By the Act of Congress of the 18th of August, 1856, s. 1, it is declared that any copyright thereafter granted, under the laws of the United States, to the author or proprietor of any dramatic composition, designed or suited for public representation, shall be deemed to confer upon the author or proprietor, his heirs, or assigns, along with the sole right to print and publish the said composition, the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place, during the whole period for which the copyright is obtained. This clause, however, refers only to cases in which copyright is effectively secured under the Act of 1831 (*a*).

The Act of Congress is declared not to extend to prohibit the importation, or vending, printing, or publishing within the United States, of any map, chart, or book, musical composition, print, or engraving, written, composed, or made by any person not a citizen of the United States, nor resident within the jurisdiction thereof.

The copyright recorded in any State extends to all the other States in the Union.

(*a*) *Keane* v. *Wheatley*, 9 Amer. Law. Reg. 33, 44; *Roberts* v. *Myers*, 13 Mo. Law Rep. (Amer.) 397, 400.

CHAPTER XIX.

ARRANGEMENTS BETWEEN AUTHORS AND PUBLISHERS.

Arrangements between authors and publishers.

A FEW remarks may, perhaps, be here advantageously offered on compacts, arrangements, and stipulations between authors and publishers, and we trust they may prove profitable both to the former and the latter.

In these days, when literature and commerce march in open array, and their pace is so rapid and great; when on the one hand a few authors write for fame, some for gain, and many for both; and on the other hand publishers regard their writings purely in a commercial point of view, estimating their worth (at least to them) by the amount of profit likely to accrue from the publication, two antagonistic parties frequently come in contact.

Authors who compose exclusively for fame are, on the assumption that they ever existed, rapidly becoming extinct; while those who write for gain are much on the increase. The spirit of the age is commerce, and almost every transaction of the present day is regarded in a commercial light.

Thus we have two parties in opposition: the one estimating the value of his work in proportion to his toil and labour in its composition, the other computing it in proportion as he conceives the public may become purchasers. The publisher could not undertake to requite or recompense the author according to the degree of exertion employed by him; for what amount of drudgery and toil may not be expended upon a work which would not even cover the expenses of printing and publication? Publishers invariably act like merchants, whose principle is to risk as

little capital as possible, and to replace *that* with profit as early as feasible.

The reward due to the author.

The reward due to an author is thus justly referred to by Mr. Serjeant Talfourd: "We cannot decide the abstract question between genius and money, because there exists no common properties by which they can be tested, if we were dispensing an arbitrary reward; but the question how much the author ought to receive is easily answered: so much as his readers are delighted to pay him. When we say that he has obtained immense wealth by his writing, what do we assert, but that he has multiplied the sources of enjoyment to countless readers, and lightened thousands of else sad, or weary, or dissolute hours? The two propositions are identical, the proof of the one at once establishing the other. Why, then, should we grudge it any more than we would reckon against the soldier, not the pension or the grant, but the very prize-money which attests the splendour of his victories, and in the amount of his gains proves the extent of ours? Complaints have been made by one in the foremost rank in the opposition to this bill [a bill for the extension of copyright], the pioneer of the noble army of publishers, booksellers, printers, and bookbinders, who are arrayed against it, that in selecting the case of Sir Walter Scott as an instance in which the extension of copyright would be just, I had been singularly unfortunate, because that great writer received during the period of subsisting copyright an unprecedented revenue from the immediate sale of his works. But, sir, the question is not one of reward—it is one of justice. How would this gentleman approve of the application of a similar rule to his own honest gains? From small beginnings, this very publisher has, in the fair and honourable course of trade, I doubt not, acquired a splendid fortune, amassed by the sale of works, the property of the public—of works, whose authors have gone to their repose, from the fevers, the disappointments, and the jealousies which await a life of literary toil. Who grudges it to him? Who doubts his title to retain it? And yet this gentleman's fortune is all, every

