purposes of the Act passed in the sixth year of Her present Majesty, intituled "An Act to amend the Law of Copyright," a book or books, entitled "The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs," wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and

also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work, and in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph of the said work, and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration.

Certain enactments of 5 & 6 Vict. c. 45, to apply to the books to be kept under this Act.

5. The several enactments in the said Act of the sixth year of Her present Majesty contained, with relation to keeping the register book thereby required, and the inspection thereof, the searches therein, and the delivery of certified and stamped copies thereof, the reception of such copies in evidence, the making of false entries in the said book, and the production in evidence of papers falsely purporting to be copies of entries in the said book, the application to the courts and judges by persons aggrieved by entries in the said book, and the expunging and varying such entries, shall apply to the book or books to be kept by virtue of this Act, and to the entries and assignments of copyright and proprietorship therein under this Act, in such and the same manner as if such enactments were here expressly enacted in relation thereto, save and except that the forms of entry prescribed by the said Act of the sixth year of Her present Majesty may be varied to meet the circumstances of the case, and that the sum to be demanded by the officer of the said Company of Stationers for making any entry required by this Act shall be one shilling only.

Penalties on infringement of copyright.

6. If the author of any painting, drawing, or photograph in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding ten pounds; and all such repetitions, copies, and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright.

Penalties on fraudulent productions and sales.

7. No person shall do or cause to be done any or either of the following acts; that is to say,

First, no person shall fraudulently sign or otherwise affix, or fraudulently cause to be signed or otherwise affixed, to or upon any painting, drawing, or photograph, or the negative thereof, any name, initials, or monogram:

25 & 26 Vict. c. 68.

Secondly, no person shall fraudulently sell, publish, exhibit, or dispose of, or offer for sale, exhibition, or distribution, any painting, drawing, or photograph, or negative of a photograph, having thereon the name, initials, or monogram of a person who did not execute or make such work:

Thirdly, no person shall fraudulently utter, dispose of, or put off, or cause to be uttered or disposed of, any copy or colourable imitation of any painting, drawing, or photograph, or negative of a photograph, whether there shall be subsisting copyright therein or not, as having been made or executed by the author or maker of the original work from which such copy or imitation shall have been taken;

Fourthly, where the author or maker of any painting, drawing, or photograph, or negative of a photograph, made either before or after the passing of this Act, shall have sold or otherwise parted with the possession of such work, if any alteration shall afterwards be made therein by any other person, by addition or otherwise, *no person shall be at liberty, during the life of the author* or maker of such work, without his consent, to make or knowingly to sell or publish, or offer for sale, such work or any copies of such work so altered as aforesaid, or of any part thereof, as or for the unaltered work of such author or maker.

Penalties.

Every offender under this section shall, upon conviction, forfeit to the person aggrieved a sum not exceeding ten pounds, or not exceeding double the full price, if any, at which all such copies, engravings, imitations, or altered works shall have been sold or offered for sale; and all such copies, engravings, imitations, or altered works shall be forfeited to the person, or the assigns or legal representatives of the person, whose name, initials, or monogram shall be so fraudulently *signed or affixed thereto, or to whom such spurious or altered work* shall be so fraudulently or falsely ascribed as aforesaid: Provided always, that the penalties imposed by this section shall not be incurred unless the person whose name, initials, or monogram shall be so fraudulently signed or affixed, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid, shall have been living at or within twenty years next before the time when the offence may have been committed.

Recovery of pecuniary penalties.

8. All pecuniary penalties which shall be incurred, and all such unlawful copies, imitations, and all other effects and things as shall have been forfeited by offenders, pursuant to this Act, and pursuant to any Act for the protection of copyright engravings, may be recovered by the person hereinbefore and in any such Act as aforesaid empowered to recover the same respectively, and hereinafter called the complainant or the complainer, as follows:

In England and Ireland.

In England and Ireland, either by action against the party offending, or by summary proceeding before any two justices having jurisdiction where the party offending resides:

In Scotland.

In Scotland by action before the Court of Session in ordinary form, or by summary action before the sheriff of the county where the offence may be committed or the offender resides, who, upon proof of the offence or offences, either by confession of the party offending, or by the oath or affirmation of one or more credible witnesses, shall convict the offender, and find him liable to the penalty or penalties aforesaid, as also in expenses, and it shall be lawful for the sheriff, in pronouncing such judgment for the penalty or penalties and costs to insert in such judgment a

warrant, in the event of such penalty or penalties and costs not being paid, to levy and recover the amount of the same by pointing: Provided always, that it shall be lawful to the sheriff, in the event of his dismissing the action and assoilzieing the defender, to find the complainer liable in expenses, and any judgment so to be pronounced by the sheriff in such summary application shall be final and conclusive, and not subject to review by advocation, suspension, reduction, or otherwise. 25 & 26 Vict. c. 68.

Superior courts of record in which any action is pending may make an order for an injunction, inspection, or account.

9. In any action in any of Her Majesty's superior courts of record at Westminster and in Dublin, for the infringement of any such copyright as aforesaid, it shall be lawful for the court in which such action is pending, if the court be then sitting, or if the court be not sitting, then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, and account, and to give such directions respecting such action, injunction, inspection, and account and the proceedings therein respectively, as to such court or judge may seem fit.

Importation of pirated works prohibited.

10. All repetitions, copies, or imitations of paintings, drawings, or photographs, wherein or in the design whereof there shall be subsisting copyright under this Act, and all repetitions, copies, and imitations of the design of any such painting or drawing, or of the negative of any such photograph, which, contrary to the provisions of this Act, shall have been made in any foreign State, or in any part of the British dominions, are hereby absolutely prohibited to be imported into any part of the United Kingdom, except by or with the consent of the proprietor of the copyright thereof, or his agent authorized in writing; and if the proprietor of any such copyright, or his agent, shall declare that any goods imported are repetitions, copies, or imitations of any such painting, drawing, or photograph, or of the negative of any such photograph, and so prohibited as aforesaid, then such goods may be detained by the officers of Her Majesty's customs.

Application in such cases of Customs Acts.

Saving of right to bring action for damages.

11. If the author of any painting, drawing, or photograph in which there shall be subsisting copyright, after having sold or otherwise disposed of such copyright, or if any other person, not being the proprietor for the time being of such copyright, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied, for sale, hire, exhibition, or distribution, any such work or the design thereof, or the negative of any such photograph, or shall import or cause to be imported into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be sold, published, let to hire, exhibited, or distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of such work, or the design thereof, or the negative of any such photograph, made without such consent as aforesaid, then every such proprietor, in addition to the remedies hereby given for the recovery of any such penalties, and forfeiture of any such things as aforesaid, may recover damages by and in a special action on the case, to be brought against the person so offending, and may in such action recover and enforce the delivery to him of all unlawful repetitions, copies, and imitations, and negatives of photographs, or may recover damages for the retention or conversion thereof: Provided that nothing herein contained, nor any proceeding, conviction, or judgment, for any act hereby forbidden, shall affect any remedy which any

25 & 26 Vict. c. 68.

person aggrieved by such act may be entitled to either at law or in equity.

Provisions of 7 & 8 Vict. c. 12, to be considered as included in this Act.

12. This Act shall be considered as including the provisions of the Act passed in the session of Parliament held in the seventh and eighth years of Her present Majesty, intituled "An Act to amend the Law relating to International Copyright," in the same manner as if such provisions were part of this Act.

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32 & 33 Vict. cap. 24.

32 & 33 Vict. c. 24.

An Act to repeal certain Enactments relating to Newspapers, Pamphlets, and other Publications, and to Printers, Typefounders, and Reading Rooms.—[*12th July*, 1869.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Acts and parts of Acts in first schedule repealed except as in second schedule.

1. The Acts and parts of Acts described in the first schedule to this Act are hereby repealed, but the provisions of the said Acts which are set out in the second schedule to this Act shall continue in force in the same manner as if they were enacted in the body of this Act; and this Act shall not affect the validity or invalidity of anything already done or suffered, or any right or title already acquired or accrued, or any remedy or proceeding in respect thereof, and all such remedies and proceedings may be had and continued in the same manner as if this Act had not passed.

Short title.

2. This Act may be cited as the Newspapers, Printers, and Reading Rooms Repeal Act, 1869.

FIRST SCHEDULE.

Date of Act.	Title of Act, and part repealed.
36 Geo. 3, c. 8.	An Act for the more effectually preventing seditious meetings and assemblies.
39 Geo. 3, c. 79, in part.	An Act for the more effectual suppression of societies established for seditious and treasonable purposes, and for better preventing treasonable and seditious practices ... ... } In part; namely,— Sections fifteen to thirty-three, both inclusive, and so much of sections thirty-four to thirty-nine as relates to the above-mentioned sections.
51 Geo. 3, c. 65.	An Act to explain and amend an Act passed in the thirty-ninth year of his Majesty's reign, intituled "An Act for the more effectual suppression of societies established for seditious and treasonable purposes, and for better preventing treasonable and seditious practices," so far as respects certain penalties on printers and publishers.
55 Geo. 3, c. 101, in part.	An Act to regulate the collection of Stamp duties and matters in respect of which licenses may be granted by the commissioner of stamps in Ireland } In part; namely,— Section thirteen.
60 Geo. 3 & 1 Geo. 4, c. 9.	An Act to subject certain publications to the duties of stamps upon newspapers, and to make other regulations for restraining the abuses arising from the publication of blasphemous and seditious libels.

Date of Act.	Title of Act, and part repealed.
11 Geo. 4 & 1 Will. 4, c. 73.	An Act to repeal so much of an Act of the sixtieth year of his late Majesty King George the Third, for the more effectual prevention and punishment of blasphemous and seditious libels, as relates to the sentence of banishment for the second offence, and to provide some further remedy against the abuse of publishing libels.
6 & 7 Will. 4, c. 76, in part.	An Act to reduce the duties on newspapers, and to amend the laws relating to the duties on newspapers and advertisements ... ... } In part; namely,— Except sections one to four (both inclusive), sections thirty-four and thirty-five, and the schedule.
2 & 3 Vict. c. 12.	An Act to amend an Act of the thirty-ninth year of King George the Third, for the more effectual suppression of societies established for seditious and treasonable purposes, and for preventing treasonable and seditious practices, and to put an end to certain proceedings now pending under the said Act.
5 & 6 Vict. c. 82, in part.	An Act to assimilate the stamp duties in Great Britain and Ireland, and to make regulations for collecting and managing the same until the tenth day of October one thousand eight hundred and forty-five ... ... } In part; namely— The following words in section twenty "and also licence to *any person to keep any printing presses and types for* printing in Ireland."
9 & 10 Vict. c. 33, in part.	An Act to amend the laws relating to corresponding societies and the licensing of lecture rooms ... } In part; namely,— So far as it relates to any proceedings under the enactments repealed by this schedule.
16 & 17 Vict. c. 59, in part.	An Act to repeal certain stamp duties and to grant others in lieu thereof, to amend the laws relating to stamp duties, and to make perpetual certain stamp duties in Ireland ... ... } In part; namely,— So much of section twenty as makes perpetual the provisions of 5 & 6 Vict. c. 82, repealed by this Act.

SECOND SCHEDULE.

The enactments in this schedule, with the exception of sect. 19 of 6 & 7 Will. 4, c. 76, do not apply to Ireland.

39 Geo. 3, c. 79.

Section twenty-eight.

Nothing in this Act contained shall extend or be construed to extend to any papers printed by the authority and for the use of either House of Parliament. — **Not to extend to papers printed by authority of Parliament.**

Section twenty-nine.

Every person who shall print any paper for hire, reward, gain, or profit, shall carefully preserve and keep one copy (at least) of every paper so printed by him or her, on which he or she shall write, or cause to be written or printed, in fair and legible characters, the name and place of abode of the person or persons by whom he or she shall be employed to print the same; and every person printing any paper for hire, reward, gain, or profit who shall omit or neglect to write or cause to be written or printed as aforesaid, the name and place of his or her employer on one of such printed papers, or to keep or preserve the same for the space of six calendar months next after the printing thereof, or to produce and show the same to any justice of the peace who within the said space of six calendar months shall require to see the same, shall for every such omission, neglect, or refusal, forfeit and lose the sum of twenty pounds.

Printers to keep a copy of every paper they print, and write thereon the name and abode of their employer.

Penalty of 20*l.* for neglect or refusing to produce the copy within six months.

32 & 33 Vict. c. 24.

Not to extend to impressions of engravings or the printing names and addresses.

Section thirty-one.

Nothing herein contained shall extend to the impression of any engraving, or to the printing by letterpress of the name, or the name and address, or business or profession, of any person, and the articles in which he deals, or to any papers for the sale of estates or goods by auction or otherwise.

Prosecutions to be commenced within three months after penalty is incurred.

Section thirty-four.

No person shall be prosecuted or sued for any penalty imposed by this Act, unless such prosecution shall be commenced, or such action shall be brought, within three calendar months next after such penalty shall have been incurred.

Part of section thirty-five.

Recovery of penalties.

And any pecuniary penalty imposed by this Act, and not exceeding the sum of twenty pounds, shall and may be recovered before any justice or justices of the peace for the county, stewartry, riding, division, city, town or place, in which the same shall be incurred, or the person having incurred the same shall happen to be, in a summary way.

Section thirty-six.

Application of penalties.

All pecuniary penalties hereinbefore imposed by this Act shall, when recovered in a summary way before any justice, be applied and disposed of in manner hereinafter mentioned; that is to say, one moiety thereof to the informer before any justice, and the other moiety thereof to his Majesty, his heirs and successors.

51 Geo. 3, c. 65.

Section three.

Name and residence of printers not required to be put to bank notes, bills, &c., or to any paper printed by authority of any public board or public office.

Nothing in the said Act of the thirty-ninth year of King George the Third, chapter seventy-nine, or in this Act contained, shall extend or be construed to extend to require the name and residence of the printer to be printed upon any bank note, or bank post bill of the governor and company of the Bank of England, upon any bill of exchange, or promissory note, or upon any bond or other security for payment of money, or upon any bill of lading, policy of insurance, letter of attorney, deed, or agreement, or upon any transfer or assignment of any public stocks, funds, or other securities, or upon any transfer or assignment of the stocks of any public corporation or company authorized or sanctioned by Act of Parliament, or upon any dividend warrant of or for any such public or other stocks, funds, or securities, or upon any receipt for money or goods, or upon any proceeding in any court of law or equity, or in any interior court, warrant, order, or other papers printed by the authority of any public board or public officer in the execution of the duties of their respective offices, notwithstanding the whole or any part of the said several securities, instruments, proceedings, matters, and things aforesaid shall have been or shall be printed.

6 & 7 Will. 4, c. 76.

Section nineteen.

Discovery of proprietors, printers, or publishers of newspapers may be enforced by bill, &c.

If any person shall file any bill in any court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required: provided always, that such discovery shall not be made use of as evidence or otherwise in any proceeding against the defendant, save only in that proceeding for which the discovery is made.

2 & 3 Vict. c. 12.

Section two.

Penalty upon printers for not printing their name and residence on every

Every person who shall print any paper or book whatsoever which shall be meant to be published or dispersed, and who shall not print upon the front of every such paper, if the same shall be printed on one side only, or upon the first or last leaf of every paper or book which shall consist of more than one leaf, in legible characters, his or her name and usual place of abode or business, and

every person who shall publish or disperse, or assist in publishing or dispersing, any printed paper or book on which the name and place of abode of the person printing the same shall not be printed as aforesaid, shall for every copy of such paper so printed by him or her forfeit a sum not more than five pounds: Provided always, that nothing herein contained shall be construed to impose any penalty upon any person for printing any paper excepted out of the operation of the said Act of the thirty-ninth year of King George the Third, chapter seventy-nine, either in the said Act or by any Act made for the amendment thereof.

32 & 33 Vict. c. 24.

Paper or book, and on persons publishing the same.

Section three.

In the case of books or papers printed at the University Press of Oxford or the Pitt Press of Cambridge, the printer, instead of printing his name thereon, shall print the following words, "Printed at the University Press, Oxford," or "The Pitt Press, Cambridge," as the case may be.

As to books or papers printed at the University presses.

Section four.

Provided always, that it shall not be lawful for any person or persons whatsoever to commence, prosecute, enter, or file, or cause or procure to be commenced, prosecuted, entered, or filed, any action, bill, plaint, or information in any of Her Majesty's Courts, or before any justice or justices of the peace, against any person or persons for the recovery of any fine, penalty, or forfeiture made or incurred or which may hereafter be incurred under the provisions of this Act, unless the same be commenced, prosecuted, entered, or filed in the name of Her Majesty's Attorney-General or Solicitor-General in that part of Great Britain called England, or Her Majesty's Advocate for Scotland (as the case may be respectively); and if any action, bill, plaint, or information shall be commenced, prosecuted, or filed in the name or names of any other person or persons than is or are in that behalf before mentioned, the same and every proceeding thereupon had are hereby declared and the same shall be null and void to all intents and purposes.

No actions for penalties to be commenced except in the name of the Attorney or Solicitor General in England, or the Queen's Advocate in Scotland.

9 & 10 Vict. c. 33.

Section one.

It shall not be lawful for any person or persons to commence, prosecute, enter, or file, or cause or procure to be commenced, prosecuted, entered or filed, any action, bill, plaint, or information in any of Her Majesty's courts, or before any justice or justices of the peace, against any person or persons for the recovery of any fine which may hereafter be incurred under the provisions of the Act of the thirty-ninth year of King George the Third, chapter seventy-nine, set out in this Act unless the same be commenced, prosecuted, entered, or filed in the name of Her Majesty's Attorney-General or Solicitor-General in England or Her Majesty's Advocate in Scotland, and every action, bill, plaint, or information which shall be commenced, prosecuted, entered or filed in the name or names of any other person or persons than is in that behalf before-mentioned, and every proceeding thereupon had, shall be null and void to all intents and purposes.

Proceedings shall not be commenced unless in the name of the law officers of the Crown.

33 & 34 Vict. cap. 79. (a)

An Act for further Regulation of Duties of Postage, and for other Purposes relating to the Post Office.—[*9th August*, 1870.]

33 & 34 Vict. c. 79.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as "The Post Office Act, 1870." Short title.

2. In this Act—

"The Treasury" means the Commissioners of Her Majesty's Treasury or two of them:

"Treasury warrant" means a warrant under the hands of the Treasury: Interpretation of terms.

(a) So much of this Act or of any warrant or regulations made thereunder as is inconsistent with 38 Vict. c. 22, or with any warrant under it, is repealed by the latter Act.

33 & 34 Vict. c. 79.

"The Postmaster-General" means Her Majesty's Postmaster-General:

"Post Office regulations" means regulations made by the Postmaster-General.

Channel Islands and Isle of Man.

3. For the purposes of this Act, the Channel Islands and the Isle of Man shall be deemed parts of the United Kingdom.

Repeal and limitation of enactments.

4. The enactments described in the first schedule to this Act shall, from and immediately after the thirtieth day of September, one thousand eight hundred and seventy, be repealed; but that repeal shall not affect the past operation of any of those enactments, or the force or operation of any Treasury warrant or Post Office regulations made, or the validity or invalidity of anything done or suffered, or any right, title, obligation, or liability accrued, before that repeal takes effect: nor shall this Act interfere with the prosecution or institution of any proceeding in respect of any right, title, obligation, or liability accrued under, or any offence committed against, or any penalty or forfeiture incurred under, any of those enactments before that repeal takes effect; and section four of and schedule (A.) to the Act first described in the first schedule to this Act, or either of them, shall not be deemed to contain or affect the definition of a newspaper, for the purposes of this Act or of any other enactment regulating the sending of newspapers by post.

Allowance for newspaper stamps on hand.

5. Where any person is possessed of any newspaper stamps made useless by this Act, the Commissioners of Inland Revenue, on application within six months after the thirtieth day of September, one thousand eight hundred and seventy, may cancel and make allowance for the same as in case of spoiled stamps.

Certain publications to be deemed newspapers.

6. Any publication coming within the following description shall for the purposes of this Act be deemed a newspaper (that is to say), any publication consisting wholly or in great part of political or other news, or of articles relating thereto, or to other current topics, with or without advertisements; subject to these conditions—

That it be printed and published in the United Kingdom;
That it be published in numbers at intervals of not more than seven days;
That it be printed on a sheet or sheets unstitched;
That it have the full title and date of publication printed at the top of the first page, and the whole or part of the title and the date of publication printed at the top of every subsequent page.

Supplement.

And the following shall, for the purposes of this Act, be deemed a supplement to a newspaper (that is to say), a publication consisting wholly or in great part of matter like that of a newspaper, or of advertisements, printed on a sheet or sheets or a piece or pieces of paper, unstitched, or consisting wholly or in part of engravings, prints, or lithographs illustrative of articles in the newspaper; such publication in every case being published with the newspaper, and having the title and date of publication of the newspaper printed at the top of every page, or at the top of every sheet or side on which any such engraving, print, or lithograph appears.

Registration of newspapers at Post Office.

7. The proprietor or printer of any newspaper within the description aforesaid, and the proprietor or printer of any publication which, regard being had to the proportion of advertisements to other matter therein, is not within the description aforesaid, but which was stamped as a newspaper before the passing of the Act lastly mentioned in the

first schedule to this Act, may register it at the General Post Office in London, at such time in each year and in such form and with such particulars as the Postmaster-General from time to time directs, paying on each registration such fee not exceeding five shillings as the Postmaster-General, with the approval of the Treasury, from time to time directs.

The Postmaster-General may from time to time revise the register and remove therefrom any publication not being a newspaper.

The decision of the Postmaster-General on the admission to or removal from the register of a publication shall be final, save that the Treasury may, if they think fit, on the application of any person interested, reverse or modify the decision, and order accordingly.

Any publication for the time being on the register shall for the purposes of this Act be deemed a registered newspaper.

Postage on newspapers, book and pattern [or sample] packets and cards.

8. From and after the thirtieth day of September one thousand eight hundred and seventy, registered newspapers, book packets, pattern [or sample] packets, and post cards, may be sent by post between places in the United Kingdom, at the following rates of postage :—

On a registered newspaper, with or without a supplement or supplements	One halfpenny.
On each registered newspaper in a packet of two or more, with or without a supplement or supplements...	One halfpenny.
On a book packet or pattern or sample packet:—	
If not exceeding two ounces in weight	One halfpenny.
If exceeding two ounces in weight, for the first two ounces and for every additional two ounces or fractional part of two ounces	One halfpenny.
On a post card...	One halfpenny.

Provided that a packet of two or more registered newspapers with or without a supplement or supplements shall not be liable under this section to a higher rate of postage than the rate chargeable on a book packet of the same weight.

So much as relates to sample packets is repealed by 34 & 35 Vict. c. 30.

Post Office regulations.

9. The Postmaster-General may from time to time, with the approval of the Treasury, make, in relation respectively to registered newspapers, book packets, pattern [or sample] packets, and post cards, sent by post, such regulations as he thinks fit, for all or any of the following purposes :—

For prescribing and regulating the times and modes of posting and delivery :
For prescribing prepayment and regulating the mode thereof :
For regulating the affixing of postage stamps :
For prescribing and regulating the payment again of postage in case of re-direction :
For regulating dimensions and maximum weight of packets :
For regulating the nature and form of covers :
For prohibiting or restricting the printing or writing of marks or communications or words :
For prohibiting inclosures ;

and such other regulations as from time to time seem expedient for the better execution of this Act.

33 & 34 Vict. c. 79.

So much as relates to sample packets is repealed by 34 & 35 Vict. c. 30.

Saving for Parliamentary proceedings.

10. Nothing in this Act or in any Treasury warrant or Post Office regulations shall repeal or alter any provision of section 13, 16, or 17 of the Act secondly described in the first schedule to this Act as far as those sections relate to printed votes or proceedings of Parliament addressed to places in the United Kingdom.

Newspapers under arrangement or convention.

11. A registered newspaper shall be deemed a newspaper for the purposes of any arrangement or convention between Her Majesty's Government and any colonial or foreign government for securing advantages for newspapers sent by post.

Colonial and foreign postage of newspapers.

12. The Treasury may from time to time, by Treasury warrant, allow any newspapers, British, colonial, or foreign, to be sent by post between the United Kingdom and places out of the United Kingdom, or between places out of the United Kingdom, whether through the United Kingdom or not, at such rates of postage, not exceeding threepence for each newspaper irrespectively of any colonial or foreign postage, and on such conditions, as they think fit, and according to Post Office regulations to be from time to time made in that behalf.

Any Treasury warrant and Post Office regulations made in that behalf before the passing of this Act are hereby confirmed; and the same shall continue in force unless and until altered by Treasury warrant or Post Office regulations (as the case may be).

Colonial and foreign book, &c., post.

13. The Treasury from time to time, by Treasury warrant, may regulate the sending of book packets and pattern or sample packets by post, between the United Kingdom and places out of the United Kingdom, or between places out of the United Kingdom, whether through the United Kingdom or not, and in relation thereto may prescribe rates of postage, weights, and other matters.

Any Treasury warrant and Post Office regulations made in that behalf before the passing of this Act are hereby confirmed; and the same shall continue in force unless and until altered by Treasury warrant or Post Office regulations (as the case may be).

Decision as to newspapers, packets, &c.

14. If a question arises whether any publication, not being a registered newspaper, is a newspaper or a supplement, or whether any packet is a book packet or pattern or sample packet, within this Act or any Treasury warrant or Post Office regulations, the decision thereon of the Postmaster-General shall be final, save that the Treasury may, if they think fit, on the application of any person interested, reverse and modify the decision, and order accordingly.

Newspapers, &c. sent not in conformity with Act, &c.

15. If any registered or other newpaper, supplement, publication, book packet, pattern, or sample packet, or post card, is sent by post otherwise than in conformity with this Act or any Treasury warrant or Post Office regulations, it shall be either returned to the sender thereof or forwarded to its destination, in either case charged with such rate of postage not exceeding the letter rate of postage, or without any additional charge, as the Postmaster-General, with the approval of the Treasury, from time to time directs, having been, if necessary, detained and opened in the Post Office.

Application to book packets, &c., of enactments as to post letters.

16. A book packet, pattern or sample packet, or post card sent by post shall be deemed a post letter, within the Act described in the second schedule to this Act.

Despatch and delivery of book packets, &c.

17. Where the despatch or delivery from a post-office of letters would be delayed by the despatch or delivery therefrom at the same time of book packets, pattern or sample packets, and post cards, or any of them, the same or any of them may, subject and according to

Post Office regulations, be detained in the Post Office until the despatch or delivery next following that by which they would ordinarily be despatched or delivered. 33 & 34 Vict. c. 79.

18. The Commissioners of Inland Revenue shall from time to time provide proper dies and other implements for denoting by adhesive or embossed or impressed stamps or otherwise the duties of postage payable in the United Kingdom under this Act or any Treasury warrant thereunder. Provision for stamps, &c.

Those duties shall be deemed stamp duties, and shall be under the management of the Commissioners of Inland Revenue.

So much of the Act secondly described in the first schedule to this Act as relates to stamp duties under that Act shall apply to the stamp duties under this Act.

A newspaper or packet sent by post and the cover thereof (if any) shall be deemed a letter or cover (as the case may be) within section twenty-three of the Act secondly described in the first schedule to this Act; and a post card shall be deemed a letter within that section, and the duties under this Act shall be deemed to be comprised in the duties in that section referred to.

19. It shall not be lawful for any person to affix to a letter, newspaper, supplement, publication, packet, or card sent by post, or to the cover thereof (if any), by way of prepayment of postage thereon, an embossed or impressed stamp cut out or otherwise separated from the cover or other paper, card, or thing on which such stamp was embossed or impressed, although such stamp has not been before sent by post or used. Prohibition of user of embossed or impressed stamps removed from paper, &c.

If any letter, newspaper, supplement, publication, packet, or card is sent by post with a stamp affixed thereto or to the cover thereof (if any) that has been so cut out or separated, the postage thereof as far as it purports to be prepaid by that stamp shall be deemed to be not prepaid.

20. The Postmaster-General may from time to time with the approval of the Treasury make such regulations as he thinks fit for preventing the sending or delivery by post of indecent or obscene prints, paintings, photographs, lithographs, engravings, books, or cards, or of other indecent or obscene articles, or of letters, newspapers, supplements, publications, packets, or post cards, having thereon, or on the covers thereof, any words, marks, or designs of an indecent, obscene, libellous, or grossly offensive character. Prohibition of sending indecent articles, &c., by post.

21. The Documentary Evidence Act, 1868, shall have effect as if the Postmaster-General were mentioned in the first column, and any secretary or assistant-secretary of the Post Office were mentioned in the second column, of the schedule to that Act; and any approval of the Treasury under this Act shall be deemed an order within that Act. Proof of Post Office regulations, &c.

SCHEDULES.

THE FIRST SCHEDULE.

ENACTMENTS REPEALED.

6 & 7 Will. 4, c. 76, in part.	An Act to reduce the duties on newspapers, and to amend the laws relating to the duties on newspapers and advertisements	In part; namely,—
	Sections one to three (both inclusive), and sections thirty-four and thirty-five.	

33 & 34 Vict. c. 79.	3 & 4 Vict. c. 96, in part.	An Act for the regulation of the duties of postage	In part; namely,— Section eleven; sections thirteen, sixteen, and seventeen, as far as those three sections relate to printed votes or proceedings of Parliament, addressed to places out of the United Kingdom, or to newspapers; section forty-two; sections forty-four, forty-five, and forty-six, as far as those three sections relate to newspapers; and sections forty-seven to fifty-one (both inclusive).
	11 & 12 Vict. c. 117.	An Act for rendering certain newspapers published in the Channel Islands and the Isle of Man liable to postage.	
	16 & 17 Vict. c. 63, in part.	An Act to repeal certain stamp duties, and to grant others in lieu thereof, to give relief with respect to the stamp duties on newspapers and supplements thereto, to repeal the duty on advertisements, and otherwise to amend the laws relating to stamp duties ... ... Sections three and four.	In part; namely,—
	16 & 19 Vict. c. 27.	An Act to amend the laws relating to the stamp duties on newspapers, and to provide for the transmission by post of printed periodical publications.	

THE SECOND SCHEDULE.

Act Referred to.

7 Will. 4, & 1 Vict. c. 36.—An Act for consolidating the laws relative to offences against the Post Office of the United Kingdom, and for regulating the judicial administration of the Post Office laws, and for explaining certain terms and expressions employed in those laws.

38 Vict. cap. 12.

38 Vict. c. 12. *An Act to amend the Law relating to International Copyright.*
[*13th May*, 1875.]

5 Vict. c. 12. Whereas by an Act passed in the fifteenth year of the reign of Her present Majesty, chapter twelve, intituled "An Act to enable Her Majesty to carry into effect a convention with France on the subject of Copyright; to extend and explain the International Copyright Acts; and to explain the Acts relating to copyright in engravings," it is enacted, that "Her Majesty may, by Order in Council, direct that authors of dramatic pieces which are, after a future time, to be specified in such order, first publicly represented in any foreign country to be named in such order, their executors, administrators, and assigns, shall, subject to the provisions thereinafter mentioned or referred to, be empowered to prevent the representation in the British dominions of any translation of such dramatic pieces not authorized by them, for such time as may be specified in such order, not extending beyond the expiration of five years from the time at which the authorized translations of such dramatic pieces are first published and publicly represented:"

And whereas by the same Act it is further enacted, "that, subject to any provisions or qualifications contained in such order, and to the provisions of the said Act contained or referred to, the laws and enactments for the time being in force for ensuring to the author of any dramatic piece first publicly represented in the British dominions the sole liberty of representing the same shall be applied for the purpose of preventing the representation of any translations

of the dramatic pieces to which such order extends, which are not sanctioned by the authors thereof:" 38 Vict. c. 12

And whereas by the sixth section of the said Act it is provided, that "nothing in the said Act contained shall be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country:"

And whereas it is expedient to alter or amend the last-mentioned provision under certain circumstances:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows—viz.,

Section 6 of recited Act not to apply to dramatic pieces in certain cases.

1. In any case in which, by virtue of the enactments hereinbefore recited, any Order in Council has been or may hereafter be made for the purpose of extending protection to the translations of dramatic pieces first publicly represented in any foreign country, it shall be lawful for Her Majesty by Order in Council to direct that the sixth section of the said Act shall not apply to the dramatic pieces to which protection is so extended; and thereupon the said recited Act shall take effect with respect to such dramatic pieces and to the translations thereof as if the said sixth section of the said Act were hereby repealed.

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38 & 39 Vict. cap. 53.

An Act to give effect to an Act of the Parliament of the Dominion of Canada respecting Copyright.—[*2nd August*, 1875.] 38 & 39 Vict. c. 53.

Whereas by an order of Her Majesty in Council, dated the 7th day of July, 1868, it was ordered that all prohibitions contained in Acts of the Imperial Parliament against the importing into the Province of Canada, or against the selling, letting out to hire, exposing for sale or hire, or possessing therein foreign reprints of books first composed, written, printed, or published in the United Kingdom, and entitled to copyright therein, should be suspended so far as regarded Canada:

And whereas the Senate and House of Commons of Canada did, in the second session of the third Parliament of the Dominion of Canada, held in the thirty-eighth year of Her Majesty's reign, pass a Bill intituled "An Act respecting Copyrights," which Bill has been reserved by the Governor-General for the signification of Her Majesty's pleasure thereon:

And whereas by the said reserved Bill provision is made, subject to such conditions as in the said Bill are mentioned, for securing in Canada the rights of authors in respect of matters of copyright, and for prohibiting the importation into Canada of any work for which copyright under the said reserved Bill has been secured; and whereas doubts have arisen whether the said reserved Bill may not be repugnant to the said Order in Council, and it is expedient to remove such doubts and to confirm the said Bill:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title of Act.

1. This Act may be cited for all purposes as The Canada Copyright Act, 1875.

38 & 39 Vict. c. 53.

Definition of terms.

2. In the construction of this Act the words "book" and "copyright" shall have respectively the same meaning as in the Act of the fifth and sixth years of Her Majesty's reign, chapter forty-five, intituled "An Act to amend the Law of Copyright."

Her Majesty may assent to the Bill in schedule.

3. It shall be lawful for Her Majesty in Council to assent to the said reserved Bill, as contained in the schedule to this Act annexed, and if Her Majesty shall be pleased to signify Her assent thereto, the said Bill shall come into operation at such time and in such manner as Her Majesty may by Order in Council direct; anything in the Act of the twenty-eighth and twenty-ninth years of the reign of Her Majesty, chapter ninety-three, or in any other Act to the contrary notwithstanding.

Colonial reprints not to be imported into United Kingdom.

4. Where any book in which, at the time when the said reserved Bill comes into operation, there is copyright in the United Kingdom, or any book in which thereafter there shall be such copyright, becomes entitled to copyright in Canada in pursuance of the provisions of the said reserved Bill, it shall be unlawful for any person, not being the owner, in the United Kingdom, of the copyright in such book, or some person authorized by him, to import into the United Kingdom any copies of such book reprinted or republished in Canada; and for the purposes of such importation the seventeenth section of the said Act of the fifth and sixth years of the reign of Her Majesty, chapter forty-five, shall apply to all such books in the same manner as if they had been reprinted out of the British dominions.

Order in Council of 7th July, 1868, to continue in force subject to this Act.

5. The said Order in Council, dated the seventh day of July one thousand eight hundred and sixty-eight, shall continue in force so far as relates to books which are not entitled to copyright for the time being, in pursuance of the said reserved Bill.

SCHEDULE.

An Act respecting Copyrights.

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

Registers of copyrights.

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

Regulations by Minister of Agriculture.

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

Unauthorized publication of manuscript.

3. If any person prints or publishes, or causes to be printed or published, any manuscript whatever, the said manuscript having not yet been printed in Canada or elsewhere, without the consent of the author or legal proprietor first obtained, such person shall be liable to the author or proprietor for all damages occasioned by such publication, to be recovered in any court of competent jurisdiction.

Copyright of author.

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

term of twenty-eight years from the time of recording the copyright thereof in the manner hereinafter directed:

Conditions for obtaining copyright.

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

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

Extension of original term of copyright.

5. If at the expiration of the aforesaid term of twenty-eight years, such author, or any of the authors when the work has been originally composed and made by more than one person, be still living, or being dead has left a widow or a child or children living, the same exclusive right shall be continued to such author, or, if dead, then to such widow and child or children (as the case may be) for the further term of fourteen years; but in such case within one year after the expiration of the first term the title of the work secured shall be a second time recorded, and all other regulations herein required to be observed in regard to original copyrights shall be complied with in respect to such renewed copyright.

Publication in Gazette.

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

Deposit of copies.

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

Deposit in Parliament library.

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

Insertion of notice in all copies published.

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

Interim copyright.

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

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

(3.) A literary work intended to be published in pamphlet or book form, but which is first published in separate articles in a newspaper or periodical, may be the subject of registration within the meaning of this Act while it is so preliminarily published, provided that the title of the manuscript and a short analysis of the work are deposited in the office of the Minister of Agriculture, and that every separate article so published is preceded

38 & 39 Vict. c. 53.

by the words "Registered in accordance with the Copyright Act of 1875;" but the work when published in book or pamphlet form shall be subject, besides, to the other requirements of this Act.

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

Penalty for infringement of copyright in books.

11. If any other person after the interim registration of the title of any book according to this Act within the term herein limited, or after the copyright is secured, and for the term or terms of its duration, prints, publishes, or reprints, or republishes, or imports, or causes to be so printed, published, or imported, any copy or any translation of such book without the consent of the person legally entitled to the copyright thereof first had and obtained by assignment, or knowing the same to be so printed or imported publishes, sells, or exposes for sale, or causes to be published, sold, or exposed for sale any copy of such book without such consent, such offender shall forfeit every copy of such book to the person then legally entitled to the copyright thereof; and shall forfeit and pay for every such copy which may be found in his possession, either printed or printing, published, imported, or exposed for sale, contrary to the intent of this Act, such sum not being less than ten cents nor more than one dollar as the court shall determine; of which penalty one moiety shall be to the use of Her Majesty, and the other to the legal owner of such copyright, and such penalty may be recovered in any court of competent jurisdiction.

Penalty in case of paintings, drawings, statues, or other works of art.

12. If any person after the recording of any painting, drawing, statue, or other work of art within the term or terms limited by this Act, reproduces in any manner, or causes to be reproduced, made, or sold, in whole or in part, copies of the said works of art without the consent of the proprietor or proprietors, such offender or offenders shall forfeit the plate or plates on which such reproduction has been made, and also every sheet thereof so copied, printed, or photographed, to the proprietor or proprietors of the copyright thereof, and shall further forfeit for every sheet of the same reproduction so published or exposed for sale, contrary to the true intent and meaning of this Act, such sum, not being less than ten cents nor more than one dollar, as the court shall determine; and one moiety of such forfeiture shall go the proprietor or proprietors, and the other moiety to the use of Her Majesty, and such forfeiture may be recovered in any court of competent jurisdiction.

Penalty in case of prints, cuts, engravings, maps, charts, musical compositions or photographs.

13. If any person, after the recording of any print, cut, or engraving, map, chart, musical composition, or photograph, according to the provisions of this Act, within the term or terms limited by this Act, engraves, etches, or works, sells or copies, or causes to be engraved, etched, or copied, made or sold, either in the whole or by varying, adding to, or diminishing the main design with intent to evade the law, or prints, or reprints, or imports for sale, or causes to be so printed or imported, for sale, any such map, chart, musical composition, print, cut, or engraving, or any part thereof, without the consent of the proprietor or proprietors of the copyright thereof first obtained as aforesaid, or knowing the same to be so printed or imported without such consent, publishes, sells, or exposes for sale, or in any manner disposes of any such map, chart, musical composition, engraving, cut, photograph, or print without such consent as aforesaid, such offender or offenders shall forfeit the plate or plates on which such map, chart, musical composition, engraving, cut, photograph, or print has been copied, and also every sheet thereof so copied or printed as aforesaid, to the proprietor or proprietors of the copyright thereof, and shall further forfeit for every sheet of such map, musical composition, print, cut, or engraving which may be found in his or their possession, printed or published or exposed for sale contrary to the true intent and meaning of this Act, such sum not being less than ten cents nor more than one dollar as the court shall determine; and one moiety of such forfeiture shall go to the proprietor or proprietors, and the other moiety to the use of Her Majesty, and such forfeiture may be recovered in any court of competent jurisdiction.

Right of separate representation.

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

Printing and publishing, or reprinting and republishing, in Canada.

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

(2.) In the case of the reprinting of any such copyright work subsequent to its publication in the United Kingdom, any person who may have previous to the date of entry of such work upon the registers of copyright imported any foreign reprints, shall have the privilege of disposing of such reprints by sale or otherwise; the burden of proof, however, in such a case will lie with such person to establish the extent and regularity of the transaction. 38 & 39 Vict. c. 53.

Work done for or sold to another person.

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

False assertion of copyright.

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

Failure to print and publish.

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

Assignment of copyright.

18. The right of an author of a literary, scientific, or artistic work to obtain a copyright, and the copyright when obtained, shall be assignable in law, either as to the whole interest or any part thereof, by an instrument in writing made in duplicate, and to be recorded in the office of the Minister of Agriculture, on production of both duplicates and payment of the fee hereinafter provided. One of the duplicates shall be retained in the office of the Minister of Agriculture, and the other returned, with the certificate of registration, to the party depositing it.

Conflicting applications for registration.

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

Clerical errors.

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

Certified extracts.

21. All copies or extracts certified from the officer of the Minister of Agriculture shall be received in evidence without further proof, and without production of the originals.

Power to authorize republication.

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

Fraudulent applications for registration.

23. The application for the registration of an interim copyright, of a temporary copyright, and of a copyright may be made in the name of the author or of his legal representative by any person purporting to be the agent of the said author, and any fraudulent assumption of such authority shall be a misdemeanour, and shall be punished by fine and imprisonment accordingly; and any damage caused by a fraudulent or an erroneous assumption of such authority shall be recoverable before any court of competent jurisdiction.

38 & 39 Vict. c. 53.

False entries.

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

Books published anonymously.

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

Subsequent editions.

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

Limitation of actions.

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

Fees.

The following fees shall be payable to the Minister of Agriculture before an application for any of the purposes hereinafter mentioned shall be entertained—that is to say,

	Dol.	c.
On registering a copyright	1	00
On registering an interim copyright	0	50
On registering a temporary copyright	0	50
On recording an assignment	1	00
On certified copy of registration	0	50
On registering any decision of a court of justice, for every folio	0	50

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

For every single or first folio certified copy	0	50
For every subsequent one hundred words (fractions from and under fifty being not counted, and over fifty being counted for one hundred)	0	25

(2.) The said fees shall be in full of all services performed under this Act by the Minister of Agriculture, or by any person employed by him in pursuance of this Act.

(3.) All fees received under this Act shall be paid over to the Receiver General and form part of the Consolidated Revenue Fund of Canada. No fees shall be made the subject of exemption in favour of any person, and no fee exacted by this Act, once paid, shall be returned to the person who paid it.

Repeal of Acts.

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

Unexpired copyrights.

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

Title.

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

44 & 45 Vict. cap. 60.

44 & 45 Vict. c. 60.

An Act to amend the Law of Newspaper Libel, and to provide for the Registration of Newspaper Proprietors.—[*27th August*, 1881.]

Whereas it is expedient to amend the law affecting civil actions and criminal prosecutions for newspaper libel:

And whereas it is also expedient to provide for the registration of newspaper proprietors:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: 44 & 45 Vict. c. 60.

1. In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words and phrases hereinafter mentioned shall have and include the meanings following (that is to say), Interpretation.

The word "registrar" shall mean in England the registrar for the time being of joint stock companies, or such person as the Board of Trade may for the time being authorize in that behalf, and in Ireland the assistant registrar for the time being of joint stock companies for Ireland, or such person as the Board of Trade may for the time being authorize in that behalf.

The phrase "registry office" shall mean the principal office for the time being of the registrar in England or Ireland, as the case may be, or such other office as the Board of Trade may from time to time appoint.

The word "newspaper" shall mean any paper containing public news, intelligence, or occurrences, or any remarks or observations therein printed for sale, and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts, or numbers.

Also any paper printed in order to be dispersed, and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.

The word "occupation" when applied to any person shall mean his trade or following, and if none, then his rank or usual title, as esquire, gentleman.

The phrase "place of residence" shall include the street, square, or place where the person to whom it refers shall reside, and the number (if any) or other designation of the house in which he shall so reside.

The word "proprietor" shall mean and include as well the sole proprietor of any newspaper, as also in the case of a divided proprietorship the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper as between themselves and the persons in like manner representing or responsible for the other shares or interests therein, and no other person.

2. Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit; provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor. Newspaper reports of certain meetings privileged.

3. No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England or Her Majesty's Attorney General in Ireland being first had and obtained. No prosecution for newspaper libel without fiat.

4. A court of summary jurisdiction, upon the hearing of a charge Inquiry by court

44 & 45 Vict. c. 60.

of summary jurisdiction as to libel being for public benefit or being true.

against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, may receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate, and published without malice, and as to any matter which under this or any other Act, or otherwise, might be given in evidence by way of defence by the person charged on his trial on indictment, and the court, if of opinion after hearing such evidence that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case.

Provision as to summary conviction for libel.

5. If a court of summary jurisdiction upon the hearing of a charge against a proprietor, publisher, editor, or any person responsible for the publication of a newspaper for a libel published therein is of opinion that though the person charged is shown to have been guilty the libel was of a trivial character, and that the offence may be adequately punished by virtue of the powers of this section, the court shall cause the charge to be reduced into writing and read to the person charged, and then address a question to him to the following effect: 'Do you desire to be tried by a jury or do you consent to the case being dealt with summarily?" and, if such person assents to the case being dealt with summarily, the court may summarily convict him, and adjudge him to pay a fine not exceeding fifty pounds.

42 & 43 Vict. c. 49.

Section twenty-seven of the Summary Jurisdiction Act, 1879, shall, so far as is consistent with the tenor thereof, apply to every such proceeding as if it were herein enacted and extended to Ireland, and as if the Summary Jurisdiction Acts were therein referred to instead of the Summary Jurisdiction Act, 1848.

11 & 12 Vict. c. 43. 22 & 23 Vict. c. 17 made applicable to this Act.

6. Every libel or alleged libel, and every offence under this Act, shall be deemed to be an offence within and subject to the provisions of the Act of the session of the twenty-second and twenty-third years of the reign of Her present Majesty, chapter seventeen, intituled "An Act to prevent vexatious indictments for certain misdemeanours."

Board of Trade may authorize registration of the names of only a portion of the proprietors of a newspaper.

7. Where, in the opinion of the Board of Trade, inconvenience would arise or be caused in any case from the registry of the names of all the proprietors of the newspaper (either owing to minority, coverture, absence from the United Kingdom, minute subdivision of shares, or other special circumstances), it shall be lawful for the Board of Trade to authorize the registration of such newspaper in the name or names of some one or more responsible "representative proprietors."

Register of newspaper proprietors to be established.

8. A register of the proprietors of newspapers as defined by this Act shall be established under the superintendence of the registrar.

Annual returns to be made.

9. It shall be the duty of the printers and publishers for the time being of every newspaper to make or cause to be made to the Registry Office on or before the thirty-first of July, one thousand eight hundred and eighty-one, and thereafter annually in the month of July in every year, a return of the following particulars according to the Schedule A. hereunto annexed—that is to say,

(*a.*) The title of a newspaper:

(*b.*) The names of all the proprietors of such newspaper, together with their respective occupations, places of business (if any), and places of residence.

Penalty for

10. If within the further period of one month after the time herein-

before appointed for the making of any return as to any newspaper such return be not made, then each printer and publisher of such newspaper shall, on conviction thereof, be liable to a penalty not exceeding twenty-five pounds, and also to be directed by a summary order to make a return within a specified time. 44 & 45 Vict. c. 60.

Omission to make annual returns.

11. Any party to a transfer or transmission of or dealing with any share of or interest in any newspaper, whereby any person comes to be a proprietor, or any new proprietor is introduced, may at any time make or cause to be made to the Registry Office a return according to the Schedule B. hereunto annexed, and containing the particulars therein set forth.

Power to party to make return.

12. If any person shall knowingly and wilfully make or cause to be made any return by this Act required or permitted to be made in which shall be inserted or set forth the name of any person as a proprietor of a newspaper who shall not be a proprietor thereof, or in which there shall be any misrepresentation, or from which there shall be any omission in respect of any of the particulars by this Act required to be contained therein, whereby such return shall be misleading, or if any proprietor of a newspaper shall knowingly and wilfully permit any such return to be made which shall be misleading as to any of the particulars with reference to his own name, occupation, place of business (if any), or place of residence, then and in every such case every such offender being convicted thereof shall be liable to a penalty not exceeding one hundred pounds.

Penalty for wilful misrepresentation in or omission from return.

13. It shall be the duty of the registrar, and he is hereby required, forthwith to register every return made in conformity with the provisions of this Act in a book to be kept for that purpose at the Registry Office, and called "The Register of Newspaper Proprietors," and all persons shall be at liberty to search and inspect the said book from time to time during the hours of business at the Registry Office, and any person may require a copy of any entry in or an extract from the book, to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar.

Registrar to enter returns in register.

14. There shall be paid in respect of the receipt and entry of returns made in conformity with the provisions of this Act, and for the inspection of the register of newspaper proprietors, and for certified copies of any entry therein, and in respect of any other services to be performed by the registrar, such fees (if any) as the Board of Trade, with the approval of the Treasury, may direct, and as they shall deem requisite to defray as well the additional expenses of the Registry Office caused by the provisions of this Act as also the further remunerations and salaries (if any) of the registrar, and of any other persons employed under him in the execution of this Act, and such fees shall be dealt with as the Treasury may direct.

Fees payable for registrar's services.

15. Every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient *prima facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown.

Copies of entries in and extracts from register to be evidence.

16. All penalties under this Act may be recovered before a court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts.

Recovery of penalties and enforcement of orders.

44 & 45 Vict. c. 60.

Summary orders under this Act may be made by a court of summary jurisdiction, and enforced in manner provided by section 34 of the Summary Jurisdiction Act, 1879; and, for the purposes of this Act, that section shall be deemed to apply to Ireland in the same manner as if it were re-enacted in this Act.

Definitions.

17. The expression "a court of summary jurisdiction" has in England the meanings assigned to it by the Summary Jurisdiction Act, 1879; and in Ireland means any justice or justices of the peace, stipendiary or other magistrate or magistrates, having jurisdiction under the Summary Jurisdiction Acts.

The expression "Summary Jurisdiction Acts" has as regards England the meanings assigned to it by the Summary Jurisdiction Act, 1879; and as regards Ireland means within the police district of Dublin metropolis the Acts regulating the powers and duties of justices of the peace for such district, or of the police of that district, and elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and any Act amending the same.

14 & 15 Vict. c. 93.

Newspaper belonging to a joint stock company.

18. The provisions as to the registration of newspaper proprietors contained in this Act shall not apply to the case of any newspaper which belongs to a joint stock company duly incorporated under and subject to the provisions of the Companies Acts, 1862 to 1879.

Act not to extend to Scotland.

19. This Act shall not extend to Scotland.

Short title.

20. This Act may for all purposes be cited as the Newspaper Libel and Registration Act, 1881.

THE SCHEDULES TO WHICH THIS ACT REFERS.

SCHEDULE A.

Return made pursuant to the Newspaper Libel and Registration Act, 1881.

Title of the Newspaper.	Names of the Proprietors.	Occupations of the Proprietors.	Places of business (if any) of the Proprietors.	Places of Residence of the Proprietors.

SCHEDULE B.

Return made pursuant to the Newspaper Libel and Registration Act, 1881.

Title of Newspaper.	Names of Persons who cease to be Proprietors.	Names of Persons who become Proprietors.	Occupation of new Proprietors	Places of business (if any) of new Proprietors.	Places of Residence of new Proprietors.

45 & 46 Vict. cap. 40.

45 & 46 Vict. c. 40.

An Act to amend the Law of Copyright relating to Musical Compositions. —[*10th August*, 1882].

WHEREAS it is expedient to amend the law relating to copyright in musical compositions, and to protect the public from vexatious proceedings for the recovery of penalties for the unauthorized performance of the same:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Printed notice restraining public performance.

1. On and after the passing of this Act the proprietor of the copyright in any musical composition first published after the passing of this Act, or his assignee, who shall be entitled to and be desirous of retaining in his own hands exclusively the right of public representation or performance of the same, shall print or cause to be printed upon the title-page of every published copy of such musical composition a notice to the effect that the right of public representation or performance is reserved.

Provision when right of performance and copyright are vested in different owners.

2. In case, after the passing of this Act, the right of public representation or performance of, and the copyright in, any musical composition shall be or become vested before publication of any copy thereof in different owners, then, if the owner of the right of public representation or performance shall desire to retain the same, he shall, before any such publication of any copy of such musical composition, give to the owner of the copyright therein notice in writing requiring him to print upon every copy of such musical composition, a notice to the effect that the right of public representation or performance is reserved; but in case the right of public representation or performance of, and the copyright in any musical composition shall, after publication of any copy thereof subsequently to the passing of this Act, first become vested in different owners, and such notice as aforesaid shall have been duly printed on all copies published after the passing of this Act previously to such vesting, then, if the owner of the right of performance and representation shall desire to retain the same, he shall, before the publication of any further copies of such musical composition, give notice in writing to the person in whom the copyright shall be then vested, requiring him to print such notice as aforesaid on every copy of such musical composition to be thereafter published.

Penalty on owner of copyright for non-compliance with notice from owner of right of performance.

3. If the owner for the time being of the copyright in any musical composition shall, after due notice being given to him or his predecessor in title at the time, and generally in accordance with the last preceding section, neglect or fail to print legibly and conspicuously upon every copy of such composition published by him or by his authority, or by any person lawfully entitled to publish the same, and claiming through or under him, a note or memorandum stating that the right of public representation or performance is reserved, then and in such case the owner of the copyright at the time of the happening of such neglect or default, shall forfeit and pay to the owner of the right of public representation or performance of such composition the sum of twenty pounds, to be recovered in any court of competent jurisdiction.

Costs.

4. Notwithstanding the provisions of the Act passed in the third and fourth years of His Majesty King William the Fourth, to amend the laws relating to dramatic literary property, or any other Act in 3 & 4 Will. 4, c. 15.

45 & 46 Vict. c. 40.

which those provisions are incorporated, the costs of any action or proceedings for penalties or damages in respect of the unauthorized representation or performance of any musical composition published before the passing of this Act shall, in cases in which the plaintiff shall not recover more than forty shillings as penalty or damages, be in the discretion of the court or judge before whom such action or proceedings shall be tried.

Short title.

5. This Act may be cited as the Copyright (Musical Compositions) Act, 1882.

46 & 47 Vict. cap. 57.

46 & 47 Vict. c. 57.

An Act to amend and consolidate the Law relating to Patents for Inventions, Registration of Designs, and of Trade Marks.—[25th *August* 1883.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

Preliminary.

Short title.

1. This Act may be cited as the Patents, Designs, and Trade Marks Act, 1883.

Division of Act into parts.

2. This Act is divided into parts, as follows:—

Part I.—Preliminary.
Part II.—Patents.
Part III.—Designs.
Part IV.—Trade Marks.
Part V.—General.

Commencement of Act.

3. This Act, except where it is otherwise expressed, shall commence from and immediately after the thirty-first day of December one thousand eight hundred and eighty-three.

PART III.

Designs.

Registration of Designs.

Application for registration of designs.

47. (1) The comptroller may, on application by or on behalf of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom, register the design under this part of this Act.

(2) The application must be made in the form set forth in the First Schedule to this Act, or in such other form as may be from time to time prescribed, and must be left at, or sent by post to, the patent office in the prescribed manner.

(3.) The application must contain a statement of the nature of the design, and the class or classes of goods in which the applicant desires that the design be registered.

(4.) The same design may be registered in more than one class.

(5.) In case of doubt as to the class in which a design ought to be registered, the comptroller may decide the question.

(6.) The comptroller may, if he thinks fit, refuse to register any design presented to him for registration, but any person aggrieved by any such refusal may appeal therefrom to the Board of Trade. 46 & 47 Vict. c. 57.

(7.) The Board of Trade shall, if required, hear the applicant and the comptroller, and may make an order determining whether, and subject to what conditions, if any, registration is to be permitted.

48. (1.) On application for registration of a design, the applicant shall furnish to the comptroller the prescribed number of copies of drawings, photographs, or tracings of the design sufficient, in the opinion of the comptroller, for enabling him to identify the design; or the applicant may, instead of such copies, furnish exact representations or specimens of the design. Drawings, &c. to be furnished on application.

(2.) The comptroller may, if he thinks fit, refuse any drawing, photograph, tracing, representation, or specimen which is not, in his opinion, suitable for the official records.

49. (1.) The comptroller shall grant a certificate of registration to the proprietor of the design when registered. Certificate of registration.

(2.) The comptroller may, in case of loss of the original certificate, or in any other case in which he deems it expedient, grant a copy or copies of the certificate.

Copyright in Registered Designs.

50. (1.) When a design is registered, the registered proprietor of the design shall, subject to the provisions of this Act, have copyright in the design during five years from the date of registration. Copyright on registration.

(2.) Before delivery on sale of any articles to which a registered design has been applied, the proprietor must (if exact representations or specimens were not furnished on the application for registration), furnish to the comptroller the prescribed number of exact representations or specimens of the design; and if he fails to do so, the comptroller may erase his name from the register, and thereupon his copyright in the design shall cease.

51. Before delivery on sale of any articles to which a registered design has been applied, the proprietor of the design shall cause each such article to be marked with the prescribed mark, or with the prescribed word or words, or figures, denoting that the design is registered; and if he fails to do so, the copyright in the design shall cease, unless the proprietor shows that he took all proper steps to ensure the marking of the article. Marking registered designs.

52. (1.) During the existence of copyright in a design, the design shall not be open to inspection except by the proprietor, or a person authorized in writing by the proprietor, or a person authorized by the comptroller or by the court, and furnishing such information as may enable the comptroller to identify the design, nor except in the presence of the comptroller, or of an officer acting under him, nor except on payment of the prescribed fee; and the person making the inspection shall not be entitled to take any copy of the design, or of any part thereof. Inspection of registered designs.

(2.) When the copyright in a design has ceased, the design shall be open to inspection, and copies thereof may be taken by any person on payment of the prescribed fee.

53. On the request of any person producing a particular design, together with its mark of registration, or producing only its mark of registration, or furnishing such information as may enable the comptroller to identify the design, and on payment of the prescribed fee, it shall be the duty of the comptroller to inform such person Information as to existence of copyright.

46 & 47 Vict. c. 57.

whether the registration still exists in respect of such design, and if so, in respect of what class or classes of goods, and stating also the date of registration, and the name and address of the registered proprietor.

Cesser of copyright in certain events.

54. If a registered design is used in manufacture in any foreign country and is not used in this country within six months of its registration in this country, the copyright in the design shall cease.

Register of Designs.

Register of designs.

55. (1.) There shall be kept at the Patent Office a book called the "Register of Designs," wherein shall be entered the names and addresses of proprietors of registered designs, notifications of assignments and of transmissions of registered designs, and such other matters as may from time to time be prescribed.

(2.) The register of designs shall be *prima facie* evidence of any matters by this Act directed or authorized to be entered therein.

Fees.

Fees on registration, &c.

56. There shall be paid in respect of applications and registration and other matters under this part of this Act such fees as may be from time to time, with the sanction of the Treasury, prescribed by the Board of Trade; and such fees shall be levied and paid to the account of Her Majesty's Exchequer in such manner as the Treasury shall from time to time direct.

Industrial and International Exhibitions.

Exhibition at industrial or international exhibition not to prevent or invalidate registration.

57. The exhibition at an industrial or international exhibition, certified as such by the Board of Trade, or the exhibition elsewhere during the period of the holding of the exhibition, without the privity or consent of the proprietor, of a design, or of any article to which a design is applied, or the publication, during the holding of any such exhibition, of a description of a design, shall not prevent the design from being registered, or invalidate the registration thereof, provided that both the following conditions are complied with, namely:

(*a.*) The exhibitor must, before exhibiting the design or article, or publishing a description of the design, give the comptroller the prescribed notice of his intention to do so; and

(*b.*) The application for registration must be made before or within six months from the date of the opening of the exhibition.

Legal Proceedings.

Penalty on piracy of registered design.

58. During the existence of copyright in any design—

(*a.*) It shall not be lawful for any person without the license or written consent of the registered proprietor to apply such design or any fraudulent or obvious imitation thereof, in the class or classes of goods in which such design is registered, for purposes of sale to any article of manufacture or to any substance artificial or natural or partly artificial and partly natural: and

(*b.*) It shall not be lawful for any person to publish or expose for sale any article of manufacture or any substance to which such design or any fraudulent or obvious imitation thereof shall have been so applied, knowing that the same has been so applied without the consent of the registered proprietor.

Any person who acts in contravention of this section shall be liable for every offence to forfeit a sum not exceeding fifty pounds to the registered proprietor of the design, who may recover such sum as a simple contract debt by action in any court of competent jurisdiction. 46 & 47 Vict. c. 47.

Action for damages.

59. Notwithstanding the remedy given by this Act for the recovery of such penalty as aforesaid, the registered proprietor of any design may (if he elects to do so) bring an action for the recovery of any damages arising from the application of any such design, or of any fraudulent or obvious imitation thereof for the purpose of sale, to any article of manufacture or substance, or from the publication, sale, or exposure for sale by any person of any article or substance, to which such design or any fraudulent or obvious imitation thereof shall have been so applied, such person knowing that the proprietor had not given his consent to such application.

Definitions.

60. In and for the purposes of this Act—

Definition of "design," "copyright."

"Design" means any design applicable to any article of manufacture, or to any substance artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined, not being a design for a sculpture, or other thing within the protection of the Sculpture Copyright Act of the year 1814 (fifty-fourth George the Third, chapter fifty-six).

"Copyright" means the exclusive right to apply a design to any article of manufacture or to any such substance as aforesaid in the class or classes in which the design is registered.

Definition of proprietor.

61. The author of any new and original design shall be considered the proprietor thereof, unless he executed the work on behalf of another person for a good or valuable consideration, in which case such person shall be considered the proprietor, and every person acquiring for a good or valuable consideration a new and original design, or the right to apply the same to any such article or substance as aforesaid, either exclusively of any other person or otherwise, and also every person on whom the property in such design or such right to the application thereof shall devolve, shall be considered the proprietor of the design in the respect in which the same may have been so acquired, and to that extent, but not otherwise.

PART V.

GENERAL.

Patent Office and Proceedings thereat.

Patent Office.

82. (1.) The Treasury may provide for the purposes of this Act an office with all requisite buildings and conveniences, which shall be called, and is in this Act referred to as, the Patent Office.

(2.) Until a new patent office is provided, the offices of the Commissioners of Patents for inventions and for the registration of designs and trade marks existing at the commencement of this Act shall be the patent office within the meaning of this Act.

(3.) The patent office shall be under the immediate control of an

46 & 47 Vict. c. 57.

officer called the comptroller-general of patents, designs, and trade marks, who shall act under the superintendence and direction of the Board of Trade.

(4.) Any act or thing directed to be done by or to the comptroller may, in his absence, be done by or to any officer for the time being in that behalf authorized by the Board of Trade.

Officers and clerks.

83. (1.) The Board of Trade may at any time after the passing of this Act, and from time to time, subject to the approval of the Treasury, appoint the comptroller-general of patents, designs, and trade marks, and so many examiners and other officers and clerks, with such designations and duties as the Board of Trade think fit, and may from time to time remove any of those officers and clerks.

(2.) The salaries of those officers and clerks shall be appointed by the Board of Trade, with the concurrence of the Treasury, and the same and the other expenses of the execution of this Act shall be paid out of money provided by Parliament.

Seal of patent office.

84. There shall be a seal for the patent office, and impressions thereof shall be judicially noticed and admitted in evidence.

Trust not to be entered in registers.

85. There shall not be entered in any register kept under this Act, or be receivable by the comptroller, any notice of any trust expressed, implied or constructive.

Refusal to grant patent, &c., in certain cases.

86. The comptroller may refuse to grant a patent for an invention, or to register a design or trade mark, of which the use would, in his opinion, be contrary to law or morality.

Entry of assignments and transmissions in registers.

87. Where a person becomes entitled by assignment, transmission, or other operation of law to a patent, or to the copyright in a registered design, or to a registered trade mark, the comptroller shall, on request, and on proof of title to his satisfaction, cause the name of such person to be entered as proprietor of the patent, copyright in the design, or trade mark, in the register of patents, designs, or trade marks, as the case may be. The person for the time being entered in the register of patents, designs, or trade marks, as proprietor of a patent, copyright in a design or trade mark, as the case may be, shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licenses as to, or otherwise deal with, the same, and to give effectual receipts for any consideration for such assignment, license, or dealing. Provided that any equities in respect of such patent, design, or trade mark may be enforced in like manner as in respect of any other personal property.

Inspection of and extracts from registers.

88. Every register kept under this Act shall at all convenient times be open to the inspection of the public, subject to such regulations as may be prescribed; and certified copies, sealed with the seal of the patent office, of any entry in any such register shall be given to any person requiring the same on payment of the prescribed fee.

Sealed copies to be received in evidence.

89. Printed or written copies or extracts, purporting to be certified by the comptroller and sealed with the seal of the patent office, of or from patents, specifications, disclaimers, and other documents in the patent office, and of or from registers and other books kept there, shall be admitted in evidence in all courts in Her Majesty's dominions, and in all proceedings, without further proof or production of the originals.

Rectification of registers by court.

90. (1.) The Court may, on the application of any person aggrieved by the omission without sufficient cause of the name of any person from any register kept under this Act, or by any entry made without sufficient cause in any such register, make such order for making, expunging, or varying the entry, as the Court thinks fit; or the

Court may refuse the application; and in either case may make such order with respect to the costs of the proceedings as the Court thinks fit. 46 & 47 Vict. c. 57.

(2.) The Court may in any proceeding under this section decide any question that it may be necessary or expedient to decide for the rectification of a register, and may direct an issue to be tried for the decision of any question of fact, and may award damages to the party aggrieved.

(3.) Any order of the Court rectifying a register shall direct that due notice of the rectification be given to the comptroller.

Power for comptroller to correct clerical errors.

91. The comptroller may, on request in writing, accompanied by the prescribed fee,—

(*a.*) Correct any clerical error in or in connexion with an application for a patent, or for registration of a design or trade mark; or

(*b.*) Correct any clerical error in the name, style, or address of the registered proprietor of a patent, design, or trade mark.

(*c.*) Cancel the entry, or part of the entry, of a trade mark on the register: Provided that the applicant accompanies his request by a statutory declaration made by himself, stating his name, address, and calling, and that he is the person whose name appears on the register as the proprietor of the said trade mark.

Alteration of registered mark

92. (1.) The registered proprietor of any registered trade mark may apply to the Court for leave to add to or alter such mark in any particular, not being an essential particular within the meaning of this Act, and the Court may refuse or grant leave on such terms as it may think fit.

(2.) Notice of any intended application to the Court under this section shall be given to the comptroller by the applicant; and the comptroller shall be entitled to be heard on the application.

(3.) If the Court grants leave, the comptroller shall, on proof thereof and on payment of the prescribed fee, cause the register to be altered in conformity with the order of leave.

Falsification of entries in registers.

93. If any person makes, or causes to be made, a false entry in any register kept under this Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces or tenders or causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanour.

Exercise of discretionary power by comptroller.

94. Where any discretionary power is by this Act given to the comptroller, he shall not exercise that power adversely to the applicant for a patent, or for amendment of a specification, or for registration of a trade mark or design, without (if so required within the prescribed time by the applicant) giving the applicant an opportunity of being heard personally or by his agent.

Power of comptroller to take directions of law officers.

95. The comptroller may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act, apply to either of the law officers for directions in the matter.

Certificate of comptroller to be evidence.

96. A certificate purporting to be under the hand of the comptroller as to any entry, matter, or thing which he is authorized by this Act, or any general rules made thereunder, to make or do, shall be *primâ facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone.

Applications and notices by post.

97. (1.) Any application, notice, or other document authorized or required to be left made or given at the patent office or to the comptroller, or to any other person under this Act, may be sent by a pre-

46 & 47 Vict. c. 57.

paid letter through the post; and if so sent shall be deemed to have been left made or given respectively at the time when the letter containing the same would be delivered in the ordinary course of post.

(2.) In proving such service or sending, it shall be sufficient to prove that the letter was properly addressed and put into the post.

Provision as to days for leaving documents at office.

98. Whenever the last day fixed by this Act, or by any rule for the time being in force, for leaving any document or paying any fee at the Patent Office shall fall on Christmas Day, Good Friday, or on a Saturday or Sunday, or any day observed as a holiday at the Bank of England, or any day observed as a day of public fast or thanksgiving, herein referred to as excluded days, it shall be lawful to leave such document or to pay such fee on the day next following such excluded day, or days if two or more of them occur consecutively.

Declaration by infant, lunatic, &c.

99. If any person is, by reason of infancy, lunacy, or other inability, incapable of making any declaration or doing anything required or permitted by this Act or by any rules made under the authority of this Act, then the guardian or committee (if any) of such incapable person, or if there be none, any person appointed by any court or judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration or doing such thing, may make such declaration or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of such incapable person, and all acts done by such substitute shall for the purposes of this Act be as effectual as if done by the person for whom he is substituted.

Transmission of certified printed copies of specifications, &c.

100. Copies of all specifications, drawings, and amendments left at the Patent Office after the commencement of this Act, printed for and sealed with the seal of the Patent Office, shall be transmitted to the Edinburgh Museum of Science and Art, and to the Enrolments Office of the Chancery Division in Ireland, and to the Rolls Office in the Isle of Man, within twenty-one days after the same shall respectively have been accepted or allowed at the Patent Office; and certified copies of or extracts from any such documents shall be given to any person requiring the same on payment of the prescribed fee; and any such copy or extract shall be admitted in evidence in all courts in Scotland and Ireland and in the Isle of Man without further proof or production of the originals.

Power for Board of Trade to make general rules for classifying goods and regulating business of patent office.

101. (1.) The Board of Trade may from time to time make such general rules and do such things as they think expedient, subject to the provisions of this Act—

(*a.*) For regulating the practice of registration under this Act:

(*b.*) For classifying goods for the purposes of designs and trade marks:

(*c.*) For making or requiring duplicates of specifications, amendment, drawings, and other documents:

(*d.*) For securing and regulating the publishing and selling of copies, at such prices and in such manner as the Board of Trade think fit, of specifications, drawings, amendments, and other documents:

(*e.*) For securing and regulating the making, printing, publishing, and selling of indexes to, and abridgments of, specifications and other documents in the Patent Office; and providing for the inspection of indexes and abridgments and other documents:

(*f.*) For regulating (with the approval of the Treasury) the presentation of copies of Patent Office publications to patentees and

to public authorities, bodies, and institutions at home and abroad: 46 & 47 Vict. c. 57.

(g.) Generally for regulating the business of the Patent Office, and all things by this Act placed under the direction or control of the comptroller, or of the Board of Trade.

(2.) Any of the forms in the First Schedule to this Act may be altered or amended by rules made by the Board as aforesaid.

(3.) General rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed.

(4.) Any rules made in pursuance of this section shall be laid before both Houses of Parliament, if Parliament be in session at the time of making thereof, or, if not, then as soon as practicable after the beginning of the then next session of Parliament, and they shall also be advertised twice in the official journal to be issued by the comptroller.

(5.) If either House of Parliament, within the next forty days after any rules have been so laid before such House, resolve that such rules or any of them ought to be annulled, the same shall after the date of such resolution be of no effect, without prejudice to the validity of anything done in the meantime under such rules or rule or to the making of any new rules or rule.

Annual reports of comptroller.

102. The comptroller shall, before the first day of June in every year, cause a report respecting the execution by or under him of this Act to be laid before both Houses of Parliament, and therein shall include for the year to which each report relates all general rules made in that year under or for the purposes of this Act, and an account of all fees, salaries, and allowances, and other money received and paid under this Act.

International and Colonial Arrangements.

International arrangements for protection of inventions, designs, and trade marks.

103. (1.) If Her Majesty is pleased to make any arrangement with the government or governments of any foreign state or states for mutual protection of inventions, designs, and trade marks, or any of them, then any person who has applied for protection for any invention, design, or trade mark in any such state, shall be entitled to a patent for his invention or to registration of his design or trade mark (as the case may be) under this Act, in priority to other applicants; and such patent or registration shall have the same date as the date of the protection obtained in such foreign state.

Provided that his application is made, in the case of a patent within seven months, and in the case of a design or trade mark within four months, from his applying for protection in the foreign state with which the arrangement is in force.

Provided that nothing in this section contained shall entitle the patentee or proprietor of the design or trade mark to recover damages for infringements happening prior to the date of the actual acceptance of his complete specification, or the actual registration of his design or trade mark in this country, as the case may be.

(2.) The publication in the United Kingdom, or the Isle of Man during the respective periods aforesaid of any description of the invention, or the use therein during such periods of the invention, or the exhibition or use therein during such periods of the design, or the publication therein during such periods of a description or

46 & 47 Vict. c. 57.

representation of the design, or the use therein during such periods of the trade mark, shall not invalidate the patent which may be granted for the invention, or the registration of the design or trade mark:

(3.) The application for the grant of a patent, or the registration of a design, or the registration of a trade mark under this section, must be made in the same manner as an ordinary application under this Act: Provided that, in the case of trade marks, any trade mark the registration of which has been duly applied for in the country of origin may be registered under this Act:

(4.) The provisions of this section shall apply only in the case of those foreign states with respect to which Her Majesty shall from time to time by Order in Council declare them to be applicable, and so long only in the case of each state as the Order in Council shall continue in force with respect to that state.

Provision for colonies and India.

104. (1.) Where it is made to appear to Her Majesty that the legislature of any British possession has made satisfactory provision for the protection of inventions, designs, and trade marks, patented or registered in this country, it shall be lawful for Her Majesty from time to time, by Order in Council, to apply the provisions of the last preceding section, with such variations or additions, if any, as to Her Majesty in Council may seem fit, to such British possession.

(2.) An Order in Council under this Act shall, from a date to be mentioned for the purpose in the Order, take effect as if its provisions had been contained in this Act; but it shall be lawful for Her Majesty in Council to revoke any Order in Council made under this Act.

Offences.

Penalty on falsely representing articles to be patented.

105. (1.) Any person who represents that any article sold by him is a patented article, when no patent has been granted for the same, or describes any design or trade mark applied to any article sold by him as registered which is not so, shall be liable for every offence on summary conviction to a fine not exceeding five pounds.

(2.) A person shall be deemed, for the purposes of this enactment, to represent that an article is patented or a design or a trade mark is registered, if he sells the article with the word "patent," "patented," "registered," or any word or words expressing or implying that a patent or registration has been obtained for the article stamped, engraved, or impressed on, or otherwise applied to, the article.

Penalty on unauthorized assumption of Royal arms.

106. Any person who, without the authority of Her Majesty, or any of the Royal Family, or of any Government Department, assumes or uses in connexion with any trade, business, calling, or profession, the Royal arms, or arms so nearly resembling the same as to be calculated to deceive, in such a manner as to be calculated to lead other persons to believe that he is carrying on his trade, business, calling, or profession by or under such authority as aforesaid, shall be liable on summary conviction to a fine not exceeding twenty pounds.

Scotland, Ireland, &c.

Saving for Courts in Scotland.

107. In any action for infringement of a patent in Scotland the provisions of this Act, with respect to calling in the aid of an assessor, shall apply, and the action shall be tried without a jury, unless the court shall otherwise direct, but otherwise nothing shall affect the jurisdiction and forms of process of the courts in Scotland in such an action or in any action or proceeding respecting a patent hitherto competent to those courts.

For the purposes of this section "court of appeal" shall mean any court to which such action is appealed. 46 & 47 Vict. c. 57.

Summary proceedings in Scotland.

108. In Scotland any offence under this Act declared to be punishable on summary conviction may be prosecuted in the sheriff court.

Proceedings for revocation of patent in Scotland.

109. (1.) Proceedings in Scotland for revocation of a patent shall be in the form of an action of reduction at the instance of the Lord Advocate, or at the instance of a party having interest with his concurrence, which concurrence may be given on just cause shown only.

(2.) Service of all writs and summonses in that action shall be made according to the forms and practice existing at the commencement of this Act.

Reservation of remedies in Ireland.

110. All parties shall, notwithstanding anything in this Act, have in Ireland their remedies under or in respect of a patent as if the same had been granted to extend to Ireland only.

General saving for jurisdiction of courts.

111. (1.) The provisions of this Act conferring a special jurisdiction on the court as defined by this Act, shall not, except so far as the jurisdiction extends, affect the jurisdiction of any court in Scotland or Ireland in any proceedings relating to patents or to designs or to trade marks; and with reference to any such proceedings in Scotland, the term "the Court" shall mean any Lord Ordinary of the Court of Session, and the term "Court of Appeal" shall mean either Division of the said Court; and with reference to any such proceedings in Ireland, the terms "the Court" and "the Court of Appeal" respectively mean the High Court of Justice in Ireland and Her Majesty's Court of Appeal in Ireland.

(2.) If any rectification of a register under this Act is required in pursuance of any proceeding in a court in Scotland or Ireland, a copy of the order, decree, or other authority for the rectification, shall be served on the comptroller, and he shall rectify the register accordingly.

Isle of Man.

112. This Act shall extend to the Isle of Man, and—

(1.) Nothing in this Act shall affect the jurisdiction of the courts in the Isle of Man, in proceedings for infringement or in any action or proceeding respecting a patent, design, or trade mark competent to those courts;

(2.) The punishment for a misdemeanor under this Act in the Isle of Man shall be imprisonment for any term not exceeding two years, with or without hard labour, and with or without a fine not exceeding one hundred pounds, at the discretion of the court;

(3.) Any offence under this Act committed in the Isle of Man, which would in England be punishable on summary conviction, may be prosecuted, and any fine in respect thereof recovered, at the instance of any person aggrieved, in the manner in which offences punishable on summary conviction may for the time being be prosecuted.

Repeal; Transitional Provisions; Savings.

Repeal and saving for past operation of repealed enactments, &c.

113. The enactments described in the Third Schedule to this Act are hereby repealed. But this repeal of enactments shall not—

(*a.*) Affect the past operation of any of those enactments, or any patent or copyright or right to use a trade mark granted or acquired, or application pending, or appointment made, or

46 & 47 Vict. c. 57.

compensation granted, or order or direction made or given, or right, privilege, obligation, or liability acquired, accrued, or incurred, or anything duly done or suffered under or by any of those enactments before or at the commencement of this Act: or

(*b.*) Interfere with the institution or prosecution of any action or proceeding, civil or criminal, in respect thereof, and any such proceeding may be carried on as if this Act had not been passed; or

(*c.*) Take away or abridge any protection or benefit in relation to any such action or proceeding.

Former registers to be deemed continued.

114. (1.) The registers of patents and of proprietors kept under any enactment repealed by this Act shall respectively be deemed parts of the same book as the register of patents kept under this Act.

(2.) The registers of designs and of trade marks kept under any enactment repealed by this Act shall respectively be deemed parts of the same book as the register of designs and the register of trade marks kept under this Act.

Saving for existing rules.

115. All general rules made by the Lord Chancellor or by any other authority under any enactment repealed by this Act, and in force at the commencement of this Act, may at any time after the passing of this Act be repealed, altered, or amended by the Board of Trade, as if they had been made by the Board under this Act, but so that no such repeal, alteration, or amendment shall take effect before the commencement of this Act; and, subject as aforesaid, such general rules shall, so far as they are consistent with and are not superseded by this Act, continue in force as if they had been made by the Board of Trade under this Act.

Saving for prerogative.

116. Nothing in this Act shall take away, abridge, or prejudicially affect the prerogative of the Crown in relation to the granting of any letters patent or to the withholding of a grant thereof.

General Definitions.

General definitions

117. (1.) In and for the purposes of this Act, unless the context otherwise requires,—

"Person" includes a body corporate:

"The Court" means (subject to the provisions for Scotland, Ireland, and the Isle of Man) Her Majesty's High Court of Justice in England:

"Law officer" means Her Majesty's Attorney-General or Solicitor-General for England:

"The Treasury" means the Commissioners of Her Majesty's Treasury:

"Comptroller" means the Comptroller General of Patents, Designs, and Trade Marks:

"Prescribed" means prescribed by any of the Schedules to this Act, or by general rules under or within the meaning of this Act:

"British possession" means any territory or place situate within Her Majesty's dominions, and not being or forming part of the United Kingdom, or of the Channel Islands, or of the Isle of Man, and all territories and places under one legislature, as hereinafter defined, are deemed to be one British possession for the purposes of this Act:

"Legislature" includes any person or persons who exercise legislative authority in the British possession; and where there are

local legislatures as well as a central legislature, means the central legislature only. 46 & 47 Vict. c. 57.

In the application of this Act to Ireland, "summary conviction" means a conviction under the Summary Jurisdiction Acts, that is to say, with reference to the Dublin Metropolitan Police District the Acts regulating the duties of justices of the peace and of the police for such district, and elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and any Act amending it.

FORM E.

Form of Application for Registration of Design.

_____day of _____ 18 .

You are hereby requested to register the accompanying
Design in Class in the name of (*a*)
of
who claims to be the Proprietor thereof, and to return the same to

(*a*) Here insert legibly the name and address of the individual or firm.

Statement of nature of Design _____

Registration Fee enclosed £ „ *s.*

To the Comptroller,
Patent Office, 25, *Southampton Buildings, Chancery Lane, W.C.*

(Signed)_____

THE THIRD SCHEDULE.

Enactments Repealed.

21 James 1. c. 3. (1623.)	The Statute of Monopolies. In part; namely,— Sections ten, eleven, and twelve.
5 & 6 Will. 4, c. 62. (1835.) In part.	The Statutory Declarations Act, 1835. In part; namely, - Section eleven.
5 & 6 Will. 4, c. 83. (1835.)	An Act to amend the law touching letters patent for inventions.
2 & 3 Vict. c. 67. (1839.)	An Act to amend an Act of the fifth and sixth years of the reign of King William the Fourth, intituled "An Act to amend the law touching letters patent for inventions."
5 & 6 Vict. c. 100. (1842.)	An Act to consolidate and amend the laws relating to the copyright of designs for ornamenting articles of manufacture.
6 & 7 Vict. c. 65. (1843.)	An Act to amend the laws relating to the copyright of designs.
7 & 8 Vict. c. 69(*a*) (1844.) In part.	An Act for amending an Act passed in the fourth year of the reign of His late Majesty, intituled "An Act for the better administration of justice in His Majesty's Privy Council, and to extend its jurisdiction and powers." In part; namely.— Sections two to five, both included.
13 & 14 Vict. c. 104. (1850.)	An Act to extend and amend the Acts relating to the copyright of designs.
15 & 16 Vict. c. 83. (1852.)	The Patent Law Amendment Act, 1852.
16 & 17 Vict. c. 5. (1853.)	An Act to substitute stamp duties for fees on passing letters patent for inventions, and to provide for the purchase for the public use of certain indexes of specifications.

(*a*) Sections six and seven of this Act are repealed by the Statute Law Revision No. 2) Act, 1874.

46 & 47 Vict. c. 57.	16 & 17 Vict. c. 115. (1853.)	An Act to amend certain provisions of the Patent Law Amendment Act, 1852, in respect of the transmission of certified copies of letters patent and specifications to certain offices in Edinburgh and Dublin, and otherwise to amend the said Act.
	21 & 22 Vict. c. 70. (1858.)	An Act to amend the Act of the fifth and sixth years of Her present Majesty, to consolidate and amend the laws relating to the copyright of designs for ornamenting articles of manufacture.
	22 Vict. c. 13. (1859.)	An Act to amend the Law concerning patents for inventions with respect to inventions for improvements in instruments and munitions of war.
	24 & 25 Vict. c. 73. (1861.)	An Act to amend the law relating to the copyright of designs.
	25 & 29 Vict. c. 3. (1865.)	The Industrial Exhibitions Act, 1865.
	33 & 34 Vict. c. 27. (1870.)	The Protection of Inventions Act, 1870.
	33 & 34 Vict. c. 97. (1870.	The Stamp Act, 1870. In part; namely,— Section sixty-five, and in the Schedule the words and figures, "Certificate of the registration of a design... £5 0 0. And see section 65."
	38 & 39 Vict. c. 91. (1875.)	The Trade Marks Registration Act, 1875.
	38 & 39 Vict. c. 93. (1875.)	The Copyright of Designs Act, 1875.
	39 & 40 Vict. c. 33. (1876.)	The Trade Marks Registration Amendment Act, 1876.
	40 & 41 Vict. c. 37. (1877.)	The Trade Marks Registration Extension Act, 1877.
	43 & 44 Vict. c. 10. (1880.)	The Great Seal Act, 1880. In part; namely,— Section five.
	45 & 46 Vict. c. 72. (1882.)	The Revenue, Friendly Societies, and National Debt Act, 1882. In part; namely,— Section sixteen.

RULES FOR THE REGISTRATION OF DESIGNS.

The following Rules relating to the Registration of Designs have been made and issued by the Board of Trade:

Commencement.

1. These Rules may be cited as the Designs Rules, 1883, and shall come into operation from and immediately after the 31st day of December, 1883.

Interpretation.

Interpretation. 2. In the construction of these Rules any words herein used defined by the said Act shall have the meanings thereby assigned to them respectively.

Fees.

Fees. 3. The Fees to be paid under the said Act, so far as it relates to applications for and registration of designs, shall be the fees specified in the First Schedule hereto.

Forms.

Forms. 4. An application for the registration of a design shall be made in the Form E. in the Second Schedule hereto. The remaining forms in such Schedule may be used in all cases to which they are applicable.

Classification of Goods.

Classification of goods. 5. For the purposes of the registration of designs and of these Rules, goods are classified in the manner appearing in the Third Schedule hereto.

Application for Registration.

Agents. 6. All communications between an applicant for the registration of a design and the Comptroller or the Board of Trade, as the case may be, may be made by or through an agent duly authorized to the satisfaction of the Comptroller.

Address of Comptroller. 7. An application for the registration of a design shall, with the prescribed fee, be left at the Patent Office, Designs Branch, or be sent prepaid by post, addressed to the Comptroller at the Patent Office (Designs Branch), 25, Southampton Buildings, Chancery Lane, London.

Size of papers. 8. An application for the registration of a design, and all drawings, sketches, photographs, or tracings of a design, and all other documents sent to or left at the Patent Office, Designs Branch, or otherwise furnished to the Comptroller or to the Board of Trade, shall be written, printed, copied, or drawn upon strong wide-ruled foolscap paper (on one side only), of the size of thirteen inches by eight inches,

leaving a margin of not less than one inch and a-half on the left-hand part thereof, and the signature of the applicants or agents thereto must be written in a large and legible hand.

The Comptroller may in any particular case vary the requirements of this Rule as he may think fit.

Sketches and drawings. Nature of design.

9. An application for the registration of a design shall be accompanied by a sketch or drawing, or by three exactly similar drawings, photographs, or tracings of the design, or by three specimens of the design, and shall, in describing the nature of the design, state whether it is applicable for the pattern or for the shape or configuration of the design, and the means by which it is applicable.

When sketches, drawings, or tracings are furnished, they must be fixed.

When the articles to which designs are applied are not of a kind which can be pasted into books, drawings, photographs, or tracings of such designs shall be furnished.

Acknowledgment to applicant.

10. On receipt of an application for registration, the Comptroller shall send to the applicant an acknowledgment thereof.

Notice of registration.

11. If the Comptroller determines to register a design, he shall, as soon as may be, send to the applicant a certificate of such registration in the prescribed form, sealed with the seal of the Patent Office.

Applications may be sent by post.

12. Any application, notice, or other document, authorized or required to be left, made, or given at the Patent Office, or to the Comptroller, or to any other person, under these Rules, may be sent by a prepaid letter through the post, and if so sent shall be deemed to have been left, made, or given respectively at the time when the letter containing the same would be delivered in the ordinary course of post.

In proving such service or sending, it shall be sufficient to prove that the letter was properly addressed and put into the post.

Hearing by Comptroller

13. Before exercising any discretionary power given to the Comptroller by the said Act adversely to an applicant for registration of a design, the Comptroller shall give him ten days' notice of the time when he may be heard personally or by his agent before the Comptroller.

Hearing by Comptroller.

14. Within five days from the date when such notice would be delivered in the ordinary course of post, the applicant shall notify to the Comptroller whether or not he intends to be heard upon the matter.

Notification of Comptroller's decision.

15. The decision or determination of the Comptroller in the exercise of any such discretionary power as aforesaid shall be notified to the applicant.

Appeal to the Board of Trade.

Notice of appeal to Board of Trade.

16. When the Comptroller refuses to register a design, and the applicant intends to appeal to the Board of Trade from such refusal, he shall, within one month from the date of the decision appealed against, leave at the Patent Office, Designs Branch, a notice of such his intention.

Statement on appeal.

17. Such notice shall be accompanied by a statement of the grounds of appeal, and of the applicant's case in support thereof.

Notice to Secretary of Board of Trade.

18. The applicant shall forthwith on leaving such notice send a copy thereof to the Secretary of the Board of Trade, No. 7, Whitehall Gardens, London.

Directions by Board of Trade.

19. The Board of Trade may thereupon give such directions (if any) as they may think fit for the purpose of the hearing of the appeal for the Board of Trade.

20. Seven days' notice, or such shorter notice as the Board of Trade may in any particular case direct, of the time and place appointed for the hearing of the appeal shall be given to the Comptroller and the applicant. Notice of time of hearing.

Register of Designs.

21. Upon the sealing of a certificate of registration the Comptroller shall cause to be entered in the register of designs the name, address, and description of the registered proprietor, and the date upon which the application for registration was received by the Comptroller, which day shall be deemed to be the date of the registration. Registering design.

22. Where a person becomes entitled to the copyright in a registered design, or to any share or interest therein, by assignment, transmission, or other operation of law, or where a person acquires any right to apply the design either exclusively or otherwise, a request for the entry of his name in the register as such proprietor of the design, or as having acquired such right, as the case may be (hereinafter called the claimant), shall be addressed to the Comptroller, and left at the Patent Office, Designs Branch. Subsequent proprietor.

23. Every such request shall, in the case of an individual, be made and signed by the person requiring to be registered as proprietor; and in the case of a firm or partnership, by some one or more members of such firm or partnership, or, in either case, by his or their agent respectively duly authorized to the satisfaction of the Comptroller; and in the case of a body corporate, by their agent authorized in like manner. Signature to request.

24. Every such request shall state the name, address, and description of the claimant, and the particulars of the assignment, transmission, or other operation of law by virtue of which the request is made, so as to show the manner in which and the person or persons to whom the design has been assigned or transmitted, or the person or persons who has or have acquired such right as aforesaid, as the case may be. Particulars in request.

25. Every such request shall be accompanied by a statutory declaration to be thereunder written verifying the several statements therein, and declaring that the particulars above described comprise every material fact and document affecting the proprietorship of the design or the right to apply the same, as the case may be, as claimed by such request. Statutory declaration with request.

26. The claimant shall furnish to the Comptroller such other proof of title as he may require for his satisfaction. Proof of title if required.

27. A body corporate may be registered as proprietor by its corporate name. Corporate name.

28. Where an order has been made by the Court, under section 90 of the said Act, the person in whose favour such order has been made shall forthwith leave at the Patent Office an office copy of such order. The register shall thereupon be rectified, or the purport of such order shall otherwise be duly entered in the register, as the case may be. Notice of order of Court.

Power to Dispense with Evidence.

29. Where under these Rules any person is required to do any act or thing, or to sign any document, or make any declaration on behalf of himself or of any body corporate, or any document or evidence is required to be produced to or left with the Comptroller or at the Patent Office, and it is shown to the satisfaction of the Comptroller that from any reasonable cause such person is unable to do such act Comptroller's discretion as to evidence.

or thing, or to sign such document, or make such declaration, or that such document or evidence cannot be produced or left as aforesaid, it shall be lawful for the Comptroller, with the sanction of the Board of Trade, and upon the production of such other evidence and subject to such terms as they may think fit, to dispense with any such act or thing, document, declaration, or evidence.

Amendments.

Amendments.

30. Any document, drawings, sketches, or tracings for the amending of which no special provision is made by the said Act may be amended, and any irregularity in procedure which, in the opinion of the Comptroller, may be obviated without detriment to the interests of any person may be corrected, if the Comptroller think fit, and upon such terms as he may direct.

Enlargement of Time.

Enlargement of time.

31. The time prescribed by these Rules for doing any act or taking any proceeding thereunder may be enlarged by the Comptroller, if he think fit, and upon such terms as he may direct.

Marking Goods.

Registration mark.

32. Before the delivery on sale of any article to which a registered design has been applied, the proprietor of such design shall, if such article is included in any of the classes one to twelve in the Third Schedule hereto, cause each such article to be marked with the abbreviation "Rd" and the number appearing on the certificate of registration, and shall, if such article is included in the classes thirteen or fourteen in the Third Schedule hereto, cause each such article to be marked with the abbreviation "REGd".

Inspection.

Office hours

33. On such days and during such hours as the Comptroller shall from time to time determine and notify by a placard posted at the Patent Office any person paying the prescribed fee may, on production of the number of any design of which the copyright has ceased, inspect such design, and any person paying the prescribed fee may take a copy or copies of such design.

Certificate by Comptroller.

Certificate in legal proceeding.

34. Where a certificate is required for the purpose of any legal proceeding or other special purpose as to any entry, matter, or thing which the Comptroller is authorized by the said Act or these Rules to make or do, the Comptroller may, on a request in writing, and on payment of the prescribed fee, give such certificate, which shall also specify on the face of it the purpose for which it has been requested as aforesaid.

Searches on Production of Sketch or Design.

Search.

35. The Comptroller may, on receipt of the prescribed fee, make searches among the designs registered at the Patent Office after the commencement of the Act, and inform any person requesting him so to do whether a particular design produced by such person, and to be applied to goods in any particular class, is or is not identical with or an obvious imitation of any design applied to such goods and registered since the commencement of the Act.

Industrial and International Exhibitions.

Notice of exhibition.

36. Any person desirous of exhibiting a design, or any article to which a design has been applied, at an industrial or international exhibition, or of publishing a description of a design during the period of the holding of the exhibition, shall, after having obtained from the Board of Trade a certificate that the exhibition is an industrial or international one, give to the Comptroller seven days' notice in writing of his intention to exhibit the design or article, or to publish a description of the design, as the case may be.

For the purpose of identifying the design in the event of an application to register the same being subsequently made, the applicant shall furnish to the Comptroller a brief description of the nature of the design, accompanied by a sketch or drawing thereof, and such other information as the Comptroller may in each case require.

Repeal.

Repeal of previous Rules.

37. All general rules and regulations made by any authority under the Acts relating to the Copyright of Designs, and in force on the 31st December, 1883, shall be, and they are hereby repealed as from that date without prejudice nevertheless to any application then pending.

J. CHAMBERLAIN,
President of the Board of Trade.

21st December, 1883.

SCHEDULES.

FIRST SCHEDULE.

Fees.

	£	s.	d.
1. On application to register one design to be applied to single articles in each class, except Classes 13 and 14	0	10	0
2. On application to register one design to be applied to single articles in Classes 13 and 14	0	1	0
3. On application to register one design to be applied to a set of articles for each class of registration	1	0	0
4. On notice of appeal to Board of Trade against refusal of Comptroller to register	1	0	0
5. Copy of certificate of registration, each copy	0	1	0
6. On request for Certificate of Comptroller for legal proceedings or other special purpose	0	5	0
7. On request to enter name of subsequent proprietor	same as registration fee.		
8. On notice to Comptroller of intended exhibition of an unregistered design	0	5	0
9. Inspection of design of which the copyright has expired, for each quarter of an hour	0	1	0
10. Copy of one such design	cost according to agreement.		
11. On request to correct clerical error	0	5	0
12. On request for search under Section 53	0	5	0
13. On request to enter new address	0	5	0
14. For office copy, every 100 words	0	0	4
	(but never less than 1s.)		

	£	s.	d.
15. For certifying office copies, MSS. or printed	0	1	0

NOTE.—The term "set" to include any number of articles ordinarily on sale together, irrespective of the varieties of size and arrangement in which the particular design may be shown on each separate article.

J. CHAMBERLAIN,
President of the Board of Trade.

Approved,
CHARLES C. COTES,
HERBERT J. GLADSTONE,
Lords Commissioners of Her Majesty's Treasury.
4th December, 1883.

SECOND SCHEDULE.

Forms.

Form of Application to Register.
" Appeal to Board of Trade.
" Certificate of Registration.
" Application for Copy of Certificate of Registration.
" Request for Certificate for use in Legal Proceedings.
" Certificate for use in Legal Proceedings.
" Request to enter Name of Subsequent Proprietor.
" Notice of intending Exhibition of Unregistered Design.
" Request for Correction of Clerical Error or for entry of New Address.

Designs.

E. *Patents, Designs, and Trade Marks Act*, 1883.

APPLICATION FOR REGISTRATION OF DESIGN IN CLASSES _____.

You are hereby requested to register the accompanying design in Class _____, in the name of (*a*) _____

of _____

_____

who claims to be the proprietor thereof, and to return the same to _____

_____

Statement of nature of design (*b*) _____

_____

(*c*)

(Signed) _____

Dated the _____ day of _____ 188 .

To the Comptroller,
Patent Office, Designs Branch,
25, Southampton Buildings,
Chancery Lane, London, W.C.

(*a*) Here insert legibly the name, address, and description of the individual or firm.

(*b*) Such as whether it is applicable for the pattern or for the shape.

(*c*) To be signed by the applicant.

F. *Patents, Designs, and Trade Marks Act*, 1883.

Designs.

APPEAL TO BOARD OF TRADE ON REFUSAL OF COMPTROLLER TO REGISTER A DESIGN.

[*To be accompanied by an unstamped copy.*]

SIR,

I hereby appeal against your decision upon my application to register

and beg to submit my case (a) for the decision of the Board of Trade.

I am, Sir,

Your obedient servant,

The Comptroller,
Patent Office, Designs Branch,
25, Southampton Buildings,
Chancery Lane, London, W.C.

(a) The statement of the case to be written upon foolscap paper (on one side only), with a margin of two inches on the left-hand side thereof.

G. *Patents, Designs, and Trade Marks Act*, 1883.

Seal of Patent Office.

CERTIFICATE OF REGISTRATION OF DESIGN.

(Reg. No.— —.)

Patent Office, Designs Branch,
25, Southampton Buildings,
Chancery Lane, London, W.C.

This is to certify that the Design of which this is a copy was registered this

_____day of_____188 , in pursuance of the Patents, Designs, and Trade Marks Act, 1883, in respect of the application of such Design to articles in Class , for which a copyright of five years is granted.

H. *Patents, Designs, and Trade Marks Act*, 1883.

Designs.

APPLICATION FOR COPY OF CERTIFICATE OF REGISTRATION OF DESIGN.

SIR,

I hereby request you to furnish me with a Copy Certificate of Registration of Design No. in Class_____.

(Signed)_____

Dated the day of 188 .

To the Comptroller,
Patent Office, Designs Branch,
25, Southampton Buildings,
Chancery Lane, London, W.C.

Designs.

I. *Patents, Designs, and Trade Marks Act*, 1883.

REQUEST FOR CERTIFICATE FOR USE IN LEGAL PROCEEDINGS.

SIR,

I hereby request you to send me for the purposes of use in the suit of (*a*) _____ a certificate that the design of which a copy is herein enclosed was (*b*) _____

_____

(Signed) _____

_____ day of _____ 188 .

To the Comptroller,
Patent Office, Designs Branch,
25, Southampton Buildings,
Chancery Lane, London, W.C.

(*a*) Here state the title of the legal proceeding or the other purpose for which the Certificate is required.

(*b*) Here state the entry, matter, or thing which the writer wishes certified.

J. *Patents, Designs, and Trade Marks Act*, 1883.

CERTIFICATE FOR USE IN LEGAL PROCEEDINGS.

In the matter of _____

_____

No. _____

I, _____ Comptroller-General of Patents, Designs, and Trade Marks, hereby certify that _____

_____

_____

Witness my hand and seal this _____ day of _____ 188 .

Seal.

Comptroller.

Patent Office, Designs Branch,
25, Southampton Buildings,
London.

K. *Patents, Designs, and Trade Marks Act*, 1883.

REQUEST TO ENTER NAME OF SUBSEQUENT PROPRIETOR OF DESIGN, WITH DECLARATION IN SUPPORT THEREOF.

Designs.

I, (*a*) _____

_____

hereby request that you will enter (*b*) _____ name (*c*) _____ in the Register of Designs as Proprietor _____ of the Design No. _____ in Class _____.

(*d*) _____ entitled as to the said design _____

(*e*) _____

_____

_____

_____

_____

(*f*) And I do solemnly and sincerely declare that the above several statements are true, and the particulars above set out comprise every material fact and document affecting the proprietorship of the said Design as above claimed.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

(*g*)

Declared at

_____

this _____ day of _____ 188 .

Before me,

(*h*)

To the Comptroller.
Patent Office, Designs Branch.
25, Southampton Buildings,
Chancery Lane, London, W.C.

(a) or We, Here insert name, full address, and description.
(b) My or our.
(c) or Names.
(d) I am, or We are.
(e) Here state whether design transmitted by death, marriage, bankruptcy, or other operation of law, and if entitled by assignment state the particulars thereof as, *e.g.*, "by deed dated the —— day of —— 188– made between So-and-so of the one part."
(*f*) This paragraph is not required when the declaration is made out of the United Kingdom.
(*g*) To be signed here by the person making the declaration.
(*h*) Signature and title of the authority before whom the declaration is made.

L. *Patents, Designs, and Trade Marks Act*, 1883.

NOTICE OF INTENDED EXHIBITION OF AN UNREGISTERED DESIGN.

Designs.

(*a*) _____

hereby give notice of my intention to exhibit a _____

_____

of _____ at the _____

Exhibition, which (*b*) _____

of _____ 188 ____, under the provisions of the Patents, Designs, and Trade Marks Act of 1883 (*c*) _____

_____

_____

herewith enclose a _____

(Signed). _____

Dated the _____ day of _____ 188 ____.

To the Comptroller,
Patent Office, Designs Branch.
25, Southampton Buildings,
Chancery Lane, London, W.C.

(a) Here state name and address of applicant.
(b) State "opened," or "is to open."
(c) Insert brief description of Design, with drawing.

Design.

M. *Patents, Designs, and Trade Marks Act*, 1883.

REQUEST FOR CORRECTION OF CLERICAL ERROR OR FOR ENTRY OF NEW ADDRESS.

SIR,

I hereby request that

(Signed)

Dated the day of 188

To the Comptroller,
Patent Office, Designs Branch,
25, Southampton Buildings,
Chancery Lane, London, W.C.

THIRD SCHEDULE.

CLASSIFICATION OF ARTICLES OF MANUFACTURE AND SUBSTANCES.

Classes.

1. Articles composed wholly or partly of metal, not included in Class 2.
2. Jewellery.
3. Articles composed wholly or partly of wood, bone, ivory, papier maché, or other solid substances not included in other classes.
4. " " glass, earthenware or porcelain, bricks, tiles, or cement.
5. " " paper (except hangings).
6. " " leather, including bookbinding, of all materials.
7. Paper hangings.
8. Carpets and rugs in all materials, floorcloths, and oilcloths.
9. Lace, hosiery.
10. Millinery and wearing apparel, including boots and shoes.
11. Ornamental needlework on muslin or other textile fabrics.
12. Goods not included in other classes.
13. Printed or woven designs on textile piece goods.
14. " " handkerchiefs and shawls.

21st December, 1883.

J. CHAMBERLAIN,
President of the Board of Trade.

FORMS OF AGREEMENT BETWEEN AUTHORS, PUBLISHERS, &c.

Agreement for publishing on Terms of Division of Profits, publisher undertaking all Expenses of Publication.

Memorandum of Agreement between *A. B.*, of , and *C. D.* and *E. F.*, booksellers and publishers, of , dated .

The said *A. B.* agrees to prepare for publication and superintend through the press . It is hereby agreed between the said parties that the said *C. D.* and *E. F.* shall procure such work to be printed, and shall publish the edition of the said work, to consist of not exceeding copies, and shall defray the expenses of paper, printing, and advertising, and account to the said *A. B.* for all copies sold or delivered out of the same, giving credit only for the trade sale price they the said *C. D.* and *E. F.* shall charge to the booksellers, and being allowed a commission of per cent. on the amount of all copies sold or delivered out of the said work, and a warehouse room charge of per annum. The copies of the work sold or delivered out by the said *C. D.* and *E. F.* shall be accounted for to the said *A. B.*, at the rate of [twenty-five copies as twenty-four]. In consideration of which the said *C. D.* and *E. F.* agree to take the risk arising from bad debts and otherwise attending the sales, upon themselves, and after the said charges are refunded by the sales of the said work, the profits shall be divided in equal moieties between the said *A. B.* and the said *C. D.* and *E. F.* The accounts shall be made up at the end of every year, and the moiety of profits, if any, that may be due to the said *A. B.* shall be paid to him by the said *C. D.* and *E. F.* in the month of following. It is hereby also agreed between the said parties, that, should a further edition or editions of the said work be required, the said *C. D.* and *E. F.* shall have the option of agreeing with the said *A. B.* for the printing and publishing the same upon such terms as may be hereafter agreed upon. It is also further agreed between the said parties, that, in case all the copies of the above-named edition of the said work shall not be sold off at the end of years after publication, the said *C. D.* and *E. F.* shall be at liberty, but shall not be compellable, to dispose of the remaining copies unsold by public or private sale, or in such manner as they the said *C. D* and *E. F.* shall deem most advisable, and shall account for the said unsold copies at such price or prices only as they shall actually be sold for, so that the account with reference to the said work may be finally settled and closed. The said *A. B.* shall be entitled to copies of the said work free of any charge. In witness whereof the said parties have subscribed their names the day and year above written.

Another Form.

Memorandum of Agreement made this day of one thousand eight hundred and seventy , between *A. B.*, of , , of the one part, and *C. D.* and *E. F.*, of , publishers, of the other part.

The said *A. B.* being the author of a certain book intituled , doth hereby agree with the said *C. D.* and *E. F.*, that they shall print, reprint, and publish the same on the following conditions, to which they also agree.

I. That the said *A. B.* shall fully prepare the whole of the said book for the press on or before the day of , 18 , and that he will correct the proof sheets, and superintend the printing thereof.

II. That the said *C. D.* and *E. F.* shall direct the mode of printing the said book, and shall bear and pay all the charges thereof, and of publishing the same, and shall take all the risk of the publication on themselves.

III. That the said *C. D.* and *E. F.* shall, out of the produce of the sale of the said book in the first instance be refunded all the charges and expenses which they shall have incurred respecting the said book, after which the profits shall be divided in equal moieties between the said *A. B.* and the said *C. D.* and *E. F.*

IV. That the accounts shall be made up at the end of every year, and the profits, if any, be then divided.

V. That the said *C. D.* and *E. F.* shall account for all the copies which they shall sell of the said book at the wholesale bookseller's price, deducting therefrom a commission of per cent., they taking the risk of all credits which they shall give on the same.

VI. That in case all the copies of the said book shall have been sold off, and a second or any subsequent edition of the said book be required by the public, the said *A. B.* shall make all necessary alterations and additions thereto, and the said *C. D.* and *E. F.* shall print and publish the said second and every subsequent edition of the said book on the above conditions.

VII. That in case all the copies of any edition of the said work shall not be sold off within five years after the time of publication, the said *C. D.* and *E. F.* shall be at full liberty to dispose of the remaining copies so unsold, either by public auction or private sale, or in such manner as they may deem most advisable, so that the account may be finally settled and closed.

Witness our hands,

License to Print one Edition of a Work.

MEMORANDUM OF AGREEMENT made the day of A.D. between *A. B.*, of , of the one part, and *C. D.*, of , of the other part.

The said *A. B.*, being the author of a certain book, entitled doth hereby agree with the said *C. D.* that the said *C. D.*, for the consideration hereinafter expressed, shall print, publish, and sell one edition of copies of the said work, the said *A. B.* reserving to himself the general copyright in the said work.

The said *A. B.*, in consideration of the payments hereinafter agreed to be made by the said *C. D.*, doth hereby agree with the said *C. D.* that he will furnish to the printer to be employed by him, fair copy of the said work, and will superintend the printing and correct the proofs thereof in the usual manner, and that he will duly register his title as proprietor of the copyright of the said work, and will not print, publish, or sell, and will not authorize any other person to print, publish, or sell, any and other copies until the whole of the said copies have been disposed of by the said *C. D.*, provided the said copies are sold within years from the date hereof.

The said *C. D.*, in consideration of the aforesaid agreement on the part of the said *A. B.*, doth hereby agree with the said *A. B.* that he will pay him, the said *A. B.*, the sum of for each and every copy of the said copies, payable [quarterly, half-yearly, &c.], as fast as the said copies shall be sold or otherwise disposed of; he, the said *C. D.*, rendering to the said *A. B.* an account of sales of the said work, at the expiration of months from the day of the first publication until the whole shall be sold. The said *C. D.* also agrees to give to the said *A. B.* copies of the said work, well bound and free of charge, as soon as conveniently may be done, after the manuscript copy has been furnished by the said *A. B.*

And the said *C. D.*, in consideration of the aforesaid agreement on the part of the said *A. B.*, doth hereby further agree with the said *A. B.* that he, the said *C. D.*, will not print, publish, or sell, any more than the said copies, until authorized by the said *A. B.* or his legal representatives in writing; it being understood that the licence herein contained extends only to one edition of the number of copies above specified. In witness whereof, &c.

Agreement to enlarge a second Edition of a Book, and correct Proof of the same.

MEMORANDUM OF AGREEMENT made the day of A.D., between *A. B.* of of the one part, and *C. D.* of of the other part.

The said *A. B.*, for and in consideration of and other consideration herein named, hereby agrees with the said *C. D.* to examine, correct, and enlarge the work known as , to furnish additional manuscript matter for the edition of the work, and to enlarge the index and make it full and complete.

It is understood and agreed that the new edition of the work shall be of the same sized page as the present work, and contain an equal amount of matter on each page, and that the additional matter furnished shall enlarge the work not less than pages, and shall be furnished to the said *C. D.*, commencing on the .

The said *A. B.* is to examine and to correct the proof sheets as fast as they shall be furnished, and to complete the index as soon as may be after the whole signatures of the text shall be ready for him for that purpose.

The said *C. D.*, on his part, agrees to print the said work as the matter shall be furnished, to furnish the said *A. B.* with a copy of the work by signatures, as each signature shall be worked off, for the purpose of arranging the index; to furnish the said *A. B.* with copies of the work, as soon as they can be conveniently finished, and to pay the said *A. B.* the sum of on the day the last proof sheet is corrected for the press. In witness whereof, &c.

Reservation by Artist of Copyright in a Painting, Drawing, or Photograph, to be taken from Vendee, or Assignee, or Person for whom the Work is executed (under 25 & 26 Vict. c. 68, s. 1).

IT is hereby agreed between *A. B.*, residing at in the United Kingdom, and *C. D.*, of , that the copyright (Registered No.) of the [painting, &c.], entitled representing

made by the said A. *B.*, and now [sold, assigned, and disposed of] for the first time to me [or now executed on my behalf] is reserved to the said *A. B.*

Date (Signed) *C. D.*

Agreement to Assign Copyright to Vendee or Assignee of Painting, Drawing, or Photograph (*under* 25 & 26 *Vict. c.* 68, *s.* 1).

It is hereby agreed between *A. B.*, residing at in the United Kingdom [artist, photographer, &c.], and *C. D.*, of , in consideration of the sum of over and above the price of the work hereinafter described, paid by the said *C. D.* to the said *A. B.*, that the said *C. D.* is entitled to the copyright in the [painting, drawing, or photograph] made by the said *A. B.*, entitled and representing , now first sold and disposed of to the said *C. D.*

Date (Signed) *A. B.*
[*or*]
E. F., agent of the said *A. B.*

FORMS OF PLEADINGS, &c.

COPYRIGHT.

1. *Form of Indorsement on Writ of Summons.*

The plaintiff's claim is for damages for the infringement of the plaintiff's copyright [and for an injunction, and for an account, and for the delivery up to the plaintiff of all piratical copies of, &c.].

2. *Form of Statement of Claim.*

18 [*Here put letter and number.*]

In the High Court of Justice,
Division.
Writ issued the day of 18
Between *A.B.*, Plaintiff,
and
C.D., Defendant.

STATEMENT OF CLAIM.

The defendant has infringed the plaintiff's copyright in a book entitled registered on the day of 18
The plaintiff claims
Place of Trial,

(Signed)

Delivered the of 18

3. *Form of Statement of Defence.*

18 , No.

In the High Court of Justice,
Division.

Between *A.B.*, Plaintiff,
and
C.D., Defendant.

DEFENCE.

The defendant says that:—
(1.) The plaintiff is not the author [*assignee, &c., as the case may be*].
(2.) The plaintiff is not the proprietor of the copyright.
(3.) The book was not registered.
(4.) The book was not first published in the United Kingdom.
(5.) The defendant did not infringe.

(Signed)

Delivered, &c.

4. *Form of Notice of Objections to be given with the Plea in an Action for Infringement of Copyright, in pursuance of* 5 *&* 6 *Vict. c.* 45, *s.* 16.

In the

A.B., Plaintiff,
against
E.F., Defendant.

Take notice that the above-named defendant means to rely, on the trial of this action, on the following objections:—

1. That the defendant is not guilty of the alleged grievances.
2. That the plaintiff was not the proprietor of the said copyright.
3. That at the time of the alleged grievances there was no subsisting copyright in the said book.
4. That *J.K.*, and not the plaintiff, was the author of the said book.
5. That *L.M.*, and not the plaintiff, was the first publisher of the said book.
6. That *N.O.*, and not the plaintiff, is the proprietor of the said copyright.
7. That the said book was first published with the title [*specify the title of the book as first published*] on the day of , A.D. [*specify the date of first publication*] at [*specify the place of the first publication*]

[*State any other objections in the same manner.*]

Yours, &c.,

To Mr. *C. D.*, plaintiff's attorney, [*or* agent.] *G. H.*, defendant's attorney, [*or* agent.]

(From Bullen and Leake's Precedents, p. 719.)

See examples of notices in *Bovsey* v. *Davidson* (4 D. & L. 147); *Sweet* v. *Benning* (16 C. B. 459); *Leader* v. *Purday* (7 C. B. 4); *Hotton* v. *Keen* (29 L. J. 20, C. P.; 7 C. B. N. S. 268).

5. *Form of Reply.*

18 [*Here put the letter and number*].

In the High Court of Justice,
Division.

Between *A.B.*, Paintiff,
and
C.D., Defendant.

REPLY.

The plaintiff as to the defence says that:—

1. He joins issue, &c.

(Signed)

Delivered, &c.

FORMS OF PLEADINGS (LIBEL).

LIBEL.

1. *Form of Indorsement on Writ of Summons.*

The plaintiff's claim is for damages for libel.

2. *Form of Statement of Claim.*

[*Heading as in Form* 2, *Copyright.*]

The plaintiff has suffered damage from the defendant's having falsely and maliciously published of the plaintiff [in a newspaper called the] the words following, &c.

[*Add an allegation of special damage, if any has been sustained*].

The plaintiff claims £

(Signed)

Delivered, &c.

4. *Form of Statement of Defence.*

[*Heading as in Form* 3, *Copyright*].

The defendant did not publish the alleged libel;

or,

The alleged libel was published by the defendant *bonâ fide* and without malice, and under circumstances which made the occasion privileged;

or,

The alleged libel is true in substance and fact;
[*as to the circumstances under which such a general plea is allowed, vide ante*, pp. 648 *et. seq.*]

or,

The words set forth are not libellous;

or,

The defendant brings into Court the sum of £ and says that it is enough to satisfy the plaintiff's claim(*a*);

or,

The alleged libel was contained in a weekly newspaper [*or* periodical publication] ordinarily published at intervals not exceeding [*or* exceeding] one week, called the " ," and was inserted in such newspaper [*or* periodical publication] without actual malice and without gross negligence; and before [*or* at the earliest opportunity after] the commencement of this action the defendant inserted in such newspaper [*or* periodical publication] a full apology for it [*or* offered to publish a full apology for it in any newspaper or periodical publication to be selected by the plaintiff] and the defendant brings into

(*a*) Payment into Court is not permitted with a defence denying liability in actions or counterclaims for libel or slander. (Rules of Supreme Court, 1883. Order xxii. R. 1.)

court the sum of £ by way of amends for the injury to the plaintiff, and says that the said sum is enough to satisfy the plaintiff's claim.

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5. *Notice of Intention to give Evidence of an Apology in Mitigation of Damages under 6 & 7 Vict. c. 96., s. 1.*

Take notice that the defendant intends, on the trial of this cause, to give in evidence, in mitigation of damages, that he made [*or* offered] an apology to the plaintiff for the defamation complained of, before the commencement of this action [*or*, as soon after the commencement of this action as there was an opportunity of making or offering such apology, the action having been commenced before there was an opportunity of making or offering one.

Yours, &c.
C. H., defendant's attorney,
[*or* agent.]

To Mr. *C. D.*, plaintiff's attorney,
[*or* agent.]

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6. *Form of Reply.*

[*Same as Form* 5. *Copyright*].

FORMS OF PLEADINGS IN PROCEEDINGS FOR LIBEL (CRIMINAL).

Ex officio Information by Attorney-General for a Seditious Libel.

Michaelmas Sittings in the year of Queen Victoria.

Middlesex.—Be it remembered that Sir , Knt., Attorney-General of our present Sovereign Lady the Queen, who for our said Lady the Queen in this behalf prosecuteth in his proper person, cometh here into the Queen's Bench Division of the High Court of Justice, before the Queen herself, at Westminster, in the county of Middlesex, on Monday next after the morrow of All Souls', in this same term, and for our said Lady the Queen giveth the court to understand and be informed that *J. L.*, late of , in the county of Middlesex, being a seditious, malicious, and ill-disposed person, and being greatly disaffected to our said present Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and to her administration of the government of this kingdom, and most unlawfully, wickedly, and maliciously, devising, designing, and intending as much as in him lay to bring our said Lady the Queen, and her administration of the government of this kingdom, and the persons employed by her in the administration of the government of this kingdom, into great and public hatred and contempt among all her liege subjects, and to alienate and withdraw from our said Lady the Queen the cordial love and affection, true and due obedience, fidelity, and allegiance of the subjects of our said Lady the Queen, on the day of , in the year of our said present Sovereign Lady the Queen, at the parish of , in the county of Middlesex, did unlawfully, seditiously and maliciously print and publish, and cause and procure to be printed and published, a certain scandalous, malicious, and seditious libel of and concerning our said Lady the Queen, and her administration of the government of this kingdom, to the tenor and effect following, that is to say: [*here state the libel*] in contempt of our said Lady the Queen and her Laws, to the evil example of all others, and against the peace of our said Lady the Queen, her crown and dignity.

Second Count.—And the said Attorney-General of our said Lady the Queen, who prosecutes as aforesaid, further gives the court here to understand and be informed that the said *J. L.*, of his further malice against our said Lady the now Queen, and again unlawfully, wickedly, and maliciously devising, designing and intending as aforesaid, afterwards, on the day of , in the year of our said present Lady the Queen at , aforesaid, did unlawfully, seditiously, and maliciously, print and publish, and cause and procure to be printed and published, a certain other scandalous, malicious, and seditious libel of and concerning our said Lady the Queen, and her administration of the government of this kingdom, to the tenor and effect following: [*Here state libel varying the innuendoes*

in the first count.] Whereupon the said Attorney-General of our said Lady the Queen, who for our said Lady the Queen in this behalf prosecutes, for our said Lady the Queen, prays the consideration of the court here in the premises, and that due process of law may be awarded against the said *J. L.* in this behalf, to make him answer to our said Lady the Queen touching and concerning the premises aforesaid.

See *Rex* v. *Lambert and Perry* (31 St. Tr. 336, and 2 Chitty Crim. L. 6 & 90). In the case of *Lambert and Perry* the libel did not require any prefatory averment.

Information by Master of Crown Office.

Of Sittings, in the year of the reign of Queen Victoria.
——, } Be it remembered that Frederick Cockburn, Esq.,
to wit } coroner and attorney of our Lady the now Queen, in the Queen's Bench Division of the High Court of Justice, before the Queen herself, who prosecutes for our said Lady the Queen in this behalf in his proper person, comes here into the said Queen's Bench before Division, the Queen herself, at Westminster(*a*), on the in these same sittings, and for our said Lady the Queen gives the court here to understand and be informed that, &c. [*State the facts and circumstances constituting the offence. See example in next form*], to the great damage, scandal, and disgrace of him the said , to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

Commence the second and other counts thus:

And the said coroner and attorney of our said Lady the Queen, who prosecutes as aforesaid, further gives the court here to understand and be informed that, &c.

