fact that no money was taken makes no difference. In the case of an amateur performance of a play before a small audience it is sometimes difficult to say whether the performance was in public or not. Clearly a performance in the nature of a charade before a family audience is not public, but the mere fact that the general public is not fully admitted does not conclusively prevent a performance being an infringement. There is, for instance, no doubt that the author's permission must be obtained before his play can be performed before a Sunday play society. There is no hard and fast rule for deciding borderline cases. The courts simply look at all the facts and rely on their common sense to decide whether a particular performance was given to a genuinely "private and domestic" audience or to a limited section of the general public. The taking of money, though irrelevant in the case of a performance which is clearly public, may be taken into account in deciding borderline cases, for it would be difficult to contend that a performance before however small and limited an audience was not "public" if any sort of charge were levied upon that audience. The reasonable basis of the matter is that if a performance is of such a nature that a profit might have been made or that authorized profit-making performances might have been interfered with, then the performance is an infringement, whether or not it can be precisely proved that the defendant has in fact made a profit or the plaintiff in fact suffered a loss.

PLAGIARISM

In the two preceding sections we have been considering what degree of reproduction or performance taken directly from the work of another person amounts at law to an infringement of his copyright. In many cases, however, the work complained of merely bears a close

resemblance to the plaintiff's work, and the latter is therefore concerned to prove, not merely that publication or performance took place, but that the work so exploited was, despite differences of detail, taken from his own.

To establish such a charge of plagiarism it is necessary to show:

(*a*) That the defendant's work is copied from the plaintiff's;

(*b*) That a substantial part was copied, and

(*c*) That the part copied was copyright.

Copyright is not a monopoly. If two persons quite independently write what is to all intents the same story, neither has infringed any rights of the other. There is no question of "first come first served." But if two stories do resemble each other very closely it will be difficult to convince the Court that the second was not in fact copied, either directly, or from conscious or unconscious memory, from the first.

Having established that use has been made of his work, the plaintiff has still to show that a substantial part has been copied and that that part consists of copyright matter. In this connection it is to be noted that the word "substantial" refers to the importance of what is copied no less than to its length. What authors seem to find it difficult to understand is that there is *no copyright in an idea*, but only in its detailed working out. It is perfectly lawful to adopt the basic idea of a previous writer and write a new story round it, for a mere idea is too unsubstantial to be the subject of copyright. The difference between writing a new story on the same theme and writing the same story in altered words is easy enough to grasp, but in practice it is sometimes hard to draw the line. Borderline cases can only be decided by common sense.

A point which not infrequently arises in cases of alleged

infringement, especially of theatrical sketches is that although the defendant may have taken his plot in some detail from the plaintiff's play, the plot did not originate there but was an immemorial stock plot in which no living person has any exclusive rights. A similar point is sometimes taken in cases of alleged plagiarism of a popular song.

There is *no copyright in mere information* however much trouble and original work may have been involved in obtaining it, for copyright is intended to protect the concrete expression of information and ideas, and not intellectual work in general. It is, therefore, no infringement to make use of items of information derived from an earlier work. If, however, substantial informative passages are reproduced whole, either in their original form or only slightly altered, an infringement certainly takes place, in virtue of the copying of the first writer's *expression* of his information. Here again it is difficult to draw a precise line between what is lawful and what is not, but in practice the courts are likely to be influenced in borderline cases by the existence or probability of direct competition between the old and new works.

TRANSLATIONS AND ADAPTATIONS

As has been explained above it is an infringement of copyright to reproduce a work in a different form or in a different language no less than in its original form.

Before, therefore, another person can translate a dramatic or literary work, convert a novel into a play, make a new arrangement of a musical work, or an engraving of a painting, or otherwise adapt any copyright work, permission must be obtained from the owner of that part of the copyright concerned. Such permission having been obtained and the translation or adaptation duly made, the second author will at once enjoy a new

copyright in so much of the adapted work as is his own creation. It is important to distinguish between the different rights which will then exist in the new work. The Translation Right is simply the right of the original author to forbid or allow his work to be translated and thereafter printed and performed in the translated version. The translator's copyright in his translation is quite distinct and in no way derived from the original author. The concurrence of the holders of both rights is necessary for the exploitation of the new version. The translator can do nothing without the permission of the owner of the translation rights, but the latter cannot exploit this particular translation without the leave of the translator; he can, however, have another translation made (in the absence of agreement to the contrary).

In the case of old works it is worthy of note that the two rights will in all probability expire at different times; the Translation Right will become common property fifty years after the death of the author of the original work, but the copyright in the translation will last until fifty years after the translator's death.

The same considerations arise in the case of an old work which has never enjoyed copyright or was out of copyright before it was translated or adapted. In such circumstances the translator or adaptor acquires an ordinary new copyright in his own particular adaptation, but no rights over the original work. If, for example, a musician notes down the tunes of a traditional peasant air he will be in a position to prevent anyone copying out his own notation but cannot prevent anyone going to the original sources and making a fresh notation. This is so even if he "discovered" the sources himself, for there is no copyright in mere information.

COMPILATIONS

The copyright existing in a compilation is similar to that in a translation or adaptation, in that it is quite distinct from the separate copyrights which may exist in each of the separate items and is frequently the property of a different person. Anyone who makes a digest, anthology or other similar work, the compilation of which requires skill or judgment, enjoys this special copyright in the work as a whole and can restrain other persons from copying his arrangement, although he cannot, of course, prevent them issuing the same items in their own arrangement independently made.

To reproduce a modern anthology in full or nearly in full it is, therefore, necessary to obtain permission from the editor (who has a copyright in the work as a whole) and also from the author of each of the separate works included. To reproduce one only of the works, however, it is only necessary to approach the individual author.*

There may be a compiler's copyright in a collection of non-copyright material such as words, phrases, or information. There has, for instance, been held to be a copyright in a meaningless collection of words suitable for use as a telegraphic code. There is also an important copyright, not infrequently enforced by legal action, in directories of all kinds. The existence of this copyright may sometimes seem difficult to reconcile with the principle that there is no copyright in mere information, but the solution lies in the fact that protection is given to the collection of items and not to each item separately. It is therefore quite legitimate when writing a different sort of book, to instruct oneself with information from works of reference, but it would be an infringement of copyright

* This paragraph is of course written on the assumption that none of the rights have been assigned. In practice the editor or publisher may be in a position to act for all parties.

to reproduce a substantial part of that information *in extenso*. When making another directory or guide book of approximately the same kind the principle to be borne in mind is that infringement lies in copying, not in using; it has been judicially held to be a piracy of one street directory by another when the entries from the first were copied out by the compiler of the second and then verified by personal inspection, but not where the information was collected afresh in a house-to-house visitation guided by the earlier work.

LECTURES

Copyright exists in all written lectures, including speeches and sermons. But it is no infringement to publish a newspaper report of a lecture given *in public* unless reporting is specially forbidden by a conspicuous notice at the entrance and also, except in the case of a sermon, near the lecturer. Even where such notices are displayed, a fair summary may be published. It is, moreover, in no circumstances an infringement of copyright to publish a full newspaper report of a public *political* speech.

LETTERS

A letter is regarded by the law as an ordinary literary work and the copyright, naturally, belongs to the writer. To post a letter to another person does not amount to an assignment of copyright, although it usually transfers the property in the actual paper and dried ink. Consequently publication normally requires the concurrence of both the writer and the addressee, for although the former retains the sole right to reproduce, the latter owns the letter itself and cannot be compelled to give it up or to lend it for the purpose of copying. Of course, if the writer has kept a copy, he is independent of the addressee.

The copyright in an unpublished letter is perpetual so long as it remains unpublished. Therefore, however long the writer may have been dead, the owner of the letter itself cannot publish it or authorise its publication without the consent of the legatee, possibly at second or third hand, of the writer's copyrights.

RECORDS AND MECHANICAL RIGHTS

It is an infringement of copyright, subject to the exception mentioned below, to make a gramophone record or other similar device by means of which a work can be mechanically reproduced. It is also, of course, an infringement of the Performing Rights to perform a work by means of such a record, but the expression "Mechanical Rights" is usually understood to refer solely to the quite distinct right of making the record. The term "Mechanical Royalties" means royalties paid by recording companies for the right to make records and has nothing to do with performing fees. A grant of the right to print and publish a work does not carry these special Mechanical Rights, but a general grant of Performing Rights does include the right to perform by means of a record, just as it includes the right to perform by any other means.