farthing of it, so much taken from the public, in the sense of the publishers' argument; it is all profits on books bought by that public, the accumulation of pence, which, if he had sold his books without profit, would have remained in the pockets of the buyers. On what principle is Mr. Tegg to retain what is denied to Sir Walter? Is it the claim of superior merit? Is it greater toil? Is it larger public service? His course, I doubt not, has been that of an honest, laborious tradesman; but what has been its anxieties compared to the stupendous labour, the sharp agonies, of him whose deadly alliance with those very trades whose members oppose me now, and whose noble resolution to combine the severest integrity with the loftiest genius, brought him to a premature grave,—a grave which, by the operation of the law, extends its chillness even to the results of those labours, and despoils them of the living efficacy to assist those whom he has left to mourn him? Let any man contemplate that heroic struggle, of which the affecting record has just been completed, and turn from the sad spectacle of one who had once rejoiced in the rapid creation of a thousand characters flowing from his brain and stamped with individuality, for ever straining the fibres of the mind till the exercise which was delight became torture, girding himself to the mighty task of achieving his deliverance from the load which pressed upon him, and with brave endeavour, but relaxing strength, returning to the toil, till his faculties give way, the pen falls from his hand on the unmarked paper, and the silent tears of half-conscious imbecility fall upon it—and to some prosperous bookseller in his counting-house, calculating the approach of the time (too swiftly accelerated) when he should be able to publish for his own gain, those works fatal to life; and then tell me, if we are to apportion the reward of the effort, where is the justice of the bookseller's claim? Had Sir Walter Scott been able to see, in the distance, an extension of his own right in his own productions, his estate and his heart had been set free; and the publishers and printers, who are our opponents now, would have been

grateful to him for a continuation of labour and rewards which would have impelled and augmented their own" (*a*).

An action maintainable for not supplying a work agreed to be furnished.

If an author agree in writing to supply a bookseller or publisher with a manuscript of a work to be printed by the latter, an action for damages can be maintained for refusing to furnish the same (*b*), provided the work be one which, if published, would not subject the author to punishment (*c*).

Should the work be stopped the author must be paid for work already done.

Where, however, the author was engaged for a certain sum to write an article to appear, among others, in a work called 'The Juvenile Library,' and before he had completed his article, and before any portion of it had been published, the work in which it was to have appeared was discontinued, Lord Chief Justice Tindal held that the publishers were not entitled to claim the completion of the article in order that it might be published in a separate form for general readers, but were bound to pay the author a reasonable sum for the part which he had prepared (*d*).

An author may bind himself not to write upon a particular subject.

An author may bind himself not to write upon a particular subject, or only for a particular person; for a bond or covenant to that effect would not resemble one in restraint of trade.

Thus, where Colman had contracted with the proprietors of the Haymarket Theatre not to write dramatic pieces for any other theatre, the Lord Chancellor maintained that such a contract was not unreasonable upon either construction, whether it was that Mr. Colman should not write for any other theatre without the licence of the proprietors of the Haymarket Theatre, or whether it gave to those proprietors merely a right of pre-emption. If, said he, Mr. Garrick were now living, would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket Theatre, and Mr. Colman with him to write for that theatre alone? Why should they not thus engage for the talents of each other? I cannot see anything

(*a*) Speech in the Commons, April 25, 1838, 42 Parl. Deb. 560.

(*b*) *Gale* v. *Leckie*, 2 Stark, N. P. C. 107; the Court of Chancery, however, could not compel him: *Clarke* v. *Price*, 2 Wils. C. C. 157.

(*c*) *Ibid.*

(*d*) *Planché* v. *Colburn*, 5 Car. & Pay. 58.

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unreasonable in this; on the contrary, it is a contract which all parties may consider as affording the most eligible, if not the only, means of making this theatre profitable to them at all as proprietors, authors, or in any other character which they are by the contract to hold (*a*).

But in *Brooke* v. *Chitty* (*b*), where the defendant has undertaken not to write or edit any work upon the criminal law, except a work of which the plaintiff had purchased the copyright, and an advertisement of an edition of Burn's 'Justice of the Peace,' by the defendant, had appeared, Lord Brougham refused to grant an injunction, observing that the defendant was at liberty to write in his closet what he pleased, and that the court would not interfere until there was a violation of the alleged undertaking by actual printing and publication.

