in 1818) *Mr. Hargrave*, the author of Notes or Annotations on Lord Coke's First Institute or Commentary upon Littleton, had assigned in the year 1784, to the *defendants*, his copyright therein, and such *further property* as he might thereafter become entitled to by virtue of the Act of 8th Anne, or any other law or usage. In 1817, he executed another assignment

cap. 156, which, as appears from the preamble, was passed for the express purpose of extending the rights of authors. It recites the 8th Anne, cap. 19, (which first gave to authors a copyright for fourteen years) and the 41st Geo. III. cap. 107, which gave the authors living at the end of the first fourteen years, a further right for a like term; and then it proceeds to state, "that it will afford further encouragement to literature, if the duration of such copyright were extended." The object of the legislature, therefore, was to extend the duration of the copyright; and, if in the subsequent clauses any words of doubtful import occur, they should be construed with reference to the general purpose, thus expressly avowed by the legislature. The ninth section of the act (which is applicable to this case) is free from any such ambiguity. It provides, "that if the author, who might under the former act have acquired a right for twenty-eight years, shall be living at the end of such twenty-eight years, after such first publication, he shall then have the copyright for his life." The author in this case *is living*, and the twenty-eight years have expired: he is, therefore, within the very words of the act, and thereby becomes entitled to the copyright for his life, and the assignment to the plaintiffs is consequently valid. It may be argued, however, that the legislature contemplated the term then to expire, and not already expired; and the author's term having actually been exhausted when this act passed, that this case is not within its meaning. But it must then be made out that the words, "at the end of twenty-eight years," are expressive of the very moment of time at which they should expire. That would, however, be a very narrow construction of these words, and not warranted by the meaning generally given to them in common usage. The words, "at the end of any term," mean after that term is expired. In stating, that at the end of a King's reign such things were done, it would not signify that they were done at the moment he ceased to reign, but only after he had ceased to reign. So if a right of way were granted for a number of years, over certain closes, and at the end of those years the right is to cease, it would mean, that after these years are expired the right was to cease. It, therefore, appears that these words are used in the common intercourse of mankind, and not to express a precise point of time, but the expiration of a period as a thing passed. Then if the words are capable of this sense (although they may admit also of the other construction), they should be construed in this case so as to effect the general purpose of the legislature, viz., the extension of the duration of the copyright of authors. By this construction, the right of the author living at the end of twenty-eight years (expired at the time of passing this act) will be extended: by the other construction, his right will not be extended or enlarged, and the object of the legislature will therefore be defeated. By construing these words so as to give the author the copyright for his life, the court will give full effect to the words of the ninth section, and will further the general intention of the legislature, viz., the encouragement of literature, by extending the rights of authors.

Mr. Richardson, contra. This Act of Parliament does not re-vest in an author a copyright, which, under the then existing laws, was spent and terminated; it only *extends*, but does not *create* a right. The language and meaning of the statute is wholly prospective. The fourth section provides, that from and after the passing of the act, the author of any book, composed and not printed and published, or which shall hereafter be composed and be printed and published, shall have the copyright for twenty-eight years; and if he be living *at* the end of that period, for the term of his life. This section, therefore, makes an alteration in the then law, by extending the author's copyright, first for twenty-eight years, and if he be living at the end of twenty-eight years, for his life. It, however, provides only as to future publications, for the work may be written either before or after the act, but unless it be *published after* the act, this clause does not attach, and it goes on to inflict very severe penalties upon persons printing the works of any authors without their consent. So far the statute had provided for the cases of authors who published after the printing of the act. It occurred, however, to the legislature, that some provisions should be made for existing authors, whose rights under former acts had not

to the *plaintiff* of all his copyright (as far as he lawfully could) in the Notes or Annotations in question, *for the remainder of his* (Mr. Hargrave's) *life.*

This case depended upon the eighth and ninth sections; the former of which recites, that it is reasonable that authors of books already published, and who where then living, should have the benefit of the *extension* of copyright.

then expired, but were concurrent; and the eighth and ninth sections provide for these cases: the eighth section recites, "that whereas it is reasonable that authors of books already published, and who are now living, should have the benefit of the *extension* of copyright." This word extension is a term properly used for the purpose of enlarging or giving further duration to any existing right, but does not import the re-vesting of any expired right; that would not be an *extension*, but a *re-creation.* The object, therefore, of the eighth section is to extend to living writers the benefit of their unexpired rights, and therefore it only applies to cases where the first fourteen years had not expired. The object of this act is to give authors an absolute right for twenty-eight years; and in pursuance of that intention, it gives a continuing interest for fourteen years to those who should be living, and whose copyright under former acts had not expired; the words following the recital in that section are, "be it further enacted, that if the author of any book, which shall not have been published fourteen years at the time of passing this act, shall be then living, and if such author shall afterwards die before the expiration of the fourteen years, then the personal representative shall have the copyright for the further term of fourteen years, provided that nothing in the act shall affect any right of the assignee to sell any of the books of the author, printed within the first fourteen years;" the eighth and ninth sections both contemplate the case of living authors; the eighth, where the first fourteen years have not yet expired, and the ninth where they have; the ninth section applies to the case where the author is living at the end of the first fourteen years, but before the expiration of the second fourteen years; these are the only two cases in which, before the passing of this act, an author could have any right capable of extension, and this statute does not create a new right not already existing, but only extends an existing right; the ninth section goes on, "and be it *also* further (i. e. upon the same recital as that which precedes the eighth section) enacted, that if the author of any book already published, shall be living at the end of twenty-eight years after such publication, he shall have the copyright for his life;" the words "*shall* be living," are prospective. The legislature does not suppose the time to have been already expired, but it contemplates a further extension of time then unexpired; the language is prospective in its terms, and the sense requires that it should be so. For taking the two sections together, it appears clearly that the legislature intended only to extend the already existing right of authors, and not to create a right then expired. This is perfectly consistent with the meaning of the word *shall*, and also with the meaning of the words, *at the end of twenty-eight years.* The words, at the expiration of a term, mean immediately after. Thus, if speaking of a reversioner who is to come into possession at the expiration of the term, that could not be said to mean after the expiration of the term, and at any future period, for the reversion attaches at the expiration of the term. But admitting that the words are capable of either sense, they must be construed so as to give effect to the other words used in these two sections, and particularly with reference to the word "shall," which is prospective in its meaning, and the word "extension," which imports the enlargement of an existing thing, and not a creation. The contrary construction would, indeed, produce an inconvenience and an injustice which could not be intended by the legislature; for at the time of passing this Act of Parliament, the author's right having become extinguished, it was competent to any person to publish the work in question, and such publications may have actually taken place at a great expence to the individual; yet according to the construction contended for, if the author's right were re-vested, the innocent publisher might have his work taken from him, and would be subject to the penalties imposed by this act: so that an individual would be guilty of an offence, and subject to a penalty for exercising his legal right. The legislature could not have intended to produce so much public inconvenience, to benefit a small, though highly

Lord ELLENBOROUGH, C. J., said the word *extension* imports the continuance of an existing thing, and must have its full effect given to it where it occurs. It is expressly used in the recital of the eighth section, which is connected with the ninth, by the subject matter, as well as by the words "be it also further enacted;" and it seems to me, that predicating the purpose to be to benefit the author by the *extension* of his rights, is adopting a very different idea from re-creating an expired right. The word extension, is too strong for me to grapple with; and, if the court were to get rid of its operation, a great public injury would be effected, by calling back a right, that by lapse of time had become extinct.

