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THE LAW

RELATING TO

COPYRIGHT AND TRADE MARKS.

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RELATING TO

COPYRIGHT AND TRADE MARKS,

TREATED MORE PARTICULARLY WITH REFERENCE TO

INFRINGEMENT.

FORMING A DIGEST OF THE MORE IMPORTANT ENGLISH AND AMERICAN DECISIONS,

TOGETHER WITH

THE PRACTICE OF THE ENGLISH COURTS AND FORMS OF INFORMATIONS, NOTICES, PLEADINGS, AND INJUNCTIONS.

BY

JOHN HERBERT SLATER,

OF THE MIDDLE TEMPLE, ESQ., BARRISTER-AT-LAW





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PREFACE.

THE Law relating to Copyright is, in many of its phases, of a dubious and complex nature, and the application of its principles to particular cases frequently becomes a matter of extreme difficulty. That this should be so will surprise no one who may have occasion to define the meaning of a large number of imperfectly drawn Acts of Parliament, rendered more confusing by reason of conflicting decisions.

The truth appears to be that this branch of Law, having been built up gradually to suit the requirements of successive generations, has become overburdened with exceptions, which, however unpleasant to contemplate, it is still necessary to weigh and apply.

The American Authors (undoubtedly the best exponents of the Law on the subject of Copyright) are unsparing in their criticism, and do not hesitate to condemn numerous decisions of the Courts either as manifestly wrong or altogether out of harmony with the demands of the age.

In the following pages I have endeavoured to lay before the Profession the Law relating to Copyright and

Trade Marks, treating it more particularly with reference to the many questions of Infringement which have from time to time arisen for adjudication in this country as well as in America.

To codify and condense is at all times a difficult task, owing to the risk of omission which such a course of procedure necessarily involves; I have, however, thought it better to incur such risk, hoping to avoid the consequences by a careful analysis of principles which could undoubtedly have been more easily enlarged upon.

The Patents, Designs, and Trade Marks Act of 1883 proceeds in a great measure upon the lines of the repealed Act of 1875; where the verbiage has been altered it has been mainly in conformity with precedent as gathered from the reported cases.

J. H. S.

3, Plowden Buildings, Temple,
London, E.C.

June, 1884.

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TABLE

SHOWING THE TIMES DURING WHICH COPYRIGHT SUBSISTS IN VARIOUS PRODUCTIONS.

GREAT BRITAIN.

Books.—During the natural life of the author, and a further period of seven years, commencing from the time of death; *or*, for the term of forty-two years from publication, whichever shall be the longer. When the book is published posthumously, then for forty-two years from the date of publication (5 & 6 Vict. c. 45, s. 3).

Maps, Charts, and Plans (separately published).—As in the case of "Books" (5 & 6 Vict. c. 45, s. 2). The term provided by the 1st sect. of 8 Geo. II. c. 13, is fourteen years from the day of first publication (*see infra*, pp. 89, 151).

Engravings, Prints, and Lithographs.—Twenty-eight years from the day of first publication (7 Geo. III. c. 38, s. 7; *the provisions of the Acts relating to Prints and Engravings were extended to Lithographs by* 15 & 16 *Vict.* c. 12, s. 14).

Paintings, Drawings, and Photographs.—During the natural life of the author, and a further period of seven years, commencing from death (25 & 26 Vict. c. 68, s. 1).

Sculpture, Models, and Casts.—Fourteen years from date of publication (54 Geo. III. c. 56, s. 1); with a further term of fourteen years, if the artist be living at the expiration of the former period (*ibid.* s. 6).

Designs.—Five years from the date of registration (46 & 47 Vict. c. 57, s. 50).

Playright.—As in the case of books (3 & 4 Will. IV. c. 15; 5 & 6 Vict. c. 45, s. 20); but see *infra*, pp. 118, 124.

UNITED STATES.

In the Case of all Works.—Twenty-eight years from the time of recording the title (Rev. Stat. s. 4953). An additional term of fourteen years may be secured by the author, if he be living at the expiration of the former period, or by his widow or children, if he be dead (*ibid.* s. 4954).

ADDENDA.

Re Ralph (*infra*, pp. 239, 250, 260), also reported 25 Ch. Div. 194.

Duck v. *Bates* (*infra*, pp. 123, 132), also reported L. R. 12 Q. B. D. 79; 53 L. J. Rep. C. L. 97. *Affirmed on Appeal*, W. N. 1884, p. 120.

Bovey v. *Fairlie* (*infra*, pp. 17, 122, 127, 129, 142, 164). *Affirmed on Appeal*, L. R. 4 App. Cas. 711.

Re Anderson's Trade Mark (W. N. 1884, p. 75). A portrait is not a sufficiently "distinctive device" to be entitled to registration *per se*. A person is not entitled to register words which are merely descriptive and *publici juris* (Trade Marks Registration Act, 1875, s. 10).

Nicols v. *Pitman* (W. N. 1884, p. 32). Where a lecture is delivered to an audience admitted without payment, any person present may take notes *verbatim* or otherwise for his own private use, but not for purposes of publication or for his own personal gain. The fact of the publication being in shorthand characters makes no difference. (See *infra*, pp. 2, 132, 133.)

Ager v. *P. & O. Steam Navigation Co.* (W. N. 1884, p. 104). In an action for infringing the copyright in a book, it is no defence to say that the defendant merely used the pirated copies by giving them to his agents abroad, and to merchants with whom he corresponded by telegraph.

Bourne v. *Coulter* (W. N. 1884, p. 111). Where the plaintiff within the time limited by R. S. C., O. XXVIII. r. 2, amends his statement of claim in such a way as to change his form of action, and to bring it within the provisions of a different statute, the defendant's proper course to pursue is to move under O. XXVIII. r. 4, that the amended pleading be disallowed, or if allowed then only on proper terms as to costs. A motion that the plaintiff may be ordered to pay the costs up to the time of the delivery of the defence, together with the costs of the motion, and that the action may be stayed until payment, is irregular (see *infra*, p. 215).

Wittman v. *Oppenheim* (W. N. 1884, p. 122). Section 51 of the Patents, Designs, and Trade Marks Act, 1883, applies to the marking, after the Act came into operation, of an article made according to a design registered under the old Act. [Whether the *proviso* in the section applies where no mark at all is placed on the article, *quære*. (See *infra*, pp. 102, 109, 188, 223).]

THE LAW

RELATING TO

COPYRIGHT AND TRADE MARKS.

PART I.—COPYRIGHT.

CHAPTER I.

THE RIGHT OF COPY IN A LITERARY COMPOSITION AS IT SUBSISTS AT COMMON LAW.

Copyright, definition of.

COPYRIGHT is the sole and exclusive liberty of printing or otherwise multiplying copies of an original work or composition (*Jefferys* v. *Boosey*, 4 H. L. C. 920); and it exists either by virtue of the Common Law, or under the protection of some particular statute. It may also be described as the exclusive right of the owner to multiply and to dispose of copies of an intellectual production, which in the case of statutory copyright endures only for a limited time. The word "copyright" is sometimes used to signify the right of the owner to the production resulting from his own skill and labour, in some instances before, and in others after the publication thereof; in the former case, it is called Copyright at Common Law, and in the latter Statutory Copyright.

Copyright at Common Law.

Now this Common Law right of copy, which the owner of every intellectual production has in the fruits of his labour, has for its essence not merely the paper and print

of the author, nor the marble block of the sculptor, nor yet again the canvas of the painter; but the performance—considered as an incorporeal creation embodied in material form. All ideas are free, and no one can therefore claim for himself the exclusive possession of a bare conception, yet where such conception is reduced to some tangible and definite form so as to be capable of identification, the rights of the author will be entitled to protection. Thus, a lecture delivered *extempore* has all the attributes of property attached to it; that is to say, to the ideas and sentiments of the lecturer as expressed and conveyed in the words which he utters, and if anyone should take down these words as they are dictated, and afterwards publish them either *verbatim* or with mere colourable differences, he would, without doubt, be restrained (see *Abernethy* v. *Hutchinson*, 3 L. J. Ch. 209; 1 Hall & Tw. 40; *Caird* v. *Sime*, 28 Journ. Juris., Jan. 1884). The property in an intellectual production is therefore incorporeal, and wholly distinct from the material in which the conception is concentrated; such material is indeed necessary as a vehicle of transmission, and the recognition of this fact forms the basis of the law of copyright considered in relation to infringement. So long as the intellectual production is stolen, it matters not that the pirate may have varied the language in which it is expressed, for if he has unwarrantably taken the arrangement and combination of the ideas and sentiments as displayed in the original work, no diversity in the mere detail of expression will protect him from the consequences of his act.

Bare Idea, not a subject of copyright.

Copyright, incorporeal property.

Common Law right.

As already stated, the Common Law right of copy in a composition of the intellect subsists only so long as the owner does not publish it in the technical sense of that word; the composition may indeed be reduced to a tangible and material form, and still remain the exclusive property

of the author, but once published, his right has gone for ever; unless, indeed, he has taken care to bring himself within the protective provisions of any statute which may happen to subsist with regard to the particular subject. Before actual publication the author has the uncontrolled mastery over his material production; he may destroy it or give it away, either with or without any conditions, he may part with the possession and reserve the property (*Marquis of Queensbury* v. *Shebbeare*, 2 Eden, 329; *Thompson* v. *Stanhope*, Amb. 737; *Southey* v. *Sherwood*, 2 Meriv. 435), or exercise any other act of ownership over it (see *Prince Albert* v. *Strange*, 2 De G. & Sm. 652; 1 Mac. & G. 25; *Bartlett* v. *Crittenden*, 4 McLean, 300 (Amer.); *Ibid.*, 5 McLean, 41, *per* McLean, J.; *Jefferys* v. *Boosey*, 4 H. L. Cas. 867, *per* Erle, J.). His creditors may indeed seize, by *fi. fa.*, the composition itself, a manuscript for instance, but they cannot publish the words contained in it; the author's *property* in them they cannot touch, however valuable it may be (*Bartlett* v. *Crittenden*, 5 McLean, 37 (Amer.); and refer also to *Stevens* v. *Cady*, 14 How. (Amer.) 528; *Stevens* v. *Gladding*, 17 How. (Amer.) 447). The Common Law right as subsisting before publication must therefore be carefully contrasted with the Statutory right as conferred by virtue of the authority of some particular Act of Parliament; for upon a true appreciation of the difference depends the whole law relating to copyright. The Common Law right of copy is personal property, and *primâ facie* passes with a transfer of the manuscript or work of art to which it is incident (*Turner* v. *Robinson*, 10 Ir. Ch. 142, *per* Smith, M. R.; *Palmer* v. *De Witt*, 2 Sickel, 538, *per* Allen, J.); yet it will not do so if the owner should manifest an intention to reserve the right of publication to himself (*Queensbury* v. *Shebbeare*, 2 Eden, 329; *Lucas* v. *Cooke*, 13 L. R. Ch. D. 872), and in the absence of any express

understanding between the parties, the question is always one of evidence of intention (*Queensbury* v. *Shebbeare*, *Ibid.*; *Thompson* v. *Stanhope*, Amb. 737; *Southey* v. *Sherwood*, 2 Meriv. 435). Consequently the literary property in an unpublished manuscript may be assigned by mere word of mouth, and a writing is never necessary, for it is the statute (if anything) that insists on writing, and not the Common Law (see *Power* v. *Walker*, 3 Maule & S. 7). The right at Common Law cannot, in the case of a manuscript, be evaded by an abridgment, a summary, or even a review (*Prince Albert* v. *Strange*, 2 De G. & Sm. 693, per Bruce, V.-C.); nor is it lost by a publication made by a third person without the authority of the proprietor (*Boucicault* v. *Wood*, 2 Biss. (Amer.) 34, 39; *Crowe* v. *Aikin*, 2 Biss. (Amer.) 208; *Palmer* v. *De Witt*, 2 Sweeny (N. Y.), 530, 551; 2 Sickel, 532; *Shook* v. *Neuendorf*, 11 Daily Reg. (N. Y.) 985). If, however, the author of the production should publish it, he must minutely comply with the provisions contained in the statute governing the case, or else both his common law and statutory right of copy will be gone, for on publication the common law right ceases, and unless such publication be in accordance with the statute, the statutory right will not attach; and such common law right of property once destroyed by publication is not revived after the expiration of the time allowed by the Copyright Acts (*Donaldson* v. *Becket*, 4 Burr. 2408) as it would be if both description of rights could subsist concurrently; for as the law is at the present time generally supposed to stand, the common law right of property is divested simultaneously with the publication of the work or production. On analysis of the cases, however, it would appear to be by no means clearly settled that the Common Law right becomes merged in or otherwise destroyed by the statute, or ceases to exist on the publication of the work to which it originally attached.

Not lost by abridgment, summary, or review, or unauthorised publication.

Effect of authorised publication on Common Law rights.

The first copyright Act, passed in 1710 (8 Anne, c. 19) was repealed by 5 & 6 Vict. c. 45, s. 1, and prior to the former statute there is no doubt but that authors had a perpetual right of property in their works by virtue of the common law; if, therefore, that right of property was taken away, it must have been by operation of the statute. This question was first raised in the case of *Tonson* v. *Collins*, 1 W. Bl. 301, 321, in which the Court inclined to the plaintiff's contention that he had a right of property independently of the statute, but as the action seemed to have been brought by collusion, and a nominal defendant set up in order to obtain a judgment, the Court refused to proceed (see *per* Willes, J., 4 Burr. 2327). At any rate the common law right of the author was so extremely doubtful in 1765, that Lord Northington declined to continue an injunction obtained by the assignee of an author after the expiration of the two terms of years allowed by the statute of Anne (*Osborne* v. *Donaldson*, 2 Eden, 327).

Millar v. *Taylor*.

In the famous case of *Millar* v. *Taylor*, 4 Burr. 2303, it was decided by a majority of three judges of the King's Bench, that it was impossible to say that the Act of Anne tacitly abolished the common law right, or could be quoted to show that no such right ever existed, and that had there been any intention to take away every pretence of right at the common law it would have been so expressly enacted. The opinion of Mr. Justice Yates, the one dissenting judge, was based upon a belief that there could be no right of property at all in any intellectual production, or in anything else that had not a corporeal existence, but that in the case of literary copyright such right was confined to the manuscript, and, further, that before the statute of Anne, no copyright existed, either at the common law, or otherwise. He admitted, however, that the statute gave a certain right of property in books for the time mentioned therein, though he denied that an intellectual production

could be identified so as to be entitled to protection ;—statements totally irreconcilable, since the right of property does not subsist in the paper and printed matter alone, but in the ideas, sentiments, and expressions which are thus externally endowed with life and form. It is now generally admitted by such writers as have dealt with the subject, that the judgment of Mr. Justice Yates cannot safely be relied on, and it certainly contributes nothing, either in force or argument, or in accuracy of historical facts to promote the success of a contention which he vainly urged as Counsel at the Bar, in the case of *Tonson* v. *Collins*, 1 W. Bl. 332, already referred to. The principal case defining the common law rights of authors, and which of necessity applies to every species of intellectual production, is *Donaldson* v. *Becket and Others* (4 Burr. 2408), decided on appeal to the House of Lords from a decree of the Court of Chancery. On the case coming before the House, it was felt to be of such grave importance that the Common Law Judges were directed to deliver their opinions upon five questions submitted to them; whereupon, the judges desiring that some time might be allowed for that purpose, the further consideration of the cause was adjourned until the Tuesday following, the 15th of February, 1774. The questions submitted to the judges were the following :—

Donaldson v. Becket. Arguments.

1. Whether at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent ?
2. If the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition, and might any person afterward reprint and sell for his

own benefit such book or literary composition against the will of the author ?

3. If such action would have lain at Common Law, is it taken away by the statute of 8 Anne ? And is an author, by the said statute precluded from every remedy, except on the foundation of the said statute, and on the terms and conditions prescribed thereby ?

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

5. Is this right in any way impeached, restrained, or taken away by the statute, 8 Anne ?

On the first question eight judges were in favour of the affirmative against three for the negative. Two of the minority, however, agreed with the majority on the general view that at common law an author had the sole right of first publishing his composition, but they doubted his ability to bring an action except under certain circumstances; the remaining judge thought an author had no right of property at common law, and consequently could not bring an action at all.

On the second question eight judges were in favour of the negative, and three of the affirmative.

On the third and fifth, six for and five against;

And on the fourth question, seven for and four against.

Now, the chief question under discussion here was the third, upon the answer to which depends the solution of the fifth; and we find that six judges were of opinion that the action at common law was taken away after publication by the Statute of Anne, and that the author was by the said statute precluded from every remedy except on the foundation of the statute itself. The remaining five judges held the direct contrary. As a matter of fact, Lord Mansfield, at that time the Lord

Chief Justice of the King's Bench, "from reasons of delicacy," as the report says, did not speak. Had he done so, he would have agreed with the minority, for it is "notorious that Lord Mansfield adhered to his opinion" (4 Burr. *2417), which he expressed in the Court below. Had this opinion been again expressed in the House of Lords the judges would have been equally divided on the question; and since the great weight of Sir William Blackstone and Lord Mansfield was thus virtually put in the scale in favour of the survival of the common law right, it is a matter of speculative inquiry how far the opinion of these two great authorities, combined with that of their colleagues on the same side, can even now be justly ignored.

The effect of the judgment as propounded by a majority of the common law judges in *Donaldson* v. *Becket & Others*, is recognised at the present day as a convenient statement of the law; but if the question is still *res integra*, as was hinted by Williams, J., in *Reade* v. *Conquest*, 9 C. B. N. S. 767, it would certainly appear that the law is by no means so firmly settled as is generally supposed to be the case. No decision is beyond question unless and until it is based upon a principle older even than the law itself, the principle of Truth. It is *not* the fact that the judgment of the majority in *Donaldson* v. *Becket* was satisfactory to the lawyers of that day; it was subsequently questioned by Lord Campbell in *Boosey* v. *Jefferys*, 6 Ex. Rep. 592, by Mr. Justice Erle and Mr. Justice Coleridge in *Jefferys* v. *Boosey*, 4 H. L. Cas. 875, 899. It has been doubted in Scotland (*Cadell* v. *Robertson*, 5 Pat. App. Cas. 518, *per* Lord Monboddo); and in America (*Wheaton* v. *Peters*, 8 Pet. 591), where the judges were again divided in opinion. In all the subsequent English cases the judges have followed the judgment propounded in *Donaldson* v. *Becket*, as a matter of course, and without discussion, and in many of them doubts have been freely expressed. The opinion

of Mr. Justice Yates, in *Millar* v. *Taylor*, 4 Burr. 2361, that "nothing can be an object of property which has not a corporeal substance," is therefore in a fair way of being realised. There is one point, however, which still operates in favour of the author, and this arises from the decision of a majority of the judges with respect to question number two, considered in relation to the succeeding question, and both being evolved from a consideration of the first. As, therefore, the owner of any work has by the common law an exclusive right to publish it (Question 1), and that right is not lost after publication by virtue of the common law (Question 2), but is taken away solely by virtue of the statute (Question 8), it is obvious that if no statute has been passed relative to the particular description of work, the force of the common law will operate to protect it. So, also, as a further development, if the work has not been published within the meaning of the statute, it will still be entitled to the protection of the common law, for the statute does not cover a work not so published, and hence can have no effect on the common law rights therein. The conclusion arrived at is that no common law rights in a work are lost by publication, unless there be a statute to take away such rights, and unless the work is published within the meaning of the statutes (*Donaldson* v. *Becket*, 4 Burr. 2408; *Wheaton* v. *Peters*, 8 Pet. 591, 654 (Amer.), affirming the general principle). Instances in which particular cases are affected and influenced by the operation of the common law are given in their proper place. The present object is merely to show and define the broad distinction existing between the ownership by virtue of some particular statute and at the common law generally.

Under any circumstances Common Law rights not lost, unless work published or remedy taken away by statute.

It is on the whole submitted that, although the owner of an intellectual production has no exclusive property in the general subject or in the manner of treating it (*Matthewson*

No exclusive property in a general subject or

Method of creating it.

v. *Stockdale*, 12 Ves. 270; *Longman* v. *Winchester*, 16 Ves. 269; *Blunt* v. *Patten*, 2 Paine, 393 (Amer.); *Bowie* v. *McDiarmid*, 12 Blatchf. (Amer.) 166), and although property cannot exist in simple ideas or thoughts, but only in their arrangement and combination constituting a production having a present existence as a composition (*Platt* v. *Walter*, 17 L. T. (N. S.) 157; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; 15 W. R. 467). Still, where an intellectual production is embodied in some outward form, and does not subsist merely *in nubibus*, there, by every consideration of justice and right, the author of such production would seem morally as much entitled to the results of his own genius as he would be to the possession of any other description of property; his rights, whether at common law or by the statute, should co-exist, and the author of a work be protected sometimes by one and sometimes by the other, and in certain instances by both.

Subject must have a present existence.

There is no doubt that if the claim of an author were judged from a standpoint of natural right and upon principles of fairness he would be entitled to a perpetual right of copy in his production. This is admitted by an author who is unfavourably disposed towards any such perpetual right (Copinger), his objection being based on the fact *inter alia* that after a lapse of years the copyright would belong to an endless number of descendants. Any apprehension on this head might, however, speedily be dissipated by changing the nature of the property in an intellectual production and investing it with the attributes of real estate.

As the author—and this term is not limited to the producing agent of a literary composition only but of every species of intellectual production—is thus protected by the common law in the enjoyment of his property before publication or after publication in the event of there being no Act of Parliament specially applicable to the case or within the provisions of which his production

can be said to fail; so, also, he is protected subsequently to such publication for a limited time, provided he complies with the provisions as to registration and otherwise contained in the statute applicable to his particular case. *Statutory protection.*

The following is a list of the English statutes regulating the subject of copyright in all its branches :—

8 Geo. II. c. 13.—Engravings.

7 Geo. III. c. 38.—Engravings.

15 Geo. III. c. 53.—Universities and colleges.

17 Geo. III. c. 57.—Engravings.

54 Geo. III. c. 56.—Sculpture.

3 & 4 Will. IV. c. 15.—Playright.

5 & 6 Will. IV. c. 65.—Lectures.

6 & 7 Will. IV. c. 59.—Engravings.

5 & 6 Vict. c. 45.—Books. Dramatic and musical compositions. (Sect. 20, extending the provisions of 3 & 4 Will. IV. c. 15.)

5 & 6 Vict. c. 45.—Maps, charts, and plans.

7 & 8 Vict. c. 12.—International copyright.

15 & 16 Vict. c. 12.—International copyright.

15 & 16 Vict. c. 12, s. 14.—Engravings.

25 & 26 Vict. c. 68.—Paintings, drawings, and photographs.

38 & 39 Vict. c. 12.—International copyright.

45 & 46 Vict. c. 40.—Musical compositions.

46 & 47 Vict. c. 57.—Designs.

The American Legislation is confined to the Act of July 8th, 1870, ss. 4948—4971, the Act of June 18th, 1874, and certain provisions contained in the revised statutes relating to jurisdiction (see ss. 629, 699, the Act of March 3, 1875, 18 U.S. Stat. at L. 470, and also s. 4970 Rev. Stat. *supra*), and as in cases of doubt and difficulty the American decisions are frequently referred to at the English bar generally with approval and always with advantage, it has been thought advisable to incorporate *American legislation.*

the most important of them in the ensuing statement of the law relating to the infringement of copyright and trade-marks. It is sufficiently obvious from what has been already said that the question whether or no an intellectual production has been "published" within the meaning of any particular Act of Parliament must in many instances be of vital importance; the question of "publication" will therefore be considered from time to time as it arises in the course of the treatise. It has been found more convenient to adopt this plan than to give a special chapter to the subject, for many of the arguments and authorities adduced must necessarily consist merely of recapitulations and repetitions, while no very great advantage would seem to be secured by massing them together in support of a series of propositions which are better distributed under the different headings to which they naturally belong.

"Publication."

CHAPTER II.

ON THE INCIDENTS OF THE PLAINTIFF'S TITLE.

Originality essential.

WHATEVER disputed points may arise from time to time during a study of the law relating to copyright, nothing is better understood or more universally recognized than the principle of "originality," an essential qualification, without which no one can be considered an author, or be fairly entitled to protection for his work.

No man is, however, capable of writing directly from his own thoughts and experiences; he must necessarily consult authorities, and may inadvertently recapitulate their sentiments and ideas. It consequently becomes apparent that the word "original" may have in legal phraseology a slightly different meaning to that accorded to it in every-day conversation.

Meaning of the word "ORIGINAL."

In the first instance the word is inherently capable of two significations; the first, as applicable to a work different in its component parts taken separately from any other work; and secondly, as applicable to the arrangement and combination of common materials, that is to say, materials taken or collected from a source *publici juris*, or common to all; and in order to constitute an original work both these qualifications should subsist.

Subjects and ideas are free.

Now it is clear that no one can monopolise the subject of even his own production; subjects like ideas are free, and as one author may treat of any subject he pleases, even although the ground may have been repeatedly traversed, so also another author has an equal liberty, and both are entitled

to refer to the same common sources of information. The principle is the same whether the author claims protection by virtue of the common law or under the provisions of some statute, for the element of originality is of the very essence of all productions, literary or otherwise intellectual. There are and can be but few, if any, things which in an abstract sense are strictly new and original throughout. Every book in literature, science, and art borrows, and must necessarily borrow and use much which was well known and used before. No man creates a new language for himself, he contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts unaided and uninstructed by the thoughts of others. The thoughts of every man are more or less a combination of what other men have thought and expressed, although they may be modified, exalted, and improved by his own genius and reflection (see *Emerson* v. *Davies*, 3 Story, 779, 4 West, L. J. 261 (Amer.), *per* Story, J.). What the law requires, therefore, is not that the subject of a work shall be entirely new and original, for this at the present day is hardly possible, but that the method of treating it shall have some degree of originality about it (*Cary* v. *Longman*, 1 East, 358, 3 Esp. 273; *Tonson* v. *Walker*, 3 Swanst. 672; *Tonson* v. *Collins*, 1 W. Bl. 301, 321; *King* v. *Reed*, 8 Ves. 223, n.; *Hogg* v. *Kirby*, 8 Ves. 215; *Longman* v. *Winchester*, 16 Ves. 269; *Lewis* v. *Fullarton*, 2 Beav. 6, 3 Jur. 669; *Leader* v. *Purday*, 7 C. B. 4, 6 Dowl. & L. 408; *Barfield* v. *Nicholson*, 2 Sim. & St. 1, 2 L. J. Ch. 90; *Jarrold* v. *Houlston*, 3 K. & J. 708, 3 Jur. (N. S.) 1051; *Atwell* v. *Ferrett*, 2 Blatchf. (Amer.) 39; *Bartlett* v. *Crittenden*, 5 McLean (Amer.) 32). And so a new and original work may consist entirely of information already perfectly well known, and this information may be collected from other works or from general observation; all that is necessary is

But the method of treating them must be original.

thief ; neither shall search into the common sources of information for himself, and not avail himself of the labours of his predecessor (*Jarrold* v. *Houlston*, 3 K. & J. 708, 3 Jur. (N. S.) 1051), the question at all points being whether there is any material product of authorship on the part of the person claiming copyright ; that is to say, whether the publication is the result of independent labour or of mere copying (see Drone on Copy. 202) ; for a mere copy or reprint not differing materially from the original matter is not entitled to protection (see *Boucicault* v. *Fox*, 5 Blatchf. (Amer.), 87, 101). The question in all these cases is not whether the materials which are used are entirely new, and have never been used before, or even whether they have never been used before for the same purpose ; but whether the same plan, arrangement and combination of materials have been used before for the same purpose, or for any other purpose (*Emerson* v. *Davies*, 3 Story (Amer.) 778, *per* Story, J.). Under certain conditions it is possible for two works to be almost exactly alike, and yet there may be copyright in both of them, for the question is not as to any similarity which may or may not exist between them, but whether the production is original, that is to say, the result of independent labour (see *Blunt* v. *Patten*, 2 Paine (Amer.) 400, *per* Thompson, J.). The points of resemblance are useful only for the purpose of determining whether there has or has not been copying (*Roworth* v. *Wilkes*, 1 Camp. 94 ; *De Berenger* v. *Wheble*, 2 Stark. 548 ; *Barfield* v. *Nicholson*, 2 Sim. & St. 1, 2 L. J. Ch. 90 ; *Nichols* v. *Loder*, 2 Coop. 217 ; *Benn* v. *Le Clercq*, 30 Leg. Int. 185 (Amer.)). It is obvious that there may and probably will be but little difference between one map and another, or between one chart and another, or between two photographs of the same scene, and yet there may be a valid right of copy in each and every of them. In cases of this description the resem-

And neither must search for himself.

Resemblance not necessarily proof of copying.

blances are valuable chiefly as evidence showing whether there has been unlawful copying, and certainly not as proof positive that there necessarily must have been; the question whether there has been unlawful copying or not is for the jury (*Blunt* v. *Patten*, 2 Paine 400, *per* Thompson, J.). So, if two persons were to write independently of each other a series of works couched in precisely the same language, each would have a copyright in his production (*Jefferys* v. *Boosey*, 4 H. L. Cas. 869, *per* Erle, J.), for no person can claim an exclusive property in the method of treating a subject (*Lewis* v. *Fullarton*, 2 Beav. 6, 3 Jur. 669), or in the general plan of a work, or in the purpose for which common materials are used (see *Mack* v. *Petter*, L. R. 14 Eq. 431; *Pike* v. *Nicholas*, L. R. 5 Ch. 251). An author is entitled to collect his general information from a copyrighted work, or he may use it for the detection of errors, omissions, and faults in his own; but, as before stated, he must go to the original common sources for his information (see *Cox* v. *Land & Water Journal Co.*, L. R. 9 Eq. 332), for the privilege of fair use accorded to a subsequent writer must be such and such only as will not cause substantial injury to the proprietor of the first publication (*Lawrence* v. *Dana*, 2 Am. L. T. Rep. (N. S.) 428; Drone on Copy. 390). Thus, the compiler of a Directory or Guide Book, containing information derived from common sources, should obtain and work out the information independently for himself, although he can verify the correctness of the results by comparison with previous works (*Kelly* v. *Morris*, L. R. 1 Eq. 697, 35 L. J. (N. S.) Ch. 423; *Morris* v. *Wright*, 5 Ch. App. 279). The compiler must not print his directory from slips cut from a previous copyrighted work of the same kind, even although he verifies all the statements (*Morris* v. *Ashbee*, L. R. 7 Eq. 34); but he may use such slips for the purpose of directing himself to the

Fair use of copyright work.

parties from whom he may obtain information (*Morris* v. *Wright*, L. R. 5 Ch. App. 279; 18 W. R. 327, explaining *Kelly* v. *Morris*, *Morris* v. *Ashbee*, *supra*). The same principles of consideration in determining whether any given production is or is not original have been laid down with respect to other descriptions of works (*Hogg* v. *Scott*, L. R. 18 Eq. 444; *Pike* v. *Nicholas*, L. R. 5 Ch. 251; 18 W. R. 321; *Scott* v. *Stanford*, L. R. 3 Eq. 722; 36 L. J. (N. S.) Ch. 729). The case of *Pike* v. *Nicholas*, *supra*, is very important, as it clearly illustrates the principle that where a person derives his information from a common source, and *bonâ fide* works up the materials so found by his own independent labour, it matters not that he advocates the same arguments or theories, or uses the same illustrations or quotations, as may happen to be found in some previous protected work (and see *Spiers* v. *Brown*, 6 W. R. 352; *Lawrence* v. *Dana*, 2 Amer. L. T. (N. S.) 423, *per* Clifford, J.). And upon the same principle a play may be original, although the details and internal incidents are the same as a novel, the copyright in which is vested in another (*Boucicault* v. *Fox*, 5 Blatchf. (Amer.) 87, 100); and, again, an arrangement of music may under certain circumstances be original, as, for instance, an arrangement of an opera for the pianoforte (*Wood* v. *Boosey*, L. R. 3 Q. B. 223; and see *Boosey* v. *Fairlie*, 7 Ch. D. 301, 309); and hence it could not be successfully argued that the publication of the arrangement amounted in point of fact to the publication of the original (*Boosey* v. *Fairlie*, *supra*). So an original photograph, that is to say, a photograph directly taken from some object, animate or otherwise, is a proper subject of copyright, although it cannot be denied that such a production is a copy of the original object (*Graves' Case*, L. R. 4 Q. B. 723, *per* Blackburn, J.). The description of specimens of fruit (*Hogg* v. *Scott*, L. R. 18 Eq. 444), the reproduction

Pike v. *Nicholas*

and description of monumental designs (*Grace* v. *Newman*, L. R. 19 Eq. 623), may amount in many instances to original productions. And so where directions were given in an Act of Parliament for drawing up certain forms to be used under the Act, the drawer of such forms in pursuance of and in conformity to the directions so given creates an original production for which he is entitled to protection; *aliter* if the statute had contained the forms themselves and he had merely copied them (*Alexander* v. *Mackenzie*, 9 Sc. Sess. Cas. 2nd Ser. 748). Specifications of patents when once filed become the property of the public, and any one can republish them and use them in any way not amounting to an infringement of the patent (*Wyatt* v. *Barnard*, 3 V. & B. 77).

Originality.

To constitute originality it is, as previously mentioned, by no means absolutely necessary that the production should be wholly and entirely original; for if this were so, abridgments and translations would not be original productions, nor would dramatizations or compilations be entitled to any protection whatever; whereas in point of fact, compositions of this nature are frequently protected by the Courts. A person may, by publishing a reprint of a work in which the copyright has expired, acquire a new copyright in it if at the same time he add notes and illustrations from other works, or otherwise improve it to a material extent; that is to say, he will create an original work if the alterations are of sufficient importance to so constitute it (*Black* v. *Murray*, 9 Sess. Cas., 3rd Ser. 341; and see *Banks* v. *McDivitt*, 13 Blatchf. (Amer.) 163); and in such cases the test of originality is applied to the additions, and in fact to everything which represents the labour and skill of the person claiming the copyright (Drone, Copy. 200). The character and extent of the alteration necessary to constitute a material distinction varies according to circumstances. Lord Deas (*Black* v.

New copyright.

Material alteration necessary to constitute new copyright.

Murray, supra, 350), was of opinion that the sole alteration of the word "spear" to "spur" in a poem of eleven stanzas was sufficient to support a claim of originality in the second poem, but his opinion was not shared by the rest of the Court, and it is difficult to understand how the alteration of a single word can constitute a new composition (see *Maxwell* v. *Hogg*, L. R. 2 Ch. 317, *per* Lord Cairns). To create a new copyright it is clear that the alterations must be extensive and substantial, practically making a new book (*Black* v. *Murray*, 9 Sess. Cas. 3rd Ser. 355, *per* Lord Kinloch).

Test of originality.

The test of originality is in all cases whether the production is the result of honest and independent labour as contradistinguished from mere copying or colourable imitation, and such test will vary according to the nature of the production itself. For instance, a person who makes an abridgment or a translation reproduces an existing work in a new and useful form, but his production, to be entitled to protection, must be something more than a mere copy of the whole or parts of the original (Drone on Copy. 158), and an abridgment is in point of fact no abridgment at all if it consists of a mere transcript of some portions of the original and the omission of others (see *Lawrence* v. *Dana*, 2 Am. L. T. R. (N. S.) 402). In the case of a translation the question is whether any essential part of a previous copyright translation of the same work has been taken, although the fact of there being identity of a few phrases does not make the translation a piracy (see *Shook* v. *Rankin*, 6 Biss. (Amer.) 482). So also, as previously mentioned, a person may arrange music composed by another in such a way as to acquire copyright in the arrangement, as where the score of a whole opera is arranged for the pianoforte (*Wood* v. *Boosey and Another*, L. R. 2 Q. B. 340; on appeal, 3 *id.* 223). A photograph may be original although all photographs are copies of some object or other,

and the test is whether the photographer has copied direct from the subject, or merely reproduced another photograph or the negative thereof (*Graves' Case*, L. R. 4 Q. B. 723). In the case of a compilation, that is to say, a collection of old materials gathered and arranged to form a treatise, the test of originality is applied to the arrangement and combination, and not to the materials themselves (see *Emerson* v. *Davies*, 3 Story (Amer.) 778; 4 West. L. Journ. 261); and consequently the compilation must have some intrinsic merit not to be found in such materials, as in the case of tables of calculations (*Baily* v. *Taylor*, 3 L. J. (Ch.) 66; 1 Russ. & My. 73); or of a directory (*Morris* v. *Wright*, L. R. 5 Ch. 279; 23 W. R. T. (N. S.) 78); the same general test being applied to every species of compilation, and to every new edition of a previously published volume. With respect to dramatizations the test is whether the work upon which it is founded has been reproduced in a substantially new form, that is, in a form materially different, not indeed so far as the characters, circumstances, and incidents are concerned, for these must necessarily to some extent be the same—the dialogue may even in parts be preserved—but as regards the situations, aspects, climaxes, contained in a work not originally adapted to, or suitable for the stage (see *Boucicault* v. *Fox*, 5 Blatchf. (Amer.), 100, 101). In every case, therefore, where the question of originality is involved, the true test is whether the production complained of is the result of the author's independent exertions, or whether he has merely copied from some previous work; similarity, or even identity of expression, may go far to augment evidence of piracy, but, as a rule, it is merely auxiliary to other evidence, save in those cases where the author is unable to explain away such similarity or identity.

Merit or intrinsic value not necessary.

It would seem that the owner's right of copy in an unpublished production at common law does not depend

upon any question of merit or intrinsic value as a composition (*Prince Albert* v. *Strange*, 2 De G. & Sm. 694); and although there is no direct decision on the point, as a matter of argument it is clear that the question of merit or value is nothing to the public before publication, for it will not interest them under any circumstances: the author of manuscripts, whether he is famous or obscure, high or low, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, saleable or unsaleable, they shall not without his consent be published (*Prince Albert* v. *Strange*, *supra*, 694, *per* Bruce, V.-C.). Furthermore, there may be copyright in letters or other communications, although they may be entirely destitute of literary merit, and of no extraneous value whatever, for every letter is in the general and proper sense of the term a literary composition, which cannot lawfully be published by the receiver, or any third person, without the consent of the writer, except for purposes of vindication (see Drone on Copy. 134; *Grigsby* v. *Breckinridge*, 2 Bush. (Ky.) 480, there cited).

Even under 5 & 6 Vict. c. 45.

The Act to amend the law of copyright (5 & 6 Vict. c. 45) recites that "it is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world;" but the Act does not confine the privilege of copyright to works of literary merit (*Maclean* v. *Moody*, 20 Sess. Cas. 2nd Ser. 1163, *per* Lord Deas). Nor *a fortiori* need they by any means be of "lasting benefit to the world." The exposition of the law on this subject appears to be that the very slightest tinge of merit if contained in a work of any value, either as an addition to knowledge, or as the receptacle of any useful or general information, will be sufficient to protect the production and to make it a fit subject of copyright. Where, however, it clearly appears that the production is utterly

But production must not

Is utterly worthless.

worthless, or of such a trivial nature as to be totally insignificant, there it lacks one of the essential qualifications of copyright, and consequently becomes common to the world (*Page* v. *Wisden*, 20 L. T. (N. S.) 435; 17 W. R. 483; and see *Cable* v. *Marks*, 52 L. J. Rep. (N. S.) Ch. 107). The true inquiry, therefore, is not whether one production is more meritorious or of greater literary value than another, but whether the work in question may fairly be considered to constitute a material addition to useful knowledge.

Intrinsic merit inquired into in action of damages for destroying manuscript.

But not in other cases.

When, however, the author of a work seeks to recover for a loss of profits which he has sustained by reason of the destruction of unpublished manuscripts, there the question of merit may form an important part of the inquiry (see *Priestley's Case*, cited 2 Meriv. 437); but in general it is not necessary that a work should possess any very great literary or art merit, and it may be definitely laid down that the right of protection afforded to an unpublished manuscript does not depend upon its pecuniary value or intrinsic merit, and the law is in this respect the same both in England and America (*Woolsey* v. *Judd*, 4 Duer (N. Y.) 386; 11 How. Pr. (N. Y.) 49).

No copyright can subsist in production calculated to deceive the public.

Another qualification essential to copyright is that the work intended to be protected thereby shall not have the effect of deceiving, or be intended to deceive the public. Consequently, where the plaintiff employed one H. to write a book, and with intent to deceive and defraud the public, and to make them believe that the book was a translation of an original book written by one Sturm, fraudulently published it as and for a translation of the said work with a false preface, it was held that these matters were sufficient to negative the existence of a valid copyright in the plaintiff (*Wright* v. *Tallis and Another*, 1 C. B. 893; 9 Jur. 946). The Court will also on similar principles restrain the publication of a book

falsely purporting to be written by a well-known author (*Byron* v. *Johnson*, 2 Mer. 29; *Seeley* v. *Fisher*, 11 Sim. 581; 10 L. J. (N. S.) Ch. 274; *Harte* v. *De Witt*, 1 Cent. Law Journ. 360 (Amer.); and refer also to *Archbold* v. *Sweet*, 5 Car. & P. 219; 1 Moody & R. 162), whether the false allegation is contained on the face of the publication itself (*Barnard* v. *Pillon*, W. N. 1868, p. 94), or in any other manner (*Seeley* v. *Fisher*, 11 Sim. 581). This view of the law rests upon a general consideration of the question of fraud rather than on the infringement of any literary property (*Lord Byron* v. *Johnson*, 2 Meriv. 29). There is, however, a wide distinction between a deliberate intent to deceive the public, and the mere assumption of some *nom de plume*, or an innocent allegation that the work is, for instance, a translation of an ancient manuscript, a method adopted by Moore in his "Epicurean," and probably by many other authors as well, ever since the art of writing was practised. The test would seem to rest upon the intention of the author, coupled with the probable deception of the public, for the very object in all these cases is not merely to conceal the name of the genuine author, and to publish opinions to the world under an innocent disguise, but to deceive the public by inducing them to believe that the work is the original work of the author who is named, with the object of obtaining from the purchaser a greater price than would otherwise be obtained (see the remarks of Tyndall, C. J., in *Wright* v. *Tallis*, 1 C. B. 907; 9 Jur. 946).

Production must be innocent.

It is to the last degree essential that every publication should be of an innocent nature, that is to say, not calculated to disturb the public peace, neither must it be seditious or have a libellous tendency, whether the public or merely a private person is the victim, nor must it be immoral or blasphemous. Neither in England nor America is there any statutory definition defining the

word "innocent," and each case as it arises will, therefore, be dealt with on principles peculiar to itself; but whatever may be the judicial interpretation, nothing is clearer than this, that a work to be entitled to protection must in the eye of the law be free from anything tending to corrupt the morals of, or to libel, individuals or society at large; the tendency, both moral and political, must not be injurious; and consequently, when a work is found to be tainted, the Courts have uniformly refused to interfere either in protecting it against infringement or in restraining its sale or publication. This principle is deeply rooted in English law, and applies to every description of intellectual production, whether published or unpublished, for neither by common law nor statute will a work be protected unless it be innocent (*Southey* v. *Sherwood*, 2 Meriv. 437, *per* Lord Eldon). The interference of the Courts is based upon the ground of a title to the property in the plaintiff, and the test is whether the plaintiff could maintain an action in damages at law (*Walcott* v. *Walker*, 7 Ves. 1; *Southey* v. *Sherwood*, 2 Mer. 439); if he can do so with success the title to the property must necessarily be complete, and as a matter of liability no one can be fined or imprisoned for doing that for which he can maintain an action at law (*Poplett* v. *Stockdale*, 1 Ry. & M. 338, *per* Best, C. J.). A man may publish anything which twelve of his countrymen think is not blameable (*Rex* v. *Cuthell*, 27 How. St. Tr. 675, *per* Lord Kenyon). And, as before stated, where a manuscript is not innocent the common law affords no protection to it, and any one who obtains possession of it may publish it (*Southey* v. *Sherwood*, 2 Mer. 435), the effect being that an author has no right to prevent the publication of a work which he himself cannot lawfully publish, as, for instance, a work having a tendency to encourage the commission of crime (*Martinetti* v. *Maguire*, 1 Deady

Or plaintiff's title defective.

And any one may publish the work.

(Amer.) 223). This at first sight may appear anomalous, but in reality it is not so, for although the Courts will not restrain either the publication or sale of, for instance, a libellous work as such (*Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142; 44 L. J. Ch. 192), at least not until the verdict of a jury is first obtained (*Saxby* v. *Easterbrook*, 3 C. P. D. 339; 27 W. R. 188; *Thorley's Cattle Food Co.* v. *Massam*, 6 Ch. D. 582; 41 L. T. 542; *Thomas* v. *Williams*, 14 Ch. D. 864; 43 L. T. 91), and although there may be no proof of actual damage (*Thorley's Cattle Food Co.* v. *Massam*, *supra*; *Thomas* v. *Williams*, *supra*), yet the publication of such a treatise is a violation of the law, and the guilty party will be dealt with as the law shall direct. The criminal courts are perfectly competent to deal with offenders, and for this reason courts of civil procedure have invariably refused to extend their jurisdiction. Where, however, a libel amounts to a contempt of Court, there it will be restrained in the interest of the administration of justice. Seditious and libellous publications will not therefore, be protected, and treatises tending to encourage the commission of an offence against the criminal law are in their nature seditious (*Martinetti* v. *Maguire*, 1 Deady (Amer.), 223); and where a composition appears on the face of it to be a libel so gross as to affect public morals no protection will be afforded; and further, no action will lie for the piracy of a composition amounting to a gross and nefarious libel upon the solemn administration of justice (*Hime* v. *Dale*, 2 Camp. 27 (note)), for the Court ought not to take account of the unhallowed profits of libellous publications (*Walcot* v. *Walker*, 7 Ves. 2). It would appear that in order to establish a defence that a certain work is libellous or seditious it must be shown that the publication threatens a breach of the peace or is actually libellous on the state; the mere fact of it containing or even abounding in obnoxious or satirical obser-

Seditious and libellous publications.

Query—Whether a work personally libellous is entitled to protection.

vations is not sufficient (Drone on Copy. 185). Whether a work containing a libel on a particular individual would be entitled to protection is a matter of argument, since there is no decision on the subject, but it is anticipated that inasmuch as an offence against an individual is also more or less an offence against society of which he is an integral part, there will be little difficulty in arriving at a satisfactory conclusion whenever such a question shall be propounded.

Indecent publications not protected.

Upon the plainest principles of the law, founded upon common sense and justice, it is apparent that productions of an indecent nature will not be protected (*Stockdale* v. *Onwhyn*, 5 B. & C. 176; *Poplett* v. *Stockdale*, Ry. & M. 337), for laws are not passed "for the promotion or benefit of authors and inventors, except as a means of promoting the progress of science and the useful arts" (*Martinetti* v. *Maguire*, 1 Deady (Amer.), 216, *per* Deady, J.).

On the contrary, prohibited by statute.

By 20 & 21 Vict. c. 83, an Act for more effectually preventing the sale of obscene books, pictures, prints, and other articles, power is given to any metropolitan police magistrate, or other stipendiary magistrate, or for any two justices of the peace, to authorize a search of any premises in which any obscene books, papers, writings, prints, pictures, drawings, or other representations are suspected to be kept (s. 1), and any person wilfully exposing to view in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition shall be deemed a rogue and a vagabond, and may be punished accordingly (5 Geo. IV. c. 83, s. 4, amended by 1 & 2 Vict. c. 38, s. 2, and extended by 20 & 21 Vict. c. 83, *supra*).

No less deleterious to the public welfare are blasphemous writings punishable by law and subversive of all morality, and these consequently will not be protected (*Murray* v. *Benbow*, Jac. 474; *Lawrence* v. *Smith*, Jac. 471). Anything tending to impugn a fundamental doc-

trine of the Christian religion would appear to be blasphemous, as, for instance, a denial of the immortality of the soul (*Lawrence* v. *Smith*, *supra*, *per* Lord Eldon), for Christianity is part and parcel of the law of the land (*Cowan* v. *Milbourn*, L. R. 2 Ex. 230, *per* Kelly, C.B.). The general principle as laid down by Lord Eldon in *Murray* v. *Benbow* and *Lawrence* v. *Smith* would appear to be perfectly correct, but the only difficulty is in the application of that principle in such a practical way as to ensure substantial justice. It is evident that if to doubt the immortality of the soul is the beginning of blasphemy made perfect on the publication of such a doubt, other doctrines may be held equally obnoxious even though widely diffused or perhaps ardently embraced by a particular sect or body. A Unitarian, for instance, might be a blasphemer, and probably would have been held to be so by Lord Eldon, but now in all cases the *intent* to corrupt the public morals, to shock and insult believers, or to bring the established religion into hatred and contempt is an essential element in the crime. *Actus non facit reum nisi mens sit rea* (Odgers on Libel and Slander, 395).

Blasphemous publications not protected.

The law with respect to the essential qualifications of copyright is equally applicable to one subject as to another, and consequently it has been held that no copyright can exist in engravings or prints which have an obscene, immoral, or libellous tendency (*Fores* v. *Johnes*, 4 Esp. 95), and the same rule would no doubt apply to statuary or photographs. It is certain, however, that the law holds these productions in such abhorrence that no protection whatever will be afforded to any one who has knowingly been instrumental in the making of them. A printer, for instance, is not bound to continue printing a work which he finds to be tainted with libel, and if he stops he will be entitled to recover for so much as he has done before he made the discovery (*Clay* v. *Yates*, 1 H. & N.

Same rules apply to every species of intellectual production.

And parties engaged in manufacture cannot recover.

73; 2 Jur. (N. S.) 908; *Poplett* v. *Stockdale*, Ry. & M. 337; 2 Car. & P. 198); and so where A. agrees to supply B. with a manuscript to be printed by the latter on an equal division of profits, and it is found that the intended publication is of an illegal nature, no action will lie against A. for refusing to supply the manuscript (*Gale and Another* v. *Leckie*, 2 Stark. 107). It is thought that to an action of trespass for destroying a picture the defendant may plead that it was a scandalous libel upon individuals, and that being publicly exhibited he cut it to pieces by way of abating a nuisance; and if the defendant does not avail himself of that defence, still, in estimating the value of the picture for the purpose of assessing the damages, the nature of the subject will be taken into consideration (*Du Bost* v. *Beresford*, 2 Camp. 511; but see the remarks of the Lord Chancellor in *The Emperor of Austria* v. *Day and Another*, 7 Jur. (N. S.) 641; 4 L. T. (N. S.) 494), but secondary evidence of illegality will not be accepted where primary, such as the production of the obnoxious publication, can be obtained (*Gale* v. *Leckie*, 2 Stark. 110). Save in the instances previously enumerated, and others which might be considered as reflecting upon public good and morality, the liberty of the owner of an intellectual production is practically secured. The spirit which actuated and perhaps originated the restrictive influence of the old Star Chamber would seem to have disappeared from society, and of the practice and procedure of that obnoxious Court, its subpœnas and writs of rebellion, not a trace remains.

The publication or circulation may be forcibly abated. Quære!

Difference between a "proprietor" and an "inventor."

It may here be mentioned that the term "proprietor" so frequently made use of in all the copyright Acts differs in signification from "inventor." A proprietor is one who finds out something either by his own ingenuity, or he may be a mere owner without having exercised his brains at all, *e.g.*, he may acquire by purchase; an inventor, on

the contrary, signifies a person who actually discovers or contrives any new process, manufacture, or substance (see *Millingen* v. *Picken*, 9 Jur. 714). The word "proprietor," when applicable to the owner of a new and original design, is further defined in the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57, s. 91).

Censorship of stage plays.

The right of the Lord Chamberlain to prohibit the acting of stage plays (6 & 7 Vict. c. 68, s. 14) is founded upon just and generous principles clearly productive of the public good, and is the only instance of censorship which can be said to remain in England at the present day.

CHAPTER III.

ON THE INFRINGEMENT OF COPYRIGHT.

Infringement and plagiarism.

THE term infringement is identical with that of piracy, and both differ in some respects from mere plagiarism. The plagiarist appropriates to himself the labour of another, and passes the result off as his own production in such a way as to avoid the penalties of the law, which attach only on the invasion of some legal right. The literary pirate goes a step further and incurs actual liability, and that, whether he passes off the production as his own, or fairly acknowledges the sources from which he has copied or stolen (*Scott v. Stanford*, L. R. 3 Eq. 718); there can, therefore, be no plagiarism without at the same time misrepresentation as to authorship, although an infringer is equally liable whether there be any misrepresentation or not.

Invasion of literary property—three modes.

Literary property is liable to invasion in three modes. First, open piracy, as where a publisher in this country publishes an unauthorised edition of a work in which copyright exists, or where a man introduces and sells in this country a reprint made abroad. Secondly, literary larceny, as where a man, pretending to be the author of a book, illegitimately appropriates the fruits of previous authors' literary labour. Thirdly, where a man is selling a work under the name or title of another man or another man's work. Against the first two species of offences the Copyright Acts afford protection; against the third, the common law. (See the remark of James, L. J., in *Dicks* v.

Yates, 50 L. J. (N. S.) Ch. 315.) It must be remembered, however, that piracy consists only in the unlawful multiplication of copies, or extracts from such copies, whether for gratuitous circulation or for purposes of profit (*Novello* v. *Sudlow*, 12 C. B. 177); and there is consequently nothing whatever to prevent a person from reading publicly the whole or any portion of a copyright work (*Tinsley* v. *Lacy*, 32 L. J. Ch. 535; 11 W. R. 877, *per* Wood, V.-C.).

Any description of intellectual property which is capable of becoming the subject of copyright may be infringed, and this, whether it is actually published at the time, or is merely under the protection of the common law; in both instances it is obvious that the owner has a right of property in his production, unless, indeed, it be of a libellous, immoral, or blasphemous nature (see *ante*, p. 23).

In some few instances the infringer will deliberately copy *verbatim* the salient features of another's work (*Macwell* v. *Somerton*, 30 L. T. (N. S.) 11), and this is of course a gross piracy, not only by reference to the general judicial interpretation, but by reference to the statutory law also, for by 5 & 6 Vict. c. 45, s. 15, it is enacted "that if any person shall, in any part of the British Dominions, after the passing of this Act, print or cause to be printed, either for sale or exportation, any book (see s. 2) in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire any such book so unlawfully printed or imported without such consent as aforesaid, such offender shall be liable to a special action on the case, at the suit of the proprietor of such copyright, to be brought in any

Infringement under Statute.

court of record in that part of the British Dominions in which the offence shall be committed." Further, no person, not being the proprietor of the copyright or some person authorised by him, may import into any part of the United Kingdom, or into any other part of the British Dominions, for sale or hire, any copyrighted book first composed or written, or printed and published in any part of the United Kingdom, and reprinted elsewhere, under a penalty of forfeiture thereof, and also of £10 and double the value (*Ibid.* s. 17, and see s. 23; *Brooke* v. *Milliken*, 3 T. R. 509, as to separate penalties; 39 & 40 Vict. c. 36; (Customs). It will be observed, that under s. 15 no remedy is given against a person who prints or imports for gratuitous distribution, or who gratuitously distributes copies printed or imported without authority (but see *Novello* v. *Sudlow*, 12 C. B. 177). And independently of the section, it has been decided in Ireland that a common law right of action attaches upon the invasion of the statutory right, even though it be invaded by printing, publishing, &c., *part* of a work only, and not the whole of it (*Rooney* v. *Kelly*, 14 Ir. Law Rep. (N. S.) 158).

Substance of production must be taken.

The principles at the foundation of the body of law which has from time to time been built up and promulgated by the decisions of the Courts, are not limited in their application to instances where the *ipsissima verba* have been slavishly copied, for the identity of internal composition as contrasted with the slavish and outward embodiment of words is principally regarded (see *Perris* v. *Hexamer*, 99 U. S. (Amer.) 674). Words are mere instruments of expression, that which is expressed forms the principal subject of consideration; and where a person deliberately copies the actual sentences one by one in their natural order and sequence, it would appear that the interference of the Courts would be based more on considerations referring to the sentiments and ideas as

And not necessarily the mere words.

arranged and assorted, and to the method which the author had adopted, than to the identity of mere words which are common to all (see *Rooney* v. *Kelly*, 14 Ir. Law Rep. (N. S.) 172). Of course, the arrangement of the words constitutes an embodiment which will clearly be protected, for to appropriate an assortment of words is *prima facie* proof of piracy, and for this reason a defendant will, in the vast majority of instances, be found to have retained the meaning and effect of the composition, while at the same time he has to some extent discarded the verbal arrangement. He will appropriate the substance of the production, and the question in all these cases is whether he has done so, and not merely whether the identical language is used (*Lawrence* v. *Dana*, 4 Cliff. 40, 2 Am. L. T. R. (N. S.) 420, *per* Clifford, J.), although that will, of course, enter into the spirit of the enquiry (*Alexander* v. *Mackenzie*, 9 Sess. Cas. 2nd Ser. 754 (note); see the remarks of the Lord Ordinary). Thus, no person can under the pretence of quotation publish either the whole or part of another's work, though he may use any quotation in a fair manner (*Wilkins* v. *Aikin*, 17 Ves. 422; *Mawman* v. *Tegg*, 2 Russ. 393, *per* Lord Eldon; *Smith* v. *Chatto*, 31 L. T. (N. S.) 775; and see *Story's Executors* v. *Holcombe*, 4 McLean (Amer.) 306). And one work may be a piracy of another although the passages copied are properly described as quotations, and although they are not so extensive as to render the piratical work a substitute for the other (*Bohn* v. *Bogue*, 10 Jur. 420). Reviewers may make extracts sufficient to show the merits or demerits of the work reviewed, but they cannot so exercise the privilege as to supersede it. Sufficient may be taken to give a correct view of the whole, but the privilege of making extracts is limited to those objects, and cannot be exercised to such an extent that the review shall become a substitute for the book

Although identity of language may constitute piracy.

As piracy under pretence of quotations

reviewed (*Lawrence* v. *Ibid*, 2 Am. L. T. R. (N. S.) 428, *per* Clifford, J.). So where a person, under the pretence of an essay on modern English poetry, introduces by way of illustration a material part of another's property, he will be restrained (*Campbell* v. *Scott*, 11 Sim. 31).

The test of fair user of the copyright work of another has been differently applied by different judges. For instance, the question may be whether the one publication is "a legitimate use of the other in the fair exercise of a mental operation deserving the character of an original work" (*Wilkins* v. *Aikin*, 17 Ves. 426, *per* Lord Eldon); or whether the similarity between the substance of a second work and of a first is a mere coincidence, the result of similar observation, or whether the second work is substantially a transcript of the first with merely colourable alterations (*Alexander* v. *Mackenzie*, 9 Scotch Sess. Cas. 2nd Ser. 754, *per* Lord Fullerton). In no civil case is it necessary for the plaintiff to prove any *animus furandi* on the part of the defendant (see *Reade* v. *Lacy*, 1 J. & H. 527), for a piracy may be committed with the best intentions, and even although the defendant had not the slightest idea that he was infringing an existing copyright. The question as to whether certain copyrighted property has been improperly appropriated may, perhaps, best of all be resolved with reference to the rule stated by Wood, V.-C., in *Scott* v. *Stanford*, 16 L. T Rep. (N. S.) 52; L. R. 3 Eq. 722; taken from the judgment of Mr. Justice Story in *Folsom* v. *Marsh*, 2 Story (Amer.) 116, where the learned judge said, "In short, we must, in deciding questions of this sort, look to the nature and object of the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work." It is not, however, necessary that all of these things should concur in order

Or other selections from copyrighted works.

to entitle the plaintiff to relief (*Smith* v. *Chatto*, 31 L. T. (N. S.) 776, *per* Hall, V.-C.); and in all cases the primary, though not necessarily the exclusive subject of enquiry, is, what effect the extracts are likely to have upon the original work. The value and materiality of the part taken is looked to as well as the *quantum* (*Bramwell* v. *Halcomb*, 3 My. & Cr. 738; *Saunders* v. *Smith*, *ibid.* 711); for it is obvious that the quintessence of a book may be reproduced in a very small substance (see *Campbell* v. *Scott*, 11 Sim. 31; *Bradbury* v. *Hotten*, L. R. 8 Ex. 1; *Story's Executors* v. *Holcombe*, 4 McLean, 309 (Amer.), *per* McLean, J.; *Tinsley* v. *Lacy*, 1 Hem. & M. 753, *per* Wood, V.-C.; *Chatterton* v. *Cave*, 3 App. Cas. 497, *per* Lord O'Hagan). The rule of law is consequently sufficiently settled that an author is not entitled to save himself labour and pains by appropriating the results of the industry of another to such an extent or in such a manner as to enhance his own work at the expense of the previous one; and therefore where a plaintiff published a work to the copyright of which he was not entitled, with certain improvements and additions, and then the defendant published the whole work with the plaintiff's improvements, the Court refused to interfere, and Lord Loughborough, stated that if he was to do strict justice he should order the defendants to take out of their book all they had taken from the plaintiff, and reciprocally the plaintiff to take out of his all he had taken from the original work (*Cary* v. *Faden*, 5 Ves. 23).

"Copy" and "substantial identity."

It is frequently a matter of extreme difficulty to say whether a suspected document or work of intellectual production is or is not a "copy" of, or "substantially identical" with a former production, for the person infringing the rights of another will, as a rule, adopt every artifice to protect himself against the consequences of his act.

A "copy" has been described as "that which comes so

near the original as to give to every person seeing it the idea created by the original" (*West* v. *Francis*, 5 B. & Ald. 743, *per* Bayley, J., and see *Lewis* v. *Chapman*, 3 Beav. 133). To constitute "substantial identity," it is not necessary that one production should be a "copy" of the other, although the term "copy" may be, and no doubt is, included in the expression "substantial identity." This latter term is of much larger scope, and embraces instances in which the matter complained of, being spread over a greater area, is consequently more difficult to adjudicate upon. Both terms are exceedingly elastic; and while at one time a question of substantial identity is decided by the Court by comparison, at another, long and laborious evidence of minute analysis may have to be gone into (see *Pike* v. *Nicholas*, L. R. 5 Ch. 251; 38 L. J. (N. S.) Ch. 529). And although as a matter of principle the Judges may be perfectly in accord upon the question as to what amounts in theory to piracy, yet it by no means follows that any two of them will arrive at the same conclusion respecting the facts to which the principle is applied. Thus in one case James, V.-C., was of opinion that the plaintiff's work had been pirated, whereas the Lords Justices of Appeal came to a directly contrary conclusion (*Pike* v. *Nicholas*, *supra*). The question of "copy" or "substantial identity" is applied to every description of composition which can form the subject of copyright—to directories, and every species of literary property; to pictures, sculpture, designs, photographs, or in fact anything entitled to protection, either under the copyright statutes or at the common law. For instance, a person who deliberately copies a picture is liable to an action and cannot escape by showing that the copy is larger or smaller than the original (*Gambart* v. *Ball*, 14 C. B. (N. S.), 306; *Graves* v. *Ashford*, L. R. 2 C. P. 410; *Bradbury* v. *Hotten*, L. R. 8 Ex. 1).

Whether copyright work can be appropriated for the purpose of improvement, Quære.

There would appear to be authority for the statement that a person is entitled as of right to take the copyrighted work of another and republish it, provided he materially improve it, either in corrections, revisions, or annotations, and does not servilely copy it (*Sayre* v. *Moore*, 1 East, 362, note, *per* Lord Mansfield; and see *Cary* v. *Kearsley*, at *Nisi Prius*, 4 Esp. 169, *per* Lord Ellenborough; *Matthewson* v. *Stockdale*, 12 Ves. 275, *per* Lord Erskine; *Martin* v. *Wright*, 6 Sim. 298, *per* Shadwell, V.-C.; *Saunders* v. *Smith*, 3 My. & Cr. 711). There are, however, one English and two American authorities pointing to a different conclusion (*Scott* v. *Stanford*, L. R. 3 Eq. 722, *per* Wood, V.-C.; *Lawrence* v. *Dana*, 2 Am. L. T. R. (N. S.) 431, *per* Clifford, J.; *Drury* v. *Ewing*, 1 Bond, 549, *per* Leavitt, J.); and it is submitted that if a plea of this nature were allowed to prevail, it would be impossible to afford protection to literary property at all. If ever the question should be raised again it may almost certainly be predicted that the judgment of the Court will be against the contention that a person has a right to appropriate the work of another for the mere purpose of improving it, whether by annotation, revision, or otherwise.

Test of piracy by means of identity of mistakes.

The principal test of piracy, where it is otherwise difficult to say whether one production is a copy of or identical with another, is to collect the inaccuracies in both works, "for when a considerable number of passages are proved to have been copied by the copying of the blunders in them, other passages which are the same with passages in the original book must be presumed, *primâ facie*, to be likewise copied, though no blunders occur in them" (*Mawman* v. *Tegg*, 2 Russ. 394, *per* Lord Eldon). But to show that defendant has quoted the same authorities as the plaintiff, that he has used a similar quotation or utilized the information contained in plaintiff's work, is in itself and without further evidence, no proof of copying (*Pike* v. *Nicholas*, L. R. 5 Ch. 262), but had he made

several identical mistakes it might be so considered, although this would again depend upon circumstances, for in one case where a defendant in a series of 7,000 mathematical calculations had made seven mistakes identical with mistakes made by the plaintiff, and had made other mistakes as well which the plaintiff had avoided, the defendant's conduct was only described as "suspicious" (*McNeill* v. *Williams*, 11 Jur. 344). On a *primâ facie* case being made out against the defendant, the onus of proving the contrary is immediately thrown upon him (*Hotten* v. *Arthur*, 1 Hem. & M. 603; *Mawman* v. *Tegg*, 2 Russ. 395), and he can only escape by showing conclusively either that he has not used the plaintiff's work in any way, or that having used it he has nevertheless gone direct to common or other sources for his information. Evidence that the extracts complained of are to be found in other works than those of the plaintiff, while it may lessen the probabilities that there was unlawful copying, can never create a substantial defence (see Drone, Copy. 431). This proof by means of the identity of mistakes, though a most valuable assistance, is not necessarily in all cases a complete and final test, since it is obvious that one person may carefully copy or imitate colourably the work of another, and find out and correct all the mistakes during the process, and on the other hand the identity of mistakes may spring from the fact that the basis of argument adopted by each party has been erroneous and identical in both instances, and such a basis as would at first sight be adopted as a matter of course. Consequently, one author after another may, and does frequently, fall into the very same errors and mistakes, and in these cases it may be of the greatest assistance to the defendant to show that the same mistakes are to be found in the work of an author other than the plaintiff. The subject of the tests of piracy is very learnedly and lucidly treated at large in the judgment of Lord Hatherley in *Pike* v. *Nicholas*, L. R. 5

Ch. 257, and refer also to *Cox* v. *Land and Water Journal Co.*, L. R. 9 Eq. 324; *Mawman* v. *Tegg*, 2 Russ. 385.

"*Animus*" and plea of ignorance not to the point.

The *animus furandi*, or fraudulent intention of the person charged with committing a piracy is not a necessary element in the case, and the absence of it cannot be made the basis of a defence (*Roworth* v. *Wilkes*, 1 Camp. 94), for if A. takes the property of B., *animus* is inferred from the mere act, even although the offence were committed without any dishonest intention, since every man must be presumed, in point of law, to intend everything to which his acts naturally lead. If, for instance, the rights of an author are clearly infringed, it can be of no importance to know with what intent this was done (*Campbell* v. *Scott*, 11 Sim. 31: and see *Scott* v. *Stanford*, L. R. 3 Eq. 723, *per* Wood, V.-C.; *Bradbury* v. *Hotten*, L. R. 8 Ex. 1, 42 L. J. (N. S.) Ex. 28; *Smith* v. *Chatto*, 31 L. T. (N. S.) 775, 23 W. R. 290); and the American law on the subject is to the same effect (*Millett* v. *Snowden*, 1 West. Law Journ. 240; *Story's Executors* v. *Holcombe*, 4 McLean, 306; *Lawrence* v. *Dana*, 2 Am. L. T. R. (N. S.) 427, *per* Clifford, J.). On the other hand, it must be remembered that evidence of innocent intention may have a bearing upon the question of "fair use," and evidence of *animus* may be given for the purpose of showing that the copying is either not fair or the contrary (see *Spiers* v. *Brown*, 6 W. R. 352, *per* Wood, V.-C.). A person cannot, unless protected by some statutory provision, plead *ignorance* in an action for piracy, for in any event the injury to the plaintiff is the same, and the defendant must, if he would enjoy the fruits of another's labour, take also the risk (see *Murray* v. *Bogue*, 1 Drew. 353, 17 Jur. 219; *Novello* v. *Ludlow*, 12 C. B. 177, 16 Jur. 689; *Gambart* v. *Sumner*, 5 Hurl. & N. 5, 5 Jur. (N. S.) 1109; *Reade* v. *Conquest*, 11 C. B. (N. S.) 479, 8 Jur. (N. S.) 764; *Rock* v. *Lazarus*, L. R. 15 Eq. 104, 42 L. J. (N. S.) Ch. 105; *Millett* v. *Snowden*, 1 West.

Law Journ. (Amer.) 240). It may, therefore, be considered as settled that a plaintiff's rights do not depend upon the innocence or guilt of the defendant, and that allegation and proof of *scienter* are not necessary (*Lee* v. *Simpson*, 3 C. B. 883, *per* Wilde, C.J.). A person who prints or imports a work in which there is subsist-

Except by statute.

ing copyright, contrary to 5 & 6 Vict. c. 45, s. 15, cannot plead that he was in point of fact ignorant of the right of the proprietor of the copyright; but if a person not knowing that he was committing an injury, should sell, publish, or expose to sale a work so printed or imported, he would not be liable, unless he were at the same time the printer or importer. The words of the section are adopted from the corresponding section of 54 Geo. III. c. 156 (s. 4), which it follows, except that instead of repeating the words "without the consent in writing," to each condition of infringement, it uses the words, "so unlawfully printed, &c.," which were perhaps incorrectly adopted to avoid repetition (*Novello* v. *Ludlow*, 12 C. B. 189, *per* Talfourd, J.). It is apparent, therefore, that a decision on this point, under the statute of George III., would be entitled to the same degree of weight, as if it had been given under 5 & 6 Vict. c. 45, and it is plain that according to the former statute, as well as according to the reason of the case, a person not knowing that he was committing an injury, may publish or sell a work of which the copyright is in another with perfect innocence. The Act, speaking of the person publishing or selling, says, that it must be with notice that the work was unlawfully printed. The situation of the printer is more onerous: he may be an offender within the terms of the Act and liable to its penalties even when it is possible that he may have acted in ignorance that he was committing a wrong upon anyone (see *Colburn* v. *Simms*, 2 Hare, 557, *per* Wigram, V.-C.). There are also other cases in which knowledge of piracy must be proved, but they always arise

out of some statutory provision, and can consequently be referred to when the statutes themselves come to be discussed. In the United States *animus* must be shown on the part of the seller of any piratical copy of any work (s. 4964) or "of a copyrighted map, chart, musical composition, print, cut, engraving, photograph, chromo, painting, drawing, statue, statuary or model, or design, intended to be perfected and executed as a work of the fine arts" (Revised Statutes, s. 4965; *Millett* v. *Snowden*, 1 West. Law Journ. 240). A similar rule does not, however, hold in England under the statute relating to engravings (17 Geo. III. c. 57), for here the seller is liable, whether he was actuated by guilty knowledge or not (*West* v. *Francis*, 5 B. & Ald. 737; *Gambart* v. *Sumner*, 5 H. & N. 5). The idea that a certain *animus* is necessary to be proved in all actions of piracy at one time held its place or was introduced into the arguments of counsel, and this seems to have sprung from the dictum of Lord Ellenborough in *Cary* v. *Kearsley*, 4 Esp. 167. It is, however, now certain, that save in such cases as may be governed by special legislative enactments it is never necessary to show either *animus* or knowledge (see *Reade* v. *Lacy*, 1 J. & H. 527), although in some instances it may be advisable to prove either one or the other, for if the alleged piracy should be difficult to discover, the question of intent may very materially affect the question. In one case where there was copying, but it was exceedingly difficult to say whether it was piratical or not, and the defendant went out of his way to deny the copying *in toto*, this was held to be a strong indication of *animus* (*Jarrold* v. *Houlston*, 3 K. & J. 708, and see *Spiers* v. *Brown*, 6 W. R. 352); and under these circumstances the intention of the party raises, with respect to what might otherwise have been held to be an innocent production, a *primâ facie* suspicion of piracy.

American legislation.

Contrasted with English.

It may be advisable to prove animus in certain cases.

In actions under 3 & 4 Will. IV. c. 15, s. 2, as extended by 5 & 6 Vict. c. 45, ss. 20, 21, an Act to amend the laws relating to dramatic literary property; it is not necessary to show that the defendant knowingly invaded the plaintiff's right (*Lee* v. *Simpson*, 3 C. B. 871).

Copyright publications not a rule covered by statute.

The first statute regulating the law relating to copyright was 8 Anne, c. 19, repealed by 5 & 6 Vict. c. 45, s. 1. The Act itself applied exclusively to books, and this is practically the case with the statute of Victoria. Under other enactments different descriptions of intellectual productions are protected, and at the present day there are but few, if any, which do not come within the provisions of one or other of the statutes relating to copyright.

"Book," what it includes.

The word "book" as defined by the second section of 5 & 6 Vict. c. 45, is construed "to mean and include every volume, part, or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan, separately published." The words of the section have been most liberally interpreted by the Courts; for instance, periodicals and magazines are "books" (*Henderson* v. *Maxwell*, 4 Ch. D. 163), and so was "any composition large or small" within the meaning of 54 Geo. III. c. 156, an Act now repealed (5 & 6 Vict. c. 45, s. 1), (*White* v. *Geroch*, 2 B. & Ald. 298, 1 Chit. 24). Where a work consists of several independent parts each of them will be protected as a "book" (*White* v. *Geroch*, *supra*; *D'Almaine* v. *Boosey*, 1 Y. & C. Ex. 288). Musical compositions are included in the words "sheet of music" occurring in 5 & 6 Vict. c. 45, s. 2, although they were protected by earlier statutes (*Bach* v. *Longman*, Cowp. 623; *Clementi* v. *Golding*, 2 Camp. 25; *Storace* v. *Longman*, 2 Camp. 26, note (*a*); *Platt* v. *Button*, 19 Ves. 447; *White* v. *Geroch*, *supra*; *D'Almaine* v. *Boosey*, *supra*; *Chappell* v. *Purday*, 4 Y. & C. Ex. 485; 14 Mees. & W. 303; and see *Jefferys* v. *Boosey*, 4 H. L.

Cas. 815). In one case it was held that a subject of copyright existed in eight lines of letter-press (*Cobbett* v. *Woodward*, L. R. 14 Eq. 407, 41 L. J. (N. S.) Ch. 656), but in another that seven lines of letter-press were not entitled to protection (*Page* v. *Wisden*, 20 L. T. (N. S.) 435), and a separate article advertised to form part of a periodical publication is not a "book" within the meaning of 5 & 6 Vict. c. 45, s. 2 (*Murray* v. *Maxwell*, 3 L. T. (N. S.) 466, 1 J. & H. 312, reported as *Mayhew* v. *Maxwell*). Copyright may, however, exist in a single sheet of composition or letter-press (see *Clementi* v. *Golding*, 2 Camp. 25; *Hime* v. *Dale*, 2 Camp. 27 (note *b*); *White* v. *Geroch*, 2 B. & Ald. 298; *D'Almaine* v. *Boosey*, 1 Y. & C. Ex. 299, *per* Lord Abinger). The "title" of a book is not however "part" of such book within the 2nd and 13th sections of 5 & 6 Vict. c. 45, and consequently will not be protected on registration (*Hogg* v. *Maxwell*, L. R. 2 Ch. App. 317, 16 L. T. (N. S.) 130). But a newspaper is a "book" within the meaning of the 18th section of the same statute, and must therefore be registered in order to give the proprietor a copyright in its contents and a right to sue in respect of the piracy of any article therein (*Walter* v. *Howe*, 50 L. J. Ch. (N. S.) 621, 44 L. T. Rep. (N. S.) 727; *Cox* v. *Land and Water Journal Company*, 39 L. J. Ch. (N. S.) 152, L. R. 9 Eq. 324, not followed). It has recently been decided that a card perforated so as to make a picture by way of a shadow on a wall, and accompanied by a paper having on it descriptive verses—both enclosed in an envelope having on it a printed title—is not an original work of such a character as to be entitled to copyright (*Cable* v. *Marks*, W. N. 1882, p. 165, 52 L. J. Rep. (N. S.) Ch. 107). There is, however, nothing in the copyright Acts to exclude from the benefits of its protection, books consisting of pictures only, or to restrict the Act to books containing letter-press (*Maple* v. *Junior Army and Navy Stores*, 52 L. J. Rep. (N. S.) Ch. 67). In the

American law.

United States no attempt has been made to determine by statute the meaning of the word "book;" the judicial decisions are, however, to the same effect as the English (see *Drury* v. *Ewing*, 1 Bond (Amer.), 540). Whether a private letter from one person to another could be brought within the protection of the Act in cases where such letter had not been written in the ordinary way, but printed or lithographed by the author, is a matter of speculative inquiry; and it is a question whether a letter so printed could be described as a "sheet of letter-press" within the meaning of 5 & 6 Vict. c. 45, s. 2, and as such not liable to protection unless registered under the Act. The principle applying to private letters is practically the same as that which applies when the owner of a manuscript permits another to make a copy of it or to read it; in this case the owner of the manuscript retains all his rights of property so far as publication is concerned (*Duke of Queensbury* v. *Shebbeare*, 2 Eden, 329), and what rights of property are lost and what retained is a question of intention as appearing from the evidence (*ante*, p. 3). So also the writer of a letter, whether he actually wrote it or whether he printed it, would not appear to part with any Common Law right of property, unless he clearly from the evidence intended so to do (see *Thompson* v. *Stanhope*, Amb. 736). The law assumes that the sender of a letter did not as a matter of fact intend to part with his property in it, and in one case where the writer had refused to receive his own letters when tendered by the

Private letters, relative rights of writer and recipient.

ver, saying at the same time that she (the receiver) t keep them; this was held to give her no right of publication (*Thompson* v. *Stanhope*, Amb. 736), and the utmost rights of property a receiver could have would be in the paper on which the letter was written (*Pope* v. *Curl*, 2 Atk. 341, and see *Howard* v. *Gunn*, 32 Beav. 462; *Oliver* v. *Oliver*, 11 C. B. (N. S.) 139; *Boosey* v. *Jefferys*, 6 Ex. 583, *per* L. Campbell). And to this extent

an action of detinue would lie against any person into whose possession the letter might have passed, even against the writer himself (*Oliver* v. *Oliver*, 11 C. B. (N. S.) 139), or the receiver might, should he think fit, apply for an injunction to restrain the publication by a third party (*Granard* v. *Dunkin*, 1 Ball & B., Irish, 207). An author therefore may be said to retain a qualified property in the contents of letters written by him to others, and he alone has a right to publish them for his own benefit. On the other hand the recipient of a private letter, sent without any reservation express or implied, is invested with the general property in such letter, qualified only by the incidental right in the author to publish and prevent publication by the recipient or any other person. The general property implies the right in the recipient to keep the letter or to destroy it, or to dispose of it in any other way than by publication, consequently the author and the recipient cannot hold a joint property in the letter because that would entitle each to the possession (see *Grigsby* v. *Breckinridge*, 2 Bush. Ky. 480).

American law.

The American law with respect to the rights of property as subsisting in or over private letters is the same as the English (*Denis* v. *Leclercq*, 1 Martin (Orleans T.) 297; *Folsom* v. *Marsh*, 2 Story, 100; *Wetmore* v. *Scovell*, 3 Edw. Ch. (N. Y.) 515; *Hoyt* v. *Mackenzie*, 3 Barb. Ch. (N. Y.) 320, 6 N. Y. Leg. Obs. 345; *United States* v. *Tanner*, 6 McLean, 128; *Woolsey* v. *Judd*, 4 Duer. (N.Y.) 379, 11 How Pr. (N. Y.) 49; *Eyre* v. *Higbee*, 22 How Pr. (N. Y.) 198, 35 Barb. S. C. (N. Y.) 503; *Grigsby* v. *Breckinridge*, *supra*).

It must be observed that it is in all instances perfectly immaterial for what purposes the defendant intends to publish the letter (*Gee* v. *Pritchard*, 2 Swanst. 415, *per* Lord Eldon), as the right of property subsisting in the

author, and which is the ground of the interference of the Court, is in any case equally infringed (*idem*, and see also *Woolsey* v. *Judd*, 4 Duer. (N. Y.) 384; *Grigsby* v. *Breckinridge*, 2 Bush. (Ky.) 480).

Cases in which letters are exclusive property of receiver.

In some cases letters are by virtue of the relationship existing between the parties the exclusive property of the receiver, or some person other than the writer, as for instance where the solicitor of a company wrote a letter to a third person respecting the company's business it was held that the document belonged to the company and not to the solicitor. In this case the solicitor swore that the letter was written and forwarded by him in his private capacity (*Howard* v. *Gunn*, 32 Beav. 465), but no intimation to that effect appeared on the face of the letter itself, as for instance by the use of such words as "private," "confidential," or the like (*ibid.* p. 466). It was stated *obiter* by the Vice-Chancellor in *Percival* v. *Phipps*, 2 Ves. & B. 28, that it would be very extraordinary to describe ordinary business correspondence as a literary work in which the writer could have copyright; but it is now certain that the Vice-Chancellor was in error when he drew the distinction between business letters and letters possessed of literary merit (*Folsom* v. *Marsh*, 2 Story (Amer.) 110; *Gee* v. *Pritchard*, 2 Swans. 426, *per* Lord Eldon; *Woolsey* v. *Judd*, 4 Duer. (N. Y.) 379, overruling *Wetmore* v. *Scovell*, 3 Edw. Ch. (N. Y.) 515, and *Hoyt* v. *Mackenzie*, 3 Barb. Ch. (N. Y.) 320; *Brandreth* v. *Lance*, 8 Paige's R. (Amer.) 24, 26). The receiver of a letter, no matter of what nature, has consequently no right to publish it without the consent of the person who wrote it; he may have a perfect right to destroy it, to read it, or to let any third party read it (unless this should be held to amount to a publication), but he has no right to publish it save and except in one instance only, that is to say as a refutation against false

No distinction between business letters and those of literary nature.

charges against his character subsequently made by the writer (*Percival* v. *Phipps*, 2 Ves. & B. 19, and see the American cases *Folsom* v. *Marsh*, 2 Story, 111; *Woolsey* v. *Judd*, 4 Duer. (N. Y.) 407; but refer to the decision of Bruce, V.-C., in *Pulin* v. *Gathercole*, 1 Coll. 565); and even in this case such right of publication does not extend beyond the purposes of an action at law, and as a necessary part of the evidence (see *Folsom* v. *Marsh*, 2 Story, 111, *per* Mr. Justice Story; also 2 Story's Eq. Juris. par. 948).

Woolsey v. Judd.

The whole subject of private letters was very carefully considered in the American case of *Woolsey* v. *Judd*, 4 Duer. 379, and the principles there laid down, founded as they are upon the English decisions, may be considered to be a correct exposition of the law. The case came before the superior court of the city of New York on appeal, and the complaint stated in substance that the defendants by some unlawful means had possessed themselves of a copy or copies of a certain letter, wholly private in its character, which the petitioner had written and forwarded to one William Crowell, and that they had avowed their intention to publish the same in a weekly journal of which they were the editors, proprietors, or publishers. The complaint therefore prayed that they might be restrained from printing, publishing, circulating, or in any other manner, either by writing or otherwise, making public the said letter or any part thereof. The Court below had granted an injunction in these terms and the defendants now moved upon affidavits to dissolve it. It was eventually decided by the Court as follows:—

1. That equity will not interfere to restrain the publication of private letters merely because such publication may be, or even will be, injurious to society. (An injunction will be granted whenever it is necessary to prevent the unauthorized use of that which is the exclusive pro-

porty of another (*Southey* v. *Sherwood*, 2 Mer. 438, *per* Lord Eldon).

2. The foundation of its jurisdiction is the right of property at Common Law subsisting in the plaintiff after the letter has been delivered at its destination (see Curtis on Copyright, pp. 84, 150, 159).

3. The writer of letters, whether they are literary compositions or familiar letters, or letters of business, possesses the sole and exclusive right of publishing the same, and that without this consent they cannot be published either by the person to whom they are addressed or by any other person (see *Pope* v. *Curl*, 2 Atk. 341; *Thompson* v. *Stanhope*, Amb. 737; *Percival* v. *Phipps*, 2 Ves. & B. 19; *Wetmore* v. *Scovell*, 3 Edw. Ch. R. (Amer.) 515; *Hoyt* v. *McKenzie*, 3 Barb. Ch. R. (Amer.) 314).

4. That the receiver of letters may, however, justify their publication when it is shown to be necessary to the vindication of his own rights or conduct against unjust claims or imputations (see *Gee* v. *Pritchard*, 2 Swanst. 402; Story's Eq. Jurisp. par. 945-8; *Folsom* v. *Marsh*, 2 Story R. (Amer.) 100).

5. If the receiver attempt to publish the letters, or any parts of them, against the wishes of the writer, and upon occasions not justifiable, a court of equity is bound to prevent the publication by injunction as a breach of that exclusive property which the writer retains.

6. As against a stranger who has possessed himself of the letters or of copies thereof unlawfully, the right to restrain the publication by an injunction is absolute. Such person not being justified in publishing the letters for any purpose whatever.

The cases of *Wetmore* v. *Scovell*, 3 Edw. Ch. R. 515, and of *Hoyt* v. *McKenzie*, 3 Barb. Ch. R. 314, in so far as they decided that an injunction to restrain the publication of private letters could only be granted when it

appeared that the letters possessed a certain value as literary compositions were disapproved of.

The right of property in private letters or other communications of a like nature, is therefore, in the majority of cases, vested in the person who inscribes them, and this subsisting right of property is founded solely on the strong probability that had he intended to part with such right, the intention would have been apparent, either by presumption, from the nature of the case, or from direct evidence.

Letters to editor of a newspaper.

The proprietor of a periodical is clearly entitled to publish all letters received from correspondents, unless indeed he be expressly or impliedly forbidden to do so; the inference in this case is, that letters sent to the editor or proprietor are intended for publication (see *Hogg* v. *Kirby*, 8 Ves. 215.) There is nothing, however, to prevent the writer from withdrawing the permission, whether given expressly or impliedly, before the publication actually takes place (*Davis* v. *Miller and Another*, 17 Ct. Sess. Cas. 2nd Ser. 1166). According to an American decision it is clear that the Government has the right of property in all communications addressed to its officers, and this of course carries with it the dependent right of publication; this exception is founded on principles of general policy (*Folsom* v. *Marsh*, 2 Story, 113, *per* Story, J.).

Letters addressed to public officers.

Measure of damages for wrongful publication of private letter.

It has not yet been decided whether an action of damages will lie at the suit of the writer for the wrongful publication of his letters (see *Davis* v. *Miller*, *supra*), but it is thought that the plaintiff would be entitled to recover either nominal or substantial damages by action founded on the common law. The measure of damages would be a question of the greatest difficulty, but it is probable that the plaintiff would be entitled to nominal damages for the injury to his property, without any proof of de-

privation of profits or consequential loss (see *Blofield* v. *Payne*, 4 B. & Ad. 410; *Burnett* v. *Phelon*, 21 How. Pr. (Amer.) 100). It would be exceedingly speculative, however, to extend the supposition to any greater length.

Right of sender purely a Common Law right.

It will have been clearly observed that the property which the writer of a letter has in his production is exclusive by virtue of the common law, and that the question of publication is one dependent entirely upon evidence; and with respect to this the primary rule is that the sender of a written communication must, in the absence of any positive or apparent intention, be taken to have reserved the right of publication.

Copyright in portion of a work valid.

