SOME REMARKS

ON THE

LAW OF COPYRIGHT.

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In the speech delivered by Mr. Sergeant Talfourd in the House of Commons, on the introduction of his bill for the extension of the period of copyright, he made this remarkable statement:—"I feel that complete justice will not be done to literature and art until a mode shall be devised for a cheap and summary vindication of their injuries before some parties better qualified to determine it than judges who have passed their lives in the laborious study of the law, or jurors who are surrounded with the cares of business, and, except by accident, little acquainted with the object presented to them for decision."

Since this speech was delivered, the unsatisfactory state of the law of copyright and its administration have been painfully illustrated in the protracted and costly litigation which has arisen on the construction of the acts, and in the contradictory judgments and dicta that have been propounded by the different Courts. The source most prolific of this ruinous litigation has been the attempt—confined solely to Music-Sellers—to establish copyright in or through foreigners, irrespective of their residence or naturalization in the United Kingdom. After the subject had been before one or other of the Courts of Equity or Law for about seven years, an elaborate judgment was delivered in the Court of Exchequer in 1845, which clearly

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negatived the claims on behalf of foreigners under most circumstances, and cast so much doubt on them under all others, that it was thought no more would be heard of foreign copyright, except under the provisions of the International Copyright Act. Such, however, unfortunately, has not been the result. An un-English class of speculators in foreign compositions have thought they could ride over that portion of the judgment of the Court of Exchequer, which had determined that publications first made abroad could not be brought within the protection of the English Copyright Acts, by causing simultaneous publication in two or more countries; and in this attempt to evade the spirit of the law and the former decisions of the Courts, the Court of Common Pleas has concurred, by a judgment delivered May 12th, 1848, in the case of Cocks *v.* Purday. The writer has therefore thought it desirable to offer a few remarks to those who take an interest in the subject, in the hope that they may have some influence in ultimately putting the law of copyright into a wholesome and intelligible condition; and, as necessary to a correct understanding of the case, he first begs attention to the following passages in the judgment of the Court of Exchequer, delivered by Chief-Baron Pollock on the 12th of June, 1845:—

"Two questions of importance were raised in the course of the argument: the first is, whether at common law a foreigner residing abroad, and composing a work, has a copyright in England? The second, whether such foreign author, or his assignee, has such a right, by virtue of the English statutes? Upon the first question we do not feel any difficulty, and we are of opinion that a foreign author residing abroad, and composing a work there, has not by the common law of England any copyright here.

"We are all of opinion that no such right exists in a foreigner at the common law, but that such a right is the creature of the municipal

law of each country; and that in England it is altogether governed by the statutes which have been passed, regulating it, as in France it is governed by the law of that country; but such a law has no extra-territorial power, and cannot be enforced beyond the limits of the state. Admitting, therefore, that by the law of France no one can, without the consent of the author, make or print any copy of his work in this country at any time or in any place, no right can be claimed in this country as founded upon such a law, nor can any right be claimed here, except what can be supported by the law of this country. The subjects of this country are not bound to obey such a law of France, nor the courts of this country to enforce it. It follows, therefore, that a British subject may at common law fairly print and publish in Great Britain any number of copies of a French work, without being exposed to an action at the suit of the French author, whose exclusive privilege, founded on the French law, is limited by the French territory; and indeed, if this were not so, the attempt to establish international copyright by treaty would have been altogether unnecessary. A foreign author having, therefore, by the common law no exclusive right in this country, the only remaining question is, whether he has such a right by the statute law, and this depends upon the construction of the statutes relating to literary copyright which were in force at the time of the transaction in question, namely, the 8 Anne, c. 19, and 54 Geo. 3, c. 156. If a judicial construction had been put on these statutes by a direct and deliberate decision of any Court, we should feel bound by it; but supposing that for the present there is no such decision, and the question comes now to be considered for the first time, we should feel no difficulty as to the proper construction to be put upon the statutes. They were passed for the encouragement of learning and the arts, by insuring to the authors, artists, and inventors, the reward of their labour. In their language these acts are general, but *prima facie* it is to be concluded that a British legislature means only to protect British subjects, and foster and encourage British industry and talent; and therefore, where statutes of the United Kingdom speak of authors and inventors, they refer to subjects by birth or residence, and do not apply to foreigners resident abroad.