ABBOTT, J., further observed, it is admitted, that if the public had exercised their rights, by publishing the work before the act passed, that the author could not interfere with the parties who had so exercised the right: and there are no words in the Act of Parliament which admit of one construction where the public have exercised the privileges which have devolved upon them by the lapse of twenty-eight years, and another construction where they have not exercised that

meritorious, class of individuals; and that cannot be the true construction of the Act of Parliament from which such a consequence would follow. Looking, therefore, to the language of the section itself, and the general intention to be collected from the several clauses, as well as the great inconvenience that would follow if the opposite construction were to prevail, it does clearly seem that the intention of the act will be best effected by confining its operation to those authors who at the time of passing the Act of Parliament had existing rights; or in other words, to those whose twenty-eight years had not then elapsed.

Mr. DENMAN, in reply.---The word "extension" does occur in the eighth section, but *not* in the ninth: it is there studiously left out; and the benefit conferred by that section need not, therefore, come within the meaning of the term extension, and there is no expression that connects the two clauses so as to make that word applicable to the ninth.

ABBOTT, Justice.---Will you mention any words in the *English* language more appropriate or apposite to connect one section with another than the words "Be it also further enacted?"

Mr. DENMAN. They are separate clauses, and are not necessarily connected; and the ninth section does not say that the author's right shall be extended, but generally, that, if living, he shall have the copyright for his life: an extension of a right is given by one clause, and a right generally conferred by the other. With respect to the inconvenience which, it is said, will result from this construction of the act, it is not true that an innocent publisher would be subjected to the penalties inflicted by the fourth section, for those penalties only attach on offences comprised in that section.

BAYLEY, J.---Is not a man penally affected who has legally vested his money in a printed book, and is afterwards prevented from selling it?

Mr. DENMAN. The act could not be meant to operate as an ex post facto law in a case where a party had exercised rights vested in the public. Certainly no right actually vested in and exercised by the public, was intended to be divested. If such rights had indeed been exercised, the case might have been very different as to the parties so exercising them; but the fact is otherwise, and therefore that question is immaterial. And that being so, then the case comes within the very words of the ninth section, and is embraced within the general object the legislature had in view in passing the Act of Parliament, viz., the extension of the copyright of authors.

privilege. The act makes no distinction between these two cases.

The COURT afterwards certified their opinion, that the plaintiff, by virtue of the last mentioned assignment, took no interest in the Notes or Annotations.

In the case of Carnan v. Bowles(1) it was also decided, that an author who sells his work in general terms, without making any limitations, has no resulting right against his own assignee after the first term has expired, formerly of fourteen, but now of twenty-eight years(2).

Although a general assignment of a copyright in writing endures only for fourteen years, yet where an author by parole gave a compilation to a publisher unconditionally, it was holden that such gift was not impliedly limited to the term of fourteen years(3).

The distinction between the point decided in the case of Carnan v. Bowles, and the eighth section of the 54th Geo. III. cap. 156, appears to be this:

If an author who has assigned his right, *outlive the first fourteen years*, (or twenty-eight years now allowed) his *assignee*, by the general assignment, will have the benefit of the resulting term, fourteen years, or the remainder of the author's life.

But if an author die after the enactment, but *within* that

(1) Carnan v. Bowles, 2 Brown's Chancery Rep. 80.

(2) The eleventh section of 8 Anne provides, that after the expiration of the term of fourteen years, the sole right of printing or disposing of copies of books shall *return* to the authors thereof, if they are then living, for a further term of fourteen years. In the case cited in the text, the author, Captain Paterson, having sold "all his right" in a Book of Roads to the plaintiff, which was printed in letter-press, after the expiration of the first fourteen years, sold it to the defendant, who published the high roads upon copper-plates, and the cross roads in letter-press.

Mr. MANSFIELD, on the part of the plaintiff, contended, that the expression in the act meant to secure something to authors even against their own acts. It gives the right to authors and their assigns during the first fourteen years, and no longer; and then, by the proviso, the right shall *return* to *the authors* (not their assigns), if living. So that it is a personal bounty to the authors only. In selling the right, the author sells all that is in him, not the contingent right that may return to him.

The SOLICITOR-GENERAL, on the other side, argued, that the author has an absolute and a contingent right; they are both capable of being disposed of. There is nothing in the act to make a difference between them. The *return* is only between the public and the author, not between him and his assignee. There are no negative words in the act to prevent his assigning that, as well as his other rights. In many cases, if he could not assign it, the disability would be productive of great inconvenience.

LORD CHANCELLOR.---The *contingent* interest must pass by the word "interest" in the grant. The author conveys all his interest in the copyright. The assignment must have been made upon the idea of a perpetuity. It is probable not a syllable was said or thought of respecting the contingent right. They merely followed the old precedents of such conveyances. It must, I think, be considered as conveying his whole right. If he had meant to convey his first term only, he should have said so. An injunction was therefore granted as to the letter-press.

(3) Rudell v. Murray, 1 Jacob, 311. 6 Petersdorff's Abr. 564.

term, then his assignee will enjoy the copyright for the first fourteen years only, and the *personal representatives* of the deceased will have the benefit of a further term of fourteen years, without prejudice to the sale of the books printed by the assignee within the first term(1).

SECTION III.

Digest of Cases relating to the extent of Copyright—works comprised in the Statute, or protected by the Common Law.

1st. *Of Manuscripts.*

Although the common law, on the subject of copyright in *printed* books, has been superseded by the statutes, the ancient protection afforded to all kinds of property still remains in full force in favor of literary *manuscripts*.

With the single exception of Mr. Baron Eyre, all the judges decided in the case of Donaldson v. Becket(2), that an author has complete control over his works, so long as they remain in manuscript.

Of these there are several kinds, consisting of

1. Unpublished works in general.
2. Dramatic works, whether they have been represented or not.
3. Epistolary writings.

These several descriptions of literary works are protected from invasion, and the Courts of Equity, at the instance of the author or proprietor, will stay the publication of them: and an action at law can be maintained in trover, detinue, or trespass(3).

2nd. *Of Printed Books.*

The statute, according to its construction by the courts, is not limited to publications usually termed "books," but includes every original work, however insignificant it may be in extent. There is a property even in a single page.

There is nothing (said Mr. Erskine) in the word *book* to require that it should consist of several sheets, bound in leather, or stitched in a marble cover. *Book* is evidently the Saxon Boc, and the latter term is from *beech tree*, the rind of which supplied the place of paper to our German ancestors. The latin word *liber* is of a similar etymology, meaning originally only the bark of a tree. *Book* may therefore

(1) Godson on Patents and Copyright, 211.
(2) 4 Burr. 2408.
(3) For the details on *pirating the copyright* of these works, vide Part III.

be applied to any writing, and it has often been so used in the English language(1).

