COPYRIGHT AND PATENTS;

OR,

PROPERTY IN THOUGHT.

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OR,

PROPERTY IN THOUGHT:

BEING

AN INVESTIGATION OF THE PRINCIPLES OF LEGAL SCIENCE,

APPLICABLE TO

PROPERTY IN THOUGHT;

WITH THEIR BEARING ON

THE CASE OF JEFFERYS v. BOOSEY, RECENTLY DECIDED BY THE HOUSE OF LORDS.

In a Letter to the Right Hon. Lord Brougham and Vaux.

TO WHICH IS APPENDED

A CORRECTED REPORT OF THE JUDGMENTS DELIVERED BY THE LORD CHANCELLOR, LORD BROUGHAM, AND LORD ST. LEONARDS.

BY MONTAGUE R. LEVERSON,
ATTORNEY AND SOLICITOR.

"THE JUST IS THE EXPEDIENT."

LONDON:
WILDY AND SONS, LINCOLN'S INN ARCHWAY.

1854.

PREFACE.

THE following Essay, (for such in effect it is;) has grown out of a consideration of the case of Jefferys *v.* Boosey, recently decided by the House of Lords.

Conceived in the form of a letter to Lord Brougham, it was expected to be comprised in little more than the length of an ordinary epistle.

Examining the case of Jefferys *v.* Boosey, its right decision was found to involve some of the most important principles of legal science; nor was it susceptible of investigation, without, at the same time, touching upon subjects of property, closely allied to that of which the con-

sideration was directly involved in the decision of this case. Hence, the Letter upon Jefferys *v.* Boosey, grew into an Essay upon Copyrights and Patents.

The epistolary form has been retained, because the changing it would have involved an amount of labour more than commensurate with any advantage to be thereby acquired.

As many of the observations made in the course of this letter are founded on the Judgments delivered by the Law Lords in the above-named case, the perusal thereof should precede that of the Essay. They will be found in the Appendix.

Beyond application to the case of Jefferys *v.* Boosey, the work of collation was that chiefly required for this letter: collation from manuscript on various jurisprudential subjects, the study whereof had occupied part of the writer's leisure for some years.

A careful examination of the analytical table, facing page 54, should succeed the perusal of their Lordships' Judgments, and it is to this

table to which especially the writer would draw attention, being that to which, if to any portion of his letter, the character of usefulness may belong. Designed to present at one view a summary of the whole, it offers to the systematic mind a clear view of what has been attempted, to the discerning, what ill done, or omitted.

For the accurate reports of the Judgments in the case of Jefferys *v.* Boosey, appended to this letter, and which have been corrected by their Lordships, the writer is indebted to the kindness of the Editor of the "Law Times."

PROPERTY IN THOUGHT.

"THAT WHICH IS EXPEDIENT THAT ALSO IS IT WHICH IS JUST."

TO THE RIGHT HONOURABLE

LORD BROUGHAM AND VAUX.

My Lord,

A law has just been established by the House of Lords, on the motion of the Lord Chancellor, Lord St. Leonard's, and your Lordship, by which certain rights have been defined. I allude to the law enacted by your Lordships, by your decisions in the case of *Jefferys* v. *Boosey*. I propose investigating the law thus made, and to enquire whether the rights thus determined are fitting rights.

Approaching the question with all the deference due to the elaborate judgments and matured arguments of your Lordships, whether the conclusions to which this enquiry shall lead me, coincide or not with the decree of the House of Lords, you at least will not regard me as wanting in duty, in that I do not hesitate to lift up private judgment for or against the now established law. The time has been, and with some minds still may be, that what is—is the subject of so much reverence, that to pass judgment thereon, either of approbation or the reverse, has been deemed a presumption little short of sacrilege.

Your Lordship was never of this number, and therefore it is I address myself to you upon the present subject.

It will be desirable to have the facts plainly stated on the outset of this enquiry. They were as follows:—Vincenzo Bellini, an alien, then and since resident out of the Queen's dominions, wrote a musical work. Bellini, by the laws of Milan, acquired a copyright therein, and assigned

that copyright to Ricordi, another alien, then also resident at Milan, where the assignment was made pursuant to the laws thereof. Ricordi came to England, and assigned to Boosey, the original Plaintiff, all his, Ricordi's, copyright in the said work for Great Britain and Ireland only. Boosey is an Englishman, and after the assignment, published the work in London; the work never having been before published either in England or elsewhere.

Boosey complied with the requisition of the statutes as to Stationer's Hall, &c., and afterwards Jefferys, the original Defendant, pirated the work, and Boosey brought an action against him.

The questions arising on this state of facts were these:—

Can an alien, resident abroad, acquire here a copyright in his own composition?

If so, can he assign such copyright to another alien?

Can such assignee assign a portion of such copyright to a citizen, by whom publication is first made?

The Court of Exchequer Chamber decided all these questions in the affirmative. The House of Lords overruled their decision.

It was admitted on all hands, and it is the fact, that the Courts were unfettered by precedent in the matter.

It was admitted, and it is the fact, that the statutes regulating copyright are so far silent, that they do not expressly compel a decision either way. That, consequently, the question must be decided on 'general principles,' though I fear much those who used this term had no distinct knowledge of the principles by which they would be guided.

If then, as was argued by some, common law is silent, and that at common law, whatever may be meant thereby, no copyright exists, it remains to put a construction on the statutes.

Of all the constructions of which the words are capable, without an evident disregard to their sense, the one to be selected is just that which will most tend to effect the object of society, *viz.*, the welfare and happiness of its members; that,

if anything, must be the meaning of a decision by an appeal to general principles; in other words, that construction which shall be most consistent with justice.

If it be true, as contended by others, that copyright exists at common law, the meaning of this expression translated into sensible language is: What regulations on the point in question will best promote the object of society?

Not that for one moment I would do so much injustice to the common law of England, as to suppose that which goes by the name as calculated in any but a remote degree to promote so insignificant an object, so contemptible an end, as the welfare of those subjected to its rules—far from it—in innumerable instances in which the law has been established. But on points such as the present, in no way fettered by statute or decision, such, if it have any meaning at all, must be the meaning of the phrase, 'the common law.'

Thus then, from whatever point of view we

regard the case in question, we have the same canon by which to decide.

What are the rights involved in the consideration of the present case, which for the attainment of the object of society it is fitting should be established?

The subject in question is one of property.

An examination of the question of property, and of the rights it is fitting should be established, in that regard will lead by easy steps to their application in the present instance.

To procure the means of subsistence, and afterwards of enjoyment, man devotes himself to labour; without these means he perishes;—an insufficient supply is a source of misery;—it is a good thing then that he should procure these means, meaning by a good thing that which tends to man's happiness. Having produced he must be suffered to enjoy, otherwise he will soon grow tired of his useless toil, and ceasing to produce, the earth would be filled with misery.

The enjoyment, then, of what he has produced by his labour, is among the earliest provisions of

a society emerging from barbarism. Thus are established the rights of property, and a body of laws having for its object the defining and protection of these rights. So important is felt to be the production of these means, that to facilitate their production men enter into agreements with one another relating thereto. Society feeling the advantage of such agreements, perceiving the important part they play in securing enjoyment to the producer, and consequently promoting production, enforces the fulfilment of such agreements by its law. Agreements tending to promote the welfare of society are thus legally enforceable; these legally enforceable agreements are called contracts.

A slight examination only, convinces the observer of the importance to be derived from the existence of the greatest possible stock of the necessaries and comforts of life, produced by labour, *i.e.*, of wealth; consequently the greatest possible inducement to production should be held out to the labourer.

The greatest possible inducement will be the

greatest possible proportion of what he has produced, that is, wherever practicable, the whole of it, less the least possible amount that shall be necessary for the purposes of protection from depredators and assailants, whether from within or without: meaning by whatever practicable the non-existence of a preponderating inconvenience. So important is the giving of this inducement felt to be, that rather than give less to one set of labourers than the full amount of the produce of their labour, such deduction made as before, something more is given, in the shape of something which neither they nor any one else produced; and because the whole value of the labour applied to land not being restored with each successive crop, continues partly to exist in the shape of improved fertility, and cannot in the present state of knowledge be distinguished from what is really rent; in the shape of exclusive permission to cultivate this land so by them before cultivated; this rent also is permitted to be retained by the cultivator.

There is nothing more purely the produce of

labour than a discovery or an invention. To the discoverer or inventor the exclusive right thereto belongs, and, as with all other property, becomes vacant by the death of the owner; like other property, it should then be dealt with in the manner that shall be meetest for the object of society. But, it may be said, discoveries or inventions, or thoughts of any kind, are not wealth, on the unquestionable ground of the importance whereof this argument rests. True, but of all the productions of labour, none are more important, none more effectual, for the promotion of the welfare of society than they; since these very discoveries and inventions either on the one hand lead to the most effectual means of production, or they tend otherwise to gratify in the highest degree all those faculties of the mind, the gratification whereof excites that state of feeling emphatically called happiness. Hence the largest possible inducement should be held out to those labourers who may be disposed to labour in so important a field.

Discoveries or inventions are thoughts. With

thoughts unexpressed the legislator has no concern; thoughts expressed only can be dealt with by him. They are expressed either by vocal or by visual signs. Thought leads to thought, intimately and directly widely spread; there is no limit to the future benefit derivable from a single thought. It is, therefore, greatly important to spread abroad as much as possible the thought of the author, care being taken that sufficient inducement be left to the thinker. The right of property, then, of the author in his thoughts, when expressed by signs, may be, and experience teaches that it is, subject to a limitation in point of duration, by the existence of antagonistic convenience attached to the dissemination of thought, not extending to the right of property in other produce of labour. I say a limitation in point of duration, and for this reason,—other things equal that motive is least efficient, the operation whereof is most remote. Hence the abatement made from the labour-inducing motives should be remote as possible; also it is that limitation, otherwise convenient to the community, being

that to which the inconvenience of uncertainty is attached in the least degree.

To the visual signs of thought the thinker may acquire right in the modes appointed for the acquirement of other species of property, failing such acquirement, he possesses still the right of property in his thought, and that alone. Can it be said, that in these thoughts others should acquire, without his consent, a right of property?

Expressed by visual signs, the discoverer, or author, publishes his thoughts to the purchaser of their expression, at the price to which the author and purchaser agree. Of these thoughts for his own use, the purchaser of the signs by which they are expressed becomes the possessor.

If any other means can be devised by which the exclusive enjoyment of the produce of his labour can be assured to the author, than the exclusive right of giving his thoughts to another, adopt such means; for my own part I know of none. On the other hand, to restrict him who shall thus have purchased the author's thoughts from every application thereof to any

purpose of utility, would in effect put a stop to the purchase. To restrict him from their expression by vocal signs, or from the personal and manual copy of their visual expression, would in most cases be productive of far greater inconvenience than such restriction purports to prevent.

But he who purchases the visual signs of thought, of that which he has purchased may dispose,—this follows from the principles of contracts. That he who purchases these visual signs may know the vendor has title for the sale, arrangements should exist for the ascertainment of the owner,—as by registration and the like. Means also should be provided, by which such ownership shall appear on the subject of sale.

Hence copyright, or patent-right, is not the right of multiplying copies, but the right to the produce of man's labour, often of a kind the most prolific of all labour of benefit to society.

Society, when by a grant of copyright, or patent-right, it grants to the thinker the exclusive

use of his thoughts, and the exclusive enjoyment of whatever may be the estimate formed by society of their value, grants no more a monopoly than when it grants a sole property to the tailor in the coat he has made, or the price he has received therefor.

In each case all others are excluded from enjoyment. 'Hands off,' exclaims society; and its reason in each case is alike. But because an inconvenience in the shape of uncertainty exists in the case of property in thought, and does not exist in a noticeable degree in the case of property in the coat, society requires the thinker to remove this uncertainty, on pain of perceiving the results of his labour become the common property of the community.

In establishing regulations for the convenient direction and exercise of the right in this peculiar instance, the legislature should impose such regulations and limitations as would produce, on the whole, the greatest proportionate advantage, compared with the disadvantages inseparably connected with this, as with all other human actions

and regulations. Whether the rights that have been established with regard to ownership of thoughts expressed by visual signs, are the meetest for the welfare of society, is not my present purpose to enquire, as it would need a complete exposition of the existing law thereon. All I need to ascertain is, in so far as before unascertained rights were established by the decision in Jefferys *v.* Boosey, what rights were the most fitting to have been then provided.

In estimating the relative advantages and disadvantages of proposed regulations on this head, a further analysis becomes necessary. Of thoughts expressed by visual signs, the visual signs are valuable, either because of the thoughts expressed, or because of the uses to which their application to things, or the signs themselves, may be applied. The first are susceptible of improvement and of progress by the mere possession of the thoughts, the last need constant use and application, and thus present a further rule of limitation of the right in point of duration. The first will include books, pamphlets, mere writings

of all kinds, and the like; the last, processes, inventions, dramatic and musical compositions, so far as concerns their performance, drawings, and designs.

With the first only I need to deal, in treating the case of Jefferys *v.* Boosey; but after dealing therewith, I shall, before concluding this letter, treat more fully the subject of property in thought, than would be merely needed for the decision of that case.

In what has been said, there appears no reason for confining this right of property to any one spot or part of the world, everywhere the same reasons exist for giving to the labourer the right to the produce of his labour. The welfare of one society requires the procurement of the means of enjoyment provided by another, and this is procured in the greatest possible extent by giving to that other the greatest possible inducement to produce; that is, by a full recognition of property in the members of that society to the produce of their labour, and giving them that which they most require in exchange therefor.

If the inducement to think remained always to the foreigner undiminished, notwithstanding the refusal to him of property in his thoughts, except in the country in which residing he may first publish, there were no need to abridge the advantage to be derived from the dissemination of his thoughts, and their free appropriation by others, but such undiminished inducement cannot exist, and of all labour this, often so incomparably important, cannot be that from which so great an inducement should be withheld.

