is granted it does not often happen that the cause is brought to a hearing; for the merits of the case will probably have been discussed upon the motion (*a*), and therefore it rarely happens that a perpetual injunction is decreed (*b*). If, however, the cause should be brought to a hearing, the court will then, if the plaintiff's cause be relieved of all doubt, grant a perpetual injunction (*c*), or it will dismiss the plaintiff's bill (*d*).

As to the piratical copies which may have been sold, the registered proprietor is not entitled in equity to the gross produce of the sale, but only to the *profits* which the defendant may have made by the sale (*e*). Nor will a court of equity grant its assistance to the party seeking its relief, unless he waive the penalty or forfeiture imposed by the Acts of Parliament (*f*).

Direct invasions of copyright by several persons, cannot be restrained in one suit (*g*).

Mode of procedure.

The mode of procedure is extremely simple. A bill is filed by the proprietor of the copyright, stating his title to the original work, the nature of the piracy, and the consequent injury. If the plaintiff has merely an equitable title, the person in possession of the legal title should be made a party (*h*).

Every application for an injunction before answer must be supported by an affidavit of merits verifying the material statements of the bill (*i*); and where the plaintiff had forgotten a material fact when he made his application

(*a*) 4 Burr. 2324, 2400; *Tonson* v. *Walker*, 3 Swans. 672; 2 Eden, 328.
(*b*) 2 Sw. 430. See *Whittingham* v. *Wooler*, 2 Swans. 428, n.
(*c*) *Macklin* v. *Richardson*, Amb. 694.
(*d*) *Dodsley* v. *Kinnersley*, Amb. 403.
(*e*) *Delf* v. *Delamotte*, 3 Jur. (N.S.) Ch. 933; 3 K. & J. 581.
(*f*) *Colburn* v. *Simms*, 2 Hare, 554; see *Geary* v. *Norton*, 1 De G. & Sm. 9; and *Stevens* v. *Gladding*, 17 How. (Amer.) 455; *Mason* v. *Murray*, cited 3 Bro. C. C. 38; *Brand* v. *Cumming*, 22 Vin. Abr. 315, pl. 4.
(*g*) *Dilly* v. *Doig*, 2 Ves. 486; and see *Hudson* v. *Maddison*, 12 Sim. 416; and *Midwinter* v. *Kincaid*, (H. L.), 11 Feb. 1751, 1 Pat. App. 488.
(*h*) *Colburn* v. *Duncombe*, 9 Sim. 151.
(*i*) No affidavit as to the title of the author or proprietor will be received after the defendant's answer has been filed, though affidavits in opposition to the answer may be read as to the facts: *Platt* v. *Button*, 19 Ves. 447; and see *Norway* v. *Rowe*, *ibid.* 143.

for the injunction, and so stated on his oath in answer to a motion to dissolve, his defect of memory was held to be no excuse, otherwise the same excuse might prevail in every case.

Neither the bill nor affidavit needs specify the parts of the work stated to have been pirated, though no copyright is claimed in all the identical passages. The Vice-Chancellor, in *Sweet* v. *Maugham* (*a*), said, "It has always been considered sufficient to allege, generally, that the defendant's work contains several passages which have been pirated from the plaintiff's work. Then, when the injunction has been moved for, the two works have been brought into court, and the counsel have pointed out to the court the passages which they rely upon as shewing the piracy."

But where A. applied for an injunction against the stereotyper, to prevent his selling copies printed by him from advance sheets, furnished him by A., of a work written by B., it was held that, an allegation "That sheets were sent to him for the advantage of said B.," and of himself, was too vague to be made the foundation of an injunction on the ground of protecting B.'s rights (*b*).

If the plaintiff claims as assignee, he must, by affidavit or otherwise, show that the assignment to him has been in accordance with the provisions of the Act (*c*); and if there has been a complete assignment, the assignor should not be made a party to the suit (*d*). Any one associated by the proprietor of a copyright with himself in an entry in the book of registry has *primâ facie* a title to sue jointly with him in a court of equity (*e*).

In the majority of cases, the bill prays that an account may be taken of the books printed, and of the profits

(*a*) 11 Sim. 51. (*b*) *Redfield* v. *Myddleton*, 7 Bosw. (Amer.) 649.

(*c*) *Morris* v. *Kelly*, 1 Jac. & W. 481. He must make a particular title, by tracing his title either to the author or his assign, who alone have title under the statute: *Gilliver* v. *Snaggs*, 2 Eq. Abr. 522; 4 Vin. Abr. 278, A. 4.

(*d*) *Sweet* v. *Maugham*, *supra*; *Colburn* v. *Simms*, 2 Hare, 560.

(*e*) *Stevens* v. *Wildy*, 19 L. J. (N.S.) Ch. 190.

thereof, from the person who has pirated from the plaintiff's works, and moreover that an injunction may be issued to restrain the further sale (*a*).

Should the cause be brought to a hearing, and a perpetual injunction be issued, the right to the account will invariably be decreed as incidental to the plaintiff's other relief (*b*). The account is in practice generally waived; but where it is not, the court grants it upon the principles enumerated in *Colburn* v. *Simms* (*c*). "It is true," said Sir James Wigram in that case, "that the court does not, by an account, accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The court, by the account, as the nearest approximation which it can make to justice, takes from the wrongdoer all the profits he has made by his piracy, and gives them to the party who has been wronged. In doing this the court may often give the injured party more, in fact, than he is entitled to, for *non constat* that a single additional copy of the more expensive book would have been sold, if the injury by the sale of the cheaper book had not been committed. The Court of Equity, however, does not give anything beyond the account."

We will conclude this subject with the words of Sir William D. Evans: "It is clear," says he in the second volume of his 'Statutes' (*d*), "that the proceeding by injunction is the most ready and effectual remedy which can be resorted to on the part of the plaintiff, but that a great degree of caution in the application of that

(*a*) Where in America an account only was sought for, and no injunction applied for, the court held that the party must proceed at law for damages: *Monck* v. *Harper*, 3 Edw. Ch. (Amer.) 109.

