way of principle for the settlement of all new cases, when particular precedents fail (*a*).

What property could be more emphatically a man's own than his literary works? Is the property in any article or substance accruing to him by reason of his own mechanical labour denied him? Is the labour of his mind less arduous, less worthy of the protection of the law? When the right could not be combatted on the ground of common sense or simple reason, the lawyers were forced to fly to what Lord Coke styles "*summa ratio*," or the legal reason, and they contended that from the very nature of literary productions no property in them could exist. For, said they, to claim a property in anything it is necessary that it should have certain qualities; it should be of a *corporeal substance*, be capable of occupancy or possession, it should have distinguishable proprietary marks, and be a subject of sole and exclusive enjoyment. Now, none of these indispensable characteristics were possessed by a literary production.

To this it was replied, that such definition of property was too narrow and confined; (for the rules attending property must ever keep pace with its increase and expansibility, and must be adapted to every particular condition;) that a distinguishable existence in the thing claimed as property, and an actual value in such thing to the true owner, are its essentials; and that the best rule of reason and justice seemed to be, to assign to everything capable of possession a legal and determinate owner.

No copyright in mere ideas.

Ideas, being neither capable of a visible possession nor of sustaining any one of the qualities or incidents of property, inasmuch as they have no bounds whatever, cannot be the subject of property. Their whole existence is in the mind alone; incapable of any other mode of acquisition or enjoyment than by mental possession or apprehension, safe and invulnerable from their own immateriality, no trespass can reach, no tort affect, no fraud or

(*a*) Bishop's 'Criminal Law.'

CAP. I.

violence diminish or damage them (*a*). They are of a nature too unsubstantial, too evanescent, to be the subject of proprietary rights.

Copyright however in the material that has embodied the ideas.

When, however, any material has embodied those ideas, then the ideas, through that corporiety, can be recognised as a species of property by the common law. The claim is not to ideas, but to the order of words, and this order has a marked identity and a permanent endurance. The order of each man's words is as singular as his countenance, and although, if two authors composed originally with the same order of words, each would have a property therein, still the probability of such an occurrence is less than that there should be two countenances that could not be discriminated. The permanent endurance of words is obvious by comparing the words of ancient authors with other works of their day; the vigour of the words is unabated, though other works have mostly perished. It is true that property in the order of words is a mental abstraction, but so also are many other kinds of property; for instance, the property in a stream of water, which is not in any of the atoms of the water, but only in the flow of the stream. The right to the stream is not the less a right of property, either because it generally belongs to the riparian proprietor, or because the remedy for a violation of the right is by action on the case, instead of detinue or trover (*b*)

Author's right to the first publication of his own manuscript.

"Ideas" says Mr. Justice Yates, "are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have a right to let fly; for, till he thinks proper to emancipate them, they are under his own dominion. It is certain every man has a right to keep his own sentiments, if he pleases; he has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends. In that state, the manuscript is, in every sense, his peculiar pro-

(*a*) Yates, in *Millar* v. *Taylor*, 4 Burr. 2362; *Abernethy* v. *Hutchinson*, 1 Hall & Tw. 28; S. C. in 3 L. J. (Ch.) 209, 213, 219; and see Sir G. Turner, V.C., in *Morison* v. *Moat*, 9 Hare, 257.

(*b*) Mr. Justice Erle, in *Jefferys* v. *Boosey*, 4 H. L. C. 869.

perty; and no man can take it from him or make any use of it which he has not authorized, without being guilty of a violation of his property. And as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication; and whoever deprives him of that priority is guilty of a manifest wrong, and the court have a right to stop it" (*a*).

Thus we see that every man has the right at common law to the first publication of his own manuscript (*b*). Suppose, therefore, that a man, with or without leave to peruse a manuscript work, transcribes and publishes it, it would not be within the Copyright Acts; it would not be larceny, nor trespass, nor a crime indictable (the physical property of the author, the original manuscript, remains), but it would be a gross violation of a valuable right. Again, suppose the original or a transcript be given or lent to a man to read, and he were to publish it, such publication would be a violation of the author's common law right to the copy.

In the case of the *Duke of Queensberry* v. *Shebbeare*, before Lord Hardwicke, an injunction was granted against printing the second part of Lord Clarendon's 'History.' Lord Clarendon lent to a person of the name of Gwynne a copy of his 'History;' his son and representatives insisted that he had a right to print and publish this 'History,' but the court were of opinion that Gwynne might make every use of it except the profit of multiplying in print. The presumption was that Lord Clarendon never intended that when he gave him the copy. The injunction was acquiesced

(*a*) Yates, J., in *Millar* v. *Taylor*, 4 Burr. 2378; 1 Mac. & Gor. 36; *Forrester* v. *Walker*, cited 2 Bro. P. C. 138; *Webb* v. *Rose*, 4 Burr. 2330; *Southey* v. *Sherwood*, 2 Mer. 435; *Wheaton* v. *Peters*, 8 Peters, S. C. R. (Amer.) 591; Eden on Injunc. 285; 2 Story, Eq. Jur. s. 943; Curtis on Copy. 84, 150, 159; *Woolsey* v. *Judd*, 4 Duer (Amer.) 385.

(*b*) See *Little* v. *Hall*, 18 How. (Amer.) 170; *Bartlette* v. *Crittenden*, 4 McLean (Amer.) 300; S. C. 5 *ibid.* 32; *Webb* v. *Rose*, 4 Burr. 2330; 2 Bro. P. C. 138; *Pope* v. *Curl*, 2 Atk. 342; *Manley* v. *Owen*, cited 4 Burr. 2329; *Macklin* v. *Richardson*, Amb. 694; *Donaldson* v. *Becket*, 4 Burr. 2408; *Wheaton* v. *Peters*, 8 Peters, S. C. R. (Amer.) 591. See *Dudley* v. *Mayhew*, 3 Coms. (Amer.) 12; *Clayton* v. *Stone*, 2 Paine, (Amer.) 383; and *Jones* v. *Thorne*, 1 N. Y. Leg. Obs. 409.

CAP. I.

under (*a*); and Dr. Shebbeare recovered, before Lord Mansfield, a large sum against Gwynne for representing "that he had a right to print."

In the cases of Webb and Forrester (*b*), the Court of Chancery again interposed by injunction. It appears that the plaintiff in the former case had his 'Precedents of Conveyancing' stolen out of his chambers and printed; and in the latter he had his notes copied by a clerk to a gentleman to whom he had lent them, and printed. In *Macklin* v. *Richardson* (*c*) the defendant had employed a short-hand writer to take down the farce of 'Love à la Mode,' upon its performance at the theatre, and inserted one act in a magazine, giving notice that the second act would be published in a magazine of the following month. Upon an application to Lord Camden for an injunction, he directed the case to stand over until that of *Millar* v. *Taylor*, which was then pending, should be determined; and after the decision had been given in that case the injunction was granted by the Lords Commissioners Smythe and Bathurst. The former, referring to the play, saying, "it has been argued to be a publication by being acted, and therefore the printing is no injury to the plaintiff; but that is a mistake; for, besides the advantage of the performance, the author has another source of profit from the printing and publishing, and there is as much reason that he should be protected in that right as any other." Bathurst adding, "The printing it before the author is doing him a great injury."