The sound-track now used in *talking films* is regarded as a record, and consequently a company wishing to film a work must acquire not only the right or licence to perform it by cinematography but also that part of the Mechanical Rights which consists of the right to make a sound-track. The manufacturers of the old silent films did not require Mechanical Rights, and accordingly most Film Agreements made before the invention of talking films were only concerned with the Performing Rights. Companies holding such agreements are therefore not entitled, without entering into a new arrangement, to remake such old films as talking films. But neither, of

course, is the author, for although he still has the Mechanical Rights he has parted with the Film Performing Rights (or "Silent Film Rights"). Unless, therefore, the two parties can get together no talking film can be made. Some old agreements, however, were so widely phrased that they unwittingly conveyed all the rights necessary for making a talking film.

It has recently been judicially held that gramophone records are themselves the subject of a separate ordinary copyright, including Performing Right, quite apart from the rights in the music, in the same way that, as described above, there is a copyright in a translation distinct from the rights in the original work. Accordingly, before a gramophone record can be played in public it is necessary to obtain permission not only from the composer (or his assignee) but also from the record manufacturer.

To the general rule stated above that to make a record of a work without the copyright-owners' permission is an infringement of copyright there is still an important and anomalous exception, much resented by composers. At the instance of record and music-box manufacturers a provision was inserted in the present Copyright Act to the effect that if the owner of a *musical* work has once given permission for it to be recorded, any manufacturer can thereafter without coming to any arrangement with the owner, make other records, subject only to the payment of a small royalty fixed by the Act. It is sometimes not realised that if a piece of music is with the composer's assent broadcast and simultaneously, as not infrequently happens, recorded for retransmission, the composer has thereby lost his control over the work, and anyone is at liberty, upon fulfilling the somewhat complicated statutory provisions, to make a record of it without his approval.*

*See also Copyright Act, 1911, Sec. 19.

DURATION OF COPYRIGHT

The normal period of copyright is during the author's life and for fifty years thereafter. In *joint works*, where the work of the two collaborators is for practical purposes inseparable, the copyright lasts until fifty years after the death of the one who dies first, or until the death of the second, whichever period is longer. The copyright in a *photograph* lasts until fifty years after the negative was made. Similarly the copyright in a record lasts until fifty years after the making of the original plate or matrix. The copyright in *Posthumous works*, i.e., works not published or performed until after the author's death, lasts in the case of literary, dramatic and musical works and engravings for fifty years from first publication or performance.

Despite the simplicity of the rules set forth above, considerable difficulty is often experienced in deciding whether an old work is still copyright owing to the fact that the present rules have only been in force since 1912. Before that date the law as to the duration of copyright was quite different and much less simple, and only works which were still in copyright under the old law in July 1912 come under the provisions of the new.

Copyright formerly endured in the case of literary works, maps and published dramatic and musical works for *either* the life of the author and seven years, *or* for forty-two years from publication, whichever period was longer. The term for engravings was twenty-eight years from publication, for sculpture fourteen, or in some cases twenty-eight years from publication, and for paintings, drawings and photographs, seven years from the author's death.

It has only been possible here to give a very rough and incomplete outline of the old law, which is of extreme complication and uncertainty. In all cases of the least

doubt it is wise to take expert advice. The following dates, however, provide a simple clue in the case of literary and published dramatic and musical works, which are the most frequent objects of enquiry.

Any such work is out of copyright if:

(*a*) The author died before July 1905, *and* it was first published before July 1870,

or

(*b*) The author died fifty years ago.

To state the same another way round: any work is still in copyright if:

(*a*) The author lived until July 1905,

or

(*b*) It was first published after June 1870, *and* the author lived until fifty years ago (1884).

NON-EXCLUSIVE COPYRIGHT

Twenty-five years after the death of the author of a published work (or twenty-five years after publication or performance of a posthumous work) anyone is at liberty to republish the work without permission, provided he gives the prescribed notice to the author's representatives, and pays them the prescribed royalty of ten per cent. It should be noted that despite any assignment or agreement made by the deceased author it is his representatives (i.e., usually his family) who are entitled to receive the statutory royalties, and not anyone to whom he may have sold any of his rights.* In the case of works which were copyright at the passing of the present Act the period is thirty years instead of twenty-five.

* This does not apply to works of which the author was not the first owner of copyright. In these cases it is the owner who is entitled to the royalties.

LEGAL PROCEEDINGS

No action in respect of infringement of copyright may be begun more than three years after the infringement.

The persons who may be sued include not only those who have themselves reproduced or performed the work or done so by their servants but also anyone who has authorised an infringing act (e.g., anyone purporting to grant permission for the use of a work of which he is not the copyright owner or which contains plagiarisms). Liability is, furthermore, especially placed upon the following classes:

(i) Anyone who
- (*a*) sells ;
- (*b*) lets for hire;
- (*c*) offers for sale or hire;
- (*d*) distributes commercially *or* so widely as to be damaging;
- (*e*) imports

any work which he knows to be an infringement.

(ii) Anyone who for his private profit permits a theatre or other place of entertainment to be used for a performance that he knew or had reason to suspect would be an infringement.

It should be carefully noted that these special grounds of liability are additional to the ordinary grounds. It is therefore no defence to a person directly responsible for an infringement to plead that he lacked the guilty knowledge or private gain required only by these extra provisions.

A successful plaintiff is entitled to Damages and an Injunction. Damages may, at the plaintiff's discretion be estimated on the basis of the actual loss caused to him by the infringement, either by way of diminution of his ordinary receipts or his failure to be paid in respect of the infringing copies or performances. He may therefore

claim the fee which he could reasonably have demanded had his permission been sought. There is, however, a useful provision of law to the effect that all infringing copies are the property of the copyright-owner. It is often preferable to base the claim to damages upon this ownership of the pirated copies as it is then possible to claim the full value of all copies sold, together with the delivery up of all remaining copies. It is usual, though not obligatory, to require the destruction of the latter. If the piracy was especially flagrant or was calculated to injure the plaintiff's reputation the damages may be increased at the jury's reasonable discretion.

An Injunction is an order of the Court addressed to the defendant ordering him, under severe penalties, to cease further infringement in the manner complained of. In a case where small damage has yet been suffered it may be the more valuable form of redress. If only a portion of a work is piratical the injunction against further reproduction or performance and the order for delivery up of remaining copies will be limited to that part, provided it can be conveniently separated from the rest of the work; otherwise the injunction and order will apply to the entire work.

Summary Criminal Proceedings may also be taken in certain circumstances against persons *wilfully* making or distributing infringing copies or giving infringing performances, and search warrants may be issued. Small fines or, for second offences, imprisonment up to two months may be imposed.

Foreign Copyright

A. BERNE CONVENTION

The Berne Convention is an international treaty which was originally signed at Berne in 1886, and has since been supplemented and modified by additional treaties

signed at Berlin and Rome. Its effect is to form all the signatory countries, which now include all British territories, most of Europe, Japan and a few other states, into an International Copyright Union. Authors belonging to any Union country enjoy copyright for their works throughout all other Union countries without any formality, and the copyright laws of all Union countries are practically the same.

The only important differences between the laws of any of the other Union countries and those of England are:

(i) That in the following countries no copyright is enjoyed in newspaper and magazine contributions unless it is expressly claimed by a printed notice:

Sweden
Denmark
Finland
Holland
Greece
Rumania
Siam

and (ii) that in the following countries the right of an original author to control translations of his work lapses unless an authorised translation into the language of the country has appeared within ten years of the publication of the original:

Esthonia
Greece
Holland
Irish Free State
Italy
Japan
Jugoslavia
Siam

The Members of the Union at the beginning of 1934 were as follows:

Australia, Austria.
Belgium, Brazil, Bulgaria.
Canada, Czechoslovakia.
Dantzig, Denmark.
Esthonia.
Finland, France and possessions.
Germany, Great Britain and possessions (including British India but not the Native States), Greece.
Haiti, Holland and possessions, Hungary.
Irish Free State, Italy.
Japan, Jugoslavia.
Liechtenstein, Luxemburg.
Monaco, Morocco.
New Zealand, Norway.
Poland, Portugal and possessions.
Rumania.
Siam, Spain, Sweden, Switzerland, Syria and Lebanon.
Tunis.
Union of South Africa.

B. UNITED STATES OF AMERICA

The U.S.A. is not a member of the Copyright Union, and protection in that country can only be obtained by British authors subject to various complicated and onerous formalities. It is hoped that the American law may soon be so amended as to bring it into line with that of other civilised countries and render it possible for the United States to join the Union.

Books. To secure American copyright in a book first published in the United Kingdom it is necessary that within 60 days of English publication a copy of the work be sent to the Register of Copyrights at the Library of Congress, Washington, together with a fee of two dollars and the appropriate printed form claiming *Ad Interim*

Copyright. The book is thereby protected for a period of 120 days from the date of registration. Unless within that period the work is separately printed and published in the United States from type set up there, and a further claim made, American copyright is lost. A further condition is that all copies of the American edition must contain on the title page or the page immediately following it a copyright notice in the form prescribed by the American Act. This consists of the word Copyright followed by the name of the copyright owner and the year of first American publication.

