he could not think that the defendant had gone beyond what the court would allow, having produced that which in the result was, in fact, a different work from that of the plaintiff.

Modes in which copyright may be infringed.

Copyright may be invaded in several ways :—

1st. By reprinting the whole work *verbatim*.

2nd. By reprinting *verbatim* a part of it.

3rd. By imitating the whole or a part, or by reproducing the whole or a part with colourable alterations.

4th. By reproducing the whole or a part under an abridged form (*a*).

5th. By reproducing the whole or a part under the form of a translation.

1. By reprinting the whole *verbatim*.

Piracies of the nature of the first division are seldom committed, on account of the ease with which they could be detected and punished.

2. By reprinting *verbatim* a part.

Piracies of the nature of the second division are far more frequent and more difficult of detection. The quantity of matter subtracted cannot in all cases be a true criterion of the extent of the piracy, for a work may be a piracy upon another, though the passages copied are stated to be quotations, and are not so extensive as to render the piratical work a substitution for the original work.

If so much is taken that the value of the original is sensibly diminished, or the labours of the original author are substantially, to an injurious extent, appropriated by another, that is sufficient, in point of law, to constitute a piracy *pro tanto*. The entirety of the copyright is the property of the author ; and it is no defence that another person has appropriated a part and not the whole of such property.

Quantity but slight criterion of piracy.

Lord Cottenham, in the cases of *Bramwell* v. *Halcomb* and *Saunders* v. *Smith*, adverting to this point, 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

(*a*) Curtis on Copy. chap. 9.

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of the book in quantity. It is not only quantity, but value, that is always looked to. It is useless to refer to any particular cases as to quantity." In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused into another work, so as to be distinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy; or they may be inserted as a sort of distinct and mosaic work into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy. If a person should, under colour of publishing "elegant extracts" of poetry, include all the best pieces at large of a favourite poet, whose volume was secured by copyright, it would be difficult to say why it was not an invasion of that right, since it might constitute the entire value of the volume. The case of *Mawman* v. *Tegg* is to this purpose. There was no pretence in that case that all the articles of the encyclopædia of the plaintiffs had been copied into that of the defendants; but large portions of the materials of the plaintiffs' work had been copied. Lord Eldon, upon that occasion, held that there might be a piracy of a part of a work, which would entitle the plaintiffs to a full remedy and relief in equity. In prior cases he had affirmed the like doctrine. In *Wilkins* v. *Aiken*, he said, "There is no doubt that a man cannot, under the pretence of quotation, publish either the whole or a part of another's book, although he may use, what in all cases it is difficult to define, fair quotation."

Reviews or criticisms.

In a case in which the work alleged to be pirated was a play, extending over forty pages, and the defendant had published a journal of theatrical criticism, in which, as

illustrative of his critical remarks, he had introduced broken and detached fragments of the piece in question, amounting in the whole to six or seven pages, some weight appears to have been allowed by the court to the fact of the extent of the extracts being so inconsiderable, as affording ground for doubt whether the defendant had transgressed the limits of fair quotation (*a*).

It is manifest, also, from what fell from Lord Chancellor Cottenham in *Saunders* v. *Smith* (*b*), that he entertained no doubt (although he did not decide the point) that there might be a violation of the copyright of volumes of reports, by copying *verbatim* a part only of the cases reported. In *Lewis* v. *Fullarton* (*c*), Lord Langdale, in the case of a typographical dictionary, held that largely copying from the work, in another book having a similar object, was a violation of that copyright, although the same information might have been (but, in fact, was not) obtained from common sources, open to all persons; and accordingly in that case he granted an injunction as to the parts pirated, notwithstanding the fact that there was much which was original in the new work (*d*).

3rd. Copyright may be infringed by imitating the whole or a part, or by reproducing the whole or a part with colourable alterations.

3. By imitating the whole or part by reproduction with colourable alterations.

A copy is one thing, an imitation or resemblance another. It is indeed certain, that whoever attempts any common topic will find unexpected coincidences of his thoughts with those of other writers; nor can the nicest judgment always distinguish accidental similitude from artful imitation. "There is likewise," says Dr. Johnson, "a common stock of images, a settled mode of arrangement, and a beaten track of transition, which all authors suppose themselves at liberty to use, and which produce the resemblance generally observable among contemporaries. So that in books which best deserve the name of

Distinction between a copy and an imitation.

(*a*) *Whittingham* v. *Wooler*, 2 Swans. 428.
(*b*) 3 My. & Cr. 711.
(*c*) 2 Beav. 6.
(*d*) See *Cox* v. *The Land and Water Co.*, 18 W. R. 206.

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originals, there is little new beyond the disposition of materials already provided; the same ideas and combinations of ideas have been long in the possession of other hands; and by restoring to every man his own, as the Romans must have returned to their cots from the possession of the world, so the most inventive and fertile genius would reduce his folios to a few pages. Yet the author who imitates his predecessors only by furnishing himself with thoughts and elegances out of the same general magazine of literature, can with little more propriety be reproached as a plagiary, than the architect can be censured as a mean copier of Angelo or Wren because he digs his marble from the same quarry, squares his stones by the same art, and unites them in columns of the same order."

There are many imitations of Homer in the '*Æneid*;' but no one would say that the one was a copy of the other. So also can similar passages be found in Virgil and Horace:

"*Hæ tibi erunt artes—*
Parcere subjectis, et debellare superbos."
VIRGIL.

"*Imperet, bellante prior, jacentem*
Lenis in hostem."
HORACE.

And Cicero observes of Achilles, that had not Homer written, his valour had been without praise: *Nisi Ilias illa extitisset, idem tumulus qui corpus ejus contexerat, nomen ejus obruisset;* while Horace remarks that there were brave men before the wars of Troy, but they were lost in oblivion for the want of a poet:

"*Vixere fortes ante Agamemnona*
Multi; sed omnes illacrymabiles
Urgentur, ignotique longâ
Nocte, carent quia vate sacro."

There may be a strong likeness without an identity. The question is, therefore, in many cases a very delicate one: what degree of imitation constitutes an infringement of the copyright of a particular composition? Certainly

not such a similitude as the instances from the classics given above.

It is very evident that any use of materials, whether they are figures or drawings, or other things which are well known and in common use, is not the subject of a copyright, unless there be some new arrangement thereof. Still, even here, it may not always follow that any person has a right to copy the figures, drawings, or other things, made by another, availing himself solely of his skill and industry, without any resort to such common source. In all cases the question of fact to come to the jury is, whether the alterations be colourable or not. There must be a similitude, so as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript; so with regard to charts, there is no monopoly in that subject; but upon a question of the above nature the jury must decide whether the latter work be a servile imitation of the former or not.