An author has a copyright in a portion only of a work (*Lane* v. *Ward*, L. R. 6 Eq. 418, *per* Giffard, V.-C., 37 L. J. Ch. 841), and is, it would seem, entitled to an injunction against a person who copies the whole (*Mason* v. *Murray* 1 East, 360 (cited)); and in those cases in which part of a work is for some reason or other not entitled to protection, the copyright will be valid to the extent of the matter which will stand the test of the law (*Barfield* v. *Nicholson*, 2 Sim. & St. 1; *Lawrence* v. *Dana*, 2 Amer. L. T. (U.S.) 402, *Cary* v. *Longman*, 1 East, 358). It was at one time considered that unless a party had an exclusive right to the whole work he could not claim copyright in any portion of it, and although this opinion is founded at first sight on grounds apparently substantial, it cannot now be supported (*Cary* v. *Longman*, 1 East, 360, *per* L. Kenyon; *Barfield* v. *Nicholson*, *supra*; *Lawrence* v. *Dana*, *supra*; for since copyright protects the whole of a book, it must be taken *a fortiori* to protect any part thereof, whether consisting of text, or engravings to illustrate the text (*White* v. *Geroch*, 2 B. & Ald. 298, 1 Chit. 24; *D'Almaine* v. *Boosey*, 1 Y. & C. Ex. 288, 4 L. J. (N. S.) Ex. Eq. 21; *Rowarth* v. *Wilkes*, 1 Camp. 94;

Wilkins v. *Aikin*, 17 Ves. 422; *Bradbury* v. *Hollen*, L. R. 8 Ex. 1, 42 L. J. (N. S.) Exch. 28; 21 W. R. 120; *Bogue* v. *Houlston*, 5 De G. & Sm. 273, *per* Parker, V.-C.).

The mere title of a book, newspaper, or other publication is not a subject of copyright (*Maxwell* v. *Hogg*, L. R. 2 Ch. 307, 36 L. J. (N. S.) Ch. 433; *Dicks* v. *Yates*, 50 L. J. (N. S.) Ch. 809; and see *Innes* v. *Daly*, 7 Jones & Sp. (Amer.) 511), even although it be registered under the copyright Acts (*Maxwell* v. *Hogg*, *supra*); but there is nevertheless a right of property in such title somewhat analogous to that which the owner of a trade mark has in his mark, and consequently where it can be shown that the use of it by the defendant is calculated to deceive the public, an injunction will be granted (*Bradbury* v. *Beeton*, 39 L. J. Ch. 57, 18 W. R. 33; *Weldon* v. *Hicks*, 10 Ch. D. 247), and this whether he had or had not any intention to injure the plaintiff or any third person (*Clement* v. *Maddick*, 1 Giff. (Ch.) 98; 5 Jur. (N. S.) 592). There are cases from which it might with some show of plausibility be argued, that the property subsisting in a "title" is altogether different from that subsisting in a trade mark (*Spottiswoode* v. *Clarke*, 2 Ph. 157, *per* Lord Cottenham; *Mack* v. *Petter*, L. R. 14 Eq. 431, *per* Lord Romilly; and see the remarks of Bacon, V.-C., in *Kelly* v. *Byles*, 40 L. T. (N. S.) 626); but unless these cases can be supported, and it is submitted that they cannot, the law with respect to the subject will be the same as that regulating rights analogous to trade marks proper. It is clearly settled that there can be no property in a title descriptive of the contents of the volume (*Young* v. *Macrae*, 9 Jur. (N. S.) 324, *per* Wood, V.-C.; *Bradbury* v. *Bustard*, 1. H. & M. 447), or in a title which is a mere advertisement of the contents (*Chearin* v. *Walker*, L. R. 5 Ch. D. 850); and so also on similar principles, where the defendant

"Title" of a book and periodical.

Except as to trade mark.

Descriptive title.

Plaintiff must show that title calculated to deceive.

has not copied the exact title, the plaintiff must show that the appearance and existing title of the publication are calculated to deceive ordinary purchasers (*Bradbury* v. *Beeton*, 18 W. R. 33; *Kelly* v. *Byles*, 40 L. T. (N. S.) 626, *per* Bacon, V.-C.), that is to say, he must prove a probability of deception (see *Hall* v. *Barrows*, 12 W. R. 322; *Chappell* v. *Davidson*, 2 K. & J. 123); for if no deception is to be apprehended the plaintiff will have no case, even although it be proved that part of his title has in point of fact been used (*Spiers* v. *Brown*, 6 W. R. 352; *Kelly* v. *Byles*, 40 L. T. (N. S.) 623, on Appeal, 13 Ch. Div. 691, and refer to *Jarrold* v. *Houlston*, 3 Kay & J. 712; *Reade* v. *Lacy*, 1 Johns. & H. 524). In one case it was decided that although there was no copyright in the mere title of a song, still a defendant would be restrained from adopting the title itself or a colourable imitation of it, on principles analogous to those regulating the infringement of trade marks, and this clearly affirms the recognised principle (*Chappell* v. *Sheard*, 2 K. & J. 117; *Same* v. *Davidson*, 2 K. & J. 123). And so also the title of a newspaper, although there is nothing analogous to copyright in it, is still a species of property to which the owner is entitled against any other person (*Bell* v. *Locke*, 8 Paige (Amer.) 75); and it is also a chattel interest, capable of assignment (*Kelly* v. *Hutton*, 3 Ch. App. 703). It has, however, been decided that the name of the editor on the title page of a periodical does not form part of the title (*Crookes* v. *Petter*, 3 L. T. Rep. (N. S.) 225).

American law.

The American law with respect to the title of a publication is regulated by Sees. 4937-4947, 4956 of the Revised Statutes, where it is in effect provided that the title of every publication shall be registered as a trade mark, and if this is done the registered proprietor may of course

maintain an action for infringement (see *Donnelley* v. *Ivers*, 20 Blatchf. 381).

Copyright which protects an original edition protects also every subsequent edition if it be substantially the same, but new matter in such subsequent edition will not be protected unless the work be re-registered (*Tonson* v. *Walker*, 3 Swanst. 672; *Cary* v. *Faden*, 5 Ves. 24; *Cary* v. *Longman*, 1 East, 358, 3 Esp. 273; *Holderwick* v. *Griffin*, 3 Sc. Sess. Cas. 2nd Ser. 383; *Black* v. *Murray*, 9 Sc. Sess. Cas. 3rd Ser. 341). The American law in this respect is substantially the same (*Gray* v. *Russell*, 1 Story, 11, 2 Law Rep. 294; *Lawrence* v. *Dana*, 2 Amer. L. T. (N. S.) 402; *Banks* v. *McDivitt*, 13 Blatchf. 163; *Farmer* v. *Calvert Publishing Co.*, 5 Amer. L. T. R. 168, 173). The law on the subject has been succinctly stated by Lord Ardmillan in the Scotch case, *Black* v. *Murray*, 9 Sess. Cas. 3rd Ser. 353, in which that learned judge is reported as having said, "A new edition is not necessarily a subject of copyright, but it may be so. There must be some originality in it, it may be in new thoughts or in new illustrations, or in new explanatory and illustrative annotation, or even in some peculiar instances, in simply new arrangement. If in any of these respects there is independent mental effort then, in the result of that mental effort there may be copyright." But in order to create copyright in a new edition there must be more than a few emendations of the text or a few additions of unimportant notes: they must be extensive and substantial, practically making a new book; and with regard to the notes they must exhibit an addition to the work which is not superficial or colourable, but imports to the book a true and real value over and above that which belongs to the text (*Black* v. *Murray*, *supra*, 355, *per* Lord Kinloch). Consequently the consideration does not resolve itself merely into a question of *quantum*, but into one of sub- *Copyright in new edition.*

stantial intellectual distinction. The alteration of a single word was in one instance thought to constitute a material difference (*Black* v. *Murray*, *supra*, *per* Lord Dean), but in another, where a plaintiff claimed copyright in a revised edition of Dr. Channing's works, and the revision consisted merely in a change of various titles, and a few corrections and emendations, it was held that the alterations were insufficient to sustain copyright; and this is doubtless the proper method of viewing the matter (*Haldermick* v. *Griffin*, 3 Sc. Sess. Cas., 2nd Ser. 383).

In considering whether a new edition of a work is entitled to a fresh copyright, the question whether such copyright will protect simply such parts of it as may happen to be new, or whether it will extend to the whole work, depends upon the nature and extent of the revision in each case (*Cary* v. *Longman*, 1 East, 358; *Black* v. *Murray*, 9 Sc. Sess. Cas., 3rd Ser. 341). It is, however, immaterial whether the copyright in the original edition or in any of the previous editions has or has not expired; where it has expired any one may by revision or annotation re-publish the work as original, and it will be protected on registration (*Tonson* v. *Walker*, 3 Swanst. 672; *Gray* v. *Russell*, 1 Story, 11; *Cary* v. *Longman*, 1 East, 358; and see *Cary* v. *Faden*, 5 Ves. 24); but where the copyright has not expired, none but the author, or some person with his assent, has a right of republication (*Sweet* v. *Cater*, 11 Sim. 572). The copyright in each edition registered as a new and independent work will extend from the date of such registration without reference to any of the preceding editions (*Murray* v. *Bogue*, 1 Drew. 353, 17 Jur. 219), and a person who has a right to annotate the work of another will be entitled to copyright in the annotations as combined with the original text (*Tonson* v. *Walker*, 3 Swanst. 672; *Black* v. *Murray*, 9 Sc. Sess.

Cas., 3rd Ser. 341; *Lawrence* v. *Dana*, 4 Amer. L. T. (N. S.) 402; *Banks* v. *McDivitt*, 13 Blatchf. 163).

Compilations.

Selections from sources which are common or *publici juris*, arranged or combined in any useful or original way are entitled to copyright as "compilations," and any number of people may use the same common materials for a similar work so long as they do not servilely copy one from another, or from any previous copyrighted compilation (*Hogg* v. *Kirby*, 8 Ves. 215; *Hotten* v. *Arthur*, 1 H. & M. 603, 32 L. J. Ch. 771; *Bullinger* v. *Mackay*, 15 Blatchf. 550). A work of this description will, therefore usually depend for its protection upon questions of arrangement or combination (*Haldenwick* v. *Griffin*, 3 Sc. Sess. Cas. 2nd Ser. 383; and see *Jollie* v. *Jaques*, 1 Blatchf. 618), for the materials are commonly taken *verbatim* from the same source common to all, and are very unfrequently found to be new or original (*Lawrence* v. *Dana*, 2 Am. L. T. (N. S.) 402; *Black* v. *Murray*, 9 Sc. Sess. Cas. 3rd Ser. 341; *Banks* v. *McDivitt*, *supra*).

It has been decided in a recent American case that a person is not entitled to copyright for a plan, arrangement or method, which is such as would naturally occur to any intelligent person intending to impart information of a similar character (*Bullinger* v. *Mackay*, 15 Blatchf. 550), and this decision is right, for unless the author arranges and combines his materials in a new form, and gives them an application previously unknown, he cannot be said to have exercised any skill or discretion in making his selections, nor to have presented anything that is new and useful to the world.

A compilation may consist of any number of facts or pieces of information which the compiler has collected, arranged, and reduced into writing; a dictionary is a compilation, so is a directory, and so also is a collection of

material facts obtained from manuscripts (*Scott* v. *Stanford*, L. R. 3 Eq. 718; and see *Maclean* v. *Moody*, 20 Sc. Sess. Cas. 2nd Ser. 1154) as well as selections made from previously published works; the compiler must in each instance have a right to use the materials he has collected, otherwise he may render himself liable to an action for piracy. Where a compiler in the course of his investigations is referred by another whom he consults to a statement or quotation contained in the works of some ancient author, in whose production copyright does not exist, there the compiler may copy the identical words from the later author, without rendering himself liable to an action, for the copyright protects the arrangement, and not the materials (*Pike* v. *Nicholas*, L. R. 5 Ch. 251); but if a compiler use the same materials in the same combination as a previous writer, he is clearly liable, although he might with impunity adopt a similar arrangement for different selections, or employ the same selections in a different manner (see *Barfield* v. *Nicholson*, 2 Sim. & St. 1; *Spiers* v. *Brown*, 6 W. R. 352). So where the compiler does not give the common matter exactly as he finds it, but remodels it by clothing it in different language, or by abridging it or by altering the vernacular, as in a translation, his work is clearly entitled to protection, as an original production. So, "if any one by pains and labour collects and reduces into the form of a systematic course of instruction, those questions which he may find ordinary persons asking in reference to the common phenomena of life with answers to those questions and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former general reading, or out of works consulted by him for the express purpose, the reduction of questions so collected, with such answers, under certain heads, and in a scientific form, is amply sufficient to con-

stitute an original work, . . which the copyright will be protected" (*Jarrold* v. *Houlston*, 3 K. & J. 713, *per* Wood. V.-C.; *Lawrence* v. *Dana*, 2 Am. L. T. (N.S.) 402). A collection of hymns may in some cases be a valuable compilation (*Marsiala* v. *Gibbons*, L. R. 9 Ch. 518, 43 L. J. (N.S.) Ch. 774, and see *Randall* v. *Murray*, Jac. 314). A person does not necessarily cease to be entitled to protection merely because his work is precisely similar to that of a previous compiler, for it may be that both works if correct, cannot be otherwise than similar, as in the case of interest-tables and mathematical calculations based on the same data and on the same principles (*Bailey* v. *Taylor*, 3 L. J. Ch. 66, 1 Russ. & My. 73; *McNeill* v. *Williams*, 11 Jur. 344). It would appear that a compilation to be entitled to protection must in general possess a value in the arrangement of the materials, and the test of piracy is consequently applied to the general arrangement or combination of such materials, which must possess a value not found in the separate parts, and for this reason the copyright in a compilation of tables of figures is in the various results, *i.e.*, sums total, quotients, &c., and not in the process of calculation (*Bailey* v. *Taylor*, *supra*). And where a person collects and arranges receipts in a book, he is entitled to copyright in respect of the arrangement, but where the receipts are merely collected and handed over to the publisher, the person who collected them has no right of copy (*Randall* v. *Murray*, Jac. 314, *per* Lord Eldon). There may be cases, however, in which copyright will attach in a certain compilation with respect to the materials themselves, as, for example, where a person takes common materials, and then translates them or arranges them in some very unusual form; under these circumstances, no one would have a right to take the translated or specially arranged matter, even although he should re-translate or re-arrange it (*Lawrence* v. *Dana*,

2 Am. L. T. R. (N. S.) 424, *per* Clifford, J., *passim*). There would seem to be nothing to prevent a compiler from imitating the plan, arrangement, or scheme, found in a previous work of a similar or different nature (*Mack* v. *Petter*, 14 Eq. 431, 41 L. J. (N. S.) Ch. 781; *Banks* v. *McDivitt*, 13 Blatchf. 163), but he must not use the same materials in the same order. The question has yet to be decided whether if a person *bond fide* obtains his materials from a common source and then adopts an arrangement similar to that employed by a previous author, such person is liable for piracy. If the materials are new he is clearly not liable; but where he goes to a common source for his materials, has he then a right to arrange them in the order, and on a plan similar to that employed by a previous author? In order to succeed, the plaintiff would have to show some injury to his right of property, and no right of property can exist in mere classification, or in common materials; the question consequently arises can it subsist in the union of both. This point has never been decided, so far as I am aware, but as no one is allowed to appropriate to himself the result of the labour of another to his detriment, and as there can be no doubt but that if an author adopts the arrangement of a previous author, he takes in effect his work and labour, although he should go direct to common sources for his extracts, and since the injury inflicted is none the less merely because the subsequent compiler copied from the original sources instead of from the previous compilation, I do not think that the conduct of such subsequent compiler could be defended in a court of law, or that he could escape the consequences of an action of piracy. The chief value of a compilation is the order in which the contents are stated, and just as these are judiciously or indifferently arranged, so the compilation becomes valuable or the reverse, and to deliberately take

all that is valuable would seem to be one of the very best illustrations that could be found, were it necessary to prove such a self-evident proposition, that no person can be allowed with impunity to avail himself of the labour of another. It may be here proper to observe that there is a vast difference between a compilation and an abridgment, the former consists of selected extracts; an abridgment is a condensation of the views of the author, and necessarily must adopt the arrangement of the work abridged. A compilation infringes the copyright, if the matter transcribed when published, shall be found to impair the value of the original book; a fair abridgment, though it may injure the original, is lawful (see *Story's Executors* v. *Holcombe*, 4 McLean (Amer.) 314, *per* Leavitt, J.) The following list forms a table of several descriptions of compilations with the leading cases upon each:— *Descriptions of compilations*

ABSTRACTS OF TITLE TO REAL PROPERTY:
Barker v. *Caldwell*, 3 Minn. (Amer.) 94.

ANNOTATIONS:
Black v. *Murray*, 9 Sess. Cas. 3rd Ser. 311.
Story's Executors v. *Holcombe*, 4 McLean, 306.

CALENDARS:
Matthewson v. *Stockdale*, 12 Ves. 270
Longman v. *Winchester*, 16 Ves. 269.

CATALOGUES:
Wilkins v. *Aikin*, 17 Ves. 422.
Holten v. *Arthur*, 1 Hem. & M. 603; 32 L. J. (N. S.) Ch. 771
Hogg v. *Scott*, L. R. 18 Eq. 444; 43 L. J. (N. S.) Ch. 705.

CHRONOLOGICAL WORKS:
Trusler v. *Murray*, 1 East, 362 (note).

DICTIONARIES:
Barfield v. *Nicholson*, 2 Sim. & St. 1; 2 L. J. Ch. 90.
Spiers v. *Brown*, 6 W. R. 352; 31 L. T. Rep. 16.

DIRECTORIES:
Kelly v. *Hooper*, 4 Jur. 21.
Kelly v. *Hodge*, 29 L. T. (N. S.) 387.
Kelly v. *Morris*, L. R. 1 Eq. 697; 35 L. J. (N. S.) Ch. 423.
Morris v. *Ashbee*, L. R. 7 Eq. 34; 19 L. T. (N. S.) 550.
Morris v. *Wright*, L. R. 5 Ch. 279; 18 W. R. 327.

GAZETTEERS:
Lewis v. *Fullarton*, 2 Beav. 6; 3 Jur. 669.

HOUSES (LIST OF, FOR SPORTING PURPOSES):
Coe v. *Land and Water Co.*, L. R. 9 Eq. 324; 39 L. J. (N. S.) Ch. 152.

MAPS AND CHARTS:
Stannard v. *Lee*, L. R. 6 Ch. 346; 40 L. J. (N. S.) Ch. 489.
Blunt v. *Patten*, 2 Paine (Amer.) 397.
Stevens v. *Gladding*, 17 How. (Amer.) 447.
Ross v. *Pelzer*, 75 Ill. 175 (Amer.).

MATHEMATICAL TABLES:
Baily v. *Taylor*, 3 L. J. Ch. 66; 1 Russ. & My. 73.
King v. *Reed*, 8 Ves. 223 (note).
McNeill v. *Williams*, 11 Jur. 344.

MONUMENTAL DESIGNS:
Grace v. *Newman*, L. R. 19 Eq. 623; 44 L. J. (N. S.) Ch. 298.

POEMS:
Mason v. *Murray*, 1 East, 360 (cited).
Campbell v. *Scott*, 11 Sim. 31; 6 Jur. 186.

RECEIPTS:
Randall v. *Murray*, Jac. 311.

ROAD BOOKS:
Carr v. *Fadon*, 5 Ves. 24.
Cary v. *Longman*, 1 East, 358; 3 Esp. 274.
Murray v. *Fogg*, 1 Drew. 353; 22 L. J. (N. S.) Ch. 457.

STATISTICS:
Scott v. *Stanford*, L. R. 3 Eq. 718; 36 L. J. (N. S.) Ch. 729.
McLean v. *Moody* and *Walford* v. *Johnston*, 20 Sc. Sess. Cas. 2nd Ser. 1151, 1160 (note).

STATUTORY FORMS:
Alexander v. *Mackenzie*, 9 Sess. Cas. 2nd Ser. 748.

GENERAL COMPILATIONS:
Mack v. *Petter*, 14 Eq. 431; 41 L. J. (N. S.) Ch. 781 (Birthday Text Book).
Pike v. *Nicholas*, 5 Ch. 251; 38 L. J. (N. S.) Ch. 529 (Anthropological Essay).
Jarrold v. *Houlston*, 3 K. & J. 708; 3 Jur. (N. S.) 1051 (Brewer's Guide to Science).
Refer to Drone on Copyright, p. 153.

Reviews, extracts, and quotations.

Fair reviews, extracts, and quotations are entitled to protection, and the question of fairness or the reverse is referable to each individual case. It matters not that the work which is reviewed, or from which the extracts or quotations are taken is the subject of copyright (*Black* v. *Murray*, 9 Sess. Cas. 3rd Ser. 356, *per* Lord Kinloch), for an author's works are for the good of mankind, as well as

for himself, and while on the one hand he is protected against infringement, on the other he is not entitled to insist on the exclusive retention of every individual part of his work or production. If so much of a copyrighted work is extracted under the pretext of a review as practically to injure the sale of it, the author of the work is entitled to protection, but a fair review is clearly defensible (*Roworth* v. *Wilkes*, 1 Camp. 97, *per* Lord Ellenborough). And it has been decided that the publication of an article from another periodical for the purpose of criticism, and for other purposes, is not such a form of publication as will injure the sale of the original work (*Bell* v. *Whitehead*, 8 L. J. (Ch.) N. S. 141, 3 Jur. 68). Where a defendant had in two numbers of a periodical inserted detached extracts, consisting of six or seven pages taken from a farce of forty pages, the Court refused to interfere (*Whittingham* v. *Wooler*, 2 Swanst. 428; and see *Bell and Another* v. *Whitehead*, *supra*); but the appropriation of such a material quantity would no doubt in some cases be instantly condemned. In *Smith* v. *Chatto* (31 L. T. (N. S.) 775, 23 W. R. 290) the defendant had written a book entitled "Thackeryana," and in order to show that the works of William Makepeace Thackeray contained the biography of that author within themselves, large selections were made from his copyright works to establish the proposition. The Court decided that the effect of the publication was to supersede to a damaging extent the works from which the selections had been made, and granted an injunction. It should also be remembered that a work may be a piracy from another, though the passages copied are stated to be quotations, and are not so extensive as to render the piratical work a substitute for the original work (*Bohn* v. *Bogue*, 10 Jur. 420). There can, however, be no piracy, if an extract from a copyrighted work is copied into a work of an entirely different nature and

description; for instance, if the author of a book of travels had incidentally described the composition of some favourite dish, and the author of a cookery book were to copy the instructions and details, even in the identical words, it is submitted that no action would lie for so doing (*Bradbury* v. *Hotten*, L. R. 8 Ex. 3, *per* Bramwell, B.); and, therefore, a person is not liable for the reproduction of certain prints or engravings to be used in a totally different manner, and for a purpose different from the originals (see *Bradbury* v. *Hotten*, L. R., *supra*).

American law.

The American law on the subject of piracy by means of extracts and quotations is practically the same as above stated, and is thoroughly reviewed and set forth in the elaborate and learned judgments delivered in the leading cases on the subject (*Folsom* v. *Marsh*, 2 Story, 100; *Story's Executors* v. *Holcombe*, 4 McLean, 306; *Lawrence* v. *Dana*, 2 Am. L. T. R. (N. S.) 402).

Maps, charts, or plans.

Maps and plans are distinct subjects of copyright, and their protection is expressly provided for, sometimes by 5 & 6 Vict. c. 45, and sometimes under the Engravings Acts (8 Geo. II. c. 13, 7 Geo. III. c. 38, 17 Geo. III. c. 57). Under section 2 of the first-named Act it is provided that in the construction of the Act the word "book" shall be construed to mean and include *inter alia* every "map, chart or plan separately published," and by the 13th section of the same Act provision is made for the registration of such "book," and no proprietor of copyright in any "book" can maintain any action or summary proceeding in respect of any infringement of such copyright unless he shall have registered the same in the way pointed out under the Act (sec. 24). The term of copyright vested in an author under 5 & 6 Vict. c. 45, endures for the term of his natural life, and for a further term of seven years, commencing at the time of his death, or for a period of forty-two years, whichever shall be the longer (sec. 3).

Under the Engravings Acts no registration is necessary, but the proprietor must engrave his name on each print (8 Geo. II. c. 13, s. 1), and it seems the date also (*Newton* v. *Cowie and Another*, 4 Bing. 234, 5 L. J. C. P. 150). By 7 Geo. III. c. 38, the words "map, chart, or plan" are expressly mentioned, and the copyright is vested in the proprietor for a term of twenty-eight years (sec. 7). The 17 Geo. III. c. 57, gives an action for damages in certain cases.

Separately published.

Doubts have from time to time arisen whether the provisions of the Engravings Acts so far as they relate to maps, charts, and plans, are not virtually repealed by the operation of the later Act of Victoria. When letterpress accompanies an engraving of a plan, or a series of engravings, then there is no doubt at all but that it is sufficient to register the whole work under 5 & 6 Vict. c. 45 (*Bogue* v. *Houlston*, 16 Jur. 372; 21 L. J. Ch. N. S. 470; *Bradbury* v. *Holten*, L. R. 8 Ex. 1, 42 L. J. (N.S.) Ex. 28; *Grace* v. *Newman*, L. R. 19 Eq. 623, 44 L. J. (N. S.) Ch. 298), and therefore the name of the proprietor, with the date, need not be placed on every copy of such engraving: it is with respect to maps and plans separately published that the difference of opinion has arisen. In *Stannard* v. *Lee*, 23 L. T. (N. S.) 306, it was decided by Bacon, V.-C., that maps separately published are within the earlier statutes, and need not therefore be registered under 5 & 6 Vict. c. 45, the decision was however reversed on appeal (L. R. 6 Ch. 346). In *Stannard* v. *Harrison*, 24 L. T. (N. S.) 570, 19 W. R. 811, it was held by the same Vice Chancellor that a bird's eye view map of a certain locality was clearly within the statutes of George II. and George III., and need not therefore be registered under 5 & 6 Vict. 45. The truth appears to be that a single map, chart, or plan separately published must be registered under 5 & 6 Vict. c. 45, as decided in *Stannard* v. *Lee*, L. R. 6 Ch. App. 346; but

that any single publication of the kind which is an object of artistic interest as contradistinguished from practical utility, will fall within the provisions of 8 Geo. II. c. 13, and 7 Geo. III. c. 38, and must consequently be printed with the name of the proprietor and date of publication, these earlier Acts apply exclusively to art-engravings, for in former times maps were undoubtedly considered artistic works, although at the present day they have been brought into their proper place as literary productions (*Stannard* v. *Lee*, 6 Ch. 348, *per* James, L.J.). It may be doubted, however, whether a bird's eye view of a certain locality arranged in the form of and intended to serve the purposes of a plan, is not primarily an object of utility rather than art, the decision in *Stannard* v. *Harrison* is not therefore to be relied upon with confidence, and a map, or chart, or plan of any kind should in addition to being marked with the proper name and date, also be registered under 5 & 6 Vict. c. 45. A person may maintain proceedings for infringement of a plan as a designer and inventor, even although he himself did not actually execute it (*Stannard* v. *Harrison*, 24 L. T. (N. S.) 570; 7 Geo. III. c. 38), for where a person designs a plan and furnishes the materials for preparing it, but employs another to make the drawing, the former is the author within 7 Geo. III. c. 38 (*Stannard* v. *Harrison*, *supra*).

Similarity between maps, charts, and plans.

With respect to the infringement of maps, charts, and plans, it is obvious that in most cases great similarity will exist between one production and another, for if for instance a map of Europe be drawn on the scale of an inch to the square mile, and made to contain towns with a population of over 2000 persons, it is clear that there is in this plan or scheme nothing exclusive, and any other person may draw a map of Europe on a similar scale, containing towns of similar magnitude, and under these circumstances both productions will be almost if not

quite identical. If both are correct, both must necessarily be the same, and it might be impossible to prove piracy, but when the original is incorrect, as it will be in many cases, infringement may be established by reference to the identity of mistakes subsisting in each (see *Alexander* v. *Mackenzie* 9 Sc. Sess. Cas. 2nd Ser. 758; *Taylor* v. *Bayne*, Mor. Dic. of Dec., Vols. 19, 20, p. 8308. On appeal, *Ibid.* App. pt. 1, 7; *Cornish* v. *Bowles*, 2 Brown, C. C. 80, 1 Cox, 283; *Blunt* v. *Patten*, 2 Paine (Amer.) 393). In a recent American case it was decided that to take the boundaries of townships from another map without going to the common source of information was an infringement (*Farmer* v. *Calvert Publishing Co.*, 5 Am. L. T. R. 165), and in all cases it is a proper question for the jury whether one production is a copy of the other or not. If the two are in all respects alike, the presumption probably would be that one was a copy of the other; yet both might be originals, and if there was some small variance it would be a proper subject of inquiry whether the alteration was not merely colourable, and that the one was in substance a mere transcript of the other (*Blunt* v. *Patten*, 2 Paine, 400 (Amer.) per Thompson, J.). In the United States Revised Statutes, sec. 4752, plans are not mentioned, although proper provision is made for the registration of maps and charts.

Abridgments.

No action will lie against a person who fairly abridges a copyright work (*Gyles* v. *Wilcox*, 2 Atk. 143, per Lord Hardwicke, *Bell* v. *Walker*, 1 Bro. C. C. 451; *Dodsley* v. *Kinnersley*, Amb. 402), and such abridgment may be published in defiance of the author of the original work; but the protection afforded by the common law with respect to unpublished literary compositions cannot be evaded by an abridgment, and they consequently differ in this respect from works lawfully published (*Prince Albert* v. *Strange*, 2 De G. & Sm. 693, per Bruce, V. C.); and so

not even a list or catalogue of manuscripts in which the author has a common law right can be legally published or abridged without his consent (*ibid*).

American law.

In America a *bond fide* abridgment of a published work is entitled to protection as a fresh subject of copyright (*Storys' Executors* v. *Holcombe*, 4 McLean, 306, per McLean, J.). It must be in good faith an abridgment and not a treatise interlarded with citations. To copy certain passages from a book, omitting others, is in no just sense an abridgment of it. It makes the work shorter but it does not abridge it. The judgment is not exercised in condensing the views of the author, his language is merely copied, and the views of the writer in this mode can be but partially given. An abridgment differs somewhat from a compilation; the former is a condensation of the views of the author, the latter consists of selected extracts from his works (*Storys' Executors* v. *Holcombe*, *supra*, 311). In all the cases bearing on the question of infringement under the pretext of an abridgment, the Courts have been unanimous in insisting on a very strict application of the principle that the abridgment must be fair. The reduction of a work to a condensed form by copying out some of the parts and omitting others is a clear piracy, and so considered by both English and American tribunals (*Gray* v. *Russell*, 1 Story 11; *Folsom* v. *Marsh*, 2 Id. 100; *Storys' Executors* v. *Holcombe*, 4 McLean, 306; *Lawrence* v. *Dana*, 2 Amer. L. T. (N. S.) 402; *Gyles* v. *Wilcox*, 2 Atk. 141).

Piracy under pretence of abridgment.

Digests.

And so also a digest may be made of a published work, and will if it is fair be protected as a new work; but the party must apply the exertion and skill of his own brain in extracting the principle or the substance of the work before him, and dressing it up in his own language so as to produce an original work (*Sweet* v. *Benning*, 16 C. B.

482, per Jervis, C. J.). Both digests and abridgments are governed by precisely the same rules of law, and in either case a mere colourable shortening of the original work will not be protected as an independent composition. So also where a person copied *verbatim*, reports of cases decided in the courts of law from plaintiff's protected work he was held to be guilty of a gross act of piracy; and to condense the reports by leaving out the arguments of counsel, together with some other portions of the cases, is a mere evasion (*Butterworth* v. *Robinson*, 5 Ves. 709), and see the remarks of Lord Eldon in *Wilkins* v. *Aikin*, 17 Ves. 424). In *Newberry's case*, Lofft. 775, heard before Lord Chancellor Apsley, assisted by Mr. Justice Blackstone, the law relating to the subject of a fair abridgment is propounded in terms which accurately describe the present state of the law on the subject. The Lord Chancellor laid down the following propositions:

Abridgments.

Newberry's Case.

1. A fair abridgment of a work is not any violation of the author's property.
2. To constitute a true and proper abridgment of a work the whole must be preserved in its *sense* and then the act of abridgment is an act of understanding, employed in carrying a large work into a smaller compass, and rendering it less expensive and more convenient to the reader.
3. To be protected an abridgment must be in the nature of a *new* and meritorious work, and while the substance of the original is preserved the abridgment must be in different language.

It would seem, therefore, that any person may make a fair abridgment of the published work of another without his consent, and that such abridgment when published will be entitled to protection against piracy, but not against another abridgment of that abridgment.

It has been frequently doubted by high judicial authority

whether an abridgment can under any circumstances amount to a *fair* reproduction of an original work. There is very little doubt that an abridgment is in some cases nothing whatever but a direct and often successful attack on the property of another, for this form of production frequently, and if well composed always, contains the whole of the spirit of the original. It may even be made of greater value by the introduction of notes; it is always cheaper, and most persons who purchased a copy of the abridgment would not after a perusal of it go to the expense of obtaining the work on which it is founded. The original author's right of property must undoubtedly suffer. On the other hand, a fair abridgment is frequently of the greatest use and assistance; it consists of a substantial condensation of the original materials, refashioned by means of intellectual labour and skill; it contains all that is useful in the original without any of the surplusage, and is often to be preferred to it. The effect of an abridgment is undoubtedly to withdr public interest from the original production; for if tl idgment is good, it is often to be preferred on account cheapness and practical utility, while if it is bad, it m and probably will tend seriously to damage the sale of the original.

Abridgments.

The actual legality of an abridgment is seriously questioned by some authors, and when the cases bearing on the subject are carefully considered, it will be found that they are not as unanimous as they are generally supposed to be. In *Dickens* v. *Lee*, 8 Jur. 184, Knight-Bruce, V.-C., remarked as follows: "I am not aware that one man has the right to abridge the works of another. On the other hand, I do not mean to say that there may not be an abridgment which may be lawful, which may be protected; but, to say that one man has the right to abridge and so publish in an abridged form the work of another, without more, is going much beyond my notion of what the law of this

country is." The learned Vice-Chancellor however agreed with the opinion of Lord Eldon in *Wilkins* v. *Aikin*, 17 Ves. 426, that "the question upon the whole, is, whether this is a legitimate use of the plaintiff's publication, in the fair exercise of a mental operation, deserving the character of an original work," and he decided that an imitation, or as the defendant called it, an "analytical condensation" of Dickens' "Christmas Carol," was not entitled to any protection. It would further appear from the report of the case that the fact of the difference in price and other circumstances of difference being such as to render the invasion of no practical mischief to the plaintiff, cannot be taken into consideration, for the person whose property has been taken is entitled to judge for himself how far he will consider that abstraction of his property to be prejudicial or not prejudicial (*Dickens* v. *Lee*, *supra*, 184). In another case it was observed "Digests are of great use to practical men, and the same may be said of abridgments of any study, but it must be a *bonâ fide* abridgment" (*D'Almaine* v. *Boosey*, 1 Y. & C. Ex. 301, *per* L. C. B.), and *dicta* to the same effect are to be found in *Gyles* v. *Wilcox*, 2 Atk. 143; *Prince Albert* v. *Strange*, 2 De G. & Sm. 693; *Tonson* v. *Walker*, 3 Swanst. 678; *Dodsley* v. *Kinnersley*, Amb. 402; *Miller* v. *Taylor*, 4 Burr. 2311; *Bell* v. *Walker*, 1 Bro. C. C. 451. There is, however, only one English case directly in point, and upon this all the opinions and *dicta* of the judges would appear to be founded (*Newbery's Case*, Lofft. 775). In an American case, McLean, J., although he expressed himself bound by the English and American decisions upon the subject, yielded more to a principle of law than to a rule of reason and justice (*Storys' Exors.* v. *Holcombe*, 4 McLean, 309). In *Gray* v. *Russell*, 1 Story 19, the right to make a fair abridgment was apparently recognised, but only under certain circumstances; a similar right has also been conceded in

American law relating abridgments.

other cases (*Folsom* v. *Marsh*, 2 Story, 106; *Webb* v. *Powers*, 2 Woodb. & M. 520; *Lawrence* v. *Dana*, 4 Clifford, 1).

At present, therefore, both in England and America, an abridgment may or may not amount to an infringement of copyright, but it is submitted that although an abridgment may be made or framed in such a manner as to escape the penalties of piracy, it will most likely be capable of inflicting serious loss on the author of the original work. The probability of this ought most certainly to be prevented, and no abridgments of copyright works should be allowed during the term of copyright without the consent of the owner of the copyright (see the report of the Copyright Commissioners, 1878, par. 67).

Translations. There is copyright in a translation, and whether produced by personal application and expense, or obtained by gift or purchase, such copyright will be protected by injunction (*Wyatt* v. *Barnard*, 3 Ves. & B. 77; and see *Rooney* v. *Kelly*, 14 Ir. Law Rep. (N. S.) 158; *Shook* v. *Rankin*, 6 Biss. (Amer.) 477). The better opinion is that any person has a right to translate even a work protected by copyright, for "the translator has bestowed his care and pains upon it" (*Burnett* v. *Chetwood*, 2 Mer. 441, *per* L. C.), and practically made a new book (see the remarks of Willes, J., *Millar* v. *Taylor*, 4 Burr. 2311). It would appear therefore to be tolerably well settled that a production, whether the subject of copyright or not, is liable to be translated into another language by any person who possesses the necessary ability and who thinks it worth his while to make such a translation.

American law. The American law is to the same effect (*Emerson* v. *Davies*, 3 Story, 780, *per* Story, J.; *Stowe* v. *Thomas*, 2 Wall Jr. 547), except that by the revised statutes, s. 4952, authors may reserve the right to translate their own works. The question as to the legality of any particular translation would therefore only arise in America in

those cases where the author has neglected to make such a reservation, but how and in what manner he must make it the section omits to explain.

A translator is required to make no change whatever except such as is naturally produced by the employment of different language (see *Rooney* v. *Kelly*, 14 Ir. L. R. 158; *Emerson* v. *Davies*, 3 Story, 768; *Shook* v. *Rankin*, 6 Biss. 477), and it seems that the right of copy will only suffice to protect a literal transcript of the words themselves, for it is evident that the ideas, sentiments, or speculations of the writer cannot be protected, since the chief object of a translator is to retain the production of the brain, and to embody in the new language as much of the intelligence of the original as possible.

At common law, unauthorised translation a piracy.

At Common Law a manuscript is, of course, as much entitled to protection against an unauthorised translation as it is against an abridgment (*Prince Albert* v. *Strange*, 2 De G. & Sm. 693, *per* Bruce, V.-C.), but in all other instances it would certainly appear that a translation may be made with impunity; and this proposition once admitted it is difficult to see where the application of the principle is to stop. Why, for instance, should there be any objection to a translation of a protected work into the Lancashire, Yorkshire, or other provincial dialect? for if the solution of the question lies in a consideration "of the care and pains" bestowed by the translator (*Burnett* v. *Chetwood*, 2 Merv. 441), he would clearly be entitled to copyright; if, on the contrary, it turns on the question whether substantially a new work has been made, and this, it is submitted, is the proper way to look at the point, then as those dialects differ from ordinary language, so much so in fact, that most persons would be quite unable to understand the translation without reference to the original, it is further submitted that the translator has practically made a new if not a particularly

instructive work, and should be entitled to copyright therein. If this question should ever be raised in the Courts a distinction would doubtless be drawn between one language and another, and two dialects of the same language; but it is very difficult to see how such a distinction could be maintained, assuming of course that the dialects are so dissimilar that a person ignorant of one of them would be unable from his knowledge of the other to decipher both.

Again, if to translate is no piracy why should a re-translation be prohibited; that it is prohibited is certain, for if a foreigner translates a protected English work and then an Englishman re-translates that foreign work into English again, this would amount to an infringement of the original copyright (*Murray* v. *Bogue*, 1 Drew, 353, 17 Jur. 219). It may be taken for granted that the re-translation would not if it were *bond fide* be in the very same words as the original, and by permitting the first translation all right of property in the intellectual and intrinsic portion of the work was set at nought. Why, then, if a translation is permissible should a re-translation be prohibited? The law relating to piracy by means of an unauthorised translation would seem to be in a highly unsatisfactory condition, and it is based moreover on a distinctly false foundation, for a translation cannot be considered to amount in substance to a new work, it is a mere reproduction, in a different form certainly, but it is the manner of the production that is new, not the work itself; the work is the same work to those who can read it, and conveys to them the same ideas and sentiments as the original. The better the translation the grosser the piracy.

Prohibition of translations by statute.

By 15 & 16 Vict. c. 12, s. 2, it is enacted that her Majesty may, by order in Council, direct that the authors of books which are, after a future time, to be specified in

such order, published in any foreign country, to be named in such order shall, subject to certain provisions, be empowered to prevent the publication in the British dominions of any translations of such books not authorised by them, for the limited time therein mentioned.

Law reports, Acts of Parliament, and specifications of patents.

Law reports can be the subject of copyright, but only to a limited extent (*Butterworth* v. *Robinson*, 5 Ves. 709; *Saunders* v. *Smith*, 3 My. & Cr. 711; *Sweet* v. *Shaw*, 3 Jur. 217; *Sweet* v. *Maugham*, 11 Sim. 51; *Hodges* v. *Welsh*, 2 Ir. Eq. 266; *Sweet* v. *Benning*, 16 C. B. 459), for it would seem that no copyright can be claimed in the judgment of the Court, for that is the exclusive property of the Crown. (*Atkins' case* cited, 4 Burr. 2315, and see *Butterworth* v. *Robinson*, *supra*; *Wheaton* v. *Peters*, 8 Pet. (Amer.) 668.) The Courts have moreover unlimited authority to restrain the publication of their proceedings, or any part thereof, and this privilege has several times been exercised (*Rex* v. *Clement*, 4 B. & Ald. 218; *Tichborne* v. *Mostyn*, L. R. 7 Eq. 55 (note); *Gurney* v. *Longman*, 13 Ves. 493), subject to these exceptions, however, the head notes (*Sweet* v. *Benning*, 16 C. B. 491), and such other parts of the report as are the result of the author's labour and skill are entitled to protection. Acts of Parliament are the property of the Crown, and no one is entitled to the exclusive publication of them (*Baskett* v. *The University of Cambridge*, 1 W. Bl. 105; *Stationers' Co.* v. *Partridge*, 4 Burr. 2402 (cited)). Specifications of patents when filed become *publici juris*, and no copyright can consequently be claimed in them (*Wyatt* v. *Barnard*, 3 V. & B. 77).

Advertisements.

No action will lie for pirating a mere advertisement for the sale of particular articles, nor for appropriating a "method" of advertising (*Ehret* v. *Pierce*, 18 Blatchf. (Amer.) 302), even although the advertisement assumes the form of a guide embellished with engravings (*Cob-*

bett v. *Woodward*, L. R. 14 Eq. 407, but see *Maple* v. *Junior Army and Navy Stores*, L. R. 21 Ch. Div. 369, affirmed on appeal, *ibid.*, 375), but a work having a merit over and above its value as an advertisement is none the less protected simply because the author employed it for advertising purposes. A bookseller's catalogue, for instance, containing notes and descriptions of the various works offered for sale is clearly entitled to protection (*Hotten* v. *Arthur*, 1 Hem. & M. 603, followed by *Grace* v. *Newman*, L. R. 19 Eq. 623; and see also *Hogg* v. *Scott*, 18 Id. 444; *Ehret* v. *Pierce*, 18 Blatchf. (Amer.) 302), and it is no defence to say that such catalogue is not offered for sale itself, but only used to promote the sale of the books mentioned in it (*Hotten* v. *Arthur*, *supra*). But although a publication may be adjudged to be a mere advertisement, still any portion of it susceptible of copyright will be separated from the remainder and its infringement restrained (*Cobbett* v. *Woodward*, L. R. 14, Eq. 407); for we have seen that a valid right of copy may subsist in part of a work (*ante*, p. 42). The case of *Cobbett* v. *Woodward*, though disapproved of by the M. R. in *Maple* v. *The Junior Army and Navy Stores*, L. R. 21 Ch. Div. 379, would seem to be perfectly sound in so far as it supports this principle of law. It is not to be supposed, however, that any person may copy another's advertisement with impunity; for although it is clear that he cannot be restrained on the ground of any infringement of copyright, yet if the tendency of the imitation is to induce the public to believe that they are purchasing the goods of the original advertiser, this will furnish a ground of action for infringing a right of property in the nature of a trade mark.

Periodicals and single articles.

The proprietor of a periodical or magazine is entitled to restrain the publication in a separate form, of a serial

published in successive numbers of such periodical or magazine (*Henderson* v. *Maxwell*, 4 Ch. D. 163). And a person who publishes a magazine in the name of another and without authority, will be restrained (*Hogg* v. *Kirby*, 8 Ves. 215). A periodical is a "book" within the meaning of 5 & 6 Vict. c. 45, but the article or serial is only part of a "book," and consequently does not itself require registration (*Henderson* v. *Maxwell*, *supra*, *per* Jessel, M. R., and see *Mayhew* v. *Maxwell*, 1 J. & H. 312). The right to commence proceedings in respect of the infringement of this description of copyright property is subjected to certain conditions by virtue of the Literary Copyright Act, 1842 (5 & 6 Vict. c. 45), and is further regulated by several important judicial decisions. By s. 18 of the said Act it is provided that when any publisher, or other person, shall before or after the passing of the Act, have carried on, or be the proprietor of "any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever," and shall have employed or shall employ any persons to compose the same or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work shall have been composed under such employment, and on the terms that the copyright therein shall belong to such proprietor, and paid for by such proprietor, then in this case it is further enacted that "the copyright in such encyclopædia, review, magazine, periodical work, and work published in a series of books, or parts, and in every volume, part, essay, article, and portion so composed and paid for," shall be the property of such proprietor, who shall enjoy the same rights as if he were the actual author thereof. It is further provided in the same section that the proprietor shall have the same term of copyright as is given to authors and assignees of books under the Act

5 & 6 Vict. c. 45, s. 18.

(s. 3) except only in the case of "essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature;" for after the term of twenty-eight years from the first publication, the right of publishing the same in a separate form reverts to the author for the remainder of the term given by the Act. There is a further proviso that during the term of twenty-eight years the proprietor shall not publish any such essay, article, or portion, separately or singly, without the consent previously obtained of the author thereof or his assigns, and also that nothing in the Act shall be taken to alter or affect the right of any person to publish such composition, provided he shall have reserved the right to do so.

The effect of this section is to enable proprietors of the periodicals and the other enumerated works to acquire copyright in a composition of which some other person is the author, and this without any formal assignment.

There was copyright in a cyclopædia before the Act (*Mawman* v. *Tegg*, 2 Russ. 385), and the same remark applies to periodicals generally (see *Hogg* v. *Kirby*, 8 Ves. 215), the section, therefore, merely defines the relative rights of authors and publishers, and the various conditions contained therein are conditions precedent to a right of action in the event of any infringement taking place. It has been held under the section that the right which the proprietor obtains under it, is merely a qualified right of publication in the particular work for which the article was written, and that he cannot use it in any other manner unless it was written on the terms that the copyright therein should belong to the proprietor for all purposes (*Bishop of Hereford* v. *Griffin*, 16 Sim. 190; *Smith* v. *Johnson*, 4 Giff. 632; *Strahan* v. *Graham*, 16 L. T. (N. S.) 87, 15 W. R. 487). It has further been held that the proprietor must actually pay for the composition before it

Proprietor must actually pay for article.

will vest in him (*Walter* v. *Howe*, 50 L. J. (N. S.) Ch. 621, 44 L. T. Rep. (N. S.) 727), and this proposition is divisible into two considerations; first, the *proprietor*, or other person named in the section, must pay, for where the publisher of a magazine employed and paid an editor who employed and paid persons for writing essays, it was doubted whether the copyright in such essays would vest in the publishers (*Brown* v. *Cooke*, 11 Jur. 79, *per* Shadwell, V.-C.). The second consideration is that the proprietor or other person must actually *pay*, and that a mere constructive payment, or contract or agreement to pay will not suffice (*Richardson* v. *Gilbert*, 1 Sim. (N. S.) 336, and see *Brown* v. *Cooke*, *supra*; *Walter* v. *Howe*, *supra*). It is not at all necessary that the proprietor of a periodical should enter into an express contract for the license to use the articles composed for him, so long as he himself actually pays the author for such articles as previously mentioned. The presumption arises that such license was intended to be conferred. And so also there is nothing to prevent the proprietor of a periodical from stipulating for the copyright for all purposes, and the copyright will then vest in him accordingly; in this case also the agreement may be merely implied (see *Sweet* v. *Benning*, 16 C. B. 459).

First number of periodical only need be registered.

The proprietor of the copyright in any encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts is entitled to all the benefits of the Act on registering the first number of such periodical (see 5 & 6 Vict. c. 45, s. 19), and it is never necessary to register separately any serial that may subsequently be commenced in the periodical (*Henderson* v. *Maxwell*, 4 Ch. D. 163). Assuming that the proprietor has himself paid for the article to be published in a particular periodical, and that the first number of the periodical has been duly registered pursuant to section 19 of the Act, the question

Whether copyright vested in proprietor, or a mere license to use articles.

arises in whom is the copyright in such article vested during the period of twenty-eight years. In *Sweet* v. *Benning*, 16 C. B. 484, it was stated that the mere fact of a proprietor of a periodical employing another to write an article or series of articles for publication in such periodical, raised a presumption that the copyright was vested in the proprietor, unless there was something in the surrounding circumstances to negative such a supposition, and the case was decided upon this view of the law. In the *Bishop of Hereford* v. *Griffin*, 16 Sim. 197, another view altogether was taken, for here the Vice-Chancellor observed that according to the law, the copyright was in the author, except so far as he had parted with it.

The case of the *Bishop of Hereford* was subsequently cited with approval by Stuart, V.-C. (*Smith* v. *Johnson*, 4 Giff. 632), and the law as it at present stands, may be taken to be that the meaning of the proviso contained in the 18th sect. of 5 & 6 Vict., c. 45, taken with the whole clause, is not to vest any copyright in the proprietors or publishers of a periodical work, but simply to give them a license to use the matter for a particular purpose. Consequently during the term of twenty-eight years specified in the Act, assuming the absence of any contrary agreement, the proprietor has simply a license to use the article or essay in connection with the particular periodical for which he contracted, he cannot publish in a separate form; and on the other hand, the author is subjected to the same restriction until after the expiration of the limited time. The copyright is always vested in the author, subject, as to a term of twenty-eight years, to a license subsisting in a third person, to the exclusive use of the article in connection with a particular periodical, and not otherwise, and during this period neither author nor publisher can, without the consent of the other of them, republish such article in a separate form. In one case the

question was raised whether the right of the author of an article in a periodical, under the 18th section of the Act, to prevent a separate publication, did not in itself amount to a copyright within the meaning of the 24th section; it was, however, decided by Wood, V.-C., that no registration was necessary (*Mayhew* v. *Maxwell*, 1 J. & H. 312). This learned judge, however, proceeded upon the assumption that the copyright had vested in the proprietor of the periodical, whereas if the decisions in the *Bishop of Hereford's Case*, 16 Sim. 197, and *Smith* v. *Johnson*, 4 Giff. 632, are to be followed, the contention can hardly be supported, even assuming it to be made out that the plaintiff (*i.e.* the author) had by express contract reserved the right of separate publication. The meaning of the term "separate" was discussed at length in *Smith* v. *Johnson*, 4 Giff. 632, where the licensee had republished in a weekly supplementary number, intended to be sold either with or without the current number, a series of tales written by the plaintiff.

Newspaper.

A newspaper is a "periodical work," and, as a "book" includes "a sheet of letterpress" under ss. 2 & 18 of the Literary Copyright Act (5 & 6 Vict. c. 45), such newspaper must consequently be registered under this Act; unless this is done the proprietor of the newspaper has no right to sue in respect of the piracy of any article appearing therein (*Walter* v. *Howe*, 50 L. J. (N. S.) Ch. 621; 44 L. T. Rep. (N. S.) 727; and see *Platt* v. *Walter*, 17 L. T. (N. S.) 159, *per* Lord Chelmsford, *ex parte Foss*, 2 De G. & J. 239, *per Turner*, L.J.). The case to the contrary, *Cox* v. *Land & Water Journal Co.* 9 L. R. Eq. 324, 39 L. J. Ch. (N. S.) 152, in so far as it asserts a contrary doctrine cannot be supported, and was not followed by the Master of the Rolls in *Walter* v. *Howe*, *supra*.

American law on the

In America the question whether copyright exists in a

Subject of magazines and newspapers.

magazine or newspaper as a whole, or in any of the articles or serials published from time to time therein, is determined solely upon principles applicable to other productions of a literary nature, no express statutory provisions having been made concerning copyright in publications of this kind. It may be said, therefore, that as both newspapers and periodical publications frequently contain matter of the utmost importance in the literary world, and that as a literary production to be the subject of copyright need not be a book in the common acceptation of the term, that is to say, a volume written or printed, made up of several sheets and bound together, but that on the contrary, a book may be printed on one sheet, as in the case of the words of a song or the music accompanying it, it follows that newspapers and other periodicals are "books," and as such entitled to the protection of the law. It is exceedingly doubtful whether the opinion of Mr. Justice Thompson in *Clayton* v. *Stone*, 2 Paine, 392, to an effect contrary to that detailed above, would be followed at the present day (see Drone on Copy: 169). In practice it is usual in the case of periodicals to obtain a copyright in each issue, as would, but for the saving operation of the 19th section of 5 & 6 Vict. c. 45, have to be done in England; and if the author of any article wishes to reserve the copyright to himself he must register such article.

Newspapers, statutory law.

The whole of the Acts of Parliament referring to and regulating the issue of newspapers were repealed by 32 & 33 Vict. c. 24, in the schedule to which, some of the provisions of the previous Acts are re-enacted. It is provided by 39 Geo. III. c. 79, s. 29 (re-enacted), that every person who shall print any paper for hire, reward, gain or profit, shall carefully preserve and keep one copy (at least) on which he shall write or print the name and place of abode of the person by whom he was employed

to print the same. The penalty for neglecting to do this or to produce the copy within the space of six calendar months after the publication on being required to do so by any justice of the peace, is fixed at £20. By 51 Geo. III. c. 65, s. 3, the name and residence of the printers need not be placed upon banknotes, bills of exchange, &c., or to any paper printed by authority of any public board or public office. The penalty of £20, mentioned above, was originally not discretionary, but by 51 Geo. III. c. 65, s. 1, it was made so: this latter Act was, however, repealed by 32 & 33 Vict. 24, and the question of penalties for printing, publishing, or dispersing any newspaper or book whatsoever, is now regulated by 2 & 3 Vict. c. 12 s. 2. This Act imposes a penalty upon the printer of any paper or book whatsoever which shall be meant to be published or dispersed, who shall not print upon the front of such paper, or upon the first and last leaf, as the case may be, his name and usual place of abode or business; and penalties are also imposed on persons publishing or dispersing, or assisting in publishing or dispersing copies which shall not be printed as aforesaid. Actions for penalties are to be commenced in the name of the Attorney or Solicitor-General in England, or the Queen's Advocate in Scotland (sec. 4).

It was decided under 39 Geo. III. c. 79, s. 27, an Act now repealed (32 & 33 Vict. c. 24), and it is presumed that the law will be the same under the corresponding Act (2 & 3 Vict. c. 12), that the omission to insert the name of the printer on a given pamphlet, not coming within the exceptions clause of the Act, is fatal to the printer's right to sue for labour or materials used in printing, and the mere fact that the Act specifies a certain penalty is no ground of argument to the contrary (*Bensley* v. *Bignold*, 5 B. & Ald. 335).

In order to carry out the spirit and meaning of the Acts

regulating the practice relating to the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, it is provided by 32 & 33 Vict. c. 24, repealing in part 6 & 7 Will. IV. c. 76, but re-enacting the 19th section thereof, that if any person shall file a bill for discovery of the name of any such person concerned as aforesaid, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter, it shall not be lawful for the defendant to plead or demur to such bill, but he must make the required discovery: there is a proviso, however, that such discovery shall not be made use of as evidence or otherwise, in any proceeding against the defendant, save only in that proceeding for which the discovery is made. Under this section a person may on complaining of a libel in a newspaper proceed against the printer and publisher to ascertain the names of the proprietors for the purpose of bringing his action against the proprietor alone (*Dixon* v. *Enoch*, 20 W. R. 359, *per* Wickens, V.-C.)

Newspaper Libel and Registration Act, 1881.

The Newspaper Libel and Registration Act (44 & 45 Vict. c. 60) now provides for the establishment of a register of the proprietors of newspapers (sect. 8), and it is the duty of the printers and publishers for the time being of every newspaper to make or cause to be made to the registry office in the month of July in every year a return of the following particulars, according to the form in the schedule, that is to say:—

(*a.*) The title of the newspaper.

(*b.*) The names of all the proprietors of such newspaper, together with their respective occupations, places of business (if any), and places of residence (sect. 9).

Penalties are likewise imposed for the omission to make annual returns (sect. 10), or for wilful misrepresentation

in or omission from such return (sect. 12). Copies of entries in and extracts from the register are to be evidence of the contents of the said register (sect. 15). By the 2nd section, fair and accurate newspaper reports of certain meetings are privileged, and no prosecution is to be commenced against any proprietor, publisher, editor or any person responsible for the publication of a newspaper for any libel published therein, without the written fiat of the Director of Public Prosecutions (sect. 3).

It had been previously held, that upon an information for maliciously publishing a defamatory libel under Lord Campbell's Act (6 & 7 Vict. c. 96, s. 5), the magistrate had no jurisdiction to receive evidence of the truth of the libel (*Reg.* v. *Carden*, 5 Q. B. Div. 1; 41 L. T. Rep. (N. S.) 504); but now by the 4th section (44 & 45 Vict. c. 60) a court of summary jurisdiction may receive evidence as to the publication of a libel contained in a newspaper, being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate and published without malice. A court of summary jurisdiction may also, if it is of opinion that, though the person charged is shown to have been guilty, the libel is of a trivial character, impose a fine, subject, however, to the defendant's right to be tried by a jury, should he demand one (sect. 5). It must also be noticed that books or other papers printed at the University Press of Oxford, or the Pitt Press of Cambridge, are to be marked with an announcement to that effect (2 & 3 Vict. c. 12, s. 3).

"Title" of newspaper.

The mere "title" of a newspaper is no more a subject of copyright than the title of any other book, but the proprietors have an inherent right to prevent any other persons from adopting it, and this is a right in the nature of a trade mark (see *Kelly* v. *Hatton*, 3 Ch. App. 703; *Metzler* v. *Wood*, 8 Ch. D. 606; *Bell* v. *Locke*, 8 Paige (Amer.) 75).

Engravings.

Engravings are protected under the joint operation of the statutes 8 Geo. II. c. 13, 7 Geo. III. c. 38, 17 Geo. III. c. 57, and remedies are provided for the infringement of the copyright subsisting in such engravings. It is provided by 8 Geo. II. c. 13, s. 1, that "every person who shall invent and design, engrave, etch, or work in mezzotinto, or chiaro-oscuro, or from his own works and invention shall cause to be designed and engraved, etched, or worked in mezzotinto or chiaro-oscuro, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for the term of fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints." By the same section certain penalties are imposed upon print-sellers and others pirating the same by engraving, etching, or working, or in any other manner copying and selling, or causing to be engraved, etched, or copied and sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or who shall print, reprint, or import for sale, or cause, &c., without the consent of the proprietor first had and obtained in writing, signed in the presence of two or more witnesses. Persons who publish, sell, or expose to sale, or otherwise, or in any other manner dispose of, or cause to be published, sold, or exposed to sale or otherwise, or in any other manner disposed of, any pirated print or prints, without such consent first had and obtained, are only liable under this section if they *knew* the same to be so printed or reprinted without the consent of the proprietor or proprietors.

8 Geo. II. c. 13.

The 2nd section contains a saving clause in favour of those persons who should purchase any plate for printing from the original proprietor, and the 3rd section contains certain provisions relating to the limitation of actions.

This Act was subsequently found to be defective, for it was decided that it applied only to those cases in which the designer had himself personally worked on the engraving, and not to those in which he had employed a printer or engraver to work for him (*Jefferys* v. *Baldwin*, Ambl. 164). This illiberal interpretation is on a par with the reasoning of the then Attorney-General in his attempt to show that the Act had no application at all unless the engraver had represented something purely imaginative, and not to be found in anything already in nature (*Blackwell* v. *Harper*, 2 Atk. 92).

7 Geo. III. c. 38, amending 8 Geo. I. c. 13.

The statute 7 Geo. III. c. 38, was passed to remedy the defects contained in the previous Act of George II., and by sect. 1 it is enacted that "all and every person and persons who shall invent or design, engrave, etch, or work in mezzotinto or chiaro-oscuro, or from his own work, design, or invention, shall cause or procure to be designed, engraved, etched, or worked in mezzotinto or chiaro-oscuro, any historical print or prints, or any print or prints of any portrait, conversation, landscape or architecture, map, chart or plan, or any other print or prints whatsoever, shall have and are hereby declared to have the benefit and protection of the said Act" (*i.e.*, the Act of Geo. II.) "and this Act." By the 2nd section, "All and every person and persons who shall engrave, etch, or work in mezzotinto or chiaro-oscuro, or cause to be engraved, etched, or worked, any print taken from any picture, drawing, model, or sculpture, either ancient or modern, shall have, and are hereby declared to have the benefit and protection of the said Act and this Act, for the term hereinafter mentioned, in like manner as if such print had been graved or drawn from the original design of such graver, etcher, or draughtsman." By sect. 7, "The sole right and liberty of printing and reprinting intended to be secured and protected by the said former Act and this Act

shall be extended, continued, and be vested in the respective proprietors for the space of twenty-eight years," to commence from the day of the first publication. Under 17 Geo. III. c. 57, an action on the case for damages is given, and the Act is also extended to Ireland by 6 & 7 Will. IV. c. 65.

17 Geo. III. c. 57.

The joint effect of these statutes is to sweep away all invidious distinctions of the nature raised in *Jefferys* v. *Baldwin*, Ambl. 164, and also greatly to extend the range of subjects which can form the basis of a legitimate engraving (see *Blackwell* v. *Harper*, 2 Atk. 92). Doubts having arisen whether the provisions of the said Acts extended to lithographs and certain other impressions, it was provided by 15 & 16 Vict. c. 12, s. 14, that the provisions of the Engravings Acts should be extended to "prints taken by lithography or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely." Consequently the copying of a picture or engraving by means of photography or by any other process, mechanical or otherwise, whereby copies may be indefinitely multiplied, is a clear infringement, as being a copy within the meaning of the Copyright of Engravings Acts (*Gambart* v. *Ball*, 14 C. B. (N. S.) 306; 9 Jur. (N. S.) 1059; 32 L. J. (N. S.) C. P. 166; affirmed by *Graves* v. *Ashford*, L. R. 2 C. P. 410; 36 L. J. C. P. (N. S.) 139); but whether copies made by hand, with pen or pencil, and not capable of being reproduced in large quantities are within the Acts is a question of argument (*Gambart* v. *Ball*, 9 Jur. (N. S.) 1059, *per* Willes, J.).

Lithographs or copies produced by any mechanical process.

Copy of engraving to be used for different purpose.

Where a copy of an engraving has been made for an entirely different purpose, and is useful only for such purpose, there is no infringement; consequently a mosaical pattern forming or intended to form a groundwork for wool-work, is no infringement of the engraving or picture from which it is taken, for any one may reproduce a print

or design, if he does so in connection with a production of an entirely different class, as a reproduction upon earthenware, tapestry, and the like (*Dicks* v. *Brooks*, L. R. 15 Ch. D. 22, *per* James, L.J.).

Inventor of design for engraving may claim copyright.

By virtue of the provisions of 7 Geo. III. c. 38, a person who employs another to make drawings for him in accordance with a certain plan of which he is the inventor has such a right of copy in the design as to justify him in proceeding against any person who infringes it (*Stannard* v. *Harrison*, 10 W. R. 811); the mere fact of a person being unable to draw for himself is a matter wholly unimportant if he has caused other persons to draw for him from plans or ideas which he himself has supplied (*ibid.* 813, see *per* Bacon, V.-C.). It would appear, therefore, that in order to ensure a valid copyright in any drawing, print, or engraving the inventor must furnish the conception to the designer, that is to say, he must give him something more than a bare idea what to design.

American law.

The American law on the above subject has been decided in accordance with the words of an Act of Congress of the 29th April, 1802, now repealed (see U. S. Rev. Stat. s. 4952, also the Act of June 18, 1874), to the effect that "any person being a citizen of the United States or a resident within the same, who shall invent and design, engrave, etch, or work, *or from his own works and inventions* shall cause to be designed and engraved," &c. Now the words of the equivalent English statute are, "all and every person and persons who shall invent or design, engrave, etch, or work in mezzotinto or chiaro-oscuro, *or from his own work, design, or invention* shall cause or procure to be designed, engraved," &c. (7 Geo. III. c. 38). The words of the two statutes are in this respect so much alike that there can be no doubt that the English provision served as a model for the American draughtsman, and it is thought that the American judicial

interpretation of the clause in question, may appropriately be applied to the English section at present in force in this country (see *Binns* v. *Woodruff*, 4 Washington's Reports, 48). The person in whom the right is vested must be the author of the invention, although the form and completion of the work may well be left to another.

Proprietor's name to be affixed to engravings.

The provisions of the Act relating to prints "which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints" (8 Geo. II. c. 13, s. 1), must in all respects be strictly complied with or proceedings to restrain infringement will fail. (But see *Roworth* v. *Wilkes*, 1 Camp. 97).

Date of publication also necessary.

It has been decided after some difference of opinion that the *date* of publication must be engraved or printed in addition to the name of the proprietor (*Newton* v. *Cowie and Another*, 4 Bing. 234, following *Sayer* v. *Dicey*, 3 Wils. 60; *Thompson* v. *Symonds*, 5 T. R. 41; *McMurdo* v. *Smith*, 7 T. R. 518; *Bonner* v. *Field*, cited 5 T. R. 44; and see *Tuck* v. *Canton*, 51 L. J. Rep. Q. B. (N. S.) 363); and any decisions to the contrary cannot now be relied on (see *Blackwell* v. *Harper*, 2 Atk. 92; *Harrison* v. *Hogg*, 2 Ves. 322). This date must be the actual and true date, that is to say, the date when the impressions are taken off the plate, and any mistake in this respect is fatal (*Bonner* v. *Field*, *supra*). The date is of importance that the public may know the period of the monopoly, the name of the proprietor, in order that those who wish to copy the engraving may know to whom to apply for consent (*Thompson* v. *Symonds*, *supra*, 45; see the remarks of Lord Kenyon); but it must be remembered that where the engravings form part of a book in which they are bound up, neither of these requisites is essential, and the registration of the book itself under 5 & 6 Vict. c. 45 is sufficient to secure copyright in the contents, including the engravings (*Bogue* v. *Houlston*, 5 De G. & Sm. 267).

With respect to the *name* of the proprietor it is of course essential that this should be engraved according to the statute, although the designation "proprietor" need not be added (*Newton* v. *Cowie and Another*, 4 Bing. 234). Nor in the case of a firm need the name of every partner appear, but the general description of such firm by its trade name will suffice (*Rock* v. *Lazarus*, L. R. 15 Eq. 104). And it is further to be observed that the name of the first proprietor must be continued on the print, and on no account should the name of his assignees be substituted. The name and the title are dependent terms, and if a person had *de facto* no title on the day mentioned on the print, it would seem that he would be non-suited, and that whether original proprietor or assignee (*Bonner* v. *Field*, cited 5 T. R. 44).

The proprietor's name.

Which must be name of the *first* proprietor.

This stringent rule applies, however, more particularly with respect to a mistake in the date, for although the statute 17 Geo. III. c. 57 has given to the person aggrieved or injured through or by the infringement of copyright, an action on the case for damages, yet it has been decided that, although the plaintiff's name is not engraved upon the prints, yet if there has been a piracy the plaintiff is entitled to judgment by virtue of the *Common Law* (see *Roworth* v. *Wilkes*, 1 Camp. 97; also *Beckford* v. *Hood*, 7 T. R. 620).

Maps, charts, and plans separately published are within the provisions of the Engravings Acts, and should therefore be printed with the date and name of the proprietor; or they may, in some cases at least, be viewed in the light of literary productions, and as such should be registered under 5 & 6 Vict. c. 45. The best plan, however, is to utilize the provisions of all these enactments (see *Stannard* v. *Lee*, L. R. 6 Ch. 346; *Stannard* v. *Harrison*, 24 L. T. (N. S.) 570).

Maps, charts, and plans.

The question as to what amounts to an infringement of

What amounts

As to infringement of an engraving.

a print or an engraving is for the jury, and each case as it arises is dealt with on principles applicable to itself. An infringement of a print for instance, like that of a literary production, may be open and barefaced, as when the original is deliberately reproduced, but by far the greater number of cases of infringement depend upon the question of colourable imitation. In all instances there must be such a degree of evidence as will tend to establish the fact that the defendant's production is a transcript of the plaintiff's, either completely, or with such variations or additions as make it in fact a colourable imitation, and by virtue of which the public are likely to be deceived (see *Sayre and Others* v. *Moore*, 1 East, 302, *per* Mansfield, C.J.), and thus it is that where a copy is made, but used for an entirely different purpose to the original, or differs from the original in character, no action will lie for the infringement thereof, that is to say, if the plaintiff had not used the original previously in the way the copy was then being used (see *Martin* v. *Wright*, 6 Sim. 297; *Dicks* v. *Brooks*, 15 Ch. D. 22).

The provisions of the Newspaper Acts relative to the printing of the name and address of the printer are not applicable to engravings (see 32 & 33 Vict. c. 24, 2nd Schedule, re-enacting sect. 31 of 39 Geo. III. c. 79).

American law.

By the Revised Statutes, s. 4952, engravings, cuts, prints, photographs, and the negatives thereof, are entitled to copyright; but by the Act of June 18th, 1874, the words "engraving," "cut," and "print," are restricted to pictorial illustrations, or works connected with the fine arts. Consequently an engraving without art value will not be protected against piracy (*Collender* v. *Griffith*, 11 Blatchf. 212); yet in one case playing cards were protected as prints (*Richardson* v. *Miller*, 12 U. S. Pat. Off. Gaz. 3), although the utility of such articles is certainly not referable to their artistic value. Labels have, how-

ever, been held not to be within the above statutes, and must therefore be registered at the Patent Office (Act of June 18th, 1874; *Coffeen* v. *Brunton*, 4 McLean, 516).

The substantial identity test of piracy is applied in America on principles analogous to those practised in England, and in this respect the law of the two countries is the same, so much so in fact that the decisions of one country are frequently quoted in the other (see *Turner* v. *Robinson*, 10 Ir. Ch. 121, 510; *Gambart* v. *Ball*, 14 C. B. (N. S.) 306; *Graves* v. *Ashford*, L. R. 2 C. P. 410; *Blunt* v. *Patten*, 2 Paine (Amer.) 397; *Richardson* v. *Miller*, 3 L. & Eq. Rep. 614).

Christmas cards.

Cards of congratulation, such as Christmas, Easter, and birthday cards may be prints within the Engravings Acts, or they may be designs (46 & 47 Vict. c. 57), or paintings, drawings, or photographs (25 & 26 Vict. c. 68), according to circumstances, and in every case they must either be properly marked, or registered under the appropriate Act, or they will not be entitled to protection.

Paintings, drawings, and photographs.

Previous to the statute 25 & 26 Vict. c. 68, the author of an original painting, drawing, or photograph, had not such an exclusive right of property in his production as to enable him to bring an action to restrain the infringement of it. Where an engraving was made from an original picture, the engraver was protected under the Engravings Acts, and no one might reproduce or colourably imitate such engraving, but it was no piracy for another artist to make a fresh engraving from the original picture (*De Berenger* v. *Wheble*, 2 Stark. 548). The same remarks applied to drawings of all kinds, and in later times to photographs also.

Right at Common Law.

At common law the author of any painting, drawing, or photograph, or his assignee, had and now has, a right to prevent any person from copying his production; and even

the publication of a mere catalogue, containing a description of any works of art in which a common law right of copy subsists, is an infringement of such right, and will be restrained (*Prince Albert* v. *Strange*, 2 De G. & Sm. 652; 1 Mac. & G. 25). After publication, however, the author bases his right to protection solely on the provisions of the statute 25 & 26 Vict. c. 68.

What is a publication.

First, to consider what amounts to such a publication of a work of art as will destroy the author's common law right of copy. It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public, as to justify the belief that it took place with the intention of rendering such work common property. It follows, therefore, and it is submitted, that if an artist permits a wood engraving of a painting to be made and published in a periodical, this is not a publication of the painting (see *Turner* v. *Robinson*, 10 Ir. Ch. (N. S.) 133); and so, where a plaster cast taken from a bust is published, this is no publication of the bust itself. The sale of a work of art cannot be said to amount to a publication, nor can the exhibition of a similar work at a public exhibition, where there are bye-laws against copying, or where it is tacitly understood that no copying shall take place; for in this instance the public are *primâ facie* admitted to view the picture on the implied understanding that no improper advantage will be taken of the privilege. For similar reasons the exhibition of a picture, with the object of obtaining subscriptions for engravings to be made from it, does not amount to a publication, if it be intimated, either expressly or impliedly, that no copying will be permitted. To constitute publication, therefore, it must appear that the object with which the exhibition or dissemination takes place, amounts to, or includes a deliberate intention to endow the public at large with the perpetual right to

reproduce the work of art in question (see the judgment of the Court, *Turner* v. *Robinson*, 10 Ir. Ch. 132).

Right of copy in paintings, drawings, and photographs by statute.

By 25 & 26 Vict. c. 68, s. 1, it is provided that the "author," being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph, whether made in the British dominions or elsewhere, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, for the term of his natural life and seven years after his death; provided that on sale or disposition of the original, or where the same has been made or executed for any other person for a valuable consideration, the person so selling or disposing of or making or executing the same, shall not retain the copyright thereof, unless it is expressly reserved to him by agreement in writing signed by the vendee or assignee or the person for whom the picture, &c., was made, at or before the time of such sale or disposition, but the copyright shall belong to the vendee or assignee or to the person on whose behalf the same shall have been made or executed. It is, however, by the same section further provided, that the vendee or assignee shall not be entitled to the copyright, unless at or before the time of such sale or disposition, an agreement in writing signed by the person so selling or disposing of the same, or by his agent duly authorised, shall have been made to that effect.

Nothing, however, is to prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object (sect. 2).

By the 4th section a register of proprietors is to

be kept at Stationers' Hall, and provisions are made for the inspection of the register and the delivery of certified copies thereof, production in evidence of such copies, application to the Courts by parties aggrieved, the expunging and varying of entries, and other similar provisions, as in the case of books registered under 5 & 6 Vict. c. 45, s. 5. All the provisions of the International Copyright Act (7 & 8 Vict. c. 12) are extended to paintings, drawings and photographs (sect. 12). Under this statute (25 & 26 Vict. c. 68), it has been judicially determined that a photograph of an engraving of a painting, is within the Act, and that in the case of an assignment of the copyright in a picture, it is sufficient to register the assignment (sect. 4), and that it is under these circumstances immaterial that the original copyright of the author has not been registered (*Graves' Case*, L. R. 4 Q. B. 715; *Beal's Case*, L. R. 3 Q. B. 387).

Where an assignee neglects to register his assignment under the Act, he cannot of course sue in respect of any infringement, but a licensee to reproduce, is in a different position from the assignee of the whole copyright, for a mere license need not be registered (*Tuck* v. *Canton*, 51 L. J. (N. S.) Q. B. 363).

It is of course clearly unlawful to copy a photograph, or a negative thereof entitled to protection under the Act, but this will not prevent any person from copying the object from which the photograph was taken, assuming of course that it be common property (*Graves' Case, supra, per* Blackburn, J., 723) for an "original photograph" within the meaning of the Act can mean nothing else than a direct reproduction of a particular object by means of photography; any one can reproduce the same object, but he cannot copy the photograph without permission, for the copy would not then be original (*ibid.*).

Who are the "au-

It has very recently been decided that where a firm of

photographers registered themselves under 25 & 26 Vict. c. 68, ss. 1 and 4, as the authors of a photograph, the negative of which, as it turned out, had been taken by an employé, they were properly speaking proprietors, but certainly not "authors," and consequently that they were precluded from bringing an action (*Nottage* v. *Jackson*, 52 L. J. Q. B. (N. S.) 760, on appeal, *ibid.* 766). The term "author" involves originating, making, producing, as the inventor or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph (*ibid. per* Cotton, L. J., 768). This decision, which would seem at first sight to operate with peculiar harshness, turns entirely on the meaning of the word "author," the person on whose life the duration of the copyright depends, and the most likely person to be the "author" of a photograph would appear to be he who effectively is as near as he can be the cause of the picture which is produced—that is, the person who has superintended the arrangement, who has actually formed the picture by putting the objects into position and arranging the place in which such objects are to be (*ibid.* 767). From this view of the meaning of the word, the decision is founded upon a substantial basis, although it may well be doubted whether the general principles involved do not stand greatly in need of revision. The "author" of a picture is doubtless the person who paints it, and none other, but between an original picture and a photograph there is a wide difference; the one is the result of personal skill solely, the other of personal skill—though of a much inferior order—combined with a mechanical process in which many persons may take part. The word "author" would therefore appear to be inappropriate when used in connection with photography.

"Author" of a photograph.

Nottage v. Jackson.

In those cases in which an artist wishes to reserve to himself a right of reproduction, he must take care to

Right to reproduce painting

must be stipulated for.

do so by agreement in writing, signed at or before the time of the sale or disposition of the painting, by the vendee or assignee. On the other hand, if the vendee or assignee should stipulate for the right of reproduction, he must obtain an agreement in writing to that effect, signed by the vendor or *by his agent duly authorised* (25 & 26 Vict. c. 68, s. 1). If neither of these courses is adopted the right of copy will become *publici juris*, and the market value of the original picture as a matter of course depreciated.

It has not yet been expressly decided in whom the copyright of a picture painted on commission will vest in those cases where no agreement is entered into between the artist and his customer, but it is submitted that the copyright will be included in the commission and pass to the latter. In the case of an ordinary photograph, which is nearly always taken on commission, the copyright would seem to belong to the customer, and if the photographer has any interest in it at all, it is merely in the materials forming the negative.

The 6th section of the 25 & 26 Vict. c. 68, imposes a penalty on the author of any painting, drawing, or photograph in which there shall be subsisting copyright, and who after having sold or disposed of such copyright shall, without the consent of the proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, any such work or the design thereof.

Artists' "studies."

The point arises under this section, whether an artist who has disposed of the copyright in a certain picture has the right to copy for sale, hire, &c., any of the studies composed by him as the groundwork for his picture. The Copyright Commissioners in their report (pars. 118-124) doubt whether the artist would have any such right. It is submitted, however, that the solution of the question entirely depends upon principles analogous to those

governing the ordinary examples of colourable imitation. In some instances the study might bear not the slightest resemblance to the picture, in others not such a resemblance as to destroy or impair the value of the latter as an object of unique interest, while in others it might be either practically identical, or the embodiment of all its salient and interesting features. The relief to be afforded would therefore entirely depend upon the nature of the case and the degree of identity subsisting between the study and the picture.

Sculpture.

Under and by virtue of 54 Geo. III. c. 56, the sole right and property in all new and original sculpture, models, copies and casts is vested in the proprietors for the term of fourteen years from first putting forth or publishing the same, provided in all and in every case the proprietor do cause his name with the date to be put on all and every such new and original sculpture, model, copy, or cast before the same shall be put forth or published. Under section 6 it is provided that the sole right of making and disposing of such new and original sculpture, or model, or copy, or cast, shall return to the person who originally made the same, if he shall then be living for the further term of fourteen years (sect. 6.) The Act contains no provision for the registration of any sculpture, &c., and all the proprietor has, therefore, to do, is to cause his name with the date to be put on every original work. He might at one time, however, if he had thought fit, have registered under the Act to Extend and Amend the Acts relating to the Copyright of Designs (13 & 14 Vict. c. 104, s. 6), under which Act certain penalties were imposed on unauthorised persons making or selling copies of registered sculptures, &c. This statute is repealed (46 & 47 Vict. c. 57), and the Act of Geo. III. is the only one now regulating the subject of copyright in sculpture, models, copies and casts. There was also at one time

another Act regulating the copyright in sculpture, but its provisions were so utterly inadequate for the protection of artists, that it was first amended and subsequently altogether repealed (38 Geo. III. c. 71, amended by 54 Geo. III. c. 56, and repealed by 24 & 25 Vict. c. 101, see *Gahagan* v. *Cooper*, 3 Camp. 111).

What is a publication?

It will be observed that under the subsisting Act the artist has copyright in his work for the term of fourteen years, from first putting forth or publishing the same. We have seen that where a plaster cast is taken from a bust and published, that this is no publication of the bust itself (*ante*, p. 92), it may give a right to copy the cast but not the detailed working of the bust (see *per* Smith, M. R., *Turner* v. *Robinson*, 10 Ir. Ch. (N. S.) 134); and in the same case on appeal the Right Hon. Maziere Brady, Lord Chancellor of Ireland, is reported to have said, "Many large works in this branch of art (sculpture) which decorate public squares and other places are of course so published, but there are others not designed for such purposes, which could never be published in any other way than in exhibitions, therefore I apprehend that these works of sculpture must be considered as 'published' by exhibition at such places as the Royal Academy and Manchester, so as to entitle them to the protection of the statutes from the date of such publication" (*ibid.* 516); and the Lord Chancellor goes on to say that publication by exhibition may be restricted by the rules of the place, as for instance by a prohibition against copying and the like, thus agreeing with the judgment of the Master of the Rolls to the same effect with respect to pictures, in the Court below (*ibid.* 130). There can be but little if any doubt that sculpture, and other works of art multiplied by casts or copies, thereby become published, that is to say, if such casts or copies are for sale or public use, for the word "published" signifies made public by those means

which are appropriate to the particular article or thing. A book is published by being printed; a dramatic piece or musical composition by being publicly represented; a print or article of sculpture is published by being made the subject of copy in casts or prints, and it is probable that with regard to sculpture and other works of art being multiplied by casts or other copies, it would depend in each case upon that which applies to the particular thing, if it be for sale or public use (*Boucicault* v. *Chatterton*, 35 L. T. (N. S.) 746; 5 Ch. D. 275; see *per* James, L. J.).

There is here, consequently, a clearly defined difference of opinion as to what amounts to "publication" of a piece of sculpture. The publication of a copy or cast either is or is not a publication of the original also; it is clear that it is a publication of the copy or cast itself. As copyright may subsist in the original and in a copy thereof as two distinct subjects, at one and the same time, it is quite possible that serious differences might at any moment arise, for it is obvious that copyright may commence in the original at one time, and in the cast or copy at another. In case of a piracy being committed, the defendant would therefore plead that he had copied the original or the cast, according to circumstances, taking care to select the one in respect of which the copyright had expired. This procedure is rendered possible by the words of the Act, providing a right of copy in an original sculpture, and another and totally distinct right of copy in a cast of such original sculpture. Furthermore, the right of copy is to date from the time when the work is "first put forth or published," an ambiguous phrase, to explain which no attempt whatever is made.

With respect to publication by means of exhibition, it is certain, that where the public are admitted under an express or implied understanding that they shall not make

copies of any of the works of art, for them to do so would be a violation of trust or confidence, which the courts would restrain; it might, therefore, be urged that the common-law right of property subsisting in the author of every intellectual production whatsoever, before and until publication, can never be taken from him against his will, to be notified either in express words or from the nature of the case. To say that *primâ facie* the author of such a production intends to dedicate it to the public on every occasion in which he is good enough to exhibit it for the benefit of the public, unless, indeed, there be some special provision against copying so as to negative the supposition, would certainly seem to place the property of many exhibitors upon a very precarious footing, and to be altogether contrary to justice and right. It would be equally just and proper to hold, that a stranger may legally make use of a picture while it is *in transitu* between the owner's house and the exhibition room; the Irish Lord Chancellor referred to this point only to avoid it, he put it in such terms as to imply that a doubt might reasonably be supposed to exist on the subject (*Turner* v. *Robinson*, 10 Ir. Ch. 517).

From this and other instances it would appear that common-law rights of copy are not at the present time regarded with favour, although it may reasonably be doubted whether the various statutes relating to copyright in intellectual productions are any improvement at all, or have in any way tended to promote the interest of either authors or the public at large.

It may be convenient here to remark that the various decisions affecting engravings, with respect to the annexation of the date and proprietor's name, apply equally to sculpture protected under the provisions of 54 Geo. III. c. 56, and consequently if a sculptor wishes to acquire copyright under that Act, in the model as well

as in the original sculpture, he must affix his name, together with the date, to the model also.

Common-Law right in sculpture before publication.

Before publication a sculptor has such a common-law right of property in his work as will enable him to restrain any one seeking to copy the production by means of drawings or photographs, but after publication it is submitted that this right of protection is lost, for the penalties imposed by 54 Geo. III. c. 56, s. 3, apply only to pirated copies or casts, and not to engravings or copies produced otherwise than by modelling or fashioning.

New and original designs for sculpture are expressly excepted from the operation of the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57, see s. 60).

American law relating to paintings, &c., and sculpture.

By the law of the United States copyright is secured in photographs, or the negatives thereof, paintings, drawings, chromos, statues, statuary, and of models or designs intended to be perfected as works of the fine arts (Rev. Stat. 4952), and such copyright may vest in a "proprietor" as well as in an author, inventor, or a designer, for a citizen or resident of the United States may acquire copyright in certain descriptions of works which he has bought from a foreign author. It is true that nothing in the chapter is to be construed to prohibit the printing, publishing, importation, or sale of any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph, written, composed, or made by any person not a citizen of the United States nor resident therein (Rev. Stat. 4971); but unfortunately no mention at all is made of paintings, drawings, chromos, statues, statuary, models, and designs, and it is apprehended, therefore, that a valid right of copy may be procured in the United States with respect to these, even although the work of an alien or non-resident.

"Publication" in the United States.

As to what amounts to a "publication" of a painting or sculpture, is just as difficult to determine as it is in England

(see *Oertel* v. *Wood*, 40 How. Pr. 10; *Oertel* v. *Jacoby*, 44 How. Pr. 179; Drone on Copy. 286).

It must be remembered that the American statutes do not prohibit the exhibition of a copy of a painting, statue, or other work of art, but are merely directed against multiplication and circulation of piratical copies (Rev. Stats. s. 4965).

Designs. The proprietor of a new or original design not previously published in the United Kingdom, has by virtue of 46 & 47 Vict. c. 57, ss. 47, 50, the exclusive copyright in such design with respect to any class or classes of goods in which it is registered, during five years from the date of registration. Under the Act registration is absolutely necessary, and provisions are made for the determination of the copyright, in case the proprietor of the design shall not before delivery on sale of any articles to which a registered design has been applied, have caused each such article to be marked with the prescribed mark, or with the prescribed word or words, or figures, denoting that the design is registered; or unless he can show that he took all proper steps to ensure the marking of the article (s. 51). So, also, where delivery on sale of any articles to which a registered design has been applied, the proprietor must (if exact representations or specimens were not furnished on the application for registration), furnish to the comptroller the prescribed number of exact representations or specimens of the design; and if he fails to do so, the comptroller may erase his name from the register, and thereupon his copyright in the design is to cease (s. 50 (2)).

Statutory definition of. For the purposes of the Act "design" is defined to mean any design applicable to any article of manufacture, or to any substance artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof.

or for any two or more of such purposes, and by whatever means it is applicable, not being a design for a sculpture, or other thing within the protection of the Sculpture Copyright Act of the year 1814 (s. 60). The term "proprietor" is also defined in s. 61 as the author of any new and original design, unless he executed the work on behalf of another person for a good and valuable consideration, in which case such person shall be considered the proprietor, and every person acquiring for a good and valuable consideration a new and original design, or the right to apply the same to any such article or substance as aforesaid, either exclusively of any other person or otherwise, and also every person on whom the property in such design or such right to the application thereof shall devolve, shall be considered the proprietor of the design in the respect in which the same may have been so acquired, and to that extent, but not otherwise (s. 61). A penalty of £50 for the piracy of a registered design (s. 58), or an action for damages (s. 59), is imposed by the Act, the provisions of which in this respect will be noticed in their proper place.

"Proprietor."

