TREATISE

ON

THE LAW OF COPYRIGHT.

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IN

BOOKS, DRAMATIC AND MUSICAL COMPOSITIONS, LETTERS AND OTHER MANUSCRIPTS, ENGRAVINGS AND SCULPTURE,

AS ENACTED AND ADMINISTERED IN

ENGLAND AND AMERICA;

WITH SOME

NOTICES OF THE HISTORY OF LITERARY PROPERTY.

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PREFACE.

It was originally my intention to have treated the kindred subjects of Copyrights and Patents for Useful Inventions, in the same work. But after having made some progress in both of these topics, the fact that very different classes of persons, out of the legal profession, are interested in the two subjects, has led me to publish this portion of my labors, as a distinct treatise. It will be followed, I hope, by a work on the law of Patents.

It will be seen that in discussing the various questions involved in this branch of the subject, I have not hesitated to express my own opinion, where the doctrine of decided cases seemed to me to be objectionable. Writers of treatises, in the manner of the English bar, generally content themselves with a dry abstract of the decisions, showing barely what the law is. This is

well, as far as it goes. It is not the province of any writer to make the law, and he must certainly state the law as it is, if he means to have his book respectable and respected. But while his text should exhibit clearly the actual state of the law, he should never forget that he is dealing with principles; that it is his task, to exhibit the doctrine of the law, which is its life; and that unless he does this, his work, however accurately he may have strung the cases together, will be a mere collection of husks, the shell without the germinating principle that lies wrapt in the meat. If, then, he essays the task of eliminating the principle of a rule or a decision, tracing it in all its bearings and following it by the thread of analogy into other systems of jurisprudence, in order to ascertain whether it be really part of the general science, and not a local idea, he cannot avoid the expression of his own opinion, to some extent. The study of the law is the pursuit of truth; and he who undertakes to express and embody such truth, must occasionally express his own convictions.

His allegiance to the science which he serves, requires him to examine critically every recorded precedent, and to dissent, if dissent be needful; not as if he were ambitious to be regarded as an authority; but in the way of suggesting to those whose high function

it is to revise and declare the law, the means of arriving at more correct results.

With this view, I have introduced into this work a discussion on the general doctrine of the English cases in relation to abridgments, which I consider contrary to principle. Should my observations induce any tribunal to reëxamine that doctrine, they will not have been published in vain.

It did not fall within the scope of this work, to discuss the reasonableness and justice of an international copyright. As between England and the United States I do not see how there can well be two opinions upon the desirableness of such an arrangement. The injustice of the present state of things to authors, especially in my own profession, is palpable and flagrant. The materials for an argument upon this question, which will be incapable of being answered, are fast accumulating, in the numerous proofs of mutual advantages obtained by those publishers in both countries, who have effected arrangements for the exchange and sale of their respective publications. These arrangements, however, rest upon no other security than the courtesy of "the trade," and can never effectually answer the purpose of a law securing the profits on American books in England and on English books in the United States. But this is not the place to enter upon the discussion of this

interesting topic. I can only express the hope of seeing the argument at no distant day presented by some one, who will do justice to its great importance. But I could not dismiss this work from my hands, without avowing myself an advocate of an international copy-right, both upon grounds of general policy, and of justice to authors.

Boston, October, 1847.

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LAW OF COPYRIGHT.

INTRODUCTION.

THEORY OF THE RIGHTS OF AUTHORS.

BEFORE we enter upon the field of municipal jurisprudence, it may be well to pass through the more enlarged region of natural law.[1] Literary Property has always asserted claims to a foundation in the principles of general right; and the nature and extent of those claims constitute an important subject of inquiry, whenever the interests of this property

[1] It is somewhat embarrassing, as all students of the Law of Nature know, to use terms accurately descriptive of that code which deals with the general rights of mankind, as held by the publicists of Christendom. The phrase, Natural Law, to an unaccustomed ear, would import simply that body of rules which, by the aid of reason, we deduce from the light of Nature, and which defines only the rights which Nature bestows. But as it has been long used to describe not only the naked rights of man in the natural state, but also the *status* of mankind after those rights have been to some extent modified by the conditions of civilized society, I have followed the example which I cannot control. Grotius, Puffendorff, Burlamaqui, and other writers, have fixed the sense in which the term Natural Law is most frequently used; and in this sense, it describes the natural rights of man after he has entered society, though many of them originate before society is formed.

are drawn into controversy, through any defect of positive law. The present inquiry therefore is, whether the right, to which jurists have given the name of Literary Property, has any foundation in the principles of that code of general law, which defines and establishes other kinds of property.

It is, of course, impossible to look to the mere light of nature for a solution of this question, or to find it in any speculations upon the condition of man in that imaginary state, which has been called the state of nature. Perhaps it would not be a violent supposition, to imagine a rude literature of poems or traditions, preserved and orally transmitted, before society, properly so called, has commenced. But, aside from the fact that the merely natural rights of man could confer no exclusive possession of ideas and sentiments thus uttered, it is to be observed, that the act of committing ideas to any corporeal substance, by means of signs, and the multiplication and delivery of copies, thus produced, for a valuable consideration, are things that can only take place after society is formed and an advanced stage of civilization has been reached. The art of printing, as well as every other systematic art of exhibiting ideas to the eye by means of characters, in any form and on any substance, is the creature of society; and when we add to the exercise of such an art the exchange of what is thus created for any other valuable commodity, or for the common representatives of value, we have reached an artificial and refined con-

dition of mankind, in which the mere light of nature will no longer guide us. We must have recourse to those general principles of justice and right, which mankind are supposed to have brought originally from the state of nature, but by which they have agreed to be bound in a state of civilization, where they have become modified, enlarged, and strengthened.

It is very important to keep this distinction in view, because those who have maintained that literary property has no foundation but in the municipal code, have drawn most of their arguments against it from the naked law of nature, without perceiving, or without choosing to perceive, that it may derive its existence from those broad and comprehensive principles, which govern the relations of man in society, and which, although they have originated in the merely natural rights of man, extend their foundations to the support of his social condition.

It should be observed, also, that it is not at all necessary, in this inquiry, to enter into elaborate disquisitions upon the origin of property, or even to select from the various theories which different jurists or ethical writers have propounded concerning it. These theories are of no greater use, on this occasion, than to illustrate the important and admitted doctrines, on which the existence of property actually depends in civilized society. The primal origin of property opens a wide field of speculation, in which men of consummate and equal genius and

learning have pursued different paths, and no theory has been constructed which meets with universal acceptance. But all the speculations of philosophers, from the time of Aristotle to the present age, have sprung from and again conducted to one fact — the existence of property itself; and while its existence has been variously accounted for, the different explanations of its origin have all tended to show, that there are certain great characteristics which mankind have universally attributed to the right thus found to exist, and certain great principles of justice by which they have found that it must be regulated. To these principles and characteristics we must look for a test, in order to answer the question — most material in the present discussion — What constitutes property ? Having satisfied ourselves on this head, we shall be able to say whether any supposed subject of the right possesses the general attributes of property, and whether it is agreeable to justice and fitness that it should be so recognized.

It is very generally conceded, that property, under the modifications and conditions with which we now have it, supposes the consent of mankind, and that those modifications and conditions do not spring from individual will alone.[1] It follows, therefore, that the

[1] Grotius, Droit de La Guerre, &c. liv. 2, ch. 2, § 10, tom. 1, (ed. Basle, 1746.) Rutherforth's Institutes, B. 1, c. 3. The consent of mankind does not indeed establish the principles on which property depends. Men cannot abolish those principles, and consequently they cannot abolish property, strictly and entirely. The Creator has made man a social being, and has made it necessary, for the development of his faculties and to accomplish the ends of his being, that he should

essential qualities of property must be those conditions which mankind have generally agreed in attributing to it.

1. First, then, the definition of property, on which mankind are agreed, is, that it embraces what is not common to the whole race, but belongs to a less number than the whole human family, whether one or more individuals. In a community of goods, among the whole race, or a nation, or a smaller collection of individuals, the right to use is in each individual, in the place of property; but property in the goods continues, and this property itself is in the whole body. As soon, however, as property with reference to individuals is established, something more than the right to use follows. An exclusive title, which embraces the right to use and the right to exclude all others both from use and possession, and the right to transmit both use and possession to others, constitutes property, in the sense in which all mankind are agreed, implying the total separation of the object itself from a community of goods.

2. In the second place, all property possesses two uses, or qualities. First, it implies the right of pos-

live in some form of society. Some form of property is essential to the existence of society; and through this chain of reasoning, property is to be traced, as to one of its main supports, to the will of the Creator. In addition to this, he has implanted in the human breast certain principles of justice which will not permit the violation of the essential rights of property, and has thus fortified its existence by the operations of conscience. At the same time, the general consent of mankind is rightly supposed to indicate the main qualities of property, because it actually exists according to the modifications and conditions which that consent has established.

session and use; which constitutes a part of the ownership, or appropriation of the individual. This right of possession and use is full and exclusive. The object may be enjoyed by the individual in any mode consistent with the general welfare; a limitation which does not arise from any inherent defect in the right itself, but is imposed upon it from without. Secondly, property implies the faculty of transmission, by exchange, or sale, or gift. Transmission, if unrestrained, carries with it the full and exclusive right of possession and use of the original owner, indefinitely, so that the object remains forever separated from a community of goods. But, as the original owner may grant the whole unrestricted right of possession and use, so it follows that he may grant a less right than he himself enjoyed, by restricting or qualifying the use. He may thus specify the uses for which he does or does not grant the possession, and may annex various conditions upon which the possession shall be held. The observance of these conditions is to be enforced by the same principles of justice which govern the whole title of the original owner. If he has granted only a part of his right, and the other part is usurped, the same principle of justice is violated, as when his whole right is usurped without his having granted any part of it.

3. In the third place, property may be in every-thing capable of these uses. Whatever admits of occupancy and of the transmission of occupancy may

be the subject of property. Whatever, on the contrary, does not admit of occupancy, and is not capable of being transferred with an exclusive title to others, cannot be the subject of property. Thus, light and air cannot of themselves be appropriated by individuals to the exclusion of the rest of mankind, because they cannot be included within limits and held and possessed in severalty. Each human being may use all of them that he requires for his own purposes, without exhausting the common stock, which is inexhaustible. In like manner, no man can sell or transfer to another the air or the light, because he cannot first obtain the exclusive occupancy thereof. One may sell or transfer peculiar advantages or positions for the enjoyment of all that portion of the air or the light, which one or more human beings can draw from the common stock, in actual use. But this creates no opportunity to occupy the great body of the air or the light, which are in themselves incapable of being held within limits or boundaries, or parcelled out into different proprietaries.

The same is true of the ocean. The great reasons why the ocean cannot be the subject of property form one of the most interesting topics in the law of nations, into which it would be too great a digression to enter here. It is sufficient to note the illustrations which they present of the qualities which belong to the subjects of property. The ocean cannot be occupied; for although astronomers and geographers have traced imaginary circles of latitude and

longitude, which theoretically divide its surface, nothing like actual occupation by boundaries or barriers has ever been attempted or can ever be possible. No part of the ocean can be taken and held in severalty, because no part of it can be designated as under occupation, by any limits or marks capable of being fixed upon its surface. Every nation and every individual may use it, as occasion requires, and such use in no degree diminishes or restrains the use of it by others, since the same waves will successively and forever transport the fleets of the whole world. Accordingly, there is no evidence that mankind have at any period entertained the intention of making the ocean the subject of property. It has ever been left as the common highway of nations, in and upon which the rights of all mankind, from the necessity of the case, are perfectly equal.[1]

On the other hand, the surface of the earth, and everything upon or beneath it, and everything upon or beneath the surface of the water, capable of being reduced into exclusive possession, may be the subject of property; and the exclusive possession carries with it the faculty of transmitting the whole of the same right, or a part of it, and of dictating in what manner and under what restrictions the subject of the right shall be used. In a refined state of civilization, these subordinate rights become themselves objects of distinct consideration, and are

[1] Grotius Droit de la Guerre, &c. Liv. 2, ch. 2, § 3. Azuni, Droit Mar. De l'Europe, tom. 1, ch. 1, § 5, 25.

made capable of distinct enjoyment, defined by positive rules, or defended by the general principles of justice. The right to pass over the soil, or to gather a definite portion of the fruit that grows upon it, may be severed from the ownership of the soil itself; and the grant of these subordinate rights does not necessarily suppose a grant of the proprietorship of the soil, or of any other of the rights of the original proprietor. The use of an animal, for a fixed period or in a certain manner, may be separated from the ownership of the animal, and a contract for the one does not imply a contract for the other.

We are to inquire, then, whether the claim of authors to the exclusive multiplication and sale of copies of their own literary productions can be brought within the fair scope of these principles. In determining this question, it is obviously necessary to define the right claimed, and to ascertain its essential character.

The right claimed by an author, after publication, is not to the exclusive possession or appropriation, intellectually, of the ideas and sentiments which he originates and puts upon paper. In the first place, such an appropriation becomes impossible, as soon as he imparts to others the means of an intellectual perception of his ideas; and in the next place, it is inconsistent with the very objects for which he publishes to others the conceptions of his own mind. Such an appropriation is impossible, because if I am permitted to read the ideas and sentiments which

another has written, they become part of my intellectual possessions, as far as I can retain them in my memory, and no rule can be established which would deprive me of the opportunity to use them for my own enjoyment, or to impart a knowledge of them by speech to others. Such an appropriation by the author is also inconsistent with one of his objects in publishing his thoughts; which is to impart his own thoughts to others, to induce others to make them part of their intellectual possessions, and thus to influence, refine, or instruct his fellow-men, to gain their admiration, excite their pity, or influence their conduct. The painter, who spreads upon canvass the immortal conceptions of genius, does not ordinarily intend to be the sole beholder of the images which he thus creates. The grandeur and loveliness, to which he has given outward form, he places before the eyes of others, in order, expressly, that they may fully appropriate into their own intellectual perceptions the ideas which he has embodied. In like manner, the author who writes and publishes, writes and publishes that he may be read — that other men may absorb into their own intellectual natures the thoughts which have had their birth in his reason or imagination, making them part and parcel of their own minds.

But it does not follow, because this is one of the objects of the painter or the author, in the exercise of their respective arts, that there may not be another purpose collateral to this, and in all respects

consistent with it. It may be the purpose of both the painter and the poet, while they delight or instruct mankind, to receive a direct compensation for the pleasure or instruction which they impart; and the question is, whether there is any right, by the exercise of which they can make this purpose effectual; or, in other terms, whether there is anything to which the compensation can be made to attach.

The right to multiply copies of what is written or printed, and to take therefor whatever other possession mankind are willing to give in exchange, constitutes the whole claim of literary property. This claim leaves wholly undisturbed the opportunity of every reader to make an intellectual appropriation of the ideas suggested to him by the characters which he purchases; it goes no farther than to assert an exclusive right to the profits which may be derived from the production of successive copies of the characters which, in a particular combination, represent a set of intellectual ideas. This right is to be derived, if at all, from the original, exclusive invention and possession by the author of the ideas themselves, and of the combination of characters which exhibits those ideas. If this right can be distinctly traced to original possession and invention, and if the exercise of the right involves the general attributes which belong to property, there is no reason why it should not be placed among the rights of property.

The author of every original literary composition

creates both the ideas and the particular combination of characters which represents those ideas upon paper. He is therefore an inventor, in two senses; and he has the exclusive possession, before publication, of his invention. Every one may use the elemental characters of which the original author makes use, in other combinations, but if any one uses them in the same precise combination, he exhibits necessarily the ideas of the original author. The two subjects of the invention are therefore inseparably interwoven, and when we contemplate them in their blended condition upon the written or printed page, they present to the mind the idea of one creation or invention only. Considered, however, with reference to its component parts, this invention consists of distinct creations, the ideas themselves and the combination of characters which exhibits those ideas to the eye. Both are new, both have never existed before, and both are capable of being retained in the exclusive possession of the original inventor.

The author, then, has in his possession a valuable invention, which he may withhold or impart to others at his pleasure. His dominion over his written composition is perfect, since it is founded both in occupancy or possession, and in invention or creation. No title can be more complete than this.

From this full and complete title flows the right to annex conditions to the transfer of such a written composition, when the author chooses to impart the possession of it to others. It cannot be doubted that

this right is inherent in every possession vested in an individual by the rules of natural or positive law. It enables the owner of a literary composition to declare the purposes for which he grants it to others, in the same manner as it enables the owner of a piece of merchandise to declare that he grants the full property, or only a qualified use thereof, when he gives the possession of it to another. In both cases, the principles of justice require that this right of the original owner should be respected in the same manner as his original possession; for if it would be a violation of justice to deprive him of all his rights, when he has reserved them all, it is equally so to deprive him of a part of them, which he reserved, when he granted another part.

The right of literary property commences, therefore, from a full and exclusive intellectual possession of his ideas, by the author, coupled with the physical possession of the combination of characters representing those ideas, which he has traced upon paper or other material. As soon as publication takes place, it is no longer his object or intention to retain to himself the intellectual appropriation and enjoyment of the ideas themselves. What he does seek to reserve is, the exclusive multiplication of copies of that particular combination of characters, which exhibits to the eye of another the ideas that he intends shall be received. His power to do this depends upon his exclusive title to his invention, and upon the fact that each copy constitutes a valuable

commodity, which he can exchange for other possessions.

The author's exclusive title is not only theoretically perfect, but it is practically acknowledged by mankind, since in every civilized society men are willing to give him valuable possessions in exchange for the opportunity to read what he has written. This opportunity men will purchase, if they cannot have it without purchase. It is in the power of the author to say, that they must purchase it, because he is the absolute owner of the copy which they desire to peruse. In the contract of sale which thus takes place, the owner of the literary composition may, of course, annex to the transfer any conditions that he pleases; and the question therefore next arises, whether he does not tacitly annex the condition, that other copies shall not be multiplied from the copy that he sells, and whether the purchaser does not take the copy burthened with this restriction.

The fair construction of a contract of sale requires, that the implied rights, which are supposed to be conferred by the seller upon the purchaser, should be determined by the apparent objects of the sale, and the price paid for the thing, when there are no express stipulations made. The delivery of a piece of merchandise for a price ordinarily held to be the measure of value for all the rights in it enjoyed by the owner, implies that the full right of property passes, including the right to use the thing in every

form of which it is capable. But if A. is found to have in his possession a chattel formerly known to belong to B., and the consideration paid by A. is sufficient only to cover the value of the possession for a restricted use, and is far less than the full value of the entire and absolute dominion over the chattel, a fair presumption arises in natural equity, that the parties contemplated in the transaction the sale and purchase of a right to use the chattel for a limited purpose.

When the purchaser of a single copy of a book pays for it whatever may be the current price set by the author, if he can, by the rules of natural law, be supposed to acquire thereby all the uses of which the copy is capable, including the faculty of indefinite multiplication, he purchases for a grossly inadequate consideration what is perhaps a mine of wealth. The profits which may be derived from the indefinite multiplication of copies justly belong to some one. The author has created the opportunity of reaping them, and is the sole owner of the original copy from which all others must be taken. This opportunity or faculty of receiving what the public will certainly and freely give, in exchange for copies of a literary production, is therefore a franchise to which no one can show so good a title as the author, who has created it. To hold that he intends to sell it, when he parts with a single copy of his composition for a price implying, if it implies anything, a

reservation of it, is wholly inconsistent with the rules of natural justice.[1]

But there is still another proof that the author reserves to himself the sole right of multiplying copies of his works, when he exposes single copies to sale. The object and purpose of publication are to put into the hands of the purchaser of a copy the means of becoming acquainted with the author's thoughts. What proof is there that the author contemplates anything more? If it is supposed that he intends to forego the profits which may be derived from his work, then the consequence also follows that he intends to abandon to others the reproduction of copies, without exercising any care for his own reputation, or any supervision over the manner in which the copies shall be reproduced. If this last supposition prevails, then the author himself defeats the object of publication, since he cannot make it certain to the reader or himself, that his thoughts will continue to be accurately represented. But the interests of the author are far too great to admit of any mere hypothesis as to his intentions, inconsistent with those interests. If he has not expressly or by necessary implication granted or abandoned his

[1] Puffendorff states succinctly the rule of natural equity concerning the equality of contracts. "Since contracts are necessary for my obtaining those things which I had no right to claim; and since it is presumed that a man gives nothing gratis, which he parts with upon contract; we cannot therefore think that any one designs to give away, by contract, more than he supposes he receives; and consequently a contract can give a right to another man's goods no further than as they are equivalent to something which that other man receives." Puffendorf's Law of Nature, &c. by Barbeyrac. B. v. ch. iii. § 1.

rights, it must be presumed that he has reserved them to himself, since it is not ordinarily consistent with human motives, for men to throw away vast interests, which touch both their fortunes and their fame.

That there is no such presumption against the author's reservation, is proved by the practice and consent of mankind. Every civilized nation, of any literary rank, has some law recognizing the property of authors in their works.[1] This universal legislation is founded in a conviction that such property exists in natural justice; for although the protection thus afforded by positive law is generally temporary, and embodies, as I shall hereafter suggest, a compromise between the strict rights of the author and the demands of society, yet it proves the existence of those rights, by undertaking to reconcile them with the wants and interests of the public at large. There is no other hypothesis to account for the careful legislation of so many countries.

Such being the nature of the author's claim, and such the right upon the exercise of which it depends, it is in the nature of property, because there is in possession an invention capable of being made a source of profit, and which will certainly produce profit to the proprietor, if society does not permit

[1] For a view of the legislation of different countries, on the rights of authors, see the work of M. Charles Renouard, Traité des Droits D'Auteurs, Paris, 1838, t. 1. He gives the legislation of England, France, the United States of America, Holland and Belgium, the different States of Germany, Denmark, Russia, the Kingdom of the two Sicilies, and Sardinia.

others to avail themselves of it without returning any compensation. As soon as the law declares that the profits arising from the multiplied copies of this invention shall not be taken by any one but the author, such profits immediately flow from the use of the invention; and before the enactments of positive law have so declared, the law of nature makes it clear, that these profits belong to him who has created and holds the invention, and who can withhold it from others, until by some pact or convention, express or implied, he has secured the compensation which he sees fit to demand.

It is not unworthy of remark, also, that public policy requires a recognition of the natural rights of authors, as the basis of legislation. It does so, because the highest policy of society is justice. There is, in the requirements of national character, the same high necessity for honesty and good faith, that lies with the whole weight of moral obligation upon the individual. Society cannot afford to be unjust. Its prosperity is the aggregate prosperity of its members. Its character, its peace and dignity, the amount of happiness which it may attain, or be the instrument of attaining to its members, depend directly upon the harmony that reigns through its internal relations, and upon the degree to which it has enforced the observance of justice and respect for the great maxims in which the essence of justice is enshrined. When society ceases to be just, it ceases to be safe. No infraction of a public principle

ever takes place, without being followed by retributive social evils. When, by a total neglect of the natural rights of authors, injustice is done to a class of conspicuous and important benefactors of their race, the violation of principle becomes the more glaring, and the injury to the moral sense of society more striking, from the species of ingratitude involved in the neglect. There is scarcely any civilized people, who would not be shocked by a proposal to withdraw all protection from the interests of literary property.

Public policy also requires a careful protection of the rights of authors, because literature flourishes most when it reaps the rewards consequent upon such protection. There can be no doubt that the body of literature, now extant in the English language, owes a vast deal to the acknowledgment of these rights, imperfect as it has sometimes been. Although no legislative protection existed before the reign of Queen Anne, there was a protection founded in an acknowledged common law right, and the practice of printers and booksellers, which may be traced as far back as the reign of Queen Elizabeth. The existing literature of England, of a date subsequent to that time, and the whole of that of America, have been produced under the stimulus afforded by a greater or less degree of security to the pecuniary interests of authors. It is not easy to say, with certainty, that any portion of this literature would not have been produced, if an author's exclusive right to

the proceeds of publication had never been admitted; nor is it easy to find many works, now classical in the language, or of an important character, which we know certainly were written without any view to profit, whether large or small. What we know certainly, is, that from Shakspeare to our own day, everything has been written under some state of the law, admitting an author's right, and that very few great authors have avoided or neglected all recompense for their writings, while the vast majority have written for money as well as fame.[1]

But it is not solely for the encouragement of genius in its transcendent displays, that it concerns the interests of society to protect the rights of authors. The great classes of compilers and scholars, whose works embody the learning of a country or an age — embracing the historian, the lexicographer, the critic and the commentator; the whole body of scientific writers, from the author of a mechanism of the heavens to the author of the last shilling arithmetic; the various grades of writers in every department, from the higher votaries of letters to the day-laborers in the vineyard of knowledge, are all necessary to the formation of a national literature and the development of a general culture. All require that the fruits of their labor, like the fruits of other men's labor, should be under the protection of the law;

[1] There is very little reason to doubt, that the right of authors was practically acknowledged as a common law right, in the reign of Elizabeth. (See post, ch. 2.)

for like other men, they labor for subsistence and the comforts of life, and it is only when these are secured to them, that they can be expected with certainty to labor at all. Glory may be the reward of genius in solitary and irregular cases; but no man ever wrote a spelling-book or compiled an almanac for that unsubstantial and thankless commodity.

It remains to answer certain objections. In the first place, it may be asked, if the rights of authors are so clearly founded in natural justice, how is it that the law of nations, which recognizes and respects most of the rights of property, has not recognized the property of authors in their works, but has allowed them to be treated, in a foreign country, as if they were *publici juris?*

The law of nations is an admirable system of rules and principles, tending, more or less directly at different periods, to perfection, but not entirely complete, at present. It has long been accustomed to regard the title of movable property as sacred, wherever found; so that the real owner may pursue and reclaim it in any country with which his own is at peace. Even in the tumult of war, it exerts a searching and efficient energy, regulated by the maxims of a broad jurisprudence, to distinguish between neutral and belligerent interests; in order that nothing but the strict rights of warfare shall be allowed to divest the ownership of property. But the law of nations has not always been so careful; the time has been, when the goods of the merchant, cast

by tempestuous weather upon a foreign shore, have been accounted the lawful prey of any occupant. It is manifest, therefore, that the law of nations is a progressive system. The fact, that its principles have never been applied to a certain case, does not disprove the existence of principles, which might be made to regulate it.

At present, however, these principles have not been applied to the rights which we are now considering. The actual law of nations knows no exclusive right of an author to the proceeds of his work, except that which is enforced by the municipal law of his own country, which can operate nowhere but in its own jurisdiction. As soon as a copy of a book is landed in any foreign country, all complaint of its republication is, in the absence of a treaty, fruitless, because no means of redress exist, except under the law of the author's own country. It becomes public property, not because the justice of the case is changed, by the passage across a sea or a boundary, but because there are no means of enforcing the private right. The law of nations, being in great part a body of customary rules, depends upon the practice of nations; and what has not been practised, cannot be affirmed to be part of that law. But the real equity of the case, founded in the principles which govern other rights, requires that the author's interest in his book should be respected throughout the globe, as much as the interest of a merchant in a bale of goods. The natural justice of the case, there-

fore, has between some nations led to treaty stipulations, by which alone the *casus omissus* of the public law can be supplied; and the example of those nations, which have thus supplied the omission, shows what consistency with the principles of justice requires.

In the next place, it may be asked, how the actual legislation of most countries, limiting the duration of an author's right, is to be reconciled with the theory which gives him, if it gives anything, a perpetuity? If the theory, which founds an author's exclusive right to the proceeds of his work in natural justice, be correct, it certainly involves as a consequence the perpetual duration of the right. The legislation of England and America, and of many other countries, has practically abridged the author's property, and reduced it to a term of years. Does it follow that society, in this course of legislation, is unjust?

The actual legislation on this subject should be regarded as a compromise. The claim of authors, resulting from the principles of natural right, involves the perpetual duration of the property. But in order that such property should be of any value, it is necessary that society should interfere actively for its protection. It can interfere by the enactment of penalties, which, in order to be effectual, must be severe; or it can interfere by prohibition, which is a stern and summary exercise of power. Society will not ordinarily be willing to apply such remedies in favor of an exclusive right, any farther than it finds such a course

beneficial to its own interests, in the broadest sense of the term. A perpetuity in literary property involves some inconveniences, which may come to be serious ; one of which is, that the text of an author, after two or three generations, if the property be retained so long by his descendants, belongs to so many claimants, that disputes must arise as to the right to publish, which are very likely to prevent publication altogether.[1] This would be a great misfortune to society ; and it is to guard against this and other inconveniences, that society may fairly require, as the price of its active protection by stringent enactments, that the author and his representatives should surrender a part of their full right re-

[1] The Emperor Napoleon is reported to have stated this objection to a perpetuity, in council, with his characteristic practical wisdom, as follows : "Napoleon dit que la perpétuité de la propriété dans les familles des auteurs aurait des inconvéniens. Une propriété littéraire est une propriété incorporelle qui, se trouvant dans la suite des temps et par le cours des successions divisée entre une multitude d'individus, finirait, en quelque sorte, par ne plus exister pour personne ; car, comment un grand nombre de propriétaires, souvent éloignés les uns des autres, et qui, après quelques générations, se connaissent à peine, pourraient-ils s'entendre et contribuer pour réimprimer l'ouvrage de leur auteur commun ? Cependant, s'ils n'y parviennent pas, et qu'eux seuls aient le droit de le publier, les meilleurs livres disparaîtront insensiblement de la circulation.

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

"D'ailleurs, un ouvrage a produit à l'auteur et à ses héritiers tout le bénéfice qu'ils pouvent naturellement en attendre, lorsque le premier a eu le droit exclusif de le vendre pendant tout sa vie, et les autres pendant les dix ans qui suivent sa mort.

"Cependant si l'on veut favoriser davantage encore la veuve et les héritiers, qu'on porte leur propriété à vingt ans." LOCRÉ, *Legislation Civile de la France*, t. ix. pp. 17, 18, 19. Renouard, Droits D'Auteurs, tom. 1, p. 387.

garded as a right according to the general principles of natural justice.

The great problem in legislation is to determine the point where this surrender ought to be made. It is a mixed question of policy and justice, with regard to which no positive rule can be laid down. The experience of nearly all nations, however, has shown that the interests of literature, as well as the dictates of natural justice, require that the children of an author should be secured in the enjoyment of the right, for some period after his capacity to provide for them has ceased.[1]

[1] In England, as the law now stands, a copyright lasts during the author's life, and for seven years after his decease; or for forty-two years, in case the life is terminated before thirty-seven years from the day of first publication, (5 & 6 Vict. c. 45, § 3.) In France, the property in a work is secured to the author for his life, to his widow for her life, in case the marriage contract endows her with it, and, after their death, to the children for twenty years. In Holland and Belgium, the duration of a copyright is to the author for his life, and to his heirs and representatives for twenty years after his death. In Prussia, copyright lasts for the author's life, and his heirs have a term of thirty years from his decease. In Russia, it is for the author's life, and for twenty-five years to the heirs. In Austria, the rights of authors do not descend to their heirs. In Denmark, Norway, Sweden, and Spain, copyright is perpetual. Godson on Patents and Copyright, pp. 319, 320. Renouard, Droits D'Auteurs, tom. 1, p. 226, et seq. In the United States, it is for twenty-eight years, with a right of renewal by the widow or children for fourteen years more. Act 3d Feb. 1831, §§ 1, 2.

CHAPTER I.

HISTORY OF LITERARY PROPERTY.

THE object of the present chapter is to state succinctly the history of Literary Property, in the jurisprudence of England and America, from the earliest recognition of such property to its modern condition. Our attention is, of course, first to be directed to its origin in England, as a right of property under the law of England. The foundation of the right in the law of general justice applicable to all property, has been already considered.

The term, "copy of a book," has been used for ages in England, to signify the sole right of printing, publishing and selling a written composition.[1] The question whether, at the common law, the author of such a composition formerly had a perpetual right of property in his work, has been attended with some difficulty; but whoever, at the present time, carefully considers the various authorities bearing

[1] Millar *v.* Taylor, 4 Burr. Rep. 2311. "I use the word 'copy,' said Lord Mansfield in this case, 'in the *technical sense* in which that name or term has been used for ages, to signify an *incorporeal right* to the *sole* printing and publishing of somewhat intellectual, communicated by letters."

upon the question, and the manner in which it came finally to be settled against the perpetual right of property, can have little doubt that such a right once existed in England. If this be true, it follows that subsequent legislation, so far as it abridged this right of property, took away what once belonged to authors by the common law of England.

Until the year 1640, the crown exercised an unlimited authority over the press, which was enforced by the summary powers of search, confiscation, and imprisonment, given to the stationers' company, and by the then supreme jurisdiction of the star-chamber. These are undoubtedly lights to which we should not turn for safe guidance upon any question of a public nature, or to ascertain the modern rights of the subject against the crown. But it cannot escape the attention of any one, accustomed to investigate a question of private law, that if, in the period of the most arbitrary features that have at any time existed in the English constitution — features, of which it has now so divested itself that we are accustomed to speak of them as utterly repugnant to the true principles of the constitution — a matter of private right was held, respected, contemplated and even enforced, through that very jurisdiction now discarded and justly reprobated, such a right must have historical evidence in its favor of grave and striking character. Whatever in the law of England concerning justice between man and man, has lived through those periods of the constitution when arbi-

trary power and prerogative most flourished, when the crown exercised powers founded in scarcely any discretion but that of policy and of the exigencies of state, must, in the eye of juridical history, be deemed of great value. If it happens, as is really the case with regard to the present subject, that the private right, thus recognized and assumed to exist by the supreme power in the state, was one that in no way conflicted with the supposed rights or actual policy of the crown, and if the crown itself asserted and enforced rights of its own of a similar character and depending upon similar principles, the testimony in favor of the doctrine upon which the right is founded is as clear and unexceptionable, as the nature of such an historical inquiry can admit.

As early as the year 1556, decrees and ordinances of the star-chamber regulated the manner of printing and the number of presses throughout the kingdom, and prohibited all printing against the force and meaning of any of the statutes or *laws* of the realm, or of any injunction, *letters-patent*, or ordinances set forth or to be set forth by the grant, commission, or authority of the crown.[1] The rights of owners of copies were not here expressly recognized, as they afterwards were, except so far as they are implied in the prohibition against violating letters patent.[2]

[1] 4 Burr. R. 2312.

[2] It will be seen hereafter, that the letters patent here referred to were not grants to authors, of property in their own works, but grants of the right to print books the sole printing of which belonged to the crown, either by naked prerogative, or by the title of property. Upon which of these two titles the right

By another decree of the star-chamber, of the 23d of June, 1585,[1] every book was required to be licensed; and any one was forbidden to print "against the form or meaning of any restraint contained in any statute or laws of the realm, or the true intent and meaning of any *letters-patent*, commissions or prohibitions under the great seal, or contrary to any allowed *ordinance* set down for the good government of the stationers' company." That this decree was intended to recognize and did recognize some rights of literary property, of some kind, is manifest from what took place in the next reign. In the 21st of James I. a proclamation of the 25th September, 1623, recited the above decree of the 28th of Elizabeth, and declared that the same had been evaded, amongst other ways, "by printing beyond seas such allowed books, works or writings as have been imprinted within the realm by such to whom the sole printing thereof by letters patent, or lawful ordinance or authority, doth appertain;" and then the proclamation enforced the decree referred to.[2]

Now, that the crown did not interfere in this manner simply for the purpose of restraining the press, or of asserting its own rights, is manifest from both the decree and the proclamation. Private rights and private property are protected in both. The kinds of private property thus protected must have included more than the rights derived by grant from the

of the crown is supposed to depend, will also be stated.

[1] 28 Eliz. See 4 Burr. R. 2312.
[2] 4 Burr. 2312.

crown, because the words of the decree and the proclamation embrace other rights of "sole printing," as well as rights which depended on letters-patent. Books, of which the copyright was recognized by ordinance of the stationers' company, were included, and there is a fair implication that books otherwise appertaining to their owners by the "laws" of the realm were also included, and the sole right of printing such books depended on the property of the author, and not on grant from the crown. But even in cases of letters-patent, the argument which deduces the right from property in the crown, is, as we shall see, far stronger than any other view of it that can be taken.

There was another decree of the star-chamber, of the 11th July, 1637, which should here be cited, and by which "no person was to print or import (printed abroad) any book or copy which the company of stationers, or *any other person* hath or shall, by any letters-patent, order or entrance in their register-book, *or otherwise*, have the right, privilege, authority, or allowance solely to print." [1]

There are one or two remarks now to be made with reference to the whole period from 1556 to 1640, at which time the star-chamber was abolished. The judicial proceedings of that tribunal are supposen to be chiefly lost or destroyed, and prosecutions for printing or pirating another man's copy, or other-

[1] 4 Burr. 2312.

wise printing unlawfully, cannot now be found. But it is obvious that no man could print another man's copy, because he could not obtain a license so to do, for two reasons. In the first place, the literature of England was not then so extensive, that the officers of the crown, whose duty it was to license publications, would not, generally, know to whom the copyright of any work belonged, which any applicant might find it worth while to reprint. There was, therefore, little danger that licenses would be incautiously granted. In the second place, the decree of 28th Elizabeth prohibited all printing "contrary to any allowed ordinance set down for the good government of the stationers' company." Now, although we know of no ordinance or by-law of the company relative to copies, until after the year 1640, yet from 1558 to 1582 there are, it is said, entries in the records of the company which show that copies were entered *as property*, and that pirating was punished.[1] This shows the contemporary opinion as to this species of property, and renders it highly probable that no license could have been obtained for printing another man's copy, because it would have been asking for an authority to do what was then held to be immoral, dishonest, and unjust. It is a just inference, that what was so held by the stationers' com-

[1] 4 Burr. 2313. In 1583, two printers, Wolf, and Ward, insisted upon a right of printing all books, even where there were copyrights existing. Stowe, 223, tit. Stationers' Company. But commissioners, appointed by the crown, willed them to desist. See Wedderburn's Argument in Tonson *v.* Collins, 1 W. Black. R. 304.

pany, in that age a recipient of royal favor and of extraordinary powers from the crown, would have been so held by the crown itself.[1]

In 1640, the star-chamber was abolished, and all regulations of the press and decrees against printing, as well as all the charter powers given to the stationers' company, were abolished. But the licentiousness that ensued led the two houses of parliament to pass a new ordinance, which prohibited printing unless the book had been first *licensed* and entered in the register of the stationers' company; and it also prohibited printing without consent of the owner, or importing (if printed abroad,) upon pain of forfeiting the same *to the owner or owners* of the copies of the said books, &c.[2]

There could be no owners of copies in England at the time when this ordinance took effect, except those who held the right to print certain books by letters-patent, or those whose title was that of authors or proprietors at common law. It is not very probable that the parliament of that day passed this part of the ordinance for the purpose of protecting grants of the crown; and as to all other books, the whole foundation of literary property, if it depended upon former decrees of the star-chamber or proceedings of the stationers' company, had been swept

[1] It would seem, therefore, that down to the year 1640, (as has been well remarked by Willes, J. in Millar *v.* Taylor,) "copies were protected and secured from piracy by a much speedier and more effectual remedy than actions at law or bills in equity."