So, where an author sells the copyright of a work (*c*) published under his own name, and covenants with the purchaser not to publish any other work to prejudice the sale of it, it seems that another publisher, who has no notice of this covenant, may be restrained from publishing a work subsequently purchased by him from the same author, and published under his name, on the same subject, but under a different title, and though there be no piracy of the first book (*d*).

Independent of a covenant to the contrary, author, at liberty to publish a continuation of his work.

But where no such covenant had been entered into and the publisher had agreed with an author for an edition of a history to be written by the latter, in four volumes, and had obtained subscriptions for all that could fall within his edition, the court held that the author was at liberty to publish a continuation of the history which

(*a*) *Morris* v *Colman*, 18 Ves. 437.
(*b*) 2 Cooper's Cases, 216.
(*c*) A contract for sale of a copyright is enforceable in equity: *Thombleson* v. *Black*, 1 Jur. 198.
(*d*) *Barfield* v. *Nicholson*, 2 Sim. & Stu. 1; 2 L. J. (Ch.) 90. But where, in an action by several plaintiffs for piracy of copyright, it appeared that the defendant, the author, had published the work in question pursuant to the conditions of a *cognovit* given by him to one of the plaintiffs and another person, in an action for not performing an agreement to write the work in question, it was held that this was a sufficient defence: *Sweet et al.* v. *Archbold*, 10 Bing. R. 133; cited Curtis on Copy. 231.

embraced part of the period and also much of the matter contained in the last of the four volumes (*a*).

As to the alteration of an author's work.

Although the publisher may have the copyright in a book he may not publish a new edition under the author's name so incorrect as to be injurious to the author's reputation. If he does, he renders himself liable to an action for damages (*b*).

When, however, a portion of a work is written to be published under the name of another, the author would have no remedy in case of its alteration or variation. This was decided in *Cox* v. *Cox* (*c*). The defendant, a house agent, having prepared a book on the sale of estates, applied to the plaintiff, a barrister, to correct the work, and to supply the legal matter necessary to complete it, for which the plaintiff was to be paid a certain remuneration, according to the number of pages the work might contain. "No agreement," said the Vice-Chancellor in passing judgment, "was come to as to the name under which the work was to appear. The case, therefore, stood thus: The defendant said, 'I am going to write a work, which you shall correct and put into shape, and a part of which you shall supply for a certain remuneration.' If that be so, the plaintiff was evidently in the subordinate position of assisting in the production of a work which was to come out in the name and as the work of the defendant. The work would be partly the defendant's own composition, and it would be partly the work of the plaintiff; but it was to come out as one entire publication, and to be paid for at one uniform rate. The bulk of the matter was apparently to be supplied by the defendant. The plaintiff employed himself in the preparation of a treatise on the law of vendor and purchaser and landlord and tenant, the whole of which the defendant desired to have compressed into one printed sheet. The plaintiff, on the other hand, thought that no information of value on the legal incidents of the property treated of could be condensed within that compass, and he

(*a*) *Blackie & Co.* v. *Aikman*, May 26, 1827; 5 Ses. Cass. 719 (N.E.) 671.
(*b*) See *Archbold* v. *Sweet*, 1 Moo. & Rob. 162; 5 Car. & Pay. 219.
(*c*) 11 Hare, 118.

CAP. XIX. extended this portion of the work to three sheets and a half. The defendant then said: 'If you will reduce this matter to one-half of its present magnitude, I am willing to print it; if not, I decline to print it at all.' This was an absolute rejection of the plaintiff's contribution, except upon the terms of reducing it in quantity to the extent which the defendant required. The plaintiff, on the other hand, was resolved that the whole should be printed or none. There was at this point of the transaction great difficulty in the way of any arrangement. The defendant said, 'I will have only one sheet and three-quarters of legal matter.' The plaintiff insisted that he should have three sheets and a half, or none. Then what followed? The plaintiff looked over the manuscript again, but did not reduce it to the required dimensions; and the defendant, although it had not been so reduced, took the manuscript in the state in which it had been left (which he could only have been entitled to do under the contract), and he began to print the work. The plaintiff proceeded to correct the proof sheets; but (as he states), when he began to find that the legal portion of the work was introduced in a mutilated form, he intimated his refusal to consent to any alteration; and in this state of things the application is made for the injunction. I have stated what appears to me to be the substance of the contract between the parties, up to the time of the discussion as to the space which the legal matter should occupy; and that contract the plaintiff has, by the fourteenth paragraph of the bill, treated as subsisting, for he thereby claims 60*l.* as the unpaid part of the remuneration on the whole contract. On the other hand, the defendant, having taken the manuscript and used it, cannot, I think, dispute his liability to pay for it, according to the terms of the contract. But that would be a question for a court of law. Something was said with regard to the possible effect of the alteration of the plaintiff's portion of his work, as affecting his reputation; but, as it was held in Sir James Clarke's case (*a*), the possible