"We should therefore conclude, upon the construction of the statutes alone, that a foreign author, or the assignee of a foreign author, whether a British subject or not, had no copyright in England, and no right of action on the grounds of any piracy of his work committed in the British territories."

Other passages of like import occur in the judgment, but those quoted would seem to be decisive enough that foreigners could not be allowed any privileges under the English Copyright Acts. In another part, however, there is a suggestion—which the general decisiveness of the language little prepares one for—that a foreigner resident abroad may assign his copyright to an Englishman, and that the Englishman, as his assignee, may have a good title, provided no purior pblication takes place to that in England.

With this judgment before them, the tactics of the speculators in foreign music became directed to the means of evading that part of the judgment which annihilated copyright here in case of first publication elsewhere; and, as none of the foreign Legislatures recognise copyright in their respective countries, except upon the condition of first publication therein, and as the price to be obtained in this country would not pay for losing the foreign market, the expedient adopted was that of simultaneous publication in the various states in which it was desired to maintain the copyright. A very cursory reading of the cases will, however, show that *first publication* is as much the basis of copyright in England as in any other country; and how *simultaneous* and *first* publication can co-exist is a paradox to grammarians, however lawyers may reconcile it to their minds. *First* is described in Johnson's Dictionary to mean the *earliest in time*. Directly anything else is shown to be as early, there must be an end to the earliest. It may be cotemporaneous, simultaneous; but the two cannot be first. When two horses in a race arrive side by side at the winning-post, it is pronounced that there is no first in the race. *Simul-*

taneity is described by Johnson as the act of *one thing happening at the same time as another*; in which case neither can happen first, or there can be no simultaneity. Nevertheless, the Court of Common Pleas has determined that the copyright of the author is not defeated by a cotemporaneous publication abroad. It happens, however, that no such words as cotemporaneous or simultaneous occur in the Copyright Act (5 and 6 Vict. c. 45); and therefore, when, in the concluding sentence of the judgment, an attempt is made to fit it more completely to the terms of the Act, the judges are reported to have said, that "the provisions of the Copyright Act extended to the protection of a foreign author publishing a work here *before* he did so abroad."

Every case in which the claims of foreigners are favoured shows that first publication in England, absolute and *bonâ fide*, was required; and no reading of them can lead the mind to the conclusion that anything so evasive of the spirit of the Act, (the object of which is to give encouragement to authors and first publishers of *original* works,) as is the trick of endeavouring to secure various copyrights by publishing in various places on one and the same day, would have been countenanced by the judges who delivered those decrees.

In the case of D'Almaine *v.* Boosey, which is the main case relied on by the advocates of copyright in aliens, Lord Abinger restrained the defendant from publishing music assigned by a Frenchman to plaintiff; but the evidence showed that, even up to the time of the application to the Court, no publication had taken place in France, or anywhere else than in England, where the right was claimed. In the case of Cocks *v.* Purday, on the contrary,

the recent case in the Common Pleas, the defence showed that the subject of action was published—and legally published—in France, at as early a date as in England. Therefore, the case was not brought fairly within the rule of Lord Abinger, for it by no means follows that he would have held simultaneous publication to be equivalent to first publication.

In the case of Guichard *v.* Mori, Lord Brougham decided, that "if a book was written by a foreigner, and *published in a foreign country*, the person who purchased the right to publish it here could not support any claim to the copyright in this country, either at law or in equity." The judgment in the Court of Exchequer, already quoted, says that, "if a foreign author, not having published abroad, *first publishes in England*, he may have the benefit of the statute." The result would appear to be that, as, *primâ facie*, a foreign composition cannot be the subject of English copyright, it should lie in the claimant of so questionable a right to show that he had brought himself within the exception the Courts have been disposed to admit, by proving satisfactorily the *first publication of the work in Great Britain*, to accomplish which it would also be necessary to show that publication elsewhere had been subsequent, not simultaneous.

All that has hitherto been written is based on the assumption, for the time, that a foreigner can have copyright, although not a resident in the kingdom, or rather that he can assign to a resident. This proposition may, however, be met at once by saying that, if foreigners have such a right, or any right, except under the provisions of the International Copyright Act (7 Vict. cap. 12), the passing of that Act was an absurdity, for it can only have

the effect of imposing terms on those who already possessed the privilege of copyright unconditionally. But, in truth, whatever doubt may have formerly existed, and may have led to the decisions favouring assignments to Englishmen, although made by foreigners, seems to have been completely removed by the passing of the International Copyright Act, the provisions of which must become a dead letter, if foreigners are to enjoy and convey copyright in England in any other ways than those prescribed by that Act.