The loss of American copyright may in some cases be a very serious matter since copyright in that country is not divisible, as it is here, and failure to secure it will mean that the film, dramatic and all other subsidiary rights become public property so far as the U.S.A. is concerned.

Plays and Music need not be separately printed in America but all copies must bear the copyright notice and be submitted for registration immediately on publication.

American copyright lasts for 28 years from first registration, at the end of which period it can be renewed by special application for a further 28 years but no longer. It is thus possible for a long-lived author to outlive the copyright in his early works. In the case of an author dying during the first period of 28 years the second period can only be claimed by his family, and not by any person to whom he may have sold his rights.

C. OTHER COUNTRIES

In the ARGENTINE protection is accorded to foreigners under a new and somewhat ambiguous Act which has not yet been interpreted by the courts. Protection is presumed to be subject to registration and payment of a fee.

In various other SOUTH AMERICAN republics it is possible to obtain copyright for works published in the United States, subject to various formalities, but in practice such copyright is rarely worth the trouble and expense involved in obtaining it.

In EGYPT there is no systematic law of copyright but a fairly effective protection is granted by the courts under their equitable jurisdiction.

Many of the NATIVE INDIAN STATES have no regular copyright law but discourage deliberate piracy by executive action.

In CHINA protection is granted to foreign "works useful to the Chinese" an expression which has been held to include modern dance music. The effectiveness of this protection varies with local conditions.

In RUSSIA there is no general law of copyright but a few foreign authors of outstanding popularity are granted royalties as a special favour, usually, however, with the proviso that the money must be spent in that country.

LIBEL

MANY authors are still unaware that it is possible to libel a person of whom they have never even heard. Unfortunately this strange rule of law is known only too well to a number of obscure individuals in various parts of the country whose constant prayer it is that they may some day recognize themselves in a novel, and so be in a position to blackmail the author into setting them up for life. No amount of care, least of all the notice that "all the characters in this novel are fictitious," can assure absolute safety from this peril, but some acquaintance with the elements of the law of libel should enable an author at least to go the right way about taking such precautions as are possible.

WHAT IS A LIBEL?

A libel for which a plaintiff can obtain damages is any written matter which is (1) defamatory; (2) untrue; (3) communicated to a third party, and (4) understood to refer to the plaintiff.

(1) *Defamatory*

A defamatory statement is one which by attacking the plaintiff's moral character or fitness to carry on his occupation, tends to "cast him into hatred, ridicule or contempt." Mere vulgar abuse or lies which do not fulfil these conditions do not amount to libel, though the latter, if causing loss, may be actionable on other grounds.

(2) *Untrue*

The truth of the matter complained of is a complete defence to a libel action, but it is often very difficult to prove the strict truth of a general statement, and honest belief in its truth is no defence. It is important to notice that what has to be proved true is not the literal meaning of the statement, but the inner meaning and implications reasonably arising from it.

(3) *Communication*

Communication of the defamatory statement to some third party is essential, but wide dissemination is not. It would, for instance, be possible to bring an action in respect of a libel contained in an unpublished MS. which had only been seen by a publisher's reader, though in such a case the damages would not be so high as if the book had been published.

(4) *Reference to Plaintiff—Intent*

It is no defence for an author to prove that he did not intend to refer to the plaintiff. It is only necessary for the plaintiff to convince the court that the passage

in question might reasonably be believed by readers to be a reference to himself. Thus anyone having the same name and not being quite obviously unlike a character in a novel, may be able to claim that what is said of the character refers to himself; and where the description tallies more exactly the identification may be established even in the absence of any similarity of name. If, for instance, a novel contains an unsympathetic character who is described as a doctor who is fond of yachting and has for *locale* a fictitious South Coast town, some real doctor who does do a little sailing and lives in an actual town on the South Coast, but is entirely unknown to the author, may claim that all his friends are saying the book is about him.

It is probably safer not to use extraordinary names for bad characters, since if there should be a real person of that name it will be more difficult to deny that he was referred to. Similarly, it is safer to use a real and correctly named place as a setting for a novel, for it is then comparatively simple to take all the obvious precautions against including an unwitting portrait of some actual resident, whereas, if a fictitious town is used, the area within which would-be victims may identify themselves is indefinitely widened. If, for example, a story be placed frankly in Bexhill, it is quite possible to make sure that none of the doctors living in that town at all resemble one's own vicious doctor, and that no one there of any profession bears the same name; but if, instead, the town were called "Brightbourne-on-Sea," one would have to anticipate attacks from every resort on the entire South Coast and the task of forestalling them would be superhuman.

Two Bills have been promoted by the Society of Authors with the object of abolishing a novelist's liability for unintentional libel where all reasonable care has been taken, but neither Bill was favourably received.

Fair Comment

In general, if one is proved to have written defamatory words of the plantiff one can only escape liability by proving them to be strictly true. In the interests of free discussion, however, an exception has been established in the case of fair comment upon a matter of public interest.

Matters of public interest fall into two classes, first, matters such as public administration and the conduct of the national services, which are from their nature fit topics for the freest public discussion, and, second, any matter which has been deliberately placed in the public gaze by the persons concerned, such as a published book, a performed play, or a publicly exhibited work of art. Upon private affairs, comment must be more than fair, it must be completely justifiable in all details.

"Fair" in the sense in which it is used in the defence of Fair Comment, means honest rather than fair in its ordinary sense. To achieve immunity the critic need only show that he wrote honestly, expressing his candid opinion, however wrongheaded, and was not actuated by any hidden motive, such as personal antipathy.

Finally the words must amount to genuine comment as opposed to allegation of fact. Comment is merely the critic's opinion, arising from facts correctly stated. Without a clear statement of the facts on which it is based, what would otherwise be a comment becomes a statement of fact, and loses its immunity. If, for instance, one says "Brown has sold his copyright; he must be out of his mind," the second part of the sentence is mere comment—the critic's own opinion—whereas if one only says "Brown seems to be out of his mind," without saying why, one is making a statement, not a comment, and can only escape liability by proving its truth.

LEGAL CONSEQUENCE OF LIBEL

Who Can Sue?

(*a*) If a defamatory statement is made of a general class, such as solicitors or publishers, no member of that class can bring an action, nor can any representative body, such as the Law Society, or the Publishers' Association bring an action on behalf of the class.

If, however, the statement is made of a small determinate group, such as the jury in a particular case, so as to cast an imputation upon everyone of them, then any of them may bring an action on his own account.

Moreover, if indeterminate words are used in circumstances which make it clear that a particular person is in fact referred to, that person can sue. Normally, for instance, to say "All publishers cook their accounts" would give no one a right of action, but if the same remark were made by an author who had only had dealings with one particular publisher with whom he was known to be on bad terms, that publisher might have grounds for an action.

(*b*) No one can sue in respect of a libel upon a person who is dead.

Who Can be Sued?

The actual offence in libel consists in communicating the libellous passage, not in originating it. Consequently everyone who is concerned in the publication and distribution of a libel is guilty of the offence. The parties usually sued are the author, because it is his fault, and the publishing and printing companies, because they can pay damages. It is, however, quite possible to sue also the author's typist, the compositors and machinists who actually printed the book, the publisher's travellers, and every bookseller and librarian who knowingly handled a copy.

A victorious plaintiff can extract his damages from any of the guilty parties, or a little from each, as he pleases, but, if he takes the whole amount from one, that one cannot compel the others to repay him their share.

If the author has died before the action is brought, his executors can be sued.

Damages

Contemptuous damages—usually a farthing—are awarded where the plaintiff is technically entitled to succeed but the jury considers the action ought never to have been brought. In such a case the defendant will not usually be ordered to pay the plaintiff's costs.

Nominal damages—often forty shillings—will be awarded if the jury considers that, while the action was necessary to restore the plaintiff's reputation, no actual damage has been suffered, and the defendant is not deserving of any censure.

Ordinary damages—amounting to the jury's rough estimate of the sum which will fairly compensate the plaintiff for his actual injuries—are awarded in the normal case.

Vindictive or Exemplary damages—a large arbitrary sum having no relation to the extent of the injury suffered—are awarded primarily to penalise the defendant when the jury considers his conduct particularly disgraceful.

Owing to the difficulty of assessing actual damage, and the great latitude allowed to juries in libel actions, the sum awarded is in the majority of cases arrived at from a combination of the last two principles and is apt to be much influenced by the jury's opinion of the parties. Consequently, lack of intent to libel, though not a complete defence, will generally reduce the damages, while obvious malice, or failure to do what is possible to minimise the injury, will increase them.

If the character of the plaintiff is so bad that it is unlikely to be harmed by the defendant's libel, evidence of general bad reputation may be given, in mitigation of damages. No specific evil actions, however, (other than the one mentioned in the libel) may be proved; the evidence must be confined to reputation.