[2] Passed in 1643. 4 Burr. 2314. 4 Black. Com. 152, note.

away. But these decrees and proceedings were not the sources of the right of property; they were merely protective in their character; and it can therefore admit of little doubt, that the understanding of the parliament was, that the property existed at common law, in the "owners" whom they chose to protect, otherwise this provision in their ordinance could only have contemplated "owners" by letters-patent.[1]

There is, however, a contemporary testimony, which places this matter in a very clear light. In November, 1644, Milton published his great tract for the liberty of unlicensed printing, against this ordinance, addressed to the parliament by whom it had been passed. His vigorous and manly denunciation was directed solely against the system of licensing. He expressly excepts from his censure that part of the ordinance which was designed for the protection of the rights of property in authors, and distinctly affirms that one of the "glossing colours" used, to make the ordinance pass, was "the just retaining of each man his several copy, which God forbid should be gainsaid."[2]

[1] Selden sat in the parliament which passed this ordinance.

[2] Milton's "Speech for the Liberty of Unlicensed Printing, to the parliament of England." He had previously said, "For that part which preserves justly *every man's copy to himself*, or provides for the poor, I touch not; only wish they be not made pretences to abuse and persecute honest and painful men, *who offend not in either of these particulars*. But that other clause of licensing books, which we thought had died with his brother quadragesimal and matrimonial when the prelates expired.—I shall now attend with such a homily, as shall lay before ye," &c. . . .

The testimony of Milton must be allowed to have some weight upon this question. He knew the state of the literature of England, if any man knew it, and he cannot be supposed to have thus recorded the general recognition of the rights of authors, and to have thus expressly admitted what the ordinance was intended, by the provision in question, to protect, without knowing of what he affirmed.[1] Many of the arguments used by him against the licensing system also show, incidentally, that the ordinance, when it spoke of "owners," must have contemplated proprietors of books, of which the public might demand successive editions; for his arguments show — as indeed, we know without resorting to them, —

[1] Milton spoke upon this occasion in the name and at the solicitation of the scholars of England. "I might say, if without envy, that he whom an honest quæstorship had endeared to the Sicilians, was not more by them importuned against Verres, than the favorable opinion I had among many who honor ye, and are known and respected by ye, *loaded me with entreaties and persuasions*, that I would not despair to lay together that which just reason should bring into my mind, toward the removal of an undeserved thraldom upon learning. That this is not, therefore, the disburdening of a particular fancy, but the common grievance of all those who had prepared their minds and studies above the vulgar pitch to advance truth in others, and from others to entertain it, thus much may satisfy. *And in their name* I shall, for neither friend nor foe, conceal what the general murmur is."

Lord Mansfield has said, that "the single opinion of Milton, speaking after much consideration to what had been the general consent of the kingdom for ages, is stronger than any inferences that can be drawn from gathering acorns or seizing on a vacant piece of ground." 4 Burr. 2399. It is curious that, in nearly a century after Milton's opinion was thus recorded, his own Paradise Lost, in the hands of the assigns to whom the sum of £5 had passed it from him and his heirs forever, was to come before the chancellor of England, to claim successfully for its *then owners* their right in their "several copy." But his great authority does not seem to have been alluded to upon that occasion. Tonson *v.* Walker, before Lord Hardwicke, in 1739. Cited 4 Burr. 2325, and 3 Swanst. 673.

that such books were then proportionally not more rare in the literature of England than they now are.[1]

In 1649, the long parliament made an ordinance, which forbids printing any book legally granted, or any book entered, without consent of the *owner*, upon pain of forfeiture, &c.

In 1662, the licensing act of 13 and 14 Car. II. was passed, prohibiting the printing of any book unless first licensed and entered in the register of the stationers' company, and prohibiting also the printing without consent of the *owner*, upon pain of forfeiting the book and 6*s*. 8*d*. for each copy, half to the king, half to the owner; to be sued for by the owner in six months.

It is remarkable that there had been thus far no legislation in England, which grants, creates, or establishes the property of an author in his own works. The liberty of publishing, and sometimes the presses which he should employ, had been subjected to

[1] "And what if the author shall be one so copious of fancy, as to have many things well worth the adding come into his mind after licensing, while the book is yet under the press, which not seldom happens to the best and diligentest writers; and that perhaps a dozen times in one book . . . . . Nay, which is more lamentable, if the work of any deceased author, though never so famous in his lifetime, and even to this day, comes to their hands for licence to be printed, or reprinted, if there be found in his book one sentence of a venturous edge, uttered in the height of zeal, (and who knows whether it might not be the dictate of a divine spirit?) yet not suiting with every low decrepit humour of their own, though it were Knox himself, the reformer of a kingdom, that spake it, they will not pardon him their dash; the sense of that great man shall to all posterity be lost, for the fearfulness, or the presumptuous rashness of a perfunctory licenser. And to what an author this violence hath been lately done, and in what book of greatest consequence to be faithfully published, I could now instance, but shall forbear to a more convenient season."

regulation and control; but from the introduction of printing to the fourteenth year of the reign of Charles II. it had been assumed that the author of a book has a property in his copy, and successive parliaments had provided for his protection as an "owner," without undertaking to confer that character upon him. The state of the literature of England in 1662 will show that when parliament provided for the protection of "owners," they could not have intended merely the royal patentees, passing by the whole existing body of literature then known by every intelligent Englishman, at least by name. The legislators of that day may also be presumed at least to have known that there were living authors then writing and publishing, not without fame and honor in the land.

The licensing act of Charles II. was continued by several acts of parliament, but expired on the 9th of May, 1679.[1] In 1681, all legislative protection having ceased, the stationers' company adopted an ordinance or by-law, which recites that several members of the company have *great part of their estates in copies*; that by ancient usage of the company, when any book or copy is duly entered in their register to any member, such person hath always been reputed and taken to be proprietor of such book or copy, and ought to have the sole printing thereof. The

[1] In this year, an action on the case was brought in the king's bench, for printing the Pilgrim's Progress, of which the plaintiff alleged himself to be the true proprietor. Ponder *v.* Bradyl, Lilly's Entries, 67. But it does not appear whether the action was proceeded in.

ordinance then further recites that this privilege and interest had *of late* been often violated and abused; and then it provides a penalty against such violation by any member or members of the company, where the copy had been duly entered in their register. The true view of this ordinance would seem to be, that the members of the stationers' company, finding their estates in copies, which belonged to them by the common law, no longer under the protection of the licensing act, the repeal of which had incidentally withdrawn the protection that had always been inserted in it, though it had necessarily no connection with the system of licensing, undertook to provide for the failure of legislation, as far as they could, by an ordinance applicable of course to their own members only. The ordinance is not to be cited as any other proof of what the common law right was, than as it shows, in connection with other historical proofs, how it was then supposed to be. Now I do not understand this ordinance to rest the exclusive right upon entry in the register book, or upon their usage to respect each other's rights as derived merely from entry. It declares, as a separate and distinct inducement, that "several members of this company have great part of their *estates in copies*." By "estates" must have been meant their capital; and "copies" they must have intended to use in the ancient technical sense of the sole right to print particular books. This right existed, if at all, by the law of England, and not by the usage of the station-

ers' company, whose members could have individually no different rights of property from all the rest of the king's subjects. If a member of the stationers' company held a "copy," any other man in England, not a member of that corporation, could also hold a "copy." But as a further inducement to the provision of a penalty upon their own members against violating the rights of another member, they recited the ancient usage of the company to respect these rights when brought to the notice of the company, by entry in their register. It was much the same as if an association of persons were to agree that any one of their number should pay a penalty for violating the acknowledged rights of property of any other person in the association, provided such rights were duly entered in their common records. It would not be an attempt to create the right; but it would justly be regarded as an acknowledgment of the existence of such a right.

The licensing act of Charles II. was revived in the 1st of James II. c. 7, and continued by 4 W. & M. c. 24, and finally expired in 1694. In this last year, the stationers' company, apparently with the same view of supplying, as far as related to themselves, the failure of legislative protection, passed a similar ordinance, or by-law, in a slightly different and stronger phraseology. The same observations apply to this ordinance as to that of 1681.[1]

[1] The two ordinances are recited at large in the special verdict found in Millar *v.* Taylor, 4 Burr. R. 2303.

Having now brought the history of private copyright down to the Revolution of 1688, it is necessary here to turn back to survey a collateral and important branch of the subject, the prerogative copies.

From the first introduction of printing, it was considered to be a matter of state. The reasons upon which it was so regarded were various. It was held to be a matter of a public nature; that it was a new art introduced by the king, and therefore he had a prerogative right to prescribe the persons who should exercise it; and that the unrestrained liberty of printing was dangerous. These reasons were from time to time advanced as the foundation for that control exercised over the press from its first introduction to the year 1688.[1] But there were also certain other special reasons assigned for the exclusive right claimed by the crown in certain publications, and granted to individuals by letters-patent, which have been justly supposed to proceed upon the notion of property. At the same time it must be admitted, that with the idea of property was also advanced the claim of naked prerogative, resting upon reasons of state; and it is not very easy to distinguish, upon the earlier authorities, what the precise grounds were, on which the courts intended to rest the title to the various prerogative copies. In the main, however, this class of cases undoubtedly does show that the crown sometimes claimed a property in copies

[1] Bacon's Abridgment, tit. Prerogative, F. 5. Carter, 90. 3 Mod. 75. Skin. 234. Vern. 275.

entirely analogous to that belonging to private individuals.

The works that have been at different times claimed as belonging to the crown, are all law books, including the Reports and the Statutes, Almanacs, the Latin Grammar, the Book of Common Prayer, and the English translation of the Bible. The earliest case, of which we have any distinct account, was between a Colonel Atkyns and certain members of the stationers' company, in the 18th Charles II. Atkyns, as the law-patentee, claimed the right to print all law books; the defendants had printed Rolle's Abridgment. A bill was brought for an injunction, which the lord chancellor granted against all the members of the stationers' company. An appeal was taken to the house of lords, and it was there argued upon the footing of the king's property in law books, because he pays the judges who pronounced the law; and the decree of the lords, affirming the decree below, has always been cited as a recognition of the copyright in the king, though of course the claim, in its full extent, has been since exploded.[1]

The next case was that of Roper *v.* Streater, in the 22d – 24th Charles II. Roper bought of the executors of Mr. Justice Croke the third part of his Reports. Streater was law-patentee, and printed these Reports "over Roper," who brought an action of debt against him on the licensing act of 13th and 14th Charles II. Streater pleaded the king's grant,

[1] Carter, 89. Bacon's Abridg. Prerogative, F. 5. 4 Burr. 2315.

and the demurrer therefore presented the question between the crown and a purchaser of the author. In short, the question was, whether the king or the plaintiff was the "owner" of these Reports, in the sense of the statute. In the king's bench, judgment was for the plaintiff and against the king's patent; the court considering the plaintiff as owner of the copy at common law by purchase of the executors of the author.[1] This judgment was reversed in the house of lords, upon the ground that the king was the owner of the copy, and therefore that the executors of the author could convey nothing.[2]

The case of the Stationers' Company *v.* Seymour, in the 29th Charles II. was a question between certain grantees of the crown and certain other persons who had printed Gadsbury's Almanac. The court put their decision, in part, upon the fact, that an almanac has no certain author, and that the property of such books is in the king. The defendants claimed to have added "prognostications" to the old almanac; but the court said "these additions did not alter the case, no more than if a man should claim a property in *another man's copy*, by reason of some inconsiderable additions of his own."[3] The reason was also assigned that the defendant's almanac was the same as that printed before the book of

[1] Skinner, 234. 1 Mod. 257. Bac. Abr. Prerog. F. 5. 4 Burr. 2316.

[2] Ibid. It seems, however, that reasons of state were also assigned. See Bacon, ut sup. and the report in Skinner, 234.

[3] 1 Mod. 256. Bacon's Abridg. Prerog. F. 5. 4 Burr. 2317.

common prayer, which regulates the feasts of the church, and therefore it trenched upon that part of the prerogative which concerns the government of the church.[1]

There was also a case of the Stationers' Company *v.* Parker, in 1 Jac. 2. It does not appear what the book in controversy was, but the question was between concurrent patentees, and whether the plaintiff's patent excluded the defendant's.[2] Holt, arguing for the defendant, agreed that the king had power to grant the printing of books concerning law or religion, and admitted it to be an interest, but not a sole interest. The court inclined for the defendant, but reserved the question for advisement.[3]

There is no case in the books concerning the Latin Grammar, but the right of the king was grounded on the allegation, that he paid for compiling and publishing it.[4] Nor is there any reported case prior to the Revolution concerning the Bible, but that was vested in part upon the ground that the king paid the translators; and with regard to the Year Books, it was said, that the crown was at the expense of taking the notes.[5] The further history of the pre-

[1] 1 Mod. 256. Bacon's Abridg. Prerog. F. 5. 4 Burr. 2317.

[2] The work was undoubtedly a law book.

[3] Stationers' Co. *v.* Parker, Skinner, 233.

[4] 4 Burr. 2329. This notion is now of course abandoned.

[5] 4 Burr. 2329, 2401. Blackstone says, that the exclusive right of printing the translation of the Bible is founded upon these two principles, combined, viz. 1. That the king is the supreme head of the church; and 2. That it was translated at the expense of the crown. 2 Black. Com. 410.

rogative copies will be pursued in their connection with the general course of the subject.[1]

The cases which have now been cited, have been considered by very great authorities as proofs that the right of the crown, in certain copies, was regarded as a right of property of the same kind as that of authors.[2] But if they do not show, that the right of the crown was a right of property merely, and if the high notions of prerogative entertained at the time entered into these decisions and affected them with reasons of religion or state, as is quite probable, then there is an argument to be drawn from them of great weight in favor of the existence of a common law right of property in authors, as a right understood at the times when these decisions were made. These cases were decided before the Revolution, at which it seems obviously proper to pause as at a stage in the inquiry. Notions of power and prerogative were then held and acted upon, such as could not be breathed at the present day in Westminster Hall, and the press had long been under the almost absolute control of the crown. Yet, in such a period, it was felt to be necessary to argue in support of the

[1] See post, ch. 2.

[2] Per Lord Mansfield Ch. J. and Willes, J. in Millar *v.* Taylor, 4 Burr. 2317, 2401. Lord Mansfield's remarks upon these cases are very cogent. He considered that "*crown copies* are, as in the case of an author, civil property; which is deduced, as in the case of an author, from the king's right of original publication. The kind of property in the crown, or a patentee from the crown, is just the same; incorporeal, incapable of violation but by a civil injury, and only to be vindicated by the same remedy, as an action upon the case, or a bill in equity." Yates J. in the same case, who dissented, held, that the crown copies were founded on reasons of state or religion.

right of the crown by analogy to the right of the subject; and the courts not only recognized the analogy, but wherever the particular publication afforded the least color for the claim as a claim of property, they always took care to rest the king's copy upon the same grounds that would have established the right in a private person. Fictions were resorted to, as in the case of the Latin Grammar, in order that the right of the king might stand upon property. All this shows that there existed at that time a right of property in copies, growing out of authorship, so well settled, so universally received and acted upon, and so thoroughly established in the notions of the profession and the public, that the crown was forced to borrow the aid of its analogies, and to claim upon the same title, as that which protected a sermon or a poem.

The proprietors of copies applied to parliament in 1709, for an act more effectually to secure their property forever, by what they thought a more adequate remedy than any that had then been used. It seems, that no one had then supposed that a bill would lie for an injunction and relief in equity.[1] But the common law remedy of an action was understood, though it was justly regarded as totally inadequate, both because of the difficulty of proving all the actual damages, and because "the defendant was always a pauper."[2] The petitioners therefore prayed, that CON-

[1] Millar *v.* Taylor, 4 Burr. 2317, 2405. Vern. 220, 275.

[2] So assigned in the petition of the booksellers. 4 Burr. 2318. Al-

FISCATION *of the counterfeit copies* might be made one of the penalties. This led to the Statute 8 Anne, c. 19, passed in 1709.[1]

The preamble of this act is worthy of attention. It is as follows: "Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted and published books and other writings without the consent of the authors or proprietors of such books and writings to their very great detriment, and too often to the ruin of them and their families; for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books; be it enacted,"[2] &c. The first section of the act then provides, that after the 10th of April, 1710, the authors of books already printed, who have not transferred their rights, and the booksellers, &c. who have purchased copies, shall have the sole right of printing them for the term of twenty-one years; and the authors of books already composed and not printed, or thereafter to be composed, and their assigns, shall have the sole right of printing the same for fourteen years; with a penalty and forfeiture for printing without consent of the proprietor.[3] The

though there was no precedent of a common law action tried, yet that it was universally held that an action at common law would lie is apparent from this petition.

[1] See Appendix, p. 1.

[2] The title of the act is, "An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned."

[3] 8 Anne, c. 19.

second section declares that the books, the property of which is intended to be "secured" by this act are such as shall, before publication, have been entered at Stationers' Hall.

It is now necessary to trace the history of the subject in the courts, after the passage of this act, until the year 1769; in order to see whether this statute was considered as the source of literary property, or whether in fact literary property was held to depend upon principles of the common law known and received before and independent of the statute.

There are two classes of cases, within the period now under consideration, both of which have proceeded upon the author's right of property independent of the statute. The first class is that of books or other writings after publication; the second class embraces manuscripts before publication.

1. The question as to the common law right, with reference to old copies, after publication, could only arise after the full term of the act of Anne had passed, that is, at the end of twenty-one years from the tenth of April, 1710, or after the tenth of April, 1731. From this time until the case of Tonson *v.* Collins, in the king's bench in 1761, the court of chancery exercised a jurisdiction by injunction, in which the antecedent right of property must have been the right to which the court granted its protection.

The first case was one before Sir Joseph Jekyll, as master of the rolls, in 1735, in which he granted an injunction against printing the *Whole Duty of Man.*

This book first appeared in 1657, and the statutory term had passed. The right of the plaintiff therefore could only have been the general right of property.[1] In the same year also, (1735) Lord Talbot granted an injunction against printing Pope's and Swift's Miscellanies, many of which were originally published before the statute.[2]

In 1736, Sir Joseph Jekyll granted a third injunction against printing Nelson's Festivals and Fasts, a book first published in 1703.[3]

In 1739, Lord Hardwicke granted a fourth injunction against printing Milton's Paradise Lost, the title to which the plaintiffs derived under an assignment made by the poet in 1667.[4]

In 1751, Milton's poem again came before Lord Hardwicke, in an application for an injunction to restrain the defendant's printing an edition of the poem with the notes of Dr. Newton and other commentators, all of which belonged to the plaintiffs. The bill derived a title to the poem by the author's assignment in 1667, to the life by Fenton, published in 1727, to Bentley's Notes, published in 1732, and to Dr. Newton's Notes, published in 1749. The defendants put in an answer immediately, and set up

[1] Eyre *v.* Walker, cited 4 Burr. 2325; 3 Swanst. 673. Sir Joseph Jekyll sat in parliament when the act of Anne was passed.

[2] Motte *v.* Falkner, cited in Millar *v.* Taylor, 4 Burr. 2325, and in Tonson *v.* Walker, 3 Swanst. 673. Lord Mansfield, (1 W. Blackst. 331) said that this case was argued on the objection that the statute term had expired.

[3] Walthoe *v.* Walker, cited *ut supra.*

[4] Tonson *v.* Walker, cited, *ut supra.* At the date of this injunction, the term of twenty-one years secured by the statute to old copies, had been exhausted for eight years.

notes of their own, of which it appeared there were twenty-eight; while the notes of the other commentators belonging to the plaintiffs, and included in the defendant's edition, numbered fifteen hundred. Lord Hardwicke gave judgment in 1752, and held that the plaintiff's *notes* were within the protection of the statute; and as to the *poem*, although he said that the general question had never been determined and there was a doubt, yet he granted an injunction until the hearing against printing the poem, the life, and all the notes that had been combined by Dr. Newton.[1] When the authority of this case came to be afterwards considered in the king's bench, in the time of Lord Mansfield, his lordship, and the rest of the judges who concurred with him, had no doubt as to the real opinion of Lord Hardwicke, and they attributed his suggestion of a doubt to his great decency and prudence in not acting decisively upon a question of law, on which a doubt had been raised, and which had not been settled in a court of common law since the statute.[2]

[1] Tonson *v.* Walker, 3 Swanst. 673.

[2] Millar *v.* Taylor, 4 Burr. 2327, 2403, 2404. There is very little reason to doubt what Lord Hardwicke's opinion was, if the report of what fell from him, (in the case of Tonson *v.* Walker, in 3 Swanst.) be correct, and there is good reason to believe it to be so. He granted the injunction as to the *poem* until the matter could be considered at the hearing, because there was a "probability of right in the plaintiffs;" and he then went on to say that in the cases of crown copies the general argument had been, that the books were made at the expense of the crown, and therefore the property is in the crown; and that these cases are used as tending to prove a general right in the author. (3 Swanst. 680.) Willes, J. in Millar *v.* Taylor, quoted Lord Hardwicke as saying, "these arguments being allowed to support that right [of the crown] *infer* such a *property existing*." (4 Burr. 2327.) Lord Mansfield added, "I heard

All these injunctions were submitted to; and Lord Mansfield said of them, that, although they were not granted upon a final hearing, yet he looked upon them as equal to any final decree, "for the judicial opinions of the great men who granted these injunctions, in cases clearly not within the statute, uncontradicted by any book, judgment, or saying, must weigh in any question of law; much more, in a question of mere theory and speculation as to what is agreeable or repugnant to *natural principles*."[1]

2. The cases of injunctions against printing surreptitiously from unpublished manuscripts proceeded upon the admitted doctrine that every author has a property in his own writings before publication; and it is difficult to say, that the argument, which proves a property before publication, does not equally prove a property in the same writing after publication.[2] But without considering at present the question

Lord Hardwicke say what Mr. Justice Willes has quoted, as to these arguments from property in support of the *king's* right necessarily inferring an *author's*." (4 Burr. 2403.) He also pointed out, that at the time when Lord Hardwicke used this argument, the question was depending in the king's bench in a case sent there by him for determination. This was the case of Baskett *v.* The University of Cambridge, (1 Black. R. 105,) sent from the court of chancery in 1743; but it lay dormant for many years, and the judges' certificate was not granted until 1758. It was a question between rival patentees of the crown, with regard to printing acts of parliament, &c. The court of king's bench held that the right was concurrent in the plaintiff and the university, *exclusive of all other persons*. The case is a full authority for the position that the *king's copy* continues after publication, at common law; and we have seen that the great effort always was to make the king's copy depend upon property like that of the subject. See Lord Mansfield's remarks in 4 Burr. 2401, 2404. See also Baskett *v.* Cuningham, 1 Black. R. 370; 2 Eden, 137.

[1] 4 Burr. 2399.

[2] Lord Mansfield rejected the idea of any distinction. See 4 Burr. 2397.

tion, whether publication is a dedication or abandonment to the public of an author's property in his own work, it is important here to state historically the jurisdiction that was exercised in the period now under consideration, with regard to manuscripts.

In 1732, Sir Joseph Jekyll, on a bill filed by the son of Mr. Webb, a conveyancer, granted an injunction against a person who was intending, without authority, to print the draughts left by Mr. Webb in manuscript.[1] The injunction was acquiesced in.

In 1741, in Forrester *v.* Waller, there was another injunction granted against printing the plaintiff's notes, obtained surreptitiously, without his consent.[2]

In the same year, also, in the case of Pope *v.* Curll, known to literary history, Lord Hardwicke granted an injunction against printing Pope's Letters to Swift.[3] The injunction was submitted to.

[1] Webb *v.* Rose, cited 4 Burr. 2330. 2 Bro. P. C. 138.

[2] Forrester *v.* Waller, cited ut supra.

[3] 2 Atk. 342. Dr. Johnson believed this case to have been got up by Pope himself, in order to create for himself an opportunity to publish his letters as if in self-defence.

"One of the passages of Pope's life, which seems to deserve some inquiry, was a publication of letters between him and many of his friends, which falling into the hands of Curll, a rapacious bookseller, of no good fame, were by him printed and sold. This volume, containing some letters from noblemen, Pope incited a prosecution against him in the house of lords for a breach of privilege, and attended himself to stimulate the resentment of his friends. Curll appeared at the bar, and, knowing himself in no great danger, spoke of Pope with very little reverence: 'He has,' said Curll, 'a knack at versifying, but in prose I think myself a match for him.' When the orders of the house were examined, none of them appeared to have been infringed; Curll went away triumphant, and Pope was left to seek some other remedy.

"Curll's account was, that one evening a man in a clergyman's gown, but with a lawyer's band, brought and offered for sale a number of printed volumes, which he found to be Pope's Epistolary Correspondence; that he asked no name and was told none, but gave the

In 1755, in the case of Manley *v.* Owen, a bill was filed by some printers, who had bought of the lord-mayor the copy of the Sessions paper of trials, to enjoin the defendants from printing it. The injunction was granted, upon the ground that the property passed by the lord-mayor's grant to the plaintiffs.[1] This injunction was acquiesced in.

In 1758, the Duke of Queensborough, as the representative of Edward, Earl of Clarendon,[2] filed a bill to restrain the defendants from printing, publishing, or disposing of Lord Clarendon's History of the reign of Charles the Second. The bill stated, that Henry, late Earl of Clarendon,[3] was at his death possessed of a manuscript copy of this history, in the handwriting of Edward, Earl of Clarendon, to the

price demanded, and thought himself authorized to use his purchase to his own advantage.

"That Curll gave a true account of the transaction, it is reasonable to believe, because no falsehood was ever detected; and when, some years afterwards, I mentioned it to Lintot, the son of Bernard, he declared his opinion to be, that Pope knew better than anybody else how Curll obtained the copies, because another parcel was at the same time sent to himself, for which no price had ever been demanded, as he made known his resolution not to pay a porter, and consequently not to deal with a nameless agent.

"Such care had been taken to make them public, that they were sent at once to two booksellers; to Curll, who was likely to seize them as a prey; and to Lintot, who might be expected to give Pope information of the seeming injury. Lintot, I believe, did nothing; and Curll did what was expected. That to make them public was the only reason, may be reasonably supposed, because the numbers, offered to sale by the private messengers, showed that the hope of gain could not have been the motive of the impression.

"It seems that Pope, being desirous of printing his letters, and not knowing how to do, without imputation of vanity, what has in this country been done very rarely, contrived an appearance of compulsion, that, when he could complain that his letters were surreptitiously published, he might decently and defensively publish them himself." — *Johnson's Life of Pope.*

[1] Manley *v.* Owen, cited 4 Burr. 2329, 2404.

[2] Edward, first Earl of Clarendon, the lord chancellor.

[3] Henry, second Earl of Clarendon, son of the lord chancellor.

sole property whereof the plaintiff, as administrator to the late earl, became entitled. The defendant, Shebbeare, by his answer, stated, that the defendant, Gwynne, from whom he received the manuscript copy, told him that Henry, Earl of Clarendon, thirty-three years before, delivered to his (Gwynne's) father the original manuscript of the history, that he might take a copy of it, and make use of the copy as he should think fit; and that a copy was accordingly taken. The court was of opinion, that it was not to be presumed that when Lord Clarendon, the son, gave the elder Gwynne a copy of his father's manuscript, he intended that he should have the right to print it; that Mr. Gwynne might make every use of it, except that.[1] The injunction was granted, and was acquiesced under; and Shebbeare afterwards recovered against Gwynne, before Lord Mansfield, large damages, for representing that he had a right to print.[2]

Thus stood the law of England upon this subject until the year 1761, when the action of Tonson *v.* Collins, upon the copyright of the Spectator, was brought in the court of king's bench. The plaintiffs were the representatives and assigns of Jacob Tonson, who purchased the work of Mr. Addison and Sir R. Steele, in 1712. Of course, this copy was not within the statute of Anne, the term of protection

[1] Duke of Queensbury *v.* Shebbeare, 2 Eden's Ch. R. 329, cited 4 Burr. R. 2330, 2397.

[2] 4 Burr. 2330, 2397.

given by that act having long passed before the commencement of the action. The case was twice solemnly argued in the king's bench, and was then, by direction of Lord Mansfield, adjourned into the exchequer chamber, to be argued before all the twelve judges.[1] This reference was not made from any difference of opinion or difficulty among the judges of the king's bench; but they suspected collusion, and thinking that there might be no writ of error brought, they chose to take the opinion of all the judges. The court were afterwards clearly informed that it was a case of collusion between the parties, though it had been argued *bona fide* by the counsel, and the case therefore fell to the ground.[2]

In this manner passed away the first opportunity for the establishment, in a court of law, of a doctrine of the highest interest and importance to letters and literary men. But few years, however, could elapse before the question must have been again presented, in a serious contest between parties litigating actual interests. The literature of England embraced so many standard works in the latter part of the last century, out of which the question must necessarily arise whether all the rights of the author or his assigns were lost at the expiration of the period of protection fixed by the statute of Anne, that it is remarkable that the decision was deferred to so late a period as the year 1769. It was reserved for the

[1] Tonson *v.* Collins, 1 W. Black. R. 301, 321, 345.

[2] See 4 Burr. 2400, statement of Lord Mansfield.

most celebrated work of the poet Thomson, to present the case upon which the doctrine of perpetual property was to be adjudged in the court of king's bench, before it was finally overthrown in another cause, which went to the house of lords from the court of chancery.

"The Seasons, by James Thomson," was first published by him, for his own use and benefit as proprietor, at several times between the beginning of the year 1727 and the end of the year 1729. In the latter year he sold the work to Andrew Millar, who entered it at stationers' hall, and continued to publish it down to the time of the poet's death, which occurred in August, 1748, and from thence until the year 1763, when Robert Taylor put forth an edition of the poem, without the license or consent of Millar. The term of years secured by the statute of Anne had expired; and the action brought by Millar in the king's bench, in 1766, proceeded upon the claim of a perpetual property at common law in the author and his assigns.[1]

The special verdict in this case found that before the reign of Queen Anne, it was usual to purchase from authors the perpetual copyright of their books, and to assign the same from hand to hand for valuable considerations, and to make the same the subject of family settlements, &c. The verdict also found the by-laws of the stationers' company, passed in 1681 and in 1694, which have already been cited.[2]

[1] Millar *v.* Taylor, 4 Burr. 2303.

[2] Ante, pp. 36, 37.

The cause was twice argued before a full bench, Lord Mansfield presiding, and judgment was finally rendered for the plaintiff in 1769, Yates, J. dissenting.[1]

The great men concerned in this cause, the ability with which it was argued, and the deliberation attending the decision, must forever give it a high value in the estimation of every lawyer. It was argued and adjudged with consummate learning and ability; Lord Mansfield's judgment was worthy of his great name, and he was assisted by two of his brethren in a manner that reflects upon them and him the highest honor. A writ of error was afterwards brought, but it was never prosecuted; and the lords commissioners, after Trinity term, 1770, granted an injunction.

In estimating this celebrated decision, it is necessary for the historical inquirer to notice by what

[1] The first argument was by Mr. Dunning for the plaintiff, and Mr. Thurlow for the defendant; the second by Mr. Blackstone for the plaintiff, and Mr. Murphy for the defendant. The judges concurring in the judgment were Lord Mansfield, C. J., Willes J. and Aston J.; Yates J. dissented. — The case first arose in the court of chancery, and was sent to the king's bench for a decision of the general question of property, at the time when the case of Tonson *v.* Collins hung in that court under an *appearance* of doubt. In the court of chancery, in July, 1765, in the case of Millar *v.* Donaldson, reported 2 Eden's Ch. R. 327, Lord Chancellor Northington dissolved an injunction that had been obtained, because the general question had never been determined, and directed an action at law to try the right. In consequence of this, the question was afterwards brought forward in the shape of a special verdict, as it now appears in Millar *v.* Taylor, 4 Burr. Lord Mansfield in this case took notice of the circumstances under which the case had been sent before him, and said that "there never had been a doubt in the court of chancery, until a doubt was raised there from decency, upon a *supposed* doubt in this court in the case of Tonson *v.* Collins." 4 Burr. 2400.

standard the right of the plaintiff, as a right at common law, was tried. Printing was introduced into England within the time of legal memory, that is, since the reign of Richard II. It was therefore out of the question to found the right of perpetual literary property upon immemorial usage or precedent. But a right may exist at the common law of England upon principles of natural justice, moral fitness, and public convenience; which, when applied to a new subject, make common law without a precedent; and if the alleged right has been received by usage, it is still stronger. The argument therefore divided itself into two great branches. Under the first head, the inquiry was directed to the legislative and the judicial, as well as the common opinion of the country, to ascertain whether this right had been generally received and treated as a right of property; and, under the second head, the justice, fitness, and convenience of the doctrine furnished the grounds on which the adjudication was in part rested.[1]

[1] M. Renouard has put the question, with great pertinency, "What were the provisions of the common law in England, before the statute of Anne? Had the author any right of copy? Has the statute of Anne given a right which the common law did not confer, or has it on the contrary restrained a right which the common law did confer?" — (*Traité des Droits D'Auteurs, Par Augustin-Charles Renouard, Conseiller a La Cour de Cassation.* Paris, 1838, tom. 1, p. 233.) It is difficult to escape from the answer that must be given to these questions, after a survey of the historical part of the argument. An author in England either had some right to enjoy the profits of his publication, before the statute, or he had none. If he had any right at all, it is difficult to see what restrained it to a right short of a perpetuity. I have never met with the argument which denies the existence of all right whatever, except that which goes the length of inferring an abandonment or surrender to the public by the act of publication.

One great struggle in this, and the preceding case of Tonson *v.* Collins was, to show that by the act of publication, the author abandoned or surrendered any right of property which he might have had in his ideas, or in the form in which they were expressed. But this was answered conclusively by the court. From the doctrine, that the author had by the common law of England, as had always been admitted, a property before publication, the court declared that there could be no just distinction founded on the mere fact of publication. If the property exists, while the work is still in manuscript, before publication, there is nothing in the mere act of publication which shows an intention to abandon or give away that property. If the author does not mean to abandon or give it away, then the question resolves itself into this, whether it is agreeable to natural principles, moral justice and fitness, to allow him the copy after publication, as well as before? Of this question, said Lord Mansfield, "the general consent of the kingdom for ages is on the affirmative side;" and he, as well as the judges who concurred with him, deduced that consent from the whole judicial and legislative opinion that had preceded the statute.

Having thus deduced the right of literary property, the question remained to be disposed of, whether the statute of Anne had abridged it, so that the owner could claim only the exclusive right for a term of years. Upon this question, the court held, that the statute had not taken away the property of authors

at common law; but was merely intended to give, for a term of years, a more efficient protection, where the entry and the other provisions of the act should have been complied with.[1]

But this decision was not long acquiesced in.

A cause had been for some time pending in the court of chancery, in which a Mr. Becket compiained of a publication by the Messrs. Donaldson of a book belonging to him. After the decision in Millar *v.* Taylor, Lord Chancellor Apsley granted an injunction, as of course, in favor of Mr. Becket, pursuant to the decision of the general question in the court of king's bench, and an appeal from this decree was taken to the house of lords.[2] This appeal came on to be heard in 1774, and was argued by Thurlow, attorney-general, and Sir John Dalrymple against the right at common law, and by Wedderburn, solicitor-general, and Dunning, in favor of it. The judges were ordered to deliver their opinions. Ten of the judges were of opinion that at common law an

[1] Yates, J. dissented upon this question also.

[2] Apsley is the proper title of this chancellor to the year 1775, though he was afterwards Lord Bathurst, and is called by the latter title by Lord Campbell, through the whole of his chancellorship. I have followed the reporters, but he is usually styled Lord Bathurst in modern times. He professed to have made this decree as of course, because the point had been so decided in the king's bench, (17 Parl. Hist. 1001.) If he had said he had followed *Lord Mansfield*, he would probably have given a reason of great significance with him. Lord Campbell represents him as a weak person, accustomed to lean upon the chief justice. But when he came to speak to this question in the house of lords, he seems to have emancipated himself from the authority of Lord Mansfield, and declaring himself impartial, went the other way, (17 Parl. Hist. 1001.) See his Life, in Lord Campbell's Chancellors, vol. v. pp. 432-472.

author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published and sold the same without his consent; and one judge was of the contrary opinion. Three judges were of opinion that the law took away the right after publication, so that any person could, without leave of the author, print and publish a book which the author had once published; and eight were of the contrary opinion.

Six judges were of opinion that the statute of Anne took away the action at common law, and that an author had no remedy except upon the foundation of that statute; and five were of the contrary opinion.

Seven judges were of opinion that the author of any book or literary composition, and his assigns, had the sole right of printing and publishing the same, in perpetuity, by the common law; and four were of the contrary opinion.

Six judges were of opinion that this right in perpetuity is impeached, restrained and taken away by the statute of Anne; and five were of opinion that it is not.[1]

Lord Mansfield, being a peer, did not deliver any opinion; but it was notorious, that he adhered to the judgment which he had delivered on all these questions;[2] and thus, of the twelve judges, the great

[1] 17 Parl. Hist. 971 et seq.; 4 Burr. R. 2408, et seq.

[2] Sir James Burrow says it was notorious that Lord Mansfield ad-

weight of authority and numbers was in favor of the perpetuity at common law; and upon the question, whether such right was taken away by the statute, the judges were equally divided.[1]

In this posture of the case, Lord Camden came forward to move the judgment of their lordships, and delivered an elaborate argument against the common law right of property, which turned the scale. His speech was able and ingenious, but sarcastic, sophistical, and not altogether fair towards the other side of the question. It was chiefly devoted to answering the judgment of Lord Mansfield in Millar *v.* Taylor.[2]

hered to his opinion; but it being very unusual (from reasons of delicacy) for a peer to support his own judgment, he did not speak. 4 Burr. 2417. He was afterwards much blamed in the house of commons for not speaking. This was on the occasion of an application by the booksellers for an extension of the term of copyright, they having, as it was shown, laid out great sums, on the authority of the decision in the king's bench. It was even said, that had Lord Mansfield defended his judgment, in the house of lords, the then pending bill would never have been brought in. 17 Parl. Hist. 1090.