(*b*) *Hogg* v. *Kirby*, 8 Ves. 215; *Baily* v. *Taylor*, 1 Russ. & My. 73; *Sheriff* v. *Coates*, 1 R. & M. 159; *Kelly* v. *Hooper*, 1 Y. & Coll. 197; *Grierson* v. *Eyre*, 9 Ves. 341; *Univer. of Oxf. and Cam.* v. *Richardson*, 6 Ves. 689; 2 Story's Eq. Jur. s. 933.

(*c*) 2 Hare, 543, 560.

(*d*) Part iii. class 1, note 29.

CAP. VIII.

proceeding, in the first instance, is requisite for preventing injustice to the defendant, whose loss does not, from the nature of it, admit of reparation if the injunction should, upon further investigation, be found to have been erroneously applied; and the judges of courts of equity have in many cases expressed a strong sense of the importance of this principle."

CHAPTER IX.

CROWN COPYRIGHT.

THE prerogative copyrights of the Crown constitute a peculiar branch of literary property which has given rise to much controversy. Prerogative copyright.

The sovereign's prerogative in granting letters patent for the privilege of printing prerogative copies, as they are called, is said to embrace the English translation of the Bible, the Book of Common Prayer, the statutes, almanacs, and the Latin grammar.

The validity of this privilege has been questioned on the ground that grants of this exclusive nature, tend to a monopoly. They contribute forcibly to enhance the prices of books, to restrain free trade, to discourage industry, and by discountenancing competition they serve to render the patentees careless and remiss in their duty. Notwithstanding, it must be admitted that the sovereign has a peculiar prerogative in printing, which has been vindicated, allowed, and maintained through all ages.

The right is said to be founded on grounds of public policy. Lord Mansfield considered it as merely a modification of the general and common right of literary property; and from the cases which had been decided in favour of the particular copies, he inferred, as a necessary consequence, the existence of the general right. They rested upon property arising from the king's right of original publication. The copy of the Hebrew Bible, of the Greek Testament, or of the Septuagint, did not belong to the king —it was common; but the English translation he bought, and therefore it was concluded to be his property. Nature of the right.

Printing, on its first introduction, was considered, as

CAP. IX.

well in England as in other countries, to be a matter of state. The quick and extensive circulation of sentiments and opinions which that invaluable art produced could not but fall under the gripe of government, whose principal strength was built upon the ignorance of the people governed. The press was, therefore, wholly under the coercion of the Crown, and all printing, not only of public books, containing ordinances, religious or civil, but of every species of publication whatsoever, was regulated by the king's proclamations, prohibitions, charters of privilege, and, finally, by the decrees of the Star Chamber. After the demolition of that odious jurisdiction (*a*), the Long Parliament, on its rupture with Charles I., assumed that power which had previously existed solely in the Crown. After the Restoration, the same restrictions were re-enacted and re-annexed to the prerogative by the statute 13 & 14 Car. 2, and continued down, by subsequent Acts, until after the Revolution. The expiration of these disgraceful statutes, by the refusal of Parliament to continue them any longer, formed the great era of the liberty of the press in this country, and stripped the Crown of every prerogative over it, except that which, upon just and rational principles of government, must ever belong to the executive magistrate in all countries, namely, the exclusive right to publish religious or civil constitutions, in a word, to promulgate every ordinance by which the subject is to live and be governed. These always did belong, and from the very nature of civil government always ought to belong, to the sovereign, and hence have gained the title of "prerogative copies" (*b*).

The Bible and Book of Common Prayer (*c*).

The Bible and Common Prayer Book.

For two hundred years and more the kings have in England granted patents to their printers. From the time of Henry VIII. have different persons enjoyed, by letters

(*a*) "Where change of fav'rites made no change of laws,
And senates heard before they judged a cause"(?)—JOHN.

(*b*) Lord Erskine's Speeches, vol. i. p. 40, by Ridgway.

(*c*) See *Mayo* v. *Hill*, cited 2 Show. 260; *King's Printer* v. *Bell*, Mor. Dict. of Dec. 19–20, p. 8316.

patent, the privilege of printing prerogative copies to the exclusion of all other persons.

These patents have, from time to time, come under the consideration of the courts, and the judges have been invited to settle their limits. Many have given it as their opinion, that the prerogative is founded on the circumstance of the translation of the Bible having been actually paid for by King James, and its having thus become the property of the Crown (*a*). Others have referred it to the circumstance of the king of England being the supreme head of the Church of England, and have invested him with the prerogative in virtue of that character. This latter argument, Mr. Godson (*b*) contends, destroys the proposition it is adduced to support; for, if the sovereign *as head of the church,* has the exclusive right of printing *all books* of Divine service, why not, as head of the church, have a right to print the principal book used in the Divine service—*the Bible*—and all kinds of Bibles, in whatever language they may be written? And yet the principle of *property* is resorted to for the right of printing the present edition of the Bible; and Lord Mansfield has declared that there is no prerogative right to the Bible in the original languages (*c*).

Others again have been of opinion that it is to be referred to another consideration, namely, to the character of the duty imposed upon the chief executive officers of the government, to superintend the publication of the acts of the legislature and acts of state of that description; and also of those works upon which the established doctrines of our religion are founded, that it is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative. That was the opinion of Lord Camden as expressed in the case of *Donaldson* v. *Becket*, and of Chief Baron Skinner in *Eyre and Strahan* v. *Carnan* (*d*).

(*a*) *Nullum tempus occurrit regi. Rex nunquam moritur.*
(*b*) 'Patents and Copyrights,' p. 437.
(*c*) 4 Burr. 2405, cited Godson's Pat. and Copy. 437.
(*d*) Exchequer, 1781, cited 6 Ves. 697, and reported at length in 6 Bac. Abr., tit., Prerog. 509.

CAP. IX.

No attempt has ever been made to prevent any person from publishing a translation of one book, or of a part of the Bible, from the original text, and enjoying a copyright in his production. And, with respect both to Acts of Parliament and Bibles, any one is at liberty to print them *with notes*.

Mr. Reeves, one of the royal patentees, and the writer of several learned juridical publications, in the preface to his edition of the Bible (divided into sections), observes, that all the authorized Bibles published by the king's printer and the universities are wholly without explanatory notes. These privileged persons have confined themselves to printing the bare text, in which they have an exclusive right, forbearing to publish it with notes, which it is deemed may be done by any of the king's subjects as well as themselves. He subjoins to this passage, a note in the following terms: "I mean such notes as are *bonâ fide* intended for annotations, not the pretence of notes which I have seen in some editions of the Bible and Common Prayer Book, placed there merely as a cover to the piracy of printing upon the patentees, as if fraud could make legal anything that was in itself illegal. In some of these editions the notes are placed purposely to be cut off by the binder" (*a*).