Injunction

Less valuable to the speculative litigant, but of more importance in genuine cases, is the Injunction—an order by the Court prohibiting any further dissemination of the libel. Disregard of an Injunction may result in imprisonment for an indefinite term. An interlocutory Injunction taking effect before the trial of the main issue, will only be granted in the case of a particularly damaging libel where there appears to be little or no prospect of a successful defence.

Criminal Libel

If a libel is so offensive and of such a kind that its dissemination is calculated to cause a breach of the peace, it is possible, instead of bringing an action for damages to institute criminal proceedings, resulting, if successful, in punishment instead of compensation. Prosecutions for criminal libel were once an important element in political life, but to-day they have fallen largely into disuse and are not favoured by the judges. It should be noted, however that although a civil action for damages cannot be brought in respect of a libel upon a dead person or upon a class, the perpetrator of such a libel may in certain circumstances be criminally prosecuted.

Blasphemy or Blasphemous Libel

Prosecutions for Blasphemy are closely similar to prosecutions for criminal libel. It is no longer regarded as an offence to attack the Established Church or the

Christian religion in a spirit of honest controversy, but a merely provocative attack upon any existing religion is an offence just in so far as it is calculated to result in disorder.

Obscene Libel

"Obscene Libel" is the formal name for obscenity, but, as this offence has nothing to do with libel in the ordinary sense, it is dealt with separately below.

OBSCENITY AND CENSORSHIP

Books

Strictly there is no censorship of books. That is to say, there is no authority whose permission is necessary prior to publication; nor is there even any official whose special duty it is to watch out for objectionable books and ban them subsequently.

The publication of an obscene or blasphemous book is simply a criminal offence and, as in the case of many other minor offences, it may be noticed and result in a prosecution, or it may not. This accounts for the apparent inconsistency between the suppression of some books and the unimpeded publication of others having the same alleged defects.

When objection is taken by the authorities to any book, its obscenity must be proved in a court before it can be suppressed. There are two alternative procedures:

(*a*) The author (and/or any other person responsible) may be prosecuted for "publishing an obscene libel" and punished as an ordinary criminal. In a recent case the author of some alleged obscene verse was sent to prison although the verse had only been shown to the printer and was intended for private circulation.

(*b*) Special summary proceedings may be taken before a petty sessional court under Lord Campbell's Obscene

Publications Act, 1857, for the destruction of the stock without the infliction of any further penalty upon the author. This is the procedure usually adopted in the case of serious works whose "obscenity" is open to doubt. Apart from the somewhat illiberal attitude of the magistrates administering this Act the chief objection to proceedings under it is that the author is not a necessary party to them and so may have his work condemned behind his back.

A legal definition of obscenity is matter "the tendency of which is to deprave or corrupt those whose minds are open to such immoral influences and into whose hands such a publication may fall." Proof of innocent intention is no defence.

Theatres

No new or partly new play may be performed in Great Britain without the licence of the Lord Chamberlain, which may be refused or subsequently revoked without any stated reason. The licence is obtained on the application of the first manager producing the play. The application must be made at least a week before production and must be accompanied by a complete script of the play and an examination fee of two guineas. If a certified copy is required an additional copy and a further fee of ten shillings must be sent.

Local authorities outside Central London and Brighton have power to ban a play licensed by the Lord Chamberlain, but they cannot authorise the performance of a play to which his licence has been refused.

Films

Control over the exhibition of films is vested in the local authorities alone. Their prior permission is not required for the presentation of a film, but if their ideas of propriety are disregarded they can close down the

offending cinema. In practice all films are submitted to the entirely unofficial British Board of Film Censors and the local authorities nearly always tacitly endorse its decisions. They can, however, and sometimes do, ban films which the Board has passed and allow films which it has refused to certify.

AGREEMENTS

by

D. KILHAM ROBERTS, Barrister-at-Law

FAR too many authors—even authors of experience—never look further than the royalty clause in their agreements. Provided that in their new agreements they are getting a slightly higher percentage and a slightly higher advance than they have been used to their pen flies to the dotted line. As for the young author, as often as not he is so eager to burst into print that he omits to examine even the royalty clause.

Only a few months ago an author who had succeeded in placing his first novel with an English publishing house of good reputation and standing asked me to let him have my views on the agreement which had been submitted to him. He remarked that he presumed that it was all right but would feel happier if I glanced through it before he signed it. It proved to be one of the most iniquitous documents I have ever seen. The royalty terms were fair enough for a first novel, but the publishers not content with demanding control of all the rights including the dramatic and film rights, and 50 per cent. of any proceeds accruing from their disposition, actually had the effrontery to include a provision to the effect that the author should give them the first refusal of all his future novels. In other words, the author was to be bound to that particular firm for the whole of his literary career. It is true that such of his work as the firm might reject he would be free to endeavour to place elsewhere, but an author's prospects of inducing a publisher to take one of his books with the knowledge that another firm

has an option on that author's subsequent work are so thin as to be almost invisible.

My advice to the author was that rather than sign such a document it would be better, if no other firm would take the book, to forego its publication altogether. Fortunately the publishers proved fairly amenable. They agreed to reduce their demand for all rights to one for book rights in the British Empire. They accepted a clause providing for the termination of the agreement in certain specified events, and in place of an option on all future novels they consented to an option on four only, the option clause to cease to be operative if they rejected any of the four. Not an ideal agreement even in its final form, but a great improvement on the one originally proposed.

In another case a brilliant young novelist had got himself tied up to a second-rate publishing firm under an option clause for six novels. After his first novel appeared excellent offers were forthcoming from leading publishers for his next book but the firm with which he had been foolish enough to contract insisted on holding him to the strict letter of his agreement although his books were totally unsuited to their list. In consequence, he became disheartened, the quality of his work deteriorated, and when ultimately the last of the option novels had been published and he was at length free the enthusiasm of other firms had waned to something less than a polite interest.

It is not, however, only of the option clause that an author has to beware when an agreement is submitted to him for signature. I have known numerous cases in which an author who was an authority on a particular subject has assigned his copyright or right of publication in an important book on that subject to his publishers with the result that it has been practically impossible for him to write again on that subject without infringing

what had been but was no longer his own copyright. Happily, in nearly all these cases the publishers concerned were willing to waive their power of restraint. Even so, it is as inadvisable as it is undignified for an author to put himself in a position in which he is dependent upon the generosity of his publishers and although it is rarely that a reputable and long-established publishing house will insist on exacting every pound of flesh to which under its agreement it may be legally entitled, it is wiser for an author to treat his agreement from the outset as a document correctly setting out the terms by which he expects his publisher to abide and by which he is no less prepared to abide himself.

Although in this introductory note I have referred merely to two of the principal pitfalls for which an author should be on the lookout before entering into an agreement with a publisher there are many others which, if overlooked, may prove little less serious in their consequences, while in the case of agreements for the production of a play or the sale or lease of film rights as great, or perhaps greater caution has to be exercised.

In the series of articles which follows I have done my best to analyse briefly but in detail agreements of various kinds and to recommend clauses which, though they are not always included in the printed forms in use by publishers and managers, most of the leading publishers or managers are generally prepared to include if asked to do so.

PUBLISHERS' AGREEMENTS

The days when it was customary for an author to assign his copyright to his publisher in return for a lump sum payment usually ridiculously disproportionate to the value of his work are now happily past. Nowadays the Royalty Agreement is in general use between the leading

publishers and their authors and it is chiefly with the Royalty Agreement in its various forms that I propose to deal here. First, however, I will refer briefly to Outright Sale, Commission Agreements and Profit-Sharing Agreements.

OUTRIGHT SALE

Outright sale of copyright for an agreed sum is rarely —perhaps never—to be recommended. It is a survival from the days when copyright meant, for all practical purposes, merely the exclusive right of publication in book form. So long as it was possible to gauge approximately a book's potential circulation and the profit to be anticipated, the value of a copyright could be fairly accurately estimated. But to-day, when a book's circulation may be anything from two hundred to half a million, whilst the various subsidiary rights—the film rights in particular—may prove either valueless or worth thousands of pounds, any arrangement for an outright sale of copyright must be a sheer gamble in which the author is almost certain to come off second best.

COMMISSION AGREEMENTS

It is obvious that if a book has commercial possibilities one of the thirty or forty important publishing houses will recognise its potentialities and be prepared to undertake publication at its own risk. It is equally obvious, therefore, that an author who decides to finance the publication of his own book when he has failed to find a publisher willing to publish it on the ordinary royalty basis cannot expect to make a profit or even to recover more than a small part of his outlay. In consequence, Commission Agreements are, save in exceptional circumstances, to be discouraged. Many of the better publishers

refuse to handle books on commission in any circumstances whatsoever; the others confine their commission publishing to authoritative books on subjects of so specialised an interest that prospective purchasers can be more or less named in advance. In such cases it may be advisable for the author whose authorship is only incidental to his profession to spend two or three hundred pounds to have his book published under a worthy imprint. This applies particularly to important medical works, the publication of which may add considerably to the professional reputation of their authors.