In *Trusler* v. *Murray* (*a*) Lord Kenyon put the point in the same light, and said, "The main. question here is, whether, in substance, the one work is a copy and imitation of the other; for undoubtedly, in a chronological work (such was the character of the work before the court) the same facts must be related." And Mr. Justice Story, in his elaborate and learned judgment in *Emerson* v. *Davies* (*b*), laid it down as the clear result of the authorities in cases of this nature, that the true test of piracy or not, is to ascertain whether the defendant has, in fact, used the plan, arrangements, and illustrations of the plaintiff as the model of his own book, with colourable alterations and variations only to disguise the use thereof; or whether his work is the result of his own labour, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental or arising from the nature of the subject. In other words, whether the defendant's book is, *quoad*

(*a*) 1 East, 363, note. (*b*) 3 Story (Amer.) 768, 793.

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hoc, a servile or evasive imitation of the plaintiff's work, or a *bonâ fide* original compilation from other common or independent sources.

An American court, in speaking of a case in which the defendant had pirated a portion of an arithmetic belonging to the plaintiff, observed that the real question on the point was not whether certain resemblances existed, but whether these resemblances were purely accidental and undesigned, and unborrowed, because arising from common sources accessible to both the authors, and the use of materials equally open to both—whether, in fact, the defendant used the plaintiff's work as his model, and imitated and copied that, and did not draw from such common sources or common materials. Then again, it had been said that, to amount to piracy, the work must be a copy and not an imitation. This, as a general proposition, could not be admitted. It was true the imitation might be very slight and shadowy. But, on the other hand, it might be very close, and so close as to be a mere evasion of the copyright, although not an exact and literal copy. "It falls within that class of cases," said Mr. Justice Story, "where the differences between different works are of such a nature, that one is somewhat at a loss to say whether the differences are formal or substantial; whether they indicate a resort to the same common sources to compile and compose them, or one is (as it were) *uno flatu* borrowed from the other, without the employment of any research or skill, with the disguised but still apparent intention to appropriate to one what in truth belongs exclusively to the other, and with no other labour than that of mere transcription, with some omissions or additions as may serve merely to veil the piracy. It is like the case of patented inventions in art or machinery, where the resemblances or diversities between the known and the unknown, and between invention and imitation, are so various or complicated, or minute or shadowy, that it is exceedingly difficult to say what is new or not, or what has been pirated and what is substantially different. The

approaches on either side may be almost infinitely varied, and the identity or diversity sometimes becomes almost evanescent. In many cases, the mere inspection of a work may at once betray the fact that it is borrowed from another author, with merely formal or colourable omissions or alterations. In others, again, we cannot affirm that identity in the appearance or use of the materials is a sufficient and conclusive test of piracy, or that the one has been fraudulently or designedly borrowed from the other. Take the case, for example, of two maps of a city, a county or a country. We cannot predicate that the one is a piracy from the other, simply because their external appearance is in nearly all respects the same, with or without some additions or alterations or omissions. Take the case of two engravings copied from the same picture, or two pictures of natural objects by different artists; it would not be practicable, in many cases, from the mere inspection of them and their apparent identity, to say, that the one was a transcript of the other. It would be necessary to resort to auxiliary and supplementary evidence to establish the fact either way (*a*)."

Not every imitation a proof of plagiarism.

"As not every instance of similitude," observes Dr. Johnson, "can be considered as a proof of imitation, so not every imitation ought to be stigmatized as plagiarism. The adoption of a noble sentiment, or the insertion of a borrowed ornament, may sometimes display so much judgment as will almost compensate for invention; and an inferior genius may, without any imputation of servility, pursue the path of the ancients, provided he declines to tread in their footsteps."

4. By reproduction under an abridged form.

4th. Copyright may be infringed by reproducing the whole or a part under an abridged form.

A fair abridgment, when the understanding is employed in retrenching unnecessary circumstances, is not a piracy of the original work. Such an abridgment is allowable, and is regarded in the light of a new work. The law with reference to abridgments might, we think, with justice

(*a*) *Emerson* v. *Davies et al.*, 3 Story (Amer.) 768–784.

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receive some modification. The decisions on the subject are somewhat inconsistent. The fundamental principle on which is based the protection afforded to authors from piracies, appears to be the injury or damage caused to them by the depreciation in the value of their original works. It seems a very unsatisfactory answer to an original author, who has been injured by an abridgment, to say, that because the wrongful taker has exhibited talent and ingenuity, both in the taking and in the use which he has made of it, the original author has no remedy. "The form," says Mr. Curtis (*a*) "under which the original matter reappears should be treated as a disguise; and the extent of the transformation shows only the extent to which the disguise has been carried, as long as anything remains which the original author can show to be justly and exclusively his own."

Now, few abridgments do not affect in some way the original work. By the selection of all the important passages in a comparatively moderate space, the quintessence of a work may be piratically extracted, so as to leave a mere *caput mortuum*. These considerations have been relied upon by the judges in coming to a determination upon the subject, and the proposition, that an abridgment is not a piracy of the original copyright, must be received with many qualifications.

The first case is that of *Dodsley* v. *Kinnersley* (*b*), where

(*a*) 'Copyright,' 272.

(*b*) Amb 403. See *Pinnock* v. *Rose*, 2 Bro. C. C. 85, note. Mr. Curtis, the learned author of an American work on copyright, thus states, in his lucid style, the injustice of the law respecting abridgments: "When the author of a book," says he, "of whatever kind, possessing the legal attributes of originality, has secured his copyright according to the prevailing law of his country, he has secured the exclusive right to print and publish his own book. In the jurisprudence with which we are concerned, this right includes the whole book and every part of it; for we have seen that there may be a piratical taking of extracts and passages, and that the quantity thus taken may be immaterial. It includes also, or may include, the style, or language and expression; the learning, the facts, or the narrative; the sentiment and ideas, as far as their identity can be traced; and the form, arrangement, and combination which the author has given to his materials. These are, or may be, all distinct objects of the right of property; and in every work of originality, likely to be abridged or capable of being abridged, they are all important objects of that right. However imperfectly the subject may have been regarded in

an injunction was applied for, to restrain the publication of an abridgment of Dr. Johnson's 'Rasselas.' It appeared that not one-tenth part of the first volume had been abstracted, and that the injury alleged to have been sustained by the author arose from the abridgment containing the narrative of the tale, and not the moral reflections. The Master of the Rolls, Sir Thomas Clarke, refused the injunction, saying, "I cannot enter into the goodness or badness of the abstract.