The definition of "design" given in the Act, would seem to have been drafted almost *verbatim* from the third section of the repealed Act, 5 & 6 Vict. c. 100, and designs are now no longer of two distinct kinds, that is to say, those applicable to the *ornamenting* of various articles (5 & 6 Vict. c. 100, s. 3), and those applicable to any article of manufacture having a reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article, and that whether it be for the whole shape or only for a part (6 & 7 Vict. c. 65, s. 2), but the species or character of the device will be considered entirely with reference to the particular class or classes in which it may be registered (46 & 47 Vict. c. 57, s. 47). It is provided, however, by the Designs Rules, 1883, that an application for the registration of a design shall, in

The Patents, Designs, and Trade Marks Acts, 1883.

describing the nature of the design state whether it is applicable for the pattern, or for the shape or configuration of the design, and the means by which it is applicable (rule 9). Questions may therefore even yet arise as to the applicability of any particular design, *i.e.*, whether for the "pattern," or for the "shape or configuration," and if the design is wrongly described, it is apprehended that a plea alleging the fact would be a good answer to a statement of claim in an action for infringement. All previous Acts relating to the registration of designs, are repealed by the Patents, Designs, and Trade Marks Act, 1883 (s. 113), which is now the only enactment on the subject; all previous rules are likewise repealed (see Designs Rules, 1883, r. 37), but nothing is to affect the past operation of any of the repealed enactments or rules or anything done in pursuance thereof (*ibid.*).

The new Act prohibits two things: first, the application of a registered design, or any fraudulent or obvious imitation thereof, without the licence or written consent of the registered proprietor, in the class or classes of goods in which such design is registered, for purposes of sale, to any article of manufacture, or to any substance, artificial or natural, or partly artificial and partly natural; and in the second place, it prohibits any person without such consent as aforesaid, from publishing or exposing for sale any article of manufacture or any substance to which such design, or any fraudulent or obvious imitation thereof, shall have been so applied, knowing that the same has been so applied without the consent of the registered proprietor (sect. 58). The result of this section will probably be, that where a person wrongfully applies the design within the protected period of five years, he will be prohibited from selling the article with the design attached after the period has expired (see *Crossley* v. *Beverley*, 1 Russ. & M. 166 (note); *Daglish* v. *Jarvie*, 14 Jur. (N. S.) 945).

Notwithstanding the very plain words of the 3rd section of the repealed Act, 5 & 6 Vict. c. 100, it was doubted whether the time during which a design would be protected, dated from the publication of the manufacture or from the publication of the design (*Daglish* v. *Jarvis*, 14 Jur. (N. S.) 945. In all cases under the new Act the copyright is to subsist for five years from the date of registration (46 & 47 Vict. c. 57, s. 50).

Judicial definition of "design."

A "design" is a picture or diagram suitable for application to a particular subject or class of subjects, and may consist in variations on old forms in respect of size, configuration, colour, and other qualities, or it may consist in alteration of certain given proportions (*Harrison* v. *Taylor*, 5 Jur. (N. S.) 1221, *per* Byles, J.).

The definition of "design" given in the 60th section of the new Act is incomplete, in this sense, that the text does not explain of what a design may consist, but only how it may be applied, and to what description of articles. The design must be "new or original," and to discover a new application for an old design, does not make such design either new or original (see *Adams* v. *Clementson*, 12 Ch. D. 714).

Combination may be a "design."

A new and original combination may be a "design," but the result of such combination must not be a multiplicity of designs, but one design only. Consequently where the plaintiff had registered a design for a shawl having the two sides of different texture and colours, a scollop pattern on parts of it, a particular border round it, a particular configuration of the corners, and a newly invented fringe to surround it, and it appeared that these points had been applied to shawls before, but the combination was new, it was held that no action for infringement would lie. The merit of this shawl was stated to be that by varying the method of folding, it might be converted in appearance into eight different shawls; this, then, constituted a multiplicity of

designs (*Norton* v. *Nicholls*, 5 Jur. (N. S.) 1203), besides which it was doubted whether there can be a "design" where all the points of a combination are old, even though the combination itself be new (*ibid. per* Lord Campbell, C.J., 1205).

But a new combination of old patterns may be a "new or original" (46 & 47 Vict. c. 57, s. 47) design, and as such entitled to registration (*Harrison* v. *Taylor*, 5 Jur. (N.S.), 1210: and see *Mulloney* v. *Stevens*, 10 L. T. (N.S.), 100). Under the old law a design of merely an ornamental character must have been registered under 5 & 6 Vict. c. 100; if not ornamental it was essential that it should combine novelty with utility in the "shape or configuration" of the article, and be registered under 6 & 7 Vict. c. 65. Both these statutes are, however, now repealed.

Shape or configuration.

The phrase "shape or configuration" occurring in the second section of the repealed statute, 6 & 7 Vict. c. 65, and repeated in the definition of a "design," already referred to, as occurring in the 60th section of the Patents, Designs and Trade Marks Act of 1883, has not received any judicial interpretation; it cannot, however, be said to mean the same thing as "combination of parts" (Patteson, J., in *Reg.* v. *Bessell*, 15 Jur. 774). Nor would it seem to apply to part of a whole (*Margetson* v. *Wright*, 2 De Gex & Sm. 420); it is clearly not applicable to the eyelet forming part of a protector label (*ibid.*), nor to a mechanical contrivance within the stem of a parasol (*Millingen* v. *Picken*, 1 C. B. 799).

On the other hand a brick intended, when arranged with other bricks, to act as a ventilating apparatus, was held to contain *intra se* a design having reference (under 6 & 7 Vict. c. 65) to some article of utility, that is to say, the design was applicable to the "shape or configuration" of the brick; no opinion, however, was given as to what

those particular words actually meant (*Rogers* v. *Driver*, 20 L. J. (N.S.), Q. B. 31).

The term "article of manufacture" (46 & 47 Vict. c. 57, s. 60), is explained to some extent in *Heywood* v. *Potter*, 1 E. & B. 439, a case decided under the 4th section of 5 & 6 Vict. c. 100, a statute now repealed. The explanation here given is, however, by no means satisfactory, and there was a difference of opinion as to the application of the phrase to particular articles. The truth would appear to be that the phrases "shape or configuration" and "article of manufacture" will not bear an interpretation which can equally apply to every case, and consequently such phrases must be applied according to circumstances and as reason and argument shall suggest. *Article of manufacture.*

A similar remark applies to the expression "new and original," made use of in the repealed statute, 5 & 6 Vict. c. 100, s. 3. It is curious that the Legislature should have gone out of its way to raise gratuitously matter for dispute. The words "new and original," it is true, may mean nothing, may be utterly useless, and incapable of application, but they are infinitely to be preferred to others, which by reason of their less extended scope, afford opportunity for that difference of opinion which it is or should be the policy of the Law to quieten. The equivalent phrase employed in the 47th section of 46 & 47 Vict. c. 57, is "new or original," a phrase which may mean anything, and which may, and probably will, give rise to disputes supported by many plausible arguments applicable to the circumstances of the particular case. For instance, under the old Act, it was held that a copy of the photograph of a well-known public character was not a "new and original design," and that the special purpose for which it was used was beside the question (*Adams* v. *Clementson*, 12 Ch. Div. 714). It would, however, doubtless be going too far to say that this decision is *New and original design.*

at all binding now, for the copy of the photograph in question may be new or it may be original, under circumstances where it could not well be both. If ever a similar question should arise again, it will have to be re-argued, and the object of the Legislature in using the phrase "new or original" at one time (s. 47), and "new and original" at another (s. 61), properly inquired into at the expense of the litigants.

Difference between designs and subject matter of patents.

There is a great difference between a design and the subject-matter of a patent, the former is a picture or drawing (*Harrison* v. *Taylor*, 5 Jur. (N.S.), 1221, *per* Wightman, J.), and has no connection with the principle of any mechanical or other contrivance; it would appear consequently that the mere fact of an invention being the subject of a patent, will be no objection to the design being registered under the Patents Designs and Trade Marks Act, 1883 (see *Millingen* v. *Picken*, 1 C. B. 799: *Rogers* v. *Driver*, 20 L. J. Q. B. (N. S.), 31).

Registration of designs.

The subject-matter to be registered under the Act is the design and not the article of manufacture, and it will be noticed that the method of registration is no longer divisible into two heads, as was the case under the old Acts, where the design might be registered either in respect of some ornamental peculiarity or with reference only to its shape or configuration. Under the old Acts it was held that a plea traversing a count that the plaintiff was the inventor of a new and original design for an article of manufacture, having reference to a purpose of utility, so far as the said design was for the shape or configuration of the article, did not raise the question whether or not the design of the alleged invention was a proper subject of registration (*Millingen* v. *Picken*, 1 C. B. 799).

Designs for sewed muslin collars transferred to the muslin, and consisting of a pattern to be worked over

by the needle, would appear to be designs applicable for the ornament "of a substance natural or artificial" (46 & 47 Vict. c. 57, s. 60) (see *Lowndes* v. *Browne*, 12 Ir. Law Rep. 293); the same remark applies to a design for ornamenting collars, and in each case the design must be registered under its appropriate class (*Riego de la Branchardiere* v. *Elvery*, 18 L. J. (N. S.) Ex. 381).

In what class to be registered.

In order to decide in which particular class a design should be registered, the final result must be looked to, and not the *modus operandi*, or the various steps in the process by means of which the result was attained (*Lowndes* v. *Browne*, 12 Ir. Law Rep. 303, see *per* Crampton, J.). A person who wishes to protect his design may register under one or more of the enumerated classes (46 & 47 Vict. c. 57, s. 47, sub-s. 4); and if a design be registered under a wrong class, it would seem to be more than doubtful whether this mere circumstance would justify the infringement of it (*Lowndes* v. *Browne*, 12 Ir. Law Rep. 293). In case of doubt as to the class in which a design ought to be registered, the comptroller may decide the question.

46 & 47 Vict. c. 57.

The 47th and 50th sections of the Patents Designs and Trade Marks Act, 1883, provides for registration in all cases in which the proprietor (s. 61, *Jewitt* v. *Eckhardt*, 8 Ch. Div. 407) of any new or original design not previously published in the United Kingdom, wishes to obtain the benefit of the Act. The design must be registered in respect of some class or classes of goods (s. 47, sub-s. 3), whether consisting of articles of manufacture or of any substance artificial or natural, or partly artificial and partly natural (s. 60), and before delivery on sale of any articles to which a registered design has been applied, the proprietor of the design shall cause each such article to be marked with the prescribed

mark, or with the prescribed word or words or figures denoting that the design is registered (s. 51). By rule 32 of the "Designs Rules," 1883, where any article is included in any of the classes 1 to 12 (see 3rd Schedule), such article must be marked with the abbreviation "Rd.," and the number appearing on the certificate of registration, and if such article is included in the classes 13 or 14 of the same schedule it must be marked with the abbreviation "Regd."

The 48th section of the same Act describes the procedure to be adopted by applicants for registration, and the 101st section authorises the Board of Trade to make rules *inter alia* for classifying goods, and generally for regulating the business of the patent office where such designs are for the future to be registered. These rules which are cited as the "Designs Rules, 1883," are given in Appendix B, *post*.

Insufficient registration.

Where the registration of a design under secs. 4 and 15 of 5 & 6 Vict. c. 100, consisted in leaving with the registrar an entire shawl, with an intimation that it was to be registered in connection with class 8 (now class 14), it was held that this was not a sufficient registration (*Norton* v. *Nicholls*, 5 Jur. (N.S.) 1203) as no information was afforded of the nature of the plaintiff's claim (see 21 & 22 Vict. c. 70, s. 5, now repealed (46 & 47 Vict. c. 57) *Holdsworth* v. *McCrea*, 16 W. R. 226).

Articles to which designs applied, to be marked "Rd." or "Regd."

It was absolutely essential under 5 & 6 Vict. c. 100, that the patterns when published should have the letters "Rd" and the proper number, marked thereon or affixed thereto, as provided by section 4 of that Act, otherwise the proprietor would have had no protection against piracy, even though the sale had taken place abroad (*Heywood* v. *Potter*, 1 E. & B. 439, and see 21 & 22 Vict. c. 70, s. 4, *Surazin* v. *Hamel*, 32 Beav. 151, 32 L. J. Ch. 380), and so in a case under

6 & 7 Vict. c. 65, where the plaintiff had registered the design of an improved chair, and was shown to have subsequently sold chairs of a similar kind without having the word "Registered" and the date of registration notified on such articles, as was provided by section 3 of the Act, it was held that he was precluded from taking proceedings to restrain infringement (*Pierce* v. *Worth*, 18 L. T. (N. S.) 710).

As we have already seen, the 51st section of the new Act provides that the proprietor of the design shall cause each article to which it has been applied to be marked with the abbreviations "Rd." or "Regd.," denoting that the design is registered, and if he fails to do so the copyright in the design will cease, unless the proprietor shows that he took all proper steps to ensure the marking of the article (see the "Designs Rules, 1883," rule 32). It would not, however, seem to be necessary to allege in the statement of claim, that the requirement of the Act has been complied with (*Sarazin* v. *Hamel*, 32 Beav. 145, 32 L. J. (Ch.) 378).

Registration by sample.

Where the registration took place by *sample*, under 21 & 22 Vict. c. 70, it would appear that in order to establish a charge of piracy, it must have been shown that the design had been appropriated either entirely or with the exception of unimportant variations (*Thom* v. *Sydall*, 20 W. R. 291). Under the new Act an applicant for registration may, instead of furnishing to the comptroller, drawings, photographs, or tracings of the design, supply exact representations or specimens thereof (s. 48, Rule 9), and where this is done, the law with respect to registration by sample will subsist as before the Act, so far indeed as it is not altered by express words; consequently where the design is reproduced in an apparently though not actually identical form, this will amount to such an infringement as the Courts will restrain (*Holdsworth* v.

McCrea, L. R. 2 H. L. 380); if, however, part only of the design be used in combination with other materials, there will be no infringement (*ibid.* and see *McCrea* v. *Holdsworth*, L. R. 6 Ch. App. 418), for where a design consists of different parts, protection is afforded to the design as a whole, and not to the parts taken separately (*Holdsworth* v. *McCrea*, *supra*), since "it must be considered that the protection of the statute is invoked for the entire thing that appears upon the register, and is applicable to nothing but an exact copy of the thing so registered" (*ibid.* 388, *per* Lord Westbury).

A person registering by sample, which would certainly seem to be the more convenient method (see sec. 50, sub-sec. 2), should therefore always file now, as heretofore, a written description, minutely describing the component parts of his design, and stating which parts of it are new and which old (see *Thom* v. *Syddall*, 20 W. R. 291), and in case of a combination, care should be taken that the design is registered as one design only, and not as a multiplicity of designs (*Norton* v. *Nicholls*, 5 Jur. (N. S.) 1203, 1205).

Comptroller General and examiners.

Inspector of registered designs.

The appointment of the comptroller-general and examiners is provided for by section 83, and it is further provided that during the existence of copyright in a design, the design shall not be open to inspection except by the proprietor, or a person authorised in writing by the proprietor, or a person authorised by the comptroller or by the Court, and furnishing such information as may enable the comptroller to identify the design, nor except in the presence of the comptroller, or of an officer acting under him, nor except on payment of the prescribed fee; and the person making the inspection shall not be entitled to take any copy of the design or any part thereof. When the copyright in a design has ceased, the design shall be open to inspection, and copies thereof may be

taken by any person on payment of the prescribed fee (s. 52, Rule 33).

No provisional registration.

By 13 & 14 Vict. c. 104, certain designs might have been registered provisionally for one year, but this Act is repealed, and no provisional registration is now provided for.

Dramatic compositions.

Dramatic compositions are as to their conception either original, or they are founded upon matter already subsisting and contained in some previous work, whether published or otherwise: the right of copy in such a composition is quite distinct from that exclusive right of representation called indifferently playright, acting, or stage right.

Dramatization of novel.

It is a principle both of English and American law that a copyright novel may be dramatized for the stage by any one capable of the task, even although he may have received no permission to do so from the author of the novel (*Reade* v. *Conquest*, 9 C. B. (N. S.) 755, 11 *ibid.* 479; 9 W. R. 434; *Tinsley* v. *Lacy*, 1 Hem. & M. 747; *Boucicault* v. *Fox*, 5 Blatchf. 87 (Amer.)); a publication *in print* would, however, be a clear infringement (*Tinsley* v. *Lacy*, *supra*), the test of piracy in this event being whether a material part of the novel had been taken.

The statute 3 & 4 Will. IV. c. 15, as extended by 5 & 6 Vict. c. 45, s. 20, enacts in effect, that the author of, *inter alia*, any dramatic piece, whether published or not, shall have as his property the sole liberty of representing it or causing it to be represented at any place of dramatic entertainment, for the time therein specified, and therefore if the novel or work which is dramatized can itself be regarded in the light of a dramatic production, then and in this case a public performance of another dramatic production founded on such work would seem to be a violation of copyright, and against the express words of the Acts referred to.

Again, if a person should publish a novel, any one may dramatize it, but if a drama is composed *before* the novel, a subsequent dramatization of the novel would indirectly amount to a copy of the drama, or at any rate to an infringement thereof; consequently an author who wishes to preserve the exclusive right of dramatizing his novel should first publish the drama and afterwards the novel (see *Reade* v. *Conquest*, 9 C. B. (N. S.) 755, 11 *ibid.* 479; 9 W. R. 434; *Toole* v. *Young*, L. R., 9 Q. B. 523).

As a corollary to this proposition it is submitted, that whether the drama be actually published or not is a matter of indifference, so long as it is actually in manuscript before the publication of the novel, and this because the author would have a common law right (and now a statutory right, 3 & 4 Will. IV. c. 15, s. 1) in his drama, and any one who endeavoured to make use of it contrary to his wishes would be restrained on ordinary principles of law (*Boucicault* v. *Fox*, 5 Blatch. 97 (Amer.) *per* Shipman, J.). Acting a play was however held to be no publication under the statute of Anne (*Coleman* v. *Wathen*, 5 T. R. 245. Where a person in adapting a novel for the stage, ignorantly copies the words of a drama upon which the novel is founded he will be restrained (*Reade* v. *Lacy*, 1 J. & H. 524, and see *Lee* v. *Simpson*, 3 C. B. 871).

The policy of the law in permitting the unauthorised dramatization of novels has been much questioned, while the successive argumentative steps used to justify such a policy, can hardly be looked upon as satisfactory. For instance, it has been conclusively settled that although a dramatic composition may be faulty in its construction and bad in detail, yet although it be improved in these respects to such an extent as to amount practically to a fresh production, yet there is no title in the improved

work (see *Levy* v. *Rutley*, L. R. 6 C. P. 523; *Shelley* v. *Ross*, *ibid.* 581), and this although the novel upon which the original and defective drama was founded was common property. It is however quite possible that a second dramatization of a novel may amount to an infringement thereof, as for instance where the novel can fairly be regarded as a dramatic production, and in this case, where the copyright in the novel, and in the first dramatization, are in different hands, the proper person to sue would, it is thought, be the owner of the first dramatization and not the owner of the novel. The truth appears to be that an ordinary literary production and a dramatization, are looked upon as two totally distinct species of property.

Right of representation.

By 3 & 4 Will. IV. c. 15, it is provided that the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, or which hereafter shall be composed, and not so printed or published, shall have as his own property the sole liberty of representing, or causing to be represented, at any place of dramatic entertainment, any such production as aforesaid, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production, printed and published within ten years before the passing of the Act by the author thereof or his assignee, or at any time after the passing of the Act shall, until the end of twenty-eight years from the day of the first publication, and also if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof (s. 1). It is further enacted by the 2nd section of the Act

Dramatic pieces.

that if any person shall, contrary to the intent of the Act, or right of the author or his assignee, represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment, any such production or any part thereof as aforesaid, he shall be liable to a penalty of forty shillings for each and every representation, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, together with double costs of suit. (Double costs taken away by 5 & 6 Vict. c. 97, s. 2; and see 45 & 46 Vict. c. 40, s. 4).

Musical composition.

The provisions of this Act are extended by the 20th section of 5 & 6 Vict. c. 45, to the representation or performance of any musical composition, and it is enacted that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the term in the Act provided for the duration of copyright in books: and the provisions in the Act contained in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent in the construction of the Act to the first publication of any book. By 45 & 46 Vict. c. 40, The Copyright (Musical Compositions) Act, 1882, it is provided, that the proprietor of the copyright in any musical composition first published after the passing of the Act, or his assignee, who shall be entitled to and be desirous of retaining in his own hands exclusively, the right of public representation or performance of the same, shall print or cause to be

45 & 46 Vict. c. 40.

printed upon the title page of every published copy of such musical composition a notice to the effect that the right of public representation or performance is reserved (s. 1). In case, after the passing of the Act, the right of public representation or performance of, and copyright in, any musical composition shall be or become vested before publication of any copy thereof in different owners (see *Chappell* v. *Boosey*, 51 L. J. Ch. 625; 46 L. T. Rep. N. S. 854), then, if the owner of the right of public representation or performance shall desire to retain the same, he shall, before any such publication of any copy of such musical composition, give to the owner of the copyright therein notice in writing requiring him to print upon every copy of such musical composition a notice to the effect that the right of public representation or performance is reserved; but in case the right of public representation or performance of, and the copyright in, any musical composition shall, after publication of any copy thereof, subsequently to the passing of the Act, first become vested in different owners, and such notice as aforesaid shall have been duly printed on all copies published after the passing of the Act previously to such vesting, then, if the owner of the right of performance and representation shall desire to retain the same, he shall, before the publication of any further copies of such musical composition, give notice in writing to the person in whom copyright shall be then vested, requiring him to print such notice as aforesaid on every copy of such musical composition to be thereafter published (s. 2). The following section imposes a penalty of £20 on the owner of the copyright, if he neglects or fails to print legibly or conspicuously upon every copy of the composition published by him, such note or memorandum as aforesaid. The penalty may be recovered in any court of competent jurisdiction (s. 3).

Notwithstanding the provisions contained in the 2nd

section of 3 & 4 Will. IV. c. 15, relating to the recovery of costs (see *ante*), it is provided that the costs of any action or proceedings for penalties or damages in respect of the unauthorised representation or performance of any musical composition published before the passing of the Act shall, in cases in which the plaintiff shall not recover more than 40*s.* as penalty or damages, be in the discretion of the court or judge before whom such action or proceeding shall be tried (s. 4).

Difference between right of representation and right of copy.

The right of publicly representing a dramatic piece or musical composition is totally distinct from the right of copy, (*Chappell* v. *Boosey*, 51 L. J. (N.S.) Ch. 625); but in cases where a dramatic composition is printed as an ordinary book, the rules of law are the same as those governing any other literary work. Where however a play is acted, so as to amount to a visible representation of the subject-matter of the composition, there, whether the composition be published or not, the rights of representation vested in the author are exclusive (*Boucicault* v. *Chatterton*, 5 Ch. D. 270, *per* Malins, V.-C.), provided the first representation takes place in the United Kingdom (*Boucicault* v. *Delafield*, 1 Hem. & M. 597; *Boucicault* v. *Chatterton*, *supra*).

Is the right of representation perpetual under 3 & 4 Will. IV. c. 15, s. 1. Query.

The first point calculated to strike the mind in attempting an interpretation of the 1st section of 3 & 4 Will. IV. c. 15, is a palpable defect in the form of words by which the sole right of representation, is given to the author of any tragedy, comedy, play, &c., "not printed and published," for no time is mentioned during which the enjoyment of such a right shall continue, consequently, a question arises, whether the owner of such a production, may not have a perpetual and exclusive right of representation; for although it is true that the copyright in a book is generally supposed to be lost at common law by a publication in print, and that by analogy, a common law right to *perform*

a play, may also be lost after it has once been publicly performed, and that as a consequence the unpublished manuscript would then become published, yet it would not, as in the words of the statute, be "printed and published," and so the author may perhaps, by conforming to the conditions upon which protection is granted and by avoiding *printing*, obtain a perpetual and exclusive right of representation. It is also true that the 20th section of 5 & 6 Vict. c. 45 extends the term of protection granted by the statute of Will. IV., but it is submitted that the section only applies to plays which have been *printed*. The statute of William clearly recognised two distinct rights of representation, one where the play has been "printed and published," and the other where it has *not* been "printed and published," and in the latter case the author's rights are perpetual. The Act 5 & 6 Vict. c. 45, "extends" the term (the perpetual term), which is of course absurd.

It is, moreover, by no means admitted that the public performance of an unpublished manuscript play, is itself a publication of the manuscript, notwithstanding s. 20 of 5 & 6 Vict. c. 45, but as there are excellent reasons for assuming the contrary to be the case, the above argument becomes so much the stronger. (See *Coleman* v. *Wathen*, 5 T. R. 245; *Murray* v. *Elliston*, 5 B. & Ald. 657; *Morris* v. *Kelly*, 1 Jac. & W. 481.)

Registration of a dramatic piece under 5 & 6 Vict. c. 45, s. 20.

A second point to which reference may here conveniently be made, is the construction of the words occurring in the 20th section of 5 & 6 Vict. c. 45, as follows: "and the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition." Now under section 2 of the same Act there is a wide difference between a "book" and a "dramatic piece," and

section 24 has reference only to the registration of any "book."

It is not denied that a "dramatic piece" may under certain circumstances be a "book," but in order to become one, it must clearly be treated as such, that is to say, printed and published (see *Russell* v. *Smith*, 12 Q. B. 217; *Clark* v. *Bishop*, 25 L. T. (N. S.) 911). A dramatic piece, therefore, which is not a "book," need not be registered under the 24th section of 5 & 6 Vict. c. 45, notwithstanding the apparently plain words of the 20th section above referred to. It consequently follows that in order to preserve the right of representation, it is necessary either to keep the composition in manuscript, or to print and register it as a book.

From what date does copyright in dramatic piece run, where representation precedes publication? Query.

Assuming a case in which a public representation has preceded the publication in print, from what date will the author's copyright commence to run?

If the first representation should be in a foreign country, this is a "publication" within the meaning of the International Copyright Act, 7 Vict. c. 12, s. 19, and the author loses his right of exclusive representation here, unless, indeed, he can shelter himself under the Act (*Boucicault* v. *Delafield*, 1 Hem. & M. 597; *Boucicault* v. *Chatterton*, 5 Ch. D. 267). And the same result would clearly follow if the publication took place in print abroad, and that whether any convention existed between this and the foreign country or not. In these cases the common law rights of copy and of representation are gone in favour of the public, for copyright and stage right are supposed as a rule to be co-existent.

Where a musical or dramatic composition is, in the first instance, printed and published in this country, it must be properly registered, or the author's right of copy, properly so called, will be gone, but this will not in any way interfere with the acting right, which is a separate and distinct

species of property altogether. (See *Chappell* v. *Boosey*, 21 Ch. Div. 232; 51 L. J. Ch. (N. S.) 625.)

Taking this statement of the law as correct, let us now assume that the representation precedes the publication in print: from what time will the author's right under these circumstances, commence to run? It is conceded that his *copyright* will date from the publication in print, and that this cannot be defeated by any previous public performance of the play, unless indeed it be under 7 Vict. c. 12, s. 19 (see *D'Almaine* v. *Bousey*, 1 Y. & C. Ex. 288, 299; *Clark* v. *Bishop*, 25 L. T. (N. S.) 908; *Boucicault* v. *Delafield*, 1 Hem. & M. 597). A dramatist may therefore enjoy the exclusive right of representing his drama, and on his publishing the words of it in print, he will secure the copyright in the "book" from the date of the publication of such "book." The further question now arises, from what date does his exclusive right of representation commence to run. If from the date of the first representation (5 & 6 Vict. c. 45, s. 20), then he will have a copyright in a drama, which he may have no exclusive right of representing, a contingency productive of a crop of litigation of the most delicate and intricate nature, while, if the exclusive right of representation dates from the time of publication in print, it is possible, and indeed probable, that playright which may have run out long before, would be revived on such publication taking place.

Copyright and right of representation, distinct subjects of property.

To assume an instance, suppose a manuscript play is first represented abroad, and that the author then prints and registers the work as a book in England; here the exclusive right of representation is gone (*Boucicault* v. *Chatterton*, 5 Ch. D. 281, *per* Brett, L. J.), but the literary copyright remains; in other words, the author has the exclusive right of selling copies of the play, for the period allowed by the Act, without however any exclusive right of performance, a state of things anomalous in the extreme, for

the value of a play lies in its suitability for purposes of representation, at least this is so in the vast majority of instances.

On the other hand, assume that the stage right is secure, and that the copyright is subsequently lost for non-compliance with the statutory requisites, in this instance, would the owner of the stage right have the power to prevent the performance of a play which anyone was at liberty to publish? (See *Boosey* v. *Fairlie*, 7 Ch. D. 309).

The solution of these questions would appear to depend upon the reasonable probability that copyright and stage right are correlative terms, and that both are governed by precisely the same principles, save and except where some third question arises, and then the stage right is subordinate to the copyright. So far as the infringement of these several rights is concerned, while statutory copyright is infringed by publication in print and not by any mere oral use of the composition (but see *Wall* v. *Taylor*, *Wall* v. *Martin*, 52 L. J. Rep. Q. B. 558, 11 Q. B. D. 102), playright or stage right is invaded by performing the dramatic piece, but not by printing it or selling printed copies (*Chappell* v. *Boosey*, 51 L. J. Ch. (N. S.) 625).

It has never been expressly decided whether the author of a dramatic piece has the right to restrain another from singing in public the melody with other words, but it is apprehended that as a composition of the kind is entitled to protection as a whole, and as a whole includes every component part thereof, of which the melody is clearly one, the author would be entitled to claim an injunction.

American Law.

These are some of the questions liable to arise in England at any moment; in America, however, stage right can only be secured as an incident of copyright, and cannot exist without it (see *Revised Statutes, U. S.* s. 4952, s. 4966; *Boucicault* v. *Hart*, 13 Blatchf. 47; *Do.* v. *Fox*, 5 Blatchf. 87; *Shook* v. *Rankin*, 6 Biss. 477).

As to Common Law right of copy in manuscript after representation. Query.

In connection with the many difficult questions arising from a study of the law, so far as it affects the copyright in dramatic publications, and the analogous but distinct right of representation, it may be questioned to what extent a common law right of copy can subsist in a manuscript play which has been acted in public.

The exclusive right of representing a manuscript play is provided for by 3 & 4 Will. IV. c. 15, and it would seem to be doubtful whether the common law right of property in such manuscript has not gone on the first representation in public.

In *Boucicault* v. *Delafield*, 1 Hem. & M. 597; *Boucicault* v. *Chatterton*, 5 Ch. D. 267, it was decided that where an English author first represents his play abroad and in a country with which no convention exists, he is deprived of his exclusive right of representation here, by virtue of the statute 7 & 8 Vict. c. 12. In these cases the court did not touch the question whether subsequent copyright in this country would have revived the right of representation, nor did the plaintiff's counsel suggest (as he might have done) that a common law right of representation existed independently of the right provided by statute. In America it is clear that the mere representation of a play does not interfere with the common law rights of the owner. (See *Palmer* v. *De Witt*, 23 L. T. Rep. (N. S.) 823.)

With respect to the common law right of copy (if any) subsisting in books after publication, reference must be made to the decision of the House of Lords in *Donaldson* v. *Becket*, 4 Burr. 2408, a case previously referred to on several occasions. Assuming, however, for the moment that no common law right exists in a manuscript play after a public performance or representation, then such right is equally gone, whether the proprietor conduct the performance himself, or whether he merely acquiesce in its

unlicensed use. (See *Tinsley* v. *Lacy*, 1 Hem. & M. 747; *Correspondent Newspaper Co.* v. *Saunders*, 12 L. T. (N. S.) 540; *Boucicault* v. *Wood*, 2 Biss. 34; *Keene* v. *Clarke*, 5 Rob. (N. Y.) 70). Such acquiescence of course presupposing knowledge on the part of the proprietor (*Keene* v. *Clarke, supra*).

As a matter of fact, however, the question whether an owner's common law rights in a manuscript are or are not lost by the public performance of the manuscript play, is involved in obscurity. The common law itself does not cease to protect any work of intellectual production merely because it has been published, it is the statute if anything that destroys the common law right, and hence if such right is destroyed, it must be by the operation of some statute or not at all. By 3 & 4 Will. IV. c. 15, the author of a dramatic piece, whether in manuscript or otherwise, has the exclusive right of representation, and by 5 & 6 Vict. c. 45, s. 20, it is provided that the first public representation or performance of any dramatic piece or musical composition, shall be deemed equivalent "in the construction of this Act" to the first publication of a book. It would appear, therefore, that statutory playright must be secured by a conformity to the requirements of these Acts, and that if this is not done, the playright at any rate will become *publici juris*. But how is the manuscript affected? Copyright and playright are two distinct subjects of property (*Chappell* v. *Boosey*, 51 L. J. Ch. (N. S.) 625), and under 3 & 4 Will. IV. c. 15, the author's right of performance is *perpetual* in those cases in which the manuscript is not printed and published; it is submitted that the statute 5 & 6 Vict. c. 45, s. 20, does not apply to manuscript plays, and further, that so long as the author does not cause them to be printed *and* published he has a perpetual right of representation and a perpetual right of copy also.

A dramatic composition published in print becomes a "book," and the author's common law right of copy will be dealt with as in other and similar cases where books are concerned; the author cannot, however, be deprived of his common law rights unless the publication occurred with his consent, express or implied (*Boucicault* v. *Wood*, 2 Biss. 34 (Amer.)), and he who alleges consent must prove it (*ibid.*). *When dramatic composition published in print.*

There would even yet appear to be a lingering belief in the minds of the public, that the unauthorised performance of a play, provided the dialogue has been committed to memory by the actors and not taken down in writing, is no infringement of the exclusive right of representation vested in the author or his assigns, that, in other words, a person is justified in publicly performing a play, even where the exclusive right of representation is vested in another, provided he can carry off the dialogue in his memory. No question of the kind has ever yet arisen in England, although in one case Mr. Justice Buller is reported to have observed: "Reporting anything from memory can never be a publication within the statute. Some instances of strength of memory are very surprising; but the mere act of repeating such a performance cannot be left as evidence to the jury that the defendant had pirated the work itself" (*Coleman* v. *Wathen*, 5 T. R. 245). *Infringement of playright.* *Where dialogue committed to memory.*

In America the state of the several authorities on the subject leave the point at issue in doubt. In favour of the proposition that the unlicensed performance of a play committed to memory is lawful, the following cases would doubtless be quoted: *Keene* v. *Wheatly*, 9 Am. Law Reg. 33; *Keene* v. *Clarke*, 5 Rob. (N. Y.) 38; *Crowe* v. *Aiken*, 2 Biss. 208; *Keene* v. *Kimball*, 16 Gray, 545; *Shook* v. *Rankin*, 6 Biss. 477; to the contrary and against such a proposition: *French* v. *Conolly*, 2 N. Y. Weekly Dig. 197; *Palmer* v. *De Witt*, 2 Sweeny (N. Y.) *American Law.*

530; 47 N. Y. 532, and see Drone on Copyright, pp. 558—572.

"Dramatic piece." What is?

A "dramatic piece" as defined in the 2nd section of 5 & 6 Vict. c. 45 "shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical or dramatic entertainment," and the term has also frequently been the subject of judicial consideration. The 2nd section of 3 & 4 Will. IV. c. 15 imposes a penalty upon any person who shall "represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment" any such production, (that is to say, any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, s. 1) as aforesaid. The words of these statutes when considered as a whole, "comprehend any piece which could be called dramatic in its widest sense, any piece which on being presented by any performer to an audience, would produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience" (*Russell* v. *Smith*, 12 Q. B. 236, *per* Lord Denman).

"Pantomimes."

In an action for penalties under the statute of Will. IV. it was contended that pantomimes were not "dramatic entertainments" because they were not expressly mentioned, and further that the Act being penal was to be construed strictly. It was decided that an introduction to a pantomime, that is, the only *written* part of the entertainment, was within the Act (*Lee* v. *Simpson*, 3 C. B. 871; 11 Jur. 127; and see *Russell* v. *Briant*, 14 Jur. 201; 8 C. B. 836).

Scenic effects and spectacular representations.

Scenic effects and spectacular representations are within the interpretation clause of 5 & 6 Vict. c. 45, and therefore where a person takes the "setting" or visible arrangement and incidental part of a scene, the property of which is in another, he will be restrained, even although the dialogue is quite different (*Chatterton* v. *Cave*, 10 C. P. 572;

33 L. T. (N. S.) 255). And in all cases of colourable imitation, the crucial test, as in the case of books, is whether a material and substantial part of another's production has been taken (*ibid.*), and this is a question for the jury (*Planché* v. *Braham*, 1 Jur. 823), who will be guided not so much by considerations of quantity as of value (*Chatterton* v. *Cave*, 3 App. Cas. 480, *per* Lord Hatherley). Both in England and in America the question whether there has been any infringement is referable chiefly to considerations of common sense (*Reade* v. *Conquest*, 11 C. B. (N. S.) 479; *Boosey* v. *Fairlie*, 7 Ch. D. 301; *Daly* v. *Palmer*, 6 Blatchf. (Amer.) *per* Blatchford, J., 256; *Martinetti* v. *Maguire*, 1 Deady, (Amer.) 216), and as in the case of literary productions, a charge of piracy will be defeated, if the defendant clearly shows that his materials were derived from a common source.

A play which is common property may be adapted to the stage by the aid of scenery, dresses, music and accompaniments, and although there can of course be no property in the words, the production as a whole will be protected by the joint operation of the statutes 3 & 4 Will. IV. c. 15 and 5 & 6 Vict. c. 45 (*Hatton* v. *Kean*, 7 C. B. (N. S.) 268; 6 Jur. (N. S.) 226). On the other hand, it would appear that neither scenery, costumes, nor in fact any of the ordinary appointments of the theatre are essential to constitute a "dramatic piece" within the meaning of the statutes, for, where the plaintiff, who was the composer of a musical composition of a representative character, called "The Ship on Fire," sang it with a pianoforte accompaniment, but without scenes or costumes, it was held that the performance was a "dramatic piece" within s. 20 of 5 & 6 Vict. c. 45 (*Russell* v. *Smith*, 12 Jur. 723), even although there was only one actor (and see *Russell* v. *Briant*, 8 C. B. 836; *Clark* v. *Bishop*, 25 L. T. (N. S.) 908). It follows, therefore, that almost anything capable of repre-

sentation may be a "dramatic piece or entertainment," but until it is actually performed, recited, sung, or otherwise impressed on the feelings, no question of infringement can arise, save at the common law.

Dramatic musical compositions.

A dramatic musical composition, that is to say, a musical composition having dramatic incidents, though not necessarily dramatic accessories, was protected by a judicial interpretation of the words, "dramatic piece or entertainment" (3 & 4 Will. IV. c. 15, *Planché* v. *Braham*, 1 Jur. 823); but now by 5 & 6 Vict. c. 45, s. 2, the title "dramatic piece" is to extend *inter alia* to every "scenic, musical, or dramatic entertainment," and by the 20th section protection is afforded *inter alia* to every "musical composition," whether dramatic or otherwise.

Musical compositions.

It has lately been decided that to sing a musical composition in public, whether at a place of dramatic entertainment (3 & 4 Will. IV. c. 15, s. 2) or otherwise, is an infringement of the rights of the proprietor (*Wall* v. *Taylor*; *Wall* v. *Martin*, 11 Q. B. D. 102, 52 L. J. (N. S.) Q. B. 558), for the right which is given by 5 & 6 Vict. c. 45, s. 20, is not expressly confined to those cases in which the representation takes place at a place of dramatic entertainment, and the following section cannot be considered as incorporating the whole of 3 & 4 Will. IV. c. 15, because the circumstances stated in section 2 of the latter Act are omitted in such following section (*ibid.*).

Where however a copyright play was performed at a hospital, the admission being free, and the governors of such hospital paying all the expenses, it was held that the performers were not liable to the owners of the copyright, the place of performance not being a "place of dramatic entertainment" within the above Acts (*Duck* v. *Bates*, 49 L. T. (N. S.) 507; 32 W. R. 169).

"Part" of a dramatic piece, What is?

A song taken from an opera is clearly "part" of a dramatic piece within the meaning of 3 & 4 Will. IV. c.

15, s. 2, and if it is sung in a place of dramatic entertainment (but see *Wall* v. *Taylor*; *Wall* v. *Martin*, *ante*), an action for penalties will lie (*Planché* v. *Braham*, 1 Jur. 823); and an action will also lie for infringing copyright in a song consisting of new words and a new accompaniment written to an old air (*Leader* v. *Purday*, 7 C. B. 4). And so the music of an opera written in scores for different instruments, may be adapted either by the composer, or by any third person having permission so to do (*D'Almaine* v. *Boosey*, 1 Y. & C. Ex. 289), for any single instrument, and a fresh subject of copyright will be created (*Wood* v. *Boosey*, L. R. 2 Q. B. 340, on app. L. R. 3 Q. B. 223; *Boosey* v. *Fairlie*, 7 Ch. Div. 301; and see *Leader* v. *Purday*, *supra*), for any substantially new arrangement or adaptation of an old piece of music is a proper subject of copyright (*Wood* v. *Boosey*, L. R. 2 Q. B. *supra*; *Boosey* v. *Fairlie*, *supra*; and see the American cases, *Atwill* v. *Ferrett*, 2 Blatchf. 39; *Jollie* v. *Jaques*, 1 Id. 618; *Reed* v. *Carusi*, 8 Law Rep. O. S. (Amer.) 411).

Sale of pirated work with information to purchaser.

A person who piratically publishes and sells a musical or other composition, cannot escape liability by proving that he had instructed his servants to inform purchasers that the song was not original (*Chappell* v. *Davidson*, 2 K. & J. 128; *Sykes* v. *Sykes*, 3 B. & C. 541), and it has been held that the publication of a piece of music, not for sale or hire, but by the gratuitous distribution of lithographed copies amongst the members of a musical society, is a publication for which the defendant is liable—as for an invasion of the property of the proprietor therein,—independently of the 15th section of the statute 5 & 6 Vict. c. 45 (*Novello* v. *Sudlow*, 12 C. B. 177).

Abridgment of a dramatic piece.

It would seem to be doubtful whether the author of a dramatic piece can restrain the public representation of a fair abridgment of such piece (see *Murray* v. *Elliston*, 5 B. & Ald. 657).

License to represent may be given by agent.

The consent in writing "of the author or other first proprietor first had and obtained," and without which, the representation "at any place of dramatic entertainment" of any dramatic piece or entertainment is prohibited, under a penalty by the 2nd section of 3 & 4 Will. IV. c. 15, may be given by an agent, the secretary of the Dramatic Authors' Society, for instance (*Morton* v. *Copeland*, 16 C. B. 517; and see *Fitzball* v. *Brooke*, 2 Dow & Lown, 477; *Shepherd* v. *Conquest*, 25 L. J. (C. P.) 127), but the onus of proving such consent, and in fact any consent at all lies on the defendant (*Morton* v. *Copeland*, *supra*); and where the permission to play certain dramas amounted to a general permission to play all dramas composed by members of the Society, it was held that the license so given applied to the dramas that might be composed after the date of the license (*ibid.*). It has, however, been decided, that a person who wishes to represent a dramatic piece belonging to two or more persons jointly, must obtain the consent of all the owners, and in case this is not done, any single plaintiff, except the one who gave the consent, is entitled to recover his proportion of the penalty (*Powell* v. *Head*, 12 Ch. Div. 686).

Sufficiency of.

Causing to be represented.

The penalty provided by section 2 of 3 & 4 Will. IV. c. 15, is inflicted upon any person who shall represent or "cause to be represented" any such production as is therein mentioned. The expression "cause to be represented" may be explained by reference to a case decided under 10 Geo. II. c. 28, s. 2, an Act which imposed a penalty upon persons performing or "causing to be performed" certain plays, &c. In the case referred to it was held that proof of a person being the acting manager of a theatre, and that he paid the salary of and dismissed one of the performers, was sufficient to show that he caused the performance, and further, that if he caused the performance, it was not material whether he did so as the agent of

others or not (*Parsons* v. *Chapman*, 5 Car. & P. 33); on the other hand, it is not sufficient to show that the defendant supplied the platform furniture, &c., for a room which he had let for a general musical entertainment, and that he had sold a ticket and received the money at the door (*Russell* v. *Briant*, 14 Jur. 201), for it must be shown that the defendant himself, or his agent by his direction, has participated to some extent in the actual performance (*ibid.*). Again, where the proprietor of a theatre lets it for a term to an actor, and provides gas, music, scene shifters, and other essentials, upon the understanding that the gross profits are to be divided, this does not of itself make the proprietor responsible either as partner or otherwise for the wrongful representation of a dramatic piece by the actor (*Lyons* v. *Knowles*, 11 W. R. 266; 10 L. T. (N. S.) 876).

Remedies for the infringement of playright.

The remedies provided by the statute 3 & 4 Will. IV. c. 15, extended by 5 & 6 Vict. c. 45, s. 21 (see *Wall* v. *Taylor*; *Wall* v. *Martin*, 11 Q. B. D. 102, 52 L. J. (N. S.) Q. B. 558), are the only remedies available for the protection of playright, and cannot be made applicable to the unlawful publication of a dramatic piece by printing, that is to say as a book, for if the infringement assumes this form, the injured party must proceed under 5 & 6 Vict. c. 45, s. 15, by action on the case.

Place of dramatic entertainment, What is.

Where a building is used for the public representation, for profit, of a dramatic piece, it becomes *ipso facto* a place of dramatic entertainment within the meaning of s. 2 of 3 & 4 Will. IV. c. 15 (*Russell* v. *Smith*, 12 Jur. 725, *per* Lord Denman), even although it has never been used for such a purpose before, since the mere fact of performing a dramatic piece makes the place where it is performed a place of dramatic entertainment (*Wall* v. *Taylor*, 11 Q. B. D. 108, *per* Brett, M. R.); consequently the question whether a given place is or is not "a place of

dramatic entertainment" is not determined by reference to the circumstance whether or not a theatrical license has been taken out, but with regard to all the circumstances of the case, as for instance, whether any charge was made for admission and the like (see *Duck* v. *Bates*, 40 L. T. 507; 32 W. R. 169).

Where the performance is public, the defendant cannot escape the penalty, by showing that the audience were admitted free; this is only one element in the case, and not in itself absolute proof.

Furthermore, the plaintiff cannot contend that if the performance is dramatic in character, the place is consequently a place of dramatic entertainment, for according to this view of the case, the street where "Punch" is performed, or the place where a strictly private performance was held, would for the time being come within the Act (*Russell* v. *Smith*, 12 Q. B. 232, *per* Patteson, J.), nor can he contend that the phrases "place of public entertainment" and "place of dramatic entertainment" are identical (*Wall* v. *Taylor*; *Wall* v. *Martin*, 51 L. J. Q. B. 547). There is consequently no decision directly stating what is or is not a place of dramatic entertainment; but on the contrary, the opinion of Brett, M. R., in *Wall* v. *Taylor*, 11 Q. B. D. 108, and that of Patteson, J., in *Russell* v. *Smith*, *supra*, are diametrically opposed to each other, and leave the whole question in uncertainty and confusion.

Lectures, infringement of copyright in, by oral delivery or publication in print.

Where a lecture is delivered on the express or implied understanding that it shall be received as a lecture *simpliciter*, and not for publishing purposes, there, the unauthorised delivery of such unpublished lecture will be restrained, on the ground of breach of trust or confidence (*Abernethy* v. *Hutchinson*, 1 Hall & Tw. 40). A person has no right to report, phonographically or otherwise, a lecture or other written discourse, which the author delivers

before a public audience, and which he desires again to use in like manner for his own profit, and consequently, although a student who attends a medical demonstration, may have a perfect right to remember as much of it as he can, and afterwards to use the information thus acquired in his own medical practice, or to communicate it to students or classes of his own, he would not be justified in committing the lecture to writing for the purpose of subsequent publication in print, or by oral delivery (*Keene* v. *Kimball*, 16 Gray (82 Mass.), *per* Hoar, J., 551 (Amer.), and see *Bartlette* v. *Crittenden*, 4 McLean (Amer.), 300).

So also any person who is present at a concert or opera, may play a tune which his ear has enabled him to catch, or sing a song which he may carry away in his memory, whether for his own entertainment or that of others, for compensation or gratuitously, but at the same time he would have no right to copy or publish the musical composition (*Keene* v. *Kimball*, 16 Gray (82 Mass.), 551, *per* Hoar, J., *supra*).

The Act 5 & 6 Will. IV. c. 65, entitled "an Act for preventing the publication of lectures without consent," confers upon the author of any lecture, or the person to whom he hath sold or otherwise conveyed the copy thereof for certain purposes, the sole right of printing and publishing such lecture, and imposes a penalty upon persons who without leave "shall print or lithograph or otherwise copy and publish the same," or who, "knowing the same to have been printed or copied and published without such consent, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale," any such lecture. 5 & 6 Will. IV. c. 65.

By s. 2 the printer or publisher of a newspaper publishing a lecture without such leave, shall be deemed and taken to be a person printing and publishing as aforesaid, and by the 3rd section, persons allowed for certain fee and reward, or otherwise, to attend lectures, are not on

that account licensed to publish them. In order, however, to secure the benefits of the Act it is necessary that notice in writing of an intention to deliver the lecture should be given to two justices, living within five miles of the place where such lecture shall be delivered, two days at least before delivering the same. Exceptions are, however, made in favour of any university or public school or college, and of lectures by any individual in virtue of or according to any gift, endowment, or foundation (s. 5).

It will be observed that this statute applies only to printing, copying, publishing, and exposing for sale, and not to the oral repetition or delivery of the lecture. The common law remains to this extent, therefore, intact, while the statute itself is so little known to lecturers, that its protection is hardly ever sought in practice.

CHAPTER IV.

ON THE VESTING OF COPYRIGHT.

Plaintiff's title.

IN addition to the question whether an act amounts in point of fact to an appropriation of the fruits of the labour of another, so as to constitute an infringement of his right of copy, the further enquiry necessarily arises, whether that right of copy is so exclusively vested in the person laying claim to it, as to enable him to prevent or to recover compensation for any infringement.

What necessary to secure right of copy.

First publication within British Isles.

In order to acquire exclusive copyright, it is absolutely necessary that the first publication should take place within the United Kingdom, for if either a foreigner or a British subject originally publishes his production abroad, it is clear that he will have no copyright in this country, save such as he may acquire under the International Copyright Act (7 & 8 Vict. c. 12). In the event of no treaty existing to give effect to the Act in the particular instance, no copyright can subsist in this country (*Boucicault* v. *Delafield*, 1 Hem. & M. 602; 33 L. J. (Ch.) N. S. 38; and see *Boucicault* v. *Chatterton*, 5 Ch. D. 267).

The International Copyright Act.

The International Copyright Act (extended to paintings, drawings, and photographs, 25 & 26 Vict. c. 68, s. 12) enacts *inter alia*, that neither the author of any book, nor composer of any dramatic piece or musical composition, nor the inventor, designer, or engraver of any print, nor the maker of any article of sculpture, or of such other work of art as is previously mentioned in the Act, which shall after the first passing of the Act be first published out of Her Majesty's dominions, shall have any copyright

therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under the Act (s. 10).

Title of aliens to copyright.

By virtue of this section, if a foreigner, the author of a dramatic piece, has it originally represented abroad, he loses his claim to the exclusive right of representation here, unless he can bring himself within the saving provisions of the Act; and where Englishmen have their plays first represented abroad, they are by this statute placed on the same footing as foreigners; if they have them first represented in England they do not come under this statute at all; but their rights will be governed by 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45 (*Boucicault* v. *Chatterton*, 5 Ch. D. 281), for it is not possible to enjoy any rights conferred by these Acts, concurrently with those created by the International Copyright Act (*Boucicault* v. *Delafield*, 1 Hem. & M. 602, *per* Wood, V.-C.).

Where a foreign author residing abroad, composes a work there, which he first publishes in this country, he himself being in his own country at the time of publication, he can acquire no copyright here, neither can a British subject to whom such work is assigned by the foreign author, gain any such right, but should an Englishman first publish his production in this country, or simultaneously in this country and abroad (*Cocks* v. *Purday*, 2 Car. & Kirw. 269, *per* Erle, J.; *Routledge* v. *Low*, L. R. 3 H. L. 100), he will be entitled to an exclusive right of copy, no matter where he may be residing at the time of publication, because he owes a natural allegiance which he cannot shake off (*Jefferys* v. *Boosey*, 4 H. L. Cas. 985, *per* Lord St. Leonards). This however does not apply to the foreigner, who owes no allegiance to this country, and to entitle his works to protection, it has been held that he must be resident within the British dominions at the time of publication in the United Kingdom (*Jefferys*

v. *Boosey*, 4 H. L. Cas. 815; *Routledge* v. *Low*, L. R. 3 H. L. 100; and see also *Low* v. *Ward*, L. R. 6 Eq. 415; *Boucicault* v. *Delafield*, 1 Hem. & M. 597).

It is not material where the work is composed, nor that the foreigner entered the British dominions solely for the purpose of acquiring copyright, nor that he did not remain there, either "before" or "after," so long as he remained "at" the time of publication. He cannot, however, be present by deputy, but must actually go in his proper person. The extent of the British dominions is defined by 5 & 6 Vict. c. 45, s. 2. It is consequently undeniable that statutory copyright commences with publication, and if "at" that time a foreigner is not actually within some part of the British dominions, he is not considered to be a person whom the Copyright Acts meant to protect (*Jefferys* v. *Boosey*, 4 H. L. Cas. 815; *Novello* v. *James*, 5 De G. M. & G. 876; and see *Chappell* v. *Purday*, 14 Mec. & W. 318; *Boosey* v. *Purday*, 4 Ex. Rep. 145). This statement of the law is directly opposed to that propounded in several previous cases, notably *Cocks* v. *Purday*, 5 C. B. 860, and *Boosey* v. *Davidson*, 13 Q. B. 257, but both these, and others to a similar effect, cannot now be considered any authority on the subject.

The judgment in *Jefferys* v. *Boosey* (*supra*), although followed in *Novello* v. *James* (*supra*), was not unanimous, and has since been doubted (*Routledge* v. *Low*, L. R. 3 H. L. 118, *per* Lords Cairns and Westbury), and as a matter of argument, although the reasons which prompt the executive to insist upon a first publication in this country are perfectly intelligible, yet it is not so easy to understand why the courts should, in addition, insist upon a foreigner being resident within certain circumscribed limits.

If the object of the Copyright Acts is "to afford greater encouragement to the production of literary works of

lasting benefit to the world" (5 & 6 Vict. c. 45, s. 1), and if this proposition should have an universal application, then it is not material where an author resides, but if on the contrary the application is only particular, that is to say, for the benefit and encouragement of authors first publishing in the United Kingdom, what can it matter to us where such author resides, provided we obtain the benefit of the first publication of his work?

It must also be observed that the judgments in *Jefferys* v. *Boosey* are chiefly based upon a construction of the word "author," as used in the preamble to the Statute of Anne (8 Anne, c. 19), and as the construction of this word might be different under 5 & 6 Vict. c. 45, where it is again used, it is quite possible that the decision might not at the present day be followed, for in all the Copyright Acts at present in force, there is nothing to restrict the term "author" to British subjects, nor to make any distinction between them and foreigners. "It is impossible not to see that the *ratio decidendi* in *Jefferys* v. *Boosey* proceeded mainly, if not exclusively, on the wording of the preamble of the Statute of Anne, and on a consideration of the general character and scope of the legislation of Great Britain at that period. The present statute has repealed that Act, and professes to aim at affording greater encouragement to the production of literary works of lasting benefit to the world. And accepting the decision of this house, as to the construction of the Statute of Anne, it is, I think, impossible not to see that the present statute would be incompatible with a policy so narrow as that expressed in the Statute of Anne" (*Routledge* v. *Low*, L. R. 3 H. L. 111, *per* Cairns, L. C.).

There is nothing in the English statutes to show an intention to extend the privilege of copyright to publications printed abroad, and it is probable therefore that such copyright is confined to books actually printed in this

kingdom (see *Clementi* v. *Walker*, 2 B. & C. 808; *Jefferys* v. *Boosey*, 4 H. L. Cas. 980, *per* Lord St. Leonards).

So also it is plain that the object of the legislature was to protect prints and engravings, designed, engraved, etched, or worked in Great Britain, and not those which were designed, engraved, etched, or worked abroad, and only published in Great Britain (*Page* v. *Townsend*, 5 Sim. 404, *per* Shadwell, V.-C.).

In sculpture.

Sculpture models and casts are governed by 54 Geo. III. c. 56, and prints and engravings by 8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57; and in none of these statutes is any distinction made between native and foreign authors.

In paintings, drawings, and photographs.

The author of paintings, drawings, and photographs must, however, either be a British subject, or he must be resident within the dominions of the Crown at the time of publication (see 25 & 26 Vict. c. 68, s. 1),

In engravings.

Concerning prints and engravings it has been already mentioned that the object of the legislature is "to protect those works which were designed, engraved, etched, or worked in Great Britain," and not merely those which were struck off abroad and only published here (*Page* v. *Townsend*, *supra*; and refer to *Clementi* v. *Walker*, *supra*; *Jefferys* v. *Boosey*, 4 H. L. Cas. 983, 986, *per* Lord St. Leonards).

From what has been said it will appear that a foreign author, in order to secure copyright in his production in this country, must publish the work in the United Kingdom in the first instance; that is to say, there must be no prior publication elsewhere, and in addition to this essential, he must, at the time of publication, be resident within the British dominions. Subject, however, to these qualifications, an alien has at common law an equal right with a British subject to the protection of his copyright interests (*Calvin's Case*, 7 Coke, 17a; 33 Vict. c. 14, s. 2).

American law relating to aliens.

By the revised statutes of the United States (4952) it is provided, that an exclusive right of copy can only be granted in America, to such author as shall be a "citizen of the United States, or resident therein;" and this restriction is applicable to "proprietors" as well as "authors, inventors, or designers" of any "book, map, chart, dramatic or musical composition, engraving, cut, print or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts."

If a foreign author should assign his property in a production to a citizen of the United States, or to some one resident there, it would consequently be protected under this section, and when such foreign author is himself a resident, a similar rule would apply (*Boucicault* v. *Wood*, 2 Biss. (Amer.) 34, and see Rev. Stat. 4071.

Meaning of the term "resident."

The term "resident" has here, however, a very different meaning to that put upon it in the judgment of the House of Lords (*Jefferys* v. *Boosey*, 4 H. L. Cas. 815, *ante*, p. 137), for the question whether an author is or is not resident in the United States at the time of publication, does not depend upon mere actual presence for a limited period of one or two days, it having been decided that no one can be considered a resident within the mean- of the Rev. Stat. 4971 (*supra*), unless he has taken up his abode in the United States with the intention of making that country his place of *permanent* residence. The intention is to be gathered from the acts of the party himself, and while, on the one hand, a subsequent change of intent will not deprive the author of a right of copy already secured, on the other, a person who proceeds to the United States with the intention of staying temporarily, is a mere sojourner only, and this although he may actually stay there many years. (Drone on Copyright, 233.) A resident in the United States may, however, be

a boarder or lodger in the house of another (*Boucicault* v. *Wood*, 2 Biss. (Amer.) 38, *per* Drummond J.).

Where the author is an American citizen, it is immaterial in what part of the world he resides, or where his production was executed or completed, so long indeed as it is first published within the dominions of the Republic.

When a work is the joint production of an American citizen and of a foreign author, copyright will vest in that part of it of which the former is the author; if, however, that part cannot be identified, it will not vest at all (Drone, 232).

As the statute confers a right of copy upon "any citizen of the United States, or resident therein," or upon "the executors, administrators, or *assigns*" of such person, and as this right may also be held by "proprietors" as well as by "authors, inventors, and designers," it is conceived that an assignee must also be a citizen of the United States, or resident therein (Rev. Stat. 4952).

Name of actual author or composer must be registered by English law.

When the name of the author or composer of an intellectual production has not been properly registered, by reason of some other person having, in point of fact, been the author or composer, this fact should be pleaded in bar to any action for infringement (*Wood* v. *Boosey*, L. R. 3 Q. B. 223); for although a person may well be the proprietor of a production which he never composed, this does not justify him in registering himself either as author or composer.

It has been decided that a person may be the author of a work, even although he has obtained the assistance of others to get up the details (*Hatton* v. *Kean*, 7 C. B. (N. S.) 281, and see *Barfield* v. *Nicholson*, 2 Sim. & Stu. 1; *Hazlitt* v. *Templeman*, 13 L. T. (N. S.) 593; *Stannard* v. *Harrison*, 24 L. T. (N. S.) 570), and in this respect the American Law is the same (*Heine* v. *Appleton*,

4 Blatchf. 125; *Little* v. *Gould*, 2 Blatchf. 165; *Laurence* v. *Dana*, 4 Cliff. 1; *Commonwealth* v. *Desilver*, 3 Phila. (Pa.) 31).

Where music composed to accompany a drama, Who is the author?

And so where a person composes music to accompany a drama, the whole becomes the property of the owner of the latter (*Wallerstein* v. *Herbert*, 16 L. T. Rep. (N. S.) 453, following *Hatton* v. *Kean*, 7 C. B. (N.S.) 268), although where an employer merely suggests the subject, and leaves the practical details to be carried out by another person, the rule is different (*Shepherd* v. *Conquest*, 17 C. B. 445, and see *Levy* v. *Rutley*, L. R. 6 C. P. 523).

Property in translations, dramatizations, abridgments, and compilations.

The property in a translation is in the translator, and a similar remark applies to dramatizations, abridgments, compilations, and other works of a similar nature. The arrangement of the full score of an opera for the pianoforte, is the property of the adaptor and not of the composer of the full score (*Wood* v. *Boosey*, L. R. 3 Q. B. 223; *Boosey* v. *Fairlie*, 7 Ch. D. 301).

Adaptations.

The author of a photograph is he who takes the negative and arranges the objects to be represented, and not the person who employed him to do so (*Nottage* v. *Jackson*, 11 Q. B. D. 627; 52 L. J. Q. B. 760).

Periodical works, articles in.

By the 18th sect. of 5 & 6 Vict. c. 45, the proprietor of any periodical work, or work published in a series, or of any book, who has employed another to prepare articles, on the terms that the copyright therein shall belong to him, is accordingly entitled to such copyright, and is, so far as his rights and interests are concerned, regarded as the actual author thereof. There is, however, in the same statute, a proviso that the author may by contract, either express or implied, reserve to himself the right to publish his production in a separate form.

Copyright primâ facie remains in author.

The primary rule under this section is that the copyright remains in the author, unless he has expressly

(*Bishop of Hereford* v. *Griffin*, 16 Sim. 190; *Mayhew* v. *Maxwell*, 1 Johns. & H. 312) or impliedly (*Smith* v. *Johnson*, 4 Giff. 632; *Sweet* v. *Benning*, 16 C. B. 484) disposed of it. It is consequently a matter of evidence in each particular case whether the proprietor of the periodical is entitled to publish the article in a separate form or not (*Sweet* v. *Benning*, *supra*), and in the absence of such evidence he has no such right.

Separate publication of article in periodical.

Irrespective of the Act, there is no doubt at all but that a person who employs another for reward, to compose a work, is himself entitled to the copyright (*Grace* v. *Newman*, L. R. 19 Eq. 623) either by virtue of an express agreement, or by reason of a mutual but tacit understanding to that effect. (*Sweet* v. *Shaw*, 3 Jur. 217.) Consequently if an author be regularly employed by a publisher, or be expressly employed to write a certain article, the publisher becomes *primâ facie* the owner of the copyright (*Sweet* v. *Benning*, 16 C. B. 459). The question as to what amounts to a separate publication is discussed in *Smith* v. *Johnson*, 4 Giff. 632, and *Mayhew* v. *Maxwell*, 1 Johns. & H. 312.

What is a separate publication.

In the case of essays or articles, forming part of and first published in reviews, magazines, or other periodical works of a like nature, the right of publishing the same reverts to the author after the period of twenty-eight years from the first publication, for the remainder of the term given by the Act (5 & 6 Vict. c. 45, s. 18); and it would appear that the only persons the section can affect, are, first, publishers or other persons who shall "project, conduct, and carry on, or be the proprietors of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever;" and, secondly, "the authors of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature." In

Right of republication of article reverts to author after lapse of certain time.

5 & 6 Vict. c. 45, s. 18.

those cases, therefore, which do not come within the express words of the section, there will be no reverter to the author at the end of the twenty-eight years, but the copyright, either limited or absolute, as the case may be, will continue in the proprietor of the periodical during the entire statutory term. The point whether the section does or does not cover any particular case is by no means unlikely to arise; and if it should do so, it will be the policy of the law to construe the words of such section in the strictest possible manner (*Richardson* v. *Gilbert*, 1 Sim. (N. S.) 336; 15 Jur. 380).

The words "or any book whatsoever" are also extremely ambiguous, and may at any moment give rise to an interesting discussion.

Where the right of copy vests in an employer.

Without regard to s. 18 of 5 & 6 Vict. c. 45, although the mere fact of employment for reward, is *primâ facie* sufficient to make the copyright in the production the property of the employer on the basis of an implied contract to that effect (*Hatton* v. *Kean*, 7 C. B. (N. S.) 268; *Wallerstein* v. *Herbert*, 16 L. T. (N. S.) 453; 15 W. R. 838); still it is submitted that such employer would have no right to use it, save and except for the purpose for which it was originally composed. Again, it is only on the basis of an agreement, express or implied, that the copyright can vest in the employer, for the property is in the author unless he has consented to part with it (*Bishop of Hereford* v. *Griffin*, 16 Sim. 190). "The title to literary property is in the author whose intellect has given birth to the thoughts and wrought them into the composition, unless he has transferred that title by contract, to another" (*Boucicault* v. *Fox*, 5 Blatchf. 95). Subject to this it is conceded that when a person is employed by another to compose for instance, certain music on occasion, the employer has an equitable right of copy in the production, although in some cases

for a limited time only, and under such circumstances as to amount to a mere license (*Shepherd* v. *Conquest*, 17 C. B. 427; *Levy* v. *Rutley*, L. R. 6 C. P. 523; *Boucicault* v. *Fox*, 5 Blatchf. (Amer.) 87). But where a person composes a literary production for his employer, without the scope of his agreement with the latter, it would by analogy seem to be clear, that he does not thereby part with his right of copy. It has been decided in America, that where an author prepares a fresh edition of a work, the copyright of which is vested in another person, and such person agrees to make no use of the additions in any fresh issue, the copyright in the new matter is equitably in the author, though the legal title is vested in such person, who consequently holds in trust for the author (*Lawrence* v. *Dana*, 4 Cliff. 1; and see *Delf* v. *Delamotte*, 3 Jur. (N. S.) 933).

Where the plaintiff, a cemetery stone mason, employed and remunerated a person to collect monumental designs, and published a book containing sketches of such designs, it was held that the plaintiff was entitled to an injunction to restrain the publication of designs copied from it (*Grace* v. *Newman*, L. R. 19 Eq. 623; and see *Barfield* v. *Nicholson*, 2 L. J. Ch. 90; *Sweet* v. *Shaw*, 3 Jur. 217).

A person who causes or procures to be designed, engraved, etched, or worked in mezzotinto or chiaro oscuro, any print or prints, engravings, maps, &c., is *primâ facie* entitled to the copyright (7 Geo. III. c. 38, s. 1, *Stannard* v. *Lee*, L. R. 6 Ch. 346; *Stannard* v. *Harrison*, 24 L. T. (N. S.) 570), and so also a person who employs another to make any new and original sculpture, or model, or copy, or cast, has the sole right and property of all and in every such new and original sculpture (54 Geo. III. c. 56, s. 1).

When any painting or drawing, or the negative of any photograph, is sold or disposed of, or is made or executed

for or on behalf of any other person for a good or a valuable consideration, neither the person so selling or disposing of, or making or executing such production, as the case may be, nor the vendee or assignee, will be entitled to copyright unless an agreement in writing is entered into at or before the time of such sale or disposition. If no agreement is made, the copyright would appear to become *publici juris* (see 25 & 26 Vict. c. 68, s. 1).

With reference to designs, the author of any new and original design is to be considered the proprietor thereof, unless he executed the work on behalf of another person for a good and valuable consideration, in which case such person shall be considered the proprietor (see 46 & 47 Vict. c. 57, s. 61).

Where no question of employment is involved, an author may, of course, make any terms he can with the purchaser of his production; he may either sell it entirely, or for a limited time, or for a particular purpose, or he may grant a mere license of user, absolute or conditional.

Difference between assignment and mere license.

The grant of a license of user, is quite a different thing from an assignment of the right of copy itself (*Reade* v. *Bentley*, 4 K. & J. 661), for in the former, the copyright remains vested in the author, and the licensee obtains a mere equitable right of user on the terms agreed upon—a right sufficient, however, to enable him to restrain any third person, and probably the author also, from publishing the work (*Sweet* v. *Cater*, 11 Sim. 572, 578). In order to divest the copyright, there must be an actual legal assignment, otherwise at the most, a mere equitable right will pass (*Sweet* v. *Cater*, *supra*; *Lawrence* v. *Dana*, 4 Cliff. 1).

The difference between an assignment and a mere license is a point of importance, affecting the conduct of the action and the consequent construction of the pleadings,

for large as the powers of amendment vested in the court now are, it is hardly to be supposed that they can give relief, in cases where the title of the plaintiff is based upon an erroneous construction of law, or upon a gross and important error of fact.

An agreement between an author, and a publisher or proprietor of a periodical or other work, or an absolute assignment between the same parties, will be construed on ordinary principles of Law in so far as they are applicable to the particular case; a discussion of these principles would, however, be out of place in a work affecting to deal with controversial points.

License to publish a later edition of a work, includes the matter contained in previous editions of the same work.

It may, however, be mentioned that a license to publish a work which has gone through several editions, or a license to publish the last edition, extends to the matter contained in all the previous editions, unless the agreement provides for the contrary (*Sweet* v. *Cater*, 11 Sim. 580, *per* Shadwell, V.-C.); and although an absolute license to publish for all time, amounts in effect to a disposition of the copyright, yet if the agreement be conditioned upon the performance of certain acts on the publisher's or proprietor's part, a different construction will be placed on the document, and if any material condition is not complied with the contract will be at an end (*Stevens* v. *Benning*, 1 Kay & J. 174, *per* Wood, V.-C.). Where also an agreement is entered into under such circumstances as would impose duties on the parties which are clearly personal, such duties are incapable of vicarious performance (*Stevens* v. *Benning*, *supra*; on appeal, 6 De G. M. & G. 223).

Conditional license.

Author may determine conditional agreement and stop further publication.

In those cases in which the duration of an agreement is not fixed, the author may at any time give notice of his intention to determine it, and this will operate to prevent the publication of any new edition upon which the publisher has not, at the receipt of the notice, actually incurred

Publisher in the absence of agreement to determine number of copies to an edition and price.

expense (*Reade* v. *Bentley*, 3 K. & J. 271; *Reade* v. *Bentley* (No. 2) 4 K. & J. 656, 4 Jur. (N.S.) 82), but it is for the publisher to determine the number of copies and the price at which they are to be sold when the agreement is silent upon the subject (*ibid.*).

Meaning of "edition."

Where the license extends to "a second edition," it does not necessarily follow that the publisher is precluded from inserting on the title page "third edition," for an edition cannot always be limited to the number of copies struck off at one impression (*Pulte* v. *Derby*, 5 McLean (Amer.) 328). The question is, or ought to be, one of fact, whether or no the extra copies printed formed a third edition or only part of a second, and as to this, it may be remarked, that where an edition is put forth to the public, and fresh batches of the work are subsequently issued at successive periods, each batch constitutes a new edition, although not reprinted, but kept in stock the whole time (*Reade* v. *Bentley* (No. 2), 4 K. & J. 666). It was decided in a Scotch case, that where a number of copies are destroyed by fire, and fresh copies are printed to supply their place, such fresh copies are merely in substitution, and do not constitute a new edition (*Blackwood* v. *Brewster*, 23 Sc. Sess. Cas. (2nd Ser.) 142).

Remedy against author for refusing to deliver manuscript.

An author, who unjustifiably refuses to deliver the remaining part of a manuscript which he has contracted to supply, may be proceeded against for damages for breach of the contract, the measure of damages being, the expense incurred by the publishers, and the profits they would probably have realized by the publication (*Gale* v. *Leckie*, 2 Stark. 109).

American law governing copyright in periodical literature.

In the United States, the ownership of property in periodical literature and contributions, is governed upon principles similar to those applying to ordinary literary productions in that country, and it has been judicially determined that a "proprietor" may become entitled to

copyright, by virtue of the contract of employment subsisting between himself or his assignor, mediate or immediate, and the author (U.S. Rev. Stat. 4952. *Little* v. *Gould*, 2 Blatchf. 165; *Heine* v. *Appleton*, 4 Blatchf. 125; *Lawrence* v. *Dana*, 4 Cliff. 1); at one time, however, this was a disputed point (see *Pierpont* v. *Fowle*, 2 Woodb. & M. 23; *Atwill* v. *Ferrell*, 2 Blatchf. 39).

Joint copyright.

Lastly, copyright may vest in joint owners, but in order that it shall do so, the production must be the result of a preconcerted joint design, and mere subsequent improvements by another person will not constitute him a joint author of the work (*Lery* v. *Rutley*, L. R. 6 C. P. 523, and see *Shelley* v. *Ross*, cited *idem*, p. 531). Where copyright does vest in joint authors, they will each obtain a distinct but undivided part or share of the production, and each can use his own right alone, without using or receiving any aid or benefit whatever from the other or others (*Carter* v. *Bailey*, 64 Maine (Amer.) 458, *per* Virgin, J., and see *Gould* v. *Banks*, 8 Wend. (N. Y.) Amer. 563; *Maclean* v. *Moody*, 20 Sc. Sess. Cas. (2nd Ser.) 1154).

Necessity of registration in the case of literary property.

As already stated, a Common Law right of copy, which is the inherent property of every author, is vested in him until he shall do something to deprive himself of such right. It is, therefore, a mistake to suppose that registration is absolutely necessary, before the proprietor can acquire a legal title; that he already has at the Common Law, and all the legislature has done, is to decree that the right of the proprietor to sue for any infringement of his copyright, shall, unless he sues at Common Law, remain in abeyance until he has conformed to the provisions of the statute (5 & 6 Vict. c. 45, s. 24. *Cassell* v. *Stiff*, 2 K. & J. 279; *Chappell* v. *Davidson*, 25 L. J. (C. P.) 225, 18 C. B. 194). Consequently, the proprietor is not required to prove that his production was registered when the right of action first arose (*Murray* v. *Bogue*, 1 Drew. 353;

Stannard v. *Lee*, L. R. 6 Ch. 346; *Hogg* v. *Scott*, L. R. 18 Eq. 444; *Goubaud* v. *Wallace*, 36 L. T. (N. S.) 704), but he may register at any time before action brought (*ibid*).

In England.

In England, the proprietor of copyright in any book, should, if he wishes to be able to sue for the infringement of his right of copy therein, make entry in the registry book of the Stationers' Company, of the title of such book, the time of first publication, the name and place of abode of the publisher, and the name and place of abode of the proprietor of the book or of any portion of the copyright (5 & 6 Vict. c. 45, s. 13), and in any action for infringement the defendant may set up by way of defence, that any one or more of the facts stated in the book are untrue in point of fact, or insufficient (*Collette* v. *Goode*, 7 Ch. D. 842). Thus he may plead that the month only, and not the day of publication is registered (*Mathieson* v. *Harrod*, L. R. 7 Eq. 270), or that the wrong date is given (*Low* v. *Routledge*, 33 L. J. (N. S.) Ch. 717, and see *Page* v. *Wisden*, 20 L. T. (N. S.) 435), or that a mistake in the publisher's name or firm (*Low* v. *Routledge, supra*), that is, in the name of the "first publisher" (*Coote* v. *Judd*, 23 Ch. D. 727), or in the name or place of abode of the author or composer (*Wood* v. *Boosey*, L. R. 3 Q. B. 223) has occurred, or that such name is not that of the true author or composer (*Wood* v. *Boosey, supra*). Again, a plea that the registered proprietor was not the proprietor at the time of registration is good, even although he was the original proprietor (*Weldon* v. *Dicks*, 10 Ch. Div. 247), and so also is an allegation by way of defence, that the date given is not the original date of publication (*Page* v. *Wisden*, 20 L. T. (N. S.) 435). But when the proprietor was abroad at the time of publication, he was held to be justified in giving his address as that of the publisher (*Lover* v. *Davidson*, 1 C. B. (N. S.) 182); it is presumed, however, that if a work

Insufficient or irregular registration. Defence.

should be registered before actual publication, that this would be fatal (*Correspondent Newspaper Co.* v. *Saunders*, 11 Jur. (N. S.) 540, *per* Wood, V.-C., and see *Murray* v. *Bogue*, 1 Drew. 353). Further, when the proprietor of copyright in a book, desires to make entry thereof, he must enter the name of the *first* publisher, and if the name of the proprietor himself be entered as publisher, he not being the first publisher, such an entry will be bad (*Coote* v. *Judd*, 23 Ch. Div. 727).

Any one or more of these defences if proved, is or are fatal, and as no power of amending the register at this stage exists, the plaintiff must make a new and correct entry and commence *de novo* (*Low* v. *Routledge*, L. R. 1 Ch. 42; *Stannard* v. *Lee*, 6 *Id.* 346; *Hogg* v. *Scott*, L. R. 18 Eq. 444).

Fresh edition sometimes amounts to a new work.

If an author should publish another edition of his work which is not a mere reprint of the first, it is a new work, so far as the materials, alterations, and additions are concerned, and in order to enable him to sue in respect of the infringement of his rights in those portions of the second edition which are new, he must first register the book in which they are contained (*Murray* v. *Bogue*, 1 Drew. 365, *per* Kindersley, V.-C., and see *Hutchings* v. *Sheard*, W. N. 1881, p. 20). The statute 25 & 26 Vict. c. 68, s. 4, regulating the right of copy in paintings, drawings, and photographs, provides *inter alia*, that a "short description of the nature and subject of the work" shall be entered in the register; it has been held that this provision is sufficiently complied with, when words are used descriptive of the appearance of the composition, as for example, "painting in oil—my first sermon," "photograph—my second sermon" (*ex parte Beal*, L. R. 3 Q. B. 387).

Maps registered as books.

Maps, if coming within the provisions of 5 & 6 Vict. c. 45, (see *Stannard* v. *Lee*, L. R. 6 Ch. 346), should be registered as "books;" but a bird's eye view of a locality

Bird's eye views. is a landscape within 7 Geo. III., c. 38, s. 1, and no registration is essential (*Stannard* v. *Harrison*, 24 L. T. Rep. N. S. 570), but it must be remembered that under the statutes relating to engravings, prints, and lithographs (8 Geo. II., c. 13; 7 Geo. III., c. 38; 17 Geo. III., c. 57; 6 & 7 Will. IV., c. 59; 15 & 16 Vict. c. 12, s. 14), no

Prints. action for piracy can be maintained, unless the date of publication and the name of the owner appear on the print, engraving, or lithograph (*Harrison* v. *Hogg*, 2 Ves. 323; *Thompson* v. *Symonds*, 5 T. R. 41; *Newton* v. *Cowie*, 4 Bing. 234; *Brooks* v. *Cock*, 3 Ad. & Ell. 138; *Ananzo* v. *Mudie*, 10 Ex. Rep. 203; *Graves* v. *Ashford*, L. R. 2 C. P. 410; *Rock* v. *Lazarus*, L. R. 15 Eq. 104).

Engraving bound up in book. Assuming an engraving to be bound up with a book, the former is incorporated in the latter, and it is sufficient if that is registered (*Bogue* v. *Houlston*, 5 De G. & Sm. 267; *Bradbury* v. *Hotten*, L. R. 8 Ex. 1).

Paintings, drawings, and photographs. No proprietor of any copyright in any painting, drawing, or photograph, not registered under 25 & 26 Vict. c. 68, s. 4, is entitled to the benefit of that Act, and no action is sustainable, nor can any penalty be recovered *in respect of anything done before registration.* The forms of entry prescribed by 5 & 6 Vict. c. 45 with respect to books, are applicable to 25 & 26 Vict. c. 68, with such variations as the nature of the case may require.

Periodical works. In the case of cyclopædias, reviews, magazines, or periodical works, or other work published in a series of books or parts, the proprietor must register, 1, the title of the work, 2, the date of publication of the first number, volume, or part, 3, the name and place of abode of the proprietor and the publishers (5 & 6 Vict. c. 45, s. 19, and see *Sweet* v. *Benning*, 16 C. B. 459). After registration of the first number, each succeeding number (*Platt* v. *Walter*, 17 L. T. (N. S.) 159, *per* Lord Chelmsford; and see *Correspondent Newspaper Co.* v. *Saunders*, 11 Jur. (N. S.) 540;

Maxwell v. *Hogg*, L. R. 2 Ch. 307; *Henderson* v. *Maxwell*, 4 Ch. D. 168; 5 *Id.* 892), including the contents (*Henderson* v. *Maxwell*, *supra*), will be protected.

Newspapers.

It has been judicially determined that a newspaper must be registered under 5 & 6 Vict. c. 45, ss. 2, 18, and unless this is done the proprietor of the newspaper will have no right to sue in respect of any article appearing therein (*ante*, p. 79). The Newspaper Libel and Registration Act (44 & 45 Vict. c. 60), though it establishes a register of proprietors, and provides penalties in certain cases, in no way affects any of the rights of copy in a periodical of this nature.

Dramatic compositions.

The right of representation of a dramatic piece or musical composition, as well as the maintenance of an action for the infringement of that right, is secured without any registration of the text (*Russell* v. *Smith*, 12 Q. B. 217; *Clark* v. *Bishop*, 25 L. T. (N. S.) 908; and see also *Lucy* v. *Rhys*, 4 Best & S. 873; *Marsh* v. *Conquest*, 17 C. B. (N. S.) 418; 5 & 6 Vict. c. 45, s. 24).

Sculpture.

In the case of sculpture, the name of the owner and the date, must be placed on the production, "before the same shall be put forth or published" (54 Geo. III. c. 56, ss. 1, 3), and if this is not done, no proceedings can be taken in respect of any infringement.

Patents, designs, and trade-marks.

By 46 & 47 Vict. c. 57: the Patents, Designs and Trade Marks Act, 1883, the proprietor of a design will have copyright in it during five years *from the date of registration* (s. 50). Consequently it would appear that no action will lie either for penalties or damages in respect of anything done before registration (see sect. 58), though in some instances an action on the case for damages at common law might be sustainable.

Expunging or varying entry on register.

Any entry on the register may be expunged or varied on application to the court (5 & 6 Vict. c. 45, s. 14; 25 &

26 Vict. c. 68, s. 5), but it must clearly be shown not only that the entry complained of is false, but that the true entry can be substituted (*Ex parte Davidson*, 18 C. B. 207; 2 Jur. (N. S.) 1024), and the application must be made by some person *aggrieved* (*Chappell* v. *Purday*, 12 M. & W. 303; *Ex parte Davidson*, *supra*; *Re Walker and Graves*, 20 L. T. (N. S.) 877; *Graves' Case*, L. R. 4 Q. B. 721). A person is considered to be aggrieved, when he can show that "the entry is inconsistent with some right that he sets up on himself, or some other person, or that the entry would really interfere with some intended action on the part of the person making the application" (*Graves' Case*, *supra*, 724, *per* Hannen, J.), that is, he must "have some substantial objection, going to the merits of the registered proprietor's title" (*ibid. per* Blackburn, J.).

In the case of designs.

In the case of designs, the court may on the application of any person aggrieved by the omission without sufficient cause of the name of any person from any register kept under the Patents, Designs and Trade Marks Act, 1883, or by any entry made without sufficient cause in any such register, make such order for making, expunging, or varying the entry, as the court thinks fit; or the court may refuse the application; and in either case may make such order with respect to the costs of the proceedings as the court thinks fit (46 & 47 Vict. c. 57, s. 90). The court may in any proceeding under the section, decide any question that it may be necessary or expedient to decide for the rectification of a register, and may direct an issue to be tried for the decision of any question of fact, and may award damages to the party aggrieved (*ibid.* sub-s. 2). Power is also vested in the comptroller to correct clerical errors of the kind mentioned (*ibid.* s. 91), and with the sanction of the Board of Trade, to dispense with the performance of any act or thing, document, declaration, or

evidence, which may be necessary to be done by any person under the rules (r. 29).

Certified copy of registration prima facie proof of ownership.

In all cases of registration under 5 & 6 Vict. c. 45, the certified copy obtained, is *prima facie* proof of ownership only, and may consequently be rebutted (s. 11; *Boosey* v. *Davidson*, 13 Q. B. 257; *Jeffreys* v. *Kyle*, 18 Sc. Sess. Cas., 2nd Ser., 906; *Hazlitt* v. *Templeman*, 13 L. T. (N. S.) 593; *Graves' Case*, L. R. 4 Q. B. 715).

Registration in the United States.

In the United States a person is not entitled to copyright in any production, without registration (*Parkinson* v. *Lasselle*, 3 Sawyer, 333, *per* Sawyer, J.) under the proper statute (U. S. Revised Stat. ss. 4948—4971), and consequently he cannot bring any action in respect of anything done before registration. It is further provided that every copy of a copyrighted production must have inscribed on it, or on the substance on which it is mounted, the notice of entry in the prescribed form (s. 4962). In America, as in this country, provision is made for the delivery of copies of books to various public institutions, but the omission to do this merely involves a pecuniary penalty, and cannot be pleaded in bar (5 & 6 Vict. c. 45, s. 8; U. S. Revised Stats. ss. 4959, 4960).

Assignment of copyright.

Both in this country and in America, the author of a work may before publication, by virtue of the common law, and afterwards, either by operation of statute or independently of it, assign his right and interest to another (5 & 6 Vict. c. 45, ss. 2, 3; and refer to *Cocks* v. *Purday*, 12 Jur. 678, *per* Wilde, C. J.; *Jefferys* v. *Boosey*, 4 H. L. Cas. 853, *per* Crompton, J.; Rev. Stat. ss. 4952, 4955; *Folsom* v. *Marsh*, 2 Story (Amer.), 100; *Paige* v. *Banks*, 13 Wall (Amer.), 608; *Lawrence* v. *Dana*, 4 Cliff. 1).

At common law.

At common law, the author's rights over his production may be transferred by simple delivery of the manuscript, coupled with the intent of parting with all his rights in it (see *Lawrence* v. *Dana*, *supra*), or by

operation of law, (see *Little* v *Gould*, 2 Blatchf. (Amer.), 105, 302; *Folsom* v. *Marsh*, 2 Story (Amer.), 100), and it is even supposed that a person who finds a manuscript, under such circumstances as to render it *res nullius*, would be entitled to the right of copy, and in this event it would make no difference whether the author's name were known or not (see the remarks of Lord Deas in *Maclean* v. *Moody*, 20 Sc. Sess. Cas., 2nd Ser. 1163). A right of copy may therefore be secured by an author of a work, or by any person or corporate body (*Manziels* v. *Gibbons*, L. R. 9 Ch. 518), by any of the modes of transfer recognized at common law, for, independently of statute, there is no distinction between the transfer of literary property and personal property of any other description (*Parton* v. *Prang*, 3 Cliff. (Amer.), 550, *per* Clifford, J.).

By statute. Copyright coming within or protected by 5 & 6 Vict. c. 45, may after publication, be assigned under the 13th section by making entry of such assignment in the book of registry, as is in the said section provided; it is, however, evident, that this section will not apply to any assignor who is not himself registered, for the terms of the section are limited to the "registered proprietor." As however it is by no means essential that a production should be registered under this Act immediately on publication, but only before action brought (*ante*, p. 149), it becomes necessary to inquire, how copyright can be transferred independently of the statute, that is to say, after publication and before registration, or after registration, where it is not intended to rely on the provisions of the Act itself.

Independently of statute. It was at one time universally thought that copyright in a literary production must be assigned by instrument in writing, at least that was the presumption acted upon in many decided cases (see *Power* v. *Walker*, 3 Maule & S. 9; *Davidson* v. *Bohn*, 6 C. B. 456; *Jefferys* v. *Boosey*, 4 H. L.