View taken in Ireland.

In *Grierson* v. *Jackson* (*b*), upon an application for an injunction against printing an edition of a Bible in numbers with prints and notes, Lord Clare, as Chancellor of Ireland, asked if the validity of the patent had ever been established at law, and said he did not know that the Crown had a right to grant a monopoly of that kind. In the course of the discussion he made the following observations: "I can conceive that the king, as head of the church, may say that there shall be but one man who shall print Bibles and Books of Common Prayer for the use of churches and other particular purposes, but I cannot conceive that the king has any prerogative to grant a monopoly as to Bibles for the instruction of mankind in the revealed religion; if he had, it would be in the power

(*a*) 2 Evans' 'Statutes,' 2nd ed. p. 19. (*b*) Irish T. R. 304.

of the patentee to put what price he pleased upon the book, and thus prevent the instruction of men in the Christian religion. If ever there was a time which called aloud for the dissemination of religious knowledge, it is this, and therefore I should with great reluctance decide in favour of such a monopoly as this, which must necessarily confine the circulation of the book."

View taken in England.

This has not been the view taken of the subject in England, for in the case of the *Universities of Oxford and Cambridge* v. *Richardson* (*a*), an injunction upon motion was granted against the king's printer in Scotland, who had a patent for the sale of Bibles, printing or selling them in England, upon the ground that possession, under colour of title, was sufficient to injoin and to continue the injunction till it was proved at law that it was only colour and not real title. In the course of the case it appeared that, in the year 1718, Sir Joseph Jekyll, as master of the rolls, had granted an injunction in a similar case, which was supported on appeal before the Lord Chancellor; and also, that a decree of the Court of Session had, in the year 1717, been reversed by the House of Lords in favour of the right of the king's printer in England, confining the right of the Scotch printer to Scotland. With respect to the precedent of the injunction, it is clear that there had been abundance of injunctions before upon private copyright, until the claim was finally put an end to by the decree of the Lords; and questions between rival patentees were not the most probable method of bringing into fair discussion the general rights of the subject to resist the claim of prerogative, root and branch (*b*). The Lord Chancellor, in his judgment, said, "My opinion is, that the public interest may be looked to upon a subject, the communication of which to the public in an authentic shape, if a matter of right, is also a matter of duty in the Crown, which are commensurate. It is not accurate to say, these privileges are not granted for the sake of unlimited sale, and for the

(*a*) 6 Ves. 689. See *Manners* v. *Blair*, 3 Bli. R. (N.S.) 391.
(*b*) 2 Evans' 'Statutes,' 2nd ed. 17.

CAP. IX.

sake of the universities, &c. They are, to a certain degree, like all other offices, calculated for that sort of advantage which will secure to the public the due execution of the duty; upon this principle proceed all the branches of our constitution, (which does not adopt the wild theories that require the execution of a duty without a due compensation), that the duty is well secured in one way by giving a responsibility, in point of means, to the person to execute it. The reasoning which affects to depreciate monopoly, will perhaps tend to create it." There certainly is no great risk that false copies of the Bible would get into general circulation by an unlimited right of printing them. We do not find it materially the case in other works; and there are, I conceive, very few persons indeed who would admit that the beneficial circulation of any commodity in general, or of these writings in particular, can be promoted by means of an exclusive monopoly; and the principal object, both of the right and the duty, with respect to the particular subject, appears to be the benefit arising to the privileged individual (*a*).

The question was afterwards brought before the House of Lords, and the injunction against the Scotch printer continued.

The Universities of Oxford and Cambridge and the queen's printer long exercised this monopoly, under patents from the Crown, but the claim has not been very rigidly enforced. The patent granted to the queen's printer expired a short time back, and it was recommended by a committee of the House of Commons that the exclusive privilege of publishing the sacred volume should not be renewed. The House, however, took no action on this recommendation, and the Crown renewed the patent during pleasure.

Acts of Parliament and Matters of State.

The right in state documents.

The exclusive right of printing Acts of Parliament has been regarded somewhat more favourably than the other

(*a*) 2 Evans' 'Statutes,' 2nd ed. p. 18.

branches of the royal prerogative in question. Upon what ground, however, it is in some degree difficult to discover. Lord Clare, while negativing the prerogative in the matter of the Bible, said he could well conceive that the king should have a power to grant a patent to print the statute books, because it was necessary that they should be correctly printed, and because the copy can only be had from the rolls of Parliament, which are within the authority of the Crown.

There was no king's printer by patent till the reign of Edward VI. He, in 1547, granted one to Grafton.

The right seemed to have been in effect recognised and established in the case of *Millar* v. *Taylor*, by the unanimous opinion of the judges, though they differed respecting the origin of it. This is certain respecting its origin, that it has ever been a trust reposed in the king, as executive magistrate, to promulgate to the people all those civil ordinances which are to be the rule of their civil obedience. There are traces of the ancient mode of promulgating the ordinances of the state yet remaining to us, suited to the gloominess of the times when few who heard them could have read them; the king's officers transmitted authentic copies of them to the sheriffs, who caused them to be publicly read in their county court (*a*). When the demand for authentic copies began to increase, and when the introduction of printing facilitated the multiplication of copies, the people were supplied with them by the king's patentee. From such source they were far more likely to be correct and accurate than if obtained from those unable to resort to the fountain head; and our courts of justice appear to have so considered, when they established it as a rule of evidence, that Acts of Parliament printed

(*a*) The statute itself was drawn with the aid of the judges and other grave and learned men, and was entered on a roll called the 'Statute Roll.' The tenor of it was afterwards transcribed into parchment, and annexed to the proclamation-writ, directed to the sheriff of every county in England, and commandment given him, that he should not only proclaim it through his whole bailiwick, but see that it was firmly observed and kept; and the usage was, to proclaim it at his county court, and there to keep the transcript, that whoso would might read or take a copy of it.—Dwarris on Stat. p. 16; 4 Inst. cap. 1.

CAP. IX.

by the king's printer should be deemed authentic, and read in evidence as such.