[1] The leading argument, adverse to the right of perpetuity, among the judges, was that delivered by De Grey, Lord Ch. Justice of the common pleas. He thus disposes of the question as to the effect of publication: "But it is said, that the sale of a printed copy is a qualified or conditional sale, and that the purchaser may make all the uses he pleases of his work, except that one of reprinting it; but where is the evidence of this extraordinary bargain? or where the analogy of law to support the supposition. In all other cases of purchase, payment transfers the whole and absolute property to the buyer; there is no instance where a legal right is otherwise transferred by sale, an example of such a speculative right remaining in the seller. It is a new and metaphysical refinement upon the law; and laws, like some manufactures, may be drawn so fine as at last to lose their strength with their solidity." 17 Parl. Hist. 990.

[2] As an American, I am bound to hold the memory of Lord Camden, the statesman, in the highest honor. But to a lawyer, the cause of truth, in all that concerns the science of human rights, is cosmopolitan. It is impossible to read this speech of Lord Camden's, with the book of history open before us, without perceiving that there were secret causes of bias operating upon his judgment. He spoke sincerely, without doubt. He was too great and too

The passage of declamation in which he argued that glory and not profit is or should be the reward of men of letters, has been often quoted, and is now the most familiar portion of the speech. He declared that there was no foundation for literary property in the common law, and none in the principles of sound policy, or good sense. He denounced the perpetuity contended for, as odious and selfish, deserving of reprobation, and likely to become intolerable.[1] He

good a man, not to say too great a lawyer, to have purposely misled the judicial action of the house of lords. But it cannot be doubted, that he was predisposed to encounters with Lord Mansfield; and, that his opinions were thus influenced by a rivalry in which he was prone to indulge, is but too apparent in the speech itself. It is, without direct allusion, a running answer to Lord Mansfield's judgment in Millar *v.* Taylor. He handles the same topics, follows in the same track, and turns or seeks to turn the positions of the illustrious chief of the king's bench and of his associates who agreed with him. The truth is, these great men for a long time time contended for the supremacy as law lords in the upper house. It appears that when Lord Camden first entered that assembly, "Lord Mansfield instinctively dreaded a contest for the supremacy which he had enjoyed there since the death of Lord Hardwicke;" (Lord Campbell's Lives of the Chancellors, V. 252,) and although when he and Lord Camden sat together at the hearing of appeals, they conducted with great decorum, and rarely differed in opinion, when settling together the law in the last resort, there were other occasions when they attacked each other in debate so sharply as almost to render it necessary for the house to interfere. In one scene, which occurred about four years before the discussion of the question of literary property, they had a personal controversy of a very disagreeable character, in which Lord Camden seems to have triumphed by the exhibition of more nerve than belonged to "the silver-tongued Murray." (Campbell, ut sup. p. 295.) Alas, that history should be obliged to chronicle the foibles of the great, who demand and receive the reverence of posterity.

[1] "If, then, there be no foundation of right for this perpetuity by the positive laws of the land, it will I believe find as little claim to encouragement upon public principles of sound policy, or good sense. If there be anything in the world common to all mankind, science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water. They forget their Creator, as well as their fellow creatures who wish to monopolize his noblest gifts and greatest benefits. Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species? Those great

was answered, it is said, very ingeniously, by Lord Littleton, a lay peer, who spoke in favor of au-

men, those favored mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock. We know what was the punishment of him who hid his talent, and Providence has taken care that there shall not be wanting the noblest motives and incentives for men of genius to communicate to the world those truths and discoveries which are nothing if uncommunicated. Knowledge has no value or use for the solitary owner: to be enjoyed it must be communicated. 'Scire tuum nihil est, nisi te scire hoc sciat alter.' Glory is the reward of science, and those who deserve it, scorn all meaner views: I speak not of the scribblers for bread, who tease the press with their wretched productions; fourteen years is too long a privilege for their perishable trash. It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of a letter press. When the bookseller offered Milton five pound for his Paradise Lost, he did not reject it, and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labor; he knew that the real price of his work was immortality, and that posterity would pay it. Some authors are as careless about profit as others are rapacious of it; and what a situation would the public be in with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition? All our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chooses to demand, till the public become as much their slaves, as their own hackney compilers are." 17 Parl. Hist. 999, 1000.

As Lord Camden cites the example of Milton, to show that he placed no value upon the right of property in his great poem, it may be well to repeat the au'' ntic facts concerning the sale of th.. copyright. Milton sold his copy to Samuel Simmons in 1667, for an immediate payment of five pounds. But the agreement entitled him to a conditional payment of five pounds more when thirteen hundred copies should be sold of the first edition; of the like sum after the same number of the second edition; and of another five pounds after the same sale of the third edition. The number of each edition was not to exceed fifteen hundred copies. In two years, the sale gave the poet a right to his second payment, for which he signed a receipt on the 26th of April, 1669. The second edition was not printed till 1674, and Milton did not live to receive the payment stipulated for this impression. The third edition was published in 1678; and his widow, to whom the copy was then to devolve, agreed with Simmons, the printer, to receive eight pounds for her right, according to her receipt, dated December 21, 1680; and she gave him a general release, dated April 29, 1681. Simmons sold the

thors.[1] Their lordships divided, twenty-two for reversing the decree, and eleven for confirming it. Thus the right of authors in their publications, as a right at the common law of England, affirmed by a majority of the judges to have previously existed, was lost forever.

Lord Camden's argument, on this occasion, went the length of maintaining that publication is an abandonment to the public of all the author's previous right over his own productions. Admitting that every man has a right to his thoughts while they continue his, he contends that they become *publici juris*, as soon as he has published them; that the common law had never recognized ideas as subjects of property, and had never declared whether

right to Brabason Aylmer, a bookseller, for twenty-five pounds, and Aylmer sold it to Jacob Tonson, one moiety in August, 1683, and the other moiety in March, 1690, at a price considerably advanced. (Todd's Life of Milton, 193–195, Lond. 1826.) It thus appears that the poet was very careful to assert his full right of property, as he and others understood it at the time, and to make it available to his family. The amount which he chose to receive, compared with the real value of the poem, or measured by a modern standard, seems very trifling. But as such rights were estimated then, and considering that the poem gained slowly upon the attention of his own age, it was not a grossly inadequate price. When it had been published fourteen years and upwards, the copyright *between one bookseller and another*, brought only twenty-five pounds. Yet its value could not have been affected by any apprehension, at the time of this sale, that it was not protected by the common law. Such a notion had not then arisen; and long after, viz. in 1739, Lord Hardwicke protected by injunction the title of Tonson, derived under the assignment made by the poet in 1667. (Ante, p. 47,) Doubtless Milton did not write his great poem for money; but we have seen that he supposed the right of exclusive property in authors was acknowledged by the law of his country, and he took pains practically to assert the right in his own case. It seems to me by no means a wild conjecture, that he did this for the sake of example, as well as in order to preserve his reputation, by keeping the control of the text of his poem.

[1] Thomas, second Lord Littleton.

they were descendable, transferable or assignable. "When published," he asks, "can the purchaser lend his book to his friend? Can he let it out for hire as the circulating libraries do? Can he enter it as common stock in a literary club, as is done in the country? May he transcribe it for charity? Then what part of the work is exempt from this desultory claim? Does it lie in the sentiments, the language and style, or the paper? If in the sentiments or language, no one can translate or abridge them. Locke's Essay might, perhaps, be put into other expressions, or newly methodized, and all the original system and ideas be retained. These questions show how the argument counteracts itself, how the subject of it shifts, and becomes public in one sense, and private in another; and they are all new to the common law, which leaves us perfectly in the dark about their solution."[1]

[1] 17 Parl. Hist. 998. "And how are the judges," he continues, "without a rule or guide, to determine them when they arise, whose books and studies afford no more light upon the subject than the common understandings of the parties themselves? What diversity of judgments! what confusion in opinion must they fall into! without a trace or line of law to direct their determination! What a code of law yet remains for their ingenuity to furnish, and could they all agree in it, it would not be law at last, but legislation.

"But it is said that it would be contrary to the ideas of private justice, moral fitness, and public convenience, not to adopt this new system. But who has a right to decide these new cases, if there is no other rule to measure by but moral fitness and equitable right? Not the judges of the common law, I am sure. Their business is to tell the suitor how the law stands, not how it ought to be; otherwise each judge would have a distinct tribunal in his own breast, the decisions of which would be irregular and uncertain, and various, as the minds and tempers of mankind. As it is, we find they do not always agree: but what would it be, where the rule of right would always be the private opinion of the judge, as to the moral fitness and convenience of the claim? Caprice,

He denied also that there is any implied contract between the person who sells and the person who buys a printed copy, which he called a "flimsy supposition, as unmeaning in itself, as it is void of a legal foundation."[1]

It can scarcely be necessary, at the present day, to make any answer to some of these arguments. It is sufficient to observe that the whole bench of judges, with one exception, held that at common law an exclusive right to publish the contents of a manuscript resided in the author, and that nine of them, (including Lord Mansfield,) did not consider that publication made the literary composition *publici juris*. No one supposed then, and it has not since been contended, that the common law recognized ideas as the subject of property, in the sense which Lord Camden attributes to his opponents. No English jurist, then or since, ever supposed that the pur-

self-interest, vanity, would by turns hold the scale of justice, and the law of property be indeed most vague and arbitrary. That excellent judge, Lord Chief Justice Lee, used always to ask the counsel, after his argument was over, 'Have you any case?' I hope judges will always copy the example, and never pretend to decide upon a claim of property, without attending to the old black letter of our law, without founding their judgment upon some solid written authority, preserved in their books, or in judicial records. In this case I know there is none such to be produced." 17 Parl. Hist. 998, 999.

[1] Ibid. p. 1000. It had for ages been admitted that the proprietor of a manuscript had the sole right to publish it, and the judges had, almost unanimously, just declared this to be common law. Repeated injunctions had been granted, to restrain the publication of manuscripts without authority. Did they proceed upon anything but an implied contract on the part of the person into whose possession the manuscripts had come, not to do more than the purpose warranted for which they had come into his hands? And was this contract a "flimsy supposition?"

chaser of a printed copy of a book could not lend it, or let it out for hire to a reader, or even transcribe it for charity, without violating the alleged exclusive right of the author. The exclusive privilege of the author consists in the sole right to print a written composition and to take the profits of the sale of printed copies. In this sense, the law of England undeniably recognized a species of property in ideas, for it absolutely prohibited the printing of a written composition, still in manuscript, without the consent of the author or proprietor. Yet in the case of manuscripts, the same argument could be urged, from possession of the copy, as from possession of the copy of a printed book. If the common law recognized this incorporeal right, in the one case, it needed no other element of property to recognize it in the other. The only remaining question, after publication, is, whether the sale of a printed copy carries with it a license of publication, when the loan of a manuscript, or its delivery for a specific purpose, carries no such license, according to the common law.

The decision in the house of lords was immediately followed by an application to parliament, on behalf of the booksellers of London, representing that large sums had been invested in the purchase of ancient copyrights, not protected by the statute of Queen Anne, upon the generally prevalent opinion that that statute did not interfere with the common law right; that by the late decision of the house of

lords, such common law right of authors and their assigns had been declared to have no existence, whereby the petitioners would be very great sufferers, through their former involuntary misapprehension of the law; and praying for relief in the premises. Evidence was thereupon taken before a committee of the house of commons, and a bill was brought in, to vest the copies of old books, not protected by the act of Anne, in the purchasers of such copies from authors or their assigns, for a limited time.[1] Counsel were heard at the bar for and against the bill, and a long and angry debate ensued upon the question of its passage. After a struggle at every stage of its progress, the bill finally passed the commons, on the 26th of May, 1774, by a vote of 40 to 22,[2] but was afterwards thrown out in the lords, chiefly through the exertions of Lord Camden.

In this posture of things, the universities applied to parliament, and succeeded in obtaining in 1775 an act, which enabled the two universities in England,

[1] The evidence showed that a great amount of money had been invested in such old copies.

[2] 17 Parl. Hist. 1077—1110. The whole discussion, both on the part of the counsel and the members opposed to the bill, was marked by a spirit of acrimony quite unworthy of the occasion. The appeals to prejudice against the booksellers, as a class of monopolists, were of the coarsest character. The principal persons who supported the bill were Mr. Fielde, Col. Onslow, and Mr. Burke, the latter taking that enlarged and liberal view of it consonant to his elevated character. The interests arrayed against it were the country and the Scotch booksellers; but letters were produced by several members from Mr. Hume, Dr. Hurd, Dr. Robertson, Dr. Beattie, and other writers of established reputation, containing the warmest wishes for the petitioners, lamenting the late decision in the house of lords, as fatal to literature, and expressing the hope that the booksellers might get speedy relief. Mr. Charles James Fox was among the opponents of the bill. *Ibid.*

the four universities in Scotland, and the several colleges of Eton, Westminster and Winchester, to hold in perpetuity their copyright in books given or bequeathed to them for the advancement of useful learning and other purposes of education.[1]

A quarter of a century later, the statutory term of copyright for authors in general was extended to twenty-eight years, in case the author should be living at the expiration of the first fourteen years.[2]

Subsequently, a further change was introduced, by which, instead of copyright for fourteen years and contingently for fourteen more, authors were to have a term of twenty-eight years, and also for the residue of their lives if living at the expiration of that term.[3]

The next important step was the passage of an act, 3 Will. IV. c. 15, giving to the authors of dramatic compositions the sole right of representing their plays or causing them to be represented in the British dominions.[4]

This was followed by the international copyright act, 1 and 2 Vict. c. 59, passed 31st July, 1838, giving a copyright in England to foreign authors whose governments shall have engaged to give the same privilege to British authors.[5]

[1] 15 Geo. 3, c. 53. See Appendix, p. 18.

[2] 41 Geo. 3, c. 107. See Appendix, p. 29.

[3] 54 Geo. 3, c. 156. Appendix, p. 38.

[4] See Appendix, p. 51.

[5] Ibid. p. 57.

Finally, by the 5 and 6 Vict. c. 45, passed 1st July, 1842, the former laws relating to literary copyright were revised, the term extended to the natural life of the author and for seven years after his death, or to forty-two years from the first publication; and many other important changes were introduced.

Upon a review of the history of the rights of authors in England, it must be admitted that they have long had to struggle against a great weight of prejudice and illiberality in the legislature. Every important concession that has been gained for them has been won as a trophy from a well fought field.[1]

[1] To Mr. Serjeant Talfourd belongs the chief honor of the last and greatest of these achievements. It was mainly through his exertions that the act 5 & 6 Vict. was passed. But it required repeated efforts to accomplish his purpose. In 1837, he addressed himself to the task in the following manly and generous strain of eloquence: "Although I see no reason why authors should not be restored to that inheritance which, under the name of protection and encouragement, has been taken from them, I feel that the subject has so long been treated as matter of compromise between those who deny that the creations of the inventive faculty, or the achievements of the reason, are the subjects of property at all, and those who think the property should last as long as the works which contain truth and beauty live, that I propose still to treat it on the principle of compromise, and to rest satisfied with a fairer adjustment of the difference than the last act of parliament affords. I shall propose — subject to modification when the details of the measure shall be discussed — that the term of property in all works of learning, genius, and art, to be produced hereafter, or in which the statutable copyright now subsists, shall be extended to sixty years, to be computed from the death of the author; which will at least enable him, while providing for the instruction and the delight of distant ages, to contemplate that he shall leave in his works themselves some legacy to those for whom a nearer, if not a higher duty, requires him to provide, and which shall make "death less terrible." When the opponents of literary property speak of glory as the reward of genius, they make an ungenerous use of the very nobleness of its impulses, and show how little they have profited by its high example. When Milton, in poverty and in blindness, fed the flame of his divine enthusiasm by the assurance of a duration coequal with his language, I believe with Lord Camden that no thought crossed him of the

That a period of nearly a century and a half should have passed away, after the propriety of legislative we[illegible]ich might be amassed by th[illegible] his poem: but surely [illegible]ow would have been cast upon "the clear dream and solemn vision" of his future glories, had he foreseen that, while booksellers were striving to rival each other in the magnificence of their editions, or their adaptation to the convenience of various classes of his admirers, his only surviving descendant — a woman — should be rescued f om abject want only by the charity of Garrick, who, at the solicitation of Dr Johnson, gave her a benefit at the theatre which had appr priated to itself all that could be represented of Comus. The liberality of genius is surely ill urged as an excuse for our ungrateful denial of its rights. The late Mr. Coleridge gave an example not merely of its liberality, but of its profuseness; while he sought not even to appropriate to his fame the vast intellectual treasures which he had derived from boundless research, and colored by a glorious imagination; while he scattered abroad the seeds of beauty and of wisdom to take root in congenial minds, and was content to witness their fruits in the productions of those who heard him. But ought we, therefore, the less to deplore, now when the music of his divine philosophy is forever hushed, that the earlier portion of those works on which he stamped his own impress — all which he desired of the world that it should recognize as his — is published for the gain of others than his children — that his death is illustrated by the forfeiture of their birthright? What justice is there in this? Do we reward our heroes thus? Did we tell our Marlboroughs, our Nelsons, our Wellingtons, that glory was their reward, that they fought for posterity, and that posterity would pay them? We leave them to no such cold and uncertain requital; we do not even leave them merely to enjoy the spoils of their victories, which we deny to the author; we concentrate a nation's honest feeling of gratitude and pride into the form of an endowment, and teach other ages what we thought, and what they ought to think, of their deeds, by the substantial memorials of our praise. Were our Shakspeare and Milton less the ornaments of their country, less the benefactors of mankind? Would the example be less inspiring if we permitted them to enjoy the spoils of their peaceful victories — if we allowed to their descendants. not the tax assessed by present gratitude, and charged on the future, but the mere amount which that future would be delighted to pay — extending as the circle of their glory expands, and rendered only by those who individually reap the benefits, and are contented at once to enjoy and to reward its author?

"But I do not press these considerations to the full extent; the past is beyond our power, and I only ask for the present a brief reversion in the future. 'Riches fineless' created by the mighty dead are already ours. It is in truth the greatness of the blessings which the world inherits from genius that dazzles the mind on this question; and the habit of repaying its bounty by words, that confuses us and indisposes us to justice. It is because the spoils of time are freely and irrevocably ours — because the forms of antique beauty wear for us the bloom of an imperishable youth —

protection had been admitted, before the enactment in England of the first law that does nearly adequate

because the elder literature of our own country is a free mine of wealth to the bookseller and of delight to ourselves, that we are unable to understand the claim of our contemporaries to a beneficial interest in their works. Because genius by a genial necessity communicates so much, we cannot conceive it as retaining anything for its possessor. There is a sense, indeed, in which the poets 'on earth have made us heirs of truth and pure delight in heavenly lays;' and it is because of the greatness of this very boon — because their thoughts become our thoughts, and their phrases unconsciously enrich our daily language — because their works, harmonious by the law of their own nature, suggest to us the rules of composition by which their imitators should be guided — because to them we can resort, and 'in our golden urns draw light,' that we cannot fancy them apart from ourselves, or admit that they have any property except in our praise. And our gratitude is shown not only in leaving their descendants without portion in the pecuniary benefits derived from their works, but in permitting their fame to be frittered away in abridgments, and polluted by base intermixtures, and denying to their children even the cold privilege of watching over and protecting it!

"There is something, sir, peculiarly unjust in bounding the term of an author's property by his natural life, if it should survive so short a period as twenty-eight years. It denies to age and experience the reward it permits to youth — to genius, sufficiently full of hope and joy, to slight its promises. It gives a bounty to haste, and informs the laborious student, who would wear away his strength to complete some work which 'the world will not willingly let die,' that the more of his life he devotes to its perfection, the more limited shall be his interest in its fruits. It stops the progress of remuneration at the moment it is most needed, and when the benignity of nature would extract from her last calamity a means of support and comfort to survivors. At the season when the author's name is invested with the solemn interest of mortality — when his eccentricities or frailties excite a smile or a sneer no longer — when the last seal is set upon his earthly course, and his works assume their place among the classics of his country, your law declares that his works shall become your property, and you requite him by seizing the patrimony of his children. We blame the errors and excesses of genius, and we leave them — justly leave them — for the most part, to the consequences of their strangely-blended nature. But if genius, in assertion of its diviner alliances, produces large returns when the earthly course of its frail possessor is past, why is the public to insult his descendants with their alms and their pity? What right have we to moralize over the excesses of a Burns, and insult his memory by charitable honors, while we are taking the benefit of his premature death, in the expiration of his copyright and the vaunted cheapness of his works? Or, to advert to a case in which the highest intellectual powers were associated with the noblest moral excellence, what right have we to take credit to ourselves

justice to authors, is indeed surprising. Addison is said to have been concerned in procuring the act of

for a paltry and ineffectual subscription to rescue Abbotsford for the family of its great author (Abbotsford, his romance in stone and mortar, but not more individually *his* than those hundred fabrics, not made with hands, which he has raised, and peopled for the delight of mankind,) while we insist on appropriating now the profits of his earlier poems, and anticipate the time when, in a few years, his novels will be ours without rent-charge to enjoy — and any one's to copy, to emasculate, and to garble? This is the case of one whom kings and people delighted to honor. But look on another picture — that of a man of genius and integrity, who has received all the insult and injury from his contemporaries, and obtains nothing from posterity but a name. Look at Daniel De Foe; recollect him pilloried, bankrupt, wearing away his life to pay his creditors in full, and dying in the struggle! — and his works live, imitated, corrupted, yet casting off the stains, not by protection of law, but by their own pure essence. Had every school-boy, whose young imagination has been prompted by his great work, and whose heart has learned to throb in the strange yet familiar solitude he created, given even the halfpenny of the statute of Anne, there would have been no want of a provision for his children, no need of a subscription for a statue to his memory!

"The term allowed by the existing law is curiously adapted to encourage the lightest works, and to leave the noblest unprotected. Its little span is ample for authors who seek only to amuse; who, 'to beguile the time, look like the time;' who lend to frivolity or corruption 'lighter wings to fly;' who sparkle, blaze, and expire. These may delight for a season — glisten as the fire-flies on the heaving sea of public opinion — the airy proofs of the intellectual activity of the age; — yet surely it is not just to legislate for those alone, and deny all reward to that literature which aspires to endure. Let us suppose an author, of true original genius, disgusted with the inane phrascology which had usurped the place of poetry, and devoting himself from youth to its service; disdaining the gauds which attract the careless, and unskilled in the moving accidents of fortune — not seeking his triumph in the tempest of the passions, but in the serenity which lies above them, — whose works shall be scoffed at — whose name made a by-word — and yet who shall persevere in his high and holy course, gradually impressing thoughtful minds with the sense of truth made visible in the severest forms of beauty, until he shall create the taste by which he shall be appreciated — influence, one after another, the master-spirits of his age — be felt pervading every part of the national literature, softening, raising, and enriching it; and when at last he shall find his confidence in his own aspirations justified, and the name which once was the scorn admitted to be the glory of his age — he shall look forward to the close of his earthly career, as the event that shall consecrate his fame and deprive his children of the opening harvest he is beginning to reap. As soon as his copyright becomes valuable, it is gone! This is no imaginary case — I refer to one who 'in this setting

Anne to be passed. From his time to the present reign, authors, as a class, seem to have had little influence in parliament.[1] Upon nearly all occasions, when their claims have been brought to the attention of the legislature, they have been so much entangled with the interests of booksellers and publishers, in whose hands the great mass of literary property, existing at the time, has generally been found, that they have had to encounter all the national prejudice against monopolies. Gradually, however, the true merits of the question have worked themselves free from irrelevant issues, and the present reign has become distinguished by a measure, of which it was well said, in advance, by a venerable poet and peti

part of time' has opened a vein of the deepest sentiment and thought before unknown — who has supplied the noblest antidote to the freezing effects of the scientific spirit of the age — who, while he has detected that poetry which is the essence of the greatest things, has cast a glory around the lowliest conditions of humanity, and traced out the subtle links by which they are connected with the highest — of one whose name will now find an echo, not only in the heart of the secluded student, but in that of the busiest of those who are fevered by political controversy — of William Wordsworth. Ought we not to requite such a poet, while yet we may, for the injustice of our boyhood! For those works which are now insensibly quoted by our most popular writers, the spirit of which now mingles with our intellectual atmosphere, he probably has not received through the long life he has devoted to his art, until lately, as much as the same labor, with moderate talent, might justly produce in a single year. Shall the law, whose term has been amply sufficient to his scorners, now afford him no protection, because he has outlasted their scoffs — because his fame has been fostered amidst the storms, and is now the growth of years?" (Three Speeches delivered in the house of commons in favor of a measure for an extension of Copyright. By T. N. Talfourd, Serjeant-at-Law. London. 1840.) In 1838 and 1839 he made similar efforts, and the measure was finally carried in 1842.

[1] The petitions of the authors of England to the house of commons, in favor of Mr. Serjeant Talfourd's bill, form a body of interesting documents, to be found in the tract from which the above extract is taken.

tioner, "that in this, as in all other cases, justice is capable of working out its own expediency."[1]

In America, since the adoption of the constitution of the United States, the protection of literary property depends upon the laws passed by congress pursuant to the power granted in that instrument. Whether there was any common law right of authors, in published works, in any of the states of this Union, before the adoption of the constitution, is a question not free from difficulty.

The fundamental principle of American law, in relation to common law rights, is, that the colonists brought with them into each colony all the body of the common law of England which was applicable to their situation, or, as it is sometimes said, which was suited to their circumstances and condition.[2] The existence of a common law right of authors, in any one of the American colonies, depends, of course, upon its existence in England, when the colony was

[1] Mr. Wordsworth.

[2] 1 Story's Commentaries on the Constitution, 137–140. Vanness *v.* Packard, 2 Peters S. C. R. 144. Wheaton *v.* Peters, 8 Ib. 591. Parsons, C. J. in Commonwealth *v.* Knowlton, 2 Mass. R 534, stated the doctrine thus: "Our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition."

settled, and also upon the fact of its having been brought by the colonists, as part of the body of the common law, not unsuited to their circumstances and condition. That this was the case, seems to have been denied by a majority of the supreme court of the United States, the question having arisen, whether there was any copyright at common law, in relation to printed books, in the state of Pennsylvania.[1]

We have seen, if the historical account given in the foregoing pages be correct, that the position cannot be maintained, that there existed in England no common law right of authors, previous to the settlement of the American colonies. It is clear, that there was such a thing as literary property in England, before the reign of Queen Anne; and it is equally clear that in the years 1769 and 1774, in the cases of Millar *v.* Taylor, and Donaldson *v.* Becket, this property was ascertained and declared to have been a right at common law, and consequently it must have existed ever since the introduction of printing into England. The last of these cases, if the answers of the judges are the proper *criteria* of the decision, decides only that the common law right had been taken away by the statute of Anne.

[1] Wheaton *v.* Peters, 8 Peters S. C. R. 591. The opinion of the court was delivered by Mr. Justice McLean. Mr. Justice Thompson and Mr. Justice Baldwin dissented, the former in an able and instructive opinion, in which he reviewed the authorities showing that the common law right existed in England prior to the statute of Anne, and affirmed that this right formed part of the common law of Pennsylvania.

How far this portion of the common law was part of the common law of any American colony, depends not upon the fact of the colonists having or not having had occasion to claim and act upon it, on their arrival, but upon the fact of there being or not being anything in their situation, during their early colonial history, so inconsistent with it, as to preclude the idea of its having been brought by them along with the rest of the body of the common law. The presumption is, that the whole of the common law, as it then existed, not inapplicable to the state and condition of the colonists, was brought by them from England. If there were any books published, in any of the colonies, at any time before they legislated on the subject, as there certainly were in many of them, there was nothing in their circumstances and situation unsuited to such a right, or inconsistent with its being claimed and recognized as part of the common law. There were objects to which the right could a tach, and any author could claim it as a right at the common law of England. Undoubtedly, the right lay dormant in all the colonies for a long period of time; and afterwards, when books began to be printed, the right was here, as in England, tacitly assumed and acted upon. There is some evidence, however, that it had been regarded as a common law right in several of the states, before the adoption of the constitution of the United States.[1]

[1] So far as the decision in Wheaton *v.* Peters negatives the adoption of the common law right of authors in the colony of Pennsylvania, I do

In March, 1783, the legislature of Massachusetts passed "an act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions, for twenty-one years." This act was preceded by the following remarkable preamble: "Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principal encouragement such persons can have to make great and beneficial exertions of this nature must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind: therefore, to encourage learned and ingenious persons to write useful books for the benefit of mankind, Be it enacted," &c.[1]

not feel authorized to criticize it, although I have made some suggestions in the text to show that a different view may be taken of that question. But that part of the decision, which denies the existence of the common law right in England, I must dissent from. The learned judge who pronounced the opinion of the majority, said, "the question was involved in great doubt and perplexity; and a little more than a century ago it was decided by the highest judicial court in England, that the right of authors could not be asserted at common law, but under the statute." (8 Peters, 660.) This is true; but if Donaldson *v.* Becket, the case referred to, decides anything, it is that the common law right existed anterior to the statute of Anne, and was taken away by that statute. Upon the existence of the common law right before the statute, the judges stood seven to four; and if the known opinion of Lord Mansfield is added, eight of the twelve judges affirmed the existence of the right.

[1] 1 Mass. Laws, 94, (edit. 1801.)

This preamble has been justly thought to recognize a right already understood to exist, and it seems manifestly to have been the purpose of the act to provide for the right additional security, and not to create it *de novo*.[1]

Soon after this act was passed, on the 27th May, 1783, a report was made in the old congress by Mr. Madison, on sundry papers and memorials on the subject of literary property, and the following resolution was passed.

"Resolved, That it be recommended to the several states, to *secure* to the authors or publishers of any new books not heretofore printed, being citizens of the United States, and to their executors, administrators and assigns, the copyright of such books for a certain time, not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, and to their executors, administrators and assigns, the copyright of such books for another term, or time, not less than fourteen years; such copy or exclusive right of printing, publishing, and vending the same, to be secured to the original authors or publishers,

[1] It expresses more comprehensively than any other piece of legislation in the language, on the same subject, the principles of public policy and private right, on which literary property must always depend. The state of Connecticut had previously, in January, 1783, passed an act with the following preamble: "Whereas it is perfectly agreeable to the principles of natural justice and equity, that every author should be secured in receiving the profits that may arise from the sale of his works; and such security may encourage men of learning and genius to publish their writings, which may do honor to their country and service to mankind." (Cited 8 Peters S. C. R. 683.)

their executors, administrators and assigns, by such laws and such restrictions as to the several states may seem proper."[1]

Pursuant to this recommendation, several states passed laws, with preambles similar to those of the Massachusetts and Connecticut acts, all designed to "*secure*" to authors the profits arising from the sale of their works.[2] This studied phraseology, which had not been employed in the English statutes, evinces some intention to protect and secure a pre-existing right. The necessity for state legislation was soon afterwards superseded by the constitution of the United States, (art. 1, § 8,) which conferred upon congress power "to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." As the states could not separately make effectual provision for these objects, the power was wisely granted to the national government.[3]

The first act passed to carry this provision into effect, so far as it related to authors, was the act of May 31st, 1790, chap. xv. entitled "An act for the encouragement of learning, by securing the copies

[1] 8 Cong. Journ. 257. 8 Peters S. C. R. 681.

[2] Cited 8 Peters S. C. R. 683, 684. Authors who aimed at national reputation entered their works in each of the states which had passed such laws. A copy of a popular work published in Massachusetts is before me, which was entered in New York, Pennsylvania and South Carolina, under the respective laws of those states, in the year 1787.

[3] 3 Story's Com. on the Constitution, p. 48, et seq. The Federalist, No. 43.

of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned." The Supreme Court of the United States have held that this act, instead of sanctioning an existing perpetual right in an author in his works, created the right secured for a limited time; and that the word *secure*, in the constitution, does not mean the protection of an acknowledged legal right, but is used in reference to a future right to be created.[1]

If this decision is to be understood as declaring that the constitution and the act of 1790 created copyright throughout the United States, it may be readily assented to. We find the states, at the time of the establishment of the constitution, conferring upon the national legislature the power to "secure" the rights of authors and inventors. Each of the states, at that time, possessed the power to secure these rights within its own limits, as part of its sovereignty. But no state legislature could provide securities for the rights of authors which should operate over the whole country, and make a copyright of a book written and published in Massachusetts of equal validity in Pennsylvania. In order, however, to obviate this inconvenience, the state laws, passed before the adoption of the federal constitution, generally contained a proviso, that the benefit of the law was not to extend to authors, in-

[1] Wheaton *v.* Peters, 8 Peters S. C. R. 591.

habitants of, or residing in other states, until such states should have passed similar laws.[1]

These provisions show that the rights of authors in their published works existed by statute, in some of the states, before the constitution of the United States was formed; and there cannot be much doubt that they also existed, in the older states, at common law. What, then, were the rights of authors, to be "secured," under the power granted to the national legislature? The object to be gained by this grant of power will aid in determining the meaning of the language employed. The object clearly was to enable the general government to make laws which should secure the proceeds of a book in all the states to an author residing and publishing in any one of the states. The old congress had this object in view, when they recommended to the states to pass laws for this purpose;[2] and it was distinctly urged, by the advocates for the adoption of the federal constitution, as the main reason for the provision.[3]

It would seem, therefore, that the rights of authors to be "secured" by congress, under this clause of the constitution, were exclusive rights to take the profits of their own publications throughout the United States. In this view, the constitution and the act of 1790 created a right which did not

[1] 1 Mass. Laws, 94, (edit. 1801.) Wheaton *v.* Peters, 8 Peters S. C. R. 681, 662, 683.

[2] Ante, p. 78.

[3] The Federalist, No. 43.

exist before; and this may account for the use of the word "secure." Whether this power is exclusive, so that the states cannot now legislate for the protection of authors within their own limits, is one of the grave questions of our complex system of government.[1]

The act of 1790 was followed by a supplementary act, passed April 29th, 1802, which extended the benefits of the former statute to engravers.[2]

By an act passed February 3d, 1831, the former laws were consolidated and revised, and this act constitutes the existing copyright law of the United States.[3]

[1] See Story's Com. on the Constitution, § 1149.

[2] See Appendix, 2 U. S. Statutes at large, 171.

[3] See Appendix, 4 U. S. Statutes at large, 436.

CHAPTER II.

OF THE SUBJECTS OF LITERARY PROPERTY, BEFORE AND AFTER PUBLICATION.

In the following chapter, the various subjects of literary property, both before and after publication, will be considered in detail.

I. And first, with regard to that class of writings, to which rights and remedies have been applied, bearing a close analogy to those applicable to copyrights, viz. writings existing in manuscript and unpublished. We have already seen that in general, the author or owner of an unpublished manuscript possesses a property therein, which consists in the right to appropriate it to such uses as he shall please.[1] This is a right at common law, and is of course wholly independent of the statutes which create a property after publication, consisting in the exclusive right to the profits of publication. The existence of such a property has been repeatedly recognized with regard to many sorts of compositions, and it is now perfectly well settled, that the author or proprietor of an unpublished man-

[1] Ante, p. 49–52.

uscript may obtain the interference of a court of equity, to prevent its unauthorized publication.[1]

This right of property rests upon one of the ultimate foundations which sustain property in general; namely, the right which every man has to the exclusive possession and control of the products of his own labor. In the great case of Millar *v.* Taylor, in which the principles on which this right depends were so fully examined, Lord Mansfield declared that the source from which the common law is drawn, in respect of a copy before publication, is this — "Because it is *just*, that an author should reap the pecuniary profits of his own ingenuity and labor. It is *just* that another should not use his name without his consent. It is *fit*, that he should judge when to publish, or whether he ever will publish. It is *fit*, he should not only choose the time, but the manner of publication; how many — what volume — what print. It is *fit*, he should choose to whose care he will trust the accuracy and correctness of the impression; to whose honesty he will confide, not to foist in additions."[2]

[1] Webb *v.* Rose, cited 4 Burr. 2330; 2 Bro. P. C. 138; Forrester *v.* Walker, cited ut supra. Pope *v.* Curl, 2 Atk. 342; Manley *v.* Owen, cited 4 Burr. 2320, 2490. Duke of Queensbury *v.* Shebbeare, 2 Eden's Ch. R. 329; Southey *v.* Sherwood, 2 Meriv. 434; Macklin *v.* Richardson, Amb. 694; Donaldson *v.* Becket, 4 Burr. 2408; Wheaton *v.* Peters, 8 Peters S. C. R. 591, 661; 2 Story's Eq. Jurisp. § 943; Eden on Inj. ch. 13, p. 275, 276.

[2] Millar *v.* Taylor, 4 Burr. 2398. Sir W. D. Evans has intimated strong doubts of the correctness of Lord Mansfield's reasoning in this case on the subject of a property in manuscripts, or what his lordship accurately calls, in technical language, "*copy*, before publication." Lord Mansfield's argument was, that the same principles of justice and fitness, which are the admitted foundation of an author's sole right before publication, apply to his right

The incorporeal right in an unpublished manuscript belongs exclusively to the author, and cannot be seized by credi[illegible]s, to the effect of entitling them to publish it.[1]

after publication; and that as the common law recognizes and protects the former, it follows that the latter is equally a right at common law, unless the act of publication is to be taken as an abandonment of the right, which he denies. Sir W. D. Evans seems to think that, as the house of lords in Donaldson *v.* Becket, overthrew the decision in Millar *v.* Taylor, and declared that there is no perpetual right at common law in published works, the reasoning of Lord Mansfield on the subject of a copy in manuscripts is also probably overruled. He closes some extended remarks with the following observation: "Lord Mansfield, to support the perpetual right to works published, argues that an unpublished manuscript cannot be distinguished from them; and may not that argument now be applied to the ultimate decision of the house of lords against a perpetual common law right of publications, and extended to manuscripts?" 2 Evans's Statutes, 20, note [14]. See also his edition of Lord Mansfield's decisions, vol. i. p. 386, note (*n*). The learned commentator seems not to have carefully considered the points actually decided in Donaldson *v.* Becket. An analysis of the questions put to the judges, and of their answers, exhibits the force of that decision. Eleven judges attended, and gave their answers. Ten were of opinion that at common law, an author of any literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published and sold the same without his consent; eight were of opinion that the law did not take away his right, upon his printing and publishing such book or literary composition, and four were of the contrary opinion. Six were of opinion that the author's right of action at common law, after he had published, is taken away by the statute 8 Anne, and that he has no remedy except on the foundation of that statute; while five were of opinion that the statute did not take away the common law right of action. It is manifest, therefore, that this decision confirms, in the most solemn manner, the doctrine of a sole right before publication, as part of the common law; that it negatives the position that publication alone takes away the right, but that it decides, by a bare majority of the judges who spoke, that the sole right at common law to multiply copies, after publication, is taken away by the statute, and depends wholly upon the terms and conditions of the act. See ante, p. 58, 59.

