

agreement between A. and the plaintiff, an English publisher. A cheap reprint taken from the pages of the 'American Magazine,' having been subsequently published in this country by the defendant, it was held that the copyright was divisible and could be claimed for a portion of the book only; and, accordingly, the publication by the defendant of the last six chapters of the work was restrained by injunction (a).

In the late case of *Routledge v. Low* (b), two of the greatest law lords on the Bench—Lord Cairns and Lord Westbury—were of opinion that the Act of Parliament gives a copyright to every author who first publishes his book in England, no matter where he lives, or under what dynasty he serves. "Protection," said the former learned judge, "is given to every author who publishes in the United Kingdom, wheresoever that author may be resident, or of whatever state he may be the subject. The intention of the Act is to obtain a benefit for the people of this country by the publication to them of works of learning, of utility, of amusement. The benefit is obtained, in the opinion of the legislature, by offering a certain amount of protection to the author, thereby inducing him to publish his work here. This is, or may be, a benefit to the author, but it is a benefit given, not for the sake of the author of the work, but for the sake of those to whom the work is communicated. The aim of the legislature is to increase the common stock of the literature of the country; and if that stock can be increased by the publication for the first time here of a new and valuable work, composed by an alien, who never has been in the country, I see nothing in the wording of the Act which prevents, nothing in the policy of the Act which should prevent, and everything in the professed object of the Act, and in its wide and general provisions, which should entitle such a person to the pro-

Lord Cairns' and Lord Westbury's opinions on the interpretation of the Copyright Act.

(a) *Low v. Ward*, Law Rep. 6 Eq. 415; 37 L. J. (Ch.) 841; but see *Routledge v. Low*, 37 L. J. (Ch.) 454; 18 L. T. (N.S.) 874; Law Rep. 3 H. L. 100.

(b) Law Rep. 3 H. L. 100; 37 L. J. (Ch.) 454; 18 L. T. (N.S.) 874.

CAP. III.

tection of the Act, in return and compensation for the addition he has made to the literature of the country. I am glad to be able to entertain no doubt that a construction of the Act so consistent with a wise and liberal policy is the proper construction to be placed upon it." To this view, however, Lord Cranworth objected, and Lord Chelmsford doubted whether it was good in law.

In this same case it was unanimously held by Lords Cairns, Chelmsford, Cranworth, Westbury, and Colonsay, that to acquire a copyright under the 5 & 6 Vict. c. 45 the works must be first published in the *United Kingdom*. The law now, therefore, is, that if a literary or musical work be first published in the *United Kingdom*, it may be protected from infringement in any part of the *British dominions*; but if, on the other hand, any such work be first published in India, Canada, Jamaica, or any other British possession, not included in the *United Kingdom*, no copyright can be acquired in that work, excepting only such (if any) as the local laws of the colony, &c., where it is first published, may afford.

CHAPTER IV.

REGISTRATION OF COPYRIGHT.

A BOOK OF REGISTRY is kept by the Company of Stationers, and the object of the entries therein is clearly shewn by the 2nd section of the Statute of Anne. The entry is deemed equivalent to notice of the existence of the copyright in the particular book or article registered. Unless such entry had been provided, many, through ignorance, would have offended (a). By the Statute of Anne it was enacted that no person should be subjected to the forfeitures or penalties therein mentioned in cases of infringement of copyright, unless the title to the copy of such book should, before publication, be entered in the register book of the Stationers' Company (b).

The Book of Registry.

The Statute of Anne was, however, repealed and incorporated in that of the 5 & 6 Vict. c. 45, the 11th section of which provides that a book of registry, wherein may be registered the proprietorship in the copyright of books, and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright, shall be kept at the hall of the Stationers' Company by the officer appointed by the said company for the purposes of the Act, which shall at all convenient times be open to inspection on payment of 1s. for every entry which shall be searched for or inspected in the same book; and that such officer shall, wherever reasonably required, give a copy of any entry, certified

(a) Sect. 2 of the 8 Anne, c. 19.

(b) *Ibid.*, and see Malins, V.C. in *Cox v. The Land and Water Co.*, 18 W. R. 206.

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under his hand, and impressed with the stamp of the said company, to any person requiring the same on payment to him of the sum of 5s.; and such copies shall be received in evidence in all courts, and in all summary proceedings, and shall be *primâ facie* proof of the proprietorship or assignment of copyright or licence as therein expressed, but subject to be rebutted by other evidence, and in the case of dramatic or musical pieces shall be *primâ facie* proof of the right of representation or performance, subject to be rebutted as aforesaid; and that making a false entry in the book of registry, or wilfully producing or causing to be tendered in evidence any paper falsely purporting to be a copy of any entry in the said book, shall be deemed an indictable misdemeanour, and punished accordingly. It provides, further, that it shall be lawful for the proprietor of the copyright in any book to make entry in the said registry book of the title of such book, the time of the first publication, the name and place of abode of the publisher, and the name and place of abode of the proprietor, in a form given in the schedule annexed to the Act, upon payment of 5s. to the officers of the said company; and that it shall be lawful for every such registered proprietor to assign his interest or any portion of his interest therein, by making entry in the said book of registry of such assignment, and of the name and place of abode of the assignees thereof, in the manner, and for the sum aforesaid. And such assignment shall have the same force and effect as if made by deed, without being subject to any stamp duty.

Entry must be correct to support action for penalties.

A proprietor of copyright in a book, registered his book by making an entry, purporting to be pursuant to this Act, but in such entry the exact date of first publication was not stated, the day of the month being omitted, and the month and year only inserted. He filed a bill to restrain a party from infringing the copyright in respect of which such entry had been made. But the court held, that the suit could not be maintained, as the entry was defective; there being no entry of the date of first publication as re-

quired by the statute, unless, in addition to the month and year, the day of the month is also stated. CAP. IV.

L. & Sons registered a cricketing scoring-sheet, dating it 1851, and, dissolving partnership, again registered it in L.'s own name, dating it 1863. P. having published the same thing, L. threatened an action. P. continued to publish, and, on L. becoming bankrupt, purchased it of the assignees for £20. W., who had bid £10, purchased the sheet of P. for some time, but ultimately printed and published the left-hand half, containing the totals of runs, but not an analysis of bowling, which was on the right-hand half. On a bill filed to restrain the alleged infringement of the copyright, it was determined that the second registration was fatal, not showing the real first date of publication (a). First date of publication must be stated.