Poetry also is occasionally published on commission by publishers of good standing, but original and interesting work in this field will usually find a publisher prepared to face the probability of losing fifty pounds or so for the satisfaction of enjoying a *succès d'estime*.

As for novels, it cannot be emphasised too strongly that no firm of standing will publish works of fiction on commission and that publishers offering to do so should be given a wide berth.

The author who contemplates publishing his book on commission, whatever its type or subject, must go warily. Before committing himself he should make sure that the firm with which he is negotiating is honest and reputable, a step all the more essential in view of the fact that shark publishers are found in great numbers in "commission" waters waiting to prey on the "vanity" author.

In this connection it is to be noted that shark publishers frequently disguise the fact that the author is paying for the production of his book by calling his payment merely "a contribution towards the cost." The soundest advice for any author who is thinking of putting up money for or towards the publication of his work is to consult the Society of Authors.

In regard to the actual terms of commission agreements

it is only necessary to say that submission and approval of specimens of type, paper, binding and lettering and a detailed estimate should be a condition-precedent to the signing of the agreement and that it should be provided in the agreement that the type, paper, binding, etc., of the book as published shall be identical with the specimens approved and that the author shall be liable for the actual cost of each item of production up to but not exceeding the figure quoted for it in the estimate. A date on or before which publication is to take place, the price at which the book is to be published and the number of copies of which the edition is to consist as well as the number to be bound on publication should all be stated. There should be an accounts clause prescribing the dates and basis on which the publisher is to render and settle accounts, including discount to be allowed to booksellers (usually 25 per cent. or 33⅓ per cent. of the published price) and the publisher's own commission on sales (which should not exceed 25 per cent. of the receipts). It should also be unequivocally provided that all rights in the work as well as the stock are the author's property, but that the publisher shall have an exclusive licence to sell copies in certain specified territories for a specified term of years after which he or the author shall be at liberty to terminate the agreement by a quarter's notice in writing. There should also be a provision entitling the author to terminate at any time if the publisher goes into liquidation or commits an act of bankruptcy, or if the edition sells out, or if the publisher fails to fulfil any of his obligations under the agreement and has not remedied his failure within a fortnight after receiving notice from the author calling upon him to do so. It should also be provided that if the author terminates the agreement for any of these causes he does so without prejudice to any claim which he may have against the publisher for monies due and/or damages and/or otherwise.

refuse to handle books on commission in any circumstances whatsoever; the others confine their commission publishing to authoritative books on subjects of so specialised an interest that prospective purchasers can be more or less named in advance. In such cases it may be advisable for the author whose authorship is only incidental to his profession to spend two or three hundred pounds to have his book published under a worthy imprint. This applies particularly to important medical works, the publication of which may add considerably to the professional reputation of their authors.

Poetry also is occasionally published on commission by publishers of good standing, but original and interesting work in this field will usually find a publisher prepared to face the probability of losing fifty pounds or so for the satisfaction of enjoying a *succès d'estime*.

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In this connection it is to be noted that shark publishers frequently disguise the fact that the author is paying for the production of his book by calling his payment merely "a contribution towards the cost." The soundest advice for any author who is thinking of putting up money for or towards the publication of his work is to consult the Society of Authors.

In regard to the actual terms of commission agreements

it is only necessary to say that submission and approval of specimens of type, paper, binding and lettering and a detailed estimate should be a condition-precedent to the signing of the agreement and that it should be provided in the agreement that the type, paper, binding, etc., of the book as published shall be identical with the specimens approved and that the author shall be liable for the actual cost of each item of production up to but not exceeding the figure quoted for it in the estimate. A date on or before which publication is to take place, the price at which the book is to be published and the number of copies of which the edition is to consist as well as the number to be bound on publication should all be stated. There should be an accounts clause prescribing the dates and basis on which the publisher is to render and settle accounts, including discount to be allowed to booksellers (usually 25 per cent. or $33\frac{1}{3}$ per cent. of the published price) and the publisher's own commission on sales (which should not exceed 25 per cent. of the receipts). It should also be unequivocally provided that all rights in the work as well as the stock are the author's property, but that the publisher shall have an exclusive licence to sell copies in certain specified territories for a specified term of years after which he or the author shall be at liberty to terminate the agreement by a quarter's notice in writing. There should also be a provision entitling the author to terminate at any time if the publisher goes into liquidation or commits an act of bankruptcy, or if the edition sells out, or if the publisher fails to fulfil any of his obligations under the agreement and has not remedied his failure within a fortnight after receiving notice from the author calling upon him to do so. It should also be provided that if the author terminates the agreement for any of these causes he does so without prejudice to any claim which he may have against the publisher for monies due and/or damages and/or otherwise.

Such details as the amount to be spent on advertising and the media to be employed, the number and destination of free and review copies, warehousing charges (not exceeding the scale rates fixed by the Bookbinders' and Printers' Association), the securing of *ad interim* copyright in the United States, the publisher's freedom from liability in respect of copies accidentally destroyed by fire, flood, etc., the insurance of stock, and other similar points should all be covered in the agreement.

PROFIT-SHARING AGREEMENTS

Both Commission agreements and Profit-Sharing Agreements are lucidly and impartially discussed at considerable length in Mr. Stanley Unwin's *The Truth about Publishing*, George Allen & Unwin, 7s. 6d., a book which should be on every author's shelves.

All that need be said here about Profit-Sharing Agreements is that while, *prima facie*, they suggest a fair basis for operations they are rarely satisfactory in practice. They lend themselves readily to abuse, and for this reason an author should only enter into such an agreement with a publisher in whose integrity he has implicit confidence. The fundamental difficulty in connection with such an agreement is in satisfactorily defining the term "profit." A further practical argument against profit-sharing agreements so far as the professional author is concerned is that if the book fails to show a profit he reaps no reward for his work and that, in any case, he can expect no return for some considerable time, whereas with a royalty agreement he will receive something on every copy sold even if the total sales fail to cover the production costs.

Indeed, Profit-Sharing Agreements like Commission Agreements are only to be recommended to an author whose authorship is subordinate to some other occupation on which he relies to support himself and his family.

ROYALTY AGREEMENTS

The usual and on the whole far the most satisfactory method of obtaining publication is by means of a Royalty Agreement. All the leading firms have printed Royalty Agreement forms in which the only blanks left are for the percentage to be paid in Royalties in the case of the individual book and the amount of the sum, if any, that is to be paid to the author by way of an advance. The Royalty Agreement forms of the different publishing houses look superficially very much alike. Actually they are very different and the differences are often of a more vital significance than even the careful author fully appreciates.

Before dealing with Royalty Agreements in detail, however, and the clauses which they should or should not contain, I would like to reassure authors who are under the impression that, because most Royalty Agreements are printed and are also usually signed by the publishers before being submitted to the author, the latter cannot reasonably ask for alterations to certain clauses which for general or particular reasons he would like changed.

It is true that certain publishers, including such well-known firms as Methuen and Hutchinson, are extremely reluctant to agree to suggestions for the amendment of their printed forms and are inclined to adopt a "take it or leave it" attitude, but in the ordinary way an author can count on having his suggestions courteously considered and some at least of them incorporated in the agreement.

The following agreement is the form in general use by a publishing house of good standing, and is fairly typical of the kind of document which an author not yet sufficiently established to insist on his own terms may expect to receive from his publishers. I reproduce it in the hope

that my comments upon it will be of more practical service than would an ideal draft.

Memorandum of Agreement made this
day of 19
BETWEEN
of
(hereinafter called "the Author"), for self, executors, administrators and assigns of the one part, and LTD., whose registered office is (hereinafter called "the Publishers"), for themselves, their administrators, successors, and assigns, of the other part. WHEREAS the Author is writing or has written a literary work at present entitled

(hereinafter called "the work") which the Author desires the Publishers to publish, now it is hereby agreed between the parties hereto as follows:—

1. The Author shall deliver to the Publishers the complete typescript of the text of the work ready for the printer, to consist of words, together with the material for illustrating the work mentioned in clause 14 hereof, not later than 19 . Should the Author neglect to do so the Publishers may, if they think fit, decline to publish the work, in which case this agreement shall be annulled, but in that event the Author shall not be at liberty to publish the work elsewhere without first offering it to the Publishers on the terms specified in this agreement.

2. The Author guarantees to the Publishers that the said work is in no way whatever a violation of any existing copyright, and that it contains nothing of a libellous or scandalous character, and the Author agrees to indemnify the Publishers from all suits, claims and proceedings, damages, and costs which may be made, taken, or incurred by or against them on the ground that the work is an infringement of copyright, or contains anything libellous or scandalous.