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former times, it is now, I think, to be regarded as settled, that whatever is metaphysically part or parcel of the intellectual contents of a book, if in a just sense original, is protected and included under the right of property vested by law in the author; and it is very material to observe, that the arrangement, the method, the plan, the course of reasoning, or course of narrative, the exhibition of the subject, or the learning of the book, may be, according to its character, as much objects of the right of property, as the language and the ideas.

"What then does the maker of an abridgment print, publish and sell, after he has made it? He has been employed, according to the definition above quoted, 'in retrenching unnecessary and uninteresting circumstances, which rather deaden the narration;' that is to say, he has rejected what *in his judgment* are redundancies. Does this make him the author or proprietor of what remains? If the work be a history, did he, the person abridging it, compile the materials into their present shape, and describe the course of events, and embody the whole of what constitutes the intellectual contents of the book, or are these things the product of another's labour, research and faculty of writing? If it be a fictitious narrative, whose genius created the characters, and animated them with the sentiments which they utter, and invented the pleasing incidents of their mock existences, and wove the whole into the novel or the poem; which exists as an intellectual whole, after as well as before the process by which 'the unnecessary and uninteresting circumstances' are 'retrenched?' Or, if it be a work of science, or a treatise in any branch of knowledge, whose are the ideas, the course of reasoning and illustration, the plan and analysis of the subject, and the collection and arrangement of materials which constitute the identity of the book? These questions can have but one answer; and if the abridgment, in any given case, consists solely in the reduction of the bulk of the volume by the rejection of redundancies, it is a mere republication of a connected series of extracts, in a different juxtaposition from the original author's, to which the party had no title whatever. On the other hand, if the abridgment not only rejects redundancies, but also clothes the sentiments and ideas which may be left, in different phraseology, then it falls under the predicament of a colourable alteration, which cannot escape the censure of justice." And in a note he takes the above case of Dr. Johnson's 'Rasselas,' and adds, "The moral reflections are left out, the narrative goes into the 'Gentleman's Magazine.' Whose genius produced that stately and immortal fiction? Who described and created the characters of Imlac, and the Princess, and the Prince of Abyssinia, and placed them in the Happy Valley, and sent them forth in a series of gentle trials and pleasing and sad perplexities, in the world beyond its walls? Who wrote that narrative? Not, certainly, the Grub Street hack, who was employed to 'leave out the reflections.' What he took and his employers published, was the literary property of another, the profits of which the law had not vested in them."—Page 273.

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It may serve the end of an advertisement. In general, it tends to the advantage of an author, if the composition be good; if it be not, it cannot be libelled. What I materially rely upon is, that it could not tend to prejudice the plaintiffs, when they had before published an abstract of the work in the 'London Chronicle.' If I were to determine this to be elusory, I must hold every abridgment to be so." Chancellor Kent, in referring to this case, says, "This latitudinarian right of abridgment is liable to abuse, and to trench upon the copyright of the author. The question as to a *bonâ fide* abridgment may turn, not so much upon the quantity as the value of the selected materials" (*a*).

In *Dickens* v. *Lee* (*b*), the plaintiff's work was an imaginative tale; the defendant had taken the fable, the characters, the incidents, the names, and even the style of language. It is to be gathered from the report, that thus using all the plaintiff's materials, he had told the story in a shorter manner, and he relied upon abridgment as his defence; but the court held that such an abridgment was not an exercise of mental labour deserving the character of an original work, and granted an injunction, putting the plaintiff to establish his right at law, if the defendant desired it. In this case, Vice-Chancellor Knight Bruce is reported to have said, that he was not aware that one man had the right to abridge the works of another; on the other hand, he did not mean to say that there might not be an abridgment which might be lawful, which might be protected; but, to say that one man had the right to abridge, and so publish in an abridged form, the work of another, without more, was going much beyond his notion of what the law of this country was.

In the case of *Butterworth* v. *Robinson* (*c*), a motion was made upon certificate of the bill, for an injunction to restrain the defendant from selling a work, entitled, 'An

(*a*) 2 Kent's Com. 382, note; *Gyles* v. *Wilcox*, 2 Atk. 141. See Campbell's 'Lives of the Chancellors,' vol. v. p. 56; 2 Story, Eq. Jur. s. 939.
(*b*) 8 Jur. 183.
(*c*) 5 Ves. 709.

Abridgment of Cases argued and determined in the Courts of Law, &c.,' until answer or further order. A copy of the work was handed to the Lord Chancellor. In support of the motion it was stated, that this work was by no means a fair abridgment; that, except in colourably leaving out some parts of the cases, such as the arguments of counsel, it was a mere copy *verbatim* of several of the reports of cases in the courts of law, and among them of the 'Term Reports,' of which the plaintiff was proprietor; comprising not a few cases only, but all the cases published in that work; the chronological order of the original work being artfully changed to an alphabetical arrangement under heads and titles, to give it the appearance of a new work. In support of the motion, *Bell* v. *Walker* (*a*) was cited. The Lord Chancellor said, "I have looked at one or two cases, with which I am pretty well acquainted, and it appears to me an extremely illiberal publication. Take the injunction upon the certificate of the bill filed, to give them an opportunity of stating what they can upon it."

The leading case on the subject of piracy, by way of digest, is that of *Sweet* v. *Benning* (*b*), where it was held by a majority of the judges that parties who take *verbatim* portions of reports (as the head-notes), the copyright of which belongs to others, and put them together, merely arranged in a different manner (as in an alphabetical order), so as to form a different work, of which they make any considerable proportion, will be guilty of piracy. The court were divided, and accordingly the judges delivered their judgments *seriatim*. Jervis, C.J., on the question of piracy, said: "The head-notes of the 'Jurist' reports may indeed be considered, perhaps, as in themselves a species of brief and condensed reports, the reporter furnishing in each case two reports, in one of which he gives the facts, the arguments, and the judgments at length, and in the other an abstract of the decision, conveying the principle

(*a*) 1 Bro. C. C. 451.
(*b*) 16 C. B. 459; Com. Law. Rep. vol. ii. pt. ii. 1452.