Cas. 815; *Jeffreys* v. *Kyle*, 18 Sc. Sess. Cas., 2nd Ser., 906; and on appeal *Kyle* v. *Jeffreys*, 3 Macq. 611; *Shepherd* v. *Conquest*, 17 C. B. 427; *Barnett* v. *Glossop*, 3 Dow. Pr. Cas. 625; *Cumberland* v. *Copeland*, 1 Hurl. & C. 194), although a deed was never considered necessary for that purpose (*Marsh* v. *Conquest*, 17 C. B. (N. S.) 418), but as these authorities were all decided under 8 Anne, c. 19 and 54 Geo. III. c. 156, both now repealed by 5 & 6 Vict. c. 45, and confessedly upon the assumption that the legislature having required a mere *license* on the part of the proprietor to be in writing (8 Anne, c. 19), could never have intended an assignment to be by parol, it is evident that this statement of the law cannot be considered to be binding at the present day. It was indeed doubted at the time, or soon after (*Cumberland* v. *Copeland*, 7 Hurn. & N. 133, *per* Bramwell, B.; *Jeffreys* v. *Kyle*, 18 Sc. Sess. Cas., 2nd Ser. 914, *passim*), for there never was, nor is there now, any express reference in any enactment on the subject. It has, however, been held that the construction placed on the two repealed statutes, is equally applicable to the statute 5 & 6 Vict. c. 45, and if this decision is correct every assignment even independently of that Act must be in writing (*Leyland* v. *Stewart*, 4 Ch. D. 419). It is submitted that this decision is open to doubt, for the Statute of Victoria does not refer to the subject of assignment any further than to recommend an entry on the register, and it is provided by s. 2 that the word "assigns, shall be construed to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise." Now as a matter of law, it is clear that an assignment before publication is good at common law, even if by parol (see *Lover* v. *Davidson*, 1 C. B. (N. S.) 182), and as an acqui-

sition by operation of law is, in some instances at least (as in bankruptcy), good without writing (*In re Curry*, 12 Ir. Eq. 391; and see *Mumman* v. *Tetly*, 2 Russ. 392, *per* Lord Eldon); it follows that the only logical conclusion to which it is possible to arrive, is, that the framer of the Act did not intend to make any distinction between copyright derived from the author "before publication" and that derived "after publication" (*Cocks* v. *Purday*, 5 C. B. 860).

Production of deed of assignment evidence of all mesne assignments.

Assuming for the moment, however, that an assignment must be in writing, then it is clear that all intermediate assignments will be presumed to exist on proof of the last transfer, and the onus of showing that such *mesne* assignments never existed, is on the defendant (*Morris* v. *Kelly*, 1 Jac. & W. 481). The title, however, must be a legal one, for no action can be sustained unless the holder of the legal title is before the Court (*Colburne* v. *Duncombe*, 9 Sim. 151, 2 Jur. 654).

Assignment of copyright to a foreigner in a foreign country.

An assignment of copyright to a foreigner in a foreign country, made according to the law of that country, would not seem to confer on the foreign assignee, any sufficient right to make an assignment here (see *Jefferys* v. *Boosey*, 4 H. L. Cas. 815; *Chappell* v *Purday*, 14 Mee. & W. 303, overruling to this extent *Cocks* v. *Purday*, 5 C. B. 860; *Boosey* v. *Davidson*, 13 Q. B. 257; 18 L. J. Q. B. 174).

Assignment of copyright in paintings, drawings, and photographs.

Assignments of copyright in paintings, drawings, and photographs must be in writing, and such assignment must also be registered (25 & 26 Vic. c. 68, ss. 1, 3, and 4). In these and similar cases, it would appear that no assignment or license can be registered before the author or proprietor himself has registered (*Jewitt* v. *Eckhardt*, L. R. 8 Ch. Div. 410, *per* M. R.); although a contrary opinion was at one time held (*Graves' Case*, L. R. 4 Q. B. 715). Consequently where the transferor becomes bankrupt before the transferee has registered, the better opinion is that the

trustee is legally entitled to the copyright (*Longman* v. *Tripp*, 2 Bos. & Pul. N. R. 67). It has been held under 25 & 26 Vic. c. 68, s. 3, that where the plaintiff, who was the proprietor and publisher of a magazine, agreed verbally with the defendant to purchase from him the right to engrave certain photographs, no action for specific performance or damages would lie, there being no written agreement or part performance to take the case out of the statute (*Strahan* v. *Graham*, 17 L. T. (N. S.) 457).

In designs.

The Patents, Designs and Trade Marks Act, 1883, vests in the person for the time being entered on the register as proprietor of, *inter alia*, any design, power to assi licenses as to, or otherwise deal with his desi comptroller on request and "on proof of title faction," shall cause the name of the assignee o be entered as proprietor (s. 87). Rule 22 of the Rules 1883, provides that where a person becomes entitled to the copyright in a registered design, or to any share or interest therein, by assignment, transmission, or other operation of law, or where a person acquires any right to apply the design either exclusively or otherwise, a request for the entry of his name in the register as such proprietor of the design, as of having acquired such right, as the case may be, shall be addressed to the Comptroller, and left at the Patent Office, Designs Branch. It would appear that an assignment in writing is not necessary, since provision is made for a statutory declaration, verifying the statements contained in the claimant's application, and it is further directed that the comptroller may demand such other proof of title as he may deem necessary (see rules 23—28). It remains, however, to be seen whether the comptroller will consider an assignment in writing to be the only satisfactory proof of title (see *Jewitt* v. *Eckhardt*, 8 Ch. Div. 404).

In engravings.

It has not yet been judicially determined how the copyright in engravings should be transferred, but as the Stat. 8 Geo. II., c. 13, s. 1 provides that a *license* under the Act must be in writing, signed in the presence of two witnesses, it is thought that an assignment would be properly carried into effect in the same manner. It is probable that a person would acquire a right of copy by taking a delivery of the plate from which the engraving was struck (see 8 Geo. II. c. 13, s. 1, *Stevens* v. *Gladding*, 17 How. 452).

In maps.

Maps are treated as "Books," and the copyright in them will be assignable in the same way. In cases falling within *Stannard* v. *Harrison*, 24 L. T. Rep. 570, copyright in maps should be transferred as in the case of copyright in engravings.

Assignment of copyright in dramatic productions includes right of representation.

On an absolute assignment of copyright in a dramatic production, the right of representation is included (*Cumberland* v. *Planché*, 1 Ad. & Ell. 580), but the assignment must embrace "all property" (*Ex parte Hutchings*, W. N. 1879, 114), otherwise the rule will be the reverse, for the rights in the production itself, and over the representation are quite distinct (5 & 6 Vic. c. 45, s. 22, *Chappell* v. *Boosey*, 51 L. J. (N. S.) Ch. 625).

Assignment of the right of representation only.

Whether a transfer of the right of representation must be in writing, would seem to be doubtful (*Shepherd* v. *Conquest*, 17 C. B. 427; but see *Lacy* v. *Toole*, 15 L. T. (N. S.) 512, *per* Byles, J.; *Marsh* v. *Conquest*, 17 C. B. (N. S.) 418; *Lacy* v. *Rhys*, 4 B. & S. 883, *per* Cockburn, C. J.), that it need not be attested (*Cumberland* v. *Copeland*, 1 Hurl. & C. 194), nor sealed (*Marsh* v. *Conquest*, 17 C. B. (N. S.) 418) is clear. The question when it shall again arise, will probably be decided with reference to the combined provisions of 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45, s. 20, although in neither of these Acts is there any direct provision for an assignment in writing.

Nothing is said in the Act regulating the right of copy in sculpture (54 Geo. III. c. 56) respecting assignment, and therefore it may be inferred that a writing is not necessary. By the 4th section of the Act, however, it is provided that no person or persons who should or might thereafter purchase the right or property of any new and original sculpture or model, or copy or cast, or of any cast from nature, or of any of the matters and things published under or protected by virtue of the Act, of the proprietor or proprietors, expressed in a deed in writing signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence and attested by two or more credible witnesses, shall be subject to any action for copying or casting or vending the same, anything contained in the Act to the contrary notwithstanding. *Assignment of right of copy in sculpture.*

The right of copy in sculpture is protected for a term of fourteen years (s. 1), provided that after the expiration of such term, the right shall return to the person or persons who originally made or caused to be made the same, if he or they shall be then living, for the further term of fourteen years (s. 6). Suppose now, that the proprietor should dispose of *all* his interest in the copyright, making in point of fact a complete and absolute assignment, would the second term of fourteen years pass as well as the first? It is thought not, for the second term is *in nubibus* only, and the proprietor in that, has merely a kind of reversion and certainly not a term in *esse* which alone is capable of assignment (*Sweet* v. *Shaw*, 8 L. J. (N. S.) Ch. 217).

It is not however denied, that the author might assign all his rights of copy, in such a way as to give the assignee an equitable title to the second term also.

It is of course, not at all essential to the validity of an assignment that it should in its terms be absolute, for copyright may be disposed of in such a way as to make *Limited assignment.*

the assignor and assignee joint owners, or it may be assigned for a limited time (5 & 6 Vict. c. 45, s. 13; *Davidson* v. *Bohn*, 6 C. B. 458, *per* Maule, J.), or a certain interest therein only may be parted with (*ibid.*).

So far as locality is concerned, the proprietor's right of copy is indivisible; for instance, he could not assign his right to different persons, limited to different portions of the United Kingdom, although if he has copyright in two countries, he may assign his right in one of them independently of the other, for this is not a division of a single right but an assignment of one of two (*Jefferys* v. *Boosey*, 4 H. L. Cas. 815; and refer to *Low* v. *Ward*, L. R. 6 Eq. 415; *Routledge* v. *Low*, L. R. 3 H. L. 100).

On an assignment for a limited time, the copyright must at the end of that time be re-assigned, or in case of the refusal of the assignee, the assignor should apply to the Court for a declaration of trust and re-transfer (*Hazlitt* v. *Templeman*, 13 L. T. N. S. 595). On account of the inconvenience attending an assignment limited as to the period of duration, a *license to publish* would appear to be a more preferable instrument. This, in its nature, is essentially different from an a ignment properly so called (*Reade* v. *Bentley*, 4 K. & J. for the licensor has the legal title and the licensee ne ng more than a right in equity to the enforcement of 'he terms of his license. This, however, will generally be found sufficient, while at the end of the term the equitable title will revert to the licensor (see *Tuck* v. *Canton*, 51 L. J. Rep. (N. S.) Q. B. 363).

License to publish, preferable to assignment limited in period of duration,

and arises under 5 & 6 Vict. c. 45, s. 18.

Such a license arises in effect where an author under the 18th sect. of 5 & 6 Vict. c. 45, permits a publisher to make use of an article or contribution in a separate form, or when he reserves such a right to himself, and it may arise either under an express agreement or by implication only

(*Strahan* v. *Graham*, 17 L. T. R. (N. S.) 457; and see *Sweet* v. *Benning*, 16 C. B. 459).

A mere license to use a contribution does not in itself, however, give the publisher a right to use it in a separate form (see 5 & 6 Vict. c. 45, s. 18; *Stewart* v. *Black*, 9 Sc. Sess. Cas. 2nd Ser. 1026).

Transmission of copyright by bequest or on intestacy.

Copyright is transmissible by bequest, or in case of intestacy, is subject to the same law of distribution as other personal property (5 & 6 Vict. c. 45, s. 25; see *Thompson* v. *Stanhope*, Amb. 737; *Cruttwell* v. *Lye*, 17 Ves. 335).

Seizure and sale under fi. fa. no assignment.

Seizure and sale of the plates from which a work is printed, does not amount to an assignment of the copyright (*Stevens* v. *Cady*, 14 How. (Amer.) 528; *Stevens* v. *Gladding*, 17 Id. 447; *Carter* v. *Bailey*, 64 Maine (Amer.) 458), although a voluntary sale might, under certain circumstances, carry with it the right of copy as well.

Title of trustee in bankruptcy.

The copyright in a published work, passes to the trustee for the benefit of the creditors of a bankrupt, yet it is clear, that both in this country and in America, his manuscript does not pass (*Longman* v. *Tripp*, 2 Bos. & Pull. New. 67; *Stevens* v. *Gladding*, *supra*), and it is submitted that the Bankruptcy Act of 1883 does not in any way affect the question (see ss. 50–57, 46 & 47 Vict. c. 52).

So far as the right of representation of a musical or dramatic piece is concerned, it is as yet undecided whether it can be transferred by registration under the Act (5 & 6 Vict. c. 45, ss. 13, 22), or by bequest, or whether it vests in the representatives of the proprietor, in case of intestacy (*idem*, s. 25).

Agreement to assign hereafter.

It is plain, that before copyright can be actually assigned, it must be *in esse* (*Sweet* v. *Shaw*, 8 L. J. (N. S.) Ch. 216), yet for all that an agreement to assign hereafter is valid (*Gould* v. *Banks*, 8 Wend. (N. Y.) 562; *Leader*

v. *Purday*, 7 C. B. 4), and the person with whom such agreement is made, will have an equitable title to the copyright when it comes into existence (*Sims* v. *Marryat*, 17 Q. B. (N. S.) 281).

Form of assignment.

No form of assignment is necessary, any thing being sufficient which clearly shows on the face of it an intention to divest the copyright in favour of the assignee, and for a valuable consideration (*Cocks* v. *Purday*, 5 C. B. 860; *Lacy* v. *Toole*, 15 L. T. (N. S.) 512).

A mere receipt for purchase-money is not generally supposed to amount to a legal assignment (*Latour* v. *Bland*, 2 Stark. 382; *Lover* v. *Davidson*, 1 C. B. (N. S.) 182); but even this conclusion has been doubted (see the remarks of Lord Ivory in *Jeffreys* v. *Kyle*, 18 Sc. Sess. Cas., 2nd Ser. 911); it may on the whole be considered as tolerably certain, that such a receipt will operate as an assignment in equity, and that specific performance of the implied agreement to hand over a legal assignment would be decreed (see *Howitt* v. *Hall*, 6 L. T. Rep. (N. S.) 348; *Strahan* v. *Graham*, 17 L. T. Rep. (N. S.) 457).

Where a manuscript was presented as a gift to a publisher by the author thereof, the latter was held to be bound by his conduct; for although it is clear that there was no assignment, yet the gift operated as an equitable license to publish for the time permitted by the Act (*Rundell* v. *Murray*, Jacobs, 311).

Certified copy of registered assignment prima facie proof.

Where an assignment is registered under 5 & 6 Vict. c. 45, ss. 11, 13, a certified copy of the entry is only *primâ facie* proof of ownership (see *Low* v. *Routledge*, 33 L. J. (N. S.) Ch. 717, 723; *Wood* v. *Boosey*, L. R. 2 Q. B. 340; on app. 3 Q. B. 223; *Graves' Case*, L. R. 4 Q. B. 715; *Boosey* v. *Fairlie*, 7 Ch. D. 301).

Assign.

In the United States, copyright is "assignable in law,

by any instrument of writing, and such assignment shall be recorded in the office of the Librarian of Congress, within sixty days after its execution; in default of which it shall be void as against any subsequent purchaser or mortgagee, for a valuable consideration, without notice." (U. S. Rev. Stat. s. 4955.)

ment in America.

By the American law, a license to publish must be given by the licensor in writing, signed by two witnesses; as in England, the method of transfer before publication, is regulated by the common law and a writing is therefore unnecessary.

License to publish. American law.

An assignment can in no case be presumed from mere length of user alone (*Platt* v. *Button*, 19 Ves. 447; 5 & 6 Vict. c. 45); the plaintiff's laches may, however, bar his remedy, and in this event the copyright becomes *publici juris*.

Assignment not implied from length of user.

If a defendant seeks to rely *inter alia* upon the absence of an assignment in writing, or that the assignment is defective, he must specially plead the matter relied on (*Barnett* v. *Glossop*, 1 Bing. N. C. 633; but see *Moore* v. *Walker*, 4 Camp. 9, note).

Defendant must specially plead absence of assignment.

It is doubtful whether a person who disposes of a copyright, impliedly warrants his title; but where the executor of an author deceased, not knowing that such author had disposed of the copyright in a certain work during his lifetime, gave permission to a third person to publish the work, it was held that the executor had, in certain letters he had written, expressly warranted his title, and was liable in an action of assumpsit (*Sims* v. *Marryat*, 17 Q. B. 281).

Implied warranty of title.

A person who has disposed of his copyright, is not entitled to reproduce substantially the same matter in another publication (*Colburn* v. *Simms*, 2 Hare, 543), and the same rule applies to an artist who has disposed of his

Vendor of right of copy not entitled to reproduce,

copyright in a picture (25 & 26 Vict. c. 68, s. 6; see *Rooney* v. *Kelly*, 14 Ir. Law Rep. (N. S.) 158).

but may sell copies printed before sale.

In the absence of an agreement to the contrary, the assignor of a copyright is entitled after assignment, to continue selling copies of the work printed by him before the date of the assignment and remaining in his possession (*Taylor* v. *Pillow*, L. R. 7 Eq. 418; *Howitt* v. *Hall*, 6 L. T. (N. S.) 348; and see also *Murray* v. *Heath*, 1 B. & Ad. 804); but when the copyright is assigned for a certain term, the assignee obtains the exclusive right to print and sell the work during such term, and if any copies remain unsold after the term has expired, the loss will fall on him. Where an author agrees with a publisher, the latter to bring out a work at his own expense, paying the author a royalty upon every copy sold, the publisher cannot prevent the author or a third person from bringing out a fresh edition until the copies in his own possession are disposed of (*Warne* v. *Routledge*, L. R. 18 Eq. 497, overruling the dictum of Wood, V.-C., in *Stevens* v. *Benning*, 1 K. & J. 176); in such a case as this, however, there would seem to be no doubt that the publisher would be entitled to dispose of any unsold copies in hand (*Howitt* v. *Hall*, *supra*).

Sale of copyright or grant of license to publish, does not confer right of alteration.

Under ordinary circumstances, the sale of a copyright or license to publish, confers no right of alteration of the draft or other production, and the remedy of the author would seem to be for an injunction, or damages, or both (see *Byron* v. *Johnston*, 2 Mer. 29; *Archbold* v. *Sweet*, 5 Car. & P. 219); but where the author's name is not intended to be used on publication, the rule is probably otherwise (*Cox* v. *Cox*, 11 Hare, 118).

Owner of revised work cannot repre-

In connection with this subject it may be mentioned that a publisher, whether the absolute owner of copyright or not, has no right to represent any particular edition,

as the work of the original author, when in point of fact it has been revised by a third person (*Archbold* v. *Sweet*, *supra*; and see *Wright* v. *Tallis*, 1 C. B. 893). The reason of this is of a twofold nature—in the first instance, the public might and probably would be deceived; and secondly, the author's literary reputation would be in the hands of a stranger.

sent it as the work of original author.

CHAPTER V.

ON THE REMEDIES FOR INFRINGEMENT OF COPYRIGHT.

(*a.*) *Remedies at Law.*

Remedies for infringement.

At common law.

By statute.

For penalties under a statute.

In Equity.

THE proprietor of a copyright is possessed of several remedies for the protection thereof: in the first place, he may have a right of action at common law; again, he may have a right of action by virtue of some statute in which a particular remedy is pointed out or provided, he may have a right to the recovery of penalties, or to the delivery up of the pirated works themselves. Such proprietor has also in some cases an equitable remedy, consisting of an action for an injunction founded on the common law right, or he may have a similar action based on the ordinary principles of equity itself, where the piracy can be shown to have been accompanied by circumstances of fraud, or breach of trust, confidence or contract, express or implied (see *Turner* v. *Robinson*, 10 Ir. Ch. (N. S.) 131, *per* M. R.).

Remedies at law.

We will first proceed to consider the remedies at law, including in this term, actions for damages founded on statute and at common law, and proceedings before the magistrates for the recovery of penalties. The Judicature Acts, while they have decided in favour of an equitable interpretation in those cases in which the rules of law and equity were formerly in conflict, do not in the least affect the rights and remedies of persons aggrieved, and it is as advisable now as heretofore, to seek in the proper court, that remedy which is most appropriate to the particular circumstances of the case.

Action on

It is to be observed, that such remedies as are in-

separably attached to the *Lex non Scripta* or ancient common law, are available under the *Lex Scripta* or statutory law, in all those cases in which the latter, while conferring a right, does not at the same time provide a sufficient remedy for the protection thereof, for where a right is secured by the statute, a remedy is if necessary supplied by the *Lex non Scripta*, for otherwise there would be a right without a remedy. (See *Comyns's Digest*, Action on Statute, A 2; *Novello* v. *Sudlow*, 12 C. B. 187, *per* Talfourd, J.) The remedy so imported, assumes in the case of copyright, the form of an action for damages, and as a matter of technical distinction, it is clear upon general principles of law, that this action is one of case and not of trespass (see *Atwill* v. *Ferrett*, 2 Blatchf. (Amer.), 47). *the case for damages at common law.*

The proprietor of a copyright which has been infringed, would not appear to have any common law right to the delivery up of the pirated copies of his work (*Colburn* v. *Simms*, 2 Hare, 543; but see *McRae* v. *Holdsworth*, 2 De G. & Sm. 496).

Where a statute creates a new offence and imposes a penalty, the auxiliary remedy by injunction may be claimed, for that is a mode of preventing a thing being done, which if done would be an offence. If the thing threatened is illegal, the Court can interfere. As to the mode of granting the injunction, the Court will grant it, either when the illegal act is threatened, or when the thing has been done, and there is a threat to continue (*Cooper* v. *Whittingham*, 28 W. R. 720). The right to apply the appropriate common law remedy is, of course, dependent upon the statute, for if no right is secured by the latter, it is obvious that a remedy cannot exist. For instance, where the statute 5 & 6 Vict. c. 45, speaks of a "Book," part of a book is equally referred to, and this upon common law principles, for a right is secured by virtue of the statute, and the common law supplies any deficiency in *Injunction.*

the remedy. On the other hand, an actor or any other person, may recite a copyright poem or other work, and this even in public, although he would not be permitted to distribute copies for sale (*Tinsley* v. *Lacy*, 1 Hem. & M. 751, *per* Wood, V.-C.). The reason of this is, that the statute 5 & 6 Vict. c. 45, by its very terms, and the connexion of its sections, is directed against printing or otherwise multiplying copies of works only, and has nothing to do with the right of representation or performance, itself expressly secured by statute (3 & 4 Will. IV. c. 15). Where there is no right there is no remedy, but when the right is provided, though without any adequate remedy, then the common law steps in (refer to *Clark* v. *Bishop*, 25 L. T. (N. S.) 908).

Proceedings under 5 & 6 Vict. c. 45, s. 15.

By 5 & 6 Vict. c. 45, s. 15, it is provided, that if any person shall, in any part of the British Dominions, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, *or* shall import for sale or hire, any such book so having been unlawfully printed, from parts beyond the sea, *or, knowing such book to have been so unlawfully printed or imported,* shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession, for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of the copyright, and such action can be brought in any court of record in that part of the British Dominions in which the offence is committed. Now it is obvious at the first glance, that the manner in which this section is worded is sufficient to destroy its utility, for all that is prohibited is, the unlawful printing "in any part of the British Dominions," of any copyrighted work, and the importing or selling any book "so having been unlawfully printed," that is to say, printed in any

part of the British Dominions. Consequently, if the section is to apply at all, it will be to those cases in which a person has piratically printed a book in the British Dominions, exported it "to parts beyond the sea," and then imported it (refer to *Boozey* v. *Tolkien*, 5 C. B. 480, *per* Wilde, C. J.).

It is clear that although the publisher or seller of a pirated work would escape liability under the section, on showing that he did not sell, publish, or expose to sale or hire, *knowing* the work to have been unlawfully printed or imported, yet the printer or importer cannot rely on such a defence (*Colburn* v. *Simms*, 2 Hare, 557; *Leader* v. *Strange*, 2 Car. & Kir. 1010). Nor is it any defence to show, that the work was printed or imported for gratuitous circulation, and not for "sale or hire," because here the common law supplements the section of the Act, and provides a remedy sufficiently adequate (*Novello* v. *Sudlow*, 12 C. B. 177).

Defendant's notice of certain objections.

Where any person is proceeded against under the section, for unlawfully printing any book for sale, hire, or exportation, *or* "for importing, selling, publishing, or exposing to sale or hire, or causing to be imported, sold, published, or exposed to sale or hire, any such book," the defendant on pleading thereto, is to give to the plaintiff a notice in writing of any objections on which he means to rely on the trial (5 & 6 Vict. c. 45, s. 16). If the nature of his defence is, (α) that the plaintiff in such action is not the author or first publisher of the book, *or* (β) is not the proprietor of the copyright, or (γ) that some other person than the plaintiff was the author or first publisher of the book or proprietor of the copyright, then the defendant must specify in the notice, (α) the name of the person who he alleges to have been the author or first publisher, or (β) the proprietor of the copyright, together with the title of the book, and the time when and the place where such book was first

published. In default of a proper notice under the section, the defendant will not be allowed at the trial to give evidence that the plaintiff was not the author, or first publisher, or proprietor, and "no other objection shall be allowed to be made on behalf of such defendant than the objection stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice," nor can the defendant give in evidence in support of his defence, any other book than one substantially corresponding in title, time, and place of publication, with the title, time, and place specified in such notice (*ibid.* s. 16). The effect of this section is, that the defendant must, not merely in an action under s. 15, but in any action for piracy of a book, give notice of the objections on which he means to rely, and further, if the nature of his defence be special he must give the further particulars required. Where, however, the defendant by his pleading denied in effect that the plaintiff was the author or first publisher, it was held that this was sufficient, as the pleader's only object is to let the plaintiff know what the objection is, and either the author's or the first publisher's name (*Dicks* v. *Yates*, 50 L. J. (N. S.) Ch. 813).

Again, in a very recent case, the defendant did not serve his notice of objections until issue had been joined and notice of trial served, but it was nevertheless held, that the action might be dismissed on a defect in the registration being brought out from the plaintiff's evidence (*Coote* v. *Judd*, 23 Ch. Div. 727).

Notice under 5 & 6 Vict. c. 45, to be given with defence.

The notice to be given under the Act should be delivered with the statement of defence, and as its purport and effect will be construed strictly, great care is necessary in its preparation.

Form of notice.

In an action for the infringement of copyright in a musical composition, the defendant, under a notice of objections, which stated that the plaintiff was not the

proprietor of the copyright, and that there was no subsisting copyright in the work, was held to be precluded from showing at the trial, that the plaintiff derived his title through an informal assignment. This notice, it will be observed, did not specifically mention who the proprietor was, as it ought to have done (*Leader* v. *Purday*, 7 C. B. 4).

Where a defendant intends to rely upon the absence of a valid assignment, it is not sufficient for him to allege in his notice, that there has been no "valid assignment" to the plaintiff, without at the same time showing how, or in what way, the assignment is defective (*Boosey* v. *Purday*, 10 Jur. 1038).

A pleading alleged, "the defendant denies that the said song has been duly registered, the time of the first publication thereof is not truly entered on the register." Held, that proof of the publisher's name being wrongly stated could not be received, and leave to amend refused (*Collette* v. *Goode*, 7 Ch. D. 842; 47 L. J. Ch. 370).

If a defendant merely states in his notice, that the work in question was not printed or published in the British Dominions, the statement is not sufficiently explicit, and is consequently bad (*Boosey* v. *Purday*, *supra*).

An allegation that the plaintiff never acquired any title by assignment "or otherwise," is too vague, and where a notice stated that there was no copyright in a work first published out of the British Dominions, "under such circumstances as the books in question were published," the concluding words were struck out with costs as misleading (*Boosey* v. *Davidson*, 4 D. & L. 147).

The defendant ought not to state that the proprietor of the copyright is not the plaintiff, but "some persons whose name is to the defendant unknown," but he should find out and allege the names of such persons.

Where the first publication of a work has taken place abroad and at a remote distance of time, the rule would

appear to be that it will be sufficient to state the *year* of publication; but the defendant is, notwithstanding, bound to state the name of the party whom he alleges to be the proprietor or publisher, he must also state the title of the work, and the place and time of publication (*Boosey* v. *Davidson*, 4 D. & L. 147).

As registration of a copyright is bad, if the name entered as that of "the publisher" is not that of the first publisher (*Coote* v. *Judd*, 23 Ch. Div. 727), a notice embodying such an objection must state who the first publisher really is.

Order for a further and better notice.

Should the plaintiff consider the notice for any reason defective or not sufficiently explicit, he should apply to a judge at chambers, before reply, for an order for the delivery of a more specific notice, or to strike out any of the clauses or allegations that he finds fault with. In case he neglects to do this, the defendant may at the trial give in evidence anything he can manage to bring within the scope of his notice, the sole question being, whether the notice is sufficiently general to include the objections (see *Neilson* v. *Harford*, 8 M. & W. 806).

Importing for sale or hire.

It is unlawful for any person, not being the proprietor of the copyright, to import into any part of the United Kingdom, or into any other part of the British Dominions, for sale or hire, or knowingly to sell, publish, or expose to sale or let to hire, or have in his possession for sale or hire, any printed book first composed or written, or printed and published in any part of the said United Kingdom, wherein there shall be copyright, and reprinted in any country

Selling copyright works reprinted out of the United Kingdom.

out of the British Dominions (5 & 6 Vict. c. 45, s. 17). A breach of this provision is a cause of forfeiture of the work (which must be destroyed by the officer of customs taking it), and a further penalty of £10 and double the value of every copy of such book imported, or knowingly sold, published, or exposed to sale or let to hire, or which shall

be in the possession of the defendant for sale or hire (*ibid.*). The Customs Act (39 & 40 Vict. c. 36), also provides for the seizure of copies of books piratically imported (ss. 42, 44, 45, 152).

Importing or selling.

Some little difficulty would seem to arise with respect to books piratically imported, for s. 17 of the Act provides for the destruction of such works, and imposes a penalty, while another section (s. 23) enacts that books unlawfully printed or imported, shall be deemed to be the property of the proprietor of the copyright, who shall, after demand in writing, be entitled to sue for and recover the same, or damages for the detention thereof, in an action of *detinue*, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of *trover*. Generally speaking, however, this section will be found of the greatest importance, for there is at common law no right to the delivery up of copies of a pirated work (but see *McRae* v. *Holdsworth*, 2 De G. & Sm. 497).

Under this Act (5 & 6 Vict. c. 45), it would appear that a defendant may be proceeded against for each and every distinct act of sale, no matter whether it occurs on the same day or not (see *Brooke* v. *Milliken*, 3 T. R. 509; *Jarrold* v. *Heywood*, 18 W. R. 281, *per* James, V.-C.).

Pleading under 5 & 6 Vict. c. 45, s. 26.

If an action is brought against any person for doing anything in pursuance of the Act, it is provided (s. 26) that the defendant in such action may plead the general issue, and give any special matter in evidence. No case has as yet been decided under this section, but persons will probably be held entitled to protection, who have reasonable ground for supposing that what they do is done under the sanction of the Act, as well as in cases where they overstep their authority in the course of doing it (see *Cook* v. *Leonard*, 6 B. & C. 356; *Chamberlain* v. *King*, L. R. 6 C. P. 474; Addison on Torts, 5th ed., 713).

Defences to action for piracy.

In an action for piracy, the defendant cannot successfully allege in his statement of defence that the work alleged to be pirated, was printed without the name and place of abode of the printer upon the first or last leaves thereof (see 2 & 3 Vict. c. 12). A defendant who intends to rely upon an incomplete, invalid, or misleading registration of the plaintiff's name, or upon the other requirements of the Act, must plead specially, and he cannot give in evidence, anything but what is included within the scope of his statement of defence. Where the statement of defence is not in this respect sufficiently comprehensive, leave to amend will not be given under O. XXVIII., Rules Supreme Court, 1883 (*Collette* v. *Goode*, L. R. 7 Ch. Div. 842).

Limitation of actions under 5 & 6 Vict. c. 45.

All actions, suits, bills, indictments, or informations for any offence committed against the Act (5 & 6 Vict. c. 45) shall be brought, sued, and commenced within 12 calendar months next after such offence committed, except in cases of actions respecting default in the delivery of copies of works to the British Museum and other libraries (s. 26).

The effect of this section is, however, much weakened, for it has been held applicable only in cases of penalties and forfeitures, and consequently an action for damages, or for an injunction, may be maintained although more than a year has passed since the wrong was done (*Hogg* v. *Scott*, L. R. 18 Eq. 444; and see also *Stewart* v. *Black*, 9 Sc. Sess. Cas. 2nd Ser. 1026). In the case of proceedings being taken for the recovery of penalties and forfeitures, the fact that an offence is committed every time a copy of a pirated work is sold (*Jarrold* v. *Heywood*, 18 W. R. 281, see the remarks of James, V.-C.), may, in some instances at least, be of the highest importance.

Piracy of prints. Remedy under 8 Geo. II. c. 13.

Any printseller, or other person whatsoever, who shall engrave, etch, or work in mezzotinto, or chiaro-oscuro, any historical or other print or prints, or in any other manner

copy and sell, or cause to be engraved, etched, or copied and sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or who shall print, reprint, or import for sale, or cause to be printed, reprinted, or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him or them respectively in the presence of two or more credible witnesses, or *knowing the same to be so printed or reprinted without the consent of the proprietor or proprietors*, shall publish, sell, or expose to sale or otherwise, or in any other manner dispose of, or cause to be published, sold, or exposed to sale or otherwise, without such consent as aforesaid, then such offender shall forfeit the plate from which the print has been copied, and all and every sheet or sheets (being part of or whereon such print or prints are or shall be so copied or printed), to the proprietor of the original print, who shall forthwith destroy the same, and further such offender is made liable to a penalty of 5*s.* for every pirated print found in his custody (8 Geo. II. c. 13, s. 1).

This provision however is not to extend to purchasers of plates from the original proprietors (*ibid.* sec. 2), and any action or suit brought against any person, for doing or causing to be done anything in pursuance of the Act, shall be brought within three calendar months after the act committed (s. 3); and any special matter may be given in evidence on the general issue (s. 3).

Limitation of actions.

And it is further provided, that any action or suit brought against any person for an offence committed against the Act, must be brought within three months after the discovery of the offence (s. 4).

7 Geo. III c. 38.

The general scope and efficiency of this enactment are much extended by the provisions of 7 Geo. III., c. 38. Under this Act, however, prosecutions for penalties

must be commenced within six calendar months after the offence committed (sect. 6), and all actions and suits against persons for doing anything in pursuance of the Act must be commenced within a similar time, the defendant being at liberty to plead the general issue, and to give any special matter in evidence (sect. 8).

17 Geo. III. c. 57.

By 17 Geo. 3, c. 57, an action on the case for damages is given to the proprietor of the pirated print or engraving, and this action is maintainable against any one who engraves, etches, or works, or causes or procures so to be engraved &c., or in any other manner copies, in the whole or in part, by varying, adding to or diminishing from the main design; also against any one who shall print, reprint, or import for sale, or cause to be so printed, &c., or who shall publish, sell, or otherwise dispose of, or cause, &c., any copies of the prints mentioned in the Act, which have been or shall be engraved, etched, drawn or designed, in any part of Great Britain, without the express consent of the proprietor in writing, signed by him in the presence of two witnesses.

Whether special damage must be proved, sub. 17 Geo. III., c. 57.

It would appear to be doubtful, whether it is necessary in an action for damages under this Act to prove special damage, or whether the plaintiff would be entitled to nominal damages on proof of the piracy (see *Moore* v. *Clarke*, 9 Mee. & W. 694).

In an action on the case for pirating an engraving, the plaintiff charged that the defendant had copied his print "in the whole or in part, by varying, adding to, or diminishing from, the main design;" and Lord Abinger directed the jury to consider whether the main design of the plaintiff's engraving had been copied, and whether the plaintiff had sustained any damage. *Held*, on motion for a new trial, on the ground of misdirection, that this direction was right (*ibid.*, p. 692).

Plaintiff must prove

Any person charged with publishing, selling, or exposing

to sale contrary to 8 Geo. 2, c. 13, must be proved to have done so *knowingly*, but under 17 Geo. 3, c. 57, a *vendor* is liable, although he did not know the engraving to be a copy (see *West* v. *Francis*, 5 B. & Ald. 737; *Gambart* v. *Sumner*, 5 H. & N. 5); further, it has been held that the statute 17 Geo. 3, c. 57 does not apply even to a seller, unless the copies sold were unlawfully printed or imported; in other words, a defendant is not guilty of piracy if he has printed the copies from the original plate (*Murray* v. *Heath and Others*, 1 B. & Ad. 804). The sale of such engravings may amount to a breach of contract on the part of somebody, but no question of copyright is involved. *Guilty knowledge.*

This conclusion would, however, seem to be more than doubtful, for the mere possession of a plate does not necessarily incorporate the exclusive right of printing and publishing the engraving; the question is, or should be, whether the printing was done with or without authority (see *Stevens* v. *Gladding*, 17 How (Amer.), 453).

The common law, in its application to augment or provide a remedy in those cases in which a statute announces a right, but either provides an insufficient remedy, or no remedy at all (see *ante*, p. 169), cannot be extended under any of the Engravings Acts, to prohibit the *exhibition* of a copy of an engraving (*Martin* v. *Wright*, 6 Sim. 297). *Exhibition of a copyright work of art, not an infringement.*

It is to be observed that no time is limited by 17 Geo. III. c. 57, within which an action for damages must be brought, and it is therefore assumed that such action may be commenced at any time within six years after the commission of the offence (see *Graves* v. *Mercer*, 16 W. R. 790); it is also assumed, that where the assignee of the copyright maintains such an action, as he clearly may do (*Thompson* v. *Symonds*, 5 T. R. 41), the time within which he may bring it will be the same. *Limitation under 17 Geo. III., c. 57.*

Query. Whether an unauthorised copy of engraving made by hand a piracy.

It is a doubtful question whether an unauthorised copy of an engraving made by hand, would be considered a piracy (*Gambart* v. *Ball*, 14 C. B. (N. S.) 318, *per* Willes, J.), for the Engravings Acts apply only to any process by which copies may be indefinitely multiplied (*ibid.*), and to "prints taken by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely" (15 & 16 Vict. c. 12, s. 14). The process of photography is clearly a mechanical process (*Gambart* v. *Ball*, 14 C. B. (N. S.) 306), and consequently comes within the provisions of the section, although under the Engravings Acts, it must be remembered, that subjects may be pirated by any process, whether mechanical or not, so long as copies may by it be indefinitely multiplied (*Graves* v. *Ashford*, L. R. 2 C. P. 410). Such copies need not be exactly like the original in every particular (*Roworth* v. *Wilkes*, 1 Camp. 94; *West* v. *Francis*, 5 B. & Ald. 737; *Moore* v. *Clarke*, 9 M. & W. 692); for instance, they may be either larger or smaller (*Graves* v. *Ashford*, L. R. 2 C. P. 419; *Gambart* v. *Ball*, 14 C. B. (N. S.) 317, *per* Erle, C.J.).

Copies by photography clearly so.

Copy need not be identical with original.

Print from plate sufficient evidence.

In an action for the piracy of an engraving, it is not necessary to produce the plate itself in evidence, but a print taken from it will be sufficient (*Thompson* v. *Symonds*, 5 T. R. 41), and such print must bear the date of publication, and be truly engraved with the name of the proprietor (*ante*, p. 88). It may be stated as a sound proposition that in all actions of damages, under 17 Geo. III. c. 57, for infringement of copyright in engravings, the *locus* of the infringement should be stated (*Graves* v. *Logan*, 7 Sc. Sess. Cas. 3rd Ser. 204).

In action, the place where infringement took place should be specified.

Maps, Charts, and plans.

Maps, charts, and plans are sometimes treated as books, and sometimes as engravings; in the former case, any remedies at law for infringement must be sought under

5 & 6 Vict. c. 45. The law on the subject of maps, charts and plans, is, however, in a very unsettled state (see *Stannard* v. *Lee*, L. R. 6 Ch. 346; *Do.* v. *Harrison*, 24 L. T. (N. S.) 570).

Paintings, drawings, and photographs. 25 & 26 *Vict.* c. 68, s. 6.

If the author of any painting, drawing, or photograph in which there is subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of the proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause, &c., any such work, or the design thereof, or, *knowing that any such repetition, copy, or other imitation has been unlawfully made*, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause, &c., any repetition, copy, or imitation of such work, or of the design thereof, made without such consent as aforesaid, such person is liable to a fine not exceeding 10*l.* for every such offence, and all such repetitions, copies, and imitations made without such consent, and all negatives of photographs made for the purpose of obtaining such copies are forfeited to the proprietor of the copyright (25 & 26 Vict. c. 68, s. 6).

Penalties.

This section applies, it will be observed, to the author himself, who repeats or makes duplicate copies of his production, "or of the design thereof," after sale of the copyright, as well as to a person who, not being the proprietor, acts contrary to the provisions of the Act.

If any person, knowing that photographic copies of an engraving have been made unlawfully, sells such copies, he can be proceeded against under this section (*Ex parte Beal*, L. R. 3 Q. B. 387), and the penalty will attach in respect of every copy sold, even although a number of copies be enclosed in a parcel and disposed of as a

whole (*ibid.*; and see *Brooke* v. *Milliken*, 3 T. R. 509); but a person who copies, or imitates for sale, hire, exhibition, or distribution, is liable even although he acted innocently in the matter. And, it will be observed, that merely to *exhibit* a pirated production constitutes an offence, provided that a knowledge of the piracy can be brought home to the exhibitor.

When an engraving is made from a painting, and a person afterwards unlawfully copies the painting, the question arises whether this can be considered an unlawful copying of the engraving as well as of the picture. When the subject of a picture is copied, it would not seem to be of any consequence whether that is done directly from the picture itself, or through intervening copies (*Ex parte Beal*, L. R. 3 Q. B. 394, *per* Blackburn, J.; and see *Ex parte Graves*, L. R. 4 Q. B. 715), and consequently on this view of the case the copy would infringe not only the original production, but copies thereof also. This statement of the law may be correct, but it is difficult to see upon what principle, and moreover in the case referred to, the remarks of Mr. Justice Blackburn were in this respect merely *obiter*, since both picture and engraving were the property of one and the same person (*Ex parte Beal*, *supra*; and see also *De Berenger* v. *Wheble*, 2 Stark. 548).

Damages for infringement of copyright in paintings, drawings, and photographs.

If the author of any painting, drawing, or photograph, in which there is subsisting copyright, after having sold or otherwise disposed of such copyright, or of any other person, not being the proprietor for the time being of such copyright, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply, or cause or procure to be repeated, &c., for sale, hire, exhibition, or distribution, any such work, or the design thereof, or the negative of any such photograph, or shall import or cause to be imported into any part of the United

Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be sold, &c., any repetition, copy, or imitation of such work, or the design thereof, or the negative of any photograph, made without such consent as aforesaid, then every such proprietor, in addition to the remedies given for the recovery of penalties and forfeiture, may recover damages by a special action on the case, to be brought against the person so offending, and may in such action recover and enforce the delivery to him of all unlawful repetitions, copies, and imitations, and negatives of photographs, or may recover damages for the retention or conversion thereof: Provided that nothing contained in the section, nor any proceeding, conviction, or judgment, for any act thereby forbidden, is to affect any remedy which any person aggrieved by such act may be entitled to either at law or in equity (25 & 26 Vict. c. 68, s. 11).

An action would seem to lie under this section whether the offender knew or did not know that he was doing wrong, whereas in proceedings for penalties under sect. 6 it is in certain cases necessary to show *scienter*. In any action for infringement of copyright in paintings, &c., the Queen's Bench Division of the High Court, or any Judge of that Division in Chambers, has power to make an order for an injunction, inspection, or account (sect. 9). The utility of this provision will, however, seem less marked, now that each division has jurisdiction to issue injunctions, whenever it may seem just or convenient to do so (Judicature Act, 1873).

Injunction, &c.

Heavy penalties and forfeitures are imposed upon persons fraudulently signing or affixing any name, initials, or monogram, to a painting, drawing, or photograph, or fraudulently selling, publishing, exhibiting, or disposing of any such production, or doing any of the other things mentioned in the section, provided that the penalties

Fraudulently signing name, &c., to paintings, &c.

therein imposed shall not be incurred, unless the person whose name, initials, or monogram, shall be so fraudulently signed or affixed, or to whom such spurious or altered work shall be fraudulently or falsely ascribed, shall have been living at or within twenty years next before the time when the offence may have been committed (sect. 7).

In addition to the remedies here pointed out, the guilty party can be indicted for a cheat at common law (*Reg.* v. *Closs*, 7 Cox, 494, as to form of indictment, *ibid.*, *per* Cockburn, C. J.), but the prosecutor, whether he proceeds at common law or for penalties under the Act, must show *scienter* (see *Reg.* v. *Cohen*, 8 Cox, 41). All repetitions, copies, &c., which, contrary to the provisions of the Act, have been made in any foreign state, or in any part of the British dominions, are absolutely prohibited to be imported into any part of the United Kingdom, except by or with the consent of the proprietor of the copyright, or his agent, authorised in writing (sect. 10).

Recovery of penalties.

All pecuniary penalties incurred and productions forfeited under the Act, or pursuant to any Act for the protection of copyright engravings, may be recovered in England, either by action against the party offending, or by summary proceeding before any two justices having jurisdiction where the party offending resides (sect. 8); but no time is limited within which proceedings must be taken.

The Small Penalties Act (28 & 29 Vict. c. 127) applied to penalties under the Copyright Act (25 & 26 Vict. c. 68), and a convicted defendant could not therefore escape by compounding with his creditors (*Ex parte Graves, re Prince*, 19 L. T. (N. S.) 241; but see *Re Johnson*, 15 W. R. 160). The Small Penalties Act is now, however, repealed by the Summary Jurisdiction Act, 1869, the terms of which are extended so as to embrace penalties up to 20*l.* in amount, and in respect of these it is thought

that the defendant must either pay or go to prison (42 & 43 Vict. c. 49, s. 5, and see also s. 6).

Sculpture.

The copyright in sculpture is protected solely by the statute 54 Geo. III. c. 56, but only in those cases in which the proprietor shall have caused his name, with the date, to be put on the sculpture, model, copy, or cast, before the same shall be put forth or published. Assuming the proprietor to have done this, an action for damages is given against any person who shall "make or import, or cause to be made or imported, or exposed to sale, or otherwise disposed of, any pirated copy or pirated cast" produced "by moulding or copying from, or imitating in any way," the matters or things published under the protection of the Act (sect. 3). No person, however, who has purchased the right or property of any new and original sculpture or model, or copy, or cast, is liable to an action, provided he purchased the work by deed, executed by him in the presence of two or more witnesses (sect. 4). All actions commenced under the Act must be brought within six calendar months next after the discovery of every such offence, and not afterwards (sect. 5).

Action for damages.

Limitation.

Designs.

For preventing the piracy of registered designs, it is provided by the Patents, Designs and Trade Marks Act, 1883, that during the existence of copyright in any design "it shall not be lawful for any person, without the license or written consent of the registered proprietor, to apply such design, or any fraudulent or obvious imitation thereof, in the class or classes of goods in which such design is registered, for purposes of sale, to any article of manufacture, or to any substance, artificial or natural, or partly artificial and partly natural. It shall not be lawful for any person to publish, or expose for sale, any article of manufacture, or any substance to which such design, or any fraudulent or obvious imitation thereof, shall have been so applied, knowing that the same has been so ap-

plied without the consent of the registered proprietor" (sect. 58).

Penalty. Any person acting in contravention of this section, is liable to a penalty of 50*l.* for every offence, to be recovered by the proprietor of the registered design as a simple contract-debt in any Court of competent jurisdiction (*ibid.*).

Action for damages. Notwithstanding this remedy, the registered proprietor may (if he elects to do so) "bring an action for the recovery of any damages arising from the application of any such design, or of any fraudulent or obvious imitation thereof, for the purpose of sale, to any article of manufacture or substance, or from the publication, sale, or exposure for sale, by any person, of any article or substance to which such design, or any fraudulent or obvious imitation thereof, shall have been so applied, such person knowing that the proprietor had not given his consent to such application (*ibid.* sect. 59).

It will be observed that the words of this latter section cover "publication, sale, or exposure for sale," while sect. 58, sub-sect. (*b*), constitutes it an offence, not to sell, but to "publish or expose for sale;" where, therefore, a person sells an article of manufacture or any substance, to which a fraudulent design has been applied, without in the first instance "exposing" it for sale, and under such circumstances that the sale does not amount to a "publication," it is assumed that although an action of damages might lie against him, he would be entitled to judgment in an action for the recovery of the penalty.

The Act does not contain any provision for the delivery up to the plaintiff of articles with the pirated design affixed, but in a case under the old statute an order to this effect was made (*McRae* v. *Holdsworth*, 2 De G. & Sm. 496).

Any person who describes any design applied to any article sold by him as registered, which is not so, is liable

for every offence, on summary conviction, to a fine not exceeding 5*l.* (sect. 105), and it is further provided that a person shall be deemed to represent that a design is registered, if he sells the article with the word "registered," or any word or words expressing or implying that registration has been obtained for the "article" stamped, engraved, or impressed on, or otherwise applied to, the article.

No limitation of time within which an action may be brought is provided by the Act, nor is any penalty expressly provided to meet a case where a person describes his design as registered after his copyright has expired.

If the magistrates should convict in respect of a design not within the statute, the proper remedy is to move to quash the conviction (*Bessell* v. *Wilson*, 1 E. & B. 489), and the defendant cannot be restrained from bringing an action; at least this was so where a conviction was quashed under 6 & 7 Vict. c. 65 (*Reg.* v. *Bessell*, 15 Jur. 773).

Appeal to Board of Trade, when.

Where the Comptroller refuses to register any design presented to him for registration, the person aggrieved has an appeal to the Board of Trade, who shall, if required, hear the applicant and the Comptroller, and may make an order determining whether, and subject to what conditions, if any, registration is to be permitted (sect. 47, sub-sects. 6, 7). The applicant must, within a month from the date of the decision appealed against, leave at the Patent Office, Designs Branch, a notice (Rule 16), accompanied by a statement of the grounds of appeal, and of the applicant's case in support thereof (Rule 17; and see also Rules 18, 19, 20).

It was decided under the old Copyright of Designs Acts, that the proprietor of a design could not proceed in respect of any infringement unless the proper registration marks were affixed to all articles to which the design was applied (see sect. 4; 5 & 6 Vict. c. 100), and it was not material

whether such proprietor was a British subject or a foreigner, or whether such articles were sold abroad or in this country (see 24 & 25 Vict. c. 73; *Sarazin* v. *Hamel*, 32 L. J. Rep. (N. S.) Ch. 380).

Under the new Act, the proprietor of the design is bound to cause each article, before delivery on sale, to be marked with the prescribed mark, or with the prescribed word or words, or figures, denoting that the design is registered; and if he fails to do this, the copyright in the design is to cease (46 & 47 Vict. c. 57, s. 51; and see Rule 32).

Dramatic and musical composition.

By 3 & 4 Will. IV. c. 15, it is enacted that if any person shall represent, or cause to be represented, without the consent in writing of the author or other proprietor, at any place of dramatic entertainment, any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and whether printed and published or not, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40*s.*, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented (ss. 1, 2).

The 5 & 6 Vict. c. 45, s. 20, enacts that the statute 3 & 4 Will. IV., c. 15, shall apply to musical compositions, and that the sole liberty of representing or performing any dramatic piece or musical composition, shall be the property of the author and his assigns for the term therein mentioned; sect. 21 provides that the person who shall have such sole liberty of representing such dramatic piece or musical composition, "shall have and enjoy the remedies given and provided by 3 & 4 Will. IV. c. 15, as if the same were re-enacted" in that Act (see *Wall* v. *Taylor*, *Wall* v. *Martin*, 11 Q. B. D. 102).

Where an infringement has taken place under these

statutes, it would appear that the plaintiff is entitled to recover the penalty, although he may have sustained no actual damage (*ibid.*; see also *Planche* v. *Braham*, 4 Bing. N. C. 19; *Chatterton* v. *Cave*, 3 App. Cas. 498), but his right to costs is now very materially restricted (45 & 46 Vict. c. 40, s. 4).

Limitation.

All actions or proceedings for any offence or injury committed in contravention of 3 & 4 Will. IV. c. 15, must be brought, sued, and commenced within twelve calendar months next after such offence committed, or else the same shall be void and of none effect (s. 3).

It would appear that registration is not essential either to the vesting of playright, or to the right of the owner to maintain an action for infringement (*Clark* v. *Bishop*, 25 L. T. (N. S.) 908; *Marsh* v. *Conquest*, 17 C. B. (N. S.) 418); but where the proprietor of the copyright in any musical composition, shall be entitled to and be desirous of retaining in his own hands exclusively, the right of public representation or performance of the same, he shall print or cause to be printed upon the title-page of every published copy of such musical composition, a notice to the effect that the right of public representation or performance is reserved. Provision is also made for cases in which the right of performance and copyright are respectively vested in different owners (45 & 46 Vict. c. 40, ss. 1, 2).

CHAPTER VI.

ON THE REMEDIES FOR INFRINGEMENT OF COPYRIGHT (*continued*).

(β) *Proceedings in the Chancery Division of the High Court of Justice.*

Jurisdiction of the Chancery Division.

THE extensive jurisdiction of granting injunctions originally given to the Common Law Courts by the Common Law Procedure Act, 1854, is now vested in the High Court of Justice, and the jurisdiction thus vested is practically unlimited, and can be exercised by any judge of the High Court in any case in which it is right or just to do so, having regard to settled legal reasons or principles (Daniell, Ch. Pr. p. 22, 6th ed.).

Generally in all matters not in the Judicature Acts particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity are to prevail (36 & 37 Vict. c. 66, s. 25 (11); this provision does not, however, refer to mere technical rules of procedure, but to matters of substantive law, for the practice is regulated from a standpoint of convenience, and sometimes common law forms will be used, and sometimes Chancery forms, as the nature of the case may require (*Bustros* v. *Bustros*, 14 Ch. Div. 849).

The ancient Court of Chancery had formerly no power to try the legal question, upon the solution of which depended the right to maintain or defend a suit, and in cases of doubt the Court frequently refused to interfere by injunction until the plaintiff had established

his title at law. Sometimes, however, an *interim* injunction was granted pending the trial of the action.

By virtue of the Act 15 & 16 Vict. c. 86, s. 62, the Court of Chancery was invested with full power to determine questions of fact, without remitting the parties to another tribunal, and had, moreover, the same powers, jurisdiction, and authority, as belonged to any judge of the Superior Courts sitting at *Nisi Prius* (21 & 22 Vict. c. 27, s. 4).

By 25 & 26 Vict. c. 42, s. 1, the discretionary powers conferred by the above-mentioned statutes were rendered compulsory, and extended to questions of law (*Fernie* v. *Young*, L. R. 1 Ir. App. 79; and see *Durell* v. *Pritchard*, 1 Ch. 244; and the Court was further empowered to direct an issue to try any question of fact at any sitting in London or Middlesex, or at the Assizes, where such question of fact might be more conveniently tried by a jury there (sect. 2).

Although the Chancery Division may try any question of fact and assess damages either with or without a jury, this would not seem to enable the Court of Appeal, on an application for a new trial, to reverse the Court below on mere issues of fact; where, however, the issues raise questions of law as well as fact, a new trial as to the facts may be refused, and judgment pronounced on the issues of law (*Simpson* v. *Holliday*, L. R. 1 App. Cas. 315).

So, also, it cannot be considered that the statute 21 & 22 Vict. c. 27, affected in any way the right of appeal which formerly existed (*Curtis* v. *Platt*, L. R. 1 App. Cas. 337); nor could either or any of the parties insist, upon the construction of that Act and the statute 25 & 26 Vict. c. 42, upon having the action tried by a jury, for the method of trial is entirely in the discretion of the Court (*Bovill* v. *Hitchcock*, L. R. 3 Ch. 419).

Again, it was provided that it should not be necessary for a Court of Equity to grant relief in any suit concerning any matter as to which a Court of Law had concurrent juris-

diction, in case it should appear that such matter has been improperly brought into equity (25 & 26 Vict. c. 42, s. 4). Where a plaintiff had no ground of equitable relief, the action was improperly brought under this section, and the Court would not proceed to try any question of damages under 21 & 22 Vict. c. 27, and 25 & 26 Vict. c. 42 (*Durell* v. *Pritchard*, L. R. 1 Ch. 244). The rule was, that the Court gave a remedy to a plaintiff in those cases only in which it could interfere by injunction, and where it could grant an injunction it could likewise order an account; in any other event the plaintiff's remedy was, and in some cases now is, at law (*Baily* v. *Taylor*, 1 Russ. & My. 75).

The above-named statutes, regulating in part the practice and course of procedure in the High Court of Chancery, are now, however, repealed (46 & 47 Vict. c. 49), and reference must be made to the Judicature Acts.

Under the Judicature Acts, every division of the High Court of Justice has concurrent jurisdiction in redressing grievances, although it is submitted that if a plaintiff should in the first instance, proceed for the recovery of penalties under any of the Copyright Acts applicable to the particular case, the Chancery Division would afterwards decline to interfere (see *Colburn* v. *Simms*, 2 Hare, 554), and in this respect the American law is the same (*Stevens* v. *Gladding*, 17 How, 455).

Injunctions.

Actions to restrain the infringement of copyright are in practice exclusively brought in the Chancery Division of the High Court of Justice.

The writ of summons is endorsed with a statement of the relief or remedy required, and this, in the case of a book, generally takes the form of,—

(*a*) An injunction to restrain a threatened infringement, or an infringement already commenced or entered upon.

(*β*) An account of the net profits realised by defendant from the infringement aforesaid.

(γ) Payment of such net profit.

(δ) Damages (if no account is claimed).

(ε) Delivery up of the unsold pirated copies.

Separate actions should as a rule be instituted against separate infringers, the Court, however, has power to order such actions to be consolidated (R. S. C., O. XLIX. r. 8).

May be founded on equitable title.

If the plaintiff can show an equitable title, that is sufficient to ground an application for an injunction, whether *interim* or otherwise (*Sims* v. *Marryat*, 17 Q. B. 281; and see also *Sweet* v. *Cater*, 11 Sim. 572; *Chappell* v. *Purday*, 4 Y. & C. 485); and for the purpose of trying the question of piracy, the legal title may *pro tem.* be directed to be admitted (*Dickens* v. *Lee*, 8 Jur. 183; *Sweet* v. *Shaw*, 8 L. J. Ch. (N. S.) 216; *Sweet* v. *Cater*, *supra*). Whether, therefore, the title of the plaintiff be legal or equitable, he will be entitled to an injunction, provided of course he can make out that a piracy has been committed. If possible, however, a legal title should always be shown, as the practice of the Court is, to withhold as far as it fairly can an interlocutory injunction based on a mere equitable title (*Bacon* v. *Jones*, 4 My. & Cr. 433; *Colburn* v. *Duncombe*, 9 Sim. 151; *Stevens* v. *Keating*, 1 Mac. & G. 659; *Norton* v. *Nicholls*, 6 W. R. 764; *McNeill* v. *Williams*, 11 Jur. 344). And, besides this, it is in some cases exceedingly difficult to say what will amount to an equitable title or interest sufficient for the maintenance of an action.

Where on an application for an injunction, a third person should swear that the legal title is in him, the motion will be dismissed, although such person does not produce an assignment (*Lowndes* v. *Duncombe*, 1 L. J. Ch. 51).

A mere agent for sale has not a sufficient title upon which to base an application for an injunction (*Nicol* v. *Stockdale*, 3 Swanst. 687).

Where a person took a parol assignment of a copyright, the Court interfered to protect him, and granted an injunction (*Hodges* v. *Welsh*, 2 Ir. Eq. 266; *Chappell* v. *Purday*, 4 Y. & C. 485; and see *Longman* v. *Oxberry*, cited Godson on Patents, 314); and it is moreover settled that where a plaintiff obtains an injunction and the defendant offers to submit, he (the plaintiff) can insist upon having his title admitted on record (*Kelly* v. *Hooper*, 1 Y. & C. Ch. 197).

Interim injunction.

Assuming that the Court is satisfied with the plaintiff's title, and that an infringement has taken place, the practice is to grant an *interim* injunction without any undertaking as to damages; but where the title is not clear, nor the infringement palpable, such an injunction will only be granted accompanied by the usual undertaking, or the motion may be directed to stand adjourned until the hearing, the defendant in the meantime to keep proper accounts. What the Court will or will not do under particular circumstances, depends entirely on the nature of the case, but, generally speaking, the question for the Court, before it interferes by injunction is, which of the two parties to the dispute is more likely to suffer by an erroneous or hasty judgment of an interlocutory nature against him? The Court is also guided by a consideration of the very possible, if not probable effect, which an injunction may have to the defendant's prejudice in the action (*McNeill* v. *Williams*, 11 Jur. 344, *per* Knight-Bruce, V.C.; and see *Ingram* v. *Stiff*, 5 Jur. (N. S.) 947).

It may be here further stated, that an interlocutory injunction will be granted where the plaintiff can show that, should the application be refused, great loss will happen to the property or estate (*Dickens* v. *Lee*, 8 Jur. 183).

An *interim* injunction is not usually granted in doubtful cases (*Morris* v. *Wright*, L. R. 5 Ch. 279),

nor where the grounds of application are slight, but the whole consideration will be postponed to the hearing (*Redfield* v. *Myddleton*, 7 Bosw. (Amer.) 649). Further, where it is doubtful whether the plaintiff could recover damages, an application for an injunction will be postponed (*Lord Byron* v. *Dugdale*, 1 L. J. Ch. 239), and this is equally the case where, from the amount of matter pirated, and the profits made by the defendant, the infringement cannot be considered of any material consequence (*Whittingham* v. *Wooler*, 2 Swanst. 428; and see *Bell* v. *Whitehead*, 8 L. J. (N. S.) Ch. 141; *Baily* v. *Taylor*, 1 Russ. & Myln. 73), or where the defendant has been misled by the plaintiff's conduct (*Tinsley* v. *Lacy*, 1 Hem. & M. 752), or been induced to suppose that his behaviour would not meet with the plaintiff's disapproval (*Saunders* v. *Smith*, 3 Mylne & C. 711), and this is so whether such conduct took place with the defendant himself or with third persons (*ibid.*, and see *Rundell* v. *Murray*, Jacobs, 316).

Interim injunction in the case of works of an ephemeral nature.

Where the production is of an ephemeral nature (as in the case of an almanac), an interim injunction will in all probability be refused, because works of this class owe their chief marketable value to a prompt sale, and an injunction of any kind would be equivalent to a perpetual injunction (*Spottiswoode* v. *Clarke*, 2 Phillips, 154); the Court might, however, direct the defendant to keep an account (*Spottiswoode* v. *Clarke*, *supra*; *Jollie* v. *Jaques*, 1 Blatchf. 618). But where a defendant pirates a work and offers it for sale at a greatly reduced price, he will be restrained *ex parte*, even although the work should be of a highly ephemeral nature, because the plaintiff otherwise might, and probably would, be unable to sell his own production; and, moreover, the defendant could not be made to account for anything more than his nett profits (*Matthewson* v. *Stockdale*, 12 Ves. 275, 277).

Injunction in the case of damage actually completed.

Although each case must rest on its own foundation, it would appear to be the general rule that an injunction can be claimed, even although the damage complained of has been actually perfected at the time (*Durell* v. *Pritchard*, L. R. 1 Ch. App. 250).

The mere fact that the plaintiff could not bring an action for penalties, is no defence whatever to a motion for an injunction. Thus, the vendor of a pirated work is only liable in an action for the penalties if he *knew* that the work was pirated, but that is no reason why an injunction should not be granted against him, since mere ignorance is no defence to an action in which the primary object is to obtain a cessation of the acts complained of. The right to an injunction is therefore grounded on a right of property, and where this right of property exists, there also is the plaintiff entitled to have it protected (see *Sheriff* v. *Coutes*, 1 Russ. & My. 167).

Interim injunction, how applied for.

An application for an *interim* injunction must be supported by affidavit, stating when the plaintiff first became aware of the piracy, and if the application is *ex parte*, that notice to the defendant would be deleterious, or that the matter is very urgent (*Anon.*, 1 L. J. Ch. 4). In any case, if no statement of defence has been delivered, the affidavit must show the plaintiff's title; but in any other event this is not necessary (*Platt* v. *Button*, 19 Ves. 447; *Norway* v. *Rowe*, *ibid.* 143); nor is it in any case necessary to tender proof of damages; for if the plaintiff is able to show an infringement, this is sufficient (*Campbell* v. *Scott*, 11 Sim. 39; *Tinsley* v. *Lacy*, 32 L. J. (N. S.) Ch. 539).

Where a defendant contravenes the terms of an interim injunction, the Court will commit him on motion, but as a rule, not where he has subsequently endeavoured to set himself right (*Cornish* v. *Upton*, 4 L. T. (N. S.) 862).

Making interim

An application to make an interim injunction perpetual

injunction perpetual.

is properly made at the hearing, but by consent it may be made on interlocutory motion (*Morrell* v. *Pearson*, 12 Beav. 284), and in no case is it incumbent on the plaintiff to move for an interim injunction at all, but he may, if he thinks fit, apply for a perpetual injunction at the hearing (*Bacon* v. *Jones*, 4 My. & Cr. 436; *Gale* v. *Abbot*, 8 Jur. (N. S.) 987). Should he do this however, he must have his facts in such order that the Court can adjudicate on the matter without unnecessary delay (*Bacon* v. *Jones*, *supra*; *Patent Type Founding Co.* v. *Walter*, Johns. 727). So, also, where an interim injunction is refused, the plaintiff is at liberty to renew the application at the hearing (*Baily* v. *Taylor*, 1 Russ. & Mylne, 76).

Dissolving interim injunction.

An interim injunction will occasionally be dissolved on the application of the defendant, as, for instance, on his throwing reasonable doubts on the exclusive legal right of the plaintiff, on the basis of which the injunction had been obtained (*Bramwell* v. *Halcomb*, 3 My. & Cr. 737; *Spottiswoode* v. *Clark*, 2 Phil. Ch. 156), or where the publication complained of is of an ephemeral nature (*Spottiswoode* v. *Clark*, *supra*), but not where the defendant in his statement of defence sets up a sufficient answer to the plaintiff's allegations (see *Wroe* v. *Clayton*, 10 Sim. 185).

Damages, inquiry as to.

Where an interim injunction is obtained with the usual undertaking as to damages, such damages will be accurately inquired into in case the action is dismissed at the hearing, the payment of costs may or may not be a sufficient satisfaction (*Novello* v. *James*, 5 De G. M. & G. 876); but if it is, it is clear that such costs will be paid as costs, and not as damages, for the question of damage is a separate matter entirely from the question of the costs of the action (*ibid.*, *per* Turner, L. J.).

On an application for an interim injunction, it would appear, from the report of an American case, that a

reference to the chief clerk will not be ordered (see *Smith* v. *Johnson*, 4 Blatchf. 252).

Where the plaintiff obtains an interim injunction, and the defendant has no defence to the action, his best course is to admit the plaintiff's right, by submitting to the injunction, and paying all the costs up to that time; if the plaintiff then proceeds to a hearing, it will be, in some cases at any rate, at his own expense (*Potts* v. *Levy*, 2 Drew. 278, *per* Kindersley, V. C.).

Perpetual injunction.

On the hearing of the action the defendant will be restrained by perpetual injunction, assuming of course that the plaintiff has made out his case (*Macklin* v. *Richardson*, Amb. 694); and this will be so, although the defendant may promise to commit no further infringement (*Geary* v. *Norton*, 1 De G. & Sm. 9), and has in fact consented to the interlocutory injunction previously obtained (*Beaufort (Duke of)* v. *Morris*, 6 Hare, 350, 12 Jur. 614). On such hearing the affidavit filed on the application for the interim injunction might have been read on the part of the plaintiff (15 & 16 Vict. c. 86, s. 36; repealed by 46 & 47 Vict. c. 49).

The form of the injunction varies according to the circumstances of the particular case.

Probably the most comprehensive form of words ever employed, is that given in *Faden* v. *Stockdale* (Reg. Lib. A. 1796, fol. 32), where the defendant was restrained from publishing a map "compiled, drawn, or engraved by or for the use of the plaintiff, or any other of the like nature or kind, or upon any such or the like plan."

Injunction directed as a rule only against the part pirated.

In some instances the injunction is directed only against the part pirated, in others against the whole production; the question is, can the pirated portion be separated from that which is original, without destroying the utility and value of the original matter?—if it can, the offending portion only will be dealt with (*Mawman* v. *Tegg*, 2 Russ.

385, 391, *per* Lord Eldon; and see *Story's Executors* v. *Holcombe*, 4 McLean (Amer.) 306, 315); if it cannot, the entire work (*Stevens* v. *Wildy*, 19 L. J. (N. S.) Ch. 190).

Unless the pirated part cannot be separated.

Where it is apparent that after eliminating the pirated passages the work would be practically useless, the Court will direct an injunction against the whole, and will not order an inquiry into the precise extent of the infringement (*ibid.*; and see also *Hogg* v. *Scott*, L. R. 18 Eq. 458, following *Lewis* v. *Fullarton*, 2 Beav. 14); and as to this Lord Eldon observes, "in the cases which have come before me, my language has been, that there must be an injunction against such part as has been pirated; but in those cases the part of the work, which was affected with the character of piracy, was so very considerable, that, if it were taken away, there would have been nothing left to publish except a few broken sentences" (*Mawman* v. *Tegg*, 2 Russ. 399).

Injunction against title page.

Where the external appearance of a work is imitated so closely as to be calculated to deceive persons of ordinary capacity (*Bradbury* v. *Beeton*, 18 W. R. 33), the injunction will lie against the work in its present "form, title page, and cover," and not against the contents (*Metzler* v. *Wood*, L. R. 8 Ch. D. 606).

Sometimes a defendant is restrained from circulating such part of a work as contains items of particular information, and in these cases it is the defendant's business to ascertain what passages come within the scope of the words made use of (*Scott* v. *Stanford*, 36 L. J. (N. S.) Ch. 732).

A note to *Jarrold* v. *Houlston*, 3 K. & J. 723, gives a form of injunction intended to inhibit particular portions of a work only.

Injunction should not extend

An injunction should not be framed so as to extend beyond damage actually done or threatened, and the word

beyond damage actually done or threatened.

"imitating" is therefore objectionable, for *non constat* that an imitator is necessarily either a plagiarist or a pirate (see *Dickens* v. *Lee*, 8 Jur. 185).

Comparison of works.

The Court frequently takes upon itself the comparison of works alleged to be pirated, but more frequently the matter is ordered to be referred to one of the officers of the Court, upon whose report the Court will act; but *query* whether a reference should be ordered on motion for an interlocutory injunction (*Smith* v. *Johnson*, 4 Blatchf. (Amer.) 252). The ordinary rule at the final hearing is, to order a reference in all cases where the piracy is not apparent, or cannot be discovered without much comparison and consequent expenditure of time (see *Pike* v. *Nicholas*, L. R. 5 Ch. App. 251).

It occasionally happens that an injunction will be refused on the ground that the Court would have no means of enforcing it. In *Cox* v. *Land and Water Journal Co.*, where the proprietor of a newspaper, sought to restrain the piracy of "a list of hounds," the Court was of opinion that although the piracy might be established, the list was liable to such frequent changes, and a correct list was so easily obtained, that it was not a case for an interlocutory injunction; that if an injunction were granted, it could not be acted upon (L. R. 9 Eq. 332).

Injunction will not be granted where action for damages would not lie.

It is clear that where an action would not lie for damages, a motion for an injunction will be refused (*Southey* v. *Sherwood*, 2 Mer. 435; *Clark* v. *Freeman*, 11 Beav. 112; *Walcot* v. *Walker*, 7 Ves. 1). And the same rule applies where the composition, the piracy of which is sought to be restrained, is on the face of it a gross libel (*Hime* v. *Dale*, 2 Camp. 27); so, also, where the evidence of the plaintiff is contradicted by that of the defendant, the Court will not as a rule grant an injunction until the matters in difference are judicially determined (*Lowndes* v. *Duncombe*, 1 L. J. (Ch.) 51).

Where a person falsely represents that his production is in point of fact the work of the plaintiff he will be restrained (*Byron* v. *Johnston*, 2 Mer. 29 ; and see *Wright* v. *Tallis*, 1 C. B. 893), and where a defendant has disposed of his right to use his name in connection with a specific publication, he will also be restrained from doing anything in contravention of his agreement (*Ward* v. *Becton*, L. R. 19 Eq. 207). The same remark applies to a person who is about to publish manuscripts or prints, to which he has no title (*Prince Albert* v. *Strange*, 2 De G. & Sm. 652, 1 M. & G. 25). *Injunction against false representation.*

A person who seeks the aid of the Court to assist him in the protection of his right of copy, must do so at the earliest possible stage (*Tinsley* v. *Lacy*, 1 H. & M. 747), for it cannot be expected that the Court will interfere by injunction where the party claiming it has allowed the infringement to take place (*Rundell* v. *Murray*, Jac. 316 ; *Chappell* v. *Purday*, 4 Y. & C. 485), or has acquiesced in such infringement for any great length of time (*Platt* v. *Button*, 19 Ves. 447). *Laches.*

The question as to what amounts to a great length of time is referable to the circumstances of each case, thus, where a plaintiff did not take any steps for 18 years, he was very properly held to be barred (*Baily* v. *Taylor*, Taml. 305) ; and so where the defendant commenced a certain work, and the plaintiff knew of it at the time, it was held that no injunction could be claimed, as he (the plaintiff), had allowed 12 months to elapse before commencing proceedings after a complete copy of the work had come to his hands (*Lewis* v. *Chapman*, 3 Beav. 134) ; in this case the plaintiff had permitted the defendant to continue his work without protest, and had not even taken the trouble to procure a copy for five years after publication.

It may, moreover, be taken as a well-defined rule, that

an *ex parte* injunction will never be granted, where a person has knowingly permitted another to proceed with the production complained of for any length of time; this acquiescence may not, however, be fatal so far as a final injunction is concerned (see *Marborough* v. *Bower*, 7 Beav. 131, *per* M. R.)

What a defendant alleging laches must prove.

Where a defendant seeks to prove acquiescence on the part of the plaintiff, he must be prepared to show, either that the plaintiff gave his authority for the carrying on of the work, or that his conduct conduced to what has been done, or that there is sufficient evidence to displace the *primâ facie* proof of the plaintiff's copyright (*Morris* v. *Ashbee*, L. R. 7 Eq. 39, *per* Giffard, V.-C.); if he can do this, he will succeed, for although the Court may acknowledge a right, it frequently refuses an injunction where the conduct of the party complaining has led to the state of things with reference to which the complaint is made (*Rundell* v. *Murray*, Jacobs, 316). The proprietor of a copyright cannot, however, be said to have abandoned it, merely because he has allowed his work to remain out of print, no matter for what length of time (*Weldon* v. *Dicks*, 10 Ch. Div. 247).

By 5 & 6 Vict. c. 45, s. 26, any proceedings for an offence (with the exception therein mentioned) committed against the Act, must be brought, sued, and commenced within twelve calendar months next after such offence committed. This, however, does not operate to prevent an injunction being applied for, since the plaintiff sues in respect of his copyright; an "offence" is something done in contravention of the provisions of the Act, whereas an application for an injunction is outside the Act altogether (see *Hogg* v. *Scott*, L. R. 18 Eq. 451).

Laches may be explained.

Where no time is specified by the Legislature, within which proceedings to restrain the infringement of copy-

right must be taken, the plaintiff will, as we have seen, have to come into Court as speedily as possible; it is always open to him, however, to explain the grounds of any delay that may have taken place. Consequently, the necessity of comparing the work complained of, with that from which the matter is alleged to be stolen, may afford sufficient excuse (*Mawman* v. *Tegg*, 2 Russ. 393), and the fact of the law at the time being in an uncertain state, may justify the plaintiff in withholding proceedings (*Buxton* v. *James*, 5 De G. & Sm. 84). But where a plaintiff, being informed of the defendant's proceedings, had the necessary legal documents prepared within five months after, and then took no steps for seven months, a motion for an injunction was refused, the distinction being, between cases where it is absolutely necessary to make due and proper inquiries in the first instance, and those where the delay is referable to the mere private convenience of the plaintiff (*Bridson* v. *Benecke*, 12 Beav. 1; *Lewis* v. *Chapman*, 3 Beav. 135).

Where the damage committed by the defendant is slight, and the plaintiff has delayed the assertion of his right, the Court will take the extent of the damage into consideration, in determining whether an injunction ought or ought not to be granted (*Wintle* v. *Bristol & South Wales Union Railway Co.*, 6 L. T. (N. S.) 20).

Account.

In most actions for infringement, the chief object the plaintiff has in view, is to obtain an injunction, and generally speaking, therefore, matters relating to "account" and "damages" are entirely subordinate (see the remarks of Romilly, M. R., in *Curtier* v. *Carlile*, 31 Beav. 298). A plaintiff may obtain a final injunction, but yet be denied an account on the ground of delay (*Harrison* v. *Taylor*, 11 Jur. (N. S.) 408), although the general rule is that the right to an account is incidental to the plaintiff's other relief, and follows almost as of course

(*Grierson* v. *Eyre*, 9 Ves. 347, *per* L. C.). In the case above quoted (*Harrison* v. *Taylor*) an injunction would probably not have been granted, but for the plaintiff persevering with his piratical designs.

As a corollary, it follows that if the Court should refuse an injunction it cannot grant an account (*Price's Patent Candle Co.* v. *Bauwen's Patent Candle Co.*, 4 K. & J. 727; *Baily* v. *Taylor*, 1 Russ. & M. 73).

The Court has no jurisdiction to give to a plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of the Court by injunction; and, in such case, the Court will also give him an account, that his remedy here may be complete (*Baily* v. *Taylor*, *supra*, 75, *per* Leach, M.R.).

A plaintiff having obtained an injunction, may insist on an account, no matter how trivial the injury complained of may be (*Fradella* v. *Weller*, 2 Russ. & My. 250), although, of course, where the defendant has actually made no profit out of the transaction, no account can as a matter of possibility be taken (*Colburn* v. *Simms*, 2 Hare, 560, *per* Wigram, V.-C.; *Powell* v. *Aiken*, 4 K. & J. 331).

Where it appears that the defendants have sold articles since an *interim* injunction was applied for and refused, an account will not be directed merely because had the facts and law been sufficiently ascertained at the time of the application for such injunction, the Court would have restrained the defendants from selling (*Price's Patent Candle Co.* v. *Bauwen's Patent Candle Co.*, *supra*).

It is also a general principle that a person cannot stand by and allow another to risk his money on a venture, and then come for an account on such venture proving successful (*Parrott* v. *Palmer*, 3 Myl. & K. 643).

Account to be taken of nett profits.

An account is in most cases directed to be taken of the *nett* profits gained by the defendant through the sale of

the pirated work; the plaintiff has no right to an account of the gross proceeds (*Delf* v. *Delamotte*, 3 Jur. (N. S.) 933, 3 K. & J. 581), even although he can show that he could have sold the production at a greater profit. It has, however, been decided in an American case, that commissions received from the sale of a pirated work are profits, to be accounted for by the commission agent in an action by the proprietor of the copyright (*Stevens* v. *Gladding*, 2 Curtis, 608). Even where the piracy consists of the publication of the plaintiff's work in a cheaper form, the Court will only direct the defendant to hand over the profits he has made, for it would be impossible to go into the question of how many copies of the plaintiff's more expensive work have been excluded from sale by reason of the defendant's conduct (*Collburn* v. *Simms*, 2 Hare, 500; and see *Pike* v. *Nicholas*, 20 L. T. (N. S.) 908, *per* James, V.-C.)

Where an interim injunction is granted, and the action directed to be tried with a jury, the plaintiff should urge that the defendant be directed to keep an account in the meantime. This was the invariable practice of the Court when actions were sent for trial before a court of common law (*Mawman* v. *Tegg*, 2 Russ. 385).

Assuming an injunction to be granted, and that the Court directs an account to be taken, it will, if necessary, refer back the account from time to time so that the certificate can be reviewed, and the defendant and his witnesses are liable to be called upon for their evidence in the usual manner (*Kelly* v. *Hodge*, 29 L. T. (N. S.) 387). So, also, the defendant's publishers may give evidence, and can be called upon so to do, for the purpose of enabling the plaintiff to ascertain how many copies of the defendant's work have been sold, and what profit the plaintiff

would have secured from the sale of so many additional copies of his work (*Pike* v. *Nicholas*, 20 L. T. (N. S.) 909, *per* James, V.-C.).

Damages. A court of equitable jurisdiction has power to assess and award damages (21 & 22 Vict. c. 27, s. 2; now repealed, 46 & 47 Vict. c. 49; but see R. S. C., O. XXXVI. r. 58; 46 & 47 Vict. c. 49, s. 6, sub-sec. *c*.). Such Court has also power to grant an injunction without any inquiry as to damages, and in this respect the matter is one of discretion (*Tinsley* v. *Lacy*, 1 H. & M. 747).

In an American case, where the plaintiff omitted to ask for an injunction and only sought an account, he was remitted to the common law courts for damages (*Monk* v. *Harper*, 3 Edw. Ch. 109), and it is apprehended that the result would be the same in this country, notwithstanding the power conferred on the courts of equity to try any question of damages, and also notwithstanding the rule that the powers of law and equity are concurrent, for in questions of copyright, an injunction is the foundation of all equitable relief (*Baily* v. *Taylor*, 1 Russ. & My. 75).

Where a material piracy is clearly proved, the plaintiff is entitled to an injunction, the question of damage or no damage being immaterial, for what has been done is against the plaintiff, and he is the most competent judge of the injuries he may have sustained (*Campbell* v. *Scott*, 11 Sim. 30; *Tinsley* v. *Lacy*, 32 L. J. (N. S.) (Ch.) 530, *per* Wood, V.-C.).

It is a rule that the plaintiff must make his election between damages on the one hand, and an account on the other; he cannot claim both: but this rule would appear to be founded more upon convenience than upon any question of law; for instance, an account only *approxi-*

nately measures out the damage the plaintiff has sustained, but he may notwithstanding have sustained greater or less damage, according to circumstances. Keeping an account of the profits may prevent the defendant from deriving any profit, as he may ultimately be obliged to account to the plaintiff for all his gains; yet, if the work which the defendant is publishing in the meantime, really affects the sale of the work which the plaintiff seeks to protect, the consequence is, that the rendering the profits of the former work to the complaining party may not be a satisfaction to him for what he ought to have been enabled to have made of his own work, if it had been the only one published; for he would argue that the profits of the defendant, as compared with the profits which he, the plaintiff, has been improperly prevented from making, could only be in the proportion of say eight shillings, the price of a copy of the one book, to one guinea, the price of a copy of the other (*Mawman* v. *Tegg*, 2 Russ. 400, *per* Lord Eldon). An account is therefore the nearest approximation that the Court can make, for the wrongdoer is compelled to give up to the plaintiff all the profits he has made. There would seem to be no reason, however, why the Court might not proceed to inquire what further damnification (if any) the plaintiff has sustained (*ibid.*).

Discovery in aid of account.

A defendant cannot be compelled to make discovery of any facts, the disclosure of which would subject him to penalties and forfeitures at the suit of the plaintiff (*Atwill* v. *Ferrett*, 2 Blatchf. 39). The forfeiture should therefore be waived, and the defendant may then be compelled to disclose the number of piratical copies sold, printed, or imported, or the sources from which he has compiled his work (see *Kelly* v. *Wyman*, 17 W. R. 399).

Measure of damages.

The measure of damages in cases of literary piracy has

been thus stated,—"the defendant is to account for every copy of his book sold as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies" (*Pike* v. *Nicholas*, L. R. 5 Ch. 260).

CHAPTER VII.

ON EVIDENCE AND PLEADING, AND HEREIN OF JOINDER OF PARTIES AND COSTS.

Evidence.

WHERE a *primâ facie* case of piracy is made out against the defendant, the onus of proof to show the contrary is thrown upon him, and under these circumstances he may either establish the fact that his own work was prepared without recourse to that of the plaintiff, or that, while he has used the latter, the parts complained of were taken from other sources; it will not be enough for him to show that the passages in question are to be found in the productions of authors other than the plaintiff. Again, the defendant may possibly succeed by showing that any quotations he may have made, are more extensive than those made use of by the plaintiff (see *Pike* v. *Nicholas*, L. R. 5 Ch. 262, *per* Lord Hatherley); or that any errors in his work, and upon which the plaintiff may have relied to make out his case, are to be found in the works of another author. It does not of course follow, that the defendant may not have copied from the plaintiff; but such evidence will be entitled to a certain amount of weight, especially if the defendant produces his manuscript (*Hotten* v. *Arthur*, 1 Hem. & M. 609). Circumstances of time and place may tell against the defendant, as where a person charged with copying, stated that he consulted original authorities, but was unable to say where he obtained their works, or where certain meetings were held from which he purported to have drawn much of his information (*Pike* v. *Nicholas*, L. R. 5 Ch. 251).

A defendant should not deny copying, if his defence is a fair user for which he would not be liable (see *Spiers v. Brown*, 6 W. R. 352; *Jarrold* v. *Houlston*, 3 Kay & J. 708).

Rival works should be brought into Court.

Where the onus is thrown on the defendant, it will not do for him to urge a probability as to where he derived the matter complained of, but he must show definitely from whence he obtained it, producing his manuscript, and offering every facility for investigation (see *Hotten* v. *Arthur*, 1 Hem. & M. 603; *Mawman* v. *Tegg*, 2 Russ. 385, and the judgment of the L. C. in *Pike* v. *Nicholas*, L. R. 5 Ch. 251).

It is never necessary for a party who complains that his copyright has been infringed, to specify in his statement of claim the parts of the defendant's work which he thinks have been pirated from his work, but it is sufficient to allege generally that the defendant's work contains several passages which have been pirated from the plaintiff's work, and to verify the allegation by affidavit. Thus, where an injunction was moved for, the two works were brought into Court, and counsel pointed out to the Court, the passages which they relied upon as showing the piracy (*Street* v. *Maugham*, 11 Sim. 58, *per* Shadwell, V.-C.). The articles alleged to be piracies, whether consisting of literary productions or not, should therefore be brought into Court for comparison (*Sheriff* v. *Coates*, 1 Russ. & My. 159), although it must be understood that this is by no means absolutely essential (*Fradella* v. *Weller*, 2 Russ. & My. 249).

Where the defence relied on is that the plaintiff's production is of a blasphemous or immoral tendency, either the work itself should be produced, or the defendant must be prepared to prove its true character (*Gale* v. *Leckie*, 2 Stark. 107).

Substantial identity or great similarity, is in itself

primâ facie proof of unlawful copying, and it rests on the defendant to explain such identity or similarity (*Pike* v. *Nicholas*, L. R. 5 Ch. 251).

Where the defendant pleads that the plaintiff authorised the act complained of, the consent must be affirmatively proved (*Boucicault* v. *Wood*, 2 Bisn. (Amer.), 40).

Where an action is brought to recover damages for the unlawful destruction of an unpublished manuscript, evidence is admissible to show that the plaintiff has been in the habit of publishing works injurious to the government of the state (Priestley's Cases, *cited* 2 Meriv. 437).

Plaintiff should if possible show how piracy effected.

If the plaintiff can describe the *modus operandi*, show how, in what way, or by what process, the defendant committed, or endeavoured to conceal the acts of piracy, it will be to the last extent desirable for him so to do (see *Lowndes* v. *Browne*, 12 Ir. Law Rep. 293).

On the trial of an action for piracy, the defendant's counsel cannot ask a skilled witness called on behalf of the plaintiff, whether he has not seen printed copies of the work in question, many years ago, in a foreign country; for such a question has reference to an object not produced or accounted for, and the evidence, if given, would be merely secondary (*Boosey* v. *Davidson*, 13 Q. B. (N. S.), 257); it is settled that secondary evidence will not be accepted when primary, as, for instance, the production of the publication itself, might be procured (*Gale* v. *Leckie*, 2 Stark. 110).

Custom of trade no defence.

Where a defendant is clearly guilty of an act of piracy, he cannot shelter himself by adducing evidence to show that his conduct is justified by the custom of trade (*Maxwell* v. *Somerton*, 30 L. T. Rep. (N. S.) 11).

Where an action was brought to restrain the breach of an agreement not to publish a certain work, it was held that the defendant could not give in evidence an offer on the part of the plaintiff to stay proceedings for a specific

sum of money, at least not for the purpose of defeating the injunction, although possibly he might do so for other purposes (*Ainsworth* v. *Bentley*, 14 W. R. 630, 632).

Plaintiff's evidence.

In an action for infringement, the plaintiff must prove his title, that is to say, show conclusively that he is either author or proprietor; and he should also produce a copy or example of the work or production alleged to be pirated, and prove the allegations of the statement of claim by suitable evidence, pointing out in what the piracy consists, and showing if possible the *modus* adopted by the defendant, upon whom the *onus* will thereupon be thrown. The fact that the plan, arrangement, and combination of a copyright work originated in the brain of its author, may, however, be proved by some other person than such author (*Bullinger* v. *Mackey*, 15 Blatchf. (Amer.) 530).

Where the action is for pirating prints or engravings, the evidence to be adduced at the trial is that the plaintiff is the proprietor of such print or engraving, and he may produce the prints taken from the original plate without producing the plate itself.