This was the opinion also of Lord Cottenham in Prince Albert's case (*d*). "The property," said he, "in an author or composer of any work, whether of literature, art, or science, such work being unpublished and kept for his private use or pleasure, cannot be disputed after the many

(*a*) 2 Eden, 329; *Knaplock* v. *Curle*, 4 Vin. Abr. 278.
(*b*) Cited Ambl. 695.
(*c*) *Ibid.*
(*d*) *Prince Albert* v. *Strange*, 18 L. J. (N. S) Ch. 120; 1 Hall & Tw. 1; 1 Mac. & Gor. 25; *Turner* v. *Robinson*, 10 Ir. Ch. Rep. 121, 510; *Southey* v. *Sherwood*, 2 Mer. 435; *Gee* v. *Pritchard*, 2 Swans. 402.

decisions upon which that proposition has been affirmed or assumed. I say 'assumed,' because in most cases which have been decided, the question was not as to the original right of the author, but whether what had taken place did not amount to a waiver of such right; as, in the case of letters how far the sending of the letter, in the case of dramatic composition how far the permitting performance, and in the case of Mr. Abernethy's lectures how far the oral delivery of the lecture, had deprived the author of any part of his original right and property;—a question which could not have arisen if there had not been such original right or property."

What amounts to publication sufficient to defeat the common law right is a question of some nicety. The publication of a work for private purposes and private circulation is not such a publication (*a*). Accordingly, it has been determined that a copyright in a piece of music is not lost, although it had been published in manuscript a year before being printed. The words "printed and published," used in the statutes, have reference only to the time at which the author's exercise of the right is to be dated; and therefore, the circumstance of an author having previously published in manuscript any composition which is afterwards printed, only varies the period of time from which the term of protection is to be calculated. The delivery of a lecture to an audience of persons admitted on payment of a fee, is not deemed a publication (*b*); neither is the exhibition of a picture at a public exhibition or gallery, where copying is expressly or impliedly forbidden, nor the exhibition of a picture for the purpose of obtaining subscribers to an engraving (*c*).

What amounts to publication at common law.

At one time it was contended that by publication the author or proprietor lost any right he might have had at

The effect of publication.

(*a*) *White* v. *Geroch*, 2 B. & Ald. 298; *Prince Albert* v. *Strange*, 2 De G. & Sm. 686; 1 Mac. & Gor. 42; 1 Hall & Tw. 1; *Jefferys* v. *Boosey*, 4 H. L. C. 816.

(*b*) *Abernethy* v. *Hutchinson*, 3 L. J. (Ch.) 209.

(*c*) *Turner* v. *Robinson*, 10 Ir. Ch. 510. But see *Dalglish* v. *Jarvie*, 2 Mac. & Gor. 231, cited Kerr on Injunc. 184, and 25 & 26 Vict. c. 68.

CAP. I.

common law to the property in the work published. But it would have been hard indeed if publication, the only and necessary act to make the work useful and profitable, were construed to be destructive at once of the author's confessed original property against his expressed will. For the right of the author to the property while in manuscript, is freely admitted. But he is ready to admit his contemporaries and posterity into a participation in the result of his labours. Without publication the work would be useless to the author, because without profit; and property, without the power of use and disposal, is an empty sound. Publication, therefore, is the necessary act and only method of rendering this avowed property serviceable to mankind and profitable to the owner; in this they are jointly concerned.

On publication, no more passes to the public than an unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains. The property in the composition does not pass; for those things which only peculiarly and appropriately are his, must remain his till he agrees or consents to part with them by compact or donation; "because no man can deprive him of them without his approbation; but the depriver must use them as his when they are not his, in contradiction to truth." For "to have the property" of any thing, and "to have the sole right of using and disposing of it," is the same thing. They are equipollent expressions (*a*).

Primary recognition of copyright.

It was only since the introduction of printing that any question of the extent and duration of copyright could be expected to occur in a court of justice. For the period of about a century from the time of this discovery we have no evidence of the recognition in any public form of the copyright of authors, or of the remedies by which its infraction might be redressed (*b*). The earliest evidence which occurs is to be found in the charter of the Stationers' Company and the decrees of the Star Chamber.

(*a*) Author of 'The Religion of Nature Delineated,' p. 136.
(*b*) Maugham, Lit. Prop.

The original charter of the Stationers' Company was granted by Philip and Mary. It was the declared object of the Crown at that time to prevent the propagation of the reformed religion, and it seems to have been thought that this could most effectually be brought about by imposing the severest restrictions on the press. About this period there are several decrees and ordinances of the Star Chamber regulating the manner of printing, the number of presses throughout the kingdom, and prohibiting all printing against the force and meaning of any of the statutes or laws of the realm. Until the year 1640 the Crown, through the instrumentality of the Star Chamber, exercised this restrictive jurisdiction without limit, enforcing by the summary powers of search, confiscation, and imprisonment, its decrees, without the least obstruction from Westminster Hall or the Parliament in any instance.

The original charter of the Stationers' Company.

In 1640, however, the Star Chamber was abolished; the king's authority was set at nought; all the regulations of the press, and restraints previously imposed against unlicensed printers by proclamations, decrees of the Star Chamber, and charter powers given to the Stationers' Company, were deemed and certainly were illegal. The licentiousness of libels induced the Parliament to make an ordinance which prohibited printing unless the book was first licensed. The ordinance prohibited printing without the consent of the owner, or importing (if printed abroad), upon pain of forfeiting the same to the owner or owners of the *copies* of the said books, &c. This provision necessarily presupposed the property to exist; it would have been nugatory if there had been no admitted owner. An owner could not at that time have existed otherwise than by common law. In 1649 the Long Parliament made another ordinance; and in 1662 was passed the Licensing Act (13 & 14 Car. 2, c. 33), which interdicted the printing of any book unless first licensed and entered in the registry of the Stationers' Company. This Act further prohibited the printing of any work without the consent of the owner, upon pain of forfeiture, &c. The

On abolition of Star Chamber all restraints on printing deemed illegal.

The Licensing Act of Car. 2.

CAP. I.

sole property of the owner is here acknowledged in express terms as a common law right; and the legislature which passed that Act could never have entertained the most distant idea "that the productions of the brain were not a subject-matter of property." To support an action on this statute ownership had to be proved or the plaintiff could not have recovered, because the action was to be brought by the owner, who was to have a moiety of the penalty. The various provisions of this Act effectually prevented piracies, without actions at law or bills in equity. But cases arose of disputed property. Some of them were between different patentees of the Crown; some, whether the property "belonged to the author, from his invention and labour, or the king, from the subject-matter."