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upon which it is founded, and the pith and substance of the case. The defendants have, for the purposes of their digest, copied *verbatim* the head-notes, the shorter species of reports. But if they were allowed to take the head-note, it is plain that they might equally have taken the report. And if they might take either, they might take both, and might republish the entire of the reports, merely altering their arrangement by putting them in an alphabetical order. The question is, whether, by this arrangement of matter, which is taken *verbatim* from the plaintiffs' periodical, they acquire a right so to use it. I think not. I admit that a digest may be made from a copyright work without piracy upon it, but that is a work in which a man applies his mind to the labour of extracting the principles of the original work, and by his labour, really produces a new work. It is not so where he merely reduces extracts or passages of another man's work to an alphabetical order, which is a work a clerk might accomplish, and requires neither learning nor study, but may be little more than a merely mechanical operation of cutting out and classifying under certain letters of the alphabet. In one of the cases cited the 'Term Reports' were so dealt with, and it was held to be a piracy. I think that case is decisive of the present, and therefore that the plaintiffs are entitled to our judgment."

What use of former musical composition constitutes a piracy.

In *D'Almaine* v. *Boosey* (*a*) the question arose as to what imitation or use of a musical composition constituted a piracy. In this case the plaintiffs published, first, the overture to Auber's opera of '*Lestocq*,' and then a number of airs, and all the melodies. It was admitted that the defendant had published portions of the opera containing the melodious parts of it; that he had also published entire airs; and that in one of his waltzes he had introduced seventeen bars in succession, containing the whole of the original air, although he added fifteen other bars which were not to be found in it. It was, nevertheless, contended that this was not a piracy, because the whole of the air

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

had not been taken; and because the latter publication was adapted for dancing only, and that some degree of art was needed for the purpose of so adapting the piece; and, moreover, but a small part of the merit belonged to the original composer. Lord Lyndhurst, then Lord Chief Baron, observed that it was a nice question, what should be deemed such a modification of an original work as should absorb the merit of the original in the new composition. "No doubt," said he, "such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their nature original. Their compiler intends to make of them a new use; not that which the author proposed to make. Digests are of great use to practical men, though not so, comparatively speaking, to students. The same may be said of an abridgment of any study; but it must be a *bonâ fide* abridgment, because if it contains many chapters of the original work, or such as made that work most saleable, the maker of the abridgment commits a piracy. Now it will be said that one author may treat the same subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may in such case be the subject of piracy; and you commit a piracy if, by taking, not a single bar, but several, you incorporate in the new work that in which the whole meritorious part of the invention consists.

"I remember, in a case of copyright, at *nisi prius*, a question arising as to how many bars were necessary for the constitution of a subject or phrase. Sir George Smart, who was a witness in the case, said, that a mere bar did not constitute a phrase, though three or four bars might do so. Now it appears to me that if you take from the composition of an author all those bars consecutively which form

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the entire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them in a different order, or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear. The adding variations makes no difference in the principle."

5. By translation.

5th. Copyright may be infringed by reproducing the whole or part under the form of a translation. Translations are protected in this country, and an unauthorized copy of a translation, though the original be not entitled to copyright here, is a piracy.

Though it does not appear, if the original work be a foreign work, not entitled to protection in this country, and a translation of it be made and published first by A., and a translation be subsequently made and published by B., that this latter would be necessarily a piracy of A.'s translation or an infringement of his right; yet, a re-translation without the consent of the author of the original work is a piracy whenever that original work is entitled to copyright.

In *Murray* v. *Bogue* (*a*), a case respecting an alleged infringement of the copyright in a guide book, the Vice-Chancellor put the following case: If Boedeker's were a translation of Murray's into German, and the other defendant had re-translated Bœdeker's work into English,

(*a*) 1 Drew. 353, 368.

even if he did not know that Bœdeker's was taken from Murray, the plaintiff's book could not be thus indirectly pirated.

By the International Copyright Act, translations, entitled under that Act to protection in this country, are prohibited (*a*).

(*a*) See *post*, chapter on International Copyright, and App. liv.

CHAPTER VII.

REMEDY AT LAW IN CASES OF INFRINGEMENT OF COPYRIGHT.

Three remedies for infringement of copyright.

THERE are three remedies in cases of infringement of copyright—an action at law, a suit in equity, and in some instances by summary proceeding before justices of the peace. We propose to deal, in the first place, with the remedy provided by the 5 & 6 Vict. c. 45.

Remedy for piracy by action on the case.

By the 15th section of this Act, it is provided, that if any person in any part of the British dominions shall print or cause to be printed, either for sale or exportation, any book in which there shall be a subsisting copyright, without the consent in writing of the proprietor, or import for sale or hire any such book unlawfully printed from parts beyond the sea, or knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose for sale or hire, or shall have in his possession for sale or hire, any such book without the consent of the proprietor, such offender shall be liable to a special action on the case, at the suit of the proprietor of the copyright, to be brought in any court of record in that part of the British dominions in which the offence shall be committed: Provided always, that in Scotland such offender shall be liable to an action in the Court of Session, there to be brought and prosecuted in the same manner as any other action of damages to the like amount (*a*). No person except the proprietor of the copyright, or some one authorized by him, may import into the United Kingdom,

(*a*) 5 & 6 Vict. c. 45, s. 15; App. xxvii.

or other parts of the British dominions, for sale or hire, any printed book first composed or written, or printed and published, in the United Kingdom, wherein there is copyright, and reprinted in any country or place out of the British dominions; and if any person, not the proprietor or party authorized by him, shall import or bring, or cause to be imported or brought, for sale or hire, any such printed book into the British dominions, or shall knowingly sell, publish, or expose for sale, or let to hire, or have in his possession for sale or hire, any such book, then every such book shall be forfeited and be seized and destroyed by any officer of the customs or excise, and every person so offending shall, on conviction, forfeit the sum of ten pounds, and double the value of every such book so unlawfully imported, sold, published, or exposed for sale, or let to hire; five pounds to the use of such officer of customs or excise, and the remainder of the penalty to the use of the proprietor of the copyright in such book (*a*).

By the customs laws it is absolutely prohibited to import into the United Kingdom books wherein the copyright shall be subsisting, (first composed, or written, or printed in the United Kingdom, and printed or reprinted in any other country), as to which the proprietor of such copyright or his agent shall have given to the Commissioners of Customs a notice in writing that such copyright subsists, such notice also stating when such copyright will expire.