The patent was to print "all law books that concern the common law." The first case on the subject arose between Atkins, the law-patentee, and some members of the Stationers' Company. The plaintiff claimed under the letters patent. The defendants had printed 'Rolle's Abridgment.' The bill was brought for an injunction, and the Lord Chancellor issued one against every member of the company. The defendants appealed to the House of Lords, but the decree was affirmed.

It was argued that printing was a power of the Crown, acquired by Henry VI. by purchase, the first printer established in England having been brought to Oxford, by Archbishop Bourchier, at that king's expense! (*a*)

Perhaps the most important case on this head is that of *Roper* v. *Streater* (*b*), the facts of which were these:—Roper bought of the executors of Justice Croke the third part of his reports, which he printed; Colonel Streater had a grant for years from the Crown for printing all law books, and he reprinted Roper's work without permission; on which Roper brought an action under the Licensing Act. Streater pleaded the king's grant, and on demurrer it was adjudged for the plaintiff against the validity of the patent, on these grounds: that the patent tended to a monopoly; that it was of a large extent; that printing was a handicraft trade, and no more to be restrained than other trades; that it was difficult to ascertain what should be called a law book; that the words in the patent "touching or concerning the common or statute law," were loose and uncertain; that if this were to be considered as an office, the grant for years could not be good, as it would go to executors and administrators; and that there was no adequate remedy in the way of redress in case of abuses by unskilfulness, selling dear, printing ill, &c. This judgment, however, was reversed on a writ of error in Parlia-

(*a*) 1 Bl. 113; 6 Bac. Abr. 507; Carter, 89; 10 Mod. 105.
(*b*) Skin. 234. See 1 Mod. 257; 2 Show. 260; 10 Mod. 105.

ment, for the following reasons: that the invention of printing was new; that this privilege had been always allowed, which was a strong argument in its favour, although it could not be said to amount to a prescription, as printing was introduced within time of memory; that it concerned the state, and was matter of public care; that it was in the nature of a proclamation, which none but the king could make; that the king had the making of judges, serjeants, and officers of the law; that as to the uncertainty, these words in the patent were to be taken *secundum subjectam materiam*, and not to be extended to a book containing a quotation of law, but where the principal design was to treat on that subject; that as to its being an office, it was not so properly an office as an employment, which may well enough be managed by executors or administrators; and that as to abuses, these, like all others, were punishable at common law, or the patent itself might be repealed by *sci. fac.* (*a*)

In the case of *Baskett* v. *The University of Cambridge* (*b*) the prerogative right of printing Acts of Parliament was sanctioned by a decision of the Court of King's Bench. That case arose upon a bill filed by the plaintiffs for an injunction to restrain the defendants from printing and selling a book entitled 'An Exact Abridgment of all the Acts of Parliament relating to the Excise on Beer, &c." Both parties claimed under letters patent from the Crown; the plaintiffs as the king's printers. The court were of opinion that during the term granted by the letters patent to the plaintiffs, they were entitled to the right of printing Acts of Parliament and abridgments of Acts of Parliament, exclusive of all other persons not authorized to print the same by prior grants from the Crown; but they thought that by the letters patent granted to the university, it was entrusted with a concurrent authority to print Acts of Parliament and abridgments of Acts, within the university, upon the terms contained in those letters patent.

Soon after the Restoration an Act of Parliament having

(*a*) 3 Mod. 77; 6 Bac. Abr. 507. (*b*) 1 W. Bl. 105; 2 Burr. 661.

CAP. IX.

prohibited the printing of law books without the licence of the lord chancellor, the two chief justices, and the chief baron, it became the practice to prefix such a licence to all reports published after that period, in which it was usual for the rest of the judges to concur, and to add to the *imprimatur* a testimonial of the great judgment and learning of the author. This Act was renewed from time to time, but finally expired in the reign of the third William. The form of licence and testimonial, however, was continued till the reign of George II., when the judges seemed to have arrived at the determination not to grant any more of them (*a*). Sir James Burrow offers an apology for publishing his reports without an *imprimatur* (*b*).

As to the publication of proceedings in courts of justice.

Though a court of justice appears to have the sole power of authenticating the publication of its own proceedings, it does not necessarily follow that it has an exclusive right of publication.

Since the year-books, it seems that no judicial proceedings, with the exception of state trials, have been published under authoritative care and inspection, either by the House of Lords or by any court in Westminster Hall.

In *Sayer's Case* (*c*) the judges of the Court of Queen's Bench directed, and in part revised, a report of the trial. The trial of Lord Melville (*d*) was likewise published by order of the Lords; and the person appointed for that purpose by the Lord Chancellor obtained an injunction against a bookseller for publishing another report of the case. *Manley* v. *Owen* (*e*) recognises the exclusive right of the Lord Mayor of London, as head of the commission, to appoint a person to print the sessions papers of the Old Bailey. Formerly, it was held to be a contempt of court to publish any reports whatever, but the practical application of this doctrine was soon relaxed, and publication is

(*a*) Pref. to Dougl. R. (*b*) Burr. R. Pref. viii.
(*c*) 16 How. St. Tr. 93; 8 Parl. Hist. 54.
(*d*) 29 How. St. Tr. 549. See *Bathurst* v. *Kearsley*, cited *Gurney v. Longman*, 13 Ves. 493, 509.
(*e*) Cited *Millar* v. *Taylor*, 4 Burr. 2329. See 13 Ves. 493; *Stockdale* v. *Hansard*, 9 Ad. & E. 1, 97.

now only treated as a contempt in those cases in which the report is published in opposition to an order of the court.

Publication during the course of a trial will be prohibited, when the publication would have a tendency to interfere with a fair and impartial decision; on this principle Lord Abbott, C.J., sitting at the Old Bailey, acted on the indictment of Thistlewood and others for high treason in the year 1820 (*a*). The prohibition was infringed by the proprietor of the *Observer* newspaper, and the proprietor was fined 500*l.* for contempt of court. He appealed subsequently to the Queen's Bench, on which occasion Holroyd, J., in refusing to make absolute a rule *nisi* obtained, said: "This was an order made in a proceeding over which the court had judicial cognizance; the subject matter respecting which it was made was then in the course of judicature before them. The object for which it was made was already, as it appears to me, one within their jurisdiction, viz., the furtherance of justice in proceedings then pending before the court; and it was made to remain in force so long, and so long only, as those proceedings should be pending before them. Now, I take it to be clear, that a court of record has a right to make orders for regulating their proceedings and for the furtherance of justice in the proceedings before them, which are to continue in force during the time that such proceedings are pending. It appears to me, that the arguments as to a further power of continuing such orders in force for a longer period, do not apply. It is sufficient for the present case, that the court have that power during the pendency of the proceedings. This order was made to delay publication only so long as it was necessary for the purposes of justice, leaving every person at liberty to publish the report of the proceedings subsequently to their termination. I am therefore of opinion, that this was an order which the court had the power to make."