The Licensing Act of Car. 2 was continued by several Acts of Parliament, but expired May, 1679; soon after which there is a case in Lilly's 'Entries of Hilary Term,' 31 Car. 2, B. R. (*a*). In this case an action was brought for printing 4000 copies of the 'Pilgrim's Progress,' of which the plaintiff was the true proprietor, whereby he lost the profit and benefit of his copy. There is no account, however, of the case having been proceeded with.

Ordinance of the Stationers' Company in 1681.

In 1681, all legislative protection having ceased, the Stationers' Company adopted an ordinance or bylaw, which recited that several members of the company had *great part of their estates in copies*, that by ancient usage of the company, when any book or copy was duly entered in their register to any member, such person had always been reputed and taken to be the proprietor of such book or copy, and ought to have the sole printing thereof. The ordinance further recited that this privilege and interest had of late been often violated and abused; and it then provides a penalty against such violation by any member or members of the company, where the copy had been duly entered in their register. The true view of this ordinance would seem to be, that the members of the

(*a*) *Ponder* v. *Bradyl*, Lilly's 'Entries,' 67; see Carter, 89; 4 Burr. 2317; Skinner, 234; 1 Mod. 257.

Stationers' Company, finding their estates in copies, which belonged to them by the common law, no longer under the protection of the Licensing Act (the repeal of which had incidentally withdrawn the protection that had always been inserted in it, though it had necessarily no connection with the system of licensing), undertook to provide for the failure of legislation, as far as they could, by an ordinance applicable of course to their own members only. The ordinance is not to be cited as any other proof of what the common law right was than that it shows, in connection with other historical proof, what it was then supposed to be. It was much the same as if an association of persons were to agree that any one of their number should pay a penalty for violating the acknowledged rights of property of any other person in the association, provided such rights were duly entered in their common records. It would not be an attempt to create the right, but it would justly be regarded as an acknowledgment of the existence of such a right (*a*).

A bylaw of the Stationers' Company in 1694.

In another bylaw, passed in 1694 (*b*), it was stated that copies were constantly bargained and sold amongst the members of the company as their property, and devised to their children and others for legacies and to their widows for maintenance; and it was ordained, that if any member should, without the consent of the member by whom the entry was made, print or sell the same, he should forfeit for every copy twelve-pence.

For many years successively attempts were made to obtain a new Licensing Act. Such a bill once passed the upper house, but the attempt miscarried upon constitutional objections to a licence. Proprietors of copyright had so long been protected by summary measures, that they regarded an action at law as an inadequate remedy. A bill in equity was never even thought of; no hope of its success appears at that time to have been entertained.

(*a*) Curtis on Copy. p. 38.

(*b*) In this year expired finally the Licensing Act of 13 & 14 Car. 2 which had been revived by 1 Jac. c. 7, and continued by 4 W. & M. c 24.

CAP. I.

A petition presented to Parliament in 1709 for protection of copyright.

In one of the petitions presented to the House in support of applications to Parliament in 1709, for a bill to protect copyright, the last clause or paragraph was as follows: "The liberty now set on foot of breaking through this ancient and reasonable usage is no way to be effectually restrained but by an Act of Parliament. For by common law, a bookseller can recover no more costs than he can prove damage; but it is impossible for him to prove the tenth, nay, perhaps, the hundredth part of the damage he suffers; because a thousand counterfeit copies may be dispersed into as many hands all over the kingdom, and he not be able to prove the sale of them. Besides, the defendant is always a pauper, and so the plaintiff must lose his costs of suit. (No man of substance has been known to offend in this particular, nor will any ever appear in it.) Therefore, the only remedy by the common law is to confine a beggar to the rules of the King's Bench or Fleet, and there he will continue the evil practice with impunity. We therefore pray that confiscation of counterfeit copies be one of the penalties to be inflicted on offenders" (*a*).

The first Copyright Act, 8 Anne, c. 19.

In response to these applications the Act 8 Anne, c. 19, was passed. It recites that printers, booksellers, and other persons had of late frequently taken the liberty of printing, reprinting, and publishing books and other writings without the consent of the authors or proprietors, to their very great detriment, and too often to the ruin of them and their families. For preventing, therefore, such practices for the future, and for the encouragement of learned men to compose and write useful books, it was enacted, that the authors of books already printed who had not transferred their rights, and the booksellers or other persons who had purchased or acquired the copy of any books in order to print or reprint the same, should have the sole right and liberty of printing them for a term of twenty-one years from the 10th of April, 1710, and no longer; and that authors of books not then printed, should have the sole right of printing for fourteen years, and no longer. It

(*a*) 4 Burr. 2318.

also provided that copies of books should be entered before publication in the register book of the Stationers' Company, which book should be free for inspection at any time without fee; and that nine copies of each book should be delivered to the warehouse-keeper of the said company for the use of university libraries, inflicting a penalty in default of such delivery, besides the value of the said printed copies, of the sum of £5 for every copy not so delivered (*a*). And lastly it provided, that after the expiration of the said term of fourteen years the sole right of printing or disposing of copies should return to the authors thereof, if they were then living, for another term of fourteen years.

The common law right to old copies.

The general question upon the common law right to old copies of works could not arise until the expiration of the full term conferred by the Act of Anne, that is, until twenty-one years from the 10th of April, 1710. Shortly after the expiration of this period, in 1735, in the case of *Eyre* v. *Walker* (*b*), Sir Joseph Jekyll granted an injunction to restrain the defendant from printing the 'Whole Duty of Man,' the first assignment of which had been made in December, 1657; and this was acquiesced under.

Injunctions issued in support of this right.

In the same year, in the case of *Motte* v. *Falkner* (*c*), an injunction was granted for printing Pope's and Swift's 'Miscellanies.' Many of the pieces had been published in 1701, 1702, and 1703, and the counsel strongly pressed the objection as to these pieces. Lord Talbot, however, continued the injunction as to the whole, and it was acquiesced under.

In the following year, in the case of *Walthoe* v. *Walker*, an injunction was granted for printing Nelson's 'Festivals and Feasts,' though the bill set forth that the original work was printed in the lifetime of Robert Nelson, the author, and that he died in 1714. This also was acquiesced under.

In 1739 Lord Hardwicke granted a fourth injunction to

(*a*) The number was extended to eleven copies by 41 Geo. 3, c. 107, s. 6; amended by 54 Geo. 3, c. 156, s. 2, and the number was limited to five by the 6 & 7 Will. 4, c. 110.

(*b*) Cited 4 Burr. 2325; 3 Swans. 673; 1 W. Bl. 331; see 2 Eden, 328.

(*c*) Cited in *Millar* v. *Taylor*, 4 Burr. 2325; *Tonson* v. *Walker*, 3 Swans. 672.