All copies of any book wherein there may be copyright, and of which entry shall have been made in the registry book, and which shall have been unlawfully printed or imported without the consent of the registered proprietor of such copyright, shall be deemed to be the property of

(*a*) 5 & 6 Vict. c. 45, s. 17; App. xxix. As to separate penalties upon each separate violation of the Act on the same day, see 12 Geo. 2, c. 36, and *Brooke* v. *Milliken*, 3 T. R. 509. A publisher of a piratical work will not be liable at law for the infringement, unless guilty knowledge can be brought home to him; such knowledge will not be presumed from the mere fact of his selling piratical works in print: *Leader* v. *Strange*, 2 Car. & Kir. 1010.

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the proprietor of such copyright; and such proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same, or damages for the detention thereof, in an action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover (*a*).

Notice of objection to plaintiff's title to be given.

The 16th section of the Copyright Act, 1842, enacts that in actions for piracy the defendant shall give notice of the objections to the plaintiff's title on which he intends to rely; and if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person whom he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published; otherwise the defendant in such action shall not, at the trial or hearing of such action, be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication, with the title, time, and place specified in such notice. (*b*)

In *Leader* v. *Purday* (*c*) a gentleman named Bellamy

(*a*) 5 & 6 Vict. c. 45, s. 23; App. xxxii. (*b*) App. xxviii. (*c*) 7 C. B. 4.

adapted words to an old air called 'Pestal,' and procured a friend of the name of Horne to write an accompaniment. The defendant, in an action for piracy of the same, gave notice of the following objections, among others: 'That the plaintiffs were not the owners of the copyright; that there was no subsisting copyright in the musical publication.' It was held that the objection could not be taken by the defendant, *that the copyright of the air was in Horne, and not assigned by writing to Bellamy*, Horne's name not being mentioned in the objections, as required by the above section. This was decided, although the objection appeared upon the plaintiff's case.

Notice of objection by defendant.

The notice of objection is sufficient, if it allege a definite publication of the disputed work at some particular place, by some definite party, either before, or simultaneously with, the publication by the plaintiff, or with a publication in another place (*a*).

When sufficient.

And on application by the plaintiff to have the notice of objections delivered with the defendant's pleas under this same section, amended, it was held that the alleged first publication having occurred abroad, and so far back as the year 1831, it was sufficient for the defendant to state the year of the first publication, and that it was not necessary that he should be bound to specify the day or month; but that he was bound to state the name of the party whom he alleged to be the proprietor or first publisher, the title of the work, the place where and the time when the first publication took place (*b*).

Amending notice of objection.

In *Chappell* v. *Purday* (*c*), however, the defendant was allowed to plead that the plaintiff was not the proprietor of the copyright at the time of commencing the grievance; and also that he was not the proprietor of the copyright when the books were printed.

(*a*) *Boosey* v. *Purday*, 10 Jur. 1038; see *Boosey* v. *Davidson*, 4 D. & L. 147; *Leader* v. *Purday*, 7 C. B. 4; 1 D. & L. 408; *Sweet* v. *Benning*, 16 C. B. 459; Bullen and Leake's 'Pleadings,' 298, 720; and see *Neilson* v. *Harford*, 8 M. & W. 806. For form of particulars of objections, *Cocks* v. *Purday*, 5 C. B. 862.

(*b*) *Boosey* v. *Davidson*, *supra*. (*c*) 1 D. & L. 458; 12 M. & W. 303.

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In any action the defendant may plead the general issue and give special matter in evidence.

The 26th section of the Act enacts that if any action or suit be commenced or brought against any person for doing or causing to be done anything in pursuance of this Act, the defendant may plead the general issue and give the special matter in evidence; and if upon such action a verdict be given for the defendant, or the plaintiff become nonsuited, or discontinue his action, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant has by law in any case.

Construction of the words "in pursuance of this Act."

According to numerous decisions, the words, *in pursuance of this Act*, do not only refer to those who have kept within the strict line of their duty, but also to those who intended to do so, but have by mistake gone beyond it. The general rule seems to be settled, that persons who *bonâ fide* and honestly believe that they are acting in the execution of the powers conferred on them by such a statute as the above, are within its privilege, although, in fact, they may have mistaken the extent of their power and have exceeded it, or failed to comply with the directions of the enactment (*a*).

All actions to be commenced within twelve months.

All actions, suits, bills, indictments, or informations for any offence committed against this Act, must be commenced within twelve calendar months after the commission of the offence; but this limitation does not extend to any actions, suits, or proceedings commenced under this Act in respect of copies of books required to be delivered to the British Museum and the four other libraries (*b*); nor to suits in equity, or to actions at common law for infringement (*c*).

In an action of damages for infringement of copyright, the *locus* of the infringement was not specified; yet the

(*a*) *Smith* v. *Shaw*, 10 Barn. & Cres. 277; cited Burke's Sup. to Godson's Copy, 99; *Gaby* v. *The Wilts and Berks Canal Co.*, 3 M. & Selw. 580; *Theobald* v. *Crichmore*, 1 B. & Ald. 227; *Parton* v. *Williams*, 3 *ibid.* 330; *Smith* v. *Wiltshire*, 2 B. & B. 619; *Cook* v. *Leonard*, 6 B. & C. 351.

(*b*) 5 & 6 Vict. c. 45, s. 26.

(*c*) See the principle on which were decided the cases of *Clark* v. *Bell*, 29 Feb. 1804; Mor. Dict. of Dec. No. 3, App., Lit. Prop.; and *Stewart* v. *Black*, 9 Sess. Cas., 2nd series, 1026.

plaintiff was allowed to amend his statement on payment of expenses incurred since the closing of the record (*a*).

The Act 2 & 3 Vict. c. 22, imposes a penalty of 5*l.* per copy for every omission to print the name and place of abode of the printer, on the first or the last leaf of every paper or book. It is no answer, however, to an action for infringing the copyright of a work, that it was printed and published without the name and residence as required by this Act (*b*).

(*a*) *Graves & Co.* v. *Logan*, 7 Sess. Cas. 3rd series, 204.
(*b*) *Chappell* v. *Davidson*, 18 C. B. 194.

CHAPTER VIII.

REMEDY IN EQUITY IN CASES OF INFRINGEMENT OF COPYRIGHT.

Remedy by injunction.

In equity is to be found the most usual and expeditious means of obtaining redress from piracy, and for preventing the continuance of the injury. "*Melius est in tempore occurrere, quam post causam vulneratam remedium quærere*" (*a*). Here, by the preliminary process of injunction, justice is more readily administered than in a court of law —the property in question protected from, perhaps, irreparable damage pending the trial of the right; and the wrong is not permitted to continue until the final decision of the court, at which time, frequently, from the circumstances of the case, the mischief may be irremediable (*b*).

