A TREATISE

ON

THE LAW OF PROPERTY

IN

INTELLECTUAL PRODUCTIONS

IN GREAT BRITAIN AND THE UNITED STATES.

EMBRACING

COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS.

BY

EATON S. DRONE.

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THIS BOOK IS DEDICATED TO MY BROTHER,

JOHN DRONE,

WITHOUT WHOSE HELP I SHOULD HAVE BEEN WITHOUT THE EDUCATION NECESSARY TO WRITE IT.

PREFACE.

MEANINGLESS, inconsistent, and inadequate statutory provisions, ambiguous, erroneous, and conflicting decisions cover the law of copyright with doubt, difficulties, and confusion. Some of the evils which result from these causes are but seeming ones, which disappear when explained, or lose their force when exposed. Others are real, and of such a nature that they can be overcome only by the power of the legislature. This condition of the law is doubtless due in a measure to the facts that the nature of literary property is somewhat peculiar, that the law relating to it may be regarded as yet in its infancy, and that it is comparatively seldom that courts are called upon to determine its meaning. But much of the error and confusion which exist can be accounted for only on the theory that the statutes have been often drawn by incompetent persons, and often interpreted by those who, however learned in other branches, have had but a limited knowledge of the law of copyright.

The English statutes relating to this subject are but a piece of chaotic patchwork, extending over a century and a half. There are in force not fewer than fourteen acts passed at various times, from 1735 to 1875. Some of these have been drawn in such ignorance or disregard of others, important provisions have been enacted in such loose, ambiguous language, incongruous and meaningless clauses are so common,

so many questions have been carelessly left in doubt for judicial determination, that often the law can be determined only with the greatest difficulty, and sometimes its meaning baffles all recognized rules of interpretation. These statutes were rightly condemned by the Royal Commissioners on Copyright, when, in their recent report to Parliament, they said: "The law is wholly destitute of any sort of arrangement, incomplete, often obscure, and even when it is intelligible upon long study, it is in many parts so ill-expressed that no one who does not give such study to it can expect to understand it."

The statutes of the United States are free from some of the faults which exist in those of England. But as the former have in many parts been blindly copied from the latter, the same defects are often found in both.

That judges in the front rank of jurists should sometimes err and disagree in determining the meaning of the legislature, even when most clearly expressed, is but natural. In the judicial interpretation of such statutes as have been spoken of, much greater allowance is to be made for mistakes and conflicting opinions. But for much of the error found in this branch of the law the courts alone are responsible. Decisions have been made against fundamental principles which would not have been violated had their governing force been known, against well-grounded authorities which would have been followed had their application been seen, against statutory provisions which would not have been disregarded had they not been overlooked. One decision has been based on the authority of another when the controlling facts and principles were so different in the two cases that both judgments could not be alike without one being wrong. Opinions, not only wrong in principle but without binding force as authorities, have been blindly followed as supposed precedents. Judicial *dicta*, as uncalled for as erroneous, have been carelessly expressed in one case only to become in another the

corner-stone of a doctrine still more mischievous. It is hardly necessary to mention that what has been said applies to the smaller and not to the greater part of the decisions on this subject. But the former are so many, their influence so far-reaching, the groundless theories affirmed or recognized in some of them so plausible, that the whole body of the law of copyright is more or less affected by them.

If every decision, however clearly wrong it may be, is to be taken as representing the law until it shall be overruled, then must the rights of authors be in endless doubt and confusion. But if, error being eliminated wherever found, the law is to be determined alone by those authorities whose soundness will stand every test, and by those principles whose governing force is recognized, then, excepting some defects which can be reached only by legislation, will the law of copyright become reasonably clear, simple, and harmonious. Under the circumstances explained, to give the results of the decisions without testing their soundness or explaining their bearing, would be to put forth a digest, whose worth would be as little as the effort required to make it. The task of the juridical writer is to set forth the true principles which govern the law; to point out the proper meaning of the statutes; to show what decisions are right and what are wrong; to explain what is doubtful or obscure; and, generally, to give the law in a form as true, clear, systematic, and harmonious as it is in his power to do. He is without authority to say what construction shall be given to statutes, as he is without power to overrule erroneous decisions. But he may point out the true meaning of the law, and show wherein it has been wrongly interpreted. When this has been done, the judicial affirmance of what is right and the rejection of what is wrong will be in many cases but a question of time. In jurisprudence, as elsewhere, error once exposed must sooner or later be eradicated. The maker of a treatise should never lose sight of the fact that his duty is to give the law as it is. But this cannot always be done by sim-

ply recording what has been decided by the courts. Jurisprudence is a science based on principles rather than on single decisions. By the former rather than by the latter the law is to be determined. It is true that one as well as the other are made by judges, and that principles which are not judicially settled or recognized are without force. But principles are fundamental and general. On them decisions are grounded, by them governed, and with them must harmonize. When two authorities are in conflict, both cannot represent the law. One must be set aside. In this, as in other cases, whether one judgment is right and another wrong may sometimes be a matter of opinion. But often the question is capable of conclusive demonstration by the application of governing principles which are judicially settled. Dealing thus with principles, the writer of a treatise may determine with reasonable certainty what the law is where it has not been judicially interpreted. In the case of copyright, there are many important questions concerning which the statutes are silent or not clear, and which have not arisen in the courts, though they are likely to come up at any time. Not to consider these, simply because they are not discussed in the reports, is to leave a treatise on this subject lacking, without excuse, in thoroughness and usefulness.