[1] Mr. Bell says, "The right at common law can exist only while the composition remains unpublished. But the property of unpublished literary compositions is not within the reach of creditors, to the effect of entitling them to publish them. No man can be forced, by any operation of the law, to publish his thoughts, even for the benefit of his creditors. And his right of withholding the publication will continue till the very moment his book

This property in copy descends to personal representatives, though neither the author nor his representatives have any manuscript whatever of the work. Thus, the copy of Lord Clarendon's History, at the distance of near a hundred years, was adjudged to his representatives,[1] and Lord Mansfield thought that although the manuscript in the defendant's hands might have been the only copy in existence, they could not print and publish without the plaintiff's consent.[2] In like manner, the son and devisee of Mr. Webb, a convey-

is actually given out to the public. Even the printer of the book will not be entitled to sell it for his payment, although there is not the smallest doubt that he has a complete lien over it till delivery, to prevent the author, or his creditors, from taking advantage of the publication till he shall be paid. When a book is published, the property of it forms a subject which creditors are entitled to attach and sell: and the price unpaid by the bookseller is as completely open to the diligence of creditors, as the price of any other commodity or piece of merchandise." 1 Bell's Com. p. 68.

[1] Duke of Queensbury *v.* Shebbeare, 2 Eden's Ch. R. 329.

[2] 4 Burr. 2397. The facts of the case were these. Henry, the second Earl of Clarendon, son of the lord chancellor and historian, gave to one Gwynne the original MSS. of his father's history, in order that he might take a copy of it, and make use of the copy as he should think fit; and a copy was accordingly taken. The administrator of Lord Clarenden, the son, brought a bill to restrain the publication of this work by Dr. Shebbeare, to whom Gwynne's son had sold or delivered the MSS. The lord keeper, Henley, was of opinion that it was not to be presumed that when Lord Clarendon, the son, gave the elder Gwynne a copy of his father's MSS. he intended he should have the right to print it; that Mr. Gwynne might make every use of it except that. Duke of Queensbury *v.* Shebbeare, 2 Eden's Ch. R. 329. Upon this case Lord Mansfield observes, "Mr. Gwynne was entitled, undoubtedly, to the *paper* of the transcript of Lord Clarendon's history; which gave him the *power* to print and publish it, after the fire at Petersham, which destroyed one original. This might have been the *only* manuscript of it in being. Mr. Gwynne might have thrown it into the fire, had he pleased. But, at the distance of near a hundred years, the copy was adjudged the property of Lord Clarendon's representatives; and Mr. Gwynne's printing and publishing it, without their consent, was adjudged an injury to that property; for which, in different shapes. he paid very dear." 4 Burr. 2397.

ancer, obtained an injunction against his father's clerk, to prevent him from printing his father's manuscript draughts.[1] So also, the assignees of the writings of President Washington, who derived their title through his devisee, obtained an injunction against certain persons who had pirated them from the edition published by them.[2]

Under what circumstances the author or proprietor of a manuscript may be deemed to have authorized its publication, is a question of some nicety as well as importance. Merely parting with the possession of a manuscript, or intrusting the possession to a third person, are acts which do not carry with them proof of an intent to part with the ownership of the intellectual contents. Such acts must be limited, in point of effect, to the purposes, expressed or implied, for which the possession was given.[3] Thus the giving of a manuscript copy of Lord Clarendon's history, to be used as the donee should think fit, was held not to have authorized its publication,[4] and the possession of letters by the person to whom they were addressed, does not take away from the writer the right to object to their publication.[5] So the allowing a manuscript play to be acted will not amount to a license to publish it.[6] And where copies of a piece

[1] Cited in Millar *v.* Taylor, 4 Burr. 2330. See also Thompson *v.* Stanhope, Amb. 739. Earl of Granard *v.* Dunkin, 1 Ball & Beat. 207. Folsom *v.* Marsh, 2 Story's R. 100.

[2] Folsom *v.* Marsh, 2 Story's R. 100, 168.

[3] 2 Story's Eq. Jurisp. § 943.

[4] Duke of Queensbury *v.* Shebbeare, 2 Eden's Ch. R. 329.

[5] Pope *v.* Curll, 2 Atk. 342. Thompson *v.* Stanhope, Amb. 773.

[6] Macklin *v.* Richardson, Ambl. 694.

of music had been distributed in manuscript for a year, by the author, before it was printed, it was held that the copyright was not lost.[1] But Lord Eldon seems to have thought that the circumstances in Mr. Southey's case, where he had left his manuscript a long time in the hands of a publisher, without inquiry, authorized the inference that he had abandoned his own right as author.[2] Perhaps the soundest rule would be, to hold that when express consent is not proved, the negative is implied as a tacit condition.[3] Most of the cases seem to proceed upon this principle,[4] and it was adopted and acted upon by Mr. Justice Story, in relation to the writings of Washington, consisting of his correspondence, addresses, messages and other papers, official and private.[5] The ground was taken in this case that these writings were public in their nature and were intended by the author for public use. But the facts of the case did not show that General Washington intended them as a donation to the public, and the court laid down the principle, that unless there be a most unequivocal dedication of private letters and papers by the author, either to the public or to some private person, the author has a property therein, and the copyright thereof exclusively be-

[1] White *v.* Gerooch, 2 B. & A. 290.
[2] Southey *v.* Sherwood, 2 Meriv. See some observations upon this case, *ante*.
[3] Per Willes J. in Millar *v.* Taylor, 4 Burr. 2330.
[4] Thompson *v.* Stanhope, Amb. 737. Duke of Queensbury *v.* Shebbeare, 2 Eden.
[5] Folsom *v.* Marsh, 2 Story's R. 100, 109.

longs to him.[1] In the United States, manuscripts are now under the protection of the statute of 1831, which gives a remedy, at law and in equity, against any person who shall print or publish, or be about to publish any manuscript whatever without the consent of the author or legal proprietor first obtained, if the author or proprietor be a citizen of or resident in the United States.[2]

II. LETTERS, addressed from one correspondent to another, have formed the subject of special discussion in courts of equity, and the principles on which the respective rights of the parties depend are analogous to those which govern in the case of other

[1] The learned judge said, "In relation to this objection, it is most manifest, that President Washington deemed them his own private property, and bequeathed them to his nephew, the late Mr. Justice Washington, through whom the late Mr. Ch. Justice Marshall and Mr. Sparks acquired an interest therein; and, as appears from the contract between these gentlemen, annexed to the report, the publication of these writings was undertaken by Mr. Sparks, as editor, for their joint benefit; and the work itself has been accomplished at great expense and labor, and after great intellectual efforts, and very patient and comprehensive researches, both at home and abroad. The publication of the defendants, therefore, to some extent, must be injurious to the rights of property of the representatives and assignees of President Washington. Indeed, as we shall presently see, congress have actually purchased these very letters and manuscripts, at a great price, for the benefit of the nation, from their owner and possessor under the will of Mr. Justice Washington, as private and most valuable property. That President Washington, therefore, intended them exclusively for public use, as a donation to the public, or did not esteem them of value as his own private property, appears to me to be a proposition, completely disproved by the evidence. Unless, indeed, there be a most unequivocal dedication of private letters and papers by the author, either to the public, or to some private person, I hold, that the author has a property therein, and that the copyright thereof exclusively belongs to him."

[2] Act of Congress of 3d Feb. 1831, § 9.

manuscript writings. It may be well briefly to review the authorities on this subject, in their historical order.

The first case is that relating to the letters of Pope to Swift. Mr. Pope obtained an injunction against Curll the bookseller, to prevent the vending of a book containing his letters to Swift. The ground was taken, on a motion to dissolve the injunction, that a letter is in the nature of a gift to the receiver. Lord Hardwicke said he was of opinion that it is only a special property in the receiver, possibly the property of the paper may belong to him; but this does not give a license to any person whatsoever to publish it to the world, for at most the receiver has only a joint property with the writer.[1] The objection was also raised, that the letters were only on familiar subjects, and the book could not properly be called a learned work. But his lordship did not admit the distinction.[2] An injunction was granted against the letters written by Pope, but not against the rest of the book.

The next case related to Lord Chesterfield's letters to his son, containing characters of persons, besides disquisitions on politics, literature and education. The widow of the son, in whose possession the letters remained, restored to Lord Chesterfield some

[1] Pope *v.* Curll, 2 Atk. 342. Mr. Pope had no copies of these letters. See Lord Mansfield's statement, 4 Burr. 2397.

[2] It seems that the book was in print, when the injunction was obtained. Lord Hardwicke held that a book of letters was within the grounds and intention of the act of Anne, as much as any other work.

of the characters, at his request, but kept copies of them; and she also kept the rest of the original letters, which he did not ask for. After Lord Chesterfield's death, she was about to publish the letters, not including the characters, when his executors applied for an injunction. Lord Apsley, C. granted the injunction, upon the ground that the defendant had not obtained the consent of Lord Chesterfield or his executors.[1]

The case of Perceval *v.* Phipps, next in point of time, seems to admit the right of the holder of letters to publish them, where the publication is necessary to the defence of his character against an unjust imputation.[2] The acts of the parties in this case supplied reasons for not restraining the publication.

In Gee *v.* Pritchard, the doctrine of property in the writer, in letters of familiar friendly correspondence, was admitted by Lord Eldon, as well as the qualified property of the receiver; but as the latter had returned the letters to the writer, with the declaration that he did not consider himself entitled to retain them, keeping copies without apprizing her, it was held, under the circumstances, that he had renounced the right of publication, even if he previously had it for purposes of self-vindication.[3]

In explaining the grounds upon which the court acts in these cases, his lordship observed, that the

[1] Thompson *v.* Stanhope, Amb. 737.

[2] Lord and Lady Perceval *v.* Phipps, 2 Ves. & B. 19.

[3] Gee *v.* Pritchard, 2 Swanst. 402, 427.

property is qualified in some respects; that, by sending a letter, the writer has given, for the purpose of reading it, and in some cases of keeping it, a property to the person to whom the letter is addressed; yet, that the gift is so restrained, that, beyond the purposes for which the letter is sent, the property is in the sender. Under such circumstances, it is immaterial whether the intended publication is for the purpose of profit or not. If for profit, the party is then selling; if not for profit, he is then giving that, a portion of which belongs to another. Property, therefore, is the ground of the interference of the court.

From these decisions it is not difficult to extract the general doctrines which govern the interference of courts of equity, in cases of this class. 1. The leading principle is, that the writer of letters has such a qualified property in them, as will intitle him to an injunction to restrain their publication by the party written to, or his assignees or representatives. 2. That this qualified property descends to representatives. 3. That it is a right of property independent of the right to take the profits of publication, and consequently does not depend upon or involve the pecuniary value of the letters proposed to be published. 4. That for the purposes of justice publicly administered, in the ordinary modes of proceeding, or to vindicate his character from an accusation publicly made, the receiver of letters may publish them.[1]

[1] Perceval *v.* Phipps, 2 Ves. & B. 19. Gee *v.* Pritchard, 2 Swanst. 418, 426, 427. Folsom *v.* Marsh, 2 Story's R. 100, 110, 111. 2 Story's Eq. Jurisp. § 948.

But a doubt has been suggested, whether mere private letters, not intended as literary compositions, are entitled to the protection of an injunction in the same manner as compositions of a literary character.[1] This doubt has probably arisen from the habit of not discriminating between the different rights of property which belong to an unpublished manuscript, and those which belong to a published book. The latter, as I have intimated in another connection, is a right to take the profits of publication. The former

[1] By Sir Thomas Plumer, vice-chancellor, in Perceval *v.* Phipps, 2 V. & B., and Mr. Chancellor Walworth, in Brandreth *v.* Lance, 8 Paige's R. 24, 26. In the former case, the vice-chancellor thought that the letters of Pope and of Lord Chesterfield derived their right to protection from their character as literary compositions. But there is no evidence in either case, as reported, to show that either of the writers intended those letters for literary compositions, or wrote them with a view to publication. In Pope *v.* Curll, Lord Hardwicke dealt with the subject, on one point, as a book, because it was already printed by the defendant. See 2 Atk. 342. With regard to Lord Chesterfield's Letters, however elegantly written, the case presents only a domestic correspondence between father and son. They certainly were not written for publication, so far as we can judge from the report in Ambl. 737. In like manner, Mr. Chancellor Walworth (8 Paige, 27,) supposes that Lord Eldon, in Gee *v.* Pritchard, went the length of allowing the remedy for a right of property, where the plaintiff's interest was no other than that of violated feelings. He says, "The complainant's bill was not to prevent the publication of her letters on account of any supposed interest she had in them as literary property, but to restrain the publication of a private correspondence, as a matter of feeling only." 8 Paige, 28. The learned chancellor seems to understand Lord Eldon's use of the term "property" to refer to a subject of pecuniary value; whereas it is clear that his lordship uses it in reference to private correspondence, which has no pecuniary value for purposes of publication, when he speaks of a joint property in the writer and the receiver of a letter. See his observations, cited in the text, *ante*, from 2 Swanst. 415. This is equally manifest from his lordship's remark on the case of Perceval *v.* Phipps, which he did not understand to have denied Lady Perceval's *property* in the letters. See 2 Swanst. 415. So, too, he says that his predecessors did not inquire whether the intention of the writer was or was not directed to publication. Ib. p. 414. Such an intention must be the only sensible test of the literary character of a letter.

is a right to control the act of publication, and to decide whether there shall be any publication at all. It has been called a right of property ; an expression perhaps not quite satisfactory, but on the other hand sufficiently descriptive of a right which, however incorporeal, involves many of the essential elements of property, and is at least positive and definite. This expression can leave us in no doubt as to the meaning of the learned judges who have used it, when they have applied it to cases of unpublished manuscripts. They obviously intended to use it in no other sense, than in contradistinction to the mere interests of feeling, and to describe a substantial right or legal interest.[1]

If this be the correct view of the adjudged cases, it follows that there can be no sound distinction between private letters or letters of friendship or business, and letters intended as literary compositions, so far as the remedy afforded to the writer by courts of equity is concerned. In either case, the writer proceeds, when seeking that remedy, upon a right which the courts have recognized as a right of property ; though in the case of letters which the writer intended for publication and profit, his right has the other element of an anticipated loss of pecuniary profits. Indeed, there is a moral reason why the rights of property should not be deemed to

[1] Gee *v.* Pritchard, 2 Swanst. 403. Southey *v.* Sherwood, 2 Meriv. 435. Folsom *v.* Marsh, 2 Story's R. 100, 108, 109. Denis *v.* Leclerc, 1 Martin's Louis. R. 297. 2 Story's Eq. Jurisp. § 945, 948 a. Ante, note, p. 93.

exist only when the letters are literary compositions, which has been pointed out by an eminent jurist. "If the mere sending of letters to third persons is not to be deemed, in cases of literary composition, a total abandonment of the right of property therein by the sender; *a fortiori*, the act of sending them cannot be presumed to be an abandonment thereof in cases where the very nature of the letters imports, as matter of business, or friendship, or advice, or family or personal confidence, the implied or necessary intention and duty of privacy and secrecy.[1]

There is another, and, as it seems to me, decisive objection to the supposed distinction between private letters and letters of a literary character. It is impossible to make any such distinction, in point of fact.[2] Literary subjects, elegance and finish of style,

[1] 2 Story's Eq. Jurisp. § 947.

[2] Mr. Godson has divided epistolary writings into three classes: 1. Letters originally intended for the press, constituting a literary work, to which the form of epistolary composition is given as a matter of dress. 2. Letters which have actually passed from one person to another, but which, from the *nature of the subject, and the literary character of the writer*, may be considered, *when a great number of them are collected*, as forming a literary work. 3. Common letters on business, and on every subject that can occur in the intercourse of private life, but which *never could have been intended to be published*, and therefore cannot be considered as *literary compositions, and entitled to protection, on the ground of a copyright existing in them*. As to the latter class, the learned author thinks, that the ground on which courts of equity have interfered to prevent publication, is "not upon copyright, but that the publication is a breach of *contract*, or *confidence*, or when they are to be made a source of *profit*, at the risk of wounding private feelings." Godson on Patents, &c. 327, 328. It will be seen that I have taken a very different view both of the authorities, and of the supposed distinction between different classes of letters. As to the authorities, it is clear that they proceed upon a property in the writer, and upon nothing else, whether the letters are of one class or another. As to the distinction, it may well be asked, what degree of scholarship, what number of letters, and what subject, are to determine whether a man's letters are to be considered as tak-

elaborate and beautiful writing, eloquent description, may all be found in letters of friendship, as much as personal anecdote or topics of domestic interest. What is the friendly correspondence of the learned, but, in a critical sense, literary composition; in which knowledge, taste and eloquence, on subjects of general and literary interest, are so copiously displayed, that the treasures which lie hidden in private repositories doubtless exceed in value and importance all that the world has yet possessed in published epistolary writing? Yet it would be extremely inaccurate to apply to such writings the term literary compositions, in the sense in which alone that term can have any legal acceptation; for in this sense it must mean compositions written with a view to their publication as literary works. If the style or the subject is to be the test of the literary character of a letter, in a court of justice, a vast mass of private correspondence would at once fall under that designation; but if this test is to decide the question of protection from unauthorized publication, a still greater mass of familiar writing, that can exhibit no atoning merits of style or subject to console the feelings wounded by publication, must be left out of the pale of human rights. Fortunately for the peace of mankind, the law establishes no such distinction.[1]

ing the character of a literary work, when they were not written for publication? No such test can be applied.

[1] Mr. Justice Story, in a case from which I have already quoted, thus sums up the doctrine in relation to letters. "There is no small confusion in the books, in reference to the question of copyright in let-

The question is probably disposed of in this country, by the statute which gives a remedy against

ters. Some of the *dicta* seem to suppose, that no copyright can exist, except in letters, which are professedly literary; whilst others again recognize a much more enlarged and liberal doctrine. Without attempting to reconcile, or even to comment upon the language of the authorities on this head, I wish to state what I conceive to be the true doctrine upon the whole subject. In the first place I hold, that the author of any letter or letters, (and his representatives,) whether they are literary compositions, or familiar letters, or letters of business, possess the sole and exclusive copyright therein; and that no persons, neither those to whom they are addressed, nor other persons, have any right or authority to publish the same upon their own account, or for their own benefit. But, consistently with this right, the persons to whom they are addressed may have, nay, must by implication possess the right to publish any letter or letters addressed to them, upon such occasions, as require or justify the publication or public use of them; but this right is strictly limited to such occasions. Thus, a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper to establish his right to maintain the suit, or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of improper conduct, in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach. If he attempt to publish such letter or letters on other occasions, not justifiable, a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author; and *a fortiori*, if he attempt to publish them for profit; for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive copyright of the writer. In short, the person to whom letters are addressed has but a limited right, or special property (if I may so call it,) in such letters, as a trustee, or bailee, for particular purposes, either of information or of protection, or of support of his own rights and character. The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. The general property in the manuscripts remains in the writer and his representatives as well as the general copyright. *A fortiori*, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion. If the case of Perceval *v.* Phipps, (2 Ves. & Beam. 21, 28,) before the then vice-chancellor, (Sir Thomas Plumer,) contains a different doctrine, all I can say is, that I do not accede to its authority; and I fall back upon the more intelligible and reasonable doctrine of Lord Hardwicke, in Pope *v.* Curll, (2 Atk. R. 342,) and Lord Apsley, in the case of Thompson *v.* Stanhope, (Amb. R. 737,) and of Lord-Keeper Henley, in the case of the Duke of Queensbury *v.* Shebbeare, (2 Eden R. 329; 4 Burr. R. 2330,) which Lord Eldon has not scrupled to hold to be binding authorities upon the point in

the unauthorized publication of *any manuscript whatever*.[1]

The question has been mooted in this country, whether official letters, addressed to the government by public officers, can be the subject of copyright. In these cases, there seems to be a right on the part of the government to publish or to withhold from publication, from principles of public policy, according to the exigencies of the public service. But this exception in favor of the government, which has been

Gee *v.* Pritchard, (2 Swanst. R. 403, 414, 415, 419, 426, 427.) But I do not understand, that Sir Thomas Plumer did, in Perceval *v.* Phipps, deny the right of property of the writer in his own letters; and so he was understood by Lord Eldon in Gee *v.* Pritchard; who, however, said, that that case admitted of much remark. Indeed, if the doctrine were otherwise, that no person, or his representatives, could have a copyright in his own private or familiar letters, written to friends upon interesting political and other occasions, or containing details of facts and occurrences passing before the writer, it would operate as a great discouragement upon the collection and preservation thereof; and the materials of history would become far more scanty than they otherwise would be. What descendant, or representative of the deceased author, would undertake to publish, at his own risk and expense, any such papers; and what editor would be willing to employ his own learning, and judgment, and researches, in illustrating such works, if, the moment they were successful and possessed the substantial patronage of the public, a rival bookseller might republish them, either in the same or in a cheaper form, and thus either share with him, or take from him the whole profits? It is the supposed exclusive copyright in such writings which now encourages the publication thereof, from time to time, after the author has passed to the grave. To this we owe not merely the publication of the writings of Washington, but of Franklin, and Jay, and Jefferson and Madison, and other distinguished statesmen of our own country. It appears to me, that the copyright act of 1831, (ch. 16, § 9,) fully recognizes the doctrine for which I contend. It gives by implication to the author or legal proprietor of any manuscript whatever, the sole right to print and publish the same, and expressly authorizes the courts of equity of the United States to grant injunctions to restrain the publication thereof, by any person or persons, without his consent." See also 2 Story's Eq. Jurisp. § 947, 948. The same doctrine substantially is held in France. Renouard, tom. ii. p. 294, 295.

[1] Act of Cong. Feb. 3, 1831, § 9.

thought to stand upon principles analogous to those which give a right to private individuals to publish the letters of their agents upon fit and justifiable occasions, is not supposed to make such letters common property, to be published by any person who may see fit, without the sanction of the government, nor to take away the property of the writers or their representatives.[1]

But the occasion, on which this doctrine was alluded to, did not require a direct adjudication of the question whether the despatches of a public officer, addressed to his government, can be the subject of

[1] Folsom *v.* Marsh, 2 Story's R. 100, 113. In this case Mr. Justice Story said, "In respect to official letters addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. But this is an exception in favor of the government, and stands upon principles allied to, or nearly similar to, the rights of private individuals, to whom letters are addressed by their agents, to use them and publish them, upon fit and justifiable occasions. But assuming the right of the government to publish such official letters and papers, under its own sanction, and for public purposes, I am not prepared to admit, that any private persons have a right to publish the same letters and papers, without the sanction of the government, for their own private profit and advantage. Recently the Duke of Wellington's despatches have (I believe) been published, by an able editor, with the consent of the noble duke, and under the sanction of the government. It would be a strange thing to say, that a compilation involving so much expense, and so much labor to the editor, in collecting and arranging the materials, might be pirated and republished by another bookseller, perhaps to the ruin of the original publisher and editor. Before my mind arrives at such a conclusion, I must have clear and positive lights to guide my judgment, or to bind me in point of authority."

private copyright.[1] In France, it seems to be considered that official documents are not subjects of the privilege of authors.[2]

III. LECTURES. The right of property in lectures, oral and written, has been recognized in England by statute. The 5 and 6 Wm. IV. chap. 65, sec. 1, enacts, that from and after the first day of September, 1835, the author, or his assignee, of lectures to be delivered in any school, seminary, institution, or other place, shall have the sole right to publish them; and the 3d section declares that no person allowed for a certain fee and reward or otherwise to attend and be present at any lecture delivered at any place, shall be deemed and taken to be licensed, or to have leave to print, copy and publish such lectures, only because of having leave to attend them. But the 5th section provides that the operation of the act is to be restricted to lectures, of the delivery of which notice in writing shall have been given to two justices living within five miles of the place of delivery, two days before the delivery thereof. And it is further provided, that the act shall not extend to any lecture or lectures delivered in any university or public school, or college, or on any public foundation, or by any individual, in virtue

[1] The letters and documents of an official character, published by the defendants in this case, were not more than one-fifth part of the whole, and the court did not expressly decide the question concerning them. See 2 Story's R. 114.

[2] See a very able discussion of the question in Renouard, tom. 2, p. 132, et seq.

of or according to any gift, endowment, or foundation. This last provision is not a liberal one. A professor on a foundation has discharged his duty when he has delivered his lecture to his class. The salary has bought of him no service beyond this, whether it is paid by the state, or is the gift of an individual. It certainly has not bought for the public the substance of lectures which may have cost their proprietor the labor of a life. This illiberal exception is unknown on the continent of Europe. In most countries, this kind of public discourse is under the full protection of the law.[1]

In the United States, the right of property in lectures depends upon the general principles of the common law, and the statute which protects the owner of manuscripts.[2]

In relation to a lecture purely oral, of which the speaker has no manuscript, or any other writing which is such in its nature, as that, coupled with what is delivered orally, it may be taken that he has substantially a written composition, the common law has not gone the length of saying that he can, on the footing of property, have a remedy for an unauthorized publication. A written composition has been hitherto held to be the subject of literary property; concerning which the court must be satisfied that the publication complained of is an invasion of a written work, and this can only be done by comparing the composition with the piracy.

[1] Renouard, tom. ii. pp. 144–149. [2] Act of Cong. 3d Feb. 1831, § 9.

But it does not follow that because the information communicated by a lecturer is not committed to writing, but orally delivered, it is therefore within the power of any person who hears it to publish it. When persons are admitted, as pupils or otherwise, to hear public lectures, it is upon the implied confidence and contract that they will not use any means to injure or to take away the exclusive right of the lecturer in his own lectures. The hearer may take notes for purposes of his own information, but he may not publish them for profit.[1]

Accordingly, if a person attending such lectures undertakes to publish them, or furnishes another person with the means of publishing them, a court of equity will restrain such a publication, as a violation of trust and confidence, founded in contract, or implied from circumstances.[2]

Where a lecture has been reduced to writing, either wholly or substantially, the author has a right of property in it as a literary composition, in the same manner as in the case of other manuscripts. The admission of persons to hear such a lecture affords no presumption that the speaker intends to give them a right to publish the information which they may acquire. But when a court of equity is called upon to restrain a publication, on the ground

[1] Abernethy *v.* Hutchinson, 3 Law Journ. 209, 219. 2 Story's Eq. Jurisp. § 949.

[2] 2 Story's Eq. Jurisp. § 949.

that it is a piracy of a composition in writing, the writing must be produced.[1]

The act of congress, 3d February, 1831, § 9, gives an action on the case against any person who shall print or publish any manuscript whatever without the consent of the author or proprietor, and empowers the courts of the United States to grant injunctions according to the principles of equity, to restrain such publication. The remedy thus afforded would, without doubt. extend to the case of any lecture, of which the author could produce notes, showing that he had substantially reduced the same to writing.[2]

IV. DRAMATIC COMPOSITIONS, when in manuscript, are protected, like other literary compositions, nor does the author lose the exclusive right of printing and publishing a play, by allowing it to be represented on the stage.[3]

[1] Ibid.

[2] In France, the *cour royale* of Paris had before it, in 1828, the interesting question, whether, when a course of oral lectures is merely the reproduction of a work previously published by the professor, a person who publishes the lectures from notes taken by a stenographer, can be made responsible for a piracy to the publisher of the work thus reproduced. The decision of the question was given in the affirmative. See Renouard, tom. 2, p. 146.

[3] Macklin *v.* Richardson, Amb. 695. The plaintiff, in this case, was the author of a farce called "*Love a la Mode*," consisting of two acts, which was performed, by his permission, several times, at the different theatres, in successive years, but was never printed or published by him. When the farce was over, he used to take the copy away from the prompter; and when it was played at the benefits of particular actors, he made them pay a certain sum for the performance. The defendants, who were proprietors of a magazine, employed a short-hand writer to take down the words of the play at the theatre, and thus published the first act, giving notice that they would publish

Whether the property of an author in a published play includes, at common law, the sole right of representation upon the stage, is a point admitting of some doubt. In an action brought for the penalty under the statute 8 Anne, c. 19, in which the only evidence of publication was by representation of the play in question, Lord Kenyon held that the statute only extends to prohibit the publication of the book itself by any other than the author or his assigns, and that the acting of a play is not a publication.[1] In a subsequent case, where Lord Byron's tragedy of Marino Faliero, altered and abridged for the stage, was performed without the consent of the owner of the copyright, who applied for an injunction, the court of K. B., on a case sent by the Lord Chancellor, certified it as their opinion that an action could not be maintained "for publicly acting and representing the said tragedy, abridged in manner aforesaid."[2]

The consequence of these decisions, in England, was, that while the authors of dramatic and musical compositions, after printing and publishing their works, enjoyed their copyrights, they had no exclusive privilege to the more valuable form of representation or performance. This defect in the law led to the enactment of statutes giving this exclusive

the second act in their next number.

granting an injunction, negatived the idea that acting a play is a publication of it.

[1] Coleman *v.* Wathen, 5 T. R. 245. Lord Commissioner Smythe, in

[2] Murray *v.* Elliston, 5 B. & Ald. 657.

right. The 3 Wm. IV. c. 15, sec. 1, gave to the author or his assignee, of any printed and unpublished tragedy, comedy, play, opera, farce, or other dramatic piece or entertainment, the sole right of having it represented in any part of the British dominions; and to the author or his assignee of any such dramatic production which was printed or published after the passing of the act, or ten years before, the sole right of representation, from the time of publication, or of the passing of the act, for a period of twenty-eight years, or, if the author were living at the end of that time, for the remainder of the author's life.[1]

By the 5 and 6 Vict. c. 45, sec. 20, it is enacted that the sole liberty of representing or performing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure, and be the property of the author or his assignee for the same term as is provided in the act for the duration of copyright in books. The same section extends the provisions in the act respecting literary copyright and the registration thereof, to the liberty of representing or performing any dramatic piece or musical composition, except that the first public representation or performance shall be deemed equivalent to the first publication of a book.[2]

V. Books. The term "Book" is made use of

[1] 3 Wm. IV. c. 15, sec. 1. See Appendix.

[2] 5 and 6 Vict. c. 45, s. 20. See Appendix.

in both the English and American statutes, and the question has arisen, whether its construction is to be confined to those forms of publication only which are popularly called books.

The question first arose in England at Nisi Prius upon a song printed on a single sheet of paper, which it was contended could not be within the protection of the act 8 Anne, c. 19, which, in the enacting clause, mentions only "books." Lord Ellenborough was inclined to think that such a publication was not protected by the statute, as the word *book* only means in common acceptation a plurality of sheets, and is decidedly used in this sense in the clause of the statute which speaks of "every sheet or sheets being part of such book or books." He therefore nonsuited the plaintiff, but reserved the point for the opinion of the court. Erskine, at the next term, moved and obtained a rule to show cause why the nonsuit should not be set aside ; [1] but when

[1] Mr. Erskine, on this occasion, argued "that the legislature could never have meant to make the operation of the statute depend upon the type in which any composition is printed, or the form in which it is bound up. This song might easily have been extended over several sheets, and rendered a duodecimo volume. In Bach *v.* Longman, Cowp. 623, it was decided that music is within the act, and musical compositions most generally appear in this fugitive form. [Lord Ellenborough. In the case cited, the musical composition was a *sonata*, and a sonata may be a book.] It never occurred to the lord chancellor who directed the issue, or to Lord Mansfield, or any of the judges who decided the case, that the form of the publication could make any difference, and therefore it is not stated. If a different construction were put upon the act, many productions of the greatest genius, both in prose and verse, would be excluded from its benefits. But, might the papers of the Spectator, or Gray's Elegy in a Country Church Yard, have been pirated as soon as they were published, because they were first given to the world on single sheets? The voluminous ex-

the counsel for the defendant proceeded to show cause, the court directed the matter to be reconsidered by a special verdict, that it might be ascertained whether the piece was a book within the meaning of the legislature. But the cause was not again carried down for trial.[1]

In a subsequent case, upon the same point, Lord Ellenborough reconsidered his former opinion, and it was settled unanimously by the court that it could not depend upon the form of the publication, whether it were entitled to the privileges of the statute or not; that a composition on a single sheet might well be a book within the meaning of the legislature.[2]

tent of a production cannot, in an enlightened country, be the sole title to the guardianship the author receives from the law. Every man knows that the mathematical and astronomical calculations which will enclose the student during a long life in his cabinet, are frequently reduced to the compass of a few lines: and is all this profundity of mental abstraction, on which the security and happiness of the species in every part of the globe depend, to be excluded from the protection of British jurisprudence? But there is nothing in the word *book* to require that it shall consist of several sheets bound in leather, or stitched in a marble cover. *Book* is evidently the Saxon *boc*, and the latter term is from the beech-tree, the rind of which supplied the place of paper to our German ancestors. The Latin word *liber* is of a similar etymology, meaning originally only the bark of a tree. *Book* may therefore be applied to any writing; and it has often been so used in the English language. Sometimes the most humble and familiar illustration is the most fortunate. The *horn book*, so formidable to infant years, consists of one small page protected by an animal preparation, and in this state it has universally received the appellation of a *book*. So in legal proceedings, the copy of the pleadings after issue joined, whether it be long or short, is called the paper *book* or the demurrer *book*. In the court of exchequer, a roll was anciently denominated a *book*, and so continues in some instances to this day. An oath as old as the time of Edward I. runs in this form: "And you shall deliver into the Court of Exchequer a book fairly written," &c. But the book delivered into court in fulfilment of this oath, has always been a roll of parchment." 2 Campb. 28, 29, note.

[1] Hime *v.* Dale, 2 Campb. 27, note.

[2] Clementi *v.* Goulding, 2 Campb. 25, 32; 11 East, 244.

By the 5 and 6 Vict. c. 45, s. 2, the word "book," as used in that act, is to be construed to mean and include every volume, part, or division of a volume, pamphlet, sheet of letter press, sheet of music, map, chart, or plan separately published. It is said, however, to have been held in this country, that a *price-current*, published in a semi-weekly newspaper, is not a *book* within the act of congress, because not a work of science or learning, but of mere industry.[1] This is inconsistent with the previous decisions, and the reason given for it is at variance with all the analogous principles on the subject. Works of industry are as much the subjects of protection as works of genius. Indeed, there can be no line drawn between a production, the fruit of learning, and one the fruit of mere industry. All learning is the accumulation of knowledge gathered by the exercise of industry.[2]

VI. Music was formerly held in England to be within the protection of the act of Anne, it being a *writing*;[3] and now by the statute of 5 and 6 Vict.

[1] Clayton *v.* Stone, cited 2 Kent's Com. 380, note, as decided in the circuit court of the United States, at New York, Dec. 1828. The case is not reported.

[2] I cannot but think that the true reason was that the publication, being in a newspaper, had not been duly entered according to the act of congress.

[3] Bach *v.* Longman, Cowp. 623. In this case Lord Mansfield said, "The words of the act of parliament are very large — *books and other writings*. It is not confined to language or letters. Music is a science: it may be *written*; and the mode of conveying ideas is by signs and marks. If the narrow interpretation contended for in the argument were to hold, it would equally apply to algebra, mathematics, arithmetic, hieroglyphics. All these are conveyed by signs and figures. There is no color for saying that music is not within the act." See also Platt *v.* Button, 19 Ves. 447. Clementi *v.* Walker, 2 B. & C. 861.

c. 45, s. 2, the word "book," in the construction of that act, is to mean and include "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan, separately published."[1] Musical compositions, intended for the stage, fall under the head of dramatic compositions. In the United States, published music is included in the "Act for the encouragement of learning," under the term "musical composition."[2] But we have no statute in this country to secure to the authors of musical compositions the sole right of performance in public.

VII. Periodical Publications. Periodical publications, when the requisites of the statutes have been complied with, of course fall under their protection as books.[3] There is also a particular remedy, through the jurisdiction of courts of equity, by which the property in the good will of a periodical can be protected from invasion. Thus an injunction will be granted against publishing as a continuation or new series of an established periodical, new num-

[1] See Appendix.

[2] Act of congress of 3d Feb, 1831, sec. 1.

[3] In the United States, in order to claim the benefit of the statute, it would be necessary to enter each volume or number of the work. In England, special provision is now made for "encyclopedias, reviews, magazines, periodical works, or other works published in a series of books or parts," by giving the benefits of registration, on entering in the book of registry, 1. *The title of such encyclopedia or periodical.* 2. *The time of the first publication of its first volume, number or part, or of the first number or volume published after the passing of the act.* 3. *The name and place of abode of the proprietor, or of the publisher when the publisher is not the proprietor.* 5 & 6 Vict. chap. 45, § 19. Newspapers are regulated by the act 6 & 7 Wm. IV. ch. 76.

bers, so disguised with contrivances as to the cover, &c., as to induce purchasers to take it for the old work ;[1] and against assuming the name of a newspaper for the fraudulent purpose of deceiving the public and supplanting the plaintiff in the good-will of his own newspaper.[2] The jurisdiction in cases of this kind is said, however, not to be founded in the law of copyright, but on the peculiar powers of the court to restrain a defendant from carrying on a trade or from publishing a work under a fraudulent representation that such trade or work is that of the plaintiff.[3]

The rights of the authors of articles and essays, forming parts of periodical publications, have been recently regulated by statute in England. The act 5 & 6 Vict. c. 45, § 18, provides that when a volume, part, essay, article, or portion, written for publication in any encyclopedia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, shall have been composed for the proprietor of such work, and paid for by him, upon the terms that the copyright therein shall belong to him, he shall enjoy the same rights therein as if he were the actual author, and shall have the same term of copyright therein as is given to the authors of books ; except that in the case of essays, articles, or portions forming part of and first

[1] Hogg *v.* Kirby, 8 Ves. 215.
[2] Bell *v.* Locke, 8 Paige R. 75.
[3] 8 Ves. 215, note *a*, Sumner's ed. 2 Story's Eq. Jurisp. § 951. Eden on Injunctions (2d Am. edit.) 339, 369, et seq. Curtwell *v.* Lye, 17 Ves. 335.

published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form is to revert to the author for the remainder of the term of copyright given by the act; and during the term of twenty-eight years, the proprietor of the work is not at liberty to publish any such essay, article, &c. separately, without the consent of the author or his assigns; but authors who have reserved to themselves the right to publish their articles in a separate form, within the twenty-eight years, are to have the copyright in their compositions when published in a separate form, without prejudice to the right of the proprietor of the work in which they originally appeared.[1]

VIII. ENGRAVINGS, MAPS AND CHARTS. In the United States, engravings, maps and charts are within the protection of the act of 3d February, 1831, which gives the sole right and liberty of printing, reprinting, publishing and vending the same, for a period of twenty-eight years, to any person or persons, a citizen or citizens of the United States, or resident therein, his executors, administrators, or assigns, who shall invent, design, etch, engrave, work, or cause to be engraved, etched, or worked from his own design, any print or engraving, or who shall be the author or authors of any map or chart.