In *Lover v. Davidson* (b) the plaintiff, who was residing at New York at the time the entry was made, gave the address of his English publishers in the entry under the above provision, and Cresswell, J., was of opinion that Mr. Lover, the plaintiff, having at that time no other place of abode in England, had very properly described himself as of a place where he might be communicated with. As to the place of residence.

The provision with reference to the place of abode of the assignee would seem not to apply to the case of an assignee to whom the proprietorship has been assigned, not according to the statutory mode, but by an independent method. As soon as the copyright is established in the original proprietor, there is nothing to prevent him from assigning by any other method, although the statute provides one more convenient and less expensive than the ordinary mode of assurance by deed. If the statute is resorted to, the terms of it must be complied with. Unfortunately, there is a discrepancy between the enactment in the 13th section, and the schedule No. 5, to which that section expressly refers. The section requires that there shall be an entry "of such assignment, and of the name As to the abode of the assignee.

(a) *Page v. Wisden*, 20 L. T. (N.S.) 435.

(b) 1 C. B. (N.S.) 182.

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and place of abode of the assignee thereof, in the form given in that behalf in the said schedule," but when we turn to the schedule there is no reference to the place of abode of the assignee. In *Wood v. Boosey* (a) the question arose, whether section 24 (which enacts that no proprietor of copyright shall maintain an action for infringement of it, unless he shall have caused an entry to be made in the book of registry pursuant to the Act) applies to an assignee. Cockburn, C.J., without directly deciding the point, said: "I observe a distinction in the earlier sections between the term 'proprietor,' (as applied to the person by whom the work is originally published and in whom the property vested), and any person who takes by assignment from him; and there is no provision in the statute which gives the assignee a right to have his name inserted in the book of registry as the new proprietor. The only case in which the change of the name of the proprietor is to be made, is where the statutory form of assignment is resorted to, and even in that case it is only the assignor who can insist on the change being made in the book of registry. Taking all this into account, it seems to me that to hold that section 24 applies to an assignee, who has no power under the statute, either through this court or by any other means, to enforce registration of himself as 'proprietor,' would work considerable injustice."

Expunging or
varying entry.

By the 14th section it is provided, That if any person shall deem himself aggrieved by any entry made under colour of this Act in the said book of registry, it shall be lawful for such person to apply by motion to the courts of law in term time, or to apply by summons to any judge of such courts in vacation, for an order that such entry may be expunged or varied; and that, upon any such application by motion or summons, the court or judge, as the case may be, shall make such order for expunging, varying, or confirming such entry, either with or without costs, and the officer appointed by the Stationers' Company for the purposes of this Act shall, on the production to him of

(a) 7 B. & S. 869, 897.

any such order for expunging or varying any such entry, expunge or vary the same according to the requisitions of such order. CAP. IV.

It seems that the court will not exercise its power under the above section to expunge any entry of proprietorship of copyright in the register book, unless it be clearly and unequivocally shewn that it is false; or vary it, unless satisfied by affidavit that in so doing it would make a true entry (a). And in one case (b), the court would not expunge the entry, but ordered an issue to be tried to determine the question of copyright, on the trial of which the entry was not to be used, and stayed proceedings in the action in the mean time.

But the entry must be clearly shewn to be false.

No copyright is acquired under 5 & 6 Vict. c. 45, by the registration of a book before its actual publication (c); and registration under the 24th section is only necessary in order to secure the copyright in books under the 3rd section, and not that of periodicals under the 18th section (d).

No copyright acquired by registration before publication.

It is not necessary to register a newspaper. The Act which provided a special registry for them was repealed but lately by the 32 & 33 Vict. c. 24. It must not be inferred from this that there is no copyright in newspapers, for they are obviously covered by the phrase "periodical works" in the 18th section, and the proprietor would therefore have a copyright under that section in all compositions for which he had paid (e). He would also, by

A newspaper need not be registered.

(a) *Ex parte Davidson* (1856), 18 C. B. 297; S. C. 25 L. J. (C.P.) 237; 2 Jur. (N.S.) 1024.

(b) *Ex parte Davidson* (1853), 2 E. & B. 577. "Persons aggrieved" are those whose title conflicts with that of the person registered: *Chappell v. Purday*, 12 M. & W. 303. But a person convicted of infringing the copyright in certain paintings and photographs of the registered proprietor, and who sets up no title in himself or adduces no evidence to rebut the *prima facie* evidence of proprietorship afforded by the book of registry, is not a person "aggrieved" within the meaning of the above section: *Re Walker v. Graves*, 20 L. T. (N.S.) 877.

(c) *Correspondent Newspaper Co. v. Saunders*, 11 Jur. (N.S.) 540; 13 W. R. 801.

(d) *Cox v. The Land and Water Co.*, 18 W. R. 206; *Browne v. Cooke*, 11 Jur. 77; *Sweet v. Benning*, 3 W. R. 519; 16 C. B. 459; S. C. 24 L. J. (C.P.) 175; *Mayhew v. Maxwell*, 9 W. R. 118; 1 J. & H. 312.

(e) *Strahan v. Graham*, 15 W. R. 487; see *Prowett v. Mortimer*, 4 W. R. 519.

CAP. IV. general law, have a right to prohibit others from appropriating the fruits of his own labour (a).

Registration
a condition
precedent to
the title to sue
under 5 & 6
Vict. c. 45.

The law, as it existed previous to the 5 & 6 Vict., did not require registration as a condition precedent to the title to sue. The neglect to register did not affect the copyright (b), it merely prevented the recovery of the penalties inflicted by the Acts in existence, until such entry had been made.

Subsequent to the Act, however, although the author has copyright in his work still unregistered (c), yet he cannot sue, either at law or in equity, to protect himself against infringement, unless he has duly registered in accordance with the Act (d). For, by the 24th section, it is declared that no proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action or suit at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company of such book, pursuant to this Act. It is worthy of note, that a different system is adopted in regard to fine arts copyright, the Act of 1862 not permitting actions or proceedings to be taken in respect to anything done before the registration is effected under section 4. This appears a fairer principle. If the process of registration is to be considered as useful as an authentic notice of the copyright, it would seem that it ought in all conscience to be effected at a date prior to that on which the infringement of the right takes place in order to operate on it, for, otherwise, the infringer cannot reasonably be affected by notice, when such notice is wholly subsequent to the commission of the act for which he is

(a) *Per Malins, V.C., in Cox v. The Land and Water Co.*, 18 W. R. 207.

(b) *Tonson v. Clifton*, 1 Wm. Bl. 330; *The University of Cambridge v. Bryer*, 16 East, 317; *Beckford v. Hood*, 7 T. R. 620.