Where the question of legal injury is referred to a court of law under the sanction of a court of equity, an injunction is granted to restrain the evil complained of until the merits of the case can be finally heard, when, if the opinion of the court of law be in favour of the plaintiff, it will grant its final preventive relief, which, by way of distinction from the temporary process just mentioned, is termed a perpetual injunction.

Definition of an injunction.

An injunction may be described as a prohibitory writ, issuing out of Chancery to restrain the defendant from using some legal right, the exercise of which would be contrary to equity and good conscience; or from doing some act inconsistent with the admitted or probable legal rights of the complainant, and with the due preserva-

(*a*) 2 Inst. 299.

(*b*) *Vide* 2 Story, Eq. Jur. 926; 1 Fonbl. Eq. 34, *notis*; Kerr. on Injunc. 439; *Saunders* v. *Smith*, 3 My. & Cr. 728; *Platt* v. *Button*, 19 Ves. 447.

tion of the property affected by the act sought to be restrained (*a*).

Formerly, courts of equity would not interfere by way of injunction, to protect copyrights any more than patent rights, until the title had been established at law (*b*). Thus, in an anonymous case reported in Vernon (*c*), upon a motion by the king's patentees for an injunction to stay the sale of English Bibles printed beyond the sea, Lord Keeper King refused the application until the validity of the patent had been established at law. The same judge again refused, in a subsequent case (*d*), to grant an injunction against printing Bibles, until the plaintiffs had brought their action in the King's Bench.

Lord Mansfield's opinion upon the issuing of injunctions.

In the general discussion of the common-law right of literary property, in *Millar* v. *Taylor* (*e*), great stress was laid upon the different injunctions which had been granted by courts of equity in favour of such right. Lord Mansfield (who had had very great experience in the Court of Chancery) said, that he looked at the injunctions which had been granted or continued before hearing, as equal to any final decree; for, such injunction never was granted upon motion, unless the legal property of the plaintiff was made out, nor continued after answer, unless it remained clear. The Court of Chancery never granted injunctions in cases of this kind, when there was any doubt. Sir Joseph Yates, on the contrary, in combatting the general common-law right, expressed his opinion that the injunction, being temporary only, decided nothing at all. Lord Camden, in his speech in *Donaldson* v. *Becket*, already referred to, expressed himself upon this part of the argument as follows: "All the injunction cases have been

(*a*) Drewry on Injunc. Intro. 5.

(*b*) 2 Story Eq. Jur. chap. 23. s. 935; *Hills* v. *University of Oxford*, 1 Vern. 275; *Baskett* v. *Cunningham*, 2 Eden, 137; *East India Co.* v. *Sandys*, 1 Vern. 127; *Jefferys* v. *Baldwin*, Amb. 164; *Bateman* v. *Johnson*, Fitz-Gib. 106; *Blanchard* v. *Hill*, 2 Atk. 485. See *Redfield* v. *Myddleton*, 7 Bosw. (Amer.) 649.

(*c*) 1 Vern. 120.

(*d*) *Hills* v. *University of Oxford*, 1 Vern. 275. See *Baskett* v. *Cunningham*, 2 Eden, 137; *Grierson* v. *Jackson*, 2 Ridg. Irish T. R. 304.

(*e*) 4 Burr. 2303.

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ably given; though I shall only add, in general terms, that they can prove nothing if a thousand injunctions had been granted, unless the Chancellor, at the time he granted them, had pronounced a solemn opinion, that they were grounded upon the common law. Lord Hardwicke, after twenty years' experience, in the last case of the kind that came before him, declared that the point had never yet been determined. Lord Northington granted them on the idea of a doubtful title. I continued the practice on the same foundation, so did the present Lord Chancellor. Where then is the Chancellor who had declared, *ex cathedrâ*, that he decided upon the common-law right? Let the decision be produced in direct terms" (*a*).

The modern practice.

The modern practice of granting injunctions is somewhat different; for now, in cases where the circumstances warrant it, the party will be entitled to an injunction, not only to the hearing, but, upon proper application, a perpetual injunction will issue.

Where this remedy applied, and on what evidence.

The jurisdiction will be exercised in all cases where there is a clear colour of title founded upon long possession and assertion of right (*b*). Even an equitable interest limited in point of time or extent is sufficient (*c*). But a mere agent to sell has not such a real interest in a work as will entitle him to relief (*d*). Where the plaintiff states circumstances showing a good equitable title, the court will, for the purpose of determining the fact of piracy, order the defendant to admit the legal title of the plaintiff (*e*). Judge Story remarks: "In some cases a court of equity will take upon itself the task of inspection and comparison of books alleged to be piracies; but the usual

(*a*) Cited from Evans' 'Statutes,' vol. ii. p. 26. *Vide Bruce* v. *Bruce*, cited 13 Ves. 505; *Harmer* v. *Plane*, 14 Ves. 130; *Hogg* v. *Kirby*, 8 Ves. 215, 224; and Lord Erskine, in *Gurney* v. *Longman*, 13 Ves. 493, 505.

(*b*) *Univ. of Oxf. and Cam.* v. *Richardson*, 6 Ves. 689; *Mawman* v. *Tegg*, 2 Russ. 385, 391; *Sheriff* v. *Coates*, 1 Russ. & My. 159, 167; *Colburn* v. *Duncombe*, 9 Sim. 151; *Chappell* v. *Purday*, 4 Y. & C. 485; *Bohn* v. *Bogue*, 10 Jur. 420.

(*c*) *Sweet* v. *Cator*, 11 Sim. 572.

(*d*) *Nicol* v. *Stockdale*, 3 Swans. 687.

(*e*) Kerr on Injunc. 439, citing *Dickens* v. *Lee*, 8 Jur. 183; *Bohn* v. *Bogue*, *supra*; *Sweet* v. *Shaw*, 8 L. J. (N.S.) Ch. 216; *Sweet* v. *Cater*, 11 Sim. 572.

practice is, to refer the subject to a master, who then reports whether the books differ, and in what respects; and upon such a report the court usually acts in making its interlocutory, as well as its final decree" (*a*). And Mr. Curtis, on the same head, says: "In general, if the court sees strong ground for supposing that the defendant's work is a violation of the plaintiff's copyright, the course is to grant an injunction *ex parte*, until answer or further order. Then, in order to ascertain the fact of piracy or no piracy, it is referred to a master to examine into the originality of the new book, or the court takes upon itself the inspection of both works. Where the works are long and of a complex character, containing original matter mixed with much that is common property, they will be referred to a master; but where they are of a class affording facility for the detection of piracy by immediate inspection, the court will examine them" (*b*). At the present day the court usually takes upon itself the inspection of the book (*c*).