[1] 5 & 6 Vict. c. 45, § 18. See Appendix.

In England, by the 8 George II. c. 13, the property in historical and other prints was vested in engravers, who took from their own designs, for a period of fourteen years.[1] By the 7 George III. c. 38, § 1, the benefit of the former statute was extended to the prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other prints whatsoever, whether taken from the artist's own original designs, or from any picture, drawing, model, or sculpture, either ancient or modern; and the term of enjoying the right was in all cases enlarged to twenty-eight years.[2]

The 17 George III. c. 57, enabled the engravers of prints to recover certain penalties for the violation of their right.[3]

These statutes did not expressly vest the property in prints in the assignees of the artist, as well as in himself. But inasmuch as the 8 George II. c. 13, § 2, enabled any purchaser of a plate from the original proprietors to print and reprint from the same, without incurring the penalties, and the first section of the same act made it necessary, before a print can be copied, to obtain the consent of the proprietor, in writing, signed in the presence of two witnesses; it was held that the assignee of a print may maintain an action against any person who has pirated it.[4]

It seems that the plates, which are introduced to ornament or illustrate a book, are within the protec-

[1] See Appendix.
[2] Ibid.
[3] Ibid.
[4] Thompson *v.* Symonds, 5 T. R. 41.

tion of these statutes. In an action on the case, for pirating a book, and certain prints contained in it, in which the plaintiff declared separately for the piracy of his prints on the act 17 George III. c. 57, Lord Ellenborough directed the jury to find separate damages for the letter-press and the prints.[1] It seems, too, that a writer, treating the same subject in original letter-press, cannot copy and use the plates published by a former writer in illustration of that subject.[2]

The property in an engraving may consist in the subject and design, or in the particular print, and not in the subject and design. It is not very easy, however, to define, in general terms, when the property will be in the design and subject, and when in the particular print only; but the distinction may be illustrated by particular cases. Thus, where the subject and design are purely the product of the artist's imagination, his property will consist in both subject and design, and the particular print. His property in the print itself would be violated by a copy or a *fac-simile*; and his property in the subject and design would be violated by an imitation falling short of a *fac-simile*, but in which the alterations should be merely colorable.[3] Thus, where the plaintiff, in a work on the art of fencing, had introduced figures to illustrate the different positions in fencing,

[1] Roworth *v.* Wilkes, 1 Campb. 94.

[2] Wilkins *v.* Aiken, 17 Ves. 422.

[3] A copy is that which comes so near to the original as to give every person seeing it, the idea created by the original. Per Bailey, J. in West *v.* Francis, 5 B. & Ald. 737.

Lord Ellenborough said, that the question was, as to the prints, whether the defendant had copied the main design; and if there was such a similitude and conformity between the prints, that the person who executed the one set must have used the others as a model, he would in that case be a copyist of the main design.[1] But where the engraving is merely a print of a drawing taken from an object in nature, or a work of art, which anybody is at liberty to copy, the property of the artist is merely in his particular print; but to this extent he has a property, which has been held to be clearly within the protection of the statutes. Thus, on an application to Lord Hardwicke, to restrain the defendant from copying and publishing the plates of a work on botany, his lordship said, "the defendant, to make out the case he aims at, must show me that these prints of medicinal plants are in any other book or herbal whatsoever, *in the same manner and form as they are represented here*, for they are represented in all their several gradations—the flower and the flower-cup, the seed-vessel, and the seed."[2] So, where the plaintiff, in a work on the antiquities of Greece, had published prints taken from drawings made by himself, Lord Eldon granted an injunction against a direct copying, applying the doctrine applicable to books, that any

[1] Roworth *v.* Wilkes, 1 Campb. 94.

[2] Blackwell *v.* Harper, 2 Atk. 92. His lordship also said, "I do not think the act [8 Geo. II. c. 13,] confines it merely to invention; as, for instance, an allegorical or fabulous representation; nor to historical only, as the design of a battle, &c., but it means the designing or engraving anything that is already in nature."

one was at liberty to make new original drawings of the subjects, but not to copy the work of another.[1]

But where a work of art is the subject of the engraving, any person has a right to copy it, provided he goes to the original and not to a prior engraving; nor can a prior engraver, by obtaining the permission of the owner of a picture to copy it, acquire any monopoly in the subject, which will prevent a subsequent engraver from copying from the same picture.[2]

There can be no property in an engraving of an obscene, immoral, or libellous nature.[3]

Maps, charts, and plans are included, under the term "book," in all the benefits of the act 5 and 6 Vict. c. 45.[4]

IX. SCULPTURE. In the United States, the sole right and property of an artist in original sculpture, is protected for seven years, by a law which requires an entry to be made at the Patent Office. This protection extends to any citizen or citizens, alien or aliens, having resided one year in the United States, and taken the oath of his or their intention to become a citizen or citizens.[5] In England, by the 54 George III. c. 56, the sole right and property of every new and original sculpture, model, copy or cast of the human figure, or of any bust, or any part of the human figure, clothed in drapery or otherwise;

[1] Wilkins *v.* Aiken, 17 Ves. 422.
[2] De Berenger *v.* Wheble, 2 Starkie's N. P. C. 548.
[3] Fores *v.* Johnes, 4 Esp. N. P. C. 97. Du Bost *v.* Beresford, 2 Campb. 511.
[4] Sect. 2.
[5] Act of Cong. Aug. 29, 1842, § 3. See Appendix, p. 101.

or of any animal, or of any part of an animal, combined with the human figure or otherwise; or of any subject being matter of invention in sculpture, or of any alto or basso-relievo representing any of the above-mentioned matters; or any cast from nature of the human figure, or part of the human figure, or any subject containing or representing any of the above-mentioned matters and things, whether separate or combined, is vested in the person who shall make them or cause them to be made, for the term of fourteen years from the time of first publication; provided that the proprietor's name, before publication, with the date, be put on such original sculpture, model, copy, or cast, &c.

The sixth section gives an additional term of fourteen years to the person who originally made or caused to be made the sculpture or other matter, if he be living at the end of the first term, and have not divested himself of the copyright by sale or otherwise.[1]

X. PREROGATIVE COPIES. The prerogative copyrights of the crown of England constitute a peculiar branch of literary property, which has given rise to much controversy, and is involved in some obscurity. It formerly embraced, in practice, the English Translation of the Bible, the Book of Common Prayer, The Statutes, Almanacs, and the Latin Grammar, of which the exclusive right of printing

[1] See Appendix.

was held to be vested in the king, and was accustomed to be granted by letters-patent. We have seen, in a former chapter of this work, that Lord Mansfield considered this right of the crown to be founded upon property, like the right of a private author or his assigns, and consequently that he held it tenable, in the cases in which the property of the crown could be traced, independent of reasons of state or of naked prerogative.[1] But the subject is attended with great difficulties, growing out of the fact that the right has at various times been exercised as a naked prerogative, and as founded in reasons of state policy, though it seems to be clear that it was also sometimes rested upon property. It is not my purpose to endeavor to decide the very intricate questions arising under this branch of the subject, but simply to state the doctrines which have prevailed in the law of England, with reference to the principal objects to which this right has been supposed to attach.[2]

1. *The English Translation of the Bible.* Sir William Blackstone says, that the claim of the king to the exclusive printing of the English Bible rests upon the two grounds of original purchase, and of his being the head of the church.[3] Lord Mansfield held it to be a mere right of property, the king having bought the translation.[4] The translation which the

[1] Millar *v.* Taylor, 4 Burr. 2401.

[2] For a more full discussion of the prerogative copies, see Godson on Patents, p. 316, 331.

[3] 2 Black. Com. 410.

[4] 4 Burr. 2405. In Baskett *v.* The University of Cambridge, 1 Bl. 105, 113, Yorke, solicitor-general, argued, that the crown has no prerogative at common law over the art of printing, but is merely entitled to some special copyrights,

king was supposed to have bought, or to have had printed at his own expense, was that executed in the reign and under the superintendence of King James I.

The notion of private purchase seems to be now abandoned;[1] but the right itself, whatever it may be founded on, seems to be fully recognized, although it has been the subject of learned doubts, on the part of respectable authorities.[2] In the case of an application made to Lord Eldon, for an injunction against the king's printer in Scotland, who had a patent for the sale of Bibles, to restrain him from printing or selling Bibles in England, the question was between rival patentees. The injunction was granted upon motion, and before the hearing, upon the ground that possession, under color of title, was sufficient for an injunction, until it was proved at law that there was no real title.[3] Subsequently, the converse of this case came before the house of lords, the question being whether the king's printer in Scotland could interdict the sale in Scotland of Bibles imported from England. In this case, the right of the crown to grant a patent for the exclusive

among which he enumerates the translation of the great English Bible under Grafton, performed at the king's expense. Lord Mansfield, who presided, seems to have taken the same view of the king's right, then, and in the subsequent case of Millar *v.* Taylor, where he expressly asserts the king's right by purchase.

[1] Maugham on Literary Property, p. 107. Manners *v.* Blair, 3 Bligh's R. (N. S.) 402, 403.

[2] 2 Evans's Statutes, 17, 18, notes. Maugham, 107, and the remarks of Lord Chancellor Clare, there cited. Lord Gifford's observations, in Manners *v.* Blair, 3 Bligh's R. (N. S.) 394, 398.

[3] Universities of Oxford and Cambridge *v.* Richardson, 6 Ves. 689.

printing of Bibles was elaborately discussed by Lord Chancellor Lyndhurst, in moving the judgment of their lordships. He defined the nature of the right, as flowing from the duty imposed upon the chief executive officer of the government, to superintend the publication of acts of state, and of the works upon which the established doctrines of religion are founded — a duty imposed upon the king, and carrying with it a corresponding prerogative.[1]

[1] Manners *v.* Blair, 3 Bligh's R. (N. S.) 391, 402. In this case, the lord chancellor said, "The principal respondents in this case are the king's printers in Scotland. They hold that office under a patent from the crown. The appellants are members of certain Bible societies in Scotland, and have been in the habit of importing Bibles from England; and the material question to be decided in this case, is whether or not the king's printers in Scotland have, by virtue of their office and their patent, a right to exclude persons from importing Bibles, and the other works which are contained in the patent from England?

"Two important questions were raised in this case. One, which was raised, and which was argued at great length in the court below, and argued very ably at your lordships' bar, was as to the right of the crown to grant a patent, the effect of which shall be, to prevent persons in Scotland from importing Bibles, and other works of the description mentioned in the patent, certain religious works, from England; and the second question turned upon the particular construction of the terms of this patent.

"With respect to the first question, it arose out of the case of Manners and Miller *v.* Blair, which was before your lordships' house two or three sessions ago. When that case came on for argument, and was argued at your lordships' bar, it occurred to the learned lord who then presided here (Lord Gifford), that there was a doubt as to the validity of the patent, and as to the power of the king to grant a patent of that description. I do not mean to suggest that the noble and learned lord expressed any opinion upon that subject, but that he was desirous, before he decided that question, that that point should be argued at your lordships' bar; but which was in fact, never argued in the particular case, because the case in which I am about to propose that your lordships should give judgment was before the courts below; and being before the courts below, the point was raised before the judges of the court in Scotland, which had not in fact been raised in the case of Manners and Miller *v.* Blair; and that case having come before your lordships upon appeal, it was considered more convenient and proper that the argument, with respect to the validity of the patent, and with respect to the prerogative of the crown,

The effect of these decisions is, that so long as there are separate subsisting patents for England

should be on that particular case, than on the case of Manners and Miller; but your lordships' decision in the one case, will be of course governed by the decision in the other.

"In conducting the argument, with respect to the prerogative of the crown, reference was made, and very properly made, to the cases of prerogative in England. For two hundred years and more, the kings have, in England, granted patents to their printers here, as extensive as the patent we are now considering, and perhaps more extensive, but extensive enough to raise the question we are now considering. In England, the power of the king to grant patents of this description, or to appoint to such an office, has never been seriously questioned. Those patents have from time to time come under the review of our courts, and the judges have been called upon to decide upon them. One case occurred before Sir Joseph Jekyll, so far back as the year 1720, and others at different periods, both in the courts of equity, and also before this house during the last century; and I would state it as a point not admitting now of doubt or controversy, that as far as relates to the office of king's printer in England, the crown has the prerogative to grant a patent as extensive as that we are now considering,—assuming, for the purpose of argument, that the patent is as extensive as it is contended on the part of the respondents to be.

"But although the power of the king and his prerogative in England has never been questioned, it has been rested by judges on different principles. Some judges have been of opinion, that it is to be founded on the circumstance of the translation of the Bible having been actually paid for by King James, and its having become the property of the crown, and therefore it has been referred to a species of copyright. Other judges have referred it to the circumstance of the king of England being the supreme head of the church of England, and that he is vested with the prerogative with reference to that character. Other judges have been of opinion, and I confess, for my own part, I am disposed to accede to that opinion, that it is to be referred to another consideration, namely, to the character of the duty imposed upon the chief executive officer of the government, to superintend the publication of the acts of the legislature, and acts of state of that description, and also of those works, upon which the established doctrines of our religion are founded,—that it is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative. That was the opinion of Lord Camden, as expressed in the case of Donaldson *v.* Becket, (4 Burr. 2408.) in most direct and eloquent terms in this house: that was the opinion also expressed by Chief Baron Skinner, in the case of Eyre and Strahan *v.* Carnan; (Court of Excheq. 1781.) and I think that may be collected or inferred to be the opinion of a learned and noble earl, now a member of your lordships' house, from what fell from that noble and learned lord, in the case of the Universities of Oxford and Cambridge *v.* Richardson. (6 Ves. 704, 5.)

"If that be so, if that is the true principle upon which this preroga-

and Scotland, for the printing of Bibles, no other copies can be sold in either country except those

tive is to be rested, it appears to me that all difficulty ceases with respect to the prerogative in Scotland. In Scotland, as well as England, patents of this description have been granted without dispute or contest, for more than two hundred years. These patents have at different periods been made the subject of suits in the courts of Scotland, and particularly in the case of Watson *v.* Baskett, in the year 1716, or the year 1717, which cases came afterwards by appeal to the house of lords. In another case, that of the King's Printers *v.* Bell and Bradfute, this patent came under the consideration of the courts of justice in Scotland; and many other cases may be referred to, for the purpose of establishing the same fact: so that we have in Scotland, as well as England, patents granted successively for a period of more than two hundred years. These patents have been the subjects of suits. These cases have come to your lordships' house; and I do not think, that until the doubt was thrown out by the noble and learned lord to whom I have referred, the late Lord Gifford, the prerogative of the crown of Scotland was ever called in question. Certainly it never did occur to the very able counsel who argued the case of Manners and Miller *v.* Blair, in the court below, seriously to consider or to contest that point.

"In the course of this argument it was assumed, as the basis of a part of an argument, that the prerogative in England depended upon the king's character as supreme head of the church; and it was argued, that that principle did not apply to Scotland, for that although the king was the supreme head of the church in England, he was not the supreme head of the church in Scotland; and therefore the prerogative might well exist in this part of the island, and yet not exist in Scotland. But, I have already stated, that I do not refer the prerogative to the circumstance of the king being, in a spiritual or ecclesiastical sense, the supreme head of the church in England, but to the kingly character — to his being at the head of the church and state, and it being his duty to act as guardian and protector of both, — a character which he has equally in Scotland and England. It is perfectly clear, that it is the duty of the king to act this part, as the guardian of the church in Scotland. That is a principle laid down by the authorities in Scotland as much as in England. By the authority of the statute by which the Reformation was established in Scotland, it is declared to be the duty of the magistrates, and the king as supreme magistrate, to be the protector of the church; and in the act of 1690, by which the Presbyterian church was established, when the Episcopalian church authority was finally put an end to in Scotland, the same principle is laid down and acknowledged. I think, therefore, that this right and prerogative depends upon the king's character as guardian of the church and guardian of the state, to take care that works of this description are published in a correct and authentic form; and that those arguments upon which the authority rests in this country apply also in Scotland.

"But it was said at the bar, that in England, as far as relates to the translation of the Holy Bible, we have the translation recognized by public authority, introduced into the

printed by the patentee in that country; and so long as there is a subsisting patent for either country, no

service of the church by public authority; and that the prerogative in England will properly apply to this translation, but that the same principle does not apply in Scotland.

"With respect to the Bible which was translated in the reign of James I., and which indisputably was translated under his sanction, and by virtue of his authority, it does not appear that he contributed anything towards the expense. It does not appear that that translation of the Bible was introduced into the church by the authority of any act of parliament, by the authority of any act of convocation, or by proclamation; but undoubtedly it was introduced under the sanction and authority of the head of the church, under the sanction of the king of that period,—in what precise way does not appear by evidence. It is probable, that after it was completed, and the heads of the church were satisfied with it, it was by the authority of the bishops, in their respective dioceses, introduced into general use throughout the kingdom, possibly without any further act for that purpose. But is there any essential difference between the situation of England and Scotland in this respect? I apprehend clearly none; because the same translation has, if not by the actual authority, at least by the sanction of the general assembly of Scotland, been introduced into their church, and used there for a period I believe of one hundred and fifty years; and I understand that use of it in Scotland is as general, and indeed as exclusive and universal as in England. This translation, therefore, has been sanctioned in the country by the church of that country, and by the proper ecclesiastical authorities; and I apprehend that it stands in the same situation, and is guarded by the same privileges, and is in point of law, unless the general assembly should order otherwise, as compellable to be used in the churches of Scotland as it is in the churches of England. I do not apprehend, therefore, that there is any difficulty in this respect, or that any argument whatever can be founded on the idea, that by some authority in this country that particular translation has been introduced into universal use in our church, and that no corresponding authority exists in Scotland. I have no doubt there is some authority, at least some implied authority, for the introduction of it in England; and I apprehend there is the same implied authority, the same sanction for it by ecclesiastical authorities in Scotland.

"It was in consequence of this circumstance, and some doubts arising out of this particular view of the case, that the noble and learned lord to whom I have referred, was desirous that in this particular view, it should be considered again.

"It appears to me, that as far as relates to the translation of the Holy Scriptures, the case with respect to Scotland is precisely the same as it is with respect to England. But in this patent there are other works noticed. There is the Confession of Faith. I find that the Confession of Faith was ratified by the general assembly, in the year 1649; it is therefore a book adopted by the proper ecclesiastical authority in the country. The larger and the shorter Catechisms were also ratified by the general assembly about that same period: and with respect to the me-

other copies can be sold except those printed by the patentee or patentees.

2. *The Book of Common Prayer.* The doctrine with reference to the publication of the Liturgy of the Church of England, is that the king, as chief executive magistrate and head of the church, has a

trical version of the Psalms, which is also contained in that patent, that was, as I am informed, prepared by the authority of the general assembly, and it is used in the churches by authority of that general assembly. It appears to me, therefore, that these works come within the same principle as the Holy Scriptures, and within the same principle as the Book of Common Prayer in this country.

"A question has been raised with respect to the Book of Common Prayer, which is also contained in this patent; and it is said, that at all events, the king could not in Scotland confer the exclusive right of printing this work on his printer in Scotland. The court below entertained some doubt upon this point, and in this particular stage of the cause, they have excepted the Common Prayer from the operation of their interdict, without, however, pronouncing any decision upon it. At one period episcopacy existed in Scotland. During that time, there is no doubt the king's authority applied to the Book of Common Prayer, as well as to the other works to which I have referred. It is true, that by the act of parliament passed in the year 1690, an alteration was made in this respect. By the effect of that act of parliament in 1690, the presbyterian form of worship became the established form in Scotland, and the church of that persuasion became the established church of Scotland: but, those persons who were members of the church of England, who were in her communion, were still entitled to the protection of the crown; there was nothing in that act of parliament to deprive them of that protection; and if the king possessed the prerogative previous to the passing of the act in 1690, by which he had the exclusive right, by himself or his officers, in Scotland, to publish the Book of Common Prayer, there is nothing in the act of 1690 to deprive him of that prerogative, which he had previously enjoyed.

"It does not appear to me, therefore, in this view of the case, that there is any essential difference between that part of the patent which relates to the Book of Common Prayer, and that which relates to the other works. I think, therefore, that with respect to this question, which was not originally mooted in the court below, namely, the general question of the validity of the patent, which was only afterwards argued in the second case, in consequence of the wish intimated by the noble and learned lord to whom I have adverted, that your lordships will have no difficulty in coming to the opinion, that in Scotland, as in England, the king possesses this prerogative, and that he has a right to confer it upon his printer."

right to the exclusive publication of the books of divine service. In 1781, a bill was filed in the exchequer, to restrain the defendant from printing and publishing a form of prayer, which had been ordered by his majesty to be read in all churches. Lord Ch. Baron Skinner, who delivered the judgment of the court, declared that whatever the origin of this right, this was certain, that it has ever been a trust reposed in the king, as executive magistrate, and the supreme head of the church, to promulgate to the people all those civil and religious ordinances which were to be the rule of their civil and religious obedience.[1] It appears that down to the 34th year of Henry VIII. the mass book and other books of divine service had not been printed in England, but had been brought from other countries, probably from Rome. In that year, however, a patent was granted for the sole printing of such books; but no other instance of the superintending care of the crown in printing books of divine service, occurs, until the first year of Queen Elizabeth, when the exclusive right of printing books of divine service was inserted in the

[1] Eyre *v.* Strahan and Carnan, reported 5 Bacon's Abridg. Prerogative, F. p. 597. Mr. Erskine, in his speech at the bar of the house of commons, in 1788, against the monopoly of almanacs, admitted that the king had the exclusive right to publish religious and civil constitutions; "in a word, to promulgate every ordinance which contains the rules of action by which the subject is to live and to be governed." Erskine's Speeches, vol. I. Sir W. D. Evans argues very strenuously against the existence of the legal right, and thinks that it could not now be agitated, as between the public and a patentee, with any prospect of success 2 Evans's Stat. pp. 15, 16, 17, notes. But the decision of the house of lords, in Manners *v.* Blair, solemnly affirms the right, although the question was between rival patentees.

same patent with the right of printing the acts of parliament, which had been granted some time before, and from that time they had been regularly granted together, to the time of this decision.[1] The recognition of the whole doctrine of prerogative copies by the house of lords, in 1828, shows that as to books of divine service, it remains the same.[2]

3. *The Statutes.* The exclusive right of printing acts of parliament has been regarded more favorably than the other branches of prerogative copyright. The reasons that have been given for it are, that it is necessary that there should be a responsibility for correct printing, and because copy can only be had from the rolls of parliament, which are within the authority of the crown.[3] Anciently, the king's officers transmitted copies of the ordinances of the state to the sheriffs, who caused them to be publicly read in their county courts. When the demand for authentic copies began to increase, and the introduction of printing facilitated the multiplication of copies, the people were supplied, by the king's command, by his patentee. This, it is said, seemed a very obvious and reasonable extent of that duty which lay upon the crown to furnish the people with the authentic text of their ordinances.[4] In this practice, the claim of right originated, and it was certainly recognized in repeated decisions from the

[1] Ibid.
[2] Manners *v.* Blair, 3 Bligh's R. (N. S.) 394.
[3] Per Lord Clare, in Grierson *v.* Jackson, cited Maugham, p. 104, as reported in Ridgway's R. 304.
[4] Per Lord Ch. B. Skinner, ut supra.

18 Chas. II. to the year 1781.[1] But some of these cases went the length of asserting the sole right of the crown to print the other law books, such as the Reports, the Year Books, and Rolle's Abridgment, and this right was contended for on grounds of property.[2] These notions are now of course exploded, and the right of the patentees of the crown to the sole printing of the statutes, as now recognized in England, must depend upon usage and the force of a decision of the court of king's bench, made in 1758, and upon the recognition of the doctrine of prerogative copies by the house of lords in 1828. The former was a case stated by order of the court of chancery, between the king's printer and the university of Cambridge, both claiming under grants from the crown. The court certified it as their opinion, that the plaintiffs were entitled to the right of printing acts of parliament, and abridgments of acts of parliament, exclusive of all other persons, not authorized to print the same by prior grants from the crown; but that the university of Cambridge is intrusted with a concurrent authority to print acts of parliament and abridgments of acts of parliament, within the university, upon the terms of their pa-

[1] Atkyns's Case, Carter 89. Bacon's Ab. Prerogative, F. 4 Burr. 2315. Roper *v.* Streater, Skin. 234. Stationers' Co. *v.* Parker, Skin. 233. Eyre *v.* Strahan & Carnan, Bac. Ab. Prerog. F. p. 597. Baskett *v.* University of Cambridge, 1 W. Black. R. 105. Baskett *v.* Cunningham, Ib. 370.

[2] Atkyns's Case, Carter 89. Roper *v.* Streater, Skin. 234. Stationers' Co. *v.* Parker, Ib. 233. Vide ante chap. 1, p. 40–44.

tents.[1] This case is open to the same remark that has been made upon Oxford *v.* Richardson, that it does not present the question of the validity of these patents, as between the crown and the public, for direct decision. It does, however, assume the exclusive right to be in the king, and it will require solemn argument and great deliberation, to set it aside. It was subsequently followed in the court of chancery,[2] and to this day constitutes the principal authority upon which applications for relief in that court have been rested. The case in the house of lords has been already cited.[3]

It seems to be agreed, that the privileged copies, both the Bible and the Statutes, may be printed by others than those having the patent right, if accom-

[1] Baskett *v.* The University of Cambridge, 1 W. Black. R. 105, 121. (1758.)

[2] Baskett *v.* Cunningham & others, 1 Black. R. 370, (1762.) The defendant, in conjunction with several booksellers, was publishing in weekly numbers, A Digest of the Statute Law, containing the Statutes at large, with notes from Lord Coke and other writers of the law. He had contracted with Strahan and Woodfall, *the proprietors of the patent for printing law books*, to print this work, and it was printed at their press. Baskett, the king's printer, (whose patent extended to Statutes) filed his bill against the proprietors and the law printers, for an injunction. The Lord Chancellor was of opinion that the work was entirely within the patent of the king's printer, and that the notes were merely collusive. But he would not interfere between the two contending patents, in the summary method of injunction; but left them to adjust their respective rights, at law. He therefore ordered an injunction to issue, to restrain the proprietors from printing at any other than a patent press; which, as Woodfall and Strahan were secretly in league with Baskett, and were at that time jointly concerned in a new edition of the Statutes, was equivalent to a total injunction. — In 1804, a bill filed by the king's printer in Ireland, to establish his right to print and distribute the copies of the statutes for Ireland, and for an account against the king's printer for England, was dismissed, upon the ground that the plaintiff had no equity which the court could administer. Grierson *v.* Eyre, 9 Ves. 341.

[3] Manners *v.* Blair, see ante, p. 119–123.

panied by *bona fide* notes.[1] But with this exception, the sole right to print the Bible and the Statutes, is now held in England to be vested in the two universities of Oxford and Cambridge, concurrently with the king's patentees.[2]

4. *Almanacs.* A patent was granted by James I. for the exclusive printing of almanacs, which were claimed as prerogative copies, upon the following curious reasons: — 1st. Because an almanac has no certain author, and the property of such books is in the king; 2dly. Because almanacs regulate the feasts of the church.[3] In the 15 George III., upon a case sent from the court of chancery, the court of common pleas, after two arguments, decided that the crown had not a prerogative or power to grant the exclusive printing of almanacs.[4] A bill was then brought into parliament to revest the monopoly in the universities and the stationers' company, and Mr. Erskine was heard at the bar against it, and defeated it.

5. *The Latin Grammar.* The foundation of the claim, in the case of the old Latin Grammar, was the allegation that it was originally composed and published at the king's expense.[5] But the pretension is now considered utterly groundless.[6]

[1] Maugham, p. 106. 2 Evans's Statutes 19, note 11.

[2] Burke on Copyright, p. 5. Lond. 1842. Manners *v.* Blair, 3 Bligh's R. (N. S.)

[3] Stationers' Co. *v.* Seymour, 1 Mod. 256. Bacon's Ab. Prerogative, F. 5. 4 Burr. 2317.

[4] Stationers' Co. *v.* Carnan, 2 W. Black. R. 1004.

[5] 4 Burr. 2329, 2401.

[6] Ib. 2315. 3 P. Williams, 255.

X. REPORTS OF JUDICIAL PROCEEDINGS. The house of lords, in England, has for a long time claimed and exercised the right to appoint the publisher of any trial that takes place before it, as an exclusive privilege, and the practice has been to order that the lord chancellor do cause the trial to be published, and that no other person do presume to print or publish the same.[1] The lord chancellor appoints a publisher of the trial, upon this order, and it seems that any one who infringes upon the exclusive privileges thus conferred, may be enjoined by a court of equity.[2] But it does not appear to be held that the order of the house confers anything like literary property; but that it proceeds upon the ground that the house, as a court of justice, exercises of right a superintendence over the publication of its own proceedings, on the principle that such superintendence is necessary for the due and impartial administration of the laws.[3] It is likened to the publication of the statutes by the king's patentee, and the person who is appointed publisher of a trial is said to stand in the same situation as the king's printer.[4]

The courts of law have, in modern times, claimed and exercised the right to restrain the publication of their proceedings, when such publication would be likely to defeat the ends of justice.[5] Formerly it was held to be a contempt of court to publish any

[1] Gurney *v.* Longman, 13 Ves. 403, 506, 507.
[2] Ibid.
[3] Ibid. Godson, p. 340.
[4] Ibid.
[5] The king *v.* Clement, 4 B. & Ald. 218.

reports whatever,[1] but the practical application of this doctrine has been much relaxed. The ancient doctrine was, that the property of all law books is in the king, because he pays the judges who pronounce the law; and in the reign of Charles II. this doctrine was twice affirmed by the house of lords, in relation to Rolle's Abridgment,[2] and Croke's Reports.[3] Soon after the restoration, an act of parliament, founded apparently upon the doctrine of the king's prerogative copy, prohibited the printing of law books without the license of the lord chancellor, the two chief justices and the chief baron; and in consequence of this act, it became the practice to prefix such a license to all reports published after that period, in which it was usual for the rest of the judges to concur, and to add to the *imprimatur* a testimonial of the learning and judgment of the author.[4] The act was renewed from time to time, but finally expired in the reign of King William. But the same form of license continued in use until the judges, as it is said, came to a resolution not to grant them any longer, and from Douglass down to the present day, the Reports have appeared without them.[5] Sir James Burrow offers an apology for publishing his Reports without an *imprimatur*, and says he is aware that it is a contempt of court to publish their proceedings.[6] It

[1] Preface to Sir J. Burrow's Reports.
[2] Carter 89. Bacon's Abridg. Prerog. F. 5. 4 Burr. 2315.
[3] Skinner, 234, 1 Mod. 217. Bacon ut supra. 4 Burr. 2316.
[4] Preface to Douglass's and Burrow's Reports.
[5] Ibid.
[6] Preface, 1 Burrow's R. p. vii.

seems, however, that since the Year Books, no judicial proceedings have been published under authoritative care and inspection, either by the house of lords, or by any court in Westminster Hall, except state trials.[1]

The idea of property in the king, as the chief foundation of the prerogative copies, has been long abandoned, with reference to most of them, and such as still exist are upheld by reasons of convenience and of the relation of the king, as head of the state and the church, to his subjects. The practice of treating the publication of judicial proceedings as a contempt, except in cases where a special order has been made, has fallen into desuetude; and on the other hand, the courts take no official measures for the publication of their judgments. There is therefore no other right of property acquired by the reporters in the judgments of the courts, than such as is founded on the diligence and skill that may be used in taking notes in court of what may fall from the judges. If the judgments are in some cases furnished to them in manuscript by the court, there seems to be no ground upon which it can be said that the court thereby confers anything like a right of property upon the reporters. The statements of the cases and the arguments of counsel may be the subject of property in the reporter, by reason of his personal skill and diligence in reporting them, which

[1] Ibid.

make them to a certain extent his own compositions. It was apparently upon this ground that the copyrights of the Term Reports and the Reports of Vesey Jr. have both, at different times, been protected by injunction.[1]

In America, the subject of copyright in the reports of the decisions of the Supreme Court of the United States, has undergone very elaborate discussion in that tribunal. By an act of congress, the Supreme Court of the United States is attended by an official reporter, who receives a stated salary from the government, and is required to furnish a certain number of copies of his reports to the department of state for the use of the government. But the court, in the case here alluded to, were unanimously of opinion that the reporter can have no copyright in the written opinions delivered by the court, and that the judges cannot confer upon any reporter any such right.[2] The ground of this decision was, that the opinions of the court, being published under the authority of congress, were not the proper subject of private copyright. But it was not doubted by the

[1] Butterworth *v.* Robinson, 5 Ves. 709. Vesey *v.* Sweet, cited 5 Ves. 709, note 3 (Sumner's Edition.) In Saunders *v.* Smith, 3 Mylne & Cr. 711, it appears that copyrights of the Term Reports and the Reports of East, Taunton, Barnewell & Cresswell, and Bingham, were claimed by the plaintiffs as their property, but the Lord Chancellor assuming but not deciding the legal right, decided the application for an injunction upon evidence of a presumed consent by the plaintiffs. The case is reported as presenting the *quære*, whether it is not piracy to print, at full length, cases contained in the Law Reports, although with the addition of notes, however voluminous. The book complained of was Smith's Leading Cases.

[2] Wheaton *v.* Peters, 8 Peters R. 591, 668.

court that the reporter had a copyright in his own marginal notes, and in the arguments of counsel, as prepared and arranged in his work.[1]

[1] Per Story J. in Gray *v.* Russell, 1 Story's R. 4.

CHAPTER III.

OF THE PERSONS ENTITLED TO THE PROTECTION OF THE STATUTES.

THE author, or his assignee, of any publication entitled to the protection of copyright, may secure the benefits of the law; but an important question arises, whether the citizenship of the author affects in any way the exercise of this right.

In England, the statute of Anne, while it secured a copyright to authors generally, contained a proviso that nothing therein should be construed to extend to prohibit the importation, or selling of any books in Greek, Latin or any other foreign language, printed beyond the seas. Under this act, it was possible that a Latin book might be written and first published in England, and afterwards republished abroad, and then imported into England. To remedy this defect, the 12 George II. c. 36, prevented the importation into England of books printed in England and reprinted in any other country. These are the only statutes which bear upon the subject of foreign books, prior to the 1 and 2 Vict. c. 59; and they

left open the questions, whether a foreigner could take a copyright in England of a work which he first publishes there; whether a British subject could take a copyright of a work which he had bought in manuscript from a foreign author; and whether a foreign author could take a copyright in England after he had published his work abroad.

Upon the first of these questions, whether an alien friend, by first publishing his work in England, can take a copyright there, a strong opinion in the affirmative has been expressed and acted upon, in equity. Sir L. Shadwell, V. C., in a recent case, said, that if an alien friend wrote a book, whether abroad or in England, and gave the British public the advantage of his industry and knowledge by first publishing the work there, he was, in his opinion, entitled to the protection of the statutes. But as the question was a legal one, he directed an action, which was brought, and the defendant consented to a verdict.[1]

The International Copyright Act, 1 and 2 Vict. c. 59, is silent upon this question, although it declares that foreign authors, who first publish out of her Majesty's dominions, can have no copyright ex-

[1] Bentley *v.* Foster, 10 Sim. 329. In a more recent case, Lord Lyndhurst, C. B., intimated the opinion, that an alien friend, first publishing in England, is entitled to the protection of the statutes. Chappel *v.* Purday, 4 Y. & Coll. 485, 488. It seems also that the case of Bach *v.* Longman, Cowp. 623, was an action brought by a foreigner; and *semble*, that a foreigner who resides and publishes in England, is entitled to copyright like a British subject. D'Almaine *v.* Boosey, 1 Y. & Col. 288, 298. The statutes are consistent with a foreigner bringing a work with him, and publishing or selling it in England. *Per* Ld. Lyndhurst, C. B. in Chappel *v.* Purday, 4 Y. & Col. 485, 490.

cept under its provisions.[1] This omission furnishes a strong presumption that alien friends, who may first publish in England, are understood to be entitled to the protection of the statute.

The second question, whether a British subject, who buys an unpublished work of a foreign author, can make it the subject of copyright in England, has likewise been answered in favor of the right. The English assignee of a foreign musical composer obtained an injunction to protect the work in England. It was held that the plaintiff, being a British subject, could acquire the copyright as well from a foreigner as from an Englishman. The title thus acquired, depends upon the common law right of the assignee of a manuscript.[2]

[1] See Appendix, p. 57.