CAP I.

restrain the defendant from printing Milton's 'Paradise Lost.' The plaintiffs derived their title under an assignment of the copy from the author in 1667. This injunction was also acquiesced under (*a*). In 1751 Milton's poem again came before Lord Hardwicke, in the form of an application for an injunction to restrain the defendants printing the same with the notes of Dr. Newton and other commentators, all of which belonged to the plaintiff. The bill, as in the former application, derived a title to the poem from the author's assignment in 1667, and a title to the life by Fenton, published in 1727, to Bentley's notes, published in 1732, and to Dr. Newton's notes, published in 1749. The defendants put in an answer, and set up notes of their own, of which it appeared there were twenty-eight, while the notes of the other commentators, belonging to the plaintiffs, and included in the defendants' edition, numbered 1500. Lord Hardwicke gave judgment in 1752, and held that the plaintiffs' notes were within the protection of the statute; and as to the poem, although he said that the general question had never been determined, and there was a doubt, yet he granted the injunction until the hearing (*a*).

Principle on which the injunctions were issued.

All these injunctions were issued and acquiesced in under the presumption that the perpetual common law right, unaffected by the statute of Anne, was in the respective plaintiffs; had there been a reasonable doubt in the minds of the judges the injunctions would have been improper (*b*), for no reparation could be afforded to the defendants for the damage sustained thereby, in the case of their being innocent of the piracies attributed to them.

The celebrated cases of *Millar* v. *Taylor* and

The common law right was at length disputed and fully discussed in the celebrated case of *Millar* v. *Taylor* (*c*),

(*a*) *Tonson* v. *Walker*, 3 Swans. 672; 4 Burr. 2325, 2327, 2379, 2380; 1 W. Bl. 345; 2 Eden, 328; 1 Cox. 285.

(*b*) *Hill* v. *The University of Oxford*, 1 Vern. 275; *Grierson* v. *Jackson*, Ir. Term R. 304; *Univs. of Oxf. and Cam.* v. *Richardson*, 6 Ves. 689; *Bruce* v. *Bruce*, cited 13 Ves. 505; *Harmer* v. *Plane*, 14 Ves. 130; *Hogg* v. *Kirby*, 8 Ves. 224. And see Lord Erskine in *Gurney* v. *Longman*, 13 Ves. 505; *The Assignees of Robinson* v. *Wilkins*, cited 8 Ves. 224.

(*c*) 4 Burr. 2303.

when judgment was given for the plaintiff on the ground that the common law right to copyright was unaffected by the statute of Anne. However, in a case (*a*) determined on the authority of the last mentioned, the defendant appealed to the House of Lords, on which occasion the following questions were propounded to the judges:

1st. Whether, at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent?

2nd. If the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition? And might any person afterwards reprint and sell, for his own benefit, such book or literary composition, against the will of the author?

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

Eleven judges delivered their opinions *seriatim;* eight to three for the affirmative on the first question, four to seven on the second, and six to five on the third; so that it was declared that, although an author had by common law an exclusive right to print his works, and does not lose it by the mere act of publication, yet the statute of Anne had completely deprived him of the right. It was notorious that Lord Mansfield concurred with the eight

(*a*) *Donaldson* v. *Becket*, 4 Burr. 2408; 2 Bro. Parl. Cas. 129. Lord Kenyon expressed a decided opinion that no such right existed: *Beckford* v. *Hood*, 7 T. R. 620. Lord Ellenborough inclined to the same view: *Cambridge Univ.* v. *Bryer*, 16 East, 317; and a majority of the judges in *Wheaton* v. *Peters*, 8 Peters (Amer.) 591, arrived at the same conclusion. See *Jefferys* v. *Boosey*, 4 H. L. C. 815.

CAP. I.

upon the first question, with the seven upon the second, and with the five upon the third; but it being very unusual (from reasons of delicacy) for a peer to support his own judgment upon an appeal to the House of Lords, he did not speak (*a*).

The universities obtain an Act for the protection of their copyrights.

The universities, alarmed at the consequence of this decision, applied for and obtained an Act of Parliament (15 Geo. 3, c. 53) establishing in perpetuity their right to all the copies given or bequeathed them theretofore, or which might thereafter be given to or acquired by them (*b*).

The period for which copyright was capable of existing was somewhat varied by the 54 Geo. 3, c. 156, s. 4, which enacted that instead of enduring for fourteen years, and contingently for fourteen more, authors should have the sole liberty of printing and reprinting their works for the term of twenty-eight years, to commence from the day of the first publication of the same; and further, if the author should be living at the expiration of that period, for the residue of his natural life (*c*).

The present Literary Copyright Act, 1842.

All these Acts have been repealed by an Act of Parliament of the present reign—the 5 & 6 Vict. c. 45, on which the law of literary copyright now depends. To Mr. Serjeant Talfourd is due the honour of obtaining this piece of legislative justice. From 1837 to 1842 he used his best endeavours and expended his most eloquent strains to accomplish its passing. In contending for an extension of the period during which protection was

(*a*) In Scotland this question had been tried as early as 1748, and decided against the author's right: *Midwinter* v. *Hamilton*, June 7, 1748; Mor. Dict. of Dec. 19, 20, 8305. On appeal the case went off upon informality in the original summons: Feb. 11, 1751; 1 Cr. & St. 488. The same decision was pronounced in *Hinton* v. *Donaldson*, July 28, 1773, Mor. Dict. of Dec. 19, 20, 8307; 5 Brown's Sup. 508; and in *Cadell & Davies* v. *Robertson*, Dec. 18, 1804, Mor. Dict. of Dec., App., Lit. Prop. 5, as delivered in the House of Lords, July 16, 1811 (5 Paton, 493), the author's right was held to depend entirely on the Act of Queen Anne: Bell's Com. See *Payne* v. *Anderson*, Mor. Dict. of Dec. vols. 19, 20, p. 8316.

(*b*) *Vide post*, p. 144.

(*c*) An author whose works had been published more than twenty-eight years before the passing of this statute was held not to be entitled to the copyright for life: *Brooke* v. *Clarke*, 1 B. & Ald. 396.

afforded to literary works, he bursts forth:—"There is something peculiarly unjust in bounding the term of an author's property by his natural life, if he should survive so short a period as twenty-eight years. It denies to age and experience the probable reward it permits to youth—to youth, sufficiently full of hope and joys to slight its promises. It gives a bounty to haste, and informs the laborious student, who would wear away his strength to complete some work which 'the world will not willingly let die,' that the more of his life he devotes to its perfection, the more limited shall be his interest in its fruits. It stops the progress of remuneration at the moment it is most needed; and when the benignity of nature would extract from her last calamity a means of support and comfort to the survivors—at the moment when his name is invested with the solemn interest of the grave—when his eccentricities or frailties excite a smile or a shrug no longer—when the last seal is set upon his earthly course, and his works assume their place among the classics of his country—your law declares that his works shall become your property, and you requite him by seizing the patrimony of his children."

CHAPTER II.

WHAT MAY BE THE SUBJECT OF COPYRIGHT.

The subject of copyright.