Publication of *ex parte* statements

A criminal information will lie for publishing an *ex parte* statement of the proceedings upon a coroner's inquest,

(*a*) *Reg.* v. *Clement*, 4 Barn. & Ald. 218.

CAP. IX.

upon a coroner's inquest.

accompanied with comments, although the statement be correct, and the party has no malicious motive in the publication. Mr. Justice Bayley on one occasion observed that it was a matter of great criminality; for the inquest before the coroner leads to a second inquiry, in which the conduct of the accused is to be considered by persons who ought to have formed no previous judgment in the case. A jury who are afterwards to sit upon the trial ought not to have *ex parte* accounts previously laid before them; they ought to decide solely upon the evidence which they hear upon the trial (*a*).

No prerogative claim to the exclusive publication of judicial proceedings has now been asserted for very many years, and in *Butterworth* v. *Robinson* (*b*), and *Saunders* v. *Smith* (*c*), individuals were treated as authors and proprietors of copyright in law reports (*d*).

Almanacs.

As to the right in almanacs.

The origin of this absurd claim is put upon still more ridiculous grounds. Property in almanacs is said to be the king's: 1st, because derelict; 2nd, because they regulate the feasts of the church (*e*).

On the 8th of March, 1615, the king by letters patent granted to the Stationers' Company and their successors for ever (*inter alia*) exclusive power and licence to print, or cause to be printed, "all manner of almanacs and prognostications whatsoever in the English tongue, and all manner of books and pamphlets tending to the same purpose, and which are not to be taken and construed other than almanacs or prognostications being allowed by the Archbishop of Canterbury and the Bishop of London, or one of them, for the time being."

In an action of debt by the *Company of Stationers against Seymour* (*f*), for printing 'Gadbury's Almanac,' it was ad-

(*a*) *Rex* v. *Fleet*, 1 Barn. & Ald. 379, 384. (*b*) 5 Ves. 709.
(*c*) 3 My. & Cr. 711, and *Vesey* v. *Sweet*, cited 5 Ves. 709, note 3.
(*d*) Phillips on Copy. 196.
(*e*) 2 Show. 258; *Stationers' Co.* v. *Wright*, 2 Ch. Cas. 76.
(*f*) 1 Mod. 256.

judged that the letters patent granted to the company for the sole printing of almanacs were valid; and though the jury found that the almanac so printed contained some additions, yet having likewise found that the said almanac had all the essential parts of the almanac that was printed before the Book of Common Prayer, the additions were regarded as immaterial.

So also was an injunction granted against Lee (*a*), on the application of the Stationers' Company, to restrain him from selling "primers, psalters, *almanacs*, and singing psalms, imported from Holland," the sole privilege of printing these belonging to that company; and that without any trial directed as to the validity of the patent. Notwithstanding the above decisions, the prerogative right to the printing of almanacs was strongly protested against in the case of the *Stationers' Company* v. *Partridge* (*b*). No judgment, indeed, was given in that case, but it stood over that the company might see if they could make it like the case of the Common Prayer Book,—whether they could show that the right of the Crown had any foundation in property; and it was never referred to again.

In a subsequent case, that of the *Stationers Company* v. *Carnan* (*c*), the right was successfully combated, and judgment given in favour of the defendant. An account of these various phases of legal doubt and indecision is succinctly given by Lord Erskine in *Gurney* v. *Longman* (*d*): "It appears in the case of *Millar* v. *Taylor* that the Crown had been in the constant course of granting the right of printing almanacs; and at last King James II. granted that right by charter to the Stationers' Company and the two universities, and for a century they kept up that monopoly by the effect of prosecutions. At length Carnan, an obstinate man, insisted upon printing them. An injunction was applied for in the Court of Exchequer, and was granted to the hearing; but at the hearing, the Court of Exchequer directed the question to

(*a*) 2 Ch. Ca. 76, 93; 2 Show. 258.
(*b*) 10 Mod. 105, cited 2 Bro. P. C. 137.
(*c*) 2 Wm. Bl. 1004.
(*d*) 13 Ves. 508.

CAP. IX.

be put to the Court of Common Pleas, whether the king had a right to grant the publication of almanacs, as not falling within the scope of the necessity or expediency, the foundation of prerogative copies. It was twice argued in the Court of Common Pleas; and the answer returned by that court to the Court of Exchequer was, that the charter was void, and almanacs were not prerogative copies. The injunction was accordingly dissolved, that usurpation having gone on for a century; and the House of Commons threw out a bill, brought in for the purpose of vesting that right in the Stationers' Company."

In consequence of this decision, an Act was passed, which, after reciting, that the power of granting a liberty to print almanacs and other books was theretofore supposed to be an inherent right in the Crown, and that the Crown had, by different charters under the great seal, granted the universities of Oxford and Cambridge, among other things, the privilege of printing almanacs; and that the universities had demised to the Company of Stationers their privilege of vending almanacs and calendars, and had received an annual sum of £1000 and upwards as a consideration for such privilege, and that the sum so received by them had been laid out and expended in promoting different branches of literature and science, to the great increase of religion and learning and the great benefit and advantage of these realms; and that the privilege or right of printing almanacs had been, by a late decision at law, found to have been a common right, over which the Crown had no control and consequently the universities no power to demise the same to any particular person or body of men, whereby the payments so made to them by the Company of Stationers had ceased and been discontinued, enacted that £500 a year should be paid to each of the universities, out of the moneys arising from the duties upon almanacs (*a*).

Any person may now make the calculations usually published in almanacs, and claim a copyright therein.

(*a*) 21 Geo. 3, c. 56, s. 10.

The Nautical Almanac.