(c) See *Chappell v. Davidson*, 25 L. J. (C.P.) 225; 18 C. B. 194.

(d) *Murray v. Boque*, 1 Drew. 353; 17 Jur. 219; 22 L. J. (Ch.) 457. This applies only to books first published after the Act; it does not affect any book published prior.

called upon to make amends, by the legal process issued out against him. CAP. IV.

Where the first edition of a work of compilation was published before the 5 & 6 Vict. c. 45, and several editions were published after the Act but were not registered, it was held that, as to so much of the matter contained in the original as was contained in the subsequent editions, the proprietor of the copyright might sue, although such subsequent editions were not registered; but as to the new matter the subsequent editions were books which ought to have been registered, and the owner could not sue for infringement on that point (a).

A copy of every book (b), published since the 5 & 6 Vict. c. 45, together with all maps, prints, or other engravings belonging thereto, finished and coloured in the same manner as the best copies of the same shall be published, and also of any subsequent edition, whether the first edition of such book shall have been published before or after the passing of the Act, and also of any second or subsequent edition of every book of which the first or some preceding edition shall not have been delivered for the use of the British Museum, bound, sewed, or stitched together, and upon the best paper on which the same shall be printed, shall, within one calendar month after the day on which such book shall first be published within the bills of mortality, or within three months if the same shall first be published in any other part of the United Kingdom, or within twelve months after the same shall first be published in any other part of the British dominions, be delivered, on behalf of the publisher thereof, at the British Museum.

Copy of every book to be delivered to the British Museum.

Copies are likewise to be delivered for the benefit of the Bodleian Library at Oxford, the Public Library at Cambridge, the Faculty of Advocates at Edinburgh, and Trinity College, Dublin, on demand at the place of abode of the publishers thereof, at any time within a month after

Copies for the use of university libraries.

(a) *Murray v. Bogue, supra.*

(b) *Routledge v. Low*, Law Rep. 3 H. L. 100; 37 L. J. (Ch.) 454.

CAP. IV. demand, during the period of twelve months from the publication thereof.

Distinction between a delivery to the British Museum and the other libraries.

According to these provisions, the main distinctions between a presentation to the British Museum, and a presentation to any of the other four libraries, are these: first, that the delivery to the Museum is to be made without demand on the part of that institution; whereas delivery to one of the other libraries need not be made at all, unless there be a written demand within twelve months after publication; and secondly, that the copy presented to the Museum must be one from the best copies of the work, while that for any of the other libraries need be only a copy from the set the most numerous. Thus, if a publisher produce a superior and an inferior edition at the same time (as in cases of quarto and octavo editions, so frequent in illustrated works), he must give a copy of the more valuable impression to the Museum; whereas he need only make presentations to the other libraries from the set of lesser cost, provided that set exceed the other by even a single copy (*a*).

Penalty for default.

The 10th section of the same statute enacts, that if the publisher of a book, or of a second or subsequent edition of a book, neglect to deliver a copy of it pursuant to this Act, he shall for every default forfeit, besides the value of the copy he ought to have delivered, a sum not exceeding £5, to be recovered by the librarian or other authorized officer of the library for whose use the copy should have been delivered; either summarily, on conviction before two magistrates for the county or place where the publisher making default resides, or by action of debt or similar proceeding at the suit of such librarian or other officer in any court of record in the United Kingdom, in which action, if the plaintiff obtain a verdict, he shall recover his costs reasonably incurred, or taxed as between attorney and client (*b*).

The first enactment extant, encouraging the establish-

(*a*) Burke's Sup. to Godson's Pat. and Copy. p. 97.

(*b*) *Ibid.*

ment of libraries for the use of the learned bodies, is in the reign of Charles II., when two copies of every work were ordered to be delivered by the publisher for the two English universities, and one copy for the king's library, 13 & 14 Car. 2, c. 33, s. 17, continued by 16 Car. 2, c. 18; 17 Car. 2, c. 4; 1 Jac. 2, c. 17, s. 15, &c., but expired in 1679. The clauses of the 17 Car. 2, appear to be perpetual, as far as they relate to the three copies, although it seems it was not so considered, from their not being adverted to in the statute of Anne. The first foundation for the claim by any public library of a gratuitous delivery of new publications is in a deed of 1610, by which the Company of Stationers in London, at Sir Thomas Bodley's request, engaged to deliver a copy of every book printed by the company, and not before printed, to the University of Oxford. The next provision is to be found in 8 Anne, which extended the number of copies demandable to nine, viz., one for the royal library, two for the Universities of Oxford and Cambridge, four for the libraries of the four Scotch Universities, the library of Sion College in London, and the library of the Faculty of Advocates in Edinburgh. This provision was afterwards enforced in 1775 (15 Geo. 3, c. 53, s. 6), by an express enactment that no person should be subject to the penalties of those Acts for pirating books, unless the whole title to the copyright of the book was entered at Stationers' Hall, and the nine copies delivered there for the use of the libraries. Two additional copies were given to Trinity College and the society of King's Inn in Dublin by 41 Geo. 3. The 54 Geo. 3, c. 156, s. 1, repealed so much of the 8 Anne, c. 19, s. 5, and the 41 Geo. 3, c. 107, s. 6, as required that any copy or copies of every book printed should be delivered to the warehouse-keeper of the Stationers' Company for the use of the libraries mentioned, or by him for their use, or which imposes any penalty on such printer or warehouse-keeper for not delivering the copies; and provided that eleven copies should be delivered for the use of the British Museum, Sion College, the Bodleian Library at

CAP. IV.

Delivery of copies to the various libraries—origin of claim.

CAP. IV. Oxford, the Public Library at Cambridge, the library of the Faculty of Advocates at Edinburgh, the libraries of the four Universities of Scotland, Trinity College Library, and that of the King's Inn at Dublin (*a*).

(*a*) In the United States, the law establishing the Smithsonian Institute (Act of Congress, August, 1846, c. 178), directs, without any penalty, that a copy of every book, of which the copyright shall be secured, shall be sent to the library of that institution. Repealed by s. 6 of the Act of 1859, c. 22.

CHAPTER V.

ASSIGNMENT OF COPYRIGHT.

COPYRIGHT is personal property, and may be assigned. Copyright
It must, however, be in existence to be assigned at personal
law (a). property.

It is a local right only, embracing Great Britain and A local right.
Ireland, the islands of Jersey and Guernsey, the British
dominions in the East and West Indies, and the colonies,
settlements, and possessions of the British Crown, acquired
on or since the 1st day of July, 1842, or which hereafter
may be acquired (b).