Conclude thus:

And therefore the said coroner and attorney of our said Lady the Queen, prays the consideration of the court here in the premises, and that due process of law may be awarded against him the said in this behalf, to make him answer to our said Lady the Queen, touching and concerning the premises aforesaid.

Criminal Information by Master of Crown Office for a Libel charging the Scuttling of a Vessel.

(*Reg.* v. *Shimmin*, not reported).

Of Michaelmas Term, in the thirty-third year of the reign of Queen Victoria.
In the County of Lancaster, } Be it remembered that Thomas Norton,
West Derby Division, } Esq., coroner and attorney of our
to wit. } present Sovereign Lady the Queen, in the court(*b*) of our said Lady the Queen before the Queen herself, who for our said Lady the Queen in this behalf prosecuteth in his own

(*a*) Or, "at the Royal Courts of Justice." Both forms are used in the Crown Office.

(*b*) The changes of language necessitated by the Judicature Acts will be seen by a comparison of this with the form immediately preceding.

person, cometh here in the said court of our Lady the Queen, before the Queen herself at Westminster, to wit, on the twenty-fourth day of November, A.D. one thousand eight hundred and sixty-nine, and in the said thirty-third year of the reign of our said Lady the Queen, and for our said Lady the Queen giveth the court here to understand and be informed that, at and before the publishing of the libel hereinafter mentioned, a certain company called and duly registered as "The Merchants' Trading Company, Limited," carried on its business, to wit, at Liverpool, in the West Derby division of the county of Lancaster, and the said company owned and employed, in trading to divers places, divers ships and vessels, and amongst others, to wit, a certain steam ship or vessel called the "Golden Fleece," and at the time aforesaid one William James Fernie, of Liverpool aforesaid was, and still is, and for some time previous to the publishing of the said libel had been, the managing director of the said company, and was and is otherwise largely interested therein; and at and before the time aforesaid it became and was and still is the duty of the said William James Fernie, as such managing director, to superintend generally the employment of the said ships or vessels of the said company, including the said steam ship or vessel the "Golden Fleece," and the effecting of insurances upon and in respect of such ships or vessels, and goods of the said company laden therein, and freight to become payable for the carriage by the said company of goods thereby; and before the printing and publishing of the said libel the said steam ship or vessel "Golden Fleece," then being a ship or vessel the property of the said company, had been altered and prepared for the carriage of a cargo of coal, and had been laden with such cargo of coals principally at Cardiff, in the United Kingdom, for a voyage to Alexandria, and the said vessel and her freight and cargo for the said voyage had been, by and under the direction of the said William James Fernie, as such managing director, insured in an amount not exceeding the fair value thereof respectively. And after the said "Golden Fleece" had been so laden with coals as aforesaid, and while the same was at anchor in the roads of the harbour at Cardiff aforesaid, the said "Golden Fleece" met with a disaster, to wit, by becoming filled with water through one of the coaling ports of the said "Golden Fleece;" and in order to prevent her sinking, the said "Golden Fleece" was necessarily driven towards the shore and stranded. And thereupon a certain inquiry was held by direction of the Board of Trade into the circumstances of the said disaster, which inquiry resulted in the exoneration of the master of the said vessel "Golden Fleece" from all blame in respect of the said disaster, and in the return to such master of his master's certificate. And thereupon the said Hugh Shimmin, of Liverpool aforesaid, being the printer and publisher of a certain newspaper called *The Porcupine*, unlawfully, wickedly, and maliciously wrote, printed, and published, and so caused and procured to be written, printed, and published, of and concerning the said William James Fernie a certain false, scandalous, malicious, and defamatory libel in the form of an article entitled "Marine Coal Scuttling," in the said newspaper, *The Porcupine*, published by the said Hugh Shimmin, to wit, on the twenty-third day of October, A.D. one thousand eight hundred and sixty-nine, and in the said thirty-third year of our said Lady the Queen, to wit, at number fifty-eight Cable Street in Liverpool aforesaid, the words following: [*Here follows in full the newspaper article.*] And the said Hugh Shimmin so unlawfully, wickedly, and maliciously wrote, printed, and published, and caused and procured to be written, printed, and published,

the said libel, he, the said Hugh Shimmin, then well knowing the same to be false, thereby intending and contriving to injure, vilify, and prejudice the said William James Fernie and to lower him in the estimation of his fellows, to the great injury, scandal, and disgrace of the said William James Fernie, to the evil example of all others in like case offending, and against the peace of our Lady the Queen, her crown and dignity.

And the said coroner and attorney of our said Lady the Queen, for our said Lady the Queen further giveth the court here to understand and be informed that, at and before the time of the publishing of the libel hereinafter mentioned, a certain company called and duly registered as "The Merchants' Trading Company, Limited," carried on its business, to wit, at Liverpool, in the West Derby division of the county of Lancaster, and the said company owned and employed, in trading to divers places, divers ships and vessels, and amongst others, to wit, a certain ship or vessel called the "Golden Fleece," and at the time aforesaid, one William James Fernie, of Liverpool aforesaid, was, and still is, and for some time previous to the publishing of the said libel, had been the managing director of the said company, and was and is otherwise largely interested therein, and at and before the time aforesaid it became and was and still is the duty of the said William James Fernie, as such managing director, to superintend generally the employment of the said ships or vessels of the said company, including the said steamship or vessel the "Golden Fleece," and the effecting of insurances upon and in respect of such ships or vessels, and goods of the said company laden therein and freight to become payable for the carriage by the said company of goods thereby. And before the printing and publishing of the said libel the said steamship "Golden Fleece," then being a ship or vessel, the property of the said company, had been laden with a cargo of coals, principally at Cardiff, in the United Kingdom, for a voyage to Alexandria, and the said vessel and her freight and cargo, for the said voyage had been by and under the direction of the said William James Fernie, as such managing director, insured in an amount not exceeding the fair value thereof, respectively; and after the said "Golden Fleece" had been so laden with coals as aforesaid, and while the same was at anchor in the roads of the harbour at Cardiff aforesaid, the said "Golden Fleece" met with a disaster, to wit, by becoming filled with water through one of the coaling ports of the said "Golden Fleece," and in order to prevent her sinking, the said "Golden Fleece" was necessarily driven towards the shore and stranded. And thereupon a certain inquiry was held by direction of the Board of Trade into the circumstances of the said disaster, which inquiry resulted in the exoneration of the master of the said vessel "Golden Fleece" from all blame in respect of the said disaster, and in the return to such master of his master's certificate. And thereupon the said Hugh Shimmin, of Liverpool aforesaid, being the printer and publisher of a certain newspaper called *The Porcupine*, unlawfully, wickedly, and maliciously wrote, printed, and published, and so caused and procured to be written, printed, and published of and concerning the said William James Fernie, a certain false, scandalous, malicious, and defamatory libel in the form of an article entitled "Marine Coal Scuttling," to wit, in the said newspaper, *The Porcupine*, published by the said Hugh Shimmin, to wit, in the twenty-third day of October, A.D. one thousand eight hundred and sixty-nine, and in the thirty-third year of our said Lady the Queen, to wit, at number fifty-eight Cable-street, in Liverpool aforesaid, the words following: "You need

not wait till she (meaning the ship or vessel in the said sentence referred to) gets out to sea. If you wish to close your accounts promptly, you can load her with coals until her ports are below the water line, and by leaving one of the side coaling ports insecurely fastened, you can at any time command a supply of water which will sink the vessel in a few minutes. All these are acts which are not individually deemed criminal, but the true colour of which is at once revealed when it is known that the vessel and her freight are insured for double their value;" the said Hugh Shimmin, thereby meaning, referring, and intending to be understood as meaning and referring to the said ship or vessel "Golden Fleece," and thereby meaning to impute that the said loss of and damage to the said "Golden Fleece" had been caused and occasioned by the wicked and corrupt contrivance, and for the profit of the said William James Fernie, and others. And the said Hugh Shimmin, so unlawfully, wickedly, and maliciously wrote, printed, and published, and caused and procured to be written, printed, and published, the said libel, he, the said Hugh Shimmin, then well knowing the same to be false, thereby intending and contriving to injure, vilify, and prejudice the said William James Fernie, and to lower him in the estimation of his fellows, to the great injury, scandal, and disgrace of the said William James Fernie, to the evil example of all others in like case offending, and against the peace of our Lady the Queen, her crown and dignity.

Whereupon the said coroner and attorney for our said Lady the Queen prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him, the said Hugh Shimmin, in this behalf, to make him answer to our said Lady the Queen, and touching and concerning the premises aforesaid.

Indictment for Publishing a Libel, knowing the same to be false.

—— } The jurors for our said Lady the Queen upon their oath
to wit. } present, that *C. D.*, contriving and unlawfully, wickedly, and maliciously intending to injure, vilify, and prejudice one *A. B.*, and to deprive him of his good name, fame, credit, and reputation, and to bring him into public contempt, scandal, infamy, and disgrace, on the day of in the year of our Lord , unlawfully, wickedly, and maliciously did write and publish, and cause and procure to be written and published, a false, scandalous, malicious, and defamatory libel, containing divers false, scandalous, malicious, and defamatory matters and things of and concerning the said *A. B.*, according to the tenor and effect following, that is to say [*Here set out the libel, together with such innuendoes as may be necessary to render it intelligible. See example in next form.*], he, the said *C. D.*, then well knowing the said defamatory libel to be false, to the great damage, scandal, and disgrace of the said *A. B.*, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

Indictment of a Newspaper Proprietor for a Libel on the late Bishop of Exeter.

(*Reg.* v. *Latimer*, 3 Cox. Crim. Cas. Appx. xxxviii.)

City and County of the City of Exeter, to wit. } The jurors for our Lady the Queen upon their oath present, that before and at the time of publishing the false, scandalous,

malicious, and defamatory libel hereinafter mentioned, Henry Phillpotts had become, and was, and still is, by Divine permission, Lord Bishop of Exeter, to wit, bishop of the diocese of Exeter, in that part of the United Kingdom of Great Britain and Ireland called England, and that before the time of the publishing of the said false, scandalous, malicious, and defamatory libel, hereinafter mentioned, to wit, on the 1st day of May, in the year of our Lord, 1846, a certain petition of one James Shore, to the Lords spiritual and temporal of the United Kingdom of Great Britain and Ireland in Parliament assembled, had been and was presented by a certain peer of the realm, to wit, by Henry, Lord Brougham and Vaux, to the said Lords spiritual and temporal in Parliament assembled, and that the said Henry, Lord Brougham and Vaux, did, to wit, on the year and day aforesaid, and on the occasion of the said presenting the said petition to the said Lords spiritual and temporal, address and make to the said Lords spiritual and temporal in Parliament assembled, certain observations with reference to and concerning the said petition and the several matters and things in the said petition contained; and that the said Henry, Bishop of Exeter, then being one of the said Lords spiritual, did, on the day and year aforesaid, and on the occasion aforesaid, address and make to the said Lords spiritual and temporal in Parliament assembled certain observations and statements, in answer and with reference to the said observations of the said Henry, Lord Brougham and Vaux, and with reference to the said matters and things contained in the said petition of the said James Shore. And the jurors aforesaid, on their oath aforesaid, do further present that Thomas Latimer, of the parish of St. John, in the city and county of the city aforesaid, labourer,(*a*) well knowing the premises, but contriving, and wickedly, and maliciously, and unlawfully intending to aggrieve and vilify the said Henry, Bishop of Exeter, and to injure him in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, in his diocese and among the clergy of his said diocese, and the other clergy of this realm, and also among his neighbours and other good and worthy subjects of this realm, afterwards, to wit, on the 24th day of July, in the year of our Lord, 1846 [with force and arms], at the parish aforesaid, in the city and county of the city aforesaid, in a certain newspaper, called, to wit, *The Western Times*, falsely, wickedly, and maliciously, did write and publish, and cause and procure to be written and published, a certain false, wicked, and malicious, scandalous, and defamatory libel of and concerning the said Henry, Bishop of Exeter, and of and concerning him as such bishop as aforesaid, and of and concerning the matters and things aforesaid, in the words and figures following, that is to say [*then follows the libel, concluding thus*], "unfortunately he (meaning thereby the said Henry, Bishop of Exeter) goes quite the other way. and his (meaning thereby the said Henry, Bishop of Exeter) reply is so directly the opposite of the truth that he (meaning thereby the said Henry, Bishop of Exeter) stands branded as a consecrated, careless perverter of facts, and one who does no credit to the mitre which he (meaning thereby the said Henry, Bishop of Exeter) is paid £200 a week or thereabouts, to wear," &c., knowing the same to be false, &c.

(*a*) The addition required by 1 Hen. 5 c. 5, of the "estate, degree, or mystery" of defendants in indictments may now be omitted altogether, as sect. 24 of 14 & 15 Vict. c. 100, enacts that no indictment for any offence shall be holden insufficient "for want of or imperfection in the addition of any defendant."

Pleas.

Plea to Information or Indictment, that Matters charged are True, and that Publication was for Public Benefit.

In the Central Criminal Court, *or* At the Assizes of our lady the Queen, holden at , in and for the county of , *or* (*in case of Information*) In the High Court of Justice,

Queen's Bench Division.

The day of , A.D. .

The Queen v. *A. B.* } And now the said *A. B.*, by *C. D.*, his attorney [*or*, in his own proper person], comes into court, and having heard the said indictment (*or* information) read, says that the alleged defamatory libel and matters charged against him, the said *A. B.*, in and by the said indictment (*or* information) as written and published by him the said *A. B.*, of and concerning the said *E. F.*, are true in this, that, &c. [*stating concisely the facts relied on as justifying the libel on the ground of its truth*]. And the said *A. B.* further saith that it was for the public benefit that the said alleged defamatory libel, and matters charged in and by the said indictment (*or* information), as written and published of and concerning the said *E. F.*, should be written and published, because, &c. [*stating the fact or facts relied on as excusing the publication on the ground of the benefit to the public*], whereby and by reason whereof it was, and is, for the public benefit that all and every the said alleged defamatory libel and matters charged in and by the said indictment (*or* information), should be published.

Plea justifying Libel charged in form next but one preceding (ante, pp. 795, 796).

And for a further plea in this behalf to so much of the first and fourth counts of the said indictment, as charged upon the said Thomas Latimer the writing and publishing, and causing and procuring to be written and published, so much of the said alleged libels in the said first and fourth counts respectively mentioned, as imputes to, or charges against Henry, Lord Bishop of Exeter, therein respectively also mentioned, that the reply of him the said Henry, Lord Bishop of Exeter, to the observations of Henry, Lord Brougham and Vaux, in the said first and fourth counts respectively mentioned, in reference to the petition of James Shore therein also respectively mentioned, was so directly opposite to the truth that the said Henry, Lord Bishop of Exeter, stands branded as a careless perverter of facts, the said Thomas Latimer, by virtue of the statute in such case made and provided, says that before the writing and publishing of, and causing and procuring to be written and published, so much of the said alleged libels respectively, as is in the introductory part of this plea mentioned, to wit, on the 12th day of September, in the year of our Lord 1832, the most noble Edward Adolphus, Duke of Somerset, then and thenceforth, and until and at the time of the writing and publishing of, and causing and procuring to be written and published, so much of the said alleged libels as last aforesaid, and still being a peer of the realm of the United Kingdom of Great Britain and Ireland, to wit, Duke of Somerset and Baron Seymour, of Hacke, in the county of Somerset, had erected and built, at his own expense, a certain chapel, for the public worship of God, on certain lands of him, the said Edward Adolphus, Duke of Somerset, situate in the hamlet of Bridgetown, in the parish of Berry Pomeroy, in the county of

Devon, and in the said diocese of Exeter, in the said first and fourth counts respectively mentioned, to wit, at the said parish in the said first and fourth counts respectively mentioned. And the said Thomas Latimer further saith that afterwards, and before the writing and publishing of, and causing and procuring to be written and published, so much of the said alleged libels as aforesaid, to wit, on the day and year last aforesaid, the said Edward Adolphus, Duke of Somerset, with the consent of the Rev. John Edwards, clerk, then being vicar of the said vicarage and parish church, applied to, and requested the said Henry, Lord Bishop of Exeter, then being Lord Bishop of the said diocese of Exeter, and the ordinary of the said vicarage and parish church, to grant his licence that the said chapel might be opened and used for the celebration of Divine service according to the rites and ceremonies of the United Church of England and Ireland by public authority established, to wit, at the said parish in the said first and fourth counts respectively in that behalf mentioned. And the said Henry, Lord Bishop of Exeter, then on such request of the said Edward Adolphus, Duke of Somerset, being so made to him as aforesaid, stated to the said Edward Adolphus, Duke of Somerset, that he the said Henry, Lord Bishop of Exeter, was willing to grant such licence as aforesaid, provided the said Edward Adolphus, Duke of Somerset, would, previously to the granting thereof, engage and undertake with and to him, the said Henry, Lord Bishop of Exeter, that he the said Edward Adolphus, Duke of Somerset, would, to the satisfaction of him the said Henry, Lord Bishop of Exeter, endow the said chapel with a permanent provision for the maintenance of a minister in Holy Orders to celebrate such Divine service as aforesaid, and would convey and assure the said land whereon the said chapel was built as aforesaid, and also the said chapel so and in such manner that the said chapel may be for ever devoted and set apart to and for such Divine service as last aforesaid; and that the said chapel should, in the meantime and until such endowment and conveyance and assurance as aforesaid, only be used for purposes connected with the ministry of the said United Church of England and Ireland, to wit, at the parish aforesaid. And the said Thomas Latimer further saith that afterwards and before the granting of the licence to the said Edward Adolphus, Duke of Somerset, by the said Henry, Lord Bishop of Exeter, as hereinafter mentioned, to wit, on the 22nd day of September, in the year of our Lord One thousand eight hundred and thirty-two, and thenceforth always until the granting of such licence, the said Edward Adolphus, Duke of Somerset, declined to enter into or give any such engagement or undertaking with and to the said Henry, Lord Bishop of Exeter as aforesaid. And the said Henry, Lord Bishop of Exeter, thereupon, then, to wit, on the day and year last aforesaid, consented to grant such licence as aforesaid to the said Edward Adolphus, Duke of Somerset, without requiring him to enter into or give any such engagement or undertaking as aforesaid, to wit, at the parish last aforesaid. And the said Henry, Lord Bishop of Exeter, afterwards, and before the writing and publishing of, and causing and procuring to be written and published, so much of the said alleged libels as aforesaid, to wit, on the 9th day of November, in the year of our Lord one thousand eight hundred and thirty-two, in accordance with the consent so given by him as aforesaid, the said Edward Adolphus, Duke of Somerset, having declined, and then declining to enter into and give, and not theretofore or then, or at any time since, having entered into or given any such

engagement or undertaking as aforesaid, did, by a certain licence there subscribed by him, the said Henry, Lord Bishop of Exeter, and sealed with his episcopal seal, bearing date a certain day and year in that behalf therein named, to wit, the day and year last aforesaid, give and grant his licence unto the said Edward Adolphus, Duke of Somerset, that the said chapel might be forthwith opened and used for the celebration of Divine service, according to the rites and ceremonies of the said United Church of England and Ireland by a priest or minister in Holy Orders, to be for that purpose licensed by the said Henry, Lord Bishop of Exeter, to wit, at the parish last aforesaid. And the said Thomas Latimer further saith, that afterwards and before the writing and publishing of, and causing and procuring to be written and published, so much of the said alleged libels as aforesaid, to wit, on the said 1st day of May, in the year of our Lord one thousand eight hundred and forty-six, in the said first and fourth counts respectively mentioned, the said Henry, Lord Bishop of Exeter, did, in reply to the said observations of the said Henry, Lord Brougham and Vaux, in the said first and fourth counts respectively mentioned, in reference to the said petition of the said James Shore, and in the said observations and statements addressed and made by him the said Henry, Lord Bishop of Exeter, in answer to the said observations of the said Henry, Lord Brougham and Vaux, and therein respectively also mentioned, did speak and say to the said Lords spiritual and temporal in Parliament assembled, of and concerning the said observations and statements of the said Henry, Lord Brougham and Vaux, and of and concerning the said Edward Adolphus, to the said Henry, Lord Bishop of Exeter, for such licence to open and use the same as aforesaid, and of and concerning such licence as last aforesaid, and of and concerning such engagement and undertaking so required by him the said Henry, Lord Bishop of Exeter, and declined to be entered into and given by the said Edward Adolphus, Duke of Somerset, as aforesaid, and of and concerning the said petition of the said James Shore, and the matters therein contained, and of and concerning the premises, the words following, that is to say,—"I" (meaning the said Henry, Lord Bishop of Exeter) "should wish to have been excused from entering into the circumstances of the present case" (meaning the said matters and things contained in the petition of the said James Shore, as aforesaid), "but my noble and learned friend" (meaning the said Henry, Lord Brougham and Vaux) "has stated several matters" (meaning the said matters stated by the said Henry, Lord Brougham and Vaux, in his said observations in reference to the said petition of the said James Shore) "which cannot be left unanswered. It is certainly true the noble duke alluded to" (meaning the said Edward Adolphus, Duke of Somerset) "built the chapel in question" (meaning the said chapel hereinbefore mentioned) "at Bridgetown" (meaning the said hamlet of Bridgetown, in the parish of Berry Pomeroy, aforesaid), "and some years ago the noble duke" (meaning the said Edward Adolphus, Duke of Somerset) "applied to me" (meaning himself, the said Henry, Lord Bishop of Exeter) "to consecrate it" (meaning the said chapel). "Several communications" (meaning the said request of the said Edward Adolphus, Duke of Somerset, for the said licence to open and use the said chapel, and the said requisitions of him, the said Henry, Lord Bishop of Exeter, that the said Edward Adolphus, Duke of Somerset, should enter into and give such undertaking and engagement as aforesaid) "had passed between myself" (meaning himself the said Henry, Lord Bishop of Exeter) "and the noble

duke" (meaning the said Edward Adolphus, Duke of Somerset), "and finally I" (meaning himself, the said Henry, Lord Bishop of Exeter) "consented to license the chapel" (meaning the chapel aforesaid), "the duke" (meaning the said Edward Adolphus, Duke of Somerset) "undertaking to endow it" (meaning the said chapel), "in order to its being consecrated" (meaning in order to the said chapel being consecrated), "and that meanwhile it should only be used for purposes connected with the ministry of the Protestant Established Church" (meaning the said United Church of England and Ireland, by public authority established), "both of which engagements I" (meaning himself the said Henry, Lord Bishop of Exeter) "regret to state have been violated by the noble duke" (meaning the said Edward Adolphus, Duke of Somerset) "for reasons which, doubtless, are satisfactory to his own mind" (meaning the mind of the said Edward Adolphus, Duke of Somerset), "though I" (meaning himself the said Henry, Lord Bishop of Exeter) "cannot even guess what they are," to wit, at the parish last aforesaid.

And the said Thomas Latimer further saith, that it was for the public benefit that so much of the said alleged libels in the said first and fourth counts respectively mentioned, as in the introductory part of this plea mentioned, should be published, by reason that it is for the public benefit that when statements opposite of the truth and perversive of facts are made by a person filling a high public office, to wit, a bishop of the said United Church of England and Ireland, of and concerning the character and conduct, and to the prejudice and discredit of another person standing in a high and important public position, to wit, a peer of the realm of the said United Kingdom of Great Britain and Ireland, that the truth in respect of the matters stated should be published and made to appear, so that the liege subjects of our Lady the Queen may not thereby be misled, or be induced to form an erroneous or ill-founded opinion respecting the character and conduct of such person as last aforesaid, to wit, at the parish last aforesaid.

Wherefore he, the said Thomas Latimer, at the several times, &c., in the said first and fourth counts in that behalf respectively mentioned, at the said parish therein also in that behalf respectively mentioned, wrote and published, and caused and procured to be written and published so much of the said alleged libels in the said first and fourth counts respectively mentioned, as imputes to, or charges against the said Henry, Lord Bishop of Exeter, that the said reply of him the said Henry, Lord Bishop of Exeter, to the said observations of the said Henry, Lord Brougham and Vaux, in reference to the said petition of the said James Shore, was so directly opposite of the truth, that the said Henry, Lord Bishop of Exeter, stands branded as a careless perverter of facts, as he the said Thomas Latimer lawfully might, for the cause aforesaid, which are the same writing and publishing as are in the said first and fourth counts respectively, and in the introductory part of this plea mentioned. And this the said Thomas Latimer is ready to verify, &c. Wherefore he prays judgment if our said Lady the Queen will or ought further to impeach him of and concerning the premises in the introductory part of this plea mentioned, and that he the said Thomas Latimer may be dismissed and discharged of the court hereof and concerning the premises last aforesaid.

Replication to preceding Plea.

And as to the plea of the said Thomas Latimer, by him secondly above pleaded, the said coroner and attorney of our said Lady the Queen, in the court of our said Lady the Queen, before the Queen herself, who prosecuteth for our said Lady the Queen, in this behalf, being present here in court, having here the said plea of the said Thomas Latimer, by him secondly above pleaded in bar, for our said Lady the Queen, saith that for anything by the said Thomas Latimer, in his said second plea alleged, our said Lady the Queen ought not to be barred from prosecuting the said indictment against the said Thomas Latimer of and concerning the premises in the introductory part of the said second plea mentioned, because he says that the said Thomas Latimer, of his own wrong, and without the cause and matter of defence in his said second plea alleged, falsely, wickedly, and maliciously, wrote and published, and caused to be written and published, so much of the said alleged libels in the said first and fourth counts respectively mentioned, as is in the introductory part of the second plea mentioned, in manner and form as in the said first and fourth counts of the said indictment is alleged. And this the said coroner and attorney prays may be inquired of by the country, &c. And the said Thomas Latimer doth the like.

FORMS OF INJUNCTION (COPYRIGHT).

For forms of perpetual injunctions see, in case of a Directory, *Kelly* v. *Morris* (L. R., 1 Eq. 697; 1 Seton on Decrees 243); and *Kelly* v. *Hodge* (1 Set. 244);

In case of a Gazetteer, *Lewis* v. *Fullarton* (2 Beav. 6; 1 Set. 263);

In case of piracy of original notes to a foreign work, *Holton* v. *The Newsagents, &c. Co.* (1 Set. 245);

In case of unauthorized use of title of a Magazine, *Hogg* v. *Kirby* (8 Ves. 215);

In case of unauthorized use of title of a Newspaper, *Clement* v. *Maddick* (1 Giff. 101) and *Ingram* v. *Stiff* (2 Jur. N. S. 947);

In case of unauthorized Dramatic representation, *Boucicault* v. *Wards* (1 Set. 246.)

FORMS OF INJUNCTION (LIBEL).

Libel injurious to trade. Perpetual injunction "to restrain the defendants, their servants, &c., from issuing or permitting the issue of the circular dated the 6th of February, 1879, and from in any manner representing or suggesting that the goods now made or sold by the plaintiff are imitations of the goods made or sold by, &c." *Thomas* v. *Williams* (L. R. 14 C. D. 875).

In *Hill* v. *Hart-Davies* (L. R. 21 C. D. 802), the injunction to restrain the issue of a circular injurious to the credit of a Friendly Society, extended also to "any other circular or letter containing false or inaccurate representations as to the credit or financial condition of the said Society."

OMITTED STATUTE.

7 Geo. 3, cap. 38.

7 Geo 3, c. 38.

An Act to amend and render more effectual an Act made in the Eighth Year of the Reign of King George the Second for Encouragement of the Arts of Designing, Engraving, and Etching Historical and other Prints &c.

Preamble, reciting Act 3 G. 2.

WHEREAS an Act of Parliament passed in the Eighth Year of the Reign of His late Majesty King George the Second, intituled "An Act for the Encouragement of the Arts of Designing, Engraving, and Etching Historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers, during the time therein mentioned," has been found ineffectual for the Purposes thereby intended: Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the first day of January, one thousand seven hundred and sixty-seven, all and every person and persons who shall invent or design, engrave, etch or work in mezzotinto or chiaro oscuro, or, from his own work, design, or invention, shall cause or procure to be designed, engraved, etched, or worked in mezzotinto or chiaro oscuro, any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, shall have, and are hereby declared to have, the benefit and protection of the said Act, and this Act, under the restrictions and limitations hereinafter mentioned.

The original Inventors, Designers, or Engravers, &c. of Historical and other prints, and such who shall cause prints to be done from works, &c. of their own invention,

2. And be it further enacted by the authority aforesaid, that from and after the said first day of January, one thousand seven hundred and sixty-seven, all and every person and persons who shall engrave, etch, or work in mezzotinto or chiaro oscuro, or cause to be engraved, etched, or worked, any print taken from any picture, drawing, model, or sculpture, either ancient or modern, shall have, and are hereby declared to have, the benefit and protection of the said Act, and this Act, for the term hereinafter mentioned, in like manner as if such print had been graved or drawn from the original design of such graver, etcher, or draughtsman: and if any person shall engrave, print and publish, or import for sale, any copy of any such print, contrary to the true intent and meaning of this and the said former Act, every such person shall be liable to the penalties contained in the said Act, to be recovered as therein and hereinafter is mentioned.

and also such as shall engrave, &c. any print taken from any picture, drawing, model, or sculpture, are entitled to the benefit and protection of the recited and present Act; and those who shall engrave or import for sale copies of such prints are liable to penalties.

Secs. 3 and 4 are repealed by the Statute Law Revision Act of 1867.

5. And be it further enacted by the authority aforesaid, That all and every the penalties and penalty inflicted by the said Act, and extended, and meant to be extended, to the several cases comprised in this Act, shall and may be sued for and recovered in like manner, and under the like restrictions and limitations, as in and by the said Act is declared and appointed; and the plaintiff or common informer in every such action (in case such plaintiff or common informer shall recover any of the penalties incurred by this or the said former Act) shall recover the same, together with his full costs of suit.

Penalties may be sued for as by the recited Act is directed; and be recovered with full costs; provided the prosecution be commenced within six months after the fact.

6. Provided also, That the party prosecuting shall commence his prosecution within the space of six calendar months after the offence committed.

7. And be it further enacted by the authority aforesaid, That the sole right and liberty of printing and reprinting intended to be secured and protected by the said former Act and this Act, shall be extended, continued, and be vested in the respective proprietors, for the space of twenty-eight years, to commence from the day of the first publishing of any of the Works respectively hereinbefore and in the said former Act mentioned.

The right intended to be secured by this and the former Act, vested in the proprietors for the term of 28 years from the first publication.

8. And be it further enacted by the authority aforesaid, That if any action or suit shall be commenced or brought against any person or persons whatsoever for doing, or causing to be done, anything in pursuance of this Act, the same shall be brought within the space of six calendar months after the fact committed; and the defendant or defendants in any such action or suit shall or may plead the general issue, and give the special matter in evidence; and if, upon such action or suit, a verdict shall be given for the defendant or defendants, or if the plaintiff or plaintiffs become nonsuited, or discontinue his, her, or their action or actions, then the defendant or defendants shall have and recover full costs; for the recovery whereof he shall have the same remedy as any other defendant or defendants, in any other case, hath or have by law.

Limitation of actions. General issue. Full costs.

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PART I. CHAPTER II.

are mentioned in Mr. Jacob's note to the case last cited. In *Murray* v. *Benbow* (February, 1822), the Lord Chancellor (Eldon) refused an injunction to restrain the defendant from publishing a pirated edition of Lord Byron's poem "Cain," on the ground of a doubt whether the poem was not intended to bring into discredit that portion of Scripture history to which it relates. And in 1823 Vice-Chancellor Sir John Leach, on similar principles, dissolved an injunction which had been obtained to restrain the publication of a pirated edition of a portion of the poem of "Don Juan." In this case, however, the Vice-Chancellor ordered that the defendant should keep an account.(*a*)

A doubt has been expressed(*b*) whether the doctrines laid down in these cases would be strictly adhered to in the present day; but, notwithstanding the more enlarged and tolerant views which are now generally entertained on subjects of a theological as well as of a political nature, there seems to be no disposition on the part of our courts of common law to relax the strict rules of former times as to contracts of an irreligious nature.(*c*) And it would seem that the author's title to relief against the infringement of his copyright, is still dependent on his work being *innocent* in the sense already described.

In *Stockdale* v. *Onwhyn*,(*d*) the Court of King's Bench, in 1826, held that no action could be brought for the infringe-

(*a*) See also *Hime* v. *Dale* referred to 2 Camp. 27.

(*b*) Phillips on Copyright, p. 25.

(*c*) In the modern case of *Cowan* v. *Milbourn* (L. Rep. 2 Ex. 230; 16 L. T. N. S. 290; 36 L. J. 124, Ex.), where an action had been brought for breach of a contract to let rooms to the plaintiff, the defendant set up as a defence, that after contracting to let the rooms he discovered that the plaintiff intended to use them for the purpose of delivering lectures of an irreligious, blasphemous, and illegal character—lectures maintaining, amongst other things, that the character of Christ is defective and His teaching misleading, and that the Bible is no more inspired than any other book. The Court of Exchequer held the defence to be a sufficient one, that the publication of such doctrines was blasphemy, and that therefore the purpose for which the plaintiff intended to use the room was illegal, and the contract one which could not be enforced at law. The remarks of Bramwell, B., in giving his judgment, are deserving of attention. "It is strange," he says, "that there should be so much difficulty in making it understood that a thing may be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it. If that only were unlawful to which a penalty is attached, the consequence would be that, inasmuch as no penalty is provided by the law for prostitution, a contract having prostitution for its object would be valid in a court of law."

(*d*) 5 B. & C. 173; 7 D. & R. 625; 2 C. & P. 163.

ment of an asserted copyright in a book entitled "Memoirs of Harriett Wilson," the book on examination appearing to be the history of the life and amours of a courtesan, and containing anecdotes either libelling or ridiculing the various persons with whom she professed to have had communication. Holroyd, J., succinctly states the principle on which the courts proceed in dealing with works of this character:(*a*) "The ground of this action, if any, must be that the defendant has worked an injury to the plaintiff's exclusive right of publishing the book in question; now it is criminal in him to publish such a book: then he has no right to publish it, and having no right, he has sustained no injury, and has no ground of action."

Publication in another's name with intent to deceive.

The analogy of the cases, where it has been held that no copyright exists in a work subversive of good order, morality, or religion, has been extended to the case of an author publishing a book in the name of another, with a deliberate design to deceive the public, by inducing them to believe that the work is the original work of the author named, and thereby to obtain from the purchaser a greater price than he would otherwise pay. "The publisher," said Tindal, C.J., with reference to such a case, "seeks to obtain money under false pretences; and as not only the original act of publishing the work, but the sale of copies to each individual purchaser falls within the reach of the same objection, we think the plaintiff cannot be considered as having a valid and subsisting copyright in the work, the sale of which produces such consequences, or that he is capable of maintaining an action in respect of its infringement."(*b*)

The book in which the plaintiff claimed copyright in that case was entitled "Evening Devotions, or the Worship of God in Spirit and in Truth, for Every Day in the Year; from the German of C. C. Sturm." The defendant set up as a defence that several of the works of Sturm had been translated into English, and were much valued, and that plaintiff knowing that, and intending to defraud and deceive the public, caused the book in question to be written, and had falsely, fraudulently, and deceitfully published the same to the public, as and for a translation of an original work written in German by C. C. Sturm. On demurrer it was held that the facts stated in the defendant's plea were sufficient to negative the existence of a valid copyright in the plaintiff, and consequently to preclude him from maintaining

(*a*) 7 D. & R. 629; see also *Poplett* v. *Stockdale* (Ry. & M. 337).
(*b*) *Wright* v. *Tallis* (1 C. B. Rep. 893).

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any action for piracy. "The cases," said the Chief Justice, "in which a copyright has been held not to subsist, where the work is subversive of good order, morality, or religion, do not, indeed, bear directly on the case before us; but they have this analogy with the present inquiry, that they prove that the rule which denies the existence of copyright in those cases, is a rule established for the benefit and protection of the public. And we think the best protection that the law can afford to the public against such a fraud as that laid open by this plea, is to make the practice of it unprofitable to its author?"

The case is different, however, where the misrepresentation as to authorship is harmless and innocent, as in the case of many books of instruction and amusement (*e.g.* Walpole's "Castle of Otranto") which have been published as translations, although in reality original works, or which have been published under an assumed instead of a true name, as has been done in the case of many books of voyages, travels, biography, works of fiction or romance, and even of science and instruction.(*a*) "There is not found in any one of those cases any serious design on the part of the author to deceive the purchaser, or to make gain and profit from him by the false representation; the purchaser, for anything that appears to the contrary, would have purchased at the same prices if he had known that the name of the author was an assumed and not a genuine name; or had known that the work was original and not translated."

A musical writer and composer, well known under the *nom de plume* of Claribel, sought to restrain the publication of certain songs, with the words "Song written by Claribel" after the title of each, on the ground that the words only of the songs and not the music were written by him, whereas the expression "song written by" conveyed that both were. Lord Romilly refused an injunction, drawing the inference of fact (a very doubtful inference, it is submitted) that ordinary purchasers using ordinary caution could not be deceived into thinking that the music was composed by Claribel. This decision appears to have been accepted, as the only report of the case (*Barnard* v. *Pillow*) is in the *Weekly Notes* for the 28th of March, 1868.

Immoral pictures, drawings, and photographs.

The same principle of law which applies to writings of a libellous, immoral, or irreligious kind would, of course, apply equally to pictures, drawings, and photographs of a similar character. Pictures and drawings may be libellous as well

(*a*) 1 C. B. Rep. 906.

as writings, and the same may be said of photographs, which are a species of pictures. And it is to be observed that the term libel includes, besides libels defamatory of individuals, such writings as are of a blasphemous, treasonable, seditious, or immoral kind, the publication of any of which is now a misdemeanor, and subjects the person by whom it was composed, written, printed, or published, to fine and imprisonment.(*a*) There cannot, of course, be copyright in pictures, drawings, or photographs which are libellous in any of the senses above mentioned. And the same doctrine is applicable to obscene pictures, prints, drawings, or other representations, the public selling or exposing for public sale or to public view of these being punishable with fine or imprisonment, or both, with hard labour at the discretion of the court.(*b*) It was long since determined(*c*) that an action would not lie to recover the value of prints of an obscene, immoral, or libellous tendency. And Lord Ellenborough, in *De Bost* v. *Beresford*,(*d*) held that if a picture destroyed by the defendant was a libel upon the individuals introduced into it, the owner of the picture was at most entitled to recover only the value of the canvas and paint which formed its component parts.

CHAPTER III.

WHO MAY POSSESS COPYRIGHT.

General rule.

LEAVING out of consideration at present the question of international copyright, there is no doubt that every person (whether he be a foreigner or a British subject) who owes allegiance, either natural and perpetual or temporary, to the sovereign of this country, is capable of possessing the copyright in any innocent work which he publishes in this country during the time that he owes such allegiance.

Natural born British subjects.

A natural born British subject before the Naturalization Act of 1870 (33 Vict. c. 14) was held to carry his allegiance with him throughout the world, and no change of circumstance, time, or place could free him from it.(*e*) An English author, therefore, might reside abroad, and yet have his right as an English author upon publication here.

(*a*) 4 Steph. Black. 345.
(*b*) 14 & 15 Vict. c. 100, s. 29; see also 20 & 21 Vict. c. 83.
(*c*) *Fores* v. *Johnes* (4 Esp. 97). (*d*) 2 Camp. 511.
(*e*) See *Calvin's Case* (7 Rep. 6 b.).

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Foreigners.

Residence abroad could not release him from his natural allegiance, and therefore he carried with him also the natural rights of a subject of England wherever he went.(*a*)

Besides this natural and perpetual allegiance, our law also recognizes a local or temporary allegiance which is due from every alien or stranger born for so long a time as he continues within the sovereign's dominion and protection,(*b*) and which he ceases to owe as soon as he transfers himself from this kingdom to another.(*c*) An alien friend temporarily residing in the British dominions, and consequently owing a temporary allegiance, is entitled to copyright in any work which he publishes here whilst so residing, however short his period of residence may be. But if the alien does not reside in the British dominions at the time of publishing his work here, is he entitled to copyright in it?(*d*) The answer to be given is not quite free from doubt.

Cocks v. *Purday*, and overruled.

In *Cocks* v. *Purday*(*e*) the Court of Common Pleas, following out the general principle that an alien may acquire personal rights and maintain personal actions in respect of injuries done to him, though he cannot maintain real actions, held that a foreigner resident abroad could acquire the copyright in a work first published by him as author or as author's assignee in this country though residing abroad at the time that the work was first published here.(*f*) And in support of this opinion the following considerations were urged:—that by the 5 & 6 Vict. c. 45, copyright is to be deemed personal property, and to be transmissible by bequest, or, in case of intestacy, to be subject to the same laws of distribution as other personal property, and in Scotland is to be deemed personal and movable estate, and even before that statute it was always treated as personal property, and aliens can acquire personal property; and the opinion expressed by Shadwell, V.C., in *Bentley* v. *Foster*(*g*) was referred to, that "if an alien friend wrote a book, whether abroad or in this country, and gave the British public the advantage of his industry and knowledge,

(*a*) *Vide* judgment of Lord St. Leonards in *Jeffreys* v. *Boosey* (4 H. L. Cas. 977). The Naturalization Act of 33 Vict. c. 14, enables natural born British subjects under certain circumstances to free themselves from their allegiance (ss. 4, 6) and to resume it again (s. 8).

(*b*) *Calvin's Case*, *ubi supra*. (*c*) 2 Steph. Black. 418.

(*d*) See the judgments in *Jeffreys* v. *Boosey*, *ubi supra*.

(*e*) 5 C. B. 860.

(*f*) See also in connection with this opinion *D'Almaine* v. *Boosey* (1 Y. & C. 288), and *Bentley* v. *Foster* (10 Sim. 329), and the opinion of Bayly, J., in *Clementi* v. *Walker* (2 B. & Cr. 861).

(*g*) 10 Sim. 329.

by first publishing the work here he was entitled to the protection of the laws relating to copyright in this country." And in *Chappell* v. *Purday*(a) Lord Abinger, C.B., had declared himself of opinion that a foreigner, who is the author of a work unpublished abroad, might communicate his right of property therein to a British subject, at least for the period prescribed by the statute of Anne. Another decision in favour of the doctrine that a foreigner, though resident abroad at the time of publication, may have copyright in this country if the first publication takes place here, was pronounced by the Court of Queen's Bench in *Boosey* v. *Davidson*,(b) where an action was brought for infringement of copyright in certain operatic airs composed by a foreigner and alleged to have been first printed and published in England. The court stated no other ground for their decision than the judgment of the Court of Common Pleas in *Cocks* v. *Purday*.

The Court of Exchequer in *Boosey* v. *Purday*(c) (decided in the same year as *Boosey* v. *Davidson*), refused to follow the decision in that case and in *Cocks* v. *Purday*. The plaintiff in *Boosey* v. *Purday* was the assignee of certain airs of an opera which Signor Ricordi had purchased from the composer Bellini, a foreigner, and the action was brought for an infringement by the defendant of the plaintiff's copyright in the dramatic airs. The court held that a foreign author residing abroad, who composes a work abroad, and sends it to this country, where it is first published under his authority, acquires no copyright therein; neither does a British subject to whom such work is assigned by the foreign author gain any such right. Pollock, C.B., in delivering the judgment of the court, said, "We perfectly concur with the Court of Common Pleas, that a foreigner in amity with this country may sue for the infringement of any of his rights, a point which we never doubted; but we thought it clear that a foreigner had no copyright in England by the common law, and that his right must depend wholly upon the construction of the statutes, and if they did not give it to him he could have no right at all. And, with respect to the construction of the statutes, we thought, if there were no binding authorities to the contrary, that the Legislature did not mean to confer a copyright on any but British subjects. . . . . Our opinion is that the Legislature must be considered *primâ facie* to mean to legislate for its

(a) 4 Y. & Col. 495. (b) 13 Q. B. 257.
(c) 4 Exch. 145.

own subjects only, in some sense of that term, which would include subjects by birth or residence, being authors, and the context or subject matter of the statutes does not call upon us to put a different construction upon them." And even before the decision in *Cocks* v. *Purday*, Shadwell, V.C., in *Delondre* v. *Shaw*,(a) though not dealing in that case with the question of copyright, remarked that "The court does not protect the copyright of a foreigner.(b)

Decision of House of Lords in *Jeffreys* v. *Boosey*.

The law on the subject of the copyright of foreigners which these conflicting decisions had left in considerable doubt, appeared to be finally determined by the House of Lords in the case of *Boosey* v. *Jeffreys*, after all the judges had been called on to deliver their opinions. The facts of that case were as follow:(c) Bellini, the celebrated musical composer, an alien friend, composed, while living at Milan an operatic work, "La Sonnambula," in which by the laws there in force, he had a certain copyright. He there, on the 19th of February, 1831, by an instrument in writing, bearing date on that day, made an assignment of that copyright to Giovanni Ricordi, which assignment was valid by the laws there in force. Ricordi afterwards came to this country, and on the 9th of June, 1831, by deed assigned, for valuable consideration, the copyright in the said work to Boosey, his executors, administrators, and assigns, but for publication in the United Kingdom only. Boosey printed and published the work in this country before any publication abroad. Then Jeffreys, without any license from Boosey, printed and published the same work in this country. Boosey brought an action against Jeffreys for the infringement of his copyright, and the action was tried before Rolfe, B. (subsequently Lord Cranworth), who directed the jury, in accordance with the decision in *Boosey* v. *Purday*, to find a verdict for the defendant Jeffreys. The matter came, on bill of exceptions, before the Court of Exchequer Chamber. That tribunal pronounced the direction given by the judge at the trial to be wrong. A writ of error was then brought in the House of Lords, where the question was argued at great length, and the judges were asked to deliver their opinions, which ten of them did in an elaborate and exhaustive manner and at considerable length. Several questions were submitted to them by the House of Lords, but we have only to deal at present with one of the topics that engaged their attention, *i.e.*, whether a foreigner who is not resident here at the time

(a) 2 Sim. 240. (b) See *Ollendorf* v. *Black* (4 De G. & S. 209).
(c) See the statement submitted to the judges (4 H. L. Cas. 843).

Opinions of the judges.

of the publication here of a work composed by him has any copyright in such work. On this subject the judges were divided in opinion, as might have been expected from the opposite decisions which their respective courts had already pronounced. Six judges were of one opinion and four of another. Williams, Erle, Wightman, Maule, Coleridge, and Crompton, J. J., pronounced in favour of the proposition that a foreign author might gain an English copyright by publishing in England before any publication abroad, though resident abroad at the time of publication, on the grounds that there were no words in the Act, 8 Anne, c. 19 (the first Copyright Act), which confines its benefits to British subjects, by birth or residence, though the context and other provisions of the Act showed that the publication must be British; that the title of the Act ("An Act for the Encouragement of Learning, &c.") did not require such a construction of its provisions, and Parliament might legislate for foreigners in respect of the legal consequences in Great Britain of an act done there; that the nature of the property was analogous to property in other personalty, and that an alien's copyright was analogous to the right which he possessed while residing abroad to prohibit the publication here of words defamatory of his character;(*a*) that to limit the Act of Anne to native authors would be to lessen its beneficial operation; that first publication in England of a work by a foreign author was not a matter *ultra vires*, therefore, the municipal law might deal with it; that the gift by Parliament of copyright to a foreign author publishing in this country was within the province of Parliament, it was a dealing with British interests and a legislation for British persons; that it would be absurd to lay down the doctrine that a foreign author should have no copyright if he remained at Calais whilst his work was being published in England, but that he should gain that copyright if he crossed over to Dover, and there gave directions for and awaited the publication of his work: and the following harsh consequence would also result from the doctrine of the necessary presence in the United Kingdom of the foreign author at the time of the publication of his works,—that a bookseller might purchase a literary work in manuscript from a foreign author resident here, yet might lose the copyright if the author should choose to leave this country and be absent from it, even without the knowledge of the bookseller, at the time of publication; nay, if the bookseller should think it best to

(*a*) *Pisani* v. *Lawson* (6 Bing. N. C. 90).

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publish the works in several volumes at several times, he might have copyright in some of the volumes and not in others—because the existence or non-existence of the right would vary with the accident of the author's being or not being in this country at the dates of the respective publications of the volumes.

Decision of the House of Lords.

Notwithstanding the foregoing very weighty reasons, the law lords, Lords Cranworth, C., Brougham, and St. Leonards, agreed with the views expressed on this point by the minority of the judges, Alderson and Parke, B.B., Pollock, C.B., and Jervis, C.J.; and the House of Lords, reversing the decision of the Exchequer Chamber, upheld the direction given by Rolfe, B., to the jury at the original trial of the case, and thus decided(*a*) that to entitle a foreigner to the copyright in any work first published by him in this country, *he must be actually resident here at the time of the publication of such work*, and consequently that no assignment by a foreigner, not resident here at the time of publication, can vest in a British subject a copyright in the work of the foreigner published here by that British subject.

The grounds on which the judgment of the House of Lords in this important case rested, will appear from the following extracts from the judgments delivered. Lord Cranworth, C., after recapitulating the facts, said: "It may be assumed that on the facts thus proved, the rights of Bellini, the author (if any), had been effectually transferred to Boosey, the defendant in error; and thus the important question arose, whether Bellini had by our law a copyright which he could transfer through Ricordi to Boosey, so as to entitle the latter to the protection of our laws? . . . . In the first place, it is proper to bear in mind that the right now in question—namely, the copyright claimed by the defendant in error (Boosey)—is not the right to publish or to abstain from publishing a work not yet published at all, but the exclusive right of multiplying copies of a work already published, and first published by the defendant in error (Boosey) in this country. Copyright thus defined, if not the creature, as I believe it to be, of our statute law, is now entirely regulated by it, and, therefore, in determining its limits, we must look exclusively to the statutes on which it depends. . . . .The substantial question is whether under the term 'author' [in 8 Anne, c. 19] we are to understand the Legislature as referring to British authors only, or to have contemplated all authors of every nation. My opinion is that the statute

(*a*) But see *Routledge* v. *Low* (*post*, p. 19).

must be construed as referring to British authors only. *Primâ facie*, the Legislature of this country must be taken to make laws for its own subjects exclusively, and where, as in the statute now under consideration, an exclusive privilege is given to a particular class at the expense of the rest of Her Majesty's subjects, the object of giving that privilege must be taken to have been a national object, and the privileged class to be confined to a portion of that community, for the general advantage of which the enactment was made. When I say that the Legislature must, *primâ facie*, be taken to legislate only for its own subjects, I must be taken to include under the word "subjects," all persons who are within the Queen's dominions, and who thus owe to her a temporary allegiance. I do not doubt but that a foreigner resident here, and composing and publishing a book here, is an author within the meaning of the statute—he is within its words and spirit. . . . . Copyright, defined to mean the exclusive right of multiplying copies, commences at the instant of publication; and if the author is at that time in England, and while here he first prints and publishes his work, he is, I apprehend, an author within the meaning of the statute, even though he should have come here solely with a view to the publication. . . . . But if at the time when copyright commences by publication the foreign author is not in this country, he is not, in my opinion, a person whose interests the statute meant to protect. I do not forget the argument that from this view of the law the apparent absurdity results, that a foreigner having composed a work at Calais, gains a British copyright if he crosses to Dover, and there first publishes it, whereas he would have no copyright if he should send it to an agent to publish for him.' I own that this does not appear to me to involve any absurdity. It is only one among the thousand instances that happen, not only in law, but in all the daily occurrences of life, showing that whenever it is necessary to draw a line, cases bordering closely on either side of it are so near to each other, that it is difficult to imagine them as belonging to separate classes; and yet our reason tells us they are as completely distinct as if they were immeasurably removed from each other. . . . . If the object of the enactment was to give, at the expense of British subjects, a premium to those who laboured, no matter where, in the cause of literature, I see no adequate reason for the exception, which it is admitted on all hands we must introduce, against those who not only compose, but first publish abroad. If we are to read the

statute (*a*) as meaning by the word 'author' to include 'foreign authors living and composing abroad,' why are we not to put a similar extended construction on the words 'first published?' And yet no one contends for such an extended use of these latter words. Some stress was laid on the supposed analogy between copyright and the right of a patentee for a new invention; but the distinction is obvious. The Crown, at common law had, or assumed to have, a right of granting to any one, whether native or foreigner, a monopoly for any particular manufacture. This was claimed as a branch of the royal prerogative, and all which the statute, 21 Jac. 1, c. 3, s. 6, did was to confine its exercise within certain prescribed limits; but it left the persons to whom it might extend untouched. The analogy, if pursued to its full extent, would tend to show that *first* publication abroad ought not to interfere with an author's rights in this country. For certainly it is no objection to a patent that the subject of it has been in public use in a foreign country. . . . . My opinion is founded on the general doctrine, that a British statute must *primâ facie* be understood to legislate for British subjects only, and that there are no special circumstances in the statute of Anne(*a*) relating to authors, leading to the notion that a more extended range was meant to be given to its enactments." The reasons assigned by Lord Brougham were of a similar nature. Lord St. Leonards, in the course of his judgment said, "If there is no common law right, which in my opinion there clearly is not,(*b*) and if the statute does not apply to foreigners, *qua* foreigners (although I entirely, of course, admit, that when a man owes a temporary allegiance, he is entitled to the benefit of it), then there being no common law right, it would be a new right given by Act of Parliament, and the foreigner must bring himself within the terms of that Act of Parliament in order to enjoy it: and to do so, in my apprehension, he must be able to predicate of himself that he is a subject of these realms, at least for the time being."

How far *Jeffreys* v. *Boosey* is a binding authority.

The authority of *Jeffreys* v. *Boosey* as a decision binding

(*a*) The part of the statute 8 Anne, c. 19, referred to is this: "The author of any book or books already composed and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer."

(*b*) It must be remembered that the common law right of which the existence is denied here and elsewhere in the judgments in this case, is a common law copyright *after publication*.

at the present day has been much shaken by the opinions expressed by Lords Cairns and Westbury in *Routledge* v. *Low* (*a*) to the effect that no matter where the author resided at the time of publication, he was entitled to copyright if he first published in the United Kingdom. It was not necessary, however, expressly to decide the point in that case, as the authoress of the book in question resided in Canada at the time of the publication here; and two other law lords (Lords Cranworth and Chelmsford) adhered to the view of the law laid down in *Jeffreys* v. *Boosey*.

Opinion of Lord Cairns.

Lord Cairns stated the reasons for his opinion thus: "The intention of the Act is to obtain a benefit for the people of this country by the publication to them of works of learning, of utility, of amusement. This benefit is obtained, in the opinion of the Legislature, by offering a certain amount of protection to the author, thereby inducing him to publish his work here. This is, or may be, a benefit to the author, but it is a benefit given, not for the sake of the author of the work, but for the sake of those to whom the work is communicated. The aim of the Legislature is to increase the common stock of the literature of the country: and if that stock can be increased by the publication for the first time here of a new and valuable work composed by an alien who never has been in the country, I see nothing in the wording of the Act which prevents, nothing in the policy of the Act which should prevent, and everything in the professed object of the Act, and in its wide and general provisions which should entitle such a person to the protection of the Act, in return and compensation for the addition he has made to the literature of the country." Lord Westbury said, "The case of *Jeffreys* v. *Boosey* is a decision which is attached to and depends on the particular statute of which it was the exponent: and as that statute has been repealed, and is now replaced by another Act, with different enactments expressed in different language, the case *Jeffreys* v. *Boosey* is not a binding authority in the exposition of this later statute. The Act appears to have been dictated by a wise and liberal spirit, and in the same spirit it should be interpreted, adhering, of course, to the settled rules of legal construction. The preamble is, in my opinion, quite inconsistent with the conclusion that the protection given by the statute was intended to be confined to the works of British authors. On the contrary, it seems to contain an invitation to men of

Opinion of Lord Westbury.

(*a*) L. Rep. 3 H. L. Cas. 100; 18 L. T. N. S. 874; 37 L. J. 454, Ch.

Part I. Chapter III.

learning in every country to make the *United Kingdom* the place of first publication of their works; and an extended term of copyright throughout the whole of the British dominions is the reward of their so doing. So interpreted and applied, the Act is *auxiliary to the advancement of* learning in this country. The real condition of obtaining its advantages is the first publication by the author of his work in the *United Kingdom*. Nothing renders necessary his bodily presence here at the time, and I find it impossible to discover any reason why it should be required, or what it can add to the merit of the first publication. It was asked, in *Jeffreys* v. *Boosey*, why should the Act (meaning the statute of Anne) be supposed to have been passed for the benefit of foreign authors? But if the like question be repeated with reference to the present Act, the answer is, in the language of the preamble, that the Act is intended 'to afford greater encouragement to the production of literary works of lasting benefit to the world;' a purpose which has no limitation of person or place. But the Act secures a special benefit to British subjects, by promoting the advancement of learning in this country, which the Act contemplates as the result of encouraging all authors to resort to the United Kingdom for the first publication of their work. The benefit of the foreign author is incidental only to the benefit of the British public. Certainly the obligation lies on those who would give the term 'author' a restricted signification to find in the statute the reason for so doing. If the intrinsic merits of the reasoning on which *Jeffreys* v. *Boosey* was decided be considered (and which we are at liberty to do, for it does not apply to this case as a binding authority), I must frankly admit that it by no means commands my assent."

33 Vict. c. 14.

Sect. 2 of the Naturalization Act, 1870 (33 Vict. c. 14), enacts that "real and personal property of *every description* may be taken, acquired, held, and disposed of by an alien *in the same manner in all respects as a natural-born British subject*; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject." This enactment, unless its very general words are in some manner explained away as not intended to apply to the case of copyright, would appear to do away wholly with the effect of the decision in *Jeffreys* v. *Boosey* as to all future cases. For all copyright is "personal property" by 5 and 6 Vict. c. 45, s. 25: it can be acquired by any natural-born British subject by first publishing his work in this country *wherever*

he is at the time of its publication: by the enactment above set out, real and *personal property of every description* may be "acquired" by an alien "in the same manner in all respects as a natural-born British subject;" from which it would seem to follow that an alien may acquire copyright in a work which he first publishes here, wherever he is at the time of its publication.(*a*) Though the question is not quite free from doubt, in all probability the ultimate court of appeal, should it ever come before that tribunal for determination, will decide it in favour of the alien, in accordance with the opinions of Lords Westbury and Cairns above referred to.

Meaning of residence in *British dominions*.

It is quite settled that it is not necessary in order to entitle a foreign author to copyright in his work, that he should be resident within the United Kingdom at the time of its first publication here. It is sufficient that he should at that time be resident in *any part of the British dominions*. And the words "British dominions" are defined by 5 and 6 Vict. c. 45, s. 2, to mean and include all parts of the United Kingdom of Great Britain and Ireland, the islands of Jersey and Guernsey, all parts of the East and West Indies, and all the colonies, settlements, and possessions of the Crown, which now are or hereafter may be acquired. In conformity with this it was determined by the Court of Appeal in Chancery, in the case of *Low* v. *Routledge*,(*b*) that an alien friend (a native of the United States of America) could, by a temporary residence in Canada at the time of publication in England, acquire a British copyright in the work published here. In that case it was agreed between the plaintiffs and an American authoress, from whom they had purchased the manuscript of a book written by her, that she should go to Montreal and reside there till after the publication of the work in England by the plaintiffs. She resided at Montreal from the 19th of May, 1864, till after the 4th of June, 1864, when the book was published for the first time by the Messrs. Low, in London. An injune-

(*a*) An argument in favour of the applicability of the above section to cases of copyright is furnished by the fact that certain exceptions are expressly made, of which copyright is not one. It is provided [sect. 1] that this enactment "shall not confer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for any office or for any municipal, parliamentary, or other franchise; and shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of *property* as are hereby expressly given to him," and also [sect. 14] that nothing in the Act contained "shall qualify an alien to be the owner of a British ship."

(*b*) 35 L. J. 114, Ch.; 13 L. T. N. S. 421.

tion was granted by Vice-Chancellor Kindersley to restrain Messrs. Routledge from publishing an edition of the same work; and on appeal the Lords Justices upheld his decision. Lord Justice Turner observed: "It was said for the defendants that the same word 'author,' which is contained in this statute, was also contained in the statute of Anne, the first Copyright Act, and that strong opinions were expressed by the judges, and by the law lords in the House of Lords, in the case of *Jeffreys* v. *Boosey*, that the word 'author' in the statute of Anne means an author resident in England at the time of publication, and that the same construction ought to be given to the word 'author' in the stat. 5 & 6 Vict. c. 45, now under our consideration. But there is no provision in the statute of Anne that the statute shall extend to the colonies, and in the statute we are now considering it is expressly so provided." It was also urged on behalf of the defendants that 5 & 6 Vict. c. 45 did not extend to colonies having legislatures of their own, as Canada; but the Lord Justice held that the word "colonies," in the absence of a context to control it, must extend to all colonies. This decision was affirmed by the House of Lords.(*a*)

Even if a statute of the colony in which the alien resides at the time of the publication of his work here, prevents an alien acquiring a copyright in a work published by him in the colony during his residence there, that would make no difference as to his title to copyright here. An alien has rights as a subject of the Crown whilst residing in one of its colonies, as well as rights as a subject of the colony; and though his civil rights within the colony depend upon the colonial laws, his civil rights beyond the limit of the colony are independent of those laws. "Every alien," said Turner, L.J., in the case last referred to, "coming into a British colony becomes temporarily a subject of the Crown, bound by, subject to, and entitled to the benefit of, the laws which affect all British subjects. He has obligations both within and beyond the colony into which he comes. As to his rights within the colony, he may well be bound by its laws; but as to his rights beyond the colony he cannot be affected by those laws, for the laws of a colony cannot extend beyond its territorial limits."

Publication in United Kingdom indispensable.

Publication in the United Kingdom is indispensable to copyright. That this was the intention of the Legislature is shown by various provisions of the statute; besides which

(*a*) See L. Rep. 3 Eng. & Ir. App. 100; 18 L. T. N. S. 874; 37 L. J. 454, Ch.

"it would be very inconsistent with the usual practice of the Imperial Parliament to create a system of copyright law for all the colonies and dependencies in the Empire, many of which have representative institutions of their own, without any consultation with those colonies or dependencies, and without any consideration whether a uniform and arbitrary system, such as that introduced by this Act, would be suitable to the varied circumstances, states of civilisation, and systems of jurisprudence and judicature in these different colonies and possessions."(*a*)

But when copyright once exists, the area over which it extends is the whole of the British dominions.(*b*)

British subject first publishing abroad.

It is important to observe that by the International Copyright Act (7 & 8 Vict. c. 12, s. 19) a British subject who first publishes abroad is, equally with a foreigner, deprived of any copyright save such as he may acquire under that Act; and if there is no treaty giving effect to the Act in his particular case, he has no copyright in this country. This was so decided by Wood, V.C., in *Boucicault* v. *Delafield*,(*c*) in which case the plaintiff prayed for an injunction to restrain the defendant from producing a drama ("The Colleen Bawn") written by the plaintiff, and, as it appeared on the hearing of the case, represented by the plaintiff at New York prior to its being represented in England. The Vice-Chancellor refused to grant the injunction, and dismissed the bill with costs, being of opinion that the words of the 19th section of 7 & 8 Vict. c. 12 took away whatever rights the plaintiff might otherwise have had. If he had first represented his drama here, he would have been entitled to the provisions of the Dramatic Copyright Act. Then 7 & 8 Vict. c. 12 was passed, enabling Her Majesty to make arrangements conferring on other nations the privileges accorded to all people who first publish their works here. If the plaintiff had this sort of double right it was the very thing which the 7 & 8 Vict. c. 12 was intended to extinguish. The statute says in effect (sect. 19) that "if any person, British subject or not, chooses to deprive this country of the advantage of the first representation of his work, then he may get the benefit of copyright, if he can, under the arrangement which may have been come to pursuant to 7 & 8 Vict. c. 12, between this country and

(*a*) *Per* Lord Cairns, C., *Routledge* v. *Low* (L. Rep. 3 Eng. & Ir. App. 108; 18 L. T. N. S. 874; 37 L. J. 454, Ch.).

(*b*) *Routledge* v. *Low*, *ubi supra*.

(*c*) 1 H. & M. 597; 9 L. T. N. S. 709; 33 L. J. 38, Ch. See also *Boucicault* v. *Chatterton*, L. R. 5 C. D. 267.

the country which he so favours with his representation; but if he chooses to publish his performance in a country which has not entered into any treaty or made any such arrangement with regard to copyright, then this country has nothing more to say to him; he must be taken to have elected under which of the two statutes with respect to copyright he wishes to come, by performing his work in one country instead of the other, and he is thereby excluded from all advantage of publishing in the other."(*a*)

Simultaneous publication here and abroad.

The publication abroad of the work on the same day that it is published here will not disentitle to copyright in this country.(*b*)

Alien's rights in unpublished works.

The property which an author has in his unpublished ideas embodied in a tangible shape being independent of statute(*c*) it should seem that an alien friend might prevent the unauthorised publication here of any of his unpublished works.(*d*)

Besides the copyright which may be possessed by individual authors and proprietors, there is also a copyright enjoyed in certain works by the Crown, and in others by the Universities, to which attention will subsequently be directed.

CHAPTER IV.

PROPERTY IN UNPUBLISHED WORKS.

Unpublished manuscripts.

It has already been stated that every new, and it should be added innocent, product of mental labour which has been embodied in writing or some other material form becomes the exclusive property of its author; and, without his express permission, the law will not allow any other person to publish it. Whether the ideas thus un-

(*a*) *Per* Wood, V.C. (1 H. & M. 597; 9 L. T. N. S. 709; 33 L. J. 38. Ch.).

(*b*) See *Boulon* v. *Jones*, 5 De G. & S. 80.

(*c*) See *Prince Albert* v. *Strange* (2 De G. & S. 652; 1 Mac. & G. 25).

(*d*) It has been held in America that the sect. (9) of the Act of Congress (Act of 1831, c. 16) which gave redress for the unauthorised printing or publishing of manuscripts, operated in favour of a resident of the United States who had acquired the proprietorship of an *unprinted* literary composition from a non-resident alien author: (*Keene* v. *Wheatley*, 9 Amer. Law Reg. 33).

published take the shape of written manuscripts of literary, dramatic, or musical compositions, or whether they are the designs for works of ornament or utility planned by the mind of an artist, they are equally inviolable while they remain unpublished, and the author possesses an absolute right to publish them or not as he thinks fit, and (if he does not desire to publish them) to hinder their publication either in whole or in part by any one else. "It is certain every man has a right to keep his own sentiments if he pleases. He has certainly a right to judge whether he will make them public or commit them only to the sight of his friends: in that state a manuscript is in every sense his peculiar property, and no man can take it from him, or make any use of it which he has not authorised, without being guilty of a violation of his property. And as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication, and whoever deprives him of that privilege is guilty of a manifest wrong, and the court have a right to stop it."(*a*)

The ideas of an author have been quaintly compared to "birds in a cage, which none but he can have a right to let fly, for till he thinks proper to emancipate them they are under his own dominion."(*b*) "The property," says Lord Cottenham,(*c*) "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. . . . . If then such right and property exist

(*a*) *Per* Yates, J. 4 Burr. 2378). (*b*) *Ibid.*

(*c*) *Prince Albert* v. *Strange* (13 Jur. 112; 1 Mac. & G. 42; 18 L. J. 120. Ch.); see *Bartlett* v. *Crittenden* (4 M'Lean, 301); *Hoyt* v. *M'Kenzie* (3 Barb. Ch. 323); *Wheaton* v. *Peters* (8 Pet. 657). "No length of time, where the invention does not go into public use, can invalidate the right of the inventor. He may take his own time to perfect his discovery, and apply for a patent. And the same principle applies to the manuscript of an author. If he permit copies to be taken for the gratification of his friends, he does not authorise those friends to print them for general use. This is the author's right, from which arise the high motive of pecuniary profit and literary reputation. When the inventor consents to the construction and use of his machine he yields the whole value of his invention. But an author's manuscripts are very different from a machine. As manuscripts in modern times, they are not and cannot be of general use" (M'Lean, J., *Bartlett* v. *Crittenden*, *ubi supra*).

PART I.
CHAPTER IV.

in the author of such works, it must so exist exclusively of all other persons."

This property is independent of statute.

For this exclusive property in the *unpublished* products of his mental labours the author, it must be remembered, is not indebted to any Copyright Acts. His right is independent of statute, and, as observed by Lord Cottenham in the judgment from which the preceding extract is taken, depends entirely on the common law right of property. To the same effect Knight Bruce, V.C., on the final hearing of *Prince Albert* v. *Strange* (*a*) in the court below, remarks—

"Upon the principle, therefore, of protecting property it is that the common law, in cases not aided nor prejudiced by statute, shelters the privacy and seclusion of thoughts and sentiments committed to writing, and desired by the author to remain not generally known. . . . . Such then being, as I believe, the nature and foundation of the common law as to manuscripts, independently of Parliamentary additions and subtractions, its operation cannot of necessity be confined to literary subjects. That would be to limit the rule by its example. Wherever the produce of labour is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress."

The protection afforded by the common law to unpublished compositions cannot be evaded by translation, abridgment, summary, or even review.(*b*)

Prince Albert v. *Strange*.

How complete the right of the author is to prevent every, even the slightest, infringement of the property in his unpublished productions is forcibly shown by the facts of the case in which the preceding opinions have been judicially expressed—a case which is in fact the leading one on the subject now treated of. In *Prince Albert* v. *Strange*(*c*) it appeared that Her Majesty the Queen and the Prince her husband had occasionally for their amusement made drawings and etchings, principally of subjects of private and domestic interest to themselves, and had some lithographic impressions struck off by means of a private press kept for that purpose, for their own use, and not for publication. Some few impressions had indeed been given to private

(*a*) 2 De G. & Sm. 695.

(*b*) *Per* Knight Bruce, V.C., in *Prince Albert* v. *Strange* (2 De G. & Sm. 693).

(*c*) 2 De G. & S. 652; 1 Mac. & G. 25; 13 Jur. 45, 109, 507. There was also an information filed by the *Attorney-General* v. *Strange*, for the purpose of protecting the interests of Her Majesty in those portions of the etchings which were the property of Her Majesty, and praying relief as to them similar to that prayed in the bill of Prince Albert.

friends of Her Majesty and the Prince, but no further publication was intended or desired. Some further copies being required, the plates for the purpose of printing them were sent to Mr. Brown, a printer at Windsor, and whilst they remained in his possession one of his workmen surreptitiously made some impressions of the etchings for himself. These surreptitiously procured impressions were subsequently obtained by a Mr. Judge, and from his possession they passed into that of the defendant Strange, a London publisher. Strange printed a catalogue of the etchings, in which was expressed an intention of publicly exhibiting the impressions of them, which had come into his possession by means of Judge. The catalogue was entitled "A Descriptive Catalogue of the Royal Victoria and Albert Gallery of Etchings," and contained, after a long introduction stating the general nature of the subjects, a detailed list of sixty-three etchings, with observations upon them, chiefly of a commendatory character. The bill prayed that the defendants might be ordered to deliver up to the plaintiff all impressions and copies of the said several etchings made by the plaintiff; and that they, their servants, &c., might be restrained by injunction from exhibiting the said gallery or collection of etchings, and from selling or in any manner publishing, and from printing the said descriptive catalogue, or any work being or purporting to be a catalogue of the said etchings, and that all the copies of the said catalogue in the possession or power of the said defendants might be given up to be destroyed. An interim injunction having been granted by Knight Bruce, V.C., extending to Judge as well as Strange, the defendant Strange put in his answer, stating, amongst other things, his original belief that the impressions had come honestly into Judge's hands, that Judge wrote the descriptive catalogue, which he (Strange) then printed, striking off only fifty-one copies, after which the type was broken up, that the catalogue had never been published, or sold, or exposed for sale, and that on receiving the first information that the contemplated exhibition was disapproved of by Her Majesty and the Prince, he had abandoned the whole scheme; and he expressly denied that he ever threatened or intended to make such exhibition, or to make any copies or engravings of the etchings. After this answer had been put in, a motion was made on behalf of Strange to dissolve the injunction granted against him, so far only as it sought to restrain him from selling or in any manner publishing or printing the descriptive catalogue of the etchings, leaving unquestioned

the remaining portion of the injunction against exhibiting, publishing, or parting with the etchings described in the catalogue. It was contended in support of the motion and of the defendant's asserted right to print and publish the catalogue, that although the owner of a print might prevent another from publishing a copy of it, it was impossible to prevent the other from describing it, and printing and publishing such description; that the law of England could not prevent a party obtaining knowledge through the medium of perceiving these etchings, from using that knowledge, and from conveying that information to others, and a Court of Equity, in the absence of contract, could not interfere with the use of that knowledge; it was difficult to understand how the rights of any one could be interfered with by the making of a catalogue describing the articles and making remarks upon them in the shape of friendly, if not flattering criticism; that if a spectator had a right to contemplate any of the productions of so exalted a personage, which he might do without any invasion of domestic privacy, he had a right to communicate full information connected with those productions; and this, substantially, was all that had been done by the descriptive catalogue; that it was a fallacy to say, as had been said on the part of the plaintiff, that privacy is essential to the right of property, for though the owner of anything may use every means in his power to prevent that thing being seen by another, yet if that other person sees it, the owner can have no right of property in the notion or idea created in the mind of the person who has seen it; that there is no property in the ideas created by seeing the etchings—the property is confined to the etchings: and no regard could be paid to a mere injury to private feelings, and that in substance the complaint is of an offence not against law but against manners.

Notwithstanding, however, the ingenious arguments by which a distinction between the publication of copies of the (unpublished) etchings themselves and that of a mere descriptive catalogue of them was endeavoured to be maintained, the Vice-Chancellor (Knight Bruce), and on appeal the Lord Chancellor (Cottenham), refused to admit the distinction, and held that the plaintiff was entitled to restrain the publication of the one as well as the other. Though the fraudulent manner in which the impressions of the etchings had been originally acquired formed one of the grounds on which the decision rested, the right of the plaintiff to restrain the publication of the catalogue on the

sole ground of his property in the things described was unmistakably asserted by both the learned judges. "Property in mechanical works or works of art," said Knight Bruce, V.C.,(*a*) "executed by a man for his own amusement, instruction, or use, is allowed to subsist certainly, and may, before publication by him, be invaded, not merely by copying, but by description or by catalogue, as it appears to me. A catalogue of such works may in itself be valuable. It may also as effectually show the bent and turn of the mind, feelings, and taste of the artist, especially if not professional, as a list of his papers. The portfolio or the studio may declare as much as the writing-table. A man may employ himself in private in a manner very harmless, but which disclosed to society may destroy the comfort of his life, or even his success in it. Every one, however, has a right, I apprehend, to say that the produce of his private hours is not more liable to publication without his consent, because the publication must be creditable or advantageous to him, than it would be in opposite circumstances. Addressing the attention specifically to the particular instance before the court, we cannot but see that the etchings, executed by the plaintiff and his consort for their private use, the produce of their labour, and belonging to themselves, they were entitled to retain in a state of privacy, to withhold from publication. The right, I think it equally clear, was not lost by the limited communication which they appear to have made, nor confined to prohibiting the taking of impressions without or beyond their consent, from the plates their undoubted property. It extended also, I conceive, to the prevention of persons unduly obtaining a knowledge of the subjects of the plates, from publishing (at least by printing or writing, though not by copy or resemblance) a description of them, whether more or less limited or summary, whether in the form of a catalogue or otherwise." And similarly Lord Cottenham:(*b*) "It being admitted that the defendant could not publish a copy—that is an impression—of the etchings, how in principle does a catalogue, list, or description differ? A copy or impression of the etching would only be a means of communicating knowledge and information of the original, and does not a list and description do the same? The means are different, but the object and effect are similar; for in both, the object and effect is to make known to the public more or less of the unpublished work and

(*a*) 2 De G. & S. 696; 13 Jur. 58.
(*b*) 1 Mac. & G. 43; 18 L. J. 126, Ch.; 13 Jur. 112.

composition of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others. . . . Upon the first question, therefore—that of property—I am clearly of opinion that the exclusive right and interest of the plaintiff in the composition or work in question being established, and there being no right or interest whatever in the defendant, the plaintiff is entitled to the injunction of this court to protect him against the invasion of such right and interest by the defendant, which the publication of any catalogue would undoubtedly be."

Points decided by *Prince Albert* v. *Strange*.

The elaborate judgments in this important case have established the following points:—That the right of property of the author or composer of any works of literature, art, or science in such works, so long as they remain unpublished, is so complete and absolute that no one else, without his permission, may publish even a list or descriptive catalogue of them; that the circulation amongst a few private friends of impressions of etchings not otherwise published is not such a publication of them as disentitles the owner to the protection of the aforesaid right, and that this right is but part of the general common law right of property.

Earlier cases.

The earliest case on the subject of copyright before publication that we find in the books is that of *Webb* v. *Rose*,(*a*) in which Sir Joseph Jekyll, M.R., in 1732, granted an injunction to restrain the clerk of a deceased conveyancer from printing unauthorised the conveyancing drafts of his late master. The bill in that case was filed by the son and devisee of the conveyancer. In *Forrester* v. *Waller*,(*b*) in 1741, an injunction was granted to hinder the printing of the plaintiff's notes obtained surreptitiously without his consent. In *Manby* v. *Owen*,(*c*) in 1755, a bill was filed by some printers who had bought from the Lord Mayor the copy of the sessions paper of trials, to enjoin the defendants from printing it. The Lord Chancellor considered that the right to print purchased from the Lord Mayor gave the plaintiffs the property, and the injunction prayed for was granted.(*d*)

In *Morris* v. *Kelly*(*e*) Lord Eldon granted an injunction to restrain the performance at the English Opera House of

(*a*) Cited 4 Burr. 2330. (*b*) *Ibid.* (*c*) Cited 4 Burr. 2329.
(*d*) See also *Duke of Queensberry* v. *Shebbeare* (2 Ed. 329), cited *post*, p. 46: and as to letters *Pope* v. *Curl*, 2 Atk. 342.
(*e*) 1 Jac. & W. 481.

the comedy of the "Young Quaker," of which the plaintiffs, the proprietors of the Haymarket Theatre, had purchased the copyright in the manuscript.(*a*) This was in 1820, several years before the Act of 3 & 4 Will. 4, c. 15, gave to authors of plays the sole right of representing them, and it is not easy to see on what ground the injunction was granted.

Letters.

Of innocent productions there is also a species of property on the part of the writer in the private letters which one person sends to another. The earliest assertion of this doctrine in our law books is to be found in the judgment of Lord Hardwicke in *Pope* v. *Curl*,(*b*) in which case his lordship refused to dissolve an injunction which Pope had obtained to restrain the defendant from publishing a collection of letters written by the poet. "The first question," said Lord Hardwicke, "is whether letters are within the grounds and intention of the statute made in the 8th year of Queen Anne, c. 19, entitled, 'An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies.' I think it would be exceedingly mischievous to make a distinction between a book of letters which comes out into the world, either by permission of the writer, or the receiver of them, and any other learned work. . . . . Another objection has been made by the defendant's counsel, that where a man writes a letter it is in the nature of a gift to the receiver. But I am of opinion that it is only a special property in the receiver; possibly the property of the paper may belong to him, but this does not give a licence to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer." And to the objection insisted on by the defendant's counsel that this was a sort of work which did not come within the meaning of the Act of Parliament, because it contained only letters on familiar subjects, and inquiries after the health of friends, and therefore could not properly be called a learned work, his lordship replied: "It is certain that no works have done more service to mankind than those which have appeared in this shape, upon familiar subjects, and which, perhaps, were never intended to be published, and it is this makes them so valuable: for I must confess, for my own part, that letters which are very elaborately written, and originally intended for the press, are generally the most insignificant,

(*a*) See the prior case of *Macklin* v. *Richardson* (Amb. 694), referred to *post*, p. 44.

(*b*) 2 Atk. 342.

and very little worth any person's reading."(*a*) The injunction was continued by the Lord Chancellor only as to those letters in the book which were written *by* Pope, and not as to those which were written *to* him.

In *Thompson* v. *Stanhope*(*b*) (a case respecting the letters written by Lord Chesterfield to his son) Lord Apsley, C., took the same view of the law as that expressed in the preceding case by Lord Hardwicke. In the later case of *Percival* v. *Phipps*(*c*) Sir Thomas Plumer, V.C., adhering to the same doctrine, observed: "An injunction restraining the publication of private letters must stand upon this foundation: that letters, whether of a private nature or upon general subjects, may be considered as the subject of literary property; and it is difficult to conceive in the abstract that they may not be so. . . . . The question then arose, whether letters having that character of literary composition, the transmission of them to the person to whom they were addressed deprived the author of his power over them as his composition, so far as to authorise a publication without his consent; and it has been decided that by sending a letter the writer does not give the receiver the power of publishing it; that, whether he is to be considered as a joint proprietor or not, letters have the character of literary composition stamped upon them, so that they are within the spirit of the Act of Parliament protecting literary property; and a violation of the right in that instance is attended with the same consequences as in the case of an unpublished manuscript of an original composition of any other description."

An important qualification of the right of property in private letters was stated by the Vice-Chancellor in the case last referred to. "Though the form of familiar letters might not prevent their approaching the character of a literary work, every private letter upon any subject to any person is not to be described as a literary work, to be protected upon the principle of copyright. The ordinary use of correspondence by letters is to carry on the intercourse of life between persons at a distance from each other, in the prosecution of commercial or other business; which it would be very extraordinary to describe as a literary work in which the writers have a copyright."

Lord Eldon followed the previous decisions in *Gee* v. *Pritchard*,(*d*) though expressing his doubts relative to the

(*a*) 2 Atk. 343. See *Eyre* v. *Higbee* (22 How. Pr. 200).
(*b*) Amb. 737.
(*c*) 2 V. & B. 19.
(*d*) 2 Swans. 402. See *Brandreth* v. *Lance* (8 Paige's Rep. 24).

jurisdiction assumed by the Court of Chancery over the publication of letters,(*a*) and hinting his determination to give effect to those doubts should the question ever be brought on appeal before the House of Lords. An injunction was granted to the plaintiff in this case to restrain the publication of private letters written by her to the defendant.

In *Cadell* v. *Stewart*,(*b*) the Scotch Court of Session restrained the publication of certain letters written by the poet Burns to Clarinda. The interdict was granted after the death of Burns on the application of the publishers of his works, concurred in by the brother of the poet and the curator of his children. The report of the case says, "There was little difference of opinion upon the bench. The ground upon which the court seemed to pronounce the decision was, that the communication in letters is always made under the implied confidence that they shall not be published without the consent of the writer, and that the representatives of Burns had a sufficient interest for the vindication of his literary character to restrain this publication."

In a bill filed by the executor and residuary legatee of Lady Tyrawly, the Irish Court of Chancery restrained a connection of her ladyship, who resided in her house, from publishing after her death a collection of letters addressed to her.(*c*)

There seems to be no distinction with reference to the writer's title to restrain the publication of letters written to another, between merely private letters not intended as literary compositions, and those which are written with a view to their literary character, although Sir T. Plumer in *Perrind* v. *Phipps*, appears to consider such a distinction material. Notwithstanding the doubts expressed by Lord Eldon(*d*) as to the existence of what Lord Hardwicke(*e*) called a "joint property" in a letter in the writer and receiver, the Court of Chancery has restrained the

(*a*) "My predecessors," said his lordship, "did not inquire whether the intention of the writer was or was not directed to publication. The difficulty which I have felt in all these cases is this: if I had written a letter on the subject of an individual for whom both the person to whom I wrote and myself had a common regard, and the question arose for the first time, I should have found it difficult to satisfy my mind that there is a property in the letter; but it is my duty to submit my judgment to the authority of those who have gone before me; and it will not be easy to remove the weight of the decisions of Lord Hardwicke and Lord Apsley."

(*b*) 13 Fac. Dec. 375, June 1, 1804.

(*c*) *Earl of Granard* v. *Dunkin* (1 Ball & B. 207).

(*d*) *Gee* v. *Pritchard* (2 Swans. 402). (*e*) *Pope* v. *Curl* (2 Atk. 342).

publication of letters on the sole ground of the property (of whatever nature it be) which the writer has in the letters written by him. Whether the right to control the act of publication and to decide whether there shall be any publication at all be correctly termed a right of property or no, it is on the ground of this right that equity interferes to aid the writer of letters. And, if so, there can be no valid distinction between the writer's property in private and familiar letters, and those of a more elaborate and literary character. Indeed it would be completely impossible to draw a line of distinction between the two; and were the case otherwise it is difficult to resist the conclusion that "if the mere sending of letters to third persons is not to be deemed, in cases of literary composition, a total abandonment of the right of property therein by the sender, *à fortiori* the act of sending them cannot be presumed to be an abandonment thereof in cases where the very nature of the letters imports, as matter of business or friendship, or advice, or family or personal confidence, the implied or necessary intention and duty of privacy and secrecy."(*a*)

Limitations of property in letters.

The decided cases, however, have placed certain restrictions on the title of the writer of private letters to insist on his special property in them, and to hinder their publication by others. The writer may by his own acts disentitle himself to prevent the publication of his letters to another person, and justify that other person in giving them to the world;—*e.g.*, a false accusation brought by the writer against the recipient of the letters which may be disproved by their publication, will justify such publication, and courts of equity have refused to aid by injunction the writer of the letters in such a case. Sir Thomas Plumer, V.C., whose *dicta* in favour of the abstract right of property in private letters have been quoted above, refused an injunction to prevent the publication of the letters under the particular circumstances of the case before him,(*b*) which are briefly these. The defendant Phipps was the proprietor of a newspaper called *The News*, in which were published from time to time articles and paragraphs on a subject which then engrossed the public attention, which articles and paragraphs were supplied to Phipps by a Mr. Mitford, but were written, as Mitford informed Phipps, by Lady Percival, and in her handwriting. A piece of intelligence in one of these published articles being found to be false, Phipps applied to Lady Percival on the subject, who denied that the intelli-

(*a*) St. Eq. Jur. 947. (*b*) *Percival* v. *Phipps* (2 V. & B. 19).

gence had ever been sent, and stated that the papers containing it were forgeries. Mitford positively asserted the contrary, and to enable Phipps to justify himself to the public delivered to him several letters written by Lady Percival to Mitford upon similar subjects, materially tending to show that the false intelligence published in *The News* had come from Lady Percival through Mitford. Phipps published in *The News* one of the letters given to him by Mitford, and announced an intention of publishing the other. A bill was filed on the part of Lady Percival to restrain the publication of those letters written by her to Mitford as being of a private nature, and having been sent to him in confidence that he would not part with them or communicate their contents to any other person. The answer denied that the letters had been sent in any such confidence. It was urged on behalf of Phipps that a gross imputation had been cast upon him, and that though he might derive a profit from publishing the letters in his own paper, his object was not profit, but the vindication of his character from the imputation thrown upon it, and to effect that object he was entitled to use the letters. And the Vice-Chancellor held that he was entitled to make this use of the letters. "Whatever degree of confidence," he said,(*a*) "or reservation of property may be implied from the transmission of a private letter, it would be too much to hold that the individual who receives it can in no case use it for the purpose of protecting himself from an unfounded imputation; stating that to be the sole and *bonâ fide* object of the publication; and upon the answer in this case it must be taken that the defendant has no purpose of gain, or to deprive another of the benefit derived from a literary composition; but that his only object is by proving agency to answer the imputation cast upon him."

The distinction, to which Sir T. Plumer seems to attach importance, between the publication of private letters without the writer's consent, *for the purpose of profit or gain*, and publication for a different purpose is treated by Lord Eldon, in *Gee* v. *Pritchard*,(*b*) as of no moment. His lordship considered the previous cases to have decided that, *ultra* the purposes for which the letter was sent, the property was in the sender. If "that is the principle," he observes, "it is immaterial whether the publication is for the purpose of profit or not. If for profit, the party is then selling, if not for profit, he is giving that a portion of which belongs to the writer." In the case before him, an attempt was made on the part of the

(*a*) 2 V. & B. 25. (*b*) See 2 Swanst., 415.

defendant to avail himself of the decision in *Perceval* v. *Phipps*; but Lord Eldon distinguished the cases, and granted the injunction asked for by the plaintiff. The defendant in the case before Lord Eldon was the illegitimate son of the plaintiff's deceased husband, and had received many letters from the plaintiff during her husband's lifetime. After her husband's death, the plaintiff ceased to be on terms of friendship with the defendant, and denied the truth of statements made by him as to the expectations which he had been led to entertain from the plaintiff and her husband. The defendant returned to the plaintiff the original letters which she had written to him, but took copies of the letters before returning them, without the plaintiff's knowledge, and advertised his intention to publish the letters, but, as he stated in his answer, for private circulation only. This he did, as he alleged, in order to clear his character from the charge of want of veracity which the plaintiff had brought against it. In this case the defendant, by returning the originals, had abandoned whatever property he had—for if he had any right of property it was in the originals,(*a*) and Lord Eldon restrained the threatened publication. In giving judgment he observed, "I do not say there may not be a case, such as the Vice-Chancellor (Sir T. Plumer) thought the case before him, where the acts of the parties supply reasons for not interfering; but that differs most materially from this case. In April last, the defendant having so much of property in these letters as belongs to the receiver, and of interest in them as possessor, thinks proper to return them to the person who has in them, as Lord Hardwicke says, a joint property, keeping copies of them without apprising her, and assigning such a reason as he assigns for the return [his 'being unworthy of the sentiments and expressions of kindness contained in them']. Now I say, that if, in the case before the Vice-Chancellor, Lady Perceval had given to Phipps a right to publish her letters, this case is the converse of that; and that the defendant, if he previously had it, has renounced the right of publication."

Lord Eldon was careful to rest his decision in this case on the ground of the plaintiff's property in the letters (as determined by previous cases) and not on any considerations as to wounded feelings. When reference was made to such considerations by the defendant's counsel, his lordship interposed: "I will relieve you from that argument. The question will be, whether the bill has stated facts of which

(*a*) 2 Swans., 418.

the court can take notice, as *a case of civil property*, which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of that friendship affords a reason for the interference of the court."(*a*)

The Scotch Court of Session held that the proprietors of a newspaper to which a person wrote a letter with a request that it might be inserted in reply to a previous article, did not acquire the property in the letters, and were not entitled to publish it after the writer had expressed his wish to withdraw it.(*b*)

If the agent or servant of a company write a letter, apparently on behalf of the company, to a shareholder, it is the property of the company, and the agent or servant cannot prevent the company from publishing the letter.(*c*)

Where the solicitor of an insurance company established in London, wrote a letter not marked "private" or "confidential," to one of the shareholders in the country, by which he appeared to negotiate a new arrangement as to certain shares allotted to the country shareholder, he was held not entitled to restrain the publication of this letter in a pamphlet, published after the winding up of the company by its late manager, to whom a copy of it had been sent by the shareholder the day after he received it.(*d*) "If the solicitor of an insurance company established in London," said the Master of the Rolls in this case, "by the direction of the directors, wrote a letter to one of the shareholders in the country, it is clear that such letter is not the property of the solicitor, and that he cannot say that the company have not a right to publish it. Take it a step further, and assume that the solicitor wrote a letter, but not by the direction or on behalf of the directors, though it had all the appearance of being written on their behalf, and by their direction. Thus, if it were written to a person who proposed to take shares in the company, and it related to the affairs of the company, and contained authoritative information on behalf of the company, in answer to an application for shares, and the person who receives it treats it as such, and sends back to the company objecting to its contents, shall the solicitor be allowed to complain of its publication, and

(*a*) 5 T. R. 245; see also the American cases *Webmore* v. *Scoville* 3 Ed. 527, Ch.); and *Woolsey* v. *Judd* (4 Duer, 382)
(*b*) *Davis* v. *Miller & Fairly*, 17 Scotch Sess. Cas. 2nd Ser. 1166.
(*c*) *Per* Lord Romilly, M.R., *Howard* v. *Gunn* (32 Beav. 465).
(*d*) *Ibid.*

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to insist that it is a private letter, though it appears to be written on behalf of the directors? The answer is, if that be so, it ought not to have been written. It has all the appearance of having been written by the plaintiff on their behalf, and Jamieson [the shareholder to whom it was addressed] so treats it, for he writes to the manager in answer to it. Can the plaintiff be allowed to say that the company have no right to publish it? and if they have, is not the defendant entitled, as regards the plaintiff, to bring it forward? It is obvious that this was not a private letter, and was not intended to be a private letter."

Summary of the Law of Literary Property.

An excellent summary of the whole law on this subject is contained in the judgment of the American judge Story, in the case of *Folsom* v. *Marsh*(*a*). "The author of any letter or letters, and his representatives, whether they are literary compositions or familiar letters or letters of business, possess the sole and exclusive copyright therein; and no person, neither those to whom they are addressed, nor other persons, have any right or authority to publish the same upon their own account, or for their own benefit. But, consistently with this right, the persons to whom they are addressed may have, nay, must by implication possess, the right to publish any letter or letters addressed to them, upon such occasions as require or justify the publication or public use of them; but this right is strictly limited to such occasions.(*b*) Thus, a person may justifiably use and publish in a suit at law or in equity such letter or letters as are necessary and proper to establish his right to maintain the suit, or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of improper conduct in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach. If he attempt to publish such letter or letters on other occasions, not justifiable, a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author, and *a fortiori* if he attempt to publish them for profit; for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive copyright of the writer. In short, the person to whom the letters are addressed has but a limited right or special property (if I may so call it) in such letters, as a trustee or bailee for particular purposes, either of information or protection, or of support of his own rights

(*a*) 2 Story's Rep. 111.

(*b*) See 2 Swans. 415, 419, and *Palin* v. *Gathercole* (1 Coll. 565).

and character. The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. The general property in the manuscripts remains in the writer and his representatives as well as the general copyright. *A fortiori*, third persons standing in no privity with either party are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion."

The right of an oral lecturer, before the Stat. 5 & 6 Will. 4, c. 65, to restrain the publication for profit of lectures delivered by him stood on a somewhat peculiar footing. In the year 1824, Mr. Abernethy, the distinguished surgeon, delivered a series of lectures on the principles and practice of surgery to the medical students of St. Bartholomew's Hospital. The *Lancet* newspaper proceeded to publish these lectures; and, besides publishing some, it contained an announcement that the remaining lectures would also be published as they were delivered. A bill was filed by Mr. Abernethy against the proprietors of the *Lancet* to restrain the publication.(*a*) It was contended on behalf of the defendants that no man could have any right of property in ideas and language not reduced into writing; and it was acknowledged by Mr. Abernethy, that although a good deal of the materials for his lectures had been reduced by him to writing, yet at the time of delivering the lectures he did not read or refer to any writing before him, but that he delivered them orally. As the written notes were not produced, the Lord Chancellor (Eldon), when the case first came before him, refused to grant an injunction grounded on an infringement of the plaintiff's copyright, because no case had determined that there was such copyright in unpublished productions not reduced into writing. The case was postponed to enable Mr. Abernethy to produce his manuscripts if he wished to do so. The manuscripts were not produced, and Lord Eldon, treating the lectures as orally delivered, refused to grant an injunction on the ground of a right of property in sentiments and language not deposited on paper; though he did grant the injunction on another ground, namely, the existence of an implied contract between the lecturer and his hearers that the latter would make use of the lectures only for their own information, and not publish for profit that which they had not the right of selling. The Lord Chancellor is reported to have stated

Lectures

(*a*) *Abernethy* v. *Hutchinson* (1 H. & T. 39; 3 L. J. 209, Ch.).

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that where the lecture was orally delivered, it was difficult to say that an injunction could be granted upon the same principle upon which literary composition was protected; because the court must be satisfied that the publication complained of was an invasion of the written work, and this could only be done by comparing the composition with the piracy. But it did not follow that because the information communicated by the lecturer was not committed to writing but orally delivered, it was therefore within the power of the person who heard it to publish it. On the contrary, he was clearly of opinion that whatever *could be done with it, the lecture could not be* published for profit. He had no doubt whatever that an action could be maintained by a pupil who published these lectures; and whether an action would or would not lie against a third person obtaining the lectures from a pupil, an injunction undoubtedly might be granted; because if there had been a breach of contract on the part of the pupil who heard the lectures, and if the pupil could not publish for profit, to do so would be regarded by the court as a fraud in a third party.(*o*)

5 & 6 Will. 4, c. 65.

A distinct property in lectures delivered (after notice given, sec. 5) is now given to the lecturer by 5 & 6 Will. 4, c. 65. After stating that printers, publishers, and other persons have frequently taken the liberty of printing and publishing lectures delivered upon divers subjects without the consent of the authors of such lectures, sect. 1 enacts, "that from and after the first day of September, one thousand eight hundred and thirty-five, the author of any lecture or lectures, or the person to whom he hath sold or otherwise conveyed the copy (*p*) thereof, in order to deliver the same in any school, seminary, institution, or other place, or for any other purpose, shall have the sole right and liberty of printing and publishing such lecture or lectures: and that if any person shall, by taking down the same in shorthand or otherwise in writing, or in any other way, obtain or make a copy of such lecture or lectures, and shall print or lithograph or otherwise copy and publish the

(*o*) 3 L. J. 219, Ch.

(*p*) "I use the word 'copy,'" said Lord Mansfield, in *Miller* v. *Taylor* (4 Burr. 2303), "in the *technical* sense in which that name or term has been used for ages, to signify an *incorporeal right* to the *sole* printing and publishing of somewhat intellectual communicated by letters." "The copy of a book," said Aston, J., in the same case (*Ibid.* 2340), "seems to have been not familiarly only, but *legally* used as a *technical* expression of the *author's sole right of printing and publishing* that work." See also *per* Willes, J. (*Ibid.* 2311).

same, or cause the same to be printed, lithographed, or otherwise copied and published, without leave of the author thereof, or of the person to whom the author thereof hath sold or otherwise conveyed the same, and every person who, knowing the same to have been printed or copied and published without such consent, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such lecture or lectures, shall forfeit such printed or otherwise copied lecture or lectures, or parts thereof, together with one penny for every sheet thereof which shall be found in his custody, either printed, lithographed, or copied, or printing, lithographing, or copying, published or exposed to sale, contrary to the true intent and meaning of this Act, the one moiety thereof to His Majesty, his heirs or successors, and the other moiety thereof to any person who shall sue for the same, to be recovered in any of His Majesty's Courts of Record in Westminster, by action of debt."

Sect. 2 enacts, "that any printer or publisher of any newspaper who shall, without such leave as aforesaid, print and publish in such newspaper any lecture or lectures, shall be deemed and taken to be a person printing and publishing without leave within the provisions of this Act, and liable to the aforesaid forfeitures and penalties in respect of such printing and publishing."

And sect. 3 provides, "that no person allowed for certain fee and reward, or otherwise to attend and be present at any lecture delivered in any place, shall be deemed and taken to be licensed or to have leave to print, copy, and publish such lectures only because of having leave to attend such lecture or lectures."

Exceptions to copyright in lectures.

Sect. 4 makes an exception in the case of lectures published with leave of the authors or their assignees, and of which the statutory term of copyright had expired, and also in the case of lectures published before the passing of the Act (9th September, 1835).

Sect. 5 makes some further exceptions. It enacts "that nothing in the Act shall extend to any lecture or lectures, or the printing, copying, or publishing any lecture or lectures, or parts thereof, of the delivering of which notice in writing shall not have been given to the justices living within five miles from the place where such lecture or lectures shall be delivered two days at the least before delivering the same, or to any lecture or lectures delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation, and that the law relating

thereto shall remain the same as if this Act had not been passed."

Rule as to all unpublished works.

It matters not how the unpublished work of any one who does not intend to publish it may have come into the hands of another person than the author, that other person cannot publish it without the author's consent. "If any person takes it to the press without his consent, he is certainly a *trespasser*, though he came by it by *legal means*, as by a loan or by devolution; for he transgresses the *bounds* of his trust, and therefore is a trespasser."(*a*) And the law is the same whether the case be *mechanical* or *literary*; whether it be an epic poem or an orrery. The inventor of the one as well as the author of the other has a right to determine "whether the world shall see it or not."(*b*)

What is a previous publication.

It being essential to the right of which we now treat that no previous publication should have taken place, it becomes important to determine what constitutes a previous publication in the eye of the law.

Publication abroad.

The publication of a work in a foreign country disentitles the author to a copyright in it here. This, before the Legislature interfered in the matter, had been judicially determined in several cases. In *Clementi* v. *Walker*(*c*) it was decided that if an author first published abroad, and then instead of using due diligence to publish here, forebore to publish until some other person had honestly published here, the author could not insist upon his privilege, and at a distance of time stop a publication which in the interim had taken place here, or treat the continuance of that publication as a piracy. "Whether the act of printing and publishing abroad," said the learned judge who delivered the judgment of the court in that case, "makes the work at once *publici juris*, it is not necessary now to decide; but we have no doubt that it becomes *publici juris* if the author does not take prompt measures to publish here."(*d*) And in *Guichard* v. *Mori*,(*e*) an injunction was refused on the ground that there had been a publication abroad before there was any publication in this country.

Contemporaneous publication here and abroad.

But where there was a contemporaneous publication abroad and in this country it was held that the copyright of the author here was not infringed by the foreign publication.(*f*)

(*a*) *Per* Yates, J., in *Taylor* v. *Millar* (4 Burr. 2379).
(*b*) *Ibid.*, p. 2386. (*c*) *Clementi* v. *Walker* (2 Barn. & Cress. 861).
(*d*) See *Page* v. *Townsend*, (5 Sim. 395) as to publication abroad of *prints engraved*.
(*e*) 9 L. J. (1831) 227, Ch.; see also *Hedderwick* v. *Griffin* (3 Sess. Cas., 2nd Ser., 383).
(*f*) By Erle, J., *Cocks* v. *Purday* (2 Car. & K. 269, Nisi Prius).

The language of Bayley, J., in *Clementi* v. *Walker*, was in favour of the author's title to copyright, provided he print and publish here "promptly" and with due "diligence" after the publication abroad.(*a*) But sect. 19 of 7 Vict. c. 12, now enacts that "neither the author of any book, nor the author or composer of any dramatic piece or musical composition, nor the inventor, designer, or engraver of any print, nor the maker of any article of sculpture, or of such other work of art as aforesaid, which shall, after the passing of this Act, be first published out of Her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act."

7 Vict. c. 12, s. 19.

In the case of dramatic representation, first representation abroad is a first publication abroad within the meaning of this section.(*b*)

Of course a publication at home equally disentitles the author to any property in his work other than that copyright after publication, which is secured to him by statute, and of which we shall afterwards treat at length.

Publication at home.

An author may lend or let his manuscript to others, or may print for private circulation only, without foregoing the right which he has in the work before publication.(*c*)

Printing, &c., for private circulation.

Though the public exhibition of a picture at the Royal Academy and in picture galleries is, in one sense, a publication of it, yet it is a publication which may be restricted by the rules of the place of exhibition, by which the managers may preclude any use being made of their rooms for the purpose of copying; and an exhibition under such circumstances would not disentitle the proprietor to an injunction to restrain the piracy of the picture.(*d*)

Public exhibition of a picture.

The publication of an engraving of a picture in a magazine, with an article describing the picture, is not a publication of the picture itself.(*e*)

Publications by engravings.

Nor would the distribution by a sculptor amongst his friends of copies of a plaster cast taken from the bust of a statue be a publication of the statue itself.(*f*) The exhibition of the picture itself for the purpose of obtaining subscribers to an engraving of it is not a publication of the

(*a*) 2 Barn. & Cress. 870.

(*b*) *Boucicault* v. *Delafield* (I. H. & M. 597; 9 L. T. N. S. 709; 33 L. J. 38, Ch.), and *Boucicault* v. *Chatterton*, L. R. 5 C. D. 267.

(*c*) See the opinion of Erle, J., in *Jeffreys* v. *Boosey* (4 H. L. 867), and *Bartlett* v. *Crittenden* (5 M'Clean, 37).

(*d*) *Turner* v. *Robinson* (10 Ir. Ch. Rep. 121, 516). (*e*) *Ibid.*

(*f*) 10 Ir. Ch. Rep. 134.

picture.(a) Nor, as already stated, is the private circulation among friends of lithographic impressions of drawings a publication of the drawings themselves.(b)

Publication of abridgment.

It is by publication of the thing itself that the common law right is lost, and not by the publication of something else that resembles it; so that the author of a literary work does not lose his common law right of property in it before its publication by previously publishing an abridgment of it.(c)

Performance of a play.

The public performance of a play by the author's permission is not such a publication of it by him as disentitles him to restrain the unauthorised printing or publishing of it by any other person. This was decided in *Macklin* v. *Richardson*.(d) The plaintiff in that case was the author of the farce called "Love à la Mode," which was performed, by his special permission, at the different theatres several times in 1760, and the following years, but never printed or published by him; and it appeared that when the play was over the plaintiff used to take the copy away from the prompter. The defendants employed a shorthand-writer to go to the playhouse and take down the words of the farce from the mouths of the actors. These notes having been corrected by one of the defendants from his own memory, the first act of the farce was published by them in a magazine called the *Court Miscellany*, of which they were the proprietors, and notice was given that the second act would be published in the next month's *Miscellany*. The plaintiff filed a bill to restrain this publication; and the Lord Commissioner (Smythe) granted an injunction. He said, "It has been argued to be a publication by being acted, and therefore the printing is no injury to the plaintiff; but that is a mistake, for besides the advantage from the performance, the author has another means of profit from the printing and publishing; and there is as much reason that he should be protected in that right as any other author."

The acting of a piece is in no case a publication of it, considered as a book. In *Coleman* v. *Wathen*(e) the defendant acted on the stage a piece of which the plaintiff had purchased the copyright, and it was sought to make the defendant liable for the penalty under the statute 8 Anne, c. 19, as for an unauthorised publication of the piece. Buller, J., said, "reporting anything from memory can never

(a) 10 Ir. Ch. Rep. 134.
(b) *Prince Albert* v. *Strange*, *ante*, p. 26, *seq.*
(c) *Ibid.* 133. (d) Ambl. 694. (e) 5 T. R. 245.

be a publication within the statute. Some instances of strength of memory are very surprising; but the mere act of repeating such a performance cannot be left as evidence to the jury that the defendant had pirated the work itself."(a)

What conduct is deemed to authorise publication.

In connection with the author's property in unpublished works an important question arises as to what conduct on his part may be deemed to have authorised their publication.

In the case of letters written and sent to another person we have already seen that the writer does not lose his right to prevent their publication.(b) We have seen also that a licence to act an unpublished play is not a licence to print or publish the play.(c) Nor does the mere gift of copies of the author's work to a few friends amount to an abandonment of his copyright before publication in the work.(d)

Where the author of a musical composition had sold several thousand copies of it in manuscript, a year before it was printed, it was held that he had not thereby lost the copyright.(e) Abbot, C.J., in that case, was of opinion that it was not the intention of the Legislature in conferring a copyright upon authors, to impose on them as a condition precedent, that they should not sell their compositions in manuscript before they were printed.

Nor does the mere parting with the possession of a manuscript, or entrusting its possession to another person, or a permission to that person to take and hold a copy of the manuscript amount to an authorisation of its publication by that other person. Such acts must be deemed strictly limited in point of effect to the very occasions expressed or implied, and ought not to be construed as a general gift or authority for any purposes of profit or publication to which the receiver may choose to devote them.(f). "Suppose," says Willes, J., in *Millar* v. *Taylor*,(g) "the original or a transcript was given or lent to a man to read, for his own use; and he publishes it; it would be a violation of the author's common law right to the copy. This never was doubted, and has often been determined."

Where the son of the great Earl of Clarendon gave

(a) See also *Murray* v. *Elliston*, 5 B. & Ald. 657.
(b) *Ante*, p. 31, *seq.* (c) *Ante*, p. 44.
(d) *Prince Albert* v. *Strange*, *ante*, p. 26, *seq.*
(e) *White* v. *Geroch* (2 B. & Ald. 298).
(f) St. Eq. Jur. 943; see *Bartlett* v. *Crittenden* (4 M'Clean, 303; 5 M'Clean, 41), where the Court says, "To make a gift of a copy of the manuscript is no more a transfer of the right or abandonment of it than it would be a transfer or an abandonment of an exclusive right to republish, to give the copy of a printed work."
(g) 4 Burr. 2330.

permission to a Mr. Gwynne to take a copy of the manuscript of his deceased father's "History of the Reign of Charles II.," and Mr. Gwynne's son and administrator sold it to a Dr. Shebbeare, the Court of Chancery, at the suit of the Duke of Queensberry (the personal representative of the Earl of Clarendon and his son), restrained Dr. Shebbeare from printing and publishing the copy of the manuscript.(*a*) The Lord Keeper Henley said it was not to be presumed that Lord Clarendon (the younger), when he gave a copy of his work to Mr. Gwynne, intended that he should have the profit of multiplying it in print; that Mr. Gwynne might make every use of it, except that.(*b*)

Abandonment of right.

Where, however, the author of a poem had sent it to a bookseller, and had allowed it to remain in his hands unpublished for twenty-three years, Lord Eldon was of opinion that the writer had abandoned his right as an author, and refused to grant an injunction to prevent the publication of the poem by the bookseller.(*c*) Notwithstanding this decision, the decided cases seem to warrant the rule laid down by Willes, J., in *Millar* v. *Taylor*,(*d*) that "when express consent is not proved, the negative is implied as a tacit condition."

A teacher of the art of book-keeping, who had reduced to writing the system he taught, on separate cards for the convenience of imparting instruction to his pupils, and permitted his students to copy these cards, with a view to their own instruction, and to enable them to instruct others, was held in an American case(*e*) not to have thereby abandoned these manuscripts to the public, or authorised their publication. "The students," said the court, "who made these copies, have a right to them, and to their use as originally intended. But they have no right to a use which was not in the contemplation of the complainant and of themselves when the consent was first given. Nor can they, by suffering others to copy the manuscripts, give a greater licence than was vested in themselves."

Alteration of sold manuscript before publication.

Where a person contracts for reward to write a certain portion of a book to be published by another, equity will not aid him by injunction to prevent his portion of the work

(*a*) 2 Eden. 329.

(*b*) We learn from a note to this case that Dr. Shebbeare afterwards recovered before Lord Mansfield, a large sum against Mr. Gwynne for having represented that he had a right to print the manuscript.

(*c*) *Southey* v. *Sherwood* (2 Meriv. 435). (*d*) 4 Burr. 2330.

(*e*) *Bartlett* v. *Crittenden* (4 M'Clean, 300).

being printed and published in an altered or mutilated form.(a) Wood, V.C., intimated an opinion, though the point did not arise in the case before him, that unless there be a special contract, either expressed or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper. The court is not moved in such a case by the possible effects of the alterations as affecting the writer's reputation. "The possible effect on reputation," said Wood, V.C., "unless connected with property, is not a ground for coming to this court, though it may be an ingredient for the court to consider when the question of a right of property also arises."

Summary of the law.

To sum up, then, the law relating to the property in unpublished works:—

Manuscripts.

The author or owner of unpublished manuscripts has a right independent of statute to the exclusive use of them, and to prevent their publication by any one else.

Letters.

The writer of letters has a special property in them, and has a right to prevent their publication by the receiver, unless by his own misconduct (for the decided cases go no further than this) he has rendered their publication necessary to the vindication of the receiver's character from some unfounded imputation. And, with respect to this right, there would seem to be no distinction between private letters, or letters of friendship, and letters intended as literary compositions.

Lectures.

The author, or his assignee, of lectures, has now by statute(b) the sole right to publish them, provided notice of the delivering of the lectures shall be given two days at least before the delivery to two justices living within five miles of the place where they are to be delivered. But the right does not extend to lectures delivered in a university, public school, or college, or on any public foundation, or by any one in virtue of any gift, endowment, or foundation.

Dramatic compositions.

The author, or his assignee, of a dramatic composition has a right similar to the foregoing to prevent the printing and publishing of his composition. And he does not lose his exclusive right of printing and publishing it by allowing it to be represented on the stage. He has now, also, by Stat. 3 & 4 Will. 4, c. 15, s. 1, the sole right of having it represented in any part of the British dominions.

Musical compositions.

Musical compositions, when in manuscript, stand on the same footing as other unpublished compositions, and by sect. 20 of 5 & 6 Vict. c. 45, the provisions of 3 & 4 Will. 4,

(a) *Cox* v. *Cox* (11 Hare, 118). (b) 5 & 6 Will. 4, c. 65.

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s. 15, as to the sole right of representing dramatic works, are extended also to musical compositions.

Engravings, maps and charts.

Engravings, maps, and charts also, whilst unpublished, are on the same footing as the foregoing.

CHAPTER V.

CROWN AND COLLEGE COPYRIGHT IN BOOKS.

Works in which Crown copyright exists.

THE copyright claimed by the Crown extended to the English Translation of the Bible, the Book of Common Prayer, the Statutes, Orders of the Privy Council, and State Proclamations; also to Almanacs, Lilley's Latin Grammar, the Year-books and reports of judicial proceedings. The exclusive right of printing these was held to be vested in the King; and he granted letters patent authorizing others to print and publish them. Some part of this claim has now become obsolete, but a large part still remains unquestioned, and has been recognized in various decisions of our courts.

The claim of the Crown to this copyright has by some been based upon a right of property similar to the right of a private author or his assigns;(*a*) by others it has been treated as grounded on naked prerogative and reasons of state policy. It is impossible to decide the point satisfactorily, nor is the matter one of importance.

The English translation of the Bible.

Blackstone(*b*) rests the claim of the Crown to copyright in English translations of the Bible on two grounds, that the translation was made at the expense of the Crown, and that the Sovereign is the head of the Church. Lord Mansfield(*c*) regarded it as a mere right of property founded on the purchase of the translation by the King in the time of James I. Lord Lyndhurst(*d*) refers it to another consideration, namely, the character of the duty (carrying with it a corresponding prerogative) imposed on the Sovereign as the chief executive officer of the government to superintend the publication of the works upon which the established doctrines of religion are founded, a duty extending to Scotland

(*a*) *E.g.*, Lord Mansfield in *Millar* v. *Taylor* (4 Burr. 2401).

(*b*) 2 Steph. Black. 39; see also the remarks of Yates, J., in *Millar* v. *Taylor* (4 Burr. 2382).

(*c*) 4 Burr. 2405.

(*d*) *Manners* v. *Blair* (3 Bligh, N. S. 402); see also the opinions of Lord Camden in *Donaldson* v. *Becket* (4 Burr. 2408), and of Skinner, C.B., in *Eyre* v. *Carnan* (6 Bac. Abr. Prer. F. p. 509).

as well as England. On whatever ground the claim rests, its validity seems now beyond dispute, though the reported cases on the subject are between rival patentees, of whom neither would raise the question of the validity of their patents as against the public in general. An Irish Lord Chancellor, indeed, in 1794, doubted the right of the Crown to grant a monopoly of this kind, and held that a patentee claiming an exclusive right of printing Bibles must establish his patent at law before he could have an injunction in equity.(*a*) But Lord Eldon, in 1802, granted an injunction to restrain the King's printer in Scotland, who had a patent for the sale of Bibles there, from printing or selling Bibles in England.(*b*) And in 1828, the House of Lords held that the King's printers in Scotland had, by virtue of their patent, a right to prevent the importation from England of Bibles and other works contained in their patent.(*c*)

Concurrent right of Universities.

The exclusive right of printing and publishing and selling copies of the Bible, New Testament, and Book of Common Prayer, is vested by letters patent of the 13 Eliz. in the Universities of Oxford and Cambridge, concurrently with the Queen's printer, and no one else may print or publish in England any such copies, or sell in England any other copies of the said books than such as have been printed and published by or for the Universities and the Queen's printer, or one of them.(*d*)

Bonâ fide notes.

It seems to be agreed that the Bible may be printed by others than those having the patent right, if it be accompanied by *bonâ fide* notes.(*e*)

Hebrew, Greek, Septuagint.

There is no Crown copyright in the Hebrew Bible, the Greek Testament, or the Septuagint. They are all common, according to Lord Mansfield ;(*f*) and, said that learned judge, "if any man should turn the Psalms, or the writings of Solomon or Job into verse, the King could not stop the printing or the sale of such a work. It would be the author's work."

Translation of a part from original.

Nor has any attempt ever been made to prevent any person from publishing a translation of one book, or of a *part* of the Bible, from the original text, and enjoying a copyright in his production.(*g*)

The Bible patent of the Queen's printer for Scotland expired in 1839. The patent of the Queen's printer for

(*a*) *Grierson* v. *Jackson* (Ridg. Ir. T. R. 304).
(*b*) *Universities of Oxford and Cambridge* v. *Richardson* (6 Ves. 689).
(*c*) *Manners* v. *Blair* (3 Bligh, N. S. 391).
(*d*) *Universities of Oxford and Cambridge* v. *Richardson* (*ubi supra*).
(*e*) 2 Ev. Stat. p. 19, note 11. (*f*) 4 Burr. 2405.
(*g*) Godson on Patents and Copyright, 442.

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England has lately been renewed during pleasure, notwithstanding the recommendation of a committee of the House of Commons that the exclusive privilege of printing and publishing English translations of the Bible should not be renewed.

The Book of Common Prayer.

The claim of the Crown to the exclusive publication of the Book of Common Prayer is put upon similar grounds—the duty and prerogative of the Sovereign as head of the Church and as chief executive magistrate, to superintend the publication of books of divine service.(*a*) It seems that down to the 34th year of Henry VIII. the different books used in divine service were not printed here, but were imported from abroad. A patent was granted in that year for the sole printing of such books, and in the first year of Elizabeth the exclusive right of printing books of divine service was inserted in the same patent with the right of printing the Acts of Parliament, which had some time before been granted, and from that time they were regularly enjoyed together by the King's patentee. In 1781, in the case of *Eyre* v. *Carnan*,(*b*) an injunction was granted to restrain the defendant from printing and publishing a form of prayer which had been ordered to be read in all churches. And in *Manners* v. *Blair*,(*c*) before the House of Lords in 1828, the copyright of the Crown was fully recognised.

Lilly's Latin Grammar.

The claim of the Crown, now obsolete, to the copyright in Lilly's Latin Grammar was founded on the alleged original compilation and publication of the grammar at the king's expense, independently of any idea of prerogative.(*d*)

Almanacs.

Various grounds for the claim of the Crown, at one time asserted, to copyright in almanacs have been alleged. In the *Stationers' Company* v. *Seymour*(*e*) (*temp.* Charles II.), the right to grant the exclusive privilege of printing almanacs was held to vest in the king; first, because an almanac has no certain author, and therefore, by the rule of our law, the

(*a*) In *Manners* v. *Blair* (3 Bligh, N. S. 391), it was contended that as to the Book of Common Prayer the King could not *in Scotland* confer the exclusive right of printing it on his printer there, as the King was not the supreme head of the Scotch Church as he was of the English; and the Scotch court from which the appeal was brought to the House of Lords seems to have been of that opinion. Lord Lyndhurst, however, in moving the judgment of the House of Lords, based the claim of the Crown to copyright in the Prayer Book as well as the Bible on the executive character of the Sovereign—a character which he has equally in Scotland and England; and the patent of the King's printer in Scotland was held valid as to the Book of Common Prayer as well as the translation of the Bible.

(*b*) Cited 6 Bac. Abr. 509

(*c*) 3 Bligh, N. S. 391.

(*d*) 4 Burr. 2329.

(*e*) 1 Mod. 256.

Sovereign had the property in it; secondly, because the almanacs made yearly are but applications of the general rules laid down in the almanac prefixed to the Book of Common Prayer which regulates the movable feasts of the Church. And the addition of prognostications and other things that are common in almanacs was held not to alter the case, "any more than if a man should claim a property in another man's copy, by reason of some inconsiderable additions of his own." Notwithstanding the decision in this case, the Court of King's Bench in the case of the *Stationers' Company* v. *Partridge*,(a) strongly inclined against the prerogative right to the printing of almanacs. No judgment, indeed, was given in that case, but it stood over, that the court might see if they could make it like the case of the Book of Common Prayer, and show that the right of the Crown had any foundation in property; and it was never moved afterwards.

The subject, however, received a positive decision adverse to the claim of the Crown in the *Stationers' Company* v. *Carnan*.(b) That was a case sent from the Court of Exchequer for the opinion of the Court of Common Pleas, and that court, after hearing counsel on both sides of the question, certified their opinion "that the Crown had not a prerogative or power to make such grant [of almanacs] to the plaintiffs exclusive of any other or others." In consequence of this it was enacted by 21 Geo. 3, c. 56, s. 10, that £500 a-year should be paid to the Universities of Oxford and Cambridge severally out of the duty upon almanacs, as a compensation for the annual sum of £1000, for which they had demised to the Stationers' Company the privilege of printing almanacs. In 1799, Lord North brought in a Bill to revest in the Universities and the Stationers' Company the exclusive right of printing almanacs, but the Bill was thrown out in the House of Commons after Erskine had been heard at the bar of the House against it. No further assertion of the right of the Crown appears to have been made since.

Nautical almanacs.

With regard to nautical almanacs, sect. 2 of 9 Geo. 4, c. 66, enacts that "It shall and may be lawful to and for the Lord High Admiral, or the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland for the time being, to cause such nautical almanacs or other useful table or tables which he or they shall from time to time judge necessary and useful,

(a) 10 Mod. 105; 4 Burr. 2402; 6 Bac. Abr. 508.
(b) 2 W. Bl. 1004.