A power was given by Act of Parliament to certain commissioners, to publish a 'Nautical Almanac, or Astronomical Ephemeris,' and to *license* some one to print it. Any other person printing, publishing, or vending it, subjects himself to a penalty. The 'Nautical Almanac' is now, however, placed under the control of the Lords of the Admiralty, and the penalty is increased to £20, with costs of suit, to be paid and applied to the use of the Royal Hospital for Seamen at Greenwich (*a*).

As to the Latin grammar.

The claim to the prerogative right in 'Lilly's Latin Grammar' was founded on an allegation that the work had been originally written and composed at the king's expense. Mr. Justice Yates observed in *Millar* v. *Taylor* that the expense of printing prerogative books was "in fact no private disbursement of the king, but done at the public charge, and formed part of the expense of government." How, then, could they be his private property, like private property claimed by an author in his own compositions? (*b*) The claim has long been abandoned.

(*a*) 9 Geo. 4, c. 66.
(*b*) See *Stationers' Co.* v. *Partridge*, 4 Burr. 2339, 2382, 2402; 10 Mod. 105; *Nicol* v. *Stockdale*, 3 Swans. 687.

CHAPTER X.

UNIVERSITY AND COLLEGE COPYRIGHT.

Copyright at the universities and colleges.

UPON the introduction of the art of printing into England by Henry VI. a press was set up at Oxford; and an important dominion over the publication of books was, for many years, very naturally assumed by that learned body. The sway was extended to the sister university, and increased in power by charters and grants conferred upon them by the liberality and bounty of several kings.

Immediately after, and in consequence of, the decision in *Donaldson* v. *Becket* (*a*), the universities hastened to Parliament, and in the same year obtained an Act (*b*) for enabling the two universities in England, the four universities in Scotland, and the several colleges of Eton, Westminster, and Winchester, to hold in perpetuity their copyright in books given or bequeathed to them for the advancement of useful learning and other purposes of education.

The right exists in all such books as had, before the year 1775, or have since, been given or bequeathed by the authors of the same, or their representatives, to or in trust for those universities, or any college or house of learning within them, or to or in trust for the colleges of Eton, Westminster, and Winchester, or any of them, for the beneficial purpose of education within them or any of them.

The exception in favour of the universities and colleges is to extend only to their own books, so long as they are printed at the college press and for their sole benefit; and any delegation of the right works a forfeiture, and the privilege becomes of no effect.

(*a*) 4 Burr. 2408. (*b*) 15 Geo. 3, c. 53; App. vi.

As to their registration and sale.

A power is given to the universities to sell or dispose of the copyrights given or bequeathed to them, but if they delegate, grant, lease, or sell the copyright of any book, or allow any person to print it, their privilege ceases to exist. The copyright of any work presented to the universities must be registered at Stationers' Hall within two months after any such gift shall come to the knowledge of the officers of the universities.

By an Act passed in the forty-first year of Geo. 3, c. 107 (*a*) a similar copyright is given to Trinity College, Dublin. And by the 27th section of the 5 & 6 Vict. c. 45 (*b*) the rights of the respective universities and colleges above enumerated are saved from the operation of the Copyright Act.

(*a*) App. xii.

(*b*) App. xxxiii.

CHAPTER XI.

MUSICAL AND DRAMATIC COPYRIGHT.

Dramatic compositions within the Literary Copyright Act.

DRAMATIC compositions, when in manuscript, are protected like other literary compositions; when printed and published they are books within the meaning of the Literary Copyright Act.

The point whether there could be copyright in a musical composition first came before Lord Mansfield in *Bach* v. *Longman*. It was a case sent out of Chancery for the opinion of the Court of King's Bench: "Whether, in a composition for the harpsichord, called a *sonata*, the original composer had a copyright?" The opinion given, was that the same rules of law apply both to literary and musical compositions. It was said that the words of the Act of Parliament were very extensive: "Books, or other writings," and consequently they were not confined to language and letters only. Music is a science; it may be written, and the mode of conveying the ideas is by signs and marks. If the narrow interpretation contended for were to hold (*i.e.*, confined to books only), it would apply equally to mathematics, algebra, arithmetic, or hieroglyphics. The case being one sent out of Chancery, the certificate of the judge was: that a musical composition is a writing within the statute of 8 Anne, c. 19, and that of course the plaintiff was entitled to the copyright given to the author by that Act.

Now, by the interpretation clause of the 5 & 6 Vict. c. 45, the word "book," in the construction of the Act, is to mean and include "every volume, part or division of a

volume, pamphlet, sheet of letterpress, *sheet of music*, map, chart, or plan separately published."

Musical compositions intended for the stage come under the head of dramatic compositions.

Formerly representation not equivalent to publication.

In an early case, it was declared that the acting a play was not a publication of it; and by analogy, it was subsequently held, at common law, that the mere *acting* of a play which had been printed and published did not constitute a piracy or an infringement of the copyright (*a*).

In the former case, the plaintiff was the author of a farce called 'Love à la Mode,' consisting of two acts, which was performed, by his permission, several times at the different theatres in successive years, but was never printed or published by him. When the farce was over he used to take the copy away from the prompter, and when it was played at the benefits of particular actors he made them pay a certain sum for the performance. The defendants, who were proprietors of a magazine, employed a shorthand writer to take down the words of the play at the theatre, and thus published the first act, giving notice that they would publish the second, in their next number. An injunction, however, was obtained on the ground that acting a play was not a publication of it (*b*).

The latter case was an action on the Statute of Anne, for publishing an entertainment called 'The Agreeable Surprise.' The plaintiff had purchased the copyright from O'Keefe, the author, and the only evidence of the publication by the defendant was the representation of the piece upon his stage at Richmond. It was held that there was no publication; the statute for the protection of copyright only extending to prohibit the publication of the work itself by any other than the author (*c*).

When the play is an abridgment or alteration of a

(*a*) In equity, injunctions have been granted to stop the performance of printed dramatic works at the request of the authors of them: *Morris* v. *Harris*, *Morris* v. *Kelly*, 1 Jac. & W. 481; cited Godson on 'Patents and Copyrights,' 390.

(*b*) *Macklin* v. *Richardson*, Amb. 694; but see 5 & 6 Vict. c. 45, s. 20.