It may be the subject of a bequest, and on the death of Its distinctive
the person to whom it belongs, without any such bequest, features.
will devolve on his personal representatives (c). An exe-
cution purchaser, however, does not acquire the rights of
an assignee of the article sold in execution. Thus a seizure
and sale on execution of the engraved plate of a map, for
which the debtor has obtained a copyright, does not transfer
the copyright to the purchaser; and the debtor is entitled,
without reimbursing to the purchaser the money paid by
the latter on such sale, to an injunction, to restrain the
purchaser from striking off and selling copies of the
map (d). The assignees under a commission of bank-

(a) *Sweet v. Shaw*, 8 L. J. (N.S.) Ch. 216; 3 Jur. 217; *Colburn v. Duncombe*, 9 Sim. 151.

(b) 5 & 6 Vict. c. 45, s. 3, cited Phillips on Copy. 55.

(c) See *Thompson v. Stanhope*, Amb. 737; *Burnett v. Chetwood*, 2 Mer. 441, n. As to the right of executors to publish, see *Dodsley v. M'Farquhar*, Mor. Dict. of Dec. 19 & 20 App. pt. 1, p. 1; and as to their right to receive the payment of the stipulated price of a portion of a work, although the author died before completing the other portion, see *Constable and Co. v. Robinson's Trustees*, 1 June, 1808; Mor. Dict. of Dec. No. 5, App., Mut. Contract.

(d) 2 Hilliard on 'Torts,' 58, n.; *Stephens v. Cady*, 14 How. 528; *Stephens v. Gladding*, 17 How. 447.

CAP. V.

ruptcy are not entitled to the manuscripts of an author, although the copyright of a book which has been printed and published will legally pass for the benefit of the creditors (a), and the price paid by the bookseller is as completely open to the diligence of creditors as the price of any other commodity or piece of merchandize. The reason assigned for this distinction is, that the author's right of withholding the publication continues till the very moment his book is actually given out to the public. Even the printer of the book would not be entitled to sell it for his payment, although there is not the smallest doubt that he has a complete lien over it, till delivery, to prevent the author or his creditors from taking advantage of the publication, till he shall have been paid (b).

An assign-
ment not to be
presumed.

A transfer of the right will not be presumed, unless the intention is manifest; such, for instance, as the acceptance of a receipt in writing for the price paid for the copyright (c); and evidence that the plaintiff, in an action for printing a musical work, acquiesced in the defendant's publication of it for six years, did not raise the presumption that the plaintiff had transferred his interest in the copyright. But where a copyright was not asserted for *fifteen years*, the Court of Chancery refused an injunction, until the right should be established at law; the Lord Chancellor saying: "I admit this to be the subject of copyright; but the plaintiff has permitted several people to publish these dances, some of them for fifteen years; thus encouraging others to do so. That, it is true, is *not a justification*; but under these circumstances a court of equity will not interfere in the first instance. If, as is represented, some of them were published only last year, and one two months ago, the bill ought to have been confined to those. You may bring your action, and then apply for an injunction" (d).

(a) *Longman v. Tripp*, 2 Bos. & Pull. New. 67; see 4 Burr. 2311; Amb. 695; *Stevens v. Cady*, 14 How. (Amer.) 528; *Stevens v. Gladding*, 17 How. (Amer.) 447; *Cooper v. Gunn*, 4 B. Mon. (Amer.) 594, 596; see *Atcherley v. Vernon*, 10 Mod. 518. (b) 1 Bell's Com. 68; cited Kerr on Inj. 186.

(c) Otherwise held previous to 5 & 6 Vict. c. 45; see *Latour v. Bland*, 2 Stark, 382.

(d) *Platt v. Button*, 19 Ves. 447; Coop. Ch. Cas. 303.

An assignment of the copyright of a work, under the Statute of Anne, must have been in *writing*, and attested by two witnesses, in order to entitle the assignee to maintain an action for pirating it (a). True, this was not expressly demanded, but the statute required that there should be two witnesses to a consent to a publication, and it was naturally inferred that an assignment, which was of a higher nature than a mere consent, must have at least the same solemnity (b). The 41 Geo. 3, c. 107, required the consent to be in writing, and to be signed in the presence of two or more credible witnesses. The 54 Geo. 3, c. 156, reciting the former enactments, generally extended the copyright, and spoke of the consent in writing, but said nothing about the two witnesses. Opinions differed upon this subject. It was contended by some that as it was only by implication from two witnesses being required to the consent it was held that two witnesses were required to an assignment, therefore, when the latter Act, the 54 Geo. 3, c. 156, no longer required two witnesses to a consent, the reason failed for requiring, by implication, two witnesses to an assignment. Lord St. Leonards, however, was of opinion that it was properly decided that the assignment ought to be attested by two witnesses; that, he said, was decided upon the Act of Anne as it stood originally and as it was originally construed. "If, by a later Act," said he, "you take away that which was, no doubt, the ground of the decision, viz., the necessity for two witnesses to a consent, does it follow, that you therefore repeal that which was the proper construction of the law applicable to the higher instrument, viz., that the assignment also required two witnesses? It would rather seem, after such a tenor of determination, after the law

(a) *Power v. Walker*, 4 Camp. 8; S. C. 3 M. & S. 7; *Morris v. Kelly*, 1 Jac. & W. 481; *Clementi v. Walker*, 2 B. & C. 861; *Davidson v. Bohn*, 6 C. B. 456; 12 Jur. 922; 18 L. J. (C.P.) 14; *Leader v. Praday*, 7 C. B. 4; *Jefferys v. Boosey*, 4 H. L. C. 815; *Cumberland v. Copeland*, 31 L. J. (Exch.) 19, *post*, p. 80.

(b) Lord Ellenborough, in *Power v. Walker*, *supra*; as to the distinction between a licence to publish and an assignment, see 27 L. J. (Ch.) 254, and the principle on which was decided the late case of *Lacy v. Toole*, 15 L. T. (N.S.) 512.

CAP. V. had been so settled, that the legislature, by being silent with regard to the assignment, meant that to remain, although it alters the law with respect to the consent." "The Act of Anne and the Act of the 54 Geo. 3 may well stand together; the latter one does not repeal the former expressly, and there is no reason why it should do so by intendment; and with respect to the assignment, the Act of Anne, being referred to generally by the 54 Geo. 3, must be considered to be referred to as bearing the construction put upon it by the authorities."

