cluded from the protection afforded by the above Act; likewise lectures of the delivery of which notice in writing shall not have been given two days previously to two justices living within five miles of the place of delivery; and those delivered in any university, or public school, or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation.

In consequence of these exceptions, few lectures are protected by this Act, for seldom is the requisite notice given. And, under this latter clause, it would appear that sermons delivered by clergymen of the Established Church, in endowed places of public worship, are deemed public property.

Copyright in abridgments.

Copyright may likewise exist in a genuine and just abridgment, for it is said that an abridgment may with great propriety be called a new book (*a*).

What constitutes an abridgment.

To constitute a true and equitable abridgment the entire work must be preserved in its precise import and exact meaning, and then the act of abridgment is an exertion of the understanding, employed in moulding and transfusing a large work into a small compass, thus rendering it less expensive, and more convenient both to the time and use of the reader. In the case known as *Newbery's* (*b*), Lord Chancellor Apsley, having spent some hours in consultation with Mr. Justice Blackstone, decided that an abridgment, where the understanding is employed in retrenching unnecessary and uninteresting circumstances which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work. It requires both invention and judgment, and displays frequently a deal of learning. Lord Hardwicke thus states the rule (*c*):—"Where books are

(*a*) *Bell* v. *Walker*, 1 Bro. C. C. 451. An abstract also was held no piracy: *Dodsley* v. *Kinnersley*, Amb. 403; 4 Esp. 168; 1 Camp. 94.

(*b*) Lofft, 775; *Dodsley* v. *Kinnersley*, *supra*; *Butterworth* v. *Robinson*, 5 Ves. 709.

(*c*) *Gyles* v. *Wilcox*, 2 Atk. 141. See also the case of *Read* v. *Hodges*, referred to in *Tonson* v. *Walker*, 3 Swans. 672, *per* Lord Eldon; *Bell* v. *Walker*, 1 Bro. C. C. 451; *Tinsley* v. *Lacy*, 11 W. R. 877.

CAP. II.

colourably shortened only, they are undoubtedly within the meaning of the Act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment. But this must not be carried so far as to restrain persons from making a real and fair abridgment; for abridgments may, with great propriety, be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shewn in them, and in many cases are extremely useful, though in some instances, prejudicial, by mistaking and curtailing the sense of an author."

On these considerations the Master of the Rolls refused an injunction to restrain the publication of an abridgment of Dr. Johnson's 'Rasselas,' it appearing that not one-tenth part of the first volume had been abstracted, and that the injury alleged to be sustained by the author arose from the abridgment containing the narrative of the tale, and not the moral reflections (*a*).

Considerations in discriminating a *bonâ fide* abridgment from a piracy.

The question in such a case must be compounded of various ingredients: whether it be a *bonâ fide* abridgment, or only an evasion by the omission of some important parts, whether it will in its present form prejudice or supersede the original work, whether it will be adapted to the same class of readers, and many other considerations of the same sort, which may enter as elements, in ascertaining whether there has been a piracy or not. Although the doctrine is often laid down in the books, that an abridgment is not piracy of the original copyright, yet this proposition must be received with many qualifications.

Impropriety of the rule respecting abridgments.

The rule appears very unreasonable, and has been the subject of much criticism by late writers. Why should an abridgment, tending to injure the reputation, and to lessen the profits of the author, not be considered an invasion of his property? (*b*) In many cases the question may naturally turn upon the point, not so much of the quantity

(*a*) Amb. 403.
(*b*) Lord Campbell's 'Lives of the Chancellors,' vol. 5, chap. 131.

as of the value of the selected materials. As was significantly said on another occasion: *Non numerantur; ponderantur.* The quintessence of a work may be practically extracted so as to leave a mere *caput mortuum*, by a selection of all the important passages in a comparatively moderate space.

Quantum but little criterion of piracy.

In the case of *Bramwell* v. *Halcomb* (*a*) it was held that the question whether one author has made a piratical use of another's work does not necessarily depend upon the quantity of that work which he has quoted, or introduced into his own book. On that occasion Lord Cottenham said, "When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value, which is looked at. It is useless to look to any particular case about quantity."

The general principle is, that the proper object of the copyright is the *peculiar expression of the author's ideas*, meaning by this, the structure of the work, the sequence of his remarks, and, above all, his language; and that this peculiarity is always distinguishable, as, by a law of nature, every human production is stamped with the idiosyncracy of the author's mind. If these views be correct, it follows that any abridgment of the work, in the original author's language, is an infringement of his right; and indeed any quotation will be, *pro tanto*, a violation, unless excused on the ground of its inconsiderable extent, or on the presumed assent of the author, which, in works of criticism, might be justly implied (*b*).

Copyright in digests.

Copyright may also be had in a digest. The digest of a report, usually included in and known as the head note, is a species of property which will receive protection. "The head note, or the side or marginal note of a report,"

(*a*) 3 My. & Cr. 737; *Bell* v. *Whitehead*, 3 Jur. 68; *Sweet* v. *Shaw*, 3 Jur. 217; *Saunders* v. *Smith*, 3 My. & Cr. 711, 728; *Wheaton* v. *Peters*, 8 Peters. (Amer.) 591; *Gray* v. *Russell*, 1 Story (Amer.) 11; *Mawman* v. *Tegg*, 2 Russ. 385; *Butterworth* v. *Robinson*, 5 Ves. 709.

(*b*) 2 Kent's Com. 382, note; Curtis on Copy. 252.

CAP. II.

said Mr. Justice Crowder, in *Sweet* v. *Benning* (*a*), "is a thing upon which much skill and exercise of thought is required, to express in clear and concise language the principles of law to be deduced from the decision to which it is prefixed, or the facts and circumstances which bring the case in hand within the same principle or rule of law or of practice." It may indeed be considered, perhaps, as in itself a species of brief and condensed report, the reporter furnishing in each case two reports, in one of which he gives the facts, the arguments, and the judgment at length; and in the other, an abstract of the decision, conveying the principle upon which it is founded and the pith and substance of the case. But whether thus regarded, or viewed in the manner adopted by Mr. Justice Maule, in the above cited case, namely, in the nature of an independent deduction from the report, and a succinct statement of the legal principles involved, or of the doctrine of law established by the decision, there is a sufficient exertion of mental power in the formation to render it substantially a subject of copyright.

The right of selecting passages from books of reports (including entire judgments) in treatises upon particular subjects is not disputed. Had it been otherwise decided, the greater part of our law libraries would be much thinned and attenuated, and we should be deprived of many valuable works; for a considerable portion consists of mere transcripts from books of report (*b*).