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in order to facilitate the method of discovering the longitude at sea, to be constructed, printed, published, and vended . . . . . and that every person who, without the special license and authority of the Lord High Admiral or Commissioners for executing the office of Lord High Admiral aforesaid, for the time being, to be signified under the hand of the Secretary of the Admiralty, for the time being, shall print, publish, or vend, or cause to be printed, published, or vended, any such almanac or almanacs, or other table or tables, shall for every copy of such almanac or table so printed, published, or vended, forfeit and pay the sum of twenty pounds, to be recovered with costs of suit, by any person to be authorised for that purpose by the Lord High Admiral or Commissioners for executing the office of Lord High Admiral aforesaid (such authority to be signified under the hand of the Secretary of the Admiralty as aforesaid), by action of debt, bill, plaint, or information, in any of His Majesty's Courts of Record at Westminster; and that the proceeds of the said penalty, when recovered, shall be paid and applied to the use of the Royal Hospital for Seamen at Greenwich."

A narrative of a voyage of discovery prepared under the orders of the Crown is the property of the Crown; but a publisher authorised to publish it by the Secretary to the Admiralty, the profits remaining at their disposition, was held by Lord Chancellor Thurlow not entitled to restrain a stranger from publishing it.(*a*)

Acts of Parliament and other State documents.

The Crown still possesses the exclusive right of printing and publishing Acts of Parliament. Blackstone rests the right on grounds of political and public convenience; the king, as executive magistrate, possessing the right of promulgating to the people all acts of State and Government.(*b*) Lord Clare(*c*) recognised the right, because it is necessary that there should be a responsibility for correct printing, and because copy can only be had from the Rolls of Parliament, which are within the authority of the Crown. In olden times the king's officers transmitted authentic copies of all State ordinances to the sheriffs, who proclaimed them in their county courts: when the demand for authentic copies began to increase, and when the introduction of printing facilitated the multiplication of copies, the king's patentee, by command of the king, supplied copies to the people, this seeming an obvious and reasonable extent of that

(*a*) *Nicol* v. *Stockdale* (3 Swans. 687.)
(*b*) 2 Bl. Com. 410. (*c*) *Grierson* v. *Jackson* (Ridg. Rep. 511).

duty which lay upon the Crown to furnish the people with the authentic texts of their ordinances.(*a*)

The right of the Crown was recognised in repeated decisions,(*b*) some of which, however, proceeded upon notions which are now exploded. The right of the patentees of the Crown to the sole printing of the statutes, as now recognised, must depend upon usage, and the force of the decision of the Court of King's Bench, in *Basket* v. *The University of Cambridge*,(*c*) in 1758, and upon the recognition of the doctrine of prerogative copies by the House of Lords in the case of *Manners* v. *Blair*,(*d*) in 1828.(*e*) The former case did not present for direct decision the question of the validity of patents for the exclusive printing of the statutes, as between the Crown and the public, the dispute being there between rival patentees under patents from different Sovereigns, each party, therefore, being interested in upholding the general prerogative. The Court of Chancery sent the case into the King's Bench for the opinion of that court, and after argument the validity of the patents given to both the parties litigant was upheld. This of course assumes the validity of the claim of the Crown.

Statutes with *bonâ fide* notes.

If *bonâ fide* notes accompany statutes printed by others than those having the patent right, the copyright of the latter, it seems, is not infringed ;(*f*) but there is no express decision on this subject. The notes must, however, be *bonâ fide*, and not merely colourable or collusive. In *Baskett* v. *Cunningham*(*g*) the defendant, in conjunction with several booksellers, was publishing, in weekly numbers, a digest of the statute law, methodised under alphabetical heads, with large notes from Coke and other writers on the law. He had contracted with Strahan and Woodfall, the proprietors of the patent for printing law books, to print this work, and it was printed at their press. Baskett, the king's printer (whose patent extended to all statutes), filed a bill for an injunction. It was urged for the defendant that the work was not within the meaning of the letters patent, being a work of labour and industry, and the method entirely new. The Lord Chancellor, however, was of opinion that the work

(*a*) See judgment of Skinner, C.B., in *Eyre* v. *Carnan* (6 Bac. Abr. 511).

(*b*) *Atkins's* case (Carter, 89, Bac. Abr. Prer. F. 4 Burr. 2315), *Roper* v. *Streater* (Skin. 234), *Stationers' Company* v. *Parker* (Skin. 233), *Eyre* v. *Carnan* (6 Bac. Abr. 509), *Basket* v. *University of Cambridge* (1 W. Bl. 105), *Baskett* v. *Cunningham* (*Id.* 370; 2 Eden. 137).

(*c*) 1 W. Bl. 105. (*d*) 3 Bligh, N. S. 391.

(*e*) Curtis on Copyright, 126.

(*f*) Maugham, 106; 2 Evans's Statutes, 19. (*g*) 1 W. Bl. 370.

was within the patent of the king's printer, and that the notes were merely collusive; but he would not interfere between the two contending patents in the summary method of injunction, but left them to adjust their respective rights at law. He therefore ordered an injunction to issue to restrain the proprietors from printing at any other than at a patent press; which, as Woodfall and Strahan were strictly in league with Baskett, and were at that time jointly concerned in a new edition of the statutes, was equivalent to a total injunction.

Except, then, in the case of editions of the statutes published with *bonâ fide* notes, the right to print and publish the statutes is vested in the Crown patentees concurrently with the Universities of Oxford and Cambridge.

It seems that the concurrent authority which the two Universities have with the patentees of the Crown to print Acts of Parliament and abridgments of them, has not been extended to the Sovereign's proclamations, Orders in Council, and other State Papers, which would accordingly appear to be vested in the king's printer solely.(*a*)

Reports of judicial proceeding.

Besides the reasons of State already mentioned, a further ground has been alleged for the claim of the Crown to the exclusive right to print and publish all reports of judicial proceedings, namely, the payment by the king of the salaries of the judges who pronounce the law, and the payment also, in former times, of the costs of compiling and publishing the volumes of reports. The right was twice affirmed by the House of Lords in the reign of Charles II.—with respect to Rolle's Abridgment(*b*) and Croke's Reports.(*c*) Shortly after the Restoration, an Act of Parliament having prohibited the printing of law books without the licence of the Lord Chancellor, the two Chief Justices, and the Chief Baron of the Exchequer, it became the practice to prefix such a licence to all reports published after that period, in which it was usual for the rest of the judges to concur, and to add to the *imprimatur* a testimonial of the *great judgment and learning* of the author. The Act was renewed from time to time, but finally expired in the reign of William III. The same form of licence and testimonial, however, continued in use for a long time after, until the judges refused to grant them any longer, which they did some time before the appearance of "Douglas's Reports."(*d*) The Reports since then have appeared without

(*a*) Maugham, 106.
(*b*) Carter, 89; Bac. Abr. Prer. F. 5; 4 Burr. 2315.
(*c*) Skin. 234; 1 Mod. 217; 4 Burr. 2316.
(*d*) See preface to Doug., p. vii. With reference to these licenses.

them. The court, it seems, regarded as a contempt the publication of their proceedings without their authority, and Sir James Burrow, in the preface to his "Reports of Cases decided in the King's Bench," apologises for publishing them without an *imprimatur*, and states that if he gives offence in doing so, he will stop and suppress his work.(*a*) Since the "Year Books," it seems, no judicial proceedings have been published under authoritative care and inspection, either by the House of Lords or by any court in Westminster Hall, except State trials.(*b*)

The courts, in treating as a contempt the unauthorized publication of their reports, appear not to have proceeded so much on the ground of a sole right of property in them, as on the expediency, with a view to the due administration of justice, of having careful and accurate reports of the decisions which serve as precedents for future cases. This, at any rate, is the ground on which the House of Lords claims the right of prohibiting the publication, otherwise than as it directs, of the report of any trial on impeachment or indictment that takes place before it. In *Gurney* v. *Longman*,(*c*) where an injunction was granted until the hearing, restraining the publication by the defendant of an unauthorised report of Lord Melville's trial, Lord Erskine, C., said: "Upon the case of *Bathurst* v. *Kearsley*,(*d*) and the practice of the House of Lords, I may grant the injunction; which I do, not upon anything like literary property, but upon this only, that these plaintiffs are in the same situation as to this particular subject, as the king's printer exercising the right of the Crown as to the prerogative copies. I shall not state anything as to other courts, but shall act upon this precedent." His Lordship desired that it should be understood that he had not delivered any judgment of this case further than by granting the injunction until the hearing, upon the precedent of *Bathurst* v. *Kearsley*; and that he should therefore consider the questions as open in any future stage. The case was ultimately compromised.

The practice of the House of Lords has been to make an order that the Lord Chancellor or Lord Speaker do cause the trial to be published; and that no other person do pre-

Practice of House of Lords on impeachments and indictments.

Sir Jas. Burrow says, (Preface, p. v.) "I have been assured that some now possessed of judicial offices have declared they never would sign one, because it haugs out false colours, and misleads those that think it gives the least approbation or authority to the work."

(*a*) Preface, p. v. (*b*) *Ibid.* (*c*) 13 Ves. 493, 507.

(*d*) This was a case in Chancery, in 1776. The claim of the plaintiff, who had obtained the order of the House for the publication of the trial of the Duchess of Kingston, was acquiesced in by the defendant, and the case passed without discussion: (13 Ves. 494).

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same to print or publish the same; and, with the exception of Lord Oxford's case and a few others, such an order appears to have been made in almost every instance of a trial before them, whether upon impeachment or indictment. The Lord Chancellor or Lord Speaker, upon this order, appoints a publisher of the trial. (*a*)

Present state of the law as to judicial reports.

The courts have not for a long time asserted a claim to the exclusive publication of their own reports, and in two modern cases, *Butterworth* v. *Robinson*,(*b*) and *Saunders* v. *Smith*,(*c*) the plaintiffs were treated by the Court of Chancery as possessing a copyright in certain law reports published by them. In the former case an injunction was granted to restrain the defendant from publishing a colourable abridgment of the Term Reports, of which the plaintiff was proprietor; and in the second case an injunction was refused only because the plaintiff's conduct was such as misled the defendant into publishing the book complained of. The existence of the plaintiffs' property in the reports was not questioned in either case.

Publication of reports during progress of a trial.

The courts have not, however, abandoned their right to restrain the publication of their proceedings in cases where such publication would be likely to hinder an impartial trial, or otherwise defeat the ends of justice. Thus, on the trial of Thistlewood and others for treason in 1820, Abbot, C.J., prohibited, by a public statement in court, the publication of any of the proceedings until the trial of all the prisoners should be concluded. Nothwithstanding this prohibition, a report of the trial of the first two prisoners tried was published in the *Observer* newspaper. Its proprietor was fined £500 for the offence, on failing to appear to answer for contemptuously publishing such proceedings. On the argument of the case before the Court in Banc,(*d*) Bayley, J., after stating the circumstances which rendered it advisable that the publication of the trial should be delayed in the present case, observed: "It is argued that if the court have this power of prohibiting publication, there is no limit to it, and that they may prohibit altogether any publication of the trial. I think that that does not follow. All that has been done in this case is very different, for the prohibition here has only been till the whole trial was completed."

(*a*) See the case of the Earl of Cardigan, tried before the House of Peers in 1841, and the order made by the House on the 19th February of that year (Lord's Journals, vol. lxxiii., p. 46). Messrs. Gurney were appointed by the Lord Speaker (Shaftesbury) to publish a report of the trial.

(*b*) 5 Ves. 709. (*c*) 3 My. & Cr. 711.

(*d*) *The King* v. *Clement* (4 B. & Ald. 218).

And Holroyd, J., added: "I take it to be clear that a court of record has a right to make orders for regulating their proceedings, and for the furtherance of justice in the proceedings before them, which are to continue in force during the time that such proceedings are pending. It appears to me that the arguments as to a further power of continuing such orders in force for a longer period, do not apply. It is sufficient for the present case that the court have that power during the pendency of the proceedings. This order was made to delay publication only so long as it was necessary for the purposes of justice, leaving every person at liberty to publish the report of the proceedings subsequently to their termination. I am, therefore, of opinion that this was an order which the court had the power to make."

We find a recent assertion of the right in the case of *Tichborne* v. *Tichborne*,(*a*) where the reasons for exercising it are fully stated. In this case a motion was made on the part of the plaintiff that the publisher of the *Pall Mall Gazette* might be committed to the Queen's prison, for a contempt of the court in having published in that paper an article containing comments on certain affidavits which had been filed in support of the plaintiff's case, but had not yet been brought before the court. Similar applications were at the same time made to commit the publishers of certain other newspapers, for having published the same article. The Vice-Chancellor (Wood) said: "I have no hesitation in saying that a gross contempt of court has been committed in this case. The first observation I would make is, that, from the time of Lord Hardwicke downwards, the rule which that great judge laid down in *Roach* v. *Garvan*,(*b*) has been the rule which the court has adopted for its guidance, namely, the determination on the part of the court to discountenance any attempt to prejudice mankind against the merits of a case before it has been heard." In reply to an argument made use of on behalf of the publisher, that the comments did not transgress the rules which have been laid down as to fair comments on matters of public interest and public notoriety, the Vice-Chancellor said: "In the first place, let me observe, that rule does not extend to comments of any description on a matter that is pending, waiting for argument, and waiting for decision; and I think this court would be failing extremely in the administration of justice, if it allowed comments of such a description as are here contained to be made on any documents whatever,

(*a*) 17 L. T. N. S. 5; 15 W. R. 1072; L. Rep. 7 Eq. 55, note.
(*b*) 2 Atk. 469.

which are before the writer and not before the court, but which are afterwards to come before the court, and which comments have a clear and distinct tendency towards directing and swaying the mind of the court or jury, or whoever may have to determine the cause." The proprietor of the *Pall Mall Gazette* having made a humble submission and apology, the Vice-Chancellor thought it sufficient for the purposes of justice to order him to pay the costs of the motion. A similar order was made with respect to the printer of another paper which had gone beyond a mere insertion of the article from the *Pall Mall Gazette*, and the motions against the other papers were abandoned.(*a*)

Copyright of English and Scotch universities, and colleges of Eton, Westminster, and Winchester.

By 15 Geo. 3, c. 53, the Universities of Oxford and Cambridge, the four Universities in Scotland, and the colleges of Eton, Westminster, and Winchester have granted to them for ever the sole liberty of printing and reprinting at their respective presses, all such books as had been before the year 1775, or should thereafter at any time "be bequeathed or otherwise given by the author or authors of the same respectively, or the representatives of such author or authors, to or in trust for the said universities, or to or in trust for any college or house of learning within the same, or to or in trust for the said four universities in Scotland, or to or in trust for the said colleges of Eton, Westminster, and Winchester, or any of them, for the purposes mentioned,(*b*) unless the same should have been bequeathed or given, or should thereafter be bequeathed or given, for any term of years, or other limited term."(*c*)

Copyright is given only so long as the books or copies belonging to the universities or colleges are printed at their own printing presses within the said universities or colleges respectively, and for their sole benefit and advantage. If they delegate, grant, lease, or sell their copyrights or exclusive rights of printing the books or any part thereof, or allow, permit, or authorise any person or persons or body corporate to print or reprint the same, then the privileges granted by the Act are to become void and of no effect. They may, however, sell such copies so bequeathed or given in like manner as any author or authors may do.(*d*)

Registration.

In order that the penalties for piracy may be enforced, it is necessary that every book be entered in the register book

(*a*) See further on this subject, the chapter on "Libellous Contempts of Courts of Justice," *post*, and the cases cited there.

(*b*) *i.e.*, "for the advancement of learning, and other beneficial purposes of education within the said universities and colleges."

(*c*) Sect. 1. (*d*) Sect. 3.

at Stationers' Hall within two months after the bequest or gift of it shall have come to the knowledge of the vice-chancellors of the said universities, or heads of houses and colleges of learning, or of the principal of any of the said four universities respectively. The register book may be inspected without a fee, and the clerk is to give a certificate of any entry on payment of a fee not exceeding sixpence.(*a*)

If the clerk refuse to make entry or give certificates of entries, the university or college which owns the copyright (notice being first given of such refusal by an advertisement in the *Gazette*) is to have the like benefit as if such entry or certificates had been duly made and given, and the clerk who refuses is for every offence to forfeit £20 to the proprietors of the copyright.(*b*)

Piracy.

If any one prints, reprints, or imports, or causes to be printed, reprinted, or imported, any such book or books, or, knowing the same to be so printed or reprinted, sells, publishes, or exposes to sale, or causes to be sold, published, or exposed to sale, any such book or books, he is to forfeit the books and every sheet of them, to the proprietor of the copyright, and one penny for every sheet found in his custody either printed or printing, published or exposed to sale contrary to the true intent and meaning of the Act, one-half to go to the Crown, the other half to the prosecutor.(*c*)

Trinity College, Dublin.

The Act of 41 Geo. 3, c. 107, s. 3, confers on Trinity College, Dublin, a similar copyright and under similar conditions in all books given or bequeathed to it.

5 & 6 Vict. c. 45, which (s. 1) repeals the Act of 41 Geo. 3, c. 107, provides (s. 27) that nothing contained therein shall affect or alter the rights of the two universities of Oxford and Cambridge, the colleges or houses of learning within the same, the four universities in Scotland, Trinity College, Dublin, and the several colleges of Eton, Westminster, and Winchester, in any copyrights theretofore vested or thereafter to be vested in them.

CHAPTER VI.

COPYRIGHT AFTER PUBLICATION.

Older views as the nature of t right.

ON the subject of copyright after publication, widely different views have been entertained by our ablest lawyers living at different times. Some have considered the title of the author to the property in the creations of his intellect as absolute in

(*a*) Sect. 4. (*b*) Sect. 5. (*c*) Sect. 2.

its nature and not only exclusive but also perpetual, giving him the sole right to determine, not only during his life, but for all time after his death, who should enjoy the benefits of his literary works. There have been others who, not doubting the author's title to the property in the products of his mind before he has published them, were yet of opinion that by the act of publication his composition became *publici juris*, and the author's right to a property in them ceased thenceforth for ever. Neither of these two opposite opinions represents the law on the subject as it is now finally determined. The first-mentioned opinion was the prevailing one down to the year 1744. "The general consent of the kingdom for ages," Lord Mansfield considered to be in favour of that view of the question, and the decisions in several cases proceeded on the ground of its correctness. The question took this form—whether copyright in the productions of an author existed at common law previous to and independently of statutory enactment, and if it had an existence previous to statutes, whether the statutes dealing with the subject and conferring on authors a copyright for a certain number of years took away from them all copyright in their works after the time so specified had expired. In other words, had an author copyright in his published works indefinite and unlimited in point of time, or was his right strictly confined to the period marked out in the legislative enactments relating to copyright?

Anne, c. 19.

The first Act of Parliament which deals with the question of copyright after publication is the 8 Anne, c. 19, and it conferred on authors (or their assigns) of works published before the year 1710 a copyright of twenty-one years' duration, "and no longer," and on the authors or assignees of works published after that date a copyright of fourteen years "and no longer," to commence from the day of first publication. Did this Act deprive authors of copyright in their productions after the expiration of the period of twenty-one or fourteen years?

For a long time it was held that it did not; that the author had a general right of property in his works which he did not lose by publication, and of which the statute did not deprive him. In 1735 (more than twenty-one years after the passing of 8 Anne, c. 19), Sir Joseph Jekyll, M.R., granted an injunction to restrain the printing of "The Whole Duty of Man," which had first appeared in 1657.(*a*) As the statutory term of copyright had passed, the plaintiff's title to an injunc-

(*a*) *Eyre* v. *Walker* (cited 4 Burr. 2325).

tion could only rest on the ground of his general common law right of property independent of and outlasting the statutory period limited by the Act of Anne. In the same year (1735) Lord Talbot granted an injunction to restrain the printing of Pope's and Swift's "Miscellanies," though many of the pieces were published before the statute of Anne(*a*), and the injunction was submitted to. In 1736 Sir Joseph Jekyll restrained the publication of Nelson's "Festivals and Fasts," though the book was first published in 1703.(*b*) In 1739 Lord Hardwicke granted an injunction against the publication of Milton's "Paradise Lost," though the title of the plaintiffs was derived from an assignment from the author made in 1667.(*c*) In 1752 Lord Hardwicke granted a similar injunction with respect to the publication of an annotated edition of the same poem.(*d*) And all these decisions were acquiesced in.

In 1761 an opportunity occurred for the first time of determining the question by a Court of Error, in the case of *Tonson* v *Collins*(*e*), an action relating to the copyright in the *Spectator*, which had been purchased from Addison and Steele. But the action, before its final determination, was discovered to be a collusive one, and it fell to the ground in consequence. An important case (*f*), however, soon after occurred (in 1769) in which the subject was very fully discussed by the Court of King's Bench, and in which the first of the two opinions referred to at the beginning of this chapter was maintained by the majority of the court. The action was brought to recover damages for the publication of an edition of Thomson's "Seasons," a work which the plaintiff had purchased from its author in 1729, and had continued to publish from that time down to the year 1763, when the defendant Millar published the edition complained of without the plaintiff's license or consent. The term of years during which the statute of Anne secured the copyright to the author had long since expired, and the plaintiff's claim could only rest upon the ground of a perpetual property at common law, independent of statute, in the author or his assignees. The jury found the facts of the case in a special verdict, and also that before the reign of Queen Anne it was usual to purchase from authors the perpetual copyright of their books, and to assign the same from

Millar v. *Taylor* (overruled).

(*a*) *Motte* v. *Faulkner* (cited *Ib.*) (*b*) *Walthoe* v. *Walker* (*Ib.*).
(*c*) *Tonson* v. *Walker* (cited 4 Burr. 2326).
(*d*) *Tonson* v. *Walker* (3 Swans. 672).
(*e*) 1 W. Black, 301, 321, 345.
(*f*) *Millar* v. *Taylor* (4 Burr. 2303).

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hand to hand for valuable consideration, and to make the same the subject of family settlements. Lord Mansfield, C.J., and Willes and Aston, JJ., gave judgment in favour of the plaintiff and his right at common law, independently of and unaffected by the statute of Anne, Yates, J., being of a contrary opinion. The judgment of the majority of the court was based not only on the decided cases already referred to, but on the broad ground of natural justice and equity. They considered that as every man has an exclusive property in his works before publication, he continues to possess it after publication, publication being no abandonment of his right And as for the statute of Anne, they were of opinion that it was merely intended to give for a term of years a more efficient protection, where the entry and the other provisions of the Act had been complied with, and not to abridge the duration of the author's exclusive property in his work.

Donaldson v. Beckett.

But this did not long continue to be law. The subject came at last, on appeal, before the House of Lords in 1774, in the case of *Donaldson* v. *Beckett*,(a) and the decision in *Millar* v. *Taylor* was distinctly overruled. The case came on appeal from the Court of Chancery, in which Lord Apsley had followed, as of course, the ruling of the King's Bench in *Millar* v. *Taylor*. After the question had been fully argued, the judges were called on to deliver their opinions in answer to certain questions put to them. Ten of them, against one, were of opinion that at common law an author of any book or literary composition had the sole right of first printing and publishing it for sale. Eight were of opinion that the author might bring an action against any person who printed, published, or sold the same without his consent; one denied the author's right to do so, and two others considered the action would lie only when the invasion was coupled with fraud or violence. Seven judges against four were of opinion that the law did not take away the author's right after publication, and that no person could reprint and sell for his own benefit the author's work without his consent. Six against five were of opinion that the statute of Anne took away the common law copyright after publication, and that an author is thereby precluded from every remedy except upon the foundation of that statute, and on the terms and conditions prescribed by it. Seven judges against four were of opinion that the author of any literary composition and his assigns had the sole right of printing and publishing the same in perpetuity, by

Opinions of the judges.

(a) 4 Burr. 2408.

the common law. And six judges against five were of opinion that this right in perpetuity is restrained and taken away by the statute of Anne. Lord Mansfield did not deliver his opinion, but it was known that he adhered to the doctrines laid down in his judgment in *Millar* v. *Taylor*. Lord Camden addressed the House of Lords against the doctrine of a common law copyright, and especially denounced as odious and selfish the doctrine of a *perpetual* copyright after publication. He was followed on the same side by Lord Apsley, C. The House reversed the decree pronounced by the Court of Chancery, and thus finally decided that whether copyright after publication did or did not exist at common law before the statute of Anne, that statute had abrogated the right, and that no author had a property in his works for any longer period than that set out in the statute. Decision.

This decision appears to have caused great alarm amongst the booksellers of London, very many of whom had purchased old copyrights, not within the protection of the statute of Anne, on the faith of the previous decisions and the general opinion that the common law right of property in literary works had not been interfered with by that statute. They petitioned Parliament to relieve them from the consequences of the recent decision of the House of Lords. A committee was appointed by the House of Commons to investigate the matter; evidence was taken, and a Bill was introduced to vest in the purchasers of old books, not protected by the Act of Anne, the sole property in them for a limited time. After debates of a very acrimonious character, and after counsel had been heard at the bar for and against the Bill, it passed the House of Commons, but was thrown out in the House of Lords, owing chiefly to the opposition of Lord Camden.

The universities were more fortunate, for in 1775 they obtained an Act(*a*) enabling the two English universities, and the Scotch, together with the colleges of Eton, Westminster, and Winchester to retain the perpetual copyright in books given or bequeathed to them for the advancement of useful learning, and other purposes of education.

On whatever basis of natural right the title of an author to the sole property in the products of his mental faculties may rest in the last resort, it is now clear that the copyright after publication enjoyed by British subjects is not regarded as a property derived from or carved out of any general Foundation of copyright after publication.

(*a*) 15 Geo. 3, c. 53.

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right of property, but it is a territorial monopoly, the creation of our municipal law, and bounded and regulated by the Copyrights Acts.(*a*) An author has no right or property in his work after publication other than that which is conferred on him by the different statutes which have been passed from time to time with reference to the subject of copyright. To these, therefore, we must look in order to determine the nature and extent of the author's right, the conditions on the performance of which it is dependent, and the mode in which infringements of his statutory rights are to be dealt with.

HISTORICAL SUMMARY OF THE COPYRIGHT ACTS.

It has already been stated that down to the year 1710 whatever rights authors had in their works were left undefined by any statutory enactments, and in consequence,

8 Anne, c. 19.

as the Act of Anne (8 Anne, c. 19) passed in that year tells us in its preamble, "printers, booksellers, and other persons" frequently took "the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families." For the purpose of preventing such practices in future, and for the encouragement of learned men to compose and write useful books, that statute enacted that from and after the 10th day of April, 1710, "the author of any book or books already printed, who hath not transferred to any other the copy or copies(*b*) of such book or books, in order to print or reprint the same, shall have sole right and liberty of printing such book and books for the term of *one and twenty years*, to commence from the said 10th day of April, and no longer; and that the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assignees shall have the sole liberty of printing and reprinting such book or books for the term of *fourteen years*, to commence from the day of first publishing the same, and no longer." And the Act inflicted a penalty on those who should, within

(*a*) See the remarks of Crompton, J., in *Jeffreys* v. *Boosey* (4 H. L. 847). In the elaborate opinions given by the judges to the House of Lords in this case the arguments for and against the existence of copyright at common law are fully stated.

(*b*) By the word "copy" in this statute and in the early cases on the subject, is meant what we now call copyright. *Vide ante*, p. 40, note (*b*).

the time specified in the Act, print, reprint, or import, or cause to be printed, &c., "without the consent of the proprietor or proprietors thereof first had and obtained in writing," or should sell, publish, or expose to sale any book or books so printed, &c., without consent, the penalty being a forfeiture of the book or books to the proprietor of the copy, and one penny for every sheet found in the offender's possession, one moiety to go to the Sovereign, the other to any person suing for it.(*a*)

The benefit of the preceding enactment was, however, extended only to those books published after the passing of the Act, whose proprietor's title was entered in the register book of the Stationers' Company in the manner usual before the Act.(*b*)

The Act furthermore empowered every person who considered the price of a book too high to bring the matter before the Archbishop of Canterbury, the Lord Chancellor or Lord Keeper, the Bishop of London, the Chief Judge of the King's Bench, the Chief Judge of the Common Pleas, the Chief Baron of the Exchequer, the Vice-Chancellors of the two English Universities, the Lord President of the Sessions, the Lord Justice General, or the Rector of the College of Edinburgh, one or more of whom might examine into the cause of complaint and settle the price of the book as seemed just, and make the bookseller or printer pay all the costs of the person making the complaint.(*c*)

Provision was made that nine copies of every book should be given to different libraries, and the rights of the universities were saved(*d*). With respect to books in other languages, the Act provided that nothing contained in it should extend or be construed to extend "to prohibit the importation, vending, or selling of any books in Greek, Latin, or any other foreign language printed beyond the seas, anything in this Act contained to the contrary notwithstanding."(*e*)

8 Geo. 2, c. 13. Extension of copyright to engravings.

The next statute dealing with the subject of copyright was the 8 George 2, c. 13. It conferred a copyright of equal duration to that given to the authors of books by the statute of Anne, viz., fourteen years, on every person who should "invent and design, engrave, etch, or work in mezzo-tinto or chiaro oscuro, or from his own works and invention should cause to be designed and engraved, etched, or worked in mezzotinto or chiaro oscuro any historical or other print or prints . . . . which shall be truly engraved, with the name

(*a*) Sect. 1. (*b*) Sect. 2. (*c*) Sect. 4. (*d*) Sect. 5. (*e*) Sect. 8.

of the proprietor on each plate, and printed on every such print or prints;" and it inflicted a penalty of five shillings for every pirated print.

The preceding Act having reference only to those who "invented and designed," or "from their own works and invention" engraved, &c., any prints, was found to be ineffectual for the purposes intended. So 7 Geo. 3, c. 38, was passed, extending the benefit and protection of the former Act to every person who should "engrave, etch, or work in mezzotinto or chiaro oscuro, or cause to be engraved, etched, or worked, any print taken from any picture, drawing, model, or sculpture, either ancient or modern . . . . in like manner as if such print had been graved or drawn from the original design of such graver, etcher, or draughtsman," and the protection afforded by both Acts is extended to the proprietors for twenty-eight instead of fourteen years.

7 Geo. 3, c. 38.

17 Geo. 3, c. 57. Further remedy by action.

The penalties inflicted on pirates by the two preceding Acts being found insufficient to protect the property of artists, the Legislature added an additional security in the Act 17 Geo. 3, c. 57, by giving to the proprietor of historical and other prints, maps, charts, plans, &c., a special action upon the case against any person who should within the time limited by the Acts offend against any of the provisions contained therein, to recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry thereon, should give or assess, together with double costs of suit.

38 Geo. 3, c. 71. Models and casts.

38 Geo. 3, c. 71, vests the sole right and property of making models or casts in the original proprietor, for the term of fourteen years, from the time of first publishing the same, and gives to the proprietor an action on the case against all persons offending against his rights during that term; an exception being made in the case of persons who purchase the right from the original proprietors.

41 Geo. 3, c. 107. Extension of the term of copyright.

The 41 Geo. 3, c. 107(*a*) afforded further protection to the proprietors of books. It increased the penalty in cases of infringement, and furthermore gave to the proprietor an action on the case against every bookseller, printer or other person "in any part of the United Kingdom, or in any part of the British dominions in Europe," who should, after the passing of the Act, print, reprint, or import, or cause to be printed, reprinted, or imported, without the consent of the proprietor first had in writing, signed in the presence of two

(*a*) Repealed by 5 & 6 Vict., c. 45, s. 1, except as to rights existing or proceedings pending at the time of passing of that Act.

or more credible witnesses, any book or books, or who, knowing them to be printed, reprinted, &c., without the proprietor's consent, should sell, publish, or expose them to sale, or cause them to be sold, &c.; the proprietor to recover such damages as the jury should award or assess with double costs of suit.

Sect. 1 further provided that, if at the expiration of the term of fourteen years the author or authors should still be living, he or they should have the sole right of printing or disposing of copies for another term of fourteen years; but the Act did not extend to books already published, nor indemnify against penalties under former Acts in force at the date of the union of Great Britain and Ireland; and (sec. 7) the importation of pirated copies was prohibited.

54 Geo. 3, c. 156. Further extension of the term.

Again the Legislature interfered, and with a design similar to that of the preceding statutes, by the Act 54 Geo. 3, c. 156.(*a*) It altered the term of copyright in books, enacting that, instead of a copyright for fourteen years in the author and his assignee, and then, if the author were alive at the expiration of that term, for fourteen years more in the author himself, the author and his assignee should have the sole liberty of printing and reprinting his book or books for the full term of twenty-eight years from the day of first publication, to continue during the remainder of the author's natural life, should he outlive the twenty-eight years.

3 & 4 Will. 4, c. 15. Right of dramatic representation.

Dramatic literary property which had hitherto been unnoticed by Parliament was next dealt with. 3 & 4 Will. 4, c. 15, enacted that, after the passing of that Act, the author, or his assignee, of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author or his assignee, or which should thereafter be composed, and not printed or published by the author or his assignee, should have as his own property the sole liberty of representing, or causing to be represented, at any place of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the isles of Man, Jersey and Guernsey, or in any part of the British dominions, any such production as aforesaid, and should be deemed the proprietor thereof; and the author of any such production, printed and published by him or his assignee within ten years before the passing of the Act, or which should thereafter be so published, should, from the time of passing the Act, or from the

(*a*) Repealed by 5 & 6 Vict., c. 45, s. 1, except as to rights existing, or proceedings pending at the time of passing of that Act.

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time of such publication, respectively, until the end of twenty-eight years from the publication, or if the author or authors, or the survivor of the authors, was alive at the end of that period, during the residue of his natural life, have, as his own property, the sole liberty of representing it, or causing it to be represented at any place of dramatic entertainment.(*a*)

5 & 6 Will. 4, c. 65. Lectures.

The next subject dealt with by statutory enactment was the publication of lectures without consent. The provisions of 5 & 6 Will. 4, c. 65, on this subject have been already referred to, *ante* pp. 40, 41.

6 & 7 Will. 4, c. 59 Ireland.

6 & 7 Will. 4, c. 59, extended to Ireland the provisions of 17 Geo. 3, c. 57, relating to the protection of copyright in prints and engravings.

1 & 2 Vict. c. 59. International copyright.

The International Copyright Act of 1 & 2 Vict. c. 59,(*b*) empowered Her Majesty, by Order in Council, to grant a copyright in England, for the same term that English subjects might enjoy it, to foreign authors whose governments should engage to secure the same privilege to British authors.

5 & 6 Vict. c. 45. Final extension of the term of copyright.

Next came the comprehensive statute of 5 & 6 Vict. c. 45, repealing the former Acts of 8 Anne, c. 19; 41 Geo. 3, c. 107, and 54 Geo. 3, c. 156, except as to proceedings then pending at law or in equity, or to causes of action or suit, or rights of contract then subsisting.

This Act extends the term of copyright in every book published in the lifetime of its author to the natural life of the author, and the further term of seven years, commencing at the time of his death; or to the term of forty-two years altogether, from the first publication of the book, should that number of years not have elapsed at the end of seven years from the death of the author; or if the book be published after his death, to the term of forty-two years from the first publication thereof. In cases of subsisting copyright the Act extended the term of enjoyment to that last mentioned, except where it belonged to an assignee for other consideration than that of natural love and affection.

Periodicals.

Sect. 18 of this Act first deals with the question of copyright in productions appearing in encyclopædias, periodicals, and works published in a series, reviews, or magazines.

Musical compositions.

The provisions of 3 & 4 Will. 4, c. 15, relating to dramatic literary property, are by this Act extended to musical compositions, and the extended term of duration of copyright in

(*a*) Sect. 1.
(*b*) Repealed by 7 Vict. c. 12.

books provided by the present Act is applied also to the liberty of representing dramatic pieces and musical compositions, the first public representation or performance of any dramatic piece or musical composition being deemed equivalent, in the construction of the Act, to the first publication of any book.(*a*)

7 Vict. c. 12. Amendments of International Copyright.

The Act 7 Vict. c. 12, was passed to amend the law relating to International Copyright. It repeals the International Copyright Act of 1 & 2 Vict. c. 59, and enables Her Majesty, by Order in Council, to confer more extended privileges on authors of books, prints, articles of sculpture, and other works of art, first published in foreign countries, by giving them a copyright of not greater duration than that enjoyed in works of a similar character first published in the United Kingdom. It also enables Her Majesty to direct that authors and composers of dramatic pieces first publicly represented and performed in foreign countries shall have similar rights in the British dominions.

10 & 11 Vict. c. 95. Colonial Copyright.

The law relating to the protection in the colonies of books entitled to copyright in the United Kingdom, was amended by 10 & 11 Vict. c. 95.

15 & 16 Vict. c. 12. Further amendment of International Copyright.

International copyright was again dealt with by 15 & 16 Vict. c. 12, (amended in one particular by 38 Vict. c. 12; *vide post*, chap. on Dramatic and Musical Compositions) which extends and explains the previous Acts, besides enabling Her Majesty to carry into effect a convention with France on the subject.

Lithographs.

This Act clears up a previously existing doubt as to prints taken by lithography, by applying to them the provisions contained in the different statutes relating to other prints and engravings.(*b*)

25 & 26 Vict. c. 68. Paintings, drawings, and photographs.

The legislature came in the last place to the aid of authors of paintings, drawings, and photographs. In 1858 Lord Lyndhurst presented a petition to the House of Lords from the Society of Arts, the Royal Institute of British Architects, and a number of sculptors, painters, photographers, and others, asking for an extension of the law of copyright to works of fine art. A committee was appointed and a report presented, and a Bill was introduced to give effect to the report. A dissolution of Parliament, however, delayed the matter for a while, but in 1862 the Act 25 & 26 Vict. c. 68, was passed to accomplish the prayer of the petition. Previously to that statute the authors of paintings, drawings, and photographs had no copyright in their works.(*c*)

(*a*) Sect. 20. (*b*) Sect. 14.
(*c*) See the preamble to this statute.

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The foregoing is but a rapid summary of the legislative enactments on the subject of copyright, in their chronological order. The chief provisions of the various Acts will be considered in detail when treating in succeeding chapters of the different subjects in which copyright exists.

CHAPTER VII.

COPYRIGHT IN BOOKS.

Definition of copyright.

THE Act of 5 & 6 Vict. c. 45, s. 2, defines "copyright" to mean the sole and exclusive liberty of printing or otherwise *multiplying*(*a*) *copies of any subject to which the said word* is in the Act applied.

Meaning of "book."

The same section provides that the word "book" shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press(*b*), sheet of music, map, chart, or plan separately published(*c*).

Maps.

In the opinion of James, L.J., and Mellish, L.J., this enactment alters the law as to maps. "Formerly," said James, L.J., "maps had been considered artistic works, now they were to be brought into their proper place as literary works. And rightly so, in my opinion, for maps are intended to give information in the same way as a book does. A chart, for instance, gives similar information to sailing rules; maps give instruction as to the statistics and history of the country portrayed; they point out the amount of population, the places where battles were fought, the dates when provinces were annexed, as in maps of India, and give other geographical and historical details. It was quite reasonable, therefore, to take them out of the law of artistic works, and to give them greater protection by bringing them under the law of copyright of literary works." Mellish, L.J., added: "It is impossible to read the Act without seeing that, for some purposes at least, there was to be a change in the copyright of maps,

(*a*) This gives a wider meaning to the term than that given by the Statute of Anne, which was "the sole right and liberty of *printing*," and thus protects literary works from unauthorised publication by other means than the press: (see *per* Talfourd, J., *Novello* v. *Sudlow* (12 C. B. 189; 16 Jur. 671.)

(*b*) A label used in the sale of any article is said by an American Judge (M'Clean) not to be a book within the provisions of the Copyright Act: (*Coffeen* v. *Brunton*, 4 M'Clean, 516.)

(*c*) See *Hime* v. *Dale* (2 Camp. 27 n.); *Clementi* v. *Goulding* (2 Camp. 25); *Back* v. *Longman* (Cowp. 623).

and that some maps were to be included under the term "books." So that for some purposes, at least, that Act altered the Acts of Geo. 2 and Geo. 3."(a)

This is important to all publishers of maps, in view of the statutory requirements as to registration and deposit of copies mentioned *post*.

Newspapers.

Malins, V.C.(*b*), held that a newspaper is not a book within this section, and does not require to be registered under sect. 13, in order to entitle the proprietor to restrain the piracy of it; but the late Master of the Rolls (Sir Geo. Jessel) refused to follow this decision, which he considered "opposed to the plain reading of the Act of Parliament."(*c*)

Book of prints.

If prints are published together in a volume, they form a book, whether there is letterpress or not: there may be such things as picture books for those who cannot read letterpress.(*d*)

Duration of copyright.

With respect to the duration of copyright in books, sect. 3 enacts "that the copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns."

Copyright in books published before the Act.

In the case of books published before the passing of the Act (1st July, 1842), and in which copyright then subsisted, sect. 4 enacts, "that the copyright which at the time of passing this Act shall subsist in any book theretofore published (except as hereinafter mentioned) shall be extended and endure for the full term provided by this Act in cases of books thereafter published, and shall be the property of the

(*a*) *Stannard* v. *Lee*, L.R. 6 Ch. App. 349. The map in this case, published in 1870, was a "Panoramic Bird's-eye view of France and Prussia, and the surrounding countries likely to be involved in the war; with the railways and strategic positions of each army, and the great fortresses of the Rhine provinces,"

(*b*) *Cox* v. *Land and Water Journal Company* (L. Rep. 9 Eq. 324; 21 L. T. N. S. 548.)

(*c*) *Walter* v. *Howe*, L.R. 17 C. D. 708.

(*d*) Per Jessel, M.R., in *Maple & Co.* v. *Junior Army & Navy Stores*, L.R. 21 C. D. 377, 379.

person who at the time of passing of this Act shall be the proprietor of such copyright: Provided always, that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this Act, but shall endure for the term which shall subsist therein at the time of passing of this Act, and no longer, unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright shall, before the expiration of such term, consent and agree to accept the benefits of this Act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to this Act annexed to be entered in the book of registry hereinafter directed to be kept, in which case such copyright shall endure for the full term by this Act provided in cases of books to be published after the passing of this Act, and shall be the property of such person or persons as in such minute shall be expressed."(*a*)

The copyright, then, in every book published during the author's lifetime is to last, at least, for forty-two years from the time of its first publication, and may last for any longer period that may be covered by the duration of the author's life, with seven more years added. If the book is published after his death, the copyright lasts for forty-two years from first publication. Copyrights subsisting at the time of the passing of the Act are extended to the same limits, but not in the case of assignees of the copyright for other consideration than that of natural love and affection, unless with the concurrence of the proprietor and author or his personal representative.

The Court of Queen's Bench (Cockburn, C.J., and Mellor, J.) was of opinion that notwithstanding the above enactment as to books published before the Act and sect. 20, extending the provisions of 3 & 4 Will. 4, c. 15, to musical compositions, no title was given to the sole right of representation or performance of musical compositions published before the Act; but this opinion was overruled by the Court of Appeal (Brannwell, Brett and Cotton, L.JJ.)(*b*)

Whether there must be a known author.

With respect to the question whether there must be a known author by whose life and from whose death the statutory period of copyright is to be determined, the observations of Lord Deas in the Scotch case of *Maclean*

(*a*) See *Marzials* v. *Gibbons*, L.R. 9 Chy. App. 518.
(*b*) Ex pte. *Hutchins* and *Romer*, L.R. 4 Q. B. D. 90, 483.

v. *Moody*,(*a*) in the year 1858, are deserving of attention. In that case an argument was addressed to the court against the title of the claimants to copyright in a shipping list called "The Clyde Bill of Entry," to the following effect:—that the object of the statute 5 & 6 Vict. c. 45, was to encourage literary merit; that intellectual labour constituting authorship is alone thereby protected; that there can be no authorship without an author; that the claimants were not the authors in the present case, nor did they name the authors; that the life of the author affords the only criterion the statute gives for measuring the endurance of the privilege; and that without the statutory means of measuring the privilege, the privilege itself cannot exist. Lord Deas said, "I am humbly of opinion that this argument, although ingenious, is unsound. The Act does not confine the privilege to works of literary merit. . . . . Neither does the Act confine the privilege to cases in which there is a known author, whose life shall afford a measure for the endurance of the privilege. A person may find a manuscript in his ancestor's repositories, or get a gift of it and publish it, and he may be entitled to copyright, although he cannot tell who was the author, or whether the author is living or dead. The Crown might, I presume, get up a publication and be entitled to copyright, and yet the Crown never dies. . . . . That the first publisher may have copyright in the work, although he cannot point out the author, appears to me implied in sect. 16 of the statute, which requires the defendant 'if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book' to give notice of 'the name of the person whom he alleges to have been the author or first publisher.' I think it is here assumed that there may be cases in which, if the plaintiff be 'the first publisher' he may be entitled to copyright, although no author has been or can be named upon either side. In all such cases it is obvious that the endurance of the privilege can have no reference to the author's life, but must be for forty-two years after the first publication."

Author.

An author may be described as one who, by his own intellectual labour applied to the materials of his composition, produces an arrangement or compilation new in itself.(*b*)

Where the incidents of a person's life were furnished by him to another who prepared them for publication, and the copyright was taken out in the name of the person furnishing the facts, it was held in America that he was not the author, and

(*a*) Cases in Court of Session, vol. xx. p. 1163.

(*b*) *Atwill* v. *Ferrett* (2 Blatch. 46).

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that a person claiming as his assignee could not maintain an action for infringement.(*a*)

Assistants employed by the publishers of a shipping list compiled from statistics contained in custom-house books to which the publisher had sole right of access for the purpose of publication, were said by Lord Deas(*b*) not to be authors in the sense of sect. 18 of 5 & 6 Vict. c. 45, nor in any reasonable sense whatever.

The person who arranges a pianoforte score of an opera is the author or composer of such arrangement, and must be registered as such.(*c*)

A person who merely procured a drawing or design to be made "of the busses of the Society of British Herring Fishery" was held by Lord Hardwicke not entitled to relief under 8 Geo. 2, c. 13, apparently on the ground that he was not the author.(*d*) But the proprietor of a periodical containing translations made from foreign works by persons employed and paid by him and from works imported by him at considerable expense, obtained an injunction (before 5 & 6 Vict. c. 45, s. 18) to prevent the unauthorised publication of these translations; whether, however, as author or as proprietor of the copyright does not appear.(*e*)

Where a person, employed as a performer and stage-manager of a theatre, agreed to write a play which was to be performed in the employer's theatre so long as it should continue to draw good audiences, it was held in America that the person who wrote the play was the proper person to take out the copyright.(*f*)

Two or more persons may jointly be the authors of a play.(*g*) Where, however, the lessee of a theatre employed one W. to write for him a drama in three acts on a subject suggested by the lessee, and the drama when completed by W. was altered in various ways by the lessee and some members of

(*a*) *De Witt* v. *Brooks* (cited Law's American Digest of Patent and Copyright Cases, p. 174).

(*b*) *Maclean* v. *Moody* (20 Scotch Sess. Cas. 2nd Ser. 1164.)

(*c*) *Wood* v. *Boosey* (L. Rep. 3 Q. B. 223; 18 L. T. N. S. 105).

(*d*) *Jeffreys* v. *Baldwin* (Amb. 163); see *Pierpoint* v. *Fowle* (2 Wood & Min. 46) and *Binns* v. *Woodruff* (4 Wash. 53), and as to alterations in a musical composition made for another person, *Atwill* v. *Ferrett* (2 Blatch. 46). See further as to the authorship of musical compositions, *Reed* v. *Carusi* (8 Amer. L. Rep. O. S. 411).

(*e*) *Wyatt* v. *Barnard* (3 Ves. & B. 77).

(*f*) *Roberts* v. *Myers* (13 Mo. L. Rep. 400, cited Law's Digest of Patent, Copyright, and Trades Mark Cases, p. 211).

(*g*) See per Keating, J., in *Levy* v. *Rutley*, L.R. 6 C. P. 529, and the language of 3 Will. 4 c. 15, s. 1.

his company, one of whom wrote an additional scene, it was held that the lessee was not joint author with W.(*a*)

"There may be a difficulty in some cases," said Montagu Smith, J., "in determining who are joint authors. But I take it that if two persons agree to write a piece, there being an original joint design, there can be no difficulty in saying that they are joint authors of the work, though one may do a larger share of it than the other. It is not pretended here that there was any original joint design. W. was employed by the plaintiff to write the play. W. invented the plot and wrote the whole dialogue complete. The plaintiff and some members of his company thought the play might be improved. Accordingly the plaintiff, either himself wrote or procured some one else to write for him a new scene and made several other alterations in the incidents and in the dialogue; and the question is whether that constituted the plaintiff a joint author of the play with W. The plot remains; the additions do not disturb the drama composed by W.; they were made for the mere purpose of improving or touching up some of its parts. It would be strange indeed, if not unjust, if the author's rights could be thus merged into a joint authorship with another. There are probably very few instances—at least in modern times—of a play being put upon the stage, without some alteration by the manager. . . . . If when the piece was brought to the plaintiff he had said to W., 'This thing requires to be remodelled, and you and I will do it together,' and W. had assented, possibly a case of joint authorship might have been set up. But the evidence here falls very short of that."(*b*)

A Scotch publisher brought out an edition of the works of Dr. Channing, the American author, which had already been published in America. Various slight alterations and corrections were made with the assistance of Dr. Channing for this edition, and the publisher sent him by way of acknowledgment a sum of money, but not as the result of any contract entered into. Another publisher having published a new edition reprinted from the former, it was held by the Court of Session that the former publisher had no copyright in his edition, and could not prevent the publication of a reprint of it.(*c*)

On the question who is the "author" of a photograph, see the case of *Nottage* v. *Jackson*, referred to post in the chapter on Paintings, Drawings, and Photographs.

If an author have composed "any book whatsoever" for

Proprietor of copyright.

(*a*) *Levy* v. *Rutley*, *ubi supra*. (*b*) L. R., 6 C. P. pp. 530, 531.
(*c*) *Hedderwick* v. *Griffin* (3 Scotch Sess. Cas. 2nd Ser. 383).

any publisher, projector, or proprietor, on the terms that the copyright should belong to such publisher, &c., and the author is paid for it, the copyright is the property of such publisher, &c. (5 & 6 Vict. c. 45, s. 18).

How far book must be original.

How far a book must be original in order to entitle its author to copyright in it is a question to which only a general answer can be given. It may be expressed thus: the law will secure to a man the property in every genuine product of his own mental labour, whether that product take the form of compilation, abridgment, new arrangement, or wholly original work—if, indeed, there can be any such thing as a wholly original work. On this subject an eminent American Judge (Story) says, with great propriety,(a) "In truth, in literature, in science, and in art, there are and can be few, if any, things which, in an abstract sense, are strictly new and original throughout. Every book in literature, science, and art borrows, and must necessarily borrow and use, much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known, and used and understood by others. The thoughts of every man are more or less a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copyright which was not new and original in the elements of which it is composed, there could be no ground for any copyright in modern times; and we should be obliged to ascend very high even in antiquity to find a work entitled to such eminence."

The law requires no such impracticable standard of originality as that alluded to in the extract just made. It requires only that the work should contain something distinctively the property of the author, which gives a character to it. "Something he must show to have been produced by himself; whether it be a purely original thought or principle, unpublished before, or a new combination of old thoughts, and ideas, and sentiments, or a new application or use of known and common materials, or a collection, the result of his industry and skill. In whatever way he claims the exclusive privilege accorded by these laws, he must show something which the law can fix upon as the product of his own and not another's labours. But in order that the law should do this ample justice to the great variety of claimants it is necessary that its rules

(a) *Emerson* v. *Davies* (3 St. 779); see also in *Gray* v. *Russell* (1 St. 16).

should be capable of adaptation to the objects of their labour. They must include in their range everything that can be justly claimed as the peculiar product of individual efforts; otherwise they would exclude from the benefits of literary property objects which are as clearly the products of individual labour as the most original thoughts ever written, namely, new and important combinations and arrangements, or collections of materials known and common to all mankind."(*a*)

Test of originality.

The test "whether the claimant's book contain any substantive product of his own labour?" has been recognised and applied in several cases. In 1797, one Cary was employed to make a survey of the different roads in Great Britain. Having completed his survey he published a book called "Cary's New Itinerary," which followed the plan and contained much of the materials of an older work called "Patterson's Road Book," but contained also many corrections of and additions to it. A person named Faden having published a book bearing the same relation to Cary's that Cary's did to Patterson's, Cary filed a bill in Chancery to restrain Faden from publishing his book, on the ground that it was not original, but either in whole or part a copy of Cary's. The Lord Chancellor (Loughborough) refused to grant an injunction, thinking the two books very different. He said, "What right had the plaintiff to the original work? If I were to do strict justice I should order the defendants to take out of their book all that they have taken from the plaintiff, and reciprocally the plaintiff to take out of his all he has taken from Patterson. I think the plaintiff may be contented that a bill is not filed against him."(*b*)

An action was brought in 1801 by the same plaintiff against Messrs. Longman and Rees for publishing a pirated edition of the same or a similar work, the book published by the defendants being professedly a twelfth edition of the original work by Patterson, but containing nine-tenths of Cary's alterations and improvements. The plaintiff was held entitled to recover. Lord Kenyon, C.J., said, "certainly the plaintiff had no title on which he could found an action to that part of his book which he had taken from Mr. Patterson's; but it is as clear that he had a right to his own additions and alterations, many of which were very material and valuable: and the defendants are answerable at least for copying those parts in their book. . . . . The courts of justice have been long labouring under an error, if an author

(*a*) Curtis on Copyright, 171, 172.
(*b*) *Cary* v. *Faden* (5 Ves. 23).

have no copyright in any part of a work unless he have an exclusive right to the whole work."(*a*)

According to Lord Eldon,(*b*) if a person collects an account of natural curiosities and such articles, and employs the labour of his mind by giving a description of them, that is as much a literary work as many others that are protected by injunction and by action. It is equally competent to any other person perceiving the success of such a work to set about a similar work, *bonâ fide* his own; but it must be in substance a new and original work, and must be handed out to the world as such.

Where subject is common.

The fact that the subject of the work is common does not deprive an author of copyright in the product of the labour which he has *bonâ fide* spent on it, or render it less necessary for any subsequent author to have recourse to the original sources; as we learn from the case of *Patterson's Road Book*, already referred to(c). So in *Longman* v. *Winchester*(*d*) the plaintiffs were held entitled to copyright in the "Court Calendar," a work consisting of lists of members of the Houses of Peers and Commons, &c., and an injunction was granted restraining the defendants from copying and publishing the plaintiffs' work. "The question before me," said Lord Eldon, "is whether it is not perfectly clear that in a vast proportion of the work of these defendants no other labour has been applied than copying the plaintiffs' work. From the identity of the inaccuracies it is impossible to deny that the one was copied from the other *verbatim et literatim*. To the extent, therefore, in which the defendant's publication has been supplied from the other work the injunction must go; but I have said nothing that has a tendency to prevent any person from giving to the public a work of this kind if it is the fair fruit of original labour; the subject being open to all the world; but if it is a mere copy of an original work this Court will interpose against that invasion of copyright."(*e*)

A work entitled "The Guide to Science," which laid no

(*a*) 1 East. 358.

(*b*) See judgment in *Hogg* v. *Kirby* (8 Ves. 221).

(*c*) "Take the instance of a map describing a particular county; and a map of the same county afterwards published by another person; if the description is accurate in both, they must be pretty much the same; but it is clear the latter publisher cannot on that account be justified in sparing himself the labour and expense of actual survey, and copying the map previously published by another:" (*per* Lord Eldon in *Longman* v. *Winchester*, 16 Ves. 269.) (*d*) 16 Ves. 269.

(*e*) And see the remarks of Wood. V.C., in *Kelly* v. *Morris* (L. Rep. 1 Eq. 702; 14 L. T. N. S. 222; 35 L. J. 423, Ch.; 14 W. R. 496).

claim to any originality with reference to the scientific doctrines treated in it, but contained in the form of questions and answers a scientific exposition of some of the ordinary phenomena of human life, in parts digested from different works, was held to constitute an original work in which the author was entitled to copyright.(*a*) Wood, V.C., said, "That an author has a copyright in a work of this description is beyond all doubt. If any one by pains and labour collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former general reading, or out of works consulted by him for the express purpose, the reduction of questions so collected, with such answers under certain heads and in a scientific form, is amply sufficient to constitute an original work of which the copyright will be protected. Therefore, I can have no hesitation in coming to the conclusion that the book now in question is in that sense an original work, and entitled to protection."

"This I hold to be clearly settled," said Lord Jeffrey, in *Alexander* v. *Mackenzie*,(*b*) "that even though the materials from which a work is taken be *in medio*, as it is called, yet if those materials be arranged in a new form, the effect of that will be to afford the author the protection of copyright in that form. In all cases, in short, although the materials are expressly *in medio*, and open to everybody, when a particular degree of judgment in the selection of those materials has been used, and when the subject *in medio*, so open to the world at large, has been to a certain extent snatched at and appropriated, such selection is in itself recognized as a certain degree of mental effort, which is entitled to the benefit of copyright." In that case the Court of Session held the pursuer entitled to copyright in certain practical forms or styles of the writs and instruments introduced by the Heritable Securities and Infeftment Acts, those Acts giving only general descriptions of the forms to be used.

The same principle was applied to a book of chronology ;(*c*) to the case of maps ;(*d*) to the case of an annotated catalogue of books published by a bookseller ;(*e*) and, in America, to the

(*a*) *Jarrold* v *Houlston* (3 K. & J. 708).
(*b*) 9 Scotch Sess. Cas. 2nd Ser. 758, 27 Feb. 1847.
(*c*) *Trusler* v. *Murray* (cited in note to *Cary* v. *Longman*, 1 East, 363).
(*d*) See 17 Ves. 425. (*e*) *Hotten* v. *Arthur* (11 W. R. 934).

case of an elementary book of arithmetic containing an original arrangement and combination of materials,(*a*) and a new edition of a Latin grammar containing alterations, additions, and notes.(*b*)

The Scotch Court of Session held, in the case of *Black* v. *Murray*,(*c*) that a person may, by publishing a reprint of a work of which the copyright has expired, with notes and illustrations from other works, create a new copyright which will be protected from piracy; and that it is a piratical use of such copyright work to borrow from it any considerable number of those illustrations.

It was contended on behalf of the defenders in this case (an action for infringing the pursuers' copyright in the works of Sir Walter Scott by publishing what purported to be a reprint of the original edition of the "Minstrelsy of the Scottish Border") that the copyright claimed by the pursuers was a copyright of an edition of a work, not of the original text, the copyright in which had admittedly long since expired; that the pursuers' claim to copyright was chiefly based on notes contributed to their alleged copyright edition; that to make notes the subject of copyright, they must in a reasonable sense form a "book," and must constitute the value of the new edition; that that was not the case with the pursuers' edition, the notes added by their edition being 200 in all, many of them unimportant, and not extending to 25 small pages; that only 40 were taken by the defenders, 10 of them being found in editions not copyright; and finally, that it was open to the defenders to quote even from copyright books for the purpose of illustration; but the Court of Session, affirming the interlocutor of the Lord Ordinary, held the defenders liable for piracy.

What is a new edition.

Some valuable observations were made by the court, in this case, on the question—what constitutes a new edition of a book? "Questions of great nicety and difficulty," said the Lord President, "may arise as to how far a new edition of a work is a proper subject of copyright at all; but that must always depend upon circumstances. A new edition of a book 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 date of the new edition. On the other hand, a new edition of a book may be so enlarged and improved as to constitute in reality a new work, and that

(*a*) *Emerson* v. *Davies* (3 St. 768). See *Baily* v. *Taylor* (1 Tamlyn, 365), and *Lennie* v. *Pillans* (5 Scotch Sess. Cas. 2nd Ser. 416).

(*b*) *Gray* v. *Russell* (1 Story, 17).

(*c*) 9 Scotch Sess. Cas. 341, 3rd Series.

just as clearly will entitle the author to a copyright running from the date of the new edition. Take for example, in illustration of that, a new edition of a scientific work which is published twenty or thirty years after the date of the first edition. The progress of science in the interval necessarily leads to the new edition being a very different book from the old. That old edition will probably, in the course of these twenty or thirty years, have become comparatively worthless, while the new edition, particularly if it is the production of the original author himself, will be as valuable at the later period as the original edition of the book was at the time when it was published. But there are many cases between these two extremes; and the difficulty will be to lay down any general rule as to what amount of addition or alteration or new matter will entitle a second or a 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 or improvements themselves, as distinguished from the rest of the book. I think in the present case that we shall not find that we are in reality much troubled with such difficulties."

"It is not necessary," observed Lord Ardmillan, "that a work shall be entirely a new work in order to be the subject of copyright. A new edition is not necessarily a subject of copyright, but it may be so. There must be some originality in it; it may be in new thought or in new illustration, or in new explanatory and illustrative annotation, or even, in some peculiar instances, in simply new arrangement. If, in any of these respects, there is independent mental effort, then in the result of that mental effort there may be copyright."

Lord Kinloch said: "I think it clear that it will not create copyright in a new edition of a work, of which the copyright has expired, merely to make a few emendations of the text, or to add a few unimportant notes. To create a copyright by alterations of the text, these must be extensive and substantial, practically making a new book. With regard to notes, in like manner, they must exhibit an addition to the work which is not superficial or colourable, but imparts to the book a true and real value, over and above that belonging to the text. This value may, perhaps, be rightly expressed by saying that the book will procure purchasers in the market on special account of these notes. When notes to this extent and of this value are added, I cannot doubt that they attach to the edition the privilege of copyright. The principle of the law of copyright directly applies. There is involved in such annotation, and often in a very eminent

degree, an exercise of intellect and an application of learning, which place the annotator in the position and character of author, in the most proper sense of the word. The skill and labour of such an annotator have often been procured at a price which cries shame on the miserable dole which formed to the author of the text his only remuneration. In every view, the addition of such notes as I have figured, puts the stamp of copyright on the edition to which they are attached. It will still, of course, remain open to publish the text, which, *ex hypothesi*, is the same as in the original edition; but to take and publish the notes will be a clear infringement of copyright."

Notes need not be original.

It is not necessary that the notes should be original: if skill and labour are bestowed in their selection and application, the annotator is entitled to copyright in them.

"Of the 200 notes," said the Lord President, in the case just referred to, "the defenders' counsel tells us further that 15 only consist of original matter and are the composition of Mr. Lockhart himself, while the remaining 185 are quotations from other books and authors. Now this seems to be considered also to be a sort of disparagement of the value of the notes, in which I cannot at all agree. It seems to me that notes of this kind are almost chiefly valuable in bringing together, and in combination, the thoughts of the same author in different places, or the thoughts of other authors or of critics bearing upon the point that is under consideration; and nothing could better illustrate it than a number of the notes which we see in these very volumes, and which are exceedingly interesting and valuable as matter of literary and critical taste and judgment. The quotations are in many places most apposite, and highly illustrative of the text, and exceedingly interesting to the reader; and certainly the selection and application of such quotations from other books may exercise as high literary faculties as the composition of original matter. They may be the result both of skill and of labour, and of great literary taste; and, therefore, I think the circumstance that the notes consist to a great extent of quotations is anything but a disparagement of their value." So Lord Kinloch: "It was, perhaps, thought that to repeat quotations from well-known authors was not piracy. If so, I think a great mistake was committed. In the adaptation of the quotation to the ballad which it illustrates—the literary research which discovered it—the critical skill which applied it—there was, I think, an act of authorship performed of which no one was entitled to take the benefit for his own publication, and thereby to save the labour, the

learning, and the expenditure necessary even for this part of the annotation."

The subject of a work may not in general be a subject of copyright, but still, if a man expends time and labour in producing a work on that subject, he has a copyright in the individual work. Thus, though an "East India Calendar" is not a subject of copyright, still, if a man from his situation having access to the repositories in the India House, has by considerable expense and labour procured with correctness all the names and appointments on the Indian Establishment, he has a copyright in that individual work.(*a*)

Illustrated catalogue.

Lord Romilly, M.R., held in the case of *Cobbett* v. *Woodward*,(*b*) that there was no copyright in the illustrated furnishing guide published by an upholsterer, containing engravings of the articles of furniture sold and descriptive remarks thereon. His lordship regarded it as "little more than an illustrated inventory of the contents of a warehouse," and said: "I know of no law which, while it would not prevent the second advertiser from selling the same articles, would prevent him from using the same advertisement, provided he did not in such advertisement by any device suggest that he was selling the works and designs of the first advertiser." This was not followed in the case of *Gracc* v. *Newman*(*c*) by Vice-Chancellor Hall who held that a cemetery stonemason, who employed and paid a person to collect monumental designs (by photographs and drawings from different tombstones in cemeteries), and who published, by way of advertisement, a book containing sketches of these designs, with scarcely any letterpress, had copyright in the volume, and might restrain the publication of designs copied from it.

The Court of Appeal in the case of *Maple & Co.* v. *Junior Army and Navy Stores*(*d*) distinctly overruled the decision of Lord Romilly. The Court of Appeal (affirming the decision of Vice-Chancellor Hall) held the plaintiffs, who were upholsterers, entitled to copyright in a catalogue of articles of furniture, containing illustrations engraved from original drawings made by artists employed by them, though the work contained no letterpress. Referring to a phrase of Lord Romilly's, that "there is no copyright in an advertisement," Sir George Jessel, M.R., said: "I think that this is not the law. I am not aware that the use to which a proprietor puts his book makes any difference in his rights. His copyright

(*a*) *Matthewson* v. *Stockdale* (12 Ves. 276).
(*b*) L. R. 14 Eq. 40. (*c*) L. R. 19 Eq. 623.
(*d*) L. R. 21 C. D. 369.

gives him the exclusive right of multiplying copies, and he may use them as he pleases."

Bacon, V.C., held the following not to be a book within the meaning of the Copyright Act, or the subject matter of copyright at all:—An envelope with the words printed on the outside, "Entered at Stationers' Hall. Key enclosed. The Christograph: the Christian's Puzzle. Suitable for all sects and denominations;" and containing inside (1) a piece of cardboard so cut that when held up to the light it cast a shadow resembling the picture "Ecce Homo," and (2) a slip of paper on which were printed some lines of Longfellow. The Vice-Chancellor considered it merely a child's trick having no pretence to be a literary work or to novelty.(*a*)

Degree of originality in cases of copyright and patent.

Whether a greater degree of originality is necessary to sustain a claim to copyright than that which would be sufficient to support a title to a patent does not distinctly appear. In the case of patent inventions, suggestions of servants employed in perfecting a discovery, tending to facilitate its practical application, may be adopted by the employer and incorporated into his design without detracting from his claim to originality. In *Barfield* v. *Nicholson*,(*b*) Sir John Leach suggested the application of a similar principle to copyright.

Chief Justice Jervis, however, leaned to a different opinion in the case of *Shepherd* v. *Conquest*,(*c*) remarking that the enactments upon which literary property and patents for inventions are respectively founded, differ widely in their origin and details; and that in order to show that the position and rights of an author within the Copyright Acts are not to be measured by those of an inventor within the patent laws, it is only necessary to bear in mind that, whilst on the one hand a person who imports from abroad the invention of another previously unknown here, without any further originality or merit in himself, is an inventor entitled to a patent, on the other hand a person who merely reprints for the first time in this country a valuable foreign work, without bestowing upon it any intellectual labour of his own, as by translation, which to some extent must impress a new character, cannot thereby acquire the title of an author within the statutes relating to copyright. The Chief Justice proceeded: "We do not think it necessary in the present case to express any opinion whether, under any circumstances, the copyright in a literary work, or the right

(*a*) *Cobbe* v. *Marks* (52 L. J. C. D. 107; 47 L. T. N. S. 432).
(*b*) 2 Sim. & St. 1; 2 L. J. 90, 102, Ch. (*c*) 17 C. B. 444.

of representation can become invested *ab initio* in an employer other than the person who has actually composed or adapted a literary work. It is enough to say in the present case, that no such effect can be produced where the employer merely suggests the subject, and has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flowed from the mind of the person employed. It appears to us an abuse of terms to say that in such a case the employer is the author of a work to which his mind has not contributed an idea; and it is upon the author in the first instance that the right is conferred by the statute which creates it."

The question in that case was as to the proprietorship rather than the authorship, the plaintiffs' counsel not insisting on their being authors, but only on their being proprietors (see 17 C. B. 433) of the copyright, a hopeless contention in a case where the only agreement relied on was a verbal one that the plaintiffs should have the right of representing in London the pieces written by the person employed by them, he retaining the sole right of representation out of London.

Musical compositions.

The addition of words, prelude, and accompaniment to an old air was held to give the adapter a copyright in the whole composition;(*a*) and where a person adapted words to an old air and procured a friend to compose an accompaniment, his assignee was held entitled to describe himself in an action for piracy, as proprietor of the copyright in the entire composition.(*b*)

The author of a pianoforte score of an opera, arranged from the full score, is the person who makes the arrangement, not the composer of the opera.(*c*)

Engravings in a book.

Engravings and prints were deliberately excluded from the operation of 5 & 6 Vict. c. 45. But in *Bogue* v. *Houlston*(*d*) Sir James Parker, V.C., was of opinion that where there are designs forming portion of a book in which a person has copyright under that act, such copyright extends to the illustrations and designs of the book as well as to the letter-press. The plaintiff had published a book containing letter-press illustrated by wood-engravings, the engravings being printed on the same paper as the letter-press itself. The defendants published a work with a different title and different letter-press, but containing pirated copies of the

(*a*) *Lover* v. *Davidson* (1 C. B. N. S. 182).
(*b*) *Leader* v. *Purday* (7 C. B. 4).
(*c*) *Wood* v. *Boosey* (7 B. & S. 869; 9 B. & S. 175; L. Rep. 2 Q. B. 340; L. Rep. 3 Q. B. 223; 18 L. T. N. S. 105).
(*d*) 5 De G. & Sm. 275.

wood engravings. The plaintiff had complied with the requisitions of 5 & 6 Vict. c. 45, but not with those of the act for the protection of engravings by printing the date of publication and the name of the proprietor on each copy. The Vice-Chancellor granted an injunction, the plaintiff undertaking to bring an action to try the right at law. "It appears to me," said Sir James Parker, "that a book must include every part of the book, it must include every print, design, or engraving which forms part of the book, as well as the letter-press therein, which is another part of it. Prints published separately do not appear to have been within that act by that express definition.(*a*) But the case now before the Court is not the case of separately published prints, but the case of designs forming part of a book. There is no decision of any court of law, or of this court, either way upon this point."

Sir George Jessel, M.R., remarks(*b*) of this case as follows: "The view I take of *Boyne* v. *Houlston* is that there was no copyright in the letter-press. The plaintiff's publication contained the old story of 'Reynard the Fox,' and other stories to which it was not necessary to refer, as the defendant had only copied that one and the illustrations to it. I do not think that the judgment turned on the fact of there being other stories in the volume. The two which are mentioned in the report were certainly old, and there is nothing to show that there were any new ones. I think the decision turned on the meaning of the word 'book.' . . . . It had been contended before the Vice-Chancellor that there could only be copyright where there was letter-press, and I think that what he meant to say was that prints forming a book were within the act, though prints published separately were not, and that if published together in a volume they formed a book whether there was letter-press or not." His lordship afterwards added that he had examined the record in *Boyne* v. *Houlston*, and found that the bill did not claim copyright in any letter-press, and did not state that there were any other stories than 'Reynard the Fox' in the plaintiff's book.

Abridgments and translations.

How far abridgments and translations may be new and original works, and the authors entitled to copyright in them, will be more conveniently treated of when we come to deal with the subject of piracy.(*c*)

Copyright may be of part of a work.

In *Low* v. *Ward*(*d*) it was urged in argument that there could not be copyright as to a part of a work only, but the

(*a*) Sect. 2 of 5 & 6 Vict. c. 45.
(*b*) *Maple & Co. Junior Army & Navy Stores* (L. R. 21 C. D. p. 380).
(*c*) See the chapter on "Piracy," *post*. (*d*) L. Rep. 6 Eq. 418.

Court overruled the argument. "There are numerous cases," said Giffard, V.C., "showing that where the parts of a work can be separated, there may be a copyright in any distinct part of it. I may instance the cases of the last canto of Lord Byron's 'Childe Harold,' Croker's Notes to 'Boswell's Life of Johnson,' and of particular articles in cyclopædias. There is no analogy in this respect between a patent and the case of copyright, as it matters not whether the copyright is for the entire work or for a part only."

STATUTORY REQUISITES TO BE OBSERVED.

The statutory requirements to be observed by the proprietors of copyright are the registration of the work at Stationers' Hall, and the deposit and delivery of a certain number of copies of it; but the existence of copyright is not dependent on either of these. The former is necessary only as a preliminary to bringing an action.

1. *Registration.*

Book of Registry to be kept at Stationers' Hall.

Sect. 11 of 5 & 6 Vict. c. 45 provides as follows with respect to keeping a Book of Registry at Stationers' Hall: "that a book of registry, wherein may be registered, as hereinafter enacted, the proprietorship in the copyright of books, and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright, shall be kept at the hall of the Stationers' Company, by the officer appointed by the said company for the purposes of this Act, and shall at all convenient times be open to the inspection of any person, on payment of one shilling for every entry which shall be searched for or inspected in the said book; and that such officer shall, whenever thereunto reasonably required, give a copy of any entry in such book, certified under his hand, and impressed with the stamp of the said company, to be provided by them for that purpose, and which they are hereby required to provide, to any person requiring the same, on payment to him of the sum of five shillings; and such copies so certified and impressed shall be received in evidence in all Courts and in all summary proceedings, and shall be *primâ facie* proof of the proprietorship or assignment of copyright or licence as therein expressed, but subject to be rebutted by other evidence, and in the case of dramatic or musical pieces shall be *primâ facie* proof of the right of representation or performance, subject to be rebutted as aforesaid."

Certified copies to be received in evidence.

Sect. 12 enacts, "that if any person shall wilfully make

or cause to be made any false entry in the registry book of the Stationers' Company' or shall wilfully produce or cause to be tendered in evidence any paper falsely purporting to be a copy of any entry in the said book, he shall be guilty of an indictable misdemeanor, and shall be punished accordingly."

Making a false entry in the book of registry a misdemeanor.

Entries of copyright.

And sect. 13 provides, "that after the passing of this Act it shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the registry book of the Stationers' Company of (1) the title of such book, (2) the time of the first publication thereof, (3) the name and place of abode of the publisher thereof, and (4) the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright, in the form in that behalf given in the schedule to this Act annexed, upon payment of the sum of five shillings to the officer of the said Company."

The statute authorises any person to make an entry as proprietor. It does not say what such person may have to do in order to satisfy the keeper of the register, before the keeper will make such registration.(*a*)

Name of publisher or proprietor.

According to Kindersley, V.C., where the publishers are a firm, it is optional to enter the name of the firm, or the names of the individuals composing it,(*b*) and the same, of course, would hold as to the name of the proprietor. It has been expressly laid down that the name of the proprietor of engravings is sufficiently declared by the firm name.(*c*)

Effect of registration before publication.

No copyright is acquired by the registration of a book before its actual publication; the protection afforded by the Act not being prospective, but dating only from the time of the first publication of the work.(*d*) Nor does it make any difference that the date (registered before publication) is the actual date on which publication subsequently takes place.(*e*)

(*a*) 18 Scotch Sess. Cas. 915.

(*b*) *Low* v. *Routledge*, cited, *post*, p. 92.

(*c*) *Graves* v. *Ashford* (L. R. 2 C. P. 410; *Rock* v. *Lazarus* (L. R. 15 Eq. 104).

(*d*) *The Correspondent Newspaper Company* (*Limited*) v. *Saunders* (13 W. R. 80;; 12 L. T. N. S. 540; 11 Jur. N. S. 540). In *Platt* v. *Walter* (17 L. T. N. S. 159) Lord Chelmsford says, "That protection given by common and statute law, which is called copyright, is only in respect of some published or unpublished literary production, and, therefore, there can be no copyright in the prospective series of newspapers. The copyright may attach upon each successive publication, but that which has no present existence cannot be the subject of this species of property."

(*e*) *Henderson* v. *Maxwell* (L. R. 5 C. D. 892).

The following is the form requiring entry of proprietorship given in the schedule to 5 & 6 Vict. c. 45 :—

Form of requiring entry of proprietorship.

I *A. B.* of do hereby certify, that I am the proprietor of the copyright of a book, intituled *Y. Z.*, and I hereby require you to make entry in the register book of the Stationer.' Company of my proprietorship of such copyright, according to the particulars underwritten.

Title of Book.	Name of Publisher and Place of Publication.	Name and Place of Abode of the Proprietor of the Copyright.	Date of First Publication.
Y. Z.		*A. B.*	

Dated this day of 18

Witness, *C. D.* (Signed) *A. B.*

Form of entry.

And the form of original entry of proprietorship of copyright of a book(*a*) given in the same schedule is as follows :—

Time of making the Entry.	Title of Book.	Name of the Publisher, and Place of Publication.	Name and Place of Abode of the Proprietor of the Copyright.	Date of First Publication.
Y. Z.	*A. B.*	*C. D.*		

Entry of several persons as proprietors.

An author may associate with himself by registry under the Act, any person or persons he pleases, and such persons have a right to sue jointly with him for any infringement of copyright in the work so registered.(*b*)

The "directors of, and subscribers to, the Customs Annuity and Benevolent Fund" having published the "Clyde Bill of Entry and Shipping List," registered their individual names as proprietors. Although they did not

(*a*) As to the mode of registering in the case of a periodical publication, see *post*, p. 102.

(*b*) *Stevens* v. *Wildy* (19 L. J. 190, Ch.).

state on the register who was the author of the work, nor whether they had acquired the right to it by purchase or assignment, it was held by the Scotch Court of Session that they had sufficiently complied with the provisions of the Act, and had set forth a sufficiently *primâ facie* title to try the question of copyright on an application for an interdict.(*a*)

It must be remembered that registration furnishes only *primâ facie* evidence of title, and that it may be rebutted.(*b*)

Time of first publication.

The day of the month, as well as the month and the year must be stated in the entry; it is not enough to give the month and year only.(*c*)

In the case of a novel published in successive numbers of a weekly periodical, the date of the number in which the first part appeared was given as the time of first publication of the novel, and this was held good.(*d*)

And where the first No. of the periodical itself had been duly registered the proprietor was held entitled to restrain the unauthorized republication of a serial story published in it, though neither the serial nor the first No. of the periodical in which it appeared had been registered.(*e*)

Place of abode.

Field, J., had no doubt, though it was not necessary to decide the point, that the "place of abode" was sufficiently designated by the place where the publishing firm carried on their business, and that it was not necessary to give the private residences of the members of the firm.(*f*)

Consequence of non-registration.

The consequence of non-registration is stated in sect. 24, which enacts, "that no proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action or suit at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, *before commencing such action, suit, or proceeding*, have caused an entry to be made, in the book of registry of the Stationers' Company, of such book, pursuant to this Act: Provided

(*a*) *Maclean* v. *Moody* (Scotch Sess. Cas. 2nd Ser., vol. xx. 1154, June 23, 1858).

(*b*) See the remarks of Fry, J., in *Lucas* v. *Cooke* (L. R. 13 Ch. D. 875, 877).

(*c*) *Mathieson* v. *Harrod* (L. Rep. 7 Eq. 272; 38 L. J. 129, Ch.; 19 L. T. N. S. 629); and see *Low* v. *Routledge* (L. Rep. 1 Eq. 42; 3 H. L. Cas. 100; 33 L. J. 717, Ch.); and *per* Blackburn, J., in *Wood* v. *Boosey* (L. Rep. 2 Q. B. 340) a case decided under sect. 6 of the International Copyright Act (7 Vict. c. 12).

(*d*) *Dicks* v. *Yates* (L. R. 18 Ch. D. 76); see *per* Jessel, M.R., p. 88.

(*e*) *Henderson* v. *Maxwell* (L. R. 4 Ch. D. 163).

(*f*) *Nottage* v. *Jackson* (49 L. T. N. S. 339).

always, that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid: Provided also, that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the Act passed in the third year of the reign of His late Majesty King William the Fourth, to amend the laws relating to dramatic literary property, or of this Act, although no entry shall be made in the book of registry aforesaid."

Separate article for periodical.

A separate article for a periodical publication is not a book within the meaning of the Act, so as to require registration under this section; and, therefore, non-registration does not by force of sect. 24 disentitle the author to proceed for any infringement of his right with respect to it.(*a*)

Newspapers.

According to Malins, V.C.,(*b*) a newspaper proprietor might sue for a piracy of its contents, without registering it.(*c*) But Sir George Jessel, M.R., declined to follow this decision and held registration necessary.(*d*)

Alteration made by 5 & 6 Vict. c. 45, s. 24.

The enactment contained in sect. 24 of 5 & 6 Vict. c. 45 made an important change in the law as to the bringing of actions in cases where a book has not been registered. Previously to this enactment it was not necessary in order to entitle a plaintiff claiming as owner of copyright to sue, that his work should be registered at Stationers' Hall. Although he was bound to register for certain purposes,(*e*) it was decided that where there was no registration, the person entitled to copyright might protect his right by action or suit.(*f*) But now, as to books first published after the Act, although the author has copyright in them, he cannot sue, either at law or in equity, to protect himself against infringement of his copyright, unless he has registered his book at Stationers' Hall pursuant to the statute.(*g*) This, however, applies only to books first published after the Act; it does not affect any book published before.

(*a*) *Murray* v. *Maxwell* (3 L. T. N. S. 466); *Mayhew* v. *Maxwell* (1 John. & H. 312).

(*b*) *Cox* v. *Land and Water Journal Co.* (L. R. 9 Eq. 324).

(*c*) See the remarks on this case in the chapter on "Newspapers," *post*.

(*d*) *Walter* v. *Howe* (L. R. 17 Ch. D. 708).

(*e*) Registration was necessary to entitle the proprietor to recover the penalty imposed by statute for the violation of his copyright.

(*f*) See *Beckford* v. *Hood* (7 T. R. 620).

(*g*) 1 Drew. 353; see p. 364.

Inaccuracy in registration;

The registration of a book, according to sect. 13, must be strictly accurate in all the particulars mentioned in that section, viz.: "the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright." Errors as to these will, by force of sect. 24, prevent the author or proprietor from proceeding by action, suit, or otherwise, until such errors have been amended. They will also invalidate a subsequent assignment under the Act.(*a*)

As to time.

Thus, where "the time of the first publication" of a book was entered on the registry as the 25th May, 1864, when, in fact, it was first published on the 23rd May in that year, this was of itself held fatal to the fact of the registry of proprietorship operating by way of assignment.(*b*)

As to name.

And where the entry on the registry of the name of the publisher was "Sampson Low, Son, and Marston," whereas the name of the firm was "Sampson Low, Son, and Co.," this also was held of itself fatal to the right of the firm to sue.(*c*). "One almost regrets," said Kindersley, V.C., in the case in which these points were decided, "to be obliged to come to the consideration of points which are so very technical as these which I am obliged to consider; but, at the same time, they are points not only which a defendant or plaintiff has a right to take, but which are of importance with reference to the carrying out of the clearly expressed intention of the Legislature, which has thought fit to require, in order to produce certain effects, that certain strict particulars shall be complied with. It is, in point of fact, a concession of a certain means of assignment upon condition; and, in order to acquire the right to that mode of assignment, you must perform the condition which the Legislature has required."

Name of firm.

With respect to the mistake in the entry of the name of the firm, the Vice-Chancellor said: "Though it is probably optional either to enter the name of the firm of publishers, or the names of the individuals composing that firm, if you profess to enter the real name of the firm you must do so. . . . . I am almost ashamed to descend to these minute particulars, but it must be done; and it is sufficient for me to say that in my opinion, either of these inaccuracies is quite sufficient to lead me to hold that the entry of the proprietorship is insufficient, and, upon that ground, that there is no valid assignment effected by the subsequent entry which immediately follows

(*a*) *Low* v. *Routledge* (33 L. J. 717, Ch.; 10 L. T. N. S. 838; 10 Jur. N. S. 922; 12 W. R. 1069).
(*b*) *Ibid.*
(*c*) *Low* v. *Routledge*, *ubi supra*.

that of the assignment," The errors in the entries at Stationers' Hall were corrected after this decision, and a second Bill was filed by the plaintiffs, praying for an injunction to restrain the defendants from printing, publishing, &c., the book in question, and the injunction was granted.(*a*).

In *Weldon* v. *Dicks*(*b*) it was argued that it was not sufficient to register "Newby & Co." as the names of the first publishers, and that the name of every partner in the firm should be inserted; but Malins, V.C., held that this was wholly unnecessary.

The name registered under this head must be the name of the first publisher.(*c*)

Place of abode.

Where, however, the place of abode of the proprietor of copyright in a song was described in the entry at Stationers' Hall as "65, Oxford-street," whereas he was in America at the time of publication, and had no place of abode in England, "65, Oxford-street" being the address of his publishers, the Court of Common Pleas held that this was sufficient to satisfy the requisites of the Act.(*d*)

As to the mode of registering the place of abode of a firm where the members of the firm do not live at the place where the business of the firm is carried on, see the opinion of Field, J., in the case of *Nottage* v. *Jackson* (relating to the piracy of photographs), referred to, *ante*, p. 90.

Pleading non-registration.

It seems that non-registration, when intended to be set up as a defence to an action for piracy, should be distinctly pleaded.(*e*)

Subsequent editions.

If the first edition of a book has been published before 5 & 6 Vict. c. 45, although other editions have been published since that Act, and have not been registered pursuant to its provisions, the proprietor is entitled to protect by action or suit his copyright in so much of the work as appeared in the first edition.(*f*)

But where a second edition of a book printed after July 1, 1842, is not a mere reprint of a first edition published before that date, but contains considerable and material alterations and additions, as to those it is a new work; and in order to enable the proprietor to sue in respect of any infringement of his rights in those portions of the second edition which are new, if those only are infringed, he must register the book in which they are contained.(*g*) And the extent of

(*a*) *Low* v *Routledge*, *ubi supra*, p. 92.
(*b*) L. R. 10 C. D. 252. (*c*) *Coote* v. *Judd* (L. R. 23 Ch. D. 727).
(*d*) *Lover* v. *Davidson* (1 C. B. N. S. 182).
(*e*) *Chappell* v. *Davidson* (18 C. B. 194).
(*f*) *Murray* v. *Bogue* (1 Drew. 365, 366). (*g*) *Ibid.* 365.

the alterations contained in the second edition 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 of Victoria has no operation as to the old parts: as to them the copyright is left where it was.(*a*)

Effect of neglect at Stationers' Hall.

The object of registration being to give notice to all other publishers that the publication is protected by the statute, if there be any neglect on the part of the officials at Stationers' Hall as to the registration, the public is not bound, and the remedy of the publisher must be against the party causing such neglect. It cannot affect those who are thereby kept in ignorance of the existence of the copyright.(*b*)

Action for doing anything in pursuance of this Act.

If any action is brought against any person or persons for doing or causing to be done anything in pursuance of the Act 5 & 6 Vict., c. 45, the defendant or defendants may plead the general issue and give the special matter in evidence; and in case of a non-suit or discontinuance of the action or of a verdict for the defendant, the defendant is to have his full costs, for which he is to have the same remedy as the defendant in any case by law has. (sect. 26).

Remedy to persons aggrieved by entries in register.

Sect. 14 of 5 & 6 Vict. c. 45, enacts, "that if any person shall *deem himself aggrieved*(*c*) by any entry made under colour of this Act in the said book of registry, it shall be lawful for such person to apply by motion to the Court of Queen's Bench, Court of Common Pleas, or Court of Exchequer, in term time, or to apply by summons to any judge of either of such courts in vacation, for an order that such entry may be expunged or varied; and that upon any such application by motion or summons to either of the said courts, or to a judge as aforesaid, such court or judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to such court or judge shall seem just; and the officer appointed by the Stationers' Company for the purpose of this Act shall, on the production to him of any such order for expunging or varying any such entry, expunge or vary the same according to the requisitions of such order."

There are not many reported cases of application for relief

(*a*) *Murray* v. *Bogue*, 306. The case of *Novello* v. *Sudlow* (16 Jur 689) is in no way opposed to the doctrine above laid down, as in that case the work had been duly registered, and the whole argument turned on the construction of sect. 15 of 5 & 6 Vict. c. 45.

(*b*) *Per* Wood, V. C., in *Cassell* v. *Stiff* (2 K. & J. 287).

(*c*) As to the interpretation of these words, *vide post*, p. 96.

under this section of the Act. A rule absolute to "vary or expunge" at the option of the applicant an unauthorised entry in the register at Stationers' Hall, was granted by the Court of Common Pleas in *ex parte Bastow.*(a)

A rather wide discretion was exercised by the Court of Queen's Bench in *ex parte Davidson.*(b) Robert Cocks brought an action against Davidson for publishing three pieces of music, in which Cocks claimed the copyright. Two of the pieces were registered in the name of Cocks, and the third in the name of a person who had assigned the copyright to him. A rule *nisi* to expunge or vary the entries was obtained upon an affidavit of Davidson, not asserting a copyright in the airs in himself, but deposing to his belief that the three airs were old, and that the persons who on the entries professed to be the authors were not really the authors. The ground suggested for expunging the entries was that they would be *primâ facie* evidence against Davidson on the trial of the action brought against him. The court declined to expunge the entries, but on the refusal of the counsel for Cocks to consent not to use the entries on the trial, an order was made by the court, *proprio vigore*, without consent, that the rule should be enlarged till the trial of an issue to determine the question of copyright, in which Cocks should be plaintiff and Davidson defendant, and on the trial of which the entries should not be used.

The Court of Common Pleas in a subsequent case(c) in which the same person applied for assistance, distinctly disclaimed the power exercised by the Court of Queen's Bench in the preceding case. The Court of Common Pleas refused to expunge an entry of proprietorship unless it was clearly and unequivocally shown to be false, or to vary it unless satisfied by affidavit that in so doing they would make a true entry. "We can only expunge or vary or confirm the entry:" said Crowder, J., "I think we have no power to do that which was done by the Court of Queen's Bench in *Ex parte Davidson.*" The circumstances of the case before the Court of Common Pleas were somewhat peculiar. Mr. Lover, the author of a song called "The Low Back'd Car," being in America, and wishing to secure to himself the copyright in England and in America by a simultaneous publication in both countries, instructed his publishers here to publish it in London, on a certain day. This was done, and the song was registered at Stationers' Hall, but in the entry

(a) 14 C. B. 631. (b) 2 El. & Bl. 577.
(c) *Ex parte Davidson* (18 C. B. 297).

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the publishers described themselves as the proprietors of the copyright. The song having been published in this country by Davidson, from a copy sent from America, where the publication was alleged to have taken place three days before the publication here, Mr. Lover obtained a judge's order to vary the entry by substituting his name as proprietor, and got an injunction and brought an action for the infringement of his copyright. A rule to expunge or vary the amended entry having been obtained on behalf of Davidson, the Court discharged it with costs, considering that no case had been made out for its interference.

Person "aggrieved."

Whether under the circumstances of the case last referred to Davidson was a person "aggrieved" within the meaning of sect. 14 of 5 & 6 Vict. c. 45, it was not necessary to decide. Jervis, C.J., was of opinion that he was; Crowder, J., was doubtful, and the language of Willes, J., seems to point to an opposite conclusion. He asks, "Has any right of the applicant been interfered with or injuriously affected? I do not see that it has. This is not the case of a contested title: the applicant does not suppose himself to have been the original author of the composition in question: he claims to publish a thing to which he has no right whatever, merely because the person who is the author, and who therefore ought to have the sole right of publishing it here, has happened (it may be) to publish it in America a little too early, or has made an unintentional mistake in the date on the title-page, or has incorrectly described his place of abode in the entry in the book at Stationers' Hall. I do not think it is a case in which we ought to interfere." In *Graves'* case,(a) Blackburn, J., used similar language, and Hannen, J., said: "A person to be 'aggrieved' within the meaning of the statute must show that the entry is inconsistent with some right that he sets up in himself or in some other person, or that the entry would really interfere with some intended action on the part of the person making the application."

How application to expunge must be made.

An order to expunge a wrongful entry by the defendant cannot, according to Fry, J., be made at the trial of an action in which the plaintiff has not asked for it in his statement of claim. A separate application must be made by motion or summons under sect. 14.(b)

(a) L. Rep. 4 Q. B. 721, 724; 20 L. T. N. S. 877; 17 W. R. 1018. See also *ex parte Hutchins* v. *Romer* (L. R. 42 B. D. 90, 483).

(b) *Hole* v. *Bradbury* (L. R. 12 Ch. D. 899).

2. *Deposit and delivery of copies.*

To British Museum.

Sect. 6 of 5 & 6 Vict. c. 45 enacts "that a printed copy of the whole of every book which shall be published after the passing of this Act, together with all maps, prints, or other engravings belonging thereto, finished and coloured in the same manner as the best copies of the same shall be published, and also of any second or subsequent edition which shall be so published with any additions or alterations, whether the same shall be in letterpress, or in the maps, prints, or other engravings belonging thereto, and whether the first edition of such book shall have been published before or after the passing of this Act, and also of any second or subsequent edition of every book of which the first or some preceding edition shall not have been delivered for the use of the British Museum, bound, sewed, or stitched together, and upon the best paper on which the same shall be printed, shall within one calendar month after the day on which any such book shall first be sold, published, or offered for sale within the bills of mortality, or within three calendar months if the same shall first be sold, published, or offered for sale in any other part of the United Kingdom, or within twelve calendar months after the same shall first be sold, published, or offered for sale in any other part of the British dominions, be delivered on behalf of the publisher thereof, at the British Museum."

Time.

Mode of delivering at the British Museum.

As to the mode of delivering at the British Museum, sect. 7 provides, "that every copy of any book which under the provisions of this Act ought to be delivered as aforesaid, shall be delivered at the British Museum between the hours of ten in the forenoon and four in the afternoon on any day except Sunday, Ash Wednesday, Good Friday, and Christmas Day, to one of the officers of the said Museum, or to some person authorised by the trustees of the said Museum to receive the same, and such officer or other person receiving such copy is hereby required to give a receipt in writing for the same, and such delivery shall to all intents and purposes be deemed to be good and sufficient delivery under the provisions of this Act."

To other libraries.

Sect. 8 provides, as to the other libraries, "that a copy of the whole of every book, and of any second or subsequent edition of every book containing additions and alterations, together with all maps and prints belonging thereto, which after the passing of this Act shall be published, shall *on demand thereof in writing*, left at the place of abode of the publisher thereof at any time within twelve months next

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after the publication thereof, under the hand of the officer of the Company of Stationers who shall from time to time be appointed by the said Company for the purposes of this Act, or under the hand of any other person thereto authorised by the persons or bodies politic and corporate, proprietors and managers of the libraries following, (*videlicet*), the Bodleian library at Oxford, the public library at Cambridge, the library of the faculty of advocates at Edinburgh, the library of the college of the Holy and Undivided Trinity of Queen Elizabeth near Dublin, be delivered, upon the paper of which the largest number of copies of such book or edition shall be printed for sale, in the like condition as the copies prepared for sale by the publisher thereof respectively, within one month after demand made thereof in writing as aforesaid to the said officer of the said Company of Stationers for the time being, which copies the said officer shall and he is hereby required to receive at the hall of the said company, for the use of the library for which such demand shall be made within such twelve months as aforesaid; and the said officer is hereby required to give a receipt in writing for the same, and within one month after any such book shall be so delivered to him as aforesaid to deliver the same for the use of such library."

Time.

Alternative mode of delivery.

By sect. 9, "if any publisher shall be desirous of delivering the copy of such book as shall be demanded on behalf of any of the said libraries at such library, it shall be lawful for him to deliver the same at such library, free of expense, to such librarian or other person authorised to receive the same (who is hereby required in such case to receive and give a receipt in writing for the same), and such delivery shall to all intents and purposes of this Act be held as equivalent to a delivery to the said officer of the Stationers' Company."

Penalty for default in delivering copies.

Sect. 10 defines the penalty for non-compliance with the foregoing provisions. It enacts "that if any publisher of any such book or of any second or subsequent edition of any such book shall neglect to deliver the same pursuant to this Act, he shall for every such default forfeit, besides the value of such copy of such book or edition which he ought to have delivered, a sum not exceeding five pounds, to be recovered by the librarian or other officer (properly authorised) of the library for the use whereof such copy should have been delivered, in a summary way, on conviction before two justices of the peace for the county or place where the publisher making default shall reside, or by action of debt or

other proceeding of the like nature, at the suit of such librarian or other officer, in any court of record in the United Kingdom, in which action, if the plaintiff shall obtain a verdict, he shall recover his costs reasonably incurred, to be taxed as between attorney and client."

These provisions of the Act require the delivery of every book and of every volume thereof; they do not apply to a part of a volume, and the publishers of such part cannot, therefore, be made liable for non-delivery of it.(*a*)

Consequence of non-delivery.

It is to be observed that the only consequence of not depositing or delivering the copies is the liability to the penalty imposed by this section. Neglect of the duty does not incapacitate the proprietor of the copyright from proceeding at law or in equity for an infringement of it, as omission to register, so long as it continues, does by force of sect. 24.

Power of Privy Council to license publication of books.

The Judicial Committee of the Privy Council has power to license the publication of books which the proprietor refuses to republish after the death of the author. Sect. 5 of 5 & 6 Vict. c. 45, after reciting that "it is expedient to provide against the suppression of books of importance to the public," enacts "that it shall be lawful for the Judicial Committee of Her Majesty's Privy Council, on complaint made to them that the proprietor of the copyright in any book after the death of its author has refused to republish or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a license to such complainant to publish such book, in such manner and subject to such conditions as they may think fit, and that it shall be lawful for such complainant to publish such book according to such license."

Assignment and infringement of copyright.

For the law relating to the assignment of copyright in books, see the chapter on the "Transfer of Copyright," *post*; and with reference to the infringement of copyright, and the remedies for it, see the chapters on "Infringement of Copyright," and "Remedies for Infringement," *post*.

CHAPTER VIII.

COPYRIGHT IN PERIODICAL PUBLICATIONS.

The property in reviews, magazines, and other periodicals is in general of the same nature as that in books, commonly

(*a*) *British Museum* v. *Payne* (4 Bing. 548).

so called, of which we have treated in the preceding chapter. There is, however, a modification in the term of enjoyment, and there are some questions which occur with respect to these productions which it has been considered more convenient to discuss by themselves.

The sections of the Copyright Act (5 & 6 Vict. c. 45) which deal with the subjects of our present consideration are the 18th (concerning the nature and duration of the right) and the 19th (as to registration).

Nature of the right.

Sect. 18 enacts, "that when any publisher or other person shall, before or at the time of the passing of this Act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for(*a*) by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act;(*b*) except only that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act."

Duration of the right.

(*a*) With reference to the language of this portion of the section, Shadwell, V.C., says, in *Brown* v. *Cooke* (16 L. J. 143, Ch.), "It seems to me that there is an inaccuracy in the language; and the only possible way of making it English would be by referring the words 'and paid for' to the former words, 'shall have been or shall hereafter be composed, &c.'"

(*b*) A similar view of the rights of proprietors of periodicals was taken before the passing of this Act. Sir John Leach said, in *Barfield* v. *Nicholson* (2 L. J. 90, 102; 2 Sim. & S. 1), "I am of opinion that

It will be observed that the word "encyclopædia" is omitted from the latter part of this, so that the copyright in articles forming part of an encyclopædia would not revert to the author after the first term of twenty-eight years. This is probably because those articles, being of a less fugitive and more elaborate character than those supplied to ordinary reviews or magazines, are more highly paid for by the proprietor; and the work, taken as a whole, is of more enduring interest and value than other periodicals.

Limitation of right.

This section also provides, "that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assigns."

Reservation by authors of right of publishing in a separate form.

It further provides, "that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid."

Effect of sec. 18.

It will be seen from sect. 18 that the duration of the copyright in all literary productions appearing in the works therein enumerated is the same as in the case of books; but the enjoyment of that period of copyright is (except in the case of encyclopædias) divided between the proprietor or projector, &c., of the larger work in which the literary production appears, and the author of the literary production; the former enjoying the right for twenty-eight years, the latter for the remainder of the term given by the Act. It is further to be observed that the right of the proprietor, &c., of the larger work during the twenty-eight years is not of an absolute character, the right to publish any contribution in a separate form without the author's consent not being included in it.

under that statute (8 Anne, c. 19) the person who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own peculiar acquirements, that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection, who, upon certain conditions, contribute to it, is the author and proprietor of the work, if not within the literal expression, at least within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally." And see the prior case of *Wyatt* v. *Barnard* (3 V. & B. 77).

Mode of registration.

Sect. 19 enacts, "that the proprietor of the copyright in any encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts, shall be entitled to all the benefits of the registration at Stationers' Hall under this Act, on entering in the said book of registry the title of such encyclopædia, review, periodical work, or other work published in a series of books or parts, the time of the first publication of the first volume, number, or part thereof, or of the first number or volume first published after the passing of this Act in any such work which shall have been published heretofore, and the name and place of abode of the proprietor thereof, and of the publisher thereof, when such publisher shall not also be the proprietor thereof."

Where a novel entitled "Splendid Misery" had been completely published in successive numbers of a weekly periodical, the proprietor, in order to bring an action for infringement of his copyright, registered at Stationers' Hall, giving as the date of publication of the novel the day of the date of the publication of the particular weekly number of his periodical which contained the first part of the novel. It was argued that this registration was invalid, because at the time when the first part was registered all the subsequent parts had also been published. Jessel, M.R., said: "I am quite unable to follow that argument. The registration informs the public of everything that the public could have any possible desire or right to know. It cannot be less a registration of the first part because the other parts had been then published. Each part may be registered separately, and each part was actually published separately, and each part is, according to the definition in the Act of Parliament, a book."(*a*)

Title of intended *periodical.*

Registering the title of an intended magazine cannot give a copyright in that name.(*b*) It was contended in *Hogg* v. *Maxwell* that as by sects. 2 and 13 of 5 & 6 Vict. c. 45, every "part" of a book may be registered, and a right to restrain the piracy of it thereby acquired, the registration of the title "Belgravia" by the Messrs. Hogg, in October, 1863, three years before the publication of a magazine bearing that name, gave them a copyright in that title. In reply to this, Cairns, L.J., in giving judgment in that case, observed: "It is said that the word 'Belgravia,' being used upon the title-page of the magazine, was part of a volume. But at the time of making the entry in the register

(*a*) *Dicks* v. *Yates* (L. R. 18 Ch. D. 88).
(*b*) *Hogg* v. *Maxwell* (L. Rep. 2 Ch. App. 316; 16 L. T. N. S. 133; 36 L. J. 433, Ch.).

at Stationers' Hall there was no volume, no part of a volume, no sheet, no separate fraction of a publication of any kind or description. There was nothing in existence except that very entry itself, and the entry of the name of a future publication. It is quite absurd to suppose that the Legislature, in providing for the registration of that which was to be the *indicium* of something outside the registry, in the shape of a volume or part of a volume, meant that by the registration of one word copyright in that one word could be obtained, even although that one word should be registered as what was to be the title of a book or of a magazine. . . . . I apprehend that, if it were necessary to decide the point, it must be held that there cannot be what is termed copyright in a single word, although the word should be used as a fitting title for a book.(*a*) The copyright contemplated by the Act must be not in a single word, but in some words in the shape of a volume or part of a volume, which is communicated to the public, by which the public are benefited, and in return for which a certain protection is given to the author of the work." A doubt had previously been expressed by Wood, V.C., in *The Correspondent Newspaper Company* v. *Saunders*,(*b*) whether the title of a periodical formed part of the copyright, the object of the Act as to that class of publications being to regulate the rights as between the contributors and the proprietors.

Nor will any amount of expenditure incurred upon a work not yet given to the world, or any outlay in advertisements of the title of the work, give a right to an injunction restaining another person from using the same title.(*c*) "That expenditure upon a work not given to the world," says Turner, L.J.,(*d*) "can create, as against the world, an exclusive right to carry on a work of this nature seems to me a proposition quite incapable of being maintained. It never, so far as I am aware, has been thought that any such equity exists. Then, if the expenditure alone will not confer such a right, will the advertisements do so? . . . . He, the plaintiff, does not by his advertisements come under any obligation to the public to publish the work, and therefore the effect of holding the advertisements to give him a title would be that, without having given any undertaking or done anything in favour of the public, he would be acquiring a right against every member of the public to prevent their

(*a*) See *Jollie* v. *Jaques* (1 Blatch. 627).
(*b*) 11 Jur. N. S. 541; 12 L. T. N. S. 540; 13 W. R. 804.
(*c*) *Maxwell* v. *Hogg* (L. Rep. 2 Ch. App. 307; 16 L. T. N. S. 131 36 L. J. 433, Ch.).
(*d*) *Ibid.*

doing that which he himself is under no obligation to do, and may never do. . . . . There is a great distinction between the case of advertisement followed by publication and a case resting upon advertisement only. In the case of advertisement followed by publication the party publishing has given something to the world, and there is some consideration for the world's giving him a right; but in the case of mere advertisement he has neither given, nor come under any obligation to give, anything to the world, so that there is a total want of consideration for the right which he claims."

Can there be copyright in a title?

The question of the possibility of the existence of copyright in the title of a work was much discussed in the recent case of *Dicks* v. *Yates*,(*a*) in reference to the novel called "Splendid Misery." James, L.J., was of opinion that "there cannot in general be any copyright in the title or name of a book;" and he understood Jessel, M.R., to have expressed the same opinion.(*b*) Lush, L.J., said: "I do not dissent from that view, but I do not wish to decide the point, as in my opinion it does not call for a decision in the present case."

Lush, L.J., was, however, clearly of opinion that there could be no copyright in the title "Splendid Misery." He said: "I take it to be established law that to be the subject of copyright the matter must be original; it must be a composition of the author, something which has grown up in his mind, the product of something which, if applied to patent rights, would be called invention. Nothing short of that would entitle a man to copyright. Now, can it be said there is anything original in these two words? I suppose there is hardly a person who has grown to maturity in this country who has not read them hundreds of times. To my mind 'Splendid Misery' is a hackneyed phrase."(*c*)

Misleading imitation of title.

But though two periodicals (as well as two books) may have a similar title, the form, title, and mode of publication of one periodical cannot be imitated by another in such a manner as would necessarily mislead the public and induce them to purchase the latter work as continuing parts of the former one. *Hogg* v. *Kirby*(*d*) was such a case. There the plaintiff had published the *Wonderful Magazine*, which the defendant had agreed to sell upon commission. After five numbers had been published, the agreement between plaintiff and defendant was put an end to. The sixth number was advertised by the plaintiff to appear on the

(*a*) L. R. 18 C. D. 76, *ante* p. 102. (*b*) *Ibid.* p. 93.
(*c*) *Ibid.* p. 92. (*d*) 8 Ves. 215.

31st December, and was published on that day. On the 1st January a publication was put forth by the defendant under a similar title, described as a *new series improved*. The defendant's publication contained an index to the contents of the five numbers already published, and continued an article not finished in number five, beginning with the word at the bottom of the last page. The execution of the two works was generally similar, and the device on the cover the same, though not exactly similar in the execution. Lord Eldon was of opinion that the defendant had published this work, not as his own original work, but as a continuation of the work of the plaintiff, and intending to represent it as such. His lordship accordingly granted an injunction restraining the defendant from printing, publishing, &c., any copies of the work, but granted the injunction in such terms as to make it clear that it was to operate upon nothing but the publication handed out to the world as the continuation of the plaintiff's work. "I am anxious," said Lord Eldon, "that nothing in the injunction shall imply that reviews, magazines, and other works of this species may not be multiplied."

The injunction granted in the case before Lord Eldon was extended to all communications from correspondents to the defendant in his capacity as publisher of the plaintiff's work.

Conduct disentitling to protection.

Even where the statutory requisites as to registration have been duly observed, the conduct of the proprietor of a periodical may be of such a nature as to disentitle him to aid from a court of equity by means of interlocutory injunction: *e.g.*, if he lie by and knowingly allow another person to incur expense in bringing out a work, which is an infringement of his strict legal right. Thus, in *The Correspondent Newspaper Company* v. *Saunders*(*a*), a company was formed in June, 1864, to establish and carry on a weekly paper called *The Correspondent*, but the paper was not brought out until after the appearance of advertisements of the intended publication by the defendants of a paper bearing the same title, which advertisements appeared in the month of April, 1865. The title had been registered by the company in April, 1864, but ineffectually, as the protection afforded by the Copyright Act is not prospective. The defendants registered the same title on the 3rd of March, 1865, in ignorance of the intended publication by the company, and incurred considerable expense in advertisements. This

(*a*) 12 L. T. N. S. 540; 11 Jur. N. S. 540; 13 W. R. 804.

becoming known to the company, they brought out the first number of *The Correspondent* on the 3rd of May, 1865, and on the same day registered the title at Stationers' Hall. On that day also, they wrote to the defendants for the first time, telling them that they would insist on their copyright in the name *Correspondent*. On Saturday, the 6th of May, 1865, the defendants published the first number of their paper, under the title of *The Public Correspondent*, whereupon the company applied for an injunction to restrain the publication of this paper, or of any paper of which the word *Correspondent* should form a part. Wood, V.C., after expressing a doubt whether the title is part of the copyright, said: "It is no doubt true that a title may be acquired, as in a trade mark, but it seems that the defendants, prior to May, 1865, had contemplated taking this title for their paper. Then the question is this; there being two persons equally honest, and one of them having given notice that he is about to produce an article with a certain name, and the other contemplating the same thing, whether or not the first, by bringing out his article a day or two sooner than the other, acquires a right by way of trade mark. The plaintiffs' position is this. The defendants in perfect good faith, and not knowing of this rather dormant company, bring out their advertisements. It was incumbent on the plaintiffs then to communicate with them as quickly as possible, because the defendants were incurring great expense, and by their advertisements really playing into the hands of the plaintiffs. The plaintiffs, however, laid by for eight days, and did not give the defendants notice till after they had brought out their own paper, and as it is to be observed, on a Wednesday, either for the purpose of gaining priority, or else having changed their day of publication, thus supplying one of the ingredients of mistake [it was said that the papers were mistaken for each other and that the plaintiffs were thereby damnified]." An interlocutory injunction was refused, and the motion was ordered to stand over till the hearing. This decision, however, was partly grounded on the doubt entertained by the Vice-Chancellor whether there could be copyright in the name of a periodical.(*a*)

Rights of contributors.

Although sect. 18 of 5 & 6 Vict. c. 45, enacts that the proprietor, projector, &c., of an encyclopædia or periodical

(*a*) See the opinion of Lord Cairns in *Hogg* v. *Maxwell* (*ante*, pp. 102, 103). See also, as to the kind of acquiescence which disentitles to relief, the observations of Hall, V.C., in *Hogg* v. *Scott* (L. R. 18 Eq. 453, *et seq.*): and see the decision of Bacon, V.C., in *Maxwell* v. *Somerton* (30 L. T. N. S. 11; 22 W. R. 313).

publication, "composed of articles, essays, &c., shall enjoy the same rights" in articles, &c., composed on the terms that the copyright therein shall belong to him, "as if he were the actual author thereof;" this right, as already pointed out, is limited by the subsequent part of the section which prohibits the proprietor, &c., from publishing any contribution in a separate form without the author's consent. The author's right to prohibit separate publication in such a case is founded on the words of this enactment, which give him a future right of property in his composition, viz., the option of publishing it or not in a separate form at the end of twenty-eight years, a right which would be seriously injured if, being minded at the end of that period to publish his writings separately or in a collected form, he should find that they had already been published separately from the periodical work to which they were contributed.(*a*)

Registration by writer of article not necessary.

This right of the author of an article in a periodical to prevent a separate publication is not copyright within the meaning of the 24th section of 5 & 6 Vict. c. 45, and so no registration by the author is necessary to entitle him to an injunction to restrain such separate publication.(*b*)

The separate publication of an article contributed to the "Encyclopædia Metropolitana" was restrained by injunction in the case of the *Bishop of Hereford* v. *Griffin*(*c*).

Meaning of "publishing separately."

What is a "separate publication" within the meaning of this section was considered in *Smith* v. *Johnson*.(*d*) In that case the plaintiff had composed certain tales for the *London Journal* which were published in that periodical in the year 1849. In the year 1863 the proprietors proceeded to republish these tales in what they called a supplementary number of the *London Journal* published weekly, which might be had with or without the current number. The plaintiff had not given his consent to this republication, and filed a Bill praying for an injunction to restrain the proprietors of the *London Journal* from continuing the republication. It was contended on behalf of the proprietors that the act complained of was not a violation of the statute, because the author had no copyright and could not publish the stories himself; his only right was to prohibit any publication in a separate or single form of his contributions, *i.e.*,

(*a*) See *per* Wood, V.C., *Mayhew* v. *Maxwell* (1 John. & H. 315).
(*b*) *Ibid.* See also *Murray* v. *Maxwell* (3 L. T. N. S. 466).
(*c*) 16 Sim. 190.
(*d*) 4 Giff. 632; 9 L. T. N. S. 437; 33 L. J. 137, Ch.

a publication out of and unconnected with the work in which they first appeared; the defendants were not attempting to do that; the republication was a republication of their own periodical, with a simple difference in the order, and this case was therefore distinguishable from the cases of the *Bishop of Hereford* v. *Griffin*, and *Mayhew* v. *Maxwell*. Sir John Stuart, V.C., was, however, of opinion that the republication was a "publication separately," within the meaning of sect. 18 of 5 & 6 Vict. c. 45, and granted the injunction prayed for. The Vice-Chancellor said:—"Keeping in view the principle of construction that the Act of Parliament was intended to give a licence only(?) to the proprietors of periodical works purchasing and paying for a literary composition to be published as a part or portion of a periodical work—the construction of the words in the proviso which prohibits them from publishing these parts or portions which 'alone' are the property of the author—from publishing these portions 'separately and singly' seems reasonably plain. 'Publishing separately' must mean publishing separately from something. What is that 'publishing' which the Act of Parliament says shall not be separately made? It must be the publishing of the part or portion separately from that which has been before published. That is the view which has been previously taken. . . . . The Act of Parliament says the publishers shall not publish these portions separately from those parts for the publication of which they have obtained a licence already. What they [the proprietors of the *London Journal*] have done is to print the portions, already published, of those antecedent parts, in what is called a supplementary number, and which may be purchased with or without the number in which the 'portions' were originally published. That is a separate publication, separate from the 'part' in which it was originally published. To reprint in numbers which may be had with or without the concurrent number of the work is an act not permitted by the legislature."

Effect of words "and paid for," &c.

The words "and paid for by such proprietor, projector," &c., in sect. 18 have received a very strict construction from the Courts of Equity, those courts having refused to recognise the proprietor's copyright in contributions where it is not clearly shown that he has paid the contributors for them.

Thus, where the publishers of the *London Medical Gazette* employed and paid an editor, who employed persons to write articles for the *Gazette* (whether he paid them or not did not sufficiently appear), the Vice-Chancellor of England, Sir L. Shadwell, was of opinion that the publishers had not

made out that sort of derivative copyright which, under the Act of Parliament, would enable them to prevent the publication by others of articles appearing in the *Gazette*.(a) "The meaning of the Act of Parliament," he said, "as I understand the language of it, is this, that if the publisher of a periodical work employs a person to write articles for him, and pays him for them upon the terms that the copyright shall be the proprietor's—*i.e.*, the proprietor of a periodical work—the proprietor shall have the copyright of the periodical work, containing all the articles, with certain subsequent limitations, upon which nothing turns as far as this case is concerned. . . . . If I find the fact to be on the face of the affidavit that A, B and C have composed articles which, by reason of some dealing between them and the editor, who alone has been paid by Messrs. Longman [the publishers], have by the editor been inserted in this *Medical Gazette*, which is published by the plaintiff, it appears to me, if that be the statement of the facts taken altogether, that then the Messrs. Longman have not entitled themselves to the copyright which is given under the terms of the 18th section as the publishers of the periodical work, who pay the composers of the articles inserted in the periodical work upon the terms that the copyright shall belong to them as the publishers."

The same doctrine was laid down by Lord Cranworth, V.C., in *Richardson* v. *Gilbert*.(b) He held that *actual payment* for an article originally published in the *Dublin Review* was made by the Act a necessary condition to the vesting of the copyright of that article in the proprietors of the *Review*. In this case, however, his lordship was of opinion, from the averments in the Bill, that the title of the proprietors was made sufficiently clear to entitle them to an injunction restraining the defendant from publishing the article.

"On the terms that the copyright," &c.

A newspaper proprietor must also, in order to entitle himself to sue for a piracy of its contents, show that the pirated articles have been composed on the terms that the copyright in them should belong to him, as well as that the author of them has been paid.(c)

Contract may be implied.

The words of the 18th section, "on the terms that the copyright therein should belong to the proprietors," do not require that an *express* contract to that effect should be entered into between the proprietor of a periodical publication and the contributors to it. There may be an implied condition, understanding, or arrangement that the copyright in

(a) *Brown* v. *Cooke* (11 Jur. 77). (b) 1 Sim. N. S. 336.
(c) *Walter* v. *Howe* (L. R. 17 Ch. D. 708).

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contributions should vest in the proprietor of the periodical to which they are furnished, and the terms of the arrangement may be inferred from the general nature and character of the employment. Thus, the publisher of a series of law reports, furnished by barristers without any express stipulation that the copyright should belong to the publisher, possesses the copyright in those reports, and is entitled to restrain their publication by any other person.(*a*) "I think," said Maule, J., "that where a man employs another to write an article, or to do anything else for him, unless there is something in the surrounding circumstances, or in the course of dealing between the parties, to require a different construction, in the absence of a special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer—subject, of course, to the limitation pointed out in the 18th section of the Act."(*b*)

CHAPTER IX.

ENGRAVINGS OR PRINTS.

8 Geo. 2, c. 13.

The first Act passed to secure a property in prints or engravings to the inventors and engravers was the 8 Geo. 2, c. 13. In the preamble it states that "whereas divers persons have by their own genius, industry, pains, and expense, invented and engraved, or worked in mezzotinto, or chiaro oscuro, sets of historical and other prints, in hopes to have reaped the sole benefit of their labours, printsellers and other persons have of late, without the consent of the inventors, designers, and proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing, or causing to be copied, engraved, and published, base(*c*) copies of such works, designs, and prints, to the very

(*a*) *Sweet* v. *Benning* (16 C. B. 459, 481, 489). (*b*) *Ibid.* 484.

Meaning of "base copy."

(*c*) The meaning of the expression "base copy" in this statute is "anything which is not the genuine work of the author:" (*Per* Kelly, C.B., delivering the judgment of the Court of Exchequer Chamber in *Graves* v. *Ashford* (L. Rep. 2 C. P. 419; 16 L. T. N. S. 98; 36 L. J. 139, C. P.) In that case it had been suggested in argument that a thing would not be a "base copy" which was avowed to be a copy, and did not profess to be the original from which it was taken. "It seems to us," said the Chief Baron, "that to put that construction upon the word 'base' would be cutting down the meaning of the legislature to a most mischievous extent, and working great injustice to the author."

great prejudice and detriment of the inventors, designers, and proprietors thereof." To prevent this for the future, the statute enacted (sect. 1) that from and after the 24th of June, 1735, every person who should *invent and design*, engrave, etch, or work in mezzotinto or chiaro oscuro, or *from his own works and inventions*, should cause to be designed and engraved, &c., any historical or other print or prints, should have the sole right and liberty of printing and reprinting the same for the term of fourteen years [since extended to twenty-eight(*a*)] "to commence from the day of first publishing thereof, which should be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints." The section then inflicts a penalty on printsellers or other persons guilty of piracy.(*b*)

Date of publishing and proprietor's name to be affixed to each print.

Sect. 2 exempts from the penalties any person or persons who should, after the passing of the Act, purchase any plate or plates, for printing, from the original proprietors thereof.

This Act vested the property in prints only in those who should "invent and design, engrave, &c.," or who, "from his own works and inventions," should cause to be designed and engraved, &c., such prints. No provision was made for the protection of the property in prints which were not designed by the person who engraved them.

This defect was, however, supplied by 7 Geo. 3, c. 38, the first section of which enacted that the benefit and protection of the preceding Act of Geo. 2 should be extended to all and every person who should "engrave, etch, or work in mezzotinto or chiaro oscuro, or cause to be engraved, etched, or worked, any print *taken from any picture, drawing, model or sculpture, either ancient or modern* . . . . in like manner as if such print had been graved or drawn from the original design of such graver, etcher, or draftsman."

7 Geo. 3, c. 38.

Duration of copyright.

This Act also enlarged the term of enjoyment of the right from fourteen to twenty-eight years. Sect. 7 enacts, "that the sole right and liberty of printing and reprinting, intended to be secured and protected by the said former Act [8 Geo. 2, c. 13] and this Act, shall be extended, continued, and be vested in the respective proprietors, for the space of twenty-eight years, to commence from the day of the first publishing of any of the works respectively hereinbefore and in the said former Act mentioned."

(*a*) By 7 Geo. 3, c. 38, s. 7.

(*b*) See the chapters on "Infringement of Copyright" and the "Remedies for Infringement," *post*.