Although the most obvious method of arriving at a conclusion in a question of piracy, is by a comparison of the offending production with one proved to be genuine, yet the plaintiff may, and most frequently does, produce other evidence, that of an expert for instance, in support of his allegation, or of witnesses to prove an intention on the part of the defendant to deceive, or to prove such facts as tend *primâ facie* to put such a construction on his conduct (*Chappell* v. *Sheard*, 2 K. & J. 117; *Prowett* v. *Mortimer*, 2 Jur. (N. S.), 414).

It is however impossible to establish a charge of piracy of a book, where mere passages or lines of print have been reproduced here and there through hundreds of pages, or

where the authors of a work have applied their labours to various sources of information (*Jarrold* v. *Heywood*, 18 W. R. 279).

An action will lie at the suit of the assignee of a print, and as already stated a print taken from the original plate is sufficient evidence without the production of the plate itself (*Thompson* v. *Symonds*, 5 T. R. 41).

If the assignee of the right of copying a painting, alleges that some other publication is an infringement of his copyright, he must show that the publication complained of has not been taken from the painting, but from his copy (*Lucas* v. *Cooke*, 13 Ch. D. 872).

In all cases a plaintiff suing as assignee must show how, i.e., in what way, he obtained the assignment, but he need not prove any mesne transfer or transfers (*Morris* v. *Kelly*, 1 Jac. & W. 481).

A certified copy of registration under 5 & 6 Vict. c. 45, ss. 11, 13, is only a *primâ facie* proof of ownership or assignment, and the defendant can bring forward evidence to rebut such evidence (*Lucas* v. *Cooke*, *supra*). The same remark would seem to apply to designs registered under the Patents Designs and Trade Marks Act, 1883. Under this same Act, printed or written copies or extracts, purporting to be certified by the Comptroller and sealed with the seal of the Patent Office, of or from patents, specifications, disclaimers and other documents in the Patent Office, and of or from registers and other books kept there, shall be admitted in evidence in all courts in her Majesty's dominions, and in all proceedings, without further proof or production of the originals (sect. 89). Where a contract provided, that if a second edition of a work should be called for the publishers would stereotype it, it was held they became bound to fulfil the contract in this respect; the question whether or no a new edition is required is a matter of fact to be determined by evidence

Defendant's evidence.

(*Pulte* v. *Derby*, 5 McLean, 328; see *Reade* v. *Bentley*, 4 K. & J. 665).

Interrogatories.

In an action for piracy, the plaintiff should deliver stringent interrogatories for the examination of the defendant, *ex. gr.*, as to the number of works printed, sold, or imported, as the case may be, the cost of such printing, &c., and the proceeds realised from the disposition thereof, the number of copies yet on hand, and the source from whence he derived his materials (*Kelly* v. *Wyman*, 17 W. R. 399; *Tipping* v. *Clarke*, 2 Hare, 383). Where a defendant offers to submit to an injunction and pay all costs, the plaintiff is nevertheless justified in insisting on a full and complete answer to his interrogatories (*Stephens* v. *Brett*, 10 L. T. (N. S.) 231) and for this purpose may continue the suit.

Profits on sales already taken place, may be proved by affidavit made by or on behalf of the defendant (*Kelly* v. *Hodge*, 29 L. T. (N. S.) 387).

Motion to expunge.

Where a motion is made under s. 14 of 5 & 6 Vict. c. 45, to expunge an entry of proprietorship of copyright it must be clearly and unequivocally shown that such entry is false; if the motion be to vary it, the Court must be satisfied by affidavit that in so doing they would make a true entry (*Ex parte Davidson*, 18 C. B. 207).

Where a person offers to take a certain sum of money as the price of his rights, such offer cannot be given in evidence against him, for he might be willing to forego his rights and so avoid litigation; but after the litigation has begun the circumstances are altered, and he is at perfect liberty to insist on his rights to the utmost (*Ainsworth* v. *Bentley*, 14 W. R. 632).

Any party in any cause or matter, might require the attendance of any witness before an examiner, and examine such witness orally, for the purpose of using his evidence upon any claim, motion, petition, or other proceeding

before the Court; and any party having made an affidavit to be used, or which should be used, on any claim, motion, petition, or other proceeding before the Court, should be bound to attend before the examiner for the purpose of being examined: Provided that the Court should have discretionary power of acting upon such evidence as might be before it at the time, and of making such interim orders, or otherwise, as might appear necessary to meet the justice of the case. The statute embodying this provision is, however, now repealed (15 & 16 Vict. c. 86, s. 40, repealed by 46 & 47 Vict. c. 49), and the examination of witnesses is provided for by R. S. C. 1883, O. XXXVII.

It was held under the section (s. 40) that no weight is to be attached to an affidavit where the opposite party has had no opportunity to cross-examine the witness (*Wightman* v. *Wheelton*, 23 Beav. 397).

Every pleading must contain a statement in a summary form, of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not of the evidence by which they are to be proved. The rules relating to pleading generally will be found set forth in the Rules of the Supreme Court, 1883 (O. XIX. rr. 1—28; O. XX. rr. 1—9; O. XXI. rr. 1—21).

Amendment of Pleadings.

The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties (see R. S. C., O. XXVIII. rr. 1—13).

Copyright in books, statement of claim.

The statement of claim must, as before stated, allege all the facts necessary to show that the plaintiff not only has a title to the copyright, but a right to relief in respect of the infringement of it. In an action under 5 & 6 Vict. c. 45, the statement should show:—

(a.) *That the plaintiff is the original proprietor of*

the copyright, or if he claims by assignment that such assignment is in writing.

Whether an assignment of copyright in a book should be in writing or not, has been discussed on a previous page, but whatever the state of the law, there is no doubt that it will be far safer to have a transfer in writing, and when this is the case the fact of such transfer being in writing should be alleged by the plaintiff. Where the plaintiff is assignee of an assignee, he need only allege the last assignment to himself (*Morris* v. *Kelly*, 1 J. & W. 481), and if the defendant intends to rely on any previous irregularity, he must plead it.

(β.) *That the plaintiff was duly registered as proprietor before action brought.*

We have seen that so long as the plaintiff is registered as proprietor before action, it is perfectly immaterial that he was not registered when the actual infringement took place (*ante*, p. 149).

(γ.) *That the defendant, without the consent in writing of the plaintiff, printed or caused to be printed a book, &c.,*

or that he infringed the copyright by selling copies unlawfully printed, or in some other way interfered with the plaintiff's copyright, alleging distinctly the form such interference assumed.

Where *scienter* is necessary to be proved, it should be alleged in a separate paragraph.

(δ.) *That the defendant intends to commit or continue the act constituting infringement, unless restrained from so doing, and that he has the power to commit or continue it.*

This allegation is only necessary where an injunction is claimed, and in many cases the defendant's power to commit or continue will be presumed from the nature of the case (see *Adair* v. *Young*, 12 Ch. D. 13).

Where the defendant has in his possession or under his

control, any considerable number of copies of the pirated work, an injunction to restrain the sale or disposition of them should always be claimed.

(c.) *That the plaintiff claims an account, or damages.*

He cannot claim both.

Form No. 7, Appendix C., Sect. VI. Rules of S. C. 1883, prescribes a form of statement of claim applicable to a simple case of infringement. It omits, however, to state in what way the defendant has infringed the plaintiff's copyright, nor does it show any title in the plaintiff.

Where the action is for the infringement of copyright in a title, the statement of claim should allege that the defendant has continued to publish the work with the intention of inducing the public to believe, and has in fact induced the public to believe, that the book so published by him was identical with that published by the plaintiff. There is properly speaking no right of copy in a mere title.

The plaintiff may also include in his statement, a claim for an order for the cancellation of all plates used by the defendant in the commission of the piracy, and for the delivery up of all copies of the pirated work.

Defence.

The following is a list of the more usual defences put forward in answer to a statement of claim for the infringement of copyright in a book:—

(α.) That a proper entry of copyright has not been made (5 & 6 Vict. c. 45, s. 13; see *ante*, p. 150).

(β.) Where the plaintiff sues as assignee, that a proper entry of such assignment has not been made.

(γ.) That the matter in respect of which the infringement took place is not a proper subject of copyright.

(b.) That there has been a prior publication of the work in question either in this country or abroad. (But see 7 & 8 Vict. c. 12; see *ante*, p. 185).

(c.) That the plaintiff acquiesced in the infringement after knowledge thereof (see *ante*, p. 202).

(f.) That the work in question is immoral, libellous, obscene, &c. (see *ante*, p. 28).

(g.) That the plaintiff has endeavoured to deceive the public by misstatements as to authorship (*ante*, p. 22).

(*h*.) That no infringement has taken place.

With respect to this last defence, it must be observed, that where the defendant is charged with copying from the plaintiff's work, and the defence is that he made a fair use of it only, that should be pleaded. A total denial, if untrue, would be evidence of bad faith.

(i.) That the plaintiff's title is defective for some reason, *ex. gr.*, that his copyright has expired.

(k.) That the plaintiff's right of action is barred by lapse of time (5 & 6 Vict. c. 45, s. 26; see *ante*, p. 202).

If any action is brought against any person for doing or causing to be done anything in pursuance of the Act, the defendant may plead the general issue, and give the special matter in evidence (s. 26, R. S. C., O. XIX. r. 12).

In addition to the statement of defence, the defendant must also deliver in certain cases, a notice in writing of any objections on which he means to rely on the trial of the action (*ibid.* s. 16, *ante*, p. 171). A comprehensive form of notice is given in Appendix A., *post*.

When such notice is not delivered within the prescribed time, the action may nevertheless be dismissed, if a fatal defect is brought out from the plaintiff's evidence (*Coote* v. *Judd*, 23 Ch. D. 727; 48 L. T. 205).

In an action for the infringement of copyright in engravings, prints, and lithographs, the statement of claim should show :— *Engravings, prints, and lithographs. Statement of claim.*

(α.) *That the copyright invaded is vested in the plaintiff, either as original inventor, designer, &c., as proprietor, or as assignee.*

That is to say, the statement should clearly define the way in which the copyright so became vested, alleging all the material facts on which the plaintiff relies.

(β). *That the provisions of the statute* 8 *Geo. II. c.* 13, *s.* 1, *respecting the engraving of the name of the proprietor and the date of first publication on each plate, &c., have been complied with, ante*, p. 88).

Owing to the decisions (*Stannard* v. *Lee* ; *Stannard* v. *Harrison*, *ante*, p. 89), the proprietor of engravings, &c., should, in addition to engraving the date of first publication and the proprietor's name on the plate and every copy, register his production as a book under 5 & 6 Vict. c. 45, and when this is done the statement of claim should contain an allegation to that effect, as well as a further statement that the plaintiff was duly registered as proprietor before action brought.

(γ) *The facts of the piracy, alleging how and in what way the defendant pirated the plaintiff's production.*

If the defendant is charged with publishing, selling, or exposing to sale, or otherwise or in any manner disposing of or causing to be published, sold, or exposed to sale or otherwise, or in any other manner disposed of, any print, &c., *scienter* must be alleged and proved (8 Geo. II. c. 13, s. 1).

(δ.) *The remedies to which the plaintiff considers himself entitled.*

These are or may be :—(1), an injunction ; (2), damages,

under 17 Geo. III. c. 57, in respect of a past infringement; (3), forfeiture of the plate or plates on which the print or prints, &c., are or shall be copied, and all and every sheet or sheets (being part of or whereon such print or prints are or shall be so copied or printed); (4), a penalty of 5*s.* for every print found in the defendant's custody, either printed or published and exposed to sale, or otherwise disposed of contrary to the true intent and meaning of the Act (8 Geo. II. c. 13, s. 1).

Defence. The statement of defence may of course deny any one or more of the allegations contained in the statement of claim, the *scienter*, where that is necessary to be proved, and also that the action has not been brought within the space of three calendar months after the commission of the offence complained of (8 Geo. II. c. 13, s. 3; 7 Geo. II. c. 38, s. 5; 17 Geo. III. c. 57). The defendant may also plead that the plaintiff's copyright has expired, and that the author was not a British subject or resident within the dominions of the Crown at the time of publication.

In an action against any person for doing or causing to be done anything in pursuance of the Acts (*supra*), the defendant may plead the general issue and give the special matter in evidence (R. S. C., O. XIX. r. 12).

Paintings, drawings, and photographs. In an action for the infringement of copyright in paintings, drawings, and photographs, the statement of claim should show, according to the circumstances of the case:

(α.) *The title of the plaintiff, either as author or assignee.*

(β.) *That the copyright was retained by the author or disposed of to an assignee, by instrument in writing, signed, &c.* (25 & 26 Vict. c. 68, s. 1).

(γ.) *That the work was executed for the plaintiff on commission.*

(δ.) *That the plaintiff has a licence of user, conferred*

by instrument in writing, signed by the proprietor or his agent authorised in writing (ibid. s. 3; see Lucas v. Cooke, 13 Ch. D. 872).

(e.) *That the plaintiff, as author or assignee, duly registered the production pursuant to 25 & 26 Vict. c. 68, s. 4, before the alleged infringement took place.*

(ζ.) *The facts of the piracy, alleging how and in what manner the defendant pirated the plaintiff's production.*

(η.) *The remedy to which the plaintiff considers himself entitled.*

This may be—(1) an injunction; (2) damages under sect. 11 of the Act; (3) Penalties under sect. 6.

Penalties are recoverable either by action or by summary proceedings before two justices of the peace.

Defence. The defendant's statement will traverse that of the plaintiff, or it may confess and avoid it on the ground that the production is immoral, or on one or more of the other grounds previously set out (*ante*, pp. 217, 218).

No limitation of time is prescribed by 25 & 26 Vict. c. 68.

With respect to photographs, see *Nottage* v. *Jackson*, L. R. 11 Q. B. D. 627.

Sculpture. Statement of claim. With respect to sculpture, an action for penalties was given by the statute 13 & 14 Vict. c. 104, but this Act is now repealed (46 & 47 Vict. c. 57), and the plaintiff can only proceed for infringement under the provisions of the Sculpture Copyright Act, 1814 (54 Geo. III. c. 56).

The plaintiff's statement of claim will allege:

(a.) *That the right for the invasion of which the plaintiff brings the action is vested in him either as author or assignee.*

That is to say, he should allege all the material facts tending to show that he is invested with the right of copy under the Act.

(β.) *If vested in the plaintiff as assignee, that the assignment is by deed executed by the proprietor in the presence of two or more witnesses* (sect. 4).

(γ.) *That the plaintiff caused his name, with the date, to be put on all and every new and original sculpture, model, copy, or cast, and on every cast from nature, before the same was put forth or published* (sect. 1).

(δ.) *The nature of the relief or remedy to which the plaintiff considers himself entitled.*

The remedies are—(1). An action for an injunction based on the original equitable jurisdiction of the Court (and see 36 & 37 Vict. c. 66, s. 25 (8)). (2.) An action for damages under the 3rd sect. of the Sculpture Act.

Defence. The defendant may deny all the material allegations contained in the statement of claim, and state further—

(α.) That the action was not brought within six calendar months next after the discovery of the offence (sect. 5).

(β.) That the plaintiff's copyright has expired.

(γ.) That the work in question is immoral, libellous, &c.

and any one or more of the defences in confession and avoidance referred to in the case of infringement of copyright in books (*ante*, pp. 217, 218).

Designs. In the case of designs the plaintiff now bases his right to protection exclusively upon the statute 46 & 47 Vict. c. 57, repealing all previous Acts on the subject.

Statement of claim. His statement of claim should allege :—

(α.) *That he is entitled as proprietor to the design* (showing how he is entitled).

(β.) *That such design is new or original* (see *ante*, p. 107), *and has not been previously published in the United Kingdom.*

(γ.) *That such design was duly registered in respect of class* (state the number of class) *before publication* (giving the date when).

(δ.) *That before delivery on sale of any articles to which the design has been applied the plaintiff furnished to the Comptroller the prescribed number of exact representations or specimens of the design* (giving the date when).

If exact representations or specimens were furnished on the application for registration, this allegation will be unnecessary (sect. 50).

(ε). *That before delivery on sale of any articles to which the design has been applied, the plaintiff caused each such article to be marked with the prescribed mark, or with the prescribed word or words or figures denoting that the design is registered* (sect. 51).

(ζ.) *That the defendant has, without the license or written consent of the plaintiff, applied the design* (or a fraudulent or obvious imitation thereof) *to certain articles of manufacture* (naming and describing them) *in the class or classes of goods in respect of which the design is registered.*

(η.) *That the defendant published or exposed for sale a certain article of manufacture* (naming it), *or some substance* (naming it) *to which such design or any fraudulent or obvious imitation thereof had been applied.*

Under this allegation it will be necessary for the plaintiff to prove *scienter*, and it should be alleged in the clause above.

(θ.) *The relief or remedy to which he considers himself entitled.*

These remedies are—(1), injunction; (2), action for penalties (sect. 58); (3), action for damages.

The plaintiff must make his election between suing for penalties and for damages, as he cannot obtain both.

Defence. The defendant in his statement of defence may deny all or any of the allegations made by the plaintiff; he may also allege that the plaintiff's "design" is not in point of fact such a design as the Act meant to protect (sect. 60, *ante*, pp. 102—5), that the plaintiff's copyright has expired, that the acts alleged to have been done do not amount to piracy, or that if done that any piracy was in fact committed.

No time is limited by the Act within which an action for the infringement of a design must be brought.

Dramatic pieces and musical compositions.

Statement of claim.

The plaintiff in an action for the infringement of his *copyright* (as distinguished from playwright) in a dramatic piece or musical composition, will, in his statement of claim, allege the same facts as in the case of an action for the infringement of copyright in books (*ante*, p. 215); but where the complaint is, that his *acting right* has been infringed, the circumstances will be somewhat different. In an action of this nature he should show:—

(α.) *That he has such a title in the playright as justifies him in bringing the action.* (The title should be set forth.)

If the plaintiff claims the playright by reason of the assignment of the *copyright* to him, he must allege that an entry of such assignment has been made (5 & 6 Vict. c. 45, s. 22). If he claims as assignee of the playright only, he need not allege any registration.

(β.) *The date of the first representation or performance, and the place where it took place.*

(γ.) *That the defendant represented or caused to be represented* (as the case may be) *the play, &c., at a place of dramatic entertainment* (naming it; see *Wall* v. *Taylor*; *Wall* v. *Martin*, 11

Q. B. D. 102), *without the consent in writing of the plaintiff.*

(δ.) *That the defendant represented, or caused, &c., such play, &c., to be represented on so many occasions (naming them).*

(ε.) *The nature or relief to which he considers himself entitled.*

The remedy for each and every representation or performance is a penalty of not less than 40*s.*, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater.

The proprietor of a musical composition should in an action for infringement also allege:—

(ζ.) *That he printed or caused to be printed upon the title-page of every published copy of such musical composition a notice to the effect that the right of public representation or performance was reserved.* (See 45 and 46 Vict. c. 40, s. 1, and the following section, in cases where the right of performance and the copyright are vested in different owners.)

The defendant may of course, and in all cases does, deny the infringement, and further he may allege:— *Defence.*

(α.) That the plaintiff has no title to the exclusive right of representation.

This may be because he claims as assignee of the copyright, and has omitted to make the entry required by 5 & 6 Vict. c. 45, s. 22, or because there has been a prior publication abroad within the meaning of 7 Vict. c. 12, or that the plaintiff being assignee does not claim by instrument in writing.

(β.) That the plaintiff has only an undivided share (see *Powell* v. *Head*, 12 Ch. Div. 686), and is

entitled only to a proportionate part of the penalty.

(γ.) Tender before action as to the proportionate part, or payment into Court.

(δ.) That the plaintiff is barred by lapse of time (3 & 4 Will. IV. c. 15, s. 3).

(ε.) That the plaintiff has parted with the whole or some portion of his exclusive rights.

for in this case the licensee must be made co-plaintiff, or the action will fail (see *Taylor* v. *Neville*, 26 W. R. 299).

In an action for penalties a plea of ignorance is bad, but where a person is sued for "causing to be represented," it must be shown that the representation took place under his direction (*ante*, p. 130), and to this extent proof of guilty knowledge is necessary.

Action at Common Law.

Before publication, the author of an intellectual production has a right of copy therein at common law, and the remedy for infringement is (1) action for damages at common law, (2) injunction.

Statement of claim.

The plaintiff in an action of damages would allege the right of copy as exclusively existing in him, either as author or transferee, and that the defendant unlawfully and without the consent of the plaintiff published the work in question. To this the defendant might plead that the production was immoral, blasphemous, or indecent, that the plaintiff or his predecessors in title had published the work, or that he (the defendant) had leave and license from the plaintiff to do so.

Defence.

There is at common law no right in the author or proprietor to the delivery up of pirated works.

Forms of injunction for the protection of a common law right are given in 1 Seton, 252.

Joinder.

All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment

may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a judge in disposing of the costs shall otherwise direct (R. S. C. 1883, O. XVI. r. 1).

Provision is also made for the substitution or addition of plaintiffs (r. 2), and the joinder of defendants (rr. 4, 5, 6, 7).

The question of joinder of parties is now of little importance, although it is still as necessary as heretofore to have the proper parties before the Court.

It will be remembered that although a plaintiff may have a right to an injunction upon the strength of an equitable title, he must nevertheless join the owner of the legal title as co-plaintiff.

Costs.

The costs of and incident to all proceedings in the Supreme Court are now in the discretion of the Court: Provided that where any action, cause, matter, or issue is tried with a jury the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court shall, *for good cause*, otherwise order (R. S. C., O. LXV. r. 1).

Subject to this section, and to the general law on the subject of costs, which in most cases is as applicable to actions for the infringement of copyright as to any other species of action, the following decisions may be noted :—

Where a fatal objection appears on the face of a statement of claim, and the defendant does not raise the point of law in his pleadings, in dismissing the action it will be without costs, except where an injunction is sought (*Page* v. *Wisden*, 20 L. T. (N. S.) 435).

A defendant who imported copyright matter for sale contrary to the statute, was ordered to pay the costs of an

action, although he had acted without knowledge, and had sold none of the works (*Cooper* v. *Whittingham*, 28 W. R. 720).

Where a plaintiff obtains a perpetual injunction he is entitled to costs, no matter how trivial the subject-matter of the action may be, *sed aliter* in some cases, as, for instance, where the defendant immediately after an *interim* injunction tenders the full costs up to that date (see *Fradella* v. *Weller*, 2 Russ. & My. 247).

And so also where a defendant offers to submit to all the relief to which the plaintiff is entitled, it is the duty of the latter to stay proceedings, and, if he insists on further prosecuting the suit, he will not be entitled to costs from that time (*Colburn* v. *Simms*, 2 Hare, 543). But where a plaintiff is compelled to bring the action to a hearing, by reason of the defendant's refusing to pay costs which he ought to have paid, he will be entitled to the whole costs, even although he should at the hearing waive his claim for an account (*Kelly* v. *Hooper*, 1 Y. & C. (Ch.) 197).

Where a person deliberately copies another's advertisement, although the Court cannot restrain him, it will as a rule refuse to allow him his costs (*Cobbett* v. *Woodward*, L. R. 14 Eq. 407, *per* Romilly, M.R., see *ante*, p. 73).

The Court will not, save in instances of bad faith, take any notice of negotiations prior to the action, unless indeed they amount to a release or binding contract, and a plaintiff who proceeds to enforce his rights will accordingly be entitled to costs (*Edelsten* v. *Edelsten*, 1 De Gex, J. & S. 203).

Where a plaintiff demands more than he is entitled to, and the defendant offers by way of settlement less than he ought to perform, and the plaintiff thereupon brings the action to a hearing, neither party is entitled to costs (*Moet* v. *Couston*, 33 Beav. 578).

A plaintiff who after hearing but before judgment becomes bankrupt, cannot be compelled personally to pay the costs, assuming judgment to be entered eventually for the defendant (*Boucicault* v. *Delafield*, 10 Jur. (N. S.) 937, 1003).

Where there is not a clear misrepresentation, but the conduct of the defendants is such as to justify the plaintiff in demanding an investigation, the action will be dismissed, and each party must pay his own costs (*Ainsworth* v. *Wadmsley*, L. R. 1 Eq. 527).

Where in an action (by reason of the defendant having discontinued the piracy), a judge makes no other order than "that the defendant do pay the costs of the action," an appeal by defendants is not for "costs only" within the 49th section of the Judicature Act, 1873 (*Dicks* v. *Yates*, 50 L. J. (N. S.) Ch. 809).

Notwithstanding the provisions of the Act 3 & 4 Will. IV. c. 15, to amend the laws relating to dramatic literary property, or any other Act in which those provisions are incorporated, it is now provided (45 & 46 Vict. c. 40, s. 4), that the costs of any action or proceedings for penalties or damages in respect of the unauthorised representation or performance of any musical composition, published before the passing of the Act, shall in cases in which the plaintiff shall not recover more than 40*s.* as penalty or damages, be in the discretion of the Court or judge before whom such action or proceeding shall be tried.

PART II.—TRADE MARKS.

CHAPTER VIII.

ON THE RIGHT OF PROPERTY SUBSISTING IN A TRADE MARK AND ON CLAIMS ANALOGOUS TO SUCH RIGHT.

Difference between copyright and a trade mark.

A TRADE MARK, although partaking to some extent of the nature of a monopoly, differs essentially from copyright. Copyright refers to and is intended to protect the *substance* of a production, whether of a literary or artistic nature, while a trade mark merely protects the *identification* of an article, and of itself in no way affects the production or sale of a similar article by a third person (see *Dicks* v. *Yates*, 50 L. J. N. S. (Ch.) 809). Anyone who has adopted a particular mode of designating his particular manufacture has a right to say, not that other persons shall not sell exactly the same article, better or worse, or an article looking exactly like it, but that they shall not sell it in such a way as to confound the identity, and lead purchasers to believe that it is the manufacture to which that trade mark was originally applied (*Farina* v. *Silverlock*, 6 De G. M. & G. 218). The consideration of a true trade mark is primarily centered in an actual mark or device, necessarily annexed to some description of goods or to the envelope or receptacle containing them, and properly registered under the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57). This Act and the

rules made in pursuance thereof repeal all previous enactments and rules relating to the registration of trade marks (see Sect. 113; Trade Mark Rules, 1883, r. 60), except that the repeal of enactments is not to affect the past operation of any of those enactments, or right to use a trade mark granted or acquired, or application pending, or appointment made, or compensation granted, or order or direction made or given, or right, privilege, obligation, or liability acquired, accrued, or incurred, or anything duly done or suffered under or by any of those enactments before or at the commencement of the Act, nor is such repeal to interfere with the institution or prosecution of any action or proceeding, civil or criminal, in respect thereof, and any such proceeding may be carried on as if the Act had not been passed. Further, such repeal shall not take away or abridge any protection or benefit in relation to any such action or proceeding (46 & 47 Vict. c. 57, s. 113), and the repeal of the rules made under the Trade Marks Registration Act, 1875, is without prejudice to any proceeding which may have been taken under such rules (Trade Mark Rules, 1883, r. 60).

Repeal of all previous registration Acts by the Act of 1883.

It must be observed that there are other species of property which are protected by the Courts, on principles analogous to those governing trade marks proper, as, for instance, the goodwill of a trade so far as it is contained in the style or title of the partnership, the name of a trader, the description of his place of business or peculiar manufacture or product, the wrappers in which goods are enveloped, such wrappers being of a distinguishing style, and the right to a trade secret under certain circumstances.

Cases analogous to trade marks proper.

The protection afforded in these and similar cases does not necessarily depend upon the existence of any trade mark, *qud* trade mark, but is directed against false representations calculated to injure the property, legal or actual,

of another. It is obvious that the assumption of the name of a firm or of a single individual, and whether placed over a shop door, or made known to the public by means of a label or ticket affixed to goods, is in either case a violation of a private right, and if anything it is a greater violation in the former case, where the fraud is extended to the whole business, than in the latter, where the false representation is merely confined to a particular class or classes of goods to which an actual trade mark is affixed (*Thurton* v. *Douglas*, Johns. 174, *see per* Wood, V.-C.).

Definition of a trade mark.

A trade mark, properly so called, may be described as a particular mark or symbol, used by a person for the purpose of denoting that the article to which it is affixed, is sold or manufactured by him or by his authority, or that he carries on business at a particular place (Kerr on Injunctions, 356), and to the same effect are the remarks of Lord Cranworth in a well-known case (*Leather Cloth Co.* v. *American Leather Cloth Co.*, 35 L. J. Ch. 61).

The American statutes (Act of July 8th, 1870, ss. 77—84, August 14th, 1876, ss. 1—8), do not contain any definition of a trade mark, and it is frequently a matter of extreme difficulty to say what amounts to one. Thus it has been decided that the exclusive use of a tin pail with a handle to it, the tin ornamented with a geometrical pattern, and used to contain paper collars for sale, and sold with the collars, could not be claimed as a trade mark, either under the statute or by virtue of the general law of trade marks [illegible]*ington* v. *Libby*, 14 Blatchf. (Amer.) 128, and see [illegible]*ks* v. *Jacobus*, *ibid.* 337). It may be here mentioned that the American Courts have decided that the legislation by Congress on the subject of trade marks, is not authorised, either by the letter or spirit of the constitutional provision from which such authority is sought to be deduced (*Leiderdorf* v. *Flint*, 8 Bissell, 327), and

consequently that such legislation is unconstitutional and void. This, however, does not apply to a common law proceeding for enjoining the use of a trade mark (*United States* v. *Roche*, 1 McCrary (Amer.) 385).

Definition of a right analogous to that in a trade mark.

Such rights as are analogous to those subsisting in trade marks are covered by a similar definition, except that the symbol or sign by which the business or goods is or are identified, is not necessarily *affixed* to the subject-matter. There is consequently no right in such symbol or sign save when used in connexion with a trade or business (*Du Boulay* v. *Du Boulay*, L. R. 2 P. C. 441; 38 L. J. (P. C.) 35). It would appear to be definitely settled, that the right to a trade mark proper is not the right in the symbol constituting such mark, but in the application of that symbol to a particular class of goods, or for a particular purpose, or in other words, there can be no right to the exclusive ownership of any symbols or marks universally in the abstract (*Leather Cloth Co.* v. *American Leather Cloth Co.*, 33 L. J. Ch. 199). Even this modified right of property has only comparatively recently been recognized (*Holloway* v. *Holloway*, 13 Beav. 209; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; 9 Jur. (N. S.) 479; *Hall* v. *Barrows*, 4 De G. J. & S. 150; 33 L. J. Ch. 204; *Burnett* v. *Leuchars*, 13 L. T. (N. S.) 495; 14 W. R. 166: *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; 35 L. J. Ch. 352; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 522, *per* Lord Westbury; *The Singer Manufacturing Co.* v. *Wilson*, 45 L. J. Ch. 490; 2 Ch. D. 448, in the House of Lords, 47 L. J. (Ch.) 481; 26 W. R. 664), since so late as 1742 Lord Hardwicke denied all right of property, and based whatever remedy a plaintiff might have upon a mere question of fraud (*Blanchard* v. *Hill*, 2 Atk. 484), and a hundred years later the same doctrine was apparently held (*Perry* v. *Truefitt*, 6 Beav. 66).

Right of property.

The principle upon which the Courts interpose to pre- *Principle*

on which relief is founded.

vent infringement is, that no man has a right to sell his own goods as the goods of another, either by positive statements or misrepresentations, or by adopting the trade mark, name, or designation of another as descriptive of quality, and in such a way as may be calculated to deceive unwary and incautious customers (*Croft* v. *Day*, 7 Beav. 90; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508); and this principle is in no way altered by the Trade Marks Act, 1883 (see *Mitchell* v. *Henry*, 15 Ch. Div. 181).

It was laid down by Pearson, J., that the object of the registration of trade marks in England, was to protect trade marks which were in use, and which were intended to be used continuously in this country, and it was not intended to allow all the world to come to England and register trade marks which were not to be used here. Consequently, a person who did not carry on business in England, and did not intend to do so, and had never used his trade mark in this country, would have no right to be put on the register as the proprietor thereof (*Re Riviere's Trade Mark*, W. N. 1883, p. 212). This decision was, however, reversed on appeal (W. N. 1884, pp. 27, 75).

Where goods are sold with such marks as would denote that they are of the genuine manufacture of the plaintiff, an action will lie, even although the immediate purchaser was perfectly well aware that the plaintiff was not in point of fact the manufacturer (*Sykes* v. *Sykes*, 3 B. & Cress. 541; *Orr Ewing & Co.* v. *Johnston*, 13 Ch. Div. 434; 7 App. Cas. 219), and this for the obvious reason that the purchaser might sell the goods again without any statement as to their true character (*supra*; see also *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. Div. 434; L. R. 3 App. Cas. 376). The probable fraud on the public, *combined* with the injury to the plaintiff's purse or business reputation, is therefore the justification of the principle. Should the plaintiff seek to obtain protection on the *sole*

ground that the public may be or have been imposed upon, he would fail, the protection of the public not being the duty of a private person, but of the Attorney-General (see *Clark* v. *Freeman*, 17 L. J. Ch. 142; *Hall* v. *Barrows*, 32 L. J. (Ch.) 551, *per* Romilly, M.R.; *Webster* v. *Webster*, 3 Swanst. 490). On the other hand, the plaintiff will equally fail if the alleged imitation of his mark has not deceived and is not likely to deceive ordinary purchasers (*Hurricane Lantern Co.* v. *Miller*, 56 How (N. Y.) Pr. 234).

Injury to the plaintiff.

So far as the person aggrieved is concerned, the injury done to his trade by loss of custom is sufficient to support his title to relief (*Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Burgess* v. *Hills*, 26 Beav. 247), and he has nothing more to do than to show that his trade mark has been taken (*Singer Manufacturing Co.* v. *Wilson*, *per* Jessel, M.R., 2 Ch. D. 442), or in some cases that part of it has been taken, for if a thing consists of 25 parts and only one is taken, such an imitation may be sufficient to contribute to a deception (*Guinness* v. *Ullmer*, Sebastian Dig. 46), although it is quite possible for a valid device to consist of a design which forms a considerable portion of an existing trade mark (*Ex parte Farina*, 26 W. R. 261; *Orr Ewing & Co.* v. *Johnston*, 13 Ch. Div. 434, 7 App. Cas. 219; *Liebig's Extract of Meat Co.* v. *Anderson*, W. N. 1882, p. 147, affirmed on appeal W. N. 1883, p. 185); in all these cases the question is whether the representation taken as a whole is distinguishable in the ordinary course of business from other representations (*Ex parte Orr Ewing & Co.* 47 L. J. Ch. 180; 26 W. R. 259).

Quantum of injury.

Actual fraud not necessarily to be proved in equity.

From the foregoing remarks it will be understood that in cases relating to trade marks proper, it is never necessary in an application for an injunction and an account to prove actual fraud on the part of the defendant, although for reasons to be given in the proper place it may sometimes

Even in the case of the infringement of a trade name.

be advisable to do so if possible. With respect to a trade name not used as a trade mark affixed to goods, all that has to be proved is, that the defendant has acted in a way calculated to deceive (*Singer Manufacturing Co.* v. *Wilson*, L. R. 3 App. Cas. 301; *Ditto* v. *Larmen*, 8 Biss. (Amer.) 151); but in other cases of false representation not amounting to the infringement of a trade mark strictly so called, fraud must be proved even in the Chancery Division (*ibid.*, 2 Ch. Div. 444).

Division of trade marks according to Lord Romilly.

Lord Romilly, in *Hall* v. *Barrows*, 32 L. J. Ch. 551; divided trade marks proper into two classes—local, denoting where the goods were manufactured, and personal, or those which denote the person who manufactures them; but it is obvious that these divisions do not comprise symbolical trade marks consisting of devices, such as an eagle or an elephant, or a fancy name, and in this respect at least, such a division would hardly seem to be sufficiently extensive. It has also been distinctly disapproved of under other circumstances. A trade mark may, however, be of such a personal nature as of necessity to import that the goods sold under its protection have been manufactured at a particular place, or under certain circumstances, or by a particular person; and when this is the case the distinction drawn would seem to be warranted, as embodying at least one necessary incident, namely, the inability of the owner to assign, at any rate without proper alterations (see *Motley* v. *Downman*, 3 My. & Cr. 1; *Hall* v. *Barrows*, 33 L. J. Ch. 204; remarks of Lord Westbury in the *Leather Cloth Co.* v. *American Leather Cloth Co.*, 33 L. J. Ch. 199, and those of Lord Cranworth in the same case, 11 H. L. Cas. 523; *Bury* v. *Bedford*, 33 L. J. Ch. 465, *per* L.JJ.; and see *Robinson* v. *Finlay*; *Ward* v. *Robinson*, 9 Ch. D. 487).

Assign-

A trade mark when registered, can be assigned and

transmitted only in connection with the goodwill of the business concerned in the particular goods, or classes of goods, for which it has been registered, and is determinable with that goodwill (s. 70); and, further, where a person becomes entitled by assignment, transmission, or other operation of law, to a registered trade mark, the comptroller shall on request, and on proof of title to his satisfaction, cause the name of such person to be entered as proprietor of the trade mark in the register. The person for the time being entered in the register of trade marks as proprietor of a trade mark, shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licenses as to, or otherwise deal with the same, and to give effectual receipts for any consideration for such assignment, license or dealing. Provided that any equities in respect of such trade mark, may be enforced in like manner as in respect of any other personal property (s. 87, and see s. 78). *ment of trade mark.*

Where several trade marks have been registered in a series, under s. 66, such series of trade marks is assignable and transmissible only as a whole, but for all other purposes each of the trade marks composing a series shall be deemed and treated as registered separately.

There shall not be entered in any register kept under the Act, or be receivable by the comptroller, any notice of any trust expressed, implied, or constructive (s. 85).

Trade marks properly so called consist of some description or device in some way or other *affixed* to the article sold, and that description or device may be either affixed to, or impressed upon, the goods themselves by means of a stamp or an adhesive label or ticket, or it may be made to accompany the goods by being impressed or made to adhere to an envelope or case containing them (*Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 441). *Trade mark proper must be affixed.*

And by the Patents, Designs, and Trade Marks Act, 1883, the name of an individual or firm used as a trade mark, must be printed, impressed, or woven in some particular and distinctive manner (sect. 64). Under the Trade Mark Registration Act, 1875, the plaintiff's mark must, in order to support an action, have been put forth to the world by the party complaining of the misuse of it (*Leno* v. *Bank of London*, 18 C. B. 93), that is to say, it must have been affixed to a vendible article actually in the market (*McAndrew* v. *Bassett*, 4 De G. J. & S. 380); but no questions of this kind can now arise under the new Act, as it is provided that "registration of a trade mark shall be deemed to be equivalent to public use of the trade mark" (46 & 47 Vict. c. 57, s. 75), and in order to constitute a public user it is sufficiently plain that the trade mark must be actually in the market, for so it was held with respect to the public user of goods (*McAndrew* v. *Bassett*, *supra*; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307). The section of the Act therefore provides in effect that registration of a trade mark shall be equivalent to placing the class of articles protected by it in the market as vendible articles.

And put forth to the world.

But see 46 & 47 Vict. c. 57, s. 75.

Length of user of trade name or designation.

The question as to what constitutes a sufficient length of user to give the plaintiff an exclusive right to a trade name or designation not registered under the Act, may be resolved by reference to the judgment in *Hall* v. *Barrows*, 32 L. J. Rep. 551, in which a decided opinion was expressed that the interference of a Court of Equity does not depend on the length of time the name has been used, and that although it might not have been adopted a week, and might not have acquired any reputation in the market, still the right to use it would be protected. It is to be observed, however, that in order to make out a case for the interference of the Court, it must be shown that there is at least a probability of pecuniary loss or damage resulting

from the wrongful act (*Leather Cloth Co.* v. *American Leather Cloth Co.*, 33 L. J. Ch. 200, *per* Westbury, L.C.), and, therefore, if a plaintiff can show that the defendant has copied his trade name or designation under circumstances calculated to deceive the public, he proves in effect that such name and designation were sufficiently identified with his business, otherwise the public could not possibly suffer, nor would he himself sustain any loss prospective or otherwise. And again, the mere fact of a person imitating the name of another would seem to show that such name is known in the market, for in any other event the plagiarist would gain nothing by his pains.

Endeavour to obtain monopoly.

If a person should endeavour to use his right in a trade mark for the purpose of getting a monopoly in particular articles, as if he had a patent for the manufactured goods, such trade mark will not be protected (*Singer Manufacturing Co.* v. *Wilson*, 2 Ch. Div. 456, *per* Mellish, L.J.: *Morgan* v. *Meadham*, 36 L. J. Ch. 228, *per* Wood, V.-C.; *Flavel* v. *Harrison*, 10 Hare, 467; *Linoleum Manufacturing Co.* v. *Nairn*, 7 Ch. Div. 834, and refer also to *Wheeler & Wilson* v. *Shakespear*, 39 L. J. Ch. 36). The name by which a patented article is generally known becomes *publici juris* at the expiration of the patent, and cannot properly be registered as a trade mark (*Re Rolph*, 53 L. J. N. S. (Ch.) 188).

Where also the inventor of a new substance had given it a name and taken out a patent for his invention, he is nevertheless not entitled to the exclusive use of that name after the expiration of the patent (*Linoleum Manufacturing Co.* v. *Nairn*, 7 Ch. D. 834).

Copyright Acts.

Publication of newspaper.

There is no advantage to be gained by registering a trade mark under any of the Copyright Acts (*Marvell* v. *Hogg*, L. R. 2 Ch. 307; *In re Meikle*, 46 L. J. (Ch.) 19), and irrespective of the Copyright Law, the Court will

restrain a person from publishing a newspaper or periodical, purporting to be a continuation of the plaintiffs, or intituled in such a way as to lead the public to purchase it as such (*Hogg* v. *Kirby*, 8 Ves. 215; *Prowell* v. *Mortimer*, 2 Jur. (N. S.) 414; *Kelly* v. *Hutton*, L. R. 3 Ch. 703; *Bell* v. *Locke*, 8 Paige (Amer.) 75).

CHAPTER IX.

THE PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883.

Section 77.

By the 77th section of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), it is provided that a person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of a trade mark, unless, in the case of a trade mark capable of being registered under the Act, it has been registered in pursuance of the Act, or of an enactment repealed by the Act; or in the case of any *other* trade mark in use before the 13th August, 1875, registration thereof under the Act or of an enactment repealed by the Act, has been refused. The comptroller may on request, and on payment of the prescribed fee (£1, see Trade Mark Rules, 1883, 1st Schedule), grant a certificate that such registration has been refused.

The owner of a mark in use before the 13th August, 1875, and who has obtained such a certificate will stand, it would seem, in precisely the same position as he would have done if the Registration Act had never been passed (*In re Barrows*, L. R. 5 Ch. D. 353—359, *per* Malins, V.-C.).

Rule 32.

Upon registering any trade mark, the comptroller shall enter in the register the date on which the application for registration was received by the comptroller (which day shall be deemed to be the date of registration), and such other particulars as he may think necessary (r. 32). This rule would not, however, appear to justify the comptroller in entering a note of a private arrange-

ment arrived at between the applicant and a third person with respect to the mark, and an *ex parte* application should, therefore, be made to the Court, accompanied by the written consent of the comptroller (*Re Keep*, W. N. 1884, p. 30).

Refusal to register. Section 62.

With respect to all applications for registration, the comptroller may, if he thinks fit, refuse to register any trade mark, but any such refusal is subject to appeal to the Board of Trade, who shall, if required, hear the applicant and the comptroller, and may make an order determining whether, and subject to what conditions, if any, registration is to be permitted (46 & 47 Vict. c. 57, s. 62, sub-sec. 4). The Board of Trade may, however, if it appears expedient, refer the appeal to the Court; and in that event the Court shall have jurisdiction to hear and determine the appeal and may make such order as aforesaid (*ibid.* sub-sec. 5). Where the comptroller refuses to register a trade mark, and the applicant intends to appeal to the Board of Trade from such refusal, he must within a month from the date of the decision appealed against, leave at the Patent Office, Trade Marks Branch, a notice of such his intention (Trade Mark Rules, 1883, r. 20), accompanied by a statement of the grounds of appeal and of the applicant's case in support thereof (*ibid.* r. 21). The Board of Trade may thereupon give such directions (if any) as they may think fit with respect to evidence, or otherwise, for the purpose of hearing the appeal, or for the purpose of referring the appeal to the Court to hear and determine the same (*ibid.* r. 23).

Rules 20, 21, 23.

Abandonment of application. Section 63.

When registration of a trade mark has not been or shall not be completed within twelve months from the date of the application, by reason of default on the part of the applicant, the application shall be deemed to be abandoned (sec. 63).

Definition

A trade mark, as defined by the Act, consists in the

several names, signatures, and devices, or combinations thereof as set forth in sect. 64, subject, in the case of trade marks used before the 13th August, 1875, to the power reserved to provide for entry on the register, of marks in common use as *additions* to trade marks, and to certain other powers with respect to marks not so used, and being common to the trade in the goods with respect to which the application to register is made. In these cases, the entry can only be made as an addition to a valid trade mark, and the applicant must disclaim any right to the exclusive use of the same (s. 74; see *Re Kuhn*, 53 L. J. Rep. N. S. (Ch.) 238). If the disclaimer is not entered on the register, the proper mode is to rectify the register by adding such disclaimer; the application may be made by any person aggrieved (*ibid.*)

of a trade mark under the Act. Section 64.

Section 74.

By the 65th section of the Act, "a trade mark must be registered for particular goods or classes of goods," but this merely amounts to a legislative acknowledgment of a previously existing law (*Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518). By the 6th rule made in pursuance of the Act, goods are classified into fifty classes in the manner appearing in the third schedule, and if any doubt arises as to what class any particular description of goods belongs, the doubt is to be determined by the comptroller. Under rule 4 of the old Acts, a trade mark might have been registered with respect to goods in different classes, but where there were four trade marks including an anchor, already registered in respect of goods under class 42, "Substances used as food," the Court refused to give leave to the registrar to register a new trade mark including an anchor, in respect of goods of the same class but different in character from those goods for which the four trade marks had been registered (*Re Hargreaves*, 11 Ch. D. 669).

Section 65.

Classification of goods. Rule 6.

It was held under the old Acts that a trade mark is suffi-

ciently distinctive to be entitled to registration, if, looked at as a whole, it will in the ordinary course of business, be distinguishable from other devices in use; it makes no difference that some part or parts of it may be contained in, or may constitute such other devices (*Ex parte Orr Ewing & Co.*, 38 L. T. Rep. (N. S.) 313). Under the "Three Mark Rule," similar marks up to three are allowed to be registered if they are proved to have been used side by side before the Trade Mark Act, 1875 (see *Re Munch*, W. N. 1883, p. 170, sect. 74, sub-sect. 3). Under the present Act, however, no direct provision has been made for the registration of the same trade mark in more than

Rule 30. one class, but by rule 30 (Trade Marks Rules, 1883), it is directed that the comptroller shall enter the applicant as the registered proprietor of the "trade mark" in respect of the particular goods or "classes of goods" described in his application, and from this it might be argued that the Act intended a mark to be registered if necessary in more than one class at a time, and if so, in part of a class also (See also s. 62, subs. 3, Form F, Second Schedule.)

Assignment of trade marks. Section 70.

When registered, a trade mark "shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill (s. 70), and where the applicant dies before registration, the trade mark may be registered in the name of the successor to the goodwill" (r. 31, and see rr. 34—39).

Rules 31, 34—39.

With respect to the assignment and transmission of such trade marks as can be lawfully disposed of (see *Motley* v. *Downman*, 3 My. & Cr. 1), rr. 34—39 provide for the registration of subsequent proprietors as follows. Where a person becomes entitled to a registered trade mark by assignment, transmission, or other operation of law, a request for the entry of his name in the register as proprietor of the

trade mark, shall be addressed to the comptroller and left at the Patent Office (r. 34). Such request shall, in the case of an individual, be made and signed by the person requiring to be registered as proprietor, and in the case of a firm or partnership, by some one or more members of such firm or partnership, or in either case by his or their agent respectively, duly authorised to the satisfaction of the comptroller, and in the case of a body corporate, by their agent authorised in like manner (r. 35).

"Every such request shall state the name, address, and description of the person claiming to be entitled to the trade mark (hereinafter called the claimant), and the particulars of the assignment, transmission, or other operation of law, by virtue of which he requires to be entered in the register as proprietor, so as to show the manner in which, and the person or persons to whom the trade mark has been assigned or transmitted, and so as to show further that it has been so assigned or transmitted in connection with the goodwill of the business concerned in the particular goods or classes of goods for which the trade mark has been registered" (r. 36).

"Every such request shall be accompanied by a statutory declaration to be thereunder written, verifying the several statements therein, and declaring that the particulars above described comprise every material fact and document affecting the proprietorship of the trade mark as claimed by such request" (r. 37).

"The claimant shall furnish to the comptroller such other proof of title, and of the existence and ownership of such goodwill as aforesaid as he may require for his satisfaction" (r. 38).

"A body corporate may be registered as proprietor by its corporate name" (r. 39).

Rival claimants for registration.

Where each of several persons claims to be registered as proprietor of the same trade mark, the comptroller may

refuse to register any of them until their rights have been determined according to law, and the comptroller may himself submit or require the claimants to submit their
Section 71. rights to the Court (s. 71) by special case to be filed and proceeded with in like manner as any other special case submitted to the Court, or in such manner as the Court may
Rules 42, 43. direct (r. 42). Where the special case is to be submitted to the parties it may be agreed to by them, or if they differ, may be settled by the comptroller on payment of the prescribed fees (r. 43). In a case decided under the old Acts, registration of similar marks was allowed on the applicants undertaking not to use part of the design alone as a mark, and to use such mark in a specified manner only (*Re Sykes*, 43 L. T. Rep. 626; *Re Whiteley*, *ibid.* 627, *note*).

Registration. Section 76. By sect. 76, "the registration of a person as proprietor of a trade mark shall be *prima facie* evidence of his right to the exclusive use of the trade mark, and shall, after the expiration of five years from the date of the registration, be conclusive evidence of his right to the exclusive use of the trade mark, subject to the provisions of this Act." In this section, the term "exclusive use" of course means exclusive so far as regards the class of goods in which the mark is registered, and the effect of the provision would seem to be, that for the first five years the title of the registered proprietor is good unless a better title is shown by some third person, but that after the expiration of that time, the title is secure except in so far as some inherent defect in the mark itself is concerned (*Re Palmer's Application*, 21 Ch. D. 47; *ibid.*, 24 Ch. D. 504; and see Hyde's Trade Mark, 38 L. T. Rep. (N. S.) 777. The expression "subject to the provisions of this Act," probably means subject to the sections and rules "as to their connexion with the goodwill of the business" (see Trade Marks Act, 1875, s. 3).

The question whether registration should be allowed ought to depend upon this, whether or not the party opposing registration would, independently of the Act, have been entitled to restrain the use by the applicant of the mark which he proposes to register (*In re Farina* 20 W. R. 261).

Where a German soap manufacturer adopted a trade mark for a particular sort of soap, the manufacture of which however at last entirely ceased, it was held that mere non-user of the mark from 1876 to 1882, though coupled with non-registration, did not amount to an abandonment of the mark so as to prevent registration, though it did not operate to bar any exclusive right to such mark on the part of another manufacturer who had in the interim innocently registered an identical mark (*Monson* v. *Bochm*, W. N. 1884, p. 68).

Registration of a series of marks. Sections 66, 67.

When a person claiming to be the proprietor of several trade marks which, while resembling each other in the material particulars thereof, yet differ in respect of—(*a*) the statement of the goods for which they are respectively used or proposed to be used, or (*b*) statements of numbers, or (*c*) statements of price, or (*d*) statements of quality, or (*e*) statements of names of places, seeks to register such trade marks, they may be registered as a series in one registration. A series of trade marks shall be assignable and transmissible only as a whole, but for all other purposes each of the trade marks comprising a series shall be deemed and treated as registered separately. And by r. 14, when an application relates to a series of trade marks differing from one another in respect of the above particulars, it is provided that a representation of each trade mark of the series shall be made or affixed upon the form of application (and see r. 28). A trade mark may moreover be registered in any colour, and such registration shall, subject to the provisions of the Act, confer

Rules 14, 28.

on the registered owner the exclusive right to use the same in that or any other colour (sect. 67).

Opposition to registration.

Section 69.

Rules 29, 44.

By sect. 69 of the Act it is provided that any person may within two months of the first advertisement of the application (see sect. 68), give notice in duplicate at the Patent Office of opposition to registration of the trade mark, and the comptroller shall send one copy of such notice to the applicant. Within two months after receipt of such notice, or such further time as the comptroller may allow, the applicant may send to the comptroller a counter statement in duplicate of the grounds on which he relies for his application, and if he does not do so, shall be deemed to have abandoned his application. If the applicant sends such counter statement the comptroller shall furnish a copy thereof to the person who gave notice of opposition, and shall require him to give security in such manner and to such amount as the comptroller may require for such costs as may be awarded in respect of such opposition, and if such security is not given within fourteen days after such requirement was made, or such further time as the comptroller may allow, the opposition shall be deemed to be withdrawn. If the person who gave notice of opposition duly gives such security as aforesaid, the comptroller shall inform the applicant thereof in writing, and thereupon the case shall be deemed to stand for the determination of the Court (see Rules 29, 44).

Under the corresponding section (sect. 5) of the Act of 1875, an application was made to remove from the register a trade mark which had been registered as an old mark, after advertisement claiming 41 years' user. It appeared that for the greater part of this term the mark had been a common mark, and for about six years had been so to the knowledge of the defendants, and that the applicants, who had long used the same trade mark, were not aware of the advertisement, and had not opposed the registration.

It was held that the trade mark must be removed from the register (*Re Hyde & Co.'s Trade Mark*, 7 Ch. D. 724).

When an opposed application for registration stands for the determination of the Court under the above section, which it will do when the parties opposing registration have given security for costs (*In re Brandreth*, L. R. 9 Ch. D. 618), the practice will for the future be regulated by r. 29, which provides in effect that the comptroller shall require the applicant, within one month or such further time as the comptroller may allow, to issue a summons in the chambers of a judge of the High Court for an order that notwithstanding the opposition of which notice has been given, the registration of the trade mark be proceeded with by the comptroller, or to take such other proceedings as may be proper and necessary for the determination of the case by the Court. The applicant then takes out the summons and gives notice to the comptroller, or if he fails to do so within the said period of one month he will be deemed to have abandoned his application.

A motion for an injunction to restrain the proposed registration would be irregular, since the application to the Court referred to in r. 29 means an application by the person seeking to register (see *Re Simpson, Davies & Sons*, 15 Ch. D. 525).

Refusal of comptroller to register. Section 62. Rules 17—24.

Where a question of title arose, an action to try the right was directed to be brought (*ibid.*); and in another case it was held that an application to the Court by a person aggrieved by the refusal of the registrar to enter his name upon the register might be by way of motion, two clear days' notice thereof being given to the registrar (*Stephens, ex parte*, 24 W. R. 819). The new remedy is by way of appeal to the Board of Trade, under sect. 62, sub-sect. 4, 5, rr. 17—24.

Person aggrieved.

When a mere word not used as a trade mark before the

Act was registered, which it clearly ought not to have been, any person who had used the word in connection with or as descriptive of an article in his trade, was held to be a person aggrieved (*Rose* v. *Evans*, 48 L. J. Ch. 618). A "person aggrieved" may possibly have a *locus standi*, even although he does not oppose the registration of the mark under sect. 60 (see *Re Hyde & Co.*, 7 Ch. D. 724. A mere licensee may be a person aggrieved (*Re Ralph*, 33 L. J. Rep. (N. S.) Ch. 188).

Where each of several persons claim to be registered as proprietor of the same trade mark, the comptroller may refuse to comply with the claims of such persons until their rights have been determined by the Court (sect. 71, *ante*, p. 245).

Section 71. The expression "same trade mark" would seem to be extended to "a trade mark so nearly resembling a trade mark already on the register with respect to such goods or description of goods as to be calculated to deceive" (see sect 72).

A discretion would therefore seem to be vested in the registrar as to whether he will register all or any of the marks, either unconditionally or with the introduction of variations, or whether he will submit or require the claimants to submit their rights to the Court (sect. 71).

In the latter event the procedure will be by special case (rr. 42 and 43; and see *Ex parte Grimshaw*, W. N. 1877, p. 24), and in the former by way of appeal to the Board of Trade (r. 20).

Rectification of register.
Sections 90, 91.
Rules 44, 47.

The Court may, on the application of any person aggrieved by the omission, without sufficient cause, of the name of any person from any register kept under the Act, or by any entry made, without sufficient cause, in any such register, make such order for making, expunging, or varying the entry as the Court thinks fit, or the Court may refuse the application; and in either case may make

such order with respect to the costs of the proceedings as the Court thinks fit (sect. 90). Under the preceding section the Court may decide any question that it may be necessary or expedient to decide for the rectification of a register, and may direct an issue to be tried for the decision of any question of fact, and may award damages to the party aggrieved (*ibid.*, sub-sect. 2). Any order of the Court rectifying a register shall direct that due notice of the rectification be given to the comptroller (*ibid.*, sub-sect. 3; and see r. 47). Mere clerical error may however be corrected by the comptroller without any application to the Court (sect. 91; see also r. 44).

A person who does not carry on business in England, and does not intend to do so, and has never used his trade mark in this country, may be a person aggrieved under this section, and it is a matter of evidence whether he is so or not; this being so, such person may apply to have the register rectified, even though he himself may not be entitled to have the mark registered in his own name (*Re Riviere*, W. N. 1884, pp. 27, 75; and see *Rose* v. *Evans*, 48 L. J. Ch. (N. S.) 618). Although no person can apply to rectify the register unless he is a person "aggrieved" within the meaning of the Act, this does not prevent a person aggrieved from suing for relief otherwise than under the Act (*Re Riviere*, *supra*).

Section 92. *Rules* 44—48.

The registered proprietor of any registered trade mark may apply to the Court for leave to add to or alter such mark in any particular, not being an essential particular within the meaning of the Act, and the Court may refuse or grant leave on such terms as it may think fit (sect. 92); and by the same section provision is made for notice to the comptroller, and alteration of the register in conformity with the order of the Court (see rr. 44—48). It must be borne in mind that the power possessed by the Court to order rectification of the register

of trade marks is applicable only to cases in which there has been some mistake in the original registration, and not to cases where the register has become defective by reason of circumstances which have occurred subsequently to such registration (*In re Ward, Stort & Sharp's Trade Marks*, 50 L. J. Ch. 347 ; 44 L. T. Rep. (N. S.) 97). In cases such as these the Court may order the entry to be expunged (*Re Lawrence*, 44 L. T. Rep. (N. S.) (note) 98), and re-registration to be effected (*Re Rust*, *ibid.* (note)), or in some cases the desired result may be effected by a simple assignment (*Re Farrow*, *ibid.* (note)).

The rules relating to the practice affecting the alteration and rectification of the register are 46—48, shortly to the following effect :—

Rule 46 46. If the registered proprietor of a trade mark send to the comptroller, together with the prescribed fee, notice of an alteration in his address, the comptroller shall alter the register accordingly.

Rule 47. 47. Whenever an order is made by the Court for making, expunging, or varying an entry from or in the register, the comptroller shall, if he thinks that such rectification or variation should be made public, and at the expense of the person applying for the same, publish, by advertisement or otherwise, and in such manner as he thinks just, the circumstances attending the rectification or variation in the register.

Rule 48. 48. Whenever the registered proprietor of any trade mark intends to apply for the leave of the Court to add to or to alter such trade mark under sect. 92 of the Act, the notice to be given to the comptroller shall be given fourteen days at least before such application. If leave be granted on such application the applicant shall forthwith supply to the comptroller such a number of representations of the trade mark as altered as he may deem sufficient.

Exceptions to registration. Section 72.

By the 72nd section, "The comptroller shall not, except where the Court has decided that two or more persons are entitled to be registered as proprietors of the same trade mark, register in respect of the same goods or description of goods a trade mark identical with one already on the register with respect to such goods or description of goods, and the comptroller shall not register with respect to the same goods or description of goods a trade mark so nearly resembling a trade mark already on the register [illegible] respect to such goods or description of goods as calculated to deceive. It shall not be lawful to [illegible] as part of or in combination with a trade mark any [illegible] the exclusive use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a court of justice, or any scandalous design" (sect. 73).

The question as to what may be considered to "nearly resemble" a trade mark already on the register, is of course a matter of evidence in each case. In *Worthington's Trade Mark*, 14 Ch. D. 8, 42 L. T. 563, the Court of Appeal, affirming the decision of Jessel, M.R., disallowed a brewer's trade mark enclosed in a triangle, the Court taking into consideration the possibility of the mark, which was registered plain, being coloured *red* in practice, as Bass's well-known trade mark is (and see *Re Farina*, 26 W. R. 261; *Ex parte Orr Ewing & Co.*, 47 L. J. Ch. 180). The words "calculated to deceive" are said to refer to an element of deception in the mark itself, without any reference to other marks (*In re Horsburgh*, 53 L. J. N. S. (Ch.) 237; see *Re Jelley & Others*, 21 Ch. D. 225, *quoted*: Sebastian's Digest, No. 616).

A trade mark for a stove polish consisted of the words "The Rising Sun," with a vignette of the sun: it was held not to be infringed by the words "Rising Moon," with vignette of the moon (*Morse* v. *Worrell*, 10 Phila. (Pa.) 168).

Where four trade marks, including an anchor, were already registered in respect of goods in Class 42 of the first Schedule to the Rules made under the Act of 1875, the Court refused to give leave to register a new mark including an anchor, in respect of goods in the same class but different in character from those goods for which the four trade marks had been registered (*Re Hargreaves*, 11 Ch. D. 669), the rule of the Court being to permit registration of identical old trade marks up to three, though if more than three applications for the registration of the same old mark are received it will be treated as common to the trade (*Benlow* v. *Low*, 44 L. T. Rep. (N. S.) 875; 29 W. R. 837; 46 & 47 Vict. c. 57, s. 74, sub-s. 3). Where an old mark has already been registered for certain goods in a certain class there would seem to be nothing to prevent the registration of a new mark for other goods in the same class, provided that the goods and the trades of the proprietors are sufficiently distinct for no confusion to take place (*Re Bixby's Applications*, 21 Ch. D. 223; *Re Jelley & Others*, *ibid.* (*quoted*) 225; Sebastian's Digest, No. 616).

Any person aggrieved by the refusal of the comptroller to register under sects. 72, 73, of the Act, may appeal to the Board of Trade, who may refer the appeal to the Court in the way pointed out by sect. 62, and rr. 20—24. It is thought that the Court will direct a trade mark to be registered if satisfied as to its dissimilarity to marks actually registered, and this without inquiring whether it is distinguishable from other marks, the subjects of pending applications to register (*Re Dugdale*, 49 L. J. Ch. (N. S.) 303). And as any word that may accompany the device is clearly part thereof, at least for purposes of registration, it is submitted that such words may be regarded in estimating the distinctiveness of the mark (*ibid.*, and see *Re Horsburgh*, 53 L. J. N. S. (Ch.) 237).

Sealed Printed or written copies or extracts, purporting to be

certified by the comptroller, and sealed with the seal of the Patent Office, are to be admitted in evidence in all courts, and in all proceedings, without further proof or production of the originals (sect. 89; and see rr. 50, 57, and also sect. 96).

Copies to be received in evidence.
Sections 89, 96.
Rules 50, 57.

The 81st section makes certain provisions with respect to the Company of Cutlers, in Hallamshire, in the county of York (see rr. 53 to 56, and the several statutes relating to the Company of Cutlers, viz.: 21 Jac. 1, c. 31; 31 Geo. III. c. 38; 41 Geo. III. c. 97; 54 Geo. III. c. 119; 23 Vict. c. 43).

Cutlers' Company.
Section 81.
Rules 53—56.

The 64th section is perhaps the most important one of the series relating to trade marks, for by it an attempt is made to define a valid trade mark under the Act. It is provided that for the purposes of the Act a trade mark must consist of or contain at least one of the following essential particulars:—

Composition of a trade mark.
Section 64.

(*a.*) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or

(*b.*) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or

(*c.*) A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use; and there may be added to any one or more of these particulars any letters, words, or figures, or combination of letters, words, or figures, or any of them;

Provided that any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures, *used as a trade mark before the* 13*th day of August*, 1875, may be registered as a trade mark under this part of the Act. The word "figures" will

doubtless here mean "numerals" (*Ex parte Stephens*, L. R. 3 Ch. D. 660).

By virtue of this section, unless a mark falls within the protection of some one or more of the three first-mentioned conditions, or was used as a trade mark before the 13th day of August, 1875, it cannot be registered under the Act.

Nothing in the Act is however to be construed to prevent the comptroller entering on the register, as an *addition* to any trade mark, in the case of an application for registration of a trade mark not used before the 13th August, 1875, any distinctive word or combination of words, though the same is common to the trade, in the goods with respect to which the application is made (sect. 74).

A mere word.

A mere word, not being a fancy word, used for the first time since the 13th August, 1875, will probably not be capable of registration under the Act (*Ex parte Stephens*, L. R. 3 Ch. D. 659). And the better opinion would appear to be that use before the Registration Act of 1875 of a word as part of a trade mark is not sufficient to render the word registrable as a mark (*Rose* v. *Evans*, 48 L. J. Ch. 618); and it would seem to be doubtful whether the scientific name of a particular tree, "Limetta," is a distinctive word capable of registration as a mark in use before the 13th August, 1875, in respect of lime juice, a product of the tree, or preparations of lime juice (*ibid.*, and see *In re Rotherham*, 14 L. R. Ch. D. 585; *Leonard* v. *Wells*, 53 L. J. Rep. (Ch.) 233). Where a mark consisted of the words "Kitchen Crystal Soap" which had been applied by the applicant and his predecessors in business for over twelve years to a compound manufactured and sold by them, consisting of soap mixed with crushed quartz or crystal, and used for cleaning and scouring purposes, it was held that these words were "special and distinctive"

words, and not merely descriptive of the article, and were consequently entitled to registration (*Re Eastman's Trade Mark*, W. N. 1880, p. 128).

A collection of words amounting to an advertisement.

A mere collection of words amounting to a description of the character and quality of goods, such as "S. C.'s Improved Patent Gold Medal Self-cleaning Rapid Water Filters," cannot be registered, and in point of fact do not in themselves constitute a trade mark even independently of the Act (*Champin* v. *Walker*, 5 Ch. D. 850; 46 L. J. Ch. 686).

A single letter.

A single letter will not be registered (*Re Mitchell*, 46 L. J. Rep. Ch. 876; L. R. 7 Ch. D. 36), but it is difficult to reconcile this decision with the judgment of Malins, V.-C., in *Barrow & Sons' Trade Mark*, in which it was held that whatever has been used in accordance with law as a trade mark, and protected as such before the passing of the Trade Marks Acts, 1875 and 1876, might be registered under them (*Re Barrow & Sons*, 46 L. J. Ch. 450; 5 Ch. D. 353), and if so, under the Act of 1883 also.

Collocation of letters.

It would seem also that a mere collocation of letters is not included in the expression "distinctive device, mark, heading, label, or ticket" (*Ex parte Stephens*, 3 Ch. D. 659; 46 L. J. Ch. 46), but it is possible that they might amount to a fancy word or words. And where the series or combination of such letters serves to indicate to purchasers that the goods are made by the person using the mark, and that the quality of such goods is different from that of other goods of the same kind which bear the other marks in the same series, it is probable that the rule will be otherwise (*Ransome* v. *Graham*, 47 L. T. Rep. (N. S.) 218).

Initials.

Before the Act of 1875, initials, either with or without additional distinctive marks, have been treated as valid trade marks; thus "H. H. 6," forming part of a mark, has been protected by injunction (*Ransome* v. *Bentall*, 3 L. J.

Ch. (N. S.) 161). So have the letters "M. C." standing alone (*Motley* v. *Downman*, 3 My. & Cr. 1; 6 L. J. Ch. (N. S.) 308); and for other examples see *Millington* v. *Fox*, 3 My. & Cr. 338; *Crawshay* v. *Thompson*, 4 Man. & G. 357; *Hall* v. *Barrows*, 32 L. J. Ch. 548; 4 De G. J. & S. 150.

It has been held that a trade mark consisting of the initials of the first manufacturers of the goods, may in course of time become a mere mark of quality, without implying a guarantee that the goods are still manufactured by the same traders (*Leather Cloth Co.* v. *American Leather Cloth Co.*, 33 L. J. Ch. 199; 10 Jur. (N. S.) 81; but how far several letters not used as a trade mark before the 13th August, 1875, and not stamped or worked upon any distinctive device, mark, brand, heading, label, or ticket, or used in conjunction with the name of an individual or firm, or with a written signature or copy of a written signature, can of themselves form a distinctive "device or mark," is a matter of inquiry. Initials consist of a combination of letters, and it has been seen that a mere combination of letters is not included in the term "distinctive device, mark, heading, label, or ticket" (*Ex parte Stephens*, 3 Ch. Div. 659), and such a combination would seem to be regarded rather as forming the additional material, which by sect. 64, sub-sect. 2 of the Act of 1883, is allowed to be *added* to the three classes of essential particulars, than such essential particulars themselves. If this is so, a collection of letters, whether disguised under the term "initials" or not, and even if worked or blended together in the form of a monogram, or possessed of any other distinguishing peculiarity either of shape or colour, and not amounting to a fancy word, could not of itself be registered under the Act. The particular function of "letters" or "combination of letters" is, that they shall be "added" to any one or more of the particulars

in the section mentioned, and not that they shall of themselves form a subject of registration (see sect. 64, sub-sect. 3). When, however, the letters are in addition to some regularly formed trade mark, there is no doubt but that the whole figure can be registered under the Act (*In re Barrows*, 46 L. J. Rep. 450).

Signatures.

Signatures, even before the Registration Act of 1875, have been held to constitute valid trade marks (*Farina* v. *Silverlock*, 1 K. & J. 509; 6 De G. M. & G. 214; *Welch* v. *Knott*, 4 K. & J. 747; *Massam* v. *Thorley's Cattle Food Co.*, 6 Ch. D. 574; 46 L. J. Ch. 707), and may now, if consisting of a written signature, or copy of a written signature, "of the individual or firm applying for registration thereof as a trade mark," be registered either with or without any additional letters, words, or figures, or combination thereof. In connection with this subject it is important to inquire how far an assignee of a trade mark consisting of a signature would be justified in using it, and the question in every such case would seem to be, whether the assignee in continuing the use of the original trade mark, would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade mark (*Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. & C. 523, *per* Lord Cranworth).

Penalty for unauthorised use of Royal Arms.

Any person who, without the authority of her Majesty, or any of the Royal Family, or of any government department assumes or uses in connection with any trade, business, calling, or profession, the royal arms, or arms so nearly resembling the same as to be calculated to deceive in such a manner as to be calculated to lead other persons to believe that he is carrying on his trade, business, calling, or profession by or under such authority as aforesaid, is liable on summary conviction to a fine not exceeding £20

(s. 106). It is apprehended that the word "Royal" would be objectionable, but whether the person using it without authority, could be proceeded against for the recovery of the penalty, is more than doubtful (*In re Royal Baking Powder Co.*, W. N. 1880, p. 49).

Removal from the register.

Provision is made for the removal of a trade mark from the register after the expiration of fourteen years, unless the proprietor pays to the comptroller a certain prescribed fee; but where a trade mark has been removed as aforesaid it shall nevertheless, for the purpose of any application for registration during the five years next after the date of such removal, be deemed to be a trade mark which is already registered (sect. 79).

Section 64.

The 64th section of the Patents, Designs, and Trade Marks Act, 1883, comprises within the essential particulars necessary to form a valid trade mark, "a distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use," and some of these terms have from time to time received a judicial interpretation.

"Device."

Thus, a "device" is an emblem or representation of some object, whether natural or fantastic, as for instance a triangle (*In re Worthington*, 14 Ch. D. 8), an eagle, or the like. But *query* whether it may not consist of a word, "Excelsior," for instance (*Ex parte Stephens*, 46 L. J. Ch. 47).

"Heading."

A "heading" consists of a separate label affixed above the ordinary one, and on which the special mark is exhibited (*Ex parte Stephens*, 24 W. R. 963), and the term is also applicable to the margin produced by the practice of inweaving patterns into the edge of certain descriptions of textile manufactures, and it is not material whether such inwoven pattern constitutes of itself the mark to be protected, or is associated with stamps on the goods (*Harter* v. *Souvazoglu*, W. N. 1875, p. 11; also refer to *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 448).

A "label" is, as its name implies, a small slip or scrip which is affixed to goods or to the vessel or envelope containing them (*Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Blackwell* v. *Crabb*, 36 L. J. Ch. 504; *Cocks* v. *Chandler*, L. R. 11 Eq. 446; 40 L. J. Ch. 575; *Lee* v. *Miller*, Seton, 4th ed. 242). And the sole distinction between "label" and "ticket," lies in the method in which they are attached to the goods; the former is fastened securely, the latter may be pinned thereto or tied (see *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Hirst* v. *Denham*, L. R. 14 Eq. 542; 41 L. J. Ch. 752. *Label.* *Ticket.*

It will be observed that neither the Registration Act nor the rules supplementary thereto, at all affect the numerous classes of cases founded on principles similar to those regulating trade marks properly so called. The Registration Act was passed to consolidate and systematise an intricate and fairly extensive body of law, affecting marks and symbols only when they are affixed to a particular species of goods or to some receptacle containing them; it does not interfere with false representations, made otherwise than by piracy of such marks and symbols by means of other devices. Such representations are dealt with by the Court by virtue of its inherent jurisdiction to prevent the commission of wrongs which cannot be codified, on account of their variable nature and extent. It is, however, certain that a breach of faith, or a wilful misrepresentation tending to the hurt or damage of the trade of another, will be punished none the less because the principles involved rest *in gremio legis*, rather than upon an act of the legislature. *Registration Act not applicable to quasi trade marks.*

In *Ex parte Stephens*, 46 L. J. Ch. 47, Jessel, M.R., observed that it would be a remarkable result of the Act, if an unregistered trade mark could be used as a trade mark, and other persons prevented from using it. It is submitted that the exclusive right to a trade mark may be

Title to unregistered trade mark.

acquired in two ways, namely, by registration under the Act, and also independently of the Act, *i.e.*, without registration. With respect to the latter contention, if an article has been placed in the market, in connection with a particular symbol which has become so well known as to lead the public dealing in the article to connect the symbol with that particular article, and if, moreover, the goods so marked have acquired such a reputation as to lead people to ask for them with the mark affixed, then, provided such mark is not copied from another already used in the trade, and is not itself calculated to deceive the public, it is further submitted that the proprietor of the mark is just as much entitled to it as he would be to any other description of property; and if this is so, he might commence proceedings to prevent or to recover damages for the infringement of his mark at any time, the only essential being that he should *before action* have registered it (if capable of registration) under the Act (see sect. 77; *Wheeler* v. *Johnston*, 3 Ir. Rep. Ch. Div. 284).

CHAPTER X.

ON THE INFRINGEMENT OF TRADE MARKS.

Title of the plaintiff.

In every question involving a suspicion of infringement, reference is, in the first instance, made to the title of the plaintiff, for if he has no exclusive right either by himself or jointly with others—the defendant not being one of them—to that which he has been deprived of, his action will necessarily fail.

Thus where three persons entered into an arrangement for the manufacture, exportation, and sale of certain goods, to bear a distinctive device or mark, it was held that this in reality gave a character to the goods in the export of which the several parties were interested, and that the particular design contained something which represented the interest, more or less, which each of the three several parties had in the goods so exported. So long as the purpose for which the mark was invented continued, such mark was joint property, and when the parties ceased to carry on the particular adventure it could not be said that any of them had an exclusive right to it (*Robinson* v. *Finlay*; *Ward* v. *Robinson*, L. R. 9 Ch. D. 487).

So also, where the inventor of a new substance gave to it a name and took out a patent for his invention, this did not in itself entitle him to the exclusive use of that name after the expiration of the patent (*Linoleum Manufacturing Co.* v. *Nairn*, L. R. 7 Ch. D. 834).

Where a trade mark was registered in the sole name of one of the members of a partnership firm, it was decided

that on the death of the registered proprietor, the proper method was for the surviving members of the partnership to take an assignment from the personal representatives of the deceased partner (*Re Furini*, 44 L. T. Rep. (N. S.) 99 (note)); during the lifetime of such partner, however, an application might have been made to the court for the rectification of the register, by cancelling the name of the registered proprietor and registering the names of all the partners trading under the style of the firm (*Re Rust*, 44 L. T. Rep. (N. S.) 98 (note)). This, however, cannot be done when the registration is the result of the wrongful act of the party registered, and in this case the only remedy is to apply to have the entry expunged, and then to make a fresh application for registration (*Re Lawrence, ibid.* (note)).

Trade mark consisting of a name.

The mere fact of a trade mark having been registered under the Act is no guarantee that such mark is valid, and the defendant may, if so advised, plead that it is bad; that it does not contain the necessary elements. For instance, a trade mark consisting of a name, must indicate the plaintiff more than a multitude of other persons, or no action will lie for the infringement of it (*Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 Hem. & M. 290, and see *Baird* v. *Turner*, 13 L. T. (N. S.) 746); and where a name, though not descriptive, does not serve to distinguish the person using it from other persons who use or are entitled to use it, it cannot be the subject of a valid trade mark (*Batty* v. *Hill*, 1 Hem. & M. 264; 11 W. R. 745); it is otherwise, however, where the class of persons so entitled is necessarily very limited (*Dent* v. *Turpin*, 2 J. & H. 139; *Hine* v. *Last*, 10 Jur. 106; *Southorn* v. *Reynolds*, 12 L. T. (N. S.) 75). Every person has of course a right to use his own name, and cannot be restrained from using it by the fact that some other person bearing the same name has previously

used it in connection with the same class of goods (*Burgess* v. *Burgess*, 3 De G. M. & G. 896); but where a person is selling goods under a particular name, and another person not having that name is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he so uses (*ibid.*), and this is likewise the ground upon which the courts interfere in all cases of disputes between parties having the same name, for if it can be proved that the defendant is taking advantage of the similarity of names to palm off his goods as the goods of the plaintiff he will be restrained from the use even of his own name (*Holloway* v. *Holloway*, 13 Beav. 209; *Taylor* v. *Taylor*, 23 L. J. Ch. 235; *Dent* v. *Turpin*, 2 J. & H. 139; *Schweitzer* v. *Atkins*, 16 W. R. 1080; and see *Sykes* v. *Sykes*, 3 B. & C. 541; *Foot* v. *Lea*, 13 Ir. Eq. 400). And so the court has restrained persons from using their own names (even apart from a trade mark), in such a manner as to represent their goods to be the goods of another, although that other was only the successor of the original maker and had a different name (*Croft* v. *Day*, 7 Beav. 84; and see *Rodgers* v. *Nowill*, 3 De G. M. & G. 614; *Churton* v. *Douglas*, Johns. 174). Where the name of the original inventor is the trade mark in question, and that has in process of time become the name of the thing sold, such name will be protected as a trade mark (*Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; 33 L. J. Ch. 199; 11 H. L. Cas. 523; *Bury* v. *Bedford*, 32 L. J. Ch. 741; 33 L. J. Ch. 465; but see the remarks of Lord Blackburn in *Singer Machine Manufacturers* v. *Wilson*, 3 App. Cas. 400); in an action on the case at Common Law it is submitted that it will be necessary to prove that the commodity in question was sold "as and for" the plaintiff's preparation (*Singleton* v. *Bolton*, 3 Doug. 293).

The name selected as a trade mark, need not be the name of the actual manufacturer of the goods to which it is attached, for the mark may in process of time become the property of a person who has purchased the goodwill of the business (46 & 47 Vict. c. 57, s. 70, and refer also to *Shipwright* v. *Clements*, 19 W. R. 599; *Cotton* v. *Gillard*, 44 L. J. Ch. 90), and whose name may consequently be quite different from that of the original manufacturer.

The mere fact of a name standing alone will not of itself be any objection, nor can such a name be considered as an arbitrary or fancy name, provided that it has or has had connection with that of the manufacturer (*Dent* v. *Turpin*, 2 J. & H. 139; *Dixon* v. *Fawcus*, 3 Ell. & Ell. 537), or selector (*Hirsch* v. *Jones*, 3 Ch. D. 384); but a name may also be used with any letters, words, or figures, or combination thereof (46 & 47 Vict. c. 57, s. 64; and refer also to *Collins Co.* v. *Brown*, 3 K. & J. 423; *Same* v. *Cowen*, 3 K. & J. 428; *Rodgers* v. *Nowill*, 6 Hare, 325); and it is obvious that the presumption of fraud in the event of infringement, would be as proportionately great as the registered device is unusual and peculiar.

Where an unpatented article was manufactured and described by the name applied to it by the original inventor, it was held that such name might be used *simpliciter* after his death, though not in his lifetime, in those cases where the name had become *publici juris*, and was the inventor's own name (*James* v. *James*, L. R. 13 Eq. 421, and see *Massam* v. *Thorley's Cattle Food Co.*, L. R. 14 Ch. D. 748). This, however, does not justify the person so using it in putting off any article other than a genuine one, or in leading the public to suppose that his preparation is the manufacture of the successors in business of the original discoverer, nor

must be assert that his is the only genuine article, or suggest that the article manufactured by the successors of the original discoverer is spurious (*James* v. *James*, *supra*, and see *Liebig's Extract of Meat Co.* v. *Anderson*, W. N. 1882, p. 147; on appeal, W. N. 1883, p. 185). The same remarks apply to the use of a trade name, which no one can adopt if by so doing he might lead the public to suppose that they are dealing with one person when they are in reality dealing with another (see Kerr on Injunctions, 361). It has, however, been recently decided that a trader has a perfect right to make and sell machines similar in form and construction to those of a rival trader, and even to refer to his rival's name and machines in his advertisements, provided that this is done in such a way as to obviate any reasonable probability of misunderstanding or deception (*Singer Manufacturing Co.* v. *Loog*, 18 Ch. D. 395; on appeal, L. R. 8 App. Cas. 15).

Trade names considered independently of the Act.

The mortgagee of stock-in-trade and goodwill, and of the right to use a name, cannot restrain persons claiming under the mortgagor from using the name; at least this was so held in a case where the mortgagee had never used the name, and had no apparent intention of doing so (*Beazley* v. *Soares*, 22 Ch. D. 660).

Where the defendants had been in the habit of describing certain beer manufactured by them as "Tivoli" beer, not in advertisements, but upon their price lists and invoices, it was held that this constituted sufficient material upon which an interim injunction could be granted (*Berliner, &c.* v. *Knight*, W. N. 1883, p. 70). The sole right, therefore, to restrain a person from using any name he pleases in the course of his business, is a right in the nature of a trade mark (see Pemberton on Judgments, ed. 1882, p. 479).

The mere user by a man of his own name is of itself no

evidence of fraud, but that it may be fraudulently used there is no doubt, and in this event the whole question resolves itself into a matter of evidence (*Holloway* v. *Holloway*, 13 Beav. 209; *Taylor* v. *Taylor*, 23 L. J. Ch. 255; 2 Eq. Rep. 290; *Dent* v. *Turpin*, 2 J. & H. 139; *Schweitzer* v. *Atkins*, 16 W. R. 1080; *James* v. *James*, 13 Eq. 421; *Du Boulay* v. *Du Boulay*, L. R. 2 P. C. 441; and see *Glen & Hall Manufacturing Co.* v. *Hall*, 16 Sickles (Amer.), 226; *Boulnois* v. *Peake*, 13 Ch. D. 513 (note)); but the assumption of another man's name is of itself, as previously stated, the strongest possible proof of fraud (*Burgess* v. *Burgess*, 3 De G. M. & G. 905, *per* Sir J. Turner).

Where a person uses a plaintiff's name and copies certificates given of the efficacy of certain manufactured articles, he will be restrained, even although he proceeded in such a manner as ostensibly to benefit the plaintiff by so doing, and although he did not in fact appropriate and apply the name and certificate to his own goods, but only drew comparisons between such goods and those of the plaintiff (*Franks* v. *Weaver*, 10 Beav. 297). So also where the defendants, who were needle manufacturers, purchased from one Abel Morrall, a nephew of the testator Abel Morrall, a patent for making double-eyed needles, together with the goodwill of a small trade in needles carried on by him at the same place as the testator formerly carried on his business, it was held that the defendants by soliciting through their travellers the plaintiffs' customers, and by supplying needles of all descriptions in addition to the patent double-eyed needles, to those purchasers who asked for Abel Morrall's needles, had so used the name as to deceive the public, and an injunction was accordingly granted (*Perks* v. *Hall*, W. N. 1881, p. 111).

An assumed or fictitious name may constitute a valid

trade name (see *Montague* v. *Moore*, Seton, 4th ed. 238; *Isaacson* v. *Thompson*, 20 W. R. 106; 41 L. J. Ch. 101; *Millner* v. *Reed*, V.-C. Wickens, Chancery of Lancashire, Feb. 3rd, 1870), but in America, the Court refused to enjoin infringement of the plaintiffs' firm name where it falsely implied that such firm was a corporation (*McNair* v. *Cleave*, 10 Phila. (Pa.) 135).

A man may so use his own name as to intentionally injure the plaintiff and deceive the public, and it is no defence that the name is the defendant's own name either in the civil or criminal courts (see *Reg.* v. *Dundas*, 6 Cox Cr. Cas. 380). If it does not appear that the assumption of a name somewhat similar to the plaintiff's name, is likely to cause any injury to the plaintiff, the courts will not interfere (*London & Provincial Law Assurance Society* v. *London & Provincial Joint Stock Life Assurance Co.*, 17 L. J. Ch. 37), especially when the name is compounded of words in every-day use (*ibid.*; and see also *The London Assurance Co.* v. *The London and Westminster Assurance Corporation, Limited*, 32 L. J. Ch. 664), or where it is manifest that the plaintiff's object is to obtain a monopoly of a general and common word forming part of the name (*The Colonial Life Assurance Co.* v. *The Home and Colonial Assurance Co., Limited*, 33 Beav. 548; 33 L. J. Ch. 741. There is nothing, however, to prevent a tradesman from using a name not in use at the time, even although he is aware that a neighbouring tradesman intends to use it (*Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512), nor is there anything to preclude the owner of a dwelling-house from calling it by the same name as another house in the immediate neighbourhood, unless a charge of malicious intention to injure can be substantiated (*Day* v. *Brownrigg*, 10 Ch. D. 294).

On the general subject of a fraudulent user of a trade

name refer to *Purser* v. *Brain*, 17 L. J. Ch. 141; *Lawson* v. *Bank of London*, 18 C. B. 84; 2 Jur. (N. S.) 716; *Lee* v. *Haley*, L. R. 5 Ch. 155; 39 L. J. Ch. 284; *Churton* v. *Douglas*, Johns. 174; *Mitchell* v. *Condy*, 37 L. T. (N. S.) 268; *Condy* v. *Mitchell*, *ibid.* 766, affirmed on appeal; *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; *Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512; *Boulnois* v. *Peake*, *ibid.* (note) 513; and as to the registration of a limited liability company under the same name as a company previously registered, see 25 & 26 Vict. c. 89, s. 20.

Trade name on dissolution of partnership.

On the dissolution of a partnership and sale of the business and goodwill, the trade name is included (*Banks* v. *Gibson*, 34 Beav. 566; 34 L. J. Ch. 591; *Hoffman* v. *Duncan*, Seton, 4th ed. 256; *Witt* v. *Corcoran*, *ibid.* 257; 2 Ch. D. 69; and therefore where a decree for the dissolution of a partnership is made, and it is ordered that the partnership business, stock-in-trade, goodwill, &c., shall be sold as a going concern, it would appear that the assignment of the goodwill and business includes the exclusive right to use the name of the old firm (*Levy* v. *Walker*, 10 Ch. D. 436), and on an ordinary dissolution without sale, either partner may use the firm's name as before (*supra*, and also refer to *Clarke* v. *Leach*, 32 Beav. 14; *Dence* v. *Mason*, W. N. 1877, p. 23; *Mitchell* v. *Condy*, 37 L. T. (N. S.) 268); but in most cases it will be found that a retiring partner has practically the power to prevent further use of his name, for the retention of it might lead the public to believe that he was still a partner; and again he might be liable for the debts of the partnership so long as it remained part of the title, and the latter contingency at least would justify the withdrawal of his name (*Scott* v. *Rowland*, 20 W. R. 508, and see Lindley on Partnerships, 863); the question whether he would incur such liability

as a fact is, however, a matter of evidence (*Levy* v. *Walker*, 10 Ch. Div. 447).