What would become of the elaborate commentaries of modern scholars upon the classics, which, for the most part, consist of selections from the works and criticisms of various former authors, arranged in a new form, and combined together by new illustrations? What would become of the modern treatises upon astronomy, mathematics, natural philosophy and chemistry? What would

(*a*) 16 C. B. 491; 1 Jur. (N.S.) 543. *Vide D'Almaine* v. *Boosey*, 1 Y. & C. 301; but there Lord Lyndhurst referred to digests such as Vin. Abr. and Comyn's 'Digest.'

(*b*) See *Butterworth* v. *Robinson*, 5 Ves. 709; Evans' 'Statutes,' 2nd. ed. vol. ii. p. 25.

become of the treatises in our own profession, the materials of which, if the work be of any real value, must essentially depend upon faithful abstracts from the reports, and from juridical treatises, with illustrations of their bearing. 'Blackstone's Commentaries' is but a compilation of the Laws of England drawn from authentic sources, open to the whole profession; and yet it was never deemed that it was not a work which, in the highest sense, might be considered an original work, since never before were the same materials so admirably combined and exquisitely wrought out, with a judgment, skill and taste absolutely unrivalled (*a*).

As to whether copyright may exist in a work not claiming an originality in the doctrine contained therein.

The question has been raised whether there can be copyright in a work not claiming an originality in the doctrines contained therein (*b*). And this argument was put forth in the case of *Jarrold* v *Houlston* (*c*) respecting Dr. Brewer's 'Guide to Science,' in which work the author does not profess to have made any discovery in science, or to do more than to provide for the young and other persons who have not been in the habit of making observations for themselves, information by which some of the ordinary phenomena of common life may be explained to them on scientific principles, and that they may themselves be led to observe and to reflect upon those wonderful laws of nature, by which the most ordinary phenomena are governed. And it was determined that, if anyone by pains and labour collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions, and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former general reading, or out of works consulted by him for the express purpose, the reduction of the questions so collected,

(*a*) Story, J., in *Gray* v. *Russell*, 1 Story (Amer.) 17.
(*b*) As to the amount of originality required in a musical composition in America, see *Jollie* v. *Jaques*, 1 Blatch. (Amer.) 626.
(*c*) 3 K. & J. 708; 3 Jur. (N.S.) 1051.

CAP. II.

with such answers, under certain heads and in a scientific form, is amply sufficient to constitute an original work of which the copyright will be protected.

No copyright in that which has no present existence.

Copyright can only exist in respect of some already published or some composed and not yet published literary production. Therefore there can be no copyright in the prospective series of a newspaper. Copyright may attach upon each successive publication; but that which has no present existence as a publication cannot be the subject of this species of property (*a*).

The mere declaration of the intention to publish any articles bearing a particular name or mark, even though made public by registration at Stationers' Hall, cannot create a right to the exclusive use of such name or mark. So in the late cases of *Maxwell* v. *Hogg*, and *Hogg* v. *Maxwell*. Messrs. Hogg, in 1863, registered an intended new magazine to be called 'Belgravia.' In 1866, such magazine not having appeared, Mr. Maxwell, in ignorance of what Messrs. Hogg had done, projected a magazine with the same name, and incurred considerable expense in preparing it, and extensively advertising it in August and September as about to appear in October. Messrs. Hogg knowing of this, made hasty preparations for bringing out their own magazine before that of Mr. Maxwell could appear, and in the meantime accepted an order from Mr. Maxwell for advertising his (Mr. Maxwell's) magazine on the covers of their own publications, and the first day on which they informed Mr. Maxwell that they objected to his publishing a magazine under that name was the 25th of September, on which day the first number of Messrs. Hogg's magazine appeared. Mr. Maxwell's magazine appeared in October. Under these circumstances, on a bill filed by Mr. Maxwell, it was held, that Mr. Maxwell's advertisements and expenditure did not give him any exclusive right to the use of the name 'Belgravia,' and that he could not restrain Messrs. Hogg from publishing a magazine under the same name, the first number of which appeared before Mr. Max-

(*a*) *Platt* v. *Walter*, 17 L. T. (N.S.) 157.

well had published his; and on a bill filed by Messrs. Hogg, that the registration by them of the title of an intended publication could not confer upon them a copyright in that name, and that, in the circumstances of the case, they had not acquired any right to restrain Mr. Maxwell from using the name as being Messrs. Hogg's trade mark (*a*).

Copyright in a title.

The title of a periodical or newspaper was held under the former statutes to be a proper subject of copyright, as characterising the particular publication (*b*); that it cannot therefore be assumed by another without injury, although a similar title distinguishable may be assumed (*c*). On this point nothing is said in the Copyright Act, 1842, unless the words 'sheet of letterpress' be held to include a title; but there is, at least, nothing to sanction any alteration of the grounds upon which the former judgments stood (*d*).

Copyright in encyclopædias and periodicals.

With regard to encyclopædias, periodicals, and works published in series, reviews, or magazines, it is provided by the Copyright Act, 1842, that the copyright in every article shall belong to the *proprietor* of the work for the same term as is given by the Act to authors of books, whenever any such article shall have been or shall be composed on the terms that the copyright therein shall belong to such proprietor and be paid for by him; but payment must be actually made by the proprietor before the copyright can vest in him (*e*). After the term of twenty-eight years from the first publication of any such article the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by the Act; and during such term of twenty-eight

(*a*) *Maxwell* v. *Hogg*; *Hogg* v. *Maxwell*, 15 L. T. 204; 15 W. R. 84, 464; 36 L. J. (Ch.) 433; Law Rep. 2 Ch. Ap. 307.

(*b*) *Hogg* v. *Kirby*, 8 Ves. 215; *Keene* v. *Harris*, cited 17 Ves. 338; *Constable & Co.* v. *Brewster*, 3 Sess. Cas. 215 (N. E. 152).

(*c*) 8 Ves. 222. Where assumed for the purpose of deceiving the public, see *Bell* v. *Locke*, 8 Paige R. (Amer.) 75; and see *Cruttwell* v. *Lye*, 17 Ves. 335.

(*d*) Bell's Com. 6th ed. 549.

(*e*) A contract for payment is not sufficient: *Richardson* v. *Gilbert*, 1 Sim. (N.S.) 336; 20 L. J. (Ch.) 553; 15 Jur. 389. See *Brown* v. *Cooke*, 11 Jur. 77; 16 L. J. (Ch.) 140.

CAP. II.

years the proprietor shall not publish any such article separately, without the previous consent of the author or his assigns, unless the article was written on the express terms that the copyright therein should belong to the proprietor, for all purposes (*a*). But any author may reserve to himself the right to publish any such composition in a separate form, and he will then be entitled to the copyright in such composition, when published separately, without prejudice to the right of the proprietor of the encyclopædia, review, or other periodical, in which it may have first appeared (*b*).

Reservation by author of right to separate publication.