There is scarce any teaching of experience more certain, than that authors feel themselves wronged, and that many abstain in consequence from uttering their thoughts, because they feel they are deprived of the enjoyment of the results of their labour; and many more there are, who, with great advantage to society, would devote themselves to the labour of thought were sufficient inducement held out to them so to do. To the refusal of all power of donation beyond a very limited number of years after decease, they must fain be reconciled by the enormous con-

venience thence arising to society, and though this limitation of itself and alone acts, it cannot be denied; in diminution of the inducement to think, yet occurring as it does at a period sufficiently remote to render its operation of small moment, it is justified by the preponderating convenience to society, *and by that alone.* That the moment they have laboured, the produce of their labour should be filched from them, acts just as it would on any other labourer. Nor is the countervailing convenience of the dissemination of thought, sufficient to make up for the withholding of that inducement, to whose powerful operation is owing whatever there may be of good and of beautiful, in short, of civilization in this and in all society.

Will you indeed allege, that though true of our own citizens, it is not true of the citizens of a foreign state, and that the very loss to them is gain to us? Shallow, indeed, must be the mind that can cheat itself with such belief, worthy only of the classic nations of Greece and Rome, from whom we derive the maxim, 'One people gains

what another loses.' Maxim indeed, by which their policy was ruled, true of nations that live by robbery, and therefore true of them, but not true of those who live by labour, and therefore not of this better, wiser, happier world. Not so indeed; what they, what foreigners lose, we lose also; it is lost to all the world. Who shall measure the loss caused by the non-expression of a single thought? Say not this applies equally to whatever limitation to the right of property in thought may be imposed. Of any such limitation the force of the labour-inducement-abstraction diminishes in a rapid ratio, according to the remoteness, in point of time, of its having operation: the abstraction that has place when the right of property is withheld from the foreigner, is instant and immediate.

Thus, my Lord, the member of a foreign society should no more be robbed of his thoughts, the produce of his labour, than your Lordship and your Lordship's colleagues of the plate from which you dine. The chair that is made, the corn that is grown, the sheep that is reared, the ship

that is built, belong no less to the maker, the grower, the rearer, and the builder, in one part of the world than another. Thus, at least, it ought to be; unhappily, it too often occurs that the rights acknowledged by the law, are not those which are most meet for the welfare of society.

In accordance with what should be the rights of property, your Lordships might have made the law. You have made it deny to the labourer the produce of his labour. Much, it fears me, a desire to retaliate upon others the immoral regulations they have established, may have interfered to warp the judgment of the sometime disciple of Bentham, and of his colleagues.

You wish to 'pay out' the Americans in their own coin, you forget that English interests are at stake; or, will you in all things follow the Americans? Are you prepared, with them, to acknowledge a property in man? By your decision, you have denied to man the produce of his labour!

But, my Lord, there are many things in which with no little advantage we might imitate our

Transatlantic brethren, and here I doubt if you are prepared to follow their lead. If you will follow them, follow them wherein they are right and just, you will find ample room for improvement; seek not to 'pay them out,' by following the course in which they are wrong.

Further; the welfare of one society requires the entering into contracts by members thereof with other members and with non-members of the same society. The contracts so entered into should be fulfilled, otherwise this good thing, their being entered into, would not have occurrence, and the means of enjoyment procurable from the foreigner would either not have existence, or not be supplied to those who, taught by experience they find, fulfil not the contracts into which they have entered.

Further reason, my Lord, why the property of foreigners, although resident abroad, should be recognized, reason also why their contracts respecting it should be regarded.

Thus, on the narrow ground of welfare and advantage of one society alone, it is seen that one

society should recognize in the citizen of a foreign state, property in the labourer in the produce of his labour.

To avoid cavil, it may be here mentioned that reference is now had only to a state of peace. In war other considerations have to be entered into, but not in this place.

Braving the sneers of those narrow minds who may choose to denounce as Utopian such views, I shrink not from declaring the greatest amount of good to mankind, to be the end that should be aimed at by all maxims of international conduct, and that a society having this end in view, judiciously framing rules of conduct for its attainment, attains also for itself the greatest amount of happiness and well being.

An enlightened view of the interest of one state, in this single instance in which it has come into question, has shown it identical with that of the world at large. In every other instance it will be found alike.

The first question is thus answered in the affirmative.

I admit that a certain popularity attaches to the Judgment of your Lordships' House, on the part of those minds that, looking only to the surface of things, gloat over the injustice perpetrated upon foreign authors, as in some sort a satisfaction, 'a retribution' they call it, for the injustice perpetrated abroad upon British authors: nay, among these may perhaps be numbered many writers of this country. "Orsini seizes the daughter of Colonna's tailor, and Colonna cuts me the throat of Orsini's baker,—it is all for the good of the people." But such popularity at best is but ephemeral, and extends not to nobler and more exalted minds. Ephemeral, and of such nature ephemeral, that with the progress of enlightenment and civilization it gradually expires.

It is argued, this is done for the purpose of compelling the Americans to do justly by us, and to enter into a treaty of international copyright. Whether this object will be attained or no, depends on the influence possessed over the public and official American mind, by those who will

be most affected by their Lordships' law. But as these, for the most part, will have always deplored the lack of probity of their fellow-citizens on this head, it is evident that hitherto their influence has not sufficed, and though their zeal may be increased now that the evil affects themselves, it may be doubted whether this additional influence will be sufficient to counterbalance the want of probity of their people, supported as they now will be by the example of this country. "We rob you," they may say to us; "true, but you rob us, and that makes all even;" and if Jonathan is more cute than John Bull, why he robs him more than he is robbed, and so the 'advantage' is on the side of Jonathan. Is it really advantage, or only a smaller amount of disadvantage and loss? But if an improved state of morality shall come to prevail in America on this head, more readily through the increased interest at work to promote it, than but for this law would have happened, and supposing the diminished duration of the augmented evil to weigh against the loss occasioned by the broader field in which it is

exerted, how will you compensate the evil done to justice—the fatal stab received at your hands; at the hands of her sworn and appointed protectors?

Thus, then, again Bellini's right of property ought to have been allowed.

The assignment by Bellini, in the absence of limitation, transferred the whole property in the produce of his labour; the assignment by Ricordi expressly assigned a part. If your Lordship possesses an estate at Cannes and in England, cannot your Lordship assign the one, or the part of one, without both, or the whole of one? If your Lordship has a carpet extending into two rooms, could you not sell the carpet in one room without selling also that which is in the other? If your Lordship has the right to use a house for January and February, ought not your Lordship to be at liberty to sell that right for January? Admitting all this, the two last questions also are answered in the affirmative.

The right to the produce of one's labour once acknowledged, involving as it does the right of partial and entire transfer, all that convenience

requires is, that the same means of registration, of identification, and of security, provided by the law in ordinary cases from motives of convenience, in this case also shall be adopted.

I have exposed the mistake of supposing copyright to mean the exclusive right of multiplying copies of a published work, as stated by the Lord Chancellor; and hence his hypothesis that it is entirely regulated by statute law, and the inference upon which he argues without asserting it, that it does not exist except where provided for by statute, fail him altogether. I have shown copyright to be a *right right*, a *fitting* right; can the Lord Chancellor show any other origin for the right to any portion of his own property? If this be common law, then are both rights the creatures thereof. If statute law, then are both rights regulated thereby. In either case, from acknowledging such rights great benefit accrues to society; therefore they should be acknowledged wherever statute or decision* have not enacted rights of a different kind.

* "Il faut reconnaître que, lorsque, dans le silence, l'obscurité

Where such different rights have been enacted, they should be reviewed by the legislature, and fitting rights established in their stead.

The law has refused all property in thought when the visual signs thereof have been first published abroad, for no sufficient reason that I can see; and in opposition to the rules above educed from a steady regard to the true principle of legislation: but having so refused, it needs an act of the legislature to alter it. The cases by which this refusal was established, were decided, we are told, on 'general principles.' On what principles? Certainly not on an enlightened view of securing the object of society—its welfare. And now it came to be determined—also on principle—whether or no the produce of the labour of a foreigner should be regarded as his property. The House of Lords, on your motion, has decided that it shall not. A noble example of

ou l'insuffisance de la loi, les tribunaux ont décidé certaines questions de droit, d'une manière uniforme et par une longue suite d'arrêts, cette jurisprudence passe, pour ainsi dire, à l'état de coutume juridique et devient comme le supplément de la législation."

respect of property, for the admiration and imitation of the world; worthy of gaining an instant admission into the society of Monsieur Proudhon and his fraternity.

Without doubt a distinction exists between the case of the work so published abroad and works first published here. Longer than the period appointed by law for the duration of the right in case of publication here, dating from a limited period after the publication abroad, should not be allowed. Within such limited period registration must take place, but as the appointment of registration is only for the removal of uncertainty, in *all cases* non-registration confers no liberty to publish without the consent of the owner of the right, where a clear knowledge of its existence can be established against him who in such case commits a robbery, and no whit less so than he who picks my pocket of my handkerchief.

It seems to me, my Lord, that the arguments here advanced are 'strictly legal,' that 'all other considerations have been entirely discarded,' and

to me the difficulty experienced as to what becomes of the copyright when the author dies, seems—with all humility I say it—a mere phantom. By the death of the owner, property—property of all description—becomes vacant, and the law will, or at least ought, to make such regulations concerning it as best to promote the object of society. Generally this extends to appointing a successor, in the person of a near relative; in the case of property in thought, it extends to appointing the whole community to the succession after a certain number of years. Nor do I suffer under your Lordship's difficulty as to when the property vests,—simply, as it seems to me, when the thoughts occur, as with wealth when the wealth is produced. Thoughts being means, means often of the greatest moment for attaining the welfare and happiness of society.

But the reason I am not puzzled by this difficulty is not hard of discovery. It is simply because I have referred the whole matter to principle, which the House of Lords talked of doing,

but never did. Of course a Latin proverb settled the point, "*Volat irrevocabile verbum;*" but did it not occur to your Lordship that notwithstanding the volatility of the words, the reward given by society for thoughts really valuable—really tending to promote its welfare—is something physical and substantial, and that a ready means existed by which the reward should be secured to him to whom it ought to be awarded, in accordance with the principle placed at the head and also at the conclusion of this Letter—the principle of justice.

The case of a translation, reference made to this principle is equally clear.

Thoughts expressed in one language will be purchased only by those who understand such language, and to the reward to be received from these only does the author look, if to this one language he confine the expression of his thoughts. If he express his thoughts by more than one set of visual signs, then does he look to all who purchase in such additional set of signs for reward.

The reward paid by these last, will be part of the reward society gives for this labour, to which labour the greatest possible inducement should be given. In the nature of things a translation must succeed by some period of time the original work; and further, time is required for the enquiries to be made, and the information procured, by which is determined the intention of the author to seek or abandon the reward offered for his labour, by those to whom the thoughts expressed by such additional signs would be an object of desire. A certain time, therefore, should be allowed the thinker for the expression of his thoughts, by other signs than those first selected, and to avoid loss of labour by another translator, notice of the consideration of the advisibility of so doing, and then of such intention, or of such intention in the first instance, should be enjoined upon the author. The time allowed for exclusive publication, where the intention so to do is announced in the first instance, exceeding that of either of the periods allowed for procuring information upon which to

ground a determination, and then for carrying such determination into effect; falling short of the two periods combined.

If no such intention should be announced at the expiration of the time given for consideration, or on the non-publication of such announced set of additional signs at the expiration of the period allowed for that purpose, it should be presumed it is not intended to do so (otherwise preponderating inconvenience would arise); and thus it should be held the thinker looks for reward only to those purchasers of his thoughts to whose notice it may be considered he has confined his attention, by the expression of his thoughts in the single set of signs thus by him already chosen.

Since an injury has been done to society by the delay, he who shall have announced an intention which he has failed to carry out, should be called on to give evidence of the reality of the intention announced: failing in so doing, punishment is due, not merely for such injury, but for the further and more grievous injury in the wounds inflicted upon truth, by the act of mendacity or

temerity of which he who made such announcement has been guilty.

That such punishment may be certain, the subject of property affords a ready means to the hand of the legislator.

A virtuous and noble imagination inspires your Lordship when you come to speak of slavery, and yet, my Lord, what is the reason for this indignation? If the law acknowledges a right of property in man, has not the person upon whom this right is conferred a right thereto? He has, no less than I to the pen with which now I write; but it is no fitting right—it is no just right; and it is not fitting, it is unjust, it is inexpedient, simply because it promotes not the welfare of society. Against slavery, indeed, the indignation of every honest mind is greatly aroused, because it violates in a special and very high degree the object of each member of society, and is thus in a very high degree destructive of human well-being. Has your Lordship any other reason for your indignation? Will you now compare the right of property in man to the right he should possess

in the produce of his labour? Wherein, my Lord, consists the analogy? You argued, indeed, against an argument that existed only in imagination. "Is it," said your Lordship, "because by the law of Milan, the '*lex loci*,' a right of property exists, that therefore it shall exist here;" and you quote those celebrated slave cases, the decisions wherein, whatever may be said of the reasons on which they are founded, reflect immortal honour on our people as well as on the judges by whom those decisions were pronounced. You quote, I say, these cases to shew that it does not follow that the right exists here because it exists elsewhere. True—but who said that it did? Like Don Quixote, you have indeed routed a windmill: but though the right exists not *because* it exists abroad, it was in your power to have said that, Seeing it ought to exist, and that hitherto it has not been prohibited, therefore it shall be established. This you now have not the power to do. What an opportunity, my Lord, has been lost!