If by arrangement one partner takes over the entire concern there must be a valuation of the whole, including the trade name (*Banks* v. *Gibson*, 34 Beav. 566; 34 L. J. Ch. 591); and unless there is a covenant to the contrary the retiring partner may start a similar business in his own name wherever he pleases (*Bond* v. *Millbourn*, 20 W. R. 197; *Scott* v. *Scott*, 16 L. T. (N. S.) 143; *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191), and however similar it may be to that of the old firm, but he must be careful not to do anything calculated to induce the belief that his business is identical with the one he has left (*Cruttwell* v. *Lye*, 17 Ves. 335; 1 Rose, 123; *Churton* v. *Douglas*, Johns. 174; *Johnson* v. *Helleley*, 34 Beav. 63; *Hudson* v. *Osborne*, 39 L. J. Ch. 79), for the use of a name, whether fictitious or real, or any description or statement calculated to represent to the world that one business is the business of another, will be restrained (see *Levy* v. *Walker*, 10 Ch. D. 448), as also will the issuing of circulars framed with a similar object, or which may fairly be considered as amounting to such a representation (*Churton* v. *Douglas*, *supra*; *Stevens* v. *Paine*, 18 L. T. (N. S.) 600; *Burrows* v. *Foster*, Seton, 4th ed. 257; *Graveley* v. *Winchester*, *ibid.*; *Ansell* v. *Gaubert*, *ibid.* 236).

Enough has been said to show the very strong analogy that exists between trade names as connected with a particular trade or business, and names forming part of a trade mark necessarily annexed to goods and chattels, or to the receptacle containing them. Practically the same law prevails to prevent the use of the name of a place of business itself, and in these and similar instances it is only necessary for the plaintiff to prove that the defendant's conduct is of such a nature as to be cal-

Name of a place of business.

culated to deceive the public into believing that the defendant's business is the same business as that of the plaintiff (*Hudson* v. *Osborne*, 39 L. J. Ch. 79, and see *The Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376; *Dunachie* v. *Young*, 10 Sc. Sess. Cas. 4th Ser. 874).

Where, therefore, the plaintiffs had for a long space of time carried on business in Pall Mall under the style of the "Guinea Coal Company," they were held entitled to an injunction restraining their former servant and manager from setting up a rival business in Pall Mall under the name of the "Pall Mall Guinea Coal Company" (*Lee* v. *Haley*, L. R. 5 Ch. 155).

But where a bootmaker having a shop running up Bedford Street, with the front and entrance in the Strand, used as a sign the words "Civil Service Boot Supply," it was held that this was in itself insufficient to entitle the Civil Service Supply Association to an injunction, more especially as that association had not, at the time the plaintiff affixed his sign, been in the habit of selling boots and shoes, but only intended to sell them (*Civil Service Supply Association* v. *Dean*, 13 Ch. D. 513).

In another very similar case the plaintiffs carried on their business of sellers of carriages by auction and commission, in a part of the Baker Street Bazaar. They had always used the title of "Carriage Bazaar," and headed their bills with these words. The defendant took a house in Baker Street, and before opening it as a shop and standing place for carriages, announced it on a board as a "Carriage Repository," afterwards altering the title to "New Carriage Bazaar." Held that the defendant must be restrained from using these latter words or any other description which would lead customers to suppose that they were trading with the plaintiffs (*Boulnois* v. *Peake*, 13 Ch. D. 513).

Again, certain coal had for a long time been known in

the market as "Lochgelly" coal, and was the only coal so called, although there was a seam known as the "Lochgelly Splint Seam," which was not confined to the Lochgelly collieries, but extended under other estates as well. The lessees of one of the estates under which the Splint Seam extended, began to advertise and sell coal got by them as "Lochgelly Splint Coal;" held that the lessees of the Lochgelly colliery were entitled to an injunction against the user of the word "Lochgelly" by the owners of the Splint Seam, except in conjunction with other words and under certain circumstances sufficient to prevent any possibility of deception (*Lochgelly Coal Co.* v. *Christie*, 6 Sc. Sess. Cas. 4th Ser. 482).

Line of omnibuses.

This principle of protection has been extended to many similar cases, as for instance where a defendant was restrained from imitating the plaintiff's line of omnibuses by employing similar colours, words, and devices, to decorate omnibuses of his own (*Knott* v. *Morgan*, 2 Keen, 213, and *per* Wood, V.-C., in *Woollam* v. *Ratcliff*, 1 H. & M. 261; and refer also to the American case, *Marsh* v. *Billings*, 7 Cush. (61 Mass.) 322).

Title of an inn.

It would seem that in America the recognized title of an inn will be protected (*Howard* v. *Henriques*, 3 Sand. 725; *Woodward* v. *Lazar*, 21 California, 448; Sebastian on Trade Marks, 160; *Rellon* v. *Barker*, 4 Kansas, 445; and see also *Charleson* v. *Campbell*, Court Sess. Cas. 4, 4th Ser. 149). And so, independently of the law relating to copyright, the recipient of private letters will be restrained from publishing them (Story, Eq. Jur. ss. 944-947), as will also a person, from opening letters addressed to, and thus obtaining orders or custom intended for, another (*Edgington* v. *Edgington*, 11 L. T. (N. S.) 299; *Scheile* v. *Brukell*, 11 W. R. 796; *Witt* v. *Corcoran*, Seton, 4th ed. 253). In fact it may be broadly stated, that when a person endeavours to obtain

Private letters.

custom or to dispose of goods by the assumption of another's personality, he will be restrained from so doing, and hence in America a defendant was even restrained from using the words "established 1780" on his labels, bill heads, &c. (*Hazard* v. *Caswell*, 37 How. (N. Y.), Pr. 1).

Right of manager or partner to make known that he has been with a late firm.

A trader who has been a manager or partner, or even a servant in a firm of established reputation, cannot on setting up an independent business for himself be restrained from making known to the public that he has been with that firm (*Hookham* v. *Pottage*, L. R. 8 Ch. 91, and see *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 281, in which see the remarks of Wood, V.-C.); but it has been held by Bacon, V.-C., that a person has no right to use the name of his late firm, even by way of reference, in a circular; there seems, however, in this case, to have been proof of suspicious solicitation (*Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191).

In this class of case, as in the others, any colourable attempt to injure the plaintiff's business by devices calculated to deceive the public will be at once suppressed. In *Glenny* v. *Smith*, 11 Jur. N. S. 964; 2 Drew. & Sm. 476, the defendant left the plaintiff's firm, and put up a sign on premises of his own, bearing the inscription "From Thresher and Glenny," the word "From" being printed diagonally to, and in smaller letters than the rest, the defendant's own name being obscured by a sun blind partly drawn down. The restrictive law on this subject will be found laid down *in extenso* in the *Leather Cloth Co.* v. *The American Leather Cloth Co.*, 1 H. &. M. 271; and in *Perry* v. *Truefitt*, 6 Beav. 66; *Hookham* v. *Pottage*, L. R. 8 Ch. 91.

No remedy in equity for mere libel.

Some of the points previously referred to rest upon the very verge of the law in its relation to libel and slander, and the distinction should be carefully sought for, as it

arises in practice. The Court will not, it is clear, restrain the publication of a libel, *qua* libel (*Emperor of Austria* v. *Day*, 3 De G. F. & J. 239, *per* Turner, L. J.; *Hinrichs* v. *Berndes*, W. N. 1878, p. 11); but the rule is different where the publication of the libel is injurious to trade or property (*Thorley's Cattle Food Co.* v. *Massam*, 6 Ch. D. 582, *ibid.*, 14 Ch. D. 763; *Thomas* v. *Williams*, 14 Ch. D. 873, *per* Fry, J.; *Hill* v. *Hart-Davies*, 21 Ch. D. 798; *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142, not followed; *ante*, p. 25); and therefore where the defendant had published a statement indicating or suggesting that the plaintiff's goods were spurious, the Court granted an injunction to restrain him from so doing (*James* v. *James*, L. R. 13 Eq. 421).

Aliter where libel injurious to trade or property.

On the other hand, where a person unwarrantedly makes use of the name of another, for the purpose of lending importance to the commodity which he has to sell, this is not such a misrepresentation as the Court will restrain (*Clarke* v. *Freeman*, 11 Beav. 112; 17 L. J. Ch. 142). In *Clarke* v. *Freeman* the plaintiff did not complain that the defendant's conduct had in any way injured his trade or property, or even that it was likely to have that effect, but merely that he had used his name as a physician, for the purpose of puffing a quack medicine which he, the defendant, in order to sell the better, represented as made from the plaintiff's receipt. It is a matter of question, however, how far the decision in *Clarke* v. *Freeman* would be followed at the present day, for it is the better opinion that the Court will restrain the unauthorised use of a plaintiff's name, not on the ground of such use amounting to a libel, but on the principle that every man has a sufficient right of property in his own name. (See the remarks of Sir Hugh Cairns in *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Dixon* v. *Holden*, L. R. 7 Eq. 488.)

Improperly using the name of another.

Where the name of a person is wrongfully used in such a way as may be calculated to injure him, he has a right to an injunction, and therefore where the defendants, a joint stock company, inserted the plaintiff's name in their prospectus without his consent, they were restrained (*Routh* v. *Webster*, 10 Beav. 561; and see *Clover* v. *Royden*, L. R. 17 Eq. 190).

Words of quality.

With reference to a trade mark properly so called, it will have been noticed that words implying a guarantee of the special quality of the goods to which the mark is applied, will not be protected as new marks or part of new marks. And in connection with this statement it will be observed that the word "Excelsior" is not a word of quality (*Braham* v. *Bustard*, 1 H. & M. 447), and consequently anyone infringing such a word (*Ex parte Stephens*, 46 L. J. Rep. Ch. 46; 3 Ch. D. 659; 46 & 47 Vict. c. 57, s. 64, sub-s. *c*), will be restrained. The words "superfine," "superior" (*Braham* v. *Bustard*, *supra*), are, however, words of quality, and so is the word "nourishing" under certain circumstances (*Ruggett* v. *Findlater*, 43 L. J. Ch. 64). It is thought that words which suggest a *variable* quality, and are at the same time suggestive of the manufacturer or seller, may well be protected (*Hirst* v. *Denham*, L. R. 14 Eq. 542); consequently where a manufacturer marked goods of a certain superior class with a number of letters to distinguish them as belonging to that class, it was held that the marks being exclusively used by the manufacturer were valid trade marks, notwithstanding that they were indicative of the quality of the goods to which they were applied (*Ransome* v. *Graham*, 47 L. T. Rep. (N. S.), 218).

"Excelsior."

"Superfine," "superior," "nourishing."

English adjective.

A plaintiff cannot claim to himself a right of property in a mere English adjective, or word in common use, such as "Colonial" (*The Colonial Life Assurance Co.* v. *The Home and Colonial Assurance Co.*, 33 Beav. 548;

33 L. J. Ch. 741), because to do so would infringe on the right of traders to call their articles by a quality they possess (*Raggett* v. *Findlater*, L. R. 17 Eq. 29; *Braham* v. *Bustard*, 1 H. & M. 447); without in any way serving to identify the articles in question with any particular person or origin. It must be remembered, however, that when persons come into equity, they must not themselves be guilty of anything having a tendency to mislead the public, and therefore the original inventor of a new manufacture, and persons claiming under him, are alone entitled to designate such manufacture as "original;" if he or they have been in the habit of so designating their manufacture, an injunction will be granted to restrain another manufacturer from applying a similar designation to his goods (*Cocks* v. *Chandler*, L. R. 11 Eq. 446).

Official stamp or brand.

An official stamp or brand cannot become a private trade mark (*Chase* v. *Mayo*, 7 Lathrop (Mass.), 343). A mere name indicative of a natural product cannot be appropriated (*Young* v. *Macrae*, 9 Jur. N. S. 322), but it is apprehended that the rule is otherwise in those cases in which the owner of the mark has the exclusive means of obtaining the natural product indicated by it (*Radde* v. *Norman*, 41 L. J. Ch. 525), or practically the only means of obtaining it (*Braham* v. *Beauchamp*, 7 Ch. D. 848; 47 L. J. Ch. 348). The manufacturer of a substance containing the same chemicals or ingredients as the natural product, is not justified in using the name of the latter (*Apollinaris Co.* v. *Norrish*, 33 L. T. N. S. 242; *Same* v. *Edwards*, Seton, 4th ed. 237), *semble*, that it might be used if a new way of getting at the natural product itself can be discovered (*Young* v. *Macrae*, 9 Jur. N. S. 322).

Name indicative of natural product.

Fancy name.

Again, a plaintiff had formerly no exclusive right of property in a fancy word, that is to say, a name or word

or combination of names or words used arbitrarily, or in a sense contrary to their ordinary use and application; but by 46 & 47 Vict. c. 57, s. 64, a trade mark may now consist *inter alia* of a fancy word or words not in common use, and a person might have had the exclusive right to such a word or words, if it or they were in actual use before the passing of the Registration Act, 1875, for in this event the latter part of sect. 10 of that Act would have been a protection (*Ex parte Stephens*, 3 Ch. D. 659). Fancy names in common use in any particular trade, could not be appropriated even before the Registration Act of 1875 (*Williams* v. *Osborne*, 13 L. T. N. S. 498; but see *Gout* v. *Aleploglu*, 6 Beav. 69 (note); *Broadhurst* v. *Barlow*, W. N. 1872, p. 212).

The exclusive right to a fancy name is not lost by the inventor habitually using it in conjunction with his own name as maker of the article (*Ford* v. *Foster*, L. R. 7 Ch. 611), but a trade mark to which a trader had originally an exclusive right may in course of time become *publici juris*, and the exclusive right may be lost, and the proper test of this having happened is, whether the use of the trade mark by other persons has ceased to deceive the public as to the maker of the article (*ibid.*). A fancy name may consist of either a single or compound word, or of a collection of words (*Cotton* v. *Gillard*, 44 L. J. Ch. 90; *Field* v. *Lewis*, Seton, 4th ed. 237), generally taken from the ancient or modern classics, as, for instance, "Excelsior" (*Braham* v. *Bustard*, 1 H. & M. 447; 11 W. R. 1061); "Eureka" (*Ford* v. *Foster*, L. R. 7 Ch. 611); or compounded of ordinary English words as "Pain Killer" (*Davis* v. *Kendall*, 2 Rhode Island, 566 (Amer.)); "Licensed Victuallers' Relish" (*Cotton* v. *Gillard*, 44 L. J. Ch. 90); "The Guinea Coal Company" (*Lee* v. *Haley*, L. R. 5 Ch. 155), and the like. "Valvoline," the name of a particular kind of oil, is not however, a fancy

name, but merely a descriptive word (*Leonard* v. *Wells*, W. N. 1884, p. 60).

Geographical names.

And so a fancy name may consist of the name of a place, and will be protected if the plaintiff can show that such name is identified in the market with his goods obtained from such place (*Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; 42 L. J. Ch. 130; *Raddle* v. *Norman*, 41 L. J. Ch. 525; *Hirst* v. *Denham*, L. R. 14 Eq. 542; and see also *Cocks* v. *Chandler*, L. R. 11 Eq. 446; 40 L. J. Ch. 575). Hence, where the plaintiff had manufactured a certain description of bitters, generally known as "Angostura Bitters," although described by him as "Aromatic Bitters," the defendant was restrained from vending other bitters under the title of "Angostura," he being guilty of an attempt to deceive, inasmuch as he had endeavoured to induce the public to believe that his commodity was that of the plaintiffs (*Siegert* v. *Findlater*, 7 Ch. D. 801). On the subject of local and geographical names, refer also to *Taylor* v. *Taylor*, 23 L. J. Ch. 255; *Hine* v. *Lart*, 10 Jur. 106; *Seixo* v. *Provezende*, L. R. 1 Ch. 198; *Bulloch* v. *Gray*, 19 Journ. of Jurisp. 218.

Trade mark consisting of name of goods must not be descriptive merely.

Where a trade mark consists of the name of certain goods, it should not indicate goods of a general nature and description (*Braham* v. *Bustard*, *supra*; *Young* v. *Macrae*, 9 Jur. N. S. 322; *Browne* v. *Freeman*, 12 W. R. 305; *Williams* v. *Osborne*, 13 L. T. N. S. 498; *Leonard* v. *Wells*, 53 L. J. Rep. N. S. (Ch.) 233; on appeal, W. N. 1884, 60); unless perhaps where the matter indicated is a natural product accessible to the owner of the mark only (*Radde* v. *Norman*, 41 L. J. Ch. 525). Hence where the plaintiff carried on business at a certain place, selling coal under her own name, and adding to it on waggons and bill heads the words "Radstock Collieries," the defendants, though coal dealers at Radstock, were enjoined from carrying on business there

under the title of "The Radstock Colliery Proprietors," they having no collieries at the place named. The plaintiff had practically speaking, the monopoly of all the coal in Radstock (*Braham* v. *Beauchamp*, 7 Ch. D. 848; and see the *Lochgelly Coal Co.* v. *Christie*, 6 Sc. Sess. Cas. 4th Ser. 482).

Names indicative of mode of manufacture, &c.

So also there cannot be any exclusive property in a name which is merely indicative of the manner in which a certain article is manufactured (*Wheeler & Wilson Manufacturing Co.* v. *Shakespeare*, 39 L. J. Ch. 36; *Singer Manufacturing Co.* v. *Wilson*, L. R. 3 App. Cas. 376; 47 L. J. Ch. 481; *Cheavin* v. *Walker*, 5 Ch. D. 850; 46 L. J. Ch. 686; *Linoleum Manufacturing Co.* v. *Nairn*, 7 Ch. D. 834). Such a name must indicate ownership or origin, and not merely quality, kind, texture, composition, utility, intended use, or class of consumers (Joyce on Inj. 173).

General summary.

A word or name therefore which is merely descriptive of an article (*Burgess* v. *Burgess*, 3 D. M. & G. 896; *Cheavin* v. *Walker*, *supra*, 862; *Linoleum Manufacturing Co.* v. *Nairn*, *supra*; *Re Palmer's Application*, 21 Ch. D. 47; *Leonard* v. *Wells*, 53 L. J. Rep. (N. S.) (Ch.) 233; on appeal, W. N. 1884, p. 60; *Re Ralph*, *ibid.* 188); or is indicative of the quality or composition thereof (*Raggett* v. *Findlater*, 17 Eq. 29; *Wheeler & Wilson Manufacturing Co.* v. *Shakespeare*, 39 L. J. Ch. 36; *Singer Manufacturing Co.* v. *Wilson*, L. R. 3 App. Cas. 376), or is a current name by which a particular article is known in the market (*Braham* v. *Bustard*, 1 H. & M. 447; *Young* v. *Macrae*, 9 Jur. (N. S.) 322; *Browne* v. *Freeman*, 12 W. R. 305; *Williams* v. *Osborne*, 13 L. T. (N. S.) 498), or is a name which merely denotes the general character of a business (*London and Provincial Law Assurance Society* v. *London and Provincial Joint Stock Life Insurance Co.*, 11 Jur. 988; *London*

Assurance v. *London and Westminster Assurance Corporation*, 32 L. J. Ch. 604; *Colonial Life Assurance Co.* v. *Home and Colonial Assurance Co.*, 33 L. J. Ch. 741), or which designates a particular trade or occupation (*Choynski* v. *Cohen*, 39 Cal. 501), cannot be the subject of a trade mark (see Kerr on Inj. 359).

Colourable imitation.

The infringement of a trade mark may assume a two-fold shape, either the defendant deliberately copies the plaintiff's mark in detail, or what is far more common, he copies it with such variations and additions as will suffice to produce a colourable imitation, for it is obvious that if a defendant were to exactly copy a trade mark belonging to another, without at the same time drawing such distinctions either on the mark itself or otherwise, as to lead the public back again to him or his agents, he would in a great measure be losing the benefit of his fraudulent practices, and therefore it is necessary in the first place to mislead the public, and in the next to secure a benefit to the party practising the deception by preserving his own individuality (*per* Lord Langdale in *Croft* v. *Day*, 7 Beav. 84). The question in all cases of colourable imitation is, whether the resemblance between the genuine trade mark and the colourable imitation, is so close as to be calculated to deceive the ordinary public, and it is not necessary therefore that on the consideration of such a question the two marks should be placed side by side (*Seixo* v. *Provezende*, L. R. 1 Ch. 192; 12 Jur. (N. S.) 215), at least so far as the public is concerned.

The law as laid down in *Seixo* v. *Provezende* was discussed and approved of in a recent case, and there would appear to be no doubt that in cases of the infringement of a trade mark, the proper questions to ask are—

(a.) Have the plaintiffs shown that the defendants'

user of their mark will cause their goods to be taken for the plaintiffs' ?

(β.) Will it be the inevitable consequence of the use by the defendants of their mark, that purchasers in purchasing the defendants' goods will believe that they are purchasing the plaintiffs' ?

(γ.) Is it true that the defendants' mark cannot fail to attribute to their goods the same name as is used by the plaintiffs ? (See *Cope* v. *Evans*, L. R. 18 Eq. 150, *per* Hall, V.-C.).

(δ.) On a comparison of the genuine and forged marks, judging them as an Englishman, and knowing the habits of English people, would the one be taken for the other by dealers or purchasers of ordinary prudence. Should I be deceived so as to take the one ticket for the other, even if the two were not before me together, supposing me to be a purchaser of ordinary caution and ordinary intelligence (*Orr Ewing* v. *Johnston*, 13 Ch. D. 445, *per* Fry, J.) ? The use of a trade mark may be restrained by injunction even although no purchaser has actually been misled, for the very life of a trade mark depends upon the promptitude with which it is vindicated (*Johnston* v. *Orr Ewing*, L. R. 7 App. Cas. 219.)

The principles according to which the Court acts in preventing a man from passing off his goods as those of another were not altered by the Trade Marks Registration Act, 1875, and it is apprehended that these principles are the same with respect to the Act of 1883 (*Mitchell* v. *Henry*, 15 Ch. D. 181).

What amounts to

The question as to what amounts to an imitation is a

matter of evidence in each case as it arises, and the Court must ascertain whether any points of resemblance or difference are such as naturally arise from the necessity of the case, or whether the differences are merely colourable (*Taylor* v. *Taylor*, 23 L. J. Ch. 255; and see *Woollam* v. *Ratcliff*, 1 H. & M. 259). In *Taylor* v. *Taylor*, *supra*, the plaintiffs, who were sewing thread manufacturers and winders at Leicester, used reels labelled at one end "Taylor's Persian Thread" in a circular form, having an inner circle, in which was marked the particular quality of the article wound on the reel. On the other end of the reel was placed another circular label, having in the centre the armorial bearings of the city of Leicester, the words "J. and W. Taylor, six-cord," and a number denoting the quantity of yards wound on the reel. The defendant, who was a thread manufacturer, used for his thread, reels of the same size and description as the plaintiffs, and placed at one end a circular label with the words "Taylor's Persian Thread" thereon, and at the other end of the reel a circular label with his own armorial bearings surrounded by the words "Sam Taylor." The Court, after looking at all the facts of the case, granted an injunction. *a colourable imitation?*

In a recent case it appeared that the plaintiffs were in the habit of shipping goods to India, and on the outside wrapper of each bundle of goods an oval-shaped ticket was affixed. The ground of this ticket was white, and it was surrounded by an ornamental border of red and gold. Inside the border was an oval-shaped red line, and between that line and the border were printed in red letters the words "Archibald Orr Ewing & Co., Levenbank Works." Inside the red line was an egg, printed in gold, with the words "Trade Mark" printed across, in white letters, and under the egg were the words, in red, "Dyed Yarns, Glasgow." This ticket was known as the egg ticket. When

the plaintiffs shipped the goods they affixed to the wrapper enclosing them another ticket in the shape of a right-angled triangle. The ticket was of a glazed green. Under the middle of the base (which was uppermost) was a golden crown, and on each side of the crown a golden elephant, supporting a golden banner, whereon were the words "Prime Turkey Red," in Guzerathi characters, and "Levenbank." This ticket the plaintiffs charged the defendants with infringing, and the question before the Court consequently was whether the defendants had taken a material and substantial part of the plaintiffs' ticket. The defendants had repeated the two elephants, placing each in a corner of a triangular ticket as the plaintiffs had done, but the elephants were dissimilar in many respects. The ticket was the same in shape and colour as the plaintiffs' ticket, and had also a golden banner upon it; it differed, however, inasmuch as in the place of the crown was a Hindoo goddess named "Gunputty," and on the banner were printed the words, "Prime Turkey Red, R. Johnston & Co., London." The plaintiffs' goods had long been sold in the market under the name of "Bhé Hathi," meaning two elephants, and the presence of a representation of these animals on the ticket consequently became a matter of considerable importance. It was decided by the Court of Appeal that if one trader appropriates a material and substantial part of a trade mark which belongs to another, he is bound to use such precautions as to avoid the reasonable probability of error and deception, and the *onus* is on him to show that purchasers of the goods will not be deceived, and further that where the trade mark has caused certain goods to be known by a certain name (in this case "Bhé Hathi") a person cannot use a ticket which is likely to lead to the application of a similar name to his own goods (*Orr Ewing* v. *Johnston*, 13 Ch. D. 434; on appeal to the

House of Lords, L. R. 7 App. Cas. 219; and see *Reud* v. *Richardson*, 45 L. T. Rep. (N. S.) 54).

Where a trader had produced and sold an ink, which he designated "Stephens' Blue Black," and it was shown to the public on a label in white capital letters of large type, and the defendant then sold an ink in bottles similar in size to the plaintiff's, designated "Steelpen's Blue Black," written in the same type, this was held to be a colourable imitation (*Stephens* v. *Peel*, 16 L. T. (N. S.) 145).

Again where the plaintiffs used the word "Leopoldshall" in connection with a description of crude salt called "Kainit," which they obtained from Leopoldshall in Anhalt, they having the exclusive access to the mines there, and the defendants began to employ the word "Leopoldsalt" to another and inferior description of Kainit, they were restrained from so doing, V.-C. Wickens remarking in the course of his judgment: "The defendants have clearly used the name of Leopoldshall, or an imitation of it, and have not attempted to show, or at any rate have not shown, that they had any excuse whatever for so doing. There is nothing in the evidence that I can see to lead to a serious belief that they have used this name *bond fide*" (*Ruddle* v. *Norman*, L. R. 14 Eq. 348; 41 L. J. Ch. 525).

Slight differences which would not be perceived without strict examination, will not protect an imitation from injunction (*Williams* v. *Johnson*, 2 Bosw. 1 (Amer.)), and in another American case it was decided that the use of a trade mark simulating another trade mark and calculated to mislead the public into a belief that it is the plaintiff's, will be restrained, although it bear the defendant's name (*Walton* v. *Crowley*, 3 Blatchf. 440).

Whole trade mark need not be taken.

It is not of course necessary that the whole of a trade mark should have been taken or imitated (*Braham* v.

Bustard, 11 W. R. 1061), for an infringement may consist in the adoption of the essential part of it (*Ford* v. *Foster*, L. R. 7 Ch. 611; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Apollinaris Co.* v. *Norrish*, 33 L. T. (N. S.) 242); or in imitating its general appearance (*Seixo* v. *Provezende*, L. R. 1 Ch. 192; *Franks* v. *Weaver*, 10 Beav. 297), so that "the unwary, the heedless, and the incautious portion of the public would be likely to be misled" (*per* Kindersley, V.-C., *Glenny* v. *Smith*, 11 Jur. (N. S.) 965).

It has, however, been decided that even an unwary and incautious person must bestow some attention upon the mark when purchasing the article (*per* Lord Cranworth, *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H L. Cas. 531), and it is probable that the true test is, whether ordinary purchasers, purchasing with ordinary caution, are likely to be misled (*Seixo* v. *Provezende*, *supra*, and the remarks of Hall, V.-C. thereon, in *Cope* v. *Evans*, L. R. 18 Eq. 148; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *The Leather Cloth Co.* v. *The American Leather Cloth Co.*, *supra*, p. 535; *per* Lord Cranworth, *Condy* v. *Mitchell*, 37 L. T. (N. S.) 766).

It must not be forgotten however, that although the mere appearance of the ticket or label complained of could never lead anyone in this country to mistake it for the original, yet it is possible that the natives of a foreign country, unable to read and understand the English language, might take them both as equally symbolical of the plaintiff's goods. Reference must, consequently, be made to the place where the goods are to be disposed of, as well as to other circumstances (*Johnston* v. *Orr Ewing* L. R. 7 App. Cas. 225, *per* Selborne, L. C.).

Where the plaintiff's trade mark was described as a trade mark applicable to "worsted stuffs" by the following description, "a white selvage on each side of the piece,

having a red and white mottled thread interwoven the full length of the selvage between the edge of the piece and the edge of the selvage," it was decided that the intermixture of colours constituted a distinctive device entitled to protection, but that in the particular case the defendants were not guilty of infringement (*Mitchell* v. *Henry*, 15 Ch. D. 181; on appeal, *ibid.* 188).

Imitation by means of wrappers and packing.

It sometimes happens that a defendant packs up his goods in imitation of the plaintiff, and this may be an aggravation of any other existing circumstances, or it may be a fraud in itself (*Edelsten* v. *Vick*, 11 Hare, 78; *Woollam* v. *Ratcliff*, 1 H. & M. 259; *The Anglo Swiss Condensed Milk Co.* v. *The Swiss Condensed Milk Co.*, W. N. 1871, p. 163; *Orr* v. *Diaper*, 4 Ch. D. 92; 46 L. J. Ch. 41), although the surrounding circumstances may point to an opposite conclusion (*Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 443—55). Where therefore one trader sells an unpatented production of his own in bottles or casks indelibly marked with his known design, the Court will restrain a rival trader from selling a similar production in the same bottles or casks, although the rival trader puts a label of his own thereon (*Rose* v. *Loftus*, 38 L. T. Rep. (N. S.) 409).

Where the plaintiffs' firm had long been accustomed to pack a compound, in long cylindrical packages with pink wrappers, and to have a crimson paper of directions, and yellow ones of warning, tied in with each package, and their firm's name printed across a white label, so that the package would be at once known by its general appearance, it was held in America that a person who commenced to use the exact form and style of package, substituting his own name for that of the firm on the labels, must be restrained (*Fresc* v. *Buchof*, 14 Blatchf. 432; and see *Enoch Morgan's Sons Co.* v. *Schwachofer*, 5 Abb. (N. Y.) N. Cas. 265).

Sale by defendant of genuine goods, with genuine labels affixed.

Where a person sells the genuine goods of another and obtains from him a supply of labels, it is submitted that he is then entitled to sell the goods as and for such other person's goods with the label affixed, and that in the absence of any contract or agreement no case can be made out against such person, even though he represented on the purchase of the goods that he intended to sell them in England, instead of which he takes them abroad and competes with such other person's own agents there (see Browne on Trade Marks, 337), but a defendant will clearly be restrained if he makes use of a true and genuine trade mark for the purpose of selling his own goods (*Rose* v. *Henley*, cited 38 L. T. (N. S.) 410; 47 L. J. Ch. 577);

Of his own goods, with plaintiff's labels affixed.

Genuine mark upon genuine goods, but of a different quality to that intended.

and so also he will if he places a genuine mark upon goods which the manufacturer did not intend to be so marked, and this although such goods are of the plaintiff's manufacture (*Richards* v. *Williamson*, 30 L. T. (N. S.) 746). But when the plaintiff registered a label, which he requested the manufacturer who supplied him with goods of a particular description to affix to the receptacle containing them, it was held that there being no evidence of any contract that the manufacturer should supply the plaintiff exclusively with goods of that particular kind, the Court could not, on an interlocutory application, restrain the agents of the manufacturer from using the label (*Hirsch* v. *Jonas*, 3 Ch. D. 584).

Use of a different mark restrained.

And where the goods of a trader have acquired a specific name from the appearance of a trade mark, no other trader will be allowed to use a mark, which though different would cause his goods to be known by the same name (*Seixo* v. *Provezende*, L. R. 1 Ch. 195, per Lord Cranworth; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; 9 Jur. (N. S.) 479).

Trade secrets.

The rule with respect to trade secrets is, that the discoverer of such a secret without fraud or breach of trust,

may use it in the preparation of an unpatented compound, and this he may even call by its original name, so long as he does not lead the public to suppose that his preparation is that of another person. Thus in an American case (*Davis* v. *Kendall*, 2 Rhode Island, 566), where the plaintiff had no patent, and therefore no exclusive property in a medical compound invented and sold by him, and known as the "Pain Killer," the Court decided that anyone was entitled to make and vend the compound; and in another American case the same doctrine was held, although the result was different, owing to proof of breach of trust (*Comstock* v. *White*, R. Cox, T. M. Cases, 232; and see *James* v. *James*, L. R. 13 Eq. 421; 41 L. J. Ch. 353; *Mitchell* v. *Condy*, 37 L. T. (N. S.) 268; *Condy* v. *Mitchell*, *ibid*, 766).

Restraint of breach of agreement not to disclose a trade secret, quære.

Where the defendant has acquired the knowledge of a trade secret by means of fraud or a breach of trust, he will be restrained from using it, and so will third persons who derive their information through the defendant (*Williams* v. *Williams*, 3 Mer. 157; *Tipping* v. *Clarke*, 2 Hare, 383; *Morison* v. *Moat*, 9 Hare 241; *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276). It would, however, seem to be doubtful whether the Court will interfere by injunction to prevent the violation of an agreement not to impart the secret of an invention, the ground of the hesitation being that from the nature of the case a decree for specific performance could not be made (*Newbery* v. *James*, 2 Mer. 446; *Williams* v. *Williams*, 3 Mer. 157); it has been remarked that the Court did not in these cases seem to have looked upon the secret receipt in the light of property liable to injury from divulgation: had this been done, there would probably not have been serious difficulty in framing an injunction in restraint of such a contemplated injury, even although the Court might not have been able to decree specific performance of the agreement (Browne

on Trade Marks, 481); and this would appear to be the correct view to take (see *Youatt* v. *Winyard*, 1 Jac. & W. 394; *Tipping* v. *Clarke*, 2 Hare 393). The case of *Morison* v. *Moat*, 9 Hare, 241, does not affect the question as to injunctions against the violation of an agreement not to divulge a secret, but confines itself to the decision that a person who acquires a knowledge of any secret process in breach of contract, trust, or confidence, will be restrained from *using it*, even although third persons not standing in such a degree of relationship could not be restrained. In *Dietrichsen* v. *Cabburn*, 2 Phill. 52, Lord Cottenham decided that the jurisdiction of the court to restrain by injunction, an act which the defendant is by contract bound to abstain from, is not confined to cases in which there are either no other executory terms in the contract, or none which a court of equity has not the means of enforcing. This, however, is not a decision upon the point referred to, and is merely quoted as illustrating a general principle applicable in a great measure to the case.

Agreement not to use a trade secret, valid.

Other cases.

Where a person has sold to another a trade secret and has bound himself not to use it, there can be no question as to his liability in the event of his breaking the agreement (*Bryson* v. *Whitehead*, 1 Sim. & S. 74; 1 L. J. Ch. 42; and see *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345; see *Allsopp* v. *Wheatcroft*, L. R. 15 Eq. 59). If a person should falsely represent that goods of his own make are made according to a receipt of which he is in point of fact ignorant, but which is used in the manufacture of an article well known in the market, he will be restrained (*Cotton* v. *Gillard*, 44 L. J. Ch. 90; *Ansell* v. *Gaubert*, Seton 4th Ed. 235).

Where a secret process is used for the manufacture of some quack medicine, or of an article made to deceive the public, the Court will not protect it, for he who comes into equity must come with clean hands (*Williams* v. *Wil-*

liams, 3 Mer. 157; *Estcourt* v. *Estcourt Hop Essence Co.* L. R. 10 Ch. 270; 44 L. J. Ch. 223.

A bare secret cannot be the subject of a sale because the court is unable with certainty to carry it out (*Green* v. *Folgham*, 1 Sim. & S. 398; *Newbery* v. *James*, 2 Mer. 446); but it can and does inquire what the value of the secret is to sell, by reference to the profits made, and may order payment on that basis (*Newbery* v. *James*, *supra*).

Warranty of trade mark.

Under the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88, s. 19) the vendor of any chattel or article bearing a trade mark, is deemed to warrant such trade mark to be genuine unless the contrary is expressed in writing, signed by or on behalf of the vendor, and the measure of damages is the difference between the actual value of the article, and what would have been its value had it conformed to the warranty (*Jones* v. *Just*, L. R. 3 Q. B. 197). Irrespective of the Act, where a person contracts to sell goods of a specified quality, the trade mark may or may not be a material factor in the case, and on this subject see *Hopkins* v. *Hitchcock*, 32 L. J. C. P. 154; *Nichol* v. *Godts*, 10 Ex. Rep. 191; *Power* v. *Barham*, 4 Ad. & E. 473; 1 H. & W. 683.

Right of property in plaintiff must be injured.

In every case of alleged infringement, it is absolutely essential that the plaintiff should be prepared to prove either that his reputation may suffer by reason of the defendant's conduct or that his trade may be injured (see *Robinson* v. *Finlay*; *Ward* v. *Robinson*, 9 Ch. D. 487). Injury to the public is not in itself sufficient to support the plaintiff's claim. It is not necessary, however, to allege or prove special damage, a bare possibility of injury being considered sufficient (*Blofield* v. *Payne*, 4 B. & Ad. 410; and see *Rodgers* v. *Nowill*, 5 C. B. 109; but where the plaintiff cannot possibly have suffered any loss, and where it is not possible that he can sustain any, as for instance in a case before the Registration Act

of 1875, where he had not carried on business at all, then he cannot recover (see *Lawson* v. *Bank of London*, 18 C. B. 84; *Batty* v. *Hill*, 1 H. & M. 264, per Willes, J).

Cases of this nature are not, so far as trade marks proper are concerned, at all likely to arise, for by the Patents, Designs, and Trade Marks Act (46 & 47 Vict. c. 57, s. 77), all marks must be registered, and by section 76 it is provided that the registration of a person as proprietor of a trade mark shall be *prima facie* evidence of his right to the exclusive use of it, and this is in itself a private right sufficient to ground a cause of action. The title of the plaintiff is therefore absolute immediately on registration, subject to the provision in the same section contained that for the first five years the *evidence* of his right shall be *prima facie* only, but that after the expiration of that time it shall be conclusive.

CHAPTER XI.

ON THE REMEDIES FOR THE INFRINGEMENT OF TRADE MARKS.

Four different remedies.

A PERSON whose trade mark has been infringed has four remedies open to him: he may proceed by action on the case at common law for deceit, in the High Court of Justice, for an injunction and an account, or damages; he may proceed criminally under the Merchandise Marks Act, 1862, or on an indictment for obtaining money under false pretences. The remedy in equity was the one usually adopted under the repealed Acts, but the writ may now be issued in any division of the High Court of Justice (46 & 47 Vict. c. 57, s. 117, see definition of "the Court"). In practice, however, the Chancery Division will doubtless retain its practically exclusive jurisdiction over trade mark cases.

Action on the case at common law.

An action at common law may be brought by the person to whom the false or fraudulent representation is made, as well as by the manufacturer whose trade mark has been imitated (see *Southern* v. *Howe*, 3 Cro. 47, and the remarks of Coltman, J., in *Rodgers* v. *Nowill*, 5 C. B. 126).

Proof of fraud on the part of the defendant is absolutely necessary in an action of this nature, that is to say, a *scienter* must be shown and not merely legal fraud (*Singleton* v. *Bolton*, 3 Doug. 293; *Crawshay* v. *Thompson*, 4 Man. & G. 377, *per* Coltman, J.; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 199, *per* Westbury, L. C.), and this *scienter* is equivalent to an intention existing in the mind

of the defendant that certain goods should pass "as and for" those of the plaintiff (*Sykes* v. *Sykes*, 3 B. & Cr. 541; *Morison* v. *Salmon*, 2 Scott. N. R. 449; see *Dixon* v. *Fawcus*, 3 Ell. & Ell. 537).

Since the Judicature Acts it is possible that a plaintiff in an action at common law would be entitled to at any rate nominal damages, on production of the same proof as would be considered necessary to support an action in the Chancery Division.

Evidence of fraud.

The mere fact that the plaintiff has informed the defendant that he is using a mark calculated to deceive, is no evidence of intentional fraud, unless it should also appear that such notice is true, and that credence was given to it by the defendant (*Rodgers* v. *Nowill*, 5 C. B. 109; and see the *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; *McAndrew* v. *Bassett*, 33 L. J. Ch. 564; 4 De G. J. & S. 380); and evidence to show that the trade mark as used by the defendant is calculated to deceive, is not in itself sufficient, but it must be further shown that the defendant used the mark with the intention of supplanting the plaintiff (*Crawshay* v. *Thompson*, 4 Man. & G. 357).

An intention to injure will be inferred in those cases where a false representation is made by a person who well knows it to be false (see *Polhill* v. *Walter*, 3 B. & Ad. 114), and in this event the motive of the defendant is beside the question (*Foster* v. *Charles*, 7 Bing. 105).

It is to be observed that no allegation of special damage is necessary (*Rodgers* v. *Nowill*, *supra*); nor need the plaintiff show that the defendant has made any misrepresentation to his immediate purchaser (*Sykes* v. *Sykes*, *supra*; *Chappell* v. *Davidson*, 2 K. & J. 123).

The question whether an action upon the case at common law is founded upon fraud on the part of the defendant, or upon a certain *jus in rem* which the

plaintiff has in the subject-matter of the action, is a point which, owing to the preponderance of judicial opinion in favour of the former view now amounting to an almost absolute settlement, is of but little practical importance. It may therefore be taken that in an action of this nature, an intention on the part of the defendant to deceive buyers, added to a probability of deception, is a sufficient ground of action (see *Crawshay* v. *Thompson*, 4 Man. & Gr. 357). The intention to deceive is a question for the jury (*ibid.*), and there is little doubt that where a trader has innocently adopted a trade mark which is calculated to deceive by its similarity to another person's trade mark, his continuing to use it after complaint has been made, is strong evidence of fraud (*Orr Ewing* v. *Johnston*, 13 Ch. D. 434).

It is evident, therefore, that in an action at common law for the infringement of a trade mark, a mere attempt to deceive is sufficient (see *Crawshay* v. *Thompson*, *supra*; *Rodgers* v. *Nowill*, 5 C. B, 109).

Injunction.

The Court can, in an action on the case, award an injunction against a defendant who has infringed a trade mark (see the Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25, sub-s. 8).

The practice of remitting matters in dispute for determination at law, was first checked by Sir John Rolt's Act (21 & 22 Vict. c. 27), and an action upon the case is now of such rare occurrence as to be practically obsolete.

Action in the Chancery Division.

Originally, the Court of Chancery interfered upon principles similar to those prevailing at law, and the jurisdiction was merely of an ancillary nature (*Motley* v. *Downman*, 3 My. & Cr. 14, *per* Lord Cottenham), and so when a case was sent to be tried at law, the action proceeded there upon ordinary common law principles. It is not, however, in the case of a trade mark proper, necessary in equity to prove fraud of any description

(*Millington* v. *Fox*, 3 My. & Cr. 338), nor that the defendant know that he was pirating such mark (*Cartier* v. *Carlile*, 31 Beav. 292; *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Burgess* v. *Hills*, 26 Beav. 244; *Harrison* v. *Taylor*, 11 Jur. (N. S.) 409), but merely that he has acted in such a way as to render it probable that deception will occur; and a similar rule would now seem to be applicable to the infringement of a trade name, even although such name be used in a manner analagous to though not as a trade mark (*Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376). In some instances it may be absolutely necessary to prove fraud, even in equity (See Chapter on Evidence, *post*).

Actions to restrain the infringement of a trade mark will probably still for the most part be brought in the Chancery Division, although the exclusive jurisdiction which such division formerly enjoyed under the Repealed Acts has not been retained by the Act of 1883. The action will be commenced in the ordinary way by writ, which should be endorsed with a claim for an injunction where the obtaining of an injunction is a substantial object of the action (*Colebourne* v. *Colebourne*, 1 Ch. D. 690), and this will be so in an action on the case at common law for deceit (Rules S. C., 1883, O. 2, r. 1. *Ibid.* Ord. 111, rr. 1, 2, 3).

Injunction.

The proprietor of a trade mark taken or imitated by the defendant is entitled to an injunction, notwithstanding defendant's promise not to repeat the illegal act (*Routh* v. *Webster*, 10 Beav. 563; *Millington* v. *Fox*, 3 M. & C. 338; *Welch* v. *Knott*, 4 K. & J. 747; *Edelsten* v. *Edelsten*, *supra*; *Geary* v. *Norton*, 1 De G. & S. 9; *Tonge* v. *Ward*, 21 L. T. (N. S.) 480); and where a person infringes a trade mark at the request of a third party, both will be restrained (*Collins Co.* v. *Reeves*, 4 Jur. (N. S.) 865; *Collins Co.* v *Walker*, 7 W. R.

222); and so also will the seller of such goods (*Coats* v. *Holbrook*, 2 Sand, 586, R. Cox, T. M. Cases, 20; *Chubb* v. *Griffiths*, 35 Beav. 127); a defence that a trade mark has been taken and placed upon defendant's goods by a servant without the knowledge of the defendant, is bad (*Tonge* v. *Ward*, 21 L. T. (N. S.). 480, and see *Twentsche* v. *Ellinger*, 26 W. R. 70).

The principles upon which interlocutory injunctions are granted, are very clearly explained in the judgment of the Court of Appeal in *Read* v. *Richardson*, 45 L. T. Rep. (N. S.) 54.

Where everything that a plaintiff can reasonably require is offered by the defendant before action, the plaintiff is entitled to an injunction and an account, but he is not entitled to costs (*Nunn* v. *D'Albuquerque*, 34 Beav. 595, and with respect to damages, see *Tonge* v. *Ward*, *supra*). The Court, however, will not take notice of any negotiations between the parties before action, unless they amount to a release or binding agreement with respect to the cause of action, or unless there is evidence of bad faith (*Edelsten* v. *Edelsten*, 1 De G. J. & S. 203, *per* Lord Westbury).

Delay in taking proceedings may disentitle the plaintiff to an interlocutory injunction, and he should also apply at an early stage of those proceedings (*Chubb* v. *Griffiths*, 35 Beav. 127), otherwise it may be refused (see *Pickford* v. *Grand Junction Ry. Co.*, 3 Railway Cas. 538; *Flavel* v. *Harrison*, 10 Hare, 467; *Isaacson* v. *Thompson*, 20 W. R. 196; *Lee* v. *Haley*, L. R. 5 Ch. 155). On an interlocutory motion for an injunction the onus of proof lies on the plaintiff, but it may under certain circumstances be thrown on the defendant (*Welch* v. *Knott*, 4 Jur. (N. S.) 330). *Onus of proof.*

An engraver who makes and prints, and is in the habit of selling imitations of the plaintiff's labels, will be re- *Injunction against an engraver.*

strained, even although he himself makes no use of them, and the only proof necessary, is the imitation, right of property in the plaintiff, and the fact that the defendant is in the habit of selling the labels to anyone who asks for them (see *Farina* v. *Silverlock*, 1 K. & J. 509; *Guinness* v. *Ulmer and Another*, 10 L. T. (O. S.) 127). The statement of claim consequently need not allege any fraudulent purpose, or that any of the labels have in fact been made use of to defraud the plaintiff (see *Delondre* v. *Shaw*, 2 Sim. 240; *Farina* v. *Silverlock*, *supra*), but the plaintiff is bound to show that the defendant threatens and intends to make an improper use of the labels (*Farina* v. *Silverlock*, *supra*; *Emperor of Austria* v. *Day*, 3 D. F. & J. 217; *Gout* v. *Aleplaglu*, 6 Beav. 69, note).

An injunction will be issued against an engraver of blocks for printing forged labels, and in fact against any person whomsoever who can be shown to be assisting in the manufacture or disposition of such forged labels (see *Guinness* v. *Ullmer*, *supra*; *Upmann* v. *Forester*, 24 Ch. D. 231).

Against a wharfinger or warehouseman.

On similar principles, where a wharfinger in possession of goods marked with a counterfeit brand, refused to deliver them up to the holder of the dock warrants after receipt of a notice that an injunction was about to be applied for, there is no doubt that he adopted a proper and legitimate course (*Hunt* v. *Maniere*, 34 Beav. 157); and in an action for damages against him for non-delivery, the wharfinger should apply to the Court in which the action is brought for a stay of proceedings with costs, under the Judicature Act, 1873, s. 24, sub-s. 5. If, however, the wharfinger, after the receipt of a communication addressed to him, does not offer to submit to the jurisdiction of the Court, either by detaining the goods or offering to erase the mark (*Upmann* v. *Elkan*, L. R. 12 Eq. 140; L. R. 7 Ch. 130, *per* Lord Hatherley), an

injunction will issue against him to restrain his parting with the goods, and he will have to pay the costs (*ibid.*). According to the decision in this same case of *Upmann* v. *Elkan*, it would appear that a person having in his hands or under his control goods bearing a forged trade mark, *in bound*, upon the fact being brought to his knowledge, at once to submit to do whatever he might be compelled to do by action, and if he fails, he will be liable for the costs, however innocently the goods may have come to him (and refer to *Ponsardin* v. *Pelo*, 33 Beav. 642).

It is, however, doubtful whether a plaintiff would have any lien for his costs on goods so warehoused by the defendant; although there is no doubt but that the wharfingers have a lien upon such goods, and that the mere fact of fraudulent labels being affixed, of which they knew nothing, will not deprive them of their right (*Mort* v. *Pickering*, 8 Ch. Div. 375).

Where a man had advanced money upon the security of dock warrants covering certain goods bearing spurious marks, and which were in the custody of a warehouseman against whom an injunction had been obtained, it was decided that the lender was entitled to have the goods delivered up to him, on the counterfeit marks being removed (*Ponsardin* v. *Pelo*, *supra*).

In a very recent case it was held that the purchaser of goods bearing a spurious trade mark, is liable to pay all the costs of an action to restrain his disposing of any of them, and this although such goods were purchased for the defendant's own private consumption, and although the defendant immediately after being served with the writ and notice of motion, had stated that he had no intention of selling the goods, and offered all the relief asked for by the writ, and afterwards at the motion agreed to an undertaking in the terms of the writ. The learned judge

based his decision upon the ground that there had been an infringement, and that the goods purchased by the defendant constituted an exceedingly large order for personal consumption, and that even if the goods were given away to friends and relatives, and not sold, there would be a large distribution, and one calculated to do the plaintiffs material injury (*Upmann* v. *Forester*, 24 Ch. D. 231).

Title of a newspaper or periodical.

There is nothing analogous to copyright in the name of a newspaper (*Bell* v. *Locke*, 8 Paige (Amer.) 75); but the proprietor has a right to restrain the adoption of the same name or any colourable imitation thereof by another person, on the principle that the right in such name is a right of property in the nature of a trade mark (*Kelly* v. *Hutton*, L. R. 3 Ch. 708; *Clement* v. *Maddick*, 1 Giff. 98). Therefore, where the plaintiffs were the publishers of "Hemy's Royal Modern Tutor for the Pianoforte," which they had neglected to register under the Copyright Acts, they were held entitled to an injunction to restrain the defendant from offering a work for sale, entitled "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor," and this, although Hemy had actually revised the work referred to (*Metzler* v. *Wood*, 8 Ch. D. 606).

The absence of a fraudulent intention is no defence against an application to the Court for an injunction by the person whose property has been injured (*Clement* v. *Maddick*, *supra*, *per* Stuart, V.-C.) The ground upon which an injunction is applied for is usually substantial similarity, and an intent to continue the manufacture or conduct complained of (*Bradley* v. *Norton*, 33 Conn. 157 (Amer.)).

Injunction under the Judicature Act, 1873.

It was at one time thought that the Court might grant an injunction under the extended words made use of in sub-s. 8 of s. 25, Judicature Act, 1873, so as to cover those classes of cases where equity would not seem to supply any

adequate remedy, but in *Day* v. *Brownrigg*, 10 Ch. D. 807, Lord Justice Turner laid it down that the power given to the Court by this sub-section, to grant an injunction in all cases in which it shall appear to the Court to be "just or convenient," does not in the least alter the principles on which the Court should act (refer also to *Beddow* v. *Beddow*, 9 Ch. D. 93; *Gaskin* v. *Balls*, 13 Ch. D. 324; *Thorley's Cattle Food Co.* v. *Massam*, 14 Ch. D. 763; *Quartz Hill Mining Co.* v. *Beall*, 20 Ch. D. 507.

Delivery up and destruction of counterfeit labels.

Independently of the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88, ss. 2, 3, 21), Courts of Equity have long exercised jurisdiction to order the delivery up and destruction of counterfeit labels (*Edelsten* v. *Vick*, 11 Ha. 86; *Farina* v. *Silverlock*, 4 K. & J. 650; *Dent* v. *Turpin*, 2 J. & H. 139; *Upmann* v. *Elkan*, L. R. 12 Eq. 140; L. R. 7 Ch. 130).

Right of action by innocent employee

Where a person is employed to make certain articles and to affix thereto the trade mark of another person, he has (if he acted in ignorance) a right of action against his employer to recover such damages and costs as he may have sustained in an action brought against him by such other person (*Dixon* v. *Fawcus*, 9 W. R. 415; and see *Spedding* v. *Nevell*, L. R. 4 C. P. 212; *Godwin* v. *Francis*, L. R. 5. C. P. 295); even although he compromised the original action (*ibid.*).

By vendee.

And so also the vendee of goods, who has been restrained by injunction from parting with them, is doubtless entitled to recover from the vendor all the expense he may have been put to in defending himself (*Dixon* v. *Fawcus*, *supra*; *Collen* v. *Wright*, 7 E. & B. 301; 26 L. J. Q. B. 147: In Error, 8 E. & B. 647; 27 L. J. Q. B. 215); and he may also recover the price of the goods in an action for money had and received (*Clarke* v. *Dickson*, 1 E. B. & E. 148).

Restraint of misrepresentation.

The Court has authority to restrain a representation that articles not the production of a certain per-

son, are in fact the production of such person (*Lord Byron* v. *Johnston*, 2 Mer. 29), but the remedy of an author against the publisher of an inaccurate edition of his works falsely purporting to be executed by him, is by action on the case at law for injury to his reputation, and the fact of the publisher being the owner of the copyright makes no difference (*Archbold* v. *Sweet*, 1 Moo. & R. 162). This example bears a very close resemblance to those in which a person having a reputation for the manufacture of a particular commodity, not protected by a patent, brings an action against another for selling an inferior article in his name (*ibid.*, *per* Lord Tenterden). Where, however, a person reproduces the production of another in an entirely different form, as in the case of a diorama purporting to be a copy of a picture, there the plaintiff has no remedy by way of injunction, for at the most the misrepresentation is only a sort of libel (*Martin* v. *Wright*, 6 Sim. 297).

Trade mark becoming publici juris. By reason of laches.

It is essential that the owner of a trade mark should use due diligence in protecting it, otherwise it will become *publici juris*. (See *Brown* v. *Freeman*, 12 W. R. 305; *Beard* v. *Turner*, 13 L. T. (N. S.) 746; *Isaacson* v. *Thompson*, 41 L. J. Ch. 101), or he may forfeit his right to damages or an account (*Cartier* v. *Carlile*, 31 Beav. 292; *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Harrison* v. *Taylor*, 11 Jur. (N. S.) 408). The mere assertion of a claim by the plaintiff without any attempt to enforce it will not, however, absolve him from *laches* (*Clegg* v. *Edmondson*, 8 De G. M. & G. 810; *Lehmann* v. *McArthur*, 37 L. J. Ch. 625; but see *Attorney-General* v. *Sheffield Gas Co.*, 3 De G. M. & G. 327; *Kinahan* v. *Bolton*, *supra*). Delay is, however, no bar to an injunction in aid of a legal right, unless the legal remedy is barred by lapse of time (*Fullwood* v. *Fullwood*, 47 L. J. Ch. 459).

By reason

A trade mark may also become *publici juris* by reason of

some intrinsic defect, and as any defect of this nature may be pleaded in bar, notwithstanding registration, it obviously becomes necessary to inquire what is sufficient to invalidate the plaintiff's title to relief in this respect. It may be pointed out that by 46 & 47 Vict. c. 57, it is not lawful to register as part of, or in combination with a trade mark, any words the exclusive use of which would by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a Court of Justice, or any scandalous design (s. 73). No proceedings can be successfully conducted on account of a trade mark of such universal use that nobody could be induced from the use of it to believe that he is buying the goods of the original manufacturer (*Ford* v. *Foster*, 41 L. J. Ch. 689; *Wheeler & Wilson Manufacturing Co.* v. *Shakespear*, 39 L. J. Ch. 40; *Liebig's Meat Co.* v. *Hanbury*, 17 L. T. (N. S.) 298), for the name then becomes a mere brand of quality, or a denomination of the commodity itself (*Hall* v. *Barrows*, 33 L. J. Ch. 204; see *ante*, p. 276). *of inherent defect.*

The test of a trade mark having become *publici juris* is whether the use of it has or has not ceased to deceive the public (*Ford* v. *Foster*, L. R. 7 Ch. 611; 41 L. J. Ch. 682); and a trade mark may become *publici juris* as between the wholesale dealer and the retail dealer, while at the same time it may not be so as between the retail dealer and the public (*ibid.*). *Test.*

"Any device, mark, brand, heading, label, ticket, letter, word, figure, or combination of letters, words, or figures, which was or were before the 13th day of August, 1875, publicly used by more than three persons on the same or a similar description of goods, shall for the purposes of the section be deemed common to the trade in such goods" (46 & 47 Vict. c. 57, s. 74 sub-s. 3); but it is by the same section provided that nothing in the Act shall be construed to prevent the comptroller entering on

the register, in the prescribed manner, and subject to the prescribed conditions, as an *addition* to any trade mark :—

(*a.*) In the case of an application for registration of a trade mark used before the 13th August, 1875 :

Any distinctive device, mark, brand, heading, label, ticket, letter, word, or figure, or combination of letters, words, or figures, though the same is common to the trade in the goods with respect to which the application is made.

(*b.*) In the case of an application for registration of a trade mark not used before the 13th August, 1875 :

Any distinctive word or combination of words, though the same is common to the trade in the goods with respect to which the application is made.

Further the applicant for entry of any such common particular or particulars must disclaim in his application any right to the exclusive use of the same (sub-s. 2).

Where a term has become known and been used as a term of art to designate a process, the exclusive right to use it as a trade mark is gone (*Liebig's Extract Co.* v. *Hanbury*, 17 L. T. (N. S.) 298; *Mitchell* v. *Condy*, 37 L. T (N. S.) 268).

Alien plaintiff.

An alien may register a trade mark, and may also take proceedings in respect thereof, though resident abroad, and although he does not carry on business in this country and his goods are not usually sold here (*Re Riviere*, W. N. 1884, p. 27 ; *Collins Co.* v. *Brown*, 3 K. & J. 425 ; *Same* v. *Cowen*, *ibid.* 428 ; *Same* v. *Reeves*, 28 L. J. Ch. 56 ; *Howe* v. *McKernan*, 30 Beav. 547). The right of property in a trade mark is therefore a *jus in personam* as well as a *jus in rem*, and is not limited by territorial bounds (*Derringer* v. *Plate*, R. Cox, T. M. Cases, 324 (Amer.) ; *Taylor* v. *Carpenter*, *ibid.*, 14 ; *Coats* v. *Holbrook*, *ibid.*, 20 ; but the remedy is as complete as in the case of an action for libel

(*Collins Co.* v. *Cowen*, 3 K. & J. 428). In the construction of the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88), the word "person" includes any person, whether a subject of Her Majesty or not (s. 1).

Prosecution under the Merchandise Marks Act.

The forgery or imitation of a trade mark is a criminal offence under the Merchandise Marks Act, and by sect. 11 it is provided that any proceeding, judgment, or conviction under the Act, shall not take away or diminish, or prejudicially affect, any civil remedy to which the person aggrieved may be entitled. The proprietor of a trade mark may therefore proceed concurrently in the civil and criminal courts. An alien may take proceedings under the Act, so may a body corporate or body of the like nature, whether constituted according to the law of this country or otherwise (s. 1).

Allegations in indictment.

In every indictment, information, pleading, or other proceeding under the Act, it is necessary to allege an attempt to defraud or to enable another to defraud, but it is not necessary to allege any attempt to defraud a particular person, and on the hearing it is only necessary to prove that the person accused did the act charged, with intent to defraud, or with intent to enable some other person to defraud, or with the intent that any other person might be enabled to defraud (s. 12).

Forging or applying forged trade marks.

The Act makes it a misdemeanor to forge or counterfeit any trade mark, or to apply any forged or counterfeited trade mark to any article not being the production of the person denoted by the mark, and in addition to criminal proceedings the person offending forfeits the articles to the Crown, and the Court may order them to be destroyed (s. 2). A "false, forged, and counterfeited" trade mark may consist in an addition to, or alteration or imitation of, any trade mark with intent to defraud, and every act of making, applying, or otherwise using any such addition to or alteration or

imitation of a trade mark is a "forging and counterfeiting" (s. 5). It is also a misdemeanor to apply any trade mark, whether genuine or not, and with intent to defraud, to any vessel containing any article intended to be sold or exposed for sale, or to place any article in any vessel to which a trade mark shall have been falsely applied, or to which any forged or counterfeit trade mark shall have been applied, and in addition to other proceedings the person offending forfeits the article or vessel, as the case may be, to the Crown, and the Court may order such forfeited articles to be destroyed (s. 3). Any person who knowingly sells, utters, or exposes for sale, any chattel or article bearing a forged or counterfeited trade mark, or a genuine mark wrongly applied, forfeits to the Crown a sum equal to the value of the article, and a further sum not exceeding £5 and not less than 10s. (s. 4), and can, at the instance of the party aggrieved, be compelled to give full information in writing of the name and address of the person from whom he obtained the chattel or article (s. 6). The provisions of the Act do not, however, apply to cases where the person charged has applied as a trade mark a name, word, or expression generally used for indicating that any chattel or article is of some particular class or description of manufacture only, nor is it any offence to sell, or expose for sale, any article to which any such generally-used name, word, or expression, shall have been applied (s. 9). The expression trade mark, made use of in the Act, applies only to names, signatures, words, &c., *lawfully* used, &c. (s. 1), and therefore a prosecutor who himself wrongfully uses the word "patent" as part of his trade mark, cannot avail himself of the benefit of the Act any more than he could hope to succeed in the civil courts (*Morgan* v. *McAdam*, 36 L. J. Ch. 228).

Selling or exposing articles bearing forged trade marks.

Although a court of Equity may not interfere in certain cases, it does not therefore follow that the trade mark is

not lawfully used, but only that the plaintiff, in consequence of misconduct, is not entitled to the protection of an injunction (Poland, Merchandise Marks Act, 21).

Allegations in indictment.

In every indictment, pleading, proceeding, and document, it is sufficient to mention that the trade mark is in point of fact a trade mark, without further describing it or setting forth any copy thereof (s. 10).

Aiding and abetting.

Any person who aids, abets, counsels, or procures the commission of any offence made a misdemeanor under the Act, is himself guilty of a misdemeanor (s. 13), and in connection with this provision it is necessary to observe that abettors of offences punishable on summary conviction can be dealt with under 11 & 12 Vict. c. 43, s. 5. Where, however, a master intends a servant to commit an offence punishable summarily under the Act, he should be summoned as principal and the servant as aiding and abetting (*Wilson* v. *Stewart*, 3 B. & S. 913); on the other hand, the master may sometimes be charged with aiding the servant (*Howells* v. *Wynne*, 32 L. J. C. P. 281).

Punishment on conviction.

A person convicted of a misdemeanor under the Act, is liable to two years' imprisonment, or less, with or without hard labour, and he is also liable to a fine, either in addition to or in substitution for imprisonment (s. 14).

Recovery of penalties.

In cases in which any person shall have committed an offence under the Act for which he is liable to a penalty, such penalties may be recovered in England, Wales, or Ireland in a *Qui Tam* action brought in any Court of Record, or in England and Wales by a summary proceeding before two justices of the peace (s. 15). All cases by way of summary proceeding are within 11 & 12 Vict. c. 43, one of Jervis's Acts (s. 16), except in so far as the limitation as to commencing proceedings is concerned, for by s. 18 of the Merchandise Marks Act, it is provided that no person shall commence any action or proceeding for the recovery of any penalty, after the

expiration of three years next after the committing of the offence, or one year next after the first discovery thereof by the person proceeding. In any action, whether at common law or otherwise, the Court has power to award an injunction (s. 21), and the plaintiff may recover damages (s. 22). A definition of what constitutes a "mark," and what a "trade mark," is laboriously set out in the first section of the Act.

Jurisdiction of Quarter Sessions.

It would appear to be questionable whether the Courts of Quarter Sessions have jurisdiction to try any person charged with a misdemeanor under the Act (see Poland, Merchandise Marks Act, p. 26).

Indictment for forgery.

It is evident that an indictment for the forgery of a trade mark may be preferred under the Merchandise Marks Act, but at common law there is no forgery; there is no fraudulent making or alteration of a writing to the prejudice of another man's right; no forging of a false document to represent a genuine one (*Reg.* v. *Smith*, 8 Cox, 32), and even where a trade mark consists of a signature, the imitation of it does not at common law amount to forgery (*Reg.* v. *Closs*, 7 Cox, 494). It appears to be certain, therefore, that if a prosecutor wishes to succeed on a charge of this nature he must lay his information under the Merchandise Marks Act, and not at common law.

Indictment for false pretence.

An indictment will also lie at the instance of the party who has been induced to part with any chattel, money, or valuable security in exchange for an article bearing a fraudulent imitation of a trade mark, against the person who fraudulently represented the article to be of a kind different to what it really was (*Reg.* v. *Dundas*, 6 Cox, 380; *Reg.* v. *Suter*, 10 Cox, 577); it is not necessary that the misrepresentation should be made in actual words, and all persons who have concurred and assisted in the fraud may be indicted and convicted as principals, though

not present at the time of making the pretence and obtaining the money or goods (*R.* v. *Moland*, 2 Mood. C. C. 276).

An indictment for obtaining money, &c., under false pretences cannot be presented to a grand jury without a previous investigation before a magistrate, or unless the *fiat* of the Attorney or Solicitor-General or one of the judges of the Supreme Court be first obtained (22 & 23 Vict. c. 17), but an indictment for *attempting* to obtain, &c., may be preferred without taking any of these steps (*R.* v. *Burton*, 13 Cox, 71).

Indictment for a cheat at common law.

In some cases the prisoner may be indicted for a cheat at common law (see *R.* v. *Closs*, 7 Cox, 494).

In an indictment for false pretences, it is not necessary to allege any attempt to defraud a particular person, or any ownership of the chattel, money, or valuable security (24 & 25 Vict. c. 96, s. 88), but it is necessary to show on the face of such indictment that the defendant did the act charged with intent to defraud (see *Reg.* v. *Henderson*, 2 Moo. C. C. 192).

Indictments, whether preferred under the Act or at Common Law, are very unusual, the remedy almost exclusively sought being in the Chancery Division of the High Court of Justice.

Penalty on falsely representing articles to be registered.

It is provided by the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), that any person who, *inter alia*, describes any trade mark applied to any article sold by him as registered, which is not so, shall be liable for every offence, on summary conviction, to a fine not exceeding £5, and a person is deemed to represent that a trade mark is registered, if he sells the article with the word "registered," or any word or words expressing or implying that registration has been ob'ained for the article (*sic*) stamped, engraved, or impressed on, or otherwise applied to the article (s. 105). This section, as drawn, limits the

offence to the actual selling of an article with the false representation affixed, the mere exposure for purposes of sale would not therefore be sufficient to convict a defendant. If any person makes or causes to be made a false entry in any register kept under the Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces or tenders, or causes to be produced or tendered in evidence, any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanor (*ibid.* s. 93).

CHAPTER XII.

ON EVIDENCE AND PLEADING AND HEREIN OF INSPECTION AND DISCOVERY, JOINDER, ACCOUNT, DAMAGES, AND COSTS.

Defence that trade mark although registered is intrinsically bad.

A DEFENCE that a registered trade mark is intrinsically bad by reason *inter alia* of false representation or fraud on the part of the plaintiff is a good defence, and so is a defence that such trade mark, although registered, possesses none of the features insisted on by the 64th section of the Act of 1883 (46 & 47 Vict. c. 57). (See *Re Palmer's Application*, 21 Ch. D. 47); the books of the Comptroller which show marks the registration of which has been refused, would not seem to be evidence that these marks are *publici juris* (see *Orr Ewing* v. *Johnston*, 13 Ch. D. 434.)

The 72nd section of the same Act provides that except where the Court has decided that two or more persons are entitled to be registered as proprietors of the same trade mark, the Comptroller shall not register in respect of the same goods, or description of goods, a trade mark identical with one already on the register with respect to such goods or description of goods; furthermore, the Comptroller shall not register with respect to the same goods, or description of goods, a trade mark so nearly resembling a trade mark already on the register with respect to such goods, or description of goods, as to be calculated to deceive.

Evidence of misrepresentation

Independently of the Act, however, it would seem to be settled that any misrepresentation on the part of the

tion on part of plaintiff.

plaintiff calculated to deceive the public, will destroy the plaintiff's title to relief (*Pilding* v. *How*, 8 Sim. 477; 6 L. J. Ch. (N. S.) 345; *Perry* v. *Truefit*, 6 Beav. 66; *Flavel* v. *Harrison*, 10 Hare, 467; 22 L. J. Ch. 866; *The Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. Cas. 523; 35 L. J. Ch. 53; *Morgan* v. *Meadam*, 36 L. J. Ch. 228; 15 L. T. (N. S.) 348), but where the misrepresentation is conclusively proved, it will not affect the plaintiff's title to relief unless it took place before the commencement of the action (*Siegert* v. *Findlater*, 7 Ch. D. 801; *Eckroyd* v. *Eckroyd Hop Essence Co.*, L. R. 10 Ch. 276).

The false representation must appear on the face of the trade mark and not merely collaterally (*Ford* v. *Foster*, L. R. 7 Ch. 611; but see the remarks of Lord Blackburn in *Singer Manufacturing Co.* v. *Wilson*, 47 L. J. Ch. 493); but in America, this rule would appear to be the reverse, for where a person who claimed property in a trade mark, had acquired it, if at all, by the use, in circulars, of fraudulent and deceptive and untrue language as to the origin and qualities of the article in respect of which the trade mark was claimed, it was held that he had lost his right to claim the assistance of a Court of Equity to protect his trade mark (*Seabury* v. *Grosvenor*, 14 Blatchf. 262). Where the matter complained of refers in an extravagant manner to the value and effect of the goods, amounting to mere puffing, the plaintiff's rights will not be affected (*Holloway* v. *Holloway*, 13 Beav. 211).

Evidence tending to show that the misstatement is so gross that no one could possibly be deceived by it, will not be accepted (*Leather Cloth Co.* v. *American Leather Cloth Co.*, 33 L. J. Ch. 199), but the rule is occasionally otherwise where the false statement refers to, or consists in, the use of a fictitious name (*Hogg* v. *Kirby*, 8 Ves.

213). The Court will not protect a person who is carrying on an immoral or deceitful trade (*Lee* v. *Haley*, L. R. 5 Ch. 158, *per* Giffard, L.J.).

Before the Registration Act, 1875, a very common method of deception consisted in the use of the word "patent;" there being in point of fact no patent taken out, and now by 46 & 47 Vict. c. 57, s. 105, it is provided that any person who represents that any article sold by him is a patented article, when no patent has been granted for the same, or describes any design or trade mark applied to any article sold by him as registered, which is not so, shall be liable for every offence, on summary conviction, to a fine not exceeding £5. A person shall be deemed for the purposes of this enactment, to represent that an article is patented or a design or a trade mark is registered if he sells the article with the word "patent," "patented," "registered," or any word or words expressing or implying that a patent or registration has been obtained for the article stamped, engraved, or impressed on, or otherwise applied to the article. If, moreover, a person should endeavour to use his right in a trade mark as if he had a monopoly by patent for the manufactured goods, such trade mark will not be protected *Singer Manufacturing Co.* v. *Wilson*, 11 H. L. Cas. 543, *per* Lord Kingsdown; *Morgan* v. *Mcaldan*, 36 L. J. Ch. 228, *per* Wood, V.-C.; *Flavel* v. *Harrison*, 10 Hare, 467); but any action he may bring in respect thereof will be dismissed with or without costs (*Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 352), and if words are first inserted in a trade mark after the expiration of a patent, the rule is the same (*Edelsten* v. *Vick*, 11 Hare, 78), and, after some difference of opinion, it is now settled that a similar rule prevails where the word has been retained after the patent has run out (*Edelsten* v. *Vick*, 11 Hare, 78; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C., 523; *Morgan*

v. *McAdam, supra*; *Chemin* v. *Walker*, 5 Ch. D. 850).

The evidence in this class of case is, however, entirely one of probability of deception, and therefore where the word "patent" is used only as part of the designation of an article (*Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. Cas. 541, *per* Lord Kingsdown), or to indicate some particular class or description of manufacture, the trade mark will not be vitiated (*Morgan* v. *McAdam*, 36 L. J. Ch. 229, *per* Wood, V.-C.; *Marshall* v. *Ross*, L. R. 8 Eq. 651).

Collateral misrepresentation.

A collateral misrepresentation by the owner of the trade mark will not disentitle him to relief, and therefore when the plaintiff had falsely represented in his invoices, and in a few advertisements, that he was a "patentee" of a particular article, it was held that such false representation was not sufficient to prevent him from sustaining an action (*Ford* v. *Foster*, L. R. 7 Ch. 611). The word "patentee" is equivalent to "patent" (*Nicoy* v. *Roffey*, W. N. 1870, p. 227, and see *Lamplough* v. *Balmer*, W. N. 1867, p. 293). In a very recent Scotch case it was considered that where the proprietor of a trade mark wrongfully uses the word "patent," or any variation of such word, either in an advertisement or in any other collateral manner, it is doubtful whether the trade mark ought to be protected (see *Macfarlane* v. *Oak Foundry Co.*, 10 Ct. of Sess. Cas. 801).

Penalty under the Merchandise Marks Act.

Under the Merchandise Marks Act, 1862, s. 7, the employment of any mark for the purpose of falsely indicating any chattel or article, or the mode of manufacturing or producing the same, or the ornamentation, shape, or configuration thereof, to be the subject of any existing patent, privilege, or copyright, is punishable by a penalty of £5 or less, and a sum of money equal to the value of the chattel or article sold or exposed for sale.

The employment of any name, word, or expression generally used for indicating a chattel or article to be of some particular class or description of manufacture only, is not to be construed as an offence under the Act (s. 9).

As the cases on the subject of a false representation on the part of the plaintiff are tolerably clear, so also are those which define the responsibility of the defendant and point out the allegations necessary to be proved against him. In an action for an injunction it is no longer necessary to prove any fraudulent intent on the part of the defendant (*Millington* v. *Fox*, 3 My. & Cr. 338; *Hall* v. *Barrows*, 33 L. J. Ch. 204; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 33 L. J. Ch. 199; *McAndrew* v. *Bassett*, 33 L. J. Ch. 561); but where it is clearly shown that there is no intention to deceive, or probability of deception whether intentional or otherwise, there the Court will not interfere (*Welch* v. *Knott*, 4 K. & J. 747; 4 Jur. (N. S.) 330; and see *Woollam* v. *Ratcliff*, 1 Hem. & Mill, 259); nor will it where the defendant has an abstract right to do what he has done, although his procedure may militate against the moral law (*Batty* v. *Hill*, 1 H. & M. 264; 8 L. T. (N. S.) 791; see *Braham* v. *Bustard*, 1 H. & M. 447; 11 W. R. 1061). It is, however, certain that much less proof of the plaintiff's title is required where there is reason to doubt the defendants' good faith, and when the defendants swear to that good faith in so many words, but give the Court no reason whatever to believe in it, and certainly considerable reason for doubting it, the rule is the same (*Rudde* v. *Norman*, L. R. 14 Eq. 356).

Evidence of fraud on the part of the defendant.

Where an imitation is such as to satisfy the Court of a probability of deception, the *onus* of proving the contrary is immediately thrown on the defendant: in any other event the probability of deception must be shown by the

plaintiff, or his action will fail (*Cope* v. *Evans*, L. R. 18 Eq. 138).

In all cases of false representation not amounting to the infringement of a trade mark strictly so called, it was at one time considered that fraud must be proved even in Equity (*Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434), as, for instance, in those cases where the defendant, without putting any trade mark at all on his goods, or putting a trade mark which was admittedly different in substance from the trade mark of the plaintiff, had represented the goods as being manufactured by the plaintiff (*ibid.* 443, *per* Jessel, M. R.; and see *Wheeler & Wilson* v. *Shakespear*, 39 L. J. Ch. 36). It would seem that in the case of a trade name it is not now necessary to prove any intent to defraud (*Singer Manufacturing Co.* v. *Wilson*, on appeal, 3 App. Cas. 376), and it is thought that a similar principle would probably be extended in practice to other cases analogous to trade marks properly so called (see *Singer Manufacturing Co.* v. *Loog*, 8 App. Cas. 15). It is always advisable, if possible, to prove a fraudulent intent, for an account will not be directed to be taken during such time as the defendant was in ignorance that he was infringing the plaintiff's rights (*Edelsten* v. *Edelsten*, 1 De G. J. & S. 185), and so where the plaintiff has been guilty of *laches*, so as to preclude himself from recovering judgment, he may, nevertheless, escape the effects of his neglect by clearly proving intentional fraud on the part of the defendant (*Rodgers* v. *Rodgers*, 31 L. T. (N. S.) 285), and it is also quite obvious that much less absolute proof of the plaintiff's title is required where there is reason to doubt the defendant's good faith (*Rudde* v. *Norman*, L. R. 14 Eq. 356).

Advantages of proving fraud if possible.

It is certainly advisable, therefore, to prove, if possible, a fraudulent intent on the part of the defendant, for in addition to other advantages, the plaintiff will be able to

prevent the defendant from ever employing the same description of trade mark again; this he cannot do where the defendant is able to establish his *bonâ fides* in the matter, for here the Court will be satisfied with the least alteration consistent with the plaintiff's interest (*Burn* v. *Dowber*, 19 L. T. (N. S.) 626, *per* Lord Romilly).

Proof of fraudulent intent.

A fraudulent intention may arise and be proved by reference to surrounding facts and circumstances—*noscitur a sociis*—by what precedes and follows. Thus, where the defendant uses a name which is not his own, the Court will presume that he must have done so with an intent of some kind, and this intent frequently grows more and more fraudulent as the defendant's motives and objects come to light, as, for instance, where he adopts the plaintiff's name, and when complaint is made, tenders as an excuse that he was authorised so to do by some person bearing the same name as the plaintiff (*Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518, and see also the American case, *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450); or that he has taken such a person into partnership (*Croft* v. *Day*, 7 Beav. 84; *Southorn* v. *Reynolds*, 12 L. T. (N. S.), 75; *Schweitzer* v. *Atkins*, 37 L. J. Ch. 847).

So, on the other hand, there may be circumstances pointing to the absence of fraud on the part of the defendant (*Cheavin* v. *Walker*, 5 Ch. D. 850).

Of the absence of fraud.

A reasonable length of time is allowed to the plaintiff to enable him to procure proof of actual deception, and if this time is not exceeded, the defendant cannot impute *laches* (*Lee* v. *Haley*, 21 L. T. (N. S.) 546; 39 L. J. Ch. 284 (App.); *Isaacson* v. *Thompson*, 41 L. J. Ch. 101).

Evidence of deception of particular person, or of loss, not necessary.

Evidence need not be produced to show that any particular person has been deceived, or that the plaintiffs have actually suffered any loss (*Lee* v. *Haley*, 21 L. T. (N. S.) 546; *Rodgers* v. *Rodgers*, 31 L. T. (N. S.) 285; *Hookham*

v. *Pottage*, 20 L. T. (N. S.) 755; and see *Sykes* v. *Sykes*, 3 B. & Crom. 541; 5 Dowl. & Ry. 292; *Blofeld* v. *Payne*, 4 B. & Ad. 410). Under no circumstances, however, is the fact that one person has been deceived, conclusive evidence as to misrepresentation (*Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512; and see *Braham* v. *Beachim*, 7 Ch. D. 848).

Misrepresentation.

A person is not at liberty to represent that the manufactures of another are spurious (*James* v. *James*, L. R. 13 Eq. 421; *Thorley's Cattle Food* v. *Massam*, 6 Ch. D. 582), or to falsely assert that his own article is the "genuine" (*ibid.*), or the "original" one (*Clark* v. *Chandler*, L. R. 11 Eq. 446); but rebutting evidence may be brought forward by a person who is alleged wrongfully to have employed the word "original" (*Browne* v. *Freeman*, 12 W. R. 305).

Where proof of actual deception wanting.

Where proof of actual deception is for any reason unable to be obtained, the plaintiff must show that the defendant has by his conduct raised a reasonable probability of deception; and the mere fact of the defendant's trade mark being somewhat similar to that of the plaintiff, is not a material factor in the case if such mark is different in the points to which a customer would look, in order to see whose manufacture he was purchasing (*Blackwell* v. *Crabb*, 36 L. J. (N. S.) Ch. 504; *Bass* v. *Dunbar*, 19 L. T. (N. S.) 626; *Cope* v. *Evans*, L. R. 18 Eq. 138; 30 L. T. (N. S.) 292; *Mitchell* v. *Condy*, 37 L. T. (N. S.) 268; *Condy* v. *Mitchell*, *ibid.* 766). It is never necessary to show that a purchaser or other person has actually been misled (*Johnston* v. *Orr Ewing*, L. R. 7 App. Cas. 219).

Opinion of witnesses.

The mere opinion of witnesses who have not themselves been deceived is of no value unless connected with other evidence (*Cope* v. *Evans*, L. R. 18 Eq. 146); and where the Court is, upon inspection alone, not satisfied of the

identity of the two trade marks, or of such a similarity as will suffice to ground an opinion that the one must be deemed a colourable imitation of the other, it will not grant an injunction upon such opinion (*ibid.*).

Evidence in action against aiders and abettors.

In the case of an action against aiders and abettors, as against a printer, it is submitted that evidence must be adduced to show that some of the spurious goods have actually been sold (see *Farina* v. *Silverlock*, 6 De G. M. & G. 214; *Delondre* v. *Shaw*, 2 Sim. 237), and the statement of claim should contain an averment to that effect (*Farina* v. *Silverlock*, *supra*). But under the Merchandise Marks Act (25 & 26 Vict. c. 88), this is not necessary, and aiders and abettors are guilty of a misdemeanor (s. 13).

In support of motion for injunction.

If the plaintiff can show that he has an exclusive right of property in the trade mark, and that the defendant imitated it without leave or licence, to the probable deception of the public, and the consequent injury of the plaintiff, the Court will restrain on that evidence alone (see *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 33 L. J. Ch. 199; *Cope* v. *Evans*, L. R. 18 Eq. 138), and so it will where it is shown that the defendant's object is to pass off his goods as those of the plaintiff, and that there is a probability of deception (*Cope* v. *Evans*, *supra*, and see *Wadham* v. *Ratcliff*, 1 H. & M. 259). Where the defendant has imitated the plaintiff's mark, the latter should proceed for an injunction, giving in evidence the imitation of the mark, even though it be unregistered and therefore invalid, for if evidence of wilful and intentional fraud can be procured, it is submitted that there is nothing in the Trade Marks Act of 1883 to prevent proof of the imitation of such mark being given as corroborative evidence of the fraud (see Sebastian on T. M., 122).

Evidence

It is not necessary to show that the defendant's goods

Of quality of defendant's goods.

are of an inferior quality, or that the plaintiff has sustained any specific damage (*Blofield* v. *Payne*, 4 B. & Ad. 410, and see the remarks of Taunton, J., in *Marzetti* v. *Williams*, 1 B. & Ad. 425). It will under no circumstances be assumed that the plaintiff would have sold the goods that the defendant has sold, but for the latter's wrongful user of the trade mark (*Leather Cloth Co.* v. *Hirschfield*, 1 Eq. 299).

Injunction to restrain the opening of letters evidence.

Where an action is brought to restrain a person from opening letters addressed to or forming part of the property of the plaintiff, a mere isolated case of opening is not sufficient (*Edgington* v. *Edgington*, 11 L. T. (N. S.) 299).

Evidence of resemblance question for jury.

Where the statement of claim charges the defendant with stamping or marking his goods in imitation of those of the plaintiff, the question whether there is such a close resemblance in the mark as to be calculated to impose on the unwary and injure the plaintiff's sale, should be left to the jury (*Croucher* v. *Thompson*, 4 Man. & G. 384; see the remarks of Cresswell, J.). Evidence that the plaintiff has not registered the mark for the infringement of which he sues, or has not obtained a certificate of refusal, is in either case sufficient, and so is evidence tending to prove that the plaintiff has no right or title in the trade mark in question, as where goods of a particular kind have been habitually manufactured at certain works, in which case the tenants have not such an interest in the trade mark as to be able to sell it with the goodwill of the business (*Motley* v. *Downman*, 3 My. & Cr. 1; and see *Harper* v. *Pearson*, 3 L. T. (N. S.) 547).

Of non-registration.

Want of title in the plaintiff.

In actions relating to trade marks, properly so called, such points as the above cannot after the lapse of a certain time arise, for by 46 & 47 Vict. c. 57, s. 76, the registration of a person as proprietor of a trade mark, is, after the expiration of five years from the date of the registration, to be

conclusive evidence of his right to the exclusive use of the trade-mark.

Extracts certified by comptroller to be evidence.

Printed or written copies or extracts, purporting to be certified by the comptroller, and sealed with the seal of the Patent Office, of or from all documents in the office, and of or from all registers and other books kept there, are to be admitted in evidence in all Courts in Her Majesty's dominions, and in all proceedings, without further proof, or production of the originals (46 & 47 Vict. c. 57, s. 89, and see r. 50 as to dispensing with evidence).

Evidence under Merchandise Marks Act.

By the 11th section of the Merchandise Marks Act, it is provided that no evidence, statement, or discovery, which any person shall be compelled to give or make in any suit or other civil proceeding, shall be admissible in evidence against such person in support of any indictment for a misdemeanour at common law, or otherwise, or of any proceeding under the provisions of the Act, and in connection with this provision it is to be observed that there may be nothing to prevent *other evidence* being adduced against the defendant (refer to *Reg.* v. *Sheen and Another*, 8 Cox, Crim. Cas. 143).

Evidence on summons under the Patents, Designs, and Trade Marks Act.

Where a summons is directed by the comptroller under sect. 69 of the Act of 1883, and rule 29 made in pursuance thereof, the better plan will be for the applicant to file his own affidavit in support, stating the facts of the case, and exhibiting the notice of opposition, counter statement, and other material documents (see *Ex parte Stephens*, 24 W. R. 819; *In re Meikle*, 24 W. R. 1067; *In re Burrows*, 5 Ch. D. 353).

Statement of claim. Allegations.

In an action for the infringement of a trade mark the statement of claim should allege all the material facts upon which the plaintiff relies in support of his claim, *e.g.*, his title; that he, or his predecessors in the particular trade or business had used the trade mark; that such mark was duly registered (giving the date when), or that a certi-

ficate of refusal has been obtained (Patents, Designs, and Trade Marks Act, 1883, s. 77); that the goods of the plaintiff, or his business, are designated and called in the market after the trade mark; that the defendant has used or threatened to use such trade mark, or a mark only differing therefrom to a colourable extent, to the probable deception of the public and injury to the plaintiff: in other words, the statement of claim must allege with sufficient clearness a false representation of some kind on the part of the defendant (*Morison* v. *Salmon*, 2 Scott, N. R. 449); it should also allege that the defendant has pirated the plaintiff's mark in connection with goods of the same class, and that the plaintiff used a similar mark in a similar manner (*Lawson* v. *Bank of London*, 25 L. J. (N. S.) C. P. 188). It is, however, a serious, and in most cases probably a fatal error, to allege in an action for the improper use of a trade mark, that such trade mark is "similar" when it is in fact identical or *vice versâ* (*Welch* v. *Knoll*, 4 Jur. (N. S.) 330).

Of fraudulent intent.

As we have already seen it is unnecessary, either to allege or prove any fraudulent intent on the part of the defendant, but if such an allegation can be sustained by evidence, it ought to be alleged. So also, although it is not necessary to show that any particular person or persons has or have actually been deceived, yet, where the fact can be proved it should be alleged.

In action against engraver.

In an action against an engraver to restrain him from printing and selling spurious labels, the statement of claim should allege that there have been sales of goods with the labels attached, but it need not allege that the defendant sold the labels with the intention of their being fraudulently applied (*Delondre* v. *Shaw*, 2 Sim. 240; and see *Farina* v. *Silverlock*, 1 K. & J. 509).