In order to give the proprietor of a periodical a copyright in articles composed for him by others, it is not necessary that there should be an express contract that he should have the property in the copyright. The fact of the author being paid by the proprietor for articles supplied expressly for the periodical, raises the presumption that the copyright is intended to be the property of the proprietor. Otherwise, the articles might be published by the writers thereof simultaneously, or shortly afterwards; possibly to the detriment and injury of the purchasers of the articles for particular periodicals.

Right of separate publication.

In the case of *Smith* v. *Johnson*, where the plaintiff had composed certain tales, under the common title of 'The Chronicles of Stanfield Hall,' for the defendant to publish in the 'London Journal,' of which he was the proprietor, it was held that the subsequent publication of such tales in a weekly supplementary number, for sale with or without the current number, was "a publication separately," within the meaning of the 18th section of the Copyright Act. And Vice-Chancellor Stuart then adopted the same view as did the Vice-Chancellor of England, in the *Bishop of Hereford* v. *Griffin*, and also that subsequently taken by

(*a*) *Hereford* (*Bishop*) v. *Griffin*, 16 Sim. 190; 17 L. J. (Ch.) 210. See 1 J. & H. 112; 3 L. T. (N.S.) 466. As to the course to be adopted on dissolution of partnership, and the withdrawal of one partner from the periodical publication by the firm, see *Bradbury* v. *Dickens*, 27 Beav. 53; 28 L. J. (Ch.) 667, cited Phillips on Copy. 181, note.

(*b*) 5 & 6 Vict. c. 45, s. 18.

Vice-Chancellor Wood, who considered that the meaning of the proviso in the 18th section, taken with the whole clause, was, not to vest a copyright in the proprietors or publishers of a periodical work, but simply to give them a licence to use the matter for a particular purpose. "Keeping in view," says the Vice-Chancellor, "this principle of construction—that the Act of Parliament was intended to give a licence only to the proprietors of periodical works purchasing and paying for a literary composition to be published as a part or portion of a periodical work—the construction of the words in the proviso which prohibit them from publishing these parts or portions which 'alone' are the property of the author—from publishing these portions 'separately and singly,' seems reasonably plain. 'Publishing separately' must mean publishing separately from something. What is that 'publishing,' which the Act of Parliament says shall not be separately made? It must be the publishing of the part or portion separately from that which has been before published. That is the view which has been previously taken, and the language in the case of *Mayhew* v. *Maxwell* was to the effect that the defendant should be prohibited from publishing the literary work then in question, otherwise than as part of the Christmas number of the 'Welcome Guest.' Now, that Christmas number was a thing called 'a part' in the Act of Parliament, which describes these periodical works as being published in a series of parts and numbers. The Christmas number is part or portion of the other composition. The order of this court peremptorily prohibited the defendant Maxwell from publishing it separately from the other part or number. What has the defendant in this case done? He has acquired, under the first clause of the Act of Parliament, an actual property in this literary composition, which is called 'The Stanfield Hall Tales,' published in portions or parts of a certain periodical work. The Act of Parliament says the publishers shall not publish these portions separately from those parts for the publication of which they have obtained a licence already. What

CAP. II.

they have done is to print the portions already published of these antecedent parts in what is called a supplementary number, and which may be purchased with or without the number in which the 'portions' were originally published. That is a separate publication; separate from the 'parts' in which it was originally published. To reprint in numbers, which may be had with or without the concurrent number of the work, is an act not permitted by the legislature" (*a*).

Copyright in work written for another, in the employer.

It is a well-known rule, that if a person be employed to produce anything for another, whether by writing or not, it is to be inferred (in the absence of any circumstances shewing the contrary) that the writing or thing produced by the person so employed is produced upon the terms that it shall be the property of the employer (*b*).

Transactions of this kind between publishers and authors resemble contracts for so much work and labour towards a general undertaking—so many bricks towards the erection of an edifice—and are different from the sale of a copyright. When delivered by the author, his contribution appears to be the property of the owner of the general work, more especially as the several articles are wrought into their appropriate form by the literary agent of the proprietor. In this manner contributions seem after leaving the hands of their authors to lose their separate identity (*c*).

Not so, however, if employer merely suggest the subject.

In *Shepherd* v. *Conquest* (*d*) the Court of Common Pleas questioned whether *under any circumstances* the copyright in a literary work, or the right of representation of a dramatic one, could become vested *ab initio* in an employer other than the person who has actually composed or adapted the work; and they decided that no such effect

(*a*) Vice-Chancellor Stuart, *Smith* v. *Johnson*, 4 Giff. 637; 33 L. J. (Ch.) 137; 9 Jur. (N.S.) 1223; 12 W. R. 122; 9 L. T. (N. S.) 437. See *Wallenstein* v. *Herbert*, 15 W. R. 838; 16 L. T. (N.S) 453.

(*b*) *Sweet* v. *Benning*, 24 L. J. (C.P.) 175; 16 C. B. 459; *Cox* v. *Cox*, 11 Hare, 118; see *Hatton* v. *Kean*, 29 L. J. (C.P.) 20, *post*, and 2 Hill. 'Torts.'

(*c*) Maugham on 'Copyright,' 171.

(*d*) 17 C. B. 427, see 25 L. J. (N.S.) C.P. 127; 2 Jur. (N.S.) 236. See *Pierpont* v. *Fowle*, 2 Wood & Min. (Amer.) 23; *Atwill* v. *Ferrett*, 2 Blatch. *ibid.* 36; *De Witt* v. *Brooks*, M.S. Nelson, J., N. Y. 1861; *Binns* v. *Woodruff*, 4 Wash. (Amer.) 53.

could be produced where the employers merely suggest the subject and have no share or design in the execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed; for it would be an abuse of terms to say that in such a case the employers were the authors of a work to which their minds had not contributed an idea.

Where, however, the employers do more than suggest the subject, and have a share in or solely design the execution of the work, the case is different. Thus in *Barfield* v. *Nicholson* (*a*) Sir John Leach said, "I am of opinion that, under the statute (8 Anne, c. 19), the person who forms the plans, and who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own peculiar acquirements, that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection, who, upon certain conditions contribute to it, is the author and proprietor of the work, if not within the liberal expression, at least within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally."

On this principle was determined the case of *Hatton* v. *Kean* (*b*), where the defendant, with the aid of scenery, dresses, and music, adapted one of Shakespeare's plays to the stage, and found the general design of the representation. He employed the plaintiff, a well-known musician named Hatton, for reward, to compose, and he did compose, as part of the representation, and as accessory to the dramatic piece, a musical composition, which formed part of the dramatic piece, on the terms that the defendant should have the liberty of representing and permitting to be represented the said musical composition with the dramatic piece as part thereof. And it was held that the defendant had the sole right of representing the entire

(*a*) 2 Sim. & Stu. 1; S. C. 2 L. J. (Ch.) 90; *Heine* v. *Appleton*, 4 Blatch. (Amer.) 125; *Siebert's Case*, 7 Opin. 656—Cushing Attorn.-Gen. (Amer.) 1856.