3. In consideration of the payments hereinafter mentioned,

the Publishers shall during the legal term of unrestricted copyright have the exclusive right of producing and publishing the work or any portion of it throughout the world

and the Author shall not publish or allow to be published in the above-mentioned territory any abridgment, portion, translation or printed dramatised version of the work without the consent of the Publishers, such consent not to be unreasonably withheld.

4. The Publishers shall at their own risk and expense and with due diligence produce and publish the work and use their best endeavours to sell the same. The Publishers shall have the entire control of the production, publication, sale and terms of sale of the work.

5. The Publishers shall pay to the Author (subject as mentioned herein and except on any copies herein specially excepted) the following royalties:—

(*a*) On all copies of the British edition of the work a royalty of % (per cent.) of the published price of the first copies sold, a royalty of % (per cent.) of the published price of the next copies sold, and a royalty of % (per cent.) of the published price of all subsequent copies sold.

(*b*) On all copies of cheap editions of the work, a royalty of 10% (ten per cent.) of the published price of all copies sold at or below one half of the published price of the original British edition but not below 2/- (two shillings) net, and a royalty of 5% (five per cent.) of the published price of all copies sold at a published price of less than 2/- (two shillings) net.

(*c*) On all copies or editions of the work disposed of by the Publishers at a reduced rate (i.e., at half the published price or under), whether bound or in sheets, for sale in Great Britain, America, the British Colonies or elsewhere, a royalty of 10% (ten per cent.) of the net amount realised by such sales.

(*d*) On all copies of the work sold off at a reduced price or as a remainder a royalty of 10% (ten per cent.) of the net amount realised by such sales, such royalty to be in lieu of other royalty, except that on any copies sold at less than cost price no royalty shall be payable.

6. In the event of the Publishers deciding to sell off copies of the work as a remainder they shall give the Author the first offer of purchasing such copies at remainder prices.

7. In the event of the Publishers being successful in arranging for copyright publication of the work in the United States of America, they shall pay the Author % (per cent.) of the net royalties or sums realised by them after deduction of American income-tax.

8. In the event of the sale of any serial rights in the work or in any portion of it the net proceeds of any sale of such rights effected before the date of first publication shall be divided in the proportion of % (per cent.) to the Author and % (per cent.) to the Publishers, and the net proceeds of any sale of such rights effected after the date of first publication shall be divided in the proportion of % (per cent.) to the Author and % (per cent.) to the Publishers.

9. In the event of the sale by the Publishers of any dramatic or motion picture or talking picture rights in the work, the Publishers shall pay the Author % (per cent.) of the net proceeds of such sale.

10. In the event of the sale by the Publishers of any translation or Continental rights in the work or in any portion of it the Publishers shall pay the Author 50% (fifty per cent.) of the net proceeds of such sale.

11. In the event of any fees being received by the Publishers for permission to reprint any portion of the work, or in the event of any other sums being received by the Publishers in connection with the work not hereinbefore mentioned and not derived from the sale of copies of the work, the Publishers shall pay the Author 50% (fifty per cent.) of the net fees or sums which they receive.

12. On the day of first publication of the work the Publishers shall deliver to the Author free of charge six presentation copies of the work for personal use, and the Author shall have the right to purchase further copies of the work for personal use, but not for sale, at two-thirds of the published price.

13. No royalty shall be payable to the Author upon any copies presented to the Author or upon any copies sent out for review to the Press or given away in the interests of the work, or upon any copies destroyed by fire or in transit.

14. The Author shall on the delivery of the typescript of the work supply to the Publishers free of charge and copyright fee suitable photographs, pictures, drawings, diagrams, maps and other material for illustrating the work. Such material supplied by the Author shall remain the Author's property and shall be returned to the Author when finished with if required, but the Publishers shall not be liable for accidental damage thereto or for loss thereof in the absence of negligence on their part or on the part of their own employees.

15. The Author shall without any payment or consideration other than is hereinbefore mentioned supply the Publishers with an index to the work if in the opinion of the Publishers an index be desirable, and shall assist the Publishers, so far as possible, by revision or otherwise in keeping the work up to date.

16. The Author shall correct the proofs of the work for the printer and all costs of corrections and alterations in the proof sheets (other than printers' errors) exceeding 10% (ten per cent.) of the cost of the typesetting as per printers' invoice shall be borne by the Author, the charge for such excess corrections to be set against the first payment due to the Author under this agreement. In the event of such charge exceeding the first payment due to the Author under this agreement, the Author agrees to pay the Publishers the balance due on receipt of the account setting forth such charge,

17. The Publishers shall make up semi-annually a statement of all sales of copies of the work or of rights in the work sold under this agreement up to June 30th and December 31st of each year, and shall deliver the same to the Author together

with any monies shown therein to be due to the Author, within three months thereafter.

18. If after the expiration of five years from the date of first publication the work be allowed to go out of print and the Publishers shall fail to issue a new edition within six months of having received a written request from the Author to do so, then all rights conveyed in this agreement shall revert to the Author without further notice provided that the Author buys from the Publishers all blocks, stereoplates, electroplates, moulds, designs and engravings specially made for the work, at one half of their original cost.

19. If any difference shall arise between the Author and the Publishers touching the meaning of this agreement or the rights and liabilities of the parties thereto, the same shall be referred to the arbitration of two persons (one to be named by each party) or their umpire, in accordance with the provisions of the Arbitration Act, 1889.

20. The term "Publishers" throughout this agreement shall be deemed to include the person or persons or Company for the time being carrying on the business of the said

LTD. under as well its present as any future style, and them or their respective administrators, successors or assigns, and the benefit of this agreement shall be transmissible accordingly.

This is not as it stands an agreement which I could recommend any author—even the author of a first novel—to sign, at any rate until he or she had made an effort to induce the publishers to vary it in various important particulars, or, failing that, tried to place his or her work and obtain better terms with any others among the leading firms likely to be interested.

In the first place, it will be noticed that the agreement is between the "Author" and the "Publishers" and that these terms cover respectively the "executors, administrators and assigns" and the "administrators, successors and assigns." In other words, both the author and the publishers are entitled under the agreement, the former

during his lifetime and the latter so long as they are in business, to transfer their interests under the agreement to some other person or persons. In consequence there is always a danger that the author may at any time find the publication of his book passed on to some firm with which he may have no desire to be associated. In practice, the danger is slight so long as the firm with which the author is contracting is itself a reputable one, but, as a matter of principle, the author should endeavour to obtain the insertion of a clause stipulating that the publishers may not assign save with his written consent.

I can see no reasonable objection to *Clause* 1, but *Clause* 2 in the form in which it is phrased may involve the author in very serious consequences through no fault of his own, since it will be noted he undertakes to indemnify the publishers not only in respect of loss and damage which they may suffer in consequence of his having infringed copyright or libelled somebody, but also in respect of any expense to which they may be put in connection with claims made and proceedings taken *on the ground that* he had done one or other of these things. This means that if the book is made the subject of an action of libel or infringement of copyright and the action fails, the author may none the less be compelled by his publishers to reimburse them for the costs which they may have incurred. It is interesting, while on this subject, to notice that if in fact an action of libel or infringement is successful the publishers are at law equally guilty with the author and that, since it is a rule of law that "there can be no contribution between joint tort-feasors," the publishers cannot enforce any undertaking of indemnification which the author may have given them. In consequence the clause with which we are dealing is only valid if the Court holds that the author is innocent! A fair form of indemnification clause is as follows:

"The Author hereby warrants to the Publishers that the said work is in no way whatever a violation of any existing copyright and that it contains nothing obscene or (with the intention of the Author) libellous and the Author will indemnify the Publishers against loss, injury or damage including any legal costs or expenses properly occasioned to or incurred by the Publishers in consequence of any breach (unknown to the Publishers) of this warranty."

Clause 3. This clause is far too sweeping. It amounts in fact to an assignment of the greater part of the author's copyright. All that the author should grant the publishers is an exclusive licence to publish the work in book form in the English language with certain limitations of territory. The difference between "right" and "licence" is explained in the article on Copyright elsewhere in the *Handbook*. The distinction is one which very few authors and not many publishers properly appreciate, but it is one of very considerable importance. The restriction to book form is desirable since it may happen that the work is one with serial possibilities, or that at least an extract from the book may be suitable for publication in a newspaper or a magazine. The restriction to the English language is advisable since, if the book is a success, the translation rights may prove a substantial source of revenue to the author. In considering whether it is also desirable to restrict the licence in regard to territory, it must depend largely on the nature of the book and the standing of the author. If the book is a novel, it has a fair chance of appearing under the Tauchnitz or Albatross imprints on the Continent if it is a success in England, and the best way of meeting this possibility is to make the British publishers' licence so far as the Continent of Europe is concerned exclusive only for the first year following publication. A more serious problem is whether to exclude the U.S.A. from the territory covered by the British publishers'

licence. As is explained in the article on Copyright, the U.S.A. is not a member of the International Copyright Union, and to secure copyright in that country certain formalities, which include the actual setting up of type in America, have to be observed. If, therefore, there is a reasonable prospect of the book being one in which an American publisher will be sufficiently interested to print and publish a seperate edition in that country, it is as well, if possible, to retain the American rights when entering into a contract with an English firm, or at any rate to stipulate that the British publishers' licence is to include the U.S.A. only if, after three months have elapsed from first British publication, the author has failed to enter into an agreement with an American publishing house.