(*c*) *Coleman* v. *Wathen*, 5 T. R. 245; see, however, 5 & 6 Vict. c. 45, s. 20.

CAP. XI.

former dramatic representation, no action can be maintained by the original author. Thus where Lord Byron's tragedy of 'Marino Faliero,' altered and abridged for the stage, was performed without the consent of the owner of the copyright, who applied for an injunction, it was laid down, that an action could not be maintained, "for publicly acting and representing the said tragedy, abridged in manner aforesaid (*a*)."

The 3 & 4 Will. 4, c. 15, to amend the law relating to dramatic copyright.

The many defects existing in the law of dramatic copyright led to the passing of the 3 & 4 Will. 4, c. 15 (*b*), which gave to the author, or his assignee, of any printed and unpublished tragedy, comedy, play, opera, farce, or other dramatic piece or entertainment (*c*), the sole right of having it represented in any part of the British dominions; and to the author, or his assignee, of any such dramatic production which was printed or published after the passing of the Act, or ten years before, the sole right of representation from the time of publication, or of the passing of the Act, for a period of twenty-eight years, or, if the author were living at the end of that time, for the remainder of the author's life. And further enacted, that if any person should represent, or cause to be represented, without the consent in writing of the author or other proprietor, at any place of dramatic entertainment, any such production, or any part thereof, every such offender should be liable for each and every such representation to the payment of an amount not less than 40*s.*, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages, to the author or other proprietor of such production so represented, to be recovered, together with double costs of suit.

Double costs were taken away in all cases by the 5 & 6

(*a*) *Murray* v. *Elliston*, 5 Barn. & Ald. 657. (*b*) App. xv.
(*c*) In *Lee* v. *Simpson*, 3 C. B. 871, it was determined that a pantomime, or rather the introduction to one, which is the only written part of the entertainment, is protected from piracy under this Act.

Vict. c. 97, and the plaintiff can now only recover a full and reasonable indemnity as to all expenses incurred, to be taxed by the proper officer in that behalf.

Provisions of the 3 & 4 Will. 4, c. 15, extended to musical compositions, and representation made equivalent to publication.

The provisions of the 3 & 4 Will. 4, c. 15, are extended to musical compositions, and the term of copyright as provided by the 5 & 6 Vict. c. 45, applied to the liberty of representing dramatic pieces and musical compositions, by the 20th section of the latter Act (*a*), which enacts that the sole liberty of representing or performing, or causing (*b*) or permitting to be represented or performed, any dramatic piece or musical composition shall endure and be the property of the author thereof and his assigns for the term in the Act provided for the duration of copyright in books (*c*); and the provisions thereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were therein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of the Act, to the first publication of any book: provided always, that in case of any dramatic piece or musical composition in manuscript, it shall be sufficient for the person having the sole liberty of representing or performing, or causing to be represented or performed, the same, to register only the title thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor thereof, and the time and place of its first representation or performance.

Omission to register does not affect the copyright.

Pursuant, however, to the 24th section of the same statute, the omission to register will not prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece has by virtue of this Act or of the 3 & 4 Will. c. 15.

There are several points which we propose now to con-

(*a*) App. xxxi. (*b*) See *Parsons* v. *Chapman*, 5 Car. & Payne, 33.
(*c*) Strictly, a copyright song cannot be publicly sung, or a tune publicly played, without the permission of the composer or his assigns.

CAP. XI.

sider in the order in which they are enumerated in the sections before us.

As to the consent of the author.

The penalties are only incurred if the representation be without the *consent in writing of the author or other proprietor.* The consent may be given by the author's agent, and it has been decided that the Dramatic Authors' Society is agent to its members, for the purpose of authorizing managers of theatres to perform pieces composed by its members (*a*).

The consent may apply to works not in existence at the time it is given. It is not as it is under the Statute of Frauds, which expressly requires that the contract shall be signed by the party to be charged; and even that is satisfied, if it is signed in his name by an agent duly authorized so to sign. It is very rarely the case that a document required by the law need be wholly in the handwriting of the party on whose behalf it is to be given. The present statute does not require signature, nor the *handwriting* of the author. All that it requires is that there should be his consent, and that it should appear in writing (*b*).

Performance at a place of dramatic entertainment.

Again, although by a former Act the performance which is alleged to be an infringement of the original right must have taken place at some place of dramatic entertainment, for the author to have maintained an action, yet the above provision does not appear to be so restrictive. It has never been judicially decided that an infringement which is not committed in a place of dramatic entertainment would be the subject of an action; but, from the general aspect of the above, we are inclined to think that it would. The question was raised in *Russell* v. *Smith* (*c*), but the judges did not express an opinion upon it, because the case was decided upon other grounds. Mr. Russell, who was the composer of a song called 'The Ship on Fire,' brought an action against a man of the name of Smith for singing the same song, among others, at an entertain-

(*a*) *Moreton* v. *Copeland*, 16 C. B. 517; S.C. 24 L. J. (C.P.) 169; *Fitzball* v. *Brooke*, 2 Dow. & Lown. 477; *Shepherd* v. *Conquest*, 25 L. J. (C.P.) 127; 17 C. B. 427.

(*b*) *Per* Maule, J., in *Moreton* v. *Copeland*, *supra*.

(*c*) 12 Q. B. 217.

ment which he opened at Crosby Hall, Bishopsgate, and to which he gave admission by shilling and two-shilling tickets. The building called Crosby Hall belonged to a literary institution, and contained a large room in which elocution classes met periodically, but which, at other times, was let out for concerts and musical entertainments. It had been hired for recitations intermixed with songs, and for performances of ventriloquy; and a music licence had been taken out for it under statute 25 Geo. 2, c. 36. On the trial it was objected that Crosby Hall was not a "place of dramatic entertainment" within the meaning of statute 3 & 4 Will. 4, c. 15, s. 1 (*a*), referred to by statute 5 & 6 Vict. c. 45, s. 20 (*b*). But Lord Denman held, that as Crosby Hall was used for the public representation for profit of a dramatic piece, it became a place of dramatic entertainment for the time within the statutes in question. "The use for the time in question," added the learned chief justice, "and not for a former time, is the essential fact. As a regular theatre may be a lecture-room, dining-room, ball-room, and concert-room on successive days, so a room used ordinarily for either of those purposes would become for the time being a theatre, if used for the representation of a regular stage play. In this sense, as 'The Ship on Fire' was a dramatic piece in our view, Crosby Hall, when used for the public representation and performance of it for profit, became a place of dramatic entertainment."