IN order to acquire a copyright in a work it is necessary that it should be original. If any part of the composition is copied or adopted by the writer from a prior-existing work of course the title fails *quoad hoc*, as the writer cannot have been the author of what he has borrowed from another (*a*). "It is difficult," says Mr. Curtis (*b*), "to lay down any legal definition of originality in a literary composition that may be resorted to as a universal test. Many intellectual productions present no more difficulty upon the question of their originality than some inventions, or discoveries. The poems of the great masters in every language, and a vast body of other writings, however freely their authors may have used the thoughts of others, are at once seen to be just as original in a legal as they are in a critical sense. But in every species of composition, in all literatures, there is of necessity a constant reproduction of what is old, mixed with more or less that is new, peculiar, and original. There are also large classes of works the materials of which are common to all writers, existing in nature, art, science, philosophy, history, statistics, &c., where there must be considerable resemblances, however independently of each other the different authors may have written. Over this vast field it is impossible to erect an unvarying general rule, which can be fitted to all cases and capable of determining whether a particular work exhibits the degree of originality necessary

(*a*) 'Copyright,' chap. 5. (*b*) *Ibid.*

to a valid copyright. The laws which protect literary property are designed for every species of composition, from the great productions of genius that are to delight and instruct mankind for ages, to the humble compilation that is to teach children the art of numbers for a few years and then to disappear for ever.

"Hence these laws must be so administered that every literary labourer shall find in them an adequate protection to whatever he can show to be the product of his own labour. Something he must show to have been produced by himself; whether it be a purely original thought or principle unpublished before, or a new combination of old thoughts, and ideas, and sentiments, or a new application or use of known and common materials, or a collection, the result of his industry and skill. In whatever way he claims the exclusive privilege accorded by these laws, he must shew something which the law can fix upon as the product of his, and not another's, labour. But in order that the law should do this ample justice, in the great variety of claimants, it is necessary that its rules should be capable of adaptation to the objects of their labours. They must include in their range everything that can be justly claimed as the peculiar product of individual efforts; otherwise they would exclude from the benefit of literary property objects which are as clearly the product of individual labour as the most original thoughts ever written, namely, new and important combinations and arrangements, or collections of materials known and common to all mankind."

Copyright may exist in a new arrangement or in novel additions.

The law does not require that the subject of a book should be new, but that the method of treating should have some degree of originality about it. Copyright may exist in a novel arrangement, as well as in recent corrections and additions to an old work not the property of the compiler (*a*).

(*a*) *Cary* v. *Longman*, 1 East, 358; *Sayre* v. *Moore*, *ibid.* 361; *Tonson* v. *Walker*, 3 Swans. 672; *Tonson* v. *Collins*, 1 W. Bl. 321; *Cary* v. *Faden*, 5 Ves. 24; *Motte* v. *Falkner*, cited 1 W. Bl. 331; *King* v. *Reed*, 8 Ves. 223, n.; *Hogg* v. *Kirby*, 8 Ves. 215; *Longman* v. *Winchester*, 16 Ves. 269;

CAP. II.

Thus, in the case of 'Gray's Poems,' which had been for many years published and were afterwards collected by a Mr. Mason, and reprinted with the addition of several new poems, the Lord Chancellor granted an injunction against a defendant who had copied the whole, though the plaintiff had but a copyright in the additions (*a*).

So, if a person collects an account of natural curiosities, or of works of art, or of mere matters of statistical or geographical information, and employs the labour of his mind in giving a description of them, his own description may be the subject of copyright. It is equally competent to any person to compile and publish a similar work; but it must be made substantially new and original, like the first work, by resort to the original sources, and must not copy or adopt from the other, upon the notion that the subject is common (*b*).

If a man makes an actual survey of certain roads and depicts such roads on a map, though his map might, and probably would, correspond with many which had previously been published, it would be hard to say that it was not a new work. In such a case it is not a question of the mind, like the 'Essay on the Human Understanding;' it lies *in medio;* every man with eyes can trace it, and the whole merit depends upon the accuracy of the observation; every description will therefore be in a great measure original (*c*). If this be so, every edition will be a new work; if it differs as much from the last edition as it does from the last precedent work, either

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Lewis v. *Fullarton*, 2 Beav. 6; *Leader* v. *Purday*, 7 C. B. 4; *Barfield* v. *Nicholson*, 2 Sim. & Stu. 1; *Jarrold* v. *Houlston*, 3 K. & J. 708; *Emerson* v. *Davies*, 3 Story (Amer.) 768; *Atwill* v. *Ferrett*, 2 Blatch. (Amer.) 46; *Bartlett* v. *Crittenden*, 5 McLean (Amer.) 32. As to musical compositions see *Reed* v. *Carusi*, 8 Law Rep. O.S. (Amer.) 411.

(*a*) *Mason* v. *Murray*, cited 1 East, 360.

(*b*) *Hogg* v. *Kirby*, 8 Ves. 215; and in a Scotch case it was held that the directors of the Customs Annuity and Benevolent Fund have a copyright or right of property in the publication 'The Clyde Bill of Entry and Shipping List,' entitling them to protection against piracy: *Walford* v. *Johnston*, 3rd June, 1846; 20 Sess. Cas. 1160. See *Maclean* v. *Moody*, 23 June, 1858, 20 Sess. Cas. 1154.

(*c*) See Lord Jeffery's observations in *Alexander* v. *Mackenzie*, 9 Sess. Cas. (N.S.) 758; *Blunt* v. *Patten*, 2 Paine (Amer.) 393.

all are original works or none of them. It is an extremely difficult thing to establish identity in a map or a mere list of distances; but there may be originality in casting an index, or pointing out a ready method of finding a place in a map (*a*).

The composing receipts or arranging them in a book will give a copyright to the compiler; but the mere collecting them and handing them over to a publisher will not (*b*); nor will the mere copying that which is public property. However, if there be some new arrangement or classification of the subject, or the copy be at all varied, then a copyright may exist in it (*c*), provided the variation be not merely colourable (*d*).

Thus, where the defendant had used four charts published by the plaintiff in making one large map, but there were very important differences between them, much in favour of the defendant's, and the evidence showed the plaintiff's charts to be founded upon a wrong principle, Lord Mansfield left it to the jury to say whether the alteration was colourable or not. "There must be such a similitude," said he, "as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So in the case of different prints; no doubt different men may take engravings from the same picture. The same principle holds with regard to charts; whoever has it in his intention to publish a chart may take advantage of all prior publications." "You are told, that there are various and very material alterations—the chart of the plaintiff is upon a wrong principle, inapplicable to navigation—the defendant, therefore, has been correcting errors, and not servilely copying. If you think so, you will find for the defendant; if you think it

(*a*) *Carnan* v. *Bowles*, 2 Bro. C. C. 80; *Taylor* v. *Bayne*, Mor. Dict. of Dec. in Ct. Sess. vols. 19, 20, 8308; *ibid.* App. pt. 1, 7; *Alexander* v. *Mackenzie*, 9 Sess. Cas. (N.S.) 758.

(*b*) *Rundell* v. *Murray*, Jac. 314, *per* Lord Eldon; *Matthewson* v. *Stockdale*, 12 Ves. 270.

(*c*) *Newton* v. *Cowrie*, 4 Bing. 234.

(*d*) *Matthewson* v. *Stockdale*, *supra*; *Barfield* v. *Nicholson*, 2 Sim. & Stu. 1.