(*b*) 8 W. R. 7.

CAP. II.

dramatic piece, including the plaintiff's musical composition, and that he violated no right of the plaintiff within the 3 & 4 Will. 4, c. 15 (*a*), and the 5 & 6 Vict. c. 45, by representing, without the plaintiff's consent in writing, the entire dramatic piece, including the plaintiff's musical composition. The reason assigned was that, though the plaintiff was the author of the musical composition, it appeared that the defendant was the author and designer of the entire dramatic work, and with respect to a part, accessory to that whole (that whole consisting of something produced by the skill of the defendant in its entirety), he employed the plaintiff. The production by the plaintiff would be a part of the whole, and the defendant would have the sole right of performing and representing the entire piece in conjunction with the music.

Copyright in translations.

Copyright may exist in a translation, whether it be the result of personal application and expense, or donation (*b*). In the case of *Wyatt* v. *Barnard* (*c*), Lord Eldon states this to be the law: The plaintiff was the proprietor of a periodical called 'The Repository of Arts, Manufacture, and Agriculture.' He claimed the sole copyright of the work, containing, amongst other articles, translations from the foreign languages. The defendants were publishers of another periodical which contained various articles, being translations from foreign languages, copied or taken from the plaintiff's work without his consent. The defendants, by their affidavit, stated the usual practice among publishers of magazines, &c., to take from each other articles translated from foreign languages, or become public property by reason of their having appeared in other works. They relied on the custom of the trade, and contended that neither of the works was original, both being mere compilations; that it had never been decided that a trans-

(*a*) *Vide, post*, p. 148, app. xv.

(*b*) *Wyatt* v. *Barnard*, 3 V. & B. 77. If a foreigner translates an English work, and then an Englishman re-translates the foreign work into English, that is an infringement of the original copyright: *Murray* v. *Bogue*, 17 Jur. 219; 1 Drew. 353; 22 L. J. (Ch.) 457.

(*c*) 3 V. & B. 78. *Vide Stowe* v. *Thomas*, 2 Amer. L. Reg. 231.

lator might have a copyright in a translation, supposing, what was not proved, that these translations were made by the plaintiff himself. The Lord Chancellor said that the custom among booksellers could not control the law; and upon an affidavit stating that all the articles were translated by a person employed and paid by the plaintiff, and were translated from foreign books imported by the plaintiff at considerable expense, his Lordship granted an injunction.

The work from which the translation was taken in the present case was, of course, unprotected by the copyright law in existence here, and the cases which have treated translations from foreign works, having no copyright in this country, as original, would not necessarily form a precedent in the case of a translation of an English copyright work. But in the case above cited, Lord Eldon draws a conclusion that every translation is an original work, and if this be the case, the translation of an English copyright work cannot be a piracy. For a considerable time this position was doubted. "Does the mere act of giving to a literary composition the new dress of another language," it was asked, "add to the case an element which ought to take it out of the rule by which reproductions in other forms are prohibited?" "The new language in which his composition is clothed by translation," observes Mr. Curtis, "affords only a different medium of communicating that in which he has an exclusive property; and to attribute to such a new medium the effect of entire originality is to declare that a change of dress alone annihilates the most important subject of his right of property. It reduces his right to the narrow limits of an exclusive privilege of publishing in that idiom alone in which he first publishes." Nevertheless, the law may now be taken as decided in favour of copyright in a translation. Mr. Justice Yates, in *Millar* v. *Taylor* (*a*), and Lord Macclesfield, in *Burnett* v. *Chetwood* (*b*), inclined to this opinion; and the late Lord Justice Knight Bruce, when Vice-Chancellor, remarked in

Every fair translation an original work.

(*a*) 4 Burr. 2348. (*b*) 2 Mer. 441.

CAP. II.

the well-known case of *Prince Albert* v. *Strange* (*a*), that a work lawfully published, in the popular sense of the term, stood in this respect differently from a work which has never been in that situation. The former was liable to be translated, abridged, analyzed, exhibited in morsels, complimented, and otherwise treated in a manner that the latter was not.

The Queen may now direct that the authors of books published after a specified day in any foreign country, their executors, administrators, or assigns, shall have the power (subject to the provisions of the 15 & 16 Vict. c. 12) to prevent the publication in the British dominions of any translations of such books as are not authorized by them, for a period (to be specified by her Majesty) not exceeding five years from the first publication of an authorized translation; and in the case of books published in parts, for a period not exceeding, as to each part, five years from the first publication of an authorized translation of that part (*b*).

No copyright in a libellous, immoral, or obscene work.

Copyright cannot exist in a work of libellous, immoral, obscene, or irreligious tendency (*c*); because in order to establish such a claim the author must, in the first place, show a right to sell; and this he cannot possibly do, he himself not being able to acquire a property therein. *Nemo plus juris ad alium transferre potest quam ipse haberet* (*d*).

Not to protect such works, it has been argued, is to increase the circulation by allowing the publication of pirated editions; but it is an open question whether the circulation is not more effectually restrained by holding that there can be no property in such a work, than by protecting it; for the inducement to the publisher will

(*a*) 2 De G. & Sm. 693.

(*b*) 15 & 16 Vict. c. 12, s. 2.

(*c*) *Stockdale* v. *Onwhyn*, 5 B. & C. 173; 7 D. & R. 625; *Hime* v. *Dale*, 2 Camp. 28; *Walcot* v. *Walker*, 7 Ves. 1; *Poplett* v. *Stockdale*, 1 R. & M. 337; *Gee* v. *Pritchard*, 2 Swans. 413; *Southey* v. *Sherwood*, 2 Mer. 435; *Murray* v. *Benbow*, 1 Jac. 474; *Lawrence* v. *Smith*, *ibid.* 471; *Forbes* v. *Johnes*, 4 Esp. 97; *Gale* v. *Leckie*, 2 Stark. N. P. C. 107.

(*d*) Ulpian: *Nemo potest plus juris ad alium transferre quam ipse habet*: Co. Lit. 309; Wing. 56.

be less if other persons may copy and publish *ad infinitum*.