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The nature of the right given, where the engraving is taken from a picture, drawing, &c., is thus explained by James, L.J., in *Dicks* v. *Brooks*:(*a*)—"It appears to me that the protection given by the subsequent Acts to the mere engraver was intended to be, and was, commensurate with that which the engraver did; that the engraver did not acquire against anybody in the world any right to that which was the work of the original painter, did not acquire any right to the design, did not acquire any right to the grouping or composition, because that was not his work, but the work of the original painter. What, as it seems to me, the Act gave him and intended to give him, was protection for that which was his own meritorious work."

17 Geo. 3, c. 57.

The last Act on the subject, 17 Geo. 3, c. 57, was passed, as the title indicates, "for more effectually securing the property of prints to inventors and engravers by enabling them to sue for and recover penalties in certain cases." It recites the two former Acts and proceeds: "Whereas the said Acts have not effectually answered the purposes for which they were intended, and it is necessary for the encouragement of artists, and for securing to them the property of and in their works, and for the advancement and improvement of the aforesaid arts, that such further provisions should be made as are hereinafter mentioned and contained." It then gives to the proprietor of prints an action on the case against any offender by piracy, in which damages and double costs may be obtained.(*b*)

Action on the case.

Ireland.

The provisions of 17 Geo. 3, c. 57, which applied to Great Britain only, were extended to Ireland by 6 & 7 Will. 4, c. 59; sect. 2 of which refers to engravings or prints "of any description whatever published in any part of Great Britain or Ireland." The action on the case may be brought against the person offending "in any court of law in Great Britain or Ireland."(*c*)

Lithographs, &c.

Doubts having been entertained whether the provisions of the preceding statutes extended to lithographs and other impressions taken by mechanical processes, sect. 14 of 15 & 16 Vict. c. 12, declares "that the provisions of the said Acts are intended to include prints taken by lithography or any other process by which prints or impress-

(*a*) L. R. 15 C. D. 34.

(*b*) See the chapter on "Remedies for Infringement," *post*.

(*c*) "I think that in *Gambart* v. *Ball* (14 C. B. N. S. 306) the object of the Acts was well pointed out as being of two-fold character, (1) the protection of the reputation of the engraver, and (2) his protection against any invasion of his commercial property in the print." (*Per* Baggallay, L.J., *Dicks* v. *Brooks*, L. R. 15 Ch. D. 36).

ions of drawings or designs are capable of being multiplied indefinitely, and the said Acts shall be construed accordingly."

Prints accompanying letterpress.

The protection given by the statutes has been applied to the case of prints not published alone, but appearing along with letterpress which they illustrate.(*a*) Lord Ellenborough, however, was of opinion that if an artist should, merely from reading the letterpress of another's work, sketch designs similar to illustrations appearing in that work, this would not be a piracy of such illustrations.(*b*)

Maps, charts, and plans.

As to maps, charts, and plans, see the observations of James, L.J., and Mellish, L.J., qu[illegible] *ante* p. 70.(*c*)

A person who employs another to make a drawing or design is not the author of it.(*d*)

A person may, however, be the inventor or designer, though himself unable to engrave or make a drawing.

In *Stannard* v. *Harrison*,(*e*) the plaintiff, a lithographer and publisher, being desirous of bringing out a bird's-eye view of Paris and its environs, took to an artist named Concanen a rough sketch or draft (a drawing of the same size as the stone on which it was to be engraved) showing the forts, a large French map and other maps, and a picture published in the *Illustrated London News*, and gave information from day to day of the earthworks that were made. Vice-Chancellor Bacon held that the plaintiff was the designer and inventor of the bird's-eye view executed from these materials by the artist. His lordship said: "There is nothing in the circumstance that Mr. Stannard cannot draw. Mr. Stannard can invent, which is more valuable, and as happens in [the case of] ninety-nine out of every hundred inventors, the inventor is generally a man who cannot perfect the machinery by which the invention is to be carried out."

Vice-Chancellor Bacon appears to have regarded the bird's-eye view of the seat of war as a "design" or "print" within the meaning of the Acts of 8 Geo. 2, c. 13, and 7 Geo. 3, c. 38, and not as a "map" separately published. This was a question of fact for his determination. It would obviously be very unsafe for publishers of maps in the form of bird's-eye views of countries to rely on this determination as finally settling the question, in view of the language used by

(*a*) *Bowerth* v. *Wilkes* (1 Camp. N. P. 94); *Wilkins* v. *Aikin* (17 Ves. 422).
(*b*) See *Bowerth* v. *Wilkes* (1 Camp. 99).
(*c*) See 7 Geo. 3, c. 38, s. 1, and 17 Geo. 3, c. 57.
(*d*) *Jeffreys* v. *Baldwin*, Amb. 163. (*e*) 24 L. T. N. S. 570.

Lords Justices James and Mellish, in *Stannard* v. *Lee*, as to *all maps* separately published, *ante* p. 70. Publishers of such bird's-eye maps would act prudently in registering before suing.

Where subject is common.

Where the subject from which an engraving is taken is common and open to all, the first engraver of a print of it is not entitled to restrain any one else from making an engraving of the same subject, provided it be made from the original subject and is not a copy of the first engraving; but he is entitled to prevent another from copying his own engraving. Thus, before the Act 25 & 26 Vict. c. 68, gave a copyright in paintings, drawings, and photographs, the engraver of a print of any such painting, drawing, or photograph, though he could not claim a monopoly of the *use of the picture*, &c., from which the engraving was made, was entitled to say to any other person wishing to copy the picture, "Take the trouble of going to the picture yourself, but do not avail yourself of my labour, who have been to the picture, and have executed the engraving."(*a*)

In *Wyatt* v. *Barnard*,(*b*) Lord Eldon said, with reference to specifications of patents, that a person who chose to go to the office, copy a specification and publish it, could not by so doing acquire a right to restrain another from copying it. It is not clear from the meagre report whether Lord Eldon intended merely to assert the right of every one to copy the original specification, or to deny altogether the existence of copyright in productions copied from specifications. The reporters, judging from their marginal note, seem to have understood him in the latter sense, but the former was most probably what he intended.

At any rate, if an engraving is made from a drawing taken from the specification of a patent, the engraver has a right to prevent any other person from pirating his engraving. "The engraver," said Best, C.J., in *Newton* v. *Coxie*,(*c*) "although a copyist, produces the resemblance by means very different from those employed by the painter or draftsman from whom he copies—means which require great labour and talent. The engraver produces his effects by the management of light and shade, or as the term of his art expresses it, the *chiaro oscuro*. The due degrees of light and shade are produced by different lines and dots: he who is the engraver must decide on the choice of the different lines or dots for himself, and on his choice depends the suc-

(*a*) See *per* Best, C.J., in *Newton* v. *Coxie* (4 Bing. 246).
(*b*) 3 Ves. & B. 78. (*c*) 4 Bing. 246.

cess of his print. If he copies from another engraving, he may see how the person who engraved that has produced the desired effect, and so without skill or attention become a successful rival. . . . . Without the introduction of express words, I should have thought therefore, that a case of this kind fell within the spirit of the Act. But the 7 Geo. 3, c. 38, extends the protection of the first statute to any print of any 'map, chart, or *plan, or any other print or prints whatsoever.*' The same words are used in 17 Geo. 3, c. 57, and nothing is said as to the place in which the original is to be found." In this case the engraving had been executed from a drawing made by an apprentice of the engraver's, from a patent specification.

Requisites to copyright in engravings.

The words in sect. 1 of 8 Geo. 2, c. 13, requiring the proprietor's name to be affixed to each print, have given rise to considerable discussion, and to some diversity of opinion, amongst the judges. That Act confers a copyright, and inflicts a penalty for the infringement of it, in historical and other prints—to commence from the day of the first publishing thereof—"which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints." This would seem to confer a copyright property only in prints so marked with the proprietor's name; and since the decision of *Donaldson* v. *Beckett* [in the year 1774] put an end to the notion of a copyright at common law, independent of statutory enactment, it should seem that no property can now exist in published engravings other than what springs from a strict compliance with the requisites of the statute.

A different opinion, indeed, appears to have been entertained by Lord Hardwicke in the case of *Blackwell* v. *Harper*.(*a*) That eminent judge expressed an opinion, but somewhat doubtfully, that the words of the Act requiring the insertion of the date of publication on prints were directory only, and not descriptive; and, therefore, that the day was necessary to be inserted on prints only where the penalty of the Act was intended to be taken advantage of. The injunction prayed for by the plaintiff in that case was granted, though the date of publication did not appear on the engravings. And Lord Ellenborough, in *Bowerth* v. *Wilkes*,(*b*) was of opinion that a plaintiff could recover for piracy of his prints, though his name was not engraved upon them; that the interest being vested, the common law gave

(*a*) 2 Atk. 95; Barn. Chanc. Rep. 210.
(*b*) 1 Camp. N. P. 97.

the remedy. His lordship, however, reserved the point for the consideration of the full court, but it was not brought before them.

Lord Alvanley was of a contrary opinion in *Harrison* v. *Hogg*.(a) He considered it "essential to the plaintiff's right to insert the date, &c., many good reasons requiring that the date should be upon the plate."

The reason for requiring the name and the date to appear on the print is, according to Lord Kenyon, "that they might convey some useful intelligence to the public. The date is of importance, that the public may know the period of the monopoly. The name of the proprietor should appear, in order that those who wish to copy it might know to whom to apply for consent. It seems, therefore, necessary that the date should remain, but that the name of the proprietor should be altered as often as the property is changed."(b)

The view taken by Lord Alvanley, in *Harrison* v. *Hogg*, was adopted by the Court of Common Pleas in *Newton* v. *Cowie*,(c) after a review of all the cases. They held that in order to maintain an action for pirating prints, the proprietor's name and the date of publication must both appear on the original print, pursuant to 8 Geo. 2, c. 13. Speaking of the statutes 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57, Best, C.J., delivering the judgment of the court, said: "Neither of these two Acts repeats the qualifications of name and date [contained in 8 Geo. 2, c. 7], and the last has, after enumerating different sorts of prints, the words 'any print or prints whatsoever.' But these Acts are in *pari materiâ*, and must be taken together, and it was not necessary to repeat in the last the qualifications contained in the first. The right of action given in 17 Geo. 3 is for the piracy of plates, the monopoly of which is secured by the 8 Geo. 2. It is impossible to suppose the legislature intended that the public should not have the protection afforded them by the first Act against a fraudulent continuance of the monopoly beyond the term prescribed by that Act." This case was followed by the Court of King's Bench in *Brooks* v. *Cock*,(d) Littledale, J., remarking, that the words "which shall be truly engraved on each plate" are not merely directory, but *make such engraving part of the thing to be protected*. And in reply to an argument of counsel that 17 Geo. 3, c. 57, passed for the purpose of enlarging the privileges of the artist, gave him a

(a) 2 Ves. 327. See also *Bonner* v. *Field* (cited 5 T. R. 44).
(b) *Thompson* v. *Symonds* (5 T. R. 45).
(c) 4 Bing. 234.
(d) 3 Ad. & El. 138.

right of action for injuries to his copyright, without any such restriction or condition as is supposed to attach under the previous statute of Geo. 2, Lord Denman, C.J., remarked: "The statutes are evidently connected with each other;" and Littledale, J., added: "the Stat. 17 Geo. 3, c. 57, was intended only to give the proprietors of plates a further remedy. Before that Act, the person infringing the copyright was liable only to forfeit his plate and prints, and five shillings for each print. As many engravings are published at a great expense, this was an insufficient remedy for their being pirated, and, therefore, the Act of 17 Geo. 3, c. 57, was passed enabling the proprietor to recover damages in an action on the case."(*a*)

All the cases agree that the penalties at least cannot be recovered, unless the conditions laid down in the Act of Geo 2 are complied with.

Publication line. What is sufficient disclosure of proprietorship.

The statute requires that the "name of the proprietor" shall be truly engraved on each plate, as well as "the day of the first publishing thereof." The name of the publisher is not required, but only that of the proprietor. The Act does not, however, say that he shall be called the proprietor on the plate; he may even be described on the plate as the publisher, provided he be in fact the proprietor. Thus, where the publication line contained the words—"London: Published by Henry Graves & Co., May 1, 1861, Printsellers to the Queen, 6, Pall Mall," Henry Graves & Co. being the actual proprietors of the engraving, it was held to be a sufficient compliance with the requisites of the Act. In that case(*b*) Kelly, C.B., delivering the judgment of the Court of Exchequer Chamber, said, "The question is, whether the Legislature, when they required the name of the proprietor to appear, required that he should be expressly described as being the proprietor. They certainly have not said so in terms, and we must put a reasonable construction upon the words they have used. Every one who is at all conversant with these things looks at what is called the 'publication line' for the name of the proprietor. The name which appears on the face of the print must be asssumed to be that of the proprietor, and it cannot alter the effect or be less a compliance with the Act because he is called the publisher. I think the statute has been substantially and literally complied with."

A further objection was urged in the case last referred to

(*a*) Cf. *Colnaghi* v. *Ward* (6 Jur. 970).

(*b*) *Graves* v. *Ashford* (L. Rep. 2 C. P. 421; 16 L. T. N. S. 98; 36 L. J. 139, C. P.).

—that the words "Henry Graves and Company" imported that Henry Graves had a partner, who *primâ facie* would be a part proprietor of the engraving, and that, as his name was not given the Act was not complied with. It appeared, however, from the evidence, that the person indicated by the words "and company" was a person to whom Mr. Graves paid a fixed sum per month out of his business; and the court held that the payment to a person of a fixed sum periodically did not constitute that person a partner or part proprietor; that Henry Graves, therefore, was the sole proprietor of the engravings in question, and that as his name appeared thereon, the requirement of the statute had been sufficiently complied with.

Malins, V.C., held that "Rock & Co., London," was a sufficient description of the proprietors, and that it was not necessary to state the names of all the partners.(*a*) "I think," he said, "that the trading name of the firm is a sufficient designation, inasmuch as it enables parties to know whom to apply to for information, and whom they must sue."

In *Blackwell* v. *Harper*(*b*) Lord Hardwicke held the words "Elizabeth Blackwell, sculpsit et delineavit" to be a sufficient disclosure of proprietorship.

In the case just referred to only one name appeared on the print, and so no mistake could arise. But even where more than one name appears on the engraving, if one of them is the name of the proprietor, the requirement of the statute is sufficiently complied with. Thus, where the publication line ran "Newton, del., 1st May, 1826; Gladwin, sculp.," the Court of Common Pleas held it to be sufficient.(*c*) "The words on these prints," said Best, C.J., "do not directly designate that the plaintiff is the proprietor, nor do I believe that it has ever been stated on any print that was ever published who was the proprietor. Nor in any one of the cases which have been decided in favour of engravers has the word proprietor ever appeared upon the print. . . . . The words of the Act are satisfied by the disclosure of the proprietor's name; this is a sufficient indication of the person who is to be applied to for leave to copy the print; coupled with the date, it shows how long the designer has had the monopoly, and fully accomplishes the two objects of the Act."(*d*)

(*a*) *Rock* v. *Lazarus* (L. R. 15 Eq. 104).
(*b*) 2 Atk. 93; Barn. 210 s. c.
(*c*) *Newton* v. *Cowie* (4 Biug. 234). See also *Stannard* v. *Lee* (23 L. T. N. S. 306).
(*d*) *Ibid.* 240.

Prints engraved and struck off abroad, but published here, are not within the protection of the Copyright Acts.(a)

Engravings.

It is not necessary to register engravings or prints under the Act of 5 & 6 Vict. c. 45, in order to sue for piracy.

Maps.

The proprietor of copyright in a map, whether it forms part of a book or is published separately, must register it before he can sue for an infringement of his copyright.(b)

For the law relating to the assignment of copyright in prints, see the chapter on the "Transfer of Copyright," *post*; and as to the piracy of prints, and the remedies for piracy, see the chapters on "Infringement of Copyright," and "Remedies for Infringement," *post*.

CHAPTER X.

DRAMATIC AND MUSICAL COMPOSITIONS.

Property twofold.

The property in a dramatic or musical composition is of a twofold nature. It embraces the copyright in the composition itself, considered simply as a literary production (in other words, a "book" within the Act 5 & 6 Vict. c. 45), and also the right of representing the drama or performing the musical composition at any place of dramatic entertainment in the British dominions. Of the two rights the latter, which is the more valuable, was secured to authors and composers at a later period than the former.

From the passing of the Copyright Act of Anne, the authors of dramatic, as well as other literary productions, have enjoyed a copyright in their works; but it was not till the statute of 3 & 4 Will. 4, c. 15, that the right of controlling the representation of their dramas in any part of the British dominions was conferred on the authors of dramatic compositions. Before the passing of that Act the author could not prevent any one that liked to do so from publicly performing on the stage a drama in which the author possessed the copyright. He could only prevent the publication of his work by multiplication of copies of it; and it was held that repeating the piece from memory on the stage was no publication of it.(c) The author's composition

(a) *Page* v. *Townsend* (5 Sim. 395).

(b) *Stannard* v. *Lee* (L. R. 6 Chy. App. 346), reversing the decision of Malins, V.C.

(c) *Coleman* v. *Wathen* (5 T. R. 245); *Macklin* v. *Richardson* (Amb. 694).

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might also be altered and abridged to make it more suitable for theatrical representation, and might be so represented for profit by whoever pleased.(*a*)

3 & 4 Will. 4, c. 15.

The legislature at length intervened to remedy this defect in the law. 3 & 4 Will. 4, c. 15, commonly called Sir Bulwer Lytton's Act, gave to the author or his assignee of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment composed, and not printed and published, the sole right of having it represented in any part of the British dominions, and to the author or his assignee of any such dramatic production, printed and published within ten years before the passing of the Act, or which might be printed and published after the passing of the Act, the sole liberty of representing or causing to be represented the same at any place of dramatic entertainment in the British dominions during the same period of time that copyright then subsisted in books. A proviso was added saving the rights of parties to whom before the passing of the Act the author or his assignee had given authority to represent his piece.(*b*)

As to the meaning of the words "place of dramatic entertainment," see *post*, the chapter on "Infringement of Copyright."

Sect. 2.

The right of the author is further secured by sect. 2, which inflicts a penalty on persons performing pieces contrary to the Act.

The foregoing provisions were extended to musical compositions by sect. 20 of 5 & 6 Vict. c. 45.

This Act has been held by the Court of Appeal, overruling the decision of the Court of the Queen's Bench, to apply retrospectively to musical compositions published within ten years before it was passed.(*c*)

Musical compositions, 45 & 46 Vict. c. 40.

An important alteration in the law relating to copyright in musical compositions has been made by 45 & 46 Vict. c. 40, passed "to protect the public from vexatious proceedings for the recovery of penalties for the unauthorized performance" of such compositions.

Notice that right of performance is reserved.

Sect. 1 provides that "the proprietor of the copyright in any musical composition first published after the passing of this Act, or his assignee, who shall be entitled to, and be desirous of, retaining in his own hands exclusively the right of public representation or performance of the same, shall print or cause to be printed upon the title-page of every

(*a*) *Murray* v. *Elliston* (5 Bar. and Ald. 657). (*b*) Sect. 1.
(*c*) *Ex parte. Hutchins* and *Romer* (L. R. 4 Q. B. D. 90, 483, and *ante* p. 72).

published copy of such musical composition a notice to the effect that the right of public representation or performance is reserved."

Where right of performance and copyright are vested in different owners.

Sect. 2 enacts that "in case, after the passing of this Act, the right of public representation or performance of, and the copyright in, any musical composition shall be or become vested, *before publication of any copy thereof*, in different owners, then if the owner of the right of public representation or performance shall desire to retain the same, he shall before any such publication of any copy of such musical composition give to the owner of the copyright therein notice in writing requiring him to print upon every copy of such musical composition a notice to the effect that the right of public representation or performance is reserved."

"In case the right of public representation or performance of, and the copyright in, any musical composition shall, *after publication of any copy thereof*, subsequently to the passing of this Act, first become vested in different owners, and such notice as aforesaid shall have been duly printed on all copies published after the passing of this Act previously to such vesting, then if the owner of the right of performance or representation shall desire to retain the same he shall before the publication of any further copies of such musical composition, give notice in writing to the person in whom the copyright shall be then vested, requiring him to print such notice as aforesaid on every copy of such musical composition to be thereafter published." (*Id.*)

Penalty on owner of copyright for non-compliance with notice from owner of right of performance.

By sect. 3 "if the owner for the time being of the copyright in any musical composition shall, after due notice being given to him or his predecessor in title at the time, and generally in accordance with the last preceding section, neglect or fail to print legibly and conspicuously upon every copy of such composition published by him or by his authority, or by any person lawfully entitled to publish the same, and claiming through or under him, a note or memorandum stating that the right of public representation or performance is reserved, then and in such case the owner of the copyright at the time of the happening of such neglect or default shall forfeit and pay to the owner of the right of public representation or performance of such composition the sum of £20 to be recovered in any court of competent jurisdiction."

Costs.

Sect. 4 provides that notwithstanding the provisions of 3 & 4 Will. 4, c. 15, or any other Act in which those provisions are incorporated, "the costs of any action or proceeding for penalties or damages in respect of the unauthorized

representation or performance of any musical composition *published before the passing of this Act*, shall, in cases in which the plaintiff shall not recover more than forty shillings as penalty or damages, be in the discretion of the court or judge before whom such action or proceeding shall be tried."

Duration of the right

The duration of the author's right to restrain or authorise the performance of his dramatic or musical compositions is by sect. 20 of 5 & 6 Vict. c. 45, made of equal length with the term of an author's copyright in books, *i.e.*, the author's lifetime, and seven years more if they together amount to or exceed forty-two years: if they do not, the right endures for the term of forty-two years from the period of first publication in the case of books, or of first public representation or performance in the case of dramatic pieces or musical compositions.

The section enacts that "the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the term in this Act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this Act, to the first publication of any book."

If there are joint owners of the right, the consent of all must be obtained to a representation of the piece.(*a*)

Mode of registration.

As to the manner of registration, the same section provides "that in case of any dramatic piece or musical composition in manuscript, it shall be sufficient for the person having the sole liberty of representing or performing or causing to be represented or performed the same, to register only (1) the title thereof, (2) the name and place of abode of the author or composer thereof, (3) the name and place of abode of the proprietor thereof, and (4) the time and place of its first representation or performance."

Author.

A person who employs another to write a play for him, suggests the subject and even makes some alterations, is not a joint author of the play.(*b*)

(*a*) *Powell* v. *Head* (L. R. 12 C. D. 688).
(*b*) *Levy* v. *Rutley* (L. R. 6 C. P. 523).

Remedies for infringement.

As to remedies for infringement of the rights, sect. 21 enacts "that the person who shall at any time have the sole liberty of representing such dramatic piece or musical composition shall have and enjoy the remedies given and provided in the said Acts of the third and fourth years of the reign of his late Majesty King William the Fourth, passed to amend the laws relating to dramatic literary property, during the whole of his interest therein, as fully as if the same were re-enacted in this Act." See the chapter on "Remedies for Infringement," *post*.

Assignment of copyright does not convey right to represent or perform.

The right of representation is now so distinct from the copyright in a dramatic or musical piece, that the assignment of the latter does not convey the former without an express assertion on the register of an intention to do so.

Sect. 22 enacts "that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment."

Where, however, the composer of two songs assigned for value "all his present and future vested and contingent copyright in the musical compositions and . . . . all other the estate, right, title, interest, property, contingency, possibility, benefit, claim, and demand whatsoever," this was held by the Court of Appeal to convey the exclusive right of performing.(*a*) The court considered the words "property" and "benefit" as sufficiently large to include all the rights of the original proprietor.

Definition of "dramatic piece."

A "dramatic piece" is defined by sect. 2 "to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment."

Musical compositions.

From the preceding statutory definition of "dramatic piece," it will be seen that musical compositions are embraced under that head, and that the statutory provisions relating to the performance of ordinary plays apply also to musical entertainments. Sec. 20, indeed, after reciting that it is expedient to extend to musical compositions the benefits of the Act 3 & 4 Will. 4, c. 15, enacts that the provisions of the said Act, as well as of the Act of 5 & 6 Vict. c. 45, shall apply to musical compositions, and then proceeds to confer on the authors the sole right of representing or performing them in the terms already cited, p. 122.

(*a*) *Ex pte. Hutchins* and *Romer* (L. R. 4 Q B. D. 483).

Long before this enactment it had been held that written music was within the Copyright Act of Anne;(*a*) but up to the time of the passing of 5 & 6 Vict. c. 45, the author was unable to restrain the unauthorised public performance of his compositions by others. Lord Mansfield, in the very case which decided that music was within the Act of Anne, said: "A person may use the copy by playing it; but he has no right to rob the author of the profit by multiplying copies and disposing of them to his own use." The author is now placed on a level, in this respect, with the author of dramatic pieces commonly so-called.

An introduction to a pantomime, which is the only *written* part of such an entertainment, is a dramatic piece within the protection of this Act.(*b*) It is not correct to say that such an introduction is not an entire and complete piece.(*c*)

Musical composition accessory to a play.

Where a person is employed by another to write for reward paid to him a musical composition, to be used as part of the representation of a dramatic piece, and as a mere accessory to such dramatic piece, the composer of the musical accessory has no copyright therein. The property in music so composed becomes vested in the employer, and he does not require the consent of the composer in order to represent it. This was decided by the Court of Common Pleas in the case of *Hatton* v. *Kean*,(*d*) where the plaintiff had been employed by the defendant to compose certain music to be performed during and as part of the representation of three of Shakespeare's plays. The musical composition was held to have become the property of Mr. Kean, and the plaintiff was held never to have been, within the language of the statute, the owner or proprietor thereof. This case was followed and approved in *Wallerstein* v. *Herbert*,(*e*) where the composer of the musical accessories was employed

(*a*) *Bach* v. *Longman* (Cowp. 623).

(*b*) *Lee* v. *Simpson* (3 C. B. 871).

(*c*) 3 C. B. 881, 882. As to what is a dramatic entertainment within 6 & 7 Vict. c. 68, see *Day* v. *Simpson* (18 C. B. N. S. 680).

(*d*) 7 C. B. N. S. 268; 29 L. J. 20. C. P.; 1 L. T. N. S. 10.

(*e*) 16 L. T. N. S. 453; 15 W. R. 838. See *Keene* v. *Wheatley* (9 Amer. Law Reg. 47), where A, in the general theatrical employment of B, was engaged in the office of assisting in the adaptation of a play for representation, and B was held to be the proprietor of the additions so made, as products of his intellectual exertions in a particular service in his employment; on the principle that where an inventor in the course of his experimental essays employs an assistant, who suggests and adapts a subordinate improvement, it is in law an incident or part of the employer's main invention.

to find an orchestral band, to procure and pay all the musical performers, and furnish all the musical instruments, to provide, lead, and perform overtures and *entr'acte* music, and the music incidental to the dramatic performances. In performance of his duties under this engagement he composed the music for a drama called "Lady Audley's Secret," and it was held that he had no copyright in such music.

Pianoforte score of an opera

A pianoforte score of an opera is an independent musical composition separate and distinct from the opera itself; and where such pianoforte score has been arranged by a person other than the composer of the opera, it is incorrect to register the score as the composition of the composer of the opera.(*a*) "It seems impossible," says Cockburn, C.J., "to believe that any musician, however great his talent, whether as a composer or as an executant, from the mere circumstance of having the opera in its entirety before him, that is to say, with all the score for all the instruments, which neither eye nor mind could take in at the same time, could be able to play the accompaniment while singing the music of the opera at the piano. It requires time, reflection, skill and mind so to condense the opera score as to compose the pianoforte accompaniment. I cannot therefore bring myself to think that the pianoforte arrangement of the music of an opera, which originally consisted of vocal music and instrumentation to be executed by some half-hundred instruments can be said to be anything else than a specific, separate, and distinct work from the opera itself."(*b*)

Whether a pianoforte arrangement of the score of an opera executed without the consent of the composer of the opera would be an infringement of his copyright therein, has not been expressly decided. In *Wood* v. *Boosey*,(*c*) Cockburn, C.J., carefully guarded himself against being understood to decide that it would not, and Blackburn, J., was of opinion that it would. Kelly, C.B., on appeal(*d*) says, "No doubt it is a piracy of the opera, and the composer may maintain an action against the adapter or the publisher of the

(*a*) *Wood* v. *Boosey* (L. Rep. 2 Q. B. 340; 7 B. & S. 869; 15 L. T. N. S. 530; 36 L. J. 103, Q. B.; affirmed on appeal, L. Rep. 3 Q. B. 223; 9 B. & S. 175; 37 L. J. 84, Q. B.; 18 L. T. N. S. 105).

(*b*) L. Rep. 2 Q. B. 350; 15 L. T. N. S. 530; 36 L. J. 103, Q. B.; 15 W. R. 309.

(*c*) L. Rep. 2 Q. B. 350, 354. See the remarks of Lord Abinger, C.B., in *D'Almaine* v. *Boosey* (1 Y. & C. 288).

(*d*) 18 L. T. N. S. 108; L. Rep. 3, Q. B. 223; 37 L. J. 84, Q. B.; 16 W. R. 485.

adaptation;" but it was not necessary to decide the point in that case.

Though the pianoforte arrangement may, on account of incorrect registration, be unprotected, still any one who should, even by independent labour expended upon it, reproduce a substantial part of the music of the original opera could be restrained from publicly performing it.(*a*)

As to the assignment of the rights treated of in this chapter, the infringement thereof, and the remedies for infringement, see the chapters on "Transfer," "Infringement of Copyright," and "Remedies for Infringement," *post*.

CHAPTER XI.

PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

Origin of copyright.

THE copyright in paintings, drawings, and photographs dates from, and is altogether dependent on, the statute 25 & 26 Vict. c. 68. The preamble to that Act states that "the authors of paintings, drawings, and photographs have no copyright in such their works,(*b*) and it is expedient that the law should in that respect be amended."

Nature and duration of the right.

Sect. 1 enacts that "the author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, or photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns shall have the *sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof, by any means and of any size*, for the term of the natural life of such author and seven years after his death."(*c*)

Who is author of photograph.

The question who is the *author* of a photograph which several persons take part in producing, was considered by the Court of Appeal in the recent case of *Nottage* v. *Jackson*.(*d*) The case, however, only decided that the proprietors of photographic studios who carry on their business through managers and a large staff of photographic artists and assistants, but

(*a*) See the judgment in *Boosey* v. *Fairlie*, L. R. 7, C. D. p. 317.

(*b*) See the opinion of Abbott, C.J., in *De Berenger* v. *Wheble* (2 St. N. P. 549).

(*c*) The Act says nothing as to the *place of first publication*. Compare Sect. 12 of the Act with Sect. 19 of 7 Vict. c. 12.

(*d*) L. R. 11 Q. B. D. 627; 49 L. T. N. S. 339.

who do not take a personal part in the production of photographs are not authors within the meaning of the section; the result of which is, in the language of the Rolls (since the copyright is to endure for the life of the author) that the great photographers of London must "either superintend the work themselves," or when they choose an artist to do it, have regard to "not only his skill but his state of health."(*a*)

It was unnecessary to give a definition of the actual author in a case where the various processes are managed by different persons. "The nearest I can come to is," said Brett, M.R., "that it is the person who effectively is, as near as he can be, the cause of the picture which is produced—that is, the person who has superintended the arrangement, who has actually formed the picture by putting the people into position, and arranging the place in which the people are to be—the man who is the effective cause of that;" a definition substantially adopted by Bowen, L.J.(*b*)

Can more than one person be author.

Brett, M.R., in this case seemed to doubt whether the author must not be a single person. He asked: "Can two persons be the author of a photograph? It is difficult to say; but if they are, for whose life is it to last? For the life of one of them, or for the life of the longest liver, or what?" The opinion of Bowen, L.J., seems to have been different. After pointing out that the section does not confer a copyright during the life of the author "or authors," he said: "I do not mean to say that you must not construe the section as if it did, and that if there had been two authors and one of them survived the other the copyright would not, perhaps, last during the life of the survivor; but I do say that the person who drew this section evidently thought that in ninety-nine cases out of a hundred there would be only one." Field, J., in the Court below, was clearly of opinion that several persons might constitute an author within the meaning of the statute.(*c*) It was unnecessary to decide the point in the Court of Appeal.

What is an original photograph.

A photograph of an engraving or a picture is a photograph in which copyright is given in this section. In a recent case,(*d*) it was contended in argument that photographs taken from engravings or pictures are not "original" photographs within the meaning of the statute, and therefore that no copyright existed in them, to which Blackburn, J., replies: "It does not appear from the language of the

(*a*) L. R. 11 Q. B. D. p. 633. (*b*) *Ibid.* p. 637.
(*c*) See the report in the Court below, 49 L. T. N. S. 339.
(*d*) *Graves's case* (20 L. T. N. S. 877; L. Rep. 4 Q. B. 715).

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Act that the word 'original' was intended to apply at all to photographs; but if it does, what photograph can be original if a photograph from a picture of an artist is not so?"

Where work is sold to or made for another.

Sect. 1 contains a proviso "that when any painting or drawing, or the negative of any photograph, shall for the first time after the passing of this Act [29th July, 1862] be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof, unless it be expressly reserved to him by agreement in writing, signed, at or before the time of such sale or disposition, by the vendee or assignee of such painting or drawing, or of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing, or of such negative of a photograph, or to the person for or on whose behalf the same shall have been made or executed; nor shall the vendee or assignee thereof be entitled to any such copyright, unless, at or before the time of such sale or disposition, an agreement in writing, signed by the person so selling or disposing of the same, or by his agent duly authorised, shall have been made to that effect."

By force of this section the copyright in a painting, drawing, or photograph is, in case of a sale or assignment of the painting, drawing, or negative of the photograph, altogether gone, unless (1) it be either expressly reserved to the author by the vendee or assignee "by agreement in writing signed at or before the time" of sale or disposition, or (2) it be conferred on the vendee or assignee "at or before the time of sale or disposition" by "an agreement in writing by the person so selling or disposing, or by his agent duly authorised." (3) If the painting, drawing, or negative of a photograph be made or executed for or on behalf of any other person for a good or valuable consideration, the copyright belongs to the person for or on whose behalf it has been made or executed.

Copyright not to prevent other persons copying original object.

Sect. 2 provides that nothing contained in the Act "shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object." This means that, though the owner of a particular photograph, &c., may have the sole right of multiplying copies of

it, nobody else shall be prevented from taking a fresh photograph, &c., of the same object or place.(*a*)

Registration.

Sect. 4 provides as to registration that "there shall be kept at the Hall of the Stationers' Company, by the officer appointed by the said company for the purposes of the Act 5 & 6 Vict. c. 45, a book or books called "The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs," wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work, and in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph of the said works."

No action for anything done before registration.

This section also provides that "no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration."

This renders registration necessary on the part of an assignee before he can sue for the penalties imposed by the Act in case of infringement; but it does not make it necessary that all or any previous assignments should also be registered, or that the copyright of the original author should be registered. It is enough that the assignment to the person suing has been registered.(*b*)

Sufficiency of description.

The Act requires that the memorandum of registration should contain amongst other things "a short description of the nature and subject of the work, and in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph" of the work. The question has been raised in two cases, what is a sufficient "description of the nature and subject" of the work within the meaning of this section?

In *Ex parte Beal*(*c*) it was contended that the entry of the

(*a*) *Per* Blackburn, J., *Graves's case* (20 L. T. N. S. 881; L. Rep. 4 Q. B. 722).

(*b*) *Graves's case, ubi supra.*

(*c*) 9 B. & S. 395; L. Rep. 3 Q. B. 387; 18 L. T. N. S. 285; 37 L. J. 161, Q. B.

name "Ordered on Foreign Service" was not a sufficient description of a picture of a young officer in a railway carriage taking leave of a lady, nor the entry of the names "My First Sermon" and "My Second Sermon" a sufficient description of a picture and a photograph representing respectively a child looking with eyes wide open at its first sermon, and fast asleep at its second. The Court of Queen's Bench, however, thought that the requirements of the statute had been sufficiently complied with.

"Is not the object of the Legislature," said Blackburn, J., "that enough be stated to identify the production, and that the registration must be *bonâ fide!* that a man shall not first claim one thing, and then sue for another! The description must be such as shall earmark the subject." In answer to an argument that the object of the registration was like that of the registration of a patent, viz., to give notice to everyone of certain things which he is not to do, Blackburn, J., said, "That is not the object. Penalties are imposed on persons who copy the work of others. The person who does so must in most cases know that he is pirating from some one. No doubt there is the conceivable case where he does this because he is told by another person who has no authority that he may do so; and if he does this with *bonâ fides* the penalty should be reduced to a nominal sum. Then, in the case where a man sells copies of a work not made by himself but by others, the statute says this must be done *knowingly*. The object of the Legislature was that there should be such a description of the subject as will be sufficient to *identify* it. For this purpose the conventional name applied to it will in general hardly be sufficient; there should be description of the subject; and whether there is or not is a question of fact for the tribunal. Taking that as the question which was before the justice in this case, and importing our own knowledge of these pictures, which we have all seen, the description of the subject of the first is evidently that of an officer ordered abroad, and taking leave of his friends. So of the second and third: who could reasonably doubt that what was intended to be represented was a child with its eyes wide open looking at its first sermon and fast asleep at the second? Some cases were suggested in the argument in which I do not say there might not be some difficulty, as, for instance, the figure of a dog described as 'A distinguished Member of the Humane Society.' So also a bullfinch and a couple of squirrels, described as 'A Piper and a Pair of Nutcrackers.' There it would be right to put a short description of the subject, or at all events wise to

give more than the name. But the question here is, does what is given earmark the picture?"

In *Re Walker and Graves*(*a*) the sufficiency of the description of the picture last referred to, "A Piper and a Pair of Nutcrackers," was questioned, but the Court did not find it necessary to pronounce an opinion on the subject.

Registration, &c.

The several enactments in the Act 5 & 6 Vict. c. 45,(*b*) with relation to keeping the register book thereby required, and the inspection thereof, the searches therein, and the delivery of certified and stamped copies thereof, the reception of such copies in evidence, the making of false entries in the said book, and the production in evidence of papers falsely purporting to be copies of such entries, the application to the courts and judges by persons aggrieved(*c*) by entries in the said book, and the expunging and varying such entries, are to apply to the book or books to be kept by virtue of the present Act, and to the entries and assignments of copyright and proprietorship therein under this Act, except that the forms of entry prescribed by 5 & 6 Vict. c. 45, may be varied to meet the circumstances of the case, and that the sum to be demanded by the officer of the Company of Stationers for making any entry required by this Act shall be one shilling only.(*d*)

Person "aggrieved."

A person who has been convicted of infringing the copyright in certain paintings and photographs of the registered proprietor, but who sets up no title in himself or adduces any evidence to rebut the *primâ facie* evidence of proprietorship afforded by the book of registry, is not a person "aggrieved" within the meaning of this section or of sect. 14 of 5 & 6 Vict. c. 45.

"A person," said Hannen, J.,(*e*) "to be 'aggrieved' within the meaning of the statute must show that the entry is inconsistent with some right that he sets up in himself or in some other person, or that the entry would really interfere with some intended action on the part of the person making the application." "It seems," said Blackburn, J., in the same case,(*f*) "that to make a person aggrieved within the meaning of the statute, the applicant must have some substantial objection, and one going to the

(*a*) 20 L. T. N. S. 877; L. Rep. 4 Q. B. 715.
(*b*) *Vide ante*, pp. 87–89.
(*c*) The words in 5 & 6 Vict. c. 45, s. 14, are "if any person shall deem himself aggrieved," &c.
(*d*) 25 & 26 Vict. c. 68, s. 5.
(*e*) *Graves's case* (L. Rep. 4 Q. B. 724; 20 L. T. N. S. 877).
(*f*) *Ibid.*

merits of the registered proprietor's title; then the Court may direct an issue, or have the question otherwise disposed of, or, if they think this the proper course, may set aside or expunge the entry. But I do not think it is enough to entitle a person to say that he is aggrieved, and that the entry ought to be expunged, that, although the registered proprietor has a complete title in equity and in good sense, yet there is some slip either in the signing of the memorandum or in the spelling of a name; this would be my view if it were necessary to decide this question." Compare the language of Willes, J., in *Ex parte Davidson*, cited *ante*, p. 96.

The wholesome provision of sect. 16 of the Act of 5 & 6 Vict. c. 45, requiring the defendant in an action for infringement to give notice of the objections to the plaintiff's title on which he intends to rely, is not made applicable to the case of paintings, drawings, or photographs.

Copyright in paintings, drawings, or photographs is personal property, and assignable as such.(*a*)

As to the infringement of this copyright, and the remedies for infringement, see the chapters on "Infringement of Copyright" and "Remedies for Infringement," *post*.

CHAPTER XII.

SCULPTURE, MODELS, AND BUSTS.

Origin of right.

THE copyright in sculpture, models, and casts is dependent solely on the Act 54 Geo. 3, c. 56; the former Act on the subject (38 Geo. 3, c. 71),(*b*) being now repealed.(*c*)

Subjects in which copyright exists.

Sect. 1 of 54 Geo. 3, c. 56, enacts "that from and after the passing of this Act every person or persons who shall make or cause to be made any new and original sculpture, or model, or copy or cast of the human figure or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals, or of any part or parts of any animal combined with the human figure or otherwise, or of any subject being matter of invention in sculpture, or of any

(*a*) 25 & 26 Vict. c. 68, s. 3. See the chapter on "Transfer of Copyright," *post*.

(*b*) For the opinion of Lord Ellenborough on the inefficient character of this Act, see *Gahagan* v. *Cooper* (3 Camp. 111, 114).

(*c*) By 24 & 25 Vict. c. 101.

alto or basso relievo representing any of the matters or things hereinbefore mentioned, or any cast from nature of the human figure, or of any part or parts of the human figure, or of any cast from nature of any animal, or of any part or parts of any animal, or of any such subject containing or representing any of the matters and things hereinbefore mentioned, whether separate or combined, shall have the sole right and property of all and in every such new and original sculpture, model, copy, and cast of the human figure or human figures, and of all and in every such bust or busts, and of all and in every such part or parts of the human figure, clothed in drapery or otherwise, and of all and in every such new and original sculpture, model, copy and cast, representing any animal or animals, and of all and in every such work representing any part or parts of any animal combined with the human figure or otherwise, and of all and in every such new and original sculpture, model, copy and cast of any subject, being matter of invention in sculpture, and of all and in every such new and original sculpture, model, copy and cast in alto or basso relievo, representing any of the matters or things hereinbefore mentioned, and of every such cast from nature, for the term of fourteen years from first putting forth or publishing the same; provided, in all and in every case, the proprietor or proprietors do cause his, her, or their name or names, with the date, to be put on all and every such new and original sculpture, model, copy or cast, and on every such cast from nature, before the same shall be put forth or published."

Condition to be observed.

The term of enjoyment is, by the above section, to be "fourteen years from first *putting forth or publishing*"(*a*) the work; but an additional term of fourteen years is granted if the maker of the original sculpture, &c., is living at the expiration of the former term.

Duration.

Sect. 6 provides "that from and immediately after the expiration of the said term of fourteen years, the sole right of making and disposing of such new and original sculpture, or model, or copy, or cast of any of the matters or things hereinbefore mentioned, shall return to the person or persons who originally made or caused to be made the same, if he or they shall be then living, for the further term of fourteen years [excepting in the case or cases where such person or persons shall by sale or otherwise have divested himself, herself, or themselves, of such right of making or disposing of

(*a*) See the remarks of Brady, L.C., in *Turner* v. *Robinson* (10 Ir. Ch. 516).

any new and original sculpture, or model, or copy, or cast of any of the matters or things hereinbefore mentioned, previous to the passing of this Act]."(*a*)

Registration.

Permission was given to register any of the works in which copyright is given by the foregoing enactments under the Designs Act, 1850 (13 & 14 Vict. c. 104 sect. 6); and sect. 7 of that Act inflicted a penalty on persons making, importing, &c., pirated copies or casts of works registered in accordance with the provisions of the Act. Little use, however, was made of the permission, and it has now been abolished.(*b*)

Sculpture first published abroad.

If the article of sculpture, model, copy, or cast is first published out of Her Majesty's dominions, the maker has no copyright in it other than such copyright as may be obtained

(*a*) The part within brackets was repealed in 1873 by 36 & 37 Vic. c. 91.

Most persons who have dealt with the subject of copyright in Sculpture, Models and Casts, have fallen into a curious error as to the duration of the right. In the ordinary text-books (see Phillips on Copyright, p. 226; Copinger on Copyright, 2nd. edit., p. 382), and the Digest of Copyright Law, prepared for the Copyright Commissioners, Article 20, it is laid down that the second period of fourteen years is given only where the author has not divested himself of his copyright. All assume that where the author has, by sale or otherwise, divested himself of his copyright, the copyright endures only for the term of fourteen years from the date of first publication; whereas the section (6) of the Act says only that such second period of fourteen years shall be denied, the author being alive at the expiration of the first period, only when he has, by sale or otherwise, divested himself of the right "previous to the passing of this Act," *i.e.* the 18th of May, 1814. And this exception, having long ceased to possess any practical value, was, as above stated, repealed by the Statute Law Revision Act, 1873. That an author may, *after* the passing of the Act, divest himself of the original term of copyright, and nevertheless, if alive at its expiration, enjoy the second term, is shown by a comparison of sect. 4. providing a mode of transferring the copyright by deed, with the enactment in sect. 6 that, at the expiration of fourteen years, the copyright shall "return" to the author if then alive. If the enactments are read carefully, it will appear that the author may, by deed, transfer his copyright for the whole of the original term of fourteen years, and yet, if alive at the expiration of that term, acquire copyright for a further term of fourteen years, which he may alienate in like manner. Further, there seems no reason why he should not transfer his copyright for the first period by deed, and likewise bind himself by contract to transfer his copyright for the second period also, in case he should live to acquire it.

(*b*) See the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57, s. 113, sched. 3). Only three objects a year had been registered on an average of five years previously to 1883, and on conferring with leading sculptors it was found that they did not value the permission at all. (Speech of Mr. Chamberlain on the second reading of the Bill).

under the International Copyright Acts, and on a strict compliance with the requirements of those Acts. See the chapter on International Copyright, *post*, and especially sect. 19 of 7 Vict. c. 12, *post*, p. 145. PART I. CHAPTER XII.

CHAPTER XIII.

COLONIAL COPYRIGHT.

THE provisions of the General Copyright Act of 5 & 6 Vict. c. 45, apply to "every part of the British dominions," a term which includes "all the colonies, settlements, and possessions of the Crown which now are or hereafter may be acquired."(*a*) The Acts relating to copyright in works of the fine arts also apply to all the British dominions.

Foreign Reprints Act.

The only enactment peculiarly relating to the colonies is the Act of 10 & 11 Vict. c. 95, commonly known as the Foreign Reprints Act, passed to amend the law relating to the protection in the colonies of works entitled to copyright in the United Kingdom. Previously to the passing of that Act it was absolutely prohibited to import into any part of the British dominions books in which copyright subsisted, first composed, written, or printed in the United Kingdom and printed or reprinted in any other country.(*b*) But the first section of that Act provides "that in case the Legislature or proper legislative authorities in any British possession shall be disposed to make due provision for securing or protecting the rights of British authors in such possession, and shall pass an Act or make an ordinance for that purpose, and shall transmit the same in the proper manner to the Secretary of State, in order that it may be submitted to Her Majesty, and in case her Majesty shall be of opinion that such Act or ordinance is sufficient for the purpose of securing to British authors reasonable protection within such possession, it shall be lawful for her Majesty, if she think fit so to do, to express her royal approval of such Act or ordinance, and thereupon to issue an Order in Council declaring that so long as the provisions of such Act or ordinance continue in force within such colony the prohibi-

Power to suspend, in certain cases, prohibition against admission of pirated books into colonies.

(*a*) Sect. 2 and 29.

(*b*) See 5 & 6 Vict. c. 45, s. 17, and 8 & 9 Vict. c. 93.

tions contained in the aforesaid Acts, and hereinbefore recited, and any prohibitions contained in the said Acts or in any other Acts against the importing, selling, letting out to hire, exposing for sale or hire, or possessing foreign reprints of books first composed, written, printed, or published in the United Kingdom, and entitled to copyright therein, shall be suspended so far as regards such colony; and thereupon such Act or ordinance shall come into operation, except so far as may be otherwise provided therein, or as may be otherwise directed by such Order in Council, anything in the said last-recited Act or in any other Act to the contrary notwithstanding."

The Orders in Council are to be published in the *Gazette*, and laid before Parliament, as well as the Colonial Acts or ordinances. Sect. 2 enacts "that every such Order in Council shall, within one week after the issuing thereof, be published in the *London Gazette*, and that a copy thereof, and of every such Colonial Act or ordinance so approved as aforesaid by her Majesty, shall be laid before both Houses of Parliament within six weeks after the issuing of such Order, if Parliament be then sitting, or if Parliament be not then sitting, then within six weeks after the opening of the next Session of Parliament."

Colonies within the Act.

The following colonies have brought themselves within the provisions of this Act: New Brunswick, Nova Scotia, Prince Edward's Island, Bermuda, Bahamas, Barbadoes, Canada,(*a*) St. Lucia, St. Vincent, British Guiana, Mauritius, Jamaica, Newfoundland, Grenada, St. Christopher, Antigua, Nevis, Cape of Good Hope, and Natal.

Canada.

By sect. 91 of the Act 30 Vict. c. 3, which joins Canada, Nova Scotia, and New Brunswick into one dominion, under the name of Canada, all matters coming under the head of

(*a*) The provision made by the Canadian Legislature was, that American reprints of English copyright works might be imported into the colony on payment of a Customs duty of 12½ per cent. which was to be collected by the Canadian Government and paid to the British Government for the benefit of the authors interested. Like provisions were made in other colonies. ("Report of Copyright Commissioners," paragraph 192.) So far as British authors and owners of copyright are concerned, the Act has proved a complete failure. Foreign reprints of copyright works have been largely introduced into the colonies, and notably American reprints into the Dominion of Canada; but no returns, or returns of an absurdly small amount, have been made to the authors and owners. (*Ibid.*, paragraph 193.) Strong efforts have in consequence been made to repeal the Foreign Reprints Act; but hitherto unsuccessfully.

copyrights in those three provinces are to be within the exclusive legislative authority of the Parliament of Canada, and not within that of the legislatures of the provinces.

An Act was passed by the Dominion Legislature in 1875, which was sent over in the form of a Bill reserved for Her Majesty's assent; but, as doubts were entertained whether the Act was not repugnant to Imperial legislation and to the Order in Council made in 1868, by which the prohibition against importing foreign reprints into Canada had been suspended, an Imperial Act (38 & 39 Vict. c. 53) was passed in 1875, empowering Her Majesty to assent to the Canadian Bill, which Her Majesty subsequently did.(*a*)

Under this Act, a copyright for the time allowed by the Act may be obtained by *republication* or *reproduction* in Canada, or by a production or publication there at the same time as in the United Kingdom.

Copyright by republication or simultaneous publication in Canada.

By sects. 4 and 7 of the Canadian Act, any person domiciled in Canada or in any part of the British possessions, or being a citizen of any country having an international copyright treaty with the United Kingdom, is to have the sole liberty of printing, publishing, and selling his work, and of allowing translations to be printed or sold, for the term of twenty-eight years from the time of recording it in the book to be kept for the purpose by the Minister of Agriculture; on condition that the work (if literary, scientific, or artistic) be printed and published, or reprinted *or republished* in Canada, or, in case of a work of art, that it be produced *or reproduced* in Canada, whether they be so published or produced for the first time or *contemporaneously with* or *subsequently to publication or production elsewhere*; provided that in no case shall the exclusive privilege in Canada continue to exist after it has expired anywhere else.

For 28 years.

If at the expiration of the twenty-eight years, the author, or any of the authors is still living, or being dead has left a widow or a child or children living, the same exclusive right shall be continued to such author, or, if dead, then to such widow and child or children (as the case may be) for the further term of fourteen years; but in such case within one year after the expiration of the first term the title of the work secured is to be a second time recorded.(*b*)

Further term of 14 years.

In all cases of renewal of copyright under the Act, the author or proprietor is, within two months from the date of

(*a*) "Report of Copyright Commissioners," paragraph, 198.
(*b*) Sect. 5.

such renewal, to cause a copy of the record thereof to be published once in the *Canada Gazette.*(*a*)

Requirements to be observed.

No person is to be entitled to the benefit of the Act unless he has deposited in the office of the Minister of Agriculture two copies of such book, map, chart, musical composition, photograph, print, cut, or engraving, and in case of paintings, drawings, statuary, and sculpture, unless he has furnished a written description of such works of art; and the Minister of Agriculture is to cause the copyright of the same to be recorded forthwith in a book to be kept for that purpose,(*b*) and to cause one of the two copies of such book, map, chart, musical composition, photograph, print, cut, or engraving aforesaid, to be deposited in the Library of the Parliament of Canada.(*c*)

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

Interim copyright.

An interim copyright pending publication or republication in Canada, may be obtained by depositing in the office of the Minister of Agriculture a copy of the title, or a designation of the work, which is to be registered in an interim copyright register; such interim registration not to endure for more than a month from the date of the original publication elsewhere, within which period the work must be printed or reprinted and published in Canada.(*e*)

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

A literary work intended to be published in pamphlet or book form, but which is first published in separate articles in

(*a*) Sect. 6. (*b*) Sect. 7. (*c*) Sect. 8.
(*d*) Sect. 9. (*e*) Sect. 10. (*f*) *Ibid.*

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

But the importation of newspapers and magazines published in foreign countries, and containing, together with foreign original matter, portions of British copyright works republished with the consent of the author or his assigns, or under the law of the country where such copyright exists, is permitted.(*b*)

Failure to print and publish or reprint and republish within the time prescribed, after interim registration, subjects the offender to a penalty not exceeding one hundred dollars.(*c*)

How registration obtained.

The application for the registration of an interim copyright, of a temporary copyright, and of a copyright may be made in the name of the author or of his legal representative by any person purporting to be the agent of the said author, and any fraudulent assumption of such authority is a misdemeanor, punishable by fine and imprisonment; and any damage caused by a fraudulent or an erroneous assumption of such authority is made recoverable before any court of competent jurisdiction.(*d*)

Penalty for infringement.

If, during the term of copyright or interim copyright in a book, a piracy is committed, the offender is to forfeit every piratical copy to the copyright owner, and for every copy found in his possession is to pay such sum, not less than ten cents, nor more than one dollar, as the Court shall determine, half to go to Her Majesty and half to the copyright owner.(*e*)

In case of piracy of a painting, drawing, statue or other work of art, the plate or plates are to be forfeited, and every sheet copied; and for every sheet published or exposed for sale contrary to the Act, the offender is to pay a similar fine, which is to be similarly divided.(*f*)

A similar provision applies in case of piracy of any print, cut, engraving, map, chart, musical composition or photograph.(*g*)

(*a*) Sect. 10 (*b*) *Ibid.* (*c*) Sect. 17. (*d*) Sect. 23.
(*e*) Sect. 11. (*f*) Sect. 12. (*g*) Sect. 13.

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By section 15 of the Act, "works of which the copyright has been granted and is subsisting in the United Kingdom, and copyright of which is not secured or subsisting in Canada under any Canadian or Provincial Act, shall, upon being printed and published or reprinted or republished in Canada, be entitled to copyright under this Act; but nothing in this Act shall be held to prohibit the importation from the United Kingdom of copies of such works legally printed there. In the case of the reprinting of any such copyright work subsequent to its publication in the United Kingdom, any person who may have previous to the date of entry of such work upon the registers of copyright imported any foreign reprints, shall have the privilege of disposing of such reprints by sale or otherwise; the burden of proof, however, in such a case will lie with such person to establish the extent and regularity of the transaction."

The false assertion by impression on or insertion in any work, of the existence of a Canadian copyright renders the offender liable to a penalty not exceeding 300 dollars.(*a*)

If any work is executed for or sold to another, the copyright goes with it, unless expressly reserved by deed to the author or artist.(*b*)

Assignment of copyright.

The right of an author of a literary, scientific, or artistic work to obtain a copyright, and the copyright when obtained, is assignable in law, either as to the whole interest or any part thereof, by an intrument in writing made in duplicate, and to be recorded in the office of the Minister of Agriculture, on production of both duplicates and payment of the fee provided by the Act. One of the duplicates is to be retained in the office of the Minister of Agriculture, and the other returned, with the certificate of registration, to the party depositing it.(*c*)

Other sections deal with cancelling or altering registrations;(*d*) making copies or certified extracts evidence;(*e*) the wilfully making a false entry in the register, or giving in evidence any false copy of an entry therein;(*f*) the registration of books published anonymously,(*g*) second editions of books;(*h*) limiting the time for actions and prosecutions for the recovery of penalties to two years;(*i*) and settling the scale of fees payable on registration.

Book out of print.

By sect. 22, "Should a work copyrighted in Canada become out of print, a complaint may be lodged by any

(*a*) Sect. 17. (*b*) Sect. 16. (*c*) Sect. 18.
(*d*) Sect. 19. (*e*) Sect. 21. (*f*) Sect. 24.
(*g*) Sect. 25. (*h*) Sect. 26. (*i*) Sect. 27.

person with the Minister of Agriculture, who, on the fact being ascertained to his satisfaction, shall notify the copyright owner of the complaint and of the fact; and if, within a reasonable time, no remedy is applied by such owner, the Minister of Agriculture may grant a licence to any person to publish a new edition or to import the work, specifying the number of copies, and the royalty to be paid on each to the copyright owner."

India. An Act of the Legislative Council of India was passed on the subject of copyright in the year 1847. After reciting in the preamble that doubts might exist whether copyright could be enforced by the common law, or by virtue of the principles of equity, in the territories subject to the government of the East India Company, and whether the Act of 5 & 6 Vict. c. 45, had made provision for the enforcement of the right against persons not being British subjects, it enacts that copyright in every book published in India in the author's lifetime, after the 28th August, 1833, shall endure for the natural life of the author, and seven years after, or for forty-two years, if the seven years sooner expire; and copyright in any book published after the death of the author shall endure for forty-two years, and shall be the property of the proprietor of the author's manuscript.(*a*)

A book of registry is to be kept in the office of the Secretary to the Government of India for the Home Department, and to be open at all convenient times to the inspection of any person on payment of eight annas for every entry searched for or inspected; and certified copies are to be given on payment of two rupees, such copies to be received in evidence in all Courts, and to be *primâ facie* proof of proprietorship.(*b*) The wilful making of a false entry, or producing a false copy in evidence, was made a misdemeanor punishable with imprisonment to the extent of three years;(*c*) but this enactment has since been repealed.(*d*)

In order to sue for an infringement of copyright, an entry must be made in the registry book of the title of the book, the time of the first publication, the name and place of abode of the publisher and of the proprietor either of the whole or any part of the copyright, in a form given in a schedule to the Act. A sum of two rupees is to be paid on registering.(*e*)

Every registered proprietor may assign his interest, or a

(*a*) Sect. 1. (*b*) Sect. 3.
(*c*) Sect. 4. (*d*) By Act xvii. of 1862.
(*e*) Sect. 5. The form of entry is exactly the same as that given in the schedule to 5 & 6 Vict. c. 45. *Vide ante*, p. 89.

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part of it, by making entry in the registry book of the assignment, and of the name and place of abode of the assignee, in a form given in the schedule to the Act.(*a*) A like sum is to be paid on making an entry of assignment.(*b*) Any person deeming himself aggrieved by any entry in the registry book may apply to the supreme court or any judge of it; and the judge may make such order for expunging, varying, or confirming it as he may consider just, with or without costs, and the Secretary of the Government shall carry out such order.(*c*)

The enactment as to the copyright in encyclopedias, reviews, magazines, and other periodical works is in all respects the same as that contained in sect. 18 of 5 & 6 Vict. c. 45.(*d*) The proprietor is entitled to all the benefits of registration by making entry in the registry book of the title, the time of first publication of the first volume, number, or part, and the name and place of abode of the proprietor and publisher.(*e*)

A special action on the case lies for infringement of copyright by printing or causing to be printed for sale or exportation without the proprietor's consent in writing, or by having in one's possession for sale or hire without such consent, any book so unlawfully printed.(*f*) The defendant in such an action, if it be tried in the superior courts, must give notice in writing of the objections to the plaintiff's title on which he means to rely,(*g*) and if it be tried in a local court, he must state the same matters in his answer.(*h*) In actions in the superior courts the defendant may plead the general issue and give the special matter in evidence.(*i*)

All copies of registered books which have been unlawfully printed are to belong to the registered proprietor, who, after demand in writing, may sue for them in detinue or trover.(*j*)

All proceedings under the Act for offences committed against it must be commenced within twelve calendar months after the offence has been committed.(*k*)

A provision is made against the possible suppression of books of importance to the public. Sect. 2 enacts that it shall be lawful for the Governor-General in Council, on complaint made to them that the proprietor of the copyright in any book published after the passing of the Act has, after the

(*a*) Sect. 5. The form is the same as that given in the schedule to 5 & 6 Vict. c. 45. (*b*) *Ibid.*
(*c*) Sect. 6. (*d*) *Vide ante*, pp. 100, 101. (*e*) Sect. 11.
(*f*) Sect. 7. (*g*) Sect. 8. (*h*) Sect. 9.
(*i*) Sect. 15. (*j*) Sects. 12, 13. (*k*) Sect. 16.

death of its author, refused to republish it, or allow the republication of it, and that by reason of such refusal, such book may be withheld from the public, to grant a licence to such complainant to publish the book in such manner, and subject to such conditions as they may think fit, and it shall be lawful for such complainant to publish such book according to such licence.

Works published in a colony are foreign works.

If a work of any sort is published in a colony, no copyright can be acquired in it under the Copyright Act of 5 & 6 Vict. c. 45. It stands in all respects on the same footing as any other foreign work; and the only rights which can be acquired here in respect of it are those which may be acquired by the author of any other work published abroad, under the International Copyright Acts.(*a*)

We have already seen (*ante*, p. 21) that the residence of the author in any British colony at the time of the publication of his work in the United Kingdom, is sufficient to entitle him to a copyright in it under 5 & 6 Vict. c. 45.

Copyright in designs.

The Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), sect. 104, enacts that where it is made to appear to Her Majesty that the legislature of any British possession has made satisfactory provision for the protection of designs registered in this country, it shall be lawful for Her Majesty from time to time, by Order in Council, to apply the provisions of sect. 103 of that Act, with such variations or additions, if any, as to Her Majesty in Council may seem fit, to such British possession.

Sect. 103 deals with the subject of international arrangements for the protection of designs, and its provisions are set forth *post*, p. 162.

(*a*) On this the "Report of the Royal Commissioners on Copyright" observes: "It is obvious that if by Imperial law copyright is to be enforced in the colonies, while at the same time first publication in the United Kingdom is a condition of obtaining it, the colonies are not treated on fair and equal terms, and that there is just ground of complaint on the part of colonial authors and publishers. In truth, a colonial author is placed even in a worse position than a foreign author who is the subject of a country with which we have an international copyright convention. For example, a French author can publish in France, and subsequently, upon the performance of certain conditions, such as registration, secure himself against piracy of his work throughout the British Empire, while the colonial author can neither secure his property in the United Kingdom nor France, unless he first publishes in the United Kingdom" (paragraphs 52, 53). The Commissioners recommend that where a work has been first published in any of Her Majesty's possessions, the proprietor should be entitled to the same copyright as he would have been entitled to if the work had been first published in the United Kingdom (paragraph 58).

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An Order in Council under this Act, is, from a date to be mentioned for the purpose in the Order, to take effect as if its provisions had been contained in the Act; but it shall be lawful for Her Majesty in Council to revoke any Order in Council made under the Act.(*a*)

CHAPTER XIV.

INTERNATIONAL COPYRIGHT.

Wholly statutory.

COPYRIGHT of an international character is altogether dependent on statutory enactments of the present reign. Three Acts have been passed, of which the first (1 & 2 Vict. c. 59), relating to books only, was repealed by the second (7 & 8 Vict. c. 12), the latter being amended and partly repealed by 15 Vict. c. 12.

Reciprocal protection to be secured.

In order to secure the rights of home authors, it is enacted by the same statute which empowers Her Majesty by Order in Council to grant copyright to foreigners, "that no such Order in Council shall have any effect unless it shall be therein stated, as the ground for issuing the same, that due protection has been secured by the foreign Power so named in such Order in Council for the benefit of parties interested in works first published in the dominions of Her Majesty similar to those comprised in such order."(*b*)

General power to grant copyright to foreigners.

Sect. 2 of 7 & 8 Vict. c. 12, gives a general power to Her Majesty to grant copyright to foreigners by such Order in Council as has been named. It enacts "that it shall be lawful for Her Majesty, by any Order of Her Majesty in Council, to direct that, as respects all or any particular class

In what works.

or classes of the following works, namely, books, prints, articles of sculpture, and other works of art, to be defined in such order, which shall after a future time, to be specified in such order, be first published in any foreign country to be named in such order, the authors, inventors, designers, engravers, and makers thereof respectively, their respective executors, administrators, and assigns, shall have the privi-

Duration.

lege of copyright therein during such period or respective periods as shall be defined in such order, not exceeding, however, as to any of the above-mentioned works, the term of copyright which authors, inventors, designers, engravers, and makers of the like works respectively first published in

(*a*) Sect. 104. (*b*) 7 & 8 Vict. c. 12, s. 14.

the United Kingdom may be then entitled to under the hereinbefore recited Acts respectively, or under any Acts which may hereafter be passed in that behalf."

Orders to be published in *Gazette* and laid before Parliament.

The Orders in Council are to be published in the *London Gazette*, and to take effect from the date of such publication.(*a*) They are, further, to be laid before both Houses of Parliament within six weeks after issuing them if Parliament is then sitting, and if it is not sitting, then within six weeks after the commencement of the next session.(*b*)

Term of enjoyment and time for registration may vary.

Different periods of duration for foreign copyright, and different times for registration, and for delivery of books and other articles at Stationers' Hall, may be specified by the Order in Council for different countries and classes of works.(*c*)

No right to exist independently of the Act.

No right of property is recognised in any of the above-mentioned works except what this Act confers. Sect. 19 enacts "that neither the author of any book, nor the author or composer of any dramatic piece or musical composition, nor the inventor, designer, or engraver of any print, nor the maker of any article of sculpture, or of such other work of art as aforesaid, which shall after the passing of this Act be first published out of her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act."

British authors first publishing abroad.

This enactment applies equally to British and to foreign authors who first publish their books or publicly represent their dramatic compositions abroad. And though no convention has been made with the foreign country in which a dramatic piece has been performed, and so a compliance with the requisites of 7 & 8 Vict. c. 12, is impossible, the author, though a British subject, is not entitled in this country to any copyright in his drama if it has been first represented abroad.

In *Boucicault* v. *Delafield*,(*d*) where the plaintiff sought to restrain the unauthorised representation of a dramatic piece—"The Colleen Bawn"—composed by him, and first performed in New York, but duly registered at Stationers' Hall on the day of its first representation in England, it was contended, in support of his alleged exclusive right of representation, that the former Copyright Acts were intended to confer a right upon British subjects at all events, and that the International Copyright Act of 7 & 8

(*a*) Sect. 15. (*b*) Sect. 16. (*c*) Sect. 13.
(*d*) 9 Jur. N. S. 1282; 33 L. J. 38, Ch.; 12 W. R. 101.

Vict. c. 12, being intended to extend to foreigners, under certain circumstances mentioned in it, the advantages which British authors had in this country with regard to literary works and dramatic performances, could not be construed to take away the privilege already conferred upon British subjects; and that *Jeffreys* v. *Boosey* (*ante*, pp. 14 *seq.*), not having been determined when the 7 & 8 Vict. c. 12 passed, could not be presumed to have been in the purview of the Legislature. The Vice-Chancellor (Wood) was of a different opinion. After pointing out that a foreigner residing here, and first publishing his work here, is entitled, just as much as any British subject, to the benefit of the copyright which applies to dramatic performances, but not if he first publish his work abroad, his Honour proceeded: "Now, that being so, how would the law stand when the Act 7 & 8 Vict. c. 12 was passed? If Mr. Boucicault had been an American, and had first represented his piece in this country, he would have been entitled to the benefit of the provisions of the Dramatic Copyright Act. Then an Act is passed extending to any nation with which the Queen may, through her Privy Council, enter into arrangements for that purpose pursuant to the Act, the privileges which are accorded to all people who first publish their works in this country. If the plaintiff had this sort of double right, it was just that which the 7 & 8 Vict. c. 12, s. 19, was intended to extinguish. That Act says that no one shall have this double right. It says, in other words, that this Act having been passed, if any person, British subject or not, chooses to deprive this country of the advantage of the first representation of his work, then he may get the benefit of copyright if he can under the arrangement which may have been come to pursuant to 7 & 8 Vict. c. 12, between this country and the country which he so favours with his representation; but if he chooses to publish his performance in a country which has not entered into any treaty or made any such arrangement with regard to copyright, then this country has nothing more to say to him; he must be taken to have elected under which of the two statutes with regard to copyright he wishes to come, by performing his work in one country instead of the other, and he is thereby excluded from all advantage of publishing in the other. I cannot see anything to justify me in restricting the provision or to enable me to say that it applies to foreigners and does not apply to British subjects. The object of the Legislature seems to have been in these cases to secure in this country the benefit of the first publication, and if it extended to any

other country the same benefit, it was only to be on certain conditions, namely, that reciprocity should be afforded and that the representation should take place for the first time in England. I am bound therefore to hold that Mr. Boucicault's right fails."

The same point was again raised and similarly decided by the Court of Appeal in *Boucicault* v. *Chatterton*.(a)

Particulars to be observed as to registry and delivery of copies.

Sect. 6 renders the observance of certain requisites as to registry and deposit of copies necessary to entitle foreign authors, engravers, &c., to the copyright in their works. It enacts "that no author of any book, dramatic piece or musical composition, or his executors, administrators, or assigns, and no inventor, designer, or engraver of any print, or maker of any article of sculpture, or other work of art, his executors, administrators, or assigns, shall be entitled to the benefit of this Act, or of any Order in Council to be issued in pursuance thereof, unless, within a time or times to be in that behalf prescribed in each such Order in Council, such book, dramatic piece, musical composition, print, article of sculpture, or other work of art, shall have been so registered, and such copy thereof shall have been so registered as hereinafter is mentioned."

Registration of books, dramatic and musical compositions.

Of books, dramatic and musical compositions (in the event of the same having been printed), it is necessary to register at Stationers' Hall "(1) the title to the copy thereof, (2) the name and place of abode of the author or composer thereof, (3) the name and place of abode of the proprietor of the copyright thereof, (4) the time and place of the first publication, representation, or performance thereof, as the case may be, in the foreign country named in the Order in Council under which the benefits of this Act shall be claimed."

Registration of pianoforte arrangement of operatic score.

An arrangement for the pianoforte of the score of an opera is an independent work, and must be registered in the name of the arranger as composer, and not in that of the composer of the original opera, although, if published during the existence of copyright in the original opera, it would have been an infringement of the copyright therein.(b)

Therefore, in a clear case of infringement by the defendant of the plaintiff's property, in a pianoforte arrangement of the score of Nicolai's opera, "Die Lustigen Weiber von Windsor," made by F. F. Brissler of Berlin, for the representatives of

(a) L. R. 5, C. D. 267.

(b) *Wood* v. *Boosey* (7 B. & S. 869; L. Rep. 2 Q. B. 340; 15 L. T. N. S. 530; affirmed by the Exchequer Chamber, 9 B. & S. 175; L. Rep. 3 Q. B. 223; 37 L. J. 84, Q. B.; 18 L. T. N. S. 105).

Nicolai, and by them assigned to the plaintiff, the plaintiff was held not entitled to maintain an action against the defendant, because Nicolai, and not Brissler, was registered as the "author or composer" of the pianoforte arrangement. Though the melodies and the harmonies all came from the original composer, and nothing was, in one sense, *invented* by the arranger of the pianoforte score; still, as the arrangement of such a score requires skill and judgment, it was held to be a distinct and independent work, of which the arranger, and not the original composer of the opera, should have been registered as the "author or composer."(*a*)

Where, however, the infringement complained of is of the sole right of dramatic or musical representation of a work, still, as a whole, remaining in manuscript, it is sufficient to register the title of the work, the name and place of abode of the author or composer, the name and place of abode of the proprietor of the right of performing or representing, and the time and place of the first representation or performance in the foreign country.(*b*)

If the opera, as a whole, remains in manuscript, and the above requisites are complied with, its unauthorised performance may be restrained, notwithstanding the publication and non-registration or wrong registration of a pianoforte arrangement of the opera by a person other than the composer. Nor will the right to restrain an unauthorised performance be taken away by the publication and non-registration of certain instrumental parts of the opera, not constituting the whole of it.(*c*)

Mode of registration where book is published anonymously.

If a book is published anonymously it is provided by sect. 7 that "it shall be sufficient to insert in the entry thereof in such register book the name and place of abode of the first publisher thereof, instead of the name and place of abode of the author thereof, together with a declaration that such entry is made either on behalf of the author, or on behalf of such first publisher, as the case may require."

Registration of dramatic and musical compositions in manuscript.

Of dramatic and musical compositions in manuscript it is necessary to register at Stationers' Hall "(1) the title to the same, (2) the name and place of abode of the author or composer thereof, (3) the name and place of abode of the proprietor of the right of representing or performing the same, and (4) the time and place of the first representation or performance thereof in the country named in the Order in Council under which the benefit of the Act shall be claimed."(*d*)

(*a*) *Wood* v. *Boosey*, *ubi supra*.
(*b*) *Boosey* v. *Fairlie* (L. R. 7, C. D. 301). (*c*) *Ibid.*
(*d*) Sect. 6.

Of prints, it is necessary to register at Stationers' Hall "(1) the title thereof, (2) the name and place of abode of the inventor, designer, or engraver thereof, (3) the name of the proprietor of the copyright therein, and (4) the time and place of the first publication thereof in the foreign country named in the Order in Council under which the benefits of the Act shall be claimed."(*a*)

Registration of prints.

Of articles of sculpture, and other such works of art, it is necessary to register at Stationers' Hall "(1) a descriptive title thereof, (2) the name and place of abode of the maker thereof, (3) the name of the proprietor of the copyright therein, and (4) the time and place of its first publication in the foreign country named in the Order in Council, under which the benefit of this Act shall be claimed."(*b*)

Registration of articles of sculpture and other works of art.

As to deposit, the enactment is that "One printed copy of the whole of such book and of such dramatic piece or musical composition, in the event of the same having been printed, and of every volume thereof, upon the best paper upon which the largest number or impression of the book, dramatic piece, or musical composition shall have been printed for sale, together with all maps and prints relating thereto, shall be delivered to the officer of the Company of Stationers, at the Hall of the said Company."(*c*)

Deposit of copies of books, dramas, and musical compositions.

It is not stated within what time the deposit should be made.

As to editions after the first, sect. 12 provides, "that it shall not be requisite to deliver to the said officer of the said Stationers' Company any printed copy of the second or of any subsequent edition of any book or books so delivered as aforesaid, unless the same shall contain additions or alterations."

Deposit in case of subsequent editions of books.

As to deposit of prints, the enactment is that "a copy upon the best paper upon which the largest number or impressions of the print shall have been printed for sale shall be delivered to the officer of the Company of Stationers, at the Hall of the said Company."(*d*) It is not stated within what time the deposit should be made.

Deposit of prints.

The officer of the Stationers' Company to whom the delivery of a copy is made, is to give a receipt in writing for the same, and such delivery is to be to all intents and purposes a sufficient delivery under the provisions of this Act.(*e*)

Sect. 11 enacts "that the officer of the Stationers' Company shall, within one calendar month after receiving such

Deposit in British Museum.

(*a*) Sect. 6. (*b*) *Ibid.*
(*c*) *Ibid.* (*d*) *Ibid.* (*e*) *Ibid.*

book, volume, or print as aforesaid, deposit the same in the library of the British Museum."

As to books, same law in general to apply as if published here.

Whatever provisions are in force at any time with respect to copyright in books published here are to apply equally to the copyright secured by this Act to foreign authors or their assigns, unless specially excepted by the Order in Council. But delivery of copies to the British Museum or other libraries is not necessary.

Sect. 3 enacts "that in case any such order shall apply to books, all and singular the enactments of the said Copyright Amendment Act [5 & 6 Vict. c. 45], and of any other Act for the time being in force with relation to the copyright in books first published in this country, shall, from and after the time so to be specified in that behalf in such order, and subject to such limitation as to the duration of the copyright as shall be therein contained, apply to and be in force in respect of the books to which such order shall extend, and which shall have been registered as hereinafter is provided, in such and the same manner as if such books were first published in the United Kingdom, save and except such of the said enactments, or such parts thereof, as shall be excepted in such order, and save and except such of the said enactments as relate to the delivery of copies of books at the British Museum, and to or for the use of the other libraries mentioned in the said Copyright Amendment Act."

Translations.

Sect. 18 added a proviso as to translations which has since been altered. The proviso enacted that nothing in the Act contained should be construed to prevent "the printing, publication, or sale of any translation of any book the author whereof and his assigns might be entitled to the benefit of the Act." But this has been repealed by sect. 1 of 15 Vict. c. 12, so far as it is inconsistent with the provisions of that Act. And sect. 2 of 15 Vict. c. 12 empowers her Majesty by Order in Council to confer on foreign authors and their assignees the right to prevent the publication in the British Dominions of unauthorised translations of works published abroad, for a period not exceeding five years from the first publication of an authorised translation.

The words of sect. 2 are as follow: "Her Majesty may, by Order in Council, direct that the authors of books which are, after a future time, to be specified in such order, published in any foreign country, to be named in such order, their executors, administrators, and assigns, shall, subject to the provisions hereinafter contained or referred to, be empowered to prevent the publication in the British Dominions of any translations of such books not authorised by them, for such

time as may be specified in such order, not extending beyond the expiration of five years from the time at which the authorised translations of such books hereinafter mentioned are respectively first published, and, in the case of books published in parts, not extending as to each part beyond the expiration of five years from the time at which the authorised translation of such part is first published."

The right is to be protected by all the laws in force with reference to copyright in books published here. Sect. 3 enacts that, "subject to any provisions or qualifications contained in such order, and to the provisions herein contained or referred to, the laws and enactments for the time being in force for the purpose of preventing the infringement of copyright in books published in the British dominions shall be applied for the purpose of preventing the publication of translations of the books to which such order extends which are not sanctioned by the authors of such books, except only such parts of the said enactments as relate to the delivery of copies of books for the use of the British Museum, and for the use of the other libraries therein referred to."

Exceptions in the case of translations of newspaper articles.

An exception is made by sect. 7 in the case of articles of a political nature published in foreign newspapers or periodicals, which may be reproduced or translated here if the source from which they are taken is acknowledged. And articles on any other subject similarly published may be similarly reproduced or translated with an acknowledgment of the source whence derived, unless the author has reserved the copyright and stated so in a conspicuous part of the periodical in which it was first published. If the author has so reserved the copyright, he is to enjoy the protection secured to the copyright in books, without observing the formalities required by the 8th section of the Act(*a*) in the case of books and dramatic pieces.

The words of the enactment are, "Notwithstanding anything in the said International Copyright Act [7 Vict. c. 12] or in this Act contained, any article of political discussion which has been published in any newspaper or periodical in a foreign country may, if the source from which the same is taken be acknowledged, be republished or translated in any newspaper or periodical in this country; and any article relating to any other subject which has been so published as aforesaid may, if the source from which the same is taken be acknowledged, be republished or translated in like manner, unless the author has signified his intention of preserving the copyright therein,

(*a*) See *post*, p. 155.

and the right of translating the same, in some conspicuous part of the newspaper or periodical in which the same was first published, in which case the same shall, without the formalities required by the next following section, receive the same protection as is by virtue of the International Copyright Act or this Act extended to books."

According to the interpretation of this section by Lord Hatherley (when Sir W. Page Wood, V.C.),(*a*) the necessity of observing all formalities is not dispensed with in the case of the proprietors of newspaper articles, but only those formalities enumerated in sect. 8 of 15 & 16 Vict. c. 12. The proprietor is to have the same protection as is given by the International Copyright Act of 7 & 8 Vict. c. 12, but subject to all the provisions of that Act, one of which (the 3rd section) declares that under an Order in Council a foreign author is to be subject to all the provisions of the General Copyright Acts, unless it shall be otherwise specified in the order.

International copyright in prints, articles of sculpture, &c.

Foreign prints, articles of sculpture, and other works of art are to have the protection of all Acts relating to those first published in this country, unless the Order in Council otherwise directs. Sect. 4 of 7 Vict. c. 12, provides, "that in case any such order shall apply to prints, articles of sculpture, or to any such other works of art as aforesaid, all and singular the enactments of the said Engraving Copyright Acts and the said Sculpture Copyright Acts,(*b*) or of any other Act for the time being in force with relation to the copyright in prints or articles of sculpture first published in this country, and of any Act for the time being in force with relation to the copyright in any similar works of art first published in this country, shall, from and after the time so to be specified in that behalf in such order, and subject to such limitation as to the duration of the copyright as shall be therein contained respectively, apply to and be in force in respect of the prints, articles of sculpture, and other works of art to which such order shall extend, and which shall have been registered as hereinafter is provided, in such and the same manner as if such articles and other works of art were first published in the United Kingdom, save and except such of the said enactments or such parts thereof as shall be excepted in such order."

It has been held, on the construction of this section, that the proprietor of a foreign print cannot claim copyright in

(*a*) *Cassell* v. *Stiff* (2 K. & J. 285).
(*b*) *Vide ante*, the chapter on "Sculpture, Models, and Busts."

it under the International Copyright Act, unless the date of publication and the name of the proprietor are engraved on the plate and printed on the print, in accordance with the provisions of 8 Geo. 2, c. 13.(a)

Right of representing dramatic and musical pieces.

The sole right of representing here dramatic and musical pieces first publicly performed abroad may also be conferred by Order in Council for any period not exceeding (it may be less than) the time during which composers of pieces first performed at home enjoy a similar right, and subject to all the same statutory provisions that are or may be in force with respect to pieces first performed here.

By sect. 5 of 7 Vict. c. 12, it is enacted "that it shall be lawful for Her Majesty, by any Order of Her Majesty in Council, to direct that the authors of dramatic pieces and musical compositions which shall after a future time, to be specified in such order, be first publicly represented or performed in any foreign country to be named in such order, shall have the sole liberty of representing or performing in any part of the British dominions such dramatic pieces or musical compositions during such period as shall be defined in such order, not exceeding the period during which authors of dramatic pieces and musical compositions first publicly represented or performed in the United Kingdom may for the time be entitled by law to the sole liberty of representing and performing the same; and from and after the time so specified in any such last-mentioned order the enactments of the said Dramatic Literary Property Act and of the said Copyright Amendment Act, and of any other Act for the time being in force with relation to the liberty of publicly representing and performing dramatic pieces or musical compositions, shall, subject to such limitation as to the duration of the right conferred by any such Order as shall be therein contained, apply to and be in force in respect of the dramatic pieces and musical compositions to which such order shall extend, and which shall have been registered as hereinafter is provided, in such and the same manner as if such dramatic pieces and musical compositions had been first publicly represented and performed in the British dominions, save and except such of the said enactments or such parts thereof as shall be excepted in such order."

Unauthorised translations of dramatic pieces.

The Act of 15 Vict. c. 12, enables Her Majesty, by Order in Council, to confer a further right on the authors of dramatic pieces first represented in a foreign country—namely, the right to prevent the representation of any unauthorised

(a) *Avanzo* v. *Mudie* (10 Exch. 203).

translation of such dramatic pieces for a period not exceeding five years, from the first publication or representation of an authorised translation.

Sect. 4 of that Act provides that "Her Majesty may, by Order in Council, direct that authors of dramatic pieces which are, after a future time, to be specified in such order, first publicly represented in any foreign country, to be named in such order, their executors, administrators, and assigns, shall, subject to the provisions hereinafter mentioned or referred to, be empowered to prevent the representation in the British dominions of any translation of such dramatic pieces not authorised by them, for such time as may be specified in such order, not extending beyond the expiration of five years from the time at which the authorised translations of such dramatic pieces hereinafter mentioned are first published or publicly represented."

This right is to be protected by all the enactments applying to dramatic pieces first represented here. According to sect. 5 of the Act last referred to, "subject to any provisions or qualifications contained in such last-mentioned order, and to the provisions hereinafter contained or referred to, the laws and enactments for the time being in force for ensuring to the author of any dramatic piece first publicly represented in the British dominions the sole liberty of representing the same shall be applied for the purpose of preventing the representation of any translations of the dramatic pieces to which such last-mentioned order extends, which are not sanctioned by the authors thereof."

Adaptations, &c., to English stage.

Sect. 6 provided that "nothing herein contained shall be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country."

This limitation of the rights of foreign authors may now be done away with by Order in Council. 38 Vict. c. 12, after reciting sects. 4, 5, & 6 of 15 Vict. c. 12, enacts that "in any case in which, by virtue of the enactments hereinbefore recited, any Order in Council has been or may hereafter be made for the purpose of extending protection to the translations of dramatic pieces first publicly represented in any foreign country, it shall be lawful for Her Majesty, by Order in Council, to direct that the 6th section of the said Act shall not apply to the dramatic pieces to which protection is so extended; and thereupon the said recited Act shall take effect with respect to such dramatic pieces and to the translations thereof as if the said 6th section of the said Act were hereby repealed."

Requisites to be complied with in order to prevent translations.

Certain requisites must be observed to entitle the author of foreign books or dramatic pieces to prevent their translation. They are enumerated in the 8th section. It enacts that "no author, or his executors, administrators, or assigns, shall be entitled to the benefit of this Act, or of any Order in Council issued in pursuance thereof, in respect of the translation of any book or dramatic piece, if the following requisitions are not complied with; (that is to say): 1. The original work from which the translation is to be made must be registered, and a copy thereof deposited in the United Kingdom in the manner required for original works by the said International Copyright Act,(*a*) within three calendar months of its first publication in the foreign country: 2. The author must notify on the title-page of the original work, or if it is published in parts, on the title-page of the first part, or if there is no title-page, on some conspicuous part of the work, that it is his intention to reserve the right of translating it: 3. The translation sanctioned by the author, or a part thereof, must be published either in the country mentioned in the Order in Council by virtue of which it is to be protected or in the British dominions, not later than one year after the registration and deposit in the United Kingdom of the original work, and the whole of such translation must be published within three years of such registration and deposit: 4. Such translation must be registered and a copy thereof deposited in the United Kingdom within a time to be mentioned in that behalf in the order by which it is protected, and in the manner provided by the said International Copyright Act for the registration and deposit of original works: 5. In the case of books published in parts, each part of the original work must be registered and deposited in this country in the manner required by the said International Copyright Act within three months after the first publication thereof in the foreign country: 6. In the case of dramatic pieces the translation sanctioned by the author must be published within three calendar months of the registration of the original work."

The above requisitions are to apply to articles originally published in newspapers or periodicals if the same be afterwards published in a separate form, but not to such articles as originally published.(*b*)

Translation must be of whole work.

This enactment contemplates and requires that the whole of the foreign work shall be translated; and it would not be

(*a*) *Vide ante*, pp. 147–149.

(*b*) *Ibid.*

a compliance with it for the author or his assignee to translate a portion only of it, and claim protection for that as the authorized translation.(*a*)

What the Act requires is that a translation should be made accessible to the English people in order that they may have the opportunity of knowing the foreign work as accurately as it is possible to know it by the medium of a version in English.(*b*)

Where the original work was a French comedy, called "Frou-frou," and the version sanctioned by the foreign authors and published in England was entitled "Like to Like," the names of the characters and the scenery being changed from French to English, English manners being in some instances substituted for French, and considerable omissions and alterations of passages being made, it was held that this version was not a translation within the meaning of the Act such as to entitle the foreign authors and their assignees to the benefit of the Act.(*c*)

"It appears to me," said James, V.C., "that the plaintiff in this case has gone out of his course to dig a pitfall for himself, for what he says he has done is, the original thing being called 'Frou-frou,' he has published in England a comedy called "'Like to Like,' a comedy in five acts, being an English version of MM. Meilhac and Halévy's 'Frou-frou,' written by H. Sutherland Edwards." Then he has introduced English characters; he has transferred the scene to England; he has made the alterations necessary for making it an English comedy, and he has left out a great number of speeches and passages, especially in the first act, which would seem to me to imply that at first he was really making an imitation or adaptation, and afterwards was minded more completely to make a translation. The first two acts seem to me particularly to be what is referred to in the Act itself as an imitation or adaptation. Whether it is a fair imitation or adaptation is another question; but if one wanted to have an example of what is an imitation or adaptation to the English stage, one would have said this is exactly the thing which is meant. It is an imitation and adaptation to the English stage; that is, you have transferred the characters to England; you make them English characters; you introduce English manners, and you leave out things which you say would not be suitable for representation on the English stage.

(*a*) *Per* James, V.C., *Wood* v. *Chart* (L. Rep. 10 Eq. 204; 22 L. T. N. S. 432; 39 L. J. 641, Ch). (*b*) *Ibid.*
(*c*) *Wood* v. *Chart*, *ubi supra*.

Now that is not, in my view of the case, what the Act requires, for some sufficient purpose as I have said before, when it requires that a translation should be made accessible to the English people. . . . . Having come to the conclusion that this is not a translation, I have also come to the conclusion that the plaintiff has failed in complying with the conditions precedent which the Act has imposed upon him in order to entitle him to sustain this suit. It is said that one ought to give a liberal interpretation to the statute, and that one ought not to strain the meaning of a 'translation,' or any other word, for the purpose of depriving a foreign author of the benefit of the Act. Of course not. One ought to take a liberal view, and one ought not to strain the words; but one must apply and give a natural meaning to the words. According to my view of the case, there would not have been the slightest difficulty whatever in the plaintiff obtaining the full benefit of his assignment, and of putting himself in a position to prevent any representation of the French play, or of any English translation of it, if he had simply employed Mr. Sutherland Edwards to do what Mr. Edwards could very well have done, namely, to make a translation; that is to say, if he had said, 'now make a translation of this; do not be thinking of adaptation or imitation for the English stage, but make a translation of it.' Mr. Edwards could well have made such a translation, and it could have been published in this country; and if it had been published in this country, then it would have been quite open to the author, or the person claiming under the author, to have represented that translation with any abbreviation, with any excision, with any alteration, with any adaptation which he might have thought fit for the purpose of making it more suitable to the English stage. I have no doubt, whatever, if he had first published a translation, that he could then have acted the piece which Mr. Sutherland Edwards has called a 'version,' and that nobody else could have acted anything like that—anything approaching to that—because, although I say this is not a translation, but in my view is rather an imitation or adaptation to the English stage, I have no hesitation whatever in saying that, if the author had complied with the condition required by the Act of Parliament, or any other person claiming under the author had complied with that condition, I should at once have restrained the acting of such a piece as this by any one else as not being a fair imitation or adaptation, but as being a piratical translation of the original work. That would have been the proper thing for me to have done in that case; but

the plaintiff having brought his suit, not having a title, must fail; and must fail, of course, with the usual consequences of the experiment which he has tried, and must pay the costs."

Keeping, inspecting, &c., register.

All the provisions of 5 & 6 Vict. c. 45, relating to the subject of registration are to apply to entries under this Act. Sect. 8 of 7 Vict. c. 12, provides, "that the several enactments in the said Copyright Amendment Act contained with relation to keeping the said register book, and the inspection thereof, the searches therein, and the delivery of certified and stamped copies thereof, the reception of such copies in evidence, the making of false entries in the said book, and the production in evidence of papers falsely purporting to be copies of entries in the said book, the applications to the courts and judges by persons aggrieved by entries in the said book, and the expunging and varying such entries, shall apply to the books, dramatic pieces, and musical compositions, prints, articles of sculpture, and other works of art, to which any Order in Council issued in pursuance of this Act shall extend, and to the entries and assignments of copyright and proprietorship therein, in such and the same manner as if such enactments were here expressly enacted in relation thereto, save and except that the forms of entry prescribed by the said Copyright Amendment Act may be varied to meet the circumstances of the case, and that the sum to be demanded by the officer of the said Company of Stationers for making any entry required by this Act shall be one shilling only."

Entry grounded on wrongful first publication.

If an entry be made grounded on a wrongful first publication, the remedy for such entry is stated in the 9th section. It enacts "that every entry made in pursuance of this Act of a first publication shall be *primâ facie* proof of a rightful first publication; but if there be a wrongful first publication, and any party have availed himself thereof to obtain an entry of a spurious work, no order for expunging or varying such entry shall be made unless it be proved to the satisfaction of the court or of the judge taking cognizance of the application for expunging or varying such entry, first, with respect to a wrongful publication in a country to which the author or first publisher does not belong, and in regard to which there does not subsist with this country any treaty of international copyright, that the party making the application was the author or first publisher, as the case requires; second, with respect to a wrongful first publication either in the country where a rightful first publication has taken place, or in regard to which there subsists with this country

a treaty of international copyright, that a court of competent jurisdiction in any such country where such wrongful first publication has taken place has given judgment in favour of the right of the party claiming to be the author or first publisher."

Importation of pirated copies prohibited.

The international copyright given by the preceding enactments is secured by prohibiting the importation of books in which it exists, printed or reprinted elsewhere than in the country where they were first published, and subjecting their importation to the customs laws for preventing the importation of other goods; and also by subjecting to a special action on the case at the suit of the proprietor of the copyright(*a*) all who import such prohibited or unlawfully printed copies, or who, knowing that they have been illegally imported or unlawfully printed, sell, publish, or expose to sale or hire, or have in their possession for that purpose, any such copies of them.(*b*)

Copies may, however, be imported "by or with the consent of the registered proprietor of the copyright thereof, or his agent authorised in writing.(*c*)

Extension of prohibition to importation of works of art, and unauthorised translations.

These provisions are, by 15 Vict. c. 12, extended to the importation of any work of literature or art in which copyright subsists, and of unauthorised translations of books or dramatic pieces, except by or with the consent of the registered proprietor of the copyright in such work, or of such book or piece, or his agent authorised in writing. And the same Act extends the provisions of 5 & 6 Vict. c. 45, as to the forfeiture, &c., of imported copies, printed abroad, of British copyright books, to those works prohibited to be imported by the Act.

Sec. 9 of 15 Vict. c. 12, enacts that "all copies of any works of literature or art wherein there is any subsisting copyright by virtue of the International Copyright Act and this Act, or of any Order in Council made in pursuance of such Acts or either of them, and which are printed, reprinted, or made in any foreign country except that in which such work shall be first published, and all unauthorised translations of any book or dramatic piece the publication or public representation in the British dominions of translations whereof not autho-

(*a*) This action is "to be brought and prosecuted in the same courts, and in the same manner, and with the like restrictions upon the proceedings of the defendant, as are respectively prescribed in the Copyright Amendment Act (5 & 6 Vict. c. 45) with relation to actions thereby authorised to be brought by proprietors of copyright against persons importing or selling books unlawfully printed in the British dominions." (Sect. 10). (*b*) Sect. 10. (*c*) *Ibid.*

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rised as in this Act mentioned shall for the time being be prevented under any Order in Council made in pursuance of this Act, are hereby absolutely prohibited to be imported into any part of the British dominions, except by or with the consent of the registered proprietor of the copyright of such work or of such book or piece, or his agent authorised in writing; and the provision of the Act of the sixth year of Her Majesty 'to amend the law of copyright,' for the forfeiture, seizure, and destruction of any printed book first published in the United Kingdom wherein there shall be copyright, and reprinted in any country out of the British dominions, and imported into any part of the British dominions by any person not being the proprietor of the copyright, or a person authorised by such proprietor, shall extend and be applicable to all copies of any works of literature and art, and to all translations the importation whereof into any part of the British dominions is prohibited under this Act."

French works.

In pursuance of the powers conferred on the Sovereign by the Act 7 & 8 Vict. c. 12, a convention for an international copyright between this country and the French Republic was signed at Paris on the 3rd November, 1851, and presented to both Houses of Parliament in 1852. An Order in Council was made on the 10th January, 1852. After reciting that the convention had been made, the Order proceeds: "Her Majesty, by and with the advice and consent of her Privy Council, and by virtue of the authority committed to her by an Act passed in the session of Parliament holden in the seventh and eighth years of her reign, intituled 'an Act to amend the Law relating to International Copyright,' doth order, and it is hereby ordered, that from and after the 17th day of January, 1852, the authors, inventors, designers, engravers, and makers of any of the

Subjects of copyright.

following works (that is to say), books, prints, articles of sculpture, dramatic works, musical compositions, and any other works of literature and the fine arts, in which the laws of Great Britain give to British subjects the privilege of copyright, and the executors, administrators, and assigns of such authors, inventors, designers, engravers, and makers respectively, shall, as respects the works first published within the dominions of France, after the said 17th day of January,

Duration.

1852, have the privilege of copyright therein for a period equal to the term of copyright which, authors, inventors, designers, engravers, and makers of the like works respectively first published in the United Kingdom are by law

Conditions.

entitled to, provided such books, dramatic pieces, musical

compositions, prints, articles of sculpture, or other works of art, have been registered, and copies thereof have been delivered, according to the requirements of the said recited Act,(*a*) within three months after the first publication thereof in any part of the French dominions; or if such work be published in parts, then within three months after the publication of the last part thereof.

Right of representation or performance.

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

French copyright for English works.

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

Work published in parts.

The provision in the preceding Order in Council as to works published in parts, which gives a copyright in them if registered within three months after the publication of the last part, must, according to Sir Page Wood, V.C. (afterwards Lord Hatherley, C.),(*b*) be interpreted as referring to publications which are to be completed in a specified number of parts, and not to those which are to be continued for an indefinite period as newspapers. The effect of the other construction would be that at any period the publisher of such a work might register it, and carry back his copyright

(*a*) *Vide ante*, pp. 133-135.
(*b*) *Cassell* v. *Stiff* (2 K. & J. 286).

to the earliest period in 1852, when French authors first had a copyright in this country—a result which could not have been intended by the Order in Council.

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

Conventions with other countries.

Besides the convention made with France, conventions to secure international copyright have also been made with the following countries:—Prussia, Saxony, Saxe-Weimar, Saxe-Meiningen, Saxe-Altenburg, Saxe-Coburg-Gotha, Brunswick, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Reuss (all in 1846), registration and delivery of copies being required within twelve months after the first publication of the work in any of those dominions; Thuringia (1847) same time for registration and delivery; Hanover (1847) same time for registration and delivery; Oldenburg (1847) same time for registration and delivery; Anhalt (1853) same time for registration and delivery; Hamburgh (1853) registration and delivery being required within three months after publication; Belgium (1855) same time for registration and delivery; Spain (1857) terminated by notice in 1880; Sardinia (1860) same time for registration and delivery; Hesse Darmstadt (1862) registration and delivery to be made within twelve months.

Power to reduce duties on books imported.

An Act of the 9 & 10 Vict. c. 58 enables Her Majesty by Order in Council to reduce the duties on books and prints published in and imported from any foreign country, such Order in Council to be twice published in the *Gazette* within fourteen days after the issuing thereof, and to be laid before Parliament within six weeks after the issuing of it, if Parliament be then sitting, or, if not, within six weeks after the commencement of the next session.

International arrangements for protection of designs.

The Patents, Designs and Trades Marks Act, 1883 (46 & 47 Vict. c. 57, s. 103) enacts that if Her Majesty is pleased to make any arrangement with the Government or Governments of any foreign State or States for mutual protection of designs, then any person who has applied for protection for any design in any such State, shall be entitled to registration of his design, &c., under this Act, in priority to other applicants; and such registration shall have the same date as the date of

(*a*) *Cassell* v. *Stiff* (2 K. & J. 286).

the protection obtained in such foreign State; provided that his application is made within four months from his applying for protection in the foreign State with which the arrangement is in force.

But nothing in this section contained is to entitle the proprietor of the design to recover damages for infringements happening prior to the actual registration of his design in this country.

The exhibition or use in the United Kingdom, or the Isle of Man, during the period aforesaid of the design, or the publication therein during such period of a description or representation of the design, shall not invalidate the registration of the design.(*a*)

The application for the registration of a design under this section must be made in the same manner as an ordinary application under the Act.(*b*)

The provisions of this section are to apply only in the case of those foreign States with respect to which Her Majesty shall from time to time by Order in Council declare them to be applicable, and so long only in the case of each State as the Order in Council shall continue in force with respect to that state.(*c*)

CHAPTER XV.

TRANSFER OF COPYRIGHT.

I. By Operation of Law.

Copyright is personal property.

Of the two kinds of property recognised by our law, real—which descends in cases of intestacy to the heir-at-law—and personal—which devolves on the personal representative of the owner—copyright belongs to the latter class, that of personal property. Sect. 25 of 5 & 6 Vict. c. 45, enacts, as to works of a literary, dramatic, or musical character, "that all copyright shall be deemed personal property, and shall be transmissible by bequest, or, in case of intestacy, shall be subject to the same law of distribution as other personal property, and in Scotland shall be deemed to be personal and moveable estate."

The words "personal representative," with reference to the

(*a*) *Cassell* v. *Stiff* (2 K. & J. 286).

(*b*) *Ibid.* For the manner in which this must be done, see the chapter on Copyright in Designs.

(*c*) *Ibid.*

provisions of this Act, are defined in the interpretation clause to mean and include "every executor, administrator, and next of kin, entitled to administration."

Sect. 3 of 25 & 26 Vict. c. 68, has a similar enactment as to the nature of the property in paintings, drawings, and photographs.

Intestacy.

Where, then, the owner of copyright in any published or unpublished production dies intestate, the copyright in such production devolves, by operation of law, upon his executor or administrator, who, as such, possesses all the rights that the original owner enjoyed.

Bequest.

Even before the above enactment copyright, like all other personal property, might be left by the proprietor by will; as a patentee might bequeath his interest in a patent.

Execution and bankruptcy.

Whether the right of publishing an *unpublished* work of an author passes to the trustee in case of bankruptcy, or may be made available by his creditors on an execution, is doubtful, never having been the subject of express decision.(*a*) The copyright in published works undoubtedly passes to the trustee in bankruptcy.(*b*)

It has been held by the Supreme Court of the United States,(*c*) that copyright in a published print is not the subject of seizure or sale by execution, although it may be reached by a creditor's bill, and applied to the payment of the debts of the author. In that case the copperplate engraving of a map, in which the plaintiff had secured a copyright, was seized and sold under an execution; but the purchaser was restrained from striking off and selling copies of the map. "The copperplate engraving," said the Court, "like any other tangible personal property, is the subject of seizure and sale, on execution, and the title passes to the purchaser, the same as if made at a private sale. But the incorporeal right, secured by the statute to the author, to multiply copies of the map by the use of the plate, being intangible and resting altogether in grant, is not the subject of seizure or sale by means of this process —certainly not at common law. No doubt the property may be reached by a creditor's bill, and be applied to the payment of the debts of the author, the same as stock of the debtor is reached and applied, the Court compelling a transfer and sale of the stock for the benefit of the creditors. But in case of such remedy, we suppose, it would be

(*a*) See 4 Burr. 2311; Amb. 695; *Atcherley* v. *Vernon* (10 Mod. 518).
(*b*) *Ibid.* See also *Longman* v. *Tripp* (2 Bos. & Pull. N.R. 67), and *Stevens* v. *Gladding* (17 How. 447).
(*c*) *Stevens* v. *Cady* (14 How. 528).

necessary for the Court to compel a transfer to the purchaser, in conformity with the requirements of the Copyright Act, in order to invest him with a complete title to the property."(*a*)

The property in a newspaper passes to the assignees of the proprietor on his bankruptcy.(*b*) The right of publishing it was held to be "goods or chattels" within the meaning of sect. 125 of the Bankruptcy Act, 1849,(*c*) which provided for goods and chattels of which the bankrupt is reputed owner passing to the assignees.(*d*)

II. ASSIGNMENT OF COPYRIGHT.

Where assignment is not necessary.

No assignment is necessary where an author has been employed by the publisher, proprietor, and projector or conductor of any encyclopædia, review, magazine, periodical work, or any work published in a series of books or parts, or any book whatsoever to compose such encyclopædia, review, &c., or any volumes, parts, essays, articles, or portions thereof, on the terms that the copyright therein shall belong to such publisher, &c., if the author has been paid for his composition.(*e*)

Definition of "assigns."

The word "assigns" with reference to literary copyright is defined by sect. 2 of 5 & 6 Vict. c. 45, to mean and include "every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law or otherwise."

Unpublished works.

In the case of unpublished productions of a literary nature, and of unpublished engravings, there is no statutory enactment as to the assignment of the copyright.

We have already seen that a foreign author residing abroad cannot by assigning the copyright which he possesses in his work in the foreign country enable his assignee to acquire a copyright in this country.(*f*)

Copyright—how far divisible.

The copyright of an author being the sole privilege of printing and publishing copies in the United Kingdom *or any part of the British Dominions*, the question has arisen whether a valid assignment can be made of the right to print and publish in some particular part only of the British Domi-

(*a*) See also *Stevens* v. *Gladding* (17 How. 447).
(*b*) *Longman* v. *Tripp* (2 Bos. & P. N. S. 67).
(*c*) See sect. 4 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).
(*d*) *Re Baldwin* (2 De G. & J. 230).
(*e*) 5 & 6 Vict. c. 45, s. 18; and see the decision in *Grace* v. *Newman* (L. R. 19 Eq. 623).
(*f*) *Jeffreys* v. *Boosey* (4 H. L. Cas. 815; *ante*, pp. 14–19).

nions—whether the enjoyment of the right can be limited as to locality?

Sect. 13 of 5 & 6 Vict. c. 45, provides for the entry in the registry book at Stationers' Hall of the title of the book, time of first publication, name and abode of the publisher and of the proprietor "of the copyright of the said book or *of any portion of such copyright*;" and it enacts that it shall be lawful for every such registered proprietor to assign "his interest or *any portion of his interest therein*" by entry in the book. This shows that a partial assignment is valid, but it is not clear from the language of the enactment whether an assignment may be limited as to time only or as to locality likewise.

Not divisible as to locality.

The point has not been expressly decided in any case, but the opinions of several eminent judges are in favour of the view that copyright is *not* divisible as to locality. In *Jeffreys* v. *Boosey*,(*a*) in which there had been assignment to the defendant of an opera for publication in the United Kingdom only, Lord St. Leonards, Pollock, C.B., and Parke, B., were strongly of opinion that copyright is indivisible and consequently incapable of being partially assigned. The case was not, however, decided on that ground. Parke, B., in giving his opinion to the House of Lords said,(*b*) "I am of opinion that this is an indivisible right, and the owner cannot assign a part of the right, as to print in a particular county or place, or do anything less than assign the whole right given by the English law. It seems to me analogous to an exclusive right by patent, which cannot, I apprehend, be parcelled out, though licences under it may." And Lord St. Leonards(*c*) still more strongly: "If there is one thing which I should be inclined to represent to your lordships as being more clear than any other, in this case, it is that copyright is one and indivisible. I am not speaking of the right to license; but copyright is one and indivisible; or is a right which may be transferred, but which cannot be divided. Nothing could be more absurd or inconvenient than that this abstract right should be divided, as if it were real property, into lots, and that one lot should be sold to one man, and another lot to a different man. It is impossible to tell what the inconvenience would be. You might have a separate transfer of the right of publication in every county in the kingdom."(*d*) The assignment in this case took place before the passing of the Act 5 & 6 Vict. c. 45,

(*a*) 4 H. L. Cas. 815. (*b*) *Ibid.* 933. (*c*) *Ibid.* 992.
(*d*) See also *per* Pollock, C.B. (*Ibid.* 940).

but this Act has made no change as to the extent of copyright. And Maule, J., in *Davidson* v. *Bohn*,(*a*) observes, with reference to the language of the section above quoted, "The author or proprietor may assign the right to *less than the full term*. It never could have been intended to introduce the complicated sort of copyright suggested."

In the case, however, of the sole right of dramatical or musical representation, a licence by the proprietor may be locally limited.(*b*)

Divisible as to time.

It is clear from the language of sect. 13 of 5 & 6 Vict. c. 45, even apart from the interpretation put upon it by Maule, J., in the case just referred to, that an author or proprietor may assign the property in his published work for any limited portion of the *time* that his copyright therein endures.

Copyright may be assigned in two ways.

A valid assignment *inter vivos* of the copyright in published books may be made in either of two ways; first, by writing, which need not, it seems, be under seal; or, secondly, by making entry in the book of registry at Stationers' Hall of the assignment, and of the name and place of abode of the assignee in the form given in a schedule to the Act 5 & 6 Vict. c. 45.(*c*)

By writing.

Writing is indispensable to a valid assignment of literary copyright; a parol assignment is not sufficient.(*d*)

This was decided under the former statute by the Court of King's Bench in *Power* v. *Walker*.(*e*) It was contended in that case that copyright was a mere personal chattel, not included within the statute of frauds, and, consequently, capable at common law, like other personalty, of passing by oral transfer; and that the statute 8 Anne, c. 19, did not make a writing necessary. The Court, however, was of a contrary opinion, considering that as the statute of Anne required a written consent from the proprietor to authorise the printing or reprinting of any book by any other person, the conclusion was almost irresistible that the assignment must also be in writing; an assignment being in the nature of a perpetual licence, was greater than a licence, and if the licence, which is the lesser thing, must be in writing, *à fortiori*, the assignment, which is the greater thing, must be so also. This case was followed in *Clementi* v. *Walker*,(*f*) and by the Court of Common Pleas in *Davidson*

(*a*) 6 C. B. 458.
(*b*) See *Taylor* v. *Neville* (38 L. T. N. S. 50; 47 L. J. Q. B. 254).
(*c*) *Vide post*, p. 172.
(*d*) *Layland* v. *Stewart* (L. R. 4 C. D. 419).
(*e*) 3 M. & Sel. 7; 4 Camp. 8.
(*f*) 2 Bar. & Cres. 861.

v. *Bohn* ;(*a*) and, though disapproved in other cases, its binding authority has been recognised.(*b*)

Where the assignees of the copyright in a comedy sought the aid of a court of equity, but did not state in their bill that the assignment to them was in writing, Lord Eldon refused to grant an injunction till that fact should be proved. The plaintiffs, who were unable to state whether the assignment from the author was in writing, afterwards produced an affidavit stating that all the manuscripts of dramatic compositions belonging to the Haymarket Theatre, including the comedy in question, had been assigned to them by three several indentures in writing, dated in the years 1805, 1808, and 1819. Lord Eldon said he would assume the plaintiffs' title to be regular till the contrary were shown, and granted the injunction prayed for.(*c*)

Writing need not be under seal.

Tindal, C.J., in *De Pinna* v. *Polhill*,(*d*) incidentally expressed an opinion that a deed was necessary to a valid assignment; and this view would seem supported by the words in which sect. 14 of 5 & 6 Vict. c. 45, speaks of the efficacy of the second mode of assignment—that by entry in the book of registry—of which it enacts that "such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force and effect *as if* such assignment had been *made by deed*." However, Wightman, J., in giving his opinion to the House of Lords in the case of *Jefferys* v. *Boosey*,(*e*) says, "there is nothing in the terms used in the statute of 8 Anne, c. 19, which requires the assignment to be either by deed or attested by witnesses; and at all events, since the statute of 54 Geo. 3, c. 156, it appears to me that an assignment by writing only is valid." And the ruling of the House of Lords in the Scotch case of *Kyle* v. *Jefferys*(*f*) seems to be decisive of the question. In that case Jefferys claimed copyright, by assignment from the authoress, in the words of a song written by Miss Eliza Cook, and sought to restrain the publication of the song by Kyle. Jefferys had registered himself as proprietor at Stationers' Hall, and a certified copy of the registry, which is by statute *primâ facie* proof of proprietorship, was produced at the trial; but his title

(*a*) 6 C. B. 456.

(*b*) See *per* Bramwell and Channell, BB., in *Cumberland* v. *Copeland* (7 H. & N. 118).

(*c*) *Morris* v. *Kelly* (1 J. & W. 481). (*d*) 8 Car. & P. 79.

(*e*) 4 H. L. Cas. 891.

(*f*) 21 Scotch Sess. Cas. N. S. 8; 18 Scotch Sess. Cas. N. S. 906.

being impeached by Kyle, other evidence was offered, consisting of a receipt by Miss Cook for a sum of money paid her by Jefferys, "for copyright of words of a song written by me, entitled 'The Old Arm Chair,'" and also the testimony of a person to whom Miss Cook had stated that she had parted with the copyright in the song to Jefferys. The reception of this evidence of title was objected to on the part of Kyle; and it was urged that no evidence, written or parol, was admissible to prove the asserted proprietorship without the production of a formal deed of assignment attested by two witnesses. The presiding judge overruled the objection, and admitted the evidence, holding that where the *prima facie* evidence afforded by the certificate of registration was rebutted, the claimant might still support his title without production of a formal instrument of assignment. The Court of Session upheld this ruling, and the House of Lords, on appeal, decided that it was correct as a general rule. As the evidence of title admitted on the trial in this case was not a writing under seal, the approval by the House of Lords of the judge's ruling, though the objection to it maintained the necessity of attestation as well as sealing, decides that a deed is not necessary to a valid assignment of copyright.

Attestation is not necessary.

It seems now to be finally determined that an assignment need not be attested by witnesses.

This question was long in an unsettled state, owing to the words in the statute of Anne, and the construction put upon them by the Court of King's Bench in the case of *Power* v. *Walker*.(*a*) The statute of Anne imposes a penalty on any person printing or publishing a book without the proprietor's consent "first had and obtained in writing, signed in the presence of two or more credible witnesses," but says nothing as to the mode of assigning copyright. *Power* v. *Walker* decided that as a licence to print or publish was required to be in writing, *à fortiori* an assignment, which was greater than a licence, must be so too; and the same reasoning would apply to the necessity of attestation by two witnesses. Then came the Act of 54 Geo. 3, c. 156, extending the duration of the copyright conferred by the statute of Anne, and inflicting a penalty on every person printing, reprinting, &c., any book or books "without the consent of the author or authors, or other proprietor or proprietors of the copyright of, and in such book or books, first had and obtained *in writing*," without making any mention of attestation. As this enactment

(*a*) 3 M. & Scl. 7.

made unattested licences valid, the inferences drawn in *Power* v. *Walker* from their previous necessity should seem to have lost its force; for the reason of requiring an assignment to be attested was that the Act of Anne required the licence to be attested; and as a licence in writing without attestation is sufficient under the Act of Geo. 3, it should follow that an assignment in writing without attestation is also sufficient. However, in the case of *Davidson* v. *Bohn*,(*a*) decided subsequently to the Act of Geo. 3, it was laid down that for the purpose of transferring copyright there must be an instrument in writing attested by two witnesses; but the case appears to have been considered as if it had arisen before the 54 Geo. 3, c. 156, as that statute was not mentioned in the arguments or judgment. In *Jefferys* v. *Boosey*,(*b*) also, Lord St. Leonards, Parke, B., and Alderson, B., were of opinion that the provisions of the Acts of Anne and Geo. 3, as to licence and assignment, might well stand together, and therefore that the latter Act did not by any intendment repeal the former. But of these judges, Alderson, B., appears to have considered himself bound(*c*) by the decision in *Davidson* v. *Bohn*, and Parke, B., afterwards changed his opinion.(*d*)

The question was again distinctly raised in 1861 in the case of *Cumberland* v. *Copeland*.(*e*) The Court of Exchequer in that case held that the construction put upon the statute of Anne in *Power* v. *Walker* was binding on them still, notwithstanding the Act of 54 Geo. 3, c. 156, and, consequently, that an assignment of copyright, to be valid, must be in writing, attested by two witnesses. This decision was appealed against, and was reversed by the unanimous decision of the Court of Exchequer Chamber (consisting of Erle, C.J., Crompton, Willes, Blackburn, Keating, and Mellor, J.J.), holding that an assignment of copyright made after the passing of 54 Geo. 3, c. 156, requires no attestation. (*f*) Erle, C.J., said, "An express enactment that a consent in writing should be valid is, to my mind, by implication, an enactment that a consent in writing may be valid without being attested by two witnesses. The former statute [that of Anne] required

(*a*) 6 C. B. 456. See also *Latour* v. *Bland* (2 Stark. 384).
(*b*) 4 H. L. Cas. 815. (*c*) See p. 915.
(*d*) See the judgment of Lord Wensleydale in *Kyle* v. *Jefferys* (3 Macq. 611): "I think that the opinion of the six judges in the case of *Jefferys* v. *Boosey* was correct; that since the stat. of 54 Geo. 3, c. 156, there is no occasion to have an assignment in writing of a copyright executed in the presence of two witnesses."
(*e*) 7 H. & N. 118.
(*f*) 31 L. J. 353, Ex.; 7 L. T. N. S. 334; 10 W. R. 581.

a consent in writing attested by two witnesses; the latter [54 Geo. 3, c. 156] requires a consent in writing only. It is clear to my mind, after the Act of 54 Geo. 3, c. 156, the plaintiff could not, without infringing the express words of that statute, say a consent in writing was not valid without two witnesses, because there was an enactment to that effect in the statute of Anne. The two statutes are inconsistent. After that time, if a consent in writing is valid without two witnesses, it seems to me, as a matter of reasoning, to follow that an unattested assignment is also valid; for if, as it was argued prior to the statute, because a consent in writing is not valid without two witnesses, so neither is an assignment: as a consent is now valid without two witnesses, so also is an assignment valid without two witnesses.(*a*) . . . . By the 54 Geo. 3, c. 156, the Legislature seem to have taken the view that I have mentioned, and, while still enacting that the contract must be in writing, left out purposely, as it seems to me, the necessity of having two witnesses. In the case of wills it may well be that greater formality and ceremony should be required, in order to avoid all doubt as to the acts of dead men; but no such safeguards are required in an ordinary instrument of commerce. I therefore think the Legislature did wisely in the 54 Geo. 3, c. 156."

Assignment by entry in registry at Stationers' Hall.

The second mode of assigning copyright is by entry in the book of registry kept at Stationers' Hall.

Sect. 13 of 5 & 6 Vict. c. 45, after providing for registration by the author or proprietor, enacts "that it shall be lawful for every such registered proprietor to assign his interest, or any portion of his interest therein, by making entry in the said book of registry of such assignment, and of the name and place of abode of the assignee thereof, in the form given in the schedule annexed to the Act, on payment of the sum of five shillings; and such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed."

The form of concurrence of the party assigning the copyright in any book already registered, given in the schedule to the Act is as follows:—

(*a*) The inference, however, was stronger in the former case, as it was an *à fortiori* argument from the necessity of attestation in the case of a mere licence to its necessity in the case of the greater and more important assignment. The absence of the necessity of attestation in the former case does not furnish an equally strong reason for its non-necessity in the latter case.

I *A. B.* of being the assignor of the copyright of the book hereunder described, do hereby require you to make entry of the assignment of the copyright therein.

Title of Book.	Assignor of the Copyright.	Assignee of Copyright.
Y. Z.	*A. B.*	*C. D.*

Dated this day of 18

(Signed) *A. B.*

The form of entry of assignment given in the schedule to the Act is as follows:—

Date of Entry.	Title of Book.	Assignor of the Copyright.	Assignee of Copyright.
	[*Set out the title of the book, and refer to the page of the registry book in which the original entry of the copyright thereof is made.*]	*A. B.*	*C. D.*

Name and abode of assignee.

It is a curious discrepancy that while sect. 13 requires the entry in the form given in the schedule of "the name and place of abode of the assignee," in the form itself which is given in the schedule there is no reference whatever to the place of abode of the assignee. Would, then, an entry following strictly the form given in the schedule, and omitting the place of abode of the assignee, be a valid assignment? This question was raised but not determined in *Wood* v. *Boosey*,(*a*) the judgment of the court proceeding on other grounds. The safer course is, to add the place of the assignee's abode.

Must an assignee register before he can sue?