I have, methinks, sufficiently explained that

both rights, the right of property of one man in another, and of one man in the produce of his own labour, where they exist, have the same foundation; both rights, and the right to life itself, have no existence but in the law; but, saving this common point, wherein all rights agree, *no one point of resemblance remains.* On the contrary, there exists the greatest possible antagonism between them, summed up in this, that the existence of the right of property in man, is fraught with a fearful amount of suffering and misery to mankind; the existence of a right of property in the labourer to the produce of his labour, is calculated, on the contrary, to produce the greatest benefits and blessings. To all this your Lordship gives a ready assent, and then, when called upon to make practical application of these your opinions, place both rights on the same footing, albeit, as has been seen, there exists between them *only* this difference, That the one is an unjust right, and the other a Right most righteous and desirable.

But in the arguments and in the judgments in

this case, well nigh every abuse of which the English law is guilty, and its imperfections are appreciated by few better than by your Lordship; nearly every instance in which the welfare of the community is most set at nought, every such instance seems to have been brought forward in argument—in elucidation, and for imitation, by the Members of the House of Lords, when called upon to decide—not what the law is, but what it ought to be, and in accordance with what it ought to be, to make it. The hash that has resulted is just that which might have been expected.

You talk of this copyright being given by the legislature at the expense of its subjects, but is it more so than the giving your Lordship the property in the carriage you have purchased, and to your coach-builder the property in the wealth you have transferred to him in exchange for the produce of his labour? Both rights, my Lord, are given to the exclusion of every body else; and so far, if you will, given by the legislature at *the expense* of its subjects, but simply because by

giving the produce of his labour to the labourer, human well-being is promoted. Nor is it, in fact, at the expense of any body the right is given, seeing that but for the right the subject of property might never have existed.

Your Lordship referred to the supposed intention of a barbarous legislature, after yourself stating that such intention had not been declared, but must be discovered, (I suppose on general principles;) and this to me is a matter of much surprise. Doubtless our ancestors, barbarians though they may have been, designed such a law as they thought would be most conducive to their interest: that such was their intention may reasonably be presumed, from the knowledge of human nature we are enabled to acquire by observing that nature under all the circumstances in which it has been placed. On one point that came now to be decided by the House of Lords, they, our ancestors, had made no provision. Had they thought of it—their ignorance might have led them to pursue their fancied interest by prohibiting a foreigner from

thinking at all. Luckily they left the case in question untouched, and their Lordships, instead of appealing as they pretended to the intentions of our ancestors, appealed not to what without doubt was their intention, their own welfare, but to the mistaken means by which that welfare was sometimes sought, and finding these our ancestors had adopted certain means in certain cases provided for by them, concluded they would have adopted certain other means had the point now in question presented itself to their minds.

In this conclusion it is quite probable their Lordships were correct, but then in their Lordships logic there follows, as it seems to me, a perfect *non-sequitur*: therefore, said the House of Lords, although the point did *not* occur, we must now, when the point arises, adopt the same means which they might have adopted had the point then occurred to them, however mistaken such means may be to attain the end they had in view, such end being the same as we now have, or ought to have,—the welfare of the community.

In pursuing this same end, our ancestors had the sagacity to perceive, that on various occasions it was of great moment to arrive at truth. Truth, then became an end, an intermediate for the attainment of an ultimate end. To ensure the attainment of this truth, recourse was had to various means:—trial by battle, trial by ordeal, wager of law, torture, and oaths, were all appealed to for this purpose. Had you now to decide, 'on general principles,' in what mode truth in any given case should be arrived at, which of all these means would you adopt? Or, so long as not prohibited by law, would you rather place reliance on other securities?

Such, nevertheless, as I have described, has been the logic by which, referring to the 'intention' of the legislature, their Lordships have been led to make the law,—THAT NO FOREIGNER SHALL HAVE COPYRIGHT IN HIS OWN WORK UNLESS HE COME OVER HERE AND HERE PUBLISH. Nor will I be withheld from appealing to the absurd conclusion to which we are thus led, by the fact that

the Lord Chancellor deprecated such appeal, that it would follow from this law that a foreigner sending hither to publish his work, say from so near a neighbourhood as Calais, no right of property will vest; but let him step over to Dover, and, *presto*, his property is his own. I thought there was a legal maxim '*qui facit per alium facit per se.*' There is such a rule in common sense, but the law disregards it now, as many times before now, as in Rapson *v.* Cubitt, and the host of decisions, *i. e.*, of judge-made law, following thereupon and so providing a fertile source of injury without redress.

In proposing to give an author the right to his manuscript, and not the reward society is willing to pay for his labour, you "keep the word of promise to the ear, and break it to the sense."

To proceed now to consider the Judgment of Lord St. Leonard's, would be little more than to recapitulate what I have already said. One or two points only need be noticed.

His Lordship is right in that he can see, in right reason, little distinction between "the right

to an invention after the publication thereof, and the right to the description of that invention after the publication of that description," the true rule in both cases has been already ascertained. Where is the right possessed by Bellini? His Lordship then exclaims, "Quite true, no law could be pointed to giving the right, nor yet (prior to a decision to that effect) any law giving to Lord St. Leonard's the coat he wore; but the question was, what should be the right? and that question, if this enquiry be not altogether misconceived, has not been correctly answered by the House of Lords.

"The 'common law,'" says Lord St. Leonards, "cannot extend to a foreigner resident abroad, and owing no allegiance to this country; it is quite impossible." Why is it impossible? In what? Where is the impossibility to which his Lordship alludes? It is a general rule with a vengeance, and extended as its elasticity permits, would go rather further than even Lord St. Leonards might approve. Methinks it has been found convenient and expedient

—*i. e.*, just—to recognize the right of a foreigner resident abroad, (although owing no allegiance to this country,) to the bale of cotton he may have purchased and sent hither. Will his Lordship say this ought not to be? Will he state if this right accrues by statute, or at common law, and point out the statute if by Act of Parliament, or reason for the decision if at common law? I admit that common law has been so construed, that not even a murder committed out of this country can in general be by it regarded—but was such construction quite in accordance with the pursuit of the welfare and happiness of mankind?

"It is distinguishable," his Lordship goes on to say, having in view the celebrated action brought by the Emperor Napoleon, (for of course his Lordship is not sufficiently ill-mannered to put his *dead* brethren in the wrong, whatever he may say of the living;) "It is distinguishable from any case which has been cited, or which can be cited, which gives a right to a foreigner with regard to damage done, (to his character for

example;) by a person resident in this country. The cases are altogether distinct." Are they? In what respect, my Lord? That also his Lordship condescends not to explain, and, for my own part, I think I can shew the like necessity for a body of laws, framed for protecting the affections of men from affliction by others, as for the protection of their person or property, a necessity originating in a like cause—the desire for happiness. And why protect the desire for happiness, so far as regards a man's affections, and refuse it where his property is concerned? So far, then, as authorities were to be found, they would go in favour of the right, the existence whereof, or desirableness of its existence, forms the subject of this letter. But taking the case as again expressly stated by Lord St. Leonards, as one "wholly uninfluenced by authority," after what has appeared no doubt, it is believed, can exist as to what the decision *i. e.*, the law, ought to have been.

I confess I dont understand what his Lordship means when he appeals to 'natural allegiance,'

and 'natural rights,' as the basis of his decision. Natural allegiance is that of the weak to the strong; natural rights those of the strong over the weak; but as such allegiance and such rights have not been found conducive to the welfare of the human family, they have been replaced in all societies by others, more and more suited to that object, in proportion to the degree of civilization the community in question may have attained.

I have perhaps said enough as to the object of the legislature at the time of passing the statute. Their object was, the good of the community; if the means adopted were fitting to that end it is well; if silent, as was unanimously asserted, seek the means best adapted thereto, if means were provided; but ill devised and not adapted to their end, the law must be obeyed until repealed, so long as the evils of resistance are not less than those of obedience, and the law itself as soon as possible should be repealed. As has been seen, the law was silent.

Then his Lordship talked of America and

reciprocity. If the Americans have done foolishly are we to follow their example? Is it for their sakes or for our own we recognize the right of property? And as to reciprocity, I confess I hoped such a remark, concerning rights of property at least, was long since banished from both houses of the legislature. Being, however, of hereditary descent it is retained, I suppose, as a relic in the house of hereditary wisdom.

His Lordship cannot understand the argument, that a first publication abroad gives a general right,—nor can I. The law gives the right, not the publication in one part of the world, or in another, but the question was, what right ought the law to give?—as before asked—what was a fitting right?

I have already met his Lordship's difficulty of a partial transfer. No particular inconvenience, that I can see, and certainly no absurdity, occurs in holding that this *not abstract, but positive,* right of property should be divisible into lots, and that there may be a separate transfer of the right of publication in every county in the king-

dom. If parties choose to make such a contract, why will you interfere? Surely, to do so you must first establish the existence of your inconvenience. Point it out to me, and to good proof I at once defer. The parties themselves must have deemed such an arrangement a convenient one, or they would not so have contracted. Shew me a greater inconvenience, and, without doubt, their mistaken estimate of convenience must give way.

Neither do I find much difficulty in determining whether, as to the mode of transfer, the requisites of the *lex loci*, or of the *lex fori*, should be complied with, reference being always had to the 'principle.' I hope, in a few words to make it equally clear to your Lordship.

When a contract is entered into, the terms not expressed are determined by the law, and those terms, in fact, form part of the contract. Wherever the contract may come to be adjudicated upon, it is the intention of the parties, in accordance with which the adjudication should take place—that intention comprises the terms, which,

unexpressed by the contract itself, are provided for by the law ruling the contract at the time it was entered into: *i. e.*, in the absence of express stipulation to the contrary, the *lex loci* must be the guide to the meaning of the parties.

Presumptuous, then, as it may appear, I have not had much hesitation in arriving at the conclusion, that the questions to be decided in this celebrated case should have been answered in the affirmative. Of course in future this cannot be, until the legislature shall have amended the law made by your Lordships.

Without apprehending any difficulty from the proposed Chinese author, I cannot but express my regret at this new departure of decision from justice. A neophyte in the mysteries of English law, and then when engaged in its practice, constantly have I found cause to bewail the like departure. But, my Lord, before this can be redressed it needs a generation of men, thoroughly instructed in what the law ought to be, and thus capable of resisting the insidious influences con-

stantly at work, undermining the integrity and clearness of perception of all who embrace the law as a profession.

Having for the purpose of the decision in Jefferys *v.* Boosey, considered the case of thoughts expressed by visual signs, where the main object of desire is the thoughts, it may be useful to consider the cases, first of such thoughts so expressed, when their mode of application to things, or when the signs themselves, are the chief objects of desire, and then of thoughts expressed by vocal signs.

I place the modes of application of thoughts to things, when they are the main object of desire, in the same sub-class with the visual signs of thoughts, when such signs are in like manner the main object of desire, because the circumstances to be noted by the legislature, as generally affecting these last, affect in like manner the former. Indeed, for the purposes of legislation, the circumstances to be considered in regard to processes, are identical with those regarding machinery, both having the same rules of limita-

tion; no rule applying to the one that does not also and equally apply to the other.

Where then the modes of application, or the signs, are the main object of desire, to give the inventor, designer, or composer, the full enjoyment of the produce of his labour, something must be done materially impeding future progress and improvement therein; since from the nature of the case improvements can rarely be effected that shall not of themselves embody the very mode of application, or signs of thought, before invented. Hence there arises a further rule of limitation to the right of property in thought of this class. But of thoughts expressed by visual signs some are evidently of both classes—for instance, a dramatic or musical composition. A copy of the signs by which they are expressed has value because of the thoughts, while there remains a further value in the dramatic signs or representation thereof; hence, while the general rules of limitation above considered apply thereto in the shape of a book or the like; the further, as well as these general rules, applies to the re-

presentation; which last should not be restricted, (unless for some reason of convenience not occurring to me at present;) for any longer period than has place for the making of a machine; and is perhaps even subject to a further rule of limitation, *viz.*, the duration of fashion. Designs intended to meet the fashion have, it is clear, for a rule of limitation the probable duration of such fashion, nor is this duration so irreducible to rule as might at first sight be supposed.

The fashion of a chair is on the average of longer duration than that of a bonnet, that for the design of a carpet than that of a gown, and so on through all substances to which designs are applied. But while the exclusive right therein needs not to expire till the longest probable average duration of its fashion, (nor ought before that period, lest thereby an injury might ensue that without preponderating inconvenience could have been prevented;) to continue it considerably beyond this period would be attended with inconvenience. For the purpose of the inventor, so far as supplying the immediate fashion is con-

cerned, any extension thereof beyond the possible (meaning by possible the utmost extent of probable;) duration is unnecessary: to expose all who may adopt the design to prohibition at the suit of the first designer when, as often happens after a period of greater or less duration, the fashion revives, would involve an enormous amount of litigation and consequent loss, besides further loss from the acts done or omitted for the purpose of avoiding the risk of such litigation, by no means compensated by the advantages arising, or to arise, from any amount of inducement offered for the production of such designs.

Next, as to thoughts expressed by vocal signs, as by lectures, and the like. The general rules of limitation apply here. Also further rules, in that if not expressed by visual signs within a short period, the thoughts may be altogether lost, and also there exists, a special and extraordinary amount of uncertainty. Uncertainty extending not only to the person owning the property, but as to whether or not it is designed to form the subject of ownership at all. This uncertainty

must be removed by the would-be proprietor, in the mode to be pointed out by the legislature,—that done; within a certain period to him must be given the exclusive power of further expressing by visual signs his thoughts thus already expressed by vocal. Their expression thus accomplished the ordinary rules applicable to thoughts expressed by visual signs apply.