Of false statements by defendant.

A declaration alleging that the defendant "deceitfully and fraudulently" prepared and sold medicines in imita-

tion of medicines prepared by the plaintiffs, and wrapped up the same in wrappers in order to denote that such medicine was the genuine medicine prepared and sold by the plaintiffs, was held to disclose a good cause of action, notwithstanding the fact that the declaration did not contain a distinct allegation that the defendant represented that the article sold by him was manufactured by the plaintiffs, but only that he represented it to be medicine in imitation of the medicine prepared by the plaintiffs (*Morison* v. *Salmon*, 2 Man. & G. 385).

Where the plaintiffs' pleading is tainted with scandal, or anything contained in it is unnecessary or embarrassing, the defendants should proceed to strike out the obnoxious clauses under O. XIX. r. 27, R. S. C., 1883.

Statement of claim. Remedies sought in.

In the case of the infringement of trade marks, as in other cases, the statement of claim should set out all the material facts upon which the plaintiff relies, and particularly the user by the plaintiff, or his predecessors, of the particular trade mark or trade name (describing it). If the plaintiff claims as assignee he should show how and when such assignment was made. The acts complained of should also be set forth and charged as being calculated to deceive the public to the detriment of the plaintiff (see *Mitchell* v. *Henry*, 15 Ch. D. 181). The remedies for an illegal user of a trade mark or trade name are (*a*) An injunction. (*β*) Damages. (*γ*) Account. (*δ*) The delivery up of counterfeit labels for the purpose of destruction, or in some cases the production of the goods, and erasure of marks or brands.

The plaintiff cannot claim both damages and an account, but must make his election.

Defence.

The statement of defence may, and in most cases does, deny the allegations contained in the statement of claim. It may in addition set up that the trade mark is bad in itself, or by reason of its being severed from the goodwill;

that the defendant had the leave and license of the plaintiff to use it, or that the plaintiff is precluded by laches from complaining of the infringement. If the plaintiff is guilty of any misrepresentation with respect to the mark, that also should be pleaded (see *Macfarlane* v. *Oak Foundry Co.*, 10 Ct. of Sess. Cas. 801), as well as want of registration.

Of infancy —Inst. It is no defence to an action, or to any indictment for infringement, that the defendant is an infant, nor can the defendant show that the plaintiff's trade marks have been infringed by others, unless at the same time he can prove that the infringement took place with the plaintiff's knowledge and acquiescence (*Ford* v. *Foster*, L. R. 7 Ch. 611.

Inspection and preservation. Under 25 & 26 Vict. c. 88, s. 21, the Courts may either in an action on the case, or in the more usual action for an injunction and account, make an order for the inspection of any manufacture or process, and of every chattel, article, and thing in the possession or power of the defendant alleged to have thereon, or in any way attached thereto, any forged or counterfeit trade mark, or any trade mark, falsely or wrongfully applied, and every or any instrument in the possession or power of the defendant used or intended to be or capable of being used, for producing or making any forged or counterfeit trade mark, or for falsely or wrongfully applying any trade mark (see also R. S. C., 1883, O. L. rr. 3, 4, 5).

Discovery. By the Merchandise Marks Act, 1862, s. 6, any person who shall have sold, uttered, or exposed for sale or for the purpose of trade or manufacture, any article, together with any forged or counterfeited trade mark, or together with the trade mark of any other person used without lawful authority or excuse, is bound upon demand in writing, to give full information in writing of the name and address of the person from whom

he purchased or obtained such chattel, and in case of refusal may be summoned before a justice and fined. Such refusal is also to be *prima facie* evidence that the person so refusing was aware of the illegal circumstances. Full provision for discovery by means of interrogatories, and for the production and inspection of documents is made by R. S. C., 1883, O. XXXI. r. 1—28. The provisions of the Merchandise Marks Act respecting any proceeding, judgment, or conviction for any act thereby declared to be a misdemeanour or offence, are not to exempt or excuse any person from answering or making discovery upon examination as a witness, or upon interrogatories in any suit or other civil proceeding. No evidence, however, which any person shall be compelled to give or make, is admissible in evidence against such person in support of any indictment for a misdemeanour at common law, or otherwise, or of any proceeding under the provisions of the Act (25 & 26 Vict. c. 88, s. 11).

A defendant is bound to disclose the names of all persons to whom he has sold any goods with the mark complained of affixed, or to whom he has sold goods, which he will not swear were not so marked (*Leather Cloth Co.* v. *Hirschfield*, 1 Eq. 299), but where the defendants declined to show certain entries and letters admitted to relate to the matters in question in the cause, it was held that they were justified in their refusal, for if compelled to disclose the names of customers, or the names of persons to or from whom letters were sent or received, or any prices, such discovery might be used in a manner prejudicial to the defendants in their trade, and was not in the particular case at all likely to assist the plaintiffs in making out their case at the hearing (*Carver* v. *Pinto Leite*, L. R. 7 Ch. 90.)

Joinder.

The owner of a trade mark and his agent cannot sue jointly, although the name of the agent appear on the trade mark (*Delondre* v. *Shaw*, 2 Sim. 237). Where,

however, two persons are interested in a trade mark, either can sue to the extent of his interest (*Hine* v. *Last*, 10 Jur. 106; *Dent* v. *Turpin*, 2 J. & H. 139); but if they are assignees they must first be registered in lieu of the assignor, and it has been seen that under certain circumstances the title of a plaintiff assignee is intrinsically bad. (*Ante*, pp. 236, 244.) Where two persons derived from a common predecessor in their respective businesses, the right to use a certain name as a trade mark, it was held that either might sue for an injunction and an account without the joinder of the other (*Southorn* v. *Reynolds*, 12 L. T. (N. S.) 75.) The question as to how far the multiplication of owners of a trade mark may be carried, so as to enable all or any of them to take proceedings in respect thereof, has not yet been judicially determined (see the judgment in *Batty* v. *Hill*, 1 H. & M. 264.)

The registered owner of a trade mark having, since notice of an application under the old Act to strike the trade mark off the register, gone into liquidation, the trustee was made a party to the proceedings by notice, under R. S. C. O. L. r. 4 (now R. S. C., 1883, O. XVII. r. 4); (*Re Rowe*, 48 L. T. (N. S.) 388).

The fullest provision for amendment is made by the Rules of the Supreme Court, 1883, O. XVI., by the substitution and addition of parties, and in case of doubt two defendants can be joined.

Account. It is [illegible] universal practice in every action for the infringement of a trade mark, to claim either an account or damages in addition to an injunction, and the writ should be endorsed with a statement of the relief required. Formerly, it was considered that the injunction was subordinate to the account, but as in many and indeed most cases at the present day, the primary object is to obtain an injunction, it may be taken as a well defined rule that the account is subordinate to the injunction

(*Barnett* v. *Lenehans*, 13 L. T. (N. S.) 495; *Shipwright* v. *Clements*, 19 W. R. 599; and see the remarks of Romilly, M. R., in *Curtier* v. *Curtis*, 31 Beav. 292).

Case where defendant acted in ignorance.

Where a person has innocently made use of another's trade mark, and sold goods marked therewith, he will be restrained by injunction, but he cannot be made to account save in respect of sales and profits acquired after the facts came to his knowledge (*Mott* v. *Cousins*, 33 Beav. 578; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185), but if the defendant knew he was using a trade mark belonging to somebody, he is liable to account, and the fact of his not knowing the particular owner is immaterial (*Curtier* v. *Curtis*, *supra*).

Or where plaintiff guilty of laches.

Where a plaintiff is guilty of gross laches he cannot claim either an account or an injunction (*Beard* v. *Turner*, 13 L. T. (N. S.) 747; see *Harrison* v. *Taylor*, 11 Jur. (N. S.) 408), and under no circumstances can he have both an account and an inquiry as to damages, but he must make his election between them (*Neilson* v. *Betts*, L. R. 5 H. L. 1).

Method of taking.

Where one of two or more joint owners of a trade mark obtains an account, the proper method of taking it is to find out what profits the defendant has made from the sale of the articles wrongfully marked, and the plaintiff is then entitled to his proper proportion thereof (*Dent* v. *Turpin*, 2 J. & H. 139). A defendant will as a rule have to account for the profit made by him during the six years previous to the issuing of the writ (*Curtier* v. *Curtis*, *supra*; *Ford* v. *Foster*, L. R. 7 Ch. 611), unless he was ignorant of his own wrong-doing, in which case he will, as already mentioned, only account from the time he became aware of it.

In taking the account, bad debts cannot be entered as profits, nor on the other hand can the cost of manufacturing the goods in respect of which the bad debts have been

incurred, be set against the contra side of the account (see *Edelsten* v. *Edelsten*, 10 L. T. (N. S.) 780).

Damages. Damages are either nominal or special, and to recover the latter a plaintiff must prove special injury proximately resulting from the defendant's conduct, but to obtain nominal damages he need not prove anything save that his rights have been invaded (*Blofeld* v. *Payne*, 4 B. & Ad. 410; *Morison* v. *Salmon*, 2 Scott, N. R. 453, *per* Erskine, J.; *Rodgers* v. *Nowill*, 5 C. B. 122, *per* Wilde, C. J.; *Chappell* v. *Davidson*, 2 K. & J. 123); therefore, where the acts of the defendant are calculated to induce purchasers to believe that the defendants are selling the plaintiff's commodity, it is not necessary for the plaintiff to prove any actual damage (*Bradbury* v. *Beauchamp*, 7 Ch. D. 848).

As in the case of an account, a defendant is liable in damages from such time, not exceeding six years, when he first became aware that he was infringing the trade mark, but not further or otherwise (see *Edelsten* v. *Edelsten*, *supra*; *Curtis* v. *Curtis*, 34 Beav. 292; *Mott* v. *Coulson*, 33 Beav. 578). No definite rule seems to exist for ascertaining the extent of any actual damage, and in practice the plaintiff's remedy lies, perhaps, more commonly in the equitable "security for the future," than in the legal indemnity for the past (Sedgwick on Damages, 728).

Measure of damages. The measure of damages has been said to be the plaintiff's loss of profit on sales sustained in consequence of the defendant's sales of the pirated article (*Taylor* v. *Carpenter*, 2 Woodb. & M. (Amer.) 1); but this is a rule difficult of application, for it cannot be assumed that the goods sold by the defendant would in the ordinary course, and but for the defendant's conduct, have been sold by the plaintiff (*Leather Cloth Co.* v. *Hirschfield*, 1 Eq. 299), the inquiry is "what damages, if any," not as in Patent cases

"what damage, &c." (see *Davenport* v. *Rylands*, 1 Eq. 308). An order is sometimes made that the defendant do keep an account of the sales made by him, with a view to the payment of the illegal profit to the plaintiff (*Spottiswoode* v. *Clark*, 10 Jur. 1043, 2 Ph. 154).

In the absence of any special reason to the contrary it might fairly be argued that the true measure of damages in cases of the kind, should be arrived at by reference to the defendant's sales (see *Pitts* v. *Hall*, 2 Blatch. 229; *Graham* v. *Plate*, 40 Cal. 593).

In action for deceit.

In an action on the case for deceit by the *vendee* of goods having a trade mark improperly affixed, the measure of damages would seem to be the difference between the actual value of the article, and what would have been its value if the proper trade mark had been affixed, together with damages for any loss which is the direct and natural consequence of the plaintiff's acting on the faith of the vendor's tacit statement (*Mullett v. Mason*, L. R. 1 C. P. 559; *Clarke* v. *Dickson*, 6 C. B. (N. S.) 453).

Under 19th sect. Merchandise Marks Act, 1862.

Under the 19th section of the Merchandise Marks Act, 1862, the vendor of an article bearing a trade mark, warrants the latter to be genuine and true, unless the contrary is expressed in writing, signed by or on behalf of the vendor. In an action under this section, the measure of damages would be the difference between the actual value of the article, and what would have been its value had it conformed to the warranty (see *Jones* v. *Just*, L. R. 3 Q. B. 197); it would however seem to be doubtful whether the vendee is entitled to damages arising from his acting on the faith of the warranty being true (*ibid.*).

In action at Common Law.

In an action on the case at Common Law, it is probable that at least nominal damages would be recoverable, on proof of such facts as would be satisfactory to a court of Equity in an action there (see Sebastian on Trade Marks, 99; Judicature Act, 1873, s. 25, sub-sec. 11).

Under 22nd sect. Merchandise Marks Act, 1862.

By the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88, s. 22), an action of damages may be brought against any person who forges or counterfeits a trade mark or does any of the other acts or things specified in this section, and an injunction will also be granted for preventing a repetition or continuance of the wrongful act complained of.

Costs.

The question of costs turns upon the conduct of the parties in the matter (Kerr on Injunctions, 382), and as a rule the costs follow the event as in other actions. Where, however, a plaintiff engages in litigation which has become unnecessary, he will get no costs (*Hudson* v. *Bennell*, 12 Jur. N. S. 519), and the same is the rule where a defendant has offered to submit and volunteered to give everything that the plaintiff can reasonably require (*Nunn* v. *D'Albuquerque*, 34 Beav. 595), and such offer on the part of the defendant must include an offer of all costs occasioned by his improper conduct (*Burgess* v. *Hills*, 26 Beav. 244; *Burgess* v. *Hately*, 26 Beav. 249; *Nunn* v. *D'Albuquerque*, *supra*), since an offer to pay part of the costs will not suffice (*Geary* v. *Norton*, 1 De G. & S. 9). The mere fact that a defendant submitted to an injunction, was held not to be a special ground under O. LXV. r. 9, for taxing the costs on the higher scale; otherwise the Court would be inflicting a punishment on him for submitting at once (*Hudson* v. *Osgerby*, W. N. 1884, p. 83). Should a plaintiff however demand more than the defendant has offered, he proceeds at his peril (*Bass* v. *Barber*, 19 L. T. (N. S.) 627).

Where an innocent person has in his hands or under his control goods bearing a forged trade mark, he should submit directly the fact is brought to his knowledge, otherwise he will be liable to the costs of an action (*Upmann* v. *Forester*, 24 Ch. D. 231).

Where both plaintiff and defendant are guilty of decep-

tion each must pay his own costs (*Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276), and where a person charged with imitating another's trade mark, escapes an injunction by an adroit nicety of procedure he will barely get his costs (*Bass* v. *Dawber*, 19 L. T. (N. S.) 627).

Where the defendant's fraudulent intent is evident, or even merely suspicious, and the plaintiff loses his remedy through *laches*, the defendant may still have to pay his own costs (see *Rodgers* v. *Rodgers*, 31 L. T. (N. S.) 285).

Should a plaintiff make charges which he is unable to substantiate, he may have to pay the costs occasioned thereby, even although he obtains an injunction with costs (*Pierce* v. *Franks*, 15 L. J. Ch. 122; see *Perks* v. *Hall*, W. N. 1881, p. 111), and on a motion for an interlocutory injunction, where the plaintiff is barred by reason of his delay, the costs are costs in the cause (*Isaacson* v. *Thompson*, 20 W. R. 196; *Brook* v. *Evans*, 2 L. T. (N. S.) 740; *Wallis* v. *Wallis*, 4 Drew. 458. A plaintiff need not give notice of action in order to entitle himself to his costs (see *Upmann* v. *Forester*, *supra*.

Where the registration of certain trade marks was ordered to be rectified, and the registered proprietor did not consent to the rectification, but appeared by counsel at the hearing, the question of costs was held regulated by certain considerations, which are explained and set forth in a recent case on the subject (*Re Kuhn*, 53 L. J. Rep. (Ch.) 238, and refer to *Re Hyde & Co.*, 7 Ch. Div. 724).

A respondent who was a forwarding agent had notice from the appellant that the latter did not seek to vary the order of the Court below as to costs: held that he appeared on the hearing of the appeal at his own cost (*Upmann* v. *Elkan*, L. R. 7 Ch. 130).

The expression "costs of and incident to all proceedings

in the Supreme Court" (R. S. C. 1883, O. LXV. r. 1), means the costs of and incident to all proceedings that have actually come unto the Court. A case under the Trade Marks Registration Acts, 1875-77, did not "stand for the determination of the Court" within the 16th rule of the Trade Marks Rules, 1876, until the parties opposing registration had given security for costs as provided by that rule, and consequently the Court refused to order payment of previous costs incurred before the Registrar (*In re Brandreth's Trade Mark*, 9 Ch. D. 618, and see now 46 & 47 Vict. c. 57, s. 69; T. M., Rule 29).

Where in an action for infringement, the judge certified under 3 & 4 Vict. c. 24, that such action was brought to try a right so as to entitle the plaintiff to costs, it was held that he was justified in so doing (*Morison* v. *Salmon*, 2 Man & G. 385); by O. LXV. r. 1 (R. S. C. 1883), the costs of and incident to all proceedings in the Supreme Court are in the discretion of the Court, provided that when any action, cause, matter, or issue, is tried with a jury, the costs shall follow the event, unless the judge or the Court shall for good cause otherwise order (see *Parsons* v. *Tinling*, 2 C. P. D. 119, approved in *Garnett* v. *Bradley*, 3 App. Cas. 944).

Costs on qui tam action under 25 & 26 Vict. c. 88.

Under 25 & 26 Vict. c. 88, s. 23, a defendant in a *qui tam* action under the Act, recovers costs as between attorney and client unless the Court shall otherwise order, in which event he obtains costs as between party and party only, and by section 24, a plaintiff in a similar action may be compelled to give security for costs:

Security for costs.

(*a*) Where in the opinion of the Court or a judge he has no ground for alleging himself aggrieved, *and*

(*β*) Where he is not within the jurisdiction, *or*

(*γ*) Where he has not sufficient property to be able to pay costs to the defendant in case the latter should be successful.

The effect of the section would appear to be, that in order to compel the plaintiff to give security for costs, it will be necessary for the defendant to show that the plaintiff has no ground for alleging himself aggrieved, and *in addition* either that he is not within the jurisdiction of the Court, *or*, that he has not sufficient property to satisfy the defendant's costs in case he should be called upon to pay them.

APPENDIX A.

FORMS OF INFORMATION, PLEADINGS, AND NOTICES

UNDER THE SEVERAL COPYRIGHT ACTS, THE MERCHANDISE MARKS ACT, 1862, AND THE PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883, TOGETHER WITH TRANSCRIPTS OF FORMS OF INJUNCTIONS.

1. *Information — Importing a Book published in the United Kingdom, and reprinted out of the British Dominions* (*ante*, pp. 32, 174).

The information [*or* complaint] of A. B., of , Gentleman, taken this day of , in the year of our Lord , before me, the undersigned, one of her Majesty's Justices of the Peace in and for the said [county] of at in the same [county], who saith that C D., of , in the county of , not being the proprietor of the copyright, or a person authorised by him, of a certain printed book entitled , and first composed [*or* written, *or* printed] and published in that part of the United Kingdom called [England], and in which said book there then was and now is copyright, and reprinted out of the British dominions, to wit, at , unlawfully did on the day of import or bring [*or* cause to be imported or brought] for sale [or hire] into that part of the British dominions called [tive] copies of the said book, contrary to the 45th chapter of the stat. 5 & 6 Vict. section 17.

5 & 6 Vict. c. 45, s. 17.

Sworn, &c.

N.B. If the defendant is charged with *knowingly* selling, publishing, or exposing to sale or letting to hire, or with having in his possession for sale or hire any such book, the above form must be altered accordingly.

2. *Information—Infringing Copyright in Painting, Drawing, or Photograph* (*ante*, pp. 93, 181).

(Heading as in No. 1.)

Who saith that C. D., of , in the county of , on the day of at , being the author of a certain painting [drawing, *or* photograph] representing [describing it] or called [naming it], in which there is subsisting copyright, did unlawfully, and without the consent of A. B., the proprietor of the said copyright, and after having sold or disposed of such copyright, repeat [copy, colourably imitate, or otherwise multiply] for sale [hire, exhibition, or distribution, or cause or procure to be repeated, &c.], the said painting [*or* drawing, *or* photograph, *or* the design of such painting, &c.], contrary to the 68th chapter of the stat. 25 & 26 Vict. section 6].

25 & 26 *Vict. c.* 68, *s.* 6.

N. B. If the defendant (whether the author or not, so long as he is not the proprietor) is charged with *knowingly* importing into any part of the United Kingdom, or *knowingly* selling, *or* publishing, *or* letting to hire, *or* exhibiting, *or* distributing, *or* offering for sale, &c., *or* causing *or* procuring, &c., any repetition, copy, or imitation of the said painting, &c., or the design thereof, without the required consent, the above form should be altered accordingly.

3. *Information Putting off Painting, &c., containing alterations, as or for the unaltered work of the author or maker* (*ante*, pp. 96, 183).

(Heading as in No. 1.)

Who saith that C. D., of , in the county of , on the day of , at , without the consent of A. B., the author or maker of a certain painting [drawing, *or* photograph, *or* negative of a photograph], called , unlawfully did make, during the life of the author or maker of such painting [drawing, *or* photograph, *or* negative, &c.] the said work [or a copy or copies of such work] with certain alterations therein made by some other person as or for the unaltered work of such author or maker, contrary to the 68th chapter of the statute 25 & 26 Vict. section 7.

25 & 26 *Vict.* c. 68, *s.* 7.

N.B.—If the defendant is charged with *knowingly* selling or publishing, or offering for sale, such work or any copies so altered as aforesaid, the above form must be varied accordingly.

4. *Information—Forging a Trade Mark.*

The information and complaint, &c. (see Form No. 1), who saith that C. D. of in the county of on the day of , at , with intent to

25 & 26 *Vict.* c. 88, *s.* 2. —— to wit.

defraud [*or* to enable A. B., to defraud], E. F. unlawfully did forge [*or* counterfeit, *or* cause or procure to be forged *or* counterfeited] a certain trade mark, to wit [see sec. 10] contrary to the 88th chapter of the statute 25 & 26 Vict. section 2.

Sworn, &c.

5. *Information—Assisting in the Forging of a Trade Mark.*

(Heading as in Form No. 4.)

Who saith that C. D., of, &c., on, &c., at, &c., with intent to defraud unlawfully did aid, abet, counsel, and procure the commission of an offence which is by the Merchandise Marks Act, 1862, made a misdemeanor, that is to say, the said C. D. did, with such intent as aforesaid, unlawfully aid, abet, counsel, and procure one A. B., of to forge [*or* counterfeit] a certain trade mark, to wit [see sec. 10], contrary to the 88th chapter of the statute 25 & 26 Vict. section 13. 25 & 26 *Vict.* c. 88, s. 13.

6. *Information—Falsely Applying a Trade Mark, with intent, &c.*

(Heading as in Form No. 4.)

Who saith that C. D., of , in the city of , did on the day of at aforesaid, with intent to defraud [*or* to enable A. B. to defraud] E. F. unlawfully apply [*or* cause *or* procure to be applied] a certain trade mark [*or* any forged *or* counterfeited trade mark] to wit [see sec. 10] belonging to one G. H., to a certain chattel or article, to wit a , not being the manufacture, workmanship, production, or merchandize of the said G. H. denoted [*or* intended to be denoted] by the said trade mark [*or* forged *or* counterfeited trade mark] contrary to the 88th chapter of the statute 25 & 26 Vict. section 2. 25 & 26 *Vict.* c. 88, s. 2.

N.B.—If the charge against the defendant is of applying or causing to be applied a trade mark or any forged, &c., to any chattel or article, not being the particular or peculiar description of manufacture, workmanship, production, or merchandize denoted [*or* intended to be denoted] by the trade mark or forged, &c., the above form must be altered accordingly (see sec. 2).

7. *Information—Applying a forged Trade Mark to any vessel enclosing an article.*

(Heading as in Form No. 4.)

Who saith that C. D. of, &c., on, &c., at, &c., with intent to defraud [*or* to enable A. B. to defraud] E. F., unlawfully did apply [*or* cause *or* procure to be applied] a certain trade mark [*or* any

25 & 26 *Vict. c.* 88, *s.* 3. forged or counterfeited trade mark] to wit (see sec. 10) to a certain cask [*or* bottle, *or* stopper, *or* vessel, *or* case, *or* cover, *or* wrapper, *or* band, *or* reel, *or* ticket, *or* label, *or* other thing] in [*or* on, *or* with] which a certain chattel [*or* article] was intended to be sold [*or* was sold, *or* was uttered, *or* exposed for sale, *or* intended for any purpose of trade or manufacture] contrary to the 88th chapter of the statute 25 & 26 Vict. section 3.

8. *Information—Selling articles with forged or false Trade Marks attached.*

(Heading as in Form No. 1.)

Who saith that C. D., of at , on the day of , unlawfully did sell [*or* utter, *or* expose for sale, *or* expose for any purpose of trade, *or* manufacture, *or* cause *or* procure to be sold, *or* uttered, *or* exposed for sale, *or* for purposes of trade, *or manufacture*] *a certain chattel, [or article] to wit a* ,

25 & 26 *Vict. c.* 88, *s.* 4. together with a certain forged and counterfeited trade mark, which he the said C. D. then well knew to be forged and counterfeited [*or* together with the trade mark of one A. B. applied, *or* used falsely, *or* wrongfully, *or* without lawful authority and excuse, which he the said C. D. then well knew to have been so applied or used as aforesaid], contrary to the 88th chapter of the statute 25 & 26 Vict. section 4.

9. *Information—Summons on Refusal of Vendor of Article bearing false Trade Mark to give information as to where he procured it* (*ante*, p. 324).

(Heading as in Form No. 1.)

Who saith that C. D., of , did, on the day of , sell [utter, *or* expose for sale, *or* for the purpose of trade *or* manufacture, or cause, *or* procure to be sold, &c.] a certain

25 & 26 *Vict. c.* 88, *s.* 6 chattel [*or* article], to wit, a , together with a certain forged and counterfeited trade mark belonging to this complainant [*or together with the trade mark of this complainant used without* lawful authority or excuse], and that this complainant did on the day of last, at the last-known dwelling-house of the said C. D. [*or* at the place of sale or exposure for sale of the said chattel [*or* article]] deliver or cause to be left a demand in writing requiring the said C. D. to give to this complainant [*or* to , his attorney *or* agent] within forty-eight hours after such demand, full information in writing of the name and address of the person from whom he the said C. D. purchased or obtained such chattel [*or* article], and of the time when he obtained the same,

and that the said C. D. hath refused and neglected to give the information aforesaid, contrary to the 88th chapter of the statute 25 & 26 Vict. section 6.

10. *Information—Selling or Exposing, &c., Articles with False Statements of Quantities, &c.*

(Heading as in Form No. 1.)

Who saith that C. D., of at on unlawfully did sell [*or* utter, *or* expose for sale, *or* for any purpose of trade *or* manufacture, *or* did cause *or* procure to be sold, &c.] a certain chattel [*or* article] to wit , upon which to the knowledge of the said C. D., was then put [*or* upon any cask, bottle, *or* stopper, *or* vessel, *or* case, *or* cover, *or* wrapper, *or* band, *or* reel, *or* ticket, *or* label, *or* other thing, together with which such chattel [*or* article] was sold, *or* uttered, *or* exposed for sale, *or* for any purpose of trade *or* manufacture, used or employed to expose or exhibit the said chattel [*or* article] for sale] a certain false description [*or* statement, *or* indication] of or respecting the number [*or* quantity, *or* measure, *or* weight] of such chattel [*or* article, *or* the place *or* country in which such chattel [*or* article] was made, manufactured, or produced], to wit [describe the false description], contrary to the 88th chapter of the statute 25 & 26 Vict. section 8. 25 & 26 Vict. c. 88, s. 8.

11. *Information—Falsely Describing a Trade Mark as Registered.* (*Patents, Designs, and Trade Marks Acts*, 1883.)

(Heading as in Form No. 1.)

Who saith that C. D., of in the county of , did on the day of at aforesaid, unlawfully sell a certain article, to wit, a , having thereon a certain device [*or* mark, *or* brand, *or* heading, *or* label, *or* ticket] with the word "registered" [or any other word] impressed on [or otherwise applied to] the said article, contrary to the 57th chapter of the statute 46 & 47 Vict. section 105. 46 & 47 Vict. c. 57, s. 105.

12. *Action for Damages for the Piracy of an Engraving* (17 Geo. III. c. 57, *ante*, p. 219).

Endorsement on Writ.—The plaintiff's claim is for damages for the infringement of the plaintiff's copyright.

Statement of Claim.

1884, Lottor , No. .

In the High Court of Justice.
Queen's Bench Division.

Between A. B., *Plaintiff*,
and
C. D., *Defendant*.

Statement of Claim.

1. The plaintiff is the proprietor of an engraving or print called , and representing .

2. The plate from which the said engraving or print was taken and each and every copy of the said engraving or print, were truly engraved and printed with the name of the proprietor, and the date of the first publication thereof.

3. The plaintiff was before the commencement of this action duly entered as the proprietor of the said engraving or print, pursuant to the 13th section of statute 5 & 6 Vict. c. 45.

4. The defendant has infringed the plaintiff's copyright in the said engraving.

5. The following are the acts complained of [set them out].

The plaintiff claims—

1. £ damages in respect of the said infringement.
2. Forfeiture of the plate or plates on which such engraving or print is copied, and all and every sheet or sheets (being part of or whereon such print or prints are or shall be so copied or printed).
3. £ penalty in respect of pirated copies of the said engraving or print found in the defendant's custody.
4. An injunction to restrain the defendant from [here set out as shortly as possible a minute of the particular injunction required. For forms of injunctions, see *post*].

Place of trial, London.

(Signed.)

Delivered this day of , 1884.

Defence.

1. The plaintiff is not and never was the proprietor of the said engraving or print.

2. The plate and every copy of the said engraving or print were not truly engraved and printed, nor was the plaintiff entered as proprietor of the said engraving or print before action as set forth in the 2nd and 3rd paragraphs of the plaintiff's statement of claim.

3. The defendant did not infringe as alleged, or at all.

4. The plaintiff's copyright in the said engraving or print had expired at the time of the alleged infringement.

5. The plaintiff's remedy was barred by the 4th section of the statute 8 Geo. II. c. 13.

6. At the time of the publication of the said engraving or print the author thereof not being a British subject, was not resident within the dominions of the Crown.

(Signed)

Reply.

The plaintiff joins issue upon the defence.

(Signed)

13. *Action for Damages for the Infringement of Copyright in a Book* (5 & 6 Vict. c. 45, s. xv. ; Rules S. C. 1883 ; App. C. (sec. vi. No. 7), and App. D. (sec. vi.)).

(Heading as before.)

Statement of Claim.

The defendant has infringed the plaintiff's copyright in a book entitled "The History of Rome," registered on the day of .

Particulars of special damage are as follow :—

Loss of sale of 50 copies	£50
Loss of profit in the copyright	£50

The plaintiff claims £100.

Place of trial, Surrey.

(Signed)

Delivered the day of , 18 .

Defence.

The plaintiff is not the author (assignee, &c., as the case may be).

The book was not registered.

The defendant did not infringe.

Reply.

The plaintiff joins issue upon the defence.

N.B.—A variety of defences in an action of this description are set out at p. 217.

14. *Notice of Objections to be given with the Defence in an Action for Infringement of Copyright, pursuant to 5 & 6 Vict. c. 45, section 16.*

1884. Letter . No. .

In the High Court of Justice.

Division.

(Heading.)

Take Notice, that the above-named defendant intends to rely on the trial of this action, on the following objections :—

1. That he is not guilty of the infringements laid to his charge, or of any of them.

2. That at the time of committing the said alleged infringements the plaintiff was not the proprietor of the copyright of and in the said book mentioned in the statement of claim [and that no person whatsoever was the proprietor thereof, inasmuch as there was no subsisting copyright in the said book].

3. That at the time of committing the said alleged grievances one of and not the plaintiff was the proprietor of the copyright in the said book.

4. That there was no valid assignment of the copyright to the plaintiff, inasmuch [here set forth how and in what way the assignment was invalid].

5. That the plaintiff was not the author [*or* first publisher] of the said book, but that of was the author [*or* first publisher] thereof.

6. That the said book in the statement of claim named was first published on the day of , with the title [give the title at length] at .

7. That the said book was not the work or composition of any natural born subject or of any British author or naturalized person or denizen, but was the work and composition of an alien, who was the author thereof, to wit , and who composed the same out of the British dominions, to wit at .

8. That the plaintiff made his copies from plates engraved abroad.

9. That a proper entry of copyright has not been made in respect of the said book, pursuant to the 45th chapter of the statute 5 & 6 Vict. section 13, inasmuch [set out how and in what manner the registration is imperfect].

10. That the matter in respect of which the infringement took place is not a proper subject of copyright, inasmuch [here set out how and in what way the matter referred to is defective].

11. That the plaintiff has acquiesced in the infringement (if any) of the said copyright, after knowledge thereof, to wit [say when he acquiesced and in what manner].

12. That the book is immoral [*or* libellous, *or* blasphemous, &c]. [State any other objections in the same manner.]

Yours, &c.,

Defendant's solicitor.

To Mr. ,
Plaintiff's solicitor.

15. *Action for Damages for the Infringement of Copyright in a Painting* (25 & 26 Vict. c. 68, s. 11).

Statement of Claim.

1. The plaintiff is the author of a certain painting entitled , and representing , duly registered day of .

2. The plaintiff made or executed the said painting for and on behalf of one A. B. for a valuable consideration, and by agreement in writing dated the day of and signed by the said A. B. the copyright of and in the said painting was expressly reserved to the plaintiff.

3. The defendant has infringed the plaintiff's copyright in the said painting [set out shortly in what way].

The plaintiff claims—

1. £10 penalty in respect of each and every offence as aforesaid.
2. That all such repetitions, copies, and imitations as aforesaid may be ordered to be given up to the plaintiff.
3. An injunction to restrain the defendant from a continuance and repetition of the said infringement, and in particular [set out a minute of the particular injunction sought].
4. An account or damages.

Defence.

1. The plaintiff was not the author of the painting referred to in the statement of claim.

2. The plaintiff did not reserve the copyright in the said painting to himself as alleged in the 2nd paragraph of the said statement.

3. The defendant did not infringe in the manner alleged, or at all.

4. The plaintiff did not register the said painting before the alleged infringement took place.

5. The said painting was not original.

6. The plaintiff was not a British subject, nor resident within the dominion of the Crown at the time of the making or execution of the said picture.

Reply.

The plaintiff joins issue on the defence.

16. *Action for the Infringement of a Trade Mark* (App. C. sec. vi. No. 8; App. D. sec. vi.; Rules S. C. 1883).

Statement of Claim.

1. The defendant has infringed the plaintiff's trade mark.

2. The defendant's trade mark is [describe it]. [If the plaintiff is not the original proprietor of the trade mark, show shortly how his title is derived].

3. The following are the acts complained of [set them out].

The plaintiff claims an injunction to restrain the defendant, his servants and agents, from infringing the plaintiff's said trade mark, and in particular from [stating any particular injunction sought].

The plaintiff also claims an account or damages.

Defence.

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

17. *Injunction—Directory.*

Kelly v. *Morris*, L. R. 1 Eq. 697.

Let a perpetual injunction be awarded against the defendant to restrain him, his workmen, servants and agents, from publishing, printing, selling, delivering, or otherwise disposing of, or causing or knowingly permitting to be published, printed, sold, delivered, or otherwise disposed of, any copies or copy of his book, called the "Imperial Directory of London, 1866," in the plaintiff's bill, mentioned, containing the divisions headed Streets, Official, Parliamentary, Court, Civic, Parochial and Clerical, Customs, Banking and Insurance, Legal, Postal, Public Institutions, Conveyance, and Miscellaneous, or any or either of them, or any part thereof respectively. Defendant to pay plaintiff's costs of suit, to be taxed, &c. (Pemberton on J., 226).

18. *Injunction—Dictionary.*

Lewis v. *Fullarton*, 2 Beav. 14.

Let the defendant, his agents, servants, and workmen, be restrained, &c., from further printing, publishing, selling, or otherwise disposing of any copy or copies of a book called "a new and comprehensive Gazetteer," containing any articles or article, passages or passage, copied, taken, or colourably altered from a book called "The Topographical Dictionary of England," published by the plaintiffs. (Pemberton on J., 226).

19. *Injunction—Part of a Book.*

The plaintiff by his counsel undertaking as to damages, &c.

Let the defendants, their servants and agents, be restrained until the hearing of this cause, or further order, from printing, publishing, selling, delivering, or otherwise disposing of, any of the copies of the book or work called "The Guardian Angel" in the plaintiff's bill mentioned, printed or caused to be printed by the defendants as in the bill mentioned, or any other copy or copies of the said book or work, containing the last six chapters of the said book or work printed and published by the plaintiff, as in the bill mentioned, or any parts of such said six chapters. (Pemberton on J., 227).

Low v. Ward, L. R. 6 Eq. 415.

20. *Injunction—Catalogue.*

Let a perpetual injunction be awarded to restrain the defendant, his servants, agents, and printers, from publishing, printing, selling, delivering or otherwise disposing of the sheet of monumental designs in the bill mentioned, or any other sheet in the compilation of which the plaintiff's book of monumental designs has been used, and from copying or pirating any parts of the said book.

Let the defendant on or before the 2nd day of April, 1875, deliver to the plaintiff on oath (if required) any such sheets in the power or custody of the defendant for the purpose of being destroyed. (Pemberton on J., 227).

Bruce v. Newman, L. R. 19 Eq. 623.

21. *Injunction—Map—Inquiry as to Damages.*

Let a perpetual injunction be awarded against the defendants, to restrain them, their servants, agents, and workmen, from printing, publishing, selling, or otherwise disposing of, and from offering or exposing for sale, the "Bird's-eye View or Plan of Paris and its Fortifications," in the plaintiffs' bill mentioned to have been published by the defendants.

Stannard v. Harrison, 21 L. T. (N.S.) 570.

Let the defendants deliver up to the plaintiffs all unsold copies of the said view or plan now in their possession or power. Let an inquiry be made what sum of money is proper to be awarded to be paid by the defendants to the plaintiffs in respect of any damage which has been sustained by the plaintiffs by reason or on account of the publication or sale of the said view or plan by the defendants. Defendants to pay to plaintiffs the sum certified within one month after date of Chief Clerk's certificate. Defendants to pay costs of suit. Liberty to apply. (Pemberton on J., 227).

22. *Injunction—Illustrated Book—Engravings.*

Bogue v. *Houlston*, 5 De G. & Sm. 267.

Let the defendants, their servants, agents, and workmen, be restrained until from printing or publishing or selling or exposing for sale or hire, or otherwise disposing of any further or other copies or copy of a book called "The Comical History and Tragical End of Reynard the Fox," or any other book, work, publication or thing containing any passage, article, print, woodcut, engraving, matter, or thing contained in the book of the plaintiffs intituled, &c. (Pemberton on J., 227).

23. *Injunction—Visitor's Guide—Assignment.*

Collard v. *Simms*, 2 Hare, 513.

Let the defendants S. & Co. and T. & Co., their servants, workmen, and agents be restricted until from printing, publishing, selling, or otherwise disposing of "The Invalids and Visitors' Hand Book," in the plaintiff's bill mentioned, or any copy thereof, or any part of the work "Spas of England," published by the plaintiff, or any work written or composed by the defendant, Dr. G., of a similar nature or description to the work so published by the plaintiff, or to any part thereof.

Let the defendant Dr. G., his servants, workmen, and agents, be restrained until, &c., from assigning or otherwise disposing of to the defendants, or any of them, or any other person, &c., the copyright of the same work, or of any part thereof, and from being concerned in any work of a similar description to, or which might interfere with the value of the copyright of, the work so published by the plaintiff. (Pemberton on J., 227).

24. *Injunction—Essays—Delivering up for Cancellation—Damages.*

Pike v. *Nicholas*, (V.-C. J.) April 24th, 1869.

Reversed L. R. 5 Ch. 251.

Let a perpetual injunction be awarded against the defendant T. N. to restrain the said defendant, his servants and agents, from selling or disposing of, or causing to be published, sold, or disposed of, any copies or copy of the defendant's book, intituled "The Pedigree of the English People," in its present state, or of any book containing the 7th section of chapter 1 of part 3, or section 1 of chapter 5, part 3 of the defendant's said book. Let the defendant deliver up to the plaintiff the above-mentioned portions of the said book, to be cancelled.

Let the defendant T. N. within 21 days after service of this order pay to the plaintiff L. P. the sum of £70 as the ascertained amount of damages sustained by the plaintiff by sale of the number of copies of the defendant's book. Defendant to pay costs of suit. (Pemberton on J., 227).

25. *Injunction—Dramatised Novel.*

Let a perpetual injunction be awarded against the defendant to restrain him and his agents from further printing, publishing, selling, or otherwise disposing of, any copies of the drama called "Lady Audley's Secret," in the plaintiff's bill mentioned, without first omitting therefrom all passages identical with, or copied or taken or only colourably differing from the book called "Lady Audley's Secret," in the plaintiff's bill mentioned, published by the plaintiff's firm, and also from further printing, publishing, selling, or otherwise disposing of any copies of the drama called "Aurora Floyd" in the plaintiff's bill mentioned, without first omitting therefrom all passages identical wi h, or copied, or taken or only colourably differing from the book called "Aurora Floyd," published by the plaintiff's firm. Defendant to pay plaintiff's cost of suit. Liberty to apply.

Tinsley v. *Lacey*, 32 L. J. (Ch.) 535.

26. *Injunction—Opening Letters and Taking Orders.*

Let an injunction be awarded to restrain the defendants, their agents, servants, and workmen, from receiving, retaining, or opening any letters or letter addressed "C. Schiele," or "Schiele & Co.," &c., or otherwise addressed to the plaintiff, Christian Schiele, or to the plaintiff's said firm of C. Schiele & Co., as in the bill mentioned, and from taking advantage or making use of the communications or information, and from supplying the orders or any of them contained in any such letters, and from in any manner availing themselves of or using the contents of any such letters until, &c. (Seton, 253).

Schiele v. *Brodell*, 11 W. R. 796.

27. *Injunction—Design—Delivery up of Drawings, &c.*

Let the defendants, their agents, servants, and workmen, be restrained until, &c., from manufacturing or making, or causing or procuring to be manufactured or made, or selling, or exposing, or offering for sale, or exporting or otherwise disposing of, any of the shawls known in the trade as the Mantilla Shawl, in the plaintiff's bill mentioned, having applied thereto the plaintiff's design, registered the 12th of February, 1857, and numbered in the Design Office, London, No. , or a design in fraudulent imitation thereof, or any shawls or shawl of the plaintiff's said registered design, or of any design being an imitation thereof, or only colourably differing therefrom, and from in any way pirating or infringing the plaintiff's said design, during the continuance of the plaintiff's copyright in the said design, or of any extension thereof. (Pemberton on J., 231).

Norton v. *Nicholls*, cited 4 K. & J. 475.

Morris v. *Haldenworth*, 2 De G. & Sm. 496.

Let the defendants forthwith deliver up to the plaintiffs for the purpose of being destroyed, the drawing or drawings, point paper, and the several cards used in applying the design in the plaintiff's bill mentioned; and also the articles manufactured by the defendants to which the said plaintiff's design had been applied; the same to be verified by affidavit. Direction for taxation of costs and payment by defendants. On payment of costs proceedings to be stayed except to enforce injunction. (Pemberton on J., 231.)

28. *Injunction Engravings—Common Law.*

Prince Albert v. *Strange*, 2 De G. & Sm. 656.

Let the defendant W. S., his servants, agents, and workmen, be restrained from exhibiting the gallery or collection of etchings in the bill mentioned, or any of such etchings, and from making or permitting to be made any engravings or copies of the same, or any of them, and from publishing the same or any of them, or parting with or disposing of the same or any of them, and from selling or in any manner publishing and from printing the descriptive catalogue in the plaintiff's bill mentioned.

29. *Injunction Title of Newspaper.*

Ingram v. *Stiff*, 5 Jur. (N.S.) 947.

Let the defendant, his servants, agents, and workmen, be restrained from printing, publishing, or selling any newspaper or other periodical under the name of the "Daily London Journal," or under any other name or style of which the words "London Journal" shall form part, and from doing or committing any act or default that may tend to lessen or diminish the sale or circulation of the plaintiff's periodical called "The London Journal."

30. *Injunction—Title of Newspaper.*

Clement v. *Maddick*, 1 Giff. 98.

Let the defendants, their servants, workmen, and agents be restrained until, &c., from printing, publishing, or continuing to print or publish, any newspaper or other periodical paper with or under the name or style of "The Penny Bell's Life and Sporting News," or with or under any name or style, of which the name, style, or words of "Bell's Life" shall form a part, or in any way occur, and from using the said name, style, or title of "Bell's Life" by way of name, style, or title to any newspaper or periodical without the license or consent of the plaintiff.

31. *Injunction—Misrepresentation.*

Ward v. *Beeton*,

Let the defendant be restrained from publishing, issuing, or circulating, any such advertisements, circulars, or letters as afore-

said, containing any statement or representation that the defendant is interested or concerned in any annual, book, or publication, other than "Beeton's Christmas Annual," so published from year to year by the plaintiffs, or that the defendant's connection with the plaintiff's firm is terminated, or that the use of the defendant's name by the plaintiffs for the purposes of their said "Beeton's Christmas Annual" is improper or unauthorised. L. R. 19 Eq. 211.

32. *Injunction—Trade Mark—Brand on Wine Cask.*

Let the defendants be restrained until, &c., from affixing or causing to be affixed to any casks of wine shipped to their orders, the brand or mark of a crown and the word "Seixo," or any other combination of marks or words so contrived as by colourable imitation or otherwise to represent the marks or brands of the plaintiff, and from employing any marks or words which should be so contrived as to represent or induce the belief that such wines were Crown Seixo, or the produce of the Quinta do Seixo, or otherwise using the word "Seixo" without clearly distinguishing the same from the wine produced by the Quinta do Seixo. (Pemberton on J., 239.) *Seixo v. Provezende*, L. R. 1 Ch. 192.

33. *Injunction and Account—Trade Mark—"Eureka."*

Let a perpetual injunction be awarded against the defendants to restrain them, their agents, servants, and workmen, from applying the mark or title "Eureka" to any shirts manufactured by the defendants, or to any shirts sold by them, unless such shirts be manufactured by the plaintiff, and from selling or disposing of any shirts already marked with the mark or title "Eureka," unless such mark shall have been applied by the plaintiff and with his sanction, and from issuing any boxes or packages containing shirts upon or in which the mark or title "Eureka" shall be applied to shirts not of the plaintiff's manufacture. *Ford v. Foster*, L. R. 7 Ch. 611.

Let an account be taken of the profits made by the defendant in manufacturing and selling, and in selling shirts under the mark or title of "Eureka" since the 22nd February, 1870, the date of the filing of the plaintiff's bill. Defendants to pay to plaintiff the amount certified to be due within fourteen days after date of certificate. Directions for payment by defendants of the costs of suit, other than the costs of the appeal, and for return of appeal deposit. (Pemberton on J., 239.) *Account.*

34. *Injunction—Trade Mark—Glenfield Starch.*

Let an injunction be awarded to restrain the respondent (the defendant), his servants and agents, &c., from using the word *Wotherspoon v.*

Currie, L. R. 5 H. L. 509.

"Glenfield" in or upon any labels affixed to packets of starch manufactured by or for him, and from in any other way representing the starch manufactured by or for him to be "Glenfield Starch," and from selling or causing the same to be sold as "Glenfield Starch," and from doing any act or thing to induce the belief that starch manufactured by or for him is "Glenfield Starch," or starch manufactured by the appellants. Respondent to pay costs of appellants in the Courts below. (Pemberton on J., 239.)

35. *Injunction—Trade Mark—Labels on Bottles—Trade Cards.*

Croft v. *Day*, 7 Beav. 90.

Let the defendant, his servants, agents, and workmen be restrained from selling, or exposing for sale, or procuring to be sold, any composition or blacking described as, or purporting to be, blacking manufactured by Day and Martin, in bottles, having affixed thereto such labels as in the complainant's bill mentioned, or any other labels, so contrived or expressed, as, by colourable imitation, or otherwise, to represent the composition or blacking sold by the defendant, to be the same as the composition or blacking manufactured and sold by John Weston (the manager) for the benefit of the estate of Charles Day, the testator, and from using trade cards, so contrived or expressed, as to represent that any composition or blacking sold, or proposed to be sold, by the defendant, is the same as the composition or blacking manufactured or sold by John Weston.

36. *Injunction—Trade Mark—"Anchor Brand Wire"—Account—Delivery up for Cancellation.*

Edelsten v. *Edelsten*, 1 De G. J. & S. 189.

Decree in the terms of the prayer of the bill. That an account be taken of the gains and profits made and obtained by the defendants by the sale of wire having tallies or labels attached thereto with the plaintiff's trade mark, or a trade mark in imitation of, or only colourably differing from that of the plaintiff, stamped or impressed thereon; and that the defendants do pay to the plaintiff the amount of such gains and profits. That the defendants be restrained from attaching to wire not the manufacture of the plaintiff, any tally or label with the plaintiff's trade mark, or any mark in imitation thereof, or only colourably differing therefrom, stamped or impressed thereon, and from otherwise using the plaintiff's trade mark, or any mark in imitation thereof, so as to denote or represent that the said wire was the "Anchor Brand Wire," or was the manufacture of the plaintiff, and from selling or offering for sale, or procuring to be sold any wire not being of the plaintiff's manufacture, having a tally or label attached thereto with the plaintiff's trade mark, or a mark in imitation thereof, or only colourably differing therefrom, stamped or impressed thereon,

or otherwise, in any manner, having the said trade mark, or a mark in imitation thereof, or only colourably differing therefrom attached thereto. That the defendants do deliver up to be cancelled all tallies, labels, and papers in their possession, or in the possession of their servants, or agents, having the said trade mark so in colourable imitation of the plaintiff's, as thereinbefore mentioned, and also all tallies, labels and papers in their possession, or in the possession of their servants or agents, having the plaintiff's trade mark, or any mark in imitation thereof, or only colourably differing therefrom, stamped or impressed thereon, and also all dies for stamping or impressing the same, and that the defendants do pay the costs of the suit.

37. *Injunction—Trade Mark—Labels.*

Interim injunction granted in the terms of the notice of motion, viz., to restrain the defendant, his workmen, &c., from printing or selling, or exposing for sale, or procuring to be printed or sold, any labels similar to those in use by the plaintiff, as in the bill in this cause mentioned, or containing copies of the signature, or address, or flourish, seal, or stamp, or other marks invented or used by the plaintiff, as therein mentioned, or any signature, address, flourish, seal, or other mark merely colourably differing therefrom, or any other papers or labels so printed or contrived, as, by colourable imitation, or otherwise, to represent or lead to the belief that Eau de Cologne prepared by other parties was Eau de Cologne prepared by the plaintiff. *Farina* v. *Silverlock*, 1 K. & J. 509.

38. *Injunction—Trade Secret.*

Let a perpetual injunction be awarded against the defendant to restrain him, &c., from carrying on any manufactory for the production of Crockett's Leather Cloth in the bill mentioned, and from being engaged in any company for the sale of the said cloth, or any cloth or any production similar thereto, and from in any manner holding himself out as the manufacturer of such Crockett's Leather Cloth or any production similar thereto. (Pemberton on J., 223.) *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345.

39. *Injunction—Trade Mark—"Crowley Millington."*

Let the injunction granted in this cause on the —— day of ——, to restrain the defendants, and each of them, their and each of their servants and agents, until, &c., from stamping or impressing, or causing to be stamped or impressed, on any bars of steel or other pieces of steel, the names Crowley Millington, or either of them, or any of the names or marks, or any material part of any of the *Millington* v. *Fox*, 3 My. & Cr. 338.

marks in the plaintiff's bill mentioned, to be stamped by the plaintiffs on steel manufactured by the plaintiffs, and from manufacturing or causing to be manufactured, and also from selling or contracting to sell, any bars of steel or other pieces of steel stamped with any of the said names or marks, or any material part of any of the said marks, or any name or mark in imitation of any of the said names, or any material part of any of the said marks, be made perpetual against the said defendants respectively, and their respective servants and agents. (Pemberton on J., 238.)

40. *Injunction—Trade Mark—Figure.*

Harrison v. Taylor, 11 Jur. (N.S.) 408.

Let an injunction be awarded to restrain the defendants, their agents, servants, and workmen, until, &c., from selling or otherwise disposing of, or exposing for sale, any packages of mustard to which the plaintiff's trade mark, or the figure of an ox, or any other figure or mark in imitation of the plaintiff's trade mark, or any label containing any such imitative mark or figure, has been or shall be affixed, and also from printing or circulating, or causing to be printed or circulated, any notices or other documents containing such imitative mark. (Pemberton on J., 239.)

41. *Injunction—Trade Mark—"Anatolia."*

McAndrew v. Barnett, 33 L. J. (Ch.) 561.

Let the defendants, their agents and servants, be restrained until, &c., from stamping or marking, or causing or permitting to be stamped or marked, upon any liquorice manufactured or prepared by them, the word "Anatolia," or from colourably using any other word, and also from selling or offering for sale any liquorice marked "Anatolia," not being of the plaintiffs' manufacture, and also from selling or offering for sale any liquorice or preparation of liquorice not being of the plaintiff's manufacture, so as to represent that the same has been manufactured by the plaintiffs. (Pemberton on J., 239.)

42. *Injunction—Fraudulent Use of Testimonials.*

Franks v. Weaver, 8 L. T. (O.S.) 512.

Injunction in terms of amended notice of motion. That the above-named defendant, and the firm of Mander, Weaver and Company, his and their servants, workmen, and agents be restrained from making, vending, or offering for sale, or in any manner disposing of any preparation, mixture, compound, or nostrum, having around or upon the same, or in connection therewith, or the bottles or other vessels containing the same, any cover, wrapper, envelope, label, bill, circular, notice, advertisement, or other

formula, in the terms, or to the purport or effect of the cover, wrapper, envelope, label, bill, circular, notice, advertisement, or other formula in the plaintiff's bill, stated to have been used by the said defendant; or any other cover, wrapper, envelope, label, bill, circular, notice, advertisement, or other formula of any kind, containing any testimonial in favour of the plaintiff's medicine, or medical preparation, in the said bill described as "Franks's Specific Solution of Copaiba," or in which any statement or representation is made or contained, indicating or implying, or tending to induce the public or purchasers to suppose, that such preparation, mixture, compound, or nostrum is the same as "Franks's Specific Solution of Copaiba," or referred to in connection with any preparation, mixture, compound, or nostrum, made, vended, or disposed of, by the said defendant, or the said firm, or in which any use is made of the character and reputation of the plaintiff, or his said Specific Solution of Copaiba, and from publishing or circulating, or causing to be published or circulated, or in any manner using such cover, wrapper, envelope, label, bill, circular, notice, advertisement, or formula, as aforesaid.

43. *Injunction—Imitating Plaintiff's Line of Omnibuses.*

Let an injunction be awarded to restrain the defendant, Robert Morgan, his servants and agents, from running, or in any manner using, or causing to be used, for the conveyance of passengers, his omnibus, in the bill mentioned, or any other omnibus, having painted, stamped, printed, or written thereon, the words or names "Londor. Conveyance," or "Original Conveyance for Company," or any other names, words, or devices painted, stamped, printed, or written thereon, in such manner as to form or be a colourable imitation of the names, words, and devices painted, stamped, printed, or written on the omnibuses of the plaintiffs, and let the defendant pay to the plaintiffs their costs of this application. *Knott* v. *Morgan*, 2 Keen. 219.

44. *Injunction—Trade Name.*

Let the defendant, his servants, &c., be restrained from painting or otherwise affixing the name of the plaintiff on or to the door or outside of the defendant's shop, or on the bill-heads, circulars, or advertisements used in his business, or from otherwise using the plaintiff's name in such a manner as to lead to the belief that the defendant was carrying on his former partnership business with the plaintiff, or that the plaintiff was in any way interested in the defendant's business. *Hookham* v. *Pottage*, L. R. 8 Ch. 92.

45. *Injunction—Trade Name.*

Scott v. *Scott*, 18 L. T. (N.S.) 145.

Injunction granted to restrain the defendants from allowing or permitting the brass plate so affixed by the defendants to the door of the premises in Regent Street, to remain affixed with any inscription thereon representing or holding out to the customers of the late partnership of Robert and Walter Scott, or to any other person whatsoever, that they are carrying on business in continuation of or in succession to the business carried on by the late firm of Robert and Walter Scott.

APPENDIX B.

STATUTES.

8 ANNE, c. 19.

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. [1709.]

(Repealed, 5 & 6 Vict. c. 45, s. 1.)

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8 GEO. II. c. 13.

An Act for the Encouragement of the Arts of Designing, Engraving, and Etching historical and other Prints, by vesting the properties thereof in the Inventors and Engravers, during the time therein mentioned. [1735.]

WHEREAS divers persons have by their own genius, industry, pains, and expense, invented and engraved, or worked in mezzotinto or chiaro oscuro, sets of historical and other prints, in hope to have reaped the sole benefit of their labours: *Preamble.*

And whereas printsellers, and other persons, have of late, without the consent of the inventors, designers, and proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing, or causing to be copied, engraved, and published, base copies of such works, designs, and prints, to the very great prejudice and detriment of the inventors, designers, and proprietors thereof:

For remedy thereof, and for preventing such practices for the future, may it please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the twenty-fourth day of June, which shall be in the year of our Lord one thousand seven hundred and thirty-five, every person who shall invent and design, engrave, etch, or work in mezzotinto or chiaro oscuro, or, from his own works and invention, shall cause to be designed and engraved, etched, or worked in mezzotinto or chiaro oscuro, any historical or other print or prints, shall have the sole right and liberty of print- *After 24 June, 1735, the property of historical and other prints vested in*

Sir Isaac Newton for 14 years.

Proprietor's names to be affixed to each print.

Penalty on printsellers or others printing same.

ing and reprinting the same for the term of fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints; and that if any printseller, or other person whatsoever, from and after the said twenty-fourth day of June, one thousand seven hundred and thirty-five, within the time limited by this Act, shall engrave, etch, or work, as aforesaid, or in any other manner copy and sell, or cause to be engraved, etched, or copied and sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause to be printed, reprinted, or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him or them respectively, in the presence of two or more credible witnesses, or knowing the same to be so printed or reprinted without the consent of the proprietor or proprietors, shall publish, sell, or expose to sale, or otherwise, or in any other manner dispose of, or cause to be published, sold, or exposed to sale, or otherwise, or in any other manner disposed of, any such print or prints without such consent first had and obtained as aforesaid, then such offender or offenders shall forfeit the plate or plates on which such print or prints are or shall be copied, and all and every sheet or sheets (being part of or whereon such print or prints are or shall be so copied or printed) to the proprietor or proprietors of such original print or prints, who shall forthwith destroy and damask the same; and further, that every such offender or offenders shall forfeit five shillings for every print which shall be found in his, her, or their custody, either printed or published, and exposed to sale, or otherwise disposed of contrary to the true intent and meaning of this Act, the one moiety thereof to the King's most excellent Majesty, his heirs and successors, and the other moiety thereof to any person or persons that shall sue for the same, to be recovered in any of his Majesty's Courts of Record at Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoign, privilege, or protection, or more than one imparlance, shall be allowed:

Not to extend to purchasers of plates from the original proprietors.

II. Provided, nevertheless, That it shall and may be lawful for any person or persons, who shall hereafter purchase any plate or plates for printing, from the original proprietors thereof, to print and reprint from the said plates, without incurring any of the penalties in this Act mentioned.

Limitation of actions.

III. And be it further enacted by the authority aforesaid, That if any action or suit shall be commenced or brought against any person or persons whatsoever, for doing or causing to be done any thing in pursuance of this Act, the same shall be brought within the space of three months after so doing; and the defendant and defendants, in such action or suit, shall or may plead the general

issue, and give the special matter in evidence; and if upon such action or suit a verdict shall be given for the defendant or defendants, or if the plaintiff or plaintiffs become nonsuited, or discontinue his, her, or their action or actions, then the defendant or defendants shall have and recover full costs, for the recovery whereof he shall have the same remedy, as any other defendant or defendants in any other case hath or have by law: *General issue.*

IV. Provided always, and be it further enacted by the authority aforesaid, That if any action or suit shall be commenced or brought against any person or persons, for any offence committed against this Act, the same shall be brought within the space of three months after the discovery of every such offence, and not afterwards; anything in this Act contained to the contrary notwithstanding:

V. And be it further enacted by the authority aforesaid, That this Act shall be deemed, adjudged, and taken to be a public Act, and be judicially taken notice of as such by all judges, justices, and other persons whatsoever, without specially pleading the same. *Public Act.*

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12 GEO. II. c. 36.

An Act for prohibiting the Importation of Books reprinted abroad, and first composed or written, and printed in Great Britain; and for repealing so much of an Act made in the 8th year of her late Majesty Queen Anne, as empowers the limiting the prices of books. [1739.]

(Repealed, 30 & 31 Vict. c. 59.)

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7 GEO. III. c. 38.

An Act to amend and render more effectual an Act made in the eighth year of the reign of King George the Second, for encouragement of the Arts of Designing, Engraving, and Etching, Historical and other Prints; and for vesting in, and securing to, Jane Hogarth, widow, the property in certain prints. [1767.]

I. WHEREAS an Act of Parliament passed in the eighth year of the reign of his late Majesty King George the Second, intituled "An Act for the Encouragement of the Arts of Designing, Engraving, and Etching Historical and other Prints, by vesting the properties thereof in the Inventors and Engravers, during the time therein mentioned," has been found ineffectual for the purposes *Preamble, reciting Act 8 G. 2.*

thereby intended: Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the first day of January, one thousand seven hundred and sixty-seven, all and every person and persons who shall invent or design, engrave, etch, or work in mezzotinto or chiaro oscuro, or, from his own work, design, or invention, shall cause or procure to be designed, engraved, etched, or worked in mezzotinto or chiaro oscuro, any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, shall have, and are hereby declared to have, the benefit and protection of the said Act, and this Act, under the restrictions and limitations hereinafter mentioned.

The original inventors, designers, or engravers, &c., of historical and other prints, and such who shall cause prints to be done from works, &c., of their own invention,

and also such as shall engrave, &c., any print taken from any picture, drawing, model, or sculpture, are entitled to the benefit and protection of the recited and present Act; and those who shall engrave or import for sale copies of such prints are liable to penalties.

II. And be it further enacted by the authority aforesaid, that from and after the said first day of January, one thousand seven hundred and sixty seven, all and every person and persons who shall engrave, etch, or work in mezzotinto or chiaro oscuro, or cause to be engraved, etched, or worked, any print taken from any picture, drawing, model, or sculpture, either ancient or modern, shall have, and are hereby declared to have, the benefit and protection of the said Act, and this Act, for the term hereinafter mentioned, in like manner as if such print had been graved or drawn from the original design of such graver, etcher, or draughtsman; and if any person shall engrave, print, and publish, or import for sale, any copy of any such print, contrary to the true intent and meaning of this and the said former Act, every such person shall be liable to the penalties contained in the said Act, to be recovered as therein and hereinafter is mentioned.

Penalties may be sued for as by the recited Act is directed; and be recovered with full costs;

V. And be it further enacted by the authority aforesaid, That all and every the penalties and penalty inflicted by the said Act, and extended, and meant to be extended, to the several cases comprised in this Act, shall and may be sued for and recovered in like manner, and under the like restrictions and limitations, as in and by the said Act is declared and appointed; and the plaintiff or common informer in every such action (in case such plaintiff or common informer shall recover any of the penalties incurred by this or the said former Act) shall recover the same, together with his full costs of suit.

provided the prosecution be commenced within 6 months after the fact.

VI. Provided also, That the party prosecuting shall commence his prosecution within the space of six calendar months after the offence committed.

The right

VII. And be it further enacted by the authority aforesaid, That

the sole right and liberty of printing and reprinting intended to be secured and protected by the said former Act and this Act, shall be extended, continued, and be vested in the respective proprietors, for the space of twenty-eight years, to commence from the day of the first publishing of any of the works respectively hereinbefore and in the said former Act mentioned.

Intended to be secured by this and the former Act, vested in the proprietors for the term of 28 years from the first publication.

Limitation of actions.

VIII. And be it further enacted by the authority aforesaid, That if any action or suit shall be commenced or brought against any person or persons whatsoever for doing, or causing to be done, anything in pursuance of this Act, the same shall be brought within the space of six calendar months after the fact committed; and the defendant or defendants in any such action or suit shall or may plead the general issue, and give the special matter in evidence; and if, upon such action or suit, a verdict shall be given for the defendant or defendants, or if the plaintiff or plaintiffs become nonsuited, or discontinue his, her, or their action or actions, then the defendant or defendants shall have and recover full costs; for the recovery whereof he shall have the same remedy as any other defendant or defendants, in any other case, hath or have by law.

General issue.

Full costs.

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15 GEO. III. c. 53.

An Act for enabling the two Universities in England, the four Universities in Scotland, and the several Colleges of Eton, Westminster, and Winchester, to hold in perpetuity their Copyright in Books, given or bequeathed to the said Universities and Colleges for the advancement of useful learning and other purposes of education; and for Amending so much of an Act of the 8th year of the reign of Queen Anne as relates to the delivery of Books to the Warehouse-keeper of the Stationers' Company, for the use of the several Libraries therein mentioned.

[1775.]

(This Act, with the exception of sects. 6 and 7, repealed by 24 & 25 Vict. c. 101, is still in force, but its provisions are without the scope of this work.)

17 GEO. III. c. 57.

An Act for more effectually securing the Property of Prints to Inventors and Engravers, by enabling them to sue for and recover Penalties in certain cases. [1777.]

Recital of Acts 8 G. 2, and 7 G. 3.

WHEREAS an Act of Parliament passed in the eighth year of the reign of his late Majesty King George the Second, intituled, "An Act for the Encouragement of the Arts of Designing, Engraving, and Etching Historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers, during the time therein mentioned:" And whereas by an Act of Parliament, passed in the seventh year of the reign of his present Majesty, for amending and rendering more effectual the aforesaid Act, and for other purposes therein mentioned, it was (among other things) enacted, that, from and after the first day of January, one thousand seven hundred and sixty-seven, all and every person or persons who should engrave, etch, or work in mezzotinto or chiaro oscuro, or cause to be engraved, etched, or worked, any print taken from any picture, drawing, model, or sculpture, either ancient or modern, should have, and were thereby declared to have, the benefit and protection of the said former Act, and that Act, for the term thereinafter mentioned, in like manner as if such print had been graved or drawn from the original design of such graver, etcher, or draughtsman: And whereas the said Acts have not effectually answered the purposes for which they were intended, and it is necessary, for the encouragement of artists, and for securing to them the property of and in their works, and for the advancement and improvement of the aforesaid arts, that such further provisions should be made as are hereinafter mentioned and contained; *May it therefore* please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that, from and after the twenty-fourth day of June, one thousand seven hundred and seventy-seven, if any engraver, etcher, printseller, or other person, shall, within the time limited by the aforesaid acts, or either of them, engrave, etch, or work, or cause or procure to be engraved, etched, or worked, in mezzotinto or chiaro oscuro, or otherwise, or in any other manner copy in the whole, or in part, by varying, adding to, or diminishing from, the main design, or shall print, reprint, or import for sale, or cause or procure to be printed, reprinted, or imported for sale, or shall publish, sell, or otherwise dispose of, or cause or procure to be published, sold, or otherwise disposed of, any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation,

After June 24, 1777, if any engraver, etc., shall within the time limited by the aforesaid Acts, engrave or etch, etc., any print, without the consent of the pro-

landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, which hath or have been, or shall be, engraved, etched, drawn, or designed, in any part of Great Britain, without the express consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of and attested by two or more credible witnesses, then every such proprietor or proprietors shall and may, by and in a special action upon the case, to be brought against the person or persons so offending, recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry thereon, shall give or assess, together with double costs of suit. (*So much as relates to double costs repealed*, 21 & 25 *Vict.* c. 101.)

printer, he shall be liable to damages, and double costs.

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27 GEO. III. c. 38.

An Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Calicos, and Muslins, by vesting the properties thereof in the Designers, Printers, and Proprietors for a limited time. [1787.]

(Repealed, 5 & 6 Vict. c. 100.)

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29 GEO. III. c. 10.)

An Act for continuing an Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Calicoes, and Muslins, by vesting the properties thereof in the Designers, Printers, and Proprietors for a limited time. [1780.]

(Repealed, 5 & 6 Vict. c. 100.)

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34 GEO. III. c. 23.

An Act for amending and making perpetual an Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Calicoes, and Muslins, by vesting the properties thereof in the Designers, Printers, and Proprietors for a limited period. [1794.]

(Repealed, 5 & 6 Vict. c. 100.)

38 GEO. III. c. 71.

An Act for Encouraging the Art of making New Models and Casts of Busts, and other things therein mentioned. [1798.]

(Repealed, 24 & 25 Vic. c. 101.)

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41 GEO. III. c. 107.

An Act for the further encouragement of Learning in the United Kingdom of Great Britain and Ireland, by securing the Copies and Copyright of printed Books to the authors of such Books, or their assigns, for the time herein mentioned. [1801.]

(Repealed, 5 & 6 Vict. c. 45.)

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54 GEO. III. c. 56.

An Act to amend and render more effectual an Act of his present Majesty, for encouraging the Art of making new Models and Casts of Busts, and other things therein mentioned; and for giving further encouragement to such Arts. [18th May, 1814.]

38 G. 3, c. 71.

WHEREAS by an Act, passed in the thirty-eighth year of the reign of his present Majesty, intituled, "An Act for encouraging the Art of making new Models and Casts of Busts, and other things therein mentioned," the sole right and property thereof were vested in the original proprietors, for a time therein specified: And whereas the provisions of the said Act having been found ineffectual for the purposes thereby intended, it is expedient to amend the same, and to make other provisions and regulations for the encouragement of artists, and to secure to them the profits of and in their works, and for the advancement of the said arts: May it therefore please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this Act, every person or persons who shall make or cause to be made any new and original sculpture, or model, or copy, or cast, of the human figure or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals, or of any part or parts of any animal combined with the human figure, or other-

The sole right and property of all new and original sculpture, models, copies,

wise, or of any subject being matter of invention in sculpture or of any alto or basso-relievo representing any of the matters or things hereinbefore mentioned, or any cast from nature of the human figure, or of any part or parts of the human figure, or of any cast from nature of any animal, or of any part or parts of any animal, or of any such subject containing or representing any of the matters and things hereinbefore mentioned, whether separate or combined, shall have the sole right and property of all and in every such new and original sculpture, model, copy, and cast of the human figure or human figures, and of all and in every such bust or busts, and of all and in every such part or parts of the human figure, clothed in drapery or otherwise, and of all and in every such new and original sculpture, model, copy and cast, representing any animal or animals, and of all and in every such work representing any part or parts of any animal combined with the human figure or otherwise, and of all and in every such new and original sculpture, model, copy, and cast of any subject, being matter of invention in sculpture, and of all and in every such new and original sculpture, model, copy and cast in alto or basso-relievo, representing any of the matters or things hereinbefore mentioned, and of every such cast from nature, for the term of fourteen years from first putting forth or publishing the same; provided, in all and in every case, the proprietor or proprietors do cause his, her, or their name or names, with the date, to be put on all and every such new and original sculpture, model, copy, or cast, and on every such cast from nature, before the same shall be put forth or published.

and casts, vested in the proprietors, for 14 years.

II. And be it further enacted, That the sole right and property of all works, which have been put forth or published under the protection of the said recited Act, shall be extended, continued to and vested in the respective proprietors thereof, for the term of fourteen years, to commence from the date when such last-mentioned works respectively were put forth or published.

Works published under the recited Act, vested in the proprietors for 14 years.

III. And be it further enacted, That if any person or persons shall, within such term of fourteen years, make or import, or cause to be made or imported, or exposed to sale, or otherwise disposed of, any pirated copy or pirated cast of any such new and original sculpture, or model or copy, or cast of the human figure or human figures, or of any such bust or busts, or of any such part or parts of the human figure, clothed in drapery or otherwise, or of any such work of any animal or animals, or of any such part or parts of any animal or animals combined with the human figure or otherwise, or of any such subject being matter of invention in sculpture, or of any such alto or basso-relievo representing any of the matters or things hereinbefore mentioned, or of any such cast from nature as aforesaid, whether such pirated copy or pirated cast be produced by moulding or copying from, or imitating in any way, any of the matters or things put forth or published under the protection of

Persons putting forth pirated copies or pirated casts, may be prosecuted.

this Act, or of any works which have been put forth or published under the protection of the said recited Act, the right and property whereof is and are secured, extended and protected by this Act, in any of the cases as aforesaid, to the detriment, damage, or loss of the original or respective proprietor or proprietors of any such works so pirated; then and in all such cases the said proprietor or proprietors, or their assignee or assignees, shall and may, by and in a special action upon the case to be brought against the person or persons so offending, receive such damages as a jury on a trial of such action shall give or assess, together with double costs of suit. *(See 5 & 6 Vict. c. 97, s. 2, as to double costs.)*

Damages and double costs.

Purchasers of copyright secured in the same.

IV. Provided nevertheless, That no person or persons who shall or may hereafter purchase the right or property of any new and original sculpture or model, or copy or cast, or of any cast from nature, or of any of the matters and things published under or protected by virtue of this Act, of the proprietor or proprietors, expressed in a deed in writing signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of and attested by two or more credible witnesses, shall be subject to any action for copying or casting, or vending the same, anything contained in this Act to the contrary notwithstanding.

Limitation of actions.

V. Provided always, and be it further enacted, That all actions to be brought as aforesaid, against any person or persons, for any offence committed against this Act, shall be commenced within six calendar months next after the discovery of every such offence, and not afterwards.

An additional term of 14 years, in case the maker of the original sculpture, &c., shall be living.

VI. Provided always, and be it further enacted, That from and immediately after the expiration of the said term of fourteen years, the sole right of making and disposing of such new and original sculpture, or model, or copy, or cast of any of the matters or things hereinbefore mentioned, shall return to the person or persons who originally made or caused to be made the same, if he or they shall be then living, for the further term of fourteen years.

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54 GEO. III. c. 156.

An Act to amend the several Acts for the encouragement of Learning, by securing the Copies and Copyright of printed Books to the Authors of such Books, or their Assigns. [1814.]

(Repealed, 5 & 6 Vict. c. 45.)

3 & 4 WILL. IV. c. 15.

An Act to amend the Laws relating to Dramatic Literary Property.

[10th June, 1833.]

I. WHEREAS by an Act passed in the fifty-fourth year of the reign of his late Majesty King George the Third, intituled "An Act to amend the several Acts for the encouragement of Learning, by securing the Copies and Copyright of printed Books to the Authors of such Books, or their Assigns," it was amongst other things provided and enacted, That from and after the passing of the said Act, the author of any book or books composed, and not printed or published, or which should thereafter be composed and printed and published, and his assignee or assigns, should have the sole liberty of printing and reprinting such book or books for the full term of twenty-eight years, to commence from the day of first publishing the same, and also, if the author should be living at the end of that period, for the residue of his natural life: And whereas it is expedient to extend the provisions of the said Act: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this Act, the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, or which hereafter shall be composed, and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British Dominions, any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof: and that the author of any such production, printed and published within ten years before the passing of this Act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of passing this Act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall

The author of any dramatic piece shall have as his property the sole liberty of representing it or causing it to be represented at any place of dramatic entertainment.

Proviso as to cases where previous to the passing of this Act, a consent has been given.

be deemed and taken to be the proprietor thereof: Provided nevertheless, that nothing in this Act contained shall prejudice, alter, or affect the right or authority of any person to represent or cause to be represented, at any place or places of dramatic entertainment whatsoever, any such production as aforesaid, in all cases in which the author thereof or his assignee shall, previously to the passing of this Act, have given his consent to or authorised such representation, but that such sole liberty of the author or his assignee shall be subject to such right or authority.

Penalty on persons performing pieces contrary to this Act.

II. And be it further enacted, That if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act, or right of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this Act, to be recovered, together with double costs of suit, by such author or other proprietors, in any Court having jurisdiction in such cases in that part of the said United Kingdom or of the British Dominions in which the offence shall be committed; and in every such proceeding where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same.

Limitation of actions.

III. Provided nevertheless, and be it further enacted, That all actions or proceedings for any offence or injury that shall be committed against this Act, shall be brought, sued, and commenced within twelve calendar months next after such offence committed, or else the same shall be void and of no effect.

Explanation of words.

IV. And be it further enacted, That whenever authors, persons, offenders, or others are spoken of in this Act in the singular number, or in the masculine gender, the same shall extend to any number of persons and to either sex.

5 & 6 WILL. IV. c. 65.

An Act for preventing the Publication of Lectures without Consent.
[9th September, 1835.]

I. WHEREAS printers, publishers, and other persons have frequently taken the liberty of printing and publishing lectures delivered upon divers subjects, without the consent of the authors of such lectures, or the persons delivering the same in public, to the great detriment of such authors and lecturers: Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the first day of September, one thousand eight hundred and thirty-five, the author of any lecture and lectures, or the person to whom he hath sold or otherwise conveyed the copy thereof, in order to deliver the same in any school, seminary, institution, or other place, or for any other purpose, shall have the sole right and liberty of printing and publishing such lecture or lectures; and that if any person shall, by taking down the same in shorthand or otherwise in writing, or in any other way, obtain or make a copy of such lecture or lectures, and shall print or lithograph or otherwise copy and publish the same, or cause the same to be printed, lithographed, or otherwise copied and published, without leave of the author thereof, or of the person to whom the author thereof hath sold or otherwise conveyed the same, and every person who, knowing the same to have been printed or copied and published without such consent, shall sell, publish, and expose to sale, or cause to be sold, published, or exposed to sale, any such lecture or lectures, shall forfeit such printed or otherwise copied lecture or lectures, or parts thereof, together with one penny for every sheet thereof which shall be found in his custody, either printed, lithographed, or copied, or printing, lithographing, or copying, published or exposed to sale, contrary to the true intent and meaning of this Act, the one moiety thereof to his Majesty, his heirs or successors, and the other moiety thereof to any person who shall sue for the same, to be recovered in any of his Majesty's courts of record in Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoign, privilege, or protection, or more than one imparlance, shall be allowed.

Authors of lectures, or their assigns, to have the sole right of publishing them.

Penalty on other persons publishing, &c., lectures without leave.

II. And be it further enacted, That any printer or publisher of any newspaper who shall, without such leave as aforesaid, print and publish in such newspaper any lecture or lectures, shall be deemed and taken to be a person printing and publishing without leave within the provisions of this Act, and liable to the

Penalty on printers or publishers of newspapers publishing

lectures without leave.

aforesaid forfeitures and penalties in respect of such printing and publishing.

Persons having leave to attend lectures, not on that account licensed to publish them.

III. And be it further enacted, That no person allowed for certain fee and reward, or otherwise, to attend and be present at any lecture delivered in any place, shall be deemed and taken to be licensed or to have leave to print, copy, and publish such lectures only because of having leave to attend such lecture or lectures.

Act not to prohibit the publishing of lectures after expiration of the copyright.

8 *Anne*, c. 19.

54 *G.* 3, c. 156.

IV. Provided always, That nothing in this Act shall extend to prohibit any person from printing, copying, and publishing, any lecture or lectures which have or shall have been printed and published with leave of the authors thereof or their assignees, and whereof the time hath or shall have expired within which the sole right to print and publish the same is given by an Act passed in the eighth year of the reign of Queen Anne, intituled "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned," and by another Act passed in the fifty-fourth year of the reign of King George the Third, intituled "An Act to Amend the several Acts for the Encouragement of Learning, by securing the Copies and Copyright of Printed Books to the Authors of such Books, or their Assigns," or to any lectures which have been printed or published before the passing of this Act (8 *Anne*, c. 19 & 54 *Geo. III.* c. 156, *repealed by* 5 & 6 *Vict.* c. 45).

Act not to extend to lectures delivered in unlicensed places, &c.

V. Provided further, That nothing in this Act shall extend to any lecture or lectures, or the printing, copying, or publishing any lecture or lectures, or parts thereof, of the delivering of which notice in writing shall not have been given to two justices living within five miles from place where such lecture or lectures shall be delivered, two days at the least before delivering the same, or to any lecture or lectures delivered in any University or public school or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation; and that the law relating thereto shall remain the same as if this Act had not been passed.

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6 & 7 WILL. IV. c. 59.

An Act to Extend the Protection of Copyright in Prints and Engravings to Ireland. [13th August, 1836.]

The following is the effect of the sections.

1. Provisions of 17 Geo. III. c. 57 extended to Ireland.
2. Any person who engraves any print published in any part of Great Britain or Ireland, without the consent of the

proprietor had and obtained, in writing, signed, &c., in the presence of and attested by two or more witnesses, liable to a separate action on the case for damages.

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1 & 2 VICT. c. 59.

International Copyright Act (1838).

(Repealed by 7 Vict. c. 12.)

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2 VICT. c. 13.

An Act for Extending the Copyright of Designs for Calico Printing to Designs for Printing other Woven Fabrics. [1839.]

(Repealed, 5 & 6 Vict. c. 100.)

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2 VICT. c. 17.

An Act to Secure to Proprietors of Designs for Articles of Manufacture the Copyright of such Designs for a limited time. [1839.]

(Repealed, 5 & 6 Vict. c. 100.)

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5 & 6 VICT. c. 45.

An Act to amend the Law of Copyright.

[1st July, 1842.]

I. WHEREAS it is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from the passing of this Act an Act passed in the eighth year of the reign of her Majesty Queen Anne, intituled "an Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies during the times

Repeal of former Acts; 8 *Anne*, c. 19.

therein mentioned;" and also an Act passed in the forty-first year of the reign of his Majesty King George III., intituled "an
41 G. 3, c. 107. Act for the further encouragement of learning in the United Kingdom of Great Britain and Ireland, by securing the copies and copyright of printed books to the authors of such books, or their assigns, for the time therein mentioned;" and also an Act passed in the fifty-fourth year of the reign of his Majesty King George
54 G. 3, c. 156. III., intituled "an Act to amend the several Acts for the encouragement of learning, by securing the copies and copyright of printed books to the authors of such books, or their assigns, be and the same are hereby repealed, except so far as the continuance of either of them may be necessary for carrying on or giving effect to any proceedings at law or in equity pending at the time of passing this Act, or for enforcing any cause of action or suit, or any right or contract, then subsisting.

Interpretation of Act. II. And be it enacted, that in the construction of this Act the word "book" shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published; that the words "dramatic piece" shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment; that the word "copyright" shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied; that the words "personal representative" shall be construed to mean and include every executor, administrator, and next of kin entitled to administration; that the word "assigns" shall be construed to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise; that the words "British Dominions" shall be construed to mean and include all parts of the United Kingdom of Great Britain and Ireland, the islands of Jersey and Guernsey, all parts of the East and West Indies, and all the colonies, settlements, and possessions of the crown which now are or hereafter may be acquired; and that whenever in this Act, in describing any person, matter, or thing, the word importing the singular number or the masculine gender only is used, the same shall be understood to include and to be applied to several persons as well as one person, and females as well as males, and several matters or things as well as one matter or thing, respectively, unless there shall be something in the subject or context repugnant to such construction.

Endurance of term of copyright in any book here- III. And be it enacted, that the copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time

of his death, and shall be the property of such author and his assigns: Provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns.

after to be published in the lifetime of the author; if published after the author's death.

IV. And whereas it is just to extend the benefits of this Act to authors of books published before the passing thereof, and in which copyright still subsists; be it enacted, that the copyright which at the time of passing this Act shall subsist in any book heretofore published (except as hereinafter mentioned) shall be extended and endure for the full term provided by this Act in cases of books thereafter published, and shall be the property of the person who at the time of passing of this Act shall be the proprietor of such copyright: Provided always, that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this Act, but shall endure for the term which shall subsist therein at the time of passing of this Act, and no longer, unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright shall, before the expiration of such term, consent and agree to accept the benefits of this Act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to this Act annexed to be entered in the book of registry hereinafter directed to be kept, in which case such copyright shall endure for the full term by this Act provided in cases of books to be published after the passing of this Act, and shall be the property of such person or persons as in such minute shall be expressed.

In cases of subsisting copyright, the term to be extended, except when it shall belong to an assignee for other consideration than natural love and affection; in which case it shall cease at the expiration of the present term, unless its extension be agreed to between the proprietor and the author.

V. And whereas it is expedient to provide against the suppression of books of importance to the public; be it enacted, that it shall be lawful for the Judicial Committee of her Majesty's Privy Council, on complaint made to them that the proprietor of the copyright in any book after the death of its author has refused to republish or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a licence to such complainant to publish such book, in such manner and subject to such conditions as they may think fit, and that it shall be lawful for such complainant to publish such book according to such licence.

Judicial Committee of the Privy Council may licence the republication of books which the proprietor refuses to republish after death of the author.

Copies of books published after the passing of this Act, and of all subsequent editions, to be delivered within certain times at the British Museum.

VI. And be it enacted, that a printed copy of the whole of every book which shall be published after the passing of this Act, together with all maps, prints, or other engravings belonging thereto, finished and coloured in the same manner as the best copies of the same shall be published, and also of any second or subsequent edition which shall be so published with any additions or alterations, whether the same shall be in letter press, or in the maps, prints, or other engravings belonging thereto, and whether the first edition to such book shall have been published before or after the passing of this Act, and also of any second or subsequent edition of every book of which the first or some preceding edition shall not have been delivered for the use of the British Museum, bound, sewed, or stitched together, and upon the best paper on which the same shall be printed, shall, within one calendar month after the day on which any such book shall first be sold, published, or offered for sale within the bills of mortality, or within three calendar months if the same shall first be sold, published, or offered for sale in any other part of the United Kingdom, or within twelve calendar months after the same shall first be sold, published, or offered for sale in any other part of the British dominions, be delivered, on behalf of the publisher thereof, at the British Museum.

Mode of delivering at the British Museum.

VII. And be it enacted, that every copy of any book which under the provisions of this Act ought to be delivered as aforesaid shall be delivered at the British Museum between the hours of ten in the forenoon and four in the afternoon on any day except Sunday, Ash Wednesday, Good Friday, and Christmas Day, to one of the officers of the said museum, or to some persons authorised by the trustees of the said museum to receive the same, and such officer or other person receiving such copy is hereby required to give a receipt in writing for the same, and such delivery shall to all intents and purposes be deemed to be good and sufficient delivery under the provisions of this Act.

A copy of every book to be delivered within a month after demand to the officer of the Stationers' Company, for the following libraries; the Bodleian at Oxford,

VIII. And be it enacted, that a copy of the whole of every book, and of any second or subsequent edition of every book containing additions and alterations, together with all maps and prints belonging thereto, which after the passing of this Act shall be published, shall, on demand thereof in writing, left at the place of abode of the publisher thereof at any time within twelve months next after the publication thereof, under the hand of the officer of the Company of Stationers who shall from time to time be appointed by the said company for the purposes of this Act, or under the hand of any other person thereto authorised by the persons or bodies politic and corporate, proprietors and managers of the libraries following (*videlicet*), the Bodleian Library at Oxford, the Public Library at Cambridge, the Library of the Faculty of Advocates at Edinburgh, the Library of the College of the Holy and

Undivided Trinity of Queen Elizabeth near Dublin, be delivered, upon the paper on which the largest number of copies of such book or edition shall be printed for sale, in the like condition as the copies prepared for sale, by the publisher thereof respectively, within one month after demand made thereof in writing as aforesaid, to the said officer of the said Company of Stationers for the time being, which copies the said officer shall and he is hereby required to receive at the hall of the said company, for the use of the library for which such demand shall be made within such twelve months as aforesaid; and the said officer is hereby required to give a receipt in writing for the same, and within one month after any such book shall be so delivered to him as aforesaid to deliver the same for the use of such library. *the Public Library at Cambridge, the Faculty of Advocates at Edinburgh, and that of Trinity College, Dublin.*

IX. Provided also, and be it enacted, that if any publisher shall be desirous of delivering the copy of such book as shall be demanded on behalf of any of the said libraries at such library, it shall be lawful for him to deliver the same at such library, free of expense, to such librarian or other person authorised to receive the same (who is hereby required in such case to receive and give a receipt in writing for the same), and such delivery shall to all intents and purposes of this Act be held as equivalent to a delivery to the said officers of the Stationers' Company. *Publishers may deliver the copies to the libraries, instead of at the Stationers' Company.*

X. And be it enacted, that if any publisher of any such book, or of any second or subsequent edition of any such book, shall neglect to deliver the same, pursuant to this Act, he shall for every such default forfeit, besides the value of such copy of such book or edition which he ought to have delivered, a sum not exceeding five pounds, to be recovered by the librarian or other officer (properly authorised) of the library for the use whereof such copy should have been delivered, in a summary way, on conviction before two justices of the peace for the county or place where the publisher making default shall reside, or by action of debt or other proceeding of the like nature, at the suit of such librarian or other officer, in any court of record in the United Kingdom, in which action, if the plaintiff shall obtain a verdict, he shall recover his costs reasonably incurred, to be taxed as between attorney and client. *Penalty for default in delivering copies for the use of the libraries.*

XI. And be it enacted, that a book of registry, wherein may be registered, as hereinafter enacted, the proprietorship in the copyright of books, and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright, shall be kept at the hall of the Stationers' Company, by the officer appointed by the said company for the purposes of this Act, and shall at all convenient times be open to the inspection of any person, on payment of one shilling for every entry which shall be searched for or inspected in the said book; and that such officer shall, whenever thereunto reasonably required, give a copy of any entry in such book, certified under his *Book of registry to be kept at Stationers' Hall*

hand, and impressed with the stamp of the said company, to be provided by them for that purpose, and which they are hereby required to provide, to any person requiring the same, on payment to him of the sum of five shillings; and such copies so certified and impressed shall be received in evidence in all courts, and in all summary proceedings, and shall be *prima facie* proof of the proprietorship or assignment of copyright or licence as therein expressed, but subject to be rebutted by other evidence, and in the case of dramatic or musical pieces shall be *prima facie* proof of the right of representation or performance, subject to be rebutted as aforesaid.