Another point discussed in the case last referred to, was whether an assignee of copyright is a "proprietor" within the meaning of that term in sect. 24 of 5 & 6 Vict. c. 45, which prevents any proprietor of copyright in books from maintaining any action or suit at law or in equity, or any

(*a*) L. Rep. 2 Q. B. 340; 36 L. J. 103, Q. B.; 15 L. T. N. S. 530.

summary proceedings, in respect of any infringement of such copyright, unless he shall, before commencing such action, &c., have caused an entry to be made in the book of registry pursuant to the Act. The Court did not decide this question either, but Cockburn, C.J., leaned to the opinion that an assignee was not a proprietor within the application of sect. 24. Lush, J., entertained considerable doubt on the subject, and the other two judges, Blackburn and Mellor, JJ., declined to express any opinion on so doubtful a point. Cockburn, C.J., said: "The result of the discussion has been to cause me very strongly to incline to the opinion that sect. 24 of 5 & 6 Vict. c. 45, which requires that the proprietor shall be registered before he shall be entitled to bring an action for the infringement of his copyright, does not apply to the case of an assignee to whom the proprietorship is assigned. The moment the copyright is established in the original proprietor, there is nothing to prevent him from assigning it by any mode by which property of that description can be assigned in law, the statute only affording one mode of making the assignment more convenient and less expensive than the ordinary mode of conveyance by deed.(*a*) If the assignment is made under the statute, then, no doubt, its terms must be complied with. . . . . But taking this not to be a statutory assignment, is it necessary that the assignee should cause an entry of proprietorship to be made under sect. 24 before he can sue? Now, I observe that there is a distinction in the earlier sections between 'proprietor' as applied to the person by whom the work is originally published, and in whom the property originally vested, and any person who takes by assignment from him; nor do I anywhere in the Act find that the assignee has any right to insist upon having his name entered as the new proprietor: the only case in which the change of the name of the proprietor is to be made being where the statutory form of assignment is resorted to; and even in that case it is not the assignee but only the assignor who can insist on the change being made in the register. Therefore, to hold that the assignee must make an entry under sect. 24 of his proprietorship, before he can sue for the infringement of the copyright transferred to him, he having no power under the statute, either through the means of this Court, or any other means that I can see, to enforce the registration of an entry by way of assignment under sect. 13, and to apply the term proprietor to him, would, I think, work considerable inconvenience, if

(*a*) As to the necessity of a deed, *vide ante*, pp. 168, 169.

not considerable injustice. However, although I make these observations in passing, to show the matter has not been overlooked, I do not desire to be understood as resting my present judgment on that point." Blackburn, J., observed, "With regard to the objection that there is no entry of the plaintiff as proprietor of the copyright under sect. 24 of 5 & 6 Vict. c. 45, at first I thought the objection fatal to the plaintiff's case, but after hearing the argument my opinion is much shaken, and I would not support the nonsuit on that ground without further time for consideration."

In this state of the law it would obviously be very unsafe for an assignee of copyright to commence any proceeding for infringement of his right without having previously registered at Stationers' Hall.

Sale of copies printed before assignment.

Unless there is some stipulation to the contrary in the conditions of sale, the person who sells his copyright to another may print any number of copies up to the time of the sale, and retain and sell such copies after disposing of the copyright; though, of course, he commits piracy by printing any copies after the sale.(*a*)

Sale of copies after expiration of limited period of copyright.

The purchaser of the copyright for a limited period was held by Wood, V.C., entitled to continue to sell after the expiration of that period copies printed before its expiration, where there was no actual fraud.(*b*)

Equitable assignment.

Courts of equity used to give relief and enforce contracts in many cases where there was no remedy at law. Amongst other maxims which they acted on was one—that Equity looks upon that as done which ought to have been done. The most common cases of the application of the rule are under agreements, all such being considered as performed which are made for a valuable consideration, in favour of persons entitled to insist on their performance. Thus an agreement to assign was treated by Equity as a valid assignment, and infringements of literary property have been restrained where the claimant of the aid of Chancery had only an equitable title to relief, and possessed no title recognised at law. We have, happily, no longer Courts of Law, as distinguished from Courts of Equity. There is one Supreme Court of Judicature, all the sub-divisions of which are empowered to administer equity as well as law,(*c*) and are bound, in case of any conflict between the two, to see that the rules of equity shall prevail.(*d*) The three cases next referred to possess, therefore, now only an historical interest.

(*a*) *Taylor* v. *Pillow* (L. Rep. 7 Eq. 418).
(*b*) *Howitt* v. *Hall* (10 W. R. 381; 6 L. T. N. S. 348).
(*c*) 36 & 37 Vict. c. 66, s. 24. (*d*) *Ibid.* sect. 25, subsect. 11.

Lord Mansfield was of opinion, in *Millar* v. *Taylor*,(*a*) that unless a court of equity saw a law right existing in the author it would not interfere. Such also was the opinion of Lord Eldon in *Rundell* v. *Murray*.(*b*) But Lord Lyndhurst in *Chappell* v. *Purday*,(*c*) referring to this expression of opinion, observed: "If by this it was meant to be said that a court of equity would only interfer[illegible]ion the legal right was in the party applying for its interference, I will not go so far; because I think that a court of equity will assist any party having an equitable right, where the legal right intervenes to prevent his obtaining justice; otherwise great fraud would ensue."

In *Sweet* v. *Shaw*,(*d*) the plaintiffs, who sought to restrain the infringement of their property in certain reports of cases, furnished to them for publication by two barristers, asserted only an equitable title to the copyright under an agreement with the barristers who reported the cases. The Vice-Chancellor, Sir Launcelot Shadwell, was distinctly of opinion that the plaintiffs had made out only an equitable right, but that, nevertheless, they had stated quite a sufficient case to support their bill; and he continued the injunction restraining the defendants from infringing the copyright of the plaintiffs. With reference to the nature of the agreement, the Vice-Chancellor said: "What the plaintiffs state is that they have agreed with A and B that A and B shall report cases for them; and accordingly A and B do take notes of cases, which are printed by Sweet and others, the plaintiffs, and they publish them, and then the plaintiffs aver that they have a copyright in the cases published. Now I think that they have in equity, but I cannot understand how they have got the copyright at law;(*e*) because I cannot see how, at law, the agreement that persons shall prepare a work for the plaintiffs gives the plaintiffs a copyright at law, for nothing can pass at law except that which actually exists; and it is true, not only with respect to an assignment, but also with respect to a release, as Littleton points out, that there cannot be a release of a future right, and consequently there cannot be an assignment of anything that does not now exist."(*f*) The same judge else-

(*a*) 4 Burr. 2400.

(*b*) Jac. 315. But see the order made by the same judge in *Mawman* v. *Tegg* (2 Russ. 385).

(*c*) 4 Y. & Col. (*d*) 3 Jur. 217.

(*e*) But see the language of 5 & 6 Vict. c. 45, s. 18, referred to *ante*, p. 165.

(*f*) See also *Sweet* v. *Maughan* (4 Jur. 456).

where(*a*) says: "This Court always takes notice of the equitable interest; and if the equitable right to the copyright is complete, this Court will take care that the real question shall be tried, notwithstanding there may be a defect in respect of the legal property." And Lord Eldon, in a case of equitable title, where he thought it advisable that an action should be tried at law before he granted an injunction, ordered the defendants to admit the legal title of the plaintiff in the trial of the action.(*b*)

An agreement in writing between an author and a bookseller by which, after reciting that the author had prepared a new edition of one of his works which the publisher was desirous of purchasing, it was agreed that 2500 copies of the work should be printed at the expense of the bookseller, who was to pay the author by instalments a sum named for the said edition, was held to constitute the publisher, not merely the purchaser of 2500 copies of the work, but an assignee in equity of the copyright to the extent of being alone entitled to publish the whole edition, consisting of 2500 copies, and to prevent the piracy of that edition by any other person.(*c*)

On the other hand a written agreement between an author and a publishing firm that the latter "should print, reprint, and publish a work of the author's, at their own risk, on the terms of dividing equally with him any profits that there might be after payment of all expenses; and that if all the copies should be sold and another edition should be required, the author should make all necessary alterations and additions, and the publishers should print and publish a second and subsequent editions on the same terms, and that if all the copies of any edition should not be sold in five years from the time of publication, the publishers might sell the remaining copies by auction or otherwise, in order to close the account," was held by the Lords Justices, affirming the decision of Wood, V.C., not to be a contract for the assignment of the author's copyright but a mere personal contract on both sides, not assignable by either party.(*d*) The firm with whom the agreement was made having been changed, and its interest having been assigned to a new firm, the latter firm was held not entitled to restrain the publication of a new edition by another publisher with the author's concurrence.

(*a*) *Bohn* v. *Bogue* (10 Jur. 421).
(*b*) *Mawman* v. *Tegg* (2 Russ. 402).
(*c*) *Sweet* v. *Cater* (11 Sim. 573).
(*d*) *Stevens* v. *Benning* (6 D. M. & G. 223; 1 Kay & J. 168).

This was followed by Fry, J., in the recent case of *Hole* v. *Bradbury*(*a*), where the joint authors were held entitled to restrain the further publication of their work by a firm of publishers which had succeeded to the business of the original firm. One of the joint authors in this case had sketched on blocks (which were ultimately paid for out of the proceeds of the sale of the book) certain drawings from which the illustrations of the book were engraved. These drawings remained, in the opinion of the learned judge, the property of the joint authors, and the blocks were not the property of the publishers. Bearing in mind the small value of the wood in comparison with that of the drawings, and that an injury had been done to the authors by the use which had been made of the blocks for a publication not authorised by them, the learned judge ordered the blocks to be delivered up to the authors.(*b*)

Reade v. Bentley.

A case similar was *Reade* v. *Bentley*,(*c*) where an agreement was entered into between the plaintiff and defendant that the latter should "publish at his own expense and risk a book written by the plaintiff, and after deducting from the produce of the sale thereof the charges for printing, paper, advertisements, embellishments, and other incidental expenses, including the allowance of £10 per cent. on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition that should be printed, to be divided equally between the plaintiff and defendant; the books sold to be accounted for at the trade sale price, reckoning twenty-five copies as twenty-four, unless it should be thought advisable to dispose of any copies, or of the remainder at a lower price, which was left to the judgment and discretion of the defendant." The Vice-Chancellor (Wood) was clearly of opinion that this agreement was not, and was never intended by either party to be, a contract for the sale or purchase of the copyright. The Vice-Chancellor said: "It is unfortunate that publishers and authors should frame their agreements with so little precision, as from the case of *Stevens* v. *Benning* and this case it appears they are in the habit of doing. At the same time, from what I see in this case, I feel more confident than I did in *Stevens* v. *Benning* that there was no intention to dispose of the copyright by this agreement, because I cannot suppose that authors or publishers are so unaware of the importance and value of that right, as not clearly to express their intention when they mean the copyright to pass."

(*a*) L. R. 12 C. D. 886. (*b*) P. 899. (*c*) 3 K. & J. 271.

When the case of *Reade* v. *Bentley* came n second time before the Court, the counsel for the defendant did not contend that the agreement amounted to a sale of the copyright, but insisted that the plaintiff had thereby granted to the defendant an irrevocable licence to print and publish. The Vice-Chancellor did not, however, adopt this construction of the agreement. He said:(*a*) "If the defendant's construction be correct, it follows that so long as he lives and is willing to continue publishing fresh editions of the work, so long, according to the doctrine in *Sweet* v. *Cater*, the plaintiff will be precluded from asserting a right to publish any competing edition. The defendant could compel the plaintiff to abstain from publishing a single copy of the work, so long as he expressed his readiness to continue publishing. But the plaintiff has no reciprocal power. He could never compel the defendant to publish more than a single edition of the work. His powers are limited to what the contract gives him; and, according to the contract, when the defendant has published a second edition the contract on his part is fulfilled. This is a position of considerable hardship for an author, and one which ought to be clearly shown upon the face of a contract to have been contemplated by the parties who entered into it. . . . . It cannot be contended that the agreement on the author's part is like a grant, in which the *onus* is upon the grantor, of showing that he has not parted with all which the grant appears to comprise. The *onus* is here with the party who contends that this agreement amounts to a licence, which, upon the face of it, it does not. It certainly is not an assignment of the copyright. It does not appear to me to create more than a joint adventure; and if licence there be at all, it is only a licence so far as may be necessary for carrying out that joint adventure, and an implied licence for that purpose. That being so, the *onus* is upon the defendant of showing that the contrary construction is necessary; and that not being shown, a construction which would leave the author fast bound, and the publisher entirely free, after the publication of one edition, is not a reasonable construction to adopt in considering the effect of an agreement of this character." His Honour showed his disapprobation of the loose manner in which the agreement had been framed by giving no costs, considering each party equally in fault for having entered into an agreement so difficult of interpretation.

Where a writer agreed with a publisher to edit a transla-

(*a*) 4 K. & J. 664.

tion of Montaigne's works, adding notes and a biographical sketch of the author, for a particular sum, to be increased by certain other sums as further editions should be published, all the copies published to be printed by the publisher, the intention being that he should have the copyright; and the work was published before the statute 5 & 6 Vict. c. 45; the question was raised, but it was not necessary to decide it, whether the writer was the author and owner of the copyright in the work. "I do not wish to express a decided opinion," said Blackburn, J., "but my present impression is that he would have been the author, and that the copyright would have been in him, although a court of equity might have called on him to transfer the copyright" to the publisher. Mellor, J., was of a similar opinion.(*a*) After the death of the publisher in this case, his widow, with the writer's knowledge and assent, registered the copyright in her own name, under 5 & 6 Vict. c. 45; and it was held that the *primâ facie* evidence of her title afforded by the register was not rebutted by the absence of proof of a formal assignment in writing.(*b*)

Paintings, drawings, and photographs.

In the case of photographs, paintings, and drawings, there can be no equitable title by a parol agreement to assign, as sect. 3 of 25 and 26 Vict. c. 68, expressly provides, with respect to them, that "every assignment and every licence to use or copy, by any means or process, the design or work which shall be the subject of such copyright shall be made by some note or memorandum in writing, to be signed by the proprietor of the copyright, or by his agent appointed for that purpose in writing."(*c*)

Where the owner of the copyright in a picture signed the following memorandum addressed to an art publisher: "I assign to you, for the purpose of producing an engraving of one size, the copyright of the picture painted by," &c., Fry, J., held that this was not an assignment of the whole copyright in the picture; that the assignor still remained owner of the copyright in the picture, and was at liberty to make and publish copies of it.(*d*)

Dramatic and musical compositions.

A valid assignment of the copyright in dramatic and musical compositions, regarded simply as literary productions, and not carrying with them the right of representation, may be made either, first, by an instrument in writing which need not be under seal or attested by witnesses,(*e*) or, secondly,

(*a*) *Hazlitt* v. *Templeman* (13 L. T. N. S. 593).
(*b*) *Ibid.*
(*c*) *Strahan* v. *Graham* (15 L. T. N. S. 87).
(*d*) *Lucas* v. *Cooke* (L. R. 13 C. D. 872).
(*e*) See the cases quoted *ante*, pp. 167 *seq.*

PART I. CHAPTER XV.

by entry in the book of registry at Stationers' Hall in the form above given (p. 172) for the assignment of books.

The necessity of writing to confer a title by assignment, valid at law, is apparent from the cases already cited with reference to the assignment of copyright in books, as by the interpretation clause (sect. 2) of 5 & 6 Vict. c. 45, the word "book" is used to include "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, &c."

Right of representation or performance.

The right of representing or causing to be represented a dramatic or musical piece is distinct from the copyright in the book containing such dramatic or musical piece, and the assignment of the latter does not carry with it a title to the former. Sect. 22 of 5 & 6 Vict. c. 45, enacts "that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right shall pass by such assignment."

This section was in all probability passed to obviate the effect of the decision in *Cumberland* v. *Planché*,(*a*) that when an author simply assigned the copyright, he also parted with the right of representation.(*b*)

Writing is necessary to the assignment of the right to represent, or cause to be represented, a dramatic or musical piece. This has been held to follow by inference from sect. 2 of 3 & 4 Will. 4, c. 15 (the Act which gave the authors of dramatic pieces the sole right of causing them to be represented), which imposes a penalty on any person performing dramatic pieces "without the consent *in writing* of the author or other proprietor first had and obtained." As this section renders a consent in writing necessary to justify a single representation, it has been decided by the Court of Common Pleas in *Shepherd* v. *Conquest*(*c*) that an assignment conveying the exclusive right to represent throughout Her Majesty's dominions, or (if that be possible) in some definite part of them, must, in order to be valid, be in writing also. In that case the plaintiffs had engaged by word of mouth one Courtney to visit Paris for

(*a*) 1 A. & E. 580.

(*b*) *Per Cur.* in *Lacy* v. *Rhys* (4 B. & S. 873; 33 L. J. 157, Q. B.; 9 L. T. N. S. 607; 12 W. R. 309).

(*c*) 17 C. B. 427; 25 L. J. 127, C. P. See 17 C. B. 442.

the purpose of adapting a piece there in vogue for representation upon the English stage, the terms being that the plaintiffs should give him a weekly salary and pay his expenses, and should have the sole right of representing the piece in London, Courtney to retain the right of representation in the provinces. In pursuance of the agreement Courtney proceeded to Paris, and adapted a piece, which was represented by the plaintiffs at their theatre. Courtney afterwards assigned the copyright in the piece to the defendant, who caused it to be represented at his theatre, whereupon the plaintiffs, claiming the sole right of representation, brought an action to recover the penalties imposed by sect. 2 of 3 & 4 Will. 4, c. 15. It was held that there had been no valid assignment to the plaintiffs either of the copyright in the piece or of the sole right of representation, and consequently that they must fail in their action.

An assignment by the composer of two songs of all his "copyright" in the songs, and "all other the estate, right, title, interest, property . . . . benefit, claim and demand whatsoever" of and in them, was held to carry the exclusive right of performance.(*a*)

Where A wrote a letter to B, agreeing to "let B have" a drama belonging to A, in discharge of a particular sum which A owed to B, this was held by Byles, J., at Nisi Prius, to be a complete assignment to B of A's whole property in the drama.(*b*)

Licence not amounting to assignment.

A document acknowledging the receipt by T. from Messrs. R. and E., of a sum of money "for the London right" of a dramatic piece, was held to be (not technically an assignment but) a licence or consent, for the whole period of T.'s own right, to R. and E.'s. enjoyment of the sole right of representing in London.(*c*)

It was held also (after evidence received on the point) that such licence or consent was assignable by R. and E.(*d*)

Consent by agent.

The consent of the author or proprietor of a dramatic piece, to its representation, need not be under the hand of the author or proprietor himself, but may be given by an agent.(*e*)

(*a*) *Ex parte. Hutchins* and *Romer* (L. R. 4, Q. B. D. 483).

(*b*) *Lacy* v. *Toole* (15 L. T. N. S. 512). See *Levy* v. *Rutley* (L. R. 6, C. P. 523). The *semble* in the former case, that an assignment of the right to represent need not be in writing, is incorrect, as the case of *Shepherd* v. *Conquest*, referred to *supra*, shows.

(*c*) *Taylor* v. *Neville* (38 L. T. N. S. 50; 47 L. J. Q. B. 254).

(*d*) *Ibid.*

(*e*) *Moreton* v. *Copeland* (16 C. B. 517).

Assignment of right of representation separately.

Sect. 22 of 5 & 6 Vict. c 45, in cases where it is intended to assign the right of representation as well as the copyright of a dramatic or musical piece, renders necessary an entry in the book of registry of the assignment, expressing an intention to convey the right of representation. The language of the enactment refers only to cases where it is intended to convey both copyright and the right of representation; nothing is said as to the mode of assigning the right of representation separately. We have just seen that it must be assigned by writing, and there does not seem to be any other requisite to a valid assignment.

Sect. 22 has no application to the case of a simple assignment of the exclusive right of representation, and an instrument assigning that right does not require to be registered, even though it likewise convey the copyright.(*a*) Where a deed assigned "both copyright and acting right" in a dramatic piece, it was held by the Court of Queen's Bench that registration was not required to entitle the assignee to bring an action for infringement of his right —that sect. 22 does not apply to a case in which there is, in terms, an assignment of the right of representation itself.(*b*)

Published engravings.

It is a curious omission in the Acts of Parliament relating to copyright, that none of them mentions the assignee of an engraver, or expressly confers a copyright on such assignee. But sect. 2 of 8 Geo. 2, c. 13, the Act which first gave a copyright in prints, and imposed penalties for infringement of it, provides, "that it shall and may be lawful for any person or persons who shall hereafter *purchase* any plate or plates for printing, from the original proprietors thereof, to print and reprint from the said plates without incurring any of the penalties in this Act mentioned." This section, says Buller, J., in *Thompson* v. *Symonds*,(*c*) takes it for granted that the proprietor may assign. And Grose, J., in the same case added, "When the print was originally published the requisites of the statute were complied with. Then the exclusive right was vested in the engraver; and the instant he assigned to the plaintiff, the latter had every right that the engraver had before."

The assignee may maintain an action for penalties in his

(*a*) *Lacy* v. *Rhys* (4 Best & S. 873; 33 L. J. 157, Q. B.; 9 L. T. N. S. 607; 12 W. R. 607). *Marsh* v. *Conquest* (17 C. B. N. S. 418; 33 L. J. 319, C. P.; 10 L. T. N. S. 717; 12 W. R. 309).
(*b*) *Ibid.*
(*c*) 5 T. R. 46.

own name. It was argued in *Thompson* v. *Symonds* that the effect of the 1st and 2nd sections of 8 Geo. 2, c. 13, taken together, was that the purchaser from the original engraver is merely exempt from the penalties of the statute, but that if any other person copy the plate the action must be brought by the original proprietor, who, perhaps, may be considered as a trustee for the assignee, as to any damages that he may recover. But this reasoning did not prevail, and the assignee was held entitled to maintain the action in his own name.

An assignment of the copyright in engravings, it would seem, must be in writing, signed by the proprietor with his own hand, in the presence of, and attested by, two or more credible witnesses. None of the Acts contain any provision as to the mode of assigning the copyright, but 17 Geo. 3, c. 57, gives to the proprietor a remedy by special action on the case against any one who prints, reprints, imports for sale, publishes, sells, or otherwise disposes of, any copies of any print, engraved, etched, drawn, or designed in Great Britain "without the express consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of, and attested by, two or more credible witnesses." As a licence requires the observance of these formalities, it should seem that their observance is also necessary in case of an assignment of the copyright. A deed does not appear to be necessary.

Drawings, paintings, or photographs.

The Act which first conferred a copyright in paintings, drawings, and photographs, 25 & 26 Vict. c. 68, has a special provision (sect. 3) as to the mode of assigning the copyright, or of giving permission to copy, or use in any other way, the subject of the copyright. In the case of every such *assignment, or licence*, a writing is necessary, signed by the proprietor of the copyright, or his agent appointed for the purpose by writing. Furthermore (by sect. 4) the protection of the Act is withheld from, and no action for penalties is maintainable by, an assignee, unless an entry is made in "The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs," kept at Stationers' Hall, of the assignment, stating the date of the assignment, the names of the parties, the name and place of abode of the assignee and of the author of the work, and a short description of the nature and subject of the work.

Sect. 3 of that Act provides that "all copyright under the Act shall be deemed personal or movable estate, and shall be assignable at law, and every assignment thereof, and every licence to use or copy by any means or process

the design or work which shall be the subject of such copyright, shall be made by some note or memorandum in writing, to be signed by the proprietor of the copyright, or by his agent appointed for that purpose in writing."

Sect. 4, after providing for the keeping at the Hall of the Stationers' Company a book or books entitled "The Register of Proprietors of Copyrights in Paintings, Drawings, and Photographs" enacts that therein "shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work, and, in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph of the said work, and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration."

This enactment, although it prevents an assignee from suing for penalties before the assignment to him has been registered, does not render it necessary in order to entitle him to sue, that all, or any previous assignments should also be registered, or that the copyright of the original author should be registered.(*a*)

In the case of paintings, drawings, and photographs, as already stated, no equitable title can be acquired by a parol agreement to assign.(*b*)

Sculpture models and busts.

Copyright in works of sculpture may be assigned to purchasers by deed signed by the proprietor or proprietors, in the presence of, and attested by, two or more witnesses.(*c*)

Designs.

All previous enactments, including those referring to transfer, relating to the copyright in designs, have been repealed by the Patents, Designs, and Trade Marks Act, 1883,(*d*) which itself contains no provisions as to the mode in which an assignment may be made.

(*a*) *Graves's case* (L. Rep. 4 Q. B. 715; 26 L. T. N. S. 877).
(*b*) *Strahan* v. *Graham* (16 L. T. N. S. 87).
(*c*) See 54 Geo. 3, c. 156, s. 4. Appendix, *post*.
(*d*) 46 & 47 Vict. c. 57.

The repealed Act 5 & 6 Vict., c. 100, s. 6 provided that any writing purporting to be a transfer of the design, and signed by the proprietor, should operate as an effectual transfer; and Jessel, M.R., held(*a*) that a partial assignment of, or licence to use, a design, must also, under that Act, have been in writing.

The same learned judge also considered the question whether an assignment or licence could be registered by the assignee or licensee before the proprietor himself had registered, and was strongly of opinion that it could not.(*b*) No doubt can exist under the new Act, which allows assignees, &c. of the copyright in a "registered design" only to have themselves entered as proprietors.(*c*)

International copyright.

Sect. 8 of the International Copyright Act, 7 Vict. c. 12, provides that all the enactments contained in the Copyright Amendment Act of 5 & 6 Vict. c. 45, as to entries and assignments of copyright and proprietorship, shall apply to the books, dramatic pieces, and musical compositions, prints, articles of sculpture, and other works of art to which any Order in Council issued in pursuance of the International Copyright Act shall extend; except that the forms of entry prescribed by the 5 & 6 Vict. c. 45, may be varied to meet the circumstances of the case, and that the sum to be demanded by the officer of the Stationers' Company for making any entry required by the International Copyright Act shall be one shilling only. The subsequent Act, 15 Vict. c. 12, to extend and explain the International Copyright Acts, incorporates 7 Vict. c. 12, with which it is to be read and construed as one Act.(*d*) All the provisions then, of 5 & 6 Vict. c. 45, with respect to the mode of assignment, apply to assignments of the foreign copyright conferred by the International Copyright Acts.

Foreign copyright, under the International Copyright Acts, may, therefore, be assigned, either, first, by writing, which need not be under seal; or, secondly, by making entry in the book of registry at Stationers' Hall of such assignment, and of the name and place of abode of the assignee thereof.

(*a*) *Jewitt* v. *Eckhardt* (L. R. 8 C. D. 404).
(*b*) *Ibid.* (*c*) Sect. 87.
(*d*) Sect. 10 of 15 Vict. c. 12.

CHAPTER XVI.

INFRINGEMENT OF COPYRIGHT.

Piracy in general.

THE leading and distinguishing feature of piracy is, that it reproduces the pirated work in such a manner as to interfere with the profit and enjoyment which the proprietor derives from it.(*a*) Yet everything that does this by no means lays the author of the interference open to the charge of piracy. For example, a *bonâ fide* abridgment of a book may seriously impair the profit which the proprietor of the larger work derives from it, at the same time that it subjects the author of the abridgment to none of the penalties which the law attaches to piracy. Nevertheless, where the act done is not one of those which are in express terms prohibited by statute, no finer test of piracy has been applied in the various cases on record than that of the degree in which one work interferes, by reproduction, with the benefits derivable from another work in which copyright exists. It may well be supposed that a test of this character has afforded scope for variance of opinion, and that many litigated cases have arisen with respect to its application. It will be well to treat the subject separately as to each class of productions in which piracy may be committed.

BOOKS.

Only by multiplication of copies.

As piracy is the infringement of copyright, and copyright is defined by 5 & 6 Vict. c. 45, to mean "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject" to which the word is applied in the Act, it follows that piracy can be committed in no other manner than by the multiplication of copies.(*b*)

(*a*) "It is enough that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced:" Lord Ellenborough, in *Roworth* v. *Wilks*, 1 Camp. 98.) "If so much is taken that the value of the original is sensibly diminished, or 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*:" (Story, J., in *Folsom* v. *Marsh*, 2 St. Rep. 115.) "The inquiry is, what effect must the extracts have upon the original work. If they render it less valuable by superseding its use in any degree, the right of the author is infringed: it can be of no importance to know with what intent this was done:" (M'Lean, J., in *Story's Executors* v. *Holcombe*, 4 M'Lean, 310.)

(*b*) A translation may be called a transcript or copy of the author's thought or conception, but in no correct sense can it be called a copy of his book; (*Stowe* v. *Thomas*, 2 Amer. Law Reg. 231).

So long ago as 1793(*a*) it was held that the public recitation from memory of any production in which copyright existed was not a piratical publication. In that case (an action for infringement of copyright in a dramatic piece) which was decided under the Act of Anne, Buller, J., observed: "Reporting anything from memory can never be a publication within the statute. Some instances of strength of memory are very surprising, but the mere act of repeating such a performance cannot be left as evidence to the jury that the defendant had pirated the work itself." The law did not at that time give the author of a dramatic piece the sole right of representing it, and the decision goes simply to the extent of showing that public recitation from memory is not a publication of a literary work. In the similar case of *Murray* v. *Elliston*(*b*) in 1822, the Court of King's Bench was of opinion that such a mode of publication gave no right of action.

The law remains the same under the more recent Act of 5 & 6 Vict. c. 45, as the case of *Reade* v. *Conquest*(*c*) shows. In that case, a novel written by the plaintiff had been dramatised by the defendant and performed at his theatre. This was treated by the plaintiff as an infringement of the copyright in his book, and he brought an action to recover the penalty imposed by 5 & 6 Vict. c. 45, for such alleged infringement. But the Court of Common Pleas, following the decision in *Coleman* v. *Wathen*,(*d*) held that the defendant had not infringed the plaintiff's copyright in his book by dramatising it and publicly performing it at his theatre.

Even if the public recitation of a book in which copyright exists is not made from memory, but takes the form of a public reading out, from the work itself, of the whole or portions of it, this would not amount to an infringement of the author's copyright.(*e*)

But, although the whole work might be read out or dramatised, copies of the work so read out or dramatised cannot, without infringing the copyright, be distributed and sold to the audience, though for the mere purpose of assisting them to follow the representation or reading.(*f*)

(*a*) *Coleman* v. *Wathen* (5 T. R. 245).

(*b*) 5 B. & Ald. 657.

(*c*) 9 C. B. N. S. 755; 30 L. J. 209, C. P. The plaintiff afterwards successfully maintained an action for infringement of his sole right of dramatic representation. *Reade* v. *Conquest* (11 C. B. N. S. 479).

(*d*) 5 T. R. 245.

(*e*) *Per* Wood, V.C., in *Tinsley* v. *Lacy* (1 H. & M. 747; 32 L. J. 535, Ch.; 11 W. R. 877).

(*f*) *Ibid.*

Gratuitous distribution of copies.

A multiplication of copies for the purpose of gratuitous distribution is as much an infringement of the proprietor's copyright as if the multiplication had been made for purposes of pecuniary profit. Thus, where a member of a Philharmonic Society, desiring to have a particular piece of published music performed at a concert of the Society to which, besides the members, other persons were admitted for money, caused a number of copies of the piece of music to be lithographed and distributed amongst the members of the choir without the consent of the proprietor of the copyright, this was held to be an illegal multiplication of copies, and a violation of the proprietor's right.(*a*)

The same view has been taken by the Scotch Court of Session in a case of gratuitous circulation.(*b*)

Where an original catalogue of old and curious books in the possession of a bookseller, intended merely as an advertisement of the books, was in great part copied and published as his own by a rival bookseller, who had a similar stock of old books to dispose of, this was held to be an infringement of the copyright in the original catalogue, though the second catalogue was not offered for sale, but merely used to promote the sale of the books mentioned in it.(*c*)

To what extent an author may use another's work.

Anything like absolute originality in the composition of a work nowadays seems to be almost an impossibility. The range of human ideas on any subject is limited, and the productions of the busy brains and pens of preceding thinkers are so numerous that, if books are to be written, the writers must be, to some extent at least, beholden for their materials to those who have written before. If no copyright exists in a work, of course subsequent writers may make of it what use they like, and reproduce it to any extent they please. But if a copyright does exist in it, then the important and somewhat difficult question arises, in what manner and to what extent may subsequent authors make use of the materials contained in it without an infringement of the copyright. In other words, how far may one writer avail himself of the product of another's labour in which copyright exists, without subjecting himself to the charge of piracy?

Tests of piracy.

The answers to the question, what amounts to piracy? given by different judges, have been variously expressed;

(*a*) *Novello* v. *Sudlow* (12 C. B. 177).
(*b*) *Alexander* v. *Mackenzie* (9 Scotch Sess. Cas. 2 Ser. 748).
(*c*) *Holten* v. *Arthur* (1 H. & M. 603; 9 L. T. N. S. 199; 32 L. J. 771, Ch.; 11 W. R. 934).

but they all point to the conclusion that the question must be treated as one of fact, to be determined with reference to the peculiar circumstances of each individual case; and this question of fact may be determined differently by judges who are at one as to the principle.(*a*) A summary of the principal tests of piracy which have been given by the most eminent judges will furnish, perhaps, the clearest idea of the nature of the offence, and, consequently, of the degree of liberty allowed to an author in the use of the copyright works of his predecessors.

Lord Eldon stated the test to be—whether the one publication is "a legitimate use of the other in the fair exercise of a mental operation deserving the character of an original work."(*b*)

According to Vice-Chancellor Kindersley, an illegitimate or unfair use of another's work is that which amounts to "such an extraction from it as comes up to an extraction of the vital part."(*c*)

Lord Ellenborough expressed the criterion thus: "Was the matter so taken [by the writer of one book from a preceding book for the promotion of science, and the benefit of the public] used fairly with that view, and without what I may term the *animus furandi*?"(*d*) Wood, V.C., refers to this rule thus: "Whether you find on the part of the defendant an *animus furandi*—an intention to take for the purpose of saving himself labour."(*e*)

Lord Jeffrey, in the Scotch case of *Alexander* v. *Mackenzie*, (*f*) in somewhat figurative language, states the test to be, in cases where the subject is *in medio*, or open to everybody to write upon it: "Is there reasonable evidence that the two works are identical, and that the last author did not mount upon the back, and walk on the crutches of, his predecessor, but actually used his own muscular exertions in traversing the field in which he made his observations? Did he, on the whole, do so fairly and

(*a*) See *Pike* v. *Nicholas* (20 L. T. N. S. 906; 38 L. J. 529, Ch.; L. Rep. 5 Ch. App. 251), where Vice-Chancellor James thought that the defendant had pirated the work of the plaintiff, whereas the Lords Justices of Appeal considered that the use made of the plaintiff's work did not amount to a piracy of it. As to piracy of a drama, see *Chatterton* v. *Cave* (L. R. 10, C. P. 572; 2 C. P. D. 42; 3 App. Cas. 483.

(*b*) *Wilkins* v. *Aikin* (17 Ves. 426).

(*c*) *Murray* v. *Bogue* (1 Drew. 369).

(*d*) *Cary* v. *Kearsley* (4 Esp. 169). As to the necessity of an *animus furandi*, see *post*, pp. 199, 200.

(*e*) *Jarrold* v. *Houlston* (3 K. & J. 716).

(*f*) 9 Scotch Ses. Cas. 2nd Ser. 758.

honestly for himself, although he may occasionally have followed in the *vestigia* left by his precursor? Or is there evidence that the second writer's not going over the ground for himself is not the very cause why he has arrived at almost identical conclusions with his predecessors?"

Lord Hatherley (when Wood, V.C.), in dealing with a work in the form of question and answer on a variety of scientific subjects, thus lays down the rule:(*a*) "I take the illegitimate use, as opposed to the legitimate use of another man's work on subject matters of this description to be this: If, knowing that a person whose work is protected by copyright has, with considerable labour, compiled from various sources a work in itself not original, but which he has digested and arranged, you being minded to compile a work of a like description, instead of taking the pains of searching into all the common sources and obtaining your subject matter from them, avail yourself of the labour of your predecessor, adopt his arrangements, adopt moreover the very questions he has asked, or adopt them with but a slight degree of colourable variation, and thus save yourself pains and labour by availing yourself of the pains and labour which he has employed, that I take to be an illegitimate use."

An American judge (Story, J.) says:(*b*) "I think it may be laid down as the clear result of the authorities in cases of this nature,(*c*) that the true test of piracy or not, is to ascertain whether the defendant has, in fact, used the plan, arrangements, and illustrations of the plaintiff, as the model of his own book, with colourable alterations and variations only to disguise the use thereof; or whether his work is the result of his own labour, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental or arising from the nature of the subject. In other words, whether the defendant's book is, *quoad hoc*, a servile or evasive imitation of the plaintiff's work, or a *bonâ fide* original compilation from other common or independent sources."

The *quantity* of one work introduced into another is a very vague test of piracy, according to Lord Cottenham,(*d*)

(*a*) *Jarrold* v. *Houlston* (*ubi supra*).

(*b*) *Emerson* v. *Davies* (3 St. Rep. 793).

(*c*) The book of which the copyright was alleged to be infringed in this case was a treatise on arithmetic.

(*d*) *Bramwell* v. *Halcomb* (3 My. & Cr. 738). Similarly Story, J. (1 St. Rep. 20), "In many cases the question may naturally turn upon

"One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to."

In *Pike* v. *Nicholas*,(*a*) a case of piracy of a book on the origin of the English nation, James, V.C., said: "There is no monopoly in the main theory of the plaintiff, nor in the theories and speculations by which he has supported it, nor even in the use of the published results of his own observations. But the plaintiff has a right to say this, that no one is to be permitted, whether with or without acknowledgment, to take a material and substantial portion of his work, his argument, his illustrations, his authorities, for the purpose of making or improving a rival publication."(*b*)

Where materials are common.

In all cases where the sources from which materials for composition are to be derived are of a common or general nature, or, as it is otherwise expressed, where the materials are *in medio*, it is open to any one to gain a copyright in any arrangement of them which he chooses to make. "In all cases," says Lord Jeffrey,(*c*) "although the materials are expressly *in medio*, and open to everybody, when a particular degree of judgment in the selection of those materials has been used, and where the subject *in medio*, so open to the world at large, has been, to a certain extent, snatched at and appropriated, such selection is in itself recognised as a certain degree of mental effort, which is entitled to the benefit of copyright."

But though any person may thus acquire a copyright in his own arrangement of common materials, the materials themselves are equally open to everyone else who chooses to have recourse to them, and different copyrights may be acquired in different arrangements of the same common materials.(*d*)

The different arrangements of common materials must, however, be independent. A later arrangement must not be

the point not so much of the quantity as of the value of the selected materials. As was significantly said on another occasion,—'Non numerantur, ponderantur.'" See *Chatterton* v. *Cave* (L. R. 3 App. Cas. 482; 2 C. P. D. 42; 10 C. P. 572).

(*a*) 20 L. T. N. S. 909; 38 L. J. 529, Ch.

(*b*) The decision of the Vice-Chancellor in this case was reversed on appeal, but only as to the question of degree in which the defendant had in fact made use of the plaintiff's work: (L. Rep. 5 Ch. App. 251.) See also *Stowe* v. *Thomas* (2 Amer. Law Reg. 229).

(*c*) *Alexander* v. *Mackenzie* (9 Scotch Sess. Cas. 2nd Ser. 758); see also *Blunt* v. *Patten* (2 Paine. 395); *Emerson* v. *Davies* (3 Story, 781).

(*d*) Compare the cases of *Jarrold* v. *Houlston* (3 K. & J. 708), and *Jarrold* v. *Heywood* (18 W. R. 279).

PART I.
CHAPTER XVI.
Compilation of directory.

a servile imitation or reproduction of an earlier one; otherwise it subjects its author to the charge of piracy.

The case of *Kelly* v. *Morris*(*a*) is a forcible illustration of this doctrine. In that case an application was made for an injunction to restrain the publication of "The Imperial Directory of London, 1866," on the ground that it was a mere piracy of a work belonging to the plaintiff, entitled "Post-office London Directory." The defendant's affidavit set up, as grounds of defence, that from 1862 to 1864 he had published a work called "The Business Directory," in which appeared the names of about 100,000 persons in trade or business, which had been obtained by a large number of canvassers, whom he had employed for the purpose; that, wishing to extend his operations, and bring out "The Imperial Directory," which should comprise street, conveyance, postal, and other sections, he acted on a similar principle to that which had guided him in taking the names of persons of business whom his canvassers were unable to see, viz., he took such information from any source "where the persons had made it public at their own expense for their own benefit;" he considered that the name of a private resident belonged to the public when that resident had "gratuitously given it to the public through some recognised medium of publicity," and that the publisher merely "held it in trust for a purpose, receiving for his trouble any benefit he could make of the information, but that the right of using that information belonged to the public as soon as the information was made public," and that any person might go round with a list of names already published and ask permission to render the work of publication more complete by reproducing it, and if any error had been made in the first publication, it rested with the original owners of the names to point out the error, when submitted to them for permission to reproduce, which opportunity was afforded the residents by means of circulars sent round to them through the defendant's canvassers, asking the residents to fill up a form with their name and address for publication in "The Imperial Directory." It was admitted that one of the defendant's canvassers, afterwards discharged by him, had not taken the trouble to make the necessary inquiries from house to house, so that most of the errors in the defendant's directory identical with those in the plaintiff's would be thus accounted for. On the other hand, several instances were adduced of corrections and large supplementary additions to the plaintiff's work

(*a*) L. Rep. 1 Eq. 697; 35 L. J. 423, Ch.; 14 L. T. N. S. 222.

contained in the defendant's, and the manuscript of the latter work was produced. The Vice-Chancellor, Sir W. Page Wood, granted the injunction prayed for, and laid down the law on the subject in very stringent terms.

His Lordship said: "The defendant has been most completely mistaken in what he assumes to be his right to deal with the labour and property of others. 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. In the case put of a newly discovered island, he must go through the whole process of triangulation, just as if he had never seen any former map, and generally, he is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained. So, in the present case, the defendant could not take a single line of the plaintiff's directory for the purpose of saving himself labour and trouble in getting his information. The defendant, from the description of the way in which he had in the first instance compiled his 'Business Directory,' seems to have known exactly what he might do. . . . . The defendant goes on in his affidavit to propound a most extraordinary doctrine as to the right of publicity in the names of private residents, who had, as he expressed it, 'given their names for public use.' What he has done has been just to copy the plaintiff's book, and then to send out canvassers to see if the information so copied was correct. If the canvassers did not find the occupier of the house at home, or could get no answer from him, then the information copied from the plaintiff's book was reprinted bodily, as if it was a question for the occupier of the house merely, and not for the compiler of the previous directory. Further than this, the defendant tells us that he had a number of new agents, and that one of them had performed his part of the work carelessly, thus at once showing how easy it would be, on the system adopted by the defendant, for any negligent agent to send back his list all ticked as if correct, without having taken the trouble to make a single inquiry. . . . . The work of the defendant has clearly not been compiled by the legitimate application of independent

personal labour, and there must be an injunction to restrain the publication of any copy of the defendant's work containing the portions called the 'Street' and 'Court' Directories, with liberty for the defendant to apply, when he shall have expunged from such portions all matter copied from the plaintiff's work."(*a*)

Lord Eldon had previously said, with reference to a "Road Book:" "It is certainly competent to any other man to publish a book of roads, and if the same skill, intelligence, and diligence are applied in the second instance, the public would receive nearly the same information from both works; but there is no doubt that this Court would interpose to prevent a mere republication of a work which the labour and skill of another person had supplied to the world."(*b*)

The fact that the publisher of a business directory receives payment from some of the persons whose names are contained in it, for printing their names in larger letters, or with lines of additional description, does not make those names, when so inserted, common property, so as to justify the compiler of a rival directory in reprinting them from slips cut from the former.(*c*)

Neither does the fact that the persons whose names were so printed had been applied to by the compiler of the second directory to verify the information contained in the first, and had not only authorised, but actually paid for the insertion of their names in the second with capital letters and added lines, prevent the publication being a piracy of the first directory.(*d*)

How far the compiler of a directory may make use of a previous directory of the same kind without being guilty of piracy, was considered by Lord Justice Giffard in the recent case of *Morris* v. *Wright*,(*e*) where the two last cited cases were considered and explained, and the rule derivable from them was thus stated by the Lord Justice: "The compiler may not cut out slips from the former work and go and see whether they are accurate, and if accurate, copy them bodily into his own work, as was done in both the cases referred to; but he is quite justified in referring to the former book 'in order to guide himself to the

(*a*) See also *Matthewson* v. *Stockdale* (12 Ves. 275); *Cornish* v. *Upton* (4 L. T. N. S. 862); and *Morris* v. *Ashbee* (L. Rep. 7 Eq. 34; 19 L. T. N. S. 550).

(*b*) Judgment in *Longman* v. *Winchester* 16 Ves. 271).

(*c*) *Morris* v. *Ashbee* (L. Rep. 7 Eq. 34; 19 L. T. N. S. 550).

(*d*) *Ibid.*

(*e*) L. Rep. 5 Ch. App. 279; 22 L. T. N. S. 78.

persons on whom it would be worth his while to call.'" After referring to the passage from the judgment in *Kelly* v. *Morris*, above cited,(*a*) where it was said that the defendant could not take a single line of the plaintiff's directory for the purpose of saving himself trouble in getting his information, the Lord Justice said: "If this passage goes further than what I take it to mean, I cannot doubt that it goes beyond what the law authorises, and beyond the decision of the Lord Chancellor and myself, in the late case of *Pike* v. *Nicholas*.(*b*) It does not mean that he may not look into the book for the purpose of ascertaining whether it was worth his while to call upon that person or not; but it means that he may not take that particular slip and show that to the person and get his authority as to putting that particular slip in. . . . . I understand that judgment to rest entirely upon the facts, and I am quite satisfied, from what the Lord Chancellor said in *Pike* v. *Nicholas*, that it was never his intention to say a person may not look at the directory for the purpose of directing him where to call; but what he meant was, that he must not take the passage of the directory and go and see whether it happens to be accurate, and if it is accurate, bodily copy the passage into his directory."

In *Morris* v. *Wright* the plaintiff, who was the proprietor of a publication called "The Business Directory of London," filed a bill against the defendant, who was preparing for publication a new mercantile directory bearing the name of "The Handbook; or, Manufacturers' and Exporters' Directory of Great Britain," charging him with pirating the former work; and an interlocutory injunction to restrain the publication was moved for. The defendant admitted having at first provided his canvassers with cuttings from the plaintiff's directory, but stated that he had discontinued its use after the decision in *Morris* v. *Ashbee*,(*c*) and denied that he had copied, or intended to copy, any part of the plaintiff's directory. James, V.C., dissolved the injunction which had been granted, and his decision was upheld on appeal by Giffard, L.J., who said, "If the fact be that Mr. Wright (the defendant) used the plaintiff's work in order to guide himself to the persons on whom it would be worth his while to call, and for no other purpose, he made a perfectly legitimate use of the plaintiff's book. I do not wish to say anything whatever to prejudice the ultimate

(*a*) *Ante* p. 193. (*b*) L. R. 5 Ch. App. 251.
(*c*) L. Rep. 7 Eq. 34; 19 L. T. N. S. 550.

decision of this case, supposing the plaintiff makes out such a case as he alleges by his Bill; but I think that in the present state of circumstances, the Vice-Chancellor did that which was right between the parties."

In *Pike* v. *Nicholas*(*a*) it was laid down by the Lords Justices of Appeal in Chancery, that an author may, without committing piracy, use the same passages in older writers which have been used by a previous author, although he has been led to refer to those writers by t .at author. He must not, however, simply copy the passages from the previous author, but, being put on the track by him, he must have recourse for himself to the original writer, and then may make use of every passage used by the other author.

Lists of hounds published in newspapers.

In the case of "lists of hounds" published in newspapers, the information must, according to Vice-Chancellor Malins, be got at the expense of each proprietor, and as the result of his own labour: he is not entitled to the results of the labours undergone by others:(*b*) but it is doubtful whether a Court of Chancery would interfere in such a case. The Vice-Chancellor refused an interlocutory injunction to restrain such a piracy, on the ground that the list was liable to frequent changes, and a correct list was so easily obtained.

Dictionaries, calendars, &c.

The same rule applies to tables of figures, dictionaries, calendars, Court guides, and other works of that description, as to directories. The difficulty as to this class of cases is that they not only relate to a subject common to all mankind, but the mode of expression and language is necessarily so common that two persons must, to a very great extent, express themselves in identical terms in conveying the instruction or information to society which they are anxious to communicate.(*c*)

Dictionaries.

As to dictionaries, Vice-Chancellor Wood, after remarking that in this country, labour having been employed upon any subjects, however humble, gave a copyright which no one had a right to interfere with, observed that "as to dictionaries, the matter stood in a somewhat different position. There might be a certain degree of skill exhibited as to order and arrangement, and there might be a good deal of ingenuity exhibited in the selection of phrases and illustrations which were the best exponents of the sense in which

(*a*) L. Rep. 5 Ch. App. 251; 38 L. J. 529. Ch.

(*b*) *Cox* v. *Land and Water Journal Company* (L. Rep. 9 Eq. 324). See, as to the soundness of this decision, the remarks on the case contained in the chapter on "Newspapers," *post*.

(*c*) *Per* Wood, V.C., in *Spiers* v. *Brown* (6 W. R. 352).

the word was to be used; there might also be great labour in the logical deduction and arrangement of the word in its different senses, when the sense of the word departed from its primary signification; on the other hand, there was always this to be said, that as to a large mass of the words, they admitted of only one acceptation, and could be translated in one way only, and the large mass of dictionaries were composed of words of this description: numerous dictionaries had necessarily been published from time to time, and the new dictionary-maker must, of necessity, use much of the information and of the results of his predecessors. . . . . Of course there could be no copyright in much of the information contained in the numerous dictionaries published, each necessarily having a large number of words identically similar." In the case before him the Vice-Chancellor *applied the test* "*whether there was a* legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work," and the result, after an elaborate comparison of the two dictionaries, was an opinion that though the defendant had taken a good deal from the plaintiff's work, yet a good deal of labour had been bestowed upon what had been taken, and, on the whole, it could not be said that the defendant had gone beyond what the Court would allow; having produced that which, in the result, was in fact a different work from that of the plaintiff. The Bill praying for an injunction was dismissed, but, on account of the doubtfulness of the case, without costs.(*a*)

Test of piracy.

Where the works are of such a nature that the information contained in them must of necessity, if it be correct, be exactly the same in both, the test frequently applied by the Courts, to determine whether the second is a mere unlaborious reproduction of the first, or has been compiled by original effort from common sources, is this—to examine the inaccuracies which appear in both works, and see whether they are identical. If so, the inference of piracy is almost invariably drawn. This test satisfied the mind of Lord Eldon in *Longman* v. *Winchester*,(*b*) a case of pirating a "Court Calendar." "The question before me," he said, "is whether it is not perfectly clear that in a vast proportion of the work of these defendants no other labour has been applied than copying the plaintiff's work. From the identity of the inaccuracies it is impossible to deny that the one was copied from the other *verbatim et literatim*. To the extent,

(*a*) *Per* Wood, V.C., in *Spiers* v. *Brown* (6 W. R. 352).
(*b*) 16 Ves. 271, 272.

therefore, that the defendants' publication has been supplied from the other work, the injunction must go." And Vice-Chancellor Wood says of the whole class of works, embracing tables of figures, directories, calendars, Court guides, and other such, that "the only mode of arriving at the amount of labour bestowed was by the common test resorted to of discovering the copy of errors and misprints indicating a servile copying."(*a*)

Translations.

Translations into English of works published in other languages stand on a somewhat similar footing to the preceding. If the foreign work is not protected by international copyright it is open to any one to translate it; but a translation already existing is the product of the translator's mental labour, and his property in it must not be infringed. Independent recourse must be had by subsequent translators to the common original source. "A man," says Justice Story,(*b*) "has a right to a copyright in a translation upon which he has bestowed his time and labour. To be sure, another man has an equal right to translate the original work, and to publish his translation; but then it must be his own translation, by his own skill and labour; and not the mere use and publication of the translation already made by another."

In *Wyatt* v. *Barnard*(*c*) Lord Eldon restrained the defendant from publishing in his magazine translations from the French and German languages which had already appeared in a periodical belonging to the plaintiff. His lordship said: "With respect to the translations, if original, whether made by the plaintiff or given to him, they could not be distinguished from other works: the injunction therefore must go."

Even though the book in a foreign or dead language be published here, and an English copyright subsist in it, an original translation will, it seems, be no infringement of the English copyright; but, it is presumed, will itself be entitled to copyright protection. In *Burnett* v. *Chetwood*,(*d*) where it was sought to make the defendant liable for an infringement of the copyright in Burnett's *Archæologiæ Sacra*, on account of his having published a translation of it, the Lord Chancellor was of opinion that a translation was not the same as reprinting the original, and so not within the prohibition of the Act "on account that the translator has bestowed his

(*a*) *Spiers* v. *Brown* (6 W. R. 352). Cf. *Cox* v. *Land and Water Journal Company* (L. Rep. 9 Eq. 324).
(*b*) *Emerson* v. *Davies* (3 St. Rep. 780). (*c*) 3 Ves. & B. 77.
(*d*) See note to *Southey* v. *Sherwood* (2 Meriv. 441).

care and pains upon it," though he granted an injunction to restrain the publication on other grounds which the Court of Chancery would not now act upon.(*a*)

Re-translation.

If a foreigner translates an English copyright work, and then an Englishman re-translates that foreign work into English, that would be an infringement of the original copyright. And it would be no defence that the re-translator was not aware that the work he translated was itself a translation from an English work.(*b*)

See now, on the subject of translations, the provisions of the International Copyright Act (15 & 16 Vict. c. 12).(*c*)

Animus furandi.

Lord Ellenborough has been considered to have laid down the rule, in *Cary* v. *Kearsley*,(*d*) that the existence of an *animus furandi* is essential to piracy. What Lord Ellenborough did in that case was to point out that from the nature of the two books before him (Road-books) the one must, if correct, be to some extent a transcript of the other: and, laying it down that the defendant might fairly own that he had taken a great part of his book from the plaintiff's, he left this question to the jury—whether what was taken or supposed to be derived from the plaintiff's book was fairly done with a view of compiling a useful book for the benefit of the public, or taken colourably, merely with a view to steal the copyright of the plaintiff. That does not mean that in every case where invasion of copyright is charged, it is necessary to prove an *animus furandi*.(*e*)

An *animus furandi*, if essential to piracy, must certainly not be understood to mean a deliberate design to steal the product of another's labour and surreptitiously appropriate it to one's own use and credit. The offence of piracy may be committed *bonâ fide*, with no dishonest intention, and without any idea on the part of him who commits it that he is infringing a copyright.

"The intention to pirate," says Lord Ellenborough,(*f*) "is not necessary in an action of this sort; it is enough that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced." And, says Sir L. Shadwell, V.C., in *Campbell* v. *Scott*,(*g*) with reference to a

(*a*) See also the opinions of Aston, J., in *Millar* v. *Taylor* (4 Burr. 2348), and of Knight Bruce, V.C., in *Prince Albert* v. *Strange* (2 De G. & Sm. 693).

(*b*) *Murray* v. *Bogue* (1 Drew. 353; 22 L. J. 457, Ch.).

(*c*) *Vide ante*, pp. 150, 151.

(*d*) 4 Esp. 169.

(*e*) See *per* Wood, V.C., in *Reade* v. *Lacy* (1 J. & H. 527).

(*f*) 1 Camp. 98.

(*g*) 11 Sim. 38. See *Millett* v. *Snowden* (1 West. Law Jour. 240).

book of avowed extracts from the poetical writings of others, "If A takes the property of B the *animus furandi* is inferred from the act."(*a*) Thus in *Scott* v. *Stanford*(*b*) the defendant, in a book of "Mineral Statistics of the United Kingdom of Great Britain and Ireland for the year 1865," published by him, had inserted, in a different arrangement, the whole of certain statements (amounting to about one-third of the work) of the quantity of coal, &c., brought into London, which the plaintiff as clerk and registrar of the City coal market had compiled, published, and registered. There was no concealment in the defendant's book of the source from which the information was obtained, it being distinctly stated at the head of the statistics that they were "compiled from the returns published by authority of the Corporation of London, by James R. Scott, Esq., clerk and registrar of the Coal Market." Nevertheless the defendant was held to have infringed the copyright of the plaintiff, and an injunction was granted to restrain the publication of such portions of the defendant's work as contained the statistics compiled by the plaintiff. The Vice-Chancellor (Wood) observed: "It had been said that there had been no *animus furandi* on the part of Mr. Hunt [the writer of the book published by the defendant], that he had taken these statistics in perfect good faith, without any notion that he was pirating the plaintiff's work, and that he acknowledged in the fullest manner the source from which they were derived. But the term *animus furandi* could not be defined in so restricted a sense as to allow a man who had an honest intention of benefiting the public, and no idea that he was infringing a copyright, to take, and without any labour, a very large portion of the work of another and materially injure the sale of it. It was as impossible to define the internal act of a man as to measure it. It was only the result of the internal act that could be measured. A man must be presumed in point of law to intend all that the publication of his work effects."

According to the same learned judge in *Reade* v. *Lacy*,(*c*) the class of cases to which the *animus furandi* test properly applies is that difficult one relating to dictionaries, road-books, and the like, where a certain amount of common material is used by different persons, and the matter in issue is "piracy or no piracy." But copyright is like patent right in this respect, that if it is infringed, ignorance will not avail as a defence in the one case any more than in the other.

(*a*) See also *Clement* v. *Maddick* (1 Giff. 98).
(*b*) L. Rep. 3 Eq. 718; 16 L. T. N. S. 51. (*c*) 1 J. & H. 527.

In *Reade* v. *Lacy* the plaintiff had written a drama called "Gold," and afterwards published a novel founded upon it called "Never too Late to Mend," into which were introduced many scenes and passages from the play. The defendant afterwards published a drama called "Never too Late to Mend," founded on the plaintiff's novel, and containing scenes and passages substantially identical with scenes and passages common both to the plaintiff's novel and his play of "Gold." On a motion for an injunction to restrain the publication of the defendant's drama as an infringement of the plaintiff's copyright in his play of "Gold," evidence was given that the defendant's play was a *bonâ fide* adaptation of the novel, written without any reference to the play of "Gold," and without any knowledge of the published play. The Vice-Chancellor granted the injunction prayed for. He said: "The plaintiff has a copyright in the printed book called 'Gold,' and no one has a right to reprint it without his consent. It so happens that, after having acquired this right, he himself extracted a large portion of this drama, and republished it in the form of a novel. The defendant alleges, and I assume in his favour that he knew nothing about the drama, and that his play was compiled from the novel alone. I also assume for the purpose of the argument, and this only, that the defendant had a right to dramatise the plaintiff's novel, and that, as far as the novel is concerned what was done was a fair adaptation of a complicated novel, so as to produce a short drama. This point I shall leave to be decided by a court of law; but even supposing it to be determined in the defendant's favour, still that will not justify the reprinting of scenes and passages identical with those in 'Gold' merely because the novel also happens to contain them, and the defendant took them from that source. The plaintiff did not by transferring these passages into his novel, lose any part of the copyright which he had in his drama; nor can ignorance of the existence of the drama on the part of the defendant be urged as a valid defence. . . . . To admit such a defence would be to open a door to fraud and perjury. There is a manifest invasion of the plaintiff's copyright in the drama; and it is no answer to say that this is not an invasion, because it would not have been so if the matter appropriated had appeared only in its later form as a novel."(*a*)

Where, however, the author wrote and published his novel

(*a*) See further, on the same subject, *Lee* v. *Simpson* (3 C. B. 871, 883), *Webb* v. *Powers* (2 Wood and Min. 512), and *Story's Executors* v. *Holcombe* (4 M'Clean, 310).

first and afterwards dramatised it, the drama not having been printed, published, or represented on the stage, the defendant who dramatised the novel in ignorance of the previous dramatization, was held not liable to an action for infringing the stage-right of the author of the first drama.(*a*) "When," said Cockburn, C.J., "an author has once given his novel to the world, he cannot take away from other persons the right to dramatise it by himself transforming it into a drama; subject to this, that they must not borrow from his drama, but only from his novel."

Blackburn, J., considered that the first and the second dramatist was each the author of his own drama, and each entitled to restrain the piracy of it. "I think," added his lordship, "as at present advised, that if Mr. H.'s [the author of the novel and first drama] drama had been plagiarised, the defendant would have been liable to an action; and in the present case, *if Mr. H.'s drama had been produced upon the stage, a jury would have found that Mr. G.* [*the second dramatist*], *having the means of knowing of Mr. H.'s drama, had, as a matter of fact, plagiarised from it*;(*b*) but Mr. H.'s drama never having been represented, Mr. G. did not plagiarise, and therefore the defendant is entitled to keep the nonsuit."

Archibald, J., after pointing out that the action was not for infringement of the plaintiff's book copyright in his novel, but only for infringement of his stage-right, said: "There is a clear and intelligible distinction between this case and the second case of *Reade* v. *Conquest*.(*c*) The grounds of that decision appear to be, that there the drama was first composed and afterwards the novel; and if there had been a direct copying by the defendant from the drama, that clearly would have been a violation of the Act. The novel being composed after the drama, was regarded by the Court of Common Pleas as in some sense a copy of the drama, so that in copying from the novel, and using the novel for the purpose of dramatising it, the defendant was treated as copying indirectly from the published drama; a drama produced under these circumstances might be a reproduction of a drama composed by the plaintiff. But the present case is different. The novel is first composed, and then the drama is composed from the novel, and the defendant in copying from the novel, or in using the novel for the purpose of his drama, cannot be said in any way to have made an indirect

(*a*) *Toole* v. *Young* (L. R. 9 Q. B. 523).

(*b*) The words italicized are found only in the Law Reports. They are not in the *Law Journal* or *Law Times* report of the same cases.

(*c*) 11 C. B. N. S. 479.

use of the plaintiff's drama, the more especially as it is admitted that he was wholly unaware of Mr. H.'s drama."

Before this decision it appears to have been thought that a previous dramatisation by the author of the novel would entitle him to prevent any subsequent dramatisation, an opinion in support of which was cited the language of Erle, C.J., in the first case of *Reade* v. *Conquest*,(a) "Perhaps the only way in which the author of a novel can protect himself from this sort of infringement is by dramatizing it himself;" and that of Wood, V.C., in *Tinsley* v. *Lacy*:(b) "I suppose if this lady [the author of the novel] wished to protect herself in the matter, as the law now stands, all she would have to do would be to take a pair of scissors and cut out certain scenes and publish a little drama of her own; because if she first published a work like this in the shape of a drama, she would come within the protection of the Dramatic Authors' Copyright Act."

In *Toole* v. *Young*,(c) Blackburn, J., expressly dissented from these two dicta, and said he could not think that the mere fact that the author of the novel and the first drama were the same person made any difference; and Quain, J.,(d) considered them not in the least necessary for the decision of the cases in which they were uttered.

Blackburn, J., has been supposed by some to have laid down in this case, as a proposition of law, that if the author of the novel and first drama has the drama once performed, any subsequent dramatisation of the novel can be prevented as necessarily a piracy of the first drama. This, however, cannot have been that learned judge's intention. For a novel once published becomes, in the language of Cockburn, C.J.,(e) "common property," and any number of persons may dramatise it, provided they do so by independent effort expended upon the novel, and do not simply plagiarise from each other's works. All are, according to Blackburn, J.,(f) equally "authors," and each is entitled to restrain the piracy of his own work. If so, no action would lie, even by the author of the novel who has himself dramatised and published or caused to be represented his drama, in respect of the performance of a second drama which its author could prove as a fact was not copied in any way from the former drama, but was the result of independent labour *bonâ fide* bestowed by him upon the novel. It is obvious that it would, at any rate, be possible for the second dramatist to convince the jury of this as

(a) 9 C. B. N. S. 759.
(b) 32 L. J. Ch. 537; 1 H. & M. 747.
(c) L. R. 9 Q. B. 529.
(d) See 43 L. J. Q. B. 176.
(e) L. R. 9 Q. B. 527.
(f) *Ibid.* p. 528.

a fact, notwithstanding a public performance (given perhaps in a distant place, and of which he probably had never heard) of the novelist's own drama. There is no effectual remedy short of that recommended by the Royal Commissioners on Copyright—viz., "that the right of dramatising a novel or other work should be reserved to the author;" assimilating, in this respect, our law to that of France and the United States.(*a*)

Publication of drama may be infringement of copyright in novel.

The distinction, alluded to by Archibald, J., between infringement of stage-right and infringement of copyright in the novel, is important. Any one may dramatise the novel of another person and perform the drama; but if, in addition, he publishes the drama, he may thereby infringe the copyright in the novel. In *Tinsley* v. *Lacy*,(*b*) Wood, V.C., granted an injunction to restrain the printing, publishing, and selling of a drama founded on a novel in which the plaintiff had copyright. The Vice-Chancellor, after referring to the fact that the author of the drama had taken one-quarter at least of his publication out of the plaintiff's publication, said: "That, for the purpose of narration, for the purpose of dramatising, or anything else except printing, he is at liberty to do; but if he chooses to put into print that one quarter, which is bodily taken out of some publication which is protected by copyright, he cannot escape from the consequences of so doing. He reprints in a book which he calls his own (I have the book alone to deal with; I have nothing to do with the drama) he reprints in that book, to the extent of one-quarter of the work, the most stirring passages, what Lord Cottenham describes as 'the vital parts' of this novel in the identical language in which the original author composed it. No doubt that is an infringement of the Copyright Act."

Piracy by quotation.

"That part of the work of one author is found in another is not of itself piracy, or sufficient to support an action," says Lord Ellenborough, in *Cary* v. *Kearsley*.(*c*) But the extracts may be too many, or contain too large or important a portion of the work from which they are made, and then they will amount to piracy, even though they are published in the form of quotations, and the source from which they are taken is expressly declared.(*d*)

"Quotation," says Lord Eldon,(*e*) "is necessary for the purpose of reviewing; and quotation for such a purpose is not to have the appellation of piracy affixed to it; but quota-

(*a*) Report, par. 80.
(*b*) 32 L. J. Chy. 535; 1 H. & M. 747. (*c*) 4 Esp. 169.
(*d*) See the judgment in *Bohn* v. *Bogue* (10 Jur. 420); *Scott* v. *Stanford* (L. Rep. 3 Eq. 718; 16 L. T. N. S. 51), and *Maxwell* v. *Somerton* (22 W. R. 313; 30 L. T. N. S. 11). (*e*) *Mawman* v. *Tegg* (2 Rus. 393).

tion may be carried to the extent of manifesting piratical intention." To the same effect Lord Ellenborough, in *Roworth* v. *Wilkes*,(a) "A review will not in general serve as a substitute for the book reviewed; and even there, if so much is extracted that it communicates the same knowledge with the original work, it is an actionable violation of literary property. The intention to pirate is not necessary in an action of this sort. It is enough that the publication complained of is in substance a copy whereby a work vested in another is prejudiced. A compilation of this kind [a large encyclopædia] may differ from a treatise published by itself, but there must be certain limits fixed to its transcripts; it must not be allowed to sweep up all modern works, or an encyclopædia would be a *recipe* for completely breaking down literary property."

Lord Ellenborough, in the case last referred to, said the question was, whether the defendant's publication would serve as "a substitute" for the plaintiff's. Sir L. Shadwell, V.C., referring to this remark, quoted by the defendant's counsel in *Sweet* v. *Shaw*,(b) says: "That does not mean a substitute for the whole work. From what you state, suppose a book to contain a hundred articles, and ninety-nine were taken, still it would not be a substitute." And again, in *Bohn* v. *Bogue*,(c) the same judge observes: "With respect to that expression of Lord Ellenborough, 'substitute,' his Lordship must be taken to have used that word with reference to the particular case before him; and it is perfectly clear to my mind that never can be the criterion." His Honour put the case of a publication of "Liddell and Scott's Lexicon," omitting three or four words at the end of each letter of the alphabet. This could not be taken as a substitute. "But can it be doubted," he asks, "that it might have a very material effect in diminishing the price of the first book; for though nobody would take it as a substitute, many people might not care about so much, and might take it cheaply for what it really did contain, which might be more than ninety-nine hundredths of the whole, and yet it would in no manner be a 'substitute'? And, therefore, the language is not generally correct, so as to be capable of application in every case."(d)

(a) 1 Camp. 97.
(b) 3 Jur. 218; 8 L. J. Ch. 216. (c) 10 Jur. 421.
(d) The Vice-Chancellor's distinction is verbal rather than substantial. The imperfect "Liddell and Scott," in the hypothetical case, is intended to be and is a substitute (though not a complete one) for the perfect work, and is bought to serve the same purpose. See further, on the subject of extracts, *Sweet* v. *Cater* (11 Sim. 580), and *Bradbury* v. *Hotten* (L. R. 8 Exch. 1).

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"No one can doubt," says Justice Story,(*a*) "that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear that if he thus cites the most important parts of the work with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy. A wide interval might, of course, exist between these two extremes, calling for great caution, and involving great difficulty, where the Court is approaching the dividing middle line which separates the one from the other."(*b*)

In *Whittingham* v. *Wooler*(*c*) an attempt was made to establish a charge of piracy against the publisher of *The Stage*, a theatrical periodical in the nature of a review and magazine, for publishing about six or seven pages of a dramatic piece, about forty pages in length. In dismissing the bill with costs, Sir Thomas Plumer, M.R., said: "It may, perhaps, be fair enough to say that if the defendant had inserted in one number a criticism and in a following number mere specimens, that would be the case of an unprotected plagiarism; but here the defendant has given no entire act or scene, but only broken and detached fragments of the piece in question."(*d*)

In *Dodsley* v. *Kinnersley*,(*e*) the plaintiffs were assignees of Johnson's "Prince of Abyssinia," and had already published an abstract of that work in the *London Chronicle*. The defendant printed part of the narrative in the *Grand Magazine of Magazines*, leaving out all the reflections. Sir Thomas Clarke, M.R., dismissed the plaintiffs' bill for an injunction, referring to the custom of annual registers, magazines, &c., to give an abstract or analysis of authors, which custom in general tended to the advantage of the author, if the composition was good. "What I materially rely on," said the Master of the Rolls, "is, that it could not tend to prejudice the plaintiffs when they had before published an abstract of the work in the *London Chronicle*."(*f*)

Bonâ fide notes.

It would seem that the work or part of the work of another may be made the foundation of *bonâ fide* notes and

(*a*) *Folsom* v. *Marsh* (2 St. Rep. 106).
(*b*) See *Smith* v. *Chatto* (31 L. T. N. S. 775).
(*c*) 2 Swanst. 428. See also *Bell* v. *Whitehead* (17 L. J. Chy. 141; 3 Jur. 68).
(*d*) See the observations of Wood, V.C., on this decision in *Tinsley* v. *Lacy* (32 L. J. Chy. 539).
(*e*) Amb. 402. (*f*) *Ibid.* 405.

observations, and may be published with such notes or observations without infringing the copyright in the original work. "Any person," says Sir L. Shadwell, V.C., in *Martin* v. *Wright*,(*a*) "may copy and publish the whole of a literary composition, provided he writes notes upon it, so as to present it to the public connected with matter of his own."

In *Cary* v. *Kearsley*,(*b*) the question was put in argument to Lord Ellenborough whether, if a man took "Paley's Philosophy" and copied a whole essay with observations and notes, or additions at the end of it, such a proceeding would amount to piracy. Lord Ellenborough replied, "That would depend on the fact of whether the publication of that essay was to convey to the public the notes and observations fairly, or only to colour the publication of the original essay, and make that a pretext for pirating it; if the latter, it could not be sustained."

In the case of legal works it has been the practice to publish in a separate form, with notes annexed, reports of cases extracted from books of reports in which copyright exists, but it has never been judicially determined whether such a practice does or does not amount to piracy of the original reports. The question was raised but not settled in the case of *Saunders* v. *Smith*,(*c*) the decision in that case against the proprietor of the original reports proceeding on the ground of his acquiescence in the labours of the defendant. Lord Cottenham said:(*d*) "In this case, I find the publication complained of to be of a character which, whether it be or be not an infringement of the copyright of the plaintiffs, is a course of proceeding which has been pretty largely admitted and pretty generally adopted. Several cases occurred to me, and several were mentioned to me at the bar, in which a gentleman at the bar, desirous of publishing a work upon a particular subject, has collected the cases upon that subject, and has taken those cases, generally speaking, *verbatim* from reports which are covered by copyright. No instance has been represented to me in which those entitled to the copyright have interfered; no judgment, therefore, has been pronounced upon that subject. I am not stating whether the owner of the copyright is entitled to interfere in such a case, or whether that use of published reports is or is not to be permitted. That is a question of legal right, upon which I find, at present, no reason for coming to an adjudication. But in considering

(*a*) 6 Sim. 298. (*b*) 4 Esp. 169. (*c*) 3 M. & Cr. 711.
(*d*) *Ibid.* 728.

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whether I am to exercise an equitable jurisdiction in such a case, before the legal right has been established, it is very important to observe that for many years such a course as I have stated has been pretty generally adopted; more particularly when I find that these plaintiffs have themselves acquiesced in a similar course of proceeding."

If the Courts of Common Law apply to such a case as this the test laid down by Lord Ellenborough in *Cary* v. *Kearsley*,(*a*) there is little doubt that it would be held to be no piracy of the original work. The leading case certainly does not bear a relation of greater importance to the notes annexed to it, which embody the decisions in a vast number of subsequent cases, than an essay of Paley would to the body of notes which any one could appropriately append to it. It is like a motto or text for a long discourse, and is frequently of little value as an exposition of the actual state of the law on the subject, owing to the modifications and limitations which the doctrines contained in it have undergone from subsequent decisions or Acts of Parliament.

The quantity as well as the character of the critical notes added to the work of another is an important element in determining the question of *bona fides*. Thus, where a book of selections of poetry contained 790 pages, of which thirty-four were taken up with a general disquisition upon the nature of the poetry of the nineteenth century, and all the rest consisted of extracts, without any notes appended, from the works of different poets, some of their poems being given entire, Vice-Chancellor Shadwell considered that the book could in no sense be said to be a book of criticism; and an injunction was granted to restrain its publication at the suit of Mr. Campbell, one of the poets from whose writings large extracts had been made.(*b*) "If," said the Vice-Chancellor, "there were critical notes appended to each separate passage, or to several of the passages in succession, which might illustrate them and show from whence Mr. Campbell had borrowed an idea, or what idea he had communicated to others, I could understand that to be a fair criticism. But there is first of all a general essay, then there follows a mass of pirated matter, which in fact constitutes the value of the volume." A similar doctrine was laid down in the prior case of *Tonson* v. *Walker*.(*c*)

Addition of plates.

The addition of plates to the copyright letter-press of

(*a*) 4 Esp. 169.
(*b*) *Campbell* v. *Scott* (11 Sim. 31).
(*c*) 3 Swanst. 672.

another would not, according to Sir L. Kenyon, M.R.,(*a*) constitute a defence to a charge of pirating the letter-press; the mere act of embellishing could not divest the right of the owner in the text.

Abridgments.

The writers of abridgments have in general been favourably regarded by the courts of law and equity.(*b*) "Abridgments," said Lord Hardwicke,(*c*) "may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shown in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author." And, said the same judge in the case of *Tonson* v. *Walker*,(*d*) "A fair abridgment would be entitled to protection; but this is a mere evasion."

In a case with respect to an abridgment by a Mr. Newbery of Dr. Hawkesworth's Voyages, Lord Chancellor Apsley,

(*a*) *Carnan* v. *Bowles* (2 Br. C. C. 85).

(*b*) Lord Hatherley was an exception. In *Tinsley* v. *Lacy* (11 W. R. 877; 1 H. & M. 747) he said: "He must confess that he did not agree in the reasons for upholding such a work given by some learned judges—viz., that an abridger was a benefactor. He should have himself regarded him rather as a sort of jackal to the public, to point out the beauties of authors." An American judge (Leavitt, J.) has also expressed himself unfavourably to the rights of an abridger, thinking the same rule of decision should be applied to a copyright as to a patent for a machine. "The construction," he says, "of any other machine which acts upon the same principle, however its structure may be varied, is an infringement on the patent. The second machine may be recommended by its simplicity and cheapness; still, if it act upon the same principle of the one first patented, the patent is violated. Now an abridgment, if fairly made, contains the principle of the original work, and this constitutes its value. Why, then, in reason and justice, should not the same principle be applied in a case of copyright as in that of a patented machine? With the assent of the patentee, a machine acting upon the same principle, but of less expensive structure than the one patented, may be built; and so a book may be abridged by the author, or with his consent, should a cheaper work be wanted by the public. This, in my judgment, is the ground on which the rights of the author should be considered. But a contrary doctrine has been long established in England under the statute of Anne, which in this respect is similar to our own statute; and in this country the same doctrine has prevailed. I am therefore bound by precedent; and I yield to it in this instance more as a principle of law than a rule of reason or justice" (*Story's Executors* v. *Holcombe*, 4 M'Clean, 308, 309). The Royal Commissioners on Copyright are also of opinion that abridgments may do great harm to the author of the original work by interfering with his market; and they recommend "that no abridgments of copyright works should be allowed during the term of copyright, without the consent of the owner of the copyright" (Report, paragraph 69).

(*c*) *Gyles* v. *Wilcox* (2 Atk. 143).

(*d*) 3 Swanst. 681. See also *Bell* v. *Walker* (1 Br. C. C. 451).

assisted by Mr. Justice Blackstone, was of opinion 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 the understanding, employed in carrying a large work into a smaller compass, and rendering it less expensive, and more convenient both to the time and use of the reader; which made an abridgment in the nature of a new and meritorious work. This had been done by Mr. Newbery, 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 in the original, and in a more agreeable and useful manner." His lordship said that he and Mr. Justice Blackstone, after consulting together for some hours, were agreed "*that an abridgment, when the understanding is employed in* retrenching unnecessary and uninteresting circumstances, which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work." The Bill praying for an injunction in that case was dismissed.(*a*)

Colourable abridgments.

But, though a *bonâ fide* abridgment of another work is no *infringement of the copyright in that work*, a *merely colourable* abridgment is. "Where books are colourably shortened only," said Lord Hardwicke, "they are undoubtedly within the meaning of the Act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment."(*b*) In the case in which this dictum is expressed his lordship considered a book published by the defendant entitled "Modern Crown Law" not to be a *bonâ fide* but a mere colourable abridgment of Sir Matthew Hale's "Pleas of the Crown," with the omission of some repealed statutes, and a translation of the Latin and French quotations.

A mere selection or different arrangement of parts of the original work, so as to bring the work into a smaller compass will not, says Justice Story, be held to be a *bonâ fide* 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 original work."(*c*)

According to another American judge (Leavitt, J.), the abridgment must not only contain the arrangement of the book abridged; the ideas must also be taken from its pages: it must be in good faith an abridgment, not a

(*a*) Lofft's Rep. 775. (*b*) *Gyles* v. *Wilcox* (2 Atk. 142).
(*c*) *Folsom* v. *Marsh* (2 St. Rep. 107).

treatise interlarded with citations: to copy certain passages from a book, omitting others, is in no just sense an abridgment: the judgment is not exercised in condensing the views of the author; the language is copied, not condensed.(a)

The case in which the preceding opinion was expressed was one in which the plaintiffs complained of an infringement of the copyright of Judge Story's "Commentaries on Equity Jurisprudence," the defence being that the work complained of (an "Introduction to Equity") was a *bonâ fide* abridgment of the Commentaries. It appeared that the chapters and the subjects were the same in both books; the former book contained 1856 octavo pages, including notes, the latter 348 octavo pages, including notes; a page in the latter contained a little more than one in the former: reduced to the same sized page, the ratio in the amount of matter in the latter book to that in the former was about two to nine. In the entire work of Story there were 226 pages, constituting nearly an eighth part, on which there was some matter which had been extracted in the same language, or very nearly so, into the defendant's book, this matter comprising 879 lines, or about twenty-four pages of his book, and thirty pages of Story, which made one fifteenth part of the defendant's book and one-sixtieth of Story; this matter being found in scattered paragraphs in the first third of the defendant's book: all the other portions of Judge Story's book were abridged without any transcription of his common language, the part so abridged comprising two-thirds of the defendant's book. The Court granted an injunction as to the first 100 pages of the defendant's work, and thus stated the grounds of its decision:

"What is the character of the work complained of? Upon its title-page it does not purport to be an abridgment, but 'An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries;' and in the preface the author says: 'It is not intended to supply the place of the Commentaries with any class of readers, but to serve simply as an introduction, a companion, and a supplement to their study. The text is substantially an abridgment of that work, &c.'; . . . . *but he also says that 'he has felt at* liberty to make very considerable alterations and additions.' Alterations of the original work, and additions to the text, are not appropriate to an abridgment. In saying, therefore,

(a) *Story's Executors* v. *Holcombe* (4 M'Clean, 311-314).

that 'the text is substantially an abridgment,' Mr. Holcombe could have meant nothing more than that, in writing his book, he followed the arrangement of the Commentaries, extracting certain parts, condensing others, with 'very considerable alterations and additions' of his own. A supplement to the Commentaries, which Mr. Holcombe says in some sense is the character of his work, may supply defects in the original, but it can in no sense be considered an abridgment. This remark seems to have been made in reference to the notes added by the author. It may not be essential to exclude extracts entirely from an abridgment, but, in making extracts merely, there is no condensation of the language of the author, and, consequently, there is no abridgment of it. Much looseness is found in the decisions upon this subject. Some of the judges would seem to consider that where a book is greatly reduced in the size, though made up principally of extracts, it is an abridgment. In a book of Reports, such as 'Bacon's Abridgments,' the language of the Court is necessarily adopted often to show the principle of the decision. But the same necessity does not exist, and the same licence cannot be exercised in abridging an elementary work. . . . . Nearly one-half of the text, in the first hundred pages of Mr. Holcombe's book, appears to have been extracted from Story. . . . . To class these extracts under the head of 'abridgments,' would seem to be a perversion of terms. Whatever else this part of Mr. Holcombe's book may be called, it is not an abridgment. With greater propriety it may be called a compilation, as the extracts contained in it are taken from various authors. As a compilation, this part of the book must be considered an infringement of the right of the plaintiffs, by the copious extracts made from the Commentaries, and the classification of the subjects copied from them. . . . . Looking at the smallness of Mr. Holcombe's book in comparison of that from which it was principally taken, one might suppose that the former was a short abridgment of the latter. But this comparison of size or number of pages affords no guide to a proper decision. The character of the work must depend upon its matter; and it would seem from the considerations stated, that the first third part of Mr. Holcombe's book, including one hundred pages, cannot be justly and legally called an abridgment, as it does not possess the essential ingredients of such a work; and that, viewing it as a compilation, it is an infringement of the plaintiff's right, on the ground that the plan of the Commentaries is copied; and also for

the reason that the extracts extend beyond the proper limit for such a work. The remaining two-thirds of the book may be comprehended under a liberal construction of an abridgment. The matter is greatly condensed by Mr. Holcombe, in his own language, and in a manner highly creditable to him. The prayer of the Bill as to the first hundred pages is granted."

The publication of a "Life of Washington," in two volumes, containing 866 pages, was restrained by Story, J., as an invasion of the copyright in Sparks's "Life and Writings of Washington," a work in twelve volumes; 353 pages of the former work being copied from the latter, 64 pages being official letters, and 255 being private letters of Washington first published by Sparks under a contract with the owners of the original papers of Washington.(*a*)

Abridgment of works of fiction.

Where the defendant published in a number of *Purley's Illuminated Library* (a weekly publication) a portion of a story entitled "A Christmas Ghost Story, re-originated from the original by Charles Dickens, Esq., and analytically condensed expressly for this work," which, with the exception of a few colourable alterations, was in all respects similar to the "Christmas Carol" of Charles Dickens, this was held to be a clear invasion of Mr. Dickens's copyright in that work.(*b*)

It was contended in this case, on a motion to dissolve an injunction which had been granted, that the defendant's work was neither a colourable imitation nor a piracy of the other, but a fair abridgment, the result of the defendant's mental labour, and falling within the principle of *Dodsley* v. *Kinnersley*;(*c*) and it was urged that so far from any attempt being made to induce the public to believe they were buying for one penny what the eminent author of the "Christmas Carol" had written and published for five shillings, the defendant in his work had a dedication of his labours to Mr. Dickens himself. Knight Bruce, V.C., said, "The plaintiff appears to be the author and to own the copyright of a work of fiction, a novel, the copyright of which has not been contended to be not entitled to protection. The defendant has printed and published a novel of which fable, persons, names and characters of persons, the age, time, country, and scene are exactly the same; the style of language in which the story is told is in many instances identical, in all similar, except when certain alterations by way of extension or

(*a*) *Folsom* v. *Marsh* (2 St. 100). (*b*) *Dickens* v. *Lee* (8 Jur. 183).
(*c*) 4 Esp. 169. *Ante*, p. 206.

substitution have been made, as to which, whether they improve or do not improve upon the original composition, it is not necessary for me to express my opinion. Now this has been said to be an abridgment, and as an abridgment to be protected. I am not aware that one man has the right to abridge the works of another. On the other hand, I do not mean to say that there may not be an abridgment which may be lawful, which may be protected; but to say that one man has the right to abridge and so publish in an abridged form the work of another, without more, is going much beyond my notion of what the law of this country is. The expressions of Lord Eldon, applied to a subject of copyright very different from the present, but still applied to the subject of copyright, are these: 'The question upon the whole is whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work.'(*a*) And I agree that there may be such an use of another man's publication as, involving the exercise of a new mental operation, may fairly and legitimately involve it. It does not appear to me that there is anything in the present case which brings that which the defendant has done within a legitimate use of the plaintiff's publication, within the terms 'fair exercise of a mental operation,' or within the expression of 'deserving the character of an original work.' I think it, therefore, entirely excluded from Lord Eldon's definition, if as a definition Lord Eldon meant it. It appears to me to be a mere borrowing with alterations and departures merely colourable, and when it is said that the difference of price and other circumstances of difference belonging to it are such as to render the invasion of no practicable mischief to the plaintiff, the person whose property has been taken is entitled to judge for himself how far he will consider that abstraction of his property to be prejudicial or not prejudicial. It is a valuable property, and he is entitled to be protected from the unauthorised use of it by another. I do not, however, as at present advised, at all accede to the argument that, whatever may be the relative merit of the two publications, whatever their relative prices, the publication and circulation of the cheaper may not, in a pecuniary point of view, at least, if not so otherwise, materially prejudice the plaintiff. There are various points of view into which it is unnecessary for me to enter in which such a case may be put, in which material damage may arise from the subject, considered merely and

(*a*) 17 Ves. 426.

solely as a question of property, which is the only point of view in which it is my duty or business to consider it."

Somewhat in the nature of abridgments are those digests of legal decisions which are published from time to time. They give, under headings arranged alphabetically, a summary of the legal points decided in each case referred to, and there is no doubt that such an arrangement may be the product of skill and mental labour on the part of the compiler. If so, the general rule applies, and the compiler is guilty of no infringement of the copyright in the published reports of the cases digested, and is entitled to copyright in his own work.

But if the compiler's labour is purely mechanical, and he only arranges in alphabetical order the marginal or head notes of cases contained in published reports, the Court of Common Pleas has held that he is guilty of infringing the copyright in the published reports. In *Street* v. *Benning*,(*a*) which was such a case, Jervis, C.J., said: "I think the defendants in this case have been guilty of an abuse of the fair right of extract which the law allows for the purpose of comment, criticism, or illustration; and that this is in reality an unauthorised publication of a portion of the plaintiff's work, without justifiable excuse. The plaintiff's publication, *The Jurist*, or that portion of it from which these extracts are made, consists of double reports in each case—a detailed report of the facts of the case, with the arguments and the judgment of the court, and an abstract in the shape of what is commonly called a side or marginal note, which professes to state the principle of law laid down in the case, if any such there be, or a summary statement of the facts and the decision of the Court thereon. In truth, they are two reports, a short one and a long one. The gentleman who has compiled *The Monthly Digest* has taken the short reports *verbatim*. If the law allows him to do that, why should he not also be allowed to take the fuller report? And if he might take either the one or the other, why should he not take both? The question is whether a man can acquire a right to avail himself in this way of the labours of another, merely because he arranges the matter under heads and subdivisions, so as to form with other matter of the same sort, derived from other sources, what is called an analytical digest? I am of opinion that he cannot. A digest, undoubtedly, may be made from the published reports without necessarily subjecting the com-

(*a*) 16 C. B. 484.

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piler to a charge of piracy: for instance, where the party applies the exertion and skill of his own brain in extracting the principle or the substance of the decisions before him, dressing it up in his own language so as to produce an original work. But here there is no thought or skill brought to bear upon the work that is complained of; it is a mere mechanical stringing together of marginal or side notes which the labour and intelligence of the authors have fashioned ready to the compiler's hand."(*a*) Cresswell and Crowder, JJ., took the same view as the Chief Justice, but the latter somewhat doubtingly. Maule, J., dissented from the judgment of the other members of the Court, being of opinion that the defendant's work was different in its object and result from the plaintiff's reports, and would be a very imperfect substitute for them. "The object of a digest," he said, "is to afford facilities for finding out cases that are inserted in the reports without buying the reports themselves *in extenso*. The effect may be to induce many persons to abstain from purchasing the reports, relying upon the means of access to public libraries and other institutions for the fuller and more perfect information, when they have occasion for it. But that, I think, is no argument in favour of this being a piracy: rather the contrary, because it shows that the defendants' work is useful only for a different purpose from that of the plaintiffs, and is not, and never was intended as, a substitute for it. . . . . By far the larger portion of the matter distributed is, as against the plaintiffs, the defendants' own property; and the method of arrangement is entirely their own. That being the state of things, the defendants have, as it seems to me, made and published a book altogether different from the plaintiffs' work, intending to answer, and really effecting, a totally different purpose. Therefore, I conceive that they have not, in a sense that is unlawful, copied any part of the plaintiffs' work, but that they have done nothing more than is done, and lawfully done, by one who, for the purpose of supporting and fortifying his own argument, avails himself of the work of another to the extent to which it is made *publici juris* for the purpose of being read and extracted from to a fair and *bonâ fide* and legitimate extent."

Prints in a book.

Prints not published separately, but forming part of a book, were held by Sir James Parker, V.C., in *Bogue* v. *Houlston*(*b*) to be within the protection afforded to books

(*a*) See also *Butterworth* v. *Robinson* (5 Ves. 709).

(*b*) *Bogue* v. *Houlston* (5 De G. & Sm. 267). See the view taken of this decision by Jessel, M.R., in *Maple* v. *Junior Army and Navy Stores* (L. R. 52 L. J. Chy. 71, *ante* p. 86).

by 5 & 6 Vict. c. 45, and he granted an injunction to restrain the publication of those prints by the defendant, on the plaintiff's undertaking to bring an action to try the right at law.

"It appears to me," said the Vice-Chancellor, "that a book must include every part of the book; it must include every print, design, or engraving which forms part of the book as well as the letter-press therein, which is another part of it. Prints published separately do not appear to have been within the Act by that express definition [the definition of a 'book' given in 5 & 6 Vict. c. 45, s. 2]. But the case now before the Court is not the case of separately published prints, but the case of designs forming part a book." In this case the plaintiff's publication consisted of letter-press and woodcuts, printed on the same large sheets of paper, the woodcuts appearing as separate leaves when the sheets were folded into their quarto size.

Where a work called "The Man of his Time" consisting (1) of "The Story of the Life of Napoleon III., by James M. Haswell," and (2) of "The Same Story as told by Popular Caricaturists of the last Thirty Years," contained in part 2 (without authority) copies in a reduced form of nine cartoons previously published in *Punch*, sometimes with and sometimes without the accompanying letter-press, the proprietors of *Punch* were held entitled to maintain an action for infringement of their copyright in the several books or sheets of letter-press containing the cartoons.(*a*)

Copying name of work.

The name or title of a work may be considered as a kind of trade mark which no person other than the proprietor of the work can use so as to damage him in respect of his property in it.(*b*) Cases of this kind depend rather upon the question whether the defendant has a right to sell as his own that in which another has acquired a description of property, than on the question of copyright.(*c*)

The term "copyright" has sometimes been applied to the title of a work, as by Malins, V.C., in *Weldon* v. *Dicks*;(*d*) but Lush, L.J., in a subsequent case,(*e*) remarked that what the learned Vice-Chancellor had in his mind was that the title of the defendant's work was proved (to his satisfaction) to

(*a*) *Bradbury* v. *Hotten* (L. R. 8 Exch. 1).

(*b*) See *Seely* v. *Fisher* (11 Sm. 582); *Spottiswoode* v. *Clark* (2 Ph. 154); *Mack* v. *Petter* (L. R. 14 Eq. 431).

(*c*) *Per* Wood, V.C., in *Chappell* v. *Davidson* (2 K. & J. 126). See *Ward* v. *Beeton* (L. R. 19 Eq. 207).

(*d*) L. R. 10, C. D. 247. See also *per* Romilly, M.R., in *Mack* v. *Petter* (L. R. 14 Eq. 431).

(*e*) *Dicks* v. *Yates* (L. R. 18, C. D. 92).

have been adapted for the very purpose of inducing persons to believe that the book was the same book as that which belonged to the plaintiff, and that he did not distinguish between an infringement of a common law right and an infringement of copyright.

The proprietor of a magazine called *The Wonderful Magazine*, obtained an injunction to restrain the publication of a magazine under a similar title, described as a *new series improved*. The defendant was publishing "a number of a work as a continuation of the plaintiff's old work; taking the merit, which had been acquired by that, to his own; and that he was not permitted to do."(*a*)

The proprietor of a newspaper called *The John Bull* having incorporated it with another newspaper called *The Britannia*, and issued the publication under the title of *The John Bull and Britannia*, was held entitled to an injunction to restrain the publication by the printer and publisher of *The Britannia* of a publication called the *True Britannia*, in imitation of and as a continuation of *The Britannia*.(*b*) The injunction in this case also restrained the defendant from soliciting custom in the name of the plaintiff's trade and business as for *The Britannia* newspaper.

The proprietors of *Bell's Life in London* obtained an injunction to restrain the publication of a newspaper under the title of the *Penny Bell's Life*. The possibility of mistaking the one publication for the other (the plaintiffs having an exclusive right to the title) was considered sufficient by Sir John Stuart, V.C., to entitle the proprietors to the protection of the Court.(*c*)

The case of *Ingram* v. *Stiff*(*d*) went very far in this direction. There the proprietor of a weekly penny publication, called *The London Journal*—a publication which was not a newspaper, but contained tales and romances, illustrated with wood engravings—sold his interest therein to the plaintiff, and covenanted with him not to publish, either alone or in partnership with anybody else, any weekly publication of a nature similar to *The London Journal*. An injunction to restrain him from publishing a *daily* penny *newspaper*, called *The Daily London Journal* was granted, on the plaintiff undertaking to abide by any order the Court might make as to damages, and to bring an action at law within a week.

The proprietors of *Punch* were held not entitled to restrain

(*a*) *Per* Lord Eldon in *Longman* v. *Winchester* (16 Ves. 271), referring to and distinguishing *Hogg* v. *Kirby* (8 Ves. 215).
(*b*) *Prowett* v. *Mortimer* (2 Jur. N. S. 414; 4 W. R. 519).
(*c*) *Clement* v. *Maddick* (1 Giff. 98). (*d*) 5 Jur. N. S. 947.

the publication of a publication entitled *Punch and Judy*, with a different frontispiece, and sold for a penny, the Vice-Chancellor (Malins) considering that persons of ordinary intelligence would not be misled.(*a*)

A song consisting of original words, adapted to an old American air by the plaintiffs, was published by them under the title of "'Minnie;' sung by Madame Anna Thillon and Miss Dolby, at Monsieur Jullien's Concerts. Written by George Linley. London: Jullien and Co., 214, Regent-street, and 45, King-street," the title-page containing also a portrait of Madame Anna Thillon. The defendants having subsequently published a song to the same air, on the title-page being printed the words "Musical Bouquet. 'Minnie Dale;' sung at Jullien's Concerts (and always encored) by Madame Anna Thillon. The music composed by H. S. Thompson. London: Musical Bouquet Office, No. 192, High Holborn, and J. Allen, 20, Warwick-lane, Paternoster-row," the title-page containing also a portrait of Madame Anna Thillon, which was a copy with some slight alterations, but reduced in size, of the portrait on the title-page of the plaintiffs' song, Vice-Chancellor Wood granted an injunction to restrain the defendants from publishing their song, "Minnie Dale," or any copy or copies thereof, or any other publication containing a colourable imitation of the name, title, or title-page of the plaintiffs' song.(*b*) "The defendants," said the Vice-Chancellor, "do not profess that their song is by the same composer or the same publisher. But the first thing anybody proposing to purchase the song would say would probably be, 'I want "Minnie," sung by Madame Thillon;' and that name and description, it seems to me, the defendants have no right to whatever. The plaintiffs' publication is the identical song which that lady did sing; it was composed for the plaintiffs, it is called by the name of 'Minnie,' and they had a perfect right to entitle it 'Minnie,' as a song sung by that lady; and then the name, having acquired a celebrity as the name of a song sung by her, the defendants advertise another song by the same name as sung by this lady, which cannot be meant merely to refer to the melody as sung by her. No person who heard 'Scots wha hae,' sung by Braham, would ask for 'Hey Tuitte Taitte,' the name of the old melody. Therefore, it seems to me that there was a plain and palpable purpose in the assumption of the name. The original song,

(*a*) *Bradbury* v. *Beeton* (18 W. R. 33).
(*b*) *Chappell* v. *Sheard* (2 K. & J. 117).

as sung in America, was 'Lillie Dale,' and the defendants have changed it into 'Minnie Dale, sung by Madame Thillon;' and such a description can be for no other purpose than to appropriate the property of the plaintiffs."

An injunction was also granted to restrain another defendant from publishing a song consisting of different words to the same air, with a title-page on which was a different portrait of Madame Anna Thillon copied from an American publication, and the words "*Minnie*, dear *Minnie*. Madame Anna Thillon." This Vice-chancellor Wood considered an obvious attempt to pass off the defendant's publication for that of the plaintiff. It was urged on the part of the defendant in this case that he had cautioned his shopboys and others to say that it was not the song of the plaintiffs; but the Vice-Chancellor considered that that afforded no defence, as there was no security that retail dealers would sell the song with the same caution to the public.(*a*)

In this case it was held also that the words "written by George Linley" (who was chiefly known as a musical composer) on the title-page of the plaintiff's song did not so clearly manifest an intention to mislead the public into the belief that the music was composed by him as to deprive the plaintiffs (his assignees) of their right to an injunction. The Vice-Chancellor was of the same opinion with respect to the entry at Stationers' Hall of [as I gather from the Report] George Linley as proprietor of the entire composition (*i.e.*, of both music and words): however this might go to the question of copyright, it did not amount to a wilful or fraudulent misrepresentation to the public of the rights of Mr. Linley.(*b*)

The Vice-Chancellor had pointed out, at the beginning of his judgment, that the case bore rather upon the question whether the defendant had a right to sell, as his own, that in which another had acquired a description of property, than upon the question of copyright; in truth, that there had been no infringement at all of what is strictly called copyright.(*c*)

Where the similarity of title is from other circumstances not calculated to deceive the public, an injunction will be refused.(*d*)

In the recent case of *Dicks* v. *Yates*,(*e*) Jessel, M.R., referred to the existence of "a certain amount of confusion in the minds of some counsel, and perhaps of some judges,

(*a*) *Chappell* v. *Davidson* (2 K. & J. 123). Cf. *Sykes* v. *Sykes* (3 B. & C. 541). (*b*) 2 K. & J. 131. (*c*) *Ibid.* 126.
(*d*) *Kelly* v. *Byles* (L. R. 13 C. D. 682).
(*e*) L. R. 18 C. D. 90).

between copyright and trade mark." And Lord Justice James said: "Literary property can be invaded in three modes, and, as I believe, in three modes only. First, where a publisher in this country publishes an unauthorised edition of a work in which copyright exists, or where a man introduces and sells a foreign reprint of such work; that is open piracy. The second mode is where a man, pretending to be the author of a book, illegitimately appropriates the fruit of a previous author's literary labour; and that is literary larceny. Those are the two modes of invasion against which the Copyright Acts have protected an author. 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 or 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 ordinary common law remedies, wholly irrespective of any of the conditions or restrictions imposed by the Copyrights Acts."

A tale entitled "Splendid Misery; or East End and West End," had been published by the plaintiff in six consecutive numbers, ending in Feb. 1875, of a weekly periodical called *Every Week*, these weekly issues being afterwards bound up with others and sold in a volume. The title "Splendid Misery" was not a new one, a novel under that name having been published in 1801. In July, 1879, the defendant began publishing in his weekly periodical, called *The World*, a new novel under the same title, by Miss Braddon. An action having been brought by the plaintiff to restrain the defendant's publication, and also claiming damages for the infringement of the plaintiff's copyright in the book called "Splendid Misery" and the title thereof, the action was dismissed with costs, the Court being convinced that the public could not be misled into purchasing the defendant's tale under the belief that it was the same as that of the plaintiff. "The publications," said Jessel, M.R., "are of a totally distinct character and published at very different prices, the price of the plaintiff's serial being a penny and that of the defendant being sixpence. They are totally different publications. The plaintiff's serial is a collection of novels: the defendant's is a newspaper with a *feuilleton*, or a chapter of a novel in it. Indeed, no two publications, each of which contained portions of a novel, could well be more different."(*a*)

The case of *Lord Byron* v. *Johnston*(*b*) stands on a peculiar

(*a*) *Dicks* v. *Yates* (L. R. 18 C. D. 77, 87).
(*b*) 2 Meriv. 29.

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footing. There an injunction was granted by Sir Thomas Plumer, V.C., and continued by Lord Eldon, restraining the defendant from publishing a poem as the work of Lord Byron, who was then abroad, on an affidavit of Lord Byron's agents of circumstances rendering it highly probable that it was not his work, and the defendant declining to swear that he believed it was.

Importation of pirated copies

Copyright may also be infringed by the importation, for sale or hire, into any part of the British dominions of copies printed abroad. This is now prohibited by statute under a penalty of £10 for every offence, and double the value of every copy imported, beside the forfeiture of such copy.

5 & 6 Vict. c. 45, s. 17, enacts, "that after the passing of this Act it shall not be lawful for any person, not being the proprietor of the copyright, or some person authorised by him, to import into any part of the United Kingdom, or into any other part of the British dominions, for sale or hire, any printed book first composed or written or printed and published in any part of the said United Kingdom, wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions; and if any person, not being such proprietor or person authorised as aforesaid, shall import or bring, or cause to be imported or brought, for sale or hire, any such printed book into any part of the British dominions, contrary to the true intent and meaning of this Act, or shall knowingly sell, publish, or expose to sale or let to hire, or have in his possession for sale or hire, any such book, then every such book shall be forfeited, and shall be seized by any officer of Customs or Excise, and the same shall be destroyed by such officer; and every person so offending, being duly convicted thereof before two justices of the peace for the county or place in which such book shall be found, shall also for every such offence forfeit the sum of ten pounds, and double the value of every copy of such book which he shall so import or cause to be imported into any part of the British dominions, or shall knowingly sell, publish, or expose to sale or let to hire, or shall cause to be sold, published, or exposed for sale or let to hire, or shall have in his possession for sale or hire, any such book, then every such book shall be forfeited, and shall be seized by any officer of Customs or Excise, and the same shall be destroyed by such officer; and every person so offending, being duly convicted thereof before two justices of the peace for the county or place in which such book shall be found, shall also for every such offence forfeit the sum of ten pounds, and double the value of every copy of such book which he shall so import or cause to be imported into any part of the British dominions, or shall knowingly sell, publish, or expose to sale or let to hire, or shall cause to be sold, published, or exposed for sale or let to hire, or shall have in his possession for sale or hire, contrary to the true intent and meaning of this Act, five pounds to the use of such officer of Customs or Excise, and the remainder of the penalty to the use of the proprietor of the copyright in such book."

"Importing for sale," though innocently, is an offence; but to "sell, publish, or expose to sale or let to hire," or to

"have" in one's "possession for sale or hire" is not an offence, unless done "knowingly."(*a*)

In the case of "importing for sale," an injunction may be obtained without previous notice to the defendant.(*b*)

"People who import for sale or hire must," according to Jessel, M.R., "carry on business at their own peril. Such persons are not like ordinary people who import for their own private use and reading, but are people engaged in business, who are bound to be on the look out and see that the books they import for sale are not piracies." And as to English agents of American publishers they must, according to the same learned judge, "be taken to know that Americans are in the habit of printing and exporting piratical works, and they must therefore know that they import books from America at the risk of their containing what is piratical, and of thus committing an unlawful act, and of being liable to be sued without notice."(*c*)

Section 102 of the Customs Laws Consolidation Act of 1876 (39 & 40 Vic. c. 36) prohibits the importation or bringing into the United Kingdom of "books wherein the copyright shall be subsisting, first composed or written or printed, in the United Kingdom, and printed or reprinted in any other country, as to which the proprietor of such copyright, or his agents, shall have given to the Commissioners of Customs a notice in writing, duly declared, that such copyright exists, such notice also stating when such copyright will expire."

Prohibited books, if imported, are, by the same enactment, to be forfeited, and may be destroyed or otherwise disposed of, as the Commissioners of Customs may direct.

Lists of prohibited books notified to Customs.

Lists of such prohibited books are to be put up at the different ports in Her Majesty's dominions. Sect. 44 of 16 & 17 Vict. c. 107, enacts that "the Commissioners of Customs shall cause to be made, and to be publicly exposed at the Custom Houses in the several ports in the United Kingdom, lists of all books wherein the copyright shall be subsisting, and as to which the proprietor of such copyright, or his agent, shall have given notice in writing to the said commissioners that such copyright exists, stating in such notice when such copyright expires, accompanied by a declaration made and submitted before a Collector of Customs or a justice of the peace, that the contents of such notice are true."

(*a*) *Per* Jessel, M.R., in *Cooper* v. *Whittingham* (L. R. 15 C. D. 501).
(*b*) *Ibid.*
(*c*) *Ibid.* p. 505.

Remedy for wrongful entry in list of prohibited books.

By sect. 45, "if any person shall have cause to complain of the insertion of any book in such lists, it shall be lawful for any judge at chambers, on the application of the person so complaining, to issue a summons, calling upon the person upon whose notice such book shall have been inserted, to appear before any such judge, at a time to be appointed in such summons, to show cause why such book shall not be expunged from such lists; and any such judge shall, at the time so appointed, proceed to hear and determine upon the matter of such summons, and make his order thereon in writing; and upon service of such order, or a certified copy thereof, upon the Commissioners of Customs, or their Secretary for the time being, the said commissioners shall expunge such book from the list, or retain the same therein, according to the tenor of such order; and in case such book shall be expunged from such lists, the importation thereof shall not be deemed to be prohibited. If at the time appointed in any such summons the person so summoned shall not appear before such judge, then upon proof by affidavit that such summons, or a true copy thereof, has been personally served upon the person so summoned, or sent to him by post to or left at his last known place of abode or business, any such judge may proceed *ex parte* to hear and determine the matter; but if either party be dissatisfied with such order, he may apply to a superior Court to review such decision and to make such further order thereon as the Court may see fit."

Reservation to persons aggrieved of all other remedies.

A proviso is added "that nothing herein contained shall affect any proceeding at law or in equity, which any party, aggrieved by reason of the insertion of any book pursuant to any such notice, or the removal of any book from such list pursuant to any such order, or by reason of any false declaration under this Act, might or would otherwise have against any party giving such notice, or obtaining such order, or making such false declaration."

Prohibition of importation into British possessions abroad.

Sect. 152 enacts that "any books wherein the copyright shall be subsisting, first composed or written or printed in the United Kingdom, and printed or reprinted in any other country, shall be and are hereby absolutely prohibited to be imported into the British possessions abroad; provided always that no such books shall be prohibited to be imported as aforesaid unless the proprietor of such copyright or his agent shall have given notice in writing to the Commissioners of Customs that such copyright subsists, and in such notice shall have stated when the copyright will expire."

Lists.

The Commissioners are to "cause to be made and transmitted to the several ports in the British possessions abroad, from time to time to be publicly exposed there, lists of books respecting which such notice shall have been duly given, and all books imported contrary thereto shall be forfeited."(*a*)

Nothing contained in the above enactment is to be "taken to prevent Her Majesty from exercising the powers vested in her by the 10 & 11 Vict. c. 95, entitled 'An Act to amend the Law relating to the Protection in the Colonies of Works entitled to Copyright in the United Kingdom,' to suspend in certain cases such prohibition."(*b*)

Sale of pirated copies.

Where a person simply sells pirated copies of the work of another, Wilde, C.J., held, in *Lowler* v. *Strange*,(*c*) that he is not liable to an action unless he has acted with guilty knowledge. The Chief Justice was of opinion in that case that, although sect. 15 of 5 & 6 Vict. c. 45, presumed guilty knowledge in some cases, it did not presume it from the mere fact of selling printed works; and as the declaration in the case before him did not allege guilty knowledge on the part of the defendant, if there were not evidence of it, his lordship ruled that the jury must, as to the publishing, find for the defendant.(*d*)

Where the copyright has been assigned, it is not an infringement of the assignee's copyright for the assignor to sell copies of the work which have been printed before the assignment was made.(*e*)

Periodicals.

Copyright in periodical publications may be infringed in the same manner as in the case of other literary works. But this species of property may also be infringed in a manner peculiar to itself. We have seen already(*f*) that even when the copyright in contributions to encyclopædias, reviews, magazines, and other periodicals is vested in the proprietors of such encyclopædias, &c., the right of publishing his contribution in a separate form reverts to the author after twenty-eight years from the first publication, and the proprietor cannot, during the term of his own copyright, publish it in a separate form without the previous consent of the author or his assigns. The author has a modified property in possession, and the sole property in reversion.

(*a*) See 152. (*b*) *Ibid.* (*c*) 2 Car. & Kir. 1010.

(*d*) In the case of paintings, drawings, and photographs, the stat. 25 & 26 Vict. c. 68, states expressly that when a person sells copies not made by himself but by others, he must do so *knowingly* in order to render himself liable to the penalty. See sect. 6 of the Act, and per Blackburn, J., in *Ex parte Beal* (9 B. & S. 400; L. Rep. 3 Q. B. 387; 18 L. T. N. S. 285; 37 L. J. 161, Q. B.). *Ante*, pp. 129, 130.

(*e*) *Taylor* v. *Pillow* (L. Rep. 7 Eq. 418). (*f*) *Ante*, pp. 100, 101.

It is, then, an infringement of the author's property to publish, without his consent, any of his contributions in a separate form; and such separate publication will be restrained.(*a*)

A republication in supplemental numbers of a periodical of a selection of various tales previously published in that periodical, is a separate publication within the meaning of sect. 18 of 5 & 6 Vict. c. 45, and such republication will be restrained.(*b*)

Dramas and musical compositions.

Dramas and musical compositions are "books" within the meaning of the Copyright Acts, and the copyright in them may be infringed in manner similar to other works.

Although, as we have seen, the score of an opera or piece of concerted music is so far an independent work as to require to be registered in the name of the compiler of the score, it would seem, although the point has not been expressly decided, that no one may compile and publish such a score without the consent of the composer of the opera or piece.(*c*)

Piracy may be of part of an air as well as of the whole, says Lord Lyndhurst in *D'Almaine* v. *Boosey*.(*d*)

"The same learned judge held in that case that to publish in the form of quadrilles and waltzes the airs of an opera, in which there exists an exclusive copyright, is an act of piracy.

"It is said," observed his lordship, in giving judgment, "that the present publication is adapted for dancing only, and that some degree of art is needed for the purpose of so adapting it: and that but a small part of the merit belongs to the original composer. That is a nice question. It is a nice question what shall be deemed such a modification of an original work as shall absorb the merit of the original in the new composition. No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their nature original. Their compiler intends to make of them a new use; not that which the author proposed to make. Digests are of

(*a*) See the cases of the *Bishop of Hereford* v. *Griffin* (16 Sim. 190); *Mayhew* v. *Maxwell* (1 J. & H. 312); *Murray* v. *Maxwell* (3 L. T. N. S. 466); *Stewart* v. *Black* (9 Scotch Ses. Cas. 1026); *Fullarton* v. *M'Phun* (13 Scotch Ses. Cas. 219).

(*b*) *Smith* v. *Johnson* (4 Giff. 632; 6 L. T. N. S. 437; 33 L. J. 137, Ch.).

(*c*) See the opinions of Cockburn, C.J., and Blackburn, J., in *Wood* v. *Boosey* (L. Rep. 2 Q. B. 350, 354; 7 B. & S. 869; 15 L. T. N. S. 530; 36 L. J. 103, Q. B.) and Kelly, C.B., on appeal (L. Rep. 3 Q. B. 223; 9 B. & S. 175; 37 L. J. 84, Q. B.; 18 L. T. N. S. 105, *ante*, p. 125).

(*d*) 1 Y. & C. 301.

great use to practical men, though not so, comparatively speaking, to students. The same may be said of an abridgment of any study. It will be said, one author may treat the same subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may in such case be the subject of piracy; and you commit a piracy if, by taking not a single bar, but several, you incorporate in the new work that in which the whole meritorious part of the invention consists." His lordship, after referring to a case at *Nisi Prius*, in which Sir George Smart, who was a witness, said that three or four bars might constitute a phrase, though one would not, proceeded: "Now it appears to me that if you take from the composition of an author all those bars consecutively which form the entire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them in a different order or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding variations makes no difference in the principle."

Engravings and Lithographs.

The statute 17 Geo. 3, c. 57, forbids every "engraver, etcher, printseller, or other person," during the term of statutory copyright in engravings, "to engrave, etch, or work, or cause or procure to be engraved, etched or worked, in mezzotinto or chiaro oscuro, or otherwise, or in any other manner copy in the whole or in part, by varying, adding to, or diminishing from the main design," or to "print, reprint, or import for sale, or publish, sell, or otherwise dispose of, or cause or procure to be published, sold, or other- 17 Geo. 3, c. 57.

wise disposed of any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, which hath or have been, or shall be engraved, etched, drawn, or designed in any part of Great Britain, without the express consent of the proprietor or proprietors thereof first had and obtained in writing signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of and attested by two or more credible witnesses."

A person is guilty of piracy under this section who sells a piratical copy, although he does not know it to be such.(*a*) The former part of the section applies to persons who actually make the copy, and who therefore must know that it is a copy; but the latter branch applies to all persons who import for sale or sell any piratical copy.(*b*)

Doubts having been entertained whether the provisions of that statute extended to lithographs and other impressions, sect. 14 of 15 Vict. c. 12, was passed for the purpose of declaring that the provisions of the former Act were intended to include prints taken by lithography or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely.

Lithographs.

It has been decided that prints engraved and struck off abroad, but published here, are not protected from piracy by 17 Geo. 3, c. 57.(*c*) Sir L. Shadwell, V.C., said: "The object of the legislature was to protect those works which were designed, engraved, etched, or worked in Great Britain, and not those which were designed, engraved, etched, or worked abroad, and only published in Great Britain."

In the case of prints first published abroad since the passing of the International Copyright Act (7 Vict. c. 12), sect. 19 of that Act provides that the inventor, designer, or engraver of them shall have no copyright therein otherwise than such (if any) as he may become entitled to under that Act.

How piratical copy may be taken.

The terms of 17 Geo. 3, c. 57, are very general, and prohibit the copying of a print in *any manner whatever*. And it is now finally settled that a picture or engraving may be pirated by taking photographic copies of it, or copies by any other process, mechanical or otherwise, whereby they may be indefinitely multiplied.

(*a*) *West* v. *Francis* (5 B. & Ald. 737).

(*b*) *Ibid.*; *per* Bayley, J., who points out that the Act omits the words "knowing the same to be so reprinted," which were contained in 8 Geo. 2, c. 13.

(*c*) *Page* v. *Townsend* (5 Sim. 395).

This was the opinion of the Court of Common Pleas in *Gambart* v. *Ball*.(*a*) Erle, C.J., in that case, said: "The object of the statute, to my mind, was not merely to prevent the reputation of the artist from being lessened in the eyes of the world, but to secure to him the commercial value of his property—to encourage the arts by securing to the artist a monopoly in the sale of an object of attraction. If that be the object of the statute, it is plain that a photographic copy may excite in the mind of the beholder the same pleasurable emotions as would be communicated by a copy of any other description: and I see no reason why these very wide and general words should not be construed according to their plain and ordinary meaning, and be held to apply to any mode of copying known at that time, and to such other modes of multiplying copies as the ingenuity of man may from time to time discover."(*b*)

The same question came again before the Court of Common Pleas in 1866, in the case of *Graves* v. *Ashford*, when a decision similar to that in the last case was pronounced. The defendants appealed to the Exchequer Chamber, and that Court unanimously affirmed the decision of the Court of Common Pleas. Kelly, C.B., in delivering the unanimous judgment of the Court, said,(*c*) "It is obvious that the Legislature could not, in providing for the protection of works of art, describe a piracy by means of a process not then within the knowlege of mankind. But it by no means follows that when words large enough to embrace it are used, the prohibition should not, as well as the protection, be extended to a subsequently discovered mode of reproducing and multiplying copies. It appears to us, therefore, that the argument derived from the 15 & 16 Vict. c. 12, and 25 & 26 Vict. c. 68, altogether fails; and that the effect of all the Acts taken together is, that *any process, whether known at the time, or the result of subsequent invention or discovery, by which pictures or engravings may be imitated or copied*, is within the mischief as well as within the express words which the Legislature has used. And we cannot help thinking that a more limited construction would be contrary to the whole spirit of the legislation on the subject, and productive of great injustice."

After this unanimous decision of a Court of Error, and of which Bramwell, L.J., formed part,(*d*) it is somewhat curious to

(*a*) 14 C. B. N. S. 306; 32 L. J. 166, C. P.
(*b*) 14 C. B. N. S. 317.
(*c*) L. Rep. 2 C. P. 421; 16 L. T. N. S. 98; 38 L. J. 139, C. P.
(*d*) The members of this court were Kelly, C.B., Bramwell, Channell,

read the guarded and hesitating language used in the recent case of *Dicks* v. *Brooks*.(*a*) "I do not say," observed Bramwell, L.J., "that if this were an original engraving with no picture, and a copy were made of it and afterwards coloured, there might not be some ground for saying that there was a piracy of the art and skill of the engraver. I should have very great misgiving about it, because I doubt whether the statutes were not intended to protect the artist's skill as an engraver only, and not as a draftsman. I give no opinion on the point." Similarly Baggallay, L.J.: "I do not mean to say that a representation of this print in chromo-lithography, executed with that high skill and art with which works in chromo-lithography are now executed, could not be treated as a copy of the print prohibited by the statute. I do not say that it would be so; but I consider it a fairly arguable question."

It is submitted that these doubts can only be justified by regarding the statutes as designed merely for the protection of the reputation of the engraver, and not also (as they were considered by Baggallay, L.J., approving the language of Erle, C.J., in *Gambart* v. *Ball*) for his protection against any invasion of his commercial property in the print. The competition of chromo-lithographic copies must surely injure the sale of the engravings. And the language of the recital in 8 Geo. 3, c. 13, should not be forgotten, viz., that "divers persons have by their own genius, industry, pains, and expense, invented and engraved, or worked, &c., *in hopes to have reaped the sole benefit of their labours*."

Definition of a copy.

A copy is defined by Bailey, J., in *West* v. *Francis*(*b*) to be "that which comes so near to the original as to give every person seeing it the idea created by the original."

Trifling variations are not material;(*c*) and in the case of photographs it makes no difference that the photograph is of smaller dimensions than the print. "It is not," said Erle, C.J., in *Gambart* v. *Ball*,(*d*) "the extent of the paper covered by the picture which conveys the pleasure to the mind. Thus, in the representation of 'The Horse Fair' [by Rosa Bonheur, one of the engravings in question in that case], we feel the same degree of pleasure in looking at the forms and attitudes of the beautiful animals there portrayed, whether we see them in the size in which they are drawn in the

and Pigott, BB., Mellor and Lush, JJ.; and the judgment affirmed the ruling of Erle, C.J., at the trial, and the decision of the Court of Common Pleas.

(*a*) L. R. 15 C. D. 38.
(*b*) 5 B. & Ald. 743.
(*c*) 14 C. B. N. S. 317.
(*d*) *Ibid.* 742, 743

original picture, or in the reduced size of the engraving, or in the still more diminished form in which they appear in the photograph." And in *Moore* v. *Clarke*,(*a*) an action for pirating an engraving, it was held to have been a correct direction to the jury to consider whether the main design of the plaintiff's engraving had been copied, and whether the defendant's engraving was substantially a copy of the plaintiff's.

The copy must be something which a person might take to be the print, or would buy instead of the print. Where a periodical published a pattern for wool-work (a mosaic built up of small coloured squares) consisting of the figures in Millais' picture "The Huguenot," which the Court was of opinion had been taken mediately or immediately from a copyright engraving of the picture, the Court of Appeal (reversing the decision of Bacon, V.C.) held that this was not a "copy" of the engraving within the meaning of the Acts. "Nobody," said James, L.J., "would ever take it to be the print; nobody would ever buy it instead of the print; nobody would ever suppose that it was, to use the language of the first Act, a base copy of the print. It is a work of a different class, intended for a different purpose, and, in my opinion, no more calculated to injure the print, *qua* print, or the reputation of the engraver, or the commercial value of the engraving in the hands of the proprietor, than if the same group were reproduced from the same engraving by waxwork at Madame Tussaud's, or in a plaster of Paris cast, or in a painting on porcelain. I cannot conceive that such a reproduction of the subject in tapestry, or Berlin wool, or upon china or earthenware, is within the meaning of the Act of Parliament."(*b*).

Publicly exhibiting a copy.