Objection:—That the right of property in thought already vocally expressed, is subject to a further limitation when they come to be expressed by visual signs, measured by the whole value of their vocal expression. That if this right be given, additional to that conferred in the case of thoughts expressed by visual signs, either more than enough is now given, or it is not. If not what is given in the case of visually expressed thoughts is too limited, the proper remedy is to extend it. If the just right was then given, you now confer an additional right, rendering it more than enough. True, so far, but as it would be easy to vary the signs that uncertainty should result, as to whether the visual signs really repre-

sent the same thoughts as the vocal, (supposing the latter accurately ascertained;) an uncertainty prolific of mis-decision, delay, vexation, and expense has place, and the convenience arising from the imposition of this minute limitation, is counterbalanced by a preponderating inconvenience.

The foregoing considerations give a ready rule by which the infringement of the rights now investigated may be determined, its application in practice will be the task—and one of no little difficulty—to be performed by the judge.

Does an alleged infringement lay claim or not to the reward society is willing, or likely to be willing, to pay for the thoughts alleged to have been thus wrongfully appropriated? Such reward being measured, not in pounds, shillings and pence only, but also in reputation.

It has been seen that registration is necessary for the purposes of certainty; *i. e.*, for the benefit of those who deal in the subject of thought, they therefore must pay the expense thereof; this is best done by charging it in the first instance to

those who desire to register. But every charge imposed excludes all who cannot pay the amount charged, it should therefore be the smallest possible charge, perhaps amounting to, but never exceeding, sufficient to defray expenses rendered necessary by the act of registration.

Wherever this expense exceeds in each instance a mere nominal sum, it will be more convenient to inventors that it should be defrayed by periodical payments, than that they should at once pay for a right which may not be desired to be retained during the whole period allotted by law. This is also to the further advantage of the community, seeing that while the inventor may choose to keep that for which he has paid, he may not think it worth his while to retain the exclusive power offered to him, on the condition of continuing this periodical payment.

Advantage on either side, and on both sides, without any abatement for disadvantage. Of course, then, it is the plan every where adopted: —but it is not.

In the annexed Table will be found an analysis

of the property in thought now investigated; more correctly, of the rules by which the rights of property therein ought to be governed, and will form a convenient appendage to this letter.

It is by an analysis such as this, extended into every part of the field of law, that what should be established, only can be known; then only after a process of scientific induction shall have been thoroughly performed can it be hoped, that what should be will replace the uncouth, incongruous, and mendacious hash, forming the common law; together with the mongrel empiricism of the statute law of England. What law, what custom, cannot be referred to its right place in such analysis, (such analysis once perfected;) that law, or that custom is inexpedient; finding no place in the analysis of law, it should find no place in legislation.

Such analysis—whether tabulated or not is of little moment—must needs precede the existence of a race of men, to whom should be explained, and who shall be capable of understanding wherein the law of England is deficient, and who shall

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possess minds of sufficient honesty to determine what ought, shall be.

The mind that shall succeed in exhibiting such analysis accurate after its kind, must be one, freed from prejudice and bias, capable of regarding the field, the complex field, of human action without confusion or dismay; filled, too, with a holy zeal for his task. Even then of one mind, it can never be possible that the entire region shall be explored.

Whosoever would proceed in such a work must possess further, an ardent humanity, gifted with an extended range of mental vision, he must survey with philosophic regard the means at his disposal, and with which he needs to work for the attainment of his end. Of this end he must have a constant and clear perception. Easy as it is to acknowledge the truth of the principle involved in the recognition of that end, when in plain words presented to the mind—the task to which the mind of the legislator must be devoted —the constant application of this principle to his laws—is a task among the most difficult of execu-

tion. Yet never can he find that of which he is in search, until to every question as it arises shall be applied its touchstone, (never for one moment to be forgotten;) the principle enunciated centuries ago by the wise man of old, and not less true and never more threadbare now than when first uttered in Attica, "That which is expedient, that also is it which is just."

With sentiments of profound respect,
I have the honour to remain,
Your Lordship's most obedient
humble servant,

M. L.

12, St. Helen's Place, London,
September, 1854.

APPENDIX.

APPENDIX.

HOUSE OF LORDS.

REPORTED BY JAMES PATERSON, ESQ., OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

(From the *Law Times*, Vol. xxiii., No. 593, p. 275.)

JEFFERYS *v.* BOOSEY.

August 1st, 1854.

Error from the Ex. Ch. on a bill of exceptions, in an action on the case for infringement of copyright.

The declaration stated that the plaintiff (defendant in error) was the proprietor of the copyright of and in a certain book, to wit, a musical composition, called "Come per me, Sereno, Recitativo e Cavatina nell' Opera La Somnambula del' M°. Bellini," which had been first printed and published in England within twenty-eight years then last past, and which copyright was subsisting at the time of the committing by the defendant of the grievances thereinafter mentioned. That the defendant, after the passing of the Act 5 & 6 Vict. c. 45, entitled "An Act to amend the Law of Copyright," and within twelve calendar months next

before the commencement of that suit, did unlawfully print and cause to be printed for sale divers copies of the said book, contrary to the form of the statute in such case made and provided, and did unlawfully sell and cause to be sold divers copies of the said book, and did unlawfully publish and cause to be published divers other copies of the said book, and did unlawfully expose and cause to be exposed for sale and hire divers other copies of the said book, and unlawfully had in his possession for sale and hire divers other copies of the said book, well knowing the said copies, and each and every of them, to have been unlawfully printed, contrary to the form of the said statute in such case made and provided.

Plea—1. That the plaintiff was not the proprietor of the alleged copyright in the declaration mentioned in manner and form as alleged, and of this the defendant puts himself upon the country. Issue thereon.

2. That there was not, at the time of the committing of the said supposed grievances above laid to his charge, or either of them, a subsisting copyright in the said book in the said declaration mentioned, or any part thereof, as in the said declaration alleged; and of this the defendant puts himself on the country. Issue thereon.

At the trial which took place in Hilary Term 1850, before Lord Cranworth (then Rolfe, B.), the following evidence was given on behalf of the plaintiff:—The book and musical composition in question was composed by an alien, Vincenzo Bellini, at Milan, in

Lombardy, in Feb. 1831. At the time of composing, and up to the first publication of the opera, Bellini had resided at Milan, out of the British dominions. By the law of Milan and Lombardy he was entitled to copyright in the book, and to assign the same; and on 19th Feb., 1851, by an instrument in writing, signed and executed by him according to the law of Milan, he assigned the copyright to one Giovanni Ricordi, also an alien and resident at Milan. Ricordi came to England, and on 9th June, 1831, in England (being then an alien, and domiciled and resident out of the British dominions), he duly executed an assignment, signed and sealed and attested by two witnesses, whereby, for valuable consideration, he transferred to Boosey (the defendant in error) the copyright of the opera, for publication in the United Kingdom only. Boosey was a native of England, and a British subject resident in England. He first published the opera in London on 10th June, 1831, and there had been no prior publication, either within or without the British dominions. On the day of publication Boosey made the usual entry at Stationers'-hall, in respect of the said opera, and deposited copies in the British Museum and other institutions, and on the 13th May, 1844, a further entry was made at Stationers'-hall, under 5 & 6 Vict. c. 45.

Upon the above evidence the judge directed the jury that the evidence was not sufficient to entitle the plaintiff to a verdict on either of the issues, and directed them to find a verdict for the defendant. The

plaintiff tendered a bill of exceptions to this ruling, and brought a writ of error to the Ex. Ch.

The case was argued in the Ex. Ch. at the sittings after Easter Term, 1851, before the following judges: —Lord Campbell, C.J., and Patteson, Maule, Wightman, Cresswell, Erle, and Williams, JJ., when they unanimously held that the ruling of Rolfe, B. was wrong, and that he ought to have directed a verdict on both issues for the plaintiff Boosey; and a *venire de novo* was granted.

A writ of error was now brought to the H. of L.; and the judges were summoned to attend.

Mr. Serjeant Byles and Mr. Quain appeared for Jeffreys; Sir Fitzroy Kelly, Mr. Bovill, and Mr. Raymond, for Boosey.

CASES AND STATUTES CITED AND REFERRED TO.

Boosey *v.* Purday, 18 L. J. Ex. 378, S. C. 4, Ex. 145. Cocks *v.* Purday, 17 L. J., C. P. 273, S. C. 5, C. B. 860. Boosey *v.* Davidson, 18 L. J., Q. B. 174, S. C. 13, Q. B. 456. Robinson *v.* Bland, 2 Burr. 277. Hunter *v.* Fox, 4 T. R. 182. Don *v.* Lipman, 5 El. & Fin. 1. Millan *v.* Taylor, 4 Burr. 2303. Beckford *v.* Hood, 7 T. R. 620. Per Lord Ellenborough in University of Cambridge *v.* Bryan, 16 East, 317. Per Lord Tenterden in White *v.* Geroch, 2 B. & Ald. 298. Wheaton *v.* Peters, 8 Peters, 591. Donaldson *v.* Beckett, 2 Bro. 129, per Lord Campbell in Ex. Page *v.* Townsend, 5 Sim. 395. Wells *v.* Porter, 3 Scott,

355. Thompson *v.* Advocate-General, 12 Cl. & Fin. 1. Sussex Peerage Case, 11 Cl. & Fin. 85. Clementi *v.* Walker, 2 B. & C. 861. Davidson *v.* Bohn, 18 L. J., C. P. 14, S. C. 6 C. B. 456. Power *v.* Walker, 3 M. & S. 7. Brookes Abridg. "Denizen," Dyer, 2 b. Pisani *v.* Lawson, 6 Bing., N. C. 90. Roper *v.* Streater, 4 Burr. 2316. Beckford *v.* Hood, 7 T. R. 620. Prince Albert *v.* Strange, 1 H. & T. 21. Wheaton *v.* Peters, 2 Kent. Com., 373. York and North Midland Railway Company *v.* Regina, 22 L. J., Q. B. 225. D'Almaine *v.* Boosey, 1 Y. & C. 288. De Londre *v.* Shaw, 2 Sim. 337. Page *v.* Townsend, 5 Sim. 395. Chapel *v.* Purday. 14 M. & W. 319. Back *v.* Longman, 2 Cowp. 623. Ollendorff *v.* Black, 20 L. J., Ch. 165. Bentley *v.* Foster, 10 Sim. 329. Givichardi *v.* Mori, 9 L. J., Ch. 227. Clementi *v.* Walker, 2 B. & Cr. 861. Lonson *v.* Collins, 1 Wm. Bl. 306. Story's Conflict of Laws, 865. 8 Anne, c. 9. Bankrupt Act, 21 Jas. 1; 17 Geo. 3, c. 57. Legacy Duty Acts, 5 & 6 Will. IV. c. 76, S. S. 59, 60, 93, 126; 5 & 6 Vict. c. 89; 7 & 8 Vict. c. 12. s. 6.

At the conclusion of the arguments the House put this question to the learned judges—whether a foreign author, resident abroad, could lawfully assign to a British subject copyright in an unpublished work; and if so, whether the assignment made by Ricordi, the assignee of Bellini, to Boosey, conferred on Boosey the rights of an original publisher according to the law of England. The judges asked time to consider.

29th June.—The learned judges now attended, and read their opinions in answer to the question put. Coleridge, Maule, Wightman, Erle, Williams, and Crompton, JJ. answered the question in the affirmative, and in favour of Boosey, the plaintiff below. Jervis, C.J., Pollock, C.B., Parke, B., and Alderson, B. were of a contrary opinion.

Cur. adv. vult.

Aug. 1.—The House now delivered

JUDGMENT.

The Lord Chancellor.—This was a writ of error brought from the judgment of the Ex. Ch. awarding a *venire de novo*. The declaration states that the plaintiff Boosey, the now defendant in error, was the proprietor of the copyright of a certain musical composition, being an air taken from the opera of "La Sonnambula," which was first published in England, and then complains that the defendant had unlawfully printed for sale and sold a number of copies thereof, to the plaintiff's damage, &c. The defendant traversed, first, the plaintiff's title, and secondly, the existence of any copyright in the work in question. Issue being joined, the case came on for trial before me when I was one of the Barons of the Court of Ex. Evidence was offered on the part of the plaintiff; but I directed the jury that they ought to find a verdict for the defendant, the evidence being insufficient to support the plaintiff's case on either side of the issues. To this direction of mine the plaintiff excepted, and

the court of error held that I was wrong; that there was evidence for the jury to sustain the case of the plaintiff; and therefore awarded a *venire de nevo*. The defendant Jeffreys has now brought the record to this House by writ of error, and the question is whether I was right in the direction I gave at the trial. The facts deposed to, as they appear on the bill of exceptions, are as follows:—The work in question was composed at Milan, in the year 1831, by Vincenzo Bellini, an alien, then and ever since resident out of the Queen's dominions. By the laws of Milan Bellini had a copyright in the work in question, and on the 19th Sept., 1831, he assigned that copyright to one Ricordi, also an alien, and then resident at Milan. The assignment was, by the laws of Milan, effectual for the purpose of transferring the rights of Bellini to Ricordi. Ricordi afterwards came to England; and when in this country, by a deed dated the 19th June 1831, he assigned to Boosey, the defendant in error, all his copyright in the said work for publication in Great Britain and Ireland only. This deed was executed by Ricordi on the day of its date in the presence of, and is attested by, two witnesses. The defendant in error is an Englishman, and has always been resident in England. On the day after the assignment to him by Ricordi (viz., on the 10th June, 1831), he published the work in question in London; and he has ever since continued to publish the same, such publication in London being the first publication of the said work either within or without the Queen's

dominions. The defendant in error duly complied with the requisitions of the statutes by entering the said work at Stationers'-hall, and deposited there the requisite number of copies. These being the facts deposed to, the question arose whether they afforded evidence of any copyright in the defendant in error. 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 him to the protection of our laws. If the work, instead of having been composed by an alien resident abroad, had been composed by a British subject resident in England, there is no doubt but that his assignee would have acquired a copyright which our laws would protect. The question, therefore, arising on this evidence, assuming the assignments first to Ricordi and then to Boosey to have been effectually made, is whether Bellini ever had a copyright—*i. e.* whether an alien resident abroad, and there composing a literary work, is an author within the meaning of our copyright statutes. If he is not, then the direction which I gave at the trial was correct; for then it was proper to tell the jury that the evidence would not warrant a finding that Boosey was the proprietor of the alleged copyright, or that there was, in fact, in this country any subsisting copyright in the said work. The case was argued most ably at your Lordship's bar