This opinion was followed in *Cumberland v. Copeland* (a), which was a claim for copyright under the 3 & 4 Will. 4, c. 15, it being held by the majority of the Court of Exchequer that an assignment of copyright made previous to the statute 5 & 6 Vict. c. 45, must be attested by two witnesses.

Assignment
under the
5 & 6 Vict.
c. 45.

Under the 5 & 6 Vict. c. 45, s. 13, the proprietor of a copyright in a composition, if he desire to sell and transfer his right, must make an entry in the register of the Stationers' Company of such work, the time of the first publication thereof, and the name and place of abode of the publisher and proprietor of the copyright; and every such registered proprietor may assign his interest, or any portion thereof, by making an entry in the register of the assignment and of the name and place of abode of the assignee (b); and the assignment so entered is expressly exempted from stamp duty, and is of the same force and effect as if it had been made by deed (c).

No partial
assignment of
copyright.

There cannot be a partial assignment of copyright (d). Copyright is one and indivisible; it is a right which may be transferred, but cannot be divided. Nothing could be more absurd or inconvenient than that this abstract right

(a) 31 L. J. (Ex.) 19.

(b) *Ante*, p. 69.

(c) The proposition that an assignment in writing, since the 5 & 6 Vict. c. 45, need not be attested (4 H. L. C. 855, 881, 891, 931, 943), has been ably disputed in the 8th volume of the *Jurist* (N.S.) pt. ii. p. 148. And see *Power v. Walker*, 3 M. & S. 8. Lord Ivory, in *Jeffreys v. Kyle*, 18 Ct. of Sess. 2nd ser. p. 911, and others have thought that both *Power v. Walker*, and *Bohn v. Davidson*, were wrongly decided.

(d) *Quære*, in America. See *Roberts v. Myers*, 13 Mo. Law Rep. 396; *contra*, *Keane v. Wheatley*, 9 Amer. Law Rep. 33.

should be divided; as if it were real property, into lots, and that one lot should be sold to one man, and another lot to a different man. It is impossible to tell what the inconvenience would be. You might have a separate transfer of the right of publication in every country in the kingdom (a). Thus, where Ricordi, the assignee of Bellini, being resident in Milan, assigned the copyright in '*La Sonnambula*' to Boosey for publication in the United Kingdom only, Lord St. Leonards, in passing judgment, observed: "The exercise of the right is confined in that assignment to the United Kingdom. Now, by the 41 Geo. 3, c. 107, copyright is extended to any part of the British dominions in Europe; and by the 54 Geo. 3, c. 156, it was further extended to every other part of the British dominions. It is quite clear, therefore, that if, in this case, there was a copyright under the law of this country, it was a copyright which extended to every part of the British dominions; even considering the right in England, if I may so call it, as being capable of being secured from any foreign right, it would consequently be a partial assignment; and, as a partial assignment, I should venture to recommend your Lordships to decide that it was wholly void, and therefore gave no right at all.

"There is also, let me observe, this particularity: that as the assignment from Ricordi is confined to the United Kingdom, Ricordi himself might, without any breach of his contract, have published this composition in any other part of the British dominions; he might, also, by his Milanese right, have published it the very next day in Milan, without infringing on the right of Boosey under the assignment. The more, therefore, the question is considered, the more, I apprehend, will it appear clear that the assignment in question was void because it was limited to the United Kingdom, and did not extend to the whole of the British dominions."

An assignment made by an assignee of a foreigner, though his title be good by the law of the country in

Assignment
by foreigner.

(a) Lord St. Leonards, in *Jefferys v. Boosey*, 4 H. L. C. 993.

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which the assignment is made, and to which law both assignee and foreigner are subject, yet (being a foreigner), he has not, by the English law, an interest in the copyright, such as he may assign to an Englishman for exclusive publication in England; nor would such an assignment hold good though made according to the law of this country.

This point was determined in *Jefferys v. Boosey*, to which we have already referred. Bellini, a foreigner, while living at Milan composed a musical work, in which, by the laws there in force, he had a certain copyright. In February, 1831, he there, by an instrument in writing valid by the law of Milan, assigned the copyright to S. Ricordi, who afterwards came to this country, and in June, 1831, by deed under his hand and seal, in the presence of, and attested by, two witnesses, assigned for a valuable consideration the copyright in the composition to Boosey, for publication in the United Kingdom only. Boosey then printed and published the work in this country, and Jefferys, without licence from Boosey, printed and published a portion of it in England. The case was carried eventually into the Upper House, and judgment given by Lords Cranworth, Brougham, and St. Leonards. The last-named learned judge was of opinion that copyright by the law of Milan could have no effect in this country; that the law of Milan, which gave to Bellini this copyright, could of course give him no right in this country. The first question was, how could a right exist in Bellini, as a foreigner, to copyright in this country? He had it by the law of Milan, because he was a native-born subject, or a subject, at all events, by residence, and the law of that country gave it to him; but the moment he stepped out of that country he could have no other right than was involved in the mere possession of the subject-matter in his hands, except so far as the law of any country to which he resorted might give him such a right. Then, in order to obtain copyright here, he must come and perform the conditions annexed to the enjoy-

ment of that right; and he (Lord St. Leonards) held it to be perfectly clear that that condition is, that he must reside in this country. Then, if that were so, as Bellini did not perform the condition, he never had the right to assign, and he could not assign that which never existed. Remaining abroad, he could not have the right, for the common law of this country gave him no such right. Neither did the statute law of this country give him any such right. Therefore, whilst at Milan he had a Milanese copyright; but he had not, and could not acquire, a British copyright; and if he had no right in this country he could assign none. And in this view he was supported by the other learned judges.

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This case completely overruled that of *Cocks v. Purday* (a). It had been held that, in the instance in which (by the law of Austria, which prevailed where A., the author of a musical composition, and B., his assignee, were respectively domiciled) A. assigned his right to B., and B., before the publication of the work, sold his copyright to C., an Englishman, there being a sale valid by the law of Austria, the country in which the sale took place, the interest of the author became vested in C. before publication, so as to make him an assignee within the meaning of the 5 & 6 Vict. c. 45, s. 3, and to confer upon him a good derivative title.

Cocks v. Purday overruled.

The absence of an assignment in writing must be specially pleaded at law (b), unless, of course, admitted by the other side (c).

It has lately been determined that, in the absence of a special contract to the contrary, the assignor of a copyright is entitled, after the assignment, to continue selling copies of the work printed by him before the assignment and remaining in his possession (d).

Right of assignor to sell stock on hand after assignment.