If a different construction were put upon the act, many productions of the greatest genius, both in prose and verse, would be excluded from its benefits. But might the papers of the *Spectator*, or *Gray's Elegy* in a Country Church-yard, have been pirated as soon as they were published, because they were given to the world on single sheets? The voluminous extent of a production cannot in an enlightened country be the sole title to the guardianship the author receives from the law. Every man knows that the mathematical and astronomical calculations which will inclose the student during a long life in his cabinet, are frequently reduced to the compass of a few lines; and is all this profundity of mental abstraction, on which the security and happiness of the species in every part of the globe depend, to be excluded from the protection of British jurisprudence?

The point was not further argued. The rule was made absolute(2).

In a subsequent case this decision was referred to, and Lord ELLENBOROUGH said(3),

I do not at present see why a composition, printed on a single sheet, should not be entitled to the privileges of the statute. We say, "sit liber index," without referring to a volume either printed or written. I was at first startled at a single sheet of paper being called a *book*; but I was afterwards disposed to think that it might be so considered, within the meaning of this Act of Parliament; and when the matter came before the court, the other judges inclined to the same opinion(4).

This point was afterwards settled and confirmed by the whole court(5)

The statute comprises not only original works, but *Translations*, both from the ancient and modern languages(6).

(1) Sometimes the most humble and familiar illustration is the most fortunate. The *Horn Book*, so formidable to infant years, consists of one small page, protected by an animal preparation, and in this state it has universally received the appellation of a *book*. So in legal proceedings, the copy of the pleadings after issue joined, whether it be long or short, is called the Paper *Book*, or the Demurrer *Book*. In the Court of Exchequer, a roll was anciently denominated a book, and continues in some instances to the present day. An oath as old as the time of Edward I. runs in this form: "And you shall deliver into the Court of Exchequer a *book* fairly written." But the book delivered into court in fulfilment of this oath, has always been a roll of parchment. *2 Camp.* 29.

(2) Hine v. Dale, 2 Camp. 28, *note.* (3) Clementi v. Golding, 2 Camp. 30.

(4) Mr. SCARLETT, in his argument for the plaintiffs, ably contended, that the legislature by the word *book*, could not be considered as meaning only a number of printed sheets bound up together, since they talked in section 2 of a literary composition, as a book before it was printed at all. According to its original meaning, it signifies any writing, without reference to size or form, and it is so used by the most celebrated authors. Thus in Shakespeare, Henry IV., *book* stands for the indenture or instrument by which Mortimer, Glendower, and Hotspur, agreed to divide England between them(*a*), and the commentators upon that passage point out various other instances in which the word is employed in the same sense.

(*a*) *Mort.* By that time will our *book* I think be drawn. Hen. IV. Part I. Act 3. Scene 1. The instrument is a little before called *an indenture tripartite.*

(5) 11 East, 244. (6) 3 Ves. and B. 77.

It also includes *Abridgments* and *Compilations*, provided they are *bona fide*, and not fraudulently or colourably, made(1).

And after the time limited by the statute has expired, if the author, or any other writer, should reprint the book with original

Notes or *additions*,

the latter are entitled to the same degree of protection as any other original composition, for the whole time allowed by the statute(2).

3rd. Of Musical Compositions.

The statute has further received a liberal interpretation in favor of musical compositions, which have also been held, as a branch of science, to be comprehended within the meaning of the act. The work thus printed and published contains a representation (so to speak) of original musical ideas, and therefore receives the same protection, both in extent and duration, as publications which convey ideas more purely intellectual.

Lord MANSFIELD said, the words of the Act of Parliament are very large---*books and other writings*. It is not confined to language or letters. Music is a science: it may be *written*; and the mode of conveying ideas is by signs and marks. If the narrow interpretation contended for in the argument were to hold, it would equally apply to algebra, mathematics, arithmetic, hieroglyphics. All these are conveyed by signs and figures. There is no colour for saying that music is not within the act(3).

CHAP. II.

OF COPYRIGHT IN ENGRAVINGS, ETCHINGS, PRINTS, MAPS, AND CHARTS.

In the historical view of the law of copyright in general, we have not adverted to the statutes regarding engravings, etchings, and prints, inasmuch as they have not been recently consolidated, like those which relate to printed books. In treating of the present state of the law on this branch of the fine arts, which is so intimately connected with literature, we may properly consider, under one view, the *three* Acts of Parliament which have been passed for "the encouragement of the arts of designing, engraving, and etching."

(1) Amb. 403, Lofft. Rep. 775. Vide Part III. for the details regarding piracy in these compositions.

(2) 1 East, 358.

(3) Bach v. Longman, Cowp. 623.

SECTION I.

Analysis of the Statutes.

The 8th Geo. II. cap. 13, is entitled, 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.

It recites, that divers persons have, by their own genius, industry, pains and expence, invented and engraved, or worked in *mezzotinto* or *chiaro oscuro,* sets of historical and other prints, in hopes to have reaped the sole benefit of their labors; and that print-sellers 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, the act vests the sole right and liberty of printing and reprinting the same for fourteen years, to commence from the day of first publishing thereof.

The date to be engraved, with the name of the proprietor, on each plate, and printed on every print.

The penalties for pirating, or selling, or exposing to sale, either the whole or a part of any print, without the consent of the proprietor in writing, signed in the presence of two witnesses, are a *forfeiture* of the prints, and a *fine* of five shillings each.

The act does not extend to purchasers of plates from the original proprietors. And there is a clause in favor of certain engravings then designed, relating to the Spanish invasion.

Actions under the statute must be brought within three months. The general issue may be pleaded.

We consider it essential, as a part of the present law, to set forth the remainder of the act in full. The following is the enacting part, together with the subsequent clauses.

That from and after the 24th of June, which will be in the year of our Lord, 1735, every person who shall invent and design, engrave, etch, or work in *mezzotinto,* or *chiaro oscuro,* or from his own works and inventions, shall cause to be designed and engraved, etched, or worked in mezzotinto or chiaro oscuro, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for the term of fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved with

the name of the proprietor on each plate, and printed on every such print or prints; and that if any printseller or other person whatsoever, from and after the said 24th day of June, 1735, 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 part 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 and 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, essoine, privilege, or protection, nor more than one imparlance, shall be allowed.

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.

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 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.

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; any thing in this act contained to the contrary notwithstanding.

V. And whereas John Pine, of London, Engraver, doth propose to engrave and publish a set of prints copied from several pieces of tapestry in the House of Lords and His Majesty's wardrobe, and other drawings relating to the Spanish invasion in the year of our Lord 1588, be it further enacted by the authority aforesaid, that the said John Pine shall be entitled to the benefit of this act to all intents and purposes whatsoever, in the same manner as if the said John Pine had been the inventor and designer of the said prints.

VI. 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.

The next act is the 7th Geo. III. c. 38, and is entitled, An act to amend and render more effectual an act made in the eighth year of the reign of King George II. 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.

By this act, the term of copyright is extended to twenty-eight years.

And it includes "the prints of any portrait, conversation, landscape, or architecture, *map, chart, or plan,* or any other print."

By the 2nd section, engravings, etchings, or works taken from "any picture, drawing, model, or sculpture, either ancient or modern," are entitled to the protection of the act.

The remedies provided by this statute must be sued for within *six months* after the offence committed.

It is observable that this act does not expressly require the name of the proprietor and the date of publication to be engraved on the print; but it seems probable that the provision of the previous statute, 8 Geo. II. in that respect should be considered as included(1); and the insertion is necessary for the recovery of the penalties, though not for the purpose of maintaining an action for damages(2).