Against this it is contended by British publishers that they often get a chance of selling copies of the English edition in sheets to an American firm, provided the sale does not have to be held up, and that the too ambitious author sometimes misses a small addition to his income from this source through trying and failing to secure his American copyright and a larger financial return from separate American publication. In general I would say that in the case of a novel it is usually worth while taking the risk of losing one's share in the proceeds of a small sheet sale if there is any chance at all of one's finding an American publisher who will print the book in the U.S.A. in time to obtain the American copyright, since in America copyright is indivisible and once it is lost not only the American publication rights but also the American film and dramatic rights become common property.

In regard to the last part of *Clause* 3, my own view is that it is quite sufficient for the author to undertake that he will not publish the work, or any substantial part of it, in book form in the English language within the territories to which the publishers' licence extends save with their consent.

Clause 4 is quite a usual clause, but it should be amplified by the addition of a sentence providing that the publishers undertake to publish the work within a specified number of months from the date on which the author delivers the complete typescript. In the case of certain works, however, it may be preferable to name a particular date.

Clause 5. It is impossible to lay down any hard and fast rule as to the royalties which an author may reasonably expect to receive. These must depend primarily on the margin of profit per copy and the question whether a large or small sale is to be expected. Obviously in the ordinary way, in the case of a book which is likely to sell three thousand copies the publisher can afford to pay a higher royalty if his margin of profit per copy is eighteenpence than would be practicable if it were fourpence. The customary starting royalty for a novel published at 7s. 6d. and written by an author whose name is not well-known is 10 per cent. of the published price. This royalty should rise to 12½ per cent. after the sale of 1,000 or 1,500 copies, to 15 per cent. after the sale of 2,000 or 3,000 and to 20 per cent. after the sale of 4,000 or 5,000. There are a number of novelists who receive a flat rate royalty of 20 per cent. and even 25 per cent., but before an author can expect such a royalty his publishers would have to be satisfied that they could count on disposing of a first edition running into, or near to, five figures.

In the case of cheap editions, 10 per cent. is the usual royalty, except in the case of editions published at less than 2s. Here the margin of profit per copy must necessarily be little more than nominal and the royalty has to be reduced accordingly. In the case of cheap editions published at 2s. or more, there is no logical reason why the royalty should not rise with the sales, but few publishers will agree to this. It is the practice of several firms to bring out cheap editions of their books before they have given the 7s. 6d. edition a fair run, while there are other

firms which rarely bring out cheap editions at all. A clause which meets both these contingencies is "The publishers undertake that they will not publish a cheaper edition of the work save with the author's written consent till at least eighteen months have elapsed from the date of first publication, and furthermore that if they have published no cheaper edition within four years following the first publication of the work the author shall be at liberty to authorise some other firm of publishers to issue an edition or editions of the work at a price not exceeding two-thirds of that at which the work was originally published."

Sub-clause (*c*) of *Clause* 5 calls for modification, whether the British publishers' licence is to extend to the U.S. or not. So far as sales in sheets are concerned, 10 per cent. of the proceeds of the sale is the usual royalty and in the ordinary way a fair return for the author, but the publishers should have no power to dispose of copies, whether bound or in sheets, except overseas, at a reduced rate, unless it is a large bulk sale, and even then they should first have to obtain the author's written assent.

In regard to remaindering, which is dealt with in Sub-clause (*d*) of *Clause* 5 and in *Clause* 6 it is important that a stipulation should be included to the effect that no remainder sale may take place save with the author's consent until at least two years have elapsed from the date of first publication.

Clauses 8, 9, 10 *and* 11 should be deleted if, as I have emphatically recommended, the publishers are merely granted an exclusive licence to publish the work in book form in the English language and *Clause* 7 should also be deleted if the U.S.A. is excluded from this licence. For these clauses, however, a clause may often advisably be substituted on the following lines:

"In the event of the author disposing of any of the subsidiary rights in the work or granting a licence in

respect of any of these rights under an agreement or agreements entered into through the agency of the publishers the author undertakes to pay to the publishers as and when received 10 per cent. of all monies accruing to him under such agreement or agreements."

In the case of a book of verse, many authors prefer to leave it to the publishers to grant licences to anthologists and most publishers in practice insist that this shall be so and also insist on retaining 50 per cent. of all anthology fees. A reasonable compromise is for the author to give way on the point subject to the stipulation that as soon as the publishers are no longer out of pocket on the book they shall have no further control over or interest in the anthology rights.

Clauses 12 and 13 are reasonable enough, but the following words should be inserted at the beginning of *Clause* 14: "If in the opinion of the author and the publishers illustrations are desirable." Furthermore, it should be made clear that the photographs, pictures, drawings, etc., which are to be supplied by the author are alternatives and that the author is under no obligations to supply all these different forms of illustration. The number of illustrations which are to included should also be stated.

Clause 15 is fair, subject to the insertion of a provision to the effect that the publishers shall notify the author prior to the signing of the agreement whether or not they consider an index desirable.

Clause 16. Ten per cent. of the cost of the typesetting is not a very generous allowance for author's proof corrections, although some publishers allow the author an even smaller margin. Others go to the other extreme and allow as much as 20 per cent. and even 25 per cent. In the ordinary way I think 15 per cent. is reasonable.

Clause 17 is the customary accounts clause and I have

no objection to it, other than to suggest the insertion of the word "detailed" before the word "statement."

Clause 18 is quite inadequate as a termination clause. The clause which I usually recommend, and which many publishers are prepared to accept, is as follows:

"If the Publishers fail to fulfil or comply with any of the provisions of this agreement within one month after written notification from the author of such failure or if they go into liquidation or if after the work is out of print or off the market they have not within three months of a written request from the author issued a new edition or impression of at least 500 copies then and in any of these events this agreement shall automatically determine without prejudice to any claim which the author may have either for monies due and/or damages and/or otherwise."

Clause 19. Although arbitration is often satisfactory as a method for dealing with industrial disputes, the experience of the Society of Authors is that in the case of serious disputes arising over the interpretation of a publishing agreement it is preferable that the matter should be taken to a Court of Law.

Clause 20. Here, as in the recitals, the word "assigns" should be deleted.

It is to be noted that the agreement printed above contains no option clause and since these are nowadays unfortunately customary in publishing agreements it would be as well for me to say that an author should avoid if possible giving an option on more than one or, at most, two future books and should make it a condition of the option that in the event of the publishers declining or failing to agree terms for the publication of one option book six weeks after its submission to them they shall automatically lose their option on any subsequent books.

American Publishing Agreements

Most of the remarks which I have made above apply with equal force to American publishing agreements. These should, however, include an additional clause under which the American publisher undertakes to secure the U.S. copyright of the work in the author's name.

A further point to be observed in the case of American agreements is that in nearly all cases the cheap edition rights are sold by the publishers of the expensive American edition to one of the firms which specialise in cheap editions. The proceeds of any such sale are usually, though as I think inequitably, divided equally between the original publishers and the author. It should also be noted that royalty rates tend to rule slightly lower in America than in Great Britain, mainly owing to the greater cost of production in the former country.

Another important point is that the distinction between the assignment of a "right" and the granting of a "licence" has not the same significance under American law as it has under the laws of Great Britain and the other countries which are members of the International Copyright Union. Nevertheless, in principle it is desirable that the word "licence" should be used rather than the word "right," especially having regard to the fact that it is probable that before very long the United States will have brought their law of copyright into conformity with that of other civilised countries.

MUSIC PUBLISHING AGREEMENTS

Although, as Mr. Rutland Boughton points out in his article elsewhere in the *Handbook*, a composer should avoid parting with his copyright, the fact remains that at the present time it is in practice next to impossible for

any but the best-known of composers to get their work published unless they are prepared to assign their copyright to the publishers. This being so, the only thing for a composer to do is to safeguard his financial and artistic interests to some extent by insisting on various provisos covering not only a fair royalty on every copy of the sheet music sold, but also as large a share as possible in the proceeds from performances and mechanical reproduction of his work. He should also make a stipulation that his work shall not be materially altered save with his written consent.