(a) 5 C. B. 860; 12 Jur. 677; 17 L. J. (C.P.) 273; and that of *Boosey v. Davidson*, 13 Q. B. 257; 13 Jur. 678; 18 L. J. (Q.B.) 174; and *Boosey v. Jefferys* (in error), 6 Ex. 580; 15 Jur. 540; 20 L. J. (Ex.) 354; overruled by *Jefferys v. Boosey*, 4 H. L. C. 815; 24 L. J. (Ex.) 81; 1 Jur. (N.S.) 615.

(b) *Barnett v. Glossop*, 1 Bing. N. C. 633; *De Pinna v. Polhill*, 8 C. & P. 78; *Cocks v. Purday*, 5 C. B. 860.

(c) *Moore v. Walker*, 4 Camp. 9, n.

(d) *Taylor v. Pillow*, Law Rep. 7 Eq. 418.

CHAPTER VI.

INFRINGEMENT OF COPYRIGHT.

"*O imitatores, servum pecus!*"

"*Quid nos dura refugimus
Ætas? quid intactum nefasti
Liquimus?*"

HORACE.

Infringement
of copyright.

THE question must obviously arise somewhat frequently, what is, and what is not, a piracy. In many cases the line of demarcation is so loosely and indifferently drawn, that arrival at a just conclusion is a matter of difficulty. So entirely must each case be governed and regulated by the particular circumstances attending it, that any general rules on the subject must be received with extreme caution. Regard must be had to the value of the work, and the value of the extent of the infringements; for while, on the one hand, the policy of the law allows a man to profit by all antecedent literature, yet, on the other, the use made of such antecedent literature may not be so extensive as to injure the sale of the original work, even though made with no intention to invade the previous author's right (*a*); for the copyright having been violated, the penalty must be paid (*b*).

The result, in such cases, is the true test of the act. Full acknowledgment of the original, and the absence of any dishonest intention, will not excuse the appropriator

(*a*) *Roworth v. Wilkes*, 1 Camp. 94; *Emerson v. Davies*, 3 Story (Amer.) 768; *Campbell v. Scott*, 11 Sim. 31; *Clement v. Maddick*, 1 Giff. (Ch.) 98; 5 Jur. (N.S.) 592; *vide* Kindersley, V.C., in *Murray v. Bogue*, 1 Drew. 353; Wood, V.C., in *Reade v. Lacy*, 1 J. & H. 524; and Story, J., in *Folsom v. Marsh*, 2 Story (Amer.) 115; see *Gambart v. Sumner*, 5 H. & N. 5.

(*b*) *Millett v. Snowden*, 1 West. L. J. (Amer.) 240; *Parker v. Hulme*, 7 *ibid.* 426; *Webb v. Powers*, 2 Wood & M. (Amer.) 497.

when the effect of his appropriation is, of necessity, to injure and supersede the sale of the original work; for a man must be presumed to intend all that the publication of his work effects (a).

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Plagiarism does not necessarily amount to an invasion of copyright, and the author of a published book has no monopoly in the theories and speculations, or even in the results of observations therein contained; but no one, whether with or without acknowledgment, can be permitted to take a material and substantial portion of the published work of another author, for the purpose of making or improving a rival publication (b).

Plagiarism not necessarily an invasion of copyright.

La Bruyère declares that we are come into the world too late to produce anything new, that nature and life are preoccupied, and that description and sentiment have been long exhausted. However this may be, it is apparent that some similarities, and a use, to a certain extent, of prior works, even to the copying of small parts, must be tolerated in the case of such works as dictionaries, gazetteers, grammars, maps, arithmetics, almanacs, concordances, encyclopædias, itineraries, guide books, and similar productions, if the main design and execution are in reality novel and improved, and not a mere cover for important piracies (c).

Want of originality in modern works.

All definitions of the same thing must be nearly the same, and descriptions, which are definitions of a more lax and fanciful kind, must always have in some degree that resemblance to each other which they all have to their object. Consequently, in compiling such works, the materials, to a considerable extent, must be nearly identical, and the prior compiler cannot monopolize what was not original with himself, nor a subsequent compiler

(a) Wood, V.C., in *Scott v. Stanford*, Law Rep. 3 Eq. 723; *Reade v. Lacy*, 9 W. R. 531; 7 Jur. (N.S.) 463; 30 L. J. (Ch.) 655; *Millett v. Snowden*, 1 West. L. J. (Amer.) 240; *Nichols v. Ruggles*, 3 Day (*ibid.*) 158; *Story v. Holcombe*, 4 McLean (*ibid.*) 306; McLean, J., Ohio, 1847.

(b) *Pike v. Nicholas*, 38 L. J. (Ch.) 529; 20 L. T. (N.S.) 906; reversed, Law Rep. 5 Ch. 251, but not in opposition to the principle above laid down.

(c) *Webb v. Powers*, 2 Wood & M. (Amer.) 497-512; *vide* 2 Hilliards on 'Torts,' 49.

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employ a prior arrangement and materials to such an extent as to be a substantial invasion of the anterior compilation.

Encyclopædias may not outstrip the limits of fair quotation.

Thus, where it appeared that 75 out of 118 pages of a work on fencing had been transcribed into an encyclopædia, the court held that a piracy had been committed; for though it is true that an encyclopædia may be allowed to embrace all the information contained in the newest works on the subject, yet definite limits must be set to its extracts. The same rule holds in respect of works under review; the reviewer may fairly make extracts, and may comment on those portions, but it would be unfair if he were allowed to exhibit the substance of the work he chose to review. Sufficient may be taken to form a correct idea of the whole, but no one is allowed to review in such a manner as to make the review serve as a substitute for the work reviewed (*a*).

The latter, to be a piracy, need not serve as a substitute for the former work.

And yet to be a piracy it is not necessary that the latter work should be a substitute for the original composition. It can seldom be the criterion. Vice-Chancellor Shadwell, on one occasion, put the case in a simple aspect: "We all know that there has been a very valuable Greek lexicon published by Mr. Liddell and another friend of his at Oxford; no person who published this lexicon, omitting three or four words at the end of each letter of the alphabet, could have done a work of which it could be said, that it might be taken as a substitute, for nobody would take it as a substitute. But can it be doubted that it might have a very material effect in diminishing the price of the first book? For, though nobody would take it as a substitute, many people might not care about so much, and might take it cheaply for what it really did contain, which might be more than ninety-nine hundredths of the whole, and yet it would in no manner be a substitute; and, therefore, the language is not generally correct, so as to be capable of application to every case."

(*a*) 1 Camp. 97; 4 Esp. 168; 17 Ves. 422; Eden on Injunc. 281; see *Murray v. M'Fargilhar*, June 25, 1785, Mor. Dic. of Dec. 8309.