The following is an accurate statement of the act:

It recites---

That an Act of Parliament passed in the eighth year of the reign of His late Majesty King George II. intituled, An act for encouragement of the arts of designing, engraving, and etching historical

(1) 2 Evans's Stat. 637, *note.* (2) 1 Camp. 98; but see the next section.

and other prints, by vesting the properties thereof in the inventors and engravers during the time therein mentioned, had been found ineffectual for the purposes thereby intended.

And it is then enacted,

That from and after the first day of January, 1767, 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.

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, 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.

III. The sole right of printing and reprinting the late W. Hogarth's prints, vested in his widow and executrix for twenty years.

IV. Penalty of copying, &c. any of them before expiration of the term ; such copies excepted as were made and exposed to sale after the term of fourteen years, for which the said works were first licenced, &c.

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.

VI. Provided also, that the party prosecuting shall commence his prosecution within the space of six calendar months after the offence committed.

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 herein before, and in the said former act, mentioned.

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, any thing 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 remedy whereof, he shall have the same remedy as any other defendant or defendants in any other case hath or have by law.

The last act on this subject is the 17th Geo. III. c. 57, and is entitled, 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.

By this statute an *action for damages* and *double costs* is given for engraving, etching, or printing any historical print, or any portrait, &c. without the consent of the proprietor, within the time limited by the former acts. The remedies provided by the former statutes were by fine and forfeiture.

The act recites---

That an act of Parliament passed in the eighth year of his late Majesty, King Geo. II. 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 that 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 purposes therein mentioned, it was (among other things) enacted, that from and after the first day of January, 1767, 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 that the said acts have not effectually answered the purposes for which they were intended; and it is necessary, for the encouragement of artists, and for securing to them the property of and in their works, and for the advancement and improvement of the aforesaid arts, that such further provisions should be made as are hereinafter mentioned and contained.

It is therefore enacted,

That from and after the 24th day of June, 1777, if any engraver, etcher, print-seller, or any 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 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 imprinted or imported for sale, or shall publish, sell, or otherwise dispose of, or cause or procure to be published, sold, or otherwise disposed of, any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever which hath or have been, or shall be, engraved, etched, drawn, or designed in any part of Great Britain, without the express consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of, and attested by, two or more credible witnesses, then every such proprietor or proprietors shall and may, by and in a special action upon the case to be brought against the person or persons so offending, recover such damages as a jury on the trial of such action, or on the execution of a Writ of Enquiry thereon, shall give or assess, together with double costs of suit.

SECTION II.

Digest of Cases.

The acts are not confined in their protection to *inventions*, strictly speaking, but comprise the designing or engraving any thing that is already in nature(1).

The *degree of originality* which entitles the inventor to the protection of the statute, has been well defined by Lord Ellenborough, who states the question thus: Whether the defendant has copied the main design? Whether there be such a similitude and conformity between the prints, that the person who executed the one set, must have used the others as a model? In that case, he is a copyist of the main design. But if the similitude can be supposed to have arisen from accident, or necessarily from the nature of the subject, or from the artist having sketched his design merely from reading the letter-press of the plaintiff, the defendant is not answerable(2).

A question has arisen, whether it be absolutely necessary to support an action at law, or a bill in equity, that the *date of publication*, and the *name of the proprietor*, be engraved on each plate and print.

(1) 2 Atkins, 293. (2) 1 Camp. 94, Roworth v. Wilkes.

It is said(1) that there is a contrariety of opinion in the authorities as to the true construction of the act. *Lord Hardwicke* and *Lord Ellenborough* being on one side, and *Lord Alvanley, Lord Kenyon,* and *Judge Buller,* on the other. The case referred to, however, was not decided on the point in question, and *Lord Kenyon* himself does not appear very decided in his opinion. He says, had the question turned entirely on the point on which it has been argued, I should have thought it involved in considerable difficulty: upon that head *my opinion has floated during the course of the argument.* It should seem, that the reason for requiring the name and the date to appear on the print was, that they might convey some useful intelligence to the public. The *date* is of importance, that the public may know the period of the monopoly. The *name* of the proprietor should appear, in order that those who wish to copy it, might know to whom to apply for consent. It seems, therefore, necessary, that the date should remain, but that the name of the proprietor should be altered as often as the property is changed(2).

This decision was in the year 1792. At a subsequent period, namely, in 1807, Lord ELLENBOROUGH said, although the plaintiff's name is not engraved upon the prints, if there has been a piracy, I think the plaintiff is entitled to a verdict. *The interest being vested, the common law gives the remedy.* I have always acted on the case of Beckford v. Hood(3), in which the Court of King's Bench held, that an author whose work is pirated, may maintain an action on the case for damages, although the work was not entered at Stationers' Hall, and although it was first published without the name of the author affixed(4).

We have stated the preceding case, which arose more directly out of the *construction* of the Acts of Parliament; and for the decisions relating to the invasion of copyright in engravings and prints, we refer to the *third part of this book,* in which the whole subject of "piracy" will be considered.

CHAP. III.

OF THE RIGHT IN ORIGINAL SCULPTURE, MODELS, AND CASTS.

There are two statutes on the subject of original sculpture, models, and casts, which may not inappropriately be introduced in this place as a branch of the fine arts.

(1) Godson on Patents and Copyright, 290.
(2) 5 T. R. 45, Thompson v. Symonds. (3) 7 T. R. 620.
(4) 1 Camp. 98. See also 2 Vesey, 327, and Law Journal, May, 1827. In Newton v. Cowie, the Common Pleas held both date and name to be essential.

The first of these acts was passed in the year 1798; and the last, a short time previously to the general Copyright Act in 1814.

SECTION I.

Analysis of the Statutes.

The 38th Geo. III. chap. 71, is entitled, "An act for encouraging the art of making new models and casts of busts, and other things therein mentioned."

It vests in the proprietor the sole right and property of making new models, or copies or casts from such models, of any bust, figure, or any statue, &c. during the term of fourteen years, provided the name of the maker and the date of publication be put thereon.

Persons making copies, without the written consent of the proprietor, may be sued for damages in a special action on the case.

The act recites---

That divers persons have by their own genius, industry, pains, and expence, improved and brought the art of making new models and casts of busts, and of statues of human figures and of animals, to great perfection, in hopes to have reaped the sole benefit of their labors; but, that divers persons have (without the consent of the proprietors thereof) copied and made moulds from the said models and casts, to the great prejudice and detriment of the original proprietors, and to the discouragement of the art of making such new models and casts as aforesaid; FOR REMEDY WHEREOF, AND FOR PREVENTING SUCH PRACTICES FOR THE FUTURE, IT IS ENACTED, that from and after the passing of this act, every person who shall make, or cause to be made, any new model or copy or cast made from such new model of any bust, or any part of the human figure, or any statue of the human figure, or the head of any animal, or any part of any animal, or the statue of any animal, or shall make or cause to be made any new model, copy, or cast from such new model, in alto or basso relievo, or any work in which the representation of any human figure or figures, or the representation of any animal or animals, shall he introduced, or shall make, or cause to be made, any new cast from nature of any part or parts of the human figure, or of any part or parts of any animal, shall have the sole right and property in every such new model, copy, or cast, and also in every such new model, copy, or cast in alto or basso relievo, or any work as aforesaid, and also in any such new cast from nature as aforesaid, for and during the term of fourteen years from the time of first publishing the same; provided always that every person who shall make, or cause to be made, any such new model, copy, or cast, or any such new model, copy, or cast in alto or basso relievo, or any work as aforesaid, or any new cast from nature as aforesaid, shall cause his or her name to be put thereon, with the date of the publication, before the same shall be published and exposed to sale.