In an action for penalties brought under the 3 & 4 Will. 4, c. 15, the declaration stated that the plaintiff was the author of a certain dramatic piece or musical composition, &c., and that defendant caused the said piece to be represented at a certain place of dramatic entertainment, &c., whereby, &c. It was determined, first, that the introduction of a pantomime was a dramatic entertainment within the meaning of the statute; secondly, that it was not necessary to allege in the declaration, or to prove at the trial, that the defendant knew that the

(*a*) App. xv. (*b*) App. xxxi.

CAP. XI.

plaintiff was the author; thirdly, that the allegation in the declaration, that the same was represented at a certain place of dramatic entertainment, was sufficient.

Punishment for infringement not to be visited on one not actually taking part in the performance.

Though it was here decided that a person ignorant of the piratical nature of a representation may be an offender within the meaning of the Act, yet one cannot be considered a transgressor of the provisions of the statute, so as to subject himself to an action of the above nature, unless he himself, or his agent, actually takes part in the representation which is a violation of copyright. Were it to be otherwise held, all those who supply some of the means of representation to him who actually represents, would have to be considered as thereby constituting him their agent, and thus *causing* the representation, within the meaning of the Act; such a doctrine would embrace a class of persons not at all intended by the legislature (*a*).

A person, therefore, who lets for hire by the evening a place of dramatic entertainment for the public performance of songs and music, and provides the hirer, who performs songs and music which he has not liberty to perform, with lights, benches, &c., is not liable to pay damages to the author for causing or permitting to be represented or performed a musical composition without the author's written consent (*b*).

This doctrine was followed in *Lyon* v. *Knowles* (*c*). The defendant, the proprietor of a theatre, allowed one Dillon to have the use of it for the purpose of dramatic entertainments. The defendant provided the band, the scene-shifters, the supernumeraries, the money-takers, and paid for printing and advertising. Dillon employed his own company of actors and actresses, and selected the pieces which were to be represented, free from control on the part of the defendant. It was arranged that the money taken at the doors should be divided equally between the defendant and Dillon. During the period of such occupation of the theatre by Dillon, certain pieces

(*a*) *Russell* v. *Briant*, 19 L. J. (C.P.) 33; 14 Jur. 201; 8 C. B. 836.
(*b*) *Ibid.* (*c*) 11 W. R. 266; 32 L. J. (Q.B.) 71; 10 L. T. (N.S.) 876.

were performed which the plaintiff had the sole liberty of representing or causing to be represented; and it was held, in an action to procure the penalties imposed by the above sections, that the plaintiff could not recover, inasmuch as, under the circumstances, the defendant was not shewn to have represented, directly or indirectly, the said dramatic pieces. If the representation of the pieces could have been considered a joint act of the defendant and Dillon, the defendant would have been liable. The defendant had no right to interfere in the choice of the pieces to be represented; and in short, though the proprietor, he was not the manager. Neither was he a partner; for the receipt of the moneys at the door was a receipt of gross proceeds, not net profits, and was merely a mode of receiving and securing the rent. There was an agreement between them to divide the gross receipts in lieu of payment of a specific sum as rent. But this did not make them partners. The defendant, then, having no control over the performances, could not be said to have caused them to be represented, and was consequently not liable. The defendant, to have been made liable, must have been shewn to have been either the partner or principal of Dillon, the person who actually directed the representation (*a*).

Representing, within the meaning of the Act, is defined to be the bringing forward on a stage or place of public representation; and the question whether in any particular case the act done amounts to a representation, is a proper question for a jury.

If the words of one song only be taken from a musical or dramatic piece protected by the Act, or be sung on a stage or in any place of theatrical entertainment, without the permission of the proprietor, the representation will be actionable (*b*).

A song which related the burning of a ship at sea and the escape of those on board, describing their feelings in vehement language, and sometimes expressing them in

(*a*) *Lyon* v. *Knowles*, 11 W. R. 266; 3 B. & S. 556; affirmed on appeal 5 B. & S. 751; 12 W. R. 1083; 10 L. T. (N.S.) 876.

(*b*) *Planché* v. *Braham*, 1 Jur. 823; 8 C. & P. 68; 4 Bing. (N.S.) 17.

CAP. XI.

As to what is a dramatic piece.

the supposed words of the suffering parties, was considered dramatic, and consequently within the meaning of the statute, even though it was sung by one person only, sitting at a piano, giving effect to the verses by the delivery, but not assisted by scenery or appropriate dress (*a*).

That the whole is expressed in music makes no difference. The early Greek drama was musical throughout; so in the modern Italian Opera. Nor can any distinction arise from the want of scenery or appropriate dress; an oratorio has neither, yet it is often dramatic. Nor, again, is it material that no second person performs. No one would suggest that Mr. Matthews' representations, or the readings of Shakespeare by Mrs. Siddons or Mr. Charles Kemble, were not dramatic. The character of Elijah is essentially a dramatic one, requiring, however, not dramatic action, but dramatic sentiment, in order to delineate it. Sometimes the wrath and gloom of such a character must be displayed, at other times the most pathetic tenderness. If the character of drama were denied to this species of entertainment, nothing short of requiring all the ingredients of a play would be admitted as a dramatic representation. If the interpretation clause of statute 5 & 6 Vict. c. 45 (*b*) be referred to, it will be remarked that the second section declares that "dramatic pieces" within that Act include "tragedy, comedy, play, opera, farce," or "other scenic, musical, or dramatic entertainment." These words comprehend any piece which can be called dramatic in its widest sense; any piece which, on being presented by any performer to an audience, will produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience (*c*).

Assignment of the right.

By the 22nd section of the 5 & 6 Vict. c. 45 (*d*) it is enacted that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition, shall be holden to convey to the assignee the right of representing or performing such dramatic piece or

(*a*) *Russell* v. *Smith*, 12 Q. B. 217.
(*b*) App. xxii.
(*c*) Lord Denman, J.C., in *Russell* v. *Smith*, 12 Q. B. 217; 17 L. J. (Q.B.) 225.
(*d*) App. xxxii.