Where a work entitled 'A Practical Treatise on the Law Relative to the Sale and Conveyance of Real Property, &c.,' contained piratical extracts from an earlier standard work, which was entitled 'A Practical Treatise on the Law of Vendors and Purchasers of Estates,' the Vice-Chancellor Shadwell observed, "In cases of this nature, if the pirated matter is not considerable, that is, where the passages, which are neither numerous nor long, have been taken from different parts of the original work, this court will not interfere to restrain the publication of the work complained of, but will leave the plaintiff to seek his remedy at law. But in this case it is plain that the passages which have been pointed out have been taken from the plaintiff's book, and they are so considerable, both in number and length, as to make it right that this court should interfere (a)."

The inquiry in most cases, is not, whether the defendant has used the thoughts, conceptions, information, and discoveries promulgated by the original, but whether his composition may be considered a *new work*, requiring invention, learning, and judgment, or only a mere transcript of the whole or parts of the original, with mere colourable variations (b).

Principles by which a piracy is judged.

In *Scott v. Stanford* (c), the plaintiff had published statistical returns of all coal imported into London, and the defendant, in giving the universal statistics of the United Kingdom, had copied from the plaintiff's work to the extent of one-third of the whole of the defendant's work, at the same time acknowledging the source from which his information was derived. Vice-Chancellor Wood decided, that having regard to the quantity and matter of the information which had been taken and republished without the exercise of any independent thought and labour, and the prejudice to the plaintiff in

(a) *Sweet v. Cater*, 11 Sim. 580. See *Kelly v. Hooper*, 4 Jur. 21.

(b) *Stowe v. Thomas*, 2 Wall. C. Ct. (Amer.) 547; S.C. 2 Amer. L. Reg. 231.

(c) Law Rep. 3 Eq. 718; *Morris v. Ashbee*, 19 L. T. (N.S.) 550; Law Rep. 7 Eq. 34. *Mawman v. Tegg*, 2 Russ. 398; *Jarrold v. Houlston*, 3 K. & J. 708; *Cox v. The Land and Water Co.*, 18 W. R. 20j.

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having the sale of his work superseded by this republication, the plaintiff was entitled to an injunction. If the defendant, after collecting the information for himself, had checked his results by the plaintiff's tables, that would have been a widely different thing from the wholesale extraction of the vital part of his work. But no man is entitled to avail himself of the previous labours of another for the purpose of conveying to the public the same information, although he may append additional information to that already published. This is consonant to the law as laid down in *Kelly v. Morris* (a), which was in the following terms: In the case of a dictionary, map, guide-book, or directory, where there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In the case of a road-book, he must count the milestones for himself, . . . and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained.

From these observations it is not to be inferred that in compiling a directory the compiler may not look into the previous directory of another for the purpose of ascertaining where a particular person lives, and for the purpose of ascertaining from that book whether or not it is worth his while to call upon that person (b); they imply no further than that he may not take a passage from the directory, and go and see whether it happens to be accurate, and if it be accurate, bodily copy it into his directory.

This latter is precisely what was done in *Morris v. Ashbee* (c). The defendant copied the plaintiff's book, and then sent out canvassers to see if the information so copied was correct. If the canvasser did not find the occupier of the house at home, or could get no answer

(a) Law Rep. 1 Eq. 697. (b) *Morris v. Wright*, 22 L. T. (N.S.) 78.
(c) 19 L. T. (N.S.) 550; Law Rep. 7 Eq. 34.

from him, then the information copied from the plaintiff's book was repeated bodily, as if it were a question for the occupier of the house merely, and not for the compiler of the previous directory. The copying was as direct in the case of *Kelly v. Morris*, to which we have already referred. Not only were the slips for the purpose of canvassing copied, but the course pursued really was, that when a slip was presented to the person who was canvassed, and his permission received for the insertion of the particular entry, the slip was forthwith copied into the book. "Now it is plain," observed Lord Justice Giffard, "that it could not be lawful for the defendants simply to cut the slips, which they have cut from the plaintiff's directory, and insert them in theirs. Can it then be lawful to do so, because, in addition to doing this, they sent persons with the slips to ascertain their correctness? I say, clearly not. . . . In *Pike v. Nicholas* (a) we had this: Two rival books were published with reference to the same subject matter, and we thought certainly that the defendant had been guided by the plaintiff's book, more or less, to the authorities which the plaintiff had cited; but it was a perfectly legitimate course for the defendant to refer to the plaintiff's book, and if he did, taking that book as his guide himself, go to the original authorities, and compile his book from the original authorities, he made no unfair or improper use of the plaintiff's book."

The question as to how far advantage may be reaped from the work of another, and what use may be legitimately made of it, is difficult of solution. Perhaps the strongest case in favour of the adoption by a subsequent compiler of the work of a preceding one, is that of *Cary v. Kearsley* (b), where Lord Ellenborough thought that the former might fairly adopt part of the work of the latter, and might so make use of his labours for the promotion of science and the benefit of the public; but having done so, he was of opinion that the question would be, was the matter so taken used fairly with that view, and with-

(a) 38 L. L. Ch. 529

(b) 4 Esp. 168.

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out what he might term the *animus furandi*? For while he considered himself bound to secure every man in the enjoyment of his copyright, he was fearful of putting manacles upon science.

In *Jarrold v. Houlston* (a), the publishers of Dr. Brewer's 'Guide to Science' obtained an injunction against the publication of the 'Reason Why.' The judge said: "The question I really have to try is, whether the use that in this case has been made of the plaintiff's book has gone beyond a fair use. Now, for trying that question, several tests have been laid down. One, which was originally expressed, I think, by a common law judge, and was adopted by Lord Langdale in *Lewis v. Fullarton*, is, whether you find on the part of the defendant an *animus furandi*—an intention to take for the purpose of saving himself labour. I take the illegitimate use as opposed to the legitimate use of another man's works on subject matters of this description to be this: if, knowing that a person whose work is protected by copyright has, with considerable labour, compiled from various sources a work in itself not original, but which he has digested and arranged, you, being minded to compile a work of a like description, instead of taking the pains of searching into all the common sources, and obtaining your subject matter from them, avail yourself of the labour of your predecessor, adopt his arrangements, adopt, moreover, the very questions he has asked, or adopt them with but a slight degree of colourable variation, and thus save yourself pains and labour by availing yourself of the pains and labour which he has employed, that I take to be an illegitimate use."

A compiler must produce an original result.