II. And be it further enacted, that if any person shall, within the said term of fourteen years, make, or cause to be made, any copy or cast of any such new model, copy, or cast, or any such model, copy, or cast in alto or basso relievo, or any such work as aforesaid, or any such new cast from nature as aforesaid, either by adding to, or diminishing from, any such new model, copy or cast, or adding to or diminishing from any such new model, copy or cast in alto or basso relievo, or any such work as aforesaid, or adding to or diminishing from any such new cast from nature, or shall cause or procure the same to be done, or shall import any copy or cast of such new model, copy, or cast in alto or basso relievo, or any such work as aforesaid, or any copy or cast of any such new cast from nature as aforesaid for sale, or shall sell or otherwise dispose of, or cause or procure to be sold or exposed to sale, or otherwise disposed of, any copy or cast of such new model, copy, or cast in alto or basso relievo, or any such work as aforesaid, or any copy or cast of any such new cast from nature as aforesaid, 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 hand or hands, in the presence of, and attested by, two or more credible witnesses, then, and in all or any of the cases aforesaid, every proprietor or proprietors of any such original model, copy, or cast, and every proprietor or proprietors of any such original model or copy or cast in alto or basso relievo, or any such work as aforesaid, or the proprietor or proprietors of any such new cast from nature as aforesaid, respectively, 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 enquiry thereon, shall give or assess, together with costs of suit.

III. Provided nevertheless that no person who shall hereafter purchase the right either in any such models, copy, or cast, or in any such model, copy, or cast in alto or basso relievo, or any such work as aforesaid, or any such new cast from nature of the original proprietor or proprietors thereof, shall be subject to any action for vending or selling any cast or copy from the same; any thing contained in this act to the contrary thereof notwithitanding.

IV. Provided also, 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.

These provisions were rendered more effectual by the 54th Geo. III. c. 56, by which double costs were given, and an additional term of fourteen years in case the maker of *original sculpture, models, &c.* should be living, except he should have divested himself of the right previous to the passing of the act.

Before proceeding to the construction which has been put on these acts, we deem it necessary to insert the several clauses of the last act.

It is intituled,

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.

It recites---

That by an act passed in the 38th 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---that the provisions of the said act having been found ineffectual for the purposes thereby intended, it is expedient to amend the same, and 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.

It is therefore enacted---

That from and after the passing of this act, every person or persons who shall make, or cause to be made, any new and original sculpture or model, or copy or cast of the human figure or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals, or of any part or parts of any animal combined with the human figure or otherwise, or of any subject being matter of invention in sculpture, or of any alto or basso relievo, representing any of the matters or things herein before 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 and 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 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.

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 into 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.

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 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 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.

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, any thing contained in this act to the contrary notwithstanding.

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.

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 herein before mentioned, shall return to the person or persons who

originally made, or cause to be made, the same, if he or they shall be then living, for the further term of fourteen years, excepting in the case or cases where such person or persons shall, by sale or otherwise, have divested himself, herself, or themselves, of such right of making or disposing of any new and original sculpture, or model, or copy, or cast of any of the matters or things herein before mentioned, previous to the passing of this act.

SECTION II.

Construction of the Acts.

The first act on this subject (38 Geo. III. c. 71) was found to be so defective, that it was held to be no offence to *make* a cast of a bust, provided it was a *perfect* fac-simile of the original(1).

It was also held, in the case of Gahagan v. Cooper, to be no offence under that act to *sell* a pirated cast of a bust, if the piracy had any addition to, or diminution from, the original(2).

The declaration, however, confined the case to the selling *exact* copies. But in West v. Francis (which has been referred to by Mr. Godson on this subject), there was a count for selling copies in part by small variations from the main design, and therefore the point did not arise(3).

The second act remedied these defects; but no case has been decided under that act as to the insertion of the name and day of publication; yet it seems clear that the construction of the statutes relating to engravings and prints will equally apply to sculpture, models, &c. It appears also that the reasoning on the statutes regarding patterns for linen, are applicable to the present subject(4).

CHAP. IV.

OF WORKS EXCLUDED FROM LEGAL PROTECTION.

The consideration of works excluded from legal protection, on the ground of their unlawful and immoral nature, has been reserved for this part of the treatise; inasmuch as the same principle which excludes a *book*, will equally apply to an *engraving* and to *sculpture*. The cases, therefore, of this kind, whether referring to books, prints, or sculpture, will be arranged according to the nature of their injurious or illegal character.

(1) Godson on Patents, &c. 305.
(2) 3 Camp. 111.
(3) 5 Barn. and Ald. 737.
(4) Godson on Patents, &c. 306.

SECTION I.

Of Works injurious to public morals.

The courts of justice endeavour to protect society from the publication of works which tend to degrade the morals of the people; and so strong is the objection to an immoral work, that Lord ELLENBOROUGH held an apprehension of a prosecution for the immorality or illegality of a work (if proved to be well founded by the production of the part printed), would justify a person for refusing to supply a bookseller with the remainder of the manuscript agreeable to a contract.

The author might say, I now feel convinced that this work cannot be committed to the press with safety, that it is not a proper one for me to publish, or for you (the bookseller) to print; here I will pause, and will proceed no further in that which will place both of us in peril(1).

It has also been held, that a Court of Equity has a superintendency over all books, and may in a summary way restrain the printing or publishing every thing that contains reflections on religion or morality.

Protection has been denied to a *translation* of an immoral work. In the case of Burnett v. Chetwood, in the year 1720, the LORD CHANCELLOR said,

Though a translation might not be the same with the reprinting the original, on account that the translator had bestowed his care and pains upon it, yet this being a book which to his knowledge contained strange notions, intended by the author to be concealed from the vulgar in the Latin language, in which language it could not do much hurt, the learned being better able to judge of it, he thought it proper to grant an injunction to the printing and publishing it in English(2).

And an action cannot be maintained to recover the value of obscene or libellous prints or caricatures. Mr. Justice LAWRENCE observed, that

For prints whose objects are general satire, or ridicule of prevailing fashions or manners, he thought a plaintiff might recover; but he could not permit him to do so for such whose tendency was immoral or obscene(3).

SECTION II.

Of Publications injurious to Religion.

Works which deny the truth of, or vilify, the sacred scriptures, or which tend to bring them into disrepute, or

(1) Gale v. Leckie, 2 Stark. 109-10. (2) 2 Meriv. 441, n.
(3) Fores v. Jones, 4 Esp. N. P. C. 97.

which lead to a disbelief in revelation, are strictly excluded from legal protection in the Courts of Justice in this country, all of which acknowledge Christianity as part of the law of the land.