in the presence of the learned judges, ten of whom have since given us their opinions on the questions submitted to them. They have differed in the conclusion at which they have arrived ; six of them being of opinion that Bellini had a copyright, which was effectually transferred to the defendant in error ; and four of them holding, on the other hand, that he had no such right. The majority, therefore, are of opinion that my direction at the trial was wrong, and so that the Ex. Ch. was right in awarding à *venire de novo*. It is impossible, my Lords, to overrate the advantage which we have derived from the assistance of the learned judges in helping us to come to a satisfactory decision on this important and difficult question. They have in truth exhausted the subject, and your Lordships have little else to do than to decide between the conflicting views presented to you by their most able opinions. I could have wished that, as my direction at the trial was the matter under review, I could have escaped from the duty of pronouncing an opinion in this case. But I have felt that I had no right to shrink from responsibility, and I have therefore given the case my most anxious attention ; and I now proceed to state, very shortly, why it is that I adhere to the opinion I expressed at the trial, and why I therefore think that the court of error was wrong in awarding a *venire de novo*. In the first place, then, it is proper to bear in mind that the right now in question, *i. e.* the copyright claimed by the defendant in error, is not the right to publish or 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 here, 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 only statutes applicable to the present case are the stat. of 8 Anne, c. 19, and the 54 Geo. 3, c. 156. Indeed, the first of these statutes is that to which alone we may confine our attention; for, though the statute of Geo. 3 extends the term of protection, it does not alter the nature of the right, or enlarge the class of persons protected. Looking, then, to the statute of Anne, we see by the preamble that its object was *the encouragement of learned men to compose and write useful books;* and even if there had been no such preamble, the nature of the enactments would have sufficiently indicated their motive. With a view to attain this object, the statute enacts, "that the author of any book which shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book for the term of fourteen years, to commence from the day of the first publishing the same, and no longer." The substantial question is whether, under the term "author," we are to understand the Legislature as referring to British authors only, or to have contemplated all authors of every nation. My opinion is, that the statute must be construed as referring to

British authors only. *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 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 is 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 foregner 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. I go further. I think that, if a foreigner, having composed, but not having published, a work abroad, were to come to this country, and, the week or day after his arrival, were to print and publish it here, he would be within the protection of the statute. This would be so if he had composed the work after his arrival in this country; and I do not think any question can be raised as to when and where he composed it: so long as a literary work remains unpublished at all, it has no existence except in the mind of its author, or in the papers in which he, for his own convenience, may have embodied it. Coyyright, 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—if, 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. The law does not require or permit any investigation on a subject which would obviously, for the most part, baffle all inquiry—namely, how far the actual composition of the work itself had, in the mind of its author, taken place here or abroad. If he comes here with his ideas already reduced into form in his own mind, still, if he first publishes after his arrival in this country, he must be treated as an author in this country. If publication, which is (so to say) the overt act establishing authorship, takes place here, the author is then a British author, wherever he may, in fact, have composed this work. 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 occurrencies of life, 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 that they are as completely distinct as if they were immeasurably removed from each other. The second which precedes midday is as completely distinct from that which follows it, as the events which happened a hundred years ago are from those which are to occur in the next century. I do not therefore feel the force of the argument to which I have just adverted. On the other hand, great support for the opinion of those who think that the statute did not comprise foreign authors, may be found in the exception which those who take a different view are obliged to make in the case of authors who have first published abroad. I do not see any satisfactory ground for such an exception if we are to consider the statute as extending to foreigners at all. 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 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

those 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 of 21 James 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 right in this country. For certainly it is no objection to a patent, that the subject of it has been in public use in a foreign country. I am aware that the statutes of James, in reserving to the Crown the right of granting to inventors the exclusive right of making new manufactures for fourteen years, has the words "within this realm." But these same words are implied, though not expressed, in the statute of Anne, and I cannot therefore feel any force in the argument derived from that statute. 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 relating to authors, leading to the notion that a more extended range was meant to be given to its enactments. It remains, however, to look to the authori-

ties: for, certainly, if I had found any long uniform current of decisions in favour of the view taken by the court of error, I should readily have yielded to them, whatever might have been my opinion of their original soundness. But I find nothing of the sort. Indeed, I agree with the observation of Alderson, B., that it is wonderful how little in the nature of authority we have to guide us. The earliest case to which we were referred was Tomson v. Collins, 1 Sir W. Black. 306. But this was hardly relied on seriously. It proves no more than this, that Lord Thurlow, when at the bar, in arguing a case of copyright, treated natural-born subjects and aliens as standing on the same footing, when it might, perhaps, have been to the interest of his client that he should have argued differently. This must, I think, be wholly disregarded. We may also disregard the cases in which the question has been as to the rights of a foreigner publishing in this country; they have no bearing on the point now under discussion, as the right of such persons is not disputed. Bach v. Longman, in Lord Mansfield's time, 2 Cowper, 623, may be placed in this class. In truth, until very recently, there have been no cases bearing directly on the point. In Delondre v. Shaw (2 Sim. 240), before the late V.C. of England, we find that learned judge stating, extra-judicially, that the Court of Ch. does not interfere to protect the copyright of a foreigner. That decision was in 1828, and four years later the same learned judge held, in Page v. Towsend, 5 Sim.

404 (what indeed could hardly have been doubted), that engravings designed and etched abroad, though imported and first published here, were not entitled to the protection of our statutes. The next case was that of D'Almaine v. Boosey, in 1835 (1 Y. & C. 288), in which Lord Abinger disputed the correctness of what had been said *obiter* by Shadwell, V.C., in Delondre v. Shaw, and granted an injunction in favour of a foreign composer, or rather, of the assignee of his right. In 1839 the point again came before Shadwell, V.C., in Bentley v. Foster, 10 Sim. 330, when he expressed his opinion to be in favour of the foreigner's copyright; but he would not decide the point without a previous trial at law. There occurred two years later the case of Chappell v. Purday 14 Y. & C. 485, before Lord Abinger, sitting in equity, when, though he adhered to the opinion he had expressed in favour of the foreigner's right, yet he declined to act in the particular case, on account of special circumstances. Since Lord Abinger's time the question has been brought before all the courts of common law, and their judgments have been conflicting. The Court of Q. B. in the case of Boosey v. Davidson, 13 Q. B. Rep. 287, and the Court of C. P. in that of Cocks v. Purday, 5 C. B. Rep. 882, have decided in favour of the foreigner's rights. On the other hand, the Court of Ex., in Chappell v. Purday, 14 M. & W. 303, and afterwards in Boosey v. Purday, 4 Exch. Rep. 145, took a different view of the law, and held that the statutes do not extend to

foreigners. I do not go into the particular facts of these cases: they are fully commented upon in the very able opinions of the judges. I consider it quite sufficient to say that these cases seem to me only to show that the minds of the ablest men differ on the subject. There is nearly an equal array of authorities, all very modern, on the one side and on the other. It can only be for this House to cut the knot. I have already stated shortly my grounds for concurring with the four judges who are in the minority. Being thus of opinion that no English copyright ever existed in this work, I have not thought it necessary to go into the minor and subordinate inquiries, on which it might have been necessary to come to a conclusion if my view on the greater question had been different; and I now, therefore, merely move your Lordships that the judgment below be reversed, and that judgment be given for the plaintiff in error.

Lord BROUGHAM.—My Lords, I must begin by stating how entirely I agree in what my noble and learned friend has observed upon the great ability and learning with which this case was argued at the bar on both sides, and the great assistance which we have derived from the answers given to our questions by the learned judges. In coming to a decision in this case, it is not necessary to assume that the much-vexed question of common law right to literary property has been disposed of either way. Yet, as a strong inclination of opinion has been manifested upon it, as that leaning seems to pervade and influence

some of the reasons of the learned judges, and as the determination of it throws a useful light upon the subject now before us, I am unwilling to shrink from expressing my opinion—the more especially as I am aware that it does not coincide with the impressions which generally prevail, at least out of the profession. The differences of opinion among the learned judges on the various points of the present case are not greater than existed when Donaldson v. Becket was decided here in 1774; and in 1769, upon the case of Miller v. Taylor, the judges of the Court of King's Bench had been divided in opinion for the first time since Lord Mansfield presided there. In this House they were, if we reckon Lord Mansfield, equally divided upon the main question, whether or not the action at common law is taken away by the statute, supposing it to have been competent before; and they were divided as nine to three (reckoning Lord Mansfield), and as eight to four, upon the two questions touching the previously-existing common law right. This House, however, reversed the decree under appeal, in accordance with the opinion given on the main point by the majority of the judges; and upon the general question of literary property at common law no judgment whatever was pronounced. In this diversity of opinion it asks no greater hardihood to maintain a doctrine opposed to that of the majority of those high authorities, considering the great names which are to be found on either side. But it must be admitted that they, who both on that memorable occasion,

and more recently, have supported the common law right, appear to rely upon somewhat speculative, perhaps enthusiastic views, and to be led away from strict, and especially from legal reasoning, into rather declamatory courses. Some reference also seems to have been occasionally made to views of expediency or of public policy to the conduct of foreign states, and the possible effects produced upon it by a regard to the arrangements of our municipal law. All such considerations must be entirely discarded, even as topics, from the present discussion, which is one purely judicial, and to be conducted without the least regard to any but strictly legal arguments. The right of the author before publication we may take to be unquestioned; and we may even assume that it never was, when accurately defined, denied he has the undisputed right to his manuscript; he may withhold or he may communicate it; and, communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation. But if he makes his composition public, can he retain the exclusive right which he had before? Is he entitled to prevent all from using his manuscript by multiplying copies—entitled to confine this use of it to those whom he specially allows so to do? Has he such a property in his composition as extends universally and endures perpetually, the property continuing in him where-

soever and whensoever that composition may be found to exist? In other words, can his thoughts, or the results of his mental labour, or the produce of his genius, be considered as something fixed and defined, which belongs to him exclusively, at all times, and in all places? That is the question. First let us observe that this question cannot be confined to the *form*, whether written or printed, which that composition takes, or in which these thoughts are conveyed. It is clear that before publication the author has the right, and may proceed against those to whom he imparts his manuscript under conditions; it is equally clear that if he had communicated his composition to them verbally under such conditions, he could have complained, with effect, of a breach. The question is personal between him and them. But if, instead of orally delivering his composition to a select number, he delivered it to all who came and heard him, imposing no restriction, he could not complain with effect of any one repeating it to others who had not been present. Now there seems no possibility of holding that he can *prevent the persons to whom he* gave or sold his paper, whether written or printed, from making their own use of it, without also holding that he could proceed against his auditors unwarned. If each of *these* might repeat what he had heard, each of *those* might lend the paper or book, and could only be tied up from so doing by express stipulations imposing restrictions upon him when he received it. So, if he could lend it, he could copy

it, and give or sell his copy, unless so tied up. It is another thing to maintain that no such restriction could be imposed *per-expressum*. If each copy furnished by the author bears with it a stipulation on his part, a correlative obligation may rest on the receiver, restraining him from any but the restricted use of the composition. But the doctrine of copyright after publication assumes that there exists, by force of law, an implied notice to all the world against using the book or paper except in one way, namely, reading it, or at least against using it by multiplying copies. Again, this right, if it be of a proprietary nature, is not only in the author, but it is transferable by assignment, and he may prevent all using the copies he has sold without leave of his assigns; that is, he may vest in his assigns the power of preventing any one, without their leave, from reading the composition. By parity of reasoning, if he recites it, he may forbid any hearer to repeat it without leave of some one authorized by him, although no condition had been imposed upon those who entered the place of recitation to listen; and if any such auditor, unknown to the author or his licensee, has repeated it, the author, or his licensee or assignee, may proceed against the party to whom that rehearsal has been made, in case he repeats, without leave, what he has been told by the first hearer. This consequence, if not wholly absurd, yet assuredly somewhat startling, follows from the title alleged. Furthermore, the author's right of exclusion is not confined to his

own life ; if it be, or even if it resemble, a right connected with property, it must be descendable and devisable, as well as assignable. If Milton's deathless verse had been recited, or Newton's immortal discoveries had been revealed in some learned conference, the right to let others hear them would have been confined to licensed persons, not indeed, during the existence of the globe, which those prodigious works enlightened, fated to endure while it lasted, but as long as the Statute of Limitations and the law of perpetuities allowed. It is not to be supposed that the analogy of incorporeal hereditaments affords countenance to the doctrine. These are connected with, or rather they are parcel of, corporeal rights ; they rest upon a substantial, a physical basis ; rather, they are the user of something material. A rent is something issuing out of land ; a way, the use of the land's surface. The enjoyment of the rents or of the way is only an incident, a fruit or consequence of the possession. The composition, and the repetition or copying of it, cannot be so distinguished and kept apart. There is nothing in the thoughts of the person resembling the substance, to which the incorporeal hereditament is related. They are of too unsubstantial, too evanescent a nature ; their expression by language, in whatever manner, is too fleeting to be the subject of proprietary rights. *Volat irrevocabile verbum*, whether borne on the wings of the wind or the press, and the supposed owner instantly loses all control over it. When the period is