And where a person made and publicly exhibited for money a large painted dioramic copy of a copyright print, this was held not to be within the mischief intended to be remedied by 17 Geo. 3, c. 57. "Exhibiting for profit," said the Vice-Chancellor (Shadwell), "is in no way analogous to selling a copy of the plaintiff's print, but is dealing with it in a very different manner. . . . . It appears to me that 17 Geo. 3, c. 57, never was intended to apply to a case where there was no intention to print, sell, or publish, but to exhibit in a certain manner; and therefore I ought not to grant the injunction until the right has been established at law. Then with respect to the defendant representing his copy as the plaintiff's picture. It must be either better or worse; if it is better the plaintiff has the benefit of it; if

(*a*) 9 M. & W. 692.
(*b*) *Dicks* v. *Brooks*, L. R. 15. C. D. 35.

worse, then the misrepresentation is only a sort of libel, and this Court will not prevent the publication of a libel."(a)

Prints unlawfully struck off from original plate.

The prints prohibited by the Acts to be engraved, etched, or sold, or otherwise disposed of, are prints struck off from engravings pirated from other engravings. Hence the sale of prints unlawfully struck off from the original plate does not amount to piracy. Thus where an engraver, being employed by the owner of certain drawings to engrave plates of those drawings, took off from the plates so engraved a number of proof impressions, which he kept for himself, and which on his bankruptcy were advertised by his assignees to be sold, it was held that an action for piracy would not lie against him or them.(b) It was contended in support of the action that the words "without the express consent of the proprietor or proprietors" in sect. 1 of 17 Geo. 3, c. 57, refer to all the antecedent clauses of that section, and so apply to the sale of copies. But the Court of King's Bench did not adopt this view. The Court considered that the Acts of Parliament did not apply to prints taken from the original plate, but only to those taken from engravings which had been pirated from other engravings; only with respect to them did 8 Geo. 2, c. 13, and 7 Geo. 3, c. 38, impose a forfeiture, and 17 Geo. 3, c. 57, give an action on the case. "The injury complained of in this case," said Lord Tenterden, C.J., "required no Act of Parliament to put an end to it; for the engraver having contracted to engrave the plate, and to appropriate the prints taken from it to the use of another, an action at common law would lie against him for the breach of that contract;"(c) but an action under 17 Geo. 3, c. 59, would not lie.

As to prints forming part of a book, see the case of *Bogue* v. *Houlston*, referred to *ante*, pp. 85, 86.

PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

In what piracy consists.

Piracy in the case of a painting, drawing, or photograph consists in the infringement of "the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof *by any means and of any size*."

Sect. 6 of 25 & 26 Vict. c. 68, enacts that "if the author of any painting, drawing, or photograph in which there

(a) *Martin* v. *Wright* (6 Sim. 297). See also *per* Best, C.J., (4 Bing. 245).

(b) *Murray* v. *Heath* (1 Bar. & Ad. 804). (c) *Ibid.* 811.

shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding ten pounds; and all such repetitions, copies, and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright."

Acts forbidden by 25 & 26 Vict. c. 68, s. 7.

Sect. 7 of the Act forbids, under a penalty, the following acts:

(1.) Fraudulently signing or otherwise affixing, or fraudulently causing to be signed or otherwise affixed, to or upon any painting, drawing, or photograph, or the negative thereof, any name, initials, or monogram: (*a*)

(2.) Fraudulently selling, publishing, exhibiting, or disposing of or offering for sale, exhibition, or distribution, any painting, drawing, or photograph, or negative of a photograph, having thereon the name, initials, or monogram of a person who did not execute or make such work:

(3.) Fraudulently uttering, disposing of, or putting off, or causing to be uttered or disposed of, any copy or colourable imitation of any printing, drawing, or photograph, or negative of a photograph, whether there shall be subsisting copyright therein or not, as having been made or executed by the author or maker of the original work from which such copy or imitation shall have been taken:

(*a*) It was held in *Reg.* v. *Closs* (7 Cox Cr. Cas. 494; 27 L. J. 54, M. C.) that the putting of the name of a painter upon the copy of one of his pictures, in order that it may be passed off as the original, is not a forgery at common law; but such passing off of the copy of the picture as the original and obtaining money by means of such false representation, is a cheat at common law.

(4.) Making or knowingly selling or publishing or offering for sale during the life of the author or maker without his consent any painting, drawing, or photograph made either before or after the passing of the Act, which the author or maker shall have sold, or of which he has parted with the possession, and in which any alteration has afterwards been made by any other person by addition or otherwise, or making or knowingly selling, or publishing, or offering for sale any copies of such work so altered as aforesaid, or any part thereof, as and for the unaltered work of such author or maker.

The section provides that "every offender under" it "shall, upon conviction, forfeit to the person aggrieved a sum not exceeding £10, or not exceeding double the full price, if any, at which all such copies, engravings, imitations, or altered works shall have been sold or offered for sale; and all such copies, engravings, imitations, or altered works shall be forfeited to the person, or the assigns or legal representatives of the person whose name, initials, or monogram shall be so fraudulently signed or affixed thereto, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid; provided always that the penalties imposed by this section shall not be incurred unless the person whose name, initials, or monogram shall be so fraudulently signed or affixed, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid, shall have been living at or within twenty years next before the time when the offence may have been committed."

The Act also contains an absolute prohibition against the unauthorized importation of pirated works, made in any foreign State or in any part of the British dominions.(*a*)

In *Ex parte Beal*,(*b*) a doubt was suggested whether taking the words "the author of any painting, drawing, or photograph," *reddendo singula singulis*, they might not mean "where a painting is made which is the copy of another painting, a drawing which is the copy of another drawing, or a photograph which is the copy of another photograph;" but the Court, looking at the very extensive terms in which the copyright is given in sect. 1, on the infringement of which the penalty followed, considered it plain that the photograph of a painting, or the photograph of a drawing of a painting, or the photograph of a photograph, all

(*a*) Sect. 10. See the chapter on "Remedies for Infringement," *post*.

(*b*) 9 B. & S. 395; L. Rep. 3 Q. B. 387; 18 L. T. N. S. 285; 37 L. J. 161, Q. B.

equally come within the Act, and are infringements of the copyright.

Making an unauthorised photograph of the engraving of a picture is a photographing or copying the picture itself. If the design is copied, it is immaterial whether it is done directly from the original or indirectly through the medium of a copy.(*a*) It would be otherwise if the owner had parted with the right to multiply engravings.(*b*)

If the assignee of the right "of producing an engraving of one size" from a picture sues for an infringement of his copyright in the engraving, the onus is upon him to show that the alleged piracy has been copied from his engraving, and was not taken from the original painting.(*c*)

Separate penalty for each copy sold.

The penalty inflicted for selling, &c., "*any* repetition, copy, or imitation," is a separate penalty for every copy sold, even where a number are sold at the same time. "Look at the nature of the thing," said Blackburn, J. "It would be a monstrous absurdity if a man might import a cargo of pirated works from France and £10 be the utmost penalty that could be imposed. Such a state of the law would render it worth a man's while to do wrong. The Legislature, however, were dealing with an offence which they knew was likely to be committed in a wholesale way. If a man sells ten pirated copies at once that makes ten offences, as much as a man who utters ten bad shillings at one time is guilty of ten utterings of false coin."(*d*)

SCULPTURE, MODELS, AND BUSTS.

The copyright in sculpture, models, and busts, may be infringed by making or importing, or causing to be made or imported, or exposed to sale, or otherwise disposed of, any pirated copy, or pirated cast of any subject within the Sculpture Copyright Acts,(*e*) whether such pirated copy, or pirated cast be produced by moulding or copying from, or imitating in any way any such subject, to the detriment, damage, or loss of the original or respective proprietor or proprietors of any such work so pirated.(*f*)

There are no decided cases on this kind of piracy.

RIGHT OF DRAMATIC AND MUSICAL REPRESENTATION.

Right of representation and performance of dramatic and musical compositions.

The nature and duration of the right (secured by 3 & 4 Will. 4, c. 15, extended by 5 & 6 Vict. c. 45) to the sole

(*a*) *Ex parte Beal* (9 B & S. 395, 401). (*b*) *Ibid.*
(*c*) *Lucas* v. *Cooke* (L. R. 13, C. D. 872).
(*d*) *Ex parte Beal* (9 B. & S. 395, 401).
(*e*) *Vide ante*, pp. 132, 133. (*f*) 54 Geo. 3, c. 56, s. 3.

representation and performance of dramatic and musical compositions are explained, *ante*, pp. 120 *seq.*

Infringement of the right, in the case of dramas, consists in representing or causing to be represented, contrary to the intent of the Act or right of the author or his assignee, without the consent in writing of the author or other proprietor first had and obtained, at any place or places of dramatic entertainment within the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, any production in which the right exists, or any part thereof.(*a*)

"Any part thereof."

The part taken must, however, be a material and substantial part, in order to sustain an action for infringement. Where the judge (by consent acting as a jury) found as a fact that two scenes or points—not part of the dialogue, but in the nature of dramatic situations or scenic effects—of the defendant's drama were taken direct from the plaintiff's, but that the extent to which the one was taken from the other was so slight, and the effect upon the total composition was so small, that there was no substantial and material taking of any one portion of the defendant's drama from any portion of the plaintiff's, it was held (by the House of Lords, affirming the decision of the Court of Appeal) that the plaintiff could not maintain an action for penalties.(*b*)

Referring to the argument based on the words "or any part thereof," which are not found in the Acts conferring copyright in books, and to the 40*s.* penalty imposed, Lord Hatherley said: "It was suggested that these differences indicated an intention to prevent the invasion of dramatic copyright, independently of the quantity or materiality of the portion of dialogue or dramatic incident proved to have been copied by the defendant. Now it appears to me that this argument goes much too far. As was said by the counsel for the respondent, the appellant would wish to read the word 'part' in the Dramatic Copyright Act as 'particle;' so that the crowing of the cock in *Hamlet*, or the introduction of a line in the dialogue, might be held to be an invasion of copyright, entitling the plaintiff to 40*s.* damages, and consequently, as the law stood, I believe, at the passing of the statute of 3 & 4 Will. 4, to the costs of his action." Lord O'Hagan added: "It is true that the Act of Geo. 3 does not contain the words 'or any part thereof,' which are inserted

(*a*) 3 & 4 Will. 4, c. 15, ss. 1, 2.
(*b*) *Chatterton* v. *Cave* (L. R. 3 App. Cas. 483; 2 C. P. D. 42; 10 C. P. 572).

in the statute of Will. 4. But this does not appear to me to create any real distinction between them. Some such words must necessarily be implied in the earlier statute, otherwise the author of a book could not bring his action unless there had been a piracy of the whole of its contents; and any partial appropriation of them could not authorise the claim for a penalty. No one has suggested a construction so manifestly inconsistent with the clear purpose of the Legislature; and it seems to me that all the authorities as to a partial taking(*a*) are fairly applicable to the Dramatic Copyright Act, and if so, an infringement of it, to be penal, must be material and of a substantial kind."

The plaintiff need not, however, prove actual damage; the penalty is recoverable though there be no actual damage.(*b*)

Music. The right which may be infringed in the case of musical compositions is "the sole liberty of representing or performing, or causing, or permitting to be represented or performed" any musical composition.(*c*)

It will be perceived that the words "at any place or places of dramatic entertainment" contained in 3 & 4 Will. 4, c. 15, are omitted from the enactment relating to musical compositions. On this account Vice-Chancellor Shadwell was of opinion, in *Russell* v. *Smith*,(*d*) that the authors of musical compositions were more extensively protected than the authors of dramatic pieces.

A dramatic representation in which a substantial and material part of an opera has been performed constitutes an infringement of the sole right of performing that opera, though the operatic score may have been obtained by independent labour bestowed on an unprotected pianoforte arrangement of the opera.(*e*)

"There is scarcely any popular opera the score of which is not, within a short time after its first performance, arranged for the piano; and if, by reconversion of the pianoforte arrangement into an operatic score, a task which could be executed by any skilled musician, and performance of that score, the penalties of infringement could be escaped, the

(*a*) *Ibid.* p. 496.

(*b*) See *per* Tindal, C.J., *Planche* v. *Braham* (4 Bing. N. C. 19); *per* Lord Hatherley in *Chatterton* v. *Cave* (3 App. Cas. 498); and *per* Bowen, L.J. (L. R. 11, Q. B. D. 112).

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

(*d*) 15 Sim. 187. See now the decision of the Court of Appeal in *Wall* v. *Taylor*, *Wall* v. *Martin*, *post*, p. 240.

(*e*) *Boosey* v. *Fairlie* (L. R. 7 C. D. 317).

protection given to operatic compositions would be almost nugatory."(*a*)

Consent may be by agent.

The consent in writing required by sect. 2 of 3 & 4 Will. 4, c. 15, need not be in the author's own handwriting; it may be given in that of an agent having due authority.

Thus, where a society, called the Dramatic Authors' Society, allowed the dramas composed by its members to be represented by others, on the fulfilment of certain conditions, a written permission given by the secretary to the defendant "to play dramas belonging to the authors forming the Dramatic Authors' Society" was held sufficient to bind the plaintiff, a member of the Society, and to disentitle him to recover penalties for the performance of certain of his dramas by the defendant.(*b*) The Court pointed out that the Act requires only the "consent in writing of the author or proprietor," but does not say that the consent shall be written by the author, or signed by him, or indeed by anybody; and in the case before them there was a consent in writing, and they considered it that of the author, who, by remaining a member of the Society, authorised the secretary to do what he had done.

The licence given by the secretary was held to apply to the dramas composed by members of the Society after the date of the licence, as well as to those composed before.

A licence from a part owner will not be sufficient, without the consent of the other owners.(*c*)

A written introduction to a pantomime is, as already stated, within the protection of this Act.(*d*)

"Place of dramatic entertainment."

It was made a question in *Russell* v. *Smith*(*e*) whether the Acts of 3 & 4 Will. 4, c. 15, and 5 & 6 Vict. c. 45, prohibited the unauthorised performance of musical compositions if they were not dramatic in their nature, or performed at a place of dramatic entertainment; but the Court did not find it necessary to decide the point, as they were of opinion that the musical composition in question in that case was of a dramatic nature. It was a song relating the burning of a ship at sea, and the escape of those on board, and describing their feelings in vehement language—sometimes expressing them in the supposed words of the suffering parties. The Court held that it was dramatic; sect. 2 of 5 & 6 Vict. c. 45, declaring that "dramatic piece"

(*a*) *Boosey* v. *Fairlie*, L. R. 7, C. D. 317.
(*b*) *Moreton* v. *Copeland* (16 C. B. 517; 24 L. J. C. P. 169).
(*c*) *Powell* v. *Head* (L. R. 12, C. D. 686).
(*d*) *Lee* v. *Simpson* (3 C. B. 871). (*e*) 12 Q. B. 217.

within that Act includes "tragedy, comedy, play, opera, farce, or" any "other scenic, musical, or dramatic entertainment."(*a*)

It was, however, held in that case that a room in which a dramatic piece is performed, and to which persons paying for tickets are admitted for the purpose of hearing it, is for the time a place of dramatic entertainment within the meaning of the statutes, although the room is ordinarily used for different purposes; in other words that the epithet, "dramatic," in the clause "place of dramatic entertainment," has in 3 & 4 Will. 4, c. 15, no particular signification. It is, according to the present Master of the Rolls, a word of supererogation.(*b*)

The question as to dramatic representations came again before the Queen's Bench Division in the recent case of *Duck* v. *Bates*,(*c*) with regard to certain unauthorised performances of a drama by an amateur dramatic club at Guy's Hospital for the entertainment of the nurses, attendants and other persons connected with the Hospital to whom a general invitation was issued. Besides this, tickets, for which nothing was paid, were issued to the medical men attached to the Hospital, and to the members of the Amateur Club, for distribution amongst their friends. Some were also sent to the editors of theatrical newspapers. On the occasion of one performance a newspaper reporter was present. Lord Coleridge, C.J., and Stephen, J., held that under the circumstances there had been no "representation at a place of dramatic entertainment."

Lord Coleridge was of opinion that *Russell* v. *Smith* (*ubi supra*) was the true authority upon the point, and in that case the Court twice in its judgment dwelt on the facts (1) that the place was "public," and (2) that the representation was "for profit."

The whole law on the subject is in a very vague and unsatisfactory state. *Russell* v. *Smith* decides simply that a dramatic piece (though musical also) cannot, without the proprietor's consent, be performed at a "public place of entertainment for profit," but any room may become such also, though used ordinarily for a different purpose, by a public representation for profit taking place there; and Lord Coleridge, in *Duck* v. *Bates*, seems to think that the two elements must be present of (1) publicity and (2) profit. But Stephen, J., puts a case in which these two elements are not found, and which yet could

(*a*) The Court guarded itself against saying that the performance of such a dramatic song as that in question would be unlawful, without a theatrical licence within the statute 6 & 7 Vict. c. 68.

(*b*) Judgment in *Wall* v. *Taylor*, *Wall* v. *Martin* (L.R. 11, Q.B. D. 108).

(*c*) L. R. 12, Q. B. D. 79, 49 L. T. N. S. 507.

hardly fail to work the mischief which it was intended by the Act to prevent. "Suppose while a copyright play was being performed at one theatre, another theatre were to perform the same play for the purpose of damaging the author, and were to be thrown open gratuitously to any person who would come to see the performance. I am far from saying that such a case would not be within the Act."(*a*)

As to musical compositions, the judgment of the Court of Appeal (Brett, M.R. and Bowen, L.J., *dissentiente* Cotton, L.J.), affirming the decision of Field and Cave, JJ., in the recent cases of *Wall* v. *Taylor* and *Wall* v. *Martin*,(*b*) has settled one of the points raised in *Russell* v. *Smith*—viz., whether a musical composition, not dramatic in its nature, must be performed at a place of dramatic entertainment in order that the penalty should be incurred. The Court held that the person who, under 5 & 6 Vict. c. 45, s. 20, has the sole liberty of performing a musical composition, is entitled to recover the penalty of forty shillings imposed by 3 & 4 Will. 4, c. 15, s. 2, for an unauthorised performance of it, though not at a place of dramatic entertainment and (see the 2nd case) though no money was taken for admission. The point whether the song in question was or was not dramatic in its nature was wholly ignored by all the judges. The decision, therefore, must not be taken to apply to musical dramas. The question involved was thus stated by Brett, M.R.: "On the part of the defendants it is admitted that 5 & 6 Vict. c. 45, s. 20, gives the plaintiff his right; but they say the remedy given by sect. 21 is only that which is given by 3 & 4 Will. 4, c. 15, sect. 2, in respect of a dramatic piece, and where the same circumstances exist as would give the proprietor of such dramatic piece a right to recover a penalty for its representation. In other words, the plaintiff says that only part of 3 & 4 Will. 4, c. 15, s. 2, is incorporated in sect. 21 of 5 & 6 Vict. c. 45, whilst the defendants say that the whole of it is incorporated in that section, and consequently that the condition in sect. 2, of 3 & 4 Will. 4, c. 15, that the piece be represented at a place of dramatic entertainment is introduced into sect. 21 of 5 & 6 Vict. c. 45, and therefore no penalty was recoverable here, because the song was not sung at a place of dramatic entertainment. This is the point we have to determine. Now the right which is given by 5 & 6 Vict. c. 45 is not limited to the representation being at a place of dramatic entertainment."(*b*)

What amounts to an unauthorised "representation or per-

(*a*) *Duck* v. *Bates*, L. R. 12, Q. B. D. 85. This case is at present under appeal.

(*b*) L.R. 11, Q. B. D. 102. In the court below, L. R. 9, Q. B. D. 727.

formance" must in each case be a question of fact to be determined according to the ordinary acceptation of those terms.(a) "Singing for one's own gratification," said the Master of the Rolls, "without intending thereby to represent anything or to amuse any one else, would not, I think, be either a representation or performance, according to the ordinary meaning of those 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 a representation or performance."

This language is very wide. If a host or hostess sings a copyright song for the amusement of the guests after a dinner party, this can hardly be such a "representation" or "performance" as the Legislature contemplated. If at an evening party wholly devoted to music such a song is sung, or an instrumental piece is played, for the amusement of those invited, is this a "representation" or "performance" of it for which the statutory penalty can be recovered? Neither the word "represent" nor "perform" is, indeed, according to the usual meaning of those terms, applicable to an ordinary song; the former suggesting something dramatic in its character, the latter being generally applied to instrumental compositions. But further, if a musical teacher invites all together the families of his pupils to hear some of the results of his teaching, and one pupil sings for the amusement of those assembled a dramatic song in character, whilst another performs a sonata on the piano, are the owners of the copyright entitled to sue for penalties?

In the *Law Journal*(b) the Master of the Rolls is reported as having said that the word "representing or performing" means that there must be *publicity*; and Field and Cave, JJ., in the Court below, considered the right conferred by statute to be the right of "performing in public."(c) And this, it is submitted, ought to be regarded as the true test. In other words that should be regarded as a "representation or performance" within the meaning of the Act to which any member of the public may obtain admittance either by payment or otherwise; that should not be deemed such to which one's private friends are alone invited.

The Master of the Rolls, on being consulted by Lord Cole-

(a) *Per* Brett, M.R., L. R. 11, Q. B. D. 106, 107.
(b) 52 Q. B. D. 562. (c) L. R. 9, Q. B. D. 732.

ridge during the argument of the recent case of *Duck* v. *Bates* (*ante*, p. 239) said that the dicta above cited went beyond what he intended.

Penalties.

The inadequacy of the remedy by action for damages was pointed out by Bowen L.J.: "What pecuniary damage does an author suffer who finds that out of twenty songs sung at a concert one of them is his? Therefore an action for damages would really afford him no protection; neither would an injunction, because it might not be easy to prove that the offender intended to repeat the offence; and what has been sung at one time by one person may be sung afterwards by another person, and the author would never get protection if he could not recover a penalty."(*a*)

Knowledge not necessary to piracy.

To establish the offence prohibited by these statutes it is not necessary to show or to aver in the declaration that the offender *knowingly* invaded the proprietor's right.

"The object of the registration," said Wilde, C.J., in *Lee* v. *Simpson*,(*b*) "was to protect authors against the piratical invasion of their rights. In the sense of having committed an *offence against the Act*, of having done a thing that is prohibited, the defendant is an offender. The plaintiff's rights do not depend upon the innocence or guilt of the defendant: . . . . . the allegation and proof of a *scienter* were not necessary to entitle the plaintiff to such protection. The statute would altogether fail to effect its object if it were necessary to show that the defendant had a knowledge of the plaintiff's right of property."

Actual participation in representation necessary.

It was decided in *Russell* v. *Briant* (*c*) that no person can be made liable to an action for an offence against these Acts, at the suit of the author or proprietor of a dramatic or musical composition, unless that person by himself or his agent actually takes part in a representation which is a violation of the copyright.

In that case the defendant had let a room in his tavern to a person who gave a musical entertainment there. After the entertainment had been continued for some nights, the defendant received a formal notice from the plaintiff's attorneys that certain of the pieces performed were the copyright property of the plaintiff, and warning him against causing or permitting them to be performed at his house. The defendant, notwithstanding this, permitted the entertainment to be continued, furnished the platform and lights for the performances, allowed bills of them to be put up in the tavern, and tickets of admission to

(*a*) P. 112. (*b*) 3 C. B. 883. (*c*) 8 C. B. 836.

be advertised to be sold at the bar, and he himself sold one ticket. The question for the decision of the Court was, did this conduct on the part of the defendant amount to a "representing or causing to be represented" within the meaning of the Acts? and the Court of Common Pleas held that it did not. "If it were to be held," said Wilde, C.J., "that all those who supply some of the means of representation to him who actually represents, are to be regarded as thereby constituting him their agent, and thus causing the representation within the meaning of the Act, such a doctrine would, we think, embrace a class of persons not at all intended by the Legislature."

The doctrine laid down in *Russell* v. *Briant* was carried a step further in *Lyons* v. *Knowles* by the Court of Queen's Bench, the decision of that Court being confirmed on appeal by the Exchequer Chamber.(*a*) In the former case it appeared that the defendant received a fixed sum per night for the room in which the performance took place, and derived no other profit from it. In the latter case the defendant, who was the licensed proprietor of a theatre, received as his remuneration for the use of the theatre one-half of the gross receipts, which were taken by his own servants at the doors, the remainder being handed to one Dillon, to whom the defendant let the use of the theatre for the purpose of dramatic entertainments. Dillon provided the company, and had the selection of the pieces to be represented, together with the entire management of their representation, and exclusive control over the persons employed in the theatre. The defendant, on his part, paid for printing and advertising, furnished the lighting, door-keepers, scene-shifters, and supernumeraries, and hired the band, music being a necessary part of the performance. Certain of the copyright pieces of the plaintiff having been performed without his consent, an action was brought against the defendant. It was held that the defendant was not liable, the Court being of opinion that he was nothing more than the proprietor of the theatre, who had transferred for the time the exercise of all his rights in it, as such, to Dillon, and that Dillon was the person who "represented, or caused to be represented," any pieces performed there while he had the sole possession. With regard to the scene-shifters, &c., supplied by the defendant, Blackburn, J., said: "Even apart from authority, I do not think that, by furnishing servants to another, a man

(*a*) 3 B. & S. 556; 10 L. T. N. S. 876; 12 W. R. 1083.

can be said to do all that is done by those servants while under the command of that other." And with respect to the division of profits, Crompton, J., said: "The question is whether, looking at the present case fairly, it amounts to more than this—that the rent of the theatre is to be paid by part of the profits. In one respect, I do not agree with my brother Pigott;(a) I do not think that the defendant's divesting himself of control over the theatre would divest him of liability if he and Dillon were partners. Suppose there had been an agreement of partnership between the defendant and Dillon that each should contribute so much money, or that each should contribute so much capital, though of a different kind, and the theatre were taken between them. I should think the act of either was the act of both. But the authorities clearly show that two persons merely receiving payment out of the *gross* profits of a business does not make a partnership between them, even as against the world." Blackburn, J., added, "If the receipt of the money in this way was only a colourable pretence to escape the consequence of a partnership, I do not say that that would not have made a difference."

If the proprietor of the theatre were also the proprietor of the scenery, lights, &c., and the employer of the actors and actresses, he would be liable for an unauthorised representation of a dramatic piece, even although on the occasion of its representation he had for a fixed sum let his theatre to another person who was to have all the profits and to select the pieces to be performed. Thus, in *Marsh* v. *Conquest* (*b*) the defendant granted to his son, who was also his stage-manager and one of his actors, the use of the company of actors, with the scenery, &c., for a benefit-night, in consideration of a fixed sum paid, the son to choose the pieces to be played. A piece belonging to the plaintiff having been played without his consent, the defendant was held liable to pay the statutory penalty. The Chief Justice (Erle) distinguished this case from *Lyons* v. *Knowles:* "There Dillon, to whom the defendant in that case had let his theatre, brought his own company of actors and actresses;

(*a*) Pigott, Serjt., had argued, on behalf of the defendant, that a person who could neither prevent nor control the representation of a piece could in no sense be considered the party representing it, and that a man who lets a house to another is not responsible for an illegal act done in it by the person who has hired it.

(*b*) 10 Jur. N. S. 989; 33 L. J. 319, C. P.; 10 L. T. N. S. 717; 12 W. R. 309.

whereas here the defendant was the owner of the dramatic company, with whom the son performed the piece. The defendant, therefore, I think, in this case, caused such piece to be performed."

What is a representation within the Acts is a question for the jury. Where the jury found that the singing of two or three songs of the plaintiff's libretto to Weber's opera of "Oberon," was a representation of part of the plaintiff's composition, the Court of Common Pleas refused to grant a new trial.(*a*) "It is difficult," said Tindal, C.J., "to say what is or is not a representation of part of a dramatic production: the subject *patitur majus et minus*, and it must be left to a jury to determine the fact." Vaughan, J., added, "We should be interfering with the province of the jury, if we did not leave it to them to say whether this was a representation of a part of the plaintiff's production."

What is a representation is a question for the jury.

CHAPTER XVII.

REMEDIES FOR INFRINGEMENT OF COPYRIGHT.

UNPUBLISHED WORKS.

WE have already seen(*b*) that the author of every unpublished work of an innocent nature has a common law right of property in it—a right to give or withhold publication. Now, if a man has a right, he must have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it: for, as has been observed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.(*c*)

Copyright in unpublished works.

An action is the peculiar mode pointed out by the law for enforcing a remedy, or for prosecuting a claim or demand in a court of justice;(*d*) and so an action will lie to recover damages for the infringement of copyright in unpublished works.

The proprietor of unpublished innocent works may also restrain the authorised publication of them. In the leading

(*a*) *Planché* v. *Braham* (4 Bing. N. C. 17). See the observations, approving and explaining this decision, of Lords Hatherley and O'Hagan, *Chatterton* v. *Cave* (L. R. 3 App. Cas. 473, 499).

(*b*) *Ante*, pp. 24 *seq.*

(*c*) *Ashby* v. *White* (2 Lord Ray, 953); *Winsmore* v. *Greenbank* (Willes, 577).

(*d*) Co. Lit. 285, a.

case of *Prince Albert* v. *Strange*(*a*) an injunction was granted to restrain the publication, not only of certain unpublished etchings belonging to the plaintiff, but even of a descriptive catalogue of them.

The unauthorised publication of works not previously published has also been restrained, in the case of a conveyancer's clerk, who sought to publish the conveyancing drafts of his deceased master,(*b*) and in the case of an attempted publication of notes belonging to another which had been surreptitiously obtained.(*c*) An injunction was also granted to restrain the publication of a certain paper of trials which the plaintiff had bought from the Lord Mayor.(*d*)

In the case of the *Duke of Queensberry* v. *Shebbeare*(*e*) the defendant was restrained from publishing the Earl of Clarendon's History of the Reign of Charles II., though the Earl of Clarendon had in his lifetime given the defendant permission to take a copy of the original manuscript.

An injunction will also be granted to restrain the publication of letters, except in such cases as are mentioned in chapter iv. of this work.(*f*) The nature of the property which the writer of letters has in them, is explained in that chapter.

The property in unpublished engravings, maps, and charts, would of course be protected in a similar manner.

In the case of *Abernethy* v. *Hutchinson*,(*g*) an injunction was granted to restrain the publication of oral lectures delivered to medical students at a hospital, on the ground of an implied contract between the lecturer and his hearers that the latter should only make use of them for their own information. The property in oral lectures is now regulated by 5 & 6 Will. 4, c. 65.(*h*)

PUBLISHED WORKS.

In the case of published works the same remedies are open to the proprietor as in the case of unpublished works,

(*a*) 2 De G. & S. 652; 1 M. N. & G. 25; see the facts of this case, *ante*, pp. 26–30.

(*b*) *Webb* v. *Rose* (cited 4 Burr. 2330).

(*c*) *Forrester* v. *Waller* (*Ibid.*) (*d*) *Manley* v. *Owen* (*Ibid.* 2329).

(*e*) 2 Eden. 329.

(*f*) *Vide ante*, pp. 34 *seq.*; *Pope* v. *Curl* (2 Atk. 342); *Thompson* v. *Stanhope* (Amb. 737); *Percival* v. *Phipps* (2 V. & B. 19); *Gee* v. *Pritchard* (2 Swanst. 402); *per* Story, J., in *Folsom* v. *Marsh* (2 St. Rep. 100, 111).

(*g*) 1 H. & T. 39; 3 L. J. 209, Ch.; *ante*, p. 39.

(*h*) *Vide ante*, pp. 39 *seq.*

and in addition, special penalties for infringement are by statute made recoverable from the offender. The enactments relating to the remedy by action at law are as follow:

BOOKS.

Special action on the case.

5 & 6 Vict. c. 45, s. 15, enacts "that if any person shall in any part of the British dominions, after the passing of this Act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed, from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in any Court of Record in that part of the British dominions in which the offence shall be committed."

The same section provides that "in Scotland such offender shall be liable to an action in the Court of Session in Scotland, which shall and may be brought and prosecuted in the same manner in which any other action of damages to the like amount may be brought and prosecuted there."

An interesting point on the construction of this section came before the Court of Common Pleas for decision in the case of *Novello* v. *Sudlow*,(a) in which the defendant had published, unauthorised, a piece of music of the plaintiff's by gratuitously distributing lithographed copies of it. The words of the interpretation clause of 5 & 6 Vict. c. 45, are wide enough to embrace such a case, as it defines copyright to be "the sole and exclusive liberty of printing or *otherwise multiplying* copies of any subject" to which the word is applied in the Act; thus protecting literary works from unauthorised multiplication by other means than the press. But sect. 15 gives the remedy by special action on the case only where any one shall "*print* or cause to be printed" any book for sale, hire, or exportation. Did this clause operate to take away the common law remedy by action in all other cases than those which it enumerates? If so, the plaintiff in that action could not recover; if it did not, then the ordi-

(a) 12 C. B. 177.

many rule by which the common law gives an action on the case for the violation of rights conferred by statute, would apply, and would render the unauthorised multiplication of copies by lithography the proper subject of an action. The Court held that sect. 15 did not take away the common law remedy by action where copies were multiplied by modes not enumerated in that section, and that if otherwise construed it would destroy the effect of the words "otherwise multiplying" in the interpretation clause.

Any doubt that existed on the subject of multiplication of copies by lithography is now put an end to by sect. 14 of 15 & 16 Vict. c. 12, which declares that the provisions of the Copyright Acts shall apply to prints taken by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely.(*a*)

Separate penalties for each sale.

In a case decided under the repealed statute 9 Geo. 2, c. 36 [see now 5 & 6 Vict. c. 45, sect. 17], it was held that two penalties might be recovered from the defendant for two distinct acts of selling, on the same day, pirated copies of books imported into this country. One act of sale was by the defendant himself in the morning, the other by his wife in the afternoon in an open shop.(*b*)

Recovery of pirated copies by action.

By sect. 23 of 5 & 6 Vict. c. 45, "all copies of any book wherein there shall be copyright, and of which entry shall have been made in the said registry book, and which shall have been unlawfully printed or imported without the consent of the registered proprietor of such copyright in writing under his hand first obtained, shall be deemed to be the property of the proprietor of such copyright, and who shall be registered as such, and such registered proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same, or damages for the detention thereof, in an action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover."(*c*)

The proprietor must, according to Fry, J.,(*d*) have been registered as such at the time the piratical copies were printed in order to be entitled to have them delivered up to him

(*a*) See also *Boosey* v. *Tolkien* (5 C. B. 476).

(*b*) *Brooke* v. *Milliken* (3 T. R. 509). See *Ex parte Beal* (9 B. & S. 395; *ante*, p. 235).

(*c*) As to the non-existence at common law of any such right to the delivery up of pirated copies, see the remarks of Wigram, V.C., in *Colburn* v. *Simms* (2 Hare, 555, 12 L. J., Ch. 388).

(*d*) *Hole* v. *Bradbury* (L. R. 12 C. D. 886).

under this section. But the Court has power, under its general jurisdiction, to order delivery up for destruction of all articles created in violation of the plaintiff's rights.(*a*) According to the same learned judge, the provisions of sect. 16 as to notice of objections, do not apply to actions of trover or detinue under this section.(*b*)

Defendant to give notice of the objections to plaintiff's title on which he means to rely.

The defendant in an action of piracy must give notice in writing of the objections to the plaintiff's title on which he means to rely on the trial.

Sect. 16 provides, "that after the passing of this Act, in any action brought within the British dominions against any person for printing any such book for sale, hire, or exportation, or for importing, selling, publishing, or exposing to sale or hire, or causing to be imported, sold, published, or exposed to sale or hire, any such book, the defendant, on pleading thereto, shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action; and if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person whom he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published, otherwise the defendant in such action shall not at the trial or hearing of such action be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication with the title, time, and place specified in such notice."

This section, according to Fry, J.,(*c*) applies only to actions

(*a*) *Hole* v. *Bradbury* (L. R. 12 C. D. 886). See also *Kelly* v. *Hodge* (Seton, 4 ed. vol. i., p. 244).

(*b*) *Ibid.*

(*c*) *Ibid.*

for infringement of copyright, and does not apply to actions for detinue or trover, asserting the right to copies under sect. 23.

Notwithstanding the words of the Act ("the defendant on pleading thereto," &c.) Bacon, V.C., in a case where the notice of objections was not served till after issue was joined and notice of trial given, dismissed the action for a defect in registration which appeared from the plaintiff's own evidence at the trial.(*a*)

Where one of the authors of a book and the daughter of the deceased joint author sued, an objection that the daughter did not represent her deceased father's estate was disallowed by Fry, J., no notice of it having been given under sect. 16, and nothing being said about it in the statement of defence.(*b*)

Requisites of sect. 16 must be strictly complied with.

The requisites enumerated in sect. 16 as to the notice of objections must be strictly complied with. Thus a general objection to the plaintiff's title to copyright in a book that some person whose name is to the defendant unknown, and not the plaintiff, was the proprietor of the said copyright, was held in *Boosey* v. *Davidson* (*c*) not sufficient to satisfy the words of the section, which require the defendant in such a case to specify in his notice of objections "the name of the person whom he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein."

"The Copyright Act," says Wightman, J., "throws on a defendant, if he seek to defend the infringement on the ground that the plaintiff is not the proprietor, the onus of showing who is, in order that the plaintiff may not be taken by surprise at the trial."(*d*)

In the subsequent case of *Boosey* v. *Purday*(*e*) the judges of the Court of Exchequer took a less strict view of the requirements of the section, and pointed out the inconveniences which would follow from a rigid adherence to its words. Alderson, B., addressing the counsel, who moved for a rule to amend the notice of objections given in that case, said, "Suppose a man were to enter his name at Stationers' Hall as proprietor of the Εικὼν βασιλικὴ; according to your argument he would acquire the property in it, for it would puzzle excessively to find out the author of that book; or, as proprietor of the works of Homer—that

(*a*) *Coote* v. *Judd* (L. R. 23 C. D. 727).
(*b*) *Hole* v. *Bradbury* (L. R. 12 C. D. 886).
(*c*) *Boosey* v. *Davidson* (4 Dow. & L. 147). See also *Leader* v. *Purday* (7 C. B. 4).
(*d*) 4 Dow. & L. 153. (*e*) 10 Jur. 1038.

would raise the question, was there such a man?" Rolfe, B., observed: "The Court must endeavour to get at some construction of the statute which shall not force a man to say who first published at one place or another. It may have been that the defendant saw the work at both places." Alderson, B., added: "The defendant in his objections ought to show a definite publication by somebody. That construction will remove all the absurdity which otherwise would follow from a literal interpretation of the statute."

Where the defendant intends to rely on the objection that the plaintiff in the action was not the author or first publisher of the book, or the proprietor of the copyright, sect. 16 requires that he should specify, in addition to the name of the proprietor or first publisher, the *title* of the work, the *time* when, and the place *where*, the first publication took place.

"Time when" first published.

"The time when" is sufficiently specified by naming the year of the first publication; it is not necessary to name the day or month.(*a*)

"Place where" first published.

"The place where" a book was first published is not sufficiently specified by a statement that "the work was not first printed or published in the British dominions."(*b*)

In an action for infringement of copyright in a song, the statement of defence contained the following passage: "The defendant denies that the song has been duly registered. The time of first publication thereof is not truly entered on the register." It was held that this only entitled the defendant to prove that the time of first publication had been untruly entered, and that he was not at liberty to prove that the name of the publisher had been untruly stated. It was held also that leave to amend, so as to raise this point, ought not to be given, though it appeared for the first time by the plaintiff's own evidence at the trial that the name of the publisher had been untruly entered on the register.(*c*)

Objections too vague.

The following objections were also considered too vague, and were struck out: "That the plaintiff never acquired any title by assignment *or otherwise*" to the copyright claimed; "that there was no *valid* assignment of the copyright to the plaintiff, or to any one under whom he claims," the word valid being ordered to be struck out; "that there is no copyright in a work first published out of the British dominions, *under such circumstances as the books in question were published*" under.(*d*)

(*a*) *Boosey* v. *Davidson* (4 Dow. & L. 155). (*b*) *Ibid.*
(*c*) *Collette* v. *Goode* (L. R. 7 C. D. 842; 47 L. J., Ch. 370).
(*d*) 4 Dowl. & L. 155. The notice of objections as amended is given in a note to this case, p. 155. See also *Boosey* v. *Purday* (10 Jur. 1038).

Where, in an action for piracy at the suit of two plaintiffs, it appeared that the defendant had published the work in question pursuant to the conditions of a *cognovit*, given by him to one of the plaintiffs and one P. in a former action for not performing an agreement to write the same work, this was held to be a sufficient defence to the action for infringement of the plaintiff's copyright.(*a*)

Declaration in action.

According to the decision of the Irish Court of Queen's Bench in *Hoonej* v. *Kelly*,(*b*) it is not necessary, in an action for the infringement of copyright in a book, to aver that the defendant published the plaintiff's *book*; and a declaration charging the defendant with publishing "*divers parts* of the book of the plaintiff," states a good *primâ facie* cause of action; though it is open to the defendant to displace such *primâ facie* charge by showing that either from the quantity and quality of such portions, or from the nature and character of the defendant's book, the copying and printing, &c., of those portions were justifiable, and should not properly be considered as an infringement of the copyright.(*c*)

It was further held, on demurrer, in this case, that the charge of defendant's book "containing, printed therein, various parts" of plaintiff's book, was not answered by a plea, in confession and avoidance, to the effect that the books of the plaintiff and defendant were composed by the same author from common sources of information, and that no part of the defendant's book was copied or colourably altered from that of the plaintiff.

Interrogatories.

Where an action is brought for infringement of copyright in a book, the Court will allow interrogatories as to the number of copies sold for a limited period before and after the date of the infringement, to be administered to the plaintiff, for the purpose of ascertaining the amount of damage sustained, and enabling the defendant to pay into Court a sum sufficient to meet it.(*d*)

Limitation of time for proceedings.

All actions, suits, bills, indictments, or informations for any offence that shall be committed against the Act 5 & 6 Vict. c. 45, must be brought, sued, and commenced within twelve calendar months next after such offence committed; otherwise they are void, and of none effect.(*e*)

But this limitation of time is not to extend or be construed to extend to any actions, suits, or other proceedings which, under the authority of the Act, shall or may be brought, sued, or commenced for, or in respect of any copies of

(*a*) *Sweet* v. *Archbold* (10 Bing. 133).
(*b*) 14 Ir. Com. L. Rep. 158. (*c*) *Ibid.*, p. 174.
(*d*) *Wright* v. *Goodlake* (13 L. T. N. S. 120). (*e*) Sect. 26.

books to be delivered for the use of the British Museum, or of any one of the four libraries mentioned in the Act.(*a*).

It was held by the Scotch Court of Session, in *Clarke* v. *Bell*,(*b*) that the limitation of "all actions, suits, bills, indictments, or informations" for offences committed against the Act of 8 Anne, c. 19, applied only to the penalties and forfeitures inflicted by the Act, but not to a prohibition to restrain infringement of copyright.

And in the case of a book published before 5 & 6 Vict. c. 45, an objection that the action to recover damages for infringement of copyright in it was not brought within twelve months after the offence had been committed, was overruled by the same Court in the case of *Stewart* v. *Black*.(*c*) No reason is given for the decision.

These cases were followed by Hall, V.C., in *Hogg* v. *Scott*,(*d*) where the defendant had (in 1868 and 1872) published two editions of a work which was a piracy of one in which the plaintiff had copyright. The V.C. held that sect. 26 was not a bar to an action for an injunction to restrain the further printing, publishing, selling, or otherwise disposing of piratical copies. He said, after referring to sect. 15: "The plaintiff is suing in respect of his copyright, that is his property. The 26th section is no doubt not very happily framed; but I am of opinion that, on the true construction of that and the other sections of the statute, the 'offence' contemplated by it must be the doing, in contravention of its provisions, of something expressly prohibited by them. . . . . The non-suing by the owner of the copyright in respect of a particular edition or part of an edition of the defendant's work is one thing; and even if it could be said that so far the owner's remedy was barred by his own neglect, still I find nothing in the statute which states that the person who has already published the edition or part of the edition complained of may go on doing so, and that if he does, the owner has then no remedy for such further offence;" and he considered the Scotch cases referred to quite consistent with good sense and the reasonable interpretation of the statute.

Proceedings for anything done in pursuance of this Act.

If any action or suit is commenced or brought against any person or persons for doing, or causing to be done anything in pursuance of the Act 5 & 6 Vict. c. 45, the defendant or defendants may plead the general issue and give the special matter in evidence; and if upon such action a verdict is given for the defendant, or the plaintiff is nonsuited or discontinues

(*a*) *Ibid.* (*b*) 13 Fac. Dec. 335, 29th February, 1804.
(*c*) 9 Scotch Sess. Cas. 2 Ser. 1029. (*d*) L. R. 18 Eq. 444.

his action, the defendant is to recover his full costs, for which he is to have the same remedy as a defendant in any case by law has.(*a*)

This enactment embraces, according to the general rule, not only those who in doing or causing to be done anything "in pursuance of the Act" keep strictly within the line of their duty, but also those who, through mistake, transgress that limit in exercising the power which they honestly believe the Act confers upon them.(*b*)

ENGRAVINGS AND PRINTS.

We have already seen that the assignee of an engraver of a print may maintain an action for the piracy of it, though none of the Acts expressly gives him such a right.(*c*) The conditions which must be observed in order to ground an action for the piracy of engravings have been stated, *ante*, p. 111.

Action.

The first Act which gave a copyright in engravings (8 Geo. 2, c. 13), in its first section, inflicts on any printseller or other person whatsoever, who, within the time limited by that Act [fourteen years, since extended to twenty-eight], should engrave, etch, or work, or in any other manner copy and sell, or cause to be engraved, etched, or copied and sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or should print, reprint, or import for sale, or cause to be printed, reprinted, or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him or them respectively in the presence of two or more credible witnesses, or, knowing the same to so be printed or reprinted without the consent of the proprietor or proprietors, should publish, sell, or expose to sale, or otherwise, or in any other manner dispose of or cause to be published, sold, or exposed to sale, or otherwise, or in any other manner disposed of, any print or prints in which copyright is given by the Act, without such consent first had and obtained as aforesaid, the penalty of forfeiting the plate or plates on which such print or prints are or shall be copied, and all and every sheet or sheets (being part of, or whereon such print or prints are or shall be so copied or printed) to the proprietor or proprietors of

(*a*) Sect. 26.

(*b*) See *Smith* v. *Shaw* (10 B. & C. 277); *Cook* v. *Leonard* (6 B. & C. 351); *Theobald* v. *Crichmore* (1 B. & Ald. 227); *Gaby* v. *The Wilts, &c., Canal Company* (3 M. & Sel. 580).

(*c*) *Thompson* v. *Symonds* (5 T. R. 41), *ante*, pp. 182, 183.

the original print or prints, who are forthwith to destroy and damask the same; and every such offender or offenders shall also forfeit five shillings for every print which shall be found in his, her, or their custody, either printed or published and exposed to sale, or otherwise disposed of contrary to the true intent and meaning of the Act, one moiety thereof to go to the Crown and the other to any person or persons that shall sue for the same, to be recovered in any of the Courts of Record at Westminster, by action of debt, bill, plaint, or information, &c.

Summary procedure.

All pecuniary penalties incurred, and all unlawful copies, imitations, and other effects and things forfeited by offenders pursuant to this Act, may now be recovered either by action or by summary proceeding before justices in England or Ireland, and in Scotland either by action before the Court of Session in ordinary form or by summary action before the sheriff of the county where the offence is committed or the offender resides.(*a*)

Damages.

A further remedy, by action on the case for damages is given by 17 Geo. 3, c. 57. The words of the enactment are: "From and after the 24th day of June, 1777, if any engraver, etcher, printseller, or other person shall, within the time limited by the aforesaid Acts,(*b*) or either of them, engrave, etch, or work, or cause or procure to be engraved, etched, or worked, in mezzotinto or chiaro oscuro, or otherwise, or in any other manner copy in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause or procure to be printed, reprinted, or imported for sale, or shall publish, sell, or otherwise dispose of, or cause or procure to be published, sold, or otherwise disposed of, any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever which hath or have been, or shall be engraved, etched, drawn, or designed in any part of *Great Britain* without the express consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of, and attested by, two or more credible witnesses, then every such proprietor or proprietors shall and may, by and in a special action upon the case, to be brought against the person or persons so offending, recover

(*a*) 25 & 26 Vict. c. 68, s. 8.
(*b*) 8 Geo. 2, c. 13; 7 Geo. 3, c. 58.

such damages as a jury, on the trial of such action, or on the execution of a writ of inquiry thereon, shall give or assess, together with double costs of suit."(a)

In an action in Scotland for damages for infringement of the copyright of certain engravings, the *locus* of the alleged acts of infringement was not specified. The Court of Session considered this a grave defect in the averments, but allowed an amendment on payment of expenses since the closing of the record.(b) "In the second article, as it now stands," said the Lord President, "there is no averment as to where the offence was committed. The defender is designed in the summons as being a printseller at 27, Sauchiehall Street, Glasgow; but we do not know even whether that is his shop or his residence. Be it the one or the other, however, it is not alleged that the defender sold a copy of the print there, nor that he did it in Glasgow, nor even that he did it within the United Kingdom, though that is necessary to bring the case under the statutes. That is a very grave imperfection; but I think it is just one of those which it is the policy of the recent statute to allow to be amended on certain conditions. And therefore I think that we should allow the record to be amended in this respect on payment of expenses since the closing of the record."

In the same case the Lord Ordinary thought it too vague and uncertain for the pursuer to rest his case on an alleged violation of various Copyright Acts, "or one or other of them;" but the Inner House was of a different opinion. "These statutes," said the Lord President, "are all to be read together, I apprehend, in considering the nature and privileges of printers and publishers of engravings. It may very well be that in this case the provisions of one of the statutes may be more applicable than those of another; but it is not necessary for the pursuer to tie himself down to one particular statute or clause of a statute."

According to a decision of Bacon, V.C.,(c) it is not necessary to register under 5 & 6 Vict. c. 45, before suing for a piracy of engravings or lithographs, that Act not mentioning or interfering in any way with the Acts of Geo. 2 and Geo. 3, which confer a copyright in works of this description.

(a) Double costs are taken away in all cases by 5 & 6 Vict. c. 97.
(b) *Graves* v. *Logan* (7 Scotch Sess. Cas. 3 Ser. 204).
(c) *Stannard* v. *Lee* (23 L. T. N. S. 306).

DRAMATIC AND MUSICAL COMPOSITIONS.

Regarded as "books."

Dramatic and musical compositions are "books" within the meaning of the Copyright Act, 5 & 6 Vict. c. 45; the word "book" being construed to mean and include "every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published." The remedies, therefore, for infringement of copyright in dramatic and musical compositions are the same as in cases of infringement of copyright in books.

Right of representation and performance.

For infringement of the right of *representing* and *performing* such compositions remedies are given by 3 & 4 Will. 4, c. 15, and 5 & 6 Will. 4, c. 45.

If, during the continuance of the sole liberty of representing or causing to be represented at any place of dramatic entertainment in any part of the United Kingdom, the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, which the first section of the former Act confers on the author of any dramatic piece, any person shall, contrary to the intent of the Act or right of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment (*a*) within the limits aforesaid, any such production as aforesaid, every such offender shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of the Act, to be recovered, together with double costs of suit, by such authors or other proprietor in any Court having jurisdiction in such cases in that part of the United Kingdom or of the British dominions in which the offence shall be committed.(*b*)

It is also provided that in every such proceeding, where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty without stating the same to be subject to such right or authority or otherwise mentioning the same.(*c*)

(*a*) See as to the effect of the words "place of dramatic entertainment" the cases of *Russell* v. *Smith* and *Duck* v. *Bates* referred to, *ante*, pp. 238, 239.

(*b*) 3 & 4 Will. 4, c. 15, s. 2. (*c*) *Ibid.*

These provisions are extended to musical compositions by 5 & 6 Vict. c. 45, ss. 20, 21; but in the case of musical compositions, it is not necessary, in order to a recovery of the statutory penalty, that the unauthorised performance should be at a place of dramatic entertainment.(*a*)

All actions or proceedings for infringements of the right are to be brought, sued, and commenced within twelve calendar months next after the offence committed, or else to be void and of no effect: (sect. 3 of 3 & 4 Will. 4, c. 15.)

The onus of proving the consent of the author or proprietor in an action for penalties lies on the defendant.(*b*)

Besides the remedy at law, there is a further remedy in equity by injunction to restrain the representation or performance.(*c*)

PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

In the case of paintings, drawings, and photographs, as well as engravings, in addition to the action on the case, the author has now a further remedy by summary proceeding before two justices in England or Ireland or the sheriff in Scotland.

Sect. 8 of 25 & 26 Vict. c. 68, enacts that "all pecuniary penalties(*d*) which shall be incurred, and all such unlawful copies, imitations, and all other effects and things as shall have been forfeited by offenders pursuant to this Act, and pursuant to any Act for the protection of copyright engravings, may be recovered by the person hereinbefore, and in any such Act as aforesaid, empowered to recover the same respectively, and hereinafter called the complainant or complainer, as follows:—

"In England and Ireland, either by action against the party offending, or by summary proceeding before any two justices(*e*) having jurisdiction where the party offending resides:

"In Scotland by action before the Court of Session in ordinary form, or by summary action before the sheriff of the county where the offence may be committed or the offender resides, who, upon proof of the offence or offences, either by confession of the party offending,

(*a*) *Wall* v. *Taylor* (L. R. 11, Q. B. D. 102), *ante*, p. 240.
(*b*) *Morton* v. *Copeland* (16 C. B. 517; 24 L. J. 169, C. P.).
(*c*) *Russell* v. *Smith* (15 Sim. 181).
(*d*) For these penalties, *vide ante*, pp. 232–234.
(*e*) A metropolitan police magistrate, or stipendiary magistrate, or the Lord Mayor or any Alderman of London may now act alone in such a case: (11 & 12 Vict. c. 43, ss. 33, 34.)

or by the oath or affirmation of one or more credible witnesses, shall convict the offender, and find him liable to the penalty or penalties aforesaid, as also in expenses, and it shall be lawful for the sheriff, in pronouncing such judgment for the penalty or penalties and costs, to insert in such judgment a warrant, in the event of such penalty or penalties and costs not being paid, to levy and recover the amount of the same by poinding: provided always, that it shall be lawful to the sheriff, in the event of his dismissing the action and assoilzieing the defender, to find the complainer liable in expenses, and any judgment so to be pronounced by the sheriff in such summary application shall be final and conclusive, and not subject to review by advocation, suspension, reduction, or otherwise."

Bankruptcy of offender.

Whether a penalty inflicted under this Act would be provable under the bankruptcy of the person on whom it is inflicted, appears to be doubtful. But it would seem that the prosecutor could not prove for it if he allowed imprisonment to be suffered for non-payment of it.(*a*)

It is now settled by the case of *Ex parte Graves*,(*b*) notwithstanding a decision of the Court of Bankruptcy (Mr. Commissioner Winslow) to the contrary,(*c*) that if a person is imprisoned in default of payment of a penalty inflicted under this section, the execution of a deed of composition containing a release of his debts will not entitle him to his discharge.

In this case nineteen summonses were taken out by Mr. Graves against a printseller to recover penalties for violating his copyright in certain engravings by selling photographs of them, and a penalty of £5 was inflicted for each offence, with fourteen days' imprisonment in each case in default of payment. Before the summonses were heard the offender prepared a deed of composition with his creditors, containing a release from all debts, and whilst the magistrate was giving judgment, and in fact after sentence for two of the offences had been pronounced, the deed was duly executed and was subsequently registered. On application being made to the Court of Bankruptcy to discharge the offender from custody under the 112th section of the Bankruptcy Act, 1849, on the ground that he was not in custody for any criminal offence, the registrar ordered

(*a*) See *per* Wood, L.J., *Ex parte Graves* (L. Rep. 3 Ch. App. 645).
(*b*) L. Rep. 3 Ch. App. 642; 19 L. T. N. S. 241; 16 W. R. 993. Cf. *Bancroft* v. *Mitchell* (L. Rep. 2 Q. B. 549; 16 L. T. N. S. 558).
(*c*) *Ex parte Johnson* (15 L. T. N. S. 163; 15 W. R. 160).

his discharge; but the Lords Justices on appeal reversed this decision, holding that the process under which the debtor was arrested was of a criminal nature and not for a debt. Wood, L.J., considered that the argument that the debtor escapes by paying money, and therefore that imprisonment is only a process to enforce payment of money, was answered by the judgment of Blackburn, J., in *Bancroft* v. *Mitchell*.(a) "Another answer to the same argument," said the Lord Justice, "is that there is the other process against him for damages. The imprisonment is the real punishment for the offence, but he can get off by paying the penalty." Selwyn, L.J., added, "Whether we take the letter or the spirit of the Act, the result is the same. If we look at the letter, the words used are 'penalty' and 'conviction,' all pointing to a criminal offence. If we look to the spirit of the Act, we find certain acts prohibited and treated as offences, and certain penalties imposed; and in addition to the penalty, the prosecutor may recover damages by action. The application for discharge must be dismissed with costs."

Injunction, inspection, or account.

The proprietor may also obtain an injunction from any of the Superior Courts of Record at Westminster or Dublin. Section 9 of 25 & 26 Vict. c. 68, provides that "in any action in any of Her Majesty's Superior Courts of Record at Westminster and in Dublin, for the infringement of any such copyright as aforesaid, it shall be lawful for the Court in which such action is pending, if the Court be then sitting, or if the Court be not sitting then for a judge of such Court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such Court or judge may seem fit."

Before the passing of this Act, in the case of *Mayall* v. *Higley*,(b) where photographs were lent by the owner to another person who became insolvent, and, the photographs being sold, the purchaser, by photographically printing from

(a) L. Rep. 2 Q. B. 555; 16 L. T. N. S. 558. This was a case of commitment for non-payment of a sum directed by justices' order to be paid for the support of the prisoner's mother. "It seems to me," said Blackburn, J., "that the commitment is not in the nature of civil but of criminal process, to punish the plaintiff for not performing the duty imposed on him by statute. It is quite true that on payment of the money he would get off the imprisonment, but still it is in the nature of criminal process, and consequently the plaintiff was not entitled to his discharge."

(b) 1 H. & C. 148; 6 L. T. N. S. 362; 10 W. R. 631.

negatives, obtained reduced copies, which he published and sold, it was held that the owner of the originals, irrespectively of copyright, was entitled to a writ of injunction to restrain the further taking or selling of copies, and also to recover them or their value under a count in detinue.

Importation of pirated copies.

The importation of pirated works is absolutely prohibited, and the copies may be detained by the officers of Her Majesty's Customs.

Sect. 10 enacts that "all repetitions, copies, or imitations of paintings, drawings, or photographs, wherein or in the design whereof there shall be subsisting copyright under this Act, and all repetitions, copies, and imitations of the design of any such painting or drawing, or of the negative of any such photograph, which, contrary to the provisions of this Act, shall have been made in any foreign State, or in any part of the British dominions, are hereby absolutely prohibited to be imported into any part of the United Kingdom, except by or with the consent of the proprietor of the copyright thereof, or his agent authorised in writing; and if the proprietor of any such copyright, or his agent, shall declare that any goods imported are repetitions, copies, or imitations of any such painting, drawing, or photograph, or of the negative of any such photograph, and so prohibited as aforesaid, then such goods may be detained by the officers of her Majesty's Customs."

SCULPTURE, MODELS, AND BUSTS.

In cases of infringement of the copyright in sculpture, models, and busts,(*a*) sect. 3 of 54 Geo. 3, c. 56, gives to the proprietor or proprietors, or their assignee or assignees, a special action on the case against the person or persons offending, to recover such damages as a jury on the trial of such an action shall give or assess, together with double costs of suit.(*b*)

If the sculpture, model, copy or cast has been registered under the Designs Act, 1850 (13 & 14 Vict. c. 104, s. 6), then in any case of piracy which would render the party offending liable to the special action last mentioned, he was also liable to forfeit for every offence a sum not less than £5 and not exceeding £30 to the proprietor of the sculpture, model, copy or cast of which the copyright had been infringed; and this penalty might be recovered in

(*a*) *Vide ante*, pp. 132–135.

(*b*) Double costs are taken away in all cases by 5 & 6 Vict. c. 97, s. 1, and only the usual costs between party and party may be recovered.

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PART I. CHAPTER XVII.

England(*a*) by an action of debt or on the case against the party offending, or by summary proceeding before two justices having jurisdiction where the party offending resides; in Scotland by action before the Court of Session in ordinary form, or by summary action before the sheriff of the county where the offence is committed, or the offender resides; in Ireland either by action in a Superior Court of law at Dublin, or by civil Bill in the Civil Bill Court of the county or place where the offence was committed.(*b*) This enactment is, however, no longer in force; for little use having for many years been made of the permission to register under this Act, the permission has, as already stated (*ante*, p. 134), been abolished by the Patent Designs and Trade Marks Act, 1883, 46 & 47 Vict. c. 57, s. 113, schedule 3.

REMEDY BY INJUNCTION.

Injunction.

The great remedial process, which was for a long time peculiar to equity, is the writ of injunction. This may be described to be a judicial process, whereby a party is required to do a particular thing or to refrain from doing a particular thing, according to the exigency of the writ. Its object is generally preventive and protective rather than restorative; it seeks to prevent a meditated wrong more often than to redress an injury already done.(*c*) It is a remedy of a very flexible nature; and it may be total or partial, qualified or unconditional, as well as temporary or perpetual.(*d*)

There are two sorts of injunctions—(1) provisional, *i.e.*, such as are to continue only until a certain specified period, such as the coming in of the defendant's answer, or the hearing of the cause; and (2) perpetual, *i.e.*, such as form part of the decree made at the hearing upon the merits, whereby the defendant is perpetually enjoined from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience.(*e*)

Ground of interference by injunction.

Lord Eldon (*f*) thus states the grounds on which equity interferes by injunction in the case of infringements of copyright: "The jurisdiction upon subjects of this nature is assumed merely for the purpose of making effectual the legal right, which cannot be made effectual by any action for damages; as, if the work is pirated, it is impossible to

(*a*) 13 & 14 Vict. c. 104, s. 7.
(*b*) 13 & 14 Vict. c. 104, s. 7, and 5 & 6 Vict. c. 100, s. 8.
(*c*) 2 St. Eq. Jur. ss. 861, 862. (*d*) 2 St. Eq. Jur. s. 886.
(*e*) 2 Daniell's Chanc. Pr. 1462.
(*f*) *Wilkins* v. *Aikin* (17 Ves. 424).

lay before a jury the whole evidence as to all the publications which go out in the world to the plaintiff's prejudice. A Court of equity, therefore, acts with a view to make the legal right effectual by preventing the publication altogether. Elsewhere the same learned judge says: "The principle of granting the injunction in those cases is, that damages do not give adequate relief; and that the sale of copies by the defendant is in each instance not only taking away the profit upon the individual book which the plaintiff probably would have sold, but may injure him to an incalculable extent, which no inquiry for the purpose of damages can ascertain.(*a*)

Where plaintiff's title is doubtful.

An injunction will not be granted where the title is in doubt. Thus, where the plaintiff claimed an injunction as the purchaser, from the composer, of the copyright of certain songs, and the defendant produced affidavits from the composer and one Elliston, from which it appeared that Elliston had a copyright, but whether qualified or absolute was doubtful, Sir John Leach refused to grant an injunction.(*b*)

In a case decided under the Copyright Act of Anne, an injunction obtained by the plaintiff to restrain the unauthorized publication of a book in which he claimed copyright, was dissolved by Lord Chancellor King, on the ground that the plaintiff had not set out a good title in his bill or affidavit, as it was there stated only that he had purchased or legally acquired the copy, which was not sufficient without saying that he purchased or acquired it "of the author."(*c*)

Courts of equity used formerly to direct an issue to be tried by a jury in a court of common law in order to determine the plaintiff's title to copyright. Sect. 1 of 25 & 26 Vict. c. 42, directed that every question of law or fact, cognizable in a court of common law, on the determination of which the title to the relief or remedy sought in a court of equity depends, should be determined by or before that court, unless (sect. 2) where questions of fact might be more conveniently determined at the assizes or in a court of common law in Westminster or Middlesex, in which cases issues of fact might be directed to be tried as before.(*d*)

Since the Judicature Act, as already pointed out, all branches of the High Court have equal powers.

(*a*) *Hogg* v. *Kirby* (8 Ves. 225).
(*b*) *Lowndes* v. *Duncombe* (2 Cowp. 216). See also *Byron* v. *Dugdale* (1 L. J. Ch. 239).
(*c*) *Gilliver* v. *Snaggs* (2 Eq. Cas. Ab. 522; 4 Viner's Abridg. 279).
(*d*) See *Re Hooper* (11 W. R. 130).

A previous Act had empowered courts of equity to award damages to the party injured, either in addition to or in substitution for an injunction.(*a*) The measure of damages in a case of piracy was thus stated by James, V.C., in a recent case: "That the defendant is to account for every copy of his book sold as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from so many additional copies."(*b*)

Where injunction would be mischievous.

A provisional injunction, if granted, would sometimes be productive of more mischief than that which it was intended to remedy, *e.g.*, if the book whose publication was sought to be restrained were of such a nature that its chief value depended upon its appearing immediately. "There is a great difference," said Lord Eldon,(*c*) "between works of a permanent and of a transitory nature. The case upon the former may be brought to a hearing. But the effect is very different upon a work of this kind [an East Indian Calendar], perishable, particularly in this instance, consisting of the names of persons continually fluctuating; a work that would be good for nothing in another year."

The difficulty in such cases is forcibly stated, and the mode of avoiding it suggested, by Lord Cottenham, C., in dealing with the question of an Almanac, alleged to be pirated from another.(*d*) "The greatest of all objections," said the Lord Chancellor, "is, that the Court runs the risk of doing the greatest injustice in case its opinion upon the legal right should turn out to be erroneous. Here is a publication which, if not issued this month [December], will lose a great part of its sale for the ensuing year. If you restrain the party from selling immediately, you probably make it impossible for him to sell at all. You take property out of his pocket and give it to nobody. In such a case, if the plaintiff is right, the Court has some means at least of indemnifying him, by making the defendant keep an account; whereas, if the defendant is right and he be restrained, it is utterly impossible to give him compensation for the loss he will have sustained. And the effect of the order in that event will be to commit a great and irremediable injury. Unless, therefore, the Court is quite clear as to what are the legal rights of the parties, it is much the safest

(*a*) 21 & 22 Vict. c. 27, s. 2; see *per* Wood, V.C., *Tinsley* v. *Lacy* (11 W. R. 877).
(*b*) *Pike* v. *Nicholas* (20 L. T. N. S. 909; 38 L. J. 529, Ch.).
(*c*) *Mathewson* v. *Stockdale* (12 Ves. 275).
(*d*) *Spottiswoode* v. *Clarke* (2 Phil. 156).

course to abstain from exercising its jurisdiction till the legal right has been determined."(*a*)

Where the work is of such a nature as those just referred to, the Court will order the defendant to keep an account of all copies sold, until the title of the plaintiff is ascertained; when the proceeds must be handed over to him.

Person having legal title should be made a party.

Although an equitable title to the work pirated is sufficient to entitle to the assistance of the court,(*b*) the person who has the legal title should also be made a party to the suit.(*c*)

Joint owners may sue.

The author or the proprietor of the copyright in a work may associate with himself any person or persons he pleases in the book of registry at Stationers' Hall, and such persons will have a right to sue jointly with him for an infringement of the copyright.(*d*)

Joinder of defendants.

On the other hand, where there are distinct infringements of copyright by several persons they cannot be joined as defendants in the same suit. Thus, where different booksellers take copies of a spurious edition of a work for sale there is no privity between them, and they must be proceeded against by separate actions.(*e*)

Form of injunction.

Where a Bill for an injunction prayed that the defendant might be restrained from publishing, selling, or otherwise disposing of a number of a periodical containing a piratical abridgment of a work of fiction, and from copying or *imitating* in whole or in part that work, Knight Bruce, V.C., granted the injunction as prayed, except as to the words "or imitating," for which he could find no precedent.

"Imitating."

"I am not satisfied," said His Honour, "that the words would go too far. Certainly, I am not satisfied that any legal or proper act would be restrained by them; but I am struck with the absence of any precedent for the use of those words in any injunction upon a case merely literary; and as I am of opinion, if I rightly understand it, that what is apprehended by the counsel for the plaintiff this Court would restrain, I think it more prudent and safe to narrow the present injunction, rather than to leave in it a word

(*a*) See remarks of Hall, V.C., in *Smith* v. *Chatto* (31 L. T. N. S. 755).

(*b*) See *Mawman* v. *Tegg* (2 Russ. 385); *Pierpoint* v. *Fowle* (2 Wood. & Min. 35); *Little* v. *Gould* (2 Blatch. 181); *per* Abinger, C.B., in *Chappell* v. *Purday* (4 Y. & C. 493); *per* Shadwell, V.C., in *Bohn* v. *Boyne* (10 Jur. 420), and *Sweet* v. *Carter* (11 Sim. 581).

(*c*) *Colburn* v. *Duncombe* (9 Sim. 151). See *Sweet* v. *Shaw* (3 Jur. 217), and *Sweet* v. *Cater* (11 Sim. 581).

(*d*) *Stevens* v. *Wildy* (19 L. J. 190, Ch.).

(*e*) *Dilly* v. *Doig* (2 Ves. 486).

apparently new in such cases, and which may be susceptible of an erroneous interpretation."(*a*)

"The largest words," said the Vice-Chancellor, "that the registrar has furnished me with are in a case of *Paden* v. *Stockdale*,(*b*) which are very large indeed." The words of the injunction in that case were: "To restrain the defendant, his servants, agents, and workmen from printing, upon a reduced scale or otherwise, and from publishing or selling any copy or copies of the map of the Island of St. Domingo, compiled, drawn, or engraved by or for the use of the plaintiff, or any other of the like nature or kind, or upon any such or the like plan, until answer or further order."

Plaintiff must not be guilty of laches, or mislead by acquiescence.

It has been observed that nothing, in general, can call forth a court of equity into activity but conscience, good faith, and personal diligence; and one of the leading maxims that guides its interference is—*Vigilantibus non dormientibus æquitas subvenit*.(*c*) If one slumbers over his rights instead of asserting them in proper time, or if one, by his conduct, acquiesces in or encourages the infringement of a right which he afterwards seeks to enforce, equity has refused to grant its aid.

A leading case on this subject is *Saunders* v. *Smith*,(*d*) in which, without pronouncing any judgment on the legal right of the defendant to publish, with notes annexed, certain legal cases recently published by the plaintiff, the Lord-Chancellor (Cottenham) refused to grant an injunction to stay the publication by the defendant of a second volume of his "Leading Cases" on account of the line of conduct pursued by the plaintiffs. Mr. Smith had published his first volume of "Leading Cases" in 1837, containing some cases taken from the plaintiffs' books, and he stated in the preface his intention to publish a second volume which would carry the work down to the time he wrote. Mr. Smith proceeded with his second volume, and a communication on the subject of taking a share in it was made by his publisher (Mr. Maxwell) to the plaintiffs, and the plaintiffs made no remonstrance until the first part of the second volume was published, when they applied for an injunction to restrain its publication. Lord Cottenham, in refusing the injunction, said: "I do not give any opinion upon the legal question. I am only to decide whether the

(*a*) *Dickens* v. *Lee* (8 Jur. 185). Notwithstanding the language of the report the meaning is clear.

(*b*) Reg. Lib. A. 1796, fol. 32*.

(*c*) See 2 Sp. Eq. Jur. 60, 61; St. Eq. Jur. s. 959 a.

(*d*) 3 My. & Cr. 711.

plaintiffs are entitled, under the circumstances, to the interposition of the Court to protect their legal right, when that legal right has not been yet established. But I assume the existence of the legal right, and I say that whatever legal right the plaintiffs may have, the circumstances are such as to make it the duty of a court of equity to withhold its hand, and to abstain from exercising its equitable jurisdiction, at all events until the plaintiffs shall come here with the legal title established. In doing this, I am only doing what Lord Eldon did in *Rundell* v. *Murray*, and what is very generally done upon questions of patent right. The Court always exercises its discretion whether it shall interfere by injunction before the establishment of the legal right."

The circumstances of the case of *Rundell* v. *Murray*,(*a*) referred to by Lord Eldon, were peculiar. The authoress gave her book to the defendant to publish at his expense on condition of giving her a few copies, and she stated in the book that it was given to the public in the idea that it might be useful, and as "she will receive from it no emolument, so she trusts it will escape without censure." The book proved a success, and the publisher sent her £150, which she acknowledged by letter to be a free gift. After the period of fourteen years had elapsed from the first publication, the authoress sought to restrain the further publication of the work by the defendant, but Lord Eldon held that she was not entitled to do so. His Lordship said: "There has often been great difficulty about granting injunctions where the plaintiff has previously, by acquiescing, permitted many others to publish the work; where ten have been allowed to publish, the Court will not restrain the eleventh. A court of equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things that occasions the application; and therefore, without saying with whom the right is, whether it is in this lady or whether it is concurrently in both, I think it is a case in which strict law only ought to govern."

In *Platt* v. *Button* (*b*) Lord Eldon said that where permission was given to some persons to publish, and then others copied, it was necessary for the proprietor to bring his action at law before he could come to equity for an injunction.

If any delay occurs in the assertion of the title to a copyright infringed, the delay must be accounted for to the

(*a*) 1 Jac. 311. See also *Southey* v. *Sherwood* (2 Mer. 438), and the American case of *Heine* v. *Appleton* (4 Blatch. 125).

(*b*) Coop. Ch. Cas. 304.

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satisfaction of the Court, otherwise no assistance will be given.(*a*)

Right to an account.

The right to an account in equity appears to be entirely ancillary to the right to an injunction.(*b*)

"The Court," says Sir John Leach, M.R.,(*c*) "has no jurisdiction to give to a plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of this Court by injunction; and in such case, the Court will also give him an account, that his remedy here may be complete. If this Court do not interfere by injunction, then his remedy, as in the case of any other injury to his property, must be at law."

And before the Judicature Act it was held that a Court of equity had no jurisdiction with reference to a mere question of damages unless the primary right to an injunction exists.(*d*)

It was held in an American case(*e*) that commissions on the sale of a pirated work, received by a bookseller from the publisher of it, are profits which the bookseller must account for to the proprietor of the copyright, where a decree for an account has been made.

Curtis, J., in that case, after referring to the law relating to profits made by one member of a partnership, said: "The jurisdiction in cases of copyright rests upon a similar principle. If the proprietor will waive his action for damages, he may have an account of profits, upon the ground that the defendant has, by dealing with his property, made gains which equitably belong to the complainant. And I perceive no sound reason for restricting those gains to the difference between the cost and the sale price of the map or book, or limiting the right to an account to those persons who have sold the work solely on their own account. He who sells on commission does in truth sell on his own account, so far as he is entitled to a per-

(*a*) See *Bailey* v. *Taylor* (1 R. & M. 76; s. c. Tamlyn, 295); *Mawman* v. *Tegg* (2 Russ. 385, 393); *Lewis* v. *Chapman* (3 Beav. 135); *Lewis* v. *Fullarton* (2 Beav. 6); *Buxton* v. *James* (5 De G. & Sm. 80, 84); *per* Wood, V.C., in *Tinsley* v. *Lacy* (11 W. R. 877; 32 L. J. 539, Ch.); and the analogous cases as to patent, *Bridson* v. *Benecke* (12 Beav. 3); *per* Lord Brougham, C. in *Crossley* v. *Derby Gas Light Company* (4 L. J. 26, Ch.; *per* Wood, V.C., in *Smith* v. *London and South-Western Railway Company* (1 Kay, 416, 417). See the observations of Hall, V.C., in *Hogg* v. *Scott* (L. R. 18 Eq. pp. 453, *seq.*), and the decision of Bacon, V.C., in *Maxwell* v. *Somerton* (30 L. T. N. S. 11), and the case of *Weldon* v. *Dicks* (L. R. 10 C. D. 247)

(*b*) 1 Kay, 417. (*c*) *Bailey* v. *Taylor* (1 R. & M. 75).

(*d*) 1 Kay, 415; *Stevens* v. *Cadby* (2 Curt. 200); and see the case of *Monk* v. *Harper* (2 Edw. Ch. 114).

(*e*) *Stevens* v. *Gladding* (2 Curt. 608).

centage on the amount of the sales. What he so receives is the gross profit coming to him from the proceeds of the sale, and what he so receives diminishes the net profit of the one who employs him to sell. That part of the profits of the sales, being in the hands of the commission merchant, the consignor is not accountable for them. But why should not the commission merchant, who has them, account for them? He was liable to an action for damages for selling. That right is waived. I think he should pay over to the proprietor, in lieu of the damages, the gain he has made from the sales. It does not seem to me that the term 'profits' necessarily, or, when construed in reference to the subject matter, properly has so restricted a meaning as to exclude commissions received from the proceeds of sales of the property of the complainant."(*a*)

Gross or net profits.

In *Delfe* v. *Delamotte*(*b*) it was argued that sect. 23 of 5 & 6 Vict. c. 45, making pirated copies the property of the proprietor of the copyright, entitled him to the gross receipts for copies sold, and not merely to the net profits realized; but Wood, V.C., decreed only an account and payment of net profits, saying that if the plaintiff wanted more, his remedy was at law.

On this decision Fry, J., remarks in a recent cause:(*c*) "I am unable to reconcile the judgment with the order made; because it appears that the Vice-Chancellor expressed his opinion that the plaintiff must proceed at law if he desired delivery up of the copies; but the order stated in *Kay* & *Johnson's* Reports, and referred to in *Seton* on Decrees, was for delivery to the plaintiff; and I think, further, in the case of *Stannard* v. *Harrison*(*d*), Vice-Chancellor Bacon upheld the decree by consent for delivering up the copies, holding that the whole of the decree was within the power of the Court."

Injunction where value of property is small.

That the value of the property infringed is small does not disentitle the owner to an injunction;(*e*) but the property may be of such trifling value that the Court will not encourage litigation by interfering to protect it by injunction.

Where some pages of an article on a subject under public discussion at the time, were extracted from a monthly periodical and commented on by a weekly newspaper, Lord Cottenham, in dissolving an injunction which had been

(*a*) *Stevens* v. *Gladding* (2 Curt. 608). (*b*) 3 K. & J. 581.
(*c*) *Hole* v. *Bradbury* (L. R. 12 C. D. 903).
(*d*) 19 W. R. 811. (*e*) *Buxton* v. *James* (5 De G. & Sm. 83).

obtained, said: "It is impossible to say there is any value in the nature of the property in what is here inserted; the question is so minute as a question of property or value—how far, in point of value, it interferes with the sale of the *Monthly Chronicle*. The injunction is not to depend altogether on a question of account; but to what value the question in point of utility is to be carried. If no other danger were to arise from granting this application than what would be consequent in encouraging the litigation of such minute inquiries, it would be a sufficient ground to refuse it, that the Court should not be so occupied to the exclusion of other matters which press upon it." The injunction is dissolved, each party paying their own costs.(*a*)

Where, however, the work of which the copyright is infringed is of value, the Court will grant an injunction without proof of actual damage. When once the Court has found that there is "*injuria*" the proprietor of the copyright will be allowed to judge of the "*damnum*."(*b*)

Sale of pirated copies after expiration of term.

If copies pirated during the continuance of a term of copyright are not published till after the expiration of the term, such publication will, it seems, as in the similar case of patents, be restrained by injunction.(*c*)

Injunction where only part of work is pirated.

Where part of a book only is pirated from another work, the extent to which an injunction goes will depend on the particular circumstance of the case. Lord Bathurst seems to have been of opinion that an injunction could not be granted against the whole of such a work, unless the part pirated was such that granting an injunction against that part necessarily destroyed the whole.(*d*)

Lord Eldon thought it was the business of the defendant, where a considerable portion of his work was shown to have been taken from that of the plaintiff, to separate and point out such pirated part.(*e*)

The presiding judge has frequently made the comparison for himself.(*f*) In some cases a reference has been made to

(*a*) *Bell* v. *Whitehead* (3 Jur. 68; 8 L. J. Ch. 141); *Whittingham* v. *Wooler* (2 Swanst. 460). See also *per* Lord Eldon in *Matthewson* v. *Stockdale* (12 Ves. 275); and *Cox* v. *Land and Water Journal Company* (L. Rep. 9 Eq. 324; 21 L. T. N. S. 548; 39 L. J. 152, Ch.; 18 W. R. 207).

(*b*) *Per* Wood, V.C., in *Tinsley* v. *Lacy* (32 L. J., 539, Ch.; 11 W. R. 876).

(*c*) Compare the remarks of Wood, V.C., in *Smith* v. *London and South-Western Railway Company* (Kay, 415) with the arguments in *Sheriff* v. *Coates* (1 R. & M. 165, 166).

(*d*) *Per* Wood, V.C., in *Jarrold* v. *Houlston* (3 K. & J. 719).

(*e*) *Mawman* v. *Tegg* (2 Russ. 395).

(*f*) See the cases of *Matthewson* v. *Stockdale* (12 Ves. 277); *Whitting-*

the master to report to what extent one book is pirated from another;(a) and in one case Lord Hardwicke thought the best course was to get a report from two persons of learning in the law, chosen by the litigants themselves.(b)

The effect of an injunction against the whole of a book is sometimes produced by an order against the publication of any copy or copies containing the portions pirated from another work, or any passages taken or colourably altered from such work.(c)

The extent to which the injunction ought to go, must, in each case, depend on the particular circumstances of that case.(d)

The remedy by injunction may be applied, even where a new offence, with a penalty for it, is created by statute.(e)

Remedy by injunction sometimes inappropriate.

The peculiar nature of the case may sometimes render the remedy by injunction inappropriate, even where the piracy is clearly established. Thus Malins, V.C., refused to grant an interlocutory injunction to restrain the publication in a weekly paper of a "list of hounds," which he was satisfied was copied from the list published in another weekly paper.(f) The Vice-Chancellor, after referring to the rule that where the information is open to all who seek to obtain it, each publisher must, nevertheless, get it at his own expense and as the result of his own labour, and is not entitled to the results of the labour undergone by others, said: "But in this case, as in many others, the question arises, is it a case for the interference of the Court of Chancery at all? and if it is a case for interference, is it a case for interference on an interlocutory application? Now, I do not think it is a case to be decided on an interlocutory application; and my reason is this: this list must be corrected from week to week; it could not be a correct list from the 1st of November until April, or to the end of the hunting-season. Changes must take place; the list of masters, huntsmen, and whips can hardly continue to be correct even for

ham v. *Wooler* (2 Swanst. 460); *Lewis* v. *Fullarton* (2 Beav. 8); *Murray* v. *Bogue* (1 Drew, 368); *Spiers* v. *Brown* (6 W. R. 352); *Jarrold* v. *Houlston* (3 K. & J. 708); *Pike* v. *Nicholas* (20 L. T. N. S. 906; 38 L. J. 529, Ch.; L. Rep. 5 Ch. App. 251).

(a) *Carnan* v. *Bowles* (2 Bro. C. C. 85); *Nicol* v. *Stockdale* (12 Ves. 227); *Story's Executors* v. *Derby* (4 M'Lean, 160, 161).

(b) *Gyles* v. *Wilcox* (2 Atk. 143).

(c) See *Lewis* v. *Fullarton* (2 Beav. 6); *Jarrold* v. *Houlston* (3 K. & J. 708).

(d) *Per* Lord Eldon, in *Mawman* v. *Tegg* (2 Russ. 393).

(e) *Cooper* v. *Whittingham* (L. R. 15 C. D. 501).

(f) *Cox* v. *Land and Water Journal Company* (L. Rep. 9 Eq. 324; 21 L. T. N. S. 548; 39 L. J. 152, Ch; 17 W. R. 207).

a week. Now, suppose I were to grant an injunction, how can it be acted upon? The defendants have only to issue a fresh circular, make an urgent appeal for answers, or send a person by rail and get the information from the masters of the hunts, and next week bring out a very correct list; and how am I to know the way in which they got their information? At present, I do not see that I can interfere. Whether the plaintiff is entitled to any remedy I do not at present decide, but I do not think it a case for an injunction, though the defendants are not entitled to avail themselves of the plaintiff's labours. . . . . I would suggest to the parties that the wisest thing would be to let the bill be dismissed without costs. But if they do not agree, then I simply refuse the motion, leaving the case to be decided at the hearing. It may be a question for damages, but I shall certainly not grant an injunction."

Where the appropriation of another's work is small in amount, and pervades the whole work, so that no permanent injunction can issue without destroying the whole work, it has been the opinion of some judges that the remedy by injunction would be disproportionate and unsuited to the case, and therefore unjust; and that as the damages sustained might be obtained in a suit at law without destroying the whole work, such would be the most equitable relief.(*a*)

Not necessary to state in bill or affidavit parts pirated.

It was held not necessary for a person who complains that his copyright has been infringed and seeks an injunction, to specify, either in his bill or his affidavit, the parts of the defendant's work which he thinks have been pirated from his work: it was sufficient to allege generally that the defendant's work contains several passages which have been pirated from the plaintiff's, and to verify the rival works by affidavit.(*b*)

The production of his manuscript is sometimes very important on the part of the person charged with piracy.(*c*)

Costs.

Where the action to enforce his copyright is brought successfully by a plaintiff who has been guilty of no misconduct,

(*a*) See *per* Woodbury, J., in the American case of *Webb* v. *Powers* (2 Wood. & Min. 521). "Though this Court," says Lord Eldon, in *Mawman* v. *Tegg*. (2 Russ. 394), "has long exercised the jurisdiction of protecting literary property by injunction, there may be much doubt whether it would exercise the jurisdiction where only a few pirated passages occurred, and would not rather in such a case leave the party complaining to his action at law."

(*b*) *Sweet* v. *Maugham* (11 Sim. 51).

(*c*) *Murray* v. *Bogue* (1 Drew. 361); *Pike* v. *Nicholas* (20 L. T. N. S. 908); 38 L. J. 529, Ch.).

the Court has, according to the opinion of Jessel, M.R.,(*a*) no discretion to refuse him costs.

"There may," said his lordship, "be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind, the rule is plain and well settled, and is as I have stated it. It is, for instance, no answer where a plaintiff asserts a legal right for a defendant to allege his ignorance of such right and to say, 'If I had known of your right I should not have infringed it.'"

Sale of stereotype plates.

Where the proprietor of copyright notes on the Bible sold the stereotype plates of a quarto edition containing these notes, together with the right of printing from them, and the plates were afterwards sold to a third party at a public sale, at which a specimen leaf of the work was exhibited, the Scotch Court of Session granted an interdict to restrain the purchaser from publishing a folio Bible, printed from the plates, with the addition of a commentary at the foot of each page, on the following grounds: that what was sold were the plates of a particular Bible, of which a specimen leaf had been shown, and had been referred to in the catalogue; that the nature of stereotype plates was to multiply copies of the same work until they were worn out; whereas, if commentaries were added to each page, the work would be a different one, and if sold as cheap as the original quarto, the value of the latter would be diminished, and that, not by the multiplication of the same work, but by the production of a different one from the plates, a thing not intended when the sale was made.(*b*)

Publication disparaging a rival work.

An advertisement of a work which merely disparages a rival work will not be restrained by injunction, where it is not such as would induce the public to take the one book for the other.(*c*)

Lord Cottenham, C., said that an allegation that matter contained in a particular edition of a work was spurious and of no value was, if untrue, no subject for an injunction, although it might be the subject of an action, as being a libel on or disparagement of the edition (*d*)

(*a*) *Cooper* v. *Whittingham* (L. R. 15 C. D. 501).
(*b*) *Fullarton* v. *McPhun* (13 Scotch Sess. Cas. 2nd Ser. 219).
(c) *Seeley* z. *Fisher* (11 Sim. 581). (*d*) *Ibid.* 583.

CHAPTER XVIII.

AMERICAN LAW OF COPYRIGHT.

General law throughout the United States.

THE general law on the subject of copyright is the same throughout the whole of the United States, since the Federal Constitution of 1789(*a*) gave to the Supreme Congress "power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; also to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Local copyright.

But, though a particular State cannot take away from an individual the property given him by an Act of Congress, and though the laws of such State are inoperative as against the laws of the United States with which they may come in collision,(*b*) yet if an author or inventor, instead of resorting to the Act of Congress, should apply to the Legislature of a particular State for an exclusive right to his production, there is nothing to hinder that State granting it, though the operation of such grant would be confined to the limits of the State.(*c*) And the use of the property is exclusively of local cognisance. Like all other property, it must be used and enjoyed within each State, according to the laws of such State.(*d*)

Copyright Acts.

The first Act on the subject of copyright was passed in 1790, and fixed the term of copyright at fourteen years, with a right of renewal for fourteen years more, if at the expiration of the first term the author were living, and a citizen of or resident in the United States. This Act was repealed by an Act passed in 1831, which, amended and enlarged by subsequent Acts (passed in 1834, 1846, 1856, 1859, 1861, 1865, 1867), continued in force down to July, 1870, when an Act was passed to revise, consolidate, and amend the statutes relating to copyrights and patents, repealing the previous enactments on the subject.

Terms of copyright.

The term of copyright fixed by the Act of 1870 (retained in the revised statutes) is twenty-eight years from the time of recording the title thereof, with a right of renewal for fourteen years more (thus making the whole term forty-two years), if, at the expiration of the first period, the author, inventor, or designer, is still living, and a citizen of the United States, or resident therein. If he has died, leaving a widow or

(*a*) Art. 1, sect. 8. (*b*) See *Gibbons* v. *Ogden* (9 Wheat. 186).
(*c*) *Livingston* v. *Van Ingen* (9 Johns. 581). (*d*) *Ibid.*

children, the same exclusive right is continued to them for the further term of fourteen years. But, in either case, all the conditions as to recording the title of the work, &c., required in the first instance, must be observed with respect to this renewed copyright within six months before the expiration of the first term. A copy of the record must also, within two months from the date of the renewal, be published in one or more newspapers printed in the United States for the space of four weeks.(*a*)

A claim under a renewal necessarily involves the validity of the right under the first as well as under the second term.(*b*)

It would seem that under this section the author can assign only the copyright actually vested in him at the time of assignment, and not the copyright for the additional term before it has been acquired.(*c*) When the additional term of copyright has been acquired, the right to assign it has also been doubted, but it is difficult to conceive what ground there can be for the doubt.

No common law right.

It is now settled, however the matter may have been formerly regarded, that copyright is dependent solely on the statute law; and that an author cannot set up any common law right to the exclusive printing or publishing of his work.(*d*)

Unpublished manuscripts.

Even what has been termed copyright before publication is not, in America, dependent solely on the common law. Sect. 4967 of the Act of 1870, as contained in the Revised Statutes, provides that any person who shall print or publish any manuscripts whatever, without the consent(*e*) of the author or proprietor first obtained (if such author or proprietor be a citizen of the United States or resident therein) shall be liable to said author or proprietor for all damages occasioned by such injury.

The similar enactment in the statute of 1831 was held not to take away the right of property which the author possesses at common law in his works before publication, and which he may protect by action at law, or by claiming

(*a*) Sects. 4953, 4954 of Revised Statutes.
(*b*) *Wheaton* v. *Peters* (8 Pet. 663).
(*c*) *Pierpont* v. *Fowle* (2 Wood. & Min. 23).
(*d*) *Dudley* v. *Mayhew* (3 Coms. 12); *Wheaton* v. *Peters* (8 Pet. 661); *Clayton* v. *Stone* (2 Paine, 383).
(*e*) The Act of 1831 (now repealed) required this consent to be in writing, signed in the presence of two or more credible witnesses: (Sect. 9). As to the continued existence of the common law right, see the judgment in *Boucicault* v. *Hart* (13 Blatch. p. 59).

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the aid of a Court of Chancery, which will be given on general equitable principles.(*a*)

An author has a common law right in his manuscript until he relinquishes it by contract or some equivocal act.(*b*)

A surreptitious publication of an important part of a manuscript is as much within the statute as if the manuscript were complete; and the whole of a manuscript need not be printed.(*c*)

Whether the enactment as to unpublished manuscripts operates in favour of a resident of the United States, who has acquired the proprietorship of an *unprinted* literary composition from a non-resident alien author, is not clearly settled; but it gives no redress for an unauthorised theatrical representation in such a case.(*d*)

It has been said that the alienage of an author is no obstacle to him or his assignee suing for a violation or to prevent a violation of his rights of property in his unpublished works;(*e*) but the language of Sect. 4967 leaves the matter open to grave doubt.

Definition of copyright.

Copyright is defined to be the sole liberty of printing, reprinting, publishing and vending.(*f*)

Subject matters in which copyright is granted.

Sect. 4952 of the Act enumerates the subject matters in which copyright is granted—viz., book, map, chart, dramatic or musical composition, engraving, cut, print or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and in the case of a dramatic composition, the sole liberty of publicly performing or representing it, or causing it to be performed or represented by others; and authors may reserve the right to dramatise, or to translate their own works.

Who may possess copyright.

The Act confers copyright only on those who are citizens of the United States, or resident therein. The word "resident" has been interpreted to mean permanently resident; so that a person temporarily residing in America, even though he has declared his intention of becoming a citizen, cannot take or hold a copyright.(*g*) If, however,

(*a*) *Woolsey* v. *Judd* (4 Duer. 385); *Wheaton* v. *Peters* (8 Pet. 657); *Jones* v. *Thorne* (1 N. Y. Leg. Obs. 409); *Bartlett* v. *Crittenden* (4 M'Lean, 301). See also *Hoyte* v. *M'Kenzie* (3 Barb. Ch. 323).

(*b*) *Bartlett* v. *Crittenden* (5 M'Lean, 36, 38). (*c*) *Ibid.* 39, 40).

(*d*) *Keene* v. *Wheatley* (9 Amer. Law Reg. 45); *Boucicault* v. *Hart* (13 Blatch. 47).

(*e*) *Palmer* v. *De Witt* (47 N. Y. 540). (*f*) Sect. 4952.

(*g*) *Cary* v. *Collier* (56 Nile's Reg. 262). The question is treated as one of fact, and the evidence in that case (relating to Captain Marryat,

a bonâ fide intention to make the United States his home exists at the time of recording the title, the author may acquire a copyright, though he should subsequently change his mind.(*a*)

The illiberality of the rule, which requires permanent residence in order to entitle to copyright, contrasts very disadvantageously with the rule of our law on the subject, as laid down in the cases of *Jefferys* v. *Boosey* and *Low* v. *Routledge* (*ante*, pp. 16 and 21).

Sect. 4971 provides that nothing contained in the Act shall be construed to prohibit the printing, publishing, importation, or sale of any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph, written, composed, or made by any person not a citizen of the United States, nor resident therein.

Originality.

The degree of originality required, in order to entitle a book to the protection of the Act is the same as English Courts require. To constitute one an author he must, by his own intellectual labour applied to the materials of his composition, produce an arrangement or compilation new in itself.(*b*) In the case of subjects open to all, the work of another must not be copied, but recourse must be had to the original sources.(*c*)

A book within the meaning of the Act may consist of a single sheet, as the words of a song, or the music accompanying it.(*d*) But a newspaper or price current is not a book within the meaning of the Act.(*e*)

Requisites to be observed.

No person is to be "entitled to a copyright" unless, (1) before publication, he deposits in the mail a printed copy of the title of the book, or other article, or a description of the painting, drawing, chromo, statue, statuary, or model or design for a work of the fine arts, for which he desires a copyright, addressed to the librarian of Congress,(*f*) and also, (2) within ten days from the publication, deposits in the mail two copies of such book, or other article, or in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of the same, to be addressed to the said librarian of Congress.(*g*) He must also, in order

an officer in the British Navy) was considered to negative the intention declared.

(*a*) See *Boucicault* v. *Wood* (2 Biss. 34).

(*b*) *Atwill* v. *Ferrett* (2 Blatch. 46). See *per* Story, J., quoted *ante*, pp. 76, 77.

(*c*) *Blunt* v. *Patten* (2 Paine, 400, 401); *Emerson* v. *Davies* (3 Story, 781); *Gray* v. *Russell* (1 Story, 17).

(*d*) *Clayton* v. *Stone* (2 Paine, 383, 391). (*e*) *Ibid.*

(*f*) Sect. 4956. (*g*) Sect. 4959.

to maintain an action, (3) print on the title-page or page next following of every book, or in the case of a map, musical composition, print, drawing, photograph, &c., inscribe on some visible part of it, or on the substance on which it is mounted, notice of entry of copyright in the prescribed form.(*a*)

Two complete printed copies of the best edition of every copyright book or other article, or description or photograph of such article as before required must be "mailed" by the proprietor to the librarian of the Congress at Washington, within ten days after publication, and also a copy of every subsequent edition in which substantial changes are made, under a penalty of twenty-five dollars.(*b*)

If a work is published without a copyright being secured, this is a dedication of it to the public, and any one may republish it.(*c*)

The publication of an official report under the direction of Congress, and for the benefit of the public, is a dedication of it, and of what is contained in it, to the public, and any one may reprint it.(*d*)

On the book being sent to the librarian of Congress, that officer is to record the name of the copyright book or other article forthwith in a book to be kept for that purpose in a printed form, and is to give a copy of the title or description, under the seal of the librarian of Congress, to the proprietor whenever he requires it.(*e*)

The form of notice of entry of copyright is as follows:—"Entered according to Act of Congress, in the year , by A. B., in the office of the librarian of Congress, at Washington."(*f*)

A penalty of 100 dollars (to be recovered by action in any Court of competent jurisdiction) is inflicted on every person inserting or impressing such a notice on any of the articles named, for which he has not obtained a copyright, one moiety of the penalty to go to the person suing for it, and the other to the use of the United States.(*g*)

Piracy of books.

If any one, after the recording the title of any book according to the Act, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, print, publish, or import, or knowing the same to be

(*a*) Sect. 4962. (*b*) Sect. 4959.
(*c*) *Bartlett* v. *Crittenden* (5 M'Lean, 37).
(*d*) *Heine* v. *Appletons* (4 Blatch., cited Law's Digest of Patent, Copyright, and Tradesmark Cases, p. 214).
(*e*) Sect. 4957.
(*f*) Sect. 4962. (*g*) Sect. 4963.

so printed, published, or imported, shall sell or expose to sale any copy of such book, such offender shall forfeit every copy thereof to the said proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any Court of competent jurisdiction.(*a*).

Maps, prints, musical compositions, &c

It is enacted as to maps, prints, &c., "that if any person after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary or model or design intended to be perfected and executed as a work of the fine arts as provided in the Act, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article as aforesaid, he shall forfeit to the said proprietor all the plates on which the same shall be copied, and every sheet thereof either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or which has by him been sold or exposed for sale; one moiety to go to the proprietor, the other to the United States."(*b*)

Dramas.

The exclusive right to publicly perform a dramatic composition is dependent upon the existence of a copyright therefor.(*c*)

Where a printed copy of the title of a dramatic composition was deposited, pursuant to statute, in October, 1874, and a bill was filed in February, 1875, to restrain an infringement of the copyright in it, but the bill did not allege any publication of the work, or any delivery of copies, it was held, on demurrer, that the bill did not show that a complete copyright had been obtained.(*d*)

It was held in the same case that where the dramatic composition still remained in manuscript, the representation of it on the stage, for the benefit and under the control of the author, was not an abandonment or dedication of it to the public, nor a publication of it within the provisions of the copyright statute.

(*a*) Sect. 4964. (*b*) Sect. 4965.
(*c*) *Boucicault* v. *Hart* (13 Blatch. 47). (*d*) *Ibid.*

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Dramatic representations.

Any person who publicly performs or represents any dramatic composition for which a copyright has been obtained, and without the consent of the proprietor or his heirs or assigns, is to be liable to damages (recoverable by action in any Court of competent jurisdiction), to be assessed in all cases at such sum, not less than 100 dollars for the first, and 50 dollars for every subsequent performance, as to the Court shall appear to be just.(*a*)

An assignee of a dramatic composition cannot maintain an action for its unauthorised representation unless he has performed *all* the acts required by law to secure a copyright.(*b*)

An authorised public circulation of a printed copy of a drama, for which there is no legislative copyright, is a publication which legalises a subsequent theatrical representation by anybody from such copy.(*c*)

Piracy in general.

If so much is taken as to impair the value of the original work, or so that the labours of the original author are substantially appropriated, that is sufficient to constitute a piracy.(*d*) But the question of piracy does not depend solely on the question of quantity.(*e*)

Intention is not a necessary element in the offence of piracy. If a copyright has been invaded, whether the party knew the work was copyrighted or not, he is liable to the penalty for violation.(*f*)

A translation is not a copy of a book within the meaning of the statute.(*g*) The words "copy of a book" mean a transcript or copy of the entire book.(*h*)

Limitation of actions.

All actions for forfeitures and penalties under the Act must be commenced within two years after the cause of action shall have arisen.(*i*)

Remedies for infringement.

The circuit Courts of the United States, or any district Court having the jurisdiction of a circuit Court, are empowered upon Bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any rights secured by the copyright laws according to the course and principles of Courts of equity, on such terms as the Court may deem reasonable.(*j*)

The jurisdiction given to the Federal Courts by the Acts

(*a*) Sect. 4966. (*b*) *Keene* v. *Wheatley* (9 Amer. Law Reg. 44).
(*c*) *Ibid.* (*d*) *Folsom* v. *Marsh* (2 St. 115).
(*e*) *Story's Executors* v. *Holcombe* (4 M'Lean, 309, 310).
(*f*) *Millett* v. *Snowden* (1 West. L. J. 240).
(*g*) *Stowe* v. *Thomas* (2 Amer. Law Reg. 230).
(*h*) *Rogers* v. *Jewett* (12 Mo. L. Rep. 340, 341). (*i*) Sect. 4968.
(*j*) Sect. 4970.

of Congress has not taken away or diminished the original jurisdiction which, before such Acts,(*a*) the State Courts exercised; except where the jurisdiction was made exclusive in express terms, or by the necessary construction of the Federal Constitution.(*b*)

Under the Acts giving to the circuit Courts cognisance of these cases, the citizenship of the litigant parties is immaterial.(*c*)

Assignment of copyright.

Copyrights may be assigned in law by *any instrument of writing*. Such assignment is to be recorded in the office of the librarian of Congress within 60 days after its execution, in default of which it is to be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice.(*d*)

The librarian of Congress is made chargeable with all the duties pertaining to copyrights required by law.(*e*) He is to make an annual report to Congress of the number and description of copyright publications for which entries have been made during the year.(*f*)

CHAPTER XIX.

COPYRIGHT IN DESIGNS.

Patents, Designs and Trade Marks Act 1883.

ALL previous legislation affecting Copyright in Designs has been repealed by the Patents, Designs and Trade Marks Act 1883,(*g*) Parts III. and V. of which contain all the statute law now relating to the subject.

The requisites to copyright are, (1) the design must be new and original; (2) it must be registered; (3) neither it nor any article to which it is applied must have been previously exhibited, nor any description of it published, otherwise than as allowed by sect. 57; (4) before sale the prescribed number of exact representations or specimens must be furnished to the Comptroller.

Duration of copyright.

When a new and original design is registered, the registered proprietor of the design is henceforth, subject to the provisions

(*a*) *Pierpont* v. *Fowle* (2 Wood & Min. 43–45).
(*b*) *Woolsey* v. *Judd* (4 Duer. 382).
(*c*) *Keene* v. *Wheatley* (9 Amer. Law Reg. 44, 45),
(*d*) Sect. 4955. (*e*) Sect. 4498. (*f*) Sect. 4951.
(*g*) 46 & 47 Vict. c. 57, s. 113, Third Schedule.

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of this Act, to have in all cases copyright in the design during five years from the date of registration,(*a*) instead of, as formerly, for periods varying from nine months to five years, according to the class of article to which it was applied.

No provisional registration.

It is further to be observed that the provisional registration allowed by the former Acts is no longer permitted.

Definition of "design."

"Design" means any design applicable to any article of manufacture, or to any substance artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined, not being a design for a sculpture, or other thing within the protection of the Sculpture Copyright Act of the year 1814 (fifty-fourth George the Third, chapter fifty-six).(*b*)

The distinction is no longer maintained between the application of the design to purposes of ornament and its applications *to purposes of utility*.

Definition of "copyright."

"Copyright" means the exclusive right to apply a design to any article of manufacture or to any such substance as aforesaid in the class or classes in which the design is registered.(*c*)

Design must have reference to shape or configuration.

On the construction of the repealed Act sect. 6 & 7 Vict. c. 65, giving protection to designs "for the shape or configuration" of any article having reference to some purpose of utility, it was held that, if the utility of the design were not produced by the "shape or configuration" of any of the parts, but only by the mode of putting them together, the design did not come within the Act, the Act not applying to designs which have reference to a purpose of utility through the combination of parts, independently of their shape and figuration.(*d*)

Thus, where the design was for a ventilator, consisting of a thin metallic frame occupying the place of one of the panes of the upper sash of a window, containing a whole pane and a half of glass, the one within the other, so as to appear, when the ventilator was closed, to be one single pane; the frame being hinged at the top, so as to open by means of a straight screw, the head of which formed a pulley, over which were passed cords for the purpose of turning it, and

(*a*) Sects. 47, 50. (*b*) Sect. 60. (*c*) *Ibid.*
(*d*) *Reg.* v. *Bessell* (16 Q.B. 810; 20 L.J. 177, M.C.; 15 Jur. 773).

so of either opening or shutting the ventilating pane; the half pane of glass being fixed in the lower portion of the frame, in which the ventilating frame moved, in order to prevent a downward draught of cold air; and the registration of the design stated that the part or parts of the design which were not new or original were "all the parts taken *per se*, and apart from the purposes thereof," and that what was claimed as new was "the general configuration and combination of the parts;" it was held by the Court of Queen's Bench that the design was not for "the shape or configuration" of an article of manufacture within the Act, and was, therefore, not the subject of registration.(*a*) "It appears to me," said Erle, J.,(*b*) "that this invention is not within the meaning of the statute. It is a skilful combination of means for producing an end. But the statute applies only to shape or configuration; and, in producing the end which is here attained, shape and configuration are immaterial. The figure of the pane in the drawing is an oblong rectangle; a square or a circular pane would produce the same result. The screw is straight; a crooked screw would produce the result equally well, perhaps better." "Combination," said Patteson, J.,(*c*) "is not 'shape.' What the general meaning of 'configuration' is, I cannot exactly define; but the word must, I think, have been used by the Legislature to denote some relation to shape visible to the eye. Here there is nothing peculiar in the shape; all depends upon the way in which the parts are put together; that is, as has been rightly said, upon the general combination. The case is not, therefore, within stat. 6 & 7 Vict. c. 65."

The design of a newly-invented brick, having on two of its opposite sides a semicircular cavity, corresponding with a similar cavity in the brick which was to be placed next to it, so that when two were laid together a cylindrical aperture was formed; and when the bricks were built into a wall, and the apertures fitted to each other, the air was admitted to circulate, and a saving in the number of bricks required was effected, was held to be a design which might be registered under 6 & 7 Vict. c. 65.(*d*) "The novelty," said Wightman, J.,(*e*) "is in the new shape and configuration of that ancient article of manufacture called a brick; and I agree with my brother Erle, that it is precisely such a specimen of a new design for an article of manufacture,

(*a*) *Reg.* v. *Bessell*, *ubi supra*.
(*b*) 16 Q. B. 818. (*c*) *Ibid.* 817.
(*d*) *Rogers* v. *Driver* (16 Q. B. 102; 20 L. J. 31, Q. B.).
(*e*) 16 Q. B. 108.

having reference to a purpose of utility, as might have been referred to by the Legislature as explanatory of their meaning."

The applicability of the Act to the design of a "protector label," which consisted in making, in the label, an eyelet-hole, and lining it with a ring of metallic substance, through which a string, attaching the label to packages, passed, was considered so doubtful by Knight Bruce, V.C., that he refused an injunction, before the hearing, against an infringement of such design.(*a*)

A design consisting of a particular collocation of shaded and bordered stars, on an ornamental chain surface, forming together the ornamentation of a woven fabric, was held to be a design protected by 5 & 6 Vict. c. 100.(*b*)

New combination of old patterns.

It was held that a new combination of old patterns might be "a new and original design" within 5 & 6 Vict. c. 100, and entitled to the protection of that Act.(*c*)

Thus, where a person designed a pattern for woollen cloths, in which large and small honeycomb cells were so arranged that a border of the larger cells surrounded an enclosed portion of the smaller cells, though neither the large nor the small honeycomb was new, it was held by the Court of Exchequer Chamber, reversing the decision of the Court of Exchequer, that this combination of the two was a new and original design within the meaning of the Act.(*d*)

"I cannot help thinking," said Wightman, J., "that the Court of Exchequer, in their decision, proceeded upon a supposed analogy between the case of an invention for which a patent is obtained, and a design which comes under the protection of the Act for amending the laws relating to the copyright of designs for ornamenting articles of manufacture. The Act uses the words 'any new and original design.' That is not a project or idea in the nature of an invention, but the representation of something which a draughtsman has for the first time produced. If that be the true meaning of the word 'design,' there is no doubt

(*a*) *Margetson* v. *Wright* (2 De G. & S. 420). And see *Millingen* v. *Picken* (1 C. B. 799), where it was doubted whether a mechanical contrivance within the stem of a parasol, for raising or lowering it with one hand, was a design for the shape or configuration of an article of manufacture within the Act. See also *Windover* v. *Smith* (32 Beav. 200; 7 L. T. N. S. 776; 32 L. J. 561, Ch.).

(*b*) *Holdsworth* v. *M'Crae* (L. Rep. 2 Eng. & Ir. App. 380; 36 L. J. 297, Q. B.; S. C., in Courts below, 5 B. & S. 495; 33 L. J. 329, Q. B.; L. Rep. 1 Q. B. 264; 35 L. J. 123, Q. B.; 13 L. T. N. S. 801).

(*c*) *Harrison* v. *Taylor* (4 H. & N. 815; 29 L. J. 3, Ex.).

(*d*) *Ibid.*

in this case that there was a design; for there was a drawing, and it was an original drawing. It is true that all its component parts had already been produced; but no one had produced such a pattern. It was said in the Court below that this was 'a mere combination in a manner well-known.' So it is with a picture: all its parts may be old, but the combination forms a new design."(*a*)

So it has been held that a new and original combination, to be protected as a design, may be the result of simultaneously applying two old and known designs to the ornamenting of a button.(*b*)

But where four old designs were respectively applied to three ribbons and a button, the three ribbons being then united so as to form a badge, Lord Hatherley (when Vice-Chancellor Wood) considered it so very doubtful whether this union amounted to a new design within 5 & 6 Vict. c. 100, that he refused to grant an injunction to restrain the manufacture and sale of a similar combination.(*c*)

A design consisting of a double card-basket, formed of a combination of two baskets, admitted to be separately old in design, was held not to be a new and original design by Malins, V.C.(*d*)

The same judge decided similarly as to the portrait of a public personage, copied from a photograph and applied as a design upon earthenware.(*e*)

New combination must constitute one design.

A new combination must, in order to be protected, constitute one design, and not a multiplicity of designs.(*f*)

Thus, where a person claimed the protection of 5 & 6 Vict. c. 100, for a shawl which he contended was new in respect of the five following points: (1) a reversible cloth, with the two sides of different texture and colours; (2) a scollop pattern on parts of the shawl; (3) a particular border round the shawl; (4) a particular configuration of the corners of the shawl; (5) a newly invented fringe to surround the shawl; all which points had been in public use before, but the combination of them in the case of his shawl was new, the Court of Queen's Bench was strongly

(*a*) 4 H. & N. 820.

(*b*) *Reg.* v. *Firman*, referred to by Lord Campbell, C.J., in *Norton* v. *Nicholls* (1 El. & El. 765; 27 L. J. 225, Q. B.; 7 W. R. 421; 33 L. T. 181); and *arguendo* in *Harrison* v. *Taylor* (3 H. & N. 301, 304).

(*c*) *Mullowney* v. *Stevens* (10 L. T. N. S. 190).

(*d*) *Lazarus* v. *Charles* (L. R. 16 Eq. 117).

(*e*) *Adams* v. *Clementson* (L. R. 12 C. D. 714).

(*f*) *Norton* v. *Nicholls* (1 El. & El. 761; 27 L. J. 225, Q. B.; 7 W. R. 420; 33 L. T. 131).

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inclined to think that such a combination was not a "design" within the meaning of the Act.(a) "The five points relied upon," said Lord Campbell, C.J., "being all old, no distinction is to be made between them and any other, in the texture, configuration, or ornaments of the shawl. Therefore the combination supposed to constitute the design which the plaintiff now seeks to protect, comprehends all that is to be discovered on both sides of the shawl, colour as well as shape. We do not doubt that a combination may be a 'design' within the meaning of the statute: and we adhere to the decision of this court in *Reg.* v. *Firman*, cited in *Harrison* v. *Taylor*,(b) that a new and original combination, to be protected as a 'design,' may be the result of simultaneously applying two old and known designs to the ornamenting of a button. But, having regard to the language of the Act of Parliament, and to the object of the Legislature, we think that the result of the combination, to be protected as a 'design,' must be one design and not a multiplicity of designs. The statute does not mention any article of manufacture being a design, but considers the design to be protected as 'applicable to the ornamenting of any article of manufacture.' The 'design' is always considered different from the 'article of manufacture or the substance to which it is to be applied.' This is particularly to be observed in sect. 3, in which the articles of manufacture are enumerated, 'to which' the design 'is to be applied.' An ornament for a lady's gown may well be a 'design' to be protected, although the ornament be the result of a new combination of lace and ribands: but the whole gown itself could hardly be such a 'design,' although it be granted that the compound parts and ornaments, before well-known separately, are arranged according to a fashion entirely new. Such an extension of the statute is quite unnecessary for the object which the Legislature seems to have had in view; and we need not point out the great public inconvenience which would arise if we were to put such a construction upon it."

Who is "proprietor."

The author of any new and original design shall be considered the proprietor thereof, unless he executed the work on behalf of another person for a good or valuable consideration, in which case such person shall be considered the proprietor; and every person acquiring for a good or valuable consideration a new and original design or the right to apply the same

(a) *Norton* v. *Nicholls* (1 El. & El. 761; 27 L. J. 225, Q. B.; 7 W. R. 420; 33 L. T. 131).

(b) 3 H. & N. 301, 304.

to any such article or substance as aforesaid, either exclusively of any other person or otherwise, and also every person on whom the property in such design or such right to the application thereof shall devolve, shall be considered the proprietor of the design in the respect in which the same may have been so acquired, and to that extent, but not otherwise.(*a*)

On the similar words of the old Act,(*b*) Jessel, M.R., laid it down that in order for a man to be a proprietor, he must have some right, either general or limited, "to apply the design." Therefore, where the plaintiff agreed to purchase from C., an American, a number of cases of an article newly designed and about to be manufactured, together with the exclusive right to sell the article in England, for a price agreed upon, which was to cover both the right and the goods: the plaintiff to obtain such protection as he could do under English law, and to get the goods only from C., it was held that the plaintiff was not entitled to register himself as proprietor. His lordship was of opinion that the purchaser never had the "right to apply" the design to any article manufactured: C. still retained the right to manufacture the articles, the plaintiff being entitled only to the sole right of selling in England.(*c*)

In this case, the contract being made in July and the money not being paid till the goods were delivered in the following September, nothing passed to the purchaser until the delivery of the goods in September; so that even if the contract had amounted to a transfer of copyright, the transfer did not take place till then.

Registration of Designs.

Application.

On application by or on behalf of any person claiming to be the proprietor of any new or original design(*d*) not previously published in the United Kingdom, the Comptroller General of Patents, Designs and Trade Marks may register the design under this part of this Act.(*e*)

Form of application.

The application must be made in the form set forth(*f*) in the First Schedule to the Act, or in such other form as may be from time to time prescribed, and must be left at, or sent by post to, the Patent Office in the prescribed manner.(*g*)

The application must contain a statement of the nature of the design, and the class or classes of goods in which the applicant desires that the design be registered.(*h*)

(*a*) Sect. 61. (*b*) 5 & 6 Vict. c. 100, s. 5.
(*c*) *Jewitt* v. *Eckhardt* (L. R. 8 C. D. 404).
(*d*) As to what designs are new and original, *vide ante*, pp. 283, 284.
(*e*) Sect. 47. (*f*) See the form set forth *post*, p. 289, note (*a*).
(*g*) *Ibid.* subsect. 2. (*h*) *Ibid.* subsect. 3.

Registration in more than one class.

The same design may be registered in more than one class, and, in case of doubt as to the class in which a design ought to be registered, the Comptroller may decide the question.(*a*)

For the purposes of the registration of designs, goods are (by the Designs Rules 1883, Rule 5) classified in the manner following:—

CLASSES.			
1.	Articles composed wholly or partly of metal, not included in Class 2.		
2.	Jewellery.		
3.	Articles composed wholly or partly of wood, bone, ivory, papier maché, or other solid substances not included in other classes.		
4.	„	„	glass, earthenware or porcelain, bricks, tiles, or cement.
5.	„	„	paper (except hangings).
6.	„	„	leather, including bookbinding, of all materials.
7.	Paper hangings.		
8.	Carpets and rugs in all materials, floorcloths, and oil-cloths.		
9.	Lace, hosiery.		
10.	Millinery and wearing apparel, including boots and shoes.		
11.	Ornamental needlework on muslin or other textile fabrics.		
12.	Goods not included in other classes.		
13.	Printed or woven designs on textile piece goods.		
14.	„	„	handkerchiefs and shawls.

Consequence of registering under wrong class.

The consequence of registering a design under a wrong class appears not to have been judicially determined; but a mistake of this kind could hardly be held to excuse a piracy.(*b*)

Agents.

All communications between an applicant for the registration of a design and the Comptroller or the Board of Trade, as the case may be, may be made by or through an agent duly authorised to the satisfaction of the Comptroller.(*c*)

(*a*) Sect. 47, subsects. 4 and 5.
(*b*) See *per* Moore, J., *Lowndes* v. *Browne* (12 Ir. L. R. 303).
(*c*) Rule 6.

An application for the registration of a design shall, with the prescribed fee, be left at the Patents Office, Designs Branch, or be sent prepaid by post, addressed to the Comptroller at the Patents Office (Designs Branch), 25, Southampton Buildings, Chancery Lane, London.(*a*)

Size of papers.

An application for the registration of a design, and all drawings, sketches, photographs, or tracings of a design, and all other documents sent to or left at the Patent Office, Designs Branch, or otherwise furnished to the Comptroller or to the Board of Trade, shall be written, printed, copied, or drawn upon strong wide-ruled foolscap paper (on one side only), of the size of 13 inches by 8 inches, leaving a margin of not less than one inch and a half on the left-hand part thereof, and the signature of the applicants or agents thereto must be written in a large and legible hand.(*b*)

The Comptroller may in any particular case vary the requirements of this rule as he may think fit.(*c*)

Drawings, &c. to be furnished when application made.

On application for registration of a design the applicant must furnish to the Comptroller the prescribed number of

(*a*) Rule 7 of the Designs Rules, 1883. By Rule 4 an application for the registration of a design is to be in the following form:—

APPLICATION FOR REGISTRATION OF DESIGN IN CLASSES _____.

You are hereby requested to register the accompanying design

in Class _____, in the name of * _____

_____

of _____

who claims to be the proprietor thereof, and to return the same to

_____

Statement of nature of design† _____

_____

_____

‡

(Signed) _____

Dated the _____ day of _____ 188___.

* Here insert legibly the name, address, and description of the individual or firm.

† Such as whether it is applicable for the pattern or for the shape.

‡ To be signed by the applicant.

To the Comptroller,
Patent Office, Designs Branch,
25, Southampton Buildings,
Chancery Lane, London, W.C.

(*b*) Rule 8. (*c*) *Ibid.*

copies of drawings, photographs, or tracings of the design sufficient, in the opinion of the Comptroller, for enabling him to identify the design; or the applicant may, instead of such copies, furnish exact representations or specimens of the design.(*a*)

This is a relaxation of the old rule, which required that exact copies of the design should be furnished.

Sketches and drawings.

By Rule 9 of the Designs Rules, 1883, the application for the registration of a design is to be accompanied by a sketch or drawing, or by three exactly similar drawings, photographs, or tracings of the design, or by three specimens of the design, and shall, in describing the nature of the design, state whether it is applicable for the pattern or for the shape or configuration of the design, and the means by which it is applicable.

Nature of design.

When sketches, drawings, or tracings are furnished they must be fixed.

When the articles to which designs are applied are not of a kind which can be pasted into books, drawings, photographs, or tracings of such designs must be furnished.

Amendments.

Any document, drawings, sketches, or tracings for the amending of which no special provision is made by the Act may be amended, and any irregularity in procedure which, in the opinion of the Comptroller, may be obviated without detriment to the interest of any person may be corrected, if the Comptroller think fit, and upon such terms as he may direct.(*b*)

Enlargement of time.

The time prescribed by the Rules for doing any act or taking any proceeding thereunder may be enlarged by the Comptroller, if he think fit, and upon such terms as he may direct.(*c*)

Applications may be sent by post.

Any application, notice, or other document authorised or required to be left, made, or given at the Patent Office or to the Comptroller or to any other person under the Designs Rules, 1883, may be sent by a prepaid letter through the post, and if so sent shall be deemed to have been left, made, or given respectively at the time when the letter containing the same would be delivered in the ordinary course of post.(*d*)

Acknowledgment to applicant.