Making false entry in the book of registry a misdemeanor.

XII. And be it enacted, that if any person shall wilfully make or cause to be made any false entry in the registry book of the Stationers' Company, or shall wilfully produce or cause to be tendered in evidence any paper falsely purporting to be a copy of any entry in the said book, he shall be guilty of an indictable misdemeanor, and shall be punished accordingly.

Entries of copyright may be made in the book of registry.

XIII. And be it enacted, that after the passing of this Act it shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the registry book of the Stationers' Company of the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright in the form in that behalf given in the schedule to this Act annexed, upon payment of the sum of five shillings to the officer of the said company; and that it shall be lawful for every such registered proprietor to assign his interest, or any portion of his interest therein, by making entry in the said book of registry of such assignment, and of the name and place of abode of the assignee thereof, in the form given in that behalf in the said schedule, on payment of the like sum; and such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed.

Persons aggrieved by any entry in the book of registry may apply to a court of law in term, or judge in vacation, who may order such entry to be varied or expunged.

XIV. And be it enacted, that if any person shall deem himself aggrieved by any entry made under colour of this Act in the said book of registry, it shall be lawful for such person to apply by motion to the Court of Queen's Bench, Court of Common Pleas, or Court of Exchequer, in Term time, or to apply by summons to any judge of either of such Courts in Vacation, for an order that such entry may be expunged or varied; and that upon any such application by motion or summons to either of the said courts, or to a judge as aforesaid, such court or judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to such court or judge shall seem just; and the officer appointed by the Stationers' Company for the purposes of this Act, shall, on

the production to him of any such order for expunging or varying any such entry, expunge or vary the same according to the requisitions of such order.

Remedy for the piracy of books by action on the case.

XV. And be it enacted, that if any person shall, in any part of the British dominions, after the passing of this Act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession, for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in any Court of Record in that part of the British dominions in which the offence shall be committed: Provided always, that in Scotland such offender shall be liable to an action in the Court of Session in Scotland, which shall and may be brought and prosecuted in the same manner in which any other action of damages to the like amount may be brought and prosecuted there.

In actions for piracy the defendant to give notice of the objections to the plaintiff's title on which he means to rely.

XVI. And be it enacted, that after the passing of this Act in any action brought within the British dominions against any person for printing any such book for sale, hire, or exportation, or for importing, selling, publishing, or exposing to sale or hire, or causing to be imported, sold, published, or exposed to sale or hire, any such book, the defendant, on pleading thereto, shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action; and if the nature of his defence be, that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person who he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published, otherwise the defendant in such action shall not at the trial of hearing of such action be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified

in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication with the title, time, and place specified in such notice.

No person except the proprietor, &c., shall import into the British dominions for sale or hire any book first composed, &c., within the United Kingdom, and re-printed elsewhere under penalty of forfeiture thereof, and also of 10l. and double the value.

XVII. And be it enacted, that after the passing of this Act it shall not be lawful for any person, not being the proprietor of the copyright, or some person authorised by him, to import into any part of the United Kingdom, or into any other part of the British dominions, for sale or hire, any printed book first composed or written or printed and published in any part of the said United Kingdom, wherein there shall be copyright, and re-printed in any country or place whatsoever out of the British dominions; and if any person, not being such proprietor or person authorised as aforesaid, shall import or bring, or cause to be imported or brought, for sale or hire, any such printed book, into any part of the British dominions, contrary to the true intent and meaning of this Act, or shall knowingly sell, publish, or expose to sale or let to hire, or have in his possession for sale or hire, any such book, then every such book shall be forfeited, and shall be seized by any officer of customs or excise, and the same shall be destroyed by such officer; and every person so offending, being duly convicted thereof before two justices of the peace for the county or place in which such book shall be found, shall also for every such offence forfeit the sum of ten pounds, and double the value of every copy of such book which he shall so import or cause to be imported into any part of the British dominions, or shall knowingly sell, publish, or expose to sale or let to hire, or shall cause to be sold, published, or exposed to sale or let to hire, or shall have in his possession for sale or hire, contrary to the true intent and meaning of this Act, five pounds to the use of such officer of customs or excise, and the remainder of the penalty to the use of the proprietor of the copyright in such book.

Books may be seized by officers of customs or excise.

As to the copyright in encyclopædias, periodicals, and works published in a series, reviews, or magazines.

XVIII. And be it enacted, that when any publisher or other person shall, before or at the time of the passing of this Act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume,

part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act; except only that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act: Provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assigns: Provided also, that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid.

Proviso for authors who have reserved the right of publishing their articles in a separate form.

XIX. And be it enacted, that the proprietor of the copyright in any encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts, shall be entitled to all the benefits of the registration at Stationers' Hall under this Act, on entering in the said book of registry the title of such encyclopædia, review, periodical work, or other work published in a series of books or parts, the time of the first publication of the first volume, number, or part thereof, or of the first number or volume first published after the passing of this Act in any such work which shall have been published heretofore, and the name and place of abode of the proprietor thereof, and of the publisher thereof, when such publisher shall not also be the proprietor thereof.

Proprietors of encyclopædias, periodicals, and works published in a series may enter at once at Stationers' Hall, and thereon have the benefit of the registration of the whole.

XX. And whereas an Act was passed in the third year of the reign of his late Majesty, to amend the law relating to dramatic literary property, and it is expedient to extend the term of the sole liberty, of representing dramatic pieces given by that Act to the full time by this Act provided for the continuance of copyright: And whereas it is expedient to extend to musical compositions the benefits of that Act and also of this Act; be it therefore enacted, that the provisions of the said Act of his late Majesty, and of this Act, shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composi-

The provisions of 3 & 4 W. 4, c. 15, extended to musical compositions, and the term of copyright, as provided by this Act, applied to the liberty

Of representing dramatic pieces and musical compositions.

tion, shall endure and be the property of the author thereof, and his assigns, for the term in this Act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this Act, to the first publication of any book: Provided always, that in case of any dramatic piece or musical composition in manuscript, it shall be sufficient for the person having the sole liberty of representing or performing, or causing to be represented or performed the same, to register only the title thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor thereof, and the time and place of its first representation or performance.

Proprietors of right of dramatic representations shall have all the remedies given by 3 & 4 W. 4, c. 15.

XXI. And be it enacted, that the person who shall at any time have the sole liberty of representing such dramatic piece or musical composition shall have and enjoy the remedies given and provided in the said Act of the third and fourth years of the reign of his late Majesty King William the Fourth, passed to amend the laws relating to dramatic literary property, during the whole of his interest therein, as fully as if the same were re-enacted in this Act.

Assignment of copyright of a dramatic piece not to convey right of representation.

XXII. And be it enacted, that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment.

Books pirated shall become the property of the proprietor of the copyright, and may be recovered by action.

XXIII. And be it enacted, that all copies of any book wherein there shall be copyright, and of which entry shall have been made in the said registry book, and which shall have been unlawfully printed or imported without the consent of the registered proprietor of such copyright, in writing under his hand first obtained, shall be deemed to be the property of the proprietor of such copyright, and who shall be registered as such, and such registered proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same, or damages for the detention thereof, in an action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover.

No proprietor of copyright

XXIV. And be it enacted, that no proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action or suit, at law or in equity, or any

summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made, in the book of registry of the Stationers' Company, of such book, pursuant to this Act: Provided always, that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid: Provided also, that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the Act passed in the third year of the reign of His late Majesty King William the Fourth, to amend the laws relating to dramatic literary property, or of this Act, although no entry shall be made in the book of registry aforesaid.

commencing after this Act shall sue or proceed for any infringement before making entry in the book of registry. Proviso for dramatic pieces.

XXV. And be it enacted, that all copyright shall be deemed personal property, and shall be transmissible by bequest, or, in case of intestacy, shall be subject to the same law of distribution as other personal property, and in Scotland shall be deemed to be personal and movable estate.

Copyright shall be personal property.

XXVI. And be it enacted, that if any action or suit shall be commenced or brought against any person or persons whomsoever for doing or causing to be done anything in pursuance of this Act, the defendant or defendants in such action may plead the general issue, and give the special matter in evidence; and if upon such action a verdict shall be given for the defendant, or the plaintiff shall become nonsuited, or discontinue his action, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant in any case by law hath; and that all actions, suits, bills, indictments, or informations, for any offence that shall be committed against this Act shall be brought, sued, and commenced within twelve calendar months next after such offence committed, or else the same shall be void and of none effect; provided that such limitation of time shall not extend or be construed to extend to any actions, suits, or other proceedings which under the authority of this Act shall or may be brought, sued, or commenced for or in respect of any copies of books to be delivered for the use of the British Museum, or of any one of the four libraries hereinbefore mentioned.

General issue.

Limitation of actions; not to extend to actions, &c., in respect of the delivery of books.

XXVII. Provided always, and be it enacted, that nothing in this Act contained shall affect or alter the rights of the two universities of Oxford and Cambridge, the colleges or houses of learning within the same, the four universities in Scotland, the college of the Holy and Undivided Trinity of Queen Elizabeth near Dublin, and the several colleges of Eton, Westminster, and Winchester, in any copyrights heretofore and now vested or hereafter to be vested in such universities and colleges respectively, anything to the contrary herein contained notwithstanding.

Saving the rights of the Universities and the Colleges of Eton, Westminster, and Winchester.

Saving all subsisting rights, contracts, and engagements.

XXVIII. Provided also, and be it enacted, that nothing in this Act contained shall affect, alter or vary any right subsisting at the time of passing of this Act, except as herein expressly enacted; and all contracts, agreements, and obligations made and entered into before the passing of this Act, and all remedies relating thereto, shall remain in full force, any thing herein contained to the contrary notwithstanding.

Extent of the Act.

XXIX. And be it enacted, that this Act shall extend to the United Kingdom of Great Britain and Ireland, and to every part of the British dominions.

Act may be amended this session.

XXX. And be it enacted, that this Act may be amended or repealed by any Act to be passed in the present session of Parliament.

SCHEDULE TO WHICH THE PRECEDING ACT REFERS.

No. 1.

Form of Minute of Consent, to be Entered at Stationers' Hall.

We, the undersigned, A. B. of the author of a certain book intituled Y. Z. [*or* the personal representative of the author, *as the case may be*], and C. D. of do hereby certify that we have consented and agreed to accept the benefits of the Act passed in the fifth year of the reign of Her Majesty Queen Victoria, Cap. , for the extension of the term of copyright therein provided by the said Act, and hereby declare that such extended term of copyright therein is the property of the said A. B. or C. D.

Dated this day of 18 .

Witness

(Signed) A. B.
C. D.

To the registering officer appointed by the Stationers' Company.

No. 2.

Form of requiring Entry of Proprietorship.

I, A. B. of do hereby certify, that I am the proprietor of the copyright of a book, intituled Y. Z., and I hereby require you to make entry in the register book of the Stationers'

Company of my proprietorship of such copyright, according to the particulars underwritten.

Title of Book.	Name of Publisher and Place of Publication.	Name and Place of Abode of the Proprietor of the Copyright.	Date of First Publication.
Y. Z.		*A. B.*	

Dated this day of 18 .
Witness, C. D. (Signed) A. B.

No. 3.

Original Entry of Proprietorship of Copyright of a Book.

Time of making the Entry.	Title of Book.	Name of the Publisher and Place of Publication.	Name and Place of Abode of the Proprietor of the Copyright.	Date of First Publication.
	Y. Z.	*A. B.*	*C. D.*	

No. 4.

Form of Concurrence of the Party Assigning in any Book Previously Registered.

I, A. B. of being the assigner of the copyright of the book hereunder described, do hereby require you to make entry of the assignment of the copyright therein.

Title of Book.	Assignor of the Copyright.	Assignee of Copyright.
Y. Z.	*A. B.*	*C. D.*

Dated this day of 18 .
(Signed) A. B.

No. 5.

Form of Entry of Assignment of Copyright in any Book previously Registered.

Date of Entry.	Title of Book.	Assignor of the Copyright.	Assignee of Copyright.
	[Set out the Title of the Book, and refer to the Page of the Registry Book in which the original Entry of the Copyright thereof is made.]	*A. B.*	*C. D.*

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5 & 6 VICT. c. 47.

An Act to amend the laws relating to the Customs. [1842.]

(See 7 & 8 Vict. c. 73.)

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5 & 6 VICT. c. 100.

An Act to consolidate and amend the laws relating to the copyright of designs for ornamenting articles of manufacture.

[10th August, 1842.]

(Repealed, 46 & 47 Vict. c. 57.)

6 & 7 VICT. c. [illegible].

An Act to amend the laws relating to the copyright of designs.
[22nd August, 1843.]

(Repealed, 46 & 47 Vict. c. 57.)

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6 & 7 VICT. c. 68.

An Act for the regulation of theatres. [22nd August, 1843.]

An Act still partly in force but without the scope of this work.

(See Statute Law Revision Act, 1874 (No. 2)).

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7 & 8 VICT. c. 12.

An Act to amend the law relating to international copyright.
(Effect only.) [10th May, 1844.]

I. Recites 1 & 2 Vict. c. 59, the International Copyright Act; 5 & 6 Vict. c. 45, the Copyright Amendment Act; 3 & 4 Will. IV. c. 15, the Dramatic Literary Property Act; 8 Geo. II. c. 13, 17 Geo. III. c. 38, 17 Geo. III. c. 57, and 6 & 7 Will. IV. c. 59, the Engraving Copyright Acts; 38 Geo. III. c. 71 (repealed by 24 & 25 Vict. c. 101), and 54 Geo. III. c. 56, the Sculpture Copyright Acts. Repeal of 1 & 2 Vict. c. 59, *supra*.

II. Her Majesty, by order in council, may direct that authors, &c., of works first published in foreign countries shall have copyright therein within Her Majesty's dominions, for any term not exceeding that for which authors, &c., of like works first published in the United Kingdom would be entitled to copyright.

III. If the order applies to books, the copyright law as to books first published in this country shall apply to the books to which the order relates, if registered, with certain exceptions.

IV. If the order applies to prints, sculptures, &c., the copyright law as to prints or sculpture first published in this country shall apply to the prints, sculptures, &c., to which such order relates if registered.

V. Her Majesty may, by order in council, direct that authors and composers of dramatic pieces and musical compositions first publicly represented and performed in foreign countries shall have exclusive rights of representation in the British dominions. Enactments relating to similar pieces first represented in this country shall apply to such pieces, if registered.

VI. Particulars to be observed as to registry and to delivery of copies—as to books and printed dramatic pieces and musical com-

positions—as to dramatic pieces and musical compositions in manuscript—as to prints—as to sculpture, &c.

VII. In case of books published anonymously it shall be sufficient to register the name, &c., of the publisher.

VIII. The provisions of the Copyright Amendment Act, 5 & 6 Vict. c. 45, as regards entries in the register book of the Company of Stationers, &c., to apply to books, &c., registered under the Act.

IX. As to expunging or varying entry grounded in wrongful first publication.

X. Copies of books wherein copyright is subsisting under the Act printed in foreign countries, other than those wherein the book was first published, shall not be imported, except with consent of registered proprietors, and shall be subject to laws of customs as to prohibited goods.

Liability of persons selling such copies, or any copies unlawfully printed (action for damages).

XI. Officer of Stationers' Company to deposit books, &c., delivered in the British Museum.

XII. As to depositing copies of second or subsequent editions.

XIII. Different periods may be specified for continuance of privilege for different countries and classes of works and times for entries, &c., may be different.

XIV. No order to take effect unless it states that reciprocal protection is secured for parties interested in works first published in British dominions.

XV. Orders to be published in *Gazette*, and to have effect as if included in Act.

XVI. Orders to be laid before Parliament.

XVII. Orders may be revoked.

XVIII. Translations (repealed so far as it may be inconsistent with the provisions of 15 & 16 Vict. c. 12).

XIX. Authors, &c., of works first published in foreign countries not entitled to copyright except under the Act.

XX. Interpretation clause.—"Book"—"Articles of Sculpture"—"Printing"—"Reprinting"—"Her Majesty"—"Order of Her Majesty in Council"—"Order in Council"—"Order"—"Officer of the Company of Stationers."

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7 & 8 VICT. c. 73.

An Act to reduce under certain circumstances the duties payable upon books and engravings. [1844.]

(Repealed, 9 & 10 Vict. c. 58.)

8 & 9 VICT. c. 93.

An Act to regulate the Trade of British Possessions abroad. [1845.]

(Repealed, 16 & 17 Vict. c. 107, s. 358.)

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9 & 10 VICT. c. 58.

An Act to amend an Act of the 7th and 8th years of Her present Majesty, for reducing, under certain circumstances, the Duties payable upon Books and Engravings. [1846.]

(Repealed, 24 & 25 Vict. c. 101.)

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10 & 11 VICT. c. 95.

An Act to amend the law relating to the Protection in the Colonies of works entitled to Copyright in the U. K. [22nd July, 1847.]

I. Recites 5 & 6 Vict. c. 45; 8 & 9 Vict. c. 93 (repealed, 16 & 17 Vict. c. 107, s. 358). Her Majesty may suspend in certain cases the prohibition against the admission of printed books into the colonies.

II. Orders in council to be published in the *Gazette*. Orders in Council and the Colonial Acts or ordinances to be laid before Parliament.

III. Repealed, Statute Law Revision Act, 1875.

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13 & 14 VICT. c. 104.

An Act to extend and amend the Acts relating to the Copyright of Designs. [14th August, 1850.]

(Repealed, 46 & 47 Vict. c. 57.)

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14 & 15 VICT. c. 8.

An Act to extend the provisions of the "Designs Act, 1850," and to give protection from Piracy to persons exhibiting new inventions in the Exhibition of the Works of Industry of all Nations in 1851. [1851.]

(Lapsed.)

15 & 16 VICT. c. 12.

An Act to enable Her Majesty to carry into effect a Convention with France on the subject of Copyright; to extend and explain the International Copyright Acts; and to explain the Acts relating to Copyright in Engravings. [28th May, 1852.]

I. Recital 7 & 8 Vict. c. 12.

Translations.

II. Partial repeal of 7 & 8 Vict. c. 12, s. 18. Her Majesty may, by order in council, direct that the authors of books published in foreign countries may for a limited time prevent unauthorised translations.

III. Thereupon the law of copyright shall extend to prevent such translations.

IV. Her Majesty may, by order in council, direct that the authors of dramatic works represented in foreign countries may for a limited time prevent unauthorised translations.

V. Thereupon the law for protecting the representation of such pieces shall extend to prevent unauthorised translations.

VI. Adaptations, &c., of dramatic pieces to the English stage allowed.

VII. All articles in newspapers, &c., relating to politics may be republished or translated; unless the author has notified his intention to reserve the right.

VIII. No author to be entitled to benefit of the Act without complying with the requisitions therein specified.

IX. Pirated copies prohibited to be imported except with consent of proprietor. Provisions of 5 & 6 Vict. c. 45, as to forfeiture, &c. of pirated works, &c., to extend to works prohibited to be imported under the Act.

X. Foregoing provisions and those of 7 & 8 Vict. c. 12 to be read as one Act.

XI. French translations to be protected as before mentioned without further order in council.

Reduction of Duties.

XII. Recital of 9 & 10 Vict. c. 58 (repealed, 24 & 25 Vict. c. 101). Rates of duty not to be raised, during continuance of treaty, and if further reduction is made for other countries it may be extended to France.

XIII. Removal of doubts as to construction of schedule to 9 & 10 Vict. c. 58 (repealed, *supra*).

Lithographs, &c.

XIV. And whereas by the four several Acts of Parliament following (that is to say): 8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57; 7 Will. IV. c. 59, provision is made for securing to every person who invents, or designs, engraves, etches, or works in mezzotinto or chiaro-oscuro, or from his own work, design, or invention, causes or procures to be designed, engraved, etched, or worked in mezzotinto or chiaro oscuro, any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, and to every person who engraves, etches, or works in mezzotinto or chiaro oscuro, or causes to be engraved, etched, or worked any print taken from any picture, drawing, model, or sculpture, notwithstanding such print has not been graven or drawn from his own original design, certain copyrights therein defined: and whereas doubts are entertained whether the provisions of the said Acts extend to lithographs and certain other impressions, and it is expedient to remove such doubts:

It is hereby declared, that the provisions of the said Acts are intended to include prints taken by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely; and the said Acts shall be construed accordingly.

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16 & 17 VICT. c. 107.

An Act to amend and consolidate the laws relating to the Customs of the United Kingdom and of the Isle of Man, and certain laws relating to the Trade and Navigation and the British Possessions. [20th August, 1853].

(See 39 & 40 Vict. c. 36.)

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18 & 19 VICT. c. 96.

An Act to consolidate certain Acts, and otherwise amend the laws of the Customs, and an Act to regulate the office of the receipt of Her Majesty's Exchequer at Westminster. [1855.]

(See 39 & 40 Vict. c. 36.)

21 & 22 VICT. c. 70.

An Act to amend the Act of the 5th and 6th years of Her present Majesty, to consolidate and amend the laws relating to the Copyright of Designs for ornamenting articles of manufacture.
[2nd August, 1858.]

(Repealed, 40 & 47 Vict. c. 57.)

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24 & 25 VICT. c. 73.

An Act to amend the Law relating to the Copyright of Designs.
[6th August, 1861.]

(Repealed, 40 & 47 Vict. c. 57.)

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25 & 26 VICT. c. 68.

An Act for amending the Law relating to Copyright in Works of the Fine Arts, and for repressing the Commission of Fraud in the production and sale of such Works. [29th July, 1862.]

Copyright in works hereafter made to vest in the author for his life and for seven years after his death.

I. The author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph, which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means, and of any size, for the term of the natural life of such author, and seven years after his death; provided that when any painting or drawing, or the negative of any photograph, shall for the first time after the passing of this Act be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or a valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof, unless it be expressly reserved to him by agreement in writing, signed, at or before the time of such sale or disposition, by the vendee or assignee of such painting or drawing, or of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing, or of

such negative of a photograph, or to the person for or on whose behalf the same shall have been made or executed, nor shall the vendee or assignee thereof be entitled to any such copyright, unless, at or before the time of such sale or disposition, an agreement in writing, signed by the person so selling or disposing of the same, or by his agent duly authorised, shall have been made to that effect.

Copyright not to prevent the representation of the same subjects in other works.

II. Nothing herein contained shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object.

Assignments, licences, &c., to be in writing.

III. All copyright under this Act shall be deemed personal or moveable estate, and shall be assignable at law, and every assignment thereof, and every licence to use or copy by any means or process the design or work which shall be the subject of such copyright, shall be made by some note or memorandum in writing, to be signed by the proprietor of the copyright, or by his agent appointed for that purpose in writing.

Register of proprietors of copyright in paintings, drawings, and photographs to be kept at Stationers' Hall, as in 5 & 6 Vict. c. 45.

IV. There shall be kept at the hall of the Stationers' Company by the officer appointed by the said company for the purposes of the Act passed in the sixth year of her present Majesty, intituled, "An Act to amend the Law of Copyright," a book or books, entitled "The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs," wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work, and in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph of the said work, and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration.

Certain enactments of 5 & 6 Vict. c. 45, to apply to the books to be kept under this Act.

V. The several enactments in the said Act of the sixth year of her present Majesty contained, with relation to keeping the register book thereby required, and the inspection thereof, the searches therein and the delivery of certified and stamped copies thereof, the reception of such copies in evidence, the making of false entries in the said book, and the production in evidence of papers falsely purporting to be copies of entries in the said book, the application to the courts and judges by persons aggrieved by entries in the said book, and the expunging and varying such entries,

shall apply to the book or books to be kept by virtue of this Act, and to the entries and assignments of copyright and proprietorship therein under this Act, in such and the same manner as if such enactments were here expressly enacted in relation thereto, save and except that the forms of entry prescribed by the said Act of the sixth year of her present Majesty may be varied to meet the circumstances of the case, and that the sum to be demanded by the officer of the said Company of Stationers for making any entry required by this Act shall be one shilling only.

Penalties on infringement of copyright.

VI. If the author of any painting, drawing, or photograph in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding ten pounds; and all such repetitions, copies, and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright.

Penalties on fraudulent productions and sales.

VII. No person shall do or cause to be done any or either of the following acts; that is to say,

First, no person shall fraudulently sign or otherwise affix, or fraudulently cause to be signed or otherwise affixed, to or upon any painting, drawing, or photograph, or the negative thereof, any name, initials, or monogram:

Secondly, no person shall fraudulently sell, publish, exhibit, or dispose of, or offer for sale, exhibition, or distribution, any painting, drawing, or photograph, or negative of a photograph, having thereon the name, initials, or monogram of a person who did not execute or make such work:

Thirdly, no person shall fraudulently utter, dispose of, or put off, or cause to be uttered or disposed of, any copy or colourable imitation of any painting, drawing, or photograph, or negative of a photograph, whether there shall be subsisting copyright therein or not, as having been made or executed

by the author or maker of the original work from which such copy or imitation shall have been taken :

Fourthly, where the author or maker of any painting, drawing, or photograph, or negative of a photograph, made either before or after the passing of this Act, shall have sold or otherwise parted with the possession of such work, if any alteration shall afterwards be made therein by any other person, by addition or otherwise, no person shall be at liberty, during the life of the author or maker of such work, without his consent, to make or knowingly to sell or publish, or offer for sale, such work or any copies of such work so altered as aforesaid, or of any part thereof, as or for the unaltered work of such author or maker :

Penalties. Every offender under this section shall, upon conviction, forfeit to the person aggrieved a sum not exceeding ten pounds, or not exceeding double the full price, if any, at which all such copies, engravings, imitations, or altered works shall have been sold or offered for sale ; and all such copies, engravings, imitations, or altered works shall be forfeited to the person, or the assigns or legal representatives of the person, whose name, initials, or monogram shall be so fraudulently signed or affixed thereto, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid : Provided always, that the penalties inposed by this section shall not be incurred unless the person whose name, initials, or monogram shall be so fraudulently signed or affixed, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid, shall have been living at or within twenty years next before the time when the offence may have been committed.

Recovery of pecuniary penalties. VIII. All pecuniary penalties which shall be incurred, and all such unlawful copies, imitations, and all other effects and things as shall have been forfeited by offenders, pursuant to this Act, and pursuant to any Act for the protection of copyright engravings, may be recovered by the person hereinbefore and in any such Act as aforesaid empowered to recover the same respectively, and hereinafter called the complainant or the complainer, as follows :—

In England and Ireland. In England and Ireland, either by action against the party offending, or by summary proceeding before any two justices having jurisdiction where the party offending resides :

In Scotland. In Scotland, by action before the Court of Session in ordinary form, or by sumniary action before the sheriff of the county where the offence may be committed or the offender resides . . . .

Superior Courts of IX. In any action in any of her Majesty's superior courts of record at Westminster and in Dublin, for the infringement of any

Record in which any action is pending may make an order for an injunction, inspection, or account.

such copyright as aforesaid, it shall be lawful for the Court in which such action is pending, if the Court be then sitting, or if the Court be not sitting, then for a judge of such Court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such Court or judge may seem fit.

Importation of pirated works prohibited.

X. All repetitions, copies, or imitations of paintings, drawings, or photographs, wherein or in the design whereof there shall be subsisting copyright under this Act, and all repetitions, copies, and imitations of the design of any such painting or drawing, or of the negative of any such photograph, which, contrary to the provisions of this Act, shall have been made in any foreign state, or in any part of the British dominions, are hereby absolutely prohibited to be imported into any part of the United Kingdom, except by or with the consent of the proprietor of the copyright thereof, or his agent, authorised in writing; and if the proprietor of any such copyright, or his agent, shall declare that any goods imported are repetitions, copies, or imitations of any such painting, drawing, or photograph, or of the negative of any such photograph, and so prohibited as aforesaid, then such goods may be detained by the officers of her Majesty's customs.

Application in such cases of Customs Acts.

Saving of right to bring action for damages.

XI. If the author of any painting, drawing, or photograph, in which there shall be subsisting copyright, after having sold or otherwise disposed of such copyright, or if any other person, not being the proprietor for the time being of such copyright, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied, for sale, hire, exhibition or distribution, any such work or the design thereof, or the negative of any such photograph, or shall import or cause to be imported into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be sold, published, let to hire, exhibited or distributed, or offered for sale, hire, exhibition or distribution, any repetition, copy, or imitation of such work, or the design thereof, or the negative of any such photograph, made without such consent as aforesaid, then every such proprietor in addition to the remedies hereby given for the recovery of any such penalties, and forfeiture of any such things as aforesaid, may recover damages by and in a special action on the case, to be brought against the person so offending, and may in such action recover and enforce the delivery to him of all unlawful repetitions, copies and imitations, and negatives of photographs, or may recover damages for the retention or conversion thereof: Provided that nothing herein contained, nor any proceeding, conviction, or judg-

ment, for any act hereby forbidden, shall affect any remedy which any person aggrieved by such Act may be entitled to either at law or in equity.

XII. This Act shall be considered as including the provisions of the Act passed in the session of Parliament held in the seventh and eighth years of her present Majesty, intituled "An Act to Amend the Law relating to International Copyright, in the same manner as if such provisions were part of this Act. *Provisions of 7 & 8 Vict. c. 12, to be considered as included in this Act.*

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25 & 26 VICT. c. 88.

An Act to amend the Law relating to the fraudulent marking of Merchandise. [7th August, 1862.]

I. In the construction of this Act the word "person" shall include any person, whether a subject of her Majesty or not, and any body corporate or body of the like nature, whether constituted according to the law of this country or of any of her Majesty's colonies or dominions, or according to the law of any foreign country, and also any company, association, or society of persons, whether the members thereof be subjects of her Majesty or not, or some of such persons subjects of her Majesty and some of them not, and whether such body corporate, body of the like nature, company, association, or society be established or carry on business within her Majesty's dominions or elsewhere, or partly within her Majesty's dominions and partly elsewhere; the word "mark" shall include any name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark of any other description; and the expression "trade mark" shall include any and every such name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark as aforesaid lawfully used by any person to denote any chattel, or (in Scotland) any article of trade, manufacture, or merchandise, to be an article or thing of the manufacture, workmanship, production, or merchandise of such person, or to be an article or thing of any peculiar or particular description made or sold by such person, and shall also include any name, signature, word, letter, number, figure, mark, or sign which in pursuance of any statute or statutes for the time being in force relating to registered designs is to be put or placed upon or attached to any chattel or article during the existence or continuance of any copyright or other sole right acquired under the provisions of such statutes or any of them; the word "misdemeanor" shall include crime and offence in Scotland; and the word "court" shall include any sheriff or sheriff substitute in Scotland. *Construction of words.*

Forging a trade mark or falsely applying any trade mark with intent to defraud, a misdemeanor.

II. Every person who, with intent to defraud, or to enable another to defraud any person, shall forge or counterfeit, or cause or procure to be forged or counterfeited, any trade mark, or shall apply, or cause or procure to be applied, any trade mark or any forged or counterfeited trade mark to any chattel or article not being the manufacture, workmanship, production, or merchandise of any person denoted or intended to be denoted by such trade mark, or denoted or intended to be denoted by such forged or counterfeited trade mark, or not being the manufacture, workmanship, production, or merchandise of any person whose trade mark shall be so forged or counterfeited, or shall apply, or cause or procure to be applied, any trade mark or any forged or counterfeited trade mark to any chattel or article, not being the particular or peculiar description of manufacture, workmanship, production, or merchandise denoted or intended to be denoted by such trade mark or by such forged or counterfeited trade mark, shall be guilty of a misdemeanor, and every person so committing a misdemeanor shall also forfeit to her Majesty every chattel and article belonging to such person to which he shall have so unlawfully applied, or caused or procured to be applied, any such trade mark or forged or counterfeited trade mark as aforesaid, and every instrument in the possession or power of such person, and by means of which any such trade mark or forged or counterfeited trade mark as aforesaid shall have been so applied, and every instrument in the possession or power of such person for applying any such trade mark or forged or counterfeit trade mark as aforesaid shall be forfeited to her Majesty; and the court before which any such misdemeanor shall be tried may order such forfeited articles as aforesaid to be destroyed or otherwise disposed of as such court shall think fit.

Applying a forged trade mark to any vessel, case, wrapper, &c., in or with which any article is sold or intended to be sold, a misdemeanor.

III. Every person who, with intent to defraud, or to enable another to defraud any person, shall apply or cause or procure to be applied any trade mark or any forged or counterfeited trade mark to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, on, or with which any chattel or article shall be intended to be sold or shall be sold or uttered or exposed for sale, or intended for any purpose of trade or manufacture, or shall inclose or place any chattel or article, or cause or procure any chattel or article, to be inclosed or placed in, upon, under, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing to which any trade mark shall have been falsely applied, or to which any forged or counterfeited trade mark shall have been applied, or shall apply or attach or cause or procure to be applied or attached to any chattel or article any case, cover, reel, ticket, label, or other thing to which any trade mark shall have been falsely applied, or to which any forged or counterfeited trade mark shall have been applied, or shall

enclose, place, or attach any chattel or article, or cause or procure any chattel or article to be enclosed, placed, or attached, in, upon, under, with, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing having thereon any trade mark of any other person, shall be guilty of a misdemeanor, and every person so committing a misdemeanor shall also forfeit to her Majesty every such chattel and article, and also every such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing as aforesaid in the possession or power of such person; and every other similar cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing made to be used in like manner as aforesaid, and every instrument in the possession or power of such person, and by means of which any such trade mark or forged or counterfeited trade mark as aforesaid shall have been applied, and also every instrument in the possession or power of such person for applying any such trade mark or forged or counterfeit trade mark as aforesaid, shall be forfeited to her Majesty; and the court before which any such misdemeanor shall be tried may order such forfeited articles as aforesaid to be destroyed or otherwise disposed of as such court shall think fit.

Selling articles with forged or false trade marks after 31st December, 1863, penalty equal to value of article sold, and a sum not exceeding 5l. nor less than 10s.

IV. Every person who, after the thirty-first day of December one thousand eight hundred and sixty-three, shall sell, utter, or expose either for sale or for any purpose of trade or manufacture, or cause or procure to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article, together with any forged or counterfeited trade mark, which he shall know to be forged or counterfeited, or together with the trade mark of any other person applied or used falsely or wrongfully or without lawful authority or excuse, knowing such trade mark of another person to have been so applied or used as aforesaid, and that whether any such trade mark or forged or counterfeited trade mark as aforesaid, together with which any such chattel or article shall be sold, uttered, or exposed for sale or other purpose as aforesaid, shall be in, upon, about, or with such chattel or article, or in, upon, about, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, upon, about, or with which such chattel or article shall be so sold or uttered or exposed for sale or other purpose as aforesaid, shall for every such offence forfeit and pay to her Majesty a sum of money equal to the value of the chattel or article so sold, uttered, offered, or exposed for sale or other purpose as aforesaid, and a further sum not exceeding five pounds and not less than ten shillings.

Additions to and alterations of trade marks

V. Every addition to and every alteration of and also every imitation of any trade mark which shall be made, applied, or used with intent to defraud or to enable any other person to defraud, or which shall cause a trade mark with such alteration or addition, or

made with intent to defraud to be deemed forgeries.

shall cause such imitation of a trade mark to resemble any genuine trade mark so or in such manner as to be calculated or likely to deceive, shall be, and be deemed to be a false, forged, and counterfeited trade mark within the meaning of this Act; and every act of making, applying, or otherwise using any such addition to or alteration of a trade mark or any such imitation of a trade mark as aforesaid done by any person with intent to defraud, or to enable any other person to defraud, shall be and be deemed to be forging and counterfeiting a trade mark within the meaning of this Act.

Any person who, after 31st December, 1863, shall have sold an article having a false trade mark to be bound to give information where he procured it.

VI. Where any person who, at any time after the thirty-first day of December, one thousand eight hundred and sixty-three, shall have sold, uttered, or exposed for sale or other purpose as aforesaid, or shall have caused or procured to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article, together with any forged or counterfeited trade mark, or together with the trade mark of any other person used without lawful authority or excuse as aforesaid, and that whether any such trade mark, or such forged or counterfeited trade mark as aforesaid, be in, upon, about, or with such chattel or article, or in, upon, about, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, upon, about, or with which such chattel or article shall have been sold or exposed for sale, such person shall be bound, upon demand in writing delivered to him or left for him at his last known dwelling house or at the place of sale or exposure for sale by or on the behalf of any person whose trade mark shall have been so forged or counterfeited or used without lawful authority or excuse as aforesaid, to give to the person requiring the same or his attorney or agent, within forty-eight hours after such demand, full information in writing of the name and address of the person from whom he shall have purchased or obtained such chattel or article, and of the time when he obtained the same; and it shall be lawful for any justice of the peace, on information on oath of such demand and refusal, to summon before him the party refusing, and on being satisfied that such demand ought to be complied with to order such information to be given within a certain time to be appointed by him; and any such party who shall refuse or neglect to comply with such order shall for every such offence forfeit and pay to her Majesty the sum of five pounds, and such refusal or neglect shall be *primâ facie* evidence that the person so refusing or neglecting had full knowledge that the trade mark, together with which such chattel or article was sold, uttered, or exposed for sale or other purpose as aforesaid, at the time of such selling, uttering, or exposing was a forged, counterfeited, and false trade mark, or was the trade mark of a person which had been used without lawful authority or excuse, as the case may be.

Power to justices to summon parties refusing to give information.

Penalty for refusal, 5l.

VII. Every person who, with intent to defraud, or to enable another to defraud, shall put or cause or procure to be put upon any chattel or article, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing, together with which any chattel or article shall be intended to be or shall be sold or uttered or exposed for sale, or for any purpose of trade or manufacture, or upon any case, frame, or other thing, in or by means of which any chattel or article shall be intended to be or shall be exposed for sale, any false description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or any part thereof, or of the place or country in which such chattel or article shall have been made, manufactured, or produced, or shall put or cause or procure to be put upon any such chattel or article, cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or thing as aforesaid, any word, letter, figure, signature, or mark for the purpose of falsely indicating such chattel or article, or the mode of manufacturing or producing the same, or the ornamentation, shape, or configuration thereof, to be the subject of any existing patent, privilege or copyright, shall for every such offence forfeit and pay to her Majesty a sum of money equal to the value of the chattel or article so sold or uttered or exposed for sale, and a further sum not exceeding five pounds and not less than ten shillings.

Marking any false indication of quantity, &c., upon an article with intent to defraud, penalty a sum equal to the value of the article and the further sum not exceeding 5l. and not less than 10s.

VIII. Every person who, after the thirty-first day of December, one thousand eight hundred and sixty-three, shall sell, utter, or expose for sale or for any purpose of trade or manufacture, or shall cause or procure to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article upon which shall have been, to his knowledge, put, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing, together with which such chattel or article shall be sold or uttered or exposed for sale or other purpose as aforesaid, shall have been so put, or upon any case, frame, or other thing used or employed to expose or exhibit such chattel or article for sale shall have been so put, any false description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article or any part thereof, or the place or country in which such chattel or article shall have been made, manufactured, or produced, shall for every such offence forfeit and pay to her Majesty a sum not exceeding five pounds and not less than five shillings.

Selling or exposing for sale after the 31st December, 1863, articles with false statement of quantities, &c., penalty not more than 5l. or less than 5s.

IX. Provided always, that the provisions of this Act shall not be construed so as to make it any offence for any person to apply to any chattel or article, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing with which such chattel or article shall be sold or intended to be sold, *apply*

Proviso that it shall not be an offence to apply

names or words known to be used for indicating particular classes of manufactures.

any name, word, or expression generally used for indicating such chattel or article to be of some particular class or description of manufacture only, or so as to make it any offence for any person to sell, utter, or offer or expose for sale any chattel or article to which, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing sold therewith, any such generally used name, word, or expression as aforesaid shall have been applied.

Description of trade marks and forged trade marks in indictments, &c.

X. In every indictment, pleading, proceeding, and document whatsoever in which any trade mark shall be intended to be mentioned it shall be sufficient to mention or state the same to be a trade mark without further or otherwise describing such trade mark, or setting forth any copy or fac-simile thereof; and in every indictment, pleading, proceeding, and document whatsoever in which it shall be intended to mention any forged or counterfeit trade mark it shall be sufficient to mention or state the same to be a forged or counterfeit trade mark without further or otherwise describing such forged or counterfeit trade mark, or setting forth any copy or fac-simile thereof.

Conviction not to affect any right or civil remedy.

XI. The provisions in this Act contained of or concerning any Act or any proceeding, judgment, or conviction for any act hereby declared to be a misdemeanor or offence, shall not nor shall any of them take away, diminish, or prejudicially affect any suit, process, proceeding, right, or remedy which any person aggrieved by such act may be entitled to at law, in equity, or otherwise, and shall not nor shall any of them exempt or excuse any person from answering or making discovery upon examination as a witness or upon interrogatories or otherwise in any suit or other civil proceeding: provided always, that no evidence, statement, or discovery which any person shall be compelled to give or make shall be admissible in evidence against such person in support of any indictment for a misdemeanor at common law or otherwise, or of any proceeding under the provisions of this Act.

Intent to defraud, &c., any particular person need not be alleged in an indictment, &c., or proved.

XII. In every indictment, information, conviction, pleading, and proceeding against any person for any misdemeanor or other offence against the provisions of this Act in which it shall be necessary to allege or mention an intent to defraud, or to enable another to defraud, it shall be sufficient to allege or mention that the person accused of having done any act which is hereby made a misdemeanor or other offence did such act with intent to defraud, or with intent to enable some other person to defraud, without alleging or mentioning an intent to defraud any particular person; and on the trial of any such indictment or information for any such misdemeanor, and on the hearing of any information or charge of or for any such other offence as aforesaid, and on the trial of any action against any person to recover a penalty for any such other offence as aforesaid, it shall not be necessary to prove an intent to defraud

any particular person, or an intent to enable any particular person to defraud any particular person, but it shall be sufficient to prove with respect to every such misdemeanor and offence that the person accused did the act charged with intent to defraud, or with intent to enable some other person to defraud, or with the intent that any other person might be enabled to defraud.

Persons who aid in the commission of a misdemeanor to be also guilty.

XIII. Every person who shall aid, abet, counsel, or procure the commission of any offence which is by this Act made a misdemeanor shall also be guilty of a misdemeanor.

Punishment for misdemeanor under this Act.

XIV. Every person who shall be convicted or found guilty of any offence which is by this Act made a misdemeanor shall be liable, at the discretion of the court and as the court shall award, to suffer such punishment by imprisonment for not more than two years, with or without hard labour, or by fine, or both by imprisonment with or without hard labour and fine, and also by imprisonment until the fine (if any) shall have been paid and satisfied.

Recovery of penalties.

XV. In every case in which any person shall have committed or done any offence or act whereby he shall have forfeited or become liable to pay to her Majesty any of the penalties or sums of money mentioned in the provisions of this Act, every such penalty or sum of money shall or may be recovered in England, Wales, or Ireland in an action of debt, which any person may as plaintiff for and on behalf of her Majesty commence and prosecute to judgment in any court of record, and the amount of every such penalty or sum of money to be recovered in any such action shall or may be determined by the jury (if any) sworn to try any issue in such action, and if there shall be no such jury then by the court or some other jury, as the court shall think fit, or instead of any such action being commenced such penalty or sum of money shall or may in England or Wales be recovered by a summary proceeding before two justices of the peace having jurisdiction in the county or place where the party offending shall reside or have any place of business, or in the county or place in which the offence shall have been committed; and shall or may in Ireland be recovered in like manner by civil bill in the civil bill court of the county or place in which the offence was committed, or in which the offender shall reside or have any place of business; and shall or may in Scotland be recovered by action before the Court of Session in ordinary form or by summary action before the sheriff of the county where the offence shall have been committed or the offender may reside or have any place of business. . . . .

Summary proceedings before justices to be within 11 & 12 Vict. c. 43.

XVI. In every case in which any such penalty or sum of money forfeited to her Majesty as hereinbefore mentioned shall be sought to be recovered by a summary proceeding before two justices of the peace, the offence or act by the committing or doing of which such penalty or sum of money shall have been so forfeited shall be and

be deemed to be an offence and act within the meaning of a statute passed in the twelfth year of the reign of her present Majesty; . . . . . and the information, conviction of the offender, and other proceedings for the recovery of the penalty or sum so forfeited shall be had according to the provisions of the said Act.

XVII. (*Effect.*) *In actions penalties to be accounted for in like manner as other monies payable to the Crown, and plaintiffs to recover full costs of suit.*

Limitations of actions, &c.

XVIII. No person shall commence any action or proceeding for the recovery of any penalty, or procuring the conviction of any offender in manner hereinbefore provided, after the expiration of three years next after the committing of the offence, or one year next after the first discovery thereof by the person proceeding.

After 31st December, 1863, vendor of an article with a trade mark to be deemed to contract that the mark is genuine.

XIX. In every case in which at any time after the thirty-first day of December, one thousand eight hundred and sixty-three, any person shall sell or contract to sell (whether by writing or not) to any other person any chattel or article with any trade mark thereon, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold or contracted to be sold, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that every trade mark upon such chattel or article, or upon any such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing as aforesaid, was genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

After 31st December, 1863, vendor of an article with description upon it of its quantity to be deemed to contract that the description was true.

XX. In every case in which at any time after the thirty-first day of December, one thousand eight hundred and sixty-three any person shall sell or contract to sell (whether by writing or not) to any other person any chattel or article upon which, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold or contracted to be sold, any description, statement or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or the place or country in which such chattel or article shall have been made, manufactured, or produced, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that no such description, statement, or other indication was in any material respect false or untrue, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

In suits at law or in equity against persons for using forged trade marks, Court may order article to be destroyed, and may award injunction, &c.

XXI. In every case in any suit at law or in equity against any person for forging or counterfeiting any trade mark, or for fraudulently applying any trade mark to any chattel or article, or for selling, exposing for sale, or uttering any chattel or article with any trade mark falsely or wrongfully applied thereto, or with any forged or counterfeit trade mark applied thereto, or for preventing the repetition or continuance of any such wrongful act, or the committal of any similar act, in which the plaintiff shall obtain a judgment or decree against the defendant, the court shall have power to direct every such chattel and article to be destroyed or otherwise disposed of; and in every such suit in a court of law the court shall or may upon giving judgment for the plaintiff award a writ of injunction or injunctions to the defendant, commanding him to forbear from committing and not by himself or otherwise to repeat or commit any offence or wrongful act of the like nature as that of which he shall or may have been convicted by such judgment, and any disobedience of any such writ of injunction or injunctions shall be punished as a contempt of court; and in every such suit at law or in equity it shall be lawful for the court or a judge thereof to make such order as such court or judge shall think fit for the inspection of every or any manufacture or process carried on by the defendant in which any such forged or counterfeit trade mark, or any such trade mark as aforesaid, shall be alleged to be used or applied as aforesaid, and of every or any chattel, article, and thing in the possession or power of the defendant alleged to have thereon or in any way attached thereto any forged or counterfeit trade mark, or any trade mark falsely or wrongfully applied, and every or any instrument in the possession or power of the defendant used or intended to be or capable of being used for producing or making any forged or counterfeit trade mark, or trade mark alleged to be forged or counterfeit, or for falsely or wrongfully applying any trade mark; and any person who shall refuse or neglect to obey any such order shall be guilty of a contempt of court.

Persons aggrieved by forgeries may recover damages against the guilty parties.

XXII. In every case in which any person shall do or cause to be done any of the wrongful acts following; (that is to say,) shall forge or counterfeit any trade mark; or for the purpose of sale, or for the purpose of any manufacture or trade, shall apply any forged or counterfeit trade mark to any chattel or article, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or thing in or with which any chattel or article shall be intended to be sold or shall be sold or uttered or exposed for sale, or for any purpose of trade or manufacture; or shall inclose or place any chattel or article in, upon, under, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing to which any trade mark shall have been falsely applied, or to which any forged or counterfeit trade mark

shall have been applied; or shall apply or attach to any chattel or article any case, cover, reel, wrapper, band, ticket, label, or other thing to which any trade mark shall have been falsely applied, or to which any forged or counterfeit trade mark shall have been applied; or shall inclose, place, or attach any chattel or article in, upon, under, with, or to any cask, bottle, stopper, vessel, case, cover, reel, wrapper, band, ticket, label, or other thing having thereon any trade mark of any other person; every person aggrieved by any such wrongful act shall be entitled to maintain an action or suit for damages in respect thereof against the person who shall be guilty of having done such act or causing or procuring the same to be done, and for preventing the repetition or continuance of the wrongful act, and the committal of any similar act.

Defendant obtaining a verdict to have full indemnity for costs.

XXIII. In every action which any person shall, under the provisions of this Act, commence as plaintiff for or on behalf of Her Majesty for recovering any penalty or sum of money, if the defendant shall obtain judgment, he shall be entitled to recover his costs of suit, which shall include a full indemnity for all the costs, charges, and expenses by him expended or incurred in, about, or for the purposes of the action, unless the court or a judge thereof shall direct that costs of the ordinary amount only shall be allowed.

A plaintiff suing for a penalty may be compelled to give security for costs.

XXIV. In any action which any person shall, under the provisions of this Act, commence as plaintiff for or on behalf of Her Majesty for recovering any penalty or sum of money, if it shall be shown to the satisfaction of the court, or a judge thereof, that the person suing as plaintiff for or on behalf of Her Majesty has no ground for alleging that he has been aggrieved by the committing of the alleged offence in respect of which the penalty or sum of money is alleged to have become payable, and also that the person so suing as plaintiff is not resident within the jurisdiction of the court, or not a person of sufficient property to be able to pay any costs which the defendant may recover in the action, the court or judge shall or may order that the plaintiff shall give security by the bond or recognizance of himself and a surety, or by the deposit of a sum of money, or otherwise, as the court or judge shall think fit, for the payment to the defendant of any costs which he may be entitled to recover in the action.

Effect. XXV. [*Act not to affect the Corporation of Cutlers of Hallamshire, nor to repeal* 59 *G.* 3, c. 7.]

Short title. XXVI. The expression "The Merchandise Marks Act, 1862," shall be a sufficient description of this Act.

32 & 33 VICT. c. 24.

An Act to repeal certain Enactments relating to Newspapers, Pamphlets, and other Publications, and to Printers, Typefounders, and Reading Rooms. [12th July, 1869.]

(An Act still partly in force, see 40 & 47 Vict. c. 39.)

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38 VICT. c. 12.

An Act to amend the Law relating to International Copyright.
[13th May, 1875.]

WHEREAS by an Act passed in the fifteenth year of the reign of her present Majesty, chapter twelve, intituled "An Act to enable her Majesty to carry into effect a convention with France on the subject of copyright; to extend and explain the International Copyright Acts; and to explain the Acts relating to copyright in engravings," it is enacted, that "Her Majesty may, by Order in Council, direct that authors of dramatic pieces which are, after a future time, to be specified in such order, first publicly represented in any foreign country, to be named in such order, their executors, administrators, and assigns, shall, subject to the provisions thereinafter mentioned or referred to, be empowered to prevent the representation in the British dominions of any translation of such dramatic pieces not authorised by them, for such time as may be specified in such order, not extending beyond the expiration of five years from the time at which the authorised translations of such dramatic pieces are first published and publicly represented:" 15 *Vict.* c. 12.

And whereas by the same Act it is further enacted, "that, subject to any provisions or qualifications contained in such order, and to the provisions in the said Act contained or referred to, the laws and enactments for the time being in force for ensuring to the author of any dramatic piece first publicly represented in the British dominions the sole liberty of representing the same shall be applied for the purpose of preventing the representation of any translations of the dramatic pieces to which such order extends, which are not sanctioned by the authors thereof:"

And whereas by the sixth section of the said Act it is provided, that "nothing in the said Act contained shall be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country:"

And whereas it is expedient to alter or amend the last-mentioned provision under certain circumstances :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows ; viz.,

Section 6 of recited Act not to apply to dramatic pieces in certain cases.

1. In any case in which, by virtue of the enactments hereinbefore recited, any Order in Council has been or may hereafter be made for the purpose of extending protection to the translations of dramatic pieces first publicly represented in any foreign country, it shall be lawful for her Majesty by Order in Council to direct that the sixth section of the said Act shall not apply to the dramatic pieces to which protection is so extended ; and thereupon the said recited Act shall take effect with respect to such dramatic piece and to the translations thereof as if the said sixth section of the said Act were hereby repealed.

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38 & 39 VICT. c. 53.

An Act to give effect to an Act of the Parliament of the Dominion of Canada respecting Copyright. [2nd August, 1875.]

(An Act still in force.)

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38 & 39 VICT. c. 91.

An Act to establish a Register of Trade Marks.

[13th August, 1875.]

(Repealed 46 & 47 Vict. c. 57.)

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38 & 39 VICT. c. 93.

An Act to amend the Copyright of Designs Act.

[13th August, 1875.]

(Repealed 46 & 47 Vict. c. 57.)

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39 & 40 VICT. c. 33.

An Act for the Amendment of the Trade Marks Registration Act, 1875. [24th July, 1876.]

(Repealed 46 & 47 Vict. c. 57.)

30 & 40 VICT. c. 36.

An Act to Consolidate the Customs Laws.
[24th July, 1876.]

(An Act still partly in force, see 44 Vict. c. 12 (schedule)).

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40 & 41 VICT. c. 37.

An Act for extending the Time for the Registration of Trade Marks, in so far as relates to Trade Marks used in Textile Industries.
[6th August, 1877.]

(Repealed 46 & 47 Vict. c. 57.)

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44 & 45 VICT. c. 60.

An Act to amend the Law of Newspaper Libel, and to provide for the Registration of Newspaper Proprietors. [27th August, 1881.]

(An Act still in force, see *ante*, p. 82).

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45 & 46 VICT. c. 40.

An Act to amend the law of Copyright relating to Musical Compositions. [10th August, 1882.]

Printed notice restraining public performance.

I. On and after the passing of this Act the proprietor of the copyright in any musical composition first published after the passing of this Act, or his assignee, who shall be entitled to and be desirous of retaining in his own hands exclusively the right of public representation or performance of the same, shall print or cause to be printed upon the title-page of every published copy of such musical composition a notice to the effect that the right of public representation or performance is reserved.

Provision when right of performance and copyright are vested in different owners.

II. In case, after the passing of this Act, the right of public representation or performance of, and the copyright in, any musical composition shall be or become vested before publication of any copy thereof in different owners, then, if the owner of the right of public representation or performance shall desire to retain the same, he shall, before any such publication of any copy of such musical composition, give to the owner of the copyright therein notice in writing requiring him to print upon every copy of such

musical composition a notice to the effect that the right of public representation or performance is reserved; but in case the right of public representation or performance of, and the copyright in, any musical composition shall, after publication of any copy thereof subsequently to the passing of this Act, first become vested in different owners, and such notice as aforesaid shall have been duly printed on all copies published after the passing of this Act previously to such vesting, then, if the owner of the right of performance and representation shall desire to retain the same, he shall, before the publication of any further copies of such musical composition, give notice in writing to the person in whom the copyright shall be then vested, requiring him to print such notice as aforesaid on every copy of such musical composition to be thereafter published.

Penalty on owner of copyright for non-compliance with notice from owner of right of performance.

III. If the owner for the time being of the copyright in any musical composition shall, after due notice being given to him or his predecessor in title at the time, and generally in accordance with the last preceding section, neglect or fail to print legibly and conspicuously upon every copy of such composition published by him or by his authority, or by any person lawfully entitled to publish the same, and claiming through or under him, a note or memorandum stating that the right of public representation or performance is reserved, then and in such case the owner of the copyright at the time of the happening of such neglect or default, shall forfeit and pay to the owner of the right of public representation or performance of such composition the sum of twenty pounds, to be recovered in any court of competent jurisdiction.

Costs.

3 & 4 Will. 4, c. 15.

IV. Notwithstanding the provisions of the Act passed in the third and fourth years of His Majesty King William the Fourth, to amend the laws relating to dramatic literary property, or any other Act in which those provisions are incorporated, the costs of any action or proceedings for penalties or damages in respect of the unauthorised representation or performance of any musical composition published before the passing of this Act shall, in cases in which the plaintiff shall not recover more than forty shillings as penalty or damages, be in the discretion of the court or judge before whom such action or proceedings shall be tried.

Short title.

V. This Act may be cited as the Copyright (Musical Compositions) Act, 1882.

46 & 47 VICT. c. 57.

An Act to amend and consolidate the Law relating to Patents for Inventions, Registration of Designs, and of Trade Marks.

[25th August, 1883.]

PART I.

PRELIMINARY.

I. This Act may be cited as the Patents, Designs, and Trade Marks Act, 1883. *Short title.*

III. This Act, except where it is otherwise expressed, shall commence from and immediately after the thirty-first day of December, one thousand eight hundred and eighty-three. *Commencement of Act.*

PART II.

RELATING EXCLUSIVELY TO PATENTS.

PART III.

DESIGNS.

Registration of Designs.

XLVII. (1.) The comptroller may, on application by or on behalf of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom, register the design under this part of this Act. *Application for registration of designs.*

(2.) The application must be made in the form set forth in the first schedule to this Act, or in such other form as may be from time to time prescribed, and must be left at, or sent by post to, the patent office in the prescribed manner.

(3.) The application must contain a statement of the nature of the design, and the class or classes of goods in which the applicant desires that the design be registered.

(4.) The same design may be registered in more than one class.

(5.) In case of doubt as to the class in which a design ought to be registered, the comptroller may decide the question.

(6.) The comptroller may, if he thinks fit, refuse to register any design presented to him for registration; but any person aggrieved by any such refusal may appeal therefrom to the Board of Trade.

(7.) The Board of Trade shall, if required, hear the applicant and the comptroller, and may make an order determining whether, and subject to what conditions, if any, registration is to be permitted.

Drawings, &c., to be furnished on application.

XLVIII. (1.) On application for registration of a design the applicant shall furnish the comptroller the prescribed number of copies of drawings, photographs, or tracings of the design sufficient, in the opinion of the comptroller, for enabling him to identify the design; or the applicant may, instead of such copies, furnish exact representations or specimens of the design.

(2.) The comptroller may, if he thinks fit, refuse any drawing, photograph, tracing, representation, or specimen which is not, in his opinion, suitable for the official records.

Certificate of registration.

XLIX. (1.) The comptroller shall grant a certificate of registration to the proprietor of the design when registered.

(2.) The comptroller may, in case of loss of the original certificate, or in any other case in which he deems it expedient, grant a copy or copies of the certificate.

Copyright in registered Designs.

Copyright on registration.

L. (1.) When a design is registered, the registered proprietor of the design shall, subject to the provisions of this Act, have copyright in the design during five years from the date of registration.

(2.) Before delivery on sale of any articles to which a registered design has been applied, the proprietor must (if exact representations or specimens were not furnished on the application for registration), furnish to the comptroller the prescribed number of exact representations or specimens of the design; and if he fails to do so, the comptroller may erase his name from the register, and thereupon his copyright in the design shall cease.

Marking registered designs.

LI. Before delivery on sale of any articles to which a registered design has been applied, the proprietor of the design shall cause each such article to be marked with the prescribed mark, or with the prescribed word or words or figures, denoting that the design is registered; and if he fails to do so the copyright in the design shall cease, unless the proprietor shows that he took all proper steps to ensure the marking of the article.

Inspection of registered designs.

LII. (1.) During the existence of copyright in a design, the design shall not be open to inspection except by the proprietor, or a person authorised in writing by the proprietor, or a person authorised by the comptroller or by the court, and furnishing such information as may enable the comptroller to identify the design, nor except in the presence of the comptroller, or of an officer acting under him, nor except on payment of the prescribed fee; and the person making the inspection shall not be entitled to take any copy of the design, or of any part thereof.

(2.) When the copyright in a design has ceased, the design shall be open to inspection, and copies thereof may be taken by any persons on payment of the prescribed fee.

Information as to

LIII. On the request of any person producing a particular

design, together with its mark of registration, or producing only its mark of registration, or furnishing such information as may enable the comptroller to identify the design, and on payment of the prescribed fee, it shall be the duty of the comptroller to inform such person whether the registration still exists in respect of such design, and if so, in respect of what class or classes of goods, and stating also the date of registration, and the name and address of the registered proprietor. *Existence of copyright.*

LIV. If a registered design is used in manufacture in any foreign country, and is not used in this country within six months of its registration in this country, the copyright in the design shall cease. *Cesser of copyright in certain events.*

Register of Designs.

LV. (1.) There shall be kept at the patent office a book called the Register of Designs, wherein shall be entered the names and addresses of proprietors of registered designs, notifications of assignments and of transmissions of registered designs, and such other matters as may from time to time be prescribed. *Register of designs.*

(2.) The register of designs shall be *primâ facie* evidence of any matters by this Act directed or authorised to be entered therein.

Fees.

LVI. There shall be paid in respect of applications and registration and other matters under this part of this Act such fees as may be from time to time, with the sanction of the Treasury, prescribed by the Board of Trade; and such fees shall be levied and paid to the account of Her Majesty's Exchequer in such manner as the Treasury shall from time to time direct. *Fees on registration, &c.*

Industrial and International Exhibitions.

LVII. The exhibition at an industrial or international exhibition, certified as such by the Board of Trade, or the exhibition elsewhere during the period of the holding of the exhibition, without the privity or consent of the proprietor, of a design, or of any article to which a design is applied, or the publication, during the holding of any such exhibition, of a description of a design, shall not prevent the design from being registered, or invalidate the registration thereof, provided that both the following conditions are complied with; namely,— *Exhibition at industrial or international exhibition not to prevent or invalidate registration.*

(*a.*) The exhibitor must, before exhibiting the design or article, or publishing a description of the design, give the comptroller the prescribed notice of his intention to do so; and

(*b.*) The application for registration must be made before or

within six months from the date of the opening of the exhibition.

Legal Proceedings.

Penalty on piracy of registered design.

LVIII. During the existence of copyright in any design—

(*a.*) It shall not be lawful for any person without the license or written consent of the registered proprietor to apply such design or any fraudulent or obvious imitation thereof, in the class or classes of goods in which such design is registered, for purposes of sale to any article of manufacture or to any substance artificial or natural or partly artificial and partly natural; and

(*b.*) It shall not be lawful for any person to publish or expose for sale any article of manufacture or any substance to which such design or any fraudulent or obvious imitation thereof shall have been so applied, knowing that the same has been so applied without the consent of the registered proprietor.

Any person who acts in contravention of this section shall be liable for every offence to forfeit a sum not exceeding fifty pounds to the registered proprietor of the design, who may recover such sum as a simple contract debt by action in any court of competent jurisdiction.

Action for damages.

LIX. Notwithstanding the remedy given by this Act for the recovery of such penalty as aforesaid, the registered proprietor of any design may (if he elects to do so) bring an action for the recovery of any damages arising from the application of any such design, or of any fraudulent or obvious imitation thereof for the purpose of sale, to any article of manufacture or substance, or from the publication sale or exposure for sale by any person of any article or substance to which such design or any fraudulent or obvious imitation thereof shall have been so applied, such person knowing that the proprietor had not given his consent to such application.

Definitions.

Definition of "design," "copyright."

LX. In and for the purposes of this Act—

"Design" means any design applicable to any article of manufacture, or to any substance artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any

other means whatever, manual, mechanical, or chemical, separate or combined, not being a design for a sculpture, or other thing within the protection of the Sculpture Copyright Act of the year 1814 (fifty-fourth George the Third, chapter fifty-six).

"Copyright" means the exclusive right to apply a design to any article of manufacture or to any such substance as aforesaid in the class or classes in which the design is registered.

Definition of proprietor.

LXI. The author of any new and original design shall be considered the proprietor thereof, unless he executed the work on behalf of another person for a good or valuable consideration, in which case such person shall be considered the proprietor, and every person acquiring for a good or valuable consideration a new and original design, or the right to apply the same to any such article or substance as aforesaid, either exclusively of any other person or otherwise, and also every person on whom the property in such design or such right to the application thereof shall devolve, shall be considered the proprietor of the design in the respect in which the same may have been so acquired, and to that extent, but not otherwise.

PART IV.

TRADE MARKS.

Registration of Trade Marks.

Application for registration.

LXII. (1.) The comptroller may, on application by or on behalf of any person claiming to be the proprietor of a trade mark, register the trade mark.

(2.) The application must be made in the form set forth in the First Schedule to this Act, or in such other form as may be from time to time prescribed, and must be left at, or sent by post to, the patent office in the prescribed manner.

(3.) The application must be accompanied by the prescribed number of representations of the trade mark, and must state the particular goods or classes of goods in connexion with which the applicant desires the trade mark to be registered.

(4.) The comptroller may, if he thinks fit, refuse to register a trade mark, but any such refusal shall be subject to appeal to the Board of Trade, who shall, if required, hear the applicant and the comptroller, and may make an order determining whether, and subject to what conditions, if any, registration is to be permitted.

(5.) The Board of Trade may, however, if it appears expedient, refer the appeal to the court; and in that event the court shall have jurisdiction to hear and determine the appeal and may make such order as aforesaid.

Limit of

LXIII. Where registration of a trade mark has not been or shall

time for proceeding with application.

not be completed within twelve months from the date of the application, by reason of default on the part of the applicant, the application shall be deemed to be abandoned.

Conditions of registration of trade mark.

LXIV. (1.) For the purposes of this Act, a trade mark must consist of or contain at least one of the following essential particulars :

(*a.*) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner ; or

(*b.*) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark ; or

(*c.*) A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use.

(2.) There may be added to any one or more of those particulars any letters words or figures, or combination of letters words or figures, or any of them.

(3.) Provided that any special and distinctive word or words, letter, figure, or combination of letters or figures or of letters and figures used as a trade mark before the thirteenth day of August one thousand eight hundred and seventy-five may be registered as a trade mark under this part of this Act.

Connexion of trade mark with goods.

LXV. A trade mark must be registered for particular goods or classes of goods.

Registration of a series of marks.

LXVI. When a person claiming to be the proprietor of several trade marks which, while resembling each other in the material particulars thereof, yet differ in respect of (*a*) the statement of the goods for which they are respectively used or proposed to be used, or (*b*) statements of numbers, or (*c*) statements of price, or (*d*) statements of quality, or (*e*) statements of names of places, seeks to register such trade marks, they may be registered as a series in one registration. A series of trade marks shall be assignable and transmissible only as a whole, but for all other purposes each of the trade marks composing a series shall be deemed and treated as registered separately.

Trade marks may be registered in any colour.

LXVII. A trade mark may be registered in any colour, and such registration shall (subject to the provisions of this Act) confer on the registered owner the exclusive right to use the same in that or any other colour.

Advertisement of application.

LXVIII. Every application for registration of a trade mark under this part of this Act shall as soon as may be after its receipt be advertised by the comptroller.

Opposition to registration.

LXIX. (1.) Any person may within two months of the first advertisement of the application, give notice in duplicate at the patent office of opposition to registration of the trade mark, and the comptroller shall send one copy of such notice to the applicant.

(2.) Within two months after receipt of such notice, or such further time as the comptroller may allow, the applicant may send

to the comptroller a counter statement in duplicate of the grounds on which he relies for his application, and if he does not do so, shall be deemed to have abandoned his application.

(3.) If the applicant sends such counter statement, the comptroller shall furnish a copy thereof to the person who gave notice of opposition, and shall require him to give security in such manner and to such amount as the comptroller may require for such costs as may be awarded in respect of such opposition; and if such security is not given within fourteen days after such requirement was made or such further time as the comptroller may allow, the opposition shall be deemed to be withdrawn.

(4.) If the person who gave notice of opposition duly gives such security as aforesaid, the comptroller shall inform the applicant thereof in writing, and thereupon the case shall be deemed to stand for the determination of the court.

Assignment and transmission of trade mark.

LXX. A trade mark, when registered, shall be assigned and transmitted only in connexion with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill.

Conflicting claims to registration.

LXXI. Where each of several persons claims to be registered as proprietor of the same trade mark, the comptroller may refuse to register any of them until their rights have been determined according to law, and the comptroller may himself submit or require the claimants to submit their rights to the court.

Restrictions on registration.

LXXII. (1.) Except where the court has decided that two or more persons are entitled to be registered as proprietors of the same trade mark, the comptroller shall not register in respect of the same goods or description of goods a trade mark identical with one already on the register with respect to such goods or description of goods.

(2.) The comptroller shall not register with respect to the same goods or description of goods a trade mark so nearly resembling a trade mark already on the register with respect to such goods or description of goods as to be calculated to deceive.

Further restriction on registration.

LXXIII. It shall not be lawful to register as part of or in combination with a trade mark any words the exclusive use of which would by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a court of justice, or any scandalous design.

Saving for power to provide for entry on register of common marks as additions to trade marks.

LXXIV. (1.) Nothing in this Act shall be construed to prevent the comptroller entering on the register, in the prescribed manner, and subject to the prescribed conditions, as an addition to any trade mark—

(a.) In the case of an application for registration of a trade mark used before the thirteenth day of August one thousand eight hundred and seventy-five—

Any distinctive device, mark, brand, heading, label,

ticket, letter, word, or figure, or combination of letters, words, or figures, though the same is common to the trade in the goods with respect to which the application is made;

(*b.*) In the case of an application for registration of a trade mark not used before the thirteenth day of August one thousand eight hundred and seventy-five—

Any distinctive word or combination of words, though the same is common to the trade in the goods with respect to which the application is made;

(2.) The applicant for entry of any such common particular or particulars must, however, disclaim in his application any right to the exclusive use of the same, and a copy of the disclaimer shall be entered on the register.

(3.) Any device, mark, brand, heading, label, ticket, letter, word, figure, or combination of letters, words, or figures, which was or were, before the thirteenth day of August one thousand eight hundred and seventy-five, publicly used by more than three persons on the same or a similar description of goods shall, for the purposes of this section, be deemed common to the trade in such goods.

Effect of Registration.

Registration equivalent to public use.

LXXV. Registration of a trade mark shall be deemed to be equivalent to public use of the trade mark.

Right of first proprietor to exclusive use of trade mark.

LXXVI. The registration of a person as proprietor of a trade mark shall be *primâ facie* evidence of his right to the exclusive use of the trade mark, and shall, after the expiration of five years from the date of the registration, be conclusive evidence of his right to the exclusive use of the trade mark, subject to the provisions of this Act.

Restrictions on actions for infringement, and on defence to action in certain cases.

LXXVII. A person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of a trade mark unless, in the case of a trade mark capable of being registered under this Act, it has been registered in pursuance of this Act, or of an enactment repealed by this Act, or, in the case of any other trade mark in use before the thirteenth of August one thousand eight hundred and seventy-five, registration thereof under this part of this Act, or of an enactment repealed by this Act, has been refused. The comptroller may, on request, and on payment of the prescribed fee, grant a certificate that such registration has been refused.

Register of Trade Marks.

Register of trade marks.

LXXVIII. There shall be kept at the patent office a book called the Register of Trade Marks, wherein shall be entered the names

and addresses of proprietors of registered trade marks, notifications of assignments and of transmissions of trade marks, and such other matters as may be from time to time prescribed.

Renewal of trade mark after fourteen years unless fee paid.

LXXIX. (1.) At a time not being less than two months nor more than three months before the expiration of fourteen years from the date of the registration of a trade mark, the comptroller shall send notice to the registered proprietor that the trade mark will be removed from the register unless the proprietor pays to the comptroller before the expiration of such fourteen years (naming the date at which the same will expire) the prescribed fee; and if such fee be not previously paid, he shall at the expiration of one month from the date of the giving of the first notice send a second notice to the same effect.

(2.) If such fee be not paid before the expiration of such fourteen years the comptroller may after the end of three months from the expiration of such fourteen years remove the mark from the register, and so from time to time at the expiration of every period of fourteen years.

(3.) If before the expiration of the said three months the registered proprietor pays the said fee together with the additional prescribed fee, the comptroller may without removing such trade mark from the register accept the said fee as if it had been paid before the expiration of the said fourteen years.

(4.) Where after the said three months a trade mark has been removed from the register for nonpayment of the prescribed fee, the comptroller may, if satisfied that it is just so to do, restore such trade mark to the register on payment of the prescribed additional fee.

(5.) Where a trade mark has been removed from the register for nonpayment of the fee or otherwise, such trade mark shall nevertheless for the purpose of any application for registration during the five years next after the date of such removal, be deemed to be a trade mark which is already registered.

LXXX. [*Relating to fees.*]

LXXXI. [*Relates exclusively to Sheffield marks.*]

PART V.

GENERAL.

Patent Office and Proceedings thereat.

LXXXII. (1.) [*Relates exclusively to the constitution of the office; an office with all requisite buildings and conveniences, which shall be called, and is in this Act referred to as, the Patent Office.*]

(2.) Until a new patent office is provided, the offices of the Commissioners of Patents for inventions and for the registration of

designs and trade marks existing at the commencement of this Act shall be the patent office within the meaning of this Act.

(3.) The patent office shall be under the immediate control of an officer called the comptroller general of patents, designs, and trade marks, who shall act under the superintendence and direction of the Board of Trade.

(4.) Any act or thing directed to be done by or to the comptroller may, in his absence, be done by or to any officer for the time being in that behalf authorised by the Board of Trade.

Officers and clerks.

LXXXIII. [*Relates to officers and clerks; the comptroller-general of patents, designs, and trade marks, and so many examiners and other officers and clerks, with such designations and duties as the Board of Trade think fit, and the salaries of those officers and clerks.*]

LXXXIV. [*Seal of patent office.*]

Trust not to be entered in registers.

LXXXV. There shall not be entered in any register kept under this Act, or be receivable by the comptroller, any notice of any trust expressed implied or constructive.

Refusal to grant patent, &c., in certain cases.

LXXXVI. The comptroller may refuse to grant a patent for an invention, or to register a design or trade mark, of which the use would, in his opinion, be contrary to law or morality.

Entry of assignments and transmissions in registers.

LXXXVII. Where a person becomes entitled by assignment, transmission, or other operation of law to a patent, or to the copyright in a registered design, or to a registered trade mark, the comptroller shall on request, and on proof of title to his satisfaction, cause the name of such person to be entered as proprietor of the patent, copyright in the design, or trade mark, in the register of patents, designs, or trade marks, as the case may be. The person for the time being entered in the register of patents, designs or trade marks, as proprietor of a patent, copyright in a design or trade mark as the case may be, shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licenses as to, or otherwise deal with, the same and to give effectual receipts for any consideration for such assignment, license, or dealing. Provided that any equities in respect of such patent, design, or trade mark may be enforced in like manner as in respect of any other personal property.

Inspection of and extracts from registers.

LXXXVIII. Every register kept under this Act shall at all convenient times be open to the inspection of the public, subject to such regulations as may be prescribed; and certified copies, sealed with the seal of the patent office, of any entry in any such register shall be given to any person requiring the same on payment of the prescribed fee.

Sealed copies to be received in evidence.

LXXXIX. Printed or written copies or extracts, purporting to be certified by the comptroller and sealed with the seal of the patent office, of or from patents specifications disclaimers and other

documents in the patent office, and of or from registers and other books kept there, shall be admitted in evidence in all courts in Her Majesty's dominions, and in all proceedings, without further proof or production of the originals.

Rectification of registers by Court.

XC. (1.) The court may on the application of any person aggrieved by the omission without sufficient cause of the name of any person from any register kept under this Act, or by any entry made without sufficient cause in any such register, make such order for making expunging or varying the entry, as the court thinks fit; or the court may refuse the application; and in either case may make such order with respect to the costs of the proceedings as the court thinks fit.

(2.) The court may in any proceeding under this section decide any question that it may be necessary or expedient to decide for the rectification of a register, and may direct an issue to be tried for the decision of any question of fact, and may award damages to the party aggrieved.

(3.) Any order of the court rectifying a register shall direct that due notice of the rectification be given to the comptroller.

Power for comptroller to correct clerical errors.

XCI. The comptroller may, on request in writing accompanied by the prescribed fee,—

(*a.*) Correct any clerical error in or in connexion with an application for a patent, or for registration of a design or trade mark; or

(*b.*) Correct any clerical error in the name style or address of the registered proprietor of a patent, design, or trade mark.

(*c.*) Cancel the entry or part of the entry of a trade mark on the register: Provided that the applicant accompanies his request by a statutory declaration made by himself, stating his name, address, and calling, and that he is the person whose name appears on the register as the proprietor of the said trade mark.

Alteration of registered mark.

XCII. (1.) The registered proprietor of any registered trade mark may apply to the court for leave to add to or alter such mark in any particular, not being an essential particular within the meaning of this Act, and the court may refuse or grant leave on such terms as it may think fit.

(2.) Notice of any intended application to the court under this section shall be given to the comptroller by the applicant; and the comptroller shall be entitled to be heard on the application.

(3.) If the court grants leave, the comptroller shall, on proof thereof and on payment of the prescribed fee, cause the register to be altered in conformity with the order of leave.

Falsification of entries in registers.

XCIII. If any person makes or causes to be made a false entry in any register kept under this Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces or

tenders or causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanor.

Exercise of discretionary power by comptroller.

XCIV. Where any discretionary power is by this Act given to the comptroller, he shall not exercise that power adversely to the applicant for a patent, or for amendment of a specification, or for registration of a trade mark or design, without (if so required within the prescribed time by the applicant) giving the applicant an opportunity of being heard personally or by his agent.

Power of comptroller to take directions of law officers.

XCV. The comptroller may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act, apply to either of the law officers for directions in the matter.

Certificate of comptroller to be evidence.

XCVI. A certificate purporting to be under the hand of the comptroller as to any entry, matter, or thing which he is authorised by this Act, or any general rules made thereunder, to make or do, shall be *primâ facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone.

Applications and notices by post.

XCVII. (1.) Any application, notice, or other document authorised or required to be left made or given at the patent office or to the comptroller, or to any other person under this Act, may be sent by a prepaid letter through the post; and if so sent shall be deemed to have been left made or given respectively at the time when the letter containing the same would be delivered in the ordinary course of post.

(2.) In proving such service or sending, it shall be sufficient to prove that the letter was properly addressed and put into the post.

Provision as to days for leaving documents at office.

XCVIII. Whenever the last day fixed by this Act, or by any rule for the time being in force, for leaving any document or paying any fee at the patent office shall fall on Christmas Day, Good Friday, or on a Saturday or Sunday, or any day observed as a holiday at the Bank of England, or any day observed as a day of public fast or thanksgiving, herein referred to as excluded days, it shall be lawful to leave such document or to pay such fee on the day next following such excluded day, or days if two or more of them occur consecutively.

Declaration by infant, lunatic, &c

XCIX. If any person is, by reason of infancy lunacy or other inability, incapable of making any declaration or doing anything required or permitted by this Act or by any rules made under the authority of this Act, then the guardian or committee (if any) of such incapable person, or if there be none, any person appointed by any court or judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration or doing such thing, may make such declaration or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on

behalf of such incapable person, and all acts done by such substitute shall for the purposes of this Act be as effectual as if done by the person for whom he is substituted.

Transmission of certified printed copies of specifications, &c.

O. Copies of all specifications, drawings, and amendments left at the patent office after the commencement of this Act, printed for and sealed with the seal of the patent office, shall be transmitted to the Edinburgh Museum of Science and Art, and to the Enrolments Office of the Chancery Division in Ireland, and to the Rolls Office in the Isle of Man, within twenty-one days after the same shall respectively have been accepted or allowed at the patent office; and certified copies of or extracts from any such documents shall be given to any person requiring the same on payment of the prescribed fee; and any such copy or extract shall be admitted in evidence in all courts in Scotland and Ireland and in the Isle of Man without further proof or production of the originals.

CI. [*Power for Board of Trade to make general rules for classifying goods and regulating business of patent office.*]

CII. [*Annual reports of comptroller.*]

International and Colonial Arrangements.

CIII. [*International arrangements for protection of inventions, designs, and trade marks.*]

CIV. [*Provision for Colonies and India.*]

Offences.

Penalty on falsely representing articles to be patented.

CV. (1.) Any person who represents that any article sold by him is a patented article, when no patent has been granted for the same, or describes any design or trade mark applied to any article sold by him as registered which is not so, shall be liable for every offence on summary conviction to a fine not exceeding five pounds.

(2.) A person shall be deemed, for the purposes of this enactment, to represent that an article is patented or a design or a trade mark is registered, if he sells the article with the word "patent," "patented," "registered," or any word or words expressing or implying that a patent or registration has been obtained for the article stamped, engraved, or impressed on, or otherwise applied to, the article.

Penalty on unauthorised assumption of Royal arms.

CVI. Any person who, without the authority of Her Majesty, or any of the Royal Family, or of any Government Department, assumes or uses in connexion with any trade, business, calling, or profession, the Royal arms, or arms so nearly resembling the same as to be calculated to deceive, in such a manner as to be calculated to lead other persons to believe that he is carrying on his trade, business, calling, or profession by or under such authority as aforc-

said, shall be liable on summary conviction to a fine not exceeding twenty pounds.

Scotland; Ireland; &c.

CVII. *Relates exclusively to patents.*

Summary proceedings in Scotland.

CVIII. In Scotland any offence under this Act declared to be punishable on summary conviction may be prosecuted in the sheriff court.

CIX. *Relates exclusively to patents.*

CX. *Relates exclusively to patents.*

General saving for jurisdiction of courts.

CXI. (1.) The provisions of this Act conferring a special jurisdiction on the court as defined by this Act, shall not, except so far as the jurisdiction extends, affect the jurisdiction of any court in Scotland or Ireland in any proceedings relating to patents or to designs or to trade marks; and with reference to any such proceedings in Scotland, the term "the court" shall mean any lord ordinary of the Court of Session, and the term "Court of Appeal" shall mean either division of the said court; and with reference to any such proceedings in Ireland, the terms "the court" and "the Court of Appeal" respectively mean the High Court of Justice in Ireland and her Majesty's Court of Appeal in Ireland.

(2.) If any rectification of a register under this Act is required in pursuance of any proceeding in a court in Scotland or Ireland, a copy of the order, decree, or other authority for the rectification, shall be served on the comptroller, and he shall rectify the register accordingly.

CXII. *Relates to procedure in the Isle of Man.*

Repeal; Transitional Provisions; Savings.

Repeal and saving for past operation of repealed enactments, &c.

CXIII. The enactments described in the Third Schedule to this Act are hereby repealed. But this repeal of enactments shall not—

(*a.*) Affect the past operation of any of those enactments, or any patent or copyright or right to use a trade mark granted or acquired, or application pending, or appointment made, or compensation granted, or order or direction made or given, or right, privilege, obligation, or liability acquired, accrued, or incurred, or anything duly done or suffered under or by any of those enactments before or at the commencement of this Act; or

(*b.*) Interfere with the institution or prosecution of any action or proceeding, civil or criminal, in respect thereof, and any such proceeding may be carried on as if this Act had not been passed; or

(*c.*) Take away or abridge any protection or benefit in relation to any such action or proceeding.

CXIV. (1.) *Relates to the register of patents.*

(2.) The registers of designs and of trade marks kept under any enactment repealed by this Act shall respectively be deemed parts of the same book as the register of designs and the register of trade marks kept under this Act. *Former registers to be deemed continued.*

CXV. All general rules made by the Lord Chancellor or by any other authority under any enactment repealed by this Act, and in force at the commencement of this Act, may at any time after the passing of this Act be repealed altered or amended by the Board of Trade, as if they had been made by the Board under this Act, but so that no such repeal alteration or amendment shall take effect before the commencement of this Act; and, subject as aforesaid, such general rules shall, so far as they are consistent with and are not superseded by this Act, continue in force as if they had been made by the Board of Trade under this Act. *Saving for existing rules.*

CXVI. Nothing in this Act shall take away abridge or prejudicially affect the prerogative of the Crown in relation to the granting of any letters patent or to the withholding of a grant thereof. *Saving for prerogative.*

General Definitions.

CXVII. (1.) In and for the purposes of this Act, unless the context otherwise requires, *General definitions*

"Person" includes a body corporate:

"The court" means (subject to the provisions for Scotland, Ireland, and the Isle of Man) her Majesty's High Court of Justice in England:

"Law officer" means her Majesty's Attorney-General or Solicitor-General for England:

"The Treasury" means the Commissioners of her Majesty's Treasury:

"Comptroller" means the Comptroller-General of Patents, Designs, and Trade Marks:

"Prescribed" means prescribed by any of the schedules to this Act, or by general rules under or within the meaning of this Act:

"British possession" means any territory or place situate within her Majesty's dominions, and not being or forming part of the United Kingdom, or of the Channel Islands, or of the Isle of Man, and all territories and places under one legislature, as hereinafter defined, are deemed to be one British possession for the purposes of this Act:

"Legislature" includes any person or persons who exercise legislative authority in the British possession; and where there are local legislatures as well as a central legislature, means the central legislature only.

In the application of this Act to Ireland, "summary convic-

tion" means a conviction under the Summary Jurisdiction Acts, that is to say, with reference to the Dublin Metropolitan Police District the Acts regulating the duties of justices of the peace and of the police for such district, and elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and any Act amending it.

SCHEDULES.

THE FIRST SCHEDULE.

Forms of Application, &c.

Form A.—Form of Application for Patent.

Form B.—Form of Provisional Specification.

Form C.—Form of Complete Specification.

Form D.—Form of Patent.

Form E.—Form of Application for Registration of Design.

Form F.—Form of Application for Registration of Trade Mark.

THE SECOND SCHEDULE.

Fees on Instruments for obtaining Patents, and Renewal.

THE THIRD SCHEDULE.

Enactments repealed.

As follows, so far as it is material to state them for the purposes of this work :—

5 & 6 Vict. c. 100. [1842.]	An Act to consolidate and amend the laws relating to the copyright of designs for ornamenting articles of manufacture.
6 & 7 Vict. c. 65. [1843.]	An Act to amend the laws relating to the copyright of designs.
13 & 14 Vict. c. 104. [1850.]	An Act to extend and amend the Acts relating to the copyright of designs.
21 & 22 Vict. c. 70. [1858.]	An Act to amend the Act of the fifth and sixth years of her present Majesty, to consolidate and amend the laws relating to the copyright of designs for ornamenting articles of manufacture.
24 & 25 Vict. c. 73. [1861.]	An Act to amend the law relating to the copyright of designs.
33 Vict. c. 97. [1870.]	"Certificate of the registration of a design, £5."
38 & 39 Vict. c. 91. [1875.]	The Trade Marks Registration Act, 1875.
38 & 39 Vict. c. 93. [1875.]	The Copyright of Designs Act, 1875.
39 & 40 Vict. c. 33. [1876.]	The Trade Marks Registration Amendment Act, 1876.
40 & 41 Vict. c. 37. [1877.]	The Trade Marks Registration Extension Act, 1877.

UNITED STATES.

The *Acts relating to copyright and trade marks are as follows* :—

Copyright.—The Act of July 8th, 1870, ss. 4043—4071, as contained in the Revised Statutes, 2nd ed., 1878, p. 957 ; 16 U. S. Statutes at Large, 198.

The Act of June 18th, 1874, as contained 18 U. S. Statutes at Large.

Revised Statutes s. 629, s. 699, which together with s. 4070 (*supra*), govern jurisdiction in copyright cases.

Trade Marks.—U. S. Revised Statutes, ss. 4937—4947.

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