[2] D'Almaine *v.* Boosey, 1 Y. & Col. 288. Before Lord Lyndhurst, in the Exchequer, in Equity, in 1835. In Chappel *v.* Purday, 4 Y. & Col. 485, 495, his lordship said, "Many points have been introduced into the argument which were not absolutely necessary in the view which I take of this case, but as I have been much pressed for my opinion upon them I cannot let them fall to the ground without observation. A question was made whether the statute of Anne raises any protection for foreigners, and that case of D'Almaine *v.* Boosey was cited to show that I had formed that opinion. Therefore I shall address a few words to that question. The statute of Anne was passed for the protection of British subjects. It does not in terms extend its protection to the publication of foreigners. But take the whole question together, and see whether the same principles do not apply to both cases. I may be allowed, perhaps, to state in the presence of gentlemen who, no doubt attend to matters of literature, that when I came to the profession I took a great interest in the case of Millar *v.* Taylor, and other cases of that sort. In that case Lord Mansfield and two of the judges differed from Mr. Justice Yates, and I own I think that to the material parts of Mr. Justice Yates's argument Lord Mansfield made a successful reply, though unquestionably the arguments of Mr. Justice Yates were very ingenious. Lord Mansfield said, — 'That the reasons for supporting the author's right before publication were equally applicable after publication;' and I think that was a successful reply. That case

But the question, whether a foreigner, who had first published abroad, could, before the act 1 and 2 Vict. c. 59, afterwards obtain a copyright in England, was one of greater difficulty. Whether the act of printing and publishing abroad, made the work at once *publici juris*, or whether there was an interval, in which, by due diligence, the alien author could secure a copyright in England, was a question which had been left undecided, before the passing of the International Copyright Act. It had, however, been held, that where an author first published abroad, and instead of using due diligence, forbore until some other person had published in England, fairly and without blame, but afterwards published in England himself, he could not insist upon his pri-

was disposed of at common law. But the case of Donaldson *v.* Beckett, (4 Burr. 2408,) in which the same question was raised, went to the house of lords. In that case eight of the judges were of opinion, first, that the author had a right at common law to the exclusive publication of his work in the first instance. Lord Mansfield, the ninth judge, gave no opinion. The other judges were of a contrary opinion. Then the second question was, whether, admitting the author had originally a right at common law, he retained the right after publication. Mr. Justice Yates thought he had given it to the public, but eight of the judges were of opinion that he did retainit. That being the case, the law was then settled as regarded the common law right. But then the question was, whether the right of protection given by the common law was not limited by the statute of Anne, and upon that the majority of the judges were of opinion that the statute had put an end to the right which had existed at common law, because it gave the protection for fourteen years, and *no longer*. Now the statute was made for the protection of British subjects; but the same reasons apply to protect a foreigner. We must presume that the foreign law would do the same for him, and, it does. A foreigner, therefore, having a copyright in his own country, might give the same right to a British subject. Therefore, it appears to me that a foreigner who is the author of a work unpublished in France, may communicate his right to a British subject, at least for the period prescribed by the statute of Anne, that is to say, fourteen years."

vilege, and, at a distance of time, stop a publication which had taken place in the interim, and treat the continuation of that publication as a piracy.[1] So too, where the plaintiff had acquired an equitable title to a copyright, so far as related to Great Britain, of a work composed and published in France, and afterwards obtained a legal conveyance, but had in the interim sold several copies to the defendant, who republished it, other copies having been imported by other tradesmen, an injunction was refused.[2] But it is now, by the 1 and 2 Vict. c. 59, § 14, declared, that the author of any book to be after the passing of the act first published out of her Majesty's dominions, or his assigns, shall have no copyright within her Majesty's dominions, otherwise than such (if any) as he may become entitled to under this act, namely, by treaty.[3]

The object of the acts which protect engravings, (8 George II. c. 13; 7 George III. c. 38, and 17 George III. c. 57,) was to protect those works which were designed, engraved, etched, or worked in Great Britain, and not those which were designed, engraved, etched or worked abroad, and only published in

[1] Clementi *v.* Walker, 2 B. & C. 861. See also D'Almaine *v.* Boosey, 1 Y. & Col. 298. Guichard *v.* Mori, 9 Law J. 227.

[2] Chappel *v.* Purday, 4 Y. & Col. 485, 495. Lord Lyndhurst, C. B. said, "This case is not exactly the same as Clementi *v.* Walker. The question is, whether a party, who, before the copyright had been actually parted with to him, (because at that time there was no conveyance,) had permitted the books to be imported here, and sold without interference, is afterwards to be at liberty to come forward, and say, that no party shall do the like again? It is an important question, and I think it is sufficiently doubtful, to prevent my interference by injunction until it is decided."

[3] See Appendix, p. 57.

Great Britain; and therefore prints engraved and struck off abroad and only published in England, are not entitled to protection.[1]

In theatrical and musical compositions the English law secures to the author a double copyright, and each of the rights may be assigned. A published play, or musical composition, when duly entered, is protected like other books; and whether published or unpublished, the author may enjoy the sole right of representation or performance, under the acts 3 Wm. IV. c. 15. and 5 and 6 Vict. c. 45, § 20.[2]

The first of t acts was passed 10th June, 1833, and it provided, ng other things, that the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, printed and published within ten years before the passing of the act by the author thereof or his assignee, or which should thereafter be so printed and published, *or the assignee of such author*, should have as his own property the sole liberty of representing, or causing to be represented such production, for a certain term of years.[3] Upon this provision, the question arose, whether the assignee of all the author's right, title, and interest in the copyright of a play, printed within ten years before the passing of the act, where the assignment was also made before the passing of the act, was to be deemed, in the sense of the statute, *the assignee of the author*, so as to be entitled, as

[1] Page *v.* Townsend, 5 Simons, 395.

[2] See Appendix, pp. 51, 75.

[3] Ibid. p. 51.

against the author, to the sole right of representation, as well as to the copyright of publication. The court of king's bench held that such a party was *the assignee of the author*, in the sense of the statute, and by virtue of the act became entitled to the sole right of representation.[1]

To prevent this consequence, the 5 and 6 Vict. c. 45, § 22, enacts, that no assignment of the copyright of a book consisting of or containing a dramatic piece or musical composition, shall convey to the assignee the right of representation or performance, unless an entry of the assignment be made in the registry book, expressing the intention of the parties that such right should pass by the assignment.[2]

By the 8 George II. c. 13, § 1, the property in historical and other prints was vested in engravers, who took from their own designs.[3] By the 7 George III. c. 38, § 1, the benefit of the former act was extended to the prints of any portrait, conversation, landscape or architecture, map, chart or plan, or any other prints whatsoever, whether taken from the artist's own original designs, or from any picture, drawing, model, or sculpture, either ancient or modern.[4]

In prints, therefore, the designs of which are original, (with the exception of maps, charts, or plans,) the property can only be vested in the person who has made the design himself, whether he en-

[1] Cumberland *v.* Planché, 1 Ad. & Ellis, 580.

[2] See Appendix, p. 76.

[3] Ibid. p. 8.

[4] Ibid. p. 15.

graves or causes it to be engraved. A person procuring a drawing to be made, is not entitled to the protection of the statutes.[1]

The manner in which the assignee of a print or engraving, in England, becomes entitled to protection, has been pointed out in a former chapter.[2]

Maps, charts and plans, and musical compositions, are, by the 5 and 6 Vict. c. 45, § 2, placed upon the same footing as "books," and therefore the title derived from authorship in such productions is to be regulated by the same rules as in the case of books.[3]

The protection of sculpture, in England, depends upon the provisions of the 54 George III. c. 56, which vests a copyright in the person who has made or caused to be made the new and original sculpture, model, copy or cast, of the subjects therein recited.[4]

In the United States, there can be no copyright of a book, map, chart, or musical composition, print, cut or engraving, unless the author be a citizen of the United States, or resident therein, at least at the time of publication. Whether it is necessary that the work should have been made or composed in the United States, or while the author was a citizen of, or resident in the country, does not present a question of much doubt. The provisions of the statute are these:

"Any person or persons, *being a citizen or citizens*

[1] Jeffreys *v.* Baldwin, Ambl. 164. Godson on Patents and Copyright, 403–404.

[2] Ante, page 112.

[3] See Appendix, p. 64.

[4] Ibid. p. 38.

of the United States, or resident therein, who shall be the author or authors of any book or books, map, chart, or musical composition, which may be now made or composed, and not printed and published, or shall be hereafter made or composed, or who shall invent, design, etch, engrave, work, or cause to be engraved, etched, or worked from his own design, any print or engraving, and the executors, administrators, or legal assigns *of such person or persons* shall have the sole right and liberty of printing, reprinting, publishing and vending such book or books, &c., in whole or in part, for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed."[1]

It would seem, upon this statute, that at the time of recording the title, whether by the author or by his assignee, the author must be a citizen of the United States, or resident therein. What constitutes such residence as is here contemplated, may present a question of some difficulty. Does the statute mean that the party shall have come to reside *animo remanendi*, and that if he has so come, he may take a copyright before he can become a citizen of the United States? Or does it mean, that he shall have come, not only with the intention of remaining, but also with the intention of becoming a citizen? Or, again, does it mean that he shall be temporarily resident only, so that he may take a copyright when he has

[1] Act of Congress, Feb. 3, 1831, § 1.

come solely for the purpose of taking it? And in either case, does it mean that he must have resided, while he made or composed his work, or can a resident foreigner publish and take a copyright of a work which he has composed abroad?

The intention of the act seems to have been, that the author should be a citizen of or resident in the United States, when the title is entered, because it is to such citizens or residents alone, or their assignees, that the law grants the exclusive right, which is secured by the entry. If the entry were made by an assignee, before the author had come to reside, such assignee would have the common law title of an unpublished manuscript; and the common law does not inquire whether the title to an unpublished work was derived from a citizen or a foreigner. But the statute has apparently taken away the common law right derivable from a non-resident alien, as soon as the work is published, because it declares, in effect, that the persons entitled to copyright, shall be only such authors as are citizens or residents, and *their* assignees; and if the assignee takes his title before the author has come to reside, he takes from a person who is not within the privilege of the statute, and has nothing to confer.

The kind of residence contemplated by the act can only be gathered from its general scope and policy. The same provision has existed in all the acts of congress for the protection of authors, and the general policy of all these statutes has been the encour-

agement of native literature. On one side, it may be said that the statute intended to encourage all literature that should be first published in the United States, and that the industry and arts connected with the manufacture of books may also be supposed to be objects of the same policy, so that if a foreigner is actually resident at the time he prints and publishes here a work that has never been printed and published elsewhere, it is immaterial whether he came *animo remanendi aut revertendi*. But suppose he brings the work already printed, but not published; is there anything in the act which declares that the paper and print shall be products of American industry? It is difficult to extract from the act anything like a tariff protection to the mere arts of paper-making and printing. Literary labor and the advancement of the literature of the country, were the great objects of encouragement; and it is by no means clear that all literature, first published in the country, is not included in the scope of this policy. But the question is not free from difficulty, and remains for judicial determination.[1]

With regard to the place where the work may have been composed, the act is wholly silent, and it is obviously immaterial, whether it was written in or

[1] The 8th section of the act declares that nothing in this act contained shall be construed to extend to prohibit the importation or vending, printing or publishing of any map, chart, book, musical composition, print, or engraving, written, composed, or made by any person not being a citizen of the United States, *nor resident within the jurisdiction thereof*.

out of the country, provided the author comes within the description of persons intended by the statute to be benefited. Any other construction would equally deprive citizens of the United States of the benefit of copyright in works written abroad, though first published at home; which clearly could not have been intended.

The person who is to be regarded as the author of a print or engraving, so as to be entitled to copyright, is he who has invented and designed and personally etched, engraved or worked it, or who has caused it to be engraved, etched or worked from his own design. In either case, the design must be the production of the party claiming the copyright; and an important question arises, what constitutes the design of a print, in the sense of the statute?

If the party personally engraves the subject of his conception, then he is both the inventor and designer; since he has not only conceived the subject of the picture, but has represented it in a visible form. But if the engraving is made by another under his direction, it must be made from his "design;" and the question is, whether this term means only the intellectual conception, or work of the imagination, before it is reduced to some visible form, or whether it implies a drawing or other visible representation of the invention, by the hand of its author. Under the act of 29th April, 1802, ch. 36, which contained a similar provision, it was held by Mr. Justice Wash-

ington, that the party must not only have invented, but he must have designed or represented the subject in some visible form, from which the engraver who executes it must have taken the picture.[1] The term "design," therefore, means the visible form given to the conception of the mind, and this must be done by the inventor himself.[2]

We have no statute in this country for the protection of prints or engravings of portraits, or other pictures, models, or sculpture, unless the painter or sculptor causes or authorizes the print or engraving to be made. If the painter of a picture procures and authorizes it to be engraved, he is, as to the design, within the statute of 1831, since he is the author of the design thus engraved, and may transfer his copyright in the engraving to an assignee. But the copyright must be founded on the title of the painter as the author of the design.

[1] Binns *v.* Woodruff, 4 Washington's Rep. 48. The act of 1802 was in these words: "Any person being a citizen of the United States, or a resident within the same, who shall invent and design, engrave, etch or work, or from his own works and inventions shall cause to be designed and engraved, etched or worked any historical or other print, shall have the sole right," &c.

[2] Ibid. The American statutes on the subject of engravings, are similar to the 8 George II. c. 13.

CHAPTER IV.

CHARACTER OF THE WORK CLAIMING PROTECTION.

ONE of the first questions that present themselves, in considering what may be the subject of a valid copyright, is, whether the law undertakes, when asked to extend its protection, to notice the tendency or usefulness of the publication. No discrimination is made by statute, either in England or America, between publications of a good and those of a bad tendency. In both countries, the statutes deal in general terms, with a property in "books." For the protection of this property, various remedies exist, to be administered by the public tribunals; and it is only when the tribunals of justice are appealed to, that the question arises, how far they may, in the exercise of their respective jurisdictions, consider the moral or political tendency of the publication, as an element in determining whether there exists a valid right of property in such publication.

There is doubtless a general right in every political society, to declare upon grounds of public policy in what things it will permit its members to claim and

exercise the rights of property, and in what things it will not permit the exercise of those rights to their full extent, even where they seem to spring from the rules of natural right. Thus, a man may be engaged in a manufacture, all the materials of which are justly and truly his own, but if, in the midst of society, the process of such manufacture or the product itself be injurious to the public health or safety, society may and will not only interfere to prevent or regulate the production, but will even destroy the materials, if necessary to the abatement of the nuisance. It will thus greatly abridge and even wholly deny the otherwise perfect rights of property. So that although the protection of property is one of the ends for which political society is instituted, and although the law regards every innocent right of property as eminently sacred, yet there may be cases, in which the title becomes inherently defective, by reason of a necessary principle of public policy, which makes the asserted right inconsistent with the public good.

The true ground, therefore, upon which the refusal to protect a particular publication rests, would seem to be, not that the author or his assignee has not *prima facie* a naked right of property, but that the law will not extend its active protection to that naked right, when it can be enjoyed only for mischievous purposes or with injury to public morals. The rule has sometimes been laid down in terms which deny that there is any property at all in a

publication of an immoral or mischievous tendency;[1] and so far as the rule of public policy tends to defeat or impair the beneficial character of the right of property, this mode of enunciating it may be correct. But strictly the *prima facie* right of property is the same in all publications; and the rule of public policy merely withholds that protection to which the publication, but for its character and tendency, would be entitled. This distinction is not unimportant, for it places the burthen of proof upon the party defending the piracy or denying his liability to the author, to show clearly, that notwithstanding the copyright confers a *prima facie* title, yet that the title is, as to remedies, inherently defective, by reason of requirements of public policy. This is where the burthen ought always to be, in cases of a denial of any right of property established or recognized by the law.

In America, there has been no decision involving this question; but the English authorities have established certain general principles, some of which are sound, while others are open to objection.

1. *Works injurious to public morals.* By the law of England, (and the same is of course true in the United States,) when the character of a book is such that the sale of each copy of it is an offence against the law, the first publisher can maintain no action for damages against any person who afterwards pub-

[1] 2 Story's Eq. Jurispr. § 936. Lawrence *v.* Smith, Jacob's R. 472.

lishes it, upon the clear principle that as the first publisher had and could have no right to sell, he cannot sustain any loss by an injury to the sale. This was conclusively settled, in an action brought by the first publisher of a book of a libellous and obscene character, purporting to be a history of the amours of a courtesan, against a subsequent publisher; in which Abbott, Lord Chief Justice, said, "It would be a disgrace to the common law could a doubt be entertained upon the subject."[1]

2. *Works injurious to religion.* With regard to publications supposed to be of this character, the adjudged cases have not proceeded upon very satisfactory doctrines. The general principle upon which they proceed is the same as that which denies protection to a work injurious to public morals.

In 1822, an application was made to Lord Eldon, for an injunction to restrain a piratical edition of Lord Byron's Cain. The injunction was refused, upon the ground of a doubt, whether the poem was not intended to vilify and bring into discredit that portion of scripture history to which it relates. His lordship read the poem, and refused the injunction until the counsel for the plaintiff should show him that an action could be maintained at law.[2] With

[1] Stockdale *v.* Onwhyn, 5 B. & C. 173. 7 D. & R. 625. 2 C. & P. 163. See also Fores *v.* Jones, 4 Esp. N. P. C. 97.

[2] "The jurisdiction of this court, in protecting literary property, is founded on this, that where an action will lie for pirating a work, then the court, attending to the imperfection of that remedy, grants its injunction, because there may be publication after publication which you may never be able to hunt down by proceeding in the other courts.

great submission, I am obliged to differ from the reasoning employed by his lordship in this case. But where such an action does not lie, I do not apprehend that it is according to the course of the court to grant an injunction to protect the copyright. Now this publication, if it is one intended to vilify and bring into discredit that portion of scripture history to which it relates, is a publication, with reference to which, if the principles on which that case at Warwick (Dr. Priestley's case) was decided, be just principles of law, the party could not recover any damages in respect of a piracy of it. This court has no criminal jurisdiction; it cannot look on anything as an offence; but in those cases it only administers justice for the protection of the civil rights of those who possess them, in consequence of being able to maintain an action. You have alluded to Milton's immortal work; it did happen in the course of last long vacation, I read that work from beginning to end; it is therefore quite fresh in my memory, and it appears to me that the great object of its author was to promote the cause of Christianity; there are, undoubtedly a great many passages in it, of which, if that were not its object, it would be very improper by law to vindicate the publication; but, taking it altogether, it is clear that the object and effect were not to bring into disrepute, but to promote, the reverence of our religion. Now the real question is, looking at the work before me, its preface, the poem, its manner of treating the subject, particularly with reference to the fall and the atonement—whether its intent be as innocent as that of the other with which you have compared it; whether it be to traduce and bring into discredit that portion of sacred history. This question I have no right to try, because it has been settled, after great difference of opinion among the learned, that it is for a jury to determine that point; and where, therefore, a reasonable doubt is entertained as to the character of the work, (and it is impossible for me to say I have not a doubt—I hope it is a reasonable one,) another course must be taken for determining what is its true nature and character.

"There is a great difficulty in these cases, because it appears a strange thing to permit the multiplication of copies, by way of preventing the circulation of a mischievous work, (which I do not presume to determine that this is,) but that I cannot help; and the singularity of the case, in this instance, is more obvious, because here is a defendant who has multiplied his work by piracy, and does not think proper to appear. If the work be of that character which a court of common law would consider criminal, it is pretty clear why he does not appear, because he would come *confitens reus*, and for the same reason the question may, perhaps, not be tried by an action at law; and if it turns out to be the case, I shall be bound to give my own opinion. That opinion I express no further now than to say, that after having read the work, I cannot grant the injunction until you show me that you can maintain an action for it. If you cannot maintain an action, there is no pretence for granting an injunction; if you should not be able to try the question at law with the defendant, I cannot be charged with impropriety if I then give my opinion upon it. "It is true that this

Without entering into the question of criticism raised by comparing the poem with Paradise Lost, — upon which a great critic and poet held a very different opinion from that expressed by Lord Eldon[1] — and admitting that an injunction before a trial at law should not be granted in a palpable case of malicious attack upon the scriptures or the doctrines of revealed religion, it is yet quite too strict to say, that because a poem admits of a suspicion of improper intentions, the author's copyright is not to be protected until he has purged himself of that suspicion. The boldness and license of poetry admit of a latitude which would not be allowed in didactic prose; and where the line is to be drawn closely, the court may not only mistake the tendency and intention of the work, but may, as Lord Eldon did on this occasion, apply its own views of doctrinal subjects to determine the innocence of the author's intention, instead of judging it by that broad, liberal and catholic spirit in which the intent of all poetry is to be judged.[2] If canons of criticism are to be applied in this manner, and a publication, which falls under the

mode of dealing with the work, if it be calculated to produce mischievous effects, opens a door for its wide dissemination; but the duty of stopping the work does not belong to a court of equity, which has no criminal jurisdiction, and cannot punish or check the offence. If the character of the work is such, that the publication of it amounts to a temporal offence, there is another way of proceeding, and the publication of it should be proceeded against directly as an offence; but whether this or any other work should be so dealt with, it would be very improper for me to form or intimate an opinion." (6 Petersdorff Abr. 558-9.)

[1] Sir Walter Scott; Letter to John Murray, Esq. accepting the dedication of Cain. Lockhart's Life of Scott, VI. 424, 2d edition.

[2] See the Letter above cited.

doubts engendered by such criticism, is to be refused protection in the first instance, there can be no safe literary property in the higher works of imagination, which deal with such subjects as man's future destiny or the events of scripture history; for the refusal of a court of equity to grant an injunction in such cases, would be only a signal to invite more piracies than the courts of law could check. It would be a far more sound rule, to hold that unless a malicious intent or mischievous tendency be apparent on its face, every work is *prima facie* entitled to protection, until the bad intent and tendency are established by those who rely upon them.[1]

In another case, Lord Eldon refused to continue an injunction to restrain a pirated edition of certain lectures delivered by Mr. Lawrence at the college of surgeons, on "Physiology, Zoology and the Natural History of Man." He doubted whether many particular parts of the work did not lead to a disbelief in the immortality of the soul — one of the doctrines of the scriptures.[2] He therefore dissolved the injunction, and left the plaintiff to bring an action at law.[3] In this case, his lordship said that

[1] See Hime *v.* Dale, 2 Campb. 29, note. 11 East, 244, note.

[2] Lawrence *v.* Smith, Jacob's R. 471.

[3] It seems not to have occurred to Lord Eldon — or if it did, he gave no heed to the consideration — that the mere rumor of the dissolution of an injunction upon such doubts as he expressed in this case, would place the author in a most unequal position with a piratical publisher in a court of law, if it should be worth his while to go there; for both court and jury would know that the plaintiff came before them after he had been turned away from the court of chancery, upon the belief or doubt raised in the mind of the first magistrate in the realm that his book was not entitled to the protection of the law.

"he was bound to look, not only to the tenor, but also *to particular passages unconnected with the general tenor; for if there were any parts of it which denied the truth of scripture*, or which furnished a doubt as to whether a court of law would not decide that they had denied the truth of scripture, he was bound to look at them and decide accordingly."[1]

If this is to be regarded as the statement of a rule by which to determine the validity of a copyright, it is quite unsound. It seems, however, to be only a statement of the rule that should govern a court of equity, in determining whether an injunction shall be granted before the right of property has been established at law. But even in this view, the doctrine is not satisfactory; and in announcing it, Lord Eldon is inconsistent with himself. In the previous case, in refusing an injunction to protect Lord Byron's Cain, he had said of Paradise Lost, that there are undoubtedly a great many passages in it, of which, if the promotion of Christianity were not its object, it would be very improper by law to vindicate the publication; but that, *taking it altogether*, it is clear that the object and effect were not to bring into discredit, but to promote the reverence of our religion.[2] Here, his lordship assumed as the criterion the general tenor of the work; and it is not very apparent why the same rule should not have been applied to Dr. Lawrence's Lectures. In the

[1] Lawrence *v.* Smith, Jacob's R. 471.

[2] Murray *v.* Benbow.

one case, the good general object of the work excuses from censure the passages which would be otherwise inexcusable. In the other case, the alleged bad character of certain detached portions, it is said, renders the general tenor of the work wholly immaterial.[1]

3. *Works injurious to the public peace.* The general principle of the law of England on this subject is, that there can be no right of property in publications which tend to disturb the public peace, to be injurious to the good government of the state, or to bring into contempt the administration of justice. This principle has, however, sometimes been applied without due discrimination.

There is a *dictum* of Lord Chief Justice Eyre, reported traditionally, upon which a great deal more has been built than is consistent with principle. Dr. Priestley brought an action against the hundred for damages sustained by him in consequence of the riotous proceedings of a mob at Birmingham; and, among other property alleged to have been destroyed, claimed compensation for the loss of certain unpublished manuscripts, offering to produce booksellers to prove that they would have given considerable sums for them. On behalf of the hundred, it was alleged that the plaintiff *was in the habit of publish-*

[1] We may ask, also, what his lordship means by "parts which deny the truth of scripture"? If an author introduce into his book a passage denying the truth of *any* part of scripture, is his copyright thereby vitiated? Or is it the general truth of scripture, that must not be denied?

ing works injurious to the government of the state; but no evidence was produced to that effect; upon which Lord Chief Justice Eyre is reported to have said, that if any such evidence had been produced, he should have held it fit to be received as against the claim made by the plaintiff.[1] In this case, it is obvious, that Dr. Priestley was seeking damages for t' 'estruction of what might have been the source ecuniary profit. The dictum of the Lord Chief Justice, therefore, goes only to this, that a work existing in manuscript may be of such a character that the author cannot make lawful profits by its publication, and in this sense it may be said that there can be no property in such a work. But this position was afterwards assumed to justify a very different doctrine, namely, that the author of an unpublished manuscript, of a character not innocent, or doubtful, cannot have the interposition of a court of equity to restrain its publication by a person who is about to publish it against his will; as if the Lord Chief Justice had said, that any one of the mob who might have stolen one of Dr. Priestley's MSS. could have published it, as against the author, and the court of chancery would not have interfered, on account of the character of the work. This doctrine, it will presently be submitted, is untenable, notwithstanding the high authority by which it has been countenanced.

[1] So cited in Walcott *v.* Walker, 7 Ves. 1, and in Southey *v.* Sherwood, 2 Meriv. 437.

In the year 1817, Mr. Southey, the poet, made application to Lord Eldon for an injunction to restrain the publication of a poem called "Wat Tyler," which he had left for a long time in the hands of a bookseller, unpublished. The motion was resisted upon the ground that the work, from its seditious tendency, was of such a nature that there could be no copyright therein. The work had never been printed by Mr. Southey, or by his permission, and his application to the court proceeded upon the right of an author to restrain the publication of his own manuscript. Lord Eldon said, "If this publication is an innocent one, I apprehend that I am authorized, by decided cases, to say that, whether the author did or did not intend to make a profit by its publication, he has a right to an injunction to prevent any other person from publishing it. If, on the other hand, this is not an innocent publication, in such a sense as that, an action would not lie in case of its having been published by the author and subsequently pirated, I apprehend that this court will not grant an injunction." [1]

It may admit of great doubt, whether the law of England recognizes any such distinction as Lord Eldon here seems to suppose. It does undoubtedly say, that in order to obtain an injunction, or to recover damages, to protect a work that has been published by the proprietor, the work itself must be

[1] Southey v. Sherwood, 2 Merivale, 435, 437.

innocent; but it may be doubted whether the law carries this distinction into the case of an unpublished work, where the author proceeds merely upon his right to possess and control, to publish or not to publish his own manuscript. Lord Eldon says justly, that "it is to prevent the use of that which is *the exclusive property* of another, that an injunction is granted;" but he seems to overlook the fact that the law recognizes two kinds or degrees of property in a literary work. There is a right of property, which consists in the right to take the profits of a book, when published; and there is also a right to the exclusive possession and control of a manuscript, or the right to publish or to withhold from publication altogether.[1] The first of these rights depends now, in England and in America, upon statute. The other is a right at common law, independent of the property created or recognized by statute. The law of England has never said that an author has no property in his manuscript *qua* manuscript, or in the ideas and sentiments written upon it before publication. If it had, it would only be necessary to steal a manuscript, in order to be able to print it with impunity; and the author could only take the profits, or obtain an injunction, by showing that he himself intended to publish and to take the profits. It has long been settled, however, that the author and proprietor of a manuscript has the sole

[1] See Wheaton *v.* Peters, 8 Peters S. C. R. 591.

dominion over it, and may obtain an injunction to prevent its publication by another; and in no case has it been considered, that his right depends on his intention to publish and to make a profit.[1] But the cases proceed upon the ground of a *right of property;* and what seems to be intended by this is a right to the possession and control of the manuscript, and to publish or to withhold from publication.[2] In the great case of Donaldson *v.* Becket, in the house of lords, in which the perpetual right of authors after publication was held to have been taken away by the act of Anne, eleven of the judges (including those who decided against some of the claims of authors) affirmed the sole right and dominion of an author over his own manuscript, as a right at common law.[3]

[1] Webb *v.* Rose, cited 4 Burr. 2330; 2 Bro. P. C. 138; Forrester *v.* Waller, cited ut supra; Pope *v.* Curll, 2 Atk. 342; Manley *v.* Owen, cited 4 Burr. 2329, 2404; Duke of Queensbury *v.* Shebbeare, 2 Eden's Ch. R. 329, cited 4 Burr. 2330, 2397; Macklin *v.* Richardson, Amb. 694.

[2] The cases of injunctions to restrain the publication of letters proceed upon this ground. None of them proceed upon an intention to publish and to make a profit. Pope *v.* Curll, ut supra. Thompson *v.* Stanhope, Amb. 737. Earl of Granard *v.* Dunkin, 1 Ball & Beat. 207. Perceval *v.* Phipps, 2 Ves. & Bea. 19. Gee *v.* Pritchard, 2 Swanst. 402. Lord Eldon admits the right to control, independent of any intention to publish and take the profits, where the work is innocent. But if it be not innocent, and the author does not intend to publish, his lordship thinks there is no ground for an injunction. But why not, as much as in the case of an innocent work which the author does not intend to publish? In neither case does he rest upon his right to the profits, but upon his right to control his own writings. The question is, does the law, where the work is not innocent, invalidate the author's right over his manuscript, or does it merely say that the *profits* of such a publication are unlawful gains?

[3] Donaldson *v.* Becket, 4 Burr. 2408. 2 Bro. Parl. Cas. 129. The following extracts, purporting to be made in the language of the judges, are given by Mr. Maugham, in his work on The Laws of Literary

When, therefore, an author has not published, or does not intend to publish a work existing in manuscript, but on the contrary desires and intends to withhold it from publication, the question as to its innocence cannot arise, because that question, according to principle and the decisions, affects only so much of his right of property as consists in the right to take the profits of the publication. It is in this sense, that the law declares there can be no property in an immoral, irreligious, or seditious publication; and not that there can be no right to the ex-

Property, without citing the source from which they are taken: —

"Nares, J. It is admitted on all hands that an author has a beneficial interest in his own manuscript.

"Ashurst, J. If a man lends his manuscript to a friend, and his friend prints it, or if he loses it, and the finder prints it, an action would lie.

"Yates, J. Admitted this doctrine.

"Blackstone, J. When a man, by the exertion of his rational powers, has produced an original work, he has clearly a right to dispose of it as he pleases.

"Willes, J. I declare it as my opinion, that an author hath an indisputable power and dominion over his manuscript.

"Aston, J. An author hath a natural right to the produce of his mental labor.

"Perrot, B. An author certainly hath a right to his manuscript; he may line his trunk with it, or he may print it.

"Gould, J. I agree that an author hath a right at common law to his manuscript.

"Smyth, L. C. B. The cases prove, and it is allowed, that literary property *is property* previous to publication.

"De Grey, L. C. J. There can be no doubt that an author has the sole right to dispose of his manuscript as he thinks proper.

"Lord Mansfield. It is just that an author should reap the pecuniary profits of his own ingenuity and labor."

Sir W. D. Evans, in the notes to his edition of the Statutes, vol. ii. p. 20, n. 14, commenting upon the decisions granting injunctions in favor of the *representatives* of the authors of manuscripts, has intimated a doubt whether a mere manuscript presents such a case of property, that an injunction can be founded on it at the suit of an executor. But it is apparent, from the question put to the judges in Donaldson *v.* Becket, 4 Burr. 2408, that they intended to affirm the right of an author over his own manuscript to be a right at common law, without making it necessary for him to rest upon its value as a marketable commodity. See also White *v.* Gerooch, 2 Barn. & Adol. 298. Wheaton *v.* Peters, 8 Peters S. C. R. 591.

clusive possession and control of whatever a man writes, before publication, unless it be innocent.[1]

[1] It would seem, that Lord Eldon's remarks in the case of Southey v. Sherwood, must be very imperfectly reported. He is reported to have made the following observations at the time of the hearing: "If this publication is an innocent one, I apprehend that I am authorized, by decided cases, to say that, whether the author did or did not intend to make a profit by its publication, he has a right to an injunction to prevent any other person from publishing it. If, on the other hand, this is not an innocent publication, in such a sense as that an action would not lie in case of its having been published by the author and subsequently pirated, I apprehend that this court will not grant an injunction. The court does not interfere in the way of injunction to punish or to prevent injuries done to the character of individuals; but it leaves the party to his remedy at law. It is to prevent the use of that which is the exclusive property of another, that an injunction is granted. There is, however, a difference between the case of an actual publication by the author, which all the world may pirate, and that of a man who, having composed a work, of which he afterwards repents, wishes to withhold it from the public. I will not say that a principle might not be found which would apply to such a case as that; but then it is necessary to take all the circumstances of the case into consideration. The circumstances of the present case are very extraordinary. I will assume that the work is of such a nature that the sending it forth into the world might have been treated as a criminal act. In that view of the circumstances, I have no jurisdiction to consider its criminality. The work was composed so long ago as the year 1794. The plaintiff's affidavit admits that, in that year, there was a serious intention of publishing it. It was sent by the plaintiff to Mr. Ridgeway, and is supposed to have been delivered by him to Symonds. The affidavit goes on to state that it was afterwards determined not to publish it. I will suppose that it was not thought worth while to publish it, in a pecuniary view. Mr. Ridgeway gives no account how it passed out of his hands; and all that is alleged concerning the subsequent disposal of it is, that Mr. Southey, living in the country, forgot it. If the work be such a one as it has been described to be, it is extraordinary that, with the change alleged to have taken place in Mr. Southey's opinions, there should be nothing stated to account for its having been left by him in Mr. Ridgeway's hands to the present time, but that Mr. Southey forgot it. It is impossible that Mr. Southey could have forgotten it. There must have been some other reason. If a man leaves a book of this description in the hands of a publisher, without assigning any satisfactory reason for doing so, and has not inquired about it during twenty-three years, he surely can have no right to complain of its being published at the end of that period."

It is obvious, that the case for which his lordship would not say, that "a principle might not be found," was the very case before him. Mr. Southey had sworn in his affidavit, that he had forgotten having left the MS. in the hands of

Lord Ellenborough, in the case of Hime *v.* Dale, said, "If the composition appeared, upon the face of

Ridgeway, with whom in fact he had originally deposited it; that he was very desirous it should not be published; and his counsel rested his application upon the right of an author to control his own MSS. Yet his lordship, if correctly reported, not only felt authorized to say, "it is impossible that Mr. Southey could have forgotten it," (there was no counter affidavit); but proceeded afterwards to decide the cause without finding the principle which he intimates might have been found for the case actually made by the application. With regard to his lordship's *dictum*, contained in the last sentence of the passage above cited, it seems scarcely necessary to say, that nothing short of a license, or an assignment of copyright, can deprive an author of the right to complain of the publication of his own MS. Whether the fact of his having left it without inquiry for three-and-twenty years, explained by his affidavit that he had forgotten it, would be presumptive evidence of a license or an assignment, may admit of much doubt. On a subsequent day, his lordship delivered judgment as follows: "I have looked into all the affidavits, and have read the book itself. The bill goes the length of stating, that the work was composed by Mr. Southey in the year 1794; that it is his own production, and that it has been published by the defendants without his sanction or authority; therefore seeking an account of the profits which have arisen from, and an injunction to restrain, the publication. I have examined the cases that I have been able to meet with, containing precedents for injunctions of this nature, and I find that they all proceed upon the ground of a title to the property in the plaintiff. On this head a distinction has been taken, to which a considerable weight of authority attaches, supported, as it is, by the opinion of Lord Chief Justice Eyre, who has expressly laid it down, that a person cannot recover in damages for a work which is in its nature calculated to do injury to the public. Upon the same principle, this court refused an injunction, in the case of Walcot *v.* Walker, inasmuch as he could not have recovered damages in an action. After the fullest consideration, I remain of the same opinion as that which I entertained in deciding the case referred to. It is very true that, in some cases, it may operate so as to multiply copies of mischievous publications by the refusal of the court to interfere by restraining them; but to this my answer is, that sitting here as a judge upon a mere question of property, I have nothing to do with the nature of the property, nor with the conduct of the parties except as it relates to their civil interests; and if the publication be mischievous, either on the part of the author, or of the bookseller, it is not my business to interfere with it. In the case now before the court, the application made by the plaintiff is on the ground only of his civil interest; and this is the proper place for such an application. I shall say nothing as to the nature of the book itself, because the grounds upon which I am about to declare my opinion render it unnecessary that I should do so. [His lordship here recapitulated the circumstances already detailed, of the original intention to publish, the subsequent abandonment of that intention, the

it, to be a libel so gross as to affect the public morals, I should advise the jury to give no damages. I know the court of chancery, on such an occasion, would grant no injunction."[1]

4. *Works injurious to private reputation.* The same

length of time during which the plaintiff had suffered the work to remain out of his possession without inquiry, and its recent publication by the defendants.] Taking all these circumstances into my consideration, and after having consulted all the cases which I could find at all regarding the question, — entertaining also the same opinion with Lord Chief Justice Eyre as to the point above noticed, — it appears to me that I cannot grant this injunction until after Mr. Southey shall have established his right to the property by an action."

From this it would seem that his lordship really refused the injunction, partly upon the ground that he was not satisfied that Mr. Southey had not parted with his right, and partly upon the ground that the work was one with which the court could not interfere. Upon both grounds, the decision is very unsatisfactory.

[1] Hime *v.* Dale, 2 Camph. 27, n. This was an action for pirating the words of a song called "*Abraham Newland*," published on a single sheet of paper. *Garrow*, for the defendant, contended, that the song was of such a description that it could not receive the protection of the law in whatever shape it appeared. It professed to be a panegyric upon money; but was in reality a gross and nefarious libel upon the solemn administration of British justice. The object of this composition was, not to satirize folly, or to raise the smile of innocent mirth, but, being sung in the streets of the capital, to excite the indignation of the people against the sacred ministers of the law, and the awful duties they were appointed to perform. The mischievous tendency of the production would sufficiently appear from the following stanza; after hearing which, the court would say whether the nonsuit ought to be disturbed.

"The world is inclined,
To think Justice blind;
Yet what of all that?
She will blink like a bat
At the sight of friend *Abraham Newland!*
Oh, *Abraham Newland! Magical Abraham Newland!*
Though Justice, 't is known,
Can see through a millstone,
She can't see thro' *Abraham Newland!*"

Lord Ellenborough. "If the composition appeared on the face of it to be a libel so gross as to affect the public morals, I should advise the jury to give no damages. I know the court of chancery on such an occasion would grant no injunction. But I think the present case is not to be considered one of that kind."

Lawrence, J. "The argument used by Mr. Garrow on this fugitive piece as being a libel, would as forcibly apply to *The Beggar's Opera*, where the language and allusions are sufficiently derogatory to the administration of public justice." — It is certainly not easy to see the seditious tendency of the stanza quoted by the learned counsel.

general motives of public policy, which defeat a copyright in a seditious, irreligious, or obscene publication, exclude from protection libels upon private character.