In answer to the remark, that by refusing to interfere in cases where the work is of an evil tendency, the court virtually promotes, in some instances, the multiplication of mischievous productions, it must be borne in mind, that a court of equity professes to decide only upon questions of property, concerning itself merely with the civil interests of the parties, and disclaiming interference to prevent or to punish injuries of a criminal nature; and it therefore leaves the offending person to be dealt with at law (*a*). And adopting such a course is not merely to act in conformity with its own general principles, but also with the constitution of the country; for, to assist a person who has exerted himself to the prejudice of national or of individual welfare, by deciding upon questions of a criminal character, the court would be assuming a power of adjudication in instances which, according to our notions of political freedom, ought not to be determined without the intervention of a jury. And it is also observable, that although interposition is refused in cases of this kind, except upon the plaintiff's right receiving the sanction of a court of law, the court of equity does not thereby bereave the party applying of any redress which he might otherwise obtain, or of the means of seeking it, but merely withholds that extraordinary relief which is adapted to other cases (*b*).

The first case establishing the doctrine that there could not be property in a work of the above description, is that known as Dr. Priestley's. The plaintiff brought an action against the hundred to recover damages for injury sustained by him in consequence of the riotous proceedings of a mob at Birmingham, and, among other property alleged to have been destroyed, claimed compensation for the loss of certain unpublished manuscripts, offering to produce booksellers as witnesses to prove that they would have given

(*a*) *Vide* 7 Ves. 2; 2 Mer. 438; 2 Swans. 413; 1 Jac. 473.
(*b*) Jer. Eq. Jur. Bk. 3 Ch. 2.

CAP. II.

considerable sums for them. On behalf of the hundred it was alleged that the plaintiff was in the habit of publishing works injurious to the government of the State; but no evidence was produced to that effect. Upon this the Lord Chief Justice Eyre remarked, that if any such evidence had been produced, he should have held it was fit to be received as against the claim made by the plaintiff. Several passages were read from the work itself in support of the charge as to its tendency.

No copyright in a work of an irreligious tendency.

This dictum was followed in *Walcot* (*Peter Pindar*) v. *Walker* (*a*), and in *Lawrence* v. *Smith* (*b*). In the latter case it was carried very far. The plaintiff having published a work under the title of 'Lectures on Physiology, Zoology, and the Natural History of Man,' filed a bill to restrain the defendant from selling a pirated edition, and obtained an injunction upon motion made *ex parte*. The defendants then moved to dissolve the injunction, and argued that the nature and general tendency of the work in question was such that it could not be the subject of copyright, and in support of this argument, several passages in it were referred to, which, it was contended, were hostile to natural and revealed religion, and impugned the doctrines of the immateriality and immortality of the soul. Lord Eldon, in dissolving the injunction, said: "I take it for granted that when the motion for the injunction was made, it was opened as quite of course; nothing probably was said as to the general nature of the work, or of any part of it; for we must look not only to the general tenor, but at the different parts; and the question is to be decided, not merely by seeing what is said of materialism, of the immortality of the soul, and of the Scriptures, but, by looking at the different parts, and inquiring whether there be any which deny, or which appear to deny, the truth of Scripture; or which raise a fair question for a court of law to determine whether they do or do not deny. Looking at the general

(*a*) 7 Ves. 1. See *Stockdale* v. *Onhwyn*, 5 B. & C. 173; *Poplett* v. *Stockdale*, Ry. & Mood. 337.

(*b*) 1 Jac. 471.

tenor of the work, and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scripture, considering that the law does not give protection to those who contradict Scriptures, and entertaining a doubt, I think a rational doubt, whether this book does not violate the law, I cannot continue the injunction. The plaintiff may bring an action, and when that is decided, he may apply again." From a note by the editor, we learn that in 1822, in *Murray* v. *Benbow*, Mr. Shadwell, on the part of the plaintiff, moved for an injunction to restrain the defendants from publishing a pirated edition of Lord Byron's poem of 'Cain.' The Lord Chancellor, after reading the work, refused the motion, on grounds similar to those stated in the above judgment. He said "that the Court of Chancery, like other courts of justice in this country, acknowledged Christianity as part of the law of the land; that the jurisdiction of the court in protecting literary property was founded on this: that, where an action would lie for pirating a work, then the court, attending to the imperfection of that remedy, granted its injunction, because there might be publication after publication, which one might never be able to hunt down by proceeding in other courts. But where such an action did not lie, he did not apprehend that it was according to the course of the court to grant an injunction to protect the copyright. That the publication, if it were one intended to vilify and bring into discredit that portion of Scripture history to which it related, was a publication with reference to which, if the principles on which that case at Warwick (Dr. Priestley's) was decided were just principles of law, the party could not recover damages in respect of a piracy of it. That the court had no criminal jurisdiction; it could not look on anything as an offence; but in those cases it only administered justice for the protection of the civil rights of those who possessed them, in consequence of being able to maintain an action. Milton's immortal work had been alluded to; it so happened that in the course of the previous long vacation, amongst the

CAP. II.

solicitæ jucunda oblivia vitæ, he had read that work from beginning to end; it was therefore quite fresh in his memory, and it appeared to him that the great object of its author was to promote the cause of Christianity; there were, undoubtedly, a great many passages in it of which, if that were not its object, it would be very improper by law to vindicate the publication; but, taking it altogether, it was clear that the object and effect were not to bring into disrepute, but to promote, the reverence of our religion. That the real question was, looking at the work before him, its preface, the poem, its manner of treating the subject, particularly with reference to the Fall and the Atonement, whether its intent was as innocent as that of the other with which it had been compared; or whether it was to traduce and bring into discredit that part of sacred history. This question he had no right to try, because it had been settled, after great difference of opinion among the learned, that it was for a jury to determine that point; and where, therefore, a reasonable doubt was entertained as to the character of the work (and it was impossible for him to say he had not a doubt, he hoped it was a reasonable one), another course should be taken for determining what was its true nature and character" (*a*).

In a case which came before the Vice-Chancellor in 1823, an injunction which had been obtained to restrain the publication of a pirated edition of a portion of the poem of 'Don Juan' was dissolved on a similar principle. His Honour ordered that the defendant should keep an account.

In the case of *Hime* v. *Dale*, referred to in *Clementi* v. *Goulding* (*b*), counsel called attention to the libellous nature of the publication, and contended that it was of such a description that it could not receive the protection of the law. It professed to be a panegyric upon money, but was in reality a gross and nefarious libel upon the solemn administration of British justice. The mischievous

(*a*) *Murray* v. *Benbow*, in Ch. 1822, MS., cited 6 Peters. Abr. 558.
(*b*) 2 Camp. 30.

tendency of the production would sufficiently appear from the following stanza:—

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

Lord Ellenborough, however, stated that though if the composition had appeared on the face of it to be a libel so gross as to affect the public morals, he should advise the jury to give no damages, as he knew the Court of Chancery on such an occasion would grant no injunction, yet he thought the above ought not to be considered one of that kind.

No copyright in works intended to deceive the public.