demanded, as it is in this argument, at which the property vests, we are generally referred to the moment of publication. But that is the moment when the hold of the proprietor necessarily ceases. He has produced the thought and given it utterance, and *eo instante* it escapes his grasp. Thus, whatever may have been the original right of the author, the publication appears to be of necessity an abandonment. As long as he kept the composition to himself, or to a select few placed under conditions, he was like the owner of a private road—none but himself, or those he permitted, could use it. But when he made the work public he resembled the owner of the road after he had abandoned it, who could not directly prohibit passengers or exact from them a consideration for the use of it. It seems a further argument against the right, that property in one so essentially implies absolute exclusion of all others. A property which, by possibility, however remote, may belong just as entirely to one as to another, stands it must be admitted, in a most anomalous position. The case has sometimes been put of two persons, without concert falling upon the very same words. In a translation this is not so improbable; and we are to observe both that translation falls within the rule as well as original composition, and also that any writing, however short, stands in the same position with the longest. Now, it is very possible, indeed, that two persons should translate a few lines in the selfsame words. Here, then, is an instance were the selfsame thing

would belong in severalty exclusively to two persons, which is absurd. Some have relied on the case of inventions, but, as appears to me, without due reflection, when used upon that side of the question; for this referenee seems an extremely strong argument against the supposed right, and an argument from which its advocates cannot escape, as some of them have attempted, by urging that the two cases stand on different grounds. I hold that they stand, in one material respect, on the same ground. Whatever can be urged for property in a composition must be applicable to property in an invention or discovery. It is the subject-matter of the composition, and not the mere writing, the mere collocation of words, that constitutes the work. It may describe an invention as well as contain a narrative of a poem; and the right to the exclusive property in the invention, the title to prevent any one from describing it to others, or using it himself (before it is reduced to writing) without the inventor's leave, is precisely the same with the right of the author to exclude all men from the multiplication of his work. But in what manner has this ever been done or attempted to be done by inventors? Never by asserting a property at common law in the inventor, but by obtaining a grant from the Crown. The Sovereign had illegally assumed the right of granting such monopolies in many things, until the abuse was corrected by the 21 Jac. 1, c. 3, which, as Lord Coke says (3 Inst. 181), is a judgment in Parliament that

such grants are against the ancient and fundamental laws; and he considers them (2 Inst. 47, 63) to be against Magna Charta. The statute of James, however, by its well-known proviso (sect. 6), allowed such exclusive privilege to be granted for a limited time to inventors; and it is only under the Crown grants, permitted by this proviso, that they have ever had the privilege. Monopolies had been given to authors and publishers of books while the abuse continued, both in the reign of Elizabeth and of her immediate predecessors; but no saving clause for these was introduced in the statute of James; on the contrary, the 10th section provides that these as well as some other grants shall not be effected either by the prohibition or by the proviso. It is said that literary and scientific men are left without protection, and that the invaluable produce of their labours is unduly estimated by the common law, if the right in question be not recognized. But the negation of that right only implies that we refuse to acknowledge a property in things by their nature incapable of being held in severalty, and that we recoil from adopting a position which involves contradiction. The contradiction is, that one can retain that which he parts with, and can dedicate to the public, or at least do an act which necessarily involves such dedication, and yet keep exclusive possession of the thing dedicated, and retain all the rights he had before the dedication. But, although the inability to hold these contradictory positions precludes to a great degree the common law

encouragement of letters and science, their cultivators are not without resource ; for while the nature of the thing and the incidents of its production prevent it from being the subject of property at common law, the lawgiver can make it a *quasi* property, or give the author the same kind of right and the same remedies which he would have if the produce of his labour could have been regarded as property. And so it is in other cases. A remarkable instance at once presents itself, where the interposition of positive law is as much to be lamented and condemned, as in the case of letters and science it is to be gratefully extolled. By all rules, by the nature of the subject, by the principles of morality, by the sanction of religion, there can be no property in human beings ; the common law rejects, condemns, abhors it. But such a property has been established by human laws, if we may so call those acts of legislative violence which outrage humanity, and usurp while they profane the sacred name of law. That which was before incapable of being regarded or dealt with as property by the common law, became clothed by the lawgiver's acts with the qualities of property ; and thus the same authority of the lawgiver, but exercised righteously and wisely, for a legitimate and beneficial purpose, gave to the produce of literary labour that protection which the common law refused it, ignorant of its existence. And this protection is, therefore, in my opinion, the mere creature of legislative enactment. That the

weight of authority is in favour of this position I hold to be clear. The very able argument of Yates, J. in Millar v. Taylor, 4 Burr. 2248, may fairly be set against that of the judges, Willes and Aston, JJ., who joined in taking the opposite view; and I entirely agree with the objection taken by the Lord Chief Baron in the present case to the argument of Willes, J. Lord Mansfield gives, no doubt, an unhesitating opinion, with the grounds of it; but he rather relies on the argument of the two puisne judges who differed from Yates, J., then enters very fully into the discussion himself. In 1798 we have a very decided opinion to this effect of Lord Kenyon in Beckford v. Hood, 7 T. R. 620, who also says that the doctrine "finally prevailed" against that maintained by some of the judges in Davidson v. Becket, that authors and their assignees had a right independent of statute. Ashurst, J., who had been one of those judges, does not in that case (Beckford v. Hood) reaffirm his opinion; he makes no reference to it. In a case which I argued in 1812, in the Court of King's Bench, Lord Ellenborough's opinion leant to the same side, although he did not consider it necessary to express it decidedly, the argument not requiring it. I refer to the case of The Cambridge University v. Bryer, 16 East, 320. But I also consider the statute of Anne itself as plainly indicating the opinion of the Legislature, that there was no copyright at common law. This appears throughout its whole provisions, and manifestly from this, that its purpose being, as stated in the preamble,

" to encourage learned men to compose and write useful books," it vests in the authors and their assignees the exclusive right of printing for twenty-one years and no longer, from the 10th of the following April in certain cases, and in other cases fourteen years from the date of the publication. Surely, if authors and their assignees had possessed the unrestrained right at common law, this restraint upon it would hardly have been deemed an encouragement, even coupled with the not very ample or stringent remedies provided by the Act. It being, therefore, in my judgment, unquestionable that the statutes alone confer the exclusive right, can it be contended that the Legislature had in contemplation to vest the right in any but its subjects, and those claiming through them? These statutes are, or rather the statute is, that of 8 Anne, c. 19—for the 54 Geo. 3, c. 156, does not alter it, except by extending the period of the monopoly, and in no way affects the class of persons to enjoy it, as my noble and learned friend has justly observed. We are therefore to rely upon the statute of Anne. The encouragement of learning by encouraging learned men to write useful books is declared to be the object of the statute, and that object it pursues by giving the author and his assigns a monopoly for a limited period. The Legislature gives this encouragement at the expense of its own subjects, to whom the monopoly raises the price of books. Generally, we must assume that the Legislature confines its enactments to its own subjects,

over whom it has authority, and to whom it owes a duty in return for their obedience. Nothing is more clear than that it may also extend its provisions to foreigners in certain cases; and may without express words, make it appear that such is the intendment of those provisions. But the presumption is rather against the extension, and the proof is rather upon those who would maintain such to be the meaning of the enactments. It can hardly be contended that, a century and a half ago, the Parliament was minded to encourage learning at home by encouraging foreigners to write books at the expense of the British purchaser—that a monopoly in our market was to be established for the sake of foreign authors, who might thus be induced to write, and thereby benefit our people. We cannot say that foreign authors were wholly out of the contemplation of the Act, that their case was *casus omissus*. There is express provision made for the importation of books in Greek, Latin, or any foreign language, notwithstanding the prohibitory enactments. It was, therefore, assumed that foreigners might publish abroad, and that their works might be brought over. That the price of all works in the British market was a subject of care to the framers of the Act is manisfest, because provision is made for preventing an underprice of books by the power given in the 4th section to certain authorities to fix their price; which absurd provision, as is well known, was repealed thirty years afterwards by 12 Geo. 2, c. 36. This provision was taken from an

Act of the 25th Henry 8, c. 16, sect. 4, repealing the permission given by 1 Rich. 3, c. 9, sect. 12, to import printed books, and repealing it in order to protect the printers and binders, who had, during the half-century that intervened since the Act of Rich. 3, become a considerable craft. While giving native industry this protection it pleased the Legislature to impose the restriction upon the price of books, by conferring on certain high functionaries the power of fixing it. And two centuries and more had not found the Legislature more rational; for the statute of Anne adopted a similar provision. But, absurd as we all must now admit that provision to have been, it at least showed the strong disposition of the Legislature, not only in Henry the Eighth's time, but in Queen Anne's time, to protect the British purchasers, from high prices. Yet the contention that learning and learned men are to be encouraged by giving foreign authors a monopoly at the expense of British purchasers proceeds upon the assumption that there was no care for their interests. And if it be said that the consideration of cheapness was sacrificed to the wish to encourage foreign writers, whereby the British purchaser might gain more than he lost in the price, the answer is, that the very same consideration would have prevented the attempt at keeping down the price of books published under the Act, because, their authors being thus encouraged to write, the purchaser gained in so far, though he lost in the cheapness of the books. But in truth, no one can read the

provision touching price without drawing a further inference from it—that very crude and narrow principles then prevailed on those subjects; and we could hardly expect that the same Legislature which appointed an authority with stringent powers to keep down prices, would entertain such large, liberal and enlightened views as it must have had if it encouraged foreigners, at the temporary and immediate cost, at all events, of its own subjects, for the sake of multiplying generally the number of useful works, and so benefiting those subjects in the whole and in the long run. Among a good deal of somewhat popular and declamatory matter which is to be found in this case, may be mentioned that more plausible and more showy than solid objection taken, that the consequence of confining the statute to our own territory will be to make a foreign author come over to Dover in order to have the exclusive privilege, whereas, as has been adverted to by my noble and learned friend, if he stopped at Calais, he could not have it. This is only one of the consequences, as my noble and learned friend justly observed, of any law which is bounded in its operation by extent of territory. We have abundant instances of such results, both in our civil and in our criminal law, and sometimes in both civil and criminal law together, arising out of the same diversity of jurisprudence. Married one foot or even an inch on this side of a middle of a bridge between England and Scotland, the parties have been held by all the judges guilty of felony, and their issue bastard;

when, had the implied contract been made a foot or even an inch to the north, the marriage would have been lawful, and its issue legitimate? The English female owner of an estate in settlement, if she comes to Dover and there lies in, produces issue inheritable, being English issue—if she had been taken in labour at Calais the issue would have been alien and could not have taken the estate. So, of the consequences arising from limitations in point of time, which have been well adverted to by my noble and learned friend. The authority of the decided cases which bear upon the question before us is of less moment than it otherwise would be, inasmuch as there is a conflict of decisions, and we may regard the whole of them to be now brought under our review for the ultimate settlement of the question by this House, which is not bound by the resolutions of the courts below. So great respect, however, is due to those courts, that it is fit we note what has passed there before arriving at our final determination. First of all we may lay out of view whatever has been said, either at the bar or on the bench, respecting the case in 1 William Blackstone, 301, and the case 2 in Cowper, 623. The former (Tonson v. Collins) amounts really to nothing. It resolves itself into the counsel, Mr. Thurlow (afterwards Lord Thurlow), who argued it, having observed that the right, if any, might be acquired by aliens; the special verdict having found that the work in question was one written by a natural-born subject, resident in England. But even if this had

been a dictum of the judge, instead of a remark by the counsel, it would prove nothing; for it is not denied in the case at bar that an alien resident in England may have the right under the statute. The other case, Bach v. Longman, is exposed to the same objection. It is only the admission of Mr. Wood (afterwards Baron Wood) who conducted the cause. But along with these two cases we have likewise to strike out of the authorities in this case that of D'Almaine v. Boosey, in the Exch. (1 Y. & C. 288), in which Lord Abinger granted an injunction upon the authority of Bach v. Longman, inadvertently supposing that the admission had been made by the court, when it had merely been an implied admission rather than a direct admission by Mr. Wood, the counsel in the cause. The cases before Shadwell, V.C., are likewise to be disregarded. The dictum in Delondre v. Shaw, 2. Sim. 240, that the court did not protect copyright of a foreigner, is in favour of the opinion I have formed. But, in Bentley v. Foster, 10 Sim. 329, the same learned judge, taking a different view, referred the parties to an action, in which the right might be tried. The authority of the same learned judge in a third case, Page v. Townsend, 5 Sim. 315, would have been in favour of the position now maintained, but that he relied on this—that express words, confining the protection of one Act to English works, were, by implication, to be considered as imported into other Acts *in pari materid*, a circumstance which of course does not occur here. We

are thus left to the cases in direct conflict, except that of Clementi v. Walker, 2 Barn. & Cress. 861; and that, as far as it goes, supports the doctrine for which I contend, because the learned judge, Bayley, J., who delivered the judgment of the court, lays it down as clear that the statute of Anne was made with a view to British interests, and the advancement of British learning (p. 868); and that without "very clear words showing an intention to extend the privilege to foreign works, it must be confined to books printed in this kingdom," which is the course of argument pursued by those who argue here with the plaintiff in error. Of the cases in conflict, Chappell v. Purday, 14 M. & W. 303, and Boosey v. Purday, 4 Exch. 145, both in the Exch., on one side, Cocks v. Purday, in the C. P., and Boosey v. Davidson in the Q. B. on the other side, it is needless that I should discuss the merits or compare their weight as authorities, because they may be said now to be before us along with the judgment of the Ex. Ch. in the case at bar. I may, however, remark that the decision in the C. P. appears to have been made, not so much upon the consideration of the statute's application to the question, as upon the erroneous assumption that the Court of Ex. had in Chappell v. Purday questioned the personal right of an *alien amy* in England. I think traces of this erroneous view may be discerned in the able answers to your Lordships' questions given by, I believe, the only judge of that Court of C. P. who has been present at this argument, namely, Maule,

J., and who had joined in the C. P.'s decision. It remains to note the point made on the Milanese copyright—that is, copyright by the Austrian or Lombardo-Venetian Law. I hold it clear that this could confer no copyright beyond the territory; consequently that the assignee of the great composer, with whatever solemnities he derived his title, could take nothing which benefited him, or those deriving right from him, in this action; for that great master at Milan had no right in England to assign. But if it be said (and the somewhat subtle argument is to be found both in the contention at the bar and in the answers of some of the judges) that, copyright being recognized by the *lex loci*, and recognized as a right at common law, the party or his assignee can avail himself of this right in England, as it were in derogation of and in exception to our common law repudiating such right—the personal property being, as is contended, in the Austrian subject by the law of his country, and thus travelling about with him to this, I make answer, that the foreign law shall not prevail over ours, where the diversity in the two laws is such as I have endeavoured to show exists, our law not recognizing such property, and holding it therefore to be impossible. It is like the case of property in human beings, to which I have already adverted *alio intuitu*. In Somerset's case and the Scotch case of Wedderburn (for to both countries belongs the unfading honour of having decided that question), it was in vain that the master set up his right to the property in his slave by the law of the

country to which he belonged, and called upon our courts to enforce it, as here we are required by this argument to enforce the Austrian common law copyright. It is sometimes said figuratively that the answer given to the master was, a slave's fetters fall off the instant he touches British ground. The more literal and homely legal answer was, that our law is not cognizant of such property as the property alleged, and can give no aid to the enforcement of rights growing out of it. The same answer I give here. For these reasons I am relieved from the necessity of arguing several other points that have been made, on some of which I have a doubt—as on the question whether the statute 54 Geo. 3 supersedes the provisions in the statute of Anne respecting attestation; the inclination of my opinion being that it does, though there is some force in the argument that both may stand together. But, in the view which I take of the case, there is no occasion to go further into these lesser questions; and I am of opinion that the judgment of the Ex. Ch. must be reversed, and the exceptions to the ruling of the learned judge who tried the cause disallowed. The judgment will be for the defendant below, the plaintiff in error.