Such works are [illegible] excluded from the protection of the law. An action cannot be maintained at law for the invasion of that which a man calls his property, but which the policy of the law will not permit him to consider and enjoy as property; and a court of equity will not grant an injunction where an action could not be maintained at law, even upon a submission in the answer.[1]

The principle of public policy, which thus defeats a copyright through the bad character of the work, has been met with the objection that it only encourages and multiplies the circulation of mischievous works. But to this objection the answer has been made, that so far as the action of courts of equity is concerned, those courts have no criminal jurisdiction; and as they have only to look at the civil rights of parties, if such rights do not exist by the law of the land, they cannot restrain a publication which one man has as much right to make as another, where neither have any right at

[1] Walcott *v.* Walker, 7 Ves. 1. So upon analogous grounds, where an artist exhibited for money a picture called "Beauty and the Beast," which was a scandalous libel upon a gentleman and his wife, who was the sister of the defendant, and great crowds went daily to see it, till the defendant one morning cut it in pieces; Lord Ellenborough instructed the jury, in assessing the damages, not to consider the picture as a work of art, but to award the plaintiff merely the value of the canvas and paint which formed its component parts. Du Bost *v.* Beresford, 2 Campb. 511.

all.[1] To this it might be added, that so far as the action of courts of law is concerned, when adjudicating between party and party, the sole inquiry is, does the law permit a copyright in an immoral, irreligious, or seditious publication? If not, then there can be no damages awarded to the proprietor of such a book. The public consequences of the operation of this principle can be remedied by legislation alone.[2]

At the same time, it cannot be denied, that this salutary general principle is subject to great difficulties in the application. Great care should be exercised, not to pronounce any copyright invalid by reason of illegality in the work itself, unless it is a clear case. In equity, the sounder rule would be to refuse no injunction, where the book is not illegal "upon the face of it;" and both in equity and at law, the defendant should not be relieved of the burthen of proof, by any disposition on the part of the court to apply its private opinions, doctrines, or standards, to the publication in question.[3] *Prima*

[1] Lawrence *v.* Smith, Jacobs R. 471. 2 Story's Eq. Jurisp. § 937.

[2] For an interesting discussion on the effects of refusing protection to illegal works, see 6 Petersdorff's Abridg. 560, 561, and an article in the Quarterly Review for April, 1822. This doctrine does not enter into the law of copyright in France. All works are equal before the law, without reference to their character. Renouard, tom. 2, p. 14.

[3] "The soundness of this general principle," says Mr. Justice Story, "can hardly admit of question. The chief embarrassment and difficulty lie in the application of it to particular cases. If a court of equity, under color of its general authority, is to enter upon all the moral, theological, metaphysical and political inquiries, which in the past times have given rise to so many controversies, and in the future may well be supposed to provoke many heated discussions, and if it is to decide dogmatically upon the character and bearing of such discussions,

facie the copyright confers title; and the burthen is upon the other side to show clearly, that notwithstanding the copy, there is an intrinsic defect in the title.[1]

5. *Works innocent in their contents, but put forth under a false and fraudulent representation as to their authorship.*

It has been recently held in England that there can be no valid and subsisting copyright, in a book which falsely purports to have been written by an author of reputation, and which, under color of such a representation, seeks to impose upon the public. The plaintiff published a book, professing upon its title-page to be a translation from a deceased German author, whose works had been translated and much sought for in England. The preface of this book falsely represented it to be the work of the German author, when in reality it was written and composed wholly by a person employed and paid by the plaintiff for the purpose. The court distinguished this entirely from the cases of works

and the rights of authors, growing out of them; it is obvious that an absolute power is conferred over the subject of literary property, which may sap the very foundations on which it rests, and retard, if not entirely suppress, the means of arriving at physical as well as at metaphysical truths. Thus, for example, a judge, who should happen to believe, that the immateriality of the soul, as well as its immortality, was a doctrine clearly revealed in the Scriptures (a point upon which very learned and pious minds have been greatly divided,) would deem any work anti-christian, which should profess to deny that point, and would refuse an injunction to protect it. So, a judge who should be a Trinitarian, might most conscientiously decide against granting an injunction in favor of an author, enforcing Unitarian views; when another judge, of opposite opinions, might not hesitate to grant it." 2 Story's Eq. Jurisp. § 938.

[1] 2 Story Eq. Jurisp. § 936, n. 2.

published under a fictitious authorship, in which there is no intent to deceive or defraud the public; and held, that where a publisher seeks to obtain the money of the public by a pretence that his book was written by a known author, the transaction ranges itself under the head of *crimen falsi*, and that he cannot have a valid and subsisting copyright in his publication, or maintain an action in respect of its infringement.[1]

[1] Wright *v.* Tallis, 1 Manning, Granger & Scott, Com. Bench Rep. 893. In this case, Lord C. J. Tindal said, "The first observation, therefore, that arises, is, that the present case is perfectly distinguishable from those which have been referred to at the bar, of books of amusement or instruction having been published as translations, whilst they have been, in fact, original works; or having been published under an assumed, instead of a true name. Such was the instance given of 'The Castle of Otranto,' professing to be translated from the Italian; and such the case of innumerable works published under assumed names — voyages, travels, biography, works of fiction or romance, and even works of science and instruction; for, in all these instances, the misrepresentation is innocent and harmless. There is not found, in any one of those cases, any serious design on the part of the author to deceive the purchaser, or to make gain and profit from him by the false representation: the purchaser, from anything that appears to the contrary, would have purchased at the same price, if he had known that the name of the author was an assumed, and not a genuine name; or had known that the work was original and not translated. And, indeed, in most of the cases that can be put, the statement is not calculated in its nature to deceive any one, but is seen, upon the very first glance, to be plainly and manifestly fictitious. In those cases therefore, it was perfectly indifferent to the public, whether the representation was true or not; and in all probability, the book would have obtained an equal sale, whether it was a translation or an original, whether the name of the author was assumed or genuine.

"But, in the case before us, no one of these observations will apply. The facts stated in the plea import a serious design on the part of the plaintiff to impose on the credulity of each purchaser by fixing upon the name of an author who (once) had a real existence, and who possessed a large share of weight and estimation in the opinion of the public. The object of the plaintiff is, not merely to conceal the name of the genuine author, and to publish opinions to the world under an innocent disguise; but to deceive the public, in inducing them to believe that the work is the original work of the author whom he names, when he himself knows it not to be so, to obtain from the purchaser a greater

price than he would otherwise obtain. The transaction, therefore, ranges itself under the head of *crimen falsi*. The publisher seeks to obtain money under false pretences; and as not only the original act of publishing the work, but the sale of copies to each individual purchaser, falls within the reach of the same objection, we think the plaintiff cannot be considered as having a valid and subsisting copyright in the work, the sale of which produces such consequences, or that he is capable of maintaining an action in respect of its infringement.

"The cases in which a copyright has been held not to subsist where the work is subversive of good order, morality, or religion, do not, indeed, bear directly on the case before us; but they have this analogy with the present inquiry — that they prove that the rule which denies the existence of copyright in those cases, is a rule established for the benefit and protection of the public. And we think the best protection that the law can afford to the public against such a fraud as that laid open by this plea is, to make the practice of it unprofitable to its author."

CHAPTER V.

OF THE ORIGINALITY NECESSARY TO A VALID COPYRIGHT.

THE party who comes into a court of law or equity, seeking protection to a copyright, must be the author of the work, or must derive title from the author. If any part of the book is copied or adopted by the writer from a preëxisting work, of course the title fails *quo ad hoc:* as the writer cannot have been the author of what he has borrowed from another.[1] Hence it may become a grave question, to

[1] The statutes both in England and America make use of the word *Author*, which *ex vi termini* imports originality, to some extent. In France, the law of copyright is founded on the decree of July 19th, 1793, which embraces in its provisions "*les auteurs d'écrits en tout genre.*" Upon this expression, M. Merlin has made the following commentary, which would lose in a translation the fine and clear distinction between the terms "esprit" and "genie."

"Mais il ne faut pas séparer, dans cet article, les mots *écrits en tout genre*, de l'expression *auteurs;* et la propriété dont cet article déclare que les *écrits en tout genre* sont susceptibles, ne peut évidemment être réclamée que par ceux qui en sont *auteurs*, dans la véritable acception de ce terme.

"Or, le mot *auteurs*, quel sens a-t-il en général? Quel sens a-t-il relativement aux écrits? Quel sens a-t-il dans la loi du 19 juillet 1793?

"En général, le mot *auteur* désigne, suivant la définition qu'en donne le Dictionnaire de l'Academie française, *celui qui est la première cause de la quelque chose*, et il est aussi, suivant la même définition, synonyme d'*inventeur*.

"Appliqué aux écrits, le mot *auteur* se dit (toujours suivant le même Dictionnaire) *de celui qui a composé un livre, qui a fait quelques ouvrages d'esprit en vers ou en prose;* et il est bien clair qu'en ce sens, le mot *auteur* est opposé à *copiste*.

"Enfin, la loi du 19 juillet 1793 ne permit pas de douter qu'elle n'exclue également les copistes de la dénomination d'auteurs. *Les héritiers de l'auteur d'un ouvrage de*

determine in a particular case what is or is not original on the part of the writer; or in other words, whether any part of his work is copied or adopted from that of another.

It is very difficult to lay down any legal definition of originality in a literary composition, that may be resorted to as a universal test. Many intellectual productions present no more difficulty, upon the question of their originality, than some inventions or discoveries. The poems of the great masters in every language, and a vast body of other writings, however freely their authors may have used the thoughts of others, are at once seen to be just as original in a legal as they are in a critical sense. But in every species of composition, in all literatures, there is of necessity a constant reproduction of what is old, mixed with more or less that is new, peculiar and original. There are also large classes of

littérature ou de gravure, dit-elle, art. 7, *ou* DE TOUTE AUTRE PRODUCTION DE L'ESPRIT OU DU GÉNIE, *qui appartient aux beaux-arts, en auront la propriété exclusive pendant dix années*. Ces termes, *ou de toute autre production de l'esprit ou du génie, qui appartient aux beaux-arts*, ne sont ni obscurs ni équivoques. Ils signifient clairement que les productions de l'esprit ou du génie sont de deux sortes; que les unes consistent en ouvrages de littérature; que les autres appartiennent aux beaux-arts; mais que nul ne peut être réputé auteur soit d'un ouvrage de littérature, soit d'un ouvrage d'arts, si ce n'est pas à son esprit ou à son génie qu'en est due la production.

"Donc, les expressions d'*écrits en tout genre*, ne sont employées dans l'art. 1^er^ de la même loi, que pour désigner tous les genres de compositions littéraires.

"Donc, elles n'y désignent pas les écrits qui ne seraient pas des compositions, mais de simples copies.

"Donc, celui qui ne fait que copier une composition littéraire ne peut jamais être réputé auteur de la copie de cette composition, ni par conséquent en avoir la *propriété*, dans le sens attaché à ce mot par la loi du 19 juillet 1793 et par le Code pénal 1810." —Merlin, Répertoire de Jurisprudence, Titre Contrefaçon, § xi.

works, the materials of which are common to all writers, existing in nature, art, science, philology, history, statistics, &c., where there must be considerable resemblances, however independently of each other the different authors may have written. Over this vast field, it is impossible to erect an unvarying general rule, which can be fitted to all cases and capable of determining whether a particular work exhibits the degree of originality necessary to a valid copyright. The laws which protect literary property are designed for every species of composition, from the great productions of genius, that are to delight and instruct mankind for ages, to the most humble compilation that is to teach children the art of numbers for a few years, and then to disappear forever. Hence these laws must be so administered, that every literary laborer shall find in them an adequate protection to whatever he can show to be the product of his own labor. Something he must show to have been produced by himself; whether it be a purely original thought or principle, unpubiished before, or a new combination of old thoughts and ideas and sentiments, or a new application or use of known and common materials, or a collection, the result of his industry and skill. In whatever way he claims the exclusive privilege accorded by these laws, he must show something which the law can fix upon as the product of his and not another's labors. But in order that the law should do this ample justice to the great variety of

claimants, it is necessary that its rules should be capable of adaptation to the objects of their labor.[1] They must include in their range everything that can be justly claimed as the peculiar product of individual efforts; otherwise they would exclude from the benefits of literary property objects which are as clearly the products of individual labor, as the most original thoughts ever written, namely, new and important combinations and arrangements, or collections of materials known and common to all mankind.

It is therefore of some importance to ascertain, in the first place, what the law does not look to, in applying a test of originality to a literary composition.

1. The mere utility of a book, or its adaptation to the end which it professes to answer — its value in a critical point of view — cannot determine its legal originality. The law takes upon itself none of the functions of the critic, in this sense. It looks only for some substantial product of individual thought or labor, and leaves to public taste or judgment to determine its value, and to bestow its due reward. So that whether a book be more or less useful, more or

[1] "The rule of decision," said Lord Mansfield, in Sayre *v.* Moore, 1 East, 361, 362, note, "is a matter of great consequence to the country. In deciding it we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The act that secures copyright to authors guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject."

less successful, or brilliant, or important, if in a just sense the claimant is the author of that in which he claims an exclusive property, he is entitled to his copyright *valere, quantum valere potest.*[1] It is true, there may be cases, in which the question will arise, whether a subsequent author has made any improvements upon his predecessors; and in such cases it may become necessary to apply collaterally, as a test of originality, an inquiry into the practical and relative value of his publication. But this will be done, in order to determine whether he has borrowed any, and how great a part of his matter from sources common to all writers — whether he has actually produced anything of his own, and not whether his production is better or worse than the productions of others. If it appears that he has produced anything of his own, not borrowed or adopted from a previous writer, its effect in advancing or retarding the progress of knowledge, or its value in a critical point of view, can have no influence upon his title to a copyright.

2. The law does not require that the subject of a book should be new, or that the materials of which it is composed should be original; but there may be a valid copyright in the book itself, though the subject and the materials are common to all writers. In all such cases, the true inquiry is, whether the claimant's book contains any substantive product

[1] Emerson *v.* Davies, 3 Story's R. 768.

of his own labor? If so, the law declares it entitled to the protection of a copyright. Thus, if a person collects an account of natural curiosities, or of works of art, or of mere matters of statistical or geographical information, and employs the labor of his mind in giving a description of them, his own description may be the subject of copyright. It is equally competent to any other person to compile and publish a similar work. But it must be made substantially new and original, like the first work, by resort to the original sources, and must not copy or adopt from the other, upon the notion that the subject is common.[1]

There have been several cases, upon works of different kinds, which have recognized and established this principle. One of the earliest of this class of cases is that concerning Road Books or Itineraries.

There was formerly an old work, called Patterson's Road Book, published in England, from 1771 to 1796. In 1797, one Cary was employed by the postmaster-general to make an actual survey of the roads, and the book published by him contained many material corrections of and additions to the last edition of the original work by Patterson. Subsequently, a book was published purporting to be founded on Patterson's, but in reality, as was alleged, copied from the improved work of Cary, with some

[1] Hogg *v.* Kirby, 8 Ves. 215, 221.

colorable alterations. Cary applied to Lord Chancellor Loughborough for an injunction against the latter publication, in 1799; but his lordship refused to make an order, thinking that the two books were very unlike.[1] Two years afterwards, Cary brought an action in the court of king's bench, for piracy, against the publishers of the same or a similar book, which purported to be the twelfth edition of Patterson's, but containing also nine-tenths of Cary's improvements. The defendant's counsel contended that Cary could not be considered as the *author of the book*, within the meaning of the statute, the greater part of it having been published before by another person. Lord Kenyon, C. J., said, "Certainly the plaintiff had no title on which he could found an action to that part of his book which he had taken from Mr. Patterson's; but it is as clear that he had a right to his own additions and abbreviations, many of which were material and valuable; and the defendants are answerable at least for copying those parts in their book. The courts of justice have been long laboring under an error, if an author has no copyright in any part of a work, unless he have an exclusive right to the whole book." [2]

So, in the case of a work called The Court Calen-

[1] Cary *v.* Faden, 5 Ves. 24.

[2] Cary *v.* Longman, 1 East, 358, 360. It is not apparent whether the book complained of in this case was or was not the same as in the case of Cary *v.* Faden (*ante*) before Lord Loughborough. The defendants being different, it is probable that the works were different. But the principle involved was the same, and it is surprising that Lord Loughborough should have summarily disposed of it in the few words reported in 5 Ves. 26.

dar, Lord Eldon held that although the subject was open, no man could on that account be justified in sparing himself the labor and expense of collecting the original information and copying the work previously published by another.[1] So also Lord Erskine C. held, although the East India Calendar could not be a subject of copyright, yet, that if a man from his situation having access to the repositories in the India house, has by considerable expense and labor procured with correctness all the names and appointments on the India establishment, he has a copyright in that individual work.[2]

The same principle was also applied to a work on the Antiquities of Greece, containing prints taken from drawings made by the plaintiff;[3] and in like

[1] Longman *v.* Winchester, 16 Ves. 269. In this case, Lord Eldon said, "I cannot go the length of stating the proposition, that copyright cannot subsist in a work of this description: nor would I disturb the injunction upon that ground without putting them to a trial. Assuming, that there may be a copyright, there is not much difficulty in the rest of the case. Take the instance of a map, describing a particular county; and a map of the same county, afterwards published by another person: if the description is accurate in both, they must be pretty much the same: but it is clear. the latter publisher cannot on that account be justified in sparing himself the labor and expense of actual survey, and copying the map, previously published by another. So as to Patterson's Road Book, it is certainly competent to any other man to publish a book of roads; and if the same skill, intelligence and diligence, are applied in the second instance, the public would receive nearly the same information from both works; but there is no doubt that this court would interpose to prevent a mere re-publication of a work, which the labor and skill of another person had supplied to the world. So in the instance, mentioned by Sir Samuel Romilly, a work, consisting of a selection from various authors, two men perhaps might make the same selection: but that must be by resorting to the original authors, not by taking advantage of the selection already made by another."

[2] Matthewson *v.* Stockdale, 12 Ves. 270.

[3] Wilkins *v.* Aikin, 17 Ves. 422. See also Sayre *v.* Moore, 1 East, 361, note, with reference to charts.

manner, a person may have copyright in mathematical tables actually calculated by himself, although, on a fresh calculation the same tables would result from the same data and the same principles, and although they may have previously been published before his appeared.[1]

3. A book may also be original, in the sense of the law, although the materials of which it is composed, the hints and sources from which its matter was derived, can all be traced out in former works, provided the author has exercised selection, arrangement and combination, and has thereby produced anything new.[2] In a scientific treatise, to be used

Wyatt *v.* Barnard, 3 Ves. & B. 77, with reference to specifications of patents copied from the public office.

[1] Bailey *v.* Taylor, 3 Law Journ. 66.

[2] The following eloquent description of original authorship is from an argument by M. Merlin before the Court of Cassation. "Sans doute, il est des compilations d'ouvrages littéraires qui, par l'immensité des recherches qu'elles supposent, par le discernement et le goût qu'elles exigent, peuvent et doivent passer pour de véritables productions de l'esprit, et qu'il n'est pas plus permis de contrefaire que si elles étaient réellement des compositions originales.

"Par exemple, les *Pandectes* de Pothier ne sont, à peu de chose près, qu'une compilation des Institutes, du Digeste, du Code et des Novelles de Justinien; c'est-à-dire, de recueils qui, depuis plusieurs siècles, sont incontestablement dans le domaine du public.

"Cependant, si Pothier vivait encore, et qu'un imprimeur s'avisât de publier une édition de ses *Pandectes*, sans sa permission, qui est-ce qui oserait contester à Pothier le droit de le poursuivre comme contrefacteur? Qui est-ce qui oserait dire que Pothier, en compilant à sa manière les Institutes, le Digeste, le Code et les Novelles de Justinien, n'a pas fait un ouvrage qu'il n'appartenait qu'à un jurisconsulte du premier ordre d'entreprendre et d'achever? Qui est-ce qui oserait dire qu'un simple copiste eût pu, comme lui, tirer tous les textes du droit romain de l'espèce de chaos dans lequel ils sont dispersés; les ranger dans un vaste cadre où, enchaînés les uns aux autres, ils s'expliquent mutuellement; rapprocher de chaque règle générale toutes les exceptions qui la limitent; placer à côté de la loi ancienne, la loi moderne qui la modifie; et la loi plus moderne encore qui l'abroge; en un mot, substituer l'ordre à la confu-

for example for purposes of instruction, the author who takes existing materials from sources common to all writers, and arranges and combines them in a form and gives them an application unknown before, is protected in the exclusive enjoyment of what he has thus collected and produced, in that particular form. In like manner, an author who takes, from the hints and suggestions of objects in nature or art, or from the ideas and methods to be found in other books, the materials of a method of illustration, and gives to them a new application, or a new use, or uses them in a new form, produces something which the law recognizes and protects as original. This doctrine has been elaborately expounded, in two modern cases.

Thus, where an editor of a modern edition of Adam's Latin Grammar had made many improvements and additions, and had compiled many new notes to the old work, although the elemental materials of his improvements and additions and the substance of his notes could more or less be traced to other and various sources in other works, yet Mr.

sion, la lumière à l'obscurité, la facilité d'étudier et d'apprendre aux dégoûts et aux épines qui arrêtent, dès leurs premiers pas, tous les aspirants à l'exacte connaissance des lois romaines?

"Compiler de cette manière, ce n'est pas copier, c'est créer; c'est faire ce que ferait un architecte qui, après avoir démoli un édifice gothique, en emploierait tous les matériaux pour élever un superbe palais, un temple majestueux.

"Mais il est aussi des compilations qui se font, comme on le dit vulgairement, *avec des ciseaux*, qui n'exigent qu'un travail de manœuvre, et qui, pour cette raison, ne peuvent pas mériter à leurs artisans le titre d'auteurs." Merlin, Rep. de Jurisp. title Contrefaçon, § xi.

Justice Story held the editor entitled to copyright in the matter of his own edition, because it had never been before collected and embodied in a former single work.[1]

[1] Gray v. Russell, 1 Story's R. 11. In this case the court said, "The argument proceeds mainly upon this ground, that there is nothing substantially new in Mr. Gould's notes to his edition of Adam's Latin Grammar; and that all his notes in substance, and many of them in form, may be found in other works antecedently printed. That is not the true question before the court. The true question is, whether these notes are to be found collected and embodied in any former single work. It is admitted, that they are not so to be found. The most, that is contended for, is, that Mr. Gould has selected his notes from very various authors, who have written at different periods, and that any other person might, by a diligent examination of the same works, have made a similar selection. It is not pretended, that Mr. Cleveland undertook or accomplished such a task by such a selection from the original authors. Indeed, it is too plain for doubt, that he has borrowed the whole of his notes directly from Mr. Gould's work; and so literal has been his transcription, that he has incorporated the very errors thereof.

"Now, certainly, the preparation and collection of these notes from these various sources, must have been a work of no small labor, and intellectual exertion. The plan, the arrangement, and the combination of these notes in the form in which they are collectively exhibited in Gould's Grammar, belong exclusively to this gentleman. He is, then, justly to be deemed the author of them in their actual form and combination, and entitled to a copyright accordingly. If no work could be considered by our law as entitled to the privilege of copyright, which is composed of materials drawn from many different sources, but for the first time brought together in the same plan and arrangement and combination, simply because those materials might be found scattered up and down in a great variety of volumes, perhaps in hundreds, or even thousands of volumes, and might, therefore, have been brought together in the same way and by the same researches of another mind, equally skilful and equally diligent,—then, indeed, it would be difficult to say, that there could be any copyright in most of the scientific and professional treatises of the present day. What would become of the elaborate commentaries of modern scholars upon the classics, which, for the most part, consist of selections from the works and criticisms of various former authors, arranged in a new form, and combined together by new illustrations, intermixed with them? What would become of the modern treatises upon astronomy, mathematics, natural philosophy, and chemistry? What would become of the treatises in our own profession, the materials of which, if the works be of any real value, must essentially depend upon faithful abstracts from the Reports, and from juridical treatises, with illustrations of their bearing. Blackstone's Commentaries is but a compilation of the Laws of England,

So, where the plaintiff, the author of an arithmetic, designed to teach children the elements of that science, claimed a peculiar plan of lessons and method of illustration, as his own invention, and it was alleged by the defendant, and partially proved, that some of the different parts and elements of his plan and method had been in use before, and that the materials of his book were to be found in many different works; the same learned judge held that as the same plan, arrangement, and combination of materials had never been used before for the same or any other purpose, the plaintiff was entitled to a copyright.[1] In this case, the subject of the copyright

drawn from authentic sources, open to the whole profession; and yet it was never dreamed, that it was not a work, which, in the highest sense, might be deemed an original work; since never before were the same materials so admirably combined, and exquisitely wrought out, with a judgment, skill, and taste absolutely unrivalled. Take the case of the work on insurance, written by one of the learned counsel in this cause, and to which the whole profession are so much indebted; it is but a compilation with occasional comments upon all the leading doctrines of that branch of the law, drawn from reported cases, or from former authors; but combined together in a new form, and in a new plan and arrangement; yet I presume, none of us ever doubted, that he was fully entitled to a copyright in the work, as being truly, in a just sense, his own."

[1] Emerson *v.* Davies, 3 Story's R. 768. In this case the court said, "The book of the plaintiff is in my judgment, new and original, in the sense in which these words are to be understood in cases of copyright. The question is not, whether the materials which are used are entirely new, and have never been used before; or even that they have never been used before for the same purpose. The true question is, whether the same plan, arrangement and combination of materials have been used before for the same purpose or for any other purpose. If they have not, then the plaintiff is entitled to a copyright, although he may have gathered hints for his plan and arrangement, or parts of his plan and arrangement, from existing and known sources. He may have borrowed much of his materials from others, but if they are combined in a different manner from what was in use before, and *a fortiori*, if his plan and arrangement are real improvements upon the existing modes, he is entitled to a copy-right in the book embodying such improvement. (See Lewis *v.* Fullerton, 2 Beav. R.

was not in the subject or in the materials, but in the plan, arrangement, and combination, which were

6.) It is true, that he does not thereby acquire the right to appropriate to himself the materials which were common to all persons before, so as to exclude those persons from a future use of such materials; but then they have no right to use such materials with his improvements superadded, whether they consist in plan, arrangement or illustrations, or combinations; for these are strictly his own. A man who constructs a new machine, is entitled to a patent therefor, if the combination and arrangements thereof are new and his own invention, although he uses old materials and old mechanical apparatus and powers in constructing such machine. He may use wheels, or levers, or screws, or toggle-joints, or cranks, or any other known modes of accomplishing given mechanical ends, if he combines them in a new manner, and thus produces a beneficial result. The steam-engine, the steam-boat, the cut-nail machine, the card machine, are all but new combinations of old materials, old processes, and old mechanical powers and apparatus.

"In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copyright which was not new and original in the elements of which it is composed, there could be no ground for any copyright in modern times, and we should be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence. Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakspeare and Milton, so justly and proudly our boast, as the brightest originals, would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days What is La Place's great work, but the combination of the processes and discoveries of the great mathematicians before his day, with his own extraordinary genius? What are all modern law books, but new combinations and arrangements of old materials, in which the skill and judgment of the author in the selection and exposition and accurate use of those materials, constitute the basis of his reputation, as well as of his copyright? Blackstone's Commentaries and Kent's Commentaries are but splendid examples of the merit and value of such achievements.

"In truth, every author of a book has a copyright in the plan, arrangement and combination of his materials, and in his mode of illustrating his subject, if it be new and original in its substance. Sir John Leach,

original and peculiar. So, also, in the case of a work called "The Topographical Dictionary of England," in Barfield *v.* Nicholson, (2 Sim. and Stu. 1, 6,) recognized this doctrine in its fullest extent; and there stated, that a copyright might well be taken where the composition is either new, or there is a new arrangement thereof. Nay, the right to a copyright goes much farther. A man has a right to a copyright in a translation, upon which he has bestowed his time and labor. To be sure, another man has an equal right to translate the original work, and to publish his translation; but then it must be his own translation by his own skill and labor: and not the mere use and publication of the translation already made by another. (Wyatt *v.* Barnard, 3 Ves & Beam. 77.) A man has a right to the copyright of a map of a state or country, which he has surveyed or caused to be compiled from existing materials, at his own expense, or skill, or labor, or money. Another man may publish another map of the same state or country, by using the like means or materials, and the like skill, labor and expense But then he has no right to publish a map taken substantially and designedly from the map of the other person, without any such exercise of skill, or labor, or expense. If he copies substantially from the map of the other, it is downright piracy; although it is plain that both maps must, the more accurate they are, approach nearer in design and execution to each other. (Matthewson *v.* Stockdale, 12 Ves. 270; Wilkins *v.* Aiken, 17 Ves 422.) He, in short, who by his own skill, judgment and labor, writes a new work, and does not merely copy that of another, is entitled to a copyright therein; if the variations are not merely formal and shadowy, from existing works. He, who instructs by a new plan, and arrangement, and combination of old materials, in a book designed for instruction, either of the young, or the old, has a title to a copyright, which cannot be displaced by showing that some part of his plan, or arrangement or combination, has been used before.

"The case of Gray *v.* Russell, (1 Story R. 11,) affords a strong illustration of the doctrine, as that was a case confessedly of a mere improvement of an old work, Adam's Latin Grammar, a subject that had been discussed and treated in many hundred works, and in which little more could be done than to arrange the materials upon a new plan, or in a new combination, with additional illustrations and initial remarks. Yet the Court held it clearly to be the subject of a copyright; and from the doctrine therein stated I feel not the slightest inclination to depart. It was upon the like ground that an action has been held to lie for the recovery of damages for pirating the new corrections and additions to an old work, (the Itinerancy of England.) Upon that occasion, Lord Kenyon said: 'The courts of justice have been long laboring under an error, if an author have no copyright in any part of a book, unless he have an exclusive right to the whole book.' (See also Trusler *v.* Murray, and Tonson *v.* Walker, cited in 1 East, 360, 361, and notes.) Another illustration may be found in the cases of histories and dictionaries, as stated by Lord Mansfield in Sayre *v.* Moore, (1 East R. 361, note.) 'In the first, a man may give a relation of the same facts,

consisting partly of compilations and selections from former works, and partly of original compositions, and in the same order of time; in the latter, an interpretation is given of the identical same words. But he must not servilely copy the words of another on either subject. An author has as much right in his plan, and in his arrangements, and in the combination of his materials, as he has in his thoughts, sentiments, opinions, and in his modes of expressing them. The former as well as the latter may be more useful or less useful than those of another author; but that, although it may diminish or increase the relative values of their works in the market, is no ground to entitle either to appropriate to himself the labor or skill of the other, as embodied in his own work.'

"It is a great mistake to suppose, because all the materials of a work or some parts of its plan and arrangements and modes of illustration, may be found separately, or in a different form, or in a different arrangement, in other distinct works, that therefore, if the plan or arrangement or combination of these materials in another work is new, or for the first time made, the author, or compiler, or framer of it, (call him which you please,) is not entitled to a copyright. The reverse is the truth in law, and, as I think, in common sense also. It is not, for example, in the present case, of any importance that the illustrating of lessons in Arithmetic by attaching unit marks representing the numbers embraced in the example, may be found by dots in Wallis's Opera Mathematica, (p. 28) or in Colburn's Arithmetic in the form of upright linear marks, in a pamphlet detached from the main work. That is not what the plaintiff purports to found his copyright upon. He does not claim the first use or invention of unit marks for the purpose above-mentioned. The use of these is a part of and included in his plan; but it is not the whole of his plan. What he does claim is, 1. The plan of the lessons in his book; 2. The execution of that plan in a certain arrangement of a set of tables in the form of lessons to illustrate those lessons; 3. The gradation of examples to precede each table in such manner as to form with the table a peculiar and symmetrical appearance of each page; 4. The illustration of his lessons by attaching to each example unit marks representing the numbers embraced in the example. It is, therefore, this method of illustration in the aggregate that he claims as his invention, each page constituting of itself a complete lesson; and he alleges that the defendants have adopted the same plan, arrangement, tables, gradation of examples and illustrations by unit marks, in the same page, in imitation of the plaintiff's book, and in infringement of his copyright, and, in confirmation of this statement, he refers to divers pages of his own book in comparison with divers pages of the book of the defendants. Now, I say that it is wholly immaterial whether each of these particulars, the arrangement of the tables and forms of the lessons, the gradation of the examples to precede the tables, the illustration of the examples by unit marks, had each existed in a separate form in different and separate works before the plaintiff's work, if they had never been before united in one combination or in one work, or on

obtained for the plaintiffs at their own cost, Lord Langdale, M. R. said, "there is no doubt but that a work of this nature may be the subject of copyright."[1]

In like manner, the Court of Cassation, in France, decided that a *compilation* may be the subject of copyright, under the law of July 19th, 1793.[2] The book was a devotional work, consisting of extracts

one page in the manner in which the plaintiff has united and connected them. No person has a right to borrow the same plan, and arrangement, and illustrations, and servilely to copy them into any other work. The same materials were certainly open to be used by any other author, and he would be at liberty to use unit marks and gradations of examples and tables and illustrations of the lessons, and to place them in the same page. But he could not be at liberty to transcribe the very lessons and pages and examples and illustrations of the plaintiff, and thus to rob him of the fruits of his industry, his skill, and his expenditures of time and money.

"I have dwelt the more upon this point, because it seems to me that some of the learned witnesses, whose evidence is in the case, have entirely misunderstood the law upon this subject; and some portions of the argument at the bar seem to me to have proceeded upon an equally inadmissible ground, that if none of the materials of the plaintiff's book were new, or invented by him, that new combinations or arrangements, or illustrations of the old materials would not give a title to a copyright. My judgment is far otherwise; and as far as the evidence in this case goes, it is clear to my mind, that the plaintiff has a good copyright in his book; that, taking his plan, arrangements, lessons, examples and illustrations, as a whole, they are not to be found combined in any former work. I must confess that it strikes me that the plaintiff's method is a real and substantial improvement upon all the works which had preceded his, and which have been relied on in the evidence; but whether it be better or worse is not a material inquiry in this case. If worse his work will not be used by the community at large; if better, it is very likely to be so used. But either way, he is entitled to his copyright, *Valere quantum, valere potest.*"

[1] Lewis *v.* Fullerton, 2 Beavan's R. 6. See also Trussler *v.* Murray, 1 East, 363 note. Hogg *v.* Kirby, 8 Ves. 215; 5 Ves. 85, note 3, (Sumner's edition.) It seems that on a change of a description of roads from letter-press to copperplate delineation, the latter form is to be deemed so far original, as to justify the author in doing it after he has sold the copyright in the letter-press. Carnan *v.* Bowles, 5 Ves. 81.

As to new corrections and additions to an old work, see Tonson *v.* Walker, cited 4 Burr. 2325. Tonson *v.* Collins, Bl. R. 321. Motte *v.* Falkner, cited Bl. R. 331. King *v.* Reed, 8 Ves. 223, note.

[2] Cited ante, p. 169.

from the devotional writings of eminent churchmen, arranged in a particular manner with reference to the festivals of the church. The correctional tribunal at Lyons decided that the law of July 19, 1793, extended the privileges of authorship only to those who can strictly be called authors, — to those who could claim the first conception of a work of literature or art — and not to one who had only copied from the works of others. They held that the compiler of this book had only copied passages from the works of others, with slight verbal alterations and additions, and that neither these nor the plan and arrangement of the book gave it the character of a new work, because the greater part of it, which was copied, and was therefore *publici juris*, drew to itself the lesser part, which was really new, and attached to it the same condition of publicity. From this decree the proprietor appealed to the court of cassation; and M. Merlin, arguing against the decree, contended that the law applied not merely to works the fruit of the conceptions of genius, but also to the productions of intelligence;[1] and that the decree confounded a compilation which is the fruit of taste, intelligence, and exquisite and ingenious combination and arrangement, with a compilation which implied nothing but an expenditure of time and research, and an indefatigable patience in copying word

[1] It is very difficult to render into English phrases equally happy and distinct, the expressions "*productions de génie*" and "*productions de l'esprit*." But the distinction is obvious.

for word. He maintained, that under this decree the Pandects of Pothier would be no subject of property, but would be open to the first occupant.[1]

The court held that the law extends to selections, compilations, and other works of that nature, when they require in their execution, discernment, taste, learning, and intellectual labor; when, in short, instead of being simply copies from one or more other books, they are at the same time the product of conceptions foreign and of conceptions peculiar to the author, in the union of which the matter receives a new form and a new character. The work in question possessed these characteristics, and the decree of the court of first instance was therefore annulled.[2]

4. It is upon principles somewhat analogous, but requiring perhaps a more careful discrimination than they have heretofore received, that translations and abridgments have been said to be original works and subjects of copyright.

Translations are so far original, as the labor spent in the translation may make them, and upon this ground they have been held to be undistinguishable from other works.[3] It is undoubtedly true, that the translation of a work from a foreign tongue incorporates with the original so much new labor, that it may with propriety be treated, for some purposes,

[1] See his eloquent vindication of the *authorship* of Pothier, ante, p. 177.

[2] Merlin, Rep. de Jurisp. tit. Contrefaçon, tom. 3, p. 701–708.