Injunction auxiliary to legal right.

In all cases of injunctions in aid of legal rights, whether it be copyright, patent right, or some other description of legal right which comes before the court, the office of the court is consequent upon the legal right; and it generally happens, that the only question the court has to consider is, whether the case is so clear and so free from objection upon the grounds of equitable consideration, that the court ought to interfere by injunction without a previous trial at law, or whether it ought to wait till the legal title has been established. That distinction depends upon a great variety of circumstances, and it is utterly impossible to lay down any general rule upon the subject, by which the discretion of the court ought in all cases to be regulated (*d*).

In what cases it will be granted.

If irreparable damage would be caused to the property

(*a*) 2 Story, Eq. Jur. 124, s. 941; Eden on Injunc. chap. 13, 289; *Carnan* v. *Bowles*, 2 Bro. C. C. 80; —— v. *Leadbetter*, 4 Ves. 681; *Carey* v. *Faden*, 5 Ves. 24; *Jeffery* v. *Bowles*, 1 Dick. 429. (*b*) Curtis on Copy. 325.

(*c*) *Murray* v. *Bogue*, 1 Drew. 368; *Spiers* v. *Brown*, 6 W. R. 352; *Jarrold* v. *Houlston*, 3 K. & J. 708; *Hotton* v. *Arthur*, 1 H. & M. 603; *Pike* v. *Nicholas*, 38 L. J. (Ch.) 529; L. R. 5 Ch. Ap. 251.

(*d*) *Per* Lord Cottenham, in *Saunders* v. *Smith*, 3 My. & Cr. 728.

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of the plaintiff by the refusal of the court to interfere, the injunction will be immediately granted (*a*). If, however, an injunction would cause a severer injury to the defendant than that occasioned the plaintiff by reason of his being required, in the first instance, to establish his legal right, the other alternative will be adopted (*b*).

Equitable remedy refused in cases of a certain description.

Though the author or his assignee may enjoy a *primâ facie* legal title sufficient to support an application for an injunction, yet the subject of his title may be such that, for reasons of morality or public policy, no action at law could be maintained upon it (*c*). The doctrine of equity in reference to works of such a nature is, that if an author can maintain an action he may, at least with some exceptions, come into equity to have his remedy made more effectual. But if the action could not be maintained in the former court, nothing can be done in equity, which is only auxiliary to the law, and therefore gives not relief, except where the law gives damages (*d*). In Scotland the question is disposed of otherwise; the principle adopted in English practice is not sanctioned. Even if property in the work be the sole ground of interdict, the proof of ownership alone (undistracted by any inquiry into the nature or value or subject of it) in that country guides judicial interference. For the use or abuse of that property the law provides another remedy, in administering which, that particular use forms the true point of inquiry.

Scotch law on this subject.

As to the continuation of the injunction, or its dissolution.

It is frequently a matter of difficulty to decide whether the injunction should be continued, or whether it should be dissolved until hearing (*e*). An injunction should in general be granted and maintained in the interim, if the defendant's publication is prejudicial to the plaintiff,

(*a*) *Sweet* v. *Shaw*, 8 L. J. Ch. (N.S.) 266; *Dickens* v. *Lee*, 8 Jur. 183.

(*b*) *Saunders* v. *Smith*, *supra*; *Bramwell* v. *Halcomb*, 3 My. & Cr. 737; *Spottiswoode* v. *Clarke*, 2 Ph. 154, 157; *M'Neil* v. *Williams*, 11 Jur. 344; Kerr on Injunc. 442.

(*c*) *Vide* 2 Mer. 439; *Hime* v. *Dale*, 2 Camp. 31, *notis per* Lord Ellenborough.

(*d*) *Walcot v. Walker*, 7 Ves. 1; *Lawrence* v. *Smith*, 1 Jac. 471; *Murray* v. *Benbow*, 1 Jac. 474, *notis*; *Southey* v. *Sherwood*, 2 Mer. 435.

(*e*) *Bramwell* v. *Halcomb*, 3 My. & Cr. 737; *Univ. of Oxf. and Cam.* v. *Richardson*, 6 Ves. 689.

although the plaintiff's right admits of a fair doubt; but in cases of works the sole or the chief value of which arises from a temporary demand, the court acts upon the opposite principle, and if there be a doubt as to the legal right, does not grant the injunction before the establishment of that right at law (*a*).

Thus, in *Spottiswoode* v. *Clarke* (*b*), the Lord Chancellor laid down the principles which ought to govern the discretion of the court, as follows: "The first question to be determined is as to the legal right, and if the court doubts about that, it may commit great injustice by interfering until that question has been decided."

Where a portion only of the work is piratical.

Where a very large proportion of a work of a piratical nature is unquestionably original, but the parts which have been copied cannot be separated from those which are original without destroying the use and value of the original matter, he who had made an improper use of that which did not belong to him must suffer the consequences of so doing, for an injunction will be issued against the whole.

In cases of this nature the court has first to decide whether there ought to be an injunction; and if there is to be one, it has next to determine whether the injunction should be issued against the entire work, or only against a portion of it. The extent to which the injunction ought to go, must, in each case, depend on the particular circumstances attending it.

The opinion of Lord Hardwicke (*c*) appears to have been that an injunction might be granted against the whole, although only a portion was pirated; and in the instance of Milton's 'Paradise Lost,' with Dr. Newton's notes, there being nothing new in that work except the notes, he granted an injunction against the entire book. There is the record of a case tried before Lord Kenyon (*d*), in which he states that the question whether

(*a*) Curtis on Copy. 317. (*b*) 2 Phillips' Ch. Rep. 154.
(*c*) 4 Burr. 2326. See *Story's Executors* v. *Holcombe*, 4 McLean. (Amer.) 306, 315.
(*d*) *Vide Cary* v. *Longman*, 1 East, 360; *Trusler* v. *Murray*, 1 East, 363.