CAP. II.

is a mere servile imitation, and pirated from the other, you will find for the plaintiff (*a*)." And in *Matthewson* v. *Stockdale* (*b*) Lord Eldon said, "I admit that no man can monopolize such subjects as the English Channel, the Island of St. Domingo, or the events of the world; and every man may take what is useful from the original work, improve, add, and give to the public the whole, comprising the original work, with the additions and improvements."

On the same principle a person may have copyright in mathematical tables *actually calculated by himself*, although on a fresh calculation the same tables would result from the same *data* and the same principles, and although they may have previously been published before his appeared (*c*).

Copyright in private letters.

The copyright of private letters forming literary compositions is in the composer, and not in the receiver, who has only a special property in them; "possibly the property of the paper may belong to him, but this does not give a licence to any person whatever to publish them to the world, for at most the receiver has but a joint property with the writer" (*d*). If a letter, therefore, by any means gets back into the hands of the sender the receiver is entitled to recover it from him by action. In *Oliver* v. *Oliver* the facts were as follows. The plaintiff and defendant were brothers. The letters for the recovery of which the action was brought, related to family affairs. They were written and sent by the defendant to the plaintiff, —had been given back by the plaintiff to the defendant, and proof was given of a demand and refusal to restore them. There was contradictory evidence as to whether

(*a*) *Sayre* v. *Moore*, 1 East, 361, n.
(*b*) 12 Ves. 275; *Wilkins* v. *Atkins*, 17 Ves. 422.
(*c*) *Bailey* v. *Taylor*, 3 L. J. 66.
(*d*) *Per* Lord Hardwicke, *Pope* v. *Curl*, 2 Atk. 342; *Perceval v. Phipps*, 2 V. & B. 19; *Forrester* v. *Walker*, 4 Burr. 2331; *Webb* v. *Rose*, *ibid.* 2330; *Macklin* v. *Richardson*, Amb. 694; *Duke of Queensberry* v. *Shebbeare*, 2 Eden, 329; *Millar* v. *Taylor*, 4 Burr. 2303; *Donaldson* v. *Becket*, 2 Bro. P. C. 129; *Oliver* v. *Oliver*, 11 C. B. (N.S.) 139; *Cadell* v. *Stewart*, Mor. Dict. of Dec. vols. 19, 20, App., Lit. Prop. 13; *Palin* v. *Gathercole*, 1 Coll. 565; *Folsom* v. *Marsh*, 2 Story (Amer.) 100; *Boosey* v. *Jefferys*, 6 Exch. 583, *per* Lord Campbell.

the letters had been given by the plaintiff to the defendant to be kept by him as his own property, or whether they had been merely handed to the defendant as custodian, to be re-delivered to the plaintiff on request. The learned judge told the jury that the receiver of a letter had such a property in the paper as to entitle him to maintain an action against the sender if, by any means, it got back into his hands; and that it was for them to say whether the letters in question had been given to the defendant that he might retain them as his own property, in which case the defendant would be entitled to their verdict, or whether they were merely deposited with him to take care of them for the plaintiff, in which case the latter would be entitled to the verdict. Erle, C.J., in refusing a rule for a new trial, upheld this direction, and said: "In the case of letters, the paper at least becomes the property of the persons receiving them. Of course it is necessary to distinguish between the property in the paper and the copyright. The former is in the receiver, the latter is in the writer" (*a*).

* The letters of Pope (*b*), Swift, and others, and the letters of Lord Chesterfield (*c*), were prevented from a surreptitious and unauthorized publication by injunction, on the ground of copyright in their authors. Lord Hardwicke, in *Pope's Case*, thought it would be extremely mischievous to draw a distinction between a book of letters, which came out into the world either by the permission of the writer or the receiver of them, and any other learned work. The same objection would, he thought, hold good against sermons which the author may never have intended to be published, but have been obtained from loose papers and brought out after his death.

A distinction drawn between letters of a literary nature, and those of a commercial description.

In the case of the *Earl of Granard* v. *Dunkin* (*d*) the executors of Lady Tyrawley obtained an injunction in the first instance against the defendant publishing letters to Lady Tyrawley from different correspondents, and which

(*a*) See *Howard* v. *Gunn*, 32 Beav. 462; 2 N. R. 256. (*b*) 2 Atk. 342.
(*c*) *Thompson* v. *Stanhope*, Amb. 737. (*d*) 1 Ball & Beatie, 207.

CAP. II.

he had got possession of by being permitted to reside in her house, and continuing to do so after her death. In 1804 the Court of Sessions in Scotland interdicted, at the instance of the children, the publication of the manuscript letters of the poet Burns (*a*).

In the case of *Perceval* v. *Phipps*, though the Vice-Chancellor, Sir Thomas Plumer, held that private letters having the character of literary compositions were within the spirit of the Act protecting literary property, and that by sending a letter the writer did not give the receiver the right to publish it, yet the court would not interfere to restrain the publication of *commercial* or *friendly letters*, except under circumstances (*b*); "for," said he, "though the form of familiar letters might not prevent their approaching the character of literary works, every private letter, upon any subject, to any person, is not to be described as a literary work, to be protected upon the principle of copyright. The ordinary use of correspondence by letters is to carry on the intercourse of life between persons at a distance from each other in the prosecution of commercial or other business, which it would be very extraordinary to describe as a literary work in which the writers have a copyright."

No such distinction at the present time admitted.

Non nostrum est tantas componere lites; yet this distinction appears to us to have but little foundation, and seems to have existed merely in the imagination of Sir Thomas Plumer. It is true that a court of equity cannot interfere to prevent the publication of private letters simply on the ground that such a publication, without the consent of the writer, as a breach of confidence, and social duty, is injurious to the interests of society; but solely on the ground that the writer has an exclusive property which remains in him, even where the letters have been transmitted to the person to whom they were addressed. A

(*a*) *Cadell & Davis* v. *Stewart*, cited 1 Bell's Com. 116, n., cited 2 Kent's Com. 381.

(*b*) 2 V. & B. 19; see *Wetmore* v. *Scoville*, 3 Edw. Ch. (Amer.) 515; *Hoyt* v. *Mackenzie*, 3 Barb. Ch. (Amer.) 320; but see *Woolsey* v. *Judd*, 4 Duer (N. York) 379; and *Eyre* v. *Higbie*, 35 Barb (N. York) 502.

court of equity is not the general guardian of the morals of society. It has not an unlimited authority to enforce the performance or prevent the violation of every moral duty. It would be extravagant to say that it may restrain by an injunction the perpetration of every act which it may judge to be corrupt in its motives or demoralising or dangerous in its tendency. An injunction can never be granted unless it is apparent to the court that the personal legal rights of the party who seeks its aid are in danger of violation, and, as a general rule, that the injury to result to him from such violation, if not prevented, will be irreparable.

Motives why no distinction should be drawn.