On receipt of an application for registration, the Comptroller is to send to the applicant an acknowledgment thereof.(*e*)

Patterns."

In a case decided under 21 & 22 Vict. c. 70, s. 50 (which

(*a*) Sect. 48. (*b*) Rule 30. (*c*) Rule 31.
(*d*) Rule 12. (*e*) Rule 10.

permitted registration of a "pattern" of the article to which the design was applied), it was held that where a pattern consisting of different parts, any one of which might be considered a "design," was registered, the claim was to the whole combination, and not to any of the parts thus combined; none of the parts, taken separately, being protected by such registration, though the pattern taken as a combination was.(*a*)

In this case Lord Westbury pointed out, "as well for warning to inventors as for the protection of the public, that if a design, as exhibited in a pattern, is filed and registered by an inventor, without any further limitation or description than that which is given by the design itself, it protects the entire thing and the entire thing only; the protection cannot, at pleasure, be made applicable one day to the entirety and another day to the separate integral parts or elements of the entire design. It must be considered that the protection of the statute is invoked for the entire thing that appears upon the register, and is applicable to nothing but the exact copy of the thing so registered."

"That which is different in shape and form, or in the relative positions of its several parts, which is not a reproduction of it, as a *replica* or copy of a picture, would not be an infringement of the thing so specified."(*b*)

Power of refusal given to Comptroller.

The Comptroller may, if he thinks fit, refuse any drawing, photograph, tracing, representation, or specimen which is not, in his opinion, suitable for the official records.(*c*)

The Comptroller may also, if he thinks fit, refuse altogether to register a design presented to him for registration;(*d*) but in this case any person aggrieved by such refusal may appeal therefrom to the Board of Trade.

Hearing by Comptroller.

By section 94 of the Act the applicant is given a right to be heard, before the Comptroller exercises adversely to him any discretionary power.

Before exercising any discretionary power given to the Comptroller by the Act adversely to an applicant for registration of a design, the Comptroller is to give him ten days notice of the time when he may be heard personally or by his agent before the Comptroller.(*e*)

Within five days from the date when such notice would be delivered in the ordinary course of post, the applicant must

(*a*) *Holdsworth* v. *M'Crea* (L. R. 2 Eng. & Ir. App. 380).
(*b*) *Ibid.* p. 388.
(*c*) Sect. 48.
(*d*) Sect. 48, subsect. 6. There is also a special provision in sect. 86 empowering the Comptroller to refuse to register a design or trade-mark of which the use would, in his opinion, be contrary to law or morality.
(*e*) Rule 13.

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notify to the Comptroller whether or not he intends to be heard upon the matter.(*a*)

Notification of Comptroller's decision.

The decision or determination of the Comptroller in the exercise of any such discretionary power as aforesaid must be notified to the applicant.(*b*)

Appeal to Board of Trade.

The Board of Trade must, if required, hear the applicant and Comptroller, and may make an order determining whether, and subject to what conditions, if any, registration is to be permitted.(*c*)

Notice of appeal to Board of Trade.

Where the Comptroller refuses to register a design, and the applicant intends to appeal to the Board of Trade from such refusal, he must, within one month from the date of the decision appealed against, leave at the Patent Office, Designs Branch, a notice of such his intention.(*d*)

Statement on appeal.

Such notice must be accompanied by a statement of the grounds of appeal, and of the applicant's case in support thereof.(*e*)

Notice to Secretary of Board of Trade.

The applicant must forthwith on leaving such notice send a copy thereof to the Secretary of the Board of Trade, No. 7, Whitehall Gardens, London.(*f*)

Directions by Board of Trade.

The Board of Trade may thereupon give such directions

(*a*) Rule 14. (*b*) Rule 15.

(*c*) Sect. 47, subsect. 7.

(*d*) Rule 16. The following is the form given in the 2nd Schedule to the Designs Rules, 1883 :—

APPEAL TO BOARD OF TRADE ON REFUSAL OF COMPTROLLER TO REGISTER A DESIGN.

[*To be accompanied by an unstamped copy.*]

SIR,

I hereby appeal against your decision upon my application to register _____

_____

_____

and beg to submit my case* for the decision of the Board of Trade.

I am, Sir,

Your obedient servant,

The Comptroller,
Patent Office, Designs Branch,
25, Southampton Buildings,
Chancery Lane, London, W.C.

* The statement of the case to be written upon foolscap paper (on one side only), with a margin of two inches on the left-hand side thereof.

(*e*) Rule 17. (*f*) Rule 18.

(if any) as they may think fit for the purpose of the hearing of the appeal for the Board of Trade.(*a*)

Notice of time of hearing.

Seven days notice, or such shorter notice as the Board of Trade may in any particular case direct, of the time and place appointed for the hearing of the appeal shall be given to the Comptroller and the applicant.(*b*)

Power of Comptroller to take directions of law officers.

The Comptroller may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act, apply to either of the law officers for directions in the matter.(*c*)

Notice of registration.

If the Comptroller determines to register a design, he shall as soon as may be send to the applicant a certificate of such registration in the prescribed form, sealed with the seal of the Patent Office.(*d*)

Registering design.

Upon the sealing of a certificate of registration the Comptroller is to cause to be entered in the register of designs the name, address, and description of the registered proprietor, and the date upon which the application for registration was received by the Comptroller, which day shall be deemed to be the date of the registration.(*e*)

Register of Designs.

There is to be kept at the patent office a book called the Register of Designs, in which are to be entered the names and addresses of proprietors of registered designs, notifications of assignments and of transmissions of registered designs, and such other matters as may from to time be prescribed.(*f*)

The register of designs is to be *primâ facie* evidence of any matters by the Act directed or authorised to be entered therein.(*g*)

(*a*) Rule 19. (*b*) Rule 20. (*c*) Sect. 95.

(*d*) Rule 11. The following is the form given in Schedule 2 to the Designs Rules, 1883:—

CERTIFICATE OF REGISTRATION OF DESIGN.

(R^p^ No._____.)

Patent Office, Designs Branch,
25, Southampton Buildings,
Chancery Lane, London, W.C.

This is to certify that the Design of which this is a copy was registered this __ day of_____ 188 , in pursuance of the Patents, Designs, and Trade Marks Act, 1883, in respect of the application of such Design to articles in Class , for which a copyright of five years is granted.

(*e*) Rule 21. (*f*) Sect. 55. (*g*) *Ibid.*

Certificate of registration.

The Comptroller is to grant a certificate of registration to the proprietor of the design when registered; and the Comptroller may, in case of loss of the original certificate, or in any other case in which he deems it expedient, grant a copy or copies of the certificate.(*a*)

Trusts not to be registered.

No notice of any trust expressed, implied or constructive is to be received by the Comptroller or entered in the register.(*b*)

Inspection of registered designs.

During the existence of copyright in a design, the design is not to be open to inspection except by the proprietor, or a person authorised in writing by the proprietor, or a person authorised by the Comptroller or by the Court, and furnishing such information as may enable the Comptroller to identify the design; nor except in the presence of the Comptroller, or of an officer acting under him, nor except on payment of the prescribed fee; and the person making the inspection shall not be entitled to take any copy of the design, or of any part thereof.(*c*)

When the copyright in a design has ceased, the design shall be open to inspection, and copies thereof may be taken by any person on payment of the prescribed fee.(*d*)

Information as to existence of copyright.

On the request of any person producing a particular design, together with its mark of registration, or producing only its mark of registration, or furnishing such information as may enable the Comptroller to identify the design, and on payment of the prescribed fee, it is the duty of the Comptroller to inform such person whether the registration

(*a*) Sect. 49. The following form is given in the Schedule to the Rules of 1883:—

APPLICATION FOR COPY OF CERTIFICATE OF REGISTRATION OF DESIGN.

SIR,

I hereby request you to furnish me with a Copy Certificate of Registration of Design No._____ in Class_____.

(Signed)_____

Dated the _____ day of _____ 188__.

To the Comptroller,

[Addressed as in previous notices.]

Sect. 85. (*c*) Sect. 52. (*d*) *Ibid.*

still exists in respect of such design, and if so, in respect of what class or classes of goods, and stating also the date of registration, and the name and address of the registered proprietor.(*a*)

Search on production of sketch or design.

The Comptroller may, on receipt of the prescribed fee, make searches among the designs registered at the Patent Office after the commencement of the Act, and inform any person requesting him so to do whether a particular design produced by such person, and to be applied to goods in any particular class, is or is not identical with, or an obvious imitation of, any design applied to such goods and registered since the commencement of the Act.(*b*)

Copyright to cease in certain events.

If a registered design is used in manufacture in any foreign country, and is not used in this country within six months of its registration in this country, the copyright in the design is to cease.(*c*)

Before sale specimens must be furnished to Comptroller.

Before delivery on sale of any articles to which a registered design has been applied, the proprietor must (if exact representations or specimens were not furnished on the application for registration), furnish to the Comptroller the prescribed number of exact representations or specimens of the design; and if he fails to do so, the Comptroller may erase his name from the register, and thereupon his copyright in the design shall cease.(*d*)

Marking registered designs before sale.

Before delivery on sale of any articles to which a registered design has been applied, the proprietor of the design must cause each such article to be marked with the prescribed mark, or with the prescribed word or words or figures, denoting that the design is registered; and if he fails to do so the copyright in the design shall cease, unless the proprietor shows that he took all proper steps to ensure the marking of the article.(*e*)

How to be marked.

Before the delivery on sale of any article to which a registered design has been applied, the proprietor of such design must, if such article is included in any of the classes one to twelve (*ante*, p. 288), cause each such article to be marked with the abbreviation "R^{D}" and the number appearing on the certificate of registration, and shall, if such article is included in the classes thirteen or fourteen, cause each such article to be marked with the abbreviation "REG^{D}."(*f*)

Under the repealed 5 & 6 Vict. c. 200 s. 4, it was held that if the proprietor, whether English or foreign, sold the registered article abroad without the prescribed mark, he lost

(*a*) Sect. 53. (*b*) Rule 35. (*c*) Sect. 54.
(*d*) Sect. 50, subsect. 2. (*e*) Sect. 51. (*f*) Rule 32.

his copyright.(*a*) Lord Romilly, M.R. said: "It is not of the slightest importance whether the sale is at Calais or at Dover: the spirit, the meaning and the words of the Act are clear, and they apply to every person and to every place."

Where the inventor of new designs published and sold them in a book, registered under the 5 & 6 Vict. c. 100, and containing a notice that persons wishing to manufacture them for purposes of sale, must have the inventor's permission, it was held that the book did not require to be stamped with the letters "R," under sect. 4 of the Act.(*b*)

It was held by the majority of the Court of Queen's Bench (Lord Campbell, C.J., and Wightman, J.; *dissentiente* Coleridge, J.), in the case of *Heywood* v. *Potter*,(*c*) that the sale of patterns only of certain small pieces of paper-hangings containing the whole design, registered under 5 & 6 Vict. c. 100, but not bearing the prescribed mark, disentitled the proprietor to protection against parties copying the design from such pattern pieces, and publishing articles with such design applied to them. The majority of the Court considered that these pattern pieces were "articles of manufacture" within sect. 4 of the Act, and that every article, containing the design secured, should, if put forth by the manufacturer in the ordinary course of trade, contain the mark intended to be a caution to the public that the design of the article had been secured to the proprietor by registration. Lord Campbell said he could not see that any limit was fixed to the size of the article so put forth. Coleridge, J., on the other hand, considered that these pieces, sold merely as patterns, could not properly be considered as paper hangings. "There is," he said, "a broad distinction, as it seems to me, between the pattern of an article and the article itself; between what is the ordinary subject of trade and what is put forth, as it were, to induce such trade."

This was remedied by sect. 4 of 21 & 22 Vict. c. 70, which provided that nothing in the 4th section of the Copyright of Designs Act, 1842, should extend or be construed to extend to deprive the proprietor of any new and original design, applied to ornamenting any article of manufacture contained in the 10th class, of the benefits of the Copyright of Designs Acts, or of this Act, provided there should have been printed

(*a*) *Saracin* v. *Hamel* (32 Beav. 145, 151; 32 L. J. Ch. 380).
(*b*) *De la Bruchardière* v. *Elvery* (4 Exch. 380: 18 L. J. 381, Ex.).
(*c*) 1 E. & Bl. 439; 22 L. J. 133, Q. B.

on such articles, at each end of the *original piece* thereof, the prescribed mark &c.

The present Act repeals both the Acts just referred to, but contains no provision on the subject.

Penalty for falsely describing design as registered.

If any person describes any design applied to any article sold by him as registered which is not so, he is liable for every offence on summary conviction, to a fine not exceeding £5.(*a*)

He will be deemed so to describe the design if he sells the article with the word "registered," or any word or words expressing or implying that registration has been obtained for the article stamped, engraved or impressed on, or otherwise applied to the article.(*b*)

Exhibition at industrial or international exhibition not to prevent or invalidate registration.

The exhibition at an industrial or international exhibition, certified as such by the Board of Trade, or the exhibition elsewhere during the period of the holding of the exhibition, without the privity or consent of the proprietor, of a design, or of any article to which a design is applied, or the publication, during the holding of any such exhibition, of a description of a design, is not to prevent the design from being registered, or invalidate the registration thereof, provided that both the following conditions are complied with; namely,—

(1) The exhibitor must, before exhibiting the design or article, or publishing a description of the design, give the Comptroller the prescribed notice of his intention to do so; and

(2) The application for registration must be made before or within six months from the date of the opening of the exhibition.(*c*)

Notice of exhibition.

Any person desirous of exhibiting a design, or any article to which a design has been applied, at an industrial or international exhibition, or of publishing a description of a design during the period of the holding of the exhibition, must, after having obtained from the Board of Trade a certificate that the exhibition is an industrial or international one, give to the Comptroller seven days' notice in writing of his intention to exhibit the design or article, or to publish a description of the design, as the case may be. For the purpose of identifying the design in the event of an application to register the same being subsequently made, the applicant must furnish to the Comptroller a brief description of the nature of the design, accompanied by a sketch or drawing thereof, and

(*a*) Sect. 105. (*b*) *Ibid.* (*c*) Sect. 57.

such other information as the Comptroller may in each case require.(*a*)

Entry of assignments and transmissions in registers.

Where a person becomes entitled by assignment, transmission, or other operation of law to the copyright in a registered design, the Comptroller, on request, and on proof of title to his satisfaction, is to cause the name of such person to be entered as proprietor of the copyright in the design in the register of designs.(*b*)

The person for the time being entered in the register of designs as proprietor of a copyright in a design shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licences as to, or otherwise deal with, the same, and to give effectual receipts for any consideration for such assignment, licence, or dealing. Provided that any equities in respect of such design may be enforced in like manner as in respect of any other personal property.(*c*)

Mode of transferring copyright.

By the repealed Acts the copyright in designs might be transferred by any writing purporting to be a transfer, and signed by the proprietor: and forms of transfer and authority to register were given (*d*) The present Act contains no provision on the subject.

Jessel, M.R., was of opinion that under the repealed Acts a partial assignment or licence must also have been in writing.(*e*)

(*a*) Rule 36. The following is the form of notice given in the Schedule to the Rules of 1883:—

NOTICE OF INTENDED EXHIBITION OF AN UNREGISTERED DESIGN.

* Here state name and address of applicant.

* _____

hereby give notice of my intention to exhibit a _____

_____

of _____ at the _____

† State "opened" or "is to open."

Exhibition, which† _____

of _____ 188 . under the provisions of the

‡ Insert brief description of Design, with drawing.

Patents, Designs, and Trade Marks Act of 1883‡ _____

_____

herewith enclose a _____

(Signed) _____

Dated _____ day of _____ 188 .

To the Comptroller,

[Addressed as in previous notices.]

(*b*) Sect. 85. (*c*) Sect. 87.

(*d*) 5 & 6 Vict. c. 100, s. 6; 6 & 7 Vict. c. 65, s. 6.

(*e*) See the chapter on Transfer of Copyright, *ante*, p. 185.

The same learned judge was of opinion that an assignee or licensee could not register before the proprietor had himself registered. It will be observed that the new section speaks only of the assignment, &c., of the copyright in a "registered" design.

Subsequent proprietors.

Where a person becomes entitled to the copyright in a registered design, or to any share or interest therein, by assignment, transmission, or other operation of law, or where a person acquires any right to apply the design either exclusively or otherwise, a request(*a*) for the entry of his name in the register as such proprietor of the design, or as having acquired such right, as the case may be (hereinafter called the claimant), must be addressed to the Comptroller, and left at the Patent Office, Designs Branch.(*b*)

Signature to request.

Every such request shall, in the case of an individual, be

(*a*) The following is the form given in Schedule 2 to the Designs Rules, 1883 :—

REQUEST TO ENTER NAME OF SUBSEQUENT PROPRIETOR OF DESIGN, WITH DECLARATION IN SUPPORT THEREOF.

1. [*] _____

hereby request that you will enter [†] name [‡] ... in the Register of Designs as proprietor of the Design No. in Class ....

[§] ... entitled as to the said Design _____

[‖] _____

[¶] And I do solemnly and sincerely declare that the above several statements are true, and the particulars above set out comprise every material fact and document affecting the proprietorship of the said Design as above claimed.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

[**]

Declared at _____

_____

this ____day of _____ 188 ....

Before me,

[††]

To the Comptroller,

[Addressed as before.]

* or We.
Here insert name, full address, and description.
† My or our.
‡ Or names.
§ I am, or We are.
‖ Here state whether design transmitted by death, marriage, bankruptcy, or other operation of law, and if entitled by assignment state the particulars thereof as, *e.g.*, "by deed dated the day of 188 made between So-and-so of the one part."
¶ This paragraph is not required when the declaration is made out of the United Kingdom.
** To be signed here by the person making the declaration.
†† Signature and title of the authority before whom the declaration is made.

(*b*) Rule 22.

made and signed by the person requiring to be registered as proprietor; and in the case of a firm or partnership, by some one or more members of such firm or partnership, or, in either case, by his or their agent respectively duly authorised to the satisfaction of the Comptroller; and in the case of a body corporate, by their agent authorised in like manner.(*a*)

Particulars in request.

Every such request shall state the name, address, and description of the claimant, and the particulars of the assignment, transmission, or other operation of law by virtue of which the request is made, so as to show the manner in which and the person or persons to whom the design has been assigned or transmitted, or the person or persons who has or have acquired such right as aforesaid, as the case may be.(*b*)

Statutory *declaration with* request.

Every such request must also be accompanied by a statutory declaration to be thereunder written verifying the several statements therein, and declaring that the particulars above described comprise every material fact and document affecting the proprietorship of the design or the right to apply the same, as the case may be, as claimed by such request.(*c*)

Proof of title if required.

The claimant must furnish to the Comptroller such other proof of title as he may require for his satisfaction.(*d*)

Corporate name.

A body corporate may be registered as proprietor by its corporate name.(*e*)

Comptroller's discretion as to evidence.

Where under these Rules any person is required to do any act or thing, or to sign any document, or make any declaration on behalf of himself or of any body corporate, or any document or evidence is required to be produced to, or left with, the Comptroller or at the Patent Office, and it is shown to the satisfaction of the Comptroller that from any reasonable cause such person is unable to do such act or thing, or to sign such document, or make such declaration, or that such document or evidence cannot be produced or left as aforesaid, it shall be lawful for the Comptroller, with the sanction of the Board of Trade, and upon the production of such other evidence and subject to such terms as they may think fit, to dispense with any such act or thing, document, declaration, or evidence.(*f*)

Inspection of and extracts from registers.

The register kept is to be at all convenient times open to the inspection of the public, subject to such regulations as may be prescribed; and certified copies, sealed with the seal of the Patent Office, of any entry in any such register are to be given to any person requiring the same on payment of the prescribed fee.(*g*)

(*a*) Rule 23. (*b*) Rule 24. (*c*) Rule 25.
(*d*) Rule 26. (*e*) Rule 27. (*f*) Rule 29.
(*g*) Sect. 88. On such days and during such hours as the Comp-

Printed or written copies or extracts, purporting to be certified by the Comptroller and sealed with the seal of the Patent Office, of or from registers and other books kept there, are to be admitted in evidence in all Courts in Her Majesty's dominions, and in all proceedings, without further proof or production of the originals.(*o*)

Sealed copies to be received in evidence.

troller shall from time to time determine and notify by a placard posted at the Patent Office any person paying the prescribed fee may, on production of the number of any design of which the copyright has ceased, inspect such design, and any person paying the prescribed fee may take a copy or copies of such design.

Office hours.

(*o*) Sect. 89. Where a certificate is required for the purpose of any legal proceeding or other special purpose as to any entry, matter, or thing which the Comptroller is authorised by the said Act or these Rules to make or do, the Comptroller may, on a request in writing and on payment of the prescribed fee, give such certificate, which shall also specify on the face of it the purpose for which it has been requested as aforesaid (Rule 34).

Certificate in legal proceedings.

The following forms are given in Schedule 2 to the Rules of 1883:—

REQUEST FOR CERTIFICATE FOR USE IN LEGAL PROCEEDINGS.

SIR,

I hereby request you to send me for the purposes of use in the suit of (*)_____

a certificate that the design of which a copy is herein enclosed was (†)_____

(Signed)_____

____ day_____188 .

To the Comptroller,
[Addressed as before.]

* Here state the title of the legal proceedings or the other purpose for which the certificate is required.
† Here state the entry, matter, or thing which the writer wishes certified.

CERTIFICATE FOR USE IN LEGAL PROCEEDINGS.

In the matter of_____

_____

_____

No._____

I, _____Comptroller-General of Patents, Designs, and Trade Marks, hereby certify that _____

_____

Witness my hand and seal this _____day of_____ 188_____.

_____
Comptroller.

Patent Office, Designs Branch,
25, Southampton Buildings,
London.

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Certificate of Comptroller to be evidence.

A certificate purporting to be under the hand of the Comptroller as to any entry, matter, or thing which he is authorised by this Act, or any general rules made thereunder, to make or do, shall be *primâ facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone.(*a*)

Rectification of registers by Court.

The Court(*b*) may on the application of any person aggrieved by the omission without sufficient cause of the name of any person from any register kept under the Act, or by any entry made without sufficient cause in any such register, make such order for making, expunging, or varying the entry as the Court thinks fit; or the Court may refuse the application; and in either case may make such order with respect to the costs of the proceedings as the Court thinks fit.(*c*)

The Court may, in any proceeding under this section, decide any question that it may be necessary or expedient to decide for the rectification of a register, and may direct an issue to be tried for the decision of any question of fact, and may award damages to the party aggrieved.(*d*)

Any order of the Court rectifying a register shall direct that due notice of the rectification be given to the Comptroller.(*e*)

If any rectification of a register under the Act is required, in pursuance of any proceeding in a Court in Scotland or Ireland, a copy of the order, decree, or other authority for the rectification must be served on the Comptroller, who is to rectify the register accordingly.(*f*)

Notice of order of Court.

Where an order has been made by the Court, under section 90 of the Act, the person in whose favour such order has been made shall forthwith leave at the Patent Office an office copy of such order. The register shall thereupon be rectified, or the purport of such order shall otherwise be duly entered in the register, as the case may be.(*g*)

Power for Comptroller to correct clerical errors.

The Comptroller may, on request in writing, accompanied by the prescribed fee,—

(1) Correct any clerical error in, or in connexion with, an application for registration of a design; or

(2) Correct any clerical error in the name, style, or address of the registered proprietor.(*h*)

(*a*) Sect. 96.

(*b*) "The Court" means in England and Ireland, Her Majesty's High Court of Justice; and in Scotland, any Lord Ordinary of the Court of Session (sects. 111, 117).

(*c*) Sect. 90. (*d*) *Ibid.* (*e*) *Ibid.*

(*f*) Sect. 111. (*g*) Rule 28. (*h*) Sect. 91.

If any person makes or causes to be made a false entry in any register kept under this Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces, or tenders, or causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanor.(*a*) Falsification of entries in registers.

INFRINGEMENT OF COPYRIGHT AND REMEDIES.

During the existence of copyright in any design— Penalty.

(1.) It shall not be lawful for any person, without the licence or written consent of the registered proprietor, to apply such design or any fraudulent or obvious imitation thereof, in the class or classes of goods in which such design is registered, for purposes of sale to any article of manufacture or to any substance artificial or natural or partly artificial and partly natural; and

(2.) It shall not be lawful for any person to publish or expose for sale any article of manufacture or any substance to which such design, or any fraudulent or obvious imitation thereof, shall have been so applied, knowing that the same has been so applied without the consent of the registered proprietor.

Any person who acts in contravention of this section shall be liable for every offence to forfeit a sum not exceeding £50 to the registered proprietor of the design, who may recover such sum as a simple contract debt by action in any Court of competent jurisdiction.(*b*)

Under the similar provisions of former acts it was held that the manufacture, within the period of protection of articles to which a registered design is applied without authority, although without the intention of selling them within that period, is piracy.(*c*)

Under the repealed act, 5 & 6 Vict. c. 100, s. 7, making it piracy to sell or expose for sale, either with knowledge of non-consent by the proprietor, or after being served with a written notice signed by the proprietor or his agent to a like effect, it was held that the following was not a sufficient statement, that the proprietor of the copyright had not given his consent to the application of his design to a particular manufactured article: "I hereby further give you notice that in case you apply such design, or any fraudulent imitation thereof, for

(*a*) Sect. 93. (*b*) Sect. 58.
(*c*) *M'Crea* v. *Holdsworth* (2 De G. & S. 499).

any purpose whatsoever, or publish, sell, or expose for sale any article of manufacture, or any substance to which such design, or any fraudulent imitation thereof, shall have been so applied, contrary to the true intent and meaning of the said Act of Parliament, the said Joseph Norton(*a*) will institute such proceedings as he may be advised for the recovery of the penalties which you may thereby incur, and also for the recovery of the damages which he may thereby sustain, and likewise to restrain you from any further violation of the said Act of Parliament."(*b*)

"The notice," said Lord Campbell, C.J., delivering the judgment of the Court of Queen's Bench, "does say that if the defendants either apply the design to an article of manufacture, or sell or expose to sale an article of manufacture with the design applied to it, he will sue them; but we cannot think that this is tantamount to a notice that he had not given his consent to the application of his design to the manufactured article. Such notice is perfectly consistent with the fact of his having actually given his consent, and cannot, we think, be considered the performance of a condition introduced to save retail dealers from very serious liability. It is likewise worthy of observation that the notice gives no indication of the plaintiff's real claim, and that this remained a mystery till the trial began."(*c*)

Action for damages.

Notwithstanding the remedy given by the Act for the recovery of such penalty as aforesaid, the registered proprietor of any design may (if he elects to do so) bring an action for the recovery of any damages arising from the application of any such design, or of any fraudulent or obvious imitation thereof for the purpose of sale, to any article of manufacture or substance, or from the publication, sale, or exposure for sale by any person of any article or substance to which such design, or any fraudulent or obvious imitation thereof shall have been so applied, such person knowing that the proprietor had not given his consent to such application.(*d*)

Fees on registration, &c.

There shall be paid in respect of applications and registration and other matters under this part of this Act such fees as may be from time to time, with the sanction of the Treasury, prescribed by the Board of Trade; and such fees shall be levied and paid to the account of Her Majesty's

(*a*) The notice was given "for and on behalf of Mr. Joseph Norton," by his solicitor and agent, and stated at its commencement that the design had been registered.

(*b*) *Norton* v. *Nicholls* (1 El. & El. 761; 5 Jur. N. S. 1205; 7 W. R. 420). (*c*) *Ibid.* (*d*) Sect. 59.

Exchequer in such manner as the Treasury shall from time to time direct.(*a*)

Power of Board of Trade to make general rules.

Power is given to the Board of Trade from time to time to make such general rules and do such things as they think expedient, subject to the provisions of this Act, for regulating the practice of registration under this Act; for classifying goods for the purposes of designs and trade marks; and generally for regulating the business of the Patent Office, and all things by this Act placed under the direction or control of the Comptroller or the Board of Trade.(*b*)

Any of the forms in the first schedule to this Act may be altered or amended by rules made by the Board; and general rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, and shall (subject as hereinafter

(*a*) Sect. 56. The following is the Schedule of fees annexed to the Designs Rules, 1883:—

Fees.	£	s.	d.
1. On application to register one design to be applied to single articles in each class except classes 13 and 14	0	10	0
2. On application to register one design to be applied to single articles in classes 13 and 14	0	1	0
3. On application to register one design to be applied to a set of articles for each class of registration . .	1	0	0
4. On notice of appeal to Board of Trade against refusal of Comptroller to register	1	0	0
5. Copy of certificate of registration, each copy . .	0	1	0
6. On request for Certificate of Comptroller for legal proceedings or other special purpose	0	5	0
7. On request to enter name of subsequent proprietor	same as registration fee.		
8. On notice to Comptroller of intended exhibition of an unregistered design	0	5	0
9. Inspection of design of which the copyright has expired, for each quarter of an hour	0	1	0
10. Copy of one such design	cost according to agreement.		
11. On request to correct clerical error	0	5	0
12. On request for search under section 53 . . .	0	5	0
13. On request to enter new address	0	5	0
14. For office copy, every 100 words . . . . . (but never less than 1s.)	0	0	4
15. For certifying office copies, MS. or printed . . .	0	1	0

Note.—The term "set" to include any number of articles ordinarily on sale together irrespective of the varieties of size and arrangement in which the particular design may be shown on each separate article.

(*b*) Sect. 101.

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mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed.(*a*)

To be laid before Parliament.

Any rules made in pursuance of this section shall be laid before both Houses of Parliament, if Parliament be in session at the time of making thereof, or, if not, then as soon as practicable after the beginning of the then next session of Parliament, and they shall also be advertised twice in the official journal to be issued by the Comptroller. If either House of Parliament, within the next forty days after any rules have been so laid before such House, resolve that such rules or any of them ought to be annulled, the same shall after the date of such resolution be of no effect, without prejudice to the validity of anything done in the meantime under such rules or rule, or to the making of any new rules or rule.(*b*)

Applications and notices by post.

Any application, notice, or other document authorised or required to be left, made, or given at the Patent Office, or to the Comptroller, or to any other person under this Act, may be sent by a prepaid letter through the post; and if so sent shall be deemed to have been left, made, or given respectively at the time when the letter containing the same would be delivered in the ordinary course of post.(*c*)

In proving such service or sending, it shall be sufficient to prove that the letter was properly addressed and put into the post.(*d*)

Declaration by infant, lunatic, &c.

If any person is, by reason of infancy, lunacy, or other inability, incapable of making any declaration or doing anything required or permitted by the Act, or by any rules made under the authority of the Act, then the guardian or committee (if any) of such incapable person, or if there be none, any person appointed by any Court or judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration or doing such thing, may make such declaration or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of such incapable person, and all acts done by such substitute shall for the purposes of the Act be as effectual as if done by the person for whom he is substituted.(*e*)

Isle of Man.

The Act extends to the Isle of Man, and—

Nothing in this Act is to affect the jurisdiction of the Courts in the Isle of Man in proceedings for infringement or

(*a*) Sect. 101. (*b*) *Ibid.*
(*c*) Sect. 97. (*d*) *Ibid.* (*e*) Sect. 99.

in any action or proceeding respecting a patent, design, or trade mark competent to those Courts.(*a*)

The punishment for a misdemeanour under the Act in the Isle of Man shall be imprisonment for any term not exceeding two years, with or without hard labour, and with or without a fine not exceeding one hundred pounds, at the discretion of the Court.(*b*)

Any offence under the Act committed in the Isle of Man, which would in England be punishable on summary conviction, may be prosecuted, and any fine in respect thereof recovered at the instance of any person aggrieved, in the manner in which offences punishable on summary conviction may for the time being be prosecuted.(*c*)

International and colonial arrangements.

For the provisions of the Act on the subject of international arrangements for the protection of designs, *vide* the chapter on International Copyright, *ante*, pp. 162, 163; and for those relating to similar arrangements with the Colonies and India, *vide* the chapter on Colonial Copyright, *ante*, p. 143.

(*a*) Sect. 112. (*b*) *Ibid.* (*c*) *Ibid.*

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LAW RELATING TO NEWSPAPERS.

Whether there is copyright in newspapers.

THE question whether a newspaper is within the Copyright Act (5 & 6 Vict. c. 45), first came before a court for express decision in the case of *Cox* v. *The Land and Water Journal Company*,(a) where the plaintiff, the proprietor of the *Field* newspaper, sought to restrain the publication in the *Land and Water Journal* of a "list of hounds," alleged to be copied from a list printed in the former paper. It was contended, on behalf of the defendants—(1) that the plaintiff had no copyright in the article of the piracy of which he complained; (2) that if he had a copyright he could not sue until his paper was registered under the Copyright Act. Malins, V.C., said: "The preliminary objection taken in this case raises a point of vast importance to the proprietors of newspapers and to the public at large. It is so important that it seems almost incredible that the point should never have arisen, namely, whether the proprietor of a newspaper has or has not such a property in articles published in that newspaper, and paid for by the proprietor, as entitles him to prohibit the publication by any other newspaper in any other form whatever." On account of the importance of this, the only case decided on the subject at the time the first edition of this work was published, the reasons were set forth at length which induced the Vice-Chancellor to hold that a newspaper does not require to be registered in order to entitle the proprietor to sue in respect of a piracy of its contents, and that though it was neither a "book" within sect. 2, nor a "periodical work" within sect. 18, yet the plaintiff was entitled to restrain the defendants from copying the list of hounds.

"It appears to me" said the Vice-Chancellor towards the close of his judgment, "that a 'newspaper,' which is the best possible and only definition of such a publication as the *Field*, not being within any of the provisions

(a) L. Rep. 9 Eq. 324; 21 L. T. N. S. 548; 18 W. R. 206.

of this Act, I must infer that it was not the intention of the Legislature to apply the Act to newspapers (for it was absolutely impossible that it should have missed insertion in some of the sections), and that the circumstance of non-registration throws no difficulty in the way of the plaintiff maintaining his right in law or equity; and, though it is seldom worth the while of proprietors to assert the copyright in articles in a newspaper, I am of opinion that, whether it be the letters of a correspondent abroad, or the publication of a tale or a treatise, or the review of a book, or whatever else, he acquires—I will not say as copyright, but as property—such a property in every article for which he pays under the 18th section of the Act, or by the general rules of property, as will entitle him, if he thinks it worth while, to prohibit any other person from publishing the same thing in any other newspaper, or in any other form."

Decision in *Cox v. Land and Water Journal Company* considered.

In the last edition of the present work, the author commented upon this decision as follows:—The effect of this decision, which cannot be considered a satisfactory one, is that the proprietor of a newspaper has a property in its published contents entitling him to restrain the piracy of any portion thereof *for which he has paid*, under the 18th section of the Act, without the necessity of a preliminary registration at Stationers' Hall. This right, it is obvious, is exactly "the sole and exclusive liberty of printing, or otherwise multiplying copies" which sect. 2 of 5 & 6 Vict. c. 45, calls "copyright," a term which the Vice-Chancellor is reluctant to apply to it, but which section 18 does expressly apply to it, enacting that the proprietor who has paid for the article shall have "such term of copyright therein as is given to the authors of books by this Act." Now, it is settled by the decision of the House of Lords, in *Donaldson* v. *Beckett*,(*a*) that the common law right of property in literary works after publication, if such right ever existed, has been taken away by statute, and that copyright after publication is now altogether dependent on statutory enactment. It exists only in those works, and can be enforced only on the observance of those conditions which are mentioned and prescribed in the Acts now in force. Considerations of the great hardship of allowing the unauthorised copying and publication of the copies of paintings, drawings, and photographs were not regarded as sufficient to justify the Courts of law or equity in interfering for the protection of the owners of such works, and

(*a*) 4 Burr. 2408, *ante*, pp. 62, 63.

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the intervention of the Legislature was necessary to confer a copyright in them; so that the observations of the Vice-Chancellor on the hardship of denying a protection from piracy to the proprietor of newspaper articles, are by no means decisive as to the existence of a right to prevent such piracy independent of the statute. If it be thought only just, as everybody must think it, that the publisher of a newspaper should be able to restrain the wholesale piracy of its contents, there does not seem to be much difficulty in the way of interpreting a newspaper to be a "book" within the meaning of sect. 2 of the above Act, there construed to mean and include "every volume, part or division of a volume, pamphlet, *sheet of letterpress*, sheet of music, map, chart, or plan separately published," or in holding it to be a "periodical work, or other work published in a series of books or parts," within the meaning of sect. 19 of the same Act; in either of which cases, however, registration would be necessary before the proprietor could sue in respect of an infringement of his copyright.

Opinion of Jessel, M.R.

This view has since been adopted by the late Master of the Rolls (Sir George Jessel), who held in the case of *Walter* v. *Howe*,(*a*) that a newspaper does come within the Act, and must be registered before the proprietor can sue in respect of a piracy. "The words of the 18th section," said his Lordship, "are of the most comprehensive kind; 'any periodical work' —a term which certainly includes a newspaper—'or any book whatsoever.' Under the 2nd section the word 'book' includes 'every sheet of letterpress.' In my opinion, therefore, to entitle the plaintiff to sue, his newspaper must have been registered under the Act. I have been referred to *Cox* v. *Land and Water Journal Company* (*ubi supra*), in which Vice-Chancellor Malins held that a proprietor of a newspaper can sue without joining the author and without registration under the Copyright Act; but, with all respect, I must decline to follow that decision, for it appears to me to be opposed to the plain wording of the Act of Parliament. If I were to decide in accordance with it, I should, in my opinion, be virtually overruling the Act."

The Master of the Rolls also held in the case last cited, that the newspaper proprietor has copyright only in articles for which the author has been paid, and which have been composed on the terms that the copyright in them should belong to the proprietor.

In cases where this is not shown both author and proprietor must join in suing.(*b*)

(*a*) L. R. 17 C. D. 708. (*b*) *Ibid.*

Nature of property in a newspaper.

Whether a copyright exists at all in the case of newspapers has been doubted by Lord Chelmsford, in *Platt* v. *Walter*;(*a*) and his Lordship refers to the language of Knight Bruce, L.J., in *Ex parte Foss*,(*b*) as seeming to imply a doubt in the mind of that learned judge also whether there was such a thing as copyright in a newspaper. The Lord Justice spoke of the right to publish newspapers bearing a particular name as "that which has been called the copyright of a newspaper." Turner, L.J., however, in the same case, considers copyright in a newspaper as a right "which undoubtedly exists."(*c*)

Though doubts have (without sufficient grounds, it is submitted) been expressed as to whether a copyright in newspapers exists, the right of publishing a newspaper is unquestionably a species of property. It has been held to be goods and chattels under the Bankruptcy Acts.(*d*)

Name of newspaper.

And, though there is nothing analogous to copyright in the name of a newspaper, the proprietor has a right to prevent any other person from adopting the same name for any other similar publication; and this right is a chattel interest capable of assignment.(*e*)

Right of publishing a newspaper.

The right of publishing a newspaper is not capable of seizure by the sheriff under an execution; but the doctrine of reputed ownership under the Bankruptcy Acts was held applicable to it.(*f*)

When the registered proprietor of certain newspapers published by him, being also the owner of the type and plant used in the printing of them, mortgaged the newspapers, type, and plant to F., who took no steps to alter the registration of proprietorship, and the sheriff entered under an execution issued by a creditor of the publisher, and though possession was demanded by F., remained in possession till after the publisher became bankrupt, which took place after two days, it was held that the type and plant were not within the order and disposition of the bankrupt at the time of his bankruptcy with the consent of the

(*a*) 17 L. T. N. S. 159. See also the American case of *Clayton* v. *Stone* (2 Paine, 383, 391).

(*b*) 2 De G. & J. 230.

(*c*) 2 De G. & J. 239.

(*d*) *Longman* v. *Tripp* (2 Bos. & P., 67); *Ex parte Foss*, 2 De G. & J. 230. See *per* Lord Chelmsford, C., in *Platt* v. *Walter* (17 L. T. N. S. 159).

(*e*) *Per* Page Wood, L.J., in *Kelly* v. *Hutton* (L. Rep. 3 Ch. App. 708; 19 L. T. N. S. 231; 38 L. J. 917 Ch.; and see the cases referred to in the preceding note, and *Keene* v. *Harris*, referred to 17 Ves. 338), and *ante*, pp. 217 *seq.*

(*f*) *Ex parte Foss*, *ubi supra*. See also *Longman* v. *Tripp* (2 Bos. & Pul. 67).

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true owner, but that as the right of publication was not capable of seizure by the sheriff, and the bankrupt continued the sole registered proprietor, and nothing had been done to make it apparent that he was not the sole owner, the doctrine of reputed ownership applied to the newspapers.(*a*)

It was held by the Scotch Court of Session that the goodwill of a newspaper is a right transmissible to the owner's representatives, and that where the surviving joint proprietors of a newspaper do not agree to purchase the share of a deceased partner, that share may be sold for behoof of his representatives.(*b*)

As to the interpretation of an agreement relating to the user by one newspaper of the matter and types of another, see the case of *Platt* v. *Walter*, referred to in Part III. of this work.(*c*)

Repealed enactments as to newspapers

The Government for a long time regarded the press with jealousy, and many enactments were made to facilitate the proof of the publication of newspapers as well as to secure to Government the heavy duties with which they were charged. Even the size of newspapers was to a late period regulated by statute. An Act of the 6 Geo. 4, c. 119, first allowed them to be printed on paper of any size.

Amongst the provisions swept away by the Act of 32 & 33 Vict. c. 24 (called "The Newspapers, Printers, and Reading Rooms' Act") were enactments requiring, before the publication of any newspaper, the delivery at the Stamp Office of a declaration containing the title of the paper, description of the house where it was to be published, and the names and places of abode of the printer, publisher, and proprietor,(*d*) certified copies of which declarations were to be received as conclusive evidence of everything contained in them relating to the newspapers.(*e*) Copies of all newspapers published had to be delivered to the Commissioners of Stamps and Taxes, and might be produced in evidence.(*f*) Every supplement to a newspaper must have had the word "supplement" printed on it, and have had the same title and date as the newspaper, and a penalty was incurred by publishing supplements without the newspapers.(*g*)

Printer must keep a copy of every paper, with name of employer thereon.

Every person who prints any paper for hire, reward, gain, or profit, must still carefully preserve and keep one copy

(*a*) *Ex parte Foss* (2 De G. & J. 230.
(*b*) *M'Cormick* v. *M'Cubbin* (1 Scotch Sess. Cas. 541, 4 July, 1822).
(*c*) *Post*, pp. 349 *seq.* (*d*) 6 & 7 Will. 4, c. 76, s. 6.
(*e*) Sect. 8. (*f*) Sect. 13. (*g*) Sect. 5.

(at least) of every paper so printed by him or her, on which he or she must write, or cause to be written or printed, in fair and legible characters, the name and place of abode of the person or persons by whom he or she is employed to print the same. Every person so printing who neglects to have written or printed the name of the employer, or to keep or preserve it for the space of six calendar months next after the printing thereof, or to produce and show the same to any justice of the peace who within the said space of six calendar months may require to see the same is, for every such omission, neglect, or refusal, to forfeit and lose the sum of twenty pounds.(*a*)

Exceptions.

This does not apply to any papers printed by the authority and for the use of either House of Parliament;(*b*) or to the impression of any engraving; or to the printing by letterpress of the name, or the name and address, or business or profession, of any person, and the articles in which he deals; or to any papers for the sale of estates or goods by auction or otherwise.(*c*)

Neither is it required that the name and residence of the printer should be printed upon any bank note, or bank post bill of the Governor and Company of the Bank of England; upon any bill of exchange, or promissory note, or upon any bond or other security for payment of money; or upon any bill of lading, policy of insurance, letter of attorney, deed, or agreement; or upon any transfer or assignment of any public stocks, funds, or other securities, or upon any transfer or assignment of the stocks of any public corporation or company authorised or sanctioned by Act of Parliament, or upon any dividend warrant of or for any such public or other stocks, funds, or securities; or upon any receipt for money or goods; or upon any proceeding in any Court of law or equity, or in any inferior Court, warrant, order, or other papers printed by the authority of any public board or public officer in the execution of the duties of their respective offices, notwithstanding the whole or any part of the said several securities, instruments, proceedings, matters, and things aforesaid shall have been or shall be printed.(*d*)

Recovery of penalties.

Penalties (not exceeding the sum of £20) may be recovered in a summary way before any justice or justices of the peace for the county, stewartry, riding, division, city, town, or place in which the same are incurred, or the person who has in-

(*a*) 39 Geo. 3, c. 79, s. 29; 32 & 33 Vict. c. 24, sched. 2.
(*b*) *Ibid.* s. 28.
(*c*) Sect. 31.
(*d*) 51 Geo. 3, c. 65, s. 3; 32 & 33 Vict. c. 34, sched.

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carred them happens to be;(*a*) and when so recovered, one moiety of the penalty is to go to the informer, and the other moiety to the Crown.(*b*)

Prosecutions or actions for penalties under this Act are to be brought within three calendar months next after they are incurred:(*c*) and they can only be brought and prosecuted in the name of Her Majesty's Attorney or Solicitor-General in England, or Her Majesty's Advocate in Scotland; every proceeding commenced or prosecuted in the name or names of any other person or persons is to be null and void to all intents and purposes.(*d*)

Printer to print his name and address on papers, &c.

On every person who prints any paper or book whatsoever which is meant to be published or dispersed, and who does not print upon the front of every such paper, if the same shall be printed on one side only, or upon the first or last leaf of every paper or book which shall consist of more than one leaf, in legible characters, his or her name and usual place of abode or business, sect. 2 of 2 & 3 Vict. c. 12,(*e*) inflicts a penalty of not more than five pounds for every copy of such paper so printed. A similar penalty is inflicted on every person who publishes, or disperses, or assists in publishing or dispersing, any printed paper or book on which the name and place of abode of the person printing the same is not printed as aforesaid. But this provision is not to be construed to impose any penalty upon any person for printing any of the papers above excepted.(*f*)

In the case of books or papers printed at the University Press of Oxford or the Pitt Press of Cambridge, the printer, instead of printing his name thereon, is to print the following words, "Printed at the University Press, Oxford," or "The Pitt Press, Cambridge," as the case may be.(*g*)

Proceedings for the recovery of any fine, penalty, or forfeiture under the provisions of this Act must be commenced, prosecuted, entered, or filed in the name of the Attorney or Solicitor-General in England, or Her Majesty's Advocate for Scotland (as the case may be respectively). All proceedings commenced, prosecuted, or filed otherwise are to be null and void to all intents and purposes.(*h*)

None of the preceding enactments apply to Ireland.(*i*)

6 & 7 Will. 4, c. 76, s. 19.

6 & 7 Will. 4, c. 76 s. 19 enabled a person to file a bill in

(*a*) Sect. 35. (*b*) Sect. 36. (*c*) Sect. 34.
(*d*) 9 & 10 Vict. c. 33, s. 1; 32 & 33 Vict. c. 24, sched. 2.
(*e*) 32 & 33 Vict. c. 24, sched. 2. (*f*) *Vide ante*, p. 313.
(*g*) 2 & 3 Vict. c. 12, s. 3.
(*h*) 2 & 3 Vict. c. 12, s. 4. (*i*) See 32 & 33 Vict. c. 24, sched. 2.

equity for discovery of the printer, publisher or proprietor of a newspaper, in order to sue at law for a libel contained in it;(*a*) but the whole of this Act has been repealed by 33 & 34 Vict. c. 99, and the Act of 1881 contains provisions equally effective for the purpose.

Register of newspaper proprietors.

The Newspaper Libel and Registration Act 1881 (44 & 45 Vict. c. 60), which does not extend to Scotland, provides(*b*) for the establishment of a register of newspaper proprietors for England and Ireland, under the superintendence in England of the Registrar, and in Ireland of the Assistant-Registrar of Joint Stock Companies, or such person as the Board of Trade may for the time being authorise in that behalf.(*c*)

Meaning of "newspaper."

For the purposes of the act "newspaper" is to mean any paper containing public news, intelligence or occurrences, or any remarks or observations therein printed for sale and published in England or Ireland periodically, or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two such papers, parts or numbers; also any paper printed in order to be dispersed and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.(*d*)

Annual returns.

It is the duty of the printers and publishers for the time being to make or cause to be made to the Registry Office annually in the month of July in every year, a return of the following particulars according to a form given in a schedule to the Act, viz.:—

(1) The title of a newspaper.

(2) The names of all the proprietors(*e*) of such newspaper, together with their respective occupations, places of business (if any), and places of residence.(*f*)

"Representative proprietors."

Where in the opinion of the Board of Trade, inconveniences would arise or be caused in any case from the registry of the names of all the proprietors (owing either to minority, coverture, absence from the United Kingdom,

(*a*) See *Dixon* v. *Enoch* (L.R. 13 Eq. 392).
(*b*) Sect. 8. (*c*) Sect. 1. (*d*) *Ibid.*
(*e*) The word "proprietor" is defined to mean and include as well the sole proprietor, as also, in the case of a divided proprietorship, the persons who, as partners or otherwise, represent or are responsible for any share or interest in the newspaper as between themselves, and the persons in like manner representing or responsible for the other shares or interests therein, and no other person. (Sect. 1.)
(*f*) Sect. 9.

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minute subdivision of shares or other special circumstances) the Board of Trade may authorise the registration in the name or names of some one or more responsible "representative proprietors."(*a*)

The form of return given in the schedule is as follows:—

Return made pursuant to the Newspaper Libel and Registration Act, 1881.

Title of the Newspaper.	Names of the Proprietors.	Places of Business of any of the Proprietors.	Places of Residence of the Proprietors.

Penalty for omission.

If within a month from the time appointed, the return is not made, then each printer and publisher of such newspaper shall, on conviction, be liable to a penalty not exceeding £25, and also to be directed by a summary order to make a return within a specified time.(*b*)

Return in case of transfer of interest.

Any party to a transfer or transmission of or dealing with any share or interest in any newspaper, whereby any person ceases to be a proprietor, or any new proprietor is introduced, may at any time make a return to the Registry Office, according to a form given in a schedule and containing the particulars therein set forth.(*c*)

The following is the form given in the schedule:—

Return made pursuant to the Newspaper Libel and Registration Act, 1881.

Title of Newspaper.	Names of Persons who cease to be Proprietors.	Names of Persons who become Proprietors.	Occupation of new Proprietors.	Places of Business (if any) of new Proprietors.	Places of Residence of new Proprietors.

Penalty for wilful misrepresentation or omission.

If any person knowingly and wilfully makes or causes to be made a return setting forth the name of any person as a

(*a*) Sect. 8. (*b*) Sect. 10. (*c*) Sect. 11.

proprietor who is not, or in which there is any misrepresentation, or from which there is any omission in respect of any of the particulars required by the Act, whereby the return is misleading; or if any proprietor knowingly and wilfully permits any such return to be made which shall be misleading as to any of the particulars with reference to his own name, occupation, place of business (if any), or place of residence, the offender in every case, on being convicted, is liable to a penalty not exceeding £100.(*a*)

Mode of recovering penalties.

Penalties may be recovered before a "Court of Summary Jurisdiction," in manner provided by the "Summary Jurisdiction Acts," and summary orders under this Act may be made by a Court of Summary Jurisdiction and enforced in manner provided by section 34 of the Summary Jurisdiction Act, 1876, which, for the purposes of this Act, is to be deemed applicable to Ireland.(*b*)

The expression "Court of Summary Jurisdiction" is to have in England the meanings assigned to it by the Summary Jurisdiction Act, 1879, and in Ireland means any justice or justices of the peace, stipendiary or other magistrate or magistrates having jurisdiction under the Summary Jurisdiction Acts. The expression "Summary Jurisdiction Acts" is to have, as regards England, the meanings assigned to it by the Summary Jurisdiction Act, 1879; and, as regards Ireland, means, within the police district of Dublin metropolis, the Acts regulating the powers and duties of justices of the peace for such district, or of the police of that district, and elsewhere in Ireland, the Petty Sessions (Ireland) Act, 1851, and any Act amending the same.(*c*)

Duty of registrar.

The registrar is required to register every return made in conformity with the Act in a book to be kept for that purpose at the Registry Office, and called "The Register of Newspaper Proprietors."(*d*)

Liberty to search register and obtain certified copies.

All persons are to be at liberty to search and inspect the register from time to time during the hours of business at the Registry Office; and any person may require a copy of any entry in or an extract from the book to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar.(*e*)

Fees payable.

Such fees (if any) as the Board of Trade, with the approval of the Treasury, may direct(*f*) are to be paid in respect of the

(*a*) Sect. 12. (*b*) Sect. 16. (*c*) Sect. 17.
(*d*) Sect. 13. (*e*) *Ibid.*

(*f*) The Fees which the Board of Trade have, with the approval of the Treasury, directed to be paid are as follow:—

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receipt and entry of returns, and for inspection of the register, and for certified copies of entries, and in respect of any other services to be performed by the registrar, which fees are to be dealt with as the Treasury may direct.(*a*)

Certified copies to be evidence.

Every copy of an entry in or extract from the register purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, is to be received as conclusive evidence of the contents of the register, so far as the same appears in such copy or extract without proof of the signature thereto, or of the seal of office affixed thereto.(*b*)

Every such certified copy or extract is, in all proceedings, civil or criminal, to be accepted as sufficient *primâ facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown.(*c*)

Newspaper belonging to Joint Stock Company.

The provisions of the Act as to registration of newspaper proprietors are not to apply to the case of any newspaper which belongs to a joint-stock company duly incorporated under and subject to the provisions of the Companies' Acts 1862 to 1879.(*d*)

The provisions of the Act relating to Libel will be dealt with in the chapters on Libel.

Stamp duties.

Previously to the passing of the Act 16 & 17 Vict. c. 63, a duty was payable on all advertisements contained in or

	£	s.	d.
For the registration for the first time of any "representative proprietor" (sect. 7) . .	1	0	0
On registration in other cases	0	10	0
On the rendering of subsequent Returns . .	0	5	0
For inspection	0	1	0
For a copy of a Return	0	1	0

and a further fee of fourpence per folio to be charged if the copy exceeds three folios.

The following regulations have been published by the Registry Office:—

Regulations as to "representative proprietors."

"Where it is desired to make a return of "representative proprietors" under sect. 7 a statement should be sent to the Registrar setting forth the circumstances which render it inconvenient to register the names of all the proprietors, and giving such information as will show that the proposed representatives are well able to meet any claims that may arise for libel or otherwise in connection with the management of the Paper.

"The prescribed forms on which the Returns are to be made will be sent, either stamped with the requisite fee stamps or unstamped, on application to the Registrar, Companies' Registration Office, Somerset House, London, W.C. No charge is made for the forms; but when stamped forms are required a Postal Order for the amount of the fee must accompany the application.

"A separate Return will be required for each Paper."

(*a*) Sect. 14. (*b*) Sect. 15. (*c*) *Ibid.* (*d*) Sect 18.

published along with newspapers, or periodical or other literary works. Sect. 5 of that Act repealed the duty on advertisements in all such cases. And down to the passing of the Act 18 Vict. c. 27, it was not allowable to print or publish newspapers except on stamped paper. That Act abolished the necessity of stamped paper except for the purpose of free transmission by post. The Customs and Inland Revenue Act of 1870(*a*) does away with all stamp duties on newspapers for the future.(*b*)

Registration at Post-Office.

As to the registration of newspapers at the Post Office, the Post Office Act of 1870,(*c*) after describing what is a newspaper within its meaning, provides (sect. 7) that the proprietor or printer of any newspaper, and the proprietor or printer of any publication which, regard being had to the proportion of advertisements to other matter therein, is not within the description aforesaid, but which was stamped as a newspaper before the passing of the Act 18 & 19 Vict. c. 27, may register it at the General Post Office in London at such time in each year and in such form and with such particulars as the Postmaster-General from time to time directs, paying on each registration such fee, not exceeding five shillings, as the Postmaster-General, with the approval of the Treasury, from time to time directs.

The Postmaster-General may from time to time revise the register and remove therefrom any publication not being a newspaper.(*d*)

The decision of the Postmaster-General on the admission to or removal from the register of a publication is final, save that the Treasury may, if they think fit, on the application of any person interested, reverse or modify the decision, and order accordingly.(*e*)

Any publication for the time being on the register is for the purposes of this Act to be deemed a registered newspaper.(*f*)

Postage.

Registered newspapers, book packets, pattern or sample packets, and post cards may be sent by post between places in the United Kingdom, at the following rates of postage :—

On a registered newspaper, with or without a supplement or supplements	One halfpenny.
On each registered newspaper in a packet of two or more, with or without a supplement or supplements	One halfpenny.

(*a*) 33 & 34 Vict. c. 32. (*b*) Sect. 12.
(*c*) 33 & 34 Vict. c. 79.
(*d*) 33 & 34 Vict. c. 79, s. 7. (*e*) *Ibid.* (*f*) *Ibid.*

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On a book packet or pattern or sample packet: - (*a*)	
If not exceeding two ounces in weight	One halfpenny.
If exceeding two ounces in weight, for the first two ounces and for every additional two ounces or fractional part of two ounces	One halfpenny.
On a post card	One halfpenny.

But a packet of two or more registered newspapers with or without a supplement or supplements is not to be liable under this section to a higher rate of postage than the rate chargeable on a book packet of the same weight.(*b*)

The Postmaster-General may from time to time, with the approval of the Treasury, make, in relation respectively to registered newspapers, book packets, pattern or sample packets, and post cards, sent by post, such regulations as he thinks fit, for all or any of the following purposes:—

For prescribing and regulating the times and modes of posting and delivery:

For prescribing prepayment and regulating the mode thereof:

For regulating the affixing of postage stamps:

For prescribing and regulating the payment again of postage in case of redirection:

For regulating dimensions and maximum weight of packets:

For regulating the nature and form of covers:

For prohibiting or restricting the printing or writing of marks or communications or words:

For prohibiting inclosures;

and such other regulations as from time to time seem expedient for the better execution of the Act.(*c*)

Any approval of the Treasury under this Act is to be deemed an order within the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), which Act is to have effect as if the Postmaster-General were mentioned in the first column, and any secretary or assistant-secretary of the Post Office were mentioned in the second column of the schedule to that Act.(*d*)

Newspapers, &c. not sent in conformity with Act.

If any registered or other newspaper, supplement, pub-

(*a*) See note to sect. 9, *post*.

(*b*) Sect. 8. The enactments as to the postage of newspapers, contained in sects. 42 & 44 of 3 & 4 Vict. c. 96, are repealed by this Act (sect. 4, sched. 1). See now the later Act, 38 & 39 Vict. c. 22, s. 1.

(*c*) Sect. 9. See now as to pattern or sample packets the provisions of 34 & 35 Vict. c. 30, s. 4. (*d*) Sect. 21.

lication, book packet, pattern or sample packet, or post card, is sent by post otherwise than in conformity with the Act or any Treasury warrant or Post Office regulations, it shall be either returned to the sender thereof or forwarded to its destination, in either case charged with such rate of postage, not exceeding the letter rate of postage, or without any additional charge, as the Postmaster-General, with the approval of the Treasury, from time to time directs, having been, if necessary, detained and opened in the Post Office.(*a*)

Under the Act of 1875.(*b*) further powers are given to the Treasury; amongst them being a power by warrant to revoke and alter any regulations made under previous Acts(*c*); and it repeals so much of the Post Office Duties Acts 1840 to 1871, as are inconsistent with it, or with any warrant made under it.

If any question arises whether any postal packet is a letter, post-card, newspaper, supplement, book packet, circular or other description of postal packet within the meaning of this Act or any warrant made under it, the decision of the Postmaster General is to be final; but the Treasury may, if they think fit, on the application of any person interested, reverse or modify the decision and order accordingly.(*d*)

Indecent or obscene papers.

The Postmaster-General may from time to time, with the approval of the Treasury, make such regulations as he thinks fit for preventing the sending or delivery by post of indecent or obscene prints, paintings, photographs, lithographs, engravings, books, or cards, or of other indecent or obscene articles, or of letters, newspapers, supplements, publications, packets, or post-cards, having thereon, or on the covers thereof, any words, marks, or designs of an indecent, obscene, libellous, or grossly offensive character.(*e*)

What are newspapers within the Act.

Any publication coming within the following description is, for the purposes of this Act, to be deemed a newspaper— any publication consisting wholly or in great part of political or other news, or of articles relating thereto, or to other

(*a*) Sect. 15. The enactments contained in sects. 13, 16, & 17 of 3 & 4 Vict. c. 96, as to newspapers posted without being stamped or prepaid, or sufficiently stamped, are repealed by the 33 & 34 Vict. c. 79 (sect. 4, sched. 1). So also are the enactments contained in sect. 45 of the former Act as to the examination of newspapers by the Postmaster-General.

(*b*) 38 & 39 Vict. c. 22.
(*c*) Sect. 4.
(*d*) 38 & 39 Vict. c. 22, s. 5.
(*e*) 33 & 34 Vict. c. 79 s. 20.

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current topics, with or without advertisements; subject to these conditions—

That it be printed and published in the United Kingdom;

That it be published in numbers at intervals of not more than seven days;

That it be printed on a sheet or sheets unstitched;

That it have the full title and date of publication printed at the top of the first page, and the whole or part of the title and the date of publication printed at the top of every subsequent page.(*a*)

The definition of a newspaper contained in 6 & 7 Will. 4, c. 76, s. 4 (not repealed by the Act of 1870), viz., "any paper containing public news, intelligence, or occurrences, printed in any part of the United Kingdom to be dispersed and made public; also any paper printed in any part of the United Kingdom weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements; and also any paper containing any public news, intelligence, or occurrences, or any remarks or observations thereon, printed in any part of the United Kingdom for sale and published periodically, or in parts, or numbers, at intervals not exceeding twenty-six days between the publication of any two such parts, papers or numbers, where any of the said papers, parts or numbers respectively shall not exceed two sheets of the dimensions"(*b*) specified in the Act, &c., is not to be deemed to contain or affect the definition of a newspaper for the purposes of the Act of 1870 or any other enactments regulating the sending of newspapers by post.(*c*)

Supplements.

And the following is, for the purposes of the Act, to be deemed a supplement to a newspaper—a publication consisting wholly or in great part of matter like that of a newspaper, or of advertisements, printed on a sheet or sheets or a piece or pieces of paper, unstitched, or consisting wholly or in part of engravings, prints, or lithographs illustrative of articles in the newspaper; such publication in every case being published with the newspaper, and having the title and date of publication of the newspaper printed at the top of every page, or at the top of every sheet or side on which any such engraving, print, or lithograph appears.(*d*)

If a question arises whether any publication, not being a registered newspaper, is a newspaper or a supplement, or whether any packet is a book packet or pattern or sample

(*a*) 33 & 34 Vict. c. 79, s. 6.
(*b*) See *Attorney-General* v. *Bradbury* (7 Exch. 97).
(*c*) 33 & 34 Vict. c. 79, s. 4. (*d*) *Ibid.* sect. 6.

packet, within the Act or any Treasury warrant or Post Office regulations, the decision thereon of the Postmaster-General is, by the Act, made final, save that the Treasury may, if they think fit, on the application of any person interested, reverse or modify the decision, and order accordingly.(*a*)

Colonial and foreign postage.

The Treasury may from time to time, by Treasury warrant, allow any newspapers, British, colonial, or foreign, to be sent by post between the United Kingdom and places out of the United Kingdom, or between places out of the United Kingdom, whether through the United Kingdom or not, at such rates of postage, not exceeding threepence for each newspaper irrespectively of any colonial or foreign postage, and on such conditions, as they think fit, and according to Post Office regulations to be from time to time made in that behalf.(*b*)

Any Treasury warrant and Post Office regulations made in that behalf before the passing of the Act of last year, are confirmed by it, and are to continue in force unless and until altered by Treasury warrant or Post Office regulations (as the case may be).(*c*)

A registered newspaper is to be deemed a newspaper for the purposes of any arrangement or convention between Her Majesty's Government and any colonial or foreign government for securing advantages for newspapers sent by post.(*d*)

The foreign postage marked on any newspaper or letter, or printed paper brought into the United Kingdom, is to be received in all courts of justice and other places as conclusive evidence of the amount of foreign postage payable in respect of such newspaper, &c., in addition to the British postage; and such foreign postage is to be recoverable within the United Kingdom and Her Majesty's other dominions as postage due to Her Majesty.(*e*)

Stamps.

The Commissioners of Inland Revenue are from time to time to provide proper dies and other implements for denoting by adhesive or embossed or impressed stamps, or otherwise, the duties of postage payable in the United Kingdom under this Act, or any Treasury warrant thereunder; and those duties are to be deemed stamp duties, and to be under

(*a*) Sect. 14. The similar provision in sect. 46 of 3 & 4 Vict. c. 96, is repealed (sect. 4, sched. 1).

(*b*) Sect. 12. The provisions on this subject contained in sects. 47–51 (both inclusive) of 3 & 4 Vict. c. 96, are repealed (sect. 4, sched. 1).

(*c*) *Ibid.*

(*d*) Sect. 11.

(*e*) 3 & 4 Vict. c. 96, s. 32.

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the management of the Commissioners of Inland Revenue.(*a*)

So much of the Act, 3 & 4 Vict. c. 96, as relates to stamp duties under that Act is to apply to the stamp duties under this Act.(*b*)

Newspapers liable to postage, if posted in any town or place within the United Kingdom, and inclosed in stamped covers, or having a stamp or stamps affixed thereto (the stamp or stamps being in every case affixed or appearing on the outside, of the proper value, and not used before), are to pass by the post free of postage; and the amount of stamps required may be made up by affixing such a number of adhesive stamps as, alone or in combination with the stamp already impressed, may be required.(*c*)

Forging or counterfeiting stamp dies, &c.

It is a felony to forge or counterfeit, or caused to be forged or counterfeited, the dies, plates, or other instruments used for stamping, or to forge, counterfeit, or imitate, or cause or procure to be forged, counterfeited, or imitated, the stamp, mark, or impression of any such die, &c., or to have in one's possession knowingly and without lawful excuse (the proof whereof lies on the person accused) any false, forged, or counterfeited die, &c., or any part of one, or any instrument resembling or intended to resemble it, wholly or in part; or to stamp or mark, or cause or procure to be stamped or marked any paper, or other substance or material whatsoever, with any such false, forged, or counterfeited die, &c.; or to use, utter, sell or expose to sale, or cause to be used, uttered, or exposed to sale, or knowingly and without lawful excuse (the proof whereof lies on the person accused) to have in one's possession any paper, or other substance or material, having thereon the impression or any part of the impression of any such false, forged, or counterfeit die, &c., or having thereon any false, forged, or counterfeit stamp or impression, resembling or representing, either wholly or in part, or intended or liable to pass or be mistaken for the stamp, mark, or impression of any such die, &c., which has been or shall be, or may be so provided, made or used as aforesaid, knowing such false, forged, or

(*a*) 33 & 34 Vict. c. 79, s. 18.

(*b*) *Ibid.* The enactments contained in sects. 3 & 4 of 16 & 17 Vict. c. 63, as to stamp duties on newspapers and supplements, and as to the cancelling and allowing for newspaper stamps on hand, are repealed by the Act of 1870 (sect. 4, sched. 1). So is the whole of the Act of 18 & 19 Vict. c. 27, passed to amend the laws relating to the stamp duties on newspapers, and to provide for the transmission by post of printed periodical publications (*Ibid.*).

(*c*) 3 & 4 Vict. c. 96, s. 12.

counterfeit stamp, mark, or impression, to be false, forged, or counterfeit; or, with intent to defraud Her Majesty, her heirs, or successors, privately or fraudulently to use, or cause or procure to be privately or fraudulently used, any die, &c., so provided, made, or used, or hereafter to be provided, made, or used as aforesaid, or, with such intent, privately to stamp or mark, or cause or procure to be stamped or marked, any paper, substance, or material whatsoever with any such die, &c., as last mentioned; or knowingly and without lawful excuse (the proof whereof lies on the person accused) to have in one's possession any paper, or other substance or material, so privately or fraudulently stamped, or marked as aforesaid.(*a*)

Fraudulent removal of stamps.

Fraudulently to remove or cause to be removed from any cover or paper the stamp or impression of any such die, &c., as mentioned in the last paragraph, with intent to use it on another; or fraudulently to use a stamp or impression so removed; or fraudulently to erase, cut, &c., or cause to be erased, cut, &c., from any cover or paper, any name, date, or other matter or thing thereon written, printed, or expressed, with intent to use any stamp or mark then impressed or being upon it, or that it may be used for the purpose of defrauding Her Majesty; or to do or be concerned in any other fraudulent act, contrivance, or device whatever, with intent to defraud Her Majesty, &c., of any of the rates or duties provided by the Act, is an offence punishable by a forfeiture of £20, to be recovered with full costs of suit.(*b*)

Pressed stamp removed from another paper not to be used.

It is unlawful for any person to affix to a newspaper, supplement, publication, packet, letter, or card sent by post, or to the cover thereof (if any), by way of prepayment of postage thereon, an embossed or impressed stamp cut out or otherwise separated from the cover or other paper, card, or thing on which such stamp was embossed or impressed, although such stamp has not been before sent by post or used.(*c*)

If any newspaper, supplement, publication, &c., is sent by post with a stamp affixed thereto, or to the cover thereof (if any), that has been so cut out or separated, the postage thereof, as far as it purports to be prepaid by that stamp, is to be deemed to be not prepaid.(*d*)

The enactments contained in 6 & 7 Will. 4, c. 76, allowing a discount of 25 per cent. on newspaper stamps in Ireland (*e*)

(*a*) 3 & 4 Vict. c. 96. s. 22.
(*b*) *Ibid.* sect. 23. Cf. sect. 18 of 33 & 34 Vict. c. 79.
(*c*) 33 & 34 Vict. c. 79. s. 19. (*d*) *Ibid.*
(*e*) 6 & 7 Will. 4, c. 76, s. 2.

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those relating to the cancelling of stamps rendered useless by that Act ;(*a*) and those providing that a separate stamp or die should be used for each newspaper, and that every newspaper should be printed on paper stamped with such appropriate die ;(*b*) as well as the section relating to the construction of the terms used in that Act,(*c*) are repealed by the Act of 1870.(*d*)

For the purposes of the Post-Office Act, 1870, the Channel Islands and the Isle of Man are to be deemed parts of the United Kingdom ;(*e*) and the Act of 11 & 12 Vict. c. 117, relating to the postage of newspapers published in the Channel Islands and the Isle of Man is repealed.(*f*)

Documents falsely purporting to be printed by Government printer.

Any person who prints any copy of any proclamation, order, or regulation which falsely purports to have been printed by the Government printer, or to be printed under the authority of the Legislature of any British colony or possession, or tenders in evidence any copy of any such proclamation, order, or regulation, which falsely purports to have been printed as aforesaid, knowing that the same was not so printed, is guilty of forgery, and on conviction is liable to be sentenced to penal servitude for such term as is prescribed by the Penal Servitude Act, 1864, as the least to which an offender can be sentenced to penal servitude, or to be imprisoned for any term not exceeding two years, with or without hard labour.(*g*)

For the purposes of this enactment the expression "British colony and possession" includes the Channel Islands, the Isle of Man, and such territories as may, for the time being, be vested in Her Majesty by virtue of any Act of Parliament for the Government of India, and all other Her Majesty's dominions; "Legislature" signifies any authority, other than the Imperial Parliament or Her Majesty in Council, competent to make laws for any colony or possession; and "Government printer" is to mean and include the printer to Her Majesty, and any printer purporting to be the printer authorised to print the statutes, ordinances, Acts of State, or other public Acts of the Legislature of any British colony or possession, or otherwise to be the Government printer of such colony or possession.(*h*)

Prohibition of advertisements respecting stolen goods.

Advertisements of rewards for the return of stolen goods are prohibited under a penalty.

Sect. 102 of 24 & 25 Vict. c. 96, provides that whosoever

(*a*) Sect. 34. (*b*) Sect. 3. (*c*) Sect. 35.
(*d*) 33 & 34 Vict. c. 79, s. 4, sched. 1. (*e*) Sect. 3.
(*f*) Sect. 4 and sched. 1. (*g*) 31 & 32 Vict. c. 37, s. 4.
(*h*) *Ibid.*, sect. 5.

shall publicly advertise a reward for the return of any property whatsoever, which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of fifty pounds for every such offence to any person who will sue for the same by action of debt, to be recovered with full costs of suit.

This provision having given occasion to many vexatious proceedings at the instance of common informers against printers and publishers of newspapers, the Legislature intervened,(*a*) to remedy the abuse.

The Act 33 & 34 Vict. c. 45, provides that no action shall be brought against the printer or publisher of a newspaper to recover the penalty under sect. 102 of 24 & 25 Vict. c. 96, unless the assent in writing of the Attorney or Solicitor-General for England, if the action is brought in England, or for Ireland, if the action is brought in Ireland, has been first obtained to the bringing of the action.(*b*)

It also limits the time for bringing the action to a period of six months after the forfeiture is incurred;(*c*) and contains a provision for staying proceedings in actions brought before the passing of the Act.(*d*)

The term "newspaper" for the purposes of this Act is to mean a newspaper as defined for the purposes of the Acts for the time being in force relating to the carriage of newspapers by post.(*e*)

(*a*) 33 & 34 Vict. c. 65. (*b*) Sect. 3. (*c*) *Ibid.*
(*d*) Sect. 4. (*e*) Sect. 2.

PART III.

CONTRACTS BETWEEN AUTHORS, PUBLISHERS, PRINTERS, &c.

Contracts in general, between *authors*, publishers, &c.

THE foundation on which contracts between publishers, authors, and others rest, is the same as that which forms the basis of all ordinary contracts, and they may be enforced either by action on the special contract, or, where a special contract does not exist, by the usual action for work and labour done.(*a*)

Agreement not to be performed within a year.

If the agreement is one "that is not to be performed within the space of one year from the making thereof" no action can be brought upon it, "unless the agreement upon which such action shall be brought or some memorandum or note thereof is in writing, and signed by the party to be charged therewith,"(*b*) and the word "agreement" includes the *consideration* for the promise as well as the promise itself.(*c*)

The following memorandum was made between the plaintiff, a law bookseller and publisher, and the defendant, the author and proprietor of the copyright in a dictionary of the practice of the Courts of King's Bench and Common Pleas, and signed with their respective initials: "Dict. of Practice. £80 per annum for five years, commencing Mich. 1828; £60 per annum for the remainder of Mr. Lee's life, if he survive the five years; payable in either case quarterly; the first payment Michaelmas 1828. "T. L.
"S. S.

"Mr. Lee to separate the practices K. B. and C. P."

Parol evidence having been held admissible to explain the document, it was held that inasmuch as it appeared to be a memorandum of a contract that was not to be performed

(*a*) *Planché* v. *Colburn* (8 Bing. 16).
(*b*) Sect. 4 of Statute of Frauds (29 Car. 2, c. 3).
(*c*) *Wain* v. *Warlters* (5 East, 10); *Saunders* v. *Wakefield* (4 B. & Ald. 595).

within a year, and no consideration was stated on the face of it, it was not capable of being enforced by action.(*a*)

A contract which does not comply with the requirements of the 4th section of the Statute of Frauds is not, however, *per se*, void, though no action can be brought upon it. Therefore it was held that the plaintiff in the case last referred to, having paid the annuity for several years under the above memorandum of agreement, could not recover back the money so paid, as upon a failure of consideration.(*b*)

Contract may be collected from a number of papers.

It is not necessary that a contract, required by the Statute of Frauds to be in writing, should be contained in one document. It may be collected from any number of papers,(*c*) provided they are, upon the face of them, sufficiently connected in sense, and do not require parol evidence to establish the connection, parol evidence being inadmissible for that purpose.

Thus, where a publisher proposed to publish by subscription an illustrated edition of Shakespeare, to appear in numbers, at the price of three guineas a number, two guineas to be paid at the time of subscribing, and the remaining guinea on the delivery of each successive number; the prospectus stating "that one number, at least, should be published *annually*," and that the proprietors were confident that they should be able "to produce *two numbers* within the course of *every year*;" and the defendant, wishing to become a subscriber, wrote his name in a book kept for the purpose in the plaintiff's shop, entitled, "*Shakspeare Subscribers, their Signatures*;" printed copies of the prospectus lying at the same time in the plaintiff's shop, but neither prospectus nor book of subscribers containing any reference the one to the other, it was held that the contract of the defendant was one not to be performed within the space of a year from the making thereof, and therefore that, in order to be enforceable by action, it must be in writing.(*d*)

The defendant having refused to continue to take in the numbers of the book, an action was brought against him by the publisher; but it was held that the action could not be maintained for want of a written agreement or memorandum signed by the party to be charged therewith, as required by the 4th section of the Statute of Frauds. The prospectus contained the terms of the agreement, and if it

(*a*) *Sweet* v. *Lee* (4 Scott's N. R. 77; 3 M. & Gr. 452). (*b*) *Ibid.*
(*c*) *Jackson* v. *Lowe* (1 Bing. 9); *Phillimore* v. *Barry* (1 Camp. 513); *Saunderson* v. *Jackson* (2 B. & P. 398); *Johnson* v. *Dodgson* (2 M. & W. 653); &c.
(*d*) *Boydell* v. *Drummond* (11 East. 142).

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could be coupled with the book of subscribers in which the defendant had signed his name, it would be a sufficient memorandum of the agreement to satisfy the statute; but as it contained no reference to the book, nor the book to it, there was no connection in sense between them which would enable the Court to couple them together, and treat them as one document; and parol evidence to establish such a connection was inadmissible.(*a*) "If," said Le Blanc, J., "there had been anything in the book which had referred to the particular prospectus, that would have been sufficient: if the title to the book had been the same with that of the prospectus, it might perhaps have done: but as the signature now stands, without reference of any sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus, and saying that it was the prospectus exhibited in his shop at the time, to which the signature related: the case therefore falls directly within this branch of the Statute of Frauds."(*b*)

Defective form of agreement.

A difficulty in the interpretation of an agreement between an author and a publisher for the publication of the author's book, sometimes arises from the neglect to state distinctly in the agreement whether it is intended by the parties to operate as an assignment of the copyright, or merely as a licence to publish. The cases of *Stevens* v. *Benning* and *Reade* v. *Bentley*, already referred to (*ante*, pp. 176, 177), exemplify the difficulty; in the latter of which cases the Vice-Chancellor (Wood) refused to allow costs to either party, considering each of them to blame for the defective form of the agreement.

Fixing price and choosing embellishments.

Where the agreement is that the publisher shall take the whole charge and risk, and the whole duty of bringing out the work as he thinks best for the interest of both parties, it seems, according to Lord Hatherley, to be necessarily incident to the duty which the publisher has to perform, that he shall(*c*) also have the right of fixing the price at which the work is to be brought out.

His Lordship considered that it was further implied in the agreement in the case before him (*vide ante*, p. 177), that the publisher was to choose the embellishments and everything else connected with the publication, and that he was to do this for all editions which should be brought out during the subsistence of the agreement.(*d*)

(*a*) *Boydell* v. *Drummond* (11 East. 142). (*b*) *Ibid.*
(*c*) *Reade* v. *Bentley* (3 K. & J. 276). (*d*) *Ibid.*

"Several difficulties," said his Lordship, "arising upon such a construction have been suggested. It was argued, can it be supposed that the plaintiff intended to give to the publisher the power, if he chooses, of bringing out the work with absurd embellishments beneath its character and injurious to the reputation of the author? The simple answer to that is, the author will take care of himself in that respect by going to a respectable publisher, who would not commit any such absurdity. If he employed a publisher who was in the habit of adding ridiculous illustrations to his works, he would not have reason to complain if the work were so published. The author would select a publisher who, he would presume, would bring out the work in a manner creditable and desirable. So again with regard to the price, it is suggested that the publisher might just so arrange the balance of prices as to enable himself, by an accurate calculation, to get his £10 per cent. commission, and leave nothing to pay the author. The answer is similar: it is not to be supposed that the author would deal with any publisher who was in the habit of so treating authors. If a publisher were to act in such a manner, although perhaps such conduct could not strictly be called a fraud, because it might not be a violation of the specific terms of the agreement, the result would be that the author whom he so treated would never contract with him again."

In an agreement like the foregoing, where the work was to be brought out at the publisher's expense and the profits to be divided, the addition of a clause providing that the books sold should be "accounted for at the trade sale price, reckoning twenty-five copies as twenty-four, unless it be thought advisable to dispose of any copies, or of the remainder at a lower price, which is left to the judgment and discretion" of the publisher, does not justify an inference that the publisher has no discretion in fixing the price except in the particular case there mentioned. The meaning of such a clause is explained by Lord Hatherley (when Vice-Chancellor) in *Reade* v. *Bentley*.(*a*) "It is quite obvious that this clause was introduced with no such view, but because Mr. Bentley is to bring out the work, and in bringing it out he is to fix a certain price to the trade; he is aware that there are persons who are in the habit of purchasing all these works for re-sale; there is a certain quantity in the first instance offered to the trade, as it is called, who

(*a*) 3 K. & J. 277.

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send in their orders, each buyer for a certain quantity of copies, and it is brought out to the trade at a price which is fixed upon each edition. Then it might happen that some copies would remain unsold. Mr. Bentley first agrees to account with the author for all copies at the trade price; but then, as that might be too hard upon the publisher, who has had all the expense of bringing out the work, it is agreed that, if any copies remain unsold, he is to have liberty, as regards that edition, to dispose of the unsold copies at a lower price. That is the obvious meaning of this clause, and it has no reference to the general question of fixing or not fixing the price."

Time and mode of publication.

On the same principle, the publisher is, in such a case, the proper person to fix the time and mode of publication.(*a*)

Agreement for division of profits after payment of expenses.

An agreement between an author and a publisher that the latter should publish, at his own risk and expense, a work belonging to the former, on the terms of an equal division of the profits after all expenses had been paid, may be regarded in the double light of a licence and a partnership—a licence for the publication of the work, and then a joint adventure between the author and publisher in the copies so to be published.(*b*) The publisher cannot be considered in such a case as merely the agent of the author, as a mere agent never embarks in the risk of the undertaking.(*c*)

Power to determine agreement.

When it is sought to put an end to such a joint adventure, a difficulty may sometimes arise in the choice of the time for making the requisite application. If the author seeks to determine the contract, and to prevent the publication of any subsequent edition by the publisher, he must take steps for the purpose before any expense is incurred by the publisher in respect to such subsequent edition. If the publisher has incurred expense of this nature, he has a right to be recouped it, and to have the benefit of all the profit, the hope of obtaining which induced him to incur such expenditure.(*d*) But where expense has not been incurred by the publisher in respect to a subsequent edition, the author has a right to determine the joint undertaking, and to prevent the further publication of his work by the publisher, even though the publisher has stereotyped the work previously to the publication of the last published edition.(*e*)

(*a*) *Reade* v. *Bentley* (4 K. & J. 665).
(*b*) *Stevens* v. *Benning* (6 D. M. & G. 231); *Reade* v. *Bentley* (4 K. & J. 663).
(*c*) 4 K. & J. 662. (*d*) 3 K. & J. 279. (*e*) 4 K. & J. 656.

In determining the point last referred to, Lord Hatherley stated the difficulties that beset the question, and the grounds on which his decision rested. On the one hand it might be said on behalf of the publisher that he had given to the undertaking the benefit of his talents and position as a publisher, and had incurred expenses in bringing out the first edition, in the expectation of being recouped the cost of the first by the sale of the second and subsequent editions; and that to hold the author entitled, at his own instance, to determine the agreement when the first edition had been published, would be to enable him by an arbitrary and unreasonable exercise of that power to deprive the publisher of all his profits. On the other hand, it may be urged on the part of the author that, unless he has the power of determining the agreement, the consequence would be that he may be under an obligation to the publisher during the whole of the publisher's life, while the publisher will be under no reciprocal obligation to him. The publisher could compel the author to abstain from publishing a single copy of the work so long as he expressed his readiness to continue publishing, while the author has no reciprocal power: he could never compel the publisher to publish more than a single edition of the work. Further, the publisher, in the *bonâ fide* exercise of his discretion as to the fitting time and mode of publication, might decline indefinitely to publish, but without resigning his contract; while the author might, at the same time, be of a contrary opinion, and yet for months or even years might be kept in suspense, and prevented from publishing on his own account, until his publisher should be of opinion that the time had come for the revival of the public interest in the work. His Lordship considered the position of the author, under such circumstances, to be one of so great hardship and difficulty, that unless it were clearly shown to have been contemplated by both parties to the agreement, it should not be forced upon him.(*a*)

Where the agreement between author and publisher states that after payment of the expenses of publication, &c., "the profits remaining of *every edition* that should be printed of the work are to be divided into two equal parts," one moiety to go to the author and the other to the publisher, this points out certain definite times for the adjustment of the accounts, and at which the author becomes entitled to terminate his agreement with the publisher.(*b*)

By stereotyping the work the publisher does not deprive

(*a*) 4 K. & J. 664–666. (*b*) *Ibid.*

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Meaning of "edition."

the author of this right. It was objected in *Reade* v. *Bentley*, that when a work has once been stereotyped the term "edition" is no longer applicable; that when a work is published in what is called "thousands," twenty thousand or thirty thousand being circulated, each thousand could not properly be called an edition. To this Lord Hatherley replied: "I apprehend that not merely in point of etymology, but having regard to what actually takes place in the publication of any work, an 'edition' of a work is the putting of it forth before the public, and if this be done in batches at successive periods, each successive batch is a new edition; and the question whether the individual copies have been printed by means of movable type or by stereotype does not seem to me to be material. If movable type is used, the type having been broken up, the new edition is prepared by setting up the type afresh, printing afresh, and repeating all the other necessary steps to obtain a new circulation of the work. In that case the contemplated break between the two editions is more complete, because, until the type is again set up, nothing further can be done. But I apprehend it makes no substantial difference, as regards the meaning of the term 'edition,' whether the new 'thousand' have been printed by a re-setting of movable type, or by stereotype, or whether they have been printed at the same time with the former thousand or subsequently. A new 'edition' is published whenever, having in his storehouse a certain number of copies, the publisher issues a fresh batch of them to the public. This, according to the practice of the trade is done, as is well known, periodically, and if, after printing 20,000 copies, a publisher should think it expedient for the purpose of keeping up the price of the work, to issue them in batches of a thousand at a time, keeping the rest under lock and key, each successive issue would be a new edition in every sense of the word."(*a*)

It was held by the Scotch Court of Session that a reprint of part of a book, to replace copies in the hands of the publisher which had been destroyed by an accidental fire, was not an edition entitling the editor of the work to insist on superintending the issue and receiving remuneration in pursuance of a contract by which he was to "superintend any other edition or editions of the work which should be thereafter published, for doing which he should receive" a certain remuneration.(*b*)

(*a*) 4 K. & J. 667.
(*b*) *Blackwood* v. *Brewster* (23 Scotch Sess. Cas. 2nd ser. 142, December 7th, 1860).

Where an authoress entered into a verbal agreement with a publisher that he should publish at his own expense a book written by her and pay her a royalty on each copy sold, Jessel, M.R., held that no agreement could be implied on the part of the authoress not to bring out a new edition until the whole of the first edition was sold. A bill filed by the publisher to restrain the authoress and another publisher from bringing out a second edition was dismissed with costs.(*a*)

"It is said," remarked his lordship, "that if you give the publisher no protection the result may be that the author may publish a new edition a day or two after the publication of the first edition, and so destroy the value of the copies of the first edition remaining unsold. That may be, and it is said that that is so unreasonable that you must infer some stipulation to prevent it. Why? No doubt partnerships at will have their inconveniences as well as conveniences. There is no reason why I should make persons take up a totally different position from that which they have agreed to take up, because it might be convenient to one of the parties after the termination of the arrangement. If you do want that protection for a term of years, or for a definite term, you must contract for it. That is all. But I cannot import such a term into the contract. If I did I should make partnerships at will involve consequences that the partners never dreamt of."(*b*)

Selling copies after expiration of limited period of copyright.

Where the copyright in a work for a limited period is sold, the purchaser may continue to sell after the expiration of that period copies printed before its expiration, unless in a case of actual fraud.(*c*)

In a case where the copyright for four years in a book was sold to a publishing firm, a motion for an injunction to restrain the selling of copies, four years after the expiration of the term, was refused. It was suggested that the effect of permitting the sale might be to destroy altogether the author's copyright, as the purchaser of the copyright for a limited period might during that period print off copies enough to last for all time. To this Wood, V.C., replied: "A nice question might arise as to the number of copies of which an edition might consist; but a publisher was not likely to incur the useless expense of printing copies enough to exhaust the demand for all time, and have them lying

(*a*) *Warne* v. *Routledge* (L. R. 18 Eq. 497).
(*b*) *Warne* v. *Routledge* (L. R. 18 Eq. 502).
(*c*) *Howitt* v. *Hall* (10 W. R. 381; 6 L. T. N. S. 348).

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upon his hands unprofitably. Besides this, even if the effect of a sale for four years might operate in this way to deprive the author of all copyright in his work, the answer was, that he had not guarded himself against such a contingency. If a manifest case of fraud upon the author were established, the Court would know how to deal with it; but nothing of the sort was shown. The defendants had acted quite *bonâ fide*, and were making a perfectly legitimate use of their contract."(*a*)

Selling copies of first edition after publication of a second.

So where the agreement between author and publishers was a mere verbal one, that the latter should publish at their own expense the book of the former, paying a royalty on each copy sold, Sir George Jessel, M.R., considered it plain that no termination of the agreement could deprive the publishers of the right of selling for their own benefit (subject to the royalty) the copies which they had printed under the arrangement.(*b*)

Mere licence not assignable.

Where there is a mere licence to publish, and not an assignment of the copyright, the contract is of a personal nature on both sides, and the benefit of it is not assignable by either party without the consent of the other.(*c*)

Where a contract in writing was entered into between an author and a firm of publishers, whereby the former agreed to give unto the latter "the exclusive right to print and publish an edition of one thousand copies of a work to be written" by the author; in consideration whereof the publishers agreed "to print and publish an edition above mentioned (one thousand copies) at their own cost and expense, and pay the author the sum of fifteen cents each for all and every copy sold;" it being further agreed that if the publishers "find a second edition called for, the said author should revise and correct a copy of the first edition ready for the press, which the said publishers agree to have stereotyped at their own cost, having the exclusive use and control of the plates, printing as many copies as they can sell, paying to the said author the sum of twenty cents for each and every copy sold; settlement to be made semi-annually from the day of publication, on their note at four months from the date of settlement;" and the publishers, with the author's knowledge and acquiescence, had them-

(*a*) *Howitt* v. *Hall* (10 W. R. 381; 6 L. S. N. S. 348).
(*b*) *Warne* v. *Routledge* (L. R. 18 Eq. 501).
(*c*) *Stevens* v. *Benning* (6 De G. M. & G. 223), followed by Fry, J., in the recent case of *Hole* v. *Bradbury* (L. R. 12 C. D. 886). See *Pulte* v. *Derby* (5 M'Lean, 335).

selves recorded as proprietors of the copyright, it was held, in America, that they had the legal title to the copyright in them, but only for the purposes of the contract. "The right," said the court, "covers their interest, and protects it so long as they shall be engaged in the publication and sale of the work. Beyond this, they are not considered as having the right. They cannot transfer it. They have no power to assign the copyright, nor to publish the work except upon the terms of the contract. In this respect the parties are bound to each other, and the contract, it is considered, covers the entire printing and publishing of the work."(*a*)

The first edition of the work in this case having been exhausted, the publishers stereotyped the corrected manuscript of the second edition, but printed only 1500 copies of the first impression, and when these were sold 2000 more copies were published, being called in the title-page the third edition. The author then revised a third edition, caused it to be stereotyped and printed, and took out a copyright in his own name, and filed a bill for an injunction to prevent the publishers from further printing, publishing, or selling their third edition, as contrary to his wishes and desires, and in fraud of his rights. The court held that the publishers were not limited under the contract to the number of copies which they might strike off at the first impression of the second edition, but might print any number they could sell, as they should be wanted during the existence of the copyright; and that the author had no right to print an edition for himself and take out a copyright, so long as the publishers complied with the contract.(*b*)

The court also held that though the publishers could not transfer their copyright to a third party, they might sell him the plates and authorise him to publish, still accounting to the author, pursuant to the contract. It was further held that the publishers were bound to keep the market supplied, and could not refuse to print if they could sell.(*c*)

A writer agreed with a publisher to edit a translation of Montaigne, adding notes and a biographical sketch of the author, for a particular sum, which was to be increased by other sums as further editions should be published. It was intended that the publisher should have the sole right of multiplying copies of the work, but there was no assignment to him of the copyright. After the publisher's death his widow and executrix, with the author's knowledge and assent, registered the copyright in her own name. On the publication

(*a*) *Pulte* v. *Derby* (5 M'Lean, 328, 335). (*b*) *Ibid.* (*c*) *Ibid.*

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of a fresh edition, the widow paid the author money, and gave him copies of the work on the same terms as were contained in the agreement made with her husband in his lifetime; and on three occasions, when the author claimed remuneration on those terms, she did not repudiate all liability, but disputed merely the amount. This was held by the Court of Queen's Bench to be evidence from which a jury might infer an agreement on the part of the widow to remunerate the author on the same scale as in the agreement with her husband, in consideration of the author assenting to her registering the copyright in her own name.(*a*)

Payment to author's representatives for unfinished work.

An author agreed with a bookseller for the publication of a work of science, to be entitled the "Elements of Mechanical Philosophy," and to be published in parts, each part to be paid for when published. After the publication of one volume, which constituted in itself a complete part, the progress of the work was interrupted by the death of the author. It was held by the Scotch Court of Session, that the representatives of the deceased author were entitled to payment of the stipulated price of the published volume. One judge dissented, thinking the contract was one for the entire work, and that the object of partial payment was the accommodation of the author, and not any qualification of the original obligation.(*b*)

Specific performance not decreed.

Courts of equity have no jurisdiction to decree specific performance of contracts between authors and publishers for the composition by the former of works to be published by the latter.(*c*)

Where a barrister agreed with a publisher to write, for a stipulated remuneration, reports of cases decided in the Court of Exchequer, to be printed and published by the publisher, Lord Eldon refused an injunction to restrain the barrister from permitting reports written by him to be published by another person. "I have no jurisdiction," said his Lordship, "to compel Mr. Price to write reports for the plaintiff. I cannot, as in *Morris* v. *Colman*,(*d*) say that I will induce him to write for the plaintiff by preventing him from writing for any other person, for that is not the nature of the agreement. The only means of enforcing the execution of this agreement would be to make an order compelling Mr. Price to write reports for the plaintiff, which I have not the

(*a*) *Hazlitt* v. *Templeman* (13 L. T. N. S. 593).
(*b*) *Constable* v. *Robinson's Trustees* (14 Fac. Dec. 166, 1 June 1808).
(*c*) *Clarke* v. *Price* (2 Wils. Ch. Cas. 157).
(*d*) 18 Ves. 437. *Vide post*, p. 344.

means of doing. If there be any remedy in this case, it is at law. If I cannot compel Mr. Price to remain in the Court of Exchequer for the purpose of taking notes, I can do nothing. I cannot indirectly, and for the purpose of compelling him to perform the agreement, compel him to do something which is merely incidental to the agreement. It is also quite clear that there is no mutuality in this agreement. I am of opinion that I have no jurisdiction in this case."(*a*)

In the case of an agreement between an author and a publisher, that the latter should publish at his own risk and expense the work of the former, on the terms that the profits should be equally divided, and that the author should, if a subsequent edition were required, prepare it for the press, and the publisher should print it on the same terms, Knight Bruce, L.J., was of opinion that the duties on neither side were of such a nature that their performance could be specifically enforced by a court of equity.(*b*)

Damages for breach of contract.

Either party may, however, in such a case be made liable in damages for breach of contract.

Thus, where a person was employed to write a treatise on a particular subject to be published in the *Juvenile Library*, but before he had completed the treatise the *Juvenile Library* was abandoned by the defendants who had employed him, he was held entitled to recover damages for the breach of contract on the part of the defendants, without any tender or delivery of the treatise on his own part.(*c*)

And the publisher may maintain an action against the author for breach of contract to deliver the manuscript of a work to be published, provided the work is of an innocent character.(*d*)

Though the terms of the contract between author and publisher be that the latter should bring out the work at his own expense, and that the profits should be divided between both, this does not prevent the bringing of such an action as last referred to, because it is not brought to recover partnership profits from the author, but to make him liable for not contributing his labour towards the attainment of profits

(*a*) 2 Wils. Ch. Cas. 165.

(*b*) *Stevens* v. *Benning* (6 De G. M. & G. 229). See also the remarks of Jessel, M.R., in *Warne* v. *Routledge* (L. R. 18 Eq. 499, 500).

(*c*) *Planchè* v. *Colburn* (8 Bing. 14; 5 C. & P. 58); and see *Colnaghi* v. *Ward* (6 Jur. 969), where an action was brought for breach of contract to deliver an engraved plate to be published by the plaintiff.

(*d*) *Gale* v. *Leckie* (2 Stark. N. P. 107).

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to be subsequently divided between the parties.(a) Lord Ellenborough indicated the amount of damages to be given in such a case as that which would include the expenses of publication, and the profits which would probably have been derived from it.(b)

Agreement between publishers not to sell under a certain price.

The defendant, having printed a book, sold 300 copies of it to the plaintiff, a bookseller, at 40s. a copy, and agreed by letter "only to sell to others at 48s. in quires, and single copies at 50s. until" the plaintiff's 300 copies were sold or the plaintiff should consent. The letter also contained these words: "I do not expect you to sell under 48s. and 50s.; but do as you like." The plaintiff, when he had sold part of the 300 copies, went into partnership with S., and transferred all his stock at the cost price; and also sold some copies at 45s. and 46s. An action being afterwards brought by him against the defendant for selling copies under the stipulated price, it was contended on behalf of the defendant, first, that the plaintiff was bound by implication not to sell the work himself under the price at which the defendant was to sell, and that his selling at 45s. and 46s. was an answer to the action, as being against the good faith and honour of the contract, inasmuch as it would tend to prevent the defendant from selling his copies at all; and, secondly, that the contract was put an end to by the plaintiff's going into partnership with S., and transferring his interest to a firm at 40s. a copy; because the undertaking of the defendant was only to continue in force till the 300 copies were sold by the plaintiff, and his parting with them to the firm of which he was only a partner was in fact a selling, just as much as it would be in the case of a joint-stock company. Lord Denman, C.J., held that he could not nonsuit on either ground;—upon the first ground, as the facts relied on did not appear to have been communicated to the defendant; and with respect to the second, enough did not appear of the terms on which the partnership commenced, to justify the decision that there was a parting with the books by the plaintiff, within the meaning of the agreement. His Lordship held, however, that on the question of damage it might be considered whether the plaintiff's own underselling had or had not contributed to affect the price of the work in the market.(c)

Contract to print within a specified time.

A contract between a publisher and a printer, whereby the latter undertakes to print a work within six months, does

(a) *Gale* v. *Leckie* (2 Stark. N. P. 107). (b) *Ibid.*
(c) *Benning* v. *Dove* (5 Car. & P. 427).

not bind the former to furnish the materials within the six months in the absence of an express stipulation to that effect.(*a*) Such an engagement to print within six months is only conditional upon the copy being supplied to the printer fast enough; but it does not create by inference an engagement by the employer to furnish it within that time. It would, however, be an answer to any action that might be brought against the defendant for not printing the work within the six months, to say that the copy was not supplied fast enough.(*b*)

Specific performance of contract for sale of copyright.

Courts of equity have jurisdiction to enforce the specific performance of a contract for the sale of a copyright; even when other matters are mixed up with it.(*c*) Lord Langdale, M.R., overruled a demurrer to a bill for the specific performance of a contract for the purchase of a copyright, stereotype sheets, prints, stock-in-trade, &c.(*d*)

Warranty on sale of copyright.

It has not been decided whether, on the sale of a copyright, the law would imply a warranty of title in the absence of an express warranty.

Where the executor (who was also the son) of a deceased author, in reply to an offer from a publishing house relating to one of his father's works, replied that he would be happy to treat with them "respecting the copyright" in it; and, in another letter, said he had accepted their offer "for the exclusive right of publishing it," and gave a receipt for the money paid "for permission to publish the work so long as the copyright may endure; that right to be exclusively their [the publishers'] own for ten years from this date," it was held that this amounted to an express warranty of title; and an equitable assignment of the copyright having, unknown to the executor, been previously made to another publisher, the executor was held liable to an action for breach of the warranty.(*e*)

Contracts between joint owners of copyright.

Joint owners of a copyright in a work may, no doubt, make what contract they please between themselves as to the printing and publishing of it, and neither will be permitted to set up against the other his original rights as a joint owner in violation of such contract.(*f*)

(*a*) *Mawman* v. *Gillett* (2 Taunt. 325). (*b*) *Ibid.*
(*c*) *Thombleson* v. *Black* (1 Jur. 198). (*d*) *Ibid.*
(*e*) *Sims* v. *Marryat* (17 Q. B. 281).
(*f*) See the American case of *Gould* v. *Banks* (8 Wend. 568). "There is no principle or authority," said the Court, "which will inhibit such a contract between parties, because they may be partners in the subject matter of it. They may bind themselves by a private agreement concerning the partnership business, but so far as third

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Alteration of work by publisher.

If a person contracts to supply another with a composition in such a form as to enable the latter to publish it as his own, a court of equity will not restrain the publication of the manuscript in an altered or mutilated form.(*a*) The late Lord Hatherley (when Vice-Chancellor Wood), expressed an opinion that, unless there is a special contract, express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper.(*b*)

Where the editor's salary was by way of royalty on the number of copies of the journal sold it was argued that the publishers were not authorised in making any alterations in the editor's articles. As to this Sir John Romilly, M.R., said: "It appears to me that it would lead to a great amount of difficulty if the owners of a copyright in a journal were bound to insert everything which the editor thought fit. Everyone would allow that they would not be bound to insert any libellous matter. How is the Court to draw the line and to determine how far the owners of the copyright may interfere with the discretion of the editor? . . . . The matter resolves itself into this: if the defendants unduly interfere with the functions of the editor, or he improperly introduces matter which is injurious to the journal, the best course is to have it settled at law, and to leave it to a jury to determine the amount of damages."(*c*)

In the same case the Court refused to restrain by injunction the publishers from omitting the editor's name from the title page. The agreement between editor and publishers was that the journal should be called the *Photographic News*, or by such other title as may be mutually agreed upon." The Master of the Rolls was of opinion that the name of the editor was not a necessary part of the title;(*d*) and it was no part of the agreement that it should be such.

Edition falsely purporting to be by author.

But it seems that if a publisher puts forth an inaccurate edition of an author's work, purporting to be executed by him, the author may maintain an action against the publisher for injury to his reputation, even where the publisher is the owner of the copyright.(*e*)

Payment of author.

An injunction will not be granted to restrain the publication of a manuscript on the ground that the sum agreed to be paid to its author for contributing it, has not been paid;

persons may be interested, it would be inoperative as to them." See also Lindley on Partnership, 869, 870, 2nd edit.

(*a*) *Cox* v. *Cox* (11 Hare, 118). (*b*) *Ibid.*
(*c*) *Crookes* v. *Petter* (6 Jur. N. S. 1133). (*d*) *Ibid.*
(*e*) *Archbold* v. *Sweet* (1 M. & Rob. 162).

for such payment may be enforced at law, and the title to it is not a ground for the interposition of a court of equity.(*a*)

If an author has agreed with a publisher for the publication of his book, and the publisher has in consequence made advances of money, an injunction would, it seems, be granted to restrain the publication of the work by another publisher until the former had been repaid.(*b*)

Right of author to publish a continuation of his work.

Where a bookseller agreed with an author for an edition of a new translation of Buchanan's "History of Scotland," with a continuation to the time of the Union, to be contained in four volumes, and had obtained subscriptions for all that could fall within his edition, he was held by the Court of Session not entitled to prevent the author from publishing in a fifth volume a continuation of the history, which embraced part of the period, and also some of the matter contained in the last of the four volumes, this being repeated in order to keep up the connection.(*c*)

An arrangement was entered into between Dr. Brewster and Professor Jameson, on the one part, and an Edinburgh publishing firm on the other part, for the publication of a work, to be edited by the former, called *The Edinburgh Philosophical Journal;* the agreement to be binding for five years, or till the termination of the twentieth number of the journal. On the title-page the journal was stated to be "conducted by Dr. Brewster and Professor Jameson." After the twentieth number had appeared, Dr. Brewster, having differed with the firm, published a prospectus of "No. 1 of the New Series of the *Edinburgh Journal,* conducted by Dr. Brewster," whereupon the firm presented a bill of suspension and interdict of a work under this title, on the ground that they were proprietors of the original journal, the publication of which they intended to continue, and that the proposed work was an invasion of their property. The Lord Ordinary, "in respect the copyright of the publication in question is the property of the complainers," passed the bill, and granted the interdict. The Court of Session recalled this interlocutor as deciding the question to be discussed on the passed bill; but at the same time remitted to pass the bill and continue the interdict.(*d*)

Title of a periodical partnership asset.

One of the joint owners of a well-known periodical, even though he is also editor with absolute control over the literary department, has no right on a dissolution of partnership,

(*a*) *Cox* v. *Cox* (11 Hare, 118).
(*b*) *Brooke* v. *Wentworth* (3 Anstr. 381).
(*c*) *Blackie* v. *Aikman* (5 Scotch Sess. Cas. 719, 26 May, 1827).
(*d*) *Constable* v. *Brewster* (3 Scotch Sess. Cas. 215).

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caused by his leaving it, to advertise that the publication was "about to be discontinued." Sir John Romilly, M.R., held that the right to use the name of the periodical was part of the partnership assets, to be sold for the benefit of all the partners. He was of opinion, however, that the editor might advertise the discontinuance of the publication as regarded himself.(a)

Contract not to compose for any other than a particular theatre.

A covenant in articles of partnership, by which a dramatic writer undertakes not to compose pieces for any other than a particular theatre, is a legal covenant.(b) Such a covenant was compared in argument before Lord Eldon to contracts in restraint of trade, which are void on principles of public policy; but his Lordship said, "I cannot perceive any violation of public policy in this provision. The case of trade to which it has been compared is perfectly distinct. . . . . The contract is not unreasonable upon either construction; whether it is that Mr. Colman shall not write for any other theatre without the licence of the proprietors of the Haymarket Theatre, or whether it gives to those proprietors merely a right of pre-emption."

The Court could not compel Colman to write for the Haymarket Theatre; but it did the only thing in its power—it induced him indirectly to do one thing by prohibiting him from doing another.(c)

Contract not to publish a work which would prejudice another work.

In the case of *Barfield* v. *Nicholson and Kelly*,(d) the defendant Nicholson had sold to the plaintiff his copyright in a work called "The Architectural Dictionary," and had covenanted for himself, his executors, and administrators, that he would not, by publishing any other work which might be prejudicial to the sale of it, or in any manner, directly or indirectly, prejudice the circulation or publication of the dictionary. The defendant Kelly, according to his affidavit, after this, and in total ignorance of the arrangement between the plaintiff and Nicholson, employed the latter in the composition of a work called "The Practical Builder," which was published by Kelly. The plaintiff charged that this work was in part pirated from "The Architectural Dictionary," and filed a bill to restrain the publication of it. Sir John Leach, V.C.—being of opinion that the plaintiff had no property in the figures and letterpress of "The Architectural Dictionary," alleged to have been pirated in

(a) *Bradbury* v. *Dickens* (27 Beav. 53).
(b) *Morris* v. *Colman* (17 Ves. 437).
(c) *Per* Lord Eldon in *Clarke* v. *Price* (2 Wils. 164).
(d) 2 Sim. & St. 1.

"The Practical Builder," as they had all been given to the world before either of those works appeared—dissolved an injunction which had been granted against Kelly. But the Lord Chancellor (Eldon), on appeal, ordered that an injunction should be awarded to restrain Kelly from publishing or selling in the name of Nicholson "The Practical Builder," or any portions of it. The grounds on which the order was made are not stated; but the injunction was granted most probably on account of the covenant between Nicholson and the plaintiff, which was considered sufficient to hinder the defendant, though ignorant of its existence, from publishing, through the instrumentality of Nicholson, any book which would be detrimental to the sale of "The Architectural Dictionary."

If an author contracts not to write or edit any other work on the subject treated in a work already written by him, a court of equity will not interfere until there is a violation of the agreement by actual printing and publication.(*a*)

Where the plaintiff purchased of the defendant the copyright of a treatise written by him upon the criminal law, the defendant undertaking not to write or edit any other work upon that subject, and an advertisement appeared that the defendant was about to edit "Burn's Justice," Lord Brougham refused a motion to restrain him from editing articles on the criminal law in that book, saying that the defendant was at liberty to write in his closet what he pleased. The Court interfered only when actual printing and publication took place.(*b*)

The plaintiffs purchased from the defendant (a publisher) the whole of his copyright, stock-in-trade, and business property, including an annual called (from the defendant's name) *Beeton's Christmas Annual*. Subsequently the defendant contracted, in consideration of a yearly salary, to devote the whole of his time and attention to the developing of the plaintiffs' publishing business, not to engage in any other business without the plaintiffs' consent, to allow the plaintiffs the use of his name for the purpose of their present or future publications, and not to permit the use of his name for any publications without the plaintiffs' consent. The plaintiffs procured another author to prepare *Beeton's Annual* for Christmas, 1874, and advertised it. Vice-Chancellor Malins restrained the publication by the defendant of an advertisement stating that he had no hand or concern in this annual, and that the annual devised by him, and

(*a*) *Brooke* v. *Chitty* (2 Cowp. 216). (*b*) *Ibid.*

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written by the authors of the two preceding annuals, would not be issued by the plaintiffs, but by a different firm of publishers.(*a*)

Contract of married woman.

On the subject of the capacity of a married woman, entitled to the copyright of a work for her separate use, to bind herself by contract with a publisher, before the Married Women's Property Act, 1882,(*b*) Jessel, M.R., thus expressed himself:(*c*) "As I understand, the mere power of contracting which a married woman has in respect of such property is not a power of entering into a personal contract in the sense of binding her personally, but a power of contracting so as to bind her property: in other words, you can enforce that contract as against the persons who, for the time being, hold that property, so far as it is a contract affecting the property. Therefore I take it that it is not impossible that a married woman may so deal with copyright to which she is entitled for her separate use as to prevent the assigns of that copyright from breaking her contract. In other words, I think it is quite possible that a married woman may put a kind of fetter upon the right to publish; that is to say, she may so far validly bind the copyright, which is a right to publish, that no person claiming under her by way of assignment or licence, with notice, would be allowed to publish."

Mortgage of a newspaper.

There is nothing analogous to copyright in the name of a newspaper, and a mortgage of a share in a "newspaper and the copyright and right of publication thereof and all profits arising therefrom," is not an assignment of copyright which requires registration at Stationers' Hall, but merely an assignment of a chattel interest in the publishing adventure, which derives no additional efficacy from the registration. Such a registration is quite futile.(*d*)

The lien on the mortgaged share of any co-adventurer in the undertaking, for capital advanced by him, must first be satisfied before the mortgage can be made available by the mortgagee.(*e*)

A suit having been instituted between Messrs. Beeton and Hutton as to the proprietorship of the *Sporting Life* newspaper, which ultimately decided that they were entitled in equal shares, Mr. Beeton, during the progress of the suit, assigned by way of mortgage his share in the newspaper,

(*a*) *Ward* v. *Beeton* (L. R. 19 Eq. 207).
(*b*) 45 & 46 Vict. c. 75. (*c*) *Warne* v. *Routledge* (L. R. 18 Eq. 500).
(*d*) *Kelly* v. *Hutton* (L. Rep. 3 Ch. App. 703; 19 L. T. N. S. 228; 38 L. J. 917, Ch.).
(*e*) *Ibid.*

"and the copyright and right of publication thereof, and all profits arising therefrom," to Messrs. Wrigley and Son, the assignment containing a recital of the proceedings in the suit, and a power of sale. Beeton subsequently mortgaged the same share to his partner Hutton, to secure two sums due to Hutton of £2000 and £512, with interest at 7½ per cent.; the former sum being the amount Beeton had been overpaid on a settlement of accounts with Hutton, the latter sum being the balance of Beeton's purchase-money for his moiety of the newspaper. Messrs. Wrigley and Son registered the assignment to them at Stationers' Hall, under the provisions of the Copyright Act, and subsequently, under their power of sale, sold the mortgaged share to the plaintiff Kelly, who filed a bill for a declaration that he was entitled to a moiety of the newspaper. Both Wrigley and Son and the plaintiff Kelly had permitted the newspaper to be carried on as formerly by Beeton and Hutton. The Lords Justices of Appeal held that the plaintiff could only take Beeton's share in the newspaper, subject to the equities subsisting between the parties. "Many points have been raised before us," said Lord Hatherley (then Sir W. Page Wood, L.J.), "as regards the property which was the subject of the mortgage to Wrigley and Son, of the 21st April, 1864. It appears to us that Beeton and Hutton the elder were engaged in a joint adventure, namely, the publishing of the paper in question. Capital was required for this adventure, and the co-partners or co-adventurers possessed leasehold premises and type, and other chattels necessary for carrying it on. The mortgage to Wrigley and Son assigned to them Beeton's share in the newspaper, whatever it might be, and all profits belonging thereto or arising therefrom. In the habendum the deed speaks of the copyright of the newspaper, and the right of continuation and publication thereof. Now it appears to us that there is nothing analogous to copyright in the name of a newspaper, but that the proprietor has a right to prevent any other person from adopting the same name for any other similar publication; and that this right is a chattel interest capable of assignment was held in *Longman* v. *Tripp*(*a*) and *Ex parte Foss*.(*b*). The mortgage, then, to Wrigley and Son, was that of Beeton's share of a chattel, which formed the principal subject of the co-adventure between Beeton and Hutton the elder. Considerable stress has been laid in argument, on the part of

(*a*) 2 Bos. & P. 67.

(*b*) 2 De G. F. & J. 230.

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the appellants, on the necessity of notice being given of such an assignment either by direct notice to Hutton the elder, or by an entry at the Inland Revenue Office; and much controversy has arisen in evidence as to whether Hutton the elder had or had not in fact such notice prior to the 9th of March, 1866. The entry of their mortgage by Wrigley and Son at Stationers' Hall was clearly futile; but we do not pause to consider the question further, because it is clear on the face of their mortgage deed that Wrigley and Son were aware of the litigation between Beeton and Hutton the elder. They allowed the joint adventure to be worked jointly, whether with or without notice, and it is impossible that they can now take to themselves the subject of that adventure and the profits arising therefrom without being subject to every equity of the co-adventurer. A judgment creditor in execution against one partner, his debtor, takes only the interest of the debtor, subject to his co-partner's equities; and Wrigley and Son could not claim the asset without satisfying in the first place the lien of £512 for the unpaid purchase-money of Beeton's moiety, nor without satisfying the balance of account due from Beeton to his co-adventurer Hutton the elder. The lien of Hutton the elder as *quasi* partner in the adventure must be satisfied before the subject matter of the adventure can be passed over to any person claiming under an assignment from Beeton; and this lien must continue so long as Wrigley and Son, as the assigns of Beeton by way of mortgage, allow the business to be carried on in co-partnership by Beeton and Hutton the elder. Irrespective of the doctrine of notice, they cannot take the benefit of Hutton's capital in carrying on the concern (whether they have given him notice or not) and then ask to have the share of Beeton in the chattel, and still less in the profits of the concern, handed over to them without first satisfying the lien of the co-adventurer for what may be due to him on taking the accounts of the adventure. The same reasoning applies to the plaintiff as purchaser. His letter of the 27th of December, 1866, to Hutton the elder, set out in the amended bill, shows that he, at least up to that time, acquiesced in the arrangement under which the newspaper was to be carried on. In fact, having acquired the interest of Beeton in the newspaper, his mortgagees allow Beeton to conduct the business, and he must be taken to act as their agent and on their behalf. They do not advance any capital, and ask no question as to how it is to be provided. They must therefore take the business as they found it, at least up to the

time of the actual exclusion of the plaintiff by Hutton the elder from the concern, and even after that time profits cannot be claimed without making all just allowances in respect of such moiety. Hutton the elder, therefore, wholly irrespective of his mortgage of the 9th of October, 1866, would be entitled to a lien on Beeton's share in the newspaper for £512, the unpaid purchase-money. He would also, we think, be entitled to the balance on the account settled, on the 9th of March, 1866, with Beeton (which account came down to the 30th of September, 1865), and to the £2000 due to Hutton the elder as the result of that account and the arrangement subsequent on it. We think, also, that interest at the rate of 7½ per cent. per annum must be allowed on those two sums; for Hutton the elder was clearly entitled to decline carrying on the business, whether with or without the knowledge of Wrigley and Son's mortgage, except on the terms of being allowed interest on his capital. It is in fact advanced to the plaintiff. As regards Hutton the elder's alleged sale to Hutton the younger on the 13th of September, 1866, we are of opinion that no such sale has been proved, certainly none that can be upheld against the plaintiff. As to the whole case, therefore, we conclude that the plaintiff has become entitled to the interest of Beeton in the newspaper. We see no reason why that interest should not be dealt with, as on former occasions, by directing the defendants to concur in procuring the plaintiff's name to be registered at the Office of Inland Revenue as such owner, subject to the lien before mentioned."

Agreement for use by one newspaper of the matter and type of another.

A novel point came before the Court of Chancery for decision in the case of *Platt* v. *Walter*.(a) The defendant's grandfather had established both the *Times* and *Evening Mail* newspapers, the former in 1788, and the latter in 1789. The *Evening Mail*, as described in the answer of the defendant, consisted of "a republication, on the evenings of the Mondays, Wednesdays, and Fridays in each week, of the matter (other than the advertisements) contained in the two preceding numbers of the *Times*, with such omissions and abridgments as were considered desirable, but with the addition of a postscript containing the latest market intelligence, and also such advertisements as had been separately bespoken and paid for, for the *Evening Mail*." This mode of publishing both newspapers continued down to the year 1864, although in 1820 one fourth share in the *Evening Mail* became, by purchase from a son of the

(a) 17 L. T. N. S. 157.

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original founder, vested in a stranger, from whom the plaintiffs derived their title. The object of the suit instituted in Chancery was to have it declared that the arrangement which had been so long in existence gave the proprietors of the *Evening Mail* certain rights and interests in and over the *Times*, which the proprietors of the latter newspaper could not at their mere will determine, viz., the right of republishing the matter of the two last preceding numbers of the *Times*, or any selection and abridgment of it, and the right of causing to be edited, printed, and published the *Evening Mail* whenever the *Times* should from time to time be edited, printed, and published. The bill further prayed that, in case a notice given by defendant for the dissolution of the partnership had been properly given, it might be declared to be dissolved, and directions should be given for the sale as a going concern of the *Evening Mail*, and the copyright and goodwill thereof, including particularly the rights and interests in and over the *Times*, and the copyright and goodwill and other property thereof; and in case the proprietors of the *Times* should be unwilling to carry it on subject to such rights and interests of the *Evening Mail*, then that the proprietors of the latter paper should be declared entitled to have the *Times* and the copyright, &c., thereof sold, subject to such rights and interest. The Vice-Chancellor (Stuart) dismissed the plaintiffs' bill, except so much of it as prayed a dissolution of the partnership and an account; and the Lord Chancellor (Chelmsford) confirmed this decision.

It was contended for the plaintiffs that, although so long as the original founder continued to be sole proprietor of both newspapers, no rights or interests could be said to belong to the *Evening Mail* either in connection with or independently of the *Times*; yet when the original founder had made a separate grant to one of his sons of one fourth share in the *Evening Mail*, he thereby not only gave birth to rights in that paper, but also created a kind of servitude over the *Times*; *i.e.*, he took upon himself an irrevocable obligation to allow the matter in its columns to be copied into the *Evening Mail*, and to permit it to be printed at the same place and with the same types as the *Times*. In reply to this, Lord Chelmsford says: "Suppose a covenant to this effect to be good against the grantor, who was sole proprietor and also printer of the *Times*, how could it bind the future proprietors and printers of that newspaper? The covenant relates not to the property granted, but it imposes

what may be properly described as a servitude upon the property, which is of a personal nature. It is at the utmost, therefore, a mere personal covenant, binding upon the covenantor and his personal representatives, but the burthen of it not running with the property of the *Times* against assigns."

In answer to a further argument on behalf of the plaintiffs, based on the length of time during which the arrangement had continued, the Lord Chancellor observed: "The presumption of a grant from long-continued usage arises only where the origin of the usage is unknown. But in the present case, if the right claimed by the plaintiff originated in the grant to William Walter [the founder's son], the usage is not required to establish it; and if it did not so originate, the usage is of no avail. The claim of the plaintiffs makes it necessary for them to prove that, either by the original grant of the shares in the *Evening Mail* to William Walter, or by some subsequent right obtained by the plaintiffs against the proprietors of the *Times*, a perpetual benefit to the *Evening Mail*, and a perpetual burthen on the *Times*, were established, however prejudicial it might prove to the interests of the proprietors of the *Times*; and that upon the dissolution of the partnership in the *Evening Mail*, and the consequent sale of the property in that newspaper, the proprietors of the *Times* were bound to give a value to the goodwill by continuing the arrangement for its publication as long as the *Times* should continue to be published. There is certainly no express contract to anything like this effect between John Walter, the grandfather, and his sons, when the separate interests in the *Evening Mail* were first created; and it would be a strong implication to draw from the transaction, that the burthen of such an obligation was intended to be assumed by Mr. Walter for himself and for all future proprietors of the *Times*." Finally, the Lord Chancellor said: "What are called in the bill the rights and interests of the *Evening Mail* over the *Times* appear to me to have begun in will and pleasure, and to have continued throughout upon the same footing. They could, at no time, have been enforced; and upon the dissolution of the partnership in the *Evening Mail* and its consequent sale, the court has no power to direct that they shall be included in the goodwill and property of that newspaper."