Thus in the case of *Murray v. Benbow,* in which an injunction was applied for to restrain a pirated edition of Lord BYRON'S Cain, Lord ELDON said,

The jurisdiction of this court in protecting literary property is founded on this, that where an action will lie for pirating a work, then the court, attending to the imperfection of that remedy, grants its injunction, because there may be publication after publication which you may never be able to hunt down by proceeding in the other courts. But where such an action does not lie, I do not apprehend that it is according to the course of the court to grant an injunction to protect the copyright. Now this publication, if it is one intended to *vilify* and bring into discredit that portion of *scripture history* to which it relates, is a publication, with reference to which, if the principles on which that case at Warwick (Dr. Priestley's case) was decided by just principles of law, the party could not recover any damages in respect of a piracy of it. This court has no criminal jurisdiction; it cannot look on any thing as an offence; but in those cases it only administers justice for the protection of the civil rights of those who possess them, in consequence of being able to maintain an action. You have alluded to MILTON'S immortal work; it did happen in the course of last long vacation, I read that work from beginning to end; it is therefore quite fresh in my memory, and it appears to me that the great object of its author was to promote the cause of Christianity; there are, undoubtedly, a great *many passages* in it, of which, if that were not its object, it would be *very improper by law* to vindicate the publication; but, *taking it altogether,* it is clear that the object and effect were not to bring into disrepute, but to promote, the reverence of our religion. Now the real question is, looking at the work before me, its preface, the poem, its manner of treating the subject, particularly with reference to the *fall* and the *atonement*---whether its intent be as innocent as that of the other with which you have compared it; whether it be to traduce and bring into discredit that portion of sacred history. This question I have no right to try, because it has been settled, after great difference of opinion among the learned, that it is for a jury to determine that point; and where, therefore, a reasonable doubt is entertained as to the character of the work (and it is impossible for me to say I have not a doubt---I hope it is a reasonable one), another course must be taken for determining what is its true nature and character.

There is a great difficulty in these cases, because it appears a strange thing to permit the multiplication of copies, by way of preventing the circulation of a mischievous work (which I do not presume to determine that this is); but that I cannot help; and the singularity of the case, in this instance, is more obvious, because here is a defendant who has multiplied his work by piracy, and does not

think proper to appear. If the work be of that character which a Court of Common Law would consider criminal, it is pretty clear why he does not appear, because he would come *confitens reus*, and for the same reason the question may, perhaps, not be tried by an action at law; and if it turns out to be the case, I shall be bound to give my own opinion. That opinion I express no further now than to say, that after having read the work, I cannot grant the injunction until you shew me that you can maintain an action for it. If you cannot maintain an action, there is no pretence for granting an injunction; if you should not be able to try the question at law with the defendant, I cannot be charged with impropriety if I then give my opinion upon it.

It is true that this mode of dealing with the work, if it be calculated to produce mischievous effects, opens a door for its wide dissemination; but *the duty of stopping the work does not belong to a Court of Equity*, which has no criminal jurisdiction, and cannot punish or check the offence. If the character of the work is such, that the publication of it amounts to a temporal offence, there is another way of proceeding, and the publication of it should be proceeded against directly as an offence; but whether this or any other work should be so dealt with, it would be very improper for me to form or intimate an opinion(1).

In the same year (1822) occurred another case, which may be classed in the same order, namely, that of *Lawrence v. Smith;* and considering the importance of the principle established by these decisions, we deem it proper to set forth the judgment of the court at large.

It appeared that Mr. Lawrence published his Lectures on Physiology, in which, mixed with a great collection of valuable and appropriate facts, were some episodical theories on the nature of the soul, and the origin of mankind, which were supposed to lead to a *disbelief in revelation.* The lectures were soon pirated. An application was made by the piratical publisher to dissolve the injunction.

It was moved on the ground that the "the evil tendency of the work was as clear as the sun at noon(2)." The defendant was heard by his counsel to maintain that "his publication denied Christianity and revelation, and was contrary to public policy and morality; that it was more dangerous from the author's scholar-like command of the language, and his scientific mode of treating the subject, which, acting upon undisciplined minds, was calculated to bring them under its control, and thereby work the greater mischief: and that

(1) 6 Petersdorff Abr. 558-9.

(2) Was this "coming into court with *clean hands*?" Was it consistent with the principle which maintains that *a man shall not avail himself of his own wrong*?

therefore the restraint which the injunction imposed on its dissemination must be removed!"

The LORD CHANCELLOR said, that this case had been argued at the bar with great ability. He would explain in a few words the principles on which his decision would be founded. On the observations which had been made on the College of Surgeons, as the place in which these lectures had been read, he would not touch; he would only treat the plaintiff as the author of the work. This case had been introduced by a bill filed by Mr. Lawrence, in which he stated that he was the author of this book, which the defendant had also published; and that he was entitled to the protection of this court, in preservation of the *profits* resulting from its publication. Undoubtedly the jurisdiction of this court was founded on this principle, that where the law will not afford a complete remedy to literary property when invaded, this court will lend its assistance; because, where every publication is a distinct cause of action, and where several parties might publish the book, if a man were obliged to bring an action on each occasion, the remedy would be worse than the disease. But then this court will only interfere where he can by law sustain an action for damages, equal to the injury he has sustained. He might then come here to make his legal remedy more effectual. But if the case be one which it is not clear will sustain an action at law, then this court will not give him the relief he seeks.

The present case had been opened as an ordinary case of piracy, and he took it that nothing was then said as to the general tenor of the work, or of particular passages in it. He, the Lord Chancellor, was bound to look, not only to the tenor, but also to *particular passages unconnected with its general tenor*(1); for if there were any parts of it which denied the *truth of scripture*, or which furnished a doubt as to whether a court of law would not decide that they had denied the truth of scripture, he was bound to look at them and decide accordingly.

There was a peculiar circumstance attending this case, which was, that the defendant possessed no right to the work, but said to the plaintiff, "this book is so original in its nature, as to deprive you of all protection at law against others and myself, and I will therefore publish it."

Now his Lordship knew it to be said that in cases where the work contained criminal matter, the court, by refusing the injunction, allowed the greater latitude for its dissemination. But his answer to that was, that this court possessed no criminal jurisdiction. It could only look at the civil rights of the parties, and therefore whether a different proceeding were hereafter instituted against the defendant or the plaintiff, or both, was a circumstance with which he had nothing to do. The only question for him to determine was, whether it was so clear that the plaintiff possessed a civil right in this publication, as

(1) But see the preceding case, in which it is laid down that the true criterion is to take the publication *altogether*, and thus to judge of the general intent.

to have no doubt upon his mind that it would support an action in a Court of Law.

He had read the whole of this book with attention, and it certainly did raise such a doubt in his mind. It might probably be expected, that after the able and learned argument which had gone forth to the world upon a subject so materially affecting the happiness of mankind, he should state his answer to that argument; but if he left these parties to a Court of Law (and he should leave them to a Court of Law), his opinion might have the effect of prejudicing the question to be there determined; all he would say, therefore, was, that entertaining a rational doubt upon some parts of the work as to their being directed against the truth of scripture, he would not continue this injunction, but the plaintiff might apply for another after he had cleared away that doubt in a Court of Law. Further than this, his Lordship would not interfere(1).

SECTION III.

Of Works injurious to Public Peace and Justice.

Publications which are calculated to disturb the public peace, or to be injurious to the good government of the state, or which tend to bring into contempt the administration of justice, are all shut out of the pale of the law. There can be no right of property in such compositions.