The sole foundation is the right which every man has to the exclusive possession and control of the product of his own labour. Why should a writing of inferior composition be precluded from being a subject of property (*a*)? To establish a rule that the quality of a composition must be weighed previous to investing it with the title of property, would be forming a very dangerous precedent. What reason can be assigned why the illiterate and badly spelt letters of an uneducated person should not be as much the subject of property as the elegant and learned epistle of a well known author? The essence of the existence of the property is the labour used in the concoction of the composition, and the reduction of ideas into a tangible and substantial form; and can it be contended that the labour is less in the former than the latter case? Every letter is, in the general and proper acceptation of the term, a literary composition. It is that, and nothing else; and it is so, however defective it may be in sense, grammar, or orthography. Every writing in which words are so arranged as to convey the thoughts of the writer to the mind of the reader is a literary composition; and the definition applies just as certainly to a trival letter as to

(*a*) School books for teaching children are entitled to protection. See *Lennie* v. *Pillans*, 5 Sess. Cas. 2nd series, 416; *Constable & Co.* v. *Brewster*, 3 S. 215 (N. E. 152). So are abstracts and indices of title to land, so long as the compiler retains the ownership of the unpublished manuscript: *Banker* v. *Caldwell*, 3 Min. (Amer.) 94.

CAP. II.

an elaborate treatise or a finished poem. Literary compositions differ widely in their merits and value, but not at all in the facts from which they derive their common sense (*a*).

Printing and publishing cannot make a book "literary" which was not so in manuscript; and consequently, the author of a book (for the same doctrine would apply to a book as to a private letter) which may be of a private nature, and not considered as "a literary composition," ought to be excluded from the benefit of the Acts conferring copyright. But surely it is not contended that the copyright of an author should be liable to impeachment and frustration by reason of an inquiry into the merits or value of his work as published.

The author's right of property alone protected by the Court of Chancery.

The exclusive right which alone a court of equity is bound to protect, and which, from its nature, can only be protected by an injunction, is the author's right of property in the words, thoughts, and sentiments which, in their connection, form the written composition—which his manuscript embodies and preserves. This composition—whether, as such, it has any value or not, is immaterial—is his work, the product of his own labour, of his hand, and his mind; and it is this fact which gives him the right to say that, without his consent, it shall not be published, and makes it the duty of a court of equity to protect him in the assertion of that right by a permanent injunction. Of this it is a conclusive proof that the right to control the publication of a manuscript remains in the author and his representatives, even when the material property has, with his own consent, been vested in another. The gift of the manuscript, it is settled, unless by an express agreement, carries with it no licence to publish (*b*).

Lord Eldon intimates in *Gee* v. *Pritchard* (*c*) that he

(*a*) 2 Story's Rep., cited *Woolsey* v. *Judd*, 4 Duer (N. York) 379.
(*b*) *Duke of Queensberry* v. *Shebbeare*, 2 Eden, 329; *Thompson* v. *Stanhope*, Amb. 737.
(*c*) 2 Swans. 418, 426, 427. See *Brandreth* v. *Lance*, 8 Paige's R. (Amer.) 24, 26.

Lord Eldon's opinion of the case of *Perceval* v. *Phipps*.

does not understand the Vice-Chancellor, in the case of *Perceval* v. *Phipps*, as denying the property of the writer in the letters, but that he appears to have inferred, from the particular circumstances of that case, that the plaintiff had authorized, and for that reason could not complain of, the publication. "I will not say," he adds, "that there may not be a case of exception, but if there is, the exception must be established on examination of the letters; and I think that it will be extremely difficult to say where that distinction is to be found between private letters of one nature and private letters of another nature."

Mr. Story's opinion.

Mr. Justice Story strongly asserts the propriety of the jurisdiction by injunction for the purpose of restraining the publication of private letters. He thinks the doctrine but sound and just that a court of equity ought to interfere where a letter, from its very nature, as in the case of matters of business, or friendship, or advice, or family or private confidence, imports the implied or necessary intention and duty of privacy and secrecy; or where the publication would be a violation of *trust* or *confidence* founded in contract, or implied from circumstances (*a*). Cicero has with great force thus spoken of the grossness of such offences against common decency: "*Quis enim unquam, qui paulum modo bonorum consuetudinem nosset, literas, ad se ab amico missas, offensione aliquâ interposita, in medium protulit, palamque recitavit? Quid est aliud, tollere e vitâ vitæ societatem quam tollere amicorum colloquia absentium? Quam multa joca solent esse in epistolis, quæ, prolati si sint, inepta videantur! Quam multa seria, neque tamen ullo modo divulganda!*" (*b*)

Principles on which the determinations of the

With these natural feelings on the breach of epistolary confidence the determinations of the Court of Session in Scotland have accorded (*c*); but it must be borne

(*a*) Story's Com. on Eq. Jur. ss. 947–949.
(*b*) Cic. *Orat. Phillip.* ii. c. 4. See Sir S. Romily, 2 Swans. 419.
(*c*) So it was held in *Dodsley* v. *M'Farquhar*, Feb. 27, 1775, relative to the publication of Lord Chesterfield's Letters: Mor. Dict. of Dec., Lit.

CAP. II.

Court of Session have proceeded.

in mind that that court is held to have jurisdiction by interdict to protect, not property only, but reputation, from injury, and private feelings from outrage and invasion (*a*).

Ground on which a court of equity will frequently interfere.

Courts of equity will, notwithstanding what we have already intimated, sometimes interfere to stay the publication of letters, on the ground that the publication is a *breach of contract* or *confidence*; and *à fortiori*, when they are intended to be made a source of *profit*; for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive copyright of the writer.

Thus, upon the principle of *breach of contract*, an injunction was granted to prevent the publication of letters written by an old lady to a young man, to whom she had been foolishly attached, there being an agreement not to publish the letters, but to deliver them up for a valuable consideration (*b*).

Were the Court of Chancery to interfere on any other principle than that already stated, individuals would be deprived of their defence in proving agency, orders for goods, the truth of an assertion, or some other fact, merely because the testimony establishing the true and genuine circumstances was contained in letters in which a pretended copyright was claimed (*c*).

Instances in which the publication of private letters has been permitted.

Accordingly an injunction obtained on account of agency and confidence was dissolved by the court when the answer denied confidence, and avowed that the defendant's ob-

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Prop., App. 1, 5; Br. Sup. 509; and again more solemnly in *Cadell and Davies* v. *Stewart*, June, 1, 1804, Mor. Dict. of Dec., Lit. Prop., App. 4. *Ibid.* But see, 5 Pat. 493. Here letters written by Burns to a lady whom he distinguished by the name of *Clarinda*, had been by her given to Stewart, a bookseller, who published them. The family of Burns, as interested in his literary reputation, were found entitled to an interdict: Bell's Com.

(*a*) Bell's Com. b. 2, pt. 2, c. 4.