Contract to print is not within 17th section of Statute of Frauds.

A contract by a printer to print, and find the paper for printing, a number of copies of a work, is not a contract for the sale of goods within the 17th section of the Statute of Frauds as extended by the 9 Geo. 4, c. 14, s. 7; and the printer, consequently, may recover the price in an action for work,

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labour, and materials, where the contract is merely a verbal one.(*a*)

"In such cases," said Pollock, C.B., "it seems to me that the true criterion is, whether work is the essence of the contract, or whether it is the materials supplied. . . . I am inclined to think that it is only where the bargain is for *goods* thereafter to be made, and not where it is a mixed contract for work and materials to be found, that Lord Tenterden's Act (9 Geo. 4, c. 14) applies." "The defendant," said Martin, B., "having a manuscript, takes it to a printer to print for him. Then what does he intend shall be done? He intends that the printer shall use his type, shall set it up in a frame and impress it on paper, that the paper shall be submitted to the author, that the author having corrected it shall send it back to the printer, who shall again exercise labour and make it into a complete thing in the shape of a book. That being so, I think that the plaintiff was employed to do work and labour and supply materials, and for that he is entitled to be paid. It seems to me that the true criterion is this: Suppose there was no contract as to payment, and the printer brought an action to recover what by law he was entitled to receive, would that be the value of the book as a book? I apprehend not; for the book might not be worth half the value of the paper on which it was printed, but he would be entitled to recover for his work, labour, and materials supplied; therefore this is in strictness work, labour, and materials done and provided by the plaintiff for the defendant." In the case of *Bensley* v. *Bignold*,(*b*) where the defence was that the printer had not affixed his name to the book as required by the 39 Geo. 3, c. 79, s. 27, it was treated by Abbott, C.J., Bayley, J., and Holroyd, J., as a contract for work, labour, and materials.(*c*)

Printer's lien.

A printer who is employed to print certain numbers, but not all consecutive numbers of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of those numbers.(*d*)

Where a printer was so employed by one Stratford, and printed 8750 copies, of which he delivered only 5987 to Stratford, the residue remaining in his own warehouse, though Stratford supplied the paper for printing the several numbers from time to time as they were to be printed, and the printer made a separate charge for each number, the

(*a*) *Clay* v. *Yates* (1 H. & N. 73).
(*b*) 5 B. & Ald. 335.
(*c*) *Clay* v. *Yates* (*ubi supra*).
(*d*) *Blake* v. *Nicholson* (3 M. & S. 167).

assignees of Stratford, who afterwards became bankrupt, were held not entitled to recover from the printer the copies remaining in his possession, on tendering to him so much as was due for the printing of those copies in proportion to his charge for the whole. Lord Ellenborough, C.J., said: "I think the defendant had a lien for the whole balance, the work being an entire work in the course of prosecution, upon the same principle that a tailor, who is employed to make a suit of clothes, has a lien for the whole price upon any part of them. It would be inconvenient if he was obliged to make stops in the course of the work: the nature of the work affords a reason for his general lien." And Le Blanc, J., added: "The supplying the paper from time to time did not make it the less one entire work."(*a*)

It seems that a stereotype printer has not a general lien on stereotype plates not manufactured by himself, but only put into his hands for the purpose of printing from them.(*b*)

To establish a general lien in such a case, the stereotype printer must show, according to Tindal, C.J., such a custom of trade that the other party to the transaction must be taken to have contracted with reference to it. "Nothing short of this," said the Chief Justice, "will dispense with an express contract; for generally that is the only mode of creating such a lien as this, which the common law does not recognise. In trades long established such a usage may not improbably have grown up; but it requires strong evidence to show its existence in a new trade like that of stereotype printing, which has sprung up within a short period,(*c*) and in which it is not very probable that any such general usage has yet been established."(*d*)

Customs of trade between printers and publishers.

It seems that by the custom of trade a printer cannot recover for the printing of a work before the whole is completed and delivered.(*e*)

And it would seem that there is a usage of trade between the printers and proprietors of newspapers, that the latter should give to the former four weeks' notice of an intention to put an end to the employment, or pay them four weeks' wages.(*f*). But there does not appear to be a reciprocal obligation on the part of the printers.(*g*)

It would appear that there is no general custom of trade

(*a*) *Blake* v. *Nicholson* (3 M. & S. 167).
(*b*) *Bleaden* v. *Hancock* (M. & Mal. 465; 4 C. & P. 152. *Per* Tindal, C.J.).
(c) This case was decided in 1829.
(*d*) *Bleaden* v. *Hancock* (*ubi suprà*).
(*e*) *Gillett* v. *Mawman* (1 Taunt. 137). See also *Adlard* v. *Booth* (7 C. & P. 108).
(*f*) *Cunningham* v. *Fonblanque* (6 C. & P. 44, Park, J.).
(*g*) *Ibid.*

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binding printers to insure for booksellers the paper given for works to be printed.(*a*)

For many years the business of printing in London, as between the master printers and compositors, has been regulated by committees of each body, who have from time to time agreed upon rules, which, so long as they remain unaltered, are treated and acted upon as binding between master and compositor, and are imported into every engagement to which they are applicable.(*b*)

Payment of compositors for advertisements on wrappers.

The following rules, agreed upon in 1839, relating to the payment of compositors for printing advertisements on wrappers, came before the Court of Exchequer(*c*) in 1858 for interpretation: "Every companionship (which means the compositors) on a magazine or review to be entitled to the first or title-page of the wrapper of the magazine or review, but not to the remaining pages of such wrapper, or to the advertising sheets which may accompany the magazine or review. Standing advertisements, or stereo blocks, forming a complete page, or, when collected together, making one or more complete pages in a wrapper or advertising sheet of a magazine or review, not to be chargeable. The compositor only to charge for his time in making them up. The remainder of the matter in such wrappers or advertising sheets, including standing advertisements or stereo blocks, not forming a complete page, to be charged by the compositor and cast up according to the 8th and 20th Articles of the scale as they may respectively apply." The interpretation given by the Court of Exchequer, whose judgment was affirmed by that of the Exchequer Chamber,(*d*) was as follows: "We think it clear that the paragraph or sentence of the rule beginning 'standing advertisements' has reference to the wrapper or advertisement sheet then about to be composed and printed, and that the master has the right to direct in what manner they shall be printed. He may direct that they all, as far as possible, be put into complete pages, or that they may be distributed through the wrappers or advertising sheets, as he may think fit. The first provision of the part of the rule before quoted is for the case of standing advertisements forming a complete page. This seems directed to the case of a page of the former number being reprinted in the succeeding one. The second case is of the standing advertisements collected together,

(*a*) *Mawman* v. *Gillett* (2 Taunt. 325).
(*b*) *Per* Watson, B., *Hill* v. *Levey* (3 H. & N. 8).
(*c*) *Hill* v. *Levey* (3 H. & N. 7).
(*d*) S. C. 3 H. & N. 702.

making one or more complete page or pages in the wrappers or advertising sheets. We think this refers to the case when the master shall direct that standing advertisements shall be printed in the same page or pages, so far as they will fill up. In such case, when they completely fill a page or pages, the advertisements are not to be chargeable according to the scale, but the compositor is only entitled to charge for his time for making up. But if any standing advertisements are left over, or if the master thinks fit to direct that they shall be distributed through the other pages of the advertising sheet, so that they do not form a complete page, we think that the latter part of the rule applies, and that the compositor is entitled to charge according to the scale."(*a*)

Where, therefore, in the November number of a monthly magazine there were composed and printed, on one page, two advertisements which occupied the entire page, and the type of which was left standing, and in the December number the same two advertisements were printed, but on different pages, each advertisement occupying about half a page, the remainder of the page being filled up by other advertisements, it was held that the compositor was entitled, under the latter part of the rule, to charge for the composing, and that the case did not come within the first part of the rule, under which the compositor would be entitled to charge only for his time in making up.(*b*)

A dispute, similar to that just referred to, having arisen in 1856 between a compositor and a master printer, the matter was referred, in pursuance of certain of the rules agreed upon, to the arbitration of three master printers, three journeymen, and a barrister, whose casting vote was to be decisive; the result being an award in favour of the master, the barrister having given his casting vote in favour of the view taken by the three masters. The plaintiff subsequently entered the defendant's service knowing of that decision, and also that the defendant was one of the three masters; but nothing was said as to the terms of payment, each party understanding that it was to be made according to the rules. It was held that the decision of the arbitrators was not, at the time of the employment of the plaintiff, binding between the parties as an interpretation of the rule above set out, and that, notwithstanding their decision, it was competent for the Court to entertain the question of its construction.(*c*)

Contract to insure.

If there is an express undertaking by the printer to insure the paper given him for a work which he contracts

(*a*) 3 H. & N. 12, 13. (*b*) *Ibid.*
(*c*) 3 H. & N. 12, 13.

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to print within six months, he is liable for a loss by fire which takes place after that time, even though the completion of the work within the specified time has been prevented by the failure of his employer to supply copy fast enough.(*a*) If he wishes to exonerate himself from all risk after the specified time has elapsed, he must abandon the contract altogether; if, whilst complaining of the delay in supplying copy, he continues to print, his contract to insure continues.(*b*)

Loss by fire.

Where certain printers were employed to print a work, of which the impression was to be 750 copies, and a fire broke out on their premises before the whole number of copies had been delivered, in an action to recover the amount to be paid for the work, Tindal, C.J., held that the printers' right to recover depended on the question whether the whole 750 copies had been printed when the fire broke out, or whether the fire took place while the press was set and before the whole was printed off, in which latter case they would not be entitled to recover anything.(*c*)

Illegal or immoral contracts.

In the case of authors, publishers, and printers, as in all other cases, our law refuses to aid any of the parties to a contract of an illegal or immoral character.

No person who has had anything to do with the composition of an immoral or libellous work can maintain an action against the person who employed him, to recover remuneration for his labour. This applies to printers, as well as to authors and publishers.(*d*)

Best, C.J., in dealing with the case of a book which recounted the amours of a courtesan, said: "I have no hesitation in saying that no person who has contributed his assistance to the publication of such a work, can recover in a court of justice any compensation for labour so bestowed. The person who lends himself to the violation of the public morals and laws of the country shall not have the assistance of these laws to carry into execution such a purpose. It would be strange if a man could be fined and imprisoned for doing that for which he could maintain an action at law. Every one who gives his aid to such a work, though as a servant, is responsible for the mischief of it."(*e*)

A printseller cannot recover the price of libellous or immoral publications sold by him.(*f*)

Where the plaintiff, a printer, agreed to print for the

(*a*) *Mawman* v. *Gillett* (2 Taunt. 325). (*b*) *Ibid.*
(*c*) *Adlard* v. *Booth* (7 C. & P. 108).
(*d*) *Poplett* v. *Stockdale* (Ry. & M. 337).
(*e*) *Ibid.* 338.
(*f*) *Fores* v. *Johnes* (4 Esp. 97).

defendant a certain number of copies of a treatise to which a dedication was to be prefixed, and, after the treatise was printed, and the proof sheet of the dedication was revised by the defendant and returned to the plaintiff, the latter, for the first time, discovered that it contained libellous matter, and on that account refused to complete the printing, it was held that he was justified in so refusing, and was also entitled to recover for printing the treatise. "I told the jury," said Pollock, C.B., in this case,(*a*) "that if the plaintiff agreed to print the dedication and the treatise, and so undertook to print that which he knew to be libellous, and afterwards said that he would not print both; in such case he could not recover. I think his right to recover rests entirely on this ground, that he had been furnished with the treatise without the dedication. The dedication was afterwards sent, but he had no opportunity of reading it until after it was printed; he then discovered that it was libellous, and refused to permit the defendant to have it. I think that if a contract is *bonâ fide* entered into by a printer to print a work consisting of two parts, and at the time he enters into the contract he has no means of knowing that one part is unlawful, and he executes both, but afterwards suppresses that which is unlawful, there is an implied undertaking on the part of the person employing him to pay for so much of the work as is lawful."

Although the illegality or immorality of an intended publication would be a good defence to an action brought against the author for breach of contract to deliver his manuscript for publication, this illegality or immorality is not to be presumed where the work itself is not produced at the trial.(*b*)

A printer whose name did not appear on the periodical paper printed by him, as was required by 38 Geo. 3, c. 78 (since repealed by 6 & 7 Will. 4, c. 76, s. 32), was held not entitled to maintain an action for work and labour done in printing it.(*c*) And the proprietor of a newspaper, published before the filing of the affidavit required by that statute, when in force, was, on the ground of having done an act prohibited by law, nonsuited in an action brought to recover damages for breach of contract to print certain copies of his newspaper.(*d*) For the same reason a printer was held not entitled to recover for labour or materials used in printing a pamphlet, on which he had not printed

(*a*) *Clay* v. *Yates* (1 H. & N. 73).
(*b*) *Gale* v. *Leckie* (2 Stark. N. P. 110).
(*c*) *Marchant* v. *Evans* (2 B. Moore, 14).
(*d*) *Houstoun* v. *Mills* (1 M. & Rob. 325).

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his name, and the name of the city or place where he dwelt, as required by sect. 27 (now repealed) of 39 Geo. 3, c. 79.(*a*)

But to an action by the proprietor of the copyright in a book against the defendant for having, without the proprietor's consent in writing, printed for sale copies of the work, and also for having in his possession for sale and selling copies of the work so unlawfully printed, it was held no defence to plead that the book was printed and published without the name and place of abode of the printer upon the first or last leaves thereof, as directed by 2 & 3 Vict. c. 12, s. 2.(*b*)

Whilst the enactment (6 & 7 Will 4, c. 76, s. 8) requiring the filing at the Stamp Office of a declaration as to the proprietorship of newspapers was still in force, it was held that where a person entered specifically into a contract with the real proprietor, who was not registered as such, a person whose name was registered could not be made liable on the contract.(*c*)

Co-owner of one newspaper being part-proprietor of a rival paper.

It is a fundamental principle of the law of partnership that one partner cannot, openly or secretly, lawfully carry on for his own benefit any business in rivalry with the firm to which he belongs.(*d*) Therefore where a firm consisting of four partners owned a newspaper (*The Morning Herald*), and three of them also owned an evening paper (*The English Chronicle*), which latter paper had, in consideration of an annual payment to the proprietors of *The Morning Herald*, the right of using its type and other effects, the three owners of the evening paper were restrained from publishing in it any information obtained at the expense of *The Morning Herald*, until it should have first been published in *The Morning Herald*.(*e*)

The plaintiff's application for an injunction to restrain the proprietors of the evening paper from using the type and effects of the morning paper was refused on several grounds:—viz., that the plaintiff himself had acquiesced; that the proprietors of other morning papers had adopted the same practice with respect to other evening papers; that if the practice were objectionable the parties might guard against it by their contract; that in the present case there was actually a covenant that the proprietors of the morning paper should not be concerned in any other morning paper, which indicated an intention that they might be concerned in any evening paper.

(*a*) *Bensley* v. *Bignold* (5 B. & Ald. 335).
(*b*) *Chappell* v. *Davidson* (18 C. B. 194; 25 L. J. 225, C. P.).
(*c*) *Holcroft* v. *Hoggins* (2 C. B. 488).
(*d*) See 1 Lind on Partnership, 579.
(*e*) *Glassington* v. *Thwaites* (1 Sim & St., 124).

PART IV.—LAW OF LIBEL.

CHAPTER I.

INTRODUCTION.

Libel in general.

WE have been treating hitherto of the rights and privileges of the authors and proprietors of literary and artistic works. Such works, besides conferring rights and privileges, also impose duties and entail liabilities. Writing, printing, and other modes of publication furnish, unhappily, no exception to the general rule that there is nothing, however beneficial its normal tendency, which may not be perverted to the worst of uses. Those arts which have done so much to enlighten mankind, to elevate their moral, social, and political condition, and to diffuse innocent gratification and amusement, have also been made the instruments of wanton and insulting attack upon religion and morals, upon the government and constitution of the State, and upon all that is most dear in private life. Of injuries thus caused either to the community at large or to its individual members the law takes cognizance, and those injurious publications which it punishes are designated *libels*.(*a*)

There is no satisfactory definition of libels in general—which really explains what they are and fully describes their various species; nor is it of importance to endeavour to obtain such a definition, since its very wide generality would render it practically valueless.(*b*) A

(*a*) The word libel is derived from the *libellus* (dim. of *liber*, a book) *famosus* of the Roman law.

(*b*) Lord Lyndhurst, in his evidence before the Committee of the House of Lords, on whose report the Act of 6 & 7 Vict. c. 96 was framed, says on this subject: "A definition, in order to satisfy the requisites of a good logical definition, ought not only to be sufficiently precise so that it shall take in nothing except what was intended to be specified, but also sufficiently comprehensive to omit nothing which ought to be included. I have never yet seen, nor been able myself to hit upon anything like a definition of libel, or even of sedition, which possessed those requisites of a definition; and I cannot help thinking that the difficulty is not accidental, but essentially inherent in the nature of the subject-matter."

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definition may with more profit be attempted of each of the different classes of libels which are embraced under the general head.(*a*)

How expressed.

It need here be only added, in general, that a libel may be expressed in a variety of ways, and not only by means of writing or printing, whether in the form of book, pamphlet, placard, letter, &c., but also by means of pictures, drawings, photographs, or other signs.(*b*)

Division of libels.

Libels may, for the purposes of the present work, be conveniently divided into two great classes—public and private; and public libels may be subdivided into those (1) which are of a blasphemous or irreligious character; (2) those which offend against decency and morality; and (3) those directed against the Sovereign, the Government, or the law.

Of the various kinds of public libels we shall treat in order, before proceeding to deal with the subject of private libels or libels on individuals.

CHAPTER II.

BLASPHEMOUS LIBELS.

Grounds of legal interference.

IT is not with a view to avenging any insults offered to the Deity that our law professes to punish blasphemy, but on account of the temporal consequences to society which it tends to produce. Society, said our older authorities, cannot exist without those religious and moral restraints which blasphemous attacks on natural or revealed religion weaken, if not destroy; the sanction of an oath in all proceedings connected with the administration of justice is rendered of no

(*a*) Of what little utility, for the purpose of conveying any precise knowledge of a practical character, a definition must be which attempts to describe at once all kinds of libels, may be seen from the two following examples taken from standard writers. "*Libelli famosi*," says Blackstone, "taken in their largest and most extensive sense, signify any writings, pictures, or the like of an immoral or illegal tendency" (4 Com. 150). "Considering the offence in its relation as well to the public as to individuals," says Starkie, "libels may not inconveniently or improperly be defined to be 'any writings, pictures, or other signs which immediately tend to injure the character of an individual, or to occasion mischief to the public'" (Law of Slander and Libel, Commentary).

(*b*) Bacon's Abridg. tit. Libel; Salk. 418; 3 Bl. Com. 125; *Austen* v. *Culpepper* (Skin. 123; Show. 314).

avail, if the belief in a moral governor of the universe who punishes vice and rewards virtue is shaken; and where Christianity, as is the case with us, is the religion of almost the entire nation, unseemly attacks on its doctrines provoke to the commission of acts of violence.(*a*) It is on these grounds that the right of the State to prohibit and punish blasphemous libels has been based, though there can be little doubt that our judges have often been influenced, in their decisions, by those purely theological considerations which in words they professed to ignore.

An American writer, Bishop,(*b*) thus speaks as to the grounds on which the legal doctrine is based: "Whether the principle on which this doctrine rests is that they [blasphemy and profane swearing] tend to undermine Christianity, which is a part of our law, or that they disturb the peace and corrupt the morals of the community, is a question not fully settled. Perhaps we may even take another view, namely, that reverence towards God and religion—Christianity being our form of religion—is essential to man, who is injured in his nature and being when this reverence is impaired; or still another view, that these offences so shock his purer and higher sensibilities as to create an injury to him against which he needs protection, precisely as against an assault. Probably these several considerations, and some others also, may each be deemed to enter more or less into the policy of the law."(*c*)

(*a*) This view of the matter is put broadly by Michaelis, quoted 2 Stark. (2nd edit.) 131. He says: "On God's account, then, punishments for blasphemies are not necessary; but perhaps they are necessary for the sake of our neighbour, who, if he believes in a God, or holds his religion, whether true or false, to be true, always feels himself extremely scandalised by them. Nor is it only blasphemy against the *true* God that ought to be punished, but even that against false gods, supposed saints, and fictitious religion, *whenever they happen to be the gods, saints, and religion of the people.*"

(*b*) Crim. Law. vol. ii. sect. 87.

(*c*) The Commissioners on Criminal Law,* in their Sixth Report (p. 80), thus state their view of the reasons by which laws against blasphemy may be defended: "Laws for the punishment of offences against religion generally are justifiable, on mere temporal grounds, upon two principles. In the first place, religion, by enforcing moral conduct and applying to that object some of the strongest motives that operate on human nature, is so effectual an assistant in securing a general obedience to social laws, that actions tending directly to expose it to ridicule and contempt, and thus to weaken its authority with the ignorant and unthinking, are mischievous to the com-

* Thomas Starkie, Henry Bellenden Ker, William Wightman (afterwards Justice of the Queen's Bench), Andrew Amos and David Jardine, Esquires.

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Blackstone's view.

Blackstone(*a*) describes the offence of blasphemy as consisting in a denial of the being or providence of the Almighty; or in contumelious reproaches of our Lord and Saviour Christ, or in profane scoffing at the Holy Scripture, or exposing it to contempt and ridicule, for Christianity is part of the laws of England.

Spoken words, equally with written, may subject the utterer to the penalties imposed by law for blasphemy. Some of the earlier cases on the subject are referred to in the note;(*b*) but the doctrines laid down in them would probably now be applied with considerable limitations, though none of the decisions have ever been overruled.

Per Lord Hale.

In one of those cases where the words were "that Jesus Christ was a bastard and a whoremaster; that religion was a cheat; that he feared neither God, the devil or man,"(*c*) Lord Hale said, "That such kind of wicked blasphemous words were not only an offence to God and Religion, but a crime against the Laws, State and Government. For to say religion is a cheat is to dissolve all those obligations whereby civil societies are preserved. Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law."(*d*)

Common law decisions.

In a subsequent case,(*e*) relating to a book designed to show that the Christian miracles were not to be taken in a literal sense, and that the whole New Testament account of the life and miracles of Christ was but an allegory, the Court would not suffer it to be debated whether to write against Christianity *in general* was not an offence punishable in the temporal courts at common law. They laid stress on the word "general," and stated that they did not intend to immunity, and on that account may properly be repressed by penal enactments. Secondly, as the great mass of the inhabitants of civilised countries regard religious faith, in one form or other, as of vital interest and importance, the criminal law may properly be employed to protect the feelings and opinions of the community on this subject from wanton insult. Upon these two principles, as it appears to us, the interference of the penal law in matters of religion is to be justified; and we think that rules framed strictly with reference to these principles neither invade the rights of opinion and legitimate discussion, nor endanger any general or particular interests which can properly be protected by the criminal law."

(*a*) 4 St. Black. 287.

(*b*) *Atwood's case* (Cr. J. 421); *Rex* v. *Taylor* (Vent. 293; 3 Keb. Rep. 607); *Rex* v. *Clendon* (cited Str. 789); *Rex* v. *Hall* (1 Str. 416).

(*c*) *Rex* v. *Taylor* (*ubi supra*).

(*d*) Lord Coleridge, C.J., in *Reg.* v. *Foote and others* (*post*, p. 374), though refusing to be bound by the unnecessary dicta of Lord Hale in this case, fully agrees with what Lord Hale *held*—viz., "that such kind of blasphemous words" as had been there used were a crime.

(*e*) *Rex* v. *Woolston* (Fitz. Rep. 64; Str. 834); 2 Geo. 2.

clude disputes between learned men upon particular controverted points. Raymond, C.J., in delivering the judgment of the Court, said: "I would have it taken notice of that we do not meddle with any differences of opinion, and that we interpose only where the very root of Christianity(*a*) itself is struck at, as it plainly is by this allegorical scheme, the New Testament and the whole relation of the life and miracles of Christ being denied."(*b*)

The same doctrine was laid down in *Rex* v. *Williams*,(*c*) where the defendant was convicted of having published an impious and blasphemous libel, called "Paine's Age of Reason," which denied the authority of the Old and New

(*a*) How vague is such a test! Who is to determine, and by what criterion, when the "root" of Christianity is struck at, or when a "fundamental" part is attacked. Are the miracles, as most believe, an essential root, or, as others think, an accidental and hurtful excrescence? The cultured author of *Literature and Dogma*, and *St. Paul and Protestantism*, considers that he holds to the very "root" of the matter, whilst discarding most of what Convocation would hold "fundamental." To the ordinary orthodox mind the Divinity of Christ and his resurrection from the dead are probably two of the most essential parts of the Christian religion. Yet a creed (the Jewish) which denies both—which, in the language of Lord Raymond, denies "the New Testament and the whole relation of the life and miracles of Christ"—does not, in the opinion of a most learned judge of our own day (Stephen, J.), strike at the root of Christianity (see *Fortnightly Review*, for March, 1884, p. 399). In his opinion the Christianity of which Lord Raymond spoke was "rather that part of the Christian religion which has an immediate bearing upon conduct than a theological system," a view of the matter liberal enough to satisfy the author above mentioned. But this removes the difficulty only one step backwards. Who is to determine, and how, what part has and what part has not an immediate bearing upon conduct? In the opinion of many, only its ethical teaching possesses this character; the miraculous incidents being for them but a hindrance and a stumbling-block. In the opinion of others the entire efficacy of the faith is dependent upon Christ having been raised from the dead (1 Cor. 15 ch. 16 & 17 verses) in the literal sense of those words. Is this the kind of question which can safely be left to the decision of a tribunal consisting of twelve men drawn from every religious denomination in the kingdom? The plain common sense of a jury (now, though not in Lord Raymond's time, the sole judges of what is or is not a libel), may not be unequal to the task of pronouncing upon the *manner* of a publication—whether it is on the one hand scurrilous and wanton, or on the other hand serious and decent. But how is such a body to decide what is or is not a fundamental part of Christianity; what part has and what has not an immediate bearing upon conduct. Is the question one of fact as to which witnesses may be examined on the one side and on the other? If so, who may be considered experts?

(*b*) "Of much which Lord Raymond says, and of many of the expressions in his judgment, I think that time and change have destroyed the authority." (Per Lord Coleridge, C.J., *Reg.* v. *Foote and others*, Summing Up, p. 20).

(*c*) In 1797. See Holt on Libel, 69, note (*e*).

Testament, asserted that reason was the only guide by which the conduct of men ought to be directed, and ridiculed the prophets, Jesus Christ, his disciples, and the Scriptures. The judgment of Ashurst, J., in that case exhibits a union of the different reasons which have influenced the determination of cases of blasphemy. He remarked that "although the Almighty did not require the aid of human tribunals to vindicate his precepts, it was nevertheless fit to show our abhorrence of such wicked doctrines, which were not only an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society. It was upon this ground that the Christian religion constituted part of the law of the land. But if the name of our Redeemer was suffered to be traduced, and his holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions—the dread of future punishment."

It was held a blasphemous libel to represent by a published writing that Jesus Christ is an impostor, the Christian religion a mere fable, and those who believe in it infidels to God.(*a*)

In *Reg.* v. *Waddington*,(*b*) tried before Lord Tenterden, C.J., in 1822 the effect of the libel set out in the information was to impugn the authenticity of the Scriptures; and one part of it stated that Jesus Christ was an impostor and a murderer in principle and a fanatic. Before the verdict was pronounced, one of the jury asked the Chief Justice whether a work which denied the divinity of our Saviour was a libel; to which the Lord Chief Justice answered that "a work speaking of Jesus Christ in the language used in the publication in question was a libel, this being a part of the law of the land." On motion by the defendant for a new trial on the ground of misdirection, the Lord Chief Justice repeated, in equally cautious language, the interpretation of the law which he had given to the juryman, omitting, however, the old commonplace as to Christianity being part of the law of the land. "There cannot be any doubt that a work which does not merely deny the Godhead of Jesus Christ, but which states him to be an impostor and a murderer in principle, was, at common law, and still is, a libel." Holroyd, J., used equally cautious language: "I have no doubt whatever that any publication in which our Saviour is spoken of in the language used in the work which was the subject of the prosecution is

(*a*) *Rex* v. *Eaton* (31 Howell's St. Tr., 927, *et seq.*)
(*b*) 1 B. & C. 26.

a libel. The direction of the Lord Chief Justice was therefore right in point of law." Best, J., added: "It is not necessary for me to say whether it be libellous to argue *from the Scriptures* against the divinity of Christ. That is not what the defendant professes to do. He argues against the divinity of Christ by denying the truth of the Scriptures. A work containing such arguments *published maliciously* (*which the jury in this case have found*) is by the common law a libel."

This is certainly (as remarked by Lord Coleridge in his summing up in *Reg.* v. *Foote*, p. 21) no authority for the proposition, in support of which it is often cited, that any attack upon Christian doctrine, however respectful and decent in language, is by law a blasphemous libel.

In *Reg.* v. *Hetherington*,(*a*) where it was held that an attack on the Old Testament alone was a blasphemous libel, on the ground that the Old Testament is so connected with the New, that a reflection on the one was a reflection on the other also, the report tells us nothing of the nature of the publication or the terms in which it was couched.(*b*) Yet something must have turned on this, for Lord Denman, C.J., said: "Though in most of the cases, I believe not in all, the libel has been against the New Testament, yet the Old Testament is so connected with the New that it is impossible that *such a publication as this* could be uttered without reflecting upon Christianity in general; and therefore I think an attack upon the Old Testament of *the nature described in the indictment* is clearly indictable."

In 1841 Mr. Moxon was indicted for publishing the poems of Shelley,(*c*) a work described in the indictment as a

Shelley's "Queen Mab."

(*a*) 5 Jur. 529.

(*b*) Since the above was written Stephen, J. (in an article on "Blasphemy and Blasphemous Libel," published in the *Fortnightly Review*, for March, 1884), sets forth certain extracts from the indictment, made from the original at the Crown Office, the first beginning thus: "What wretched stuff this Bible [meaning that part of the Holy Bible called the Old Testament] is, to be sure! What a random idiot its author must be!" Part of the passage set out in the second count was this: "I not only assert that it is not the Word of God, but that it is a book containing more blunders, more ignorance, and more nonsense than any book to be found in the universe." The third count was founded on a passage in which the author stated his object to be "to expose this book [meaning the Old Testament] in such a manner that the children of the Stockport Sunday School will reject it with contempt," &c.

(*c*) 2 Mod. State Trials, 356. The prosecutor in this case was Hetherington, who had, a short time before, been found guilty of publishing certain libels on the Old Testament (see *Reg.* v. *Hetherington*, *ante*, p. 364), and his object in instituting the prosecution against Mr. Moxon is not very clear. His counsel concluded his opening speech by expressing the satisfaction he should feel if the result of the

"scandalous, impious, profane, and malicious libel of and concerning the Christian religion, and of and concerning the Holy Scriptures, and of and concerning Almighty God," in which were contained certain passages charged as blasphemous, the indictment setting out some passages from the poem of "Queen Mab" and a passage in prose from the notes. After Serjeant (afterwards Mr. Justice) Talfourd, himself a poet, had addressed the jury, for the defence in a speech of great eloquence, Lord Denman, C.J., told the jury that he and they "were bound to take the law as it had been handed down to them. The only question for their consideration was, whether in their opinion the work, which had been made the subject of prosecution, deserved the imputations that were cast upon it by the indictment, and whether the publisher had sent it forth deliberately into the world, knowing its character to be such. The purpose of the passage cited from 'Queen Mab' was, he thought, to cast reproach and insult upon what in Christian minds were the peculiar objects of veneration; it was not, however, sufficient that mere passages of such an offensive character should exist in a work in order to render the publication of it an act of criminality; it must appear that no condemnation of such passages appeared in the context. It had been said that the extraordinary poem in question was the production of a mere youth. Were the lines indicted calculated to shock the feelings of any Christian reader? Were their points of offence explained, or was their virus neutralized by any remarks in the margin, by any note of explanation or apology? If not, they were libels on God, and indictable." The jury returned a verdict of guilty; but the prosecutor abandoned all further proceedings on payment of his costs.(*a*)

trial were to establish that no publication on religion should be a subject for prosecutions in future (2 Mod. State Trials, 365); but Mr. Moxon's counsel treated the prosecution as one prompted solely by an indiscriminate desire, on the part of the prosecutor, of retaliating on some other person the punishment which he had himself suffered. And Blackburn, J., says of it: "I believe, as everybody knows, that it was a prosecution instituted merely for the purpose of vexation and annoyance" (*Reg.* v. *Hicklin*, L. Rep. 3 Q. B. 374; S. C. 37 L. J. 89, M. C.; 18 L. T. N. S. 395, *nom. Reg.* v. *The Recorder of Wolverhampton*).

(*a*) 2 Mod. State Trials, 362. Blackburn, J., alluding to this case in *Reg.* v. *Hicklin* (L. Rep. 3 Q. B. 374), says: "I hope I may not be understood to agree with what the jury found, that the publication of 'Queen Mab' was sufficient to make it an indictable offence." For Lord Lyndhurst's view of the prosecution see Parl. Debates in the House of Lords for 13th July, 1857.

In addition to the doctrines of the common law relating to blasphemous libels, there are some express enactments of the Legislature on the subject. Several of the old statutory provisions have been repealed, but the following still remain in force:

1 Edw. 6, c. 1, enacts that persons reviling the Sacrament of the Lord's Supper by contemptuous words or otherwise, shall be punished by fine and imprisonment.

1 Eliz. c. 2, enacts that if any *minister* shall speak anything in derogation of the Book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second; and if he be beneficed, shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second, shall be deprived and suffer one year's imprisonment; and for the third, shall in like manner be deprived and suffer imprisonment for life. And that if any person whatsoever shall in plays, songs, or other open words, speak anything in derogation, depraving, or despising of the said book, &c., he shall forfeit for the first offence, 100 marks; for the second, 400; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life.

The most important of the statutes now in force is the 9 & 10 Will. 3, c. 35.(*a*) It enacts that if any person educated in or having made profession of the Christian religion, shall by writing, printing, teaching, or advised speaking, deny any one of the persons of the Holy Trinity to be God [repealed by 53 Geo. 3, c. 160, s. 2, "so far as the same relates to persons denying as therein mentioned respecting the Holy Trinity"], or assert or maintain that there are more gods than one, or deny the Christian religion to be true, or the Holy Scriptures to be of divine authority,(*b*) he shall, upon the first offence, be rendered incapable to hold any office or place of trust; and for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer imprisonment without bail for three years. But the person convicted for a first offence is to be discharged from all penalties and disabilities for that offence, if he renounces his error in open

(*a*) Chap. 32 in Ruffhead's edition of the Statutes.

(*b*) The Privy Council has held that a clergyman of the Church of England, who declares in effect "That the Scriptures of the Old and New Testament were not written under the inspiration of the Holy Spirit, and that they were not necessarily at all, and certainly not in parts the word of God," does not contravene the Articles, the Formularies, or the Nicene Creed. (*Williams* v. *Bishop of Salisbury*, 2 Moore, P.C.C. N. S. 377.)

PART IV. CHAPTER II.

Court within four months after conviction.(*a*) Information of an offence against the Act must be given within four days after it has been committed, and the prosecution must be within three months after such information.(*b*)

No instance of a prosecution under this Act has been found recorded.

Effect of statutes.

The statute has not altered the common law on the subject of blasphemous libels, but has only introduced certain peculiar disabilities cumulative upon the penalties previously inflicted by the common law ;(*c*) for it is a general rule that, where an offence is already punishable by a common law proceeding, a statute providing a particular punishment for it does not exclude the common law punishment, but only supplies an alternative or a cumulative one.(*d*)

53 Geo. 3, c. 160.

Neither, according to Best, J., does the 53 Geo. 3, c. 160, alter the common law doctrine as to blasphemous libels: it only removes the penalties imposed by 9 & 10 Will. 3, c. 32, upon persons denying the Trinity, and extends to them the benefits of the Toleration Act of 1 Will. & M. sess. 1, c. 18.

In *Rex* v. *Waddington*(*e*) the defendant, in moving for a new trial, urged that the Lord Chief Justice had misdirected the jury by stating that any publication in which the divinity of Jesus Christ was denied was an unlawful libel (*f*); and he argued that, since the 53 Geo. 3, c. 160, the denying one of the persons of the Trinity to be God was no offence, and consequently that a publication in support of such a position was not a libel. The Court of Queen's Bench unanimously refused a rule for a new trial, and held that the publication was a blasphemous libel. Best, J., said: "The 53 Geo. 3, c. 160, has made no alteration in the common law relative to libel. If, previous to the passing of that statute, it would have been a libel to deny, in any printed work, the divinity of the second person in the Trinity, the same publication would be a libel now. The 53 Geo. 3, c. 160, as its title expresses, is an Act to relieve persons who impugn the doctrine of the Trinity from certain penalties. If we look at the body of the Act to see from what penalties such persons are relieved, we find that they are the penalties from which the 1 Will. & M.

(*a*) Sect. 3. (*b*) Sect. 2.

(*c*) *Rex* v. *Carlile* (3 B. & Ald. 161); *Rex* v. *Williams* (26 Howell's St. Tr. 656; 2 Str. 884; Barnard, K.B. (162).

(*d*) *Rex* v. *Robinson* (Burr. 799); *Rex* v. *Carlile* (3 B. & Ald. 163).

(*e*) 1 B. & C. 26; compare the remarks of Brainwell, B., in *Cowan* v. *Milbourn* (L. Rep. 2 Ex. 233; 36 L. J. 124, Ex.; 16 L. T. N. S. 290.)

(*f*) This was incorrect. For what the Chief Justice did tell the jury, *vide ante*, p. 364.

sess. 1, c. 18, exempted all Protestant Dissenters, except such as denied the Trinity, and the penalties or disabilities which the 9 & 10 Will. 3, c. 32, imposed on those who denied the Trinity. The 1 Will. & M. sess. 1, c. 18, is, as it has been usually called, an Act of Toleration, or one which allows Dissenters to worship God in the mode that is agreeable to their religious opinions, and exempts them from punishment for non-attendance at the Established Church, and nonconformity to its rights. The Legislature, in passing that Act, only thought of easing the consciences of Dissenters, and not of allowing them to attempt to weaken the faith of the members of the Church."

This also seems to have been the opinion of Lord Eldon in *The Attorney General* v. *Pearson*,(*a*) though, sitting as a judge in equity, he said he had "no office to determine what is or is not an offence or crime," except where the civil rights of the parties imperatively required such a decision.

Cases in Scotland.

A person accused of wickedly and feloniously publishing, vending, and exposing for sale certain blasphemous books containing a denial of the truth and authority of the Holy Scriptures and the Christian religion, and devised, contrived, and intended to asperse, vilify, ridicule, and bring them into contempt, was not allowed in his speech to the jury to quote passages from the Bible for the purpose of justifying his opinion of it.(*b*) "No animadversions," said the Lord Justice Clerk, "can have the slightest effect in making the Court swerve from its duty. We tell you what the law is, that the publication of works tending to vilify the Christian religion is an offence in law; and it is no answer to say that, in your opinion, the passages contained in those works are true, and that the Bible deserves the character ascribed to it. If you can show that the Lord Advocate has mistaken the meaning of these passages, that they do not deny the truth of the Bible, that they do not vilify it, that is a point of which the jury will judge." In charging the jury, his Lordship thus stated the law: "The Holy Scriptures and Christian religion are part of the statute law of the land; and whatever vilifies them is therefore an infringement of the law. There can be no controversy in a court of justice as to the merits or demerits of a law. Our duty is to interpret and explain the law as established, while it is yours to apply it. Now the law of Scotland, apart from all questions of Church Establishment,

(*a*) 3 Meriv. pp. 407, 408.
(*b*) *Paterson's case* (1 Broun 629). See also *Robinson's case* (*ibid.* 643).

or Church government, has declared that the Holy Scriptures are of supreme authority. It gives every man the right of regulating his faith or not by the standard of the Holy Scriptures, and gives full scope to private judgment, regarding the doctrines contained therein; but it expressly provides that all 'blasphemies shall be suppressed,' and that they who publish opinions 'contrary to the known principles of Christianity,' may be lawfully called to account, and proceeded against by the civil magistrate. This law does not impose upon individuals any obligation as to their belief. It leaves free and independent the right of private belief, but it carefully protects that which was established as part of the law from being brought into contempt."

What forms of religion may be attacked.

From the fact that a particular form of the Christian religion is established here by law, this consequence follows—that a person may, without being liable to prosecution for it, attack Judaism, or Mahomedanism, or even any sect of the Christian religion, except the established religion of the country; and the only reason, says Alderson, B.,(*a*) why the latter is in a different situation from the others is "because it is *the form established by law*, and is therefore a part of the constitution of the country. In like manner, and for the same reason, any general attack on *Christianity* is the subject of criminal prosecution, because Christianity is the established(*b*) religion of the country."

Liberty of discussion.

How far, then, is liberty of discussion allowed on questions relating to the fundamental doctrines of religion? or, is the expression of all views adverse to those now received prohibited and punishable? Would the law now make no distinction in favour of the fair and temperate expression of opinions sincerely entertained? Before *Reg.* v. *Foote and others*, and the luminous charge delivered by Lord Coleridge, C.J., in that case, the question has not, in any reported case, been distinctly stated or broadly dealt with.

American law.

In America the question has been more fully discussed than with us, and the doctrines laid down by the Courts of that country are much more consonant to the tolerant views of the present day than any which can be extracted from the English authorities hitherto cited. In *The People* v. *Ruggles*,(*c*) after a verdict and sentence for blasphemous words spoken against Jesus Christ, Kent, C.J., on appeal, said: "After conviction we must intend that the words were uttered

(*a*) *Reg.* v. *Gathercole* (2 Lewin, 254).

(*b*) It is obvious that the learned Judge uses the word "established" in two different senses.

(*c*) 8 Johns. 292.

in a wanton manner and, as they evidently import, with a wicked and malicious disposition, and not in a serious discussion upon any controverted point in religion. The language was blasphemous, not only in a popular, but in a legal sense; for blasphemy, according to the most precise definitions, consists in maliciously reviling God or religion, and this was reviling Christianity through its Author. The jury have passed upon the intent or *quo animo*, and if those words spoken, in any case, will amount to a misdemeanour the indictment is good. . . . . The free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, are granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right." Another American judge speaks still more plainly. "No author or printer," says Duncan, J.,(*a*) "who fairly and conscientiously promulgates opinions with whose truth he is impressed, for the benefit of others, is answerable as a criminal. A malicious and mischievous intention is, in such a case, the broad boundary between right and wrong; it is to be collected from the offensive levity, scurrilous and opprobrious language, and other circumstances, whether the act of the party was malicious." And the criminal code of New York speaks in a similar tone. Art. 31, extracting a definition from existing common law decisions, describes blasphemy as consisting in "wantonly uttering or publishing words, casting contumacious reproach or profane ridicule upon God, Jesus Christ, the Holy Ghost, the Holy Scriptures, or the Christian religion;" and Art. 32 adds—"If it appears beyond reasonable doubt that the words complained of were used in the course of serious discussion, and with intent to make known or recommend opinions entertained by the accused, such words are not blasphemy."

American definition of blasphemy.

A law against blasphemy, based on such grounds as the foregoing, is rational as well as intelligible; for no good man will attack, in a wanton, offensive, or scurrilous manner, the religious opinions which are sincerely entertained by the vast majority of the inhabitants of the country where he lives; and, on the other hand, no man who fairly and temperately seeks to spread the views which he himself conscientiously holds, should be subjected to any penalty for doing so.

(*a*) *Updegraph* v. *Commonwealth* (11 S. & R. 394, 405, 406), quoted 2 Bish. Crim. Law, 93.

No such explicit exception as obtains in America in favour of the honest and temperate expression of opinions opposed to the received doctrines of religion, is made by any of our older authorities. Mr. Starkie, indeed, in a well-known passage of his book on Libel(*a*) states the rule with a liberality not inferior to that of American law; but the soundness of his view has been denied by an eminent authority. Mr. Starkie says: "The very absurdity and folly of an ignorant man who professes to teach and enlighten the rest of mankind are usually so gross as to render his errors harmless; but be this as it may, the law interferes not with his blunders, so long as they are honest ones. . . . . It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law as well as morals—a state of apathy and indifference to the interests of society—is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he publishes immediately tends, to destroy or even weaken men's sense of religious or moral obligations, to insult those who believe, by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship into disgrace and contempt, the offence against society is complete." Of this view of the law Sir J. F. Stephen says: "The weight of authority appears to me to be opposed to it. The cases cited all proceed upon the plain principle that the public importance of the Christian religion is so great that no one is to be allowed to deny its truth. . . . . To say that the crime lies in the manner and not in the matter appears to be an attempt to evade and explain away a law which has no doubt ceased to be in harmony with the temper of the times."(*b*) On the other hand, Lord Coleridge, C.J., in *Reg.* v *Foote and others*, read the passage to the jury as in his opinion a correct statement of the law.

The liberty allowed in *Rex* v. *Woolston*,(*c*) is only in the case

(*a*) Vol. ii., pp. 146, 147 (3rd edit. p. 590). Ed. by Folkard, p. 599.
(*b*) Hist. Crim. Law, vol. ii., p. 475.
(*c*) Str. 834; Fitzgib. 66, *ante*, p. 362.

of "disputes between learned men upon particular controverted points:" an attack on Christianity *in general* was considered to be clearly a punishable offence. The exception admitted by Blackstone does not extend beyond "rational and dispassionate discussions of the rectitude and propriety of the established mode of worship."(*a*) There is, indeed, a dictum of Best, J., in *Rex* v. *Burdett*(*b*)—"Every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country;" and the same judge, in *Rex* v. *Waddington*,(*c*) dealing with a libel which contained a very gross and offensive attack on the character of Christ, speaks as if he considered *express* malice a necessary ingredient in the offence. "A work," he says, "containing such arguments *published maliciously* (which the jury in this case have found) is by the common law a libel." But in the comparatively recent case of *Cowan* v. *Milbourn*,(*d*) the old doctrine was asserted in stringent terms. There a breach of contract to let rooms for the purposes of delivering lectures was justified on the ground that the lectures to be delivered were of a blasphemous and illegal nature, some of them being advertised as follows: "The Character and Teachings of Christ: the former defective, the latter misleading;" "The Bible shown to be no more inspired than any other book." Counsel for the intending lecturer argued that the test of blasphemy lies rather in the manner than the matter of what is said, and that, according to the current of opinion in modern times, to support a prosecution for blasphemy, there must be a scurrilous and indecent attack upon commonly received opinions, or a maintenance of views flagrantly opposed to ordinary morality. But the Court of Exchequer, without any reference to the motives which might prompt the delivery of the lectures, held that the publication of the doctrines stated in the advertisements referred to was blasphemy, and that, therefore, the breach of contract was justifiable. "It would be a violation of duty," said Kelly, C.B., "to allow the question raised to remain in any doubt. . . . . There is abundant authority for saying that Christianity is part and parcel of the law of the land; and that, therefore, to support and maintain publicly the proposition I have above mentioned [that Christ's character was defective, and His teaching misleading] is a violation of the first principles of the law, and

(*a*) 4 St. Black. 289. (*b*) 4 B. & Ald. 132. (*c*) 1 B. & C. 26.
(*d*) L. Rep. 2 Ex. 230; 36 L. J. 124, Ex.; 16 L. T. N. S. 290; 15 W. R. 750.

cannot be done without blasphemy. I therefore do not hesitate to say that the defendant was not only entitled, but was called on and bound by the law to refuse his sanction to this use of his rooms." The more cautious judgment of Lord Bramwell was based on the language of the statute of Will. 3; and he pointed out that "a thing might be unlawful in the sense that the law will not aid it, and yet the law will not immediately punish it."

In the case last referred to the question of the blasphemous nature of the lectures intended to be delivered arose only incidentally, in dealing with a civil contract; and it is more than doubtful whether a criminal prosecution could, with the tolerant views now prevailing, be successfully maintained for the *bonâ fide* publication of opinions sincerely entertained and temperately expressed, though hostile to the doctrines of Christianity. In no reported case has the point ever come before any of our Courts for express decision. The question, therefore, is *still* an open one; and should a Court or judge ever be called on to determine a case necessarily involving it, there is no insuperable difficulty in the way of declaring the law to be such as is required by the views now held by the bulk of the community as to liberty of discussion. Opposing dicta, not necessary to the decision of the cases in which they are found reported, are obstacles of a kind which our Courts never find much difficulty in surmounting.

In a very recent case the present Lord Chief Justice of England grappled boldly with the question, and in clear and precise language states the rule of law in the only manner which (it is submitted) would not be an anachronism in the age in which we live.

Per Lord Coleridge, C.J.

"You have heard with truth," said Lord Coleridge, C.J., to the jury, in *Reg.* v. *Foote and others*, a prosecution for blasphemous libel(*a*) "that these things are, according to the old law, if the dicta of old judges, dicta often not necessary

(*a*) In the case of *Reg.* v. *Bradlaugh* (15 Cox C. C. 217) tried immediately before, a similar view of the law was expressed by his Lordship. We quote from the charge in the later case, as a more elaborate exposition of the subject, and one published by his Lordship himself. The publications, which were of a very ribald character, are set forth in the report of the case (nom. *Reg.* v. *Ramsey* and others) in Cab. & El. 126. At the trial of *Foote and Ramsay*, a month previously at the Central Criminal Court, before North, J., that learned judge put the question to the jury thus: "Is there any contumelious or profane scoffing against Scripture, or anything exposing the Scripture or Christian religion to ridicule, contempt or derision?" 15 Cox. C.C. 225, note (*a*).

Previously to this case, according to Stephen, J. (Hist. of Crim. Law, vol. ii., p. 373), at the trial of a man named Pooley, at Bodmin, in 1857, Coleridge, J., laid down the law to the jury in terms

for the decisions, are to be taken as of absolute and unqualified authority,—that these things, I say, are undoubtedly blasphemous libels, simply and without more, because they question the truth of Christianity. But, for reasons which I will presently explain, these dicta cannot be taken to be a true statement of the law, as the law is now. It is no longer true, in the sense in which it was true when these dicta were uttered, that Christianity is part of the law of the land. In the times when these dicta were uttered, Jews, Roman Catholics, Nonconformists of all sorts were under heavy disabilities for religion, were regarded as hardly having civil rights. Everything almost, short of the punishment of death, was enacted against them. The epithet 'ferocious,' which has been applied to the statute of William III., to which so much reference has been made, is hardly stronger than that statute deserves. Jews, it is true, were excluded from Parliament in a sense by accident, for the oath which excluded them was not pointed at them; but no one can doubt that at that time, if it had occurred to any one that they were not excluded, a law would have been forthwith passed to exclude them. Historically and as matter of fact, such was the state of things when these dicta were pronounced. But now, so far as I know the law, a Jew might be Lord Chancellor, most certainly he might be Master of the Rolls. The great and illustrious lawyer(*a*) whose loss the whole profession is deploring, and in whom his friends know that they lost a warm friend and a loyal colleague; he, but for the accident of taking his office before the Judicature Act came into operation, might have had to go circuit, might have sat in a criminal court to try such a case as this, might have been called upon, if the law really be that 'Christianity is part of the law of the land' in the sense contended for, to lay it down as law to a jury, amongst whom might have been Jews—that it was an offence against the law, as blasphemy, to deny that Jesus Christ was the Messiah, a thing which he himself did deny, which Parliament had allowed him to deny,

apparently founded upon the passage of Starkie (cited *ante*, p. 374), Stephen, J., adds: "No judge who ever sat on the bench was less likely to understate the law relating to blasphemous libel than Mr. Justice Coleridge, and indeed the sentence which he passed upon Pooley was regarded as over severe, and was afterwards mitigated; and this circumstance gives special weight to his decision." The writer further informs us, in a note, that in the course of the discussion to which this case gave rise, Mr. Justice Coleridge told him that he pointed out to the jury "that one of the offensive remarks made by Pooley upon the character of Jesus Christ might possibly have been intended as an argument and not as mere railing, and that if they took that view of it they might acquit him on the count founded upon it."

(*a*) The late Sir George Jessel, Master of the Rolls.

and which it is just as much part of the law that any one may deny, as it is your right and mine, if we believe it, to assert. Therefore, to base the prosecution of a bare denial of the truth of Christianity, *simpliciter* and *per se* on the ground that Christianity is part of the law of the land, in the sense in which it was said to be so by Lord Hale, and Lord Raymond, and Lord Tenterden, is in my judgment a mistake. It is to forget that law grows; and that though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression; I call it progression of human opinion. Therefore, to take up a book or a paper, to discover merely that in it the truth of Christianity is denied without more, and thereupon to say that now a man may be indicted upon such denial as for a blasphemous libel is, as I venture to think, absolutely untrue. I for one positively refuse to lay that down as law, unless it is authoritatively so declared by some tribunal I am bound by. Historically, I cannot doubt I should be justified in so doing; for Parliament, which is supreme and binds us all, has enacted statutes which make that old view of the law no longer applicable. Nor is it any great disrespect whatever to the great men of elder days, to hold that what they said in one state of things is not applicable under another. . . . . It is clear to my mind, that the mere denial of the truth of the Christian religion is not enough alone to constitute the offence of blasphemy. What, then, is enough?"

In answer to this question, his lordship read, as what he believed a correct statement of the law, the passage from Starkie (cited *ante*, p. 372), adding: "Such study as I have made of the cases has not satisfied me that the law ever was laid down *differently*(*a*) *from* the law as laid down by Mr. Starkie." Then after a review of the cases, his Lordship proceeded: "But whether this is so or not, Parliament at least has altered the law on these subjects; it is no longer the law that none but professors of Christianity can take part or have rights in the State; others have now just as much right in civil matters as any member of the Church of England has. The condition of things is no longer what it was when these great judges pronounced the judgments which I think have been misunderstood and strained to a meaning they do not warrant. . . . . If the decencies of controversy are observed,

(*a*) Meaning, doubtless, by express decision not going beyond the point actually requiring determination. As to unnecessary dicta, see his lordship's language cited at the top of p. 375, and compare the author's remarks in note (*a*) on pp. 379, 380.

even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel."(*a*)

As this view of the law is opposed to that laid down by so eminent an authority as Mr. Justice Stephen, in his History of the Criminal Law,(*b*) after a review of all the decisions, and as the subject is one of increasing interest at the present day, let us inquire more particularly: What, besides the offensive manner of the libels, are the reasons for the old decisions, and the more frequent *dicta*, not necessary to the determination of the cases in which they are found? Do they still exist in equal force? Do they still exist at all?

How far are the older decisions now applicable?

The reasons given are three in number; (1) Lord Hale's famous dictum that "Christianity is parcel of the law of England; therefore to reproach the Christian religion is to speak in subversion of the law;"(*c*) (2) that "if the name of our Redeemer was suffered to be traduced, and His holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions—the dread of future punishment;"(*d*) (3) that blasphemous publications tend to acts of outrage and violence, by wounding the feelings of those who believe in the doctrines attacked.

(1.) As to Lord Hale's dictum, Archbishop Whately says,

(*a*) The jury being unable to agree were discharged. The accused having been convicted of a similar offence before the case came on again for trial, the prosecutor obtained leave to enter a *nolle prosequi*.

Lord Coleridge has been criticised (*Fortnightly Review* for March, 1884, pp. 295, 296) for not having held that the publications of the defendants in this case were blasphemous libels, and for having directed the jury that "it was for them to say" whether they were permissible attacks on the religion of the country. But what is the proper function of the judge since Fox's Act? His duty is to explain, as best he can, what, in general, a blasphemous libel is. It is for the jury to determine whether the publication in question is or is not a libel. As to what Lord Coleridge's own opinion was, the concluding portion of his charge to the jury leaves little room for doubt: "Look at them and judge for yourselves whether they do or do not come within the widest limits of the law. If they do, then, as with the libels, find the defendants not guilty. But if you think that they do not come within the most liberal and largest view that any one can give of the law as it exists now, then find them guilty. Whatever may be the consequences—you may think the prosecution unwise, you may think the law undesirable, you may think no publications of this sort should ever be made the subject of criminal attack, it matters not—your duty is to obey the law; not to strain it in favour of the defendants, because you do not like the prosecution; not to strain it against them, because you do not yourselves agree with the statements they advocate, as you are certain entirely to disapprove of the manner in which they advocate them" (Summing Up, p. 32, 1 Cab. and El. 149).

(*b*) Vol. ii., pp. 464, *seq*. (*c*) *Rex* v. *Taylor*, *ante*, p. 362.

(*d*) *Per* Ashurst, J., *Rey.* v. *Williams*, Holt on Libel, 69.

in the preface to his "Elements of Rhetoric," that he never met with any one who could explain the precise meaning of it. If we adopt Alderson, B.'s, explanation of it (*ante*, p. 370) as applicable only to attacks on the established religion "because it is the form established by law, and is therefore a part of the constitution of the country," we have the following curious result, that a written attack on any of the doctrinal points which distinguish the Established Church from the other religious denominations of the country, is a blasphemous libel in England; that it was but is no longer so in Ireland; it neither being nor ever having been so in Scotland. It follows also, as pointed out by Lord Coleridge,(*a*) that a written attack on any part of the Constitution as now established, must be a (seditious) libel; which, in our days at any rate, is a *reductio ad absurdum* of the proposition.

(2.) That the solemnity of an oath is necessary to the due administration of justice is a notion now repudiated by the legislature itself, which has (32 and 33 Vict. c. 68. 3, 4.) allowed a solemn declaration to be substituted for it in all cases where the judge is satisfied that an oath would have no binding effect on the conscience of the witness.

(3.) As to the tendency of such publications to provoke to acts of outrage and revenge, it is no doubt true, as observed by Michaelis, that, "were I in Turkey to blaspheme Mahomet, or in a heathen city its gods, nothing would be more natural than for the people, instead of suffering it, to avenge the insult in their usual way, that is to say, tumultuously, passionately, and immoderately"—a state of things which every State is justified in preventing. If, however, in this country, a written attack upon any part of the established religion, couched in decent language, would no longer have the effect of producing such a result, the last reason ceases to exist for holding that the matter and not the manner of a publication is to be the legal criterion of its blasphemous character.

On this last point it should be borne in mind that what might have a tendency to shock the sense and wound the feelings of a community at one period of its career, at a more advanced stage of its development may but slightly ruffle or possibly only languidly and very partially excite. At a time when neither Atheist, Quaker, nor Moravian was a competent witness in a court of justice, when no Jew or Roman Catholic could sit in Parliament or hold judicial office, the so-called religious feelings of those who professed the dominant creed were naturally more easily hurt by any attacks upon

(*a*) *Reg.* v. *Foote and others.* Summing-up, p, 12. 1 Cab. & El. 136.

its truth than can possibly be the case now, after long years of no more than equality in all matters legal and political, with the old religious pariahs, have taught a less proud spirit and a wider tolerance. When Roman Catholic, Unitarian, Jew and Agnostic, sitting side by side with the professors of the State religion, equally take part in making the laws and in administering them; when in all the relations of life they are in the habit of meeting daily on altogether equal terms, it is of necessity that the ears of orthodoxy should have become less sensitive to sounds that in olden times would have grated harshly upon them, its feelings less easily outraged by the expression of opinions with which use and contact have made them less unfamiliar. Further, an age accustomed to the most thorough-going criticism of all the philosophic, scientific, political, and social opinions of the present, as well as the past, and which has come to look upon such criticism favourably, must inevitably have learned to extend a larger tolerance also to similar researches into questions of theology. That might well have shocked the entire community of a century ago which now would seriously disturb no moderately cultivated member of it, however strict his orthodoxy. Where so much has changed, it would be strange if our common law, in all other matters expansive and sympathetic with the growing needs and ever widening views of an advancing community, should in this alone remain harsh and rigid.(*a*)

(*a*) The distinguished writer of the article in the *Fortnightly Review*, already referred to, says: "It seems to me that where a definite rule of law has once been laid down by the judges and has long been acquiesced in by the public, it acquires the force of law, and can be altered only by Parliament, even if the state of things which caused it to be laid down has altogether altered" (pp. 310, 311). This is undoubtedly true; but has it ever definitely been laid down in any case, in which the point arose for decision, that the matter, irrespectively of the manner of a publication was the criterion of its blasphemous character? The learned judge makes an admission on p. 314 of his article, which, it is submitted, is fatal to his contention on this point. He there says: "It is certainly true that no case can be produced in which a man has been convicted of a blasphemous libel merely for a perfectly decent denial of the truth of Christianity." In other words, no Court or judge has up to the present ever been called on to determine the question; the question, therefore, has never been judicially determined, and the matter remains *res integra*. If any observations on the subject are to be found in cases in which it was wholly unnecessary to decide this particular point, such observations are, so far as this point is concerned, merely *obiter dicta*, and therefore, according to the well-established principles of our common law, not of binding authority.

Strictly speaking, the law itself is not altered or modified when a judge declines to apply old cases to a vastly altered state of

Statement of the law as it now is.

It is submitted, then, that on a prosecution for the common law offence of blasphemy in our day the language of the older cases does not express the rule of law now properly applicable, and that the true criterion of criminality is the manner and not the matter of the publication.

On the other hand, on the prosecution of any person educated in or who has made profession of the Christian religion, for an offence against the statute 9 & 10 Will. 3, c. 35 (*ante*, p. 367), no decency of manner will furnish a defence, if the subject matter of the publication maintains that there are more gods than one, or denies the Christian religion to be true or the Holy Scriptures to be of divine authority.

Criminal Code Bill, 1879.

By the Criminal Code Bill (being the Draft Code of 1878 revised by a commission consisting of Lord Blackburn, Mr. Justice Barry, the late Lord Justice Lush and Mr. Justice

society. The rationale of a common law decision is this: a particular case—that is, a particular group of facts, being brought before the Court, the Court pronounces what is the law applicable to it. The Court does not profess to determine what is the law applicable to a group of facts differing in any material respect from that before it. So far as it goes beyond the requirements of the particular case, and enunciates a principle wider than they demand, its decision is a mere *obiter dictum*, not binding upon any other Court. Now, what was the group of facts presented to the Courts in olden days on a prosecution for blasphemous libel? It was this: a publication of some sort (1) attacking that which was considered a fundamental part of the law of the land, (2) when no attack on any part of the law was permitted, (3) which also tended to destroy that which was held to be a necessary requisite to the due administration of justice, and (4) from which outrage or tumult might naturally be expected to result; in other words, a publication forming one of a class, the whole of which were forbidden, producing one ill effect of vital consequence to the administration of justice, and likely to be followed by another detrimental to the public peace. Is a decision strictly applicable only to a publication of which all this could truthfully be said, an authority binding on a Court or a judge dealing nowadays with a publication which, if it attacks a fundamental part of the law of the land in any intelligible sense, (1) does so after such attacks have become freely permitted, (2) when the assumed necessary requisite to the administration of justice which was thought to be endangered has ceased, by Act of the Legislature itself, to be regarded as a necessary requisite, and (3) where there is not the least probability of tumult or disorder being caused by the publication? If a case, differing from the old cases in any one of these respects now presented itself for determination, he would not be a very bold judge who refused to apply to it the old common law decisions; if the case differed in most if not all of the foregoing respects the judge would, it is submitted, be bound to hold the old decisions inapplicable.

As to the disabilities imposed by the statute 9 & 10 Will. 3, c. 32, they, of course, can only be removed by an Act of the Legislature.

Stephen) introduced in 1879, and destined, possibly, some day to become law; "It shall be a question of fact whether any particular published matter is or is not a blasphemous libel; provided that no one shall be liable to be convicted upon any indictment for a blasphemous libel only for expressing in good faith and in decent language, or attempting to establish by arguments used in good faith, and conveyed in decent language any opinion whatever upon any religious subject;"(*a*) the punishment being liability to one year's imprisonment.(*b*)

How punishable.

Blasphemous publications are punishable either by indictment at common law(*c*) or by criminal information. Persons convicted were formerly compelled to stand in the pillory(*d*) besides suffering other punishments. The Act of 56 Geo. 3, c. 138 which abolished the punishment of the pillory in most cases, provides (sect. 2) that the Court may in all cases where it was formerly used, pass such sentence of fine or imprisonment, or of both, in lieu of the sentence of pillory, as to it shall seem most proper.

The punishment by banishment was abolished by 11 Geo. 4 & 1 Will. 4, c. 73, s. 1.

The Act 60 Geo. 3 & 1 Geo. 4, c. 9, contained various provisions for securing (by recognisance or bond with sureties) the payment of fines inflicted for the publication of blasphemous and other libels in newspapers; but this Act is now repealed by 32 & 33 Vict. c. 24.

Scotch statute law.

The Scotch law is not different from the English as laid down in our older authorities.(*e*) The Act of 6 Geo. 4, c. 47, still remains in force with the exception of the provisions as to punishment by banishment, which are repealed by 7 Will. 4 & 1 Vict. c. 5.

Plea of justification not allowed.

The provision in Lord Campbell's Act (6 & 7 Vict. c. 96, s. 6), enabling a defendant to give evidence of the truth of the libel, and that it was for the public benefit that it should be published, does not apply to libels of a blasphemous or seditious character.(*f*)

(*a*) Sect. 141. The name of Mr. Justice Stephen can not now be cited in support of this projected legislation. At p. 315 of the article already referred to, he expresses the opinion that a law permitting decent and serious attacks on Christianity, but requiring that the decencies of controversy should be observed, would never work, adding "You cannot really distinguish between substance and style. You must either forbid or permit all attacks on Christianity."

(*b*) Sect. 141. (*c*) *Reg.* v. *Hetherington* (5 Jur. 529).

(*d*) *Rex* v. *Taylor* (Vent. 293: 3 Keb. 607); *Rex* v. *Waddington* (1 B. & C. 26); *Rex* v. *Carlile* (3 B. & Ald. 161).

(*e*) See the direction given to the jury in *Paterson's case*, *ante*, p. 369.

(*f*) *Reg.* v. *Duffy* (9 Ir. L. Rep. 329), followed in *Ex parte* O'Brien, 15 Cox. C. C. 180.

CHAPTER III.

OBSCENE LIBELS.

Jurisdiction of courts.

THE jurisdiction of our common law courts in cases of publications of an immoral nature, though now unquestioned, was for some time not free from doubt. After the abolition of the Star Chamber, it seems that the Court of King's Bench came to be regarded as the *custos morum* of the nation, having cognisance of all offences against the public morals.(*a*) But, though one Hill was indicted in Michaelmas, 10 Will. 3,(*b*) for printing and publishing some obscene poems of Lord Rochester tending to the corruption of youth, and on going abroad was outlawed for the offence; yet in Easter, 6 Anne, in the case of Read,(*c*) who was indicted and convicted for publishing a lascivious and obscene libel, Holt, C.J., and Powell, J., on a motion in arrest of judgment, were so strongly of opinion that the offence was only punishable in the ecclesiastical courts, that no judgment was pronounced against the defendant. However, the case of *Rex* v. *Curl*,(*d*) in 1 Geo. 2, settled the question in favour of the jurisdiction of the temporal courts. An information was filed against the defendant in that case for having published a base and obscene libel entitled "Venus in the Cloister, or the Nun in her Smock," and he was found guilty. An argument took place on a motion in arrest of judgment, and the preceding cases were referred to, the Attorney-General urging, in defence of the temporal jurisdiction, that to destroy morality was to destroy the peace of the government, since government is no more than public order, which is morality; and that although every immoral act is not indictable, such as telling a lie, &c., yet if it is destructive of morality in general, and does, or may, affect all the subjects of the realm, it then becomes an offence of a public nature. The Court, dissenting from the opinions expressed in Read's case, upheld the temporal jurisdiction, and Curl was pilloried for his offence. Since this decision the temporal character of the offence of publishing obscene and immoral works has not been questioned.

Wilkes was convicted in 1764, imprisoned, and heavily fined

(*a*) *Sir Charles Sedley's case*, 1663 (Keb. 720, 2 Str. 790).
(*b*) 2 Str. 790; Dig. L. L. 60. (*c*) Fort. 98.
(*d*) 2 Str. 789. One of the members of the Court when this case first came before it, Fortescue, J., was of opinion that the offence, though great, was not punishable by law. *Ibid.* 790.

for publishing an obscene and impious libel called "An Essay on Woman;"(*a*) and very many unreported cases of convictions for a similar offence have since taken place.(*b*)

Test of obscenity.

The test of obscenity in any publication, according to Cockburn, C.J.,(*c*) is this: "Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of the sort may fall."

Having possession of obscene works for purpose of selling.

"Preserving and keeping in one's possession" obscene works for the purpose of uttering and selling them is not an indictable offence. But "obtaining and procuring" them for that purpose is an indictable misdemeanour at common law.(*d*) With reference to counts charging the former as an offence, Lord Campbell, C.J., said: "We must hold them bad, because they are consistent with the possibility that the plaintiff in error may have had the pictures in his possession with an innocent intention; and there is no act shown to be done which can be considered as the first step in the prosecution of a misdemeanour. . . . . Procuring is an overt act, an unlawful step taken in pursuance of the abominable offence of circulating obscene prints to deprave and corrupt the public morals."

Selling obscene works.

By 14 & 15 Vict. 100, s. 29, it is enacted that, "whenever any person shall be convicted of any public selling, or exposing for public sale, or to public view, of any obscene book, print, picture, or other indecent exhibition, it shall be lawful for the Court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment."

In 1857 a Bill was introduced into Parliament by Lord Campbell for more effectually preventing the sale of obscene books, pictures, prints, and other articles, by giving power to magistrates to issue warrants to search for and seize them. The Bill, on its second reading in the House of Lords, was opposed by several learned lords as unnecessary, vexatious, and likely to be inoperative with respect to the class of works aimed at. The absence of any definition of the word

(*a*) 4 Burr. 2527.

(*b*) As to other forms of obscene or indecent publication, see *Sir Charles Sedley's case* (*ubi supra*); *Rex* v. *Crunden* (2 Camp. 89); *R.* v. *Rowerard* (cited 1 Den. C. C. 338; 2 Car. & K. 933); *Reg.* v. *Webb* (1 Den. C. C. 338); *Reg.* v. *Watson* (2 Cox Crim. Cas. 376); *Reg.* v. *Holmes* (1 Dears. C. C. 207).

(*c*) *Reg.* v. *Hicklin* (L. Rep. 3 Q. B. 371; 18 L. T. N. S. 398; 36 L. 9, J. S M. C.).

(*d*) *Dugdale's case* (1 Dears. C. C. 64).

"obscene" was warmly animadverted upon by Lord Lyndhurst, in a speech pointing out that copies of some of the pictures of the greatest masters, and the writings of many of the greatest dramatists and novelists, might be included under the operation of the Act. Alterations were made by Lord Campbell to meet the objections raised, and the Bill became law the same year.(*a*)

Power to search for obscene books, pictures, &c.

Sect. 1 of this Act (20 & 21 Vict. c. 83) provides that, "it shall be lawful for any metropolitan police magistrate, or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them upon oath that the complainant has reason to believe and does believe, that any obscene *books, papers, writings, prints, pictures, drawings, or other representations* are kept in any house, shop, room, or other place within the limits of the jurisdiction of any such magistrate or justices, *for the purpose of sale or distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain,* which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid, at or in connection with such place, so as to satisfy such magistrate or justices that the belief of the said complainant is well founded; and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanour, and proper to be prosecuted as such, to give authority by special warrant

(*a*) "The Bill, as it originally stood," said Lord Campbell in committee, "*only required an affidavit that the person making it had* reasonable ground to suspect that these books were kept for sale and exhibition. The Bill, as now amended, required that the complainant should swear that he had reason to believe, and did believe, that these books or prints were kept in store for sale or exhibition. Another amendment enacted that the complainant should set forth the facts on which he entertained that belief, and if the justice were satisfied on these facts that the books and prints were kept as alleged, he might issue his search warrant, with this additional guard, that he must be satisfied they were such books and prints as that their publication would constitute a misdemeanour by the common law. There was also this further security, that the magistrate must not only be satisfied that the publication of these books and prints was a misdemeanour, but a misdemeanour which ought to be prosecuted by indictment" (Parliamentary Debates, July 3rd, 1857).

"The Bill, as originally introduced, contained a clause empowering the Chief Commissioner of Police, where he had reasonable information that obscene works were kept, to grant a warrant in the same manner as a magistrate or justices: but the clause, being objected to, was omitted" (*Ibid.*).

to any constable or police officer into such house, shop, room, or other place, with such assistance as may be necessary, to enter in the daytime, and, if necessary, to use force by breaking open doors or otherwise, and to search for and seize all such books, papers, writings, prints, pictures, drawings, or other representations as aforesaid found in such house, shop, room, or other place, and to carry all the articles so seized before the magistrate or justices issuing the said warrant, or some other magistrate or justices exercising the same jurisdiction; and such magistrate or justices shall thereupon issue a summons, calling upon the occupier of the house or other place which may have been so entered by virtue of the said warrant, to appear within seven days before such police stipendiary magistrate or any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and such magistrate or justices shall be satisfied that such articles, or any of them, are of the character stated in the warrant, and that such, or any of them, have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal as hereinafter mentioned be given, and such articles shall be in the meantime impounded; and if such magistrate or justices shall be satisfied that the articles seized are not of the character stated in the warrant, or have not been kept for any of the purposes aforesaid, he or they shall forthwith direct them to be restored to the occupier of the house or other place in which they were seized."

Three things of which justices must be satisfied.

The magistrate or justices, before ordering a search and seizure under this section, are to be satisfied of three things: first, that the belief of the complainant is well founded; secondly, that any of the articles published for any of the purposes mentioned are of such a character and description that the publication of them would be a misdemeanour; and thirdly, that the publication in the manner alleged would be proper to be prosecuted.(*a*) And the justices in petty sessions

(*a*) See *per* Blackburn, J., *Reg.* v. *Hicklin* (L. Rep. 3 Q. B. 373; 18 L. T. N. S. 398; 37 L. J. 89, M. C.).

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are also in effect to be satisfied of the same three things. Before ordering the works seized to be destroyed, they must be satisfied that the articles complained of have been kept for any of the purposes mentioned, that they are of such a character that it would be a misdemeanour to publish them, and that it would not only be a misdemeanour to publish them, but that it would be proper to be prosecuted as such.(*a*)

The words "and proper to be prosecuted as such," were, according to Blackburn, J.,(*b*) inserted in the section with *the object of guarding against the vexatious prosecution* of publishers of old and recognised standard works, in which there may be some obscene or mischievous matter, *e.g.*, the works of Dryden.

Where the order made by a magistrate under this Act for the destruction of obscene books, stated merely that he was satisfied that the books were obscene, but did not state that "the publication of them would be a misdemeanour, and proper to be prosecuted as such," the order was held bad.(*c*)

Death of complainant.

If after the issuing of the summons, but before it is heard, the complainant dies, an order for the destruction of the obscene works may still be made.(*d*)

To the argument against this view based on the provision in sect. 4 as to awarding costs to the party appealing or appealed against, Lush, J., replied: "I cannot see why, if upon the death of the complainant some other person takes up the prosecution, he should not be liable to pay costs if the appeal should be successful. It could readily be ascertained as a matter of fact who was the party virtually prosecuting the appeal."(*e*)

Intention of publisher immaterial.

If a work be in itself obscene, however innocent may be the motive of its publisher, the publication of it is an indictable misdemeanour, and the work may be seized by a magistrate or justices under sect. 1 of 20 & 21 Vict. c. 83.(*f*)

Where a pamphlet called "The Confessional Unmasked;

(*a*) *Per* Blackburn, J., *Ibid.*

(*b*) *Ibid.* "The magistrate," said Lord Lyndhurst, on the third reading of the Bill in the House of Lords, "must also be satisfied that the case is a proper one for a prosecution, so that if indecent passages were taken out of such authors as Dryden or Pope, he would say—'Although these are very indecent passages, and ought never to have been inserted in these works, yet this is not a case for a prosecution'" (Parliamentary Debates, July 13, 1857).

(*c*) *Ex pte. Bradlaugh* (L. R. 3 Q. B. D. 509).

(*d*) *R.* v. *Truelove* (L. R. 5, Q. B. D. 536). (*e*) *Ibid.* p. 540.

(*f*) *Reg.* v. *Hicklin* (L. Rep. 3 Q. B. 373; 37 L. J. 89, M. C.; 18 L. T. N. S. 398).

showing the depravity of the Romish priesthood, the iniquity of the confessional, and the questions put to females in confession," containing extracts in Latin, with translations of the same, from various writers, half the pamphlet relating to controversial matters, and the other half being grossly obscene as relating to impure and filthy acts, words, and deeds, was circulated by the appellant, a member of "The Protestant Electoral Union," not for profit or gain, but for the purpose of exposing what he deemed to be the errors of the Church of Rome, and particularly the immorality of the confessional, the pamphlet in fact containing a preface and notes condemnatory of the tenets and principles of the writers cited from, the Court of Queen's Bench held that the justices were right in ordering a number of copies of the pamphlet to be seized in the appellant's house and destroyed as obscene books within this section.(*a*) "I take it," said Cockburn, C. J., "that, apart from the ulterior object which the publisher of this work had in view, the work itself is, in every sense of the term, an obscene publication, and that consequently, as the law of England does not allow of any obscene publication, such publication is indictable. We have it therefore that the publication itself is a breach of the law. But then it is said for the appellant, 'Yes, but his purpose was not to deprave the public mind; his purpose was to expose the errors of the Roman Catholic religion, especially in the matter of the confessional.' Be it so. The question then presents itself in this simple form: May you commit an offence against the law in order that thereby you may effect some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is, emphatically, no. The law says, you shall not publish an obscene work. An obscene work is here published, and a work the obscenity of which is so clear and decided that it is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come would be of a mischievous and demoralizing character. . . . . I think the old sound and honest maxim that you shall not do evil that good may come, is applicable in law as well as in morals; and here we have a certain and positive evil produced for the purpose of effecting an uncertain, remote, and very doubtful good. I think, therefore, the case for the order is made out; and although I quite concur in thinking that the motive of the parties who published

(*a*) *Reg.* v. *Hicklin* (L. Rep. 3 Q. B. 373; 37 L. J. 89, M. C.; 18 L. T. N. S. 398).

this work, however mistaken, was an honest one, yet I cannot suppose but what they had that intention which constitutes the criminality of the act: at any rate, that they knew perfectly well that this work must have the tendency which in point of law makes it an obscene publication—namely, the tendency to corrupt the minds and morals of those into whose hands it might come. The mischief of it, I think, cannot be exaggerated. But it is not upon that I take my stand in the judgment I pronounce. I am of opinion, as the learned recorder has found, that this is an obscene publication. I hold that where a man publishes a work manifestly obscene he must be taken to have had the intention which is implied from that act; and that, as soon as you have an illegal act thus established, *quoad* the intention and *quoad* the act, it does not lie in the mouth of the man who does it to say, 'Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose.' The law does not allow that. You must abide by the law, and if you would accomplish your object, you must do it in a legal manner, or let it alone; you must not do it in a manner which is illegal."

Report of judicial proceedings.

It is no defence that the obscene libel is a correct report of what took place in a court of justice(*a*). This was so held as to a book containing a full report of the trial of one Mackay for selling "The Confessional Unmasked," which set forth the whole of that work. "If," said Grove, J.,(*b*) "it were permissible to publish a report of a trial in which the question was whether certain matter was obscene and the publication of it a misdemeanour, and to reproduce the whole of such disgusting matter under the cover of such report, the result would be that the person publishing an obscene work would only have to be brought before a court of justice for such publication, in order to entitle him to republish the same matter with perfect impunity."

Appeal from act of magistrates or justices.

Any person aggrieved by any act or determination of the magistrate or justices in or concerning the execution of the above Act may appeal to the next general or quarter sessions for the county, riding, division, city, borough, or place in and for which such magistrate or justices shall have so acted, giving to the magistrate or justices of the peace whose act or determination shall be appealed against notice in writing of such appeal, and of the grounds thereof, within seven days after such act or determination, and before the next general or quarter sessions, and entering

(*a*) *Steele*, appellant; *Brannan*, respondent (L. R. 7 C. P. 261).
(*b*) *Ibid.* p. 271.

within such seven days into a recognisance with sufficient surety, before a justice of the peace for the county, city, borough, or place in which such act or determination shall have taken place, personally to appear and prosecute such appeal, and to abide the order of and pay such costs as shall be awarded by such court of quarter sessions, or any adjournment thereof; and the court at such general or quarter sessions shall hear and determine the matter of such appeal, and shall make such order therein as shall to the said court seem meet; and such court upon hearing and finally determining such appeal shall, and may, according to their discretion, award such costs to the party appealing or appealed against, as they shall think proper: and if such appeal be dismissed or decided against the appellant, or be not prosecuted, such court may order the articles seized forthwith to be destroyed: provided always that it shall not be lawful for the appellant on the hearing of any such appeal to go into or give evidence of any other grounds of appeal against any such order, act, or determination, than those set forth in such notice of appeal.(*a*)

Wrongful acts, done in execution of the Act.

Sect. 2 enacts that "no plaintiff shall recover in any action for any irregularity, trespass, or other wrongful proceeding made or committed in the execution of this Act, or in, under, or by virtue of any authority hereby given, if tender of sufficient amends shall have been made by or on behalf of the party who shall have committed such irregularity, trespass, or other wrongful proceeding, before such action brought; and in case no tender shall have been made, it shall be lawful for the defendant in any such action by leave of the Court where such action shall depend, at any time before issue joined, to pay into Court such sum of money as he shall think fit, whereupon such proceeding, order, and adjudication shall be had and made in and by such Court as in other actions where defendants are allowed to pay money into Court."

No action, suit, or information, or any other proceeding, of what nature soever, is to be brought against any person for anything done or omitted to be done in pursuance of this Act, or in the execution of the authorities under this Act, unless notice in writing has been given by the party intending to prosecute such action, suit, information, or other proceeding to the intended defendant, one calendar month at least before prosecuting the same.(*b*) Such action, suit, information, or other proceeding must be brought or

(*a*) 20 & 21 Vict. c. 83, s. 4. (*b*) *Ibid.*

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commenced within three calendar months next after the act or omission complained of, or in case there shall be a continuation of damage, then within three calendar months next after the doing such damage shall have ceased.(*a*)

Form of indictment.

As to the manner in which an obscene libel must be set out in the indictment, see *Bradlaugh* v. *The Queen*(*b*) referred to in the chapter on Criminal Prosecutions, *post*.

Ecclesiastical jurisdiction abolished.

The stats. 18 & 19 Vict. c. 41, and 23 & 24 Vict. c. 32, have taken away the jurisdiction in suits for defamation which the Ecclesiastical Courts formerly possessed in England, Wales, and Ireland.

CHAPTER IV.

SEDITIOUS LIBELS.

Summary of history of freedom of the press.

DURING a long period of our history the press of the country was under a rigorous censorship. The number of printers(*c*) and of the presses used by them, was strictly limited, and the publication of new works was prohibited unless previously authorised by licensers. The censorship of the press was part of the prerogative of the Crown, exercised chiefly through the tribunal of the Star Chamber. On the abolition of the Star Chamber, in 1641, the Long Parliament assumed to itself the jurisdiction exercised by that Court in matters relating to the press, and passed many severe ordinances in restraint of printing. The restraints of the press were continued after the Restoration by the Licensing Act of 13 & 14 Car. 2, c. 33 ("An Act for preventing the frequent abuses in printing seditious, treasonable, and unlicensed books and pamphlets, and for regulating of printing and printing presses"). This Act interdicted the printing of pamphlets and books except in London, York, and the Universities; limited the number of master printers to twenty; regulated the number of their presses and apprentices; appointed licensers, and imposed severe penalties on offenders against its provisions. Many cruel punishments were inflicted under this Act.(*d*) It continued in force till 1679, and in 1685

(*a*) 20 & 21 Vict. c. 83. s. 3.

(*b*) L. R. 3 Q. B. D. 607.

(*c*) Queen Elizabeth prohibited printing except in London, Oxford, and Cambridge (1 St. Tr. 1263).

(*d*) In 1680, when the Licensing Act had ceased for a time to operate, the opinion of the judges on the subject of unlicensed printing

was revived (by 1 Jac. 2, c. 17) for seven years. In 1692 it was continued (by 4 Will. & M. c. 24) until the end of the session of 1693, since when its operation has ceased, notwithstanding several attempts to revive it.(*a*) The liberty of the press dates from that year.

Liberty of press.

The liberty of the press, according to Blackstone,(*b*) when rightly understood, consists in laying no *previous* restraints upon publications; not in freedom from censure for criminal matter when published."(*c*) Though this is true, it cannot

was expressed by Chief Justice Scroggs in the following manner. At the trial of Benjamin Harris, a bookseller, for the publication of a libel entitled, "An Appeal from the Country to the City for the Preservation of His Majesty's Person, Liberty, Property, and the Protestant Religion," the Chief Justice said: "It is not long since that all the judges met by the King's command—as they did some time before, too—and they both times declared unanimously that all persons that do write or print or sell any pamphlet that is either scandalous to public or private persons, such books may be seized and the person punished by law; that all books which are scandalous to the Government may be seized, and all persons so exposing them may be punished; and, further, that all writers of news, though not scandalous, seditious, or reflective upon the Government or the State, yet if they are writers (as there are few others) of false news, they are indictable and punishable upon that account" (7 St. Tr. 929).

(*a*) "While the Abbey was hanging with black for the funeral of the Queen, the Commons came to a vote which at the time attracted little attention, which produced no excitement, which has been left unnoticed by voluminous annalists, and of which the history can be but imperfectly traced in the archives of Parliament, but which has done more for liberty and for civilization than the Great Charter or the Bill of Rights. Early in the session a select committee had been appointed to ascertain what temporary statutes were about to expire, and to consider which of those statutes it might be expedient to continue. The report was made; and all the recommendations contained in that report were adopted, with one exception. Among the laws which the committee advised the House to renew was the law which subjected the press to a censorship. The question was put 'that the House do agree with the committee in the resolution that the Act entitled An Act for preventing abuses in printing seditious, treasonable, and unlicensed pamphlets, and for regulating of printing and printing presses be continued.' The Speaker pronounced that the 'noes' had it; and the 'ayes' did not think fit to divide" (Macaulay, Hist. of Eng. vol. iv. p. 540). As to the reasons which induced Parliament to discontinue the Licensing Act, see p. 541 of the volume last referred to.

(*b*) 4 Steph. Com. 346.

(*c*) To the same effect, Lord Mansfield: "The liberty of the press consists in printing without any previous licence, subject to the consequence of law" (*The King* v. *Dean of St. Asaph*, 3 T. R. 429). Lord Ellenborough: "The law of England is a law of liberty, and, consistently with this liberty, we have not what is called an *imprimatur*; there is no such preliminary licence necessary; but if a man publish a paper he is exposed to the penal consequences, as he is in every other

as Hallam remarks,(*a*) be said to exist in any security, or sufficiently for its principal ends, where discussions of a political or religious nature, whether general or particular, are restrained by too narrow and severe limitations. What the actual limitations are in matters political will be discussed in this chapter, in treating of libellous attacks on the Sovereign, on the Administration, and on the Constitution generally.

Form of publication.

It is to be observed, in the first place, with respect to seditions as well as other libels, that pictures, engravings, or woodcuts may be libellous as well as written or printed words.(*b*)

Function of jury.

It is also to be observed that in these, as in other cases of libel, the jury are the sole judges of both law and fact: they are to determine not only the fact of publication, but also whether the libel was published with the seditious intention charged in the indictment or information.

"You," said Fitzgerald, J., to the jury in a case of this sort, "are the sole judges of the guilt or innocence of the defendant. The judges are here to give any help they can, but the jury are the judges of law and fact, and on them rests the whole responsibility. In this sense the jury are the true guardians of the liberty of the press."(*c*) "The questions of law are usually for the judge, and on them the jury are bound to take his direction; the questions of fact are solely for their determination. In this peculiar case of libel the law of the land says that the jury shall determine the whole question, whether the publication is a libel or a seditious libel."(*d*)

The fact that the House of Commons has resolved a particular publication to be a malicious, scandalous, and seditious libel, tending to create jealousies and divisions amongst the liege subjects of the Sovereign, and to alienate the affections of the people of this country from the constitution, does not deprive the jury of their right to determine whether the act if it be illegal" (*Rex* v. *Cobb*, 29 Howell's St. Tr. 49). And Fitzgerald, J.: "By liberty of the press I mean complete freedom to write and publish without censorship and without restriction, save such as was absolutely necessary for the preservation of society" (11 Cox Cr. Cas. 49)

(*a*) Const. Hist. vol. iii., p. 227 (edit. 1832).

(*b*) See *Reg.* v. *Sullivan* (11 Cox Crim. Cas. 51, 53–55).

(*c*) *Ibid.* p. 50; see also *per* Deasy, B., *Ibid.* p. 60. Lord Kenyon thus gives the substance of all that has been said on this subject: "That a man may publish anything which twelve of his countrymen think is not blameable, but that he ought to be punished if he publishes that which is blameable" (*Rex* v. *Cuthell*, 27 Howell's St. Tr. 675).

(*d*) *Ibid.* p. 52.

publication is really a seditious libel or not.(*a*) In a case of this sort, Lord Kenyon, C.J., told the jury that in this country a defendant could never be crushed by the name of his prosecutor, however great that name might be; this was not the first prosecution commenced under the direction of the House of Commons which had failed: in *The King* v. *Stockdale* the House of Commons were also the prosecutors, but the defendant in that case was not weighed down by the weight of the prosecution, nor did the jury hold themselves bound to find the publication a libel because the House of Commons had voted it to be such.(*b*)

Gist of offence.

The criminal intention is the gist of the offence. "The crime laid," said Fitzgerald, J., to a grand jury,(*c*) "is the intent, and you can only find a bill against the accused when you come conscientiously to the conclusion—assuming you find the articles to be seditious—that they were published with the intent laid in the indictment, namely, to spread, stir up, and excite disaffection and sedition against the Queen's subjects, to excite hatred and contempt towards Her Majesty's Government and Administration," &c.

Justification not allowed.

On a prosecution for a seditious libel (notwithstanding 44 & 45 Vict. c. 60, s. 4), evidence cannot be given of the truth of the libel, and that it was for the public benefit that it should be published.(*d*)

Libels Against the Sovereign Personally.

The old law on the subject of words spoken or written against the Sovereign personally has undergone considerable alteration in more recent times.

Statutory enactments.

The following statutory enactments on the subject are still in force:—

An Act of 3 Edw. I, c. 34, provides "that from henceforth none be so hardy to tell or publish any false news or tales whereby discord or occasion of discord or slander may

(*a*) *The King* v. *Reeves* (2 Peake's N. P. Cas. 84).

(*b*) 2 Peake's N. P. Cas. 86, 87. The jury in this case returned a verdict of not guilty. *Rex* v. *Stockdale* was the case of a criminal information filed against the defendant, in accordance with a vote of the House of Commons, for publishing a review of the articles of impeachment against Warren Hastings. The jury found the defendant not guilty.

(*c*) See *Reg.* v. *Sullivan* (11 Cox Crim. Cas. 47). See also *The King* v. *Reeves* (*ubi supra*).

(*d*) *Ex parte* O'Brien (15 Cox Cr. Cas. 180), following *Reg.* v. *Duffy* (9 Ir. L. R. 329).

grow between the king and his people, or the great men of this realm."

Sect. 1 of 6 Anne, c. 41, made it high treason for any person maliciously, advisedly, and directly, by writing or printing to maintain and affirm that the then Sovereign was not the lawful and rightful queen of these realms, or that the Pretender had any right or title to the Crown, or that any other person or persons has or have any right or title to the same, otherwise than according to the Bill of Rights,(a) the Act of Settlement,(b) and the Acts for the Union of England and Scotland; or that the kings or queens of this realm, with and by the authority of Parliament, are not able to make laws or statutes of sufficient force and validity to limit and bind the Crown, and the descent, limitation, inheritance, and government thereof.

Spoken words not treason.

Words spoken against the king were in more than one case, before the time of Charles I., held to be treasonable. To accuse the king of having committed murder,(c) or to say that a king *de facto* and not *de jure* was the rightful king,(d) was held to amount to high treason.(e) But in the case of Hugh Pine (f) who was accused of having spoken several disparaging words concerning the king (Charles I.), all the judges having been commanded to assemble themselves, to consider and resolve what offence the speaking of those words was, it was resolved by them "that the speaking of the words before mentioned, though they were as wicked as might be, were not treason; that, unless it were by some particular statute, no words will be treason."

To charge the king with a personal vice was held by the judges, upon debate of Peacham's case, not to be treason.(g)

Unpublished writing.

The law as to words spoken, one would have imagined, ought to have been held equally applicable to unpublished writings. Nevertheless, a clergyman named Peacham was found guilty of treason, in the reign of James I., for certain passages in a sermon found in his study, which was never preached or intended to be preached. Many of the judges, however, were of opinion that this was not treason, and Peacham was not executed.(h) "This case," says Sir Michael Foster,(i) "therefore weigheth very little; and no great

(a) 1 Will. & M. sess. 2, c. 2.
(b) 12 & 13 Will. 3, c. 2. (c) *Juliana Quick's case* (21 Hen. 6).
(d) *Germaine's case* (2 Edw. 4).
(e) See also *Challercomb's case*, cited Cro. Car. 125.
(f) Cro. Car. 117, 126. (g) *Ibid.* 126. (h) *Ibid.* 125.
(i) First Discourse of High Treason, chap. i. 199.

regard has been paid to it ever since."(*a*) In the case of Algernon Sidney, an unpublished paper, forming part of a theoretical work on Government, found in his house, was given in evidence against him, and the Chief Justice (Jefferies) in his charge to the jury, insinuated that the doctrines contained in the paper were treasonable in themselves and without reference to other evidence.(*b*) If this paper had related to the treasonable practices charged in the indictment, it would no doubt have been admissible in evidence against the accused, though unpublished; "but papers not capable of such connection, while they remain in the hands of the author unpublished, as Mr. Sidney's did, will not make a man a traitor."(*c*) The judgment in Sidney's case was reversed by . . t of Parliament in 1689.(*d*)

Though neither words spoken nor an unpublished writing will amount to an overt act of treason, to make good an indictment of compassing the death of the Sovereign, under 25 Edw. 3, c. 2, yet a writing which imports such a compassing, if it be published, will amount to an overt act of treason under that statute.(*e*) Published writing.

Apart from statute, all contempts against the Sovereign's person or Government, are, according to the textbooks, very highly criminal, and punishable with fine and imprisonment, by the discretion of the judges, upon consideration of all the circumstances of the case.(*f*) Under this head is ranked contemptuously speaking of the Sovereign, as by cursing him, &c., or giving out that he wants wisdom, valour, or steadiness; or in general, doing anything which may lessen Attacks on the Sovereign.

(*a*) The King (James I.) instructed the Attorney-General (Bacon) as to the best measures to be taken for the defendant's examination, and the judges were sounded separately before they could have an opportunity of conferring together, the Attorney-General himself undertaking to practise upon the Chief Justice (Coke), of whom some doubt was entertained. A conviction procured by such means is of little value as a precedent.

(*b*) 9 St. Tr. 889, 893. He said: "In the next place I am to tell you, that though some judges have been of opinion that words of themselves were not an overt act, but my Lord Hale, nor my Lord Coke, nor any other of the sages of the law, ever questioned but that a letter would be an overt act, sufficient to prove a man guilty of high treason; for *scribere est agere*." "If you believe that that was Colonel Sidney's book, writ by him, no man can doubt but it is a sufficient evidence that he is guilty of compassing and imagining the death of the king."

(*c*) Foster, chap. i. p. 198.

(*d*) See the Act (a private one) in 9 St. Tr. 996.

(*e*) Hale's P. C. 118; Foster's First Discourse on Treason, chap. i. 198; *Williams's case* (2 Roll. Rep. 88; 3 Inst. 12).

(*f*) Hawk. P. C., book 1, c. 6.

him in the esteem of his subjects, weaken his government, or raise jealousies between him and his people.(*a*) Stating or insinuating that he acts from partial or corrupt motives, or with an intention to favour or oppress any individual, or class of men, would be a seditious libel; but not the imputation of honest error without moral blame.(*b*)

It is a criminal libel to publish falsely of the Sovereign, as of any other person, that he is insane.(*c*)

Lord Ellenborough's exposition of law as to attacks on Sovereign personally.

A leading case on the subject of seditious libels is that of *The King* v. *Lambert and Perry*,(*d*) in which the law relating to seditious libels which attack the Sovereign personally is fully stated by Lord Ellenborough, C.J., in his summing up to the jury. The defendants were the printer and the proprietor of the *Morning Chronicle*, and the libel for the publication of which the criminal information was filed was the following: "What a crowd of blessings rush upon one's mind that might be bestowed upon the country in the event of a total change of system! Of all monarchs, indeed, since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular."(*e*)

Lord Ellenborough said: "The fair meaning of the expression 'change of system,' I think, is a change of political system —and not a change in the frame of the established government —but in the measures of policy which have been for some time pursued. By total change of system is certainly not meant *subversion* or *demolition*; for the descent of the Crown to the successor of his Majesty is mentioned immediately after. The writer goes on to speak of the blessings that may be enjoyed upon the accession of the Prince of

(*a*) Hawk. P. C., book 1, c. 6.

(*b*) *Per* Lord Ellenborough, *Rex* v. *Lambert and Perry* (2 Camp. 402, 403).

(*c*) *Rex* v. *Harvey* (2 B. & C. 257). (*d*) 2 Camp. 398.

(*e*) The information charged that the defendants, "being seditious, malicious, and ill-disposed persons, and being greatly disaffected to our present Sovereign Lord George the Third, &c., and to his administration of the government of this kingdom, and most unlawfully, wickedly, and maliciously devising, designing, and intending as much as in them lay, to bring our said Lord the King and his administration of the government of this kingdom, and the persons employed by him in the administration of the government of this kingdom into great and public hatred and contempt among all his liege subjects, and to alienate and withdraw from our said Lord the King the cordial love and affection, true and due obedience, fidelity, and allegiance of the subjects of our said Lord the King, did unlawfully, seditiously and maliciously print and publish, and cause, &c., a certain scandalous, malicious, and seditious libel of and concerning our said Lord the King and his administration of the government of this kingdom, to the tenor and effect following," &c.

Wales; and therefore cannot be understood to allude to a change inconsistent with the full vigour of the monarchical part of the constitution. Now, I do not know that merely saying that there would be blessings from a change of system, without reference to the period at which they may be expected, is expressing a wish or a sentiment that may not be innocently expressed in reviewing the political condition of the country. The information treats this as a libel on the person of his Majesty and his personal administration of the government of the country. But there may be error in the present system, without any vicious motives, and with the greatest virtues, on the part of the reigning sovereign. He may be misled by the Ministers he employs, and a change of system may be desirable from their faults. He may himself, notwithstanding the utmost solicitude for the happiness of his people, take an erroneous view of some great question of policy, either foreign or domestic. I know but of ONE BEING to whom error may not be imputed. If a person who admits the wisdom and the virtues of his Majesty, laments that in the exercise of these he has taken an unfortunate and erroneous view of the interests of his dominions, I am not prepared to say that this tends to degrade his Majesty, or to alienate the affections of his subjects. I am not prepared to say that this is libellous. But it must be with perfect decency and respect, and without any imputation of bad motives. Go one step farther, and say or insinuate that his Majesty acts from any partial or corrupt view, or with an intention to favour or oppress any individual or class of men, and it would become most libellous. However, merely to represent that an erroneous system of government obtains under his Majesty's reign, I am not prepared to say exceeds the freedom of discussion on political subjects which the law permits. Then comes the next sentence: 'Of all monarchs, indeed, since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular.' This is more equivocal; and it will be for you, gentlemen of the jury, to determine what is the *fair import of the words employed*. Formerly it was the practice to say, that words were to be taken in the more lenient sense; but that doctrine is now exploded; they are not to be taken in the more lenient or more severe sense; but in the sense which fairly belongs to them, and which they were intended to convey. Now, do these words means that his Majesty is actuated by improper motives, or that his successor may render himself nobly popular by taking a more lively interest in the welfare of

his subjects? Such sentiments, as it would be most mischievous, so it would be most criminal, to propagate. But if the passage only means that his Majesty, during his reign, or at any length of time, may have taken an imperfect view of the interests of the country, either respecting our foreign relations or the system of our internal policy, if it imputes nothing but honest error without moral blame, I am not prepared to say that it is a libel. The extract read at the request of the defendants(*a*) does seem to me too remote in point of situation in the newspaper to have any material bearing on the paragraph in question. If it had formed a part of the same discussion, it must certainly have tended strongly to show the innocence of the whole. It speaks of that which everybody in his Majesty's dominions knows, his Majesty's solicitude for the happiness of his people; and it expresses a respectful regard for his paternal virtues. What connection it has with the passage set out in the information, it is for you to determine. Taking that passage substantively and by itself, it is a matter, I think, somewhat doubtful, whether the writer meant to calumniate the person and character of our august Sovereign. If you are satisfied that this was his intention, by the application of your understandings honestly and fairly to the words complained of, and you think they cannot properly be interpreted by the extract which has been read from the same paper, you will find the defendants *guilty*. But if, looking at the obnoxious paragraph by itself, you are persuaded that it betrays no such intention, or if, feeling yourselves warranted to import into your consideration of it a passage connected with the subject, though considerably distant in place and disjoined by other matter, you infer from that connexion that this was written without any purpose to calumniate the personal government of his Majesty and render it odious to his people, you will find the defendants not guilty. The question of intention is for your consideration. You will not distort the words, but give them their application and meaning as they impress your minds. What appears to me most material is the substantive paragraph itself; and if you consider it as meant to represent that the reign of his Majesty is the only thing interposed between the subjects of this country and the possession of great blessings, which are likely to be enjoyed in the reign of his successor, and thus to render his Majesty's

(*a*) The defendant was allowed to read another paragraph from the same newspaper, at a considerable distance from the alleged libel and printed in a different type, for the purpose of explaining it.

administration of his government odious, it is a calumnious paragraph, and to be dealt with as a libel. If, on the contrary, you do not see that it means distinctly, according to your reasoning, to impute any purposed maladministration to his Majesty, or those acting under him, but may be fairly construed as an expression of regret that an erroneous view has been taken of public affairs, I am not prepared to say that it is a libel."(*a*) This direction of Lord Ellenborough has been quoted at length, as being at once the most recent and the fullest authoritative exposition of the law relating to this branch of our subject.

Liability of printers.

In 1729 an information was filed against John Clerk, charging him with printing and publishing an infamous libel called *Mist's Weekly Journal*, wherein the King's title to the Crown was openly struck at, his legitimacy called in question, and the persons of several of the royal family scandalously traduced under borrowed names, by representing the late King (George I.) under the name of Merewits, his present Majesty under that of Esrelf, the Queen under that of Sultana; and at the same time drawing a beautiful character of the Pretender by the name of the Young Sophi, and setting forth the tyranny and subjection all Englishmen lay under, by representing them under the name of the Persians. The charge against the defendant was for maliciously and traitorously printing off one of these papers in particular; but, according to the report, the evidence produced at the trial was that he acted merely as a servant to the printer, and that his business was only to clap down the press; and few or no circumstances were offered of his knowing the import of the paper, or being conscious of doing anything illegal. It was objected, by the counsel for the defendant, that the paper ought not to be thought a libel upon the royal family, because the characters drawn in it were by no means agreeable to the persons supposed to be represented; but, if anything related to them it was entirely opposite to what each was known to deserve; and, secondly, that the evidence did not come up to the charge, the fact of printing being charged to be attended with a malicious and traitorous design, whereas it was only proved that it was done through ignorance and in obedience to his master's authority. It was answered by the counsel for the Crown that they were only called on to show that the construction they put upon the paper was such as the generality of readers would put upon it, according to its obvious and natural sense; and,

(*a*) The jury returned a verdict of not guilty.

secondly, that if they could have given evidence of express malice, that fact would have been treason within the statute of 6 Anne, c. 7; but, the charge being only for printing and publishing a seditious libel, the circumstance of malice was entirely immaterial: and the Lord Chief Justice (Raymond) having agreed the law to be so, the jury found the defendant guilty.(*a*)

A similar information was filed against a compositor named Knell, one of two servants of Mist, for printing and publishing the same work. The evidence being that the defendant and his fellow-servant set up the type, and that one took one column of it downwards and the other the other column, the Chief Justice directed the jury to acquit the defendant as to the publication; but, if they believed the evidence, to find him guilty of the printing; and the jury did so.(*b*) An old bed-ridden woman was indicted for publishing the same libel; the only evidence being that she kept a pamphlet shop at which the libel was sold, the shop being shown to be a mile distant from the house in which she had for a long time lain bedridden. The jury refused to do anything else than find specially the circumstances given in evidence before them, and the Attorney-General at length consented to withdraw a juror.(*c*)

The North Briton.

In 1763, an information was filed against John Wilkes, for printing and publishing a certain malicious, seditious, and scandalous libel, intituled, "*The North Briton*, number 45," tending to vilify and traduce the King and his Government, to impeach and disparage his veracity and honour, and to represent and make it to be believed that his Majesty's most gracious speech delivered from his throne to the Parliament, on the 19th day of April, 1763, contained many falsities and gross impositions upon the public, and that his Majesty had suffered the honour of his Crown to be sunk and prostituted, and the interests of his subjects and allies to be treacherously betrayed; and also to render the King and his Government contemptible and odious, and to excite tumults, commotions, and insurrections; and to violate and disturb the public tranquillity, good order, and peace of the kingdom. He was found guilty, and sentenced to be fined and imprisoned. George Kearsley was convicted of printing and publishing, and John Williams of publishing, the same number of *The North Briton*.(*d*)

(*a*) 1 Barnardiston's Rep. 304. (*b*) *Ibid.* 305.
(*c*) *Rex* v. *Nutt* (*Ibid.* 306).
(*d*) Dig. L. L. 69, K. B. MSS., Easter Term, 3 Geo. 3, and Hilary Term, 4 Geo. 3. See also the cases of *Rex* v. *Woodfall* (5 Burr. 2661),

The condition of Ireland in 1848 induced the Government of that time to introduce a Bill into Parliament for the better security of the Crown and Government of the United Kingdom, by making it treason-felony to publish or utter for the future such seditious writings or language as then incited the people to disaffection and rebellion.(*o*) The Bill became law the same year (11 & 12 Vict. c. 12).

Sect. 3 enacts "that if any person whatsoever after the passing of this Act shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most gracious lady the Queen, her heirs or successors from the style, honour, or royal name of

and *Rex* v. *Alsop* (*Ibid.* 2686), where the defendants were convicted of publishing certain letters of "Junius."

(*o*) Previously to the passing of this Act, the law on the subject stood thus: The only statute relating to treason, which beyond doubt extended to Ireland, was that of the 25 Edw. 3, c. 2, by which any person compassing or imagining the death of the Sovereign, levying war against him, or being adherent to the king's enemies in his realm, giving to them aid or comfort in the realm or elsewhere, is guilty of high treason. An Act of 36 Geo. 3, c. 7, made perpetual by 57 Geo. 3, c. 6, extended the law of treason by making it applicable to persons who should, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of his Majesty, his heirs or successors, or to deprive or depose him or them from the style, honour, or kingly name of the Imperial Crown of this realm, or of any other of His Majesty's dominions or countries, or to levy war against His said Majesty, his heirs and successors within this realm, in order by force or constraint to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon or to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade this realm, or any other of His said Majesty's dominions, or countries under the obeisance of his said Majesty, his heirs and successors, and such compassings, imaginations, inventions, devices, or intentions, or any of them, should express, utter, or declare by *publishing any printing or writing*, or by any overt act or deed. The punishment for the offence was death. The preponderance of legal opinion was in favour of the view that the statute of 36 Geo. 3, c. 7, as made perpetual by 57 Geo. 3, c. 6, did not extend to Ireland. The present Act (11 & 12 Vict. c. 12) was passed to make the law on the subject uniform throughout the United Kingdom, by extending to Ireland (sect. 2) all the provisions of the former Act which are not by the present Act repealed. Sect. 1 repeals all the provisions of 57 Geo. 3, c. 6, on this subject, except such as relate to the compassing, imagining, inventing, devising, or intending death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the *person* of the Sovereign, and the expressing, uttering, or declaring of such compassings, imaginations, inventions, devices, or intentions, or any of them.

the Imperial Crown of the United Kingdom, or of any other of Her Majesty's dominions and countries, or to levy war against Her Majesty, her heirs, or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe, both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other Her Majesty's dominions or countries, under the obeisance of Her Majesty, her heirs or successors, and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare *by publishing any printing or writing*, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported(*a*) beyond the seas for the term of his or her natural life, or for any term not less than seven years, or to be imprisoned for any term not exceeding two years, with or without hard labour, as the Court shall direct."

Sect. 8 provides that in the case of every felony punishable under this Act, every principal in the second degree and every accessory before the fact shall be punishable in the same manner as the principal in the first degree is by the Act punishable; and every accessory after the fact to any such felony shall, on conviction, be liable to be imprisoned, with or without hard labour, for any term not exceeding two years.

In an indictment under this Act, the offender may be charged with any number of the matters, acts, or deeds by which such compassings, &c., as aforesaid, or any of them, shall have been expressed, uttered, or declared.(*b*) If the facts or matters alleged in the indictment shall amount in law to treason, the indictment is not by reason thereof to be deemed void, erroneous, or defective; neither, if the facts or matters proved on the trial of any person indicted for felony under the Act amount in law to treason, is the person tried to be entitled by reason thereof to be acquitted of the felony;

(*a*) The punishment by transportation beyond the seas has been abolished by the Acts 16 & 17 Vict. c. 99, and 20 & 21 Vict. c. 3, and that by penal servitude substituted for it. By 27 & 28 Vict. c. 47, no person is in any case to be sentenced to penal servitude for a shorter period than five years, or, if previously convicted for felony (either on indictment or by way of summary conviction) for less than seven years.

(*b*) Sect. 5.

but no person tried for such felony is afterwards to be prosecuted for treason upon the same facts.(*a*)

Nothing in this Act contained is to lessen the force of, or in any manner to affect anything enacted by, the statute of 25 Edw. 3, c. 2.(*b*)

LIBELS ON THE ADMINISTRATION.

How far criticisms on Government are allowed.

Everybody may, with impunity, criticise the conduct of the Government, provided he does it fairly and honestly; but imputations of corrupt motives in the administration of affairs, or other writings calculated to alienate the affections of the people by bringing the Government into disesteem,(*c*) or likely to excite sedition,(*d*) whether such be the writer's intention or not,(*e*) come within the denomination of seditious libels, and are punishable as such.

"It is certain," says Hawkins,(*f*) "that it is a very high aggravation of a libel that it tends to scandalise the Government by reflecting on those who are entrusted with the administration of public affairs, which doth not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also has a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition."

"It has been observed," said Lord Ellenborough,(*g*) "that it is the right of the British subject to exhibit the folly or imbecility of the members of the Government. . . . If, in so doing, individual feelings are violated, there the line of interdiction begins, and the offence becomes the subject of penal legislation."

"A writer," says Fitzgerald, J.,(*h*) "may criticise or censure the conduct of the servants of the Crown or the acts of the Government; he can do it freely and liberally, but it must be without malignity, and not imputing corrupt or malicious motives. With the same motives a writer may freely criticise the proceedings of courts of justice and of individual judges—nay, he is invited to do so, and to do so

(*a*) Sect. 7. (*b*) Sect. 6.

(*c*) See *per* Lord Ellenborough in *Rex* v. *Cobbett* (29 Howell's St. Tr. 49).

(*d*) See *per* Best, J., in *Rex* v. *Burdett* (4 B. & Ald. 131).

(*e*) *Ibid.* See also *per* Littledale, J., in *Rex* v. *Lovett* (9 C. & P. 466).

(*f*) P. C., book i. chap. 28, "Libels," s. 7.

(*g*) *Rex* v. *Cobbett* (29 Howell's St. Tr. 53).

(*h*) *Reg.* v. *Sullivan & Pigott*, 11 Cox Crim. Cas. 49, 50.

in a free and fair and liberal spirit. The law does not seek to put any narrow construction on the expressions used, and only interferes when plainly and deliberately the limits are passed of frank and candid and honest discussion. . . . . There is no sedition in censuring the servants of the Crown, or in just criticism on the administration of the law, or in seeking redress of grievances, or in the fair discussion of all party questions."

Test of seditious libel.

Many cases have been decided under this head of the law of libel, but no finer test of what constitutes the offence can be deduced from them than the following—the plain intrinsic tendency of the particular publication to produce public disorder, and the malicious intention of its author.(*a*)

Cases decided.

In *Rex* v. *Tutchin*(*b*) the defendant was charged with having falsely, seditiously, and scandalously written, composed, and published a certain false, malicious, seditious, and scandalous libel, intituled "The Observator." The information set forth several passages from "The Observator," some of which lamented the sad state of the country owing to the influence of French gold on those who had the conduct of affairs; whilst others complained of the mismanagement of the navy, attributing ignorance and incapacity to those who had the management of it. It having been contended on behalf of the defendant that the publications could not be libels, because they did not reflect upon particular persons, Lord Holt, C.J., said to the jury:(*c*)

Per Lord Holt.

"This is a very strange doctrine, to say it is not a libel reflecting on the Government, endeavouring to posses the people that the Government is maladministered by corrupt persons that are employed in such or such stations either in the navy or army. To say that corrupt officers are appointed to administer affairs is certainly a reflection on the Government. If people should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist; for it is very necessary for all Governments that the people should have a good opinion of it (*sic*). And nothing can be worse to any Government than to endeavour to procure animosities as to the mismanagement of it: this has been always looked upon as a crime, and no Government can be safe without it be punished. Now you

(*a*) Starkie on Libel, 617, 3rd edit.; Holt's Rep. 424. *Rex* v. *Beere* (12 Mod. Rep. 219; Holt's Rep. 422); *Rex* v. *Lawrence* (12 Mod. 311); and *Rex* v. *Bliss* (Dig. L. L. 122) are cases, amongst others, in which publications of this nature have been punished; but they throw no additional light on the principle above stated.

(*b*) 14 Howell's St. Tr. 1095. (*c*) *Ibid.* 1127.

are to consider whether these words I have read to you do not tend to beget an ill opinion of the administration of the Government."(*a*)

Per Lord Raymond.

Richard Franeklin was tried and convicted in 1731 for printing and publishing in *The Craftsman* a seditious libel, intituled "A Letter from the Hague,"(*b*) wickedly, maliciously, and seditiously contriving and intending to disturb and disquiet the public peace and tranquillity of the kingdom, and to bring the treaty of peace into contempt and disgrace, and also to detract, scandalise, traduce, and vilify the administration of His Majesty's present Government of this kingdom and his principal officers and Ministers of State, and to represent his said officers and Ministers of State as persons of no integrity and ability, and as enemies to the public good of this kingdom, and to cause it to be believed that His Majesty by the advice of his said principal officers and Ministers intended to break and violate the said treaty last mentioned, &c. "Even a private man's character," said Lord Raymond, C.J.,(*c*) "is not to be scandalised, either directly or indirectly, because there are remedies appointed by the law in case he has injured any person, without maliciously scandalising him in his character; and much less is a magistrate's, Minister of State, or other public person's character to be stained either directly or indirectly, because the law hath pointed out another remedy than publishing libels, if they have injured any person either in a public or private capacity. And the law always punishes libels even among private persons, because they flow from malice and tend to create disturbance, quarrels, and revenge between them, their families and kindred, and disturb the public peace; and the law reckons it a greater offence when the libel is pointed at persons in a public capacity, as it is a reproach to the Government to have corrupt magistrates, &c., substituted by his Majesty, and tends to sow sedition and disturb the peace of the kingdom." And his lordship refused to allow the admission of any evidence to prove that the matters charged in the libels were true.(*d*)

In 1777 an information was filed against John Horne, charging that the defendant wickedly, maliciously, and seditiously intending, devising, and contriving to stir up and

(*a*) Tutchin was convicted; but a new trial was afterwards granted on a technical point, and he was not tried again.

(*b*) 9 St. Tr. 255 (17 Howell's St Tr. 626). The "Letter from the Hague" was said to have been written by Bolingbroke.

(*c*) P. 659.

(*d*) Franeklin was sentenced to pay a fine of £100, to be imprisoned for a year, and to find security for his good behaviour for seven years.

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excite discontents and seditions amongst his Majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his Majesty's subjects from his said Majesty, and to insinuate and cause it to be believed that divers of his Majesty's innocent and deserving subjects had been inhumanly murdered by his said Majesty's troops in the province, colony, or plantation of the Massachusett's Bay, in New England, in America, belonging to the Crown of Great Britain, and unlawfully and wickedly to seduce and encourage his said Majesty's subjects in the said province, colony, or plantation to resist and oppose his Majesty's Government, &c., did wickedly, maliciously, and seditiously write and publish a certain false, wicked, malicious, scandalous, and seditious libel of and concerning his said Majesty's Government and the employment of his troops.(*a*) The information was tried before the Earl of Mansfield by a special jury, and the defendant was found guilty and sentenced to pay a fine of £200 to the king, to be imprisoned for twelve months and until the fine should be paid, and to find sureties for his good behaviour for three years.(*b*)

Per Lord Ellenborough.

In 1804 an information was filed against William Cobbett for a libel upon the administration of the Irish Government, and upon the public conduct and character of the Lord Lieutenant and Lord Chancellor of Ireland. The libel was contained in a letter signed "Juverna," published in the *Weekly Register*; and the information charged that the defendant, unlawfully and maliciously devising and intending to move and incite the liege subjects of the King to hatred and dislike of his Majesty's administration and Government of this kingdom, and to insinuate and cause it to be believed that the people of that part of the United Kingdom of Great

(*a*) The seditious libel set out in the information was as follows:—"*King's Arms Tavern, Cornhill, June* 7, 1775.—At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into (by such of the members present as should approve the purpose) for raising the sum of £100, to be applied to the relief of the widows, orphans, and aged parents of our beloved *American* fellow subjects, who, faithful to the character of Englishmen, preferring death to slavery, were for that reason only inhumanly murdered by the king's troops at or near Lexington and Concord, in the Province of Massachuset, on the 19th of last April, which sum being immediately collected, it was thereupon resolved, that Mr. Horne do pay to-*morrow* into the hands of Messrs. Brownes and Collison, on the account of Dr. Franklin, the said sum of £100, and that Dr. Franklin be requested to apply the same to the above mentioned purpose."

(*b*) 11 St. Tr. 264 (20 How. St. Tr. 651); Cowp. Rep. 672.

Britain and Ireland called Ireland were oppressed, aggrieved, and injured by our said lord the King's Government of the said part of the United Kingdom, and to traduce, defame, and vilify the persons employed by our said lord the King, in the administration of the Government of the said part of the said United Kingdom, &c., did unlawfully and maliciously print and publish the said libel. Mr. Cobbett was not the author, but only the publisher of the letter. Lord Ellenborough, C.J., in his summing up to the jury, said: "It is no new doctrine that if a publication be calculated to alienate the affections of the people, by bringing the Government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime. It has ever been considered as a crime, whether it be wrapped in one form or in another. The case of *The King* v. *Tutchin*, decided in the time of Lord Chief Justice Holt,(*a*) has removed all ambiguity from this question; and although, at the period when that case was decided, great political contentions existed, the matter was not again brought before the judges of the Court by any application for a new trial. . . . . If you are of opinion that the publications are hurtful to the individuals or to the Government, you will find the defendant guilty; if on the contrary you consider them neither destructive of the peace of the one or the other, you will acquit him of the charges under this information."(*b*)

An information was filed in 1811 against John Hunt and John Leigh Hunt for printing and publishing in *The Examiner* a libel tending to create disaffection in the army. "The information," said Lord Ellenborough to the jury, "states that the defendants, being malicious, seditious, and ill-disposed persons, and unlawfully and maliciously devising and intending to injure the military service of our lord the King, and to insinuate and cause it to be believed that an improper and cruel method of punishment was practised in the army of our said lord the King, and that persons belonging to the said army were punished according to such method with great and excessive severity, and thereby to raise and excite discontent and disaffection in the minds of the persons

(*a*) 14 Howell's St. Tr. 1095.

(*b*) Mr. Cobbett was found guilty, but was not called up for judgment, having redeemed himself by giving up the author of the letter (the Hon. Robert Johnson, one of the judges of the Court of Common Pleas in Ireland), who was subsequently prosecuted and convicted (See *Rex* v. *Johnson*, in the same volume of Howell's St. Tr. and 7 East. 65).