Equally is there an end to all necessity for conventions under the International Copyright Act, because, if foreigners, by simply multiplying plates, and causing them to be published simultaneously in all the great cities of the universe, can thereby in each of them secure a copyright, it would be quite absurd to expect that their respective Governments will give to Englishmen that reciprocity which the 14th section of the International Copyright Act declares shall be the condition of any Order in Council having for its object the granting of copyright in England to foreigners. And it is right here emphatically to observe on the fact—that while, (if the decision of the Common Pleas be good law,) any foreigner may have an unconditional copyright in England, there is no process known by which an Englishman, resident in England, can get a copyright in any foreign nation in the world.

English literature, to judge from the lists of Galignani, Xavier, Baudry, and others, appears to have no protection in France. Yet the International Copyright Act requires reciprocity. The Frenchman living in Paris, it seems, may sell his copyright in London: can our Balfe, or Bishop,

or Wallace, &c., sell their copyrights in Paris?—If they go and reside there, absolutely composing and producing their works there, they may; but not otherwise.

If, as laid down by the Common Pleas, a foreigner can get copyright in England without express enactment, how was it that the Legislature, at the time of the Union with Ireland, re-enacted the then Copyright Acts expressly to bring Irish literature within their protection? Irishmen, it need scarcely be remarked, were not foreigners—they were the subjects of the English Crown even before the Union—yet they could not have the benefit of English legislation unless expressly mentioned. This is corroborated by the fact that all the writings of Thomas Moore published in Ireland before the Union are treated to this day as noncopyright in England.

In all privileges conceded to foreigners by the statutes, their residence in these dominions is evidently contemplated: the object of those concessions, indeed, appears to be to enable them to reside and trade here. It would be out of reason to give them the benefit of laws to which they hold no allegiance, and from the controul of which they are wholly removed.

An alien can hold no land by descent, or be tenant by courtesy or in dower. If he cannot be tenant in courtesy, can he, either in or out of this country, execute a deed that will create a copyright under the English acts? In one of the copyright cases, Justice Yates said:—"Ideas cannot be the object of property: they are not visible, tangible, or corporeal." Being thus incorporeal, can they become the subject of legal conveyance from an alien, who is not, as such, allowed to hold even an extended lease.

But, say the counsel for the traders in foreign music, it is not the foreigner, but the English assignee, that the law is to protect. This is a distinction without a difference; for the whole purport of the acts in protecting assignees is to enable them properly to compensate the authors.

No assignee, in law, can have larger powers than the principal from whom he derives his power. If the judgment of the Court of Common Pleas in Cocks *v.* Purday is sound, Cocks, as the assignee of Labitski, can restrain the publication of Labitski's compositions—Labitski being now, as always, resident abroad. Had Labitski not assigned at all, could he, residing abroad, have brought similar actions to Cocks *v.* Purday? and, if he could not, how can his assignee?

The writer is, however, fortunately enabled to close this subject by quoting from the gentleman at the bar who is supposed to have given a greater amount of attention to the law of copyright than any other member of his profession, and who is himself the parent of the leading copyright acts, Mr. Serjeant Talfourd, the written opinion he delivered to one of the parties in the recent proceedings:—

"*I am of opinion that a foreigner who has composed music in a foreign country cannot obtain a copyright therein in England by publishing such music in this country and abroad on the same day. This point is not decided in the case of Chappell v. Purday; but I think that, inasmuch as the foreign publication might be imported into England without some special restriction arising from an antecedent copyright here, it would be impossible to maintain a copyright in the English contemporaneous publication. The assignee could be in no better condition than the composer.*"

There are two other points relative to foreign music which are entitled to consideration in reference to its admissibility to English copyright. The one is, whether such music is not analagous to books in a foreign language, and therefore not protected; for one of the sections of the statute of Anne provides "that nothing in this act contained do extend, or shall 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 to the contrary notwithstanding." Music, in connexion with a foreign language, as is the position of all the operas on which these cases have arisen, would surely be taken as part of that language, and therefore not protected. The other point is, whether representation is not tantamount to publication: in which case none of the music, the subject of recent litigation, could be protected, inasmuch as its representation abroad is not to be denied. That the cogency of this objection has been felt is manifest; for, in the proceedings in Chancery in Chappell *v.* Purday, the plaintiff found it prudent to aver that the conveyance of copyright took place "before any *public representation* or publication of the opera;" and the case appears to have been argued on the assumption that representatian would have been equivalent to publication in barring the English copyrigh t.