(*b*) *Anon* v. *Eaton*, cited 2 V. & B. 27; *Perceval* v. *Phipps*, 2 V. & B. 27; *Earl of Granard* v. *Dunkin*, 1 Ball. & B. 247; Story's Eq. Jur. vol. 2, ss. 944–950; *Denis* v. *Laclerc*, 1 Martin (Amer.), 297; *Woolsey* v. *Judd*, 4 Duer. (N. York) 379; *Eyre* v. *Higbie*, 35 Barb. (N. York) 502.

(*c*) See Godson on Copy. p. 330.

ject in publishing them in a newspaper, of which he was the proprietor, was not to obtain profit, but to *vindicate his own character* from the imputation of having published false intelligence publicly cast on him by the plaintiff; for defective and injurious indeed would be the effect of a law permitting not the publication or production of business letters when necessary for one's own defence (*a*).

Not permissible for the purpose of representing that to be true which has been admitted to be false.

The receiver of a letter, however, will not be permitted to publish it for the purpose of representing to the public as true that which he has, in legal proceedings upon that very question, admitted to be false. The case of *Palin* v. *Gathercole* (*b*) elucidated this point. The circumstances of that case were these: Palin, the plaintiff, had written to Gathercole, the defendant, who was the editor of a newspaper, certain letters containing information respecting one Noakes, and Gathercole from these letters drew up an article which he published in his newspaper. Noakes brought an action against him for libel, and he compromised the action, paying Noakes' costs, and apologizing. Gathercole then claimed of Palin half the costs that he, Gathercole, had so incurred, and Palin refusing to pay them, Gathercole published in his newspaper a statement that the libel upon Noakes was communicated to him, Gathercole, by Palin. Palin thereupon brought an action against Gathercole; and Gathercole pleaded that the matter, however libellous as between Noakes and Gathercole, was matter of which, as between Palin and Gathercole, Palin was the author; but before trial Gathercole submitted to what was, in effect, a general verdict, establishing in substance, as Vice-Chancellor Knight Bruce expressed it in his judgment, that the libel published by Gathercole on Noakes was not a libel which Palin had communicated to Gathercole. Gathercole then proceeded to shew Palin's letters to third persons, upon which Palin filed his bill for an injunction to restrain Gathercole from

(*a*) *Folsom* v. *Marsh*, 2 Story (Amer.) 100; see *Howard* v. *Gunn*, 32 Beav. 462.

(*b*) 1 Coll. 565.

CAP. II.

publishing or showing the letters, and obtained an *ex parte* injunction. The use which Gathercole desired to make of the letters was, it will be observed, to establish the fact that Palin was the author of the libel upon Noakes, the very fact which he had, by submitting to the general verdict in Palin's action, admitted not to exist. Under those circumstances, the court refused to dissolve the injunction, permitting, however, the defendant to exhibit the letters to his solicitors and counsel in the cause.

Communications sent to editors of periodicals.

Communications received from correspondents by editors or proprietors of periodical publications (if sent impliedly or expressly for the purpose of publication) become the property of the person to whom they are directed, and cannot be published by any other person obtaining possession of them (*a*). The editor or proprietor, however, of any such periodical may not publish them if, previous to publication, the writer expresses his desire to withdraw them (*b*); but though the editor may not publish them he may destroy them (*c*).

Power of government to publish or withhold letters.

The government has, moreover, a right to publish or to withhold all letters addressed to the public offices (*d*). This exception in favour of the government is not supposed to make such communications common property, to be published by any person who may see fit, without the sanction of the government, nor to take away the property of the writers or their representatives. "In respect to official letters addressed to government," observed Mr. Justice Story in *Folsom* v. *Marsh* (*e*), "or any of its departments, by public officers, so far as the right of the government extends from principles of public policy to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful whether any public officer is at liberty to publish

(*a*) 8 Ves. 215.
(*b*) *Davis* v. *Miller*, July 28, 1855; 17 Dec. of Ct. of Sess. 2nd series, 1166. See 1 Jur. (N.S.) pt. 2, 523. (*c*) Kerr on Injunc. p. 188.
(*d*) Curtis on Copy. 98.
(*e*) *Folsom* v. *Marsh*, 2 Story (Amer.) 100.

them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. But this is an exception in favour of the government, and stands upon principles allied to, or nearly similar to, the right of private individuals, to whom letters are addressed by their agents, to use them, and publish them, upon fit and justifiable occasions. But assuming the right of the government to publish such official letters and papers, under its own sanction, and for public purposes, I am not prepared to admit that any private persons have a right to publish the same letters and papers without the sanction of the government for their own private profit and advantage. Recently the Duke of Wellington's despatches have, I believe, been published by an able editor, with the consent of the noble duke and under the sanction of the government. It would be a strange thing to say, that a compilation involving so much expense and so much labour to the editor in collecting and arranging the materials, might be pirated and republished by another bookseller, perhaps to the ruin of the original publisher and editor. Before my mind arrives at such a conclusion, I must have clear and positive lights to guide my judgment, or to bind me in point of authority."

Copyright in lectures.

Copyright may be had in lectures. If a lecture has been reduced wholly or partially into writing, the author has a right of property in it; but when a court of equity is called upon to restrain the publication of such a lecture, the writing must be produced, that the court may compare the original composition with the piracy.

The admission of persons to hear such a lecture affords no presumption that the speaker intends to give them a right to publish the information they may acquire. When the lecture is orally delivered it is difficult to say that an

CAP. II.

injunction can be granted upon the same principle as that upon which an injunction is issued in the case of a literary composition; because the court must be satisfied that the publication complained of is an invasion of the written work, and this can only be done by comparing the composition with the piracy. It does not, however, follow that because the information communicated by the lecturer is not committed to writing, but orally delivered, it is therefore within the power of the person who hears it to publish it (*a*). On the contrary, Lord Eldon, in *Abernethy* v. *Hutchinson*, observed that he was clearly of opinion that, whatever else might be done with it, the lecture could not be published for profit. When persons are admitted as pupils or otherwise to listen to lectures orally delivered, although they may go to the extent, if desirous and capable, of putting down the whole by means of shorthand, yet they can do that only for the purpose of their own information; they may not publish.

The Lecture Copyright Act, 5 & 6 Will. 4, c. 65.

The right of property in lectures, whether written or oral, has now been confirmed by statute. The Lecture Copyright Act is the 5 & 6 Will. 4, c. 65. It provides that, from and after the 1st of September, 1835, the author of any lecture, or the person to whom he has sold or otherwise conveyed the copy in order to deliver the same to any school, seminary, institution, or other place, or for any other purpose, shall have the sole right and liberty of printing and publishing such lecture. And it declares that no person, allowed for a certain fee and reward or otherwise to attend and be present at any lecture delivered at any place, shall be deemed and taken to be licensed, or to have leave to print, copy, and publish such lecture on account merely of having permission to attend the delivery.

Lectures not within the meaning of the Act.

Lectures published by authority, since the publication of which the period of copyright therein given by 8 Anne, c. 19, and 54 Geo. 3, c. 156, has expired, and lectures printed and published before September 1835, are ex-

(*a*) *Per* Lord Eldon, in *Abernethy* v. *Hutchinson*, 3 L. J. (Ch.) 209.