[3] Wyatt *v.* Barnard, 3 Ves. & B. 77. Drury on Injunctions, Part II. ch. 2, § 20, p. 213.

as a new work. It is the policy of the laws which protect copyright to encourage this and every other species of literary labor, as far as may consist with the vested rights of authors. But it may perhaps admit of question, whether it is not necessary, in order that a translator should acquire a new title and a valid copyright in literary matter, originally composed by another, that the original should have been first published in a foreign country. If a British or American author should see fit to publish in his own country an original work in a foreign or a dead language, and should secure the copyright thereof in the manner required by law, can any person translate it, and by such translation acquire the right to publish it in the vernacular tongue? The answer to this question must depend in a good degree upon the effect to be given to the act of translation, as a new labor, taken in connection with the fact that the original author has an undoubted copyright in the matter of the work, as he put it forth. Translation of a work published in a foreign country is the adoption of matter in which no one has an exclusive right in the country where the translation is made, since it is there *publici juris;* and the translator impresses upon that matter so much of a new character by his own labor, that the law treats his translation as a new product, and holds him entitled to a copyright, to protect this new product, as such. At the same time any one else may

make a new translation. But where the matter of the work is not *publici juris*, is the new form given to it by translation sufficient to override the exclusive right of the original author in the matter itself? Notwithstanding the general principle of the English law in relation to translations, this question, I apprehend, would be not easy of solution, in the case of a scientific work written, for instance, in Latin, intended for the learned, and intended to convey a new discovery, or other information peculiarly original. It would be urged, in such a case, that the translation had given the work a new dress, in which the matter of it would be brought within the reach of a far greater number of persons; and this, it would be contended, was not only meritorious, but was a result of new labor of a purely intellectual kind. Still, the principle which allows the character of originality to the product of new labor upon old materials, would, in such a case, encounter the exclusive right of the original author in the matter of the work itself. In other analogous cases, this principle is not always of sufficient force to give to the mere labor of preparing a new dress, or a new form, the right to appropriate to itself the original matter of another author. Where the adoption and use of the matter of an original author, whose work is under the protection of copyright, is direct and palpable, and nothing new is added but form or dress, or an immaterial change of arrangement, the law will treat the alter-

ation as merely colorable, and will stamp it with the character of piracy. Whether the change of form, or dress, produced by a close translation, in cases where the original work is under the protection of copyright, can have any greater effect than belongs to a change of form or dress, in other cases, is an interesting question, not determined, as it seems to me, by the general principle of the law of England, which treats translations as original works. This general principle was established only with reference to translations of foreign works, not under the protection of copyright.[1]

The same question might arise, where a treaty, establishing international copyright, subsists between two countries, without express provision being made for the case of translations. The British interna-

[1] The question here considered seems to have actually arisen once in England, but the case was disposed of upon grounds sufficiently absurd, which did not touch the point raised, if the imperfect report of it is correct. A bill was brought for an injunction to stay the printing and publishing a translation of Burnett's *Archæologia Sacra*, suggesting it to be an injury to the executor, in whom the property of the book was vested by 8 Anne, c. 19. It was insisted, for the defendant, that a translation of a book was not within the intent of the act. Lord Chancellor Parker said, that though a translation might not be the same with the reprinting the original, on account that the translator has bestowed his care and pains upon it, and so not within the prohibition of the act, yet this being a book which to his knowledge (having read it in his study) contained strange notions intended by the author to be concealed from the vulgar in the Latin language, in which language it could not do much hurt, the learned being better able to judge of it, he thought it proper to grant an injunction to the printing and publishing it in English; that he looked upon it, that this court has a superintendency over all books, and might, in a summary way, restrain the printing or publishing any that contained reflections on religion or morality. Burnett *v.* Chetwood, 2 Meriv. 441, note. For the talents and acquirements of Lord Ch. Parker, see Lord Campbell's Lives of the Chancellors.

tional copyright act contains a proviso, saving the right to publish and sell translations of any book, the author whereof and his assigns may be entitled to the benefit of the act.[1]

In like manner there is a general doctrine in the English law, that a *bona fide* abridgment of a previous work may be the subject of copyright in the person who makes it, upon the ground that it is a new work. The present chapter is not the appropriate place to consider in what cases an abridgment will constitute a piracy. This question will be discussed at large in a subsequent part of this work. But it is proper here to inquire into the doctrine which declares abridgments to be the subjects of new copyright, and to consider what discriminations ought to be made from the general position which some of the authorities appear to sanction.

The general doctrine is that a *bona fide* abridgment is in the nature of a new and meritorious work. The most elaborate general statement of this doctrine, found in the books, was that made by Lord Chancellor Apsley, assisted by Mr. Justice Blackstone, in a case relating to an abridgment of Hawkesworth's Voyages. His lordship is reported to have said, "that to constitute a true and proper abridgment of a work, the whole must be preserved in its sense; and then the act of abridgment is an act of understanding, employed in carrying a large work

[1] 1 and 2 Vict. c. 59, s. 13. See Appendix.

into a smaller compass, and rendering it less expensive, and more convenient both to the time and use of the reader, which made an abridgment in the nature of a new and a meritorious work." He further stated it as his own and Mr. Justice Blackstone's opinion, "that an abridgment, where the understanding is employed in retrenching unnecessary and uninteresting circumstances, which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work."[1]

Without discussing at present the soundness of this definition of an allowable abridgment, it is sufficient to remark here, that if there are certain classes of works, such as translations, histories, &c. in which, by abridgment, a subsequent writer can acquire a new and independent title upon the footing of a new work, there are also other classes of works, with reference to which the doctrine of abridgment must encounter an exclusive title in the original author, so inseparable from the matter and substance of the work, that it must create the gravest doubts whether

[1] Anon. Lofft's R. 775. The other authorities are Gyles *v.* Wilcox, 2 Atk. 142. Bell *v.* Walker, 1 Brown's Ch. R. 450. Dodsley *v.* Kinnersly, Ambl. 403. Butterworth *v.* Robinson, 5 Ves. 709. In these cases, the general doctrine of a fair *bona fide* abridgment, as constituting a new work, is taken for granted, but no approach is made to a definition of such an abridgment. In Dodsley *v.* Kinnersly, Sir Thomas Clarke, M. R. said, that "no certain line can be drawn to distinguish a fair abridgment, but every case must depend on its own circumstances;" and Mr. Justice Story, in Gray *v.* Russell, 1 Story's R. 11, 19, has made the same suggestion. The authorities will be found collected and examined in the chapter relating to piracy, post.

the pretensions of the subsequent writer can prevail over the rights of the original author.

It has been recently held, that an author has as much right in his plan, and in his arrangement, and in the combination of his materials, as he has in his thoughts, sentiments, opinions, and his modes of expressing them.[1] If this doctrine be correct, it follows that a subsequent author cannot, by abridgment, acquire a new and independent title in the plan, arrangement, and combination of materials, made use of by a former author, who has secured his title in the due course of law. It would seem to be quite as consistent with sound principle, to hold that a mechanician may acquire a new patent by making a reduced copy of an original machine, previously protected by a patent, as to hold that by the mere act of abridgment, a new title can be acquired in the peculiar matter of a book.[2]

[1] Emerson *v.* Davies, 3 Story's R. 768.

[2] For a further discussion of this subject, see post, Chap. IX.

CHAPTER VI.

OF THE STATUTE REQUISITES FOR A VALID COPY-RIGHT.

1. In the United States.
2. In Great Britain.

1. The act of congress of 3d February, 1831, § 4, requires that a printed copy of the title of any book, or books, map, chart, musical composition, print, cut, or engraving, to be entitled to the benefits of the act, shall, before publication, be deposited in the clerk's office of the district court of the United States for the district where the author or proprietor resides, which title is to be recorded by the clerk, and a certified copy of the title as recorded is to be delivered to the author or proprietor. Within three months from the publication, the author or proprietor is to deliver, or cause to be delivered, a copy of the book, map, &c. to the clerk, which it is made the duty of the clerk to transmit to the secretary of state.[1]

[1] Act of Cong. Feb. 3, 1831, § 4. See Appendix.

The fifth section of the same act makes it necessary to insert in the several copies of each and every edition published during the term secured, on the title-page, or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, or engraving, to impress on the face thereof, or if a volume of maps, charts, music, or engraving, upon the title or frontispiece thereof, the words, "Entered according to act of congress, in the year , by A. B., in the clerk's office of the district court of ," (as the case may be.)[1]

These steps are all essential to a perfect title, according to a decision made by the supreme court of the United States, upon the former acts, that of 1790 and that of 1802. Upon those acts, it was held by the court, that although the right was vested, when a copy of the title was deposited with the clerk, and a copy of his record was printed, as the act of 1802 required, yet that the performance of the other conditions was essential to a perfect title.[2]

[1] Sec. 5. See Appendix. The act of 1790, § 3, required the author or proprietor to publish a copy of the record or certificate of entry in one or more newspapers printed in the United States, for the space of four weeks. The act of 1802 required, that the copy of the record, which by the act of 1790 the author or proprietor was required to publish, should also be inserted in the page of the book next to the title. (See Appendix, p. 89.) With the exception of publication in the newspapers, and the time and mode of deposit in the secretary of state's office, the requisites remain the same under the act of 1831, as they stood at the time that act was passed. The act of 1790, § 4, required the author or proprietors, within *six months* of the publication, to deliver or cause to be delivered to the secretary of state, a copy of the book, to be preserved in his office. The act of 1831 directs the copy for this purpose to be deposited with the clerk of the court, within *three months* from the date of publication.

[2] Wheaton *v.* Peters, 8 Peters S. C. R. 591, 663, 665. Upon this point, the court said, "It will be

As the law now stands, there are but three requisites for securing a valid copyright. 1. The deposit of a printed copy of the title, before publication, with

observed, that a right accrues under the act of 1790, from the time a copy of the title of the book is deposited in the clerk's office. But the act of 1802 adds another requisite to the accruing of the right, and that is, that the record made by the clerk shall be published in the page next to the title-page of the book.

"And it is argued with great earnestness and ability, that these are the only requisites to the perfection of the complainant's title. That the requisition of the third section to give public notice in the newspapers, and that contained in the fourth to deposit a copy in the department of state, are acts subsequent to the accruing of the right, and whether they are performed or not, cannot materially affect the title.

"The case is compared to a grant with conditions subsequent, which can never operate as a forfeiture of the title. It is said also that the object of the publication in the newspapers, and the deposit of the copy in the department of state was merely to give notice to the public; and that such acts, not being essential to the title, after so great a lapse of time, may well be presumed. That if neither act had been done, the right of the party having accrued, before either was required to be done, it must remain unshaken.

"This right, as has been shown, does not exist at common law — it originated, if at all, under the acts of congress. No one can deny that when the legislature are about to vest an exclusive right in an author or an inventor, they have the power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law. This principle is familiar, as it regards patent rights; and it is the same in relation to the copyright of a book. If any difference shall be made, as it respects a strict conformity to the law, it would seem to be more reasonable to make the requirement of the author, rather than the inventor. The papers of the latter are examined in the department of state, and require the sanction of the attorney-general; but the author takes every step on his own responsibility, unchecked by the scrutiny or sanction of any public functionary.

"The acts required to be done by an author, to secure his right, are in the order in which they must naturally transpire. First, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given; and within six months after the publication of the book, a copy must be deposited in the department of state.

"A right undoubtedly accrues on the record being made with the clerk, and the printing of it as required; but what is the nature of that right? Is it perfect? If so, the other two requisites are wholly useless. How can the author be compelled either to give notice in the newspaper, or deposit a copy in the state department. The statute affixes no penalty for a failure to perform either of these acts, and it provides no means by which it may be enforced.

"But we are told they are unimportant acts. If they are indeed

the clerk of the district court; 2. Notice to the public, by printing, in the place designated, the fact of the entry, in the form prescribed by the statute;

wholly unimportant, congress acted unwisely in requiring them to be done. But whether they are important or not, is not for the court to determine, but the legislature; and in what light they were considered by the legislature, we can learn only by their official acts.

"Judging then of these acts by this rule, we are not at liberty to say they are unimportant, and may be dispensed with. They are acts which the law requires to be done, and may this court dispense with their performance?

"But the inquiry is made, shall the non-performance of these subsequent conditions operate as a forfeiture of the right?

"The answer is, that this is not a technical grant of precedent and subsequent conditions. All the conditions are important; the law requires them to be performed, and consequently their performance is essential to a perfect title. On the performance of a part of them the right vests; and this was essential to its protection under the statute: but other acts are to be done, unless congress have legislated in vain, to render the right perfect.

"The notice could not be published until after the entry with the clerk, nor could the book be deposited with the secretary of state until it was published. But these are acts not less important than those which are required to be done previously. They form a part of the title, and until they are performed the title is not perfect. The deposit of the book in the department of state, may be important to identify it at any future period, should the copyright be contested, or an unfounded claim of authorship asserted. But, if doubts could be entertained whether the notice and deposit of the book in the state department, were essential to the title, under the act of 1790; on which act my opinion is principally founded, though I consider it in connection with the other act; there is, in the opinion of three of the judges, no ground for doubt under the act of 1802. The latter act declares that every author, &c. before he shall be entitled to the benefit of the former act, shall, 'in addition to the requisitions enjoined in the third and fourth sections of said act, if a book, publish,' &c. — Is not this a clear exposition of the first act? Can an author claim the benefit of the act of 1790, without performing the requisites enjoined in the third and fourth sections of it? If there be any meaning in language, the act of 1802, the three judges think, requires these requisites to be performed 'in addition' to the one required by that act, before an author, &c. 'shall be entitled to the benefit of the first act.'

"The rule by which conditions precedent and subsequent are construed, in a grant, can have no application to the case under consideration, as every requisite, in both acts, is essential to the title.

"A renewal of the term of fourteen years can only be obtained by having the title-page recorded with the clerk, and the record published on the page next to that of the title, and public notice given within six months before the expiration of the first term."

See also Ewer *v.* Cox, 4 Wash. C. C. R. 486.

3. The deposit with the clerk of a copy of the publication, within three months from the date of publication.[1] These acts are also made essential to a perfect title, by the statute itself, which declares that *no person shall be entitled to its benefits*, unless he shall have complied with these directions.[2]

In all cases of renewal of copyright, under the act of the 3d February, 1831, the entry, deposit at the clerk's office, &c., must be made a second time, within six months before the expiration of the first term, and notice thereof must be given, by publishing a copy of the record within two months from the date of the renewal, in one or more newspapers published in the United States, for the space of four weeks.[3]

The provisions of law respecting transfers and assignments of copyrights, will be found stated in a subsequent chapter.

It is not essential to the validity of a copyright,

[1] Act of Congress, 3d Feb. 1831, § 4. I do not include, as one of the conditions for a perfect title, the recent enactment, which requires a copy of every work, of which the copyright shall be secured, to be sent to the library of the Smithsonian Institute; but I should not advise the neglect of this requisition, although it is not enforced by any penalty whatsoever. The statute, containing this provision, is in these words:

"And be it further enacted, That the author or proprietor of any book, map, chart, musical composition, print, cut, or engraving, for which a copyright shall be secured under the existing acts of congress, or those which shall hereafter be enacted respecting copyrights, shall, within three months from the publication of said book, map, chart, musical composition, print, cut, or engraving, deliver, or cause to be delivered, one copy of the same to the librarian of the Smithsonian Institution, and one copy to the librarian of Congress Library, for the use of the said libraries." Act of Congress, 10th Aug. 1846, ch. 178, § 10.

[2] Ibid.

[3] Act of Congress, 3d Feb. 1831, § 3.

that the author's name should appear upon the title-page.[1]

2. Registration, under the English law, seems not to be essential to a good title, but merely affects the remedy. By the 5 and 6 Vict. c. 45, § 11, it is enacted, that a book of registry be kept at stationers' hall, wherein may be registered the proprietorship in the copyright of books, and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licenses affecting such copyright; and certified copies of any entry are made *prima facie* proof of the proprietorship or assignment of copyright or license, as therein expressed.[2] The 13th section makes it lawful for the proprietor of a copyright in any "book"[3] published before or after the act, to make entry in the registry book of the stationers' company, of the title of such book, the time of the first publication thereof, the name and place of abode of the publisher, and the name and place of abode of the proprietor of the copyright, or of any portion thereof, according to a form annexed to the act, and it is also made lawful for every such registered proprietor to assign his interest, or any portion of his interest, by making en-

[1] Beckford *v.* Hook, 7 T. R. 620.
[2] Act 5 and 6 Vict. c. 45, § 11.
[3] The word "book," in this act, includes every volume, part, or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published, sec. 2.

try in the book of registry of such assignment, and of the name and place of abode of the assignee, in a form annexed to the act; and such assignment, so entered, is declared to be, without stamp or duty, of the same force and effect as if made by deed.[1]

The 19th section provides, that the proprietor of the copyright in any encyclopedia, review, magazine, periodical work, or other work published in a series of books or parts, shall be entitled to all the benefits of registration under the act, on entering in the book of registry the title of the work, the time of the first publication of the first volume, number or part, or of the first number or volume first published after the passing of the act, in any such work which shall have been published before the act, and the name and place of abode of the proprietor, and of the publisher, when the publisher is not the proprietor.[2]

The 24th section enacts, that no proprietor of copyright in any book which shall be first published after the passing of the act, shall maintain any action or suit, at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the book of registry of the stationers' company, of such book, pursuant to the act;[3] provided always,

[1] Act 5 and 6 Vict. c. 45, § 13.

[2] Ibid. § 19.

[3] Formerly, an action for damages could be maintained, although the work had not been entered at stationers' hall; but the penalties given by the 8 Anne, c. 19, could not be recovered. Beckford *v.* Hood, 7 T. R. 620.

that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof; provided also, that nothing in the act shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the act 3 Wm. IV. or of this act, although no entry shall be made in the book of registry.[1]

By the 20th section of this act, dramatic and musical compositions are to be registered, by entering the title of the production, the name and abode of the author or composer, the name and abode of the proprietor, and the time and place of the first representation or performance.[2] But the omission to register is not to affect the remedies which the proprietor of the sole liberty of representation has by virtue of this act, or of the 3 Wm. IV. c. 15.[3]

University and Collegiate Copyright.

The acts 15 George III. c. 53, § 1, and 41 George III. c. 107, § 3, secure to the two universities of Oxford and Cambridge and the colleges within them, the four universities in Scotland, Trinity College, Dublin, and the Colleges of Eton, Westminster, and

[1] Act 5 and 6 Vict. c. 45, § 24. The 12th section of this act makes it an indictable misdemeanor, punishable accordingly, for any person wilfully to make, or cause to be made, any false entry, or wilfully to produce, or cause to be tendered in evidence, any paper falsely purporting to be a copy of any entry in the registry book.

[2] Act 5 and 6 Vict. c. 45, § 20.

[3] Ibid. § 24. The term "dramatic piece," in this act, includes every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment. Sect. 2.

Winchester, a copyright in books given or bequeathed to them for the advancement of useful learning or other purposes of education; and this copyright they hold in perpetuity, unless the bequest is expressly stated to be for a limited term, and if they continue to print at their own presses. But the penalties given by these acts against piracy, cannot be recovered, unless the title to the copy of the book be entered at stationers' hall, within the space of two months after the bequest or gift thereof shall have come to the knowledge of the vice-chancellors, or heads of colleges, or principals, of the said institutions, respectively.[1] If the clerk of the stationers' company neglect or refuse to make the entry and grant a certificate thereof, when required, then the proprietors (notice being first given of such neglect or refusal in the London Gazette,) are to have the like benefit as if the entry and certificate had been made and given, and the clerk is subjected to a penalty.[2]

Prints and engravings are regulated by the acts 8 Geo. II: c. 13, 7 Geo. III. c. 38, and 17 Geo. III. c. 57, the latter being extended to Ireland by the 6 and 7 Wm. IV. c. 59. Registration does not seem to be required; but the statute 8 Geo. II. c. 13, § 1,

[1] Sawyer *v.* Dicey, 3 Wills. 60.

[2] Acts 15 Geo. III. c. 53, § 5; and 41 Geo. III. c. 107, § 5. The rights of the several universities and colleges mentioned in these acts are saved to them by the 5 and 6 Vict. c. 45, § 27. The universities obtained these rights by special enactment, after the decision of the house of lords, in Donaldson *v.* Becket, had unexpectedly overthrown the doctrine of perpetual copyright at common law.

requires that the day of the first publication shall be truly engraved with the name of the proprietor on each plate, and printed on every copy. The fulfilment of this requisition has been held to be necessary, to enable a party to recover, in case of piracy, the penalties imposed by the statutes. But it was formerly doubted whether an action at law for damages, or a bill in equity for an account and injunction, could not be sustained, without a compliance with these requisitions.[1] But it has since been settled, that no action for the piracy of a print can be maintained, unless the date and name of the proprietor were engraved upon it, according to the act.[2]

Sculpture, which is protected by the act 54 Geo. III. c. 56, (which amended the 33 Geo, III. c. 71,) must have the name of the proprietor, with the date, put upon each original copy or cast.[3]

Delivery of Copies to certain Public Libraries.[4] The

[1] Blackwell *v.* Harper, 2 Atk. 95. Roworth *v.* Wilkes, 1 Camp. 95. Harrison *v.* Hogg, 2 Ves. Jr. 323. Thompson *v.* Symonds, 5 T. R. 41.

[2] Brooks *v.* Cock, 3 Ad. & Ellis, 138.

[3] Act 54 George III. c. 56, § 1. See Appendix.

[4] It has long been a part of the policy of English legislation on the subject of literature, to support certain institutions by compelling a delivery of a certain number of copies of all published works. The first statute containing this requirement, was the 13 and 14 Car. II. c. 33, by which three copies were ordered to be delivered, one for each of the two English universities, and one for the king's library. This was followed by the 8 Anne, c. 19, which extended the number of copies to nine; one for the King's Library, two for the libraries of Oxford and Cambridge, four for the libraries of the four Scotch universities, one for Sion College in London, and one for the library of the Faculty of Advocates in Edinburgh. The 41 George III. c. 107, gave two more copies, one to Trinity College, and one to the King's Inn, Dublin. The 54 George III. c. 156, substituted the British Museum, in place of the King's Li-

5 and 6 Vict. c. 45, § 6, requires the delivery to the British Museum, of a printed copy of every book published after the passing of the act, together with all maps, prints, or other engravings belonging to it, finished and colored as are the best copies of the work; also of a printed copy of any second or subsequent edition published with additions or alterations, whether in the letter-press or in the maps, prints, or other engravings, and whether the first edition was published before or after the passing of the act; and also of a printed copy of any second or subsequent, of which the first or some preceding edition has not been delivered to the Museum. Each of these copies is required to be bound, sewed or stitched together, and to be upon the best paper on which the work is printed; and the delivery must be made within one calendar month after the book is first published within the bills of mortality, or within three calendar months after it is first published in any other part of the united kingdom, or within

brary. Under these statutes, all books published, whether entered at stationers' hall or not, were demandable, under a penalty. The University of Cambridge *v.* Bryer, 16 East, 317. This legislation has recently been followed in the United States, in the law establishing the Smithsonian Institute, (Act of Congress, Aug. 1846, c. 178,) which directs, without any penalty, a copy of every book, of which the copyright shall be secured, to be sent to the library of that institution. It is to be regretted that this species of tax upon literature should have been introduced into this country. If confined to a single institution, it will never be very seriously felt. But, should the instances be multiplied, the justice and expediency of the measure will require grave consideration. In 1818, evidence was taken before a committee of the house of commons, upon the propriety of this tax. For this evidence and other discussions on the subject see Maugham on Copyright, Appendix, p. 229, et seq.

twelve calendar months after it is first published in any other part of the British dominions.[1] The seventh section of the act prescribes the days on which the delivery is to be made, and directs the person receiving the book to give a receipt for the same in writing.[2]

The eighth section of the same statute requires that a copy of every book, or of any second or subsequent edition containing additions or alterations, together with all maps, and prints belonging to it, published after the passing of the act, on the paper of which the largest number of copies is printed for sale, and in like condition with them, shall, on demand in writing, left at the publisher's abode within twelve months after publication, under the hand of the officer of the stationers' company, or of any person with authority from the Bodleian Library at Oxford, the Public Library at Cambridge, the Library of the Faculty of Advocates at Edinburgh, and the Library of Trinity College, Dublin, be delivered within one month after such demand, to the officer of the stationers' company; which copies the officer is required to receive for the use of the library for which such demand shall have been made, and to give a written receipt therefor.[3] But it is optional with the publisher to deliver the copies at the libraries, instead of at the stationers' company.[4] The penalty for default in delivering copies as required

[1] Act 5 and 6 Vict. c. 45, § 6.
[2] Ibid § 7.
[3] Ibid. § 8.
[4] Ibid. § 9.

by the act, is, besides the value of the book, a sum not exceeding five pounds, to be recovered to the use of the library, by summary conviction before two justices of the peace, or by an action of debt.[1]

[1] Act 5 and 6 Vict. c. 45, § 10.

CHAPTER VII.

DURATION OF COPYRIGHT.

1. Duration of Copyright in England.

1. *Books.*[1] The act 8 Anne, c. 29, (passed April 18th, 1710,) gave the author or proprietor of a book, then already printed, the sole and exclusive right of printing it for twenty years. It also gave to the author and his assignee of a book then already composed, but not published, or of a work that should thereafter be composed and published, the sole liberty to print and reprint it for the term of fourteen years and no longer, to commence from the day of its first publication; with the further provision, that in case the author should be living at the end of the first term of fourteen years, then the sole right of disposing of copies of the work should return to him for another term of fourteen years.[2] In the 54 Geo. III. c. 156, (passed July 20th, 1814,) all the provisions of the former acts were consolidated; con-

[1] For the definition of the statute term "book," see post, p. 207, n. 2.

[2] See Appendix, p. 2. By the 41 Geo. III. c. 167, the law of copyright in Ireland was assimilated to that in Great Britain.

siderable alteration was at the same time made in the law; the term of copyright in the author and his assignee was extended to twenty-eight years absolutely, and for the life of the author; and to benefit the families of those authors who were alive at the time the act was passed, but who might die before the first fourteen years from the day of publication had expired, a further term of fourteen years was given to the personal representatives of such authors, without prejudice to all or any part of the former term.[1]

The 5 and 6 Vict. c. 45, (passed July 1st, 1842,) revised the whole subject. The 3d section of that act provides, "That the copyright in every book,[2] which shall, after the passing of this act, be published in the lifetime of its author, shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns; provided always, that if the term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall, in that case, endure for a period of forty-two years; and that the copyright in every book which shall be published after the death of its author, shall

[1] See Appendix, p. 38. For this short analysis of the two acts recited in the text, I am indebted to a little work on Copyright, by Peter Burke, Esq. of the Inner Temple, Barrister at Law, published at London in 1842, 12mo. pp. 64.

[2] By the 2d section, the word "book," in the construction of this act, is declared to include "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan, separately published."

endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript, from which such book shall be first published, and his assigns."[1]

According, therefore, to the present law of England, the copyright of every book published during the author's lifetime is to last certainly for forty-two years from the date of its first publication; and if the author's life and the seven years after his decease cover a longer period than forty-two years, the copyright may last longer. The copyright of a book published after the author's death will endure for forty-two years from the date of the first publication.

The fourth section of the statute enacts, "That the copyright which at the time of the passing of this act, shall subsist in any book theretofore published (except as hereinafter mentioned,) shall be extended and endure for the full term provided by this act in cases of books thereafter published, and shall be the property of the person who at the time of the passing of this act shall be the proprietor of such copyright; provided always, that in all cases in which such copyright shall belong, in whole or in part, to a publisher, or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this act, but shall endure for the term which shall subsist therein at the time of the passing

[1] See Appendix, p. 66.

of this act, and no longer ; unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright shall, before the expiration of such term, consent and agree to accept the benefits of this act in respect to such book, and shall cause a minute of such consent, in the form in that behalf given in the schedule to this act annexed, to be entered in the book of registry hereinafter directed to be kept, in which case such copyrights shall endure for the full term by this act provided, in cases of books to be published after the passing of this act, and shall be the property of such person or persons as in such minute shall be expressed."

Copyrights, therefore, which existed before the passing of this act, and which had not expired, are extended through the natural life of the author, and for seven years after his decease, or for forty-two years certain from the date of first publication. This extended term, however, will not belong to the proprietor who has obtained the assignment for other consideration than that of natural love and affection, unless the extension be agreed on between such proprietor and the author, or his personal representative.

In order to provide against the suppression of books of importance to the public, the fifth section of the statute makes it lawful for the judicial committee of the privy council, on complaint made to them, that the proprietor of the copyright in any

book, after the death of its author, has refused to republish, or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a license to such complainant to publish such book, in such manner, and subject to such conditions as they may think fit, and that it shall be lawful for such complainant to publish such book according to such license.[1]

2. *Dramatic and Musical Compositions.* By the law of England, a double copyright may exist in a dramatic or musical composition, viz. the sole right of printing, and the sole right of representation or performance.

The sole right of printing and publishing plays and musical compositions is vested in the authors for the same period of time as is provided in the case of books.[2]

By the 3 Wm. IV. c. 15, § 1, the sole right of representation or performance of plays, composed or to be composed and not printed and published by the author or his assignee, was secured to the author and his assignee, indefinitely; and in the case of plays, printed or published after the passing of the act, (10th June, 1833,) or within ten years before, the sole right of representation or performance was given to the author or his assignee, for a period of twenty-eight years from the time of publication, or of the passing of the act, or, if the author were living at the

[1] Act 5 & 6 Vict. c. 45, § 5.

[2] Ibid. § 2.

end of that period, for the remainder of the author's life.

By the 5 and 6 Vict. c. 45, § 20, the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, was made to endure and be the property of the author and his assigns, for the term provided in the same act for the duration of copyright in books, viz. for the author's life, and seven years after his death, or for forty-two years.

The question may arise, under these statutes, whether the author of an unpublished play or musical composition, has the exclusive right of representation or performance forever. The act 3 Wm. IV. c. 15, gave to the author, or his assignee, of an unpublished play, the sole liberty of performing it, without any limitation of time, and when it is considered that by the common law it had previously been settled that representation is not publication, and that consequently, so long as the author keeps his play in manuscript, no one can acquire the right to perform it by printing it surreptitiously from the mouths of the actors, it would seem that this act is merely declaratory of the common law, and intended to confirm a perpetual exclusive right in the case of an unpublished play. But the act 5 and 6 Vict. c. 45, § 20, without noticing the distinction between published and unpublished plays, contained in the former act, recites as follows: "And whereas an act was passed in the third year of the reign of his

late Majesty, to amend the law relating to dramatic literary property, *and it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that act to the full time by this act provided for the continuance of copyright ;*" and it then enacts, that "the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the term in this act provided for the duration of copyright in books, viz. during the author's life and for seven years after his decease, if the life and the term of seven years together make forty-two years, and if not, then for forty-two years from the first publication. The construction of the two acts together, will be aided by inquiring what term, in the act 3 Wm. IV. is referred to by the words in the preamble of the last act, "the term of the sole liberty," &c. which is to be extended. No other term is provided in the former act, than that for the performance of *published* plays. The sole right to perform *unpublished* plays is confirmed to the author without limitation of time. If, therefore, the preamble refers to the term before provided for published plays, and confines the general words of the enacting clause to the same reference, the sole right to perform unpublished plays is not reduced from a perpetuity to a term of forty-two years, but remains untouched.

Assuming this to be so, the law now stands thus:

1. The author or assignee of a dramatic or musical composition, unprinted and unpublished, has a sole and perpetual right to its performance.

2. The author or assignee of a dramatic or musical composition printed and published within ten years before the passing of the 3 and 4 Wm. IV. c. 15, (10th June, 1833,) or printed and published after the passing of that act, has the sole right of performance for the author's life, and seven years after his death, and if that time expire before forty-two years from the time of first performance, then for such forty-two years.[1]

3. *Engravings.* The 8 Geo. II. c. 13, vested a copyright in historical and other prints for the term of fourteen years, to commence from the day of the first publication. By the 7 Geo. III. c. 38, § 1, the benefits of the former act were extended to the prints of any portrait, conversation, landscape, or architecture, map, chart or plan, or any other prints whatsoever, whether taken from the artist's own original designs, or from any picture, drawing, model, or sculpture, either ancient or modern ; and the term of enjoying the right was in all cases enlarged from fourteen to twenty-eight years.

Maps, charts and plans are now, by the 5 and 6 Vict. c. 45, § 2, regarded as "books," and are consequently entitled to the same period of copyright.

4. *Sculpture.* In the subjects of sculpture, by the

[1] Burke on Copyright, p. 42.

54 Geo. III. c. 56, § 1, a term of fourteen years copyright is vested in the person who made or caused to be made the original sculpture, model, copy or cast; and, by the fifth section, an additional term of fourteen years is also given, if such person be living at the end of the first term, and have not divested himself of the copyright by sale or otherwise.[1]

2. Duration of Copyright in the United States.

By the act of congress of 3d February, 1831, § 1, books, maps, charts, musical compositions, prints, cuts and engravings, have a term of copyright of twenty-eight years from the time of recording the title thereof.[2]

If, at the expiration of the first term of twenty-eight years, the author, inventor, designer, engraver, or any of them, where the work had been originally composed and made by more than one person, be still living, and a citizen or citizens of the United States, or resident therein, or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author, designer, or engraver, or if dead then to such widow and child, or children, for the further term of fourteen years: *Provided*, that the title of the work so secured shall be a second time recorded, and all the other regulations of the act in relation to

[1] See Appendix, p. 38.

[2] See Appendix, p. 93.

original copyrights be complied with in respect to such renewed copyright, and that within six months before the expiration of the first term.[1] The act further requires that a copy of the record of renewal be published in one or more newspapers printed in the United States, within two months from the date of such renewal, for the space of four weeks.[2]

[1] See Appendix, p. 93.

[2] § 3.

CHAPTER VIII.

TRANSMISSION OF COPYRIGHT, AND OTHER INCIDENTS OF LITERARY PROPERTY.

THE law of England and that of America recognize, as we have seen, the exclusive right of an author over his own productions existing in manuscript.[1] This right is independent of the property in the paper itself, and consists in the exclusive authority to print and publish the literary contents. No question has ever been successfully made of the existence of this species of property, whatever disputes have arisen, from time to time, as to the effect upon it of publication and sale.

Literary property, in unpublished writings, has always been a well-settled right at common law.[2]

The nature of this property has been defined as "an incorporeal right in the nature of a faculty, and having reference to a future time for reaping the profits."[3] Lord Mansfield described it as "a incor-

[1] Ante, Chap. II.

[2] Millar *v.* Taylor, 4 Burr. 2398. Donaldson *v.* Becket, Ibid. 2408. Duke of Queensbury *v.* Shebbeare, 2 Eden's Ch. R. 329. Macklin *v.* Richardson, Amb. 694. Southey *v.* Sherwood, 2 Meriv. 434. Wheaton *v.* Peters, 8 Peters S. C. R. 591, 661. 2 Story's Eq. Jurisp. § 943.

[3] 1 Bell's Com. 68.

poreal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever."[1]

This species of property has long been, and is at the present day treated as an inheritable right. The copy in Lord Clarendon's History,[2] the manuscripts of a Conveyancer,[3] the Letters of Lord Chesterfield,[4] and the Writings of Washington,[5] were severally held to have passed to personal representatives,

[1] 4 Burr. 2396. His Lordship there said, "It has all along been expressly admitted, 'that, by the common law, an author is entitled to the copy of his own work until it has been once printed and published by his authority;' and 'that the four cases in chancery, cited for that purpose, are agreeable to the common law; and the relief was properly given, in consequence of the legal right.'

"The property in the copy thus abridged, is equally an incoporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever.

"The property thus abridged is equally incapable of being violated by a crime indictable. In like manner, it can only be violated by another's printing without the author's consent; which is a civil injury.

"The only remedy is the same; by an action upon the case, for damages, or a bill in equity for a specific relief.

"No action of detinue, trover, or trespass *quare vi et armis*, can lie; because the copy thus abridged is equally a property in notion, and has no corporeal tangible substance.

"No disposition, no transfer of paper upon which the composition is written, marked, or impressed, (though it gives the power to print and publish,) can be construed a conveyance of the copy, without the author's express consent 'to print and publish;' much less, against his will.

"The property of the copy, thus narrowed, may equally go down from generation to generation, and possibly continue forever; though neither the author nor his representatives should have any manuscript whatsoever of the work, original, duplicate, or transcript."

[2] Duke of Queensbury *v.* Shebbeare, 2 Eden's C. R. 329.

[3] Webb *v.* Rose, cited 4 Burr. 2330.

[4] Thompson *v.* Stanhope, Amb. 737.

[5] Folsom *v.* Marsh, 2 Story's R. 100.

with the sole right of publication. Indeed, there seems to be no reason why the remark of Lord Mansfield is not strictly true, that the property in manuscript, being the incorporeal right to print a set of intellectual ideas, communicated in words and sentences, may go down from generation to generation, and possibly continue forever; though neither the author nor his representatives should have any manuscript copy whatever of the work, original, duplicate or transcript.[1]

It is also a right that adheres solely to the person entitled to exercise it, so long as he does not see fit to alienate it; and it cannot be seized by creditors, and does not pass to assignees under a bankruptcy.[2] Being detached from the manuscript, or any other physical existence, and being a mere incorporeal right to print, or to withhold from printing—a faculty, or right to exercise a choice—it would seem to be beyond the reach of execution, or the opera-

[1] See Millar *v.* Taylor, 4 Burr. 2397. The 5 and 6 Vict. c. 45, § 25, makes all copyright personal property, transmissible by bequest, or, in case of intestacy, subject to the same law of distribution as other personal property, and in Scotland it is to be deemed to be personal and movable estate.

[2] 1 Bell's Com 68. See also 4 Burr. 2396, 2397. Mr. Godson says, "it is doubtful whether an unpublished manuscript can be taken in execution by creditors;" and cites 4 Burr. 2311, where the question is suggested by Lord Mansfield *arguendo*. Mr. Godson adds: "but the better opinion seems to incline against such a rule of law, because until the act of publication is accomplished, an author has an undoubted right to have full control over it," [his manuscript.] Godson on Patents and Copyright, 2d edition, p. 430. This seems to be merely stating the same proposition in a different form. But Lord Mansfield's exposition of the real basis of exclusive property before publication, shows that Mr. Godson touches the true grounds of the opinion, that such property does not pass under a commission of bankruptcy. See ante, p. 85, for the view taken by Mr. Bell, upon this point.

tion of the bankrupt laws. The manuscript itself may possibly be taken in execution; but the transfer of the manuscript does not alone carry with it a conveyance of the copy, that is, the authority to print and publish.[1] If the mere paper can be seized under execution, it must be taken subject to the sole right of the author over the intellectual ideas that are written upon it.

The author or proprietor of a manuscript may, by parol, at common law, license another to print and publish it; and such an authority may possibly be inferred from the acts of the parties.[2] But there must be a consent proved, and such consent cannot be inferred from possession of the manuscript alone, even if there be but a single copy of it in existence.[3] There are so many other purposes, which may account for the possession of a manuscript, without involving an authority to publish it, that mere possession would have a very slight tendency to prove that authority. The right to print and publish being a right detached from the manuscript, does not necessarily go along with it, and therefore its transfer must be proved by farther independent evidence. Whether the sole right to print forever the contents of an unpublished manuscript can, at common law, be conveyed by parol, so that the copyright will

[1] 4 Burr. 2396.

[2] Southey *v.* Sherwood, 2 Meriv. 434. Rundell *v.* Murray, Jacobs R. 311.

[3] Duke of Queensbury *v.* Shebbeare, 2 Eden's Ch. R. 329. Pope *v.* Curll, 2 Atk. 342. 2 Story's Eq. Jurisp. § 342. 4 Burr. 2396. Ante, p. 217, note 1.