Lord St. Leonards.—My Lords, after the very elaborate arguments which have been addressed to your Lordships, I shall confine what I have to say upon this case within a very small compass. I most cordially concur in what has fallen from my noble and learned friends, with regard to the arguments at the

bar, and the very great assistance which the House has derived from the very elaborate opinions which have been delivered by the learned judges. Whatever conclusion any man may come to upon the point in issue, it is quite impossible not to admire the acuteness, the research, and the judgment which have been exhibited in the opinions with which the House has been favoured by the judges; and it is rather the selection of the grounds of decision than the formation of an original opinion which is called for from your Lordships upon the present occasion. My Lords, the simple question is, as has been truly stated, whether a foreigner can obtain an English copyright by publishing here, although legally resident abroad. Now that right has been claimed upon two grounds—first, upon a supposed or asserted common law right, to which reference has already been made. My Lords, upon the common law right I confess that I never have, at least for many years, been able to entertain any doubt. It is a question which I have often, in my professional life, had occasion to consider, and upon which I have arrived long since at the conclusion that no such right exists after publication. I never could in my own mind distinguish between the right to an invention after the publication of that invention, and the right to the description of that invention after the publication of that description. If a mechanical genius should invent a machine of the greatest importance to mankind, it is admitted—nobody attempts to insist or to argue otherwise—it

has always been considered as settled—that, after he has disposed of even a single copy of it, it may be copied and made use of without restriction by the purchaser, or by any person who properly obtains possession of it. Now, I do not see how you are to estimate differently different kinds of genius; or how you can say, that a man, who invents a machine of the greatest importance to the state, shall not have any right the moment he disposes of a single copy of that article, but that a man, whose mind brings forth a certain collocation of words, shall be entitled to an absolute property in it in all time, even after he has published and let the world at large have it. It appears to me, therefore, my Lords, and has always so appeared, that there is no such common law right, either in the one case or in the other; and I agree with my noble and learned friend who last addressed your Lordships, that the patent law is decidedly against the common law right in this particular instance, because it shows that the inventor had not the right. The right of granting a monopoly was originally claimed by the Crown, and was restricted by the statute of James I.; but that is simply a monopoly granted by the Crown under the authority of an Act of Parliament. The Crown, therefore, has the power to grant a patent of an important invention. It is not an objection to an invention that it has been published and used abroad, if the Crown chooses to grant a patent. It depends strictly and wholly upon the right of the Crown, so far as it is not abridged by the Act of Parliament; or,

if no such right existed in the Crown originally, it depends simply and only upon the statute of James I. Therefore that appears to me to decide very much the question as to the common law right in this case. Now, my Lords, when we are talking of the right of an author, we must distinguish, as has been already very accurately done, between the mere right to his manuscript and to any copy which he may choose to make of it as his property, just like any other personal chattel, and the right to multiply copies to the exclusion of every other person. Nothing can be more distinct than these two things. The common law does give a man who has composed a work a right to that composition, just as he has a right to any other part of his personal property; but the question of the right of excluding all the world from copying, and of himself claiming the exclusive right of for ever copying his own composition, after he has published it to the world, is a totally different question. But, as to this question of common law right, I do not intend to enter upon the argument, particularly after the very full discussion of it by my noble and learned friend who has just sat down. I cannot at all understand how the question of common law right can apply to this case; it is entirely beyond my comprehension. What possible right can Bellini, or any other person claiming under him, have at common law in this country to the exclusive right of publishing a composition by Bellini abroad? If Bellini comes to this country, and, owing even a temporary

allegiance to the Sovereign, acquires the common law right which belongs to every subject, that, of course, one can understand; but what common law right in this country can exist in a foreigner like Bellini, composing abroad and residing abroad, but sending his composition here simply for publication? Where is the right? The common law cannot extend to a foreigner, resident abroad and owing no allegiance to this country; it is quite impossible. It is distinguishable from any case which has been cited, or which can be cited, which gives a right to a foreigner with regard to damage done to his character, for example, by a person resident in this country: The cases are altogether distinct. This is a right of property which is claimed within this realm; and that right of property cannot be claimed by the common law by a foreigner, who owes no allegiance to this country, and who has never acquired any property or right in respect of residence, or by Act of Parliament or otherwise, to make him a subject of this realm. I am therefore clearly of opinion, that whatever may be the view which might be taken as to the common law right, that right never can be held to extend to a foreigner situated as Bellini is. My Lords, the question then comes, of course, to the statutes. I think we may fairly consider that, speaking generally, an Act of our own Parliament, having a municipal operation, cannot be held to extend *primâ facie* beyond our own subjects. It is not that an Act of Parliament may not, like the common law itself, be extended in its benefits to

foreigners, who come here and acquire that which it has been the policy of this country to give them, namely, the rights, in a great measure, of natural-born subjects—that is not the question; but the question is, do these Acts of Parliament or not give to foreigners, *quâ* foreigners, the right which is claimed by Ricordi, as claiming under Bellini, or by the plaintiff, as claiming under Ricordi? That is the question. I venture to represent to your Lordships that it is quite clear, as an abstract proposition, that an Act of Parliament of this country, having within its views a municipal operation—having, as in this particular case, a territorial operation, and being therefore limited to the kingdom, cannot be considered to provide for foreigners, except as both statute and common law do provide for foreigners where they become resident here, and owe at least a temporary allegiance to the sovereign, and thereby acquire rights, just as other persons do. They acquire such rights, not because they are foreigners, but because they are here entitled, in so far as they do not break in upon certain rules, to the general benefit of the law in the protection of their property, in the same way as if they were natural-born subjects. Now I will just draw your Lordships' attention to what had been the state of legislation about the very time that the Copyright Act of the 8 Anne was passed. In the 7th year of that Queen we know that there was an Act passed for generally encouraging foreign Protestants; and the Act recites "That the

increase of people is a means of advancing the strength and wealth of nations; and whereas many strangers of the Protestant or reformed religion, out of a due consideration of the happy constitution of the government of this realm, would be induced to transport themselves and their estates into this kingdom, if they might be made partakers of the privileges and advantages which the natural-born subjects thereof do enjoy." Then, upon taking certain oaths, all foreign Protestants in this country were at once naturalized. We know that that was afterwards repealed, it being found not to answer the views which the Legislature had; but it shows that just before this Act of Parliament was passed, which is now under discussion, the Parliament had held out a strong inducement to foreigners being Protestants to become as it were natural-born subjects; to come over to this country, as it is stated, with their wealth, and to add to that which was considered to constitute the riches of a country, namely, the population of the country. One can easily understand, therefore, that on any view which the Legislature would take of it, they took a course which was intended indirectly to benefit foreigners, but foreigners resident here—the object being to attract foreigners to this country, and to give them certain benefits when they arrived here, being Protestants. And it is singular enough that in two different Acts of the very same year in which this Copyright Act passed, both Acts having for their object to raise funds for the prosecution of the war,

there are express enactments that natives and foreigners may subscribe to the sums which are intended and proposed to be raised; therefore, when the Acts of Parliament of that period intended to provide expressly for foreigners, they took care to insert the words "natives and foreigners." Now, although these observations are not entitled to much weight, still they rather help to guide one to what was the feeling at the time. Then we come to the Act of Parliament itself. Now, my Lords, as regards the authorities, I shall not say another word after what has fallen from both of my noble and learned friends; because, from the ample discussion which those cases have undergone by the learned judge with whose opinions the House has been favoured, and after the observations of my noble and learned friends, I think every one must arrive at this conclusion, the conclusion stated by one of the learned judges, that this case, for the purpose of decision by your Lordships, is wholly uninfluenced by authority. It is impossible, looking at the whole of the authorities down to the cases which are now before this House for decision, to say that there is any authority which is entitled to any weight. We come therefore at once to the cases which are now under review, upon which your Lordships are called upon at this time to decide the great and important question now before you. Now, the statute of Anne is framed in very general words. It is by no means scientifically framed, and, singularly enough, in the very statement of it,

one would hardly suppose what its object was, for it stated in the first place that the object is to give to authors the right to copies. The Act is called "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." Of course, the heading of an Act of Parliament does not at all affect its construction; but it is a singular heading, for it does not speak of authorship or the right to exclude others, but it speaks of vesting the copies in the authors. The truth is, that the copies, as copies, are vested in the authors without the assistance of Parliament at all. Nobody doubts that a man printing a certain number of copies had the right to those copies, as he had to any other property, if he had a right to print them; and therefore it required no Act of Parliament for that purpose: but the expression "copies" here, of course, is made use of to represent an exclusive right to those copies as against the rest of the world. My Lords, the Act of Parliament itself provides for three things:—First, for books that have already been printed; next, for works composed, but not printed and published; and, thirdly, for works thereafter to be composed; and it gave an exclusive copyright for twenty-one years to books already printed. Now, we can nowhere find upon the face of the Act any express provision as to the necessity of printing here. Nor can we find any express provision that the first printing shall take place here; we find neither the one nor the other.

My Lords, it has been decided, and it is no longer to be disputed, nor is it attempted to be disputed, that the first publication must take place here; but that is only by implication—it is not by express enactment, but by implication from the provisions in the Act of Parliament. Well, then, the first publication must take place here. Must the printing take place here? There is no such actual provision. It is not said so; but I apprehend it is implied, I think it is clearly implied from the provisions of the Act, that the printing must take place here. When books already printed have the term of twenty-one years given to them, it can hardly be supposed that Parliament meant to provide for books which had been printed abroad, their object being clearly, whilst they advanced learning and science, to advance also the interests of the British public. The provisions of the Act of Parliament, I think, clearly settle that point. It is quite clear that Parliament intended to benefit authors and not importers; but section 7 of the Act of Anne expressly authorises the importation of books in the Greek, Latin, or other foreign language. That, I think, at once inevitably leads one to this conclusion, that no printed books in the English language were to be imported as within this Act of Parliament I think that is perfectly clear. But the Act of Parliament does not say that books in foreign languages shall be original compositions. Therefore, I apprehend that it would have authorised the importation of a translation of an English book into a foreign language; but

it does by implication show that the printing of English books is to be in this country and not in a foreign country. My Lords, I think, therefore, that, as far as regards the right with respect to books already printed, it must be considered to mean books printed here, and not books which had been printed abroad and imported here; and that will give a key to the meaning of this statute in the other two cases to which I have referred. There is a later Act of Parliament, the 12th Geo. 2, c. 36, the object of which was to prohibit generally the importation of books reprinted abroad, which had been first composed, or written, and printed and published here. That was a general prohibition; but it is impossible to read that Act of Parliament, without coming to the conclusion that the Legislature then assumed that the books, to be entitled to the protection of the statute of Anne, must be books printed in this country; and yet there is not such express provision. Then as to the probable intention. If it be clear, as I apprehend it is quite clear, that in the first place a book which is a foreign composition must be first published here, and secondly that it must be printed here, would it not necessarily and naturally follow that the man himself should be here to superintend that publication? Is not it a natural inference from the Act of Parliament, which does not expressly provide for either of the foregoing conditions, that it implies that the man shall be here to superintend his publication, seeing that it shall not only be first published here, but that it shall also be

printed here? Nothing could be further from the intention of the Legislature, at the time that this Act of Parliament was passed, than that a foreigner should be enabled to import books printed abroad; but unless you put that construction upon the Act of Parliament, he would have been able to import books printed abroad, and, bringing them here, to have a copyright in their publication. That would plainly be directly contrary to the intention of the Legislature. I think, therefore, that gives us an easy means of interpretation as to the meaning of the statute with regard to the residence of the publisher. All that is entirely independent of the general question—whether such an Act of Parliament as this could be considered as intended to benefit foreigners, and foreigners who are resident abroad. If this Act of Parliament extends to foreigners generally, then there is no reason why they should not publish here while they reside abroad. It seems not to be denied that an English author may reside abroad, and yet may have his publication here. Why? Because he owns a natural allegiance which he cannot shake off. Residence abroad (although he may thereby have come under some new obligations, or have acquired some new rights) will not relieve him from his natural allegiance; he cannot be relieved from it by any foreign country, and, therefore, he carries with him the natural right of a subject of England wherever he goes. That gives him, though resident abroad, the right to publish here; because he has always fulfilled the implied condition of being a sub-