Neither can there be copyright in works intended to deceive purchasers, and therefore, in an action for pirating a work of a devotional character, falsely professing to be a translation from the German, of an author who had a high reputation for writings of this kind, the object being to deceive purchasers, and give the work a value which it would not otherwise have possessed, judgment was given for the defendants. Chief Justice Tindal, in the case referred to (*a*), drew a distinction between such a work and books of instruction or amusement which have been published as translations, whilst they have, in fact, been original works, or which have been published under an assumed instead of a true name. Such, for instance, as 'The Castle of Otranto,' professing to be translated from the Italian, and such the case of innumerable works published under assumed names—voyages, travels, biographies, works of fiction or romance, and even works of science and instruction; for, in all these instances the misrepresentation is innocent and harmless. But the facts stated in the pleas in the case under consideration imported a serious design on the part of the plaintiff to

(*a*) *Wright* v. *Tallis*, 1 C. B. 893; 14 L. J. (C.P.) 283; 9 Jur. 946.

CAP. II.

impose on the credulity of each purchaser, by fixing on the name of an author who had a real existence, and who possessed a large share of weight and estimation in the opinion of the public. The object of the plaintiff was, not merely to conceal the name of the genuine author, and to publish opinions to the world under an innocent disguise, but it was to practise upon some of the best feelings of the public, namely, their religious feelings; and thus to induce them to believe that the work was the original work of the author whom he named, when he knew it not to be so. The transaction, therefore, ranged itself under the head of *crimen falsi*. It was a species of obtaining money under false pretences; and as the very act of publishing the work, and the sale of the copies to each individual purchaser, were each liable to the objection above stated, the chief justice thought the plaintiff could not be considered as having a valid and subsisting copyright in the work, the sale of which produced such consequences, or that he was capable of maintaining an action in respect of its infringement. Cases in which a copyright has been held not to subsist, where the work is one which is subversive of good order, morality, or religion, did not bear, he thought, on the case before him, but they had so far analogy, that the rule which denied the existence of copyright in those cases, was the rule established for the benefit and protection of the public.

So decided on the ground of fraud.

This decision proceeded more on the ground of fraud than invasion of literary property, and to the principle of this decision may also be referred the case of *Seeley* v. *Fisher* (*a*), where an injunction was granted to restrain A. from putting forth his work under advertisements which the court below thought tended to produce the impression, contrary to the truth, that it contained matter which was in fact the property of B. But if there be no such fraudulent misrepresentation, but only statements which, whether true or false, tend merely to encourage a belief that the matter contained in A.'s work is the truly valuable matter,

(*a*) 11 Sim. 581.

and that contained in B.'s is spurious and of no value, an injunction will not be granted to restrain such representations; and on the ground that such was the true effect of the advertisements, in the last cited case, the Lord Chancellor dissolved the injunction.

No copyright in a dry catalogue of names.

There can be no copyright in a catalogue, consisting of a mere dry list of names, but where a bookseller's catalogue contained a description of the books offered for sale, with short anecdotes relating to them, protection was afforded (*a*).

(*a*) *Hotten* v. *Arthur*, 1 Hem. & Mil. 603; 32 L. J. (Ch.) 771; 11 W. R. 934; 9 L. T. (N. S.) 199.

CHAPTER III.

TERM OF COPYRIGHT, AND IN WHOM VESTED.

Term of copyright.

MANY have agitated for the establishment of a perpetual copyright, together with a bestowal upon authors of the exclusive power of abridging, dramatizing, and metamorphosing their own works at will, turning prose into poetry, romances into plays, and *vice versâ*. The claim of authors resulting from the principles of natural right involves the perpetual duration of the property. But in order that such property should be of value, it is necessary that society should interfere actively for its protection. It may either interfere by the enactment of penalties, which, in order to be effectual, must be severe; or it may interfere by prohibition, which is a stern and summary exercise of power. Society will not ordinarily be willing to apply such remedies in favour of an exclusive right, further than it finds such a course beneficial to its own interests, in the broadest sense of the term. It is argued, however, that the concessionary allowance of a perpetuity in copyright would encourage publication, and tend greatly to the promotion and furtherance of science and literature. But, admitting that learning and science should be encouraged, that everything tending or conducible to the advancement of knowledge, and consequently to the happiness of the community, should be favoured and tenderly cherished by the legislature, and that the labour of every individual should be properly recompensed, it does not follow that the same or a similar end might not be obtained by different and less objectionable means.

If the individual is a gainer by the existence of perpetual copyright, society is a loser. The absurdity of the asser-

Considerations respecting a perpetuity in copyright.

tion that authors are alone inclined to make known their works from the specific benefit arising from an absolute perpetual monopoly, is manifest. What a studied indignity to those who have devoted their lives to the advancement of every science that adorns the annals of literature! Ambition cannot be deemed a cipher; benevolence will ever exist in the heart of man, and they at least act as powerfully by way of conducives to the communication of knowledge between man and man, as avaricious or mercenary motives.

The effect of a perpetuity in copyright.

A perpetuity in copyright would have the effect of impeding the progress of literature and science, and among other serious inconveniences we will mention one. The text of an author, after two or three generations, if the property be retained so long by his descendants, would belong to so many claimants, that endless disputes would arise as to the right to publish, which in all probability might prevent the publication altogether. The Emperor Napoleon is reported to have stated this objection in council with his characteristic practical wisdom as follows:—

The Emperor Napoleon's opinion of a perpetuity.

"*Napoléon dit que la perpétuité de la propriété dans les familles des auteurs aurait des inconvéniens. Une propriété littéraire est une propriété incorporelle qui, se trouvant dans la suite des temps et par le cours des successions divisée entre une multitude d'individus, finirait, en quelque sorte, par ne plus exister pour personne; car, comment un grand nombre de propriétaires, souvent éloignés les uns des autres, et qui, après quelques générations, se connaissent à peine, pourraient-ils s'entendre et contribuer pour réimprimer l'ouvrage de leur auteur commun? Cependant, s'ils n'y parviennent pas, et qu'eux seuls aient le droit de la publier, les meilleurs livres disparaîtront insensiblement de la circulation.*

"*Il y aurait un autre inconvénient non moins grave. Le progrès des lumières serait arrêté, puis qu'il ne serait plus permis ni de commenter, ni d'annoter les ouvrages; les gloses, les notes, les commentaires ne pourraient être séparés d'un texte qu'on n'aurait pas la liberté d'imprimer.*

"*D'ailleurs, un ouvrage a produit à l'auteur et à ses*

CAP. III.

héritiers tout le bénéfice qu'ils pouvent naturellement en attendre, lorsque le premier a eu le droit exclusif de le vendre pendant tout sa vie, et les autres pendant les dix ans qui suivent sa mort. Cependant, si l'on veut favoriser davantage encore la veuve et les héritiers, qu'on porte leur propriété à vingt ans" (*a*).