The rule appears now to be settled, that the compiler of a work in which absolute originality is of necessity excluded, is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction

(a) 3 K. & J. 708; 3 Jur. (N.S.) 1051.

as to *produce an original result*, provided that he does not deny the use made of such preceding works, and the alterations are not merely colourable (a). CAP. VI.

For an example, take the case of a dictionary. There may be a certain degree of skill exhibited as to order and arrangement, and there may be a good deal of ingenuity exhibited in the selection of phrases and illustrations, which are the best exponents of the sense in which the word is to be used; and there may also be great labour in the logical deduction and arrangement of the word in its different senses, when the sense of the word departs from its primary signification; but there cannot be copyright in much of the information contained in the numerous dictionaries published, each necessarily having a large number of words identically similar. The great point to decide in such cases is, as we have already stated, whether in the particular case the work is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work. (b) The case of a dictionary analyzed.

Lord Hatherley, while Vice-Chancellor, in the case of *Spiers v. Brown* (c), thus summed up the law in his peculiarly lucid style: All cases of copyright were very simple when a work of an entirely original character was concerned, being a work of imagination or invention on the part of the author, or original in respect of its being a work treating of a subject common to mankind, such as history, or other branches of knowledge varying much in their mode of treatment, and in which the hand of the artist would be readily discerned. But the difficulty that arose in cases of the class then before him was, that they not only related to a subject common to all mankind, but that the mode of expression and language was necessarily so common that two persons must, to a very great extent, express themselves in identical terms in conveying the instruction or The case of *Spiers v. Brown*.

(a) *Spiers v. Brown*, 6 W. R. 352; *Reade v. Lacy*, 1 J. & H. 524.

(b) *Vide Wilkins v. Aiken*, 17 Ves. 422; *Bramwell v. Halcomb*, 3 My. & Cr. 737; *Cornish v. Upton*, 4 L. T. (N.S.) 863.

(c) 6 W. R. 352.

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information to society which they were anxious to communicate. The most obvious case was that of figures, such as the table of logarithms—the case before Sir John Leach—where it would be impossible to deviate in the calculations, or to vary the order, and the result must be identical. The same might be said of directories, calendars, court guides, and works of that description. Those were cases in which the only mode of arriving at the amount of labour bestowed was by the common test resorted to of discovering the copy of errors and misprints, indicating a servile copying. Copyright was considered, for the highest purposes of society in every country, as necessary to be secured to those who contributed to the civilization, refinement, or instruction of mankind, and extended, in this country, if not elsewhere, to every description of work, however humble it might be, even to the mere collection of the abodes of persons, and to streets and places; and labour having been employed upon subjects even of that class, no one had a right to avail himself of it. . . . The real question was, how far the courts had decided that a certain amount of use of preceding works was legitimate in carrying out a second work of a similar description, calculated to afford instruction by means of a dictionary, vocabulary, or the like. In the case of *Cary v. Kearsley* (a), Lord Ellenborough laid down the law in a manner which had not been questioned. He said, “that part of the work of one author found in another is not of itself piracy, or sufficient to support an action. A man may fairly adopt part of the work of another; he may so make use of another’s labour for the promotion of science and the benefit of the public; but, having done so, the question will be, was the matter so taken used fairly with that view, and without what I may term the *animus furandi*? Look through the book, and find any part that is a transcript of the other; if there is none such, if the subject of the book is that which is subject to every man’s observation, such as the names of the places and their

(a) 4 Esp. 168.

distances from each other, the places being the same, the distances being the same, if they are correct, one book must be a transcript of the other; but when in the defendant's book there are additional observations, and in some parts of the book I find corrections of misprintings, while I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles on science." Then there was the case of *Longman v. Winchester* (a), in which Lord Eldon said, "Take the instance of a map describing a particular county, and a map of the same county afterwards published by another person; if the description is accurate in both they must be pretty much the same, but it is clear that the latter publisher cannot, on that account, be justified in sparing himself the labour and expense of actual survey, by copying the map previously published by another. So, as to Paterson's 'Road Book,' it is certainly competent to any other man to publish a book of roads, and if the same skill, intelligence, and diligence are applied in the second instance, the public would receive nearly the same information from both works; but there is no doubt that this court would interpose to prevent a mere republication of a work which the labour and skill of another person had supplied to the world. So, in the instance mentioned by Sir Samuel Romilly, a work consisting of a selection from various authors, two men perhaps might make the same selection, but that must be by resorting to the original authors, not by taking advantage of the selection already made by another." And again: "The question before me is, whether it is not perfectly clear that in a vast proportion of the work of these defendants no other labour has been applied than copying the plaintiff's work. From the identity of the inaccuracies it is impossible to deny that the one was copied from the other *verbatim et literatim*. To the extent, therefore, in which the defendant's publication has been supplied from the other work the injunction must go; but I have said nothing that has a tendency to prevent any person from

(a) 16 Ves. 269.

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giving to the public a work of this kind if it is the fair fruit of original labour, the subject being open to all the world." Another case—which seemed to condense into one point the view taken by the courts in cases where actual use is avowed and the only question is, whether it is a fair use (*a*),—where Lord Eldon says this: "Upon inspection of the different works, I observe a considerable proportion taken from the plaintiff's that is acknowledged, but also much that is not; and in determining whether the former is within the doctrine upon this subject the case must be considered as also presenting the latter circumstance. The question upon the whole is, whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work." These were the words which had been relied on by Lord Cottenham in *Bramwell v. Halcomb* (*b*), and it was with the view thus taken by those learned judges that he (the Vice-Chancellor) had gone through a very laborious investigation of the works then in question, there being, as it seemed to him, a considerable portion of the defendant's work which came within the doctrine of its being a legitimate use and a fair exercise of mental operation, and (adding the negative used by Lord Ellenborough) not being done colourably. . . . His Honour said, that the real issue which the court was called on to decide was one of the most difficult ever presented to him, namely, as to how far this very considerable use of the work of another might be taken to be legitimate. There was no concealment of some use having been made; no colourable alteration proved, nor anything tending to show a fraudulent design to make an unfair use of the work of another. The present case went as far as any previous, though not perhaps further than *Mawman v. Tegg* (*c*), where a very large and considerable portion of the plaintiff's work had been taken without any alteration or addition. Though a good deal had been taken from the plaintiff, yet a good deal of labour had been bestowed upon what had been taken. . . . Upon the whole,

(*a*) *Wilkins v. Aiken*, 17 Ves. 422.

(*b*) 3 My. & Cr. 737.

(*c*) 2 Russ. 385.