ject of and owing allegiance to the crown of Great Britain. That could not, of course, be said of any foreigner, who was not actually resident here. Now, my Lords, in the case which has been referred to of Clementi v. Walker, 2 B. & C. 867, Bayley, J., speaking of the statute of Anne, makes a few observations, in which I entirely concur, with regard to the intention of Parliament to limit the provisions of that statute to British interests. He says, "The statute of Anne, therefore, not only gives protection to authors as to books thereafter to be published, but to books previously printed; but the British Legislature must be supposed to have legislated with a view to British interests, and the advancement of British learning. By confining the privilege to British printing, British capital, workmen, and materials would be employed, and the work would be within the reach of the British public. By extending the privilege to foreign printing, the employment of British capital, workmen, and materials might be suspended, and the work might never find its way to the British public. Without very clear words, therefore, to show an intention to extend the privilege to foreign publications, I should think it must be confined to books printed in this kingdom, and instead of there being any such clear words to show that intention, there are provisions which strongly imply the latter." I may observe that there is some incorrectness in this opinion of the learned judge, because he seems to suppose that "by extending the privilege to foreign printing, the em-

ployment of British capital, workmen, and materials might be suspended." That is true: but he adds, "and the work might never find its way to the British public." There is some error in that, of course; because unless the work *did* find its way to the British public, it never could claim, in any public sense, copyright in this country; consequently every book, even if printed abroad, must find its way to the British public before it could claim the benefit of that Act of Parliament. But the opinion of the learned judge that the Act involves the necessity of printing in this country, is one in which I entirely agree. My Lords, if there be no common law right, which there clearly is not in my opinion, and if the statute does not apply to foreigners, *quà* 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. My Lords, your attention has been already sufficiently drawn to what was so much pressed upon you in argument, namely, the alleged absurdity that a man might step over from Calais and obtain the right; whereas remaining at Calais, he could not acquire that right here. Really that has no bearing upon this question; it does not depend

upon whether the author is on the other side of the Atlantic, or is on the shores of Calais, and can get over here in two hours—that is not the question. The question is, let him be where he will, is he or is he not a foreigner within the realm whilst he is resident abroad? Therefore, whether it be the case of a man residing at Calais, or on the other side of the Atlantic, it is exactly the same thing, and the distinction has not the slightest bearing upon the subject. My Lords, it is then said that there is a difficulty with respect to what is to constitute residence here. Now, I will not take upon myself to state any opinion to your Lordships as to what would be a sufficient residence; but I will say this, that whatever would constitute a man a resident here, so as to make him subject in point of allegiance to the country whilst he was here, and would give to him the common rights to which every foreigner coming to this country is entitled, would be a residence which would give him a copyright here if he published here. My Lords, it is much easier to deal with an implied right of this sort under the statute of Anne—that is, a right implied from his residence here; for you then have only to ascertain whether the residence be such as to make him owe temporary allegiance, and to give him temporarily the rights of a subject. It is much easier, I say, to deal with that case, than it would be to deal with the case of an express enactment that a man should not have the right unless he was a subject of these realms, or was resident here. If we had an

enactment which expressly said that no one should have a copyright here unless he was a native or a resident, the question would at once arise, what was the meaning of residence under the Act of Parliament? And it would be much more difficult to deal with the question under that enactment than with the general right of foreigners under the statute of Anne, merely considered as coming under that statute like any other statute, or under the common law as persons resident here, acquiring the rights of subjects, and being temporarily subject to the obligations of the law. Now, the American Legislature have no such difficulty. They have expressly enacted that copyright there shall be confined to natives, or to persons resident within the United States. Those are the express words of their statute; and they have found no difficulty at all in deciding what was residence. We have been pressed much at the bar, my Lords, with the difficulty of stating what would be a sufficient residence. The Americans have found no difficulty at all upon the subject. They have it expressly in their enactment, and they have had no difficulty in applying that enactment; and there is no reason why we should have any difficulty in this case upon that ground. But the American law also takes care to permit importation. The reason of that, of course, is that they may be enabled to import the works of other men, for the copyright of which they have never paid any consideration. And I may remark in passing, that although nothing could be more im-

proper than to consider the state of international law in deciding a question upon our own municipal laws (for here we must decide this question not with reference to the relation in which we stand to America, or any other country with respect to copyright, but as it regards our own law in the abstract, without reference to any other country at all); yet I may observe that the strained construction which would give to a foreigner the right which is now claimed, would have the effect of placing this country not on a level with America. For example, America does not allow a foreigner resident out of the country to obtain a copyright there; but the American publisher imports his books the moment they are published, and sells them without difficulty and without interruption. In America they attempted to bring in a Bill, in order to reconcile the laws of the two countries, and to put authors upon the same footing in each country. That attempt did not succeed. But it shows that we are not called upon to put any strained construction upon our own Act of Parliament, in order to give to foreigners a right which their law denies to us. If, however, I found in our Act of Parliament the right was given, I should not stop to inquire whether or not it was given in America, because I must be bound by our own law, and put a proper construction upon that law. As regards the point therefore of residence, I do not feel any difficulty. I may observe in passing, with reference to pirating here, that the case of Page v. Townsend, 5

Sim. 395, which has already been referred to, although upon a different point, has a bearing upon that subject. It was there held that prints engraved and struck off abroad, but published here, were not protected from piracy under the Act; and therefore, if works could be printed abroad, and then, being imported, could obtain a copyright here, you would be giving to works of a general nature a right which is not extended to prints and engravings. My own opinion therefore, my Lords, in the abstract, upon the general question is, first, against any common law right, and if the common law right existed, clearly against the right of a foreigner to claim the benefit of it; and, *secondly, against such a construction* of the statute of Anne as would give to a foreign author, resident abroad, the right to a first publication here. But there are other considerations in this case, which have been elaborately argued, and upon which the case may turn, and to which I think it proper shortly to call your Lordships' attention. The first question is whether there is any right whatever in the person, who claims here the exclusive publication to copyright in this country. My Lords, the bill of exceptions states it in this way; that there is by the law of Milan a copyright in Bellini, and that Bellini transferred that copyright to Ricordi. Now, just stop for a moment, and let us see how it will stand. A copyright by the law of Milan can, of course, have no effect in this country. I do not myself quite understand the

argument that a first publication abroad gives a general right, because it is rather difficult to conceive, if a man publishes in his own country, and the copyright is secured to him by the law of that country, giving him under the sanction of that law a limited right in his own country, that he thereby acquires in all other countries an unlimited right. If you were to look to international obligations, it would be rather difficult, perhaps, to come to that conclusion; but, however, that is rather a separate point. Now the law of Milan, which gave to Bellini this copyright, could of course give him no right in this country; that is perfectly clear—nobody disputes that. But it is said that he has a right, as he would have to any personal chattel, to his composition;. and that, that right being properly transferred, as it is stated in the bill of exceptions, by the law of Milan to Ricordi, who afterwards transferred it to Boosey, therefore the right now exists in Boosey. The first question is, how can a right exist in Bellini, as a foreigner, to copyright in this country? He has it by the law of Milan, because he is a native-born subject, or a subject at all events by residence, and the law of that country gives it to him; but, the moment he steps out of that country, he can have no other right than is involved in the mere possession of the subject-matter in his hands, except so far as any country to which he resorts may give him a right. Then, in order to obtain copyright here, he must come and perform, as I have already shown, the condition annexed to the

enjoyment of that right; and I hold it, my Lords, to be perfectly clear, that that condition is, that he must reside in this country. Then, if that be so, as he did not perform the condition, he never had the right to assign, and he could not therefore assign that which never existed. Remaining abroad, he could not have the right, for the common law of this country gave him no such right—neither did the statute law of this country give him any such right. Therefore, whilst at Milan he had a Milanese copyright; but he had not, and could not, acquire a right in this country; and, if he had no right in this country, he could assign none. I hold it, therefore, my Lords, to be perfectly clear that that would be of itself an answer to the claim. But I think that in the bill of exceptions it is said that there was an assignment of the general right to the copy, and that therefore the party bringing it here would be entitled to the benefit of the statute. If you will look at the bill of exceptions, you will find it stated (it may be a technical construction, but I hold it to be a statement out of which you are not at liberty to depart) that the thing assigned by Bellini was the Milanese copyright. Then if it was the Milanese copyright, and that copyright gave no right here, and the condition had not been performed which must be performed before any right could be acquired here, the assignment was altogether void as regards this country, and consequently it could not transfer any right to Ricordi. But, supposing it did transfer a right to Ricordi, then what right

did Boosey obtain under Ricordi? Why, the assignment from Ricordi to Boosey was expressly confined to publication in his country. Now, if there be 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 that copyright, properly considered, is one and indivisible. It 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 another man. One cannot tell what the inconvenience would be. You might have a separate transfer of the right of publication in every county in the kingdom. If, however, the right, as I am advising your Lordships, is properly one and indivisible, then let us see what construction can be put upon the assignment from Ricordi to Boosey. The exercise of the right is confined in that assignment to the United Kingdom. Now by the 41 Geo. 3, c. 107, copyright is extended to every part of the British dominions in Europe; and by the 54 Geo. 3, c. 156, it was further extended to every other part of the British dominions. It is quite clear, therefore, that if in this case there was a copyright under the law of this country, it was a copyright which extended to every portion of the British dominions. Then, as Ricordi limited the assignment to the United Kingdom, and therefore

reserved to himself the right as regarded the publication in every other part of the British dominions, even considering the right in England, if I may so call it, as being capable of being severed from any foreign right, it would consequently be a partial assignment, and, as a partial assignment, I should venture to recommend your Lordships to decide that it was wholly void, and therefore gave no right at all. There is also, let me observe, this peculiarity, that, as the assignment from Ricordi is confined to the United Kingdom, Ricordi himself might, without any breach of his contract, have published this composition in any other part of the British dominions. He might also by his Milanese right have published it the very next day in Milan, without infringing upon the right of Boosey under the assignment. The more, therefore, the question is considered, the more, I apprehend, it will appear clear that the assignment in question was void, because it was limited to the United Kingdom, and did not extend to the whole of the British dominions. Independently of the question whether the Milanese copyright could be reserved, and the supposed right in England could be assigned, there is another question, which would also decide this question in one view of it, and that is a question upon the assignment itself. I hold it to be perfectly clear that if, according to the proper construction, an assignment of a copyright ought by the law of England to be attested by two witnesses, no assignment of a copyright, the benefit of

which is claimed by the assignee, although from a foreigner, can be held good in this country unless it be so attested, It is not a question whether the Milanese copyright, which could be assigned by the law of Milan, has no effect here. And if, in order to protect the public and the author, Parliament has thought fit to enact that the assignment shall be attested by two witnesses, then that must equally apply to every person claiming the benefit of the statute, whether he be a foreigner or not, because, as I have already repeatedly stated, the question is not whether he is a foreigner or not, but whether, being a foreigner, he owes such a temporary allegiance to the Crown of this country as gives him the right under the statute. It is very true that the statute of Anne does not expressly require that there should be two witnesses to an assignment; but the statute requires that there should be two witnesses to a consent; and it has been established by several authoritics, and among others by the case of Davidson v. Bohn, 6 C. B. 456, decided since the 54 Geo. 3, that an assignment must be attested by two witnesses. The ground of that decision is simply this, that when it was found that by that Act of Parliament the consent to a publication must be attested by two witnesses, it was naturally to be inferred that an assignment, which was of a higher nature than a mere consent, must have the same solemnity. Now that has become a settled point which your Lordships, I am sure, will not disturb. I may observe that the 41 Geo. 3, c. 107, re-

quired the consent to be in writing, and to be signed in the presence of two or more credible witnesses. Now opinions, my Lords, have very much differed upon this question. On the one hand, it has been said that it was only by implication, from two witnesses being required to the consent, that it was held by our courts that two witnesses were required to an assignment, and that, therefore, when the latter Act, the 54 Geo. 3, no longer required two witnesses to a consent, the reason failed for requiring them by implication to an assignment. My Lords, I cannot go along with that reasoning. It appears to me that it was properly decided that the assignment ought to be attested by two witnesses. That was decided upon the Act of Anne as it stood originally, and as it ought to have been originally construed. Then if by a latter Act you take away that which was, no doubt, the ground of the decision, namely, the necessity for two witnesses to a consent, does it follow that you therefore repeal that which was the proper construction of the law applicable to the higher instrument, namely, that the assignment also required two witnesses? It would rather seem, after such a tenor of determination, after the law had been so settled, that the Legislature, by being silent with regard to the assignment, meant that to remain, although it altered the law with respect to the consent; and therefore I should certainly advise your Lordships, if it were necessary, to come to the conclusion upon this point that it was rightly decided that the assignment ought

to be attested by two witnesses, and that was not altered by the Act of the 54 Geo. 3. The Act of Anne and the Act of the 54 Geo. 3 may well stand together; the latter one does not repeal the former expressly, and there is no reason why it should be so by implication; and, with respect to the assignment, the Act of Anne, being referred to generally by the 54 Geo. 3, must be considered to be referred to as bearing the construction put upon it by the authorities. My Lords, upon all the grounds which I have stated, I have come to a conclusion satisfactory to my own mind, but, at the same time, not without great consideration and much hesitation—not hesitation, I must candidly say, created by any doubt which I have myself felt, but I have been impressed, and properly impressed, not only by the arguments at the Bar, but by the elaborate opinions which have been delivered by the learned judges. Agreeing as I do with my noble and learned friends in the conclusion at which they have arrived, my advice to your Lordships is, that the decision below should be reversed.

Judgment of the Ex. Ch. reversed.

LONDON:
Printed by A. BENISCH, 7, Bevis Marks, St. Mary Axe.