(*a*) *Clarke* v. *Freeman*, 11 Beav. 112.

effect on reputation, unless connected with property, is not a ground for coming to this court, though it may be an ingredient for the court to consider when the question of a right of property also arises. . . . . A serious question was then adverted to—but it is one which does not arise in this case—how far a party who had purchased a manuscript has a right to alter it, and produce it in a mutilated form?—how far, in a case in which the property has completely passed, it is to be assimilated to a case of goods sold and delivered, and thenceforward in the complete dominion of the purchaser? A qualified contract may be made; an essay may be supplied to a magazine or an encyclopædia, on the understanding that it is to be published entire; and it may be accepted by the editor, and paid for as what it purports to be. In the instance of an essay which had been accepted in that shape, the question might arise whether any curtailment could be allowed under that special contract. But here there is no such special contract. The contract is, that the plaintiff shall supply the defendant with the matter which is required, in such a form as to enable the defendant to publish it as his own. I can find no circumstances from which any such special contract as I have mentioned can be inferred. The plaintiff has, indeed, sought to make it a stipulation that his contribution of the legal materials shall not be published otherwise than entire; but this stipulation has no foundation in the original contract, upon which his case rests. It may well be that this part of the work may suffer in value from the alterations made by the defendant, but no one will probably expect to find the law set forth with any great amount of precision in a work issued by a house agent for the guidance of his customers in dealings of a simple character. If any such mistakes should occur in the legal portion of the work, as the plaintiff apprehends, he will have the remedy in his own hands, by correcting the errors in a subsequent work, in which he may publish his treatise in a distinct form."

The plaintiff would have had this right by analogy to

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the principle that a publisher acquiring from an author a right to publish a treatise in a particular work, such as in the 'Encyclopædia Britannica,' would not be entitled to make the publication in another work not embraced in the contract, nor to publish generally beyond his licence (*a*). But it must be borne in mind that the opportunity of correcting the errors by separate publication could not have arrived until the expiration of twenty-eight years from the first publication.

Copyright of articles in the proprietor of periodicals.

A person may be the proprietor of a copyright in the separate parts of a periodical simply by reason of his employment of the writers (*b*). It appears but reasonable, that where the proprietors of a periodical employ a gentleman to write a given article, or a series of articles or reports, expressly for the purpose of publication therein, to imply that the copyright of the articles so expressly written for such periodical, and paid for by the proprietors and publishers, shall be the property of such proprietors and publishers; otherwise the author, the day after his article had been published by the persons for whom he contracted to write it, might republish it in a separate form, or in another serial, and there would be no correspondent benefit to the original publishers for the payment they had made.

Construction of agreements between authors and publishers.

Should an author, in consideration of a sum of money paid to him, agree that certain persons shall have the sole power of printing, reprinting, and publishing a particular work for all time, that would be parting with the copyright; but if the agreement be that the publishers, performing certain conditions on their part, should, so long as they perform such conditions, have the right of printing and publishing the book, that is a very different agreement.

(*a*) *Stewart* v. *Black*, 9 Sess. Cas. 2nd series, 1026; cited Phillips on Copy. 178. As to bookseller's lien on the copyright for his disbursements, see *Brook* v. *Wentworth*, 3 Anstr. 881.

(*b*) But see Jervis, C.J., in *Shepherd* v. *Conquest*, 25 L. J. (C.P.) 127; 17 C. B. 427.