In conclusion, and as a further argument that a foreigner resident abroad cannot have copyright, either by himself or his assigns, a careful reading of the various cases is earnestly suggested. In Page *v.* Townsend, the Vice-Chancellor of England expressed his opinion that the object of the Legislature was to protect those works which were "*designed*, etched, or worked in Great Britain, andnot

those which were *designed*, etched, or worked abroad,"—a dictum which would appear to render necessary the residency in this country of all the parties employed in producing the article claimed as the subject of copyright.

If the argument is to be admitted, that a foreigner may engrave duplicate sets of plates in his own country for publication there and in other populous places, as London, Paris, Milan, the States of America, &c., and that, if he contrives to effect a simultaneous publication in each of these places, he or his assigns are to have copyright in each of them, there is an end, not merely to exclusive protection, but to any protection whatever, of English talent in England—at all events, as far as musical composition is concerned. Under cover of this judgment of the Common Pleas, every composer on the face of the globe may establish a copyright in England, on the simple condition of simultaneous publication; and the continental states, particularly, abound with composers of music, who, with this encouragement, will flood England with their productions, to the inevitable destruction of native artists.

It is worthy of remark, that, wherever the prices given by English publishers for these so-called foreign copyrights can be ascertained, they do not exceed one-eighth or one-tenth of the amount paid the composer for the same thing abroad, or than is paid by English publishers for successful English operas, while the sale of operas by foreigners of high reputation is generally much greater and more certain than that of English operatic works. It is also to be borne in mind that the prices foreign composers may get here will be no deduction from their gains in their own country, inasmuch as the English editions of their productions will be contraband in countries where they are

copyright. The consequence will be that foreign composers or publishers, with the object of engrossing to themselves the English markets, will sell these simultaneous copyrights at a sixth or an eighth of what they are worth in their own country, or what would have to be given to a native composer by a publisher desirous of rendering him a fair requital for his works—generally the result of years of study and labour, and then only producible by those gifted with musical genius. This is no speculative hypothesis, for the English licence to publish "Fra Diavolo," the most popular opera Auber ever produced, was sold for £50, and "La Sonnambula," at this time the most attractive opera in Europe, is understood to have been sold for £80, and that when the Continent was ringing with its transcendant success.

There has for a length of time existed among music publishers a practice in direct contravention of the spirit of the Copyright Acts. These Acts vest the *prima facie* copyright in the parties who make the first entries of proprietorship at Stationers' Hall. Music being a sort of universal language, there is always a probability that the musical publications of Italy, Germany, or France will get into request in this country; yet that probability is not sufficiently strong to justify the publishers in re-engraving every one of the immense number of musical publications of merit issued on the Continent. They therefore procure early copies of such works as they think likely to bear republication in England, and they either make entry of the same at Stationers' Hall, as published here, when they are not, or they abstract from an opera such a collection of the leading airs as they can get engraved, perhaps on a single music plate, at an insigni-

ficant cost, make entry of the whole as being published, and, on copies being demanded by the British Museum and other institutions entitled to copies of all published works, they thus have something to deliver bearing a colourable correspondence with the entries at the Hall. The copies thus delivered are speedily transferred to the respective libraries for which they are collected, where, in the ordinary course, they lie buried in oblivion; and thus is accomplished the fraudulent purpose of the party making the entry, persons referring to the books of the Stationers' Company being induced to suppose that a *bond fide* English publication has taken place, as therein falsely described. Of this the authorities both at Stationers' Hall and the British Museum are perfectly cognisant. The latter institution contains many sheets of music that have been engraved and printed for no other than the one purpose of being deposited there. But, in the majority of instances, the foreign-printed copies are deposited, so as to save all cost, till a demand springs up for the composition. The opera of "La Sonnambula" is an illustration of the latter practice. The copies deposited are foreign-printed articles, palpable to every one conversant with British printing, particularly to the intelligent librarian, Mr. Oliphant, who has the charge of the music in the British Museum, and who, from long experience, cannot be deceived in such a matter. But the judges and jury cannot see with the eyes of a literary virtuoso, and therefore the fraud succeeds; for let it not be forgotten that these entries at Stationers' Hall always purport to be those of *English-printed works*.