The first case in which this doctrine was judicially pronounced was that of Dr. *Priestley*, who brought an action against the hundred for damages for the injuries sustained by him in consequence of the riotous proceedings of the mob at Birmingham; and among other property alleged to have been destroyed, claimed compensation for the loss of certain unpublished MSS. offering to produce booksellers as witnesses to prove that they would have given considerable sums for them.

On behalf of the hundred it was alleged, that the plaintiff was in the habit of publishing works *injurious to the government of the state;* upon which, Lord Chief Justice Eyre said, if any such evidence had been produced, he should have held it fit to be received as against the claim made by the plaintiff(2).

In another case, that of Hime v. Dale(3), which was an

(1) Petersdorff's Abr. 559-60. (2) 2 Meriv. 437.

(3) The mischievous tendency of the production would sufficiently appear (it was contended) from the following stanza:

The world is inclined
To think justice blind;
Yet what of all that?
She will blink like a bat
At the sight of friend *Abraham Newland*,
Oh! *Abraham Newland!* magical *Abraham Newland*!
Tho' justice 'tis known
Can see thro' a mill stone,
She can't see thro' *Abraham Newland*.

action for pirating the words of a song called "Abraham Newland," Mr. *Garrow* contended that the song was of such a description that it could not receive the protection of the law.

It professed, he said, to be a panegyric on money, but was in reality a gross and nefarious *libel* on the solemn *administration* of British *justice*. The object of this composition was not to satirize folly, or to raise the smile of innocent mirth, but being sung in the streets of the capital to excite the indignation of the people against the sacred ministers of the law, and the awful duties they were appointed to perform(1).

Lord ELLENBOROUGH. If the composition appeared on the face of it to be a libel, so gross as to affect the public morals, I should advise the jury to give no damages. I know the Court of Chancery on such an occasion would grant no injunction.

But I think the present case is not to be considered one of that kind.

LAWRENCE, J. The argument used by Mr. GARROW on this fugitive piece as being a libel, would as forcibly apply to the *Beggar's Opera*, where the language and allusions are sufficiently derogatory to the administration of justice.

The last case of this kind was that of *Southey v. Sherwood*, which was decided in the year 1822. The author had written a seditious poem, called "Wat Tyler," which, having come into the defendant's possession, he published it without Mr. Southey's consent, and the latter applied to the Court of Chancery for an injunction.

The work was composed in the year 1794, when the author was under twenty-one. In that year there was an intention to publish it. It was sent by the plaintiff to Mr. Ridgway. The latter gave no account how it passed out of his hands.

The LORD CHANCELLOR said, if a man leaves a book of this description in the hands of a publisher, without assigning any satisfactory reason for doing so, and has not enquired about it during twenty-three years, he can have no right to complain of its being published at the end of that period.

But his lordship, in another part of his judgment, said, there is a difference between the case of an actual publication by the author, which all the world may pirate, and that of a man, who having composed a work, of which he afterwards repents, and wishes to withhold it from the public. I will not say that a principle might not be found which would apply to such a case as that; but then it is necessary to take all the circumstances of the case into consideration(2).

The LORD CHANCELLOR subsequently delivered the following judgment.

(1) 2 Camp. 29. (2) Meriv. 438.

"I have looked into all the affidavits, and have read the book itself. The bill goes the length of stating, that the work was composed by Mr. Southey in 1794, that it is his own production, and that it has been published by the defendant, without his sanction or authority; and therefore seeking an account of the profits which have arisen from, and an injunction to restrain, the publication. I have examined the cases that I have been able to meet with, containing precedent for injunctions of this nature, and I find that they all proceed upon the ground of a title to the property in the plaintiff. On this head a distinction has been taken, to which a considerable weight of authority attaches, supported, as it is, by the opinion of Lord C. J. EYRE, who has expressly laid it down that a person cannot recover in damages for a work which is in its nature to do injury to the public. Upon the same principle this court refused an injunction in the case of *Walcot v. Walker*, inasmuch as he could not have recovered damages in an action. After the fullest consideration, I remain of the same opinion as that which I entertained in deciding the case referred to. It is very true, that in some cases it may operate so as to multiply copies of mischievous publications, by the refusal of the court to interfere by restraining them; but to this my answer is, that sitting here as a judge upon a mere question of property, I have nothing to do with the nature of the property, nor with the conduct of the parties, except it relates to their civil interests; and if the publication be mischievous, either on the part of the author or the publisher, it is not my business to interfere with it. In the case now before the court, the application made by the plaintiff is on the ground only of his civil interest, and this is the proper place for such an application. I shall say nothing as to the nature of the book itself, because the grounds upon which I am about to declare my opinion, render it unnecessary that I should do so."

His Lordship then recapitulated the circumstances of the original intention to publish, the subsequent abandonment of the intention, the length of time during which the plaintiff had suffered the work to remain out of his possession, without inquiry, and its recent publication by the defendant.

"Taking," said his Lordship, "all these circumstances into my consideration, and having consulted all the cases which I could find at all regarding the question, entertaining also the same opinion with C. J. EYRE as to the point above noticed, it appears to me that I cannot grant this injunction, until after Mr. Southey shall have established his right to the property by an action(1).

(1) 2 Meriv. 438.

The question of the protection claimed for illegal works is one of general importance, and has been productive of much litigation. It has been ably discussed by Mr. PETERSDORFF, in his comprehensive abridgment, and we subjoin the *substance* of his observations thereon.

From the decisions of Lord ELDON, it will appear that that learned judge was well aware of the ground he was treading on, in refusing those injunctions which he felt himself bound to do from acknowledged law and precedent; but he shows that the rule, with all its practical evils and absurdities, is now part of the law of the land; and that it is only by an alteration of the law that it can be got rid of.

Two arguments are urged in defence of this system.

There is this distinction in *Southey's* case from that of *Byron and Lawrence*, that the former required the suppression of a work which had been published without his consent, which he had never previously published himself, and desired to be suppressed. In the latter instances, the object of the suit was to preserve the profit of exclusively printing and publishing the work.

It would seem that Mr. Southey might have put his case on the footing of those of *Pope* and *Swift*, in which the exclusive right to the manuscript was decided. Mr. Southey did not complain that he was deprived of the profits which he might derive from publishing the work himself, but he objected to the publication altogether. During the lapse of a quarter of a century, his views had undergone a change. He came within the reasoning advanced by Lord Mansfield(1)

1st. Admitting the incidental advantage that would arise by the protection from piracy of a work, however libellous, such protection cannot be afforded without violating the established principle of law, that *there can be no property in what is injurious.*

Waiving the answer afforded by the equally established principle that *a man shall not profit by his own wrong;* and that a defendant cannot plead that his own act is criminal, to support a maxim, established only because it is generally useful, in the cases in which it is hurtful, is a puerile preference of the means to the end.

2ndly. It is said, that by destroying the profit, it prevents the publication of injurious works.

Now, if it were true that it destroys the profit, it does not follow that it will prevent the publication. The desire of obtaining notoriety, and of producing an effect, are (often) much stronger motives to authors, than the mere contingency of profit.

Besides, the profit will not be destroyed; it will not necessarily be diminished when the piracy has been foreseen. The publisher must protect himself from being undersold, by reducing both the cost and the price of the work; and trust to a small profit on a wide scale, instead of a profit greater in each individual instance, but not so often repeated.