(*c*) Where publishers of a magazine employ and pay an editor, and the editor employs and pays persons for writing articles in the magazine,—*Semble*, the copyright in such articles is not vested in the publishers under 5 & 6 Vict. c. 45, s. 18; *Brown* v. *Cooke*, 11 Jur. 77; 16 L. J. (N.S.) Ch. 140.

In the case of *Sweet* v. *Cater* (*a*) the agreement, after reciting that the author had prepared a tenth edition of his work, which the publisher was desirous of *purchasing*, and that it had been agreed that a certain printer should print a given number of copies, and the publisher should pay to the author *for the said tenth edition* a certain sum, went on to direct that the work should be in a given number of volumes, and should *be sold* to the public for a given price. It was objected that the plaintiff, the publisher, was not under this agreement the *proprietor of the copyright* within the meaning of the statute (54 Geo. 3, c. 156, s. 4), but a mere licensee to sell a given number of copies. The court overruled the objection, holding that the copyright was equitably vested in the publisher, on the ground that the contract was obligatory on both parties, that the plaintiff was bound to sell, and therefore the author was bound to abstain from doing anything which would interfere with the sale. The court, moreover, were of opinion that the equitable right to the copyright endured until the number of copies fixed by the terms of the agreement had been exhausted. It is to be regretted that the court did not advert to the question whether the words of purchase of the agreement—viz., that the publisher was to pay for *the edition*—gave him, independently of the implied contract on the part of the author not to do any act which might interfere with the sale, an equitable copyright in the work.

Agreements for division of profits, personal.

Where there was an agreement in writing between an author and certain publishers, that they should print, reprint, and publish his book, upon condition that the author should prepare it all before a certain day, and should correct the press, and that the publishers should direct the mode of printing, and pay all the expenses and take all risk of publishing, and out of the produce should first repay such expenses, and then divide the profits between themselves and the author equally; and that if all copies should be sold and a new edition should be

(*a*) 5 Jur. 68; 11 Sim. 572.

CAP. XIX. required, the author should prepare the same, and the publishers should print and publish it on the same conditions; and that, if all the copies of any edition should not be sold in five years from the time of publication, the publishers might sell the remaining copies by auction or otherwise, in order to close the account; it was held to be a personal contract by the author, and not a contract for an assignment of the copyright; and, consequently, the benefit thereof could not be assigned by the publishers (*a*).

Agreement for division of profits a joint adventure.

An agreement similar to this, and without specifying a particular edition, constitutes a joint adventure between the parties (*b*), which either party is at liberty to terminate upon notice after the publication of a given edition, if at the date of such notice no fresh expense has been incurred by the party to whom such notice be given.

By a memorandum of agreement made in November, 1852, between the plaintiff and the defendant, it was agreed that the latter should publish, at his own expense and risk, a work entitled 'Peg Woffington,' of which the former was the author; and after deducting from the produce of the sale thereof the charges for printing, paper, advertisements, embellishments (if any), and other incidental expenses, including the allowance of 10 per cent. on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition that should be printed of the work were to be divided into two equal parts, one moiety to be paid to the plaintiff, and the other to the defendant.

Subsequently the same parties entered into a similar agreement relative to the publication of another work entitled 'Christie Johnstone,' of which the plaintiff was also the author; and they signed for that purpose a memorandum of agreement, which, except as to the date and the title of the work, was in the same words as the former.

(*a*) *Stevens* v. *Benning*, 1 K. & J. 168, affirmed, 6 D. M. & G. 223. See *Pulte* v. *Derby*, 5 McLean (Amer.) 332.

(*b*) Joint owners of a copyright may make a contract between themselves as to the printing and publishing of the work, and neither will be permitted to set up against the other his original rights as a joint owner in violation of such contract: *Gould* v. *Banks*, 8 Wend. (Amer.) 568.

Two editions of the former work and four of the latter having been published by the defendant, and no fresh expenditure having been incurred by him since the publication of those editions, the plaintiff claimed a right to terminate the joint adventure between them, and to prevent the defendant from publishing any further edition of either work.