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an injunction could be issued against the whole of a book on account of the piratical quality of a part, came before Lord Bathurst; and Lord Bathurst seems to have held it could not, unless the part pirated was such, that granting an injunction against such part necessarily destroyed the whole. Lord Kenyon, who possessed great information on this subject, states himself to have been perfectly satisfied with the opinion of Lord Bathurst, as bearing upon the judgment of Lord Hardwicke and the other cases. In the case referred to before Lord Kenyon the declaration at law contained a count for publishing the whole work, and another for publishing a part; and Lord Kenyon's direction to the jury seems to have been to find damages for publishing the part only.

"In the cases which have come before me," said Lord Eldon, in *Mawman* v. *Tegg* (*a*), the case from which we have already quoted, "my language has been, that there must be an injunction against such part as has been pirated; but in those cases the part of the work which was affected with the character of piracy was so very considerable, that if it were taken away there would have been nothing left to publish except a few broken sentences. Now, the difficulty here is this: whether I have before me sufficient grounds to authorize me to say, how far the matter which is proved (if I may use the word) to have been copied, is sufficient to enable me to decide how much I may enjoin against; and if I can be thus authorized to say how much I can enjoin against, then the question is, what will be the effect if that injunction applied to so much of the work, in the state of uncertainty in which we now are? Or whether, on the other hand, as the matter cannot be tried by the eye of the judge, I must not pursue a course which has been adopted in cases of a similar nature, namely, refer it to the Master (*b*) to report to what extent the one book is a copy of the other, upon

(*a*) 2 Russ. 385, 399.

(*b*) *Carnan* v. *Bowles*, 1 Cox. 283, S. C.; 2 Bro. C. C. 85; *Jeffrey* v. *Bowles*, 1 Dick. 429; *Nicol* v. *Stockdale*, 12 Ves. 277; —— v. *Leadbetter*, 4 Ves. 681. In America, in *Smith* v. *Johnson*, 4 Blatch. (Amer.) 252.

the comparison of all the numbers [the works were periodicals] that have been published?

"Another way of ascertaining the facts of the case is to send it to a jury; and, in either of those ways of disposing of it, the court will order the defendant to keep an account of the profits in the mean time. But one difficulty in all these cases is that, though keeping an account of the profits may prevent the defendant from deriving any profit, as he may ultimately be obliged to account to the plaintiff for all his gains, yet, if the work, which the defendant is publishing in the meantime, really affects the sale of the work which the plaintiff seeks to protect, the consequence is, that the rendering the profits of the former work to the complaining party may not be a satisfaction to him for what he might have been enabled to have made of his own work, if it had been the only one published; for he would argue, that the profits of the defendant, as compared with the profits which he, the plaintiff, has been improperly prevented from making, could only be in the proportion of 8*s.*, the price of a copy of the one book, to one guinea, the price of a copy of the other. If the principle upon which the court acts, is, that satisfaction is to be made to the plaintiff, I cannot see, though I never knew it done, why, if a party succeeds at law in proving the piracy, the court could not give him leave to go on to ascertain, if he can, his damages at law; or if, after applying the profits which are handed over to him by the defendants, he can shew that they were not a satisfaction for the injury done to him, I cannot see why the court might not in such a case direct an issue to try what further damnification the plaintiff had sustained."

Due diligence to be observed in obtaining an injunction.

A person who solicits the assistance of the court for the protection of his copyright from violation, must evince due assiduity and diligence in coming to the court. Delay or acquiescence will be fatal to the success of the application, unless it can be satisfactorily accounted for (*a*).

(*a*) *Mawman* v. *Tegg*, 2 Russ. 385, 393; *Baily* v. *Taylor*, Tam. 295; 1 Russ. & My. 73; *Campbell* v. *Scott*, 11 Sim. 31; *Buxton* v. *James*, 5 De G. & Sm. 80; *Tinsley* v. *Lacy*, 1 H. & M. 747.

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In *Mawman* v. *Tegg* five months' delay was adequately explained by the necessity of comparing the whole of the two works for the purpose of discovering the extent of the piracy (*a*).

If the conduct of the party complaining has conduced to the condition of affairs that occasions the application he cannot have relief (*b*). According to 5 & 6 Vict. c. 45, s. 26, all suits and bills should be commenced within twelve months of the offence (*c*).

Methods usually adopted by the court in particular instances.

If the court is satisfied that the alleged title is good, and that there has been a piracy, it may interfere at once and restrain the piracy *simpliciter* by injunction; but if the title is not clear, or the fact of violation is denied, the course the court usually adopts is either to grant the injunction pending the trial of the legal right, or to direct the motion to stand over until hearing, on the terms of the defendant keeping an account of the number of copies sold, in order that justice may ultimately be done between the parties (*d*).

The 25 & 26 Vict. c. 42, commonly known as Rolt's Act, confers upon the Court of Chancery power to determine every question of law and fact incident to the relief sought; and this is now the duty of that court (*e*).

In instances where the publication is of a temporary character.

It is here worthy of remark, that if the work be of such a character that the sale is temporary, the Court of Chancery is more cautious, inasmuch as an intermediate injunction in such a case may be of equal effect with a perpetual injunction (*f*). Where, indeed, an intermediate injunction

(*a*) *Vide Smith* v. *London and S. W. Railway Co.*, 1 K. 408, 412; *Lewis* v. *Chapman*, 3 Beav. 133, 135; *Bridson* v. *Benecke*, 12 Beav. 3; *Lewis* v. *Fullarton*, 2 Beav. 8; *Buxton* v. *James*, *supra*; *Wintle* v. *Bristol and S. Wales Union Railway Co.*, 6 L. T. (N.S.) 20; *Bacon* v. *Jones*, 4 My. & Cr. 433.

(*b*) *Rundell* v. *Murray*, Jac. 311; *Saunders* v. *Smith*, 3 My. & Cr. 711. See also *Lewis* v. *Chapman*, 3 Beav. 135; *Platt* v. *Button*, 19 Ves. 447; *Rundell* v. *Murray*, *supra*; *Campbell* v. *Scott*, 11 Sim. 31.

(*c*) Kerr on Injunc. chap. 20. s. 1.

(*d*) *Ibid.* chap. 20.; *Walcot* v. *Walker*, 7 Ves. 1; *Wilkins* v. *Aikin*, 17 Ves. 422.

(*e*) *Re Hooper*, 11 W. R. 130; 32 L. J. (Ch.) 55; *Baylis* v. *Watkins*, 7 L. T. (N.S.) 843.

(*f*) See *Gurney and Longman*, 13 Ves. 493, *ante*, p. 120.