Though we could not, therefore, uphold a perpetual copyright, believing that its existence would by no means tend to the spread or encouragement of literature, we would willingly offer our support to the extension of the period during which literary copyright is at present protected.

Present term of copyright.

The third section of the 5 & 6 Vict. c. 45 enacts that the copyright in every book which shall after the passing of that Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns; provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns.

In whom vested.

The only persons who can claim the copyright in a book published before the 1st of July, 1842, are the proprietor on that day of the copyright therein, or his assigns; and in the case of a book since published, the author or his assigns. And as the word "author" is used without limitation or restriction, it is therefore equally applicable to foreigners as to British subjects (*b*).

Meaning of the word "book."

The term "book" by virtue of the interpretation clause is to be construed to signify and include every volume,

(*a*) Locré, *Législation civile de la France*, tit. ix. pp. 17–19; Renouard, *Droits d'Auteurs*, tom. i. p. 387.

(*b*) *Routledge* v. *Low*, Law Rep. 3 H. L. 100; 37 L. J. (Ch.) 454; 18 L. T. (N.S.) 874; 16 W. R. 1081.

part or division of a volume (*a*), pamphlet, sheet of letter-press (*b*), sheet of music, map, chart, or plan separately published. But a separate article, advertised to form part of a periodical publication, is not a book within the meaning of this Act, and therefore does not require registration under the 24th section (*c*).

What is a publication.

The copyright is, we have seen, to run from the date of the publication of the work, consequently it will be necessary to inquire what, in the eye of the law, may be regarded as equivalent to publication. In *Coleman* v. *Wathen* (*d*), it was said that the acting of a dramatic composition on the stage was not a publication within the statute. The plaintiff, it appears, had purchased from O'Keefe the copyright of an entertainment called the 'Agreeable Surprise,' and the defendant represented this piece upon the stage. The mere act of repeating such a performance from memory was held to be no publication. On the other hand, to take down from the mouths of the actors the words of a dramatic composition, which the author had occasionally suffered to be performed, but never printed or published, and to publish it from the notes so taken down, was deemed a breach of right; and the publication of the copy so taken down was restrained by injunction (*e*).

By the 20th section of the Copyright Act, 1842, it is declared, that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent to the first publication of any book (*f*).

Gratuitous circulation a publication.

The gratuitous circulation would seem to amount to a publication (*g*).

(*a*) See the *University of Cambridge* v. *Bryer*, 16 East, 317; *The British Museum* v. *Payne*, 2 Y. & J. 166; *Clayton* v. *Stone*, 2 Paine (Amer.) 383; *Scoville* v. *Toland*, 6 West, L. J. (Amer.) 84. But a label used in the sale of an article is not a book. *Coffeen* v. *Brunton*, 4 McLean (Amer.) 517.

(*b*) See *Clementi* v. *Goulding*, 2 Camp. 25; 11 East, 244; *Hime* v. *Dale*, 2 Camp. 27 a; *White* v. *Geroch*, 2 B. & Ald. 298.

(*c*) *Murray* v. *Maxwell*, 3 L. T. (N.S.) Ch. 466.

(*d*) 5 T. R. 245; see *Roberts* v. *Myers*, 13 Mo. Law Rep. (Amer.) 397; *Crowe* v. *Aiken*, Amer. Law Rep. L. Jour. vol. 5, No. 226. 1870.

(*e*) *Macklin* v. *Richardson*, Amb. 694, cited 2 Kent's Com. 378.

(*f*) *Post*, p. 149; App. xxxi.

(*g*) *Vide Novello* v. *Ludlow*, 12 C. B. 177; 16 Jur. 689; 21 L. J. (C.P.) 169; *Dr. Paley's Case*, cited 2 V. & B. 23; *Alexander* v. *Mackenzie*, 9 Sess. Cas., 2nd series, 748.

CAP. III.

Work must be first published in this country, or simultaneously with that in another.

The previous publication of a work abroad disqualifies it for copyright in this country (*a*). If, however, the publication here and abroad be simultaneous, the publication abroad will not stand in the way of copyright in this country (*b*). The legislature contemplates publication *here* and *here only*, and it contemplates such publication only when made by the author, or under such consent and authority from him as the statute requires; and it contemplates publication of foreign books only when they are capable of advancing literature here, that is to say, before the work is published here by a person who has obtained it fairly and *bonâ fide* under a previous publication by the author in a foreign country (*c*).

An Englishman resident abroad may have a copyright.

A residence abroad by an English subject, or the fact of the work having been composed abroad, either by an Englishman or a foreigner, would not have the effect of preventing the author from acquiring a copyright in this country. The reason assigned for the copyright attaching to an English subject, though resident abroad, is that by such residence he does not throw off his natural allegiance; he cannot be relieved from it, and therefore carries with him the natural rights of a subject of England wherever he goes. That gives him, though resident abroad, the right of publishing and acquiring a copyright here, because he has always fulfilled the implied condition of being a subject of, and owing allegiance to, the crown of Great Britain. This of course could not be said of a foreigner, who was not actually resident here (*d*).

Copyright no existence in the law of nations.

Copyright has no existence in the law of nations; it acquires a power simply by the municipal law of each particular community. "As soon," observes Mr. Curtis (*e*), "as a copy of a book is landed in any foreign country, all

(*a*) See *Clementi* v. *Walker*, 2 B. & C. 861; *Guichard* v. *Mori*, 9 L. J. (Ch.) 227; *Hedderwich* v. *Griffin*, 3 Sess. Cas., 2nd series, 383.

(*b*) Phillips on Copy. 52, citing Erle, J., in *Cocks* v. *Purday*, 2 Car. & Kirw. 269.

(*c*) *Per* Bayley, J., *Clementi* v. *Walker*, *supra*; *Chappell* v. *Purday*, 4 Y. & C. 485; 14 M. & W. 303; *Guichard* v. *Mori*, *supra*.

(*d*) *Per* Lord St. Leonards in *Jefferys* v. *Boosey*, 4 H. L. C. 985.

(*e*) 'Copyright,' 22.

complaint of its republication is, in the absence of a treaty, fruitless, because no means of redress exist, except under the law of the author's own country. It becomes public property, not because the justice of the case is changed by the passage across the sea or a boundary, but because there are no means of enforcing the private right."

Whether a foreigner resident abroad can obtain a copyright in a work first published in this country.