The main question to determine was, what was the effect of the agreement which had been entered into between the plaintiff and the defendant?

It was contended by the plaintiff that the case was one of simple agency; that by the effect of the agreement the defendant became a mere agent of the plaintiff. "But," observed the Vice-Chancellor, "it is clear that he became more than that. A mere agent may be paid, as the defendant was to be paid, by a share of the profits; but a mere agent never embarks in the risk of the undertaking; and here the defendant took upon himself the whole expense and risk of bringing out the work. Clearly, therefore, the case is something more than simple agency."

Sir W. Page Wood, in passing judgment, made the following observations: "Agreements between authors and publishers assume a variety of forms. Some are so clear and explicit that no doubt can arise upon them. Thus, where an author assigns his copyright, the transaction is one which every person understands, and which leaves no room for uncertainty as to the rights of the parties. Again, where, as in *Sweet* v. *Cater* (a), the author assigns a particular edition, the rights of himself and the publisher are equally clear; and although in that case the point did not require determination, the court observed, and justly observed, that, where an author has sold an edition of a given number of copies to one publisher, he is not at liberty, before they are sold, to publish the same work himself or through another publisher, in such a manner as to compete with the edition he has sold, but is bound to afford to the purchaser a full opportunity of realizing the benefit of his

(a) 5 Jur. 68; 11 Sim. 572.

contract. The case before me, like that of *Stevens* v. *Benning* (a), is of an intermediate description. Here, as there, the author does not sell, or purport to sell, any interest whatever in the copyright. It was contended, and very strongly, in *Stevens* v. *Benning*, that the author had done so; but I held that he had not, and my view was affirmed by the lords justices. Here also, as there, the publisher was to publish at his own risk. Nevertheless, in *Stevens* v. *Benning*, the agreement contained other provisions, considerably more definite than any in this case. It pointed to a series of editions to be published for the author by the same publisher, as to every one of which the author himself stipulated, as part of the contract, that he would assist in the publication. Here the agreement is simply that the publisher shall publish the work at his own expense and risk, and, after deducting all the expenses specified in the memorandum, and an allowance of £10 per cent., the profits remaining of every edition that shall be printed of the work are to be divided into two equal parts, one of which is to be paid to the author, and the other to the publisher.

"It was contended for the defendant that if the effect of the agreement was not an assignment of the copyright (which it is now clearly decided that it could not be), it resulted in a joint adventure, in which the defendant was to have a licence to publish the work; and that, from the nature of the case, and by the terms of the agreement, that licence was irrevocable. In *Stevens* v. *Benning* I considered the agreement must be regarded as creating, to a certain extent, a joint adventure, and Lord Justice Knight Bruce adopted the same view. He says, it must be observed, that such interest, if any, in the copyright of the author's work as the other parties to the agreement acquired under it, they acquired, not exclusively of the author, 'but by way of joint adventure with him, or of partnership with him, in respect and for the objects of which he undertook the fulfilment by himself personally

(a) 1 K. & J. 168; 6 D. M. & G. 223.

of certain duties to him' (*a*). Community of risk did not appear to him to be by our law, any more than it was by the civil law, essential to constitute a partnership, one partner being at liberty to contract with another that he will take all the losses of the concern upon himself. Lord Justice Turner looked upon the agreement in *Stevens* v. *Benning* in the double light of a licence and a partnership; speaking, however, less decidedly as to its being a partnership. He says: 'Next, if there was a partnership, then, if the agreement does not affect the copyright, the partnership was not in the copyright, but in the copies printed under the licence contained in the agreement' (*b*) —viewing it, therefore, as a licence for the publication of the work, and then a joint adventure between the author and publisher in the copies so to be published. If that were the effect of the agreement in the present case, the question would still remain, whether the licence be irrevocable.