Finding the law in the condition described, my aim has been to treat it on the principles which have been explained. I have given, in the first place, the law as it has been judicially interpreted, however erroneous in any case that interpretation may be. But I have let no important decision or doctrine go unquestioned, knowing or believing it to be wrong. In denying or questioning the soundness of any authority, I have tried to set forth all the facts, principles, and authorities which have any real bearing on the point in question, and to give fully the reasons for what is pointed out as the true meaning of the law. In this way, whatever is essential to a right understanding of the subject is brought together, so that,

if in any case the conclusion I have reached is wrong, the error becomes apparent, and the reader still has before him the law as it has been judicially construed. In treating many questions which have not been decided or discussed by the courts, I have given prominence to the fact that the law remains for judicial determination. Where I have not done what I aimed to do, the failure is due to lack of ability, not of effort.

E. S. DRONE.

NEW YORK, January, 1879.

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EXPLANATION OF ABBREVIATIONS USED IN THIS WORK.

Abb. Pr. N. S. (N. Y.)	Abbotts' Practice Reports, New York.
Abb. U. S.	Abbott's United States Reports, Circuit and District Courts.
Ad. & El.	Adolphus and Ellis's Reports, Queen's Bench.
Alb. Law Jour. . .	Albany Law Journal, Albany, N. Y.
Am.	American.
Am. Law Rec. . . .	American Law Record, Cincinnati, Ohio.
Am. Law Reg. . . .	American Law Register, Philadelphia, Pa.
Am. Law Reg. N. S. .	American Law Register, New Series, Philadelphia, Pa.
Am. Law Rev. . . .	American Law Review, Boston, Mass.
Am. L. T. N. S. . .	American Law Times, New Series, New York, N. Y.
Am. L. T. R. . . .	American Law Times Reports, Washington, D. C.
Am. L. T. R. N. S. .	American Law Times Reports, New Series, New York, N. Y.
Am. Rep.	American Reports.
Amb.	Ambler's Reports, Chancery, Br.
Anstr.	Anstruther's Reports, Exchequer, Br.
App. Cas.	Law Reports, Appeal Cases before House of Lords.
Art.	Article.
Atk.	Atkyns's Reports, Chancery, Br.
B.	Baron.
B. Mon. (Ky.) . . .	Ben. Monroe's Reports, Court of Appeals, Kentucky.
Bac. Abr. Prerog. . .	Bacon's Abridgment, title Prerogative.
Bac. Abr. Stat. . . .	Bacon's Abridgment, title Statute.
Ball & B.	Ball and Beatty's Reports, Chancery, Ireland.
Barb. Ch. (N. Y.) . .	Barbour's Chancery Reports, New York.
Barb. S. C. (N. Y.) .	Barbour's Supreme Court Reports, New York.
Barbeyr. Puf. . . .	Barbeyrac's Pufendorf de Jure Naturæ et Gentium.
Barn. & Ad.	Barnewall and Adolphus's Reports, King's Bench.
Barn. & Ald. . . .	Barnewall and Alderson's Reports, King's Bench.
Barn. & Cr.	Barnewall and Creswell's Reports, King's Bench.
Barnardiston, Ch. .	Barnardiston's Chancery Reports, Br.
Beav.	Beavan's Reports, Rolls Court, Br.
Best & S.	Best and Smith's Reports, Queen's Bench.
Bing.	Bingham's Reports, Common Pleas, Br.
Bing. N. C.	Bingham's New Cases, Common Pleas, Br.
Biss.	Bissell's Reports, U. S. Circuit and District Courts, 7th Circuit.
Bl. Com.	Blackstone's Commentaries.
Blatchf.	Blatchford's Reports, U. S. Circuit Court, 2d Circuit.
Bligh N. S.	Bligh's Reports, New Series, House of Lords.
Bond	Bond's Reports, U. S. Circuit and District Courts, Southern District of Ohio.
Br.	British.
Bro. C. C.	Brown's Chancery Cases, Br.
Bro. P. C.	Brown's Cases in Parliament.
Burr.	Burrow's Reports, King's Bench.
Bush (Ky.)	Bush's Reports, Court of Appeals, Kentucky.
C.	Chapter.
C. B.	Chief Baron.

C. B.	Common Bench Reports (Manning, Granger, and Scott), Br.
C. B. N. S.	Common Bench Reports, New Series, Br.
C. C.	Chancery Cases.
C. C.	Circuit Court of the United States.
C. J.	Chief Justice.
C. L.	Common Law.
C. P.	Common Pleas.
C. P. D.	Law Reports, Common Pleas Division of the High Court of Justice and the Court of Appeal, Br.
Camp.	Campbell's Reports, Nisi Prius, Br.
Car. II.	Charles the Second.
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, Br.
Car. & P.	Carrington and Payne's Reports, Nisi Prius, Br.
Carter	Carter's Reports, Common Pleas, Br.
Cent. Law Jour.	Central Law Journal, St. Louis, Mo.
Ch.	Chancery.
Ch. D.	Law Reports, Chancery Division of the High Court of Justice and the Court of Appeal, Br.
Chic. Leg. News	Chicago Legal News, Chicago, Ill.
Chit.	