If *Don Juan*, and such like publications, had been the subject of copyright, and had been confined by its price to a class of readers with whom its faults might have been somewhat compensated by its merits, with whom, in fact, the ridicule which it endeavours to throw upon virtue, might have been partially balanced by that with which it overwhelms vice, no evil, comparatively speaking, would have accrued to the public. The proprietor's price was intended to confine the circulation amongst those to whom each side of the question was familiar; that of the pirate's, to diffuse it among readers with whom its impieties have all the face of novelty, and to whom the answers are unknown(*a*).

As a remedy for these evils, the Quarterly Review(*b*) suggests, that it would be sufficient if a short Act of Parliament were passed, declaring that the libellous character of the work shall never be resorted to in bar of any proceeding at law or in equity for the infringement of copyright. The effect of such an act would be to subject the piratical publisher, whatever may be the tendency of the work, to those restraints which the law has imposed upon piracy, namely, an injunction, with an account of the profits, and an action at law for damages. We at first thought (say the reviewers) of excluding the two latter remedies, and merely proposing an injunction. This would be a slighter alteration of the law, and spare the prejudices of those whom no advantage can reconcile to the enabling a plaintiff to demand damages, and an account of "the unhallowed profits of a libellous publication;" but it would leave these unhallowed profits where they ought *still less* to be—in the hands of a libellous pirate.

(*a*) 6. Petersdorff Abr. 560-1. (*b*) April, 1822.

(1) Vide pages 8, 9, *'ante.*---In *Macklin v. Richardson*, it was also decided, that the author has a property in an unpublished work, independent of the statute of Anne, which is capable of being protected by injunction. *Amb.* 694.

—he had repented, and become ashamed of his former sentiments; he wished to suppress their publication; and ought to have been allowed the exclusive dominion over his own manuscript.

SECTION IV.

Of Publications injurious to private Individuals.

The Courts of Equity will not assist an author, whose work contains a libel on private character. The criterion of exclusion may be stated to be the liability of the writer to an action for damages, or a prosecution for the libel.

A case in illustration of this principle was that of *Dr. Walcot,* who filed a bill against booksellers of the name of *Walker* for an injunction to restrain them from publishing two editions of his works, upon a dispute as to the construction of the agreement between the parties.

The defendants by their answer admitted that they had published in one of the editions some of the plaintiff's works, which they were not authorized to publish. As to that edition, therefore, they submitted.

The Lord Chancellor, in his judgment, observed, "If the doctrine of Lord C. J. Eyre is right, (and I think it is) that publications may be of such a nature that an author can maintain no action at law, it is not the business of this court, even upon the submission in the answer, to decree either an injunction, or an account of the profits of works of such a nature that the author can maintain no action at law for the invasion of that which he calls his property, but which the policy of the law will not permit him to consider his property. It is no answer that the defendants are as criminal. It is the duty of the court to know whether an action at law would lie; for if not, the court ought not to give an account of the unhallowed profits of *libellous* publications. At present, I am in total ignorance of the nature of the work, and whether the plaintiff can have any property in it or not. But I will see these publications, and determine upon the nature of them, whether there is question enough to send to law, as to the property in these copies; for if not, I will act upon that submission in the answer.

If upon inspection the work appears innocent, I will act upon that submission; if criminal, I will not act at all; and if doubtful, I will send that question to the law(1).

It seems doubtful whether an action could be maintained for destroying a picture containing a scandalous libel upon individuals, and which had been publicly exhibited; but it

(1) 7 Vesey, 1. 6 Petersdorff Abr. 557.

has been decided that the owner of such a libellous picture so destroyed, is, at most, only entitled to recover the value of the materials.

Thus, in the case of *Du Bost v. Beresford*, it appeared, that the picture in question, entitled *La Belle et la Bête*, or "Beauty and the Beast," was a scandalous libel upon a gentleman of fashion and his lady, who was the sister of the defendant. It was exhibited in a house in Pall Mall, for money, and great crowds went daily to see it, till the defendant one morning cut it in pieces.

Lord ELLENBOROUGH. The only plea on the record being the general issue of not guilty, it is unnecessary to consider whether the destruction of this picture might or might not have been justified. The material question is, as to the value to be set upon the article destroyed. If it was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it. The jury, therefore, in assessing the damages, must not consider this as a work of art, but must award the plaintiff the value of the canvas and paint which formed its component parts(1).

SECTION V.

Of Piratical Works.

As the law will not protect works which are immoral and unlawful, because there can be no right of property in such productions, so also it refuses its aid in preserving the exclusive use of books which have been pirated from previous publications. The law will not assist the robber in multiplying his spoil.

We reserve to the third part of this book the full consideration of the subject of literary piracy. It will be sufficient, in this place, to state, generally, that the law not only withholds its protection from books which are *wholly pirated*, but from those which are, *in substance*, merely *copies* and *imitations*; or which, although in some parts different, yet are in general the same.

Thus in a book of *chronology*(2), though the same facts must be related, yet if the new work transcribes literally page after page, although other parts of it are original, the former author will be entitled to recover damages, and consequently the pirate would be excluded from proceeding against any one who had subsequently copied the passages thus illegally taken.

So also in the publication of *original poems*, together with

(1) 2 Camp. 511. (2) Trusler v. Murray, 1 East, 363, *note*.

others which had been *before published*, a Court of Equity will grant an injunction to restrain the publication(1), and it follows that the pirated part of the work will receive no protection.

A similar decision was made with respect to an *abridgment* of Cook's Voyage round the World(2). A *bona fide* abridgment or compilation is considered in the nature of an original work; but whole passages must not be transcribed to the injury of the original author, nor the work abridged in a merely colorable manner(3). It seems clear, that where these rules are violated, the law will not interfere between the first and subsequent pirates, or lend itself to the protection of property thus fraudulently obtained.

CHAP. V.

OF THE SPECIAL COPYRIGHT OF THE CROWN AND THE UNIVERSITIES, AND OF PUBLISHING PARLIAMENTARY AND JUDICIAL PROCEEDINGS.

SECT. 1.—*Of the former prerogative Copyright in Law Books, Almanacs, and the Latin Grammar.*

In the review which we have taken of the progressive stages of the law in relation to copyright in general, we passed over the peculiar and special nature of *prerogative* copyright. Before entering on the present state of the law in this respect, we may advert briefly to its past condition, and set forth the instances in which the Universities and the Stationers' Company, as well as the Crown, claimed an exclusive right of printing; but which claims have been exploded by the learning and independence of the distinguished judges in recent times.

We avail ourselves of the language of Mr. ERSKINE in describing the monopoly of printing, which formerly was exercised by the Crown.

"On the first introduction of printing (says this distinguished advocate), it was considered, as well in England as in other countries, to be a matter of state. The quick and extensive circulation of sentiments and opinions which that invaluable art introduced, could not but fall under the gripe of Governments, whose principal strength was built upon the ignorance of the people who were to submit to them. The *press* was therefore wholly under the coercion of the Crown; and

(1) Case of Mason's Poems, *per Lord Bathurst.* (2) 1 East, 363, *note.*
(3) Vide p. 76 *ante*, and Part III. *post.*