"The plaintiff does not attempt to interfere with the publication of an edition which the defendant had commenced, and incurred expense in preparing for publication, before he exercised the option of determining the agreement. His claim is limited to editions about which no such expense had been incurred by the defendant; and his argument is, that, unless he has a right to determine the agreement as to all such editions, the consequence will be, that, during the whole of the defendant's life, he may be under an obligation to the defendant, while the defendant will be under no reciprocal obligation to him. It is true that, according to *Stevens* v. *Benning*, a licence like the present would, I apprehend, be restricted to the defendant personally, and would not extend to his executors, or to any future partner or assignee; but if the defendant's construction be correct, it follows, that, so long as he lives and is willing to continue publishing fresh editions of the work, so long, according to the doctrine in *Sweet* v. *Cater*, the plaintiff will be precluded from asserting a right to publish any competing edition. The

(*a*) 6 D. M. & G. 223, 229. (*b*) *Ibid.* 231.

defendant could compel the plaintiff to abstain from publishing a single copy of the work, so long as he expressed his readiness to continue publishing. But the plaintiff has no reciprocal power. He could never compel the defendant to publish more than a single edition of the work. His powers are limited to what the contract gives him; and, according to the contract, when the defendant has published a single edition the contract on his part is fulfilled. That is a position of considerable hardship for an author, and one which ought to be clearly shewn, upon the face of a contract, to have been contemplated by the parties who entered into it . . . . In the present case, no new expense has been incurred by the defendant, either in printing, advertising, or otherwise, as regards 'Peg Woffington,' since the publication of the second edition, and, as regards 'Christie Johnstone,' since the publication of the fourth edition; and that being, as I have already intimated, the true test in construing the agreement, it appears to me, that, when these editions were published, the period had arrived at which the parties intended a division of profits to take place, and at which the plaintiff became entitled to terminate his agreement with the defendant. This is the only conclusion at which I can arrive, after a very careful consideration of the contracts. But it is much to be regretted that contracts should be framed with such uncertainty, when it would have been so easy to make them certain" (*a*).

In all agreements between authors and publishers the terms should be distinctly stated, and the respective rights of the parties clearly defined. The number of copies of which the edition is to consist should be declared, for otherwise a publisher might, if so disposed, print 20,000 as one edition (*b*).

Construction of the word "edition."

The meaning of the word "edition," and the construction to be placed upon it, were fully discussed in *Reade* v.

(*a*) *Per* Wood, V.C., in *Reade* v. *Bentley*, 4 K. & J. 656, 669.

(*b*) *Per* Wood, V.C., in *Reade* v. *Bentley*, 4 K. & J. 656, 669; 27 L. J. (Ch.) 254; *Sweet* v. *Cater*, 11 Sim. 572; 5 Jur. 68; *Stevens* v. *Benning*, 1 K. & J. 168; 6 D. M. & G. 223; *Benning* v. *Dove*, 5 C. & P. 427.

Bentley. It was argued that where a work had once been stereotyped, the term "edition" was no longer applicable; and that when a work is published in what are called "thousands," 20,000 or 30,000 being circulated, each thousand could not properly be called an "edition." Wood, V.C., however, thought that not merely in point of etymology, but having regard to what actually takes place in the publication of any work, an "edition" of a work was the putting of it forth before the public, and if this be done in batches at successive periods, each successive batch was a new edition; and the question whether the individual copies had been printed by means of movable type or by stereotype, did not seem to him to be material. If movable type were used, the type having been broken up, the new edition was prepared by setting-up the type afresh, printing afresh, advertising afresh, and repeating all the other necessary steps to obtain a new circulation of the work. In that case the contemplated break between the two editions was more complete, because, until the type was again set-up, nothing further could be done. It made no substantial difference as regards the meaning of the term "edition," whether the new "thousand" had been printed by a resetting of movable type, or by stereotype, or whether they have been printed at the same time with the former thousand or subsequently. A new "edition" is published whenever, having in his storehouse a certain number of copies, the publisher issues a fresh batch of them to the public. This, according to the practice of the trade, is done, as is well known, periodically. And if, after printing 20,000 copies, a publisher should think it expedient for the purpose of keeping up the price of the work, to issue them in batches of a thousand at a time, keeping the rest under lock and key, each successive issue would be a new "edition" in every sense of the word (*a*).