In *D'Almaine* v. *Boosey* (*a*) the two principal questions that arose were, whether the law would protect the assignee of foreign copyright at all, and whether any protection could exist where the work had been first published abroad. Alluding to *Delondre* v. *Shaw*, Lord Abinger said, "If the Vice-Chancellor had decided expressly that a foreigner, *quâ* foreigner, had no protection in England in regard to copyright, I confess I should have doubted the correctness of that decision; though, certainly, I should not have decided in opposition to him, but should have put this case to the course of further investigation, out of respect to his authority. But the case which has been cited upon the subject does not go that length; it is in principle not quite intelligible; but there was clear ground for an injunction independently of the question of copyright. Besides, that was a case where one of the parties resided abroad. Now, the Acts give no protection to foreigners resident abroad in respect of works published abroad; and all the Vice-Chancellor said was, that the publisher of a work at Paris could not protect himself in a court of justice in England, either by action or injunction."

Again, in *Bentley* v. *Foster* (*b*), Vice-Chancellor Shadwell said, that if an alien friend wrote a book, whether abroad or in this country, and gave the British public the advantage of his industry and knowledge by first publishing the work here, he was entitled to the protection of the laws relating to copyright in this country.

The question was fully discussed in *Bach* v. *Longman* (*c*).

(*a*) 1 Y. & C. 288.

(*b*) 10 Sim. 329; see also *Page* v. *Townsend*, 5 Sim. 395; *Tonson* v. *Collins*, 1 W. Bl. 301; *Bach* v. *Longman*, 2 Cowp. 623; *contrà*, *Chappell* v. *Purday*, 14 M. & W. 303.

(*c*) 2 Cowp. 623.

CAP. III.

Bach was a musical composer, who had come into this country from Germany. He sued Longman for pirating a sonata, which the latter had published in England, and he was successful in his suit. In accordance with these decisions, in the year 1845 Chief Baron Pollock, in delivering the judgment of the Barons of the Exchequer in *Chappell* v. *Purday*, stated the result of the cases at that time decided on the subject to be that if a foreign author, not having published abroad, first publishes in England, he may have the benefit of the statutes; and on the authority of these cases, and the general rule that an alien may acquire personal rights and maintain personal actions in respect of injuries to them (*a*), it was determined in *Cock* v. *Purday*, that an *alien amy* resident abroad, the author of a work of which he is also the first publisher in *England*, and which he has not made *publici juris* by a previous publication elsewhere, has a copyright in that work, whether it be composed in this country or abroad. This determination was supported in *Boosey* v. *Davidson* (*b*), and subsequently considered by the Court of Exchequer in *Boosey* v. *Purday* (*c*), when that court held that a foreigner had no such capacity.

Case of *Jefferys* v. *Boosey*.

In this unsettled state of the law arose the case of *Jefferys* v. *Boosey*, which was ultimately carried on appeal to the House of Lords.

Bellini, a foreign musical composer, resident at that time in his own country, composed a certain work, in which, by the laws there in force, he had a copyright. He then assigned to Ricordi, another foreigner also resident there, according to the laws of their country, his right to the copyright in the composition of which he was the author, and which was then unpublished. The assignee brought the composition to this country, and, before publication, assigned it, according to the forms required by the laws of this country, to an Englishman. The first

(*a*) See *Pisani* v. *Lawson*, 8 Scott, 182; 6 Bing. (N.S.) 90; 8 Dowl. 57; *Tuerloote* v. *Morrison*, 1 Bulst. 134; Yelv. 198; Dyer. 2 b.
(*b*) 18 L. J. (Q.B.) 174; 13 Q. B. 257.
(*c*) 4 Ex. 145.

publication took place in this country. The work was subsequently pirated, and proceedings instituted which ultimately reached the Upper House. The judges were called upon for their opinions, which they delivered *seriatim*, and judgment was finally pronounced by the House in favour of the defendant. The grounds of the decision were that an Act of Parliament of this country, having within its view a municipal operation only, and being therefore limited to this kingdom, cannot be held to extend beyond our own subjects, except as both statutes and common law so provide for foreigners when they become resident here, and owe at least a temporary allegiance to the sovereign, and thereby acquire rights just as other persons do; not because they are foreigners, but because being here, they are here entitled, in so far as they do not break in upon certain rules, to the general benefit of the law for the protection of their property, in the same way as if they were natural-born subjects. "Where an exclusive privilege," said Lord Cranworth (*a*), "is given to a particular class at the expense of the rest of Her Majesty's subjects, the object of giving that privilege must be taken to have been a national object; and the privileged class to be confined to a portion of that community, for the general advantage of which the enactment is made. When I say that the Legislature must *primâ facie* be taken to legislate only for its own subjects, I must be taken to include under the word 'subjects,' all persons who are within the Queen's dominions, and who thus owe to her a temporary allegiance. I do not doubt but that a foreigner resident here, and composing and publishing a book here, is an author within the meaning of the statute; he is within its words and spirit. I go further; I think that if a foreigner having composed, but not having published a work abroad, were to come to this country, and the week or day after his arrival, were to print and publish

(*a*) *Jefferys* v. *Boosey*, 4 H. L. C. 815; 1 Jur. (N. S.) 615; *Low* v. *Routledge*, 10 Jur. (N.S.) 922; 10 L. T. (N.S.) 838; 11 Jur. (N. S.) 939; *Routledge* v. *Low*, Law Rep. 3 H. L. 100; 37 L. J. (Ch.) 454; 18 L. T. (N. S.) 874.

it here, he would be within the protection of the statute. This would be so if he had composed the work after his arrival in this country, and I do not think any question can be raised as to when and where he composed it. So long as a literary work remains unpublished at all, it has no existence, except in the mind of its author, or in the papers in which he, for his own convenience, may have embodied it. Copyright, defined to mean the exclusive right of multiplying copies, commences at the instant of publication; and if the author is at that time in England, and while here he first prints and publishes his work, he is, I apprehend, an author within the meaning of the statute, even though he should have come here solely with a view to the publication. The law does not require or permit any investigation on a subject which would obviously, for the most part, baffle all inquiry, namely, how far the actual composition of the work itself had, in the mind of its author, taken place here or abroad. If he comes here with his ideas already reduced into form in his own mind, still, if he first publishes after his arrival in this country, he must be treated as an author in this country. If publication, which is (so to say) the overt act establishing authorship, takes place here, the author is then a British subject, wherever he may, in fact, have composed his work. But if at the time when copyright commences by publication, the foreign author is not in this country, he is not, in my opinion, a person whose interests the statute meant to protect."

Such portion of a work as is first published in this country will be protected.

If only a portion of a work be first published in this country, or within the scope of the British Copyright Act, it will be protected. A., a citizen of the United States, published a work of which he was the author, in monthly parts, between January and December, 1867, of a magazine published in the United States. In October, 1867, A. went to reside in Canada for the purpose of acquiring a British copyright, and during such residence, when the work wanted six chapters for completion in the magazine, an edition of the whole was published in London under an