The printed form of agreement in use by many music publishers divests the composer of all his rights in consideration of a small lump sum or royalty payment and I have known of numerous cases in which composers who have signed agreements of this kind have obtained £5 or less from works which have brought in hundreds of pounds to the publishers and gramophone companies.

Clauses which should be in every music publishing agreement are one providing for a date on or before which the work is to be published; another providing for accounts to be made up to a certain date each year or half-year and rendered and settled within three months following; a third providing that, in the event of the publishers going into liquidation or committing an act of bankruptcy or neglecting or failing to comply with any of the provisions of the agreement one month after written notification from the composer of such neglect or failure or in the event of their allowing the work to go out of print or off the market and failing to publish a new edition within three months after receiving a written request from the composer to do so, the composer should be at liberty to terminate the agreement.

A further clause should set out the share which the composer is to have in the proceeds from mechanical reproduction of the work and all performances of it,

although in the second case, if the publisher is a member of the Performing Right Society, that society will collect the performing fees and apportion them between the publisher and composer, if the latter is eligible for membership.

Yet another clause should stipulate that the publishers shall print on every copy of the work a copyright notice in the form required by the American Copyright Act and shall secure U.S. copyright in the composer's name.

The usual royalty paid in respect of sheet music is 10 per cent. of the published price, while the proceeds from the subsidiary rights are usually divided fifty-fifty, except in cases in which an author is also involved when it is usual for the publishers and composer each to receive 40 per cent. and the author 20 per cent. All these figures are of course subject to modification in particular circumstances, but they will serve as a rough guide. Needless to say, if a composer can retain some or all of his subsidiary rights in his own hands he is well-advised to do so.

In conclusion, I would like to exempt two music publishing firms from the general condemnation of music publishing agreements which I have made above. These are the Oxford University Press and Messrs. Curwen, both of whom usually employ forms of agreement which follow the general lines of those in use by the best book publishers. There are also, it is true, a number of other music publishers from whom a composer may expect in the long run more courtesy and generous treatment than the agreement which he is required to sign would lead him to expect.

DRAMATIC AGREEMENTS

For the purposes of analogy the run of a play in the West End of London may be said to correspond to the publication of a novel in its seven-and-sixpenny form, the

provincial tour to the cheap edition. In much the same way as a novel failing in its first and more expensive form not infrequently finds a ready public at three shillings and sixpence, while a more sophisticated work, successful in the first instance, will have no appeal to the majority of three-and-sixpenny readers, so sometimes the West End proves more profitable to dramatist and manager than the provinces, while not infrequently a West End failure fills houses in the country.

The great difference, however, between the play and the novel—apart, of course, from the obvious differences of form and presentation—is that a first edition of a full-length novel can be handsomely produced for a quarter of the sum required for the production of a play, however economical in the matter of cast, scenery and properties the latter may be. Nevertheless, just as the manager's risk is at least four times as great, so also is his prospect of profit if a play is a success. Managers and dramatists have often from a single play accumulated fortunes much in excess of the sums a publisher or author, however optimistic, may expect from the publication of a "best-seller."

It must be remembered, too, that the commercial possibilities of dramatic property have been enormously enhanced by the coming of the sound-film, and it is especially in connection with the share or interest usually demanded by the manager in the talkie-film rights that caution is necessary.

Whatever view may be taken with regard to the æsthetic qualities of the talkie-film in its present state of artistic and mechanical semi-development there can be no doubt as to the important reshuffling of values which it has brought about. Until the advent of the talkie, certain types of novel presented greater ultimate money-spinning potentialities than a play. Silent films were seldom made from work executed in dramatic form.

With the talkie the reverse is the case; indeed, so long as the sound-film corporations persist in their present policy of merely substituting the screen for the stage as a medium of presentation, the playwright can continue to reap a dual harvest.

It is obvious, therefore, that whilst great care should be taken by novelists in any contracts which they may make to protect their interest in their subsidiary rights, even greater precautions should be taken by the dramatist to see that his interest in his film rights is adequately safeguarded in any contract made with a theatrical manager. The nature of silent and talkie-film rights is dealt with elsewhere in this book and it is proposed in the present article to confine the issues on this point to the share, if any, of the dramatist's interest in his film rights which should normally be apportioned to the theatrical manager.

With the help of Mr. Aubrey Blackburn I outline below the main provisions contained in a normal agreement between an author and a West End manager, but first I wish to impress on dramatists that *in no circumstances whatever should they assign their dramatic or performing rights.*

(i) The agreement should be in the form of a grant of a sole and exclusive licence to perform the play professionally with actors appearing in the flesh on the stage in the English language in the territory of the United Kingdom of Great Britain and Northern Ireland, the Irish Free State, the Channel Isles and the Isle of Man, and should be for a period of so long as not less than 50 performances of the play are given in the said territory in each calendar year (or 100 performances in each two years) dating from the first performance of the play under the agreement.

(ii) The author should receive a sum of usually £100, payable on the signing of the contract. This sum not to

be returnable to the manager in any event and to be in advance and on account of royalties.

(iii) The manager should agree to produce the play for a run in the evening bill with a first-class cast in a first-class manner at a first-class West End theatre within a specified time after the date of the agreement, and should be permitted, should he so desire, to produce the play in the Provinces prior to the West End run for a tour of not more than eight weeks. Failure by the manager to produce the play in the West End as specified and within the time indicated should entitle the dramatist to rescind the licence granted and to terminate the agreement forthwith, unless prior to the expiration of the said period the manager shall have paid to the author a further non-returnable £100 advance in consideration of the period during which production in the West End must take place being extended for a further specified number of months.

(iv) The name of the author should be announced on all programmes, posters, printing and other paid advertising matter in the customary manner. It is, however, unreasonable for the dramatist to insist that his name should appear in short newspaper advertisements inserted on a payment per line basis, and such advertisements may be excluded from this provision.

(v) The dramatist should have access to rehearsals, and should be consulted about the casting arrangements, but whether he is to have any right of choice of actors or of supervision must depend upon his experience of the stage.

(vi) The manager should have no right to make alterations in the text of the play without the consent of the author.

(vii) The royalties for the West End of London should be on a rising scale of 5 per cent., 7½ per cent. and 10 per cent. The exact scale varies according to the im-

portance of the author and the nature of the play. Roughly speaking, the manager is usually prepared to pay 5 per cent. on a sum representing his weekly running expenses. These will probably be in the neighbourhood of £1,000. The author might, therefore, reasonably expect 5 per cent. on the first £1,000, 7½ per cent. on the next £200-£300 and 10 per cent. on all over £1,200-£1,300, gross weekly box office receipts, exclusive of entertainment tax and exclusive of library commission up to but not exceeding 10 per cent.

In cases where the manager himself sends out a tour of the play into the Provinces, he may agree to pay the author the same royalty as that stipulated for the West End of London. In most cases, however, the manager enters into a sub-licence with another manager for the Provinces. In such cases the author should receive a royalty of 5 per cent. and in addition be entitled to 50 per cent. of all sums paid to the London manager by way of bonuses, premiums and/or advances on account of royalties.

The above scale of royalties would not of course apply to musical plays, for which the royalty in respect of performances in London and the Provinces is usually on a basis of 5 or 6 per cent. on the total receipts. This amount is divisible between the writer of the book, the lyricist and the composer of the music, it being generally agreed that an equitable division is in the proportion of two-sixths to the author of the book, one-sixth to the lyricist and three-sixths to the composer.

(viii) Provided the manager produces the play in the West End of London he should be entitled to sub-license the play for stock and repertory performances, paying the author two-thirds of all sums paid as and when such sums are received by the manager.

(ix) It is a usual provision that once the play has been produced in the West End of London the manager

shall acquire a one-third interest in respect of all performances of the play in the Colonies under any contract made during the period in which the manager holds the licence for the United Kingdom rights of the play. Any contract for the Colonies should be subject to the signatures of both the manager and the author.

(x) The manager should not be permitted to assign the agreement nor any part of the licences granted without the written consent of the author, such consent not to be unreasonably withheld in the case of a responsible management. In the event of the manager entering into a sub-licence it should be stated that he is personally responsible to the author.

(xi) Provided the manager produces the play in the West End of London for a specified number of performances, he usually expects the sole and exclusive licence to produce the play, or cause it to be produced professionally, on the stage in the United States and Canada upon payment to the author within six or eight weeks from the date of the first performance of the play in the West End of the sum of £200, on account of royalties. It should however be provided that if the manager exercises his option the play shall be produced for a run in the evening bill in a first-class theatre in New York City or Chicago within twelve months (excluding June, July and August) from the date of the exercising of the option, or within six months (excluding June, July and August) from the date of the last performance of the London run of the play, whichever date is the later. The managers' licence for such territory to be for so long as 50 performances are given in each period of twelve calendar months dating from the first performance in such territory.

The royalties payable to the author in the event of the manager presenting the play in America under his own management or jointly with some other manage-