In many cases an advantage would accrue by a pub-

(*a*) *Per* Wood, V.C., in *Reade* v. *Bentley*, 4 K. & J. 656, 667. See *Blackwood* v. *Brewster*, 7 Dec. 1860; 23 Sess. Cas. 2nd series, 142.

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lisher so doing; for when an author sells the copyright of a work to a publisher for a certain specified time, the publisher has the right, after the expiration of that period, of selling copies of the work he has printed before the expiration of the time limited.

Right of the publisher to sell copies on hand prior to the expiration of his limited copyright.

This was decided in the important case of *Howitt* v. *Hall* (a). Mr. William Howitt applied for an injunction to restrain the defendants Messrs. Hall and Virtue, the publishers, from selling or otherwise disposing of any copies of an original work called 'A Boy's Adventures in the Wilds of Australia,' of which Mr. Howitt was the author and registered proprietor. It appeared by the affidavits that in the year 1854, a negotiation was entered into with the defendants by Mrs. Mary Howitt, the wife of the plaintiff, who was then in Australia, for the sale to them of the copyright of the work in question for four years, for a sum of £250. This negotiation, after some discussion as to the precise date from which the contract was to commence, resulted in an agreement being entered into on behalf of the plaintiff, which was afterwards confirmed on his return from Australia by the following memorandum signed by him:—

"Gentlemen,—I confirm the agreement entered into with you by Mrs. Howitt on the 14th of March, 1854, for the publication of 'A Boy's Adventures in Australia,' being a copyright of four years from that date.

"WILLIAM HOWITT."

On the same day the defendants sent for the plaintiff's signature, a receipt for the £250, "being the purchase-money, as agreed, for the copyright and sole right of sale for four years" of the work in question. In October, 1857, the work having then gone through two editions, the defendants contemplated issuing a third and cheap edition, and accordingly gave notice of their intention to Mr. Howitt, by whom it was revised previously to publica-

(a) 10 W. R. 381: 6 L. T. (N.S.) 348.

tion. No further copies had been printed, and the term of four years expired in March, 1858. In February of 1862, the plaintiff, being about to bring out a uniform edition of the juvenile works of Mrs. Howitt and himself, and having, as he stated, only then for the first time discovered that the defendants were continuing to sell the work and to advertise it for sale, wrote to them complaining of this as an infringement of his copyright and a breach of contract, and asking for compensation. In reply to this application, the defendants insisted on their legal right to sell the remaining stock, as their own *bonâ fide* property, when and as they pleased; but at the same time they expressed their willingness to sell it by auction during the present month of March, so as not to stand in the way of the new edition. This suggestion, however, the plaintiff declined to accede to, and filed his bill praying for an account of the profits made by the defendants since March, 1858, and for an injunction. Vice-Chancellor Wood said, that the purchase of the copyright carried with it the right of printing and publishing, and the defendant was entitled to continue selling after the expiration of the four years' term the stock printed by him under his purchase. "The Copyright Acts were directed against unlawful printing; and when, as in this case, the defendant had acquired the right of lawfully printing the work, he was at liberty to sell at any time what he had so printed. The words 'sole right of sale' might or might not have been superfluous; but after the four years the right to print the work reverted to the author, who had taken care to secure himself in this respect. It had been suggested that the effect might be to destroy the copyright in the author altogether, as the publisher who had purchased the copyright for a limited period only might during that period print off copies enough to last for all time. A nice question might indeed arise as to the number of copies of which an edition might consist, but a publisher was not likely to incur the useless expense of printing copies enough to exhaust the demand for all time, and have them

lying upon his hands unprofitably. Besides this, even if the effect of a sale for four years might operate in this way to deprive the author of all copyright in his work, the answer was that he had not guarded himself against such a contingency. If a manifest case of fraud upon the author were established, the court would know how to deal with it. But nothing of the sort was shewn. The defendants had acted quite *bonâ fide*, and were making a perfectly legitimate use of their contract, and the motion must be refused."

Accounts between authors and publishers.

As to accounts between authors and publishers, see *Barry* v. *Stevens* (a) and *Stiff* v. *Cassell* (b).

(a) 31 Beav. 258.

(b) 2 Jur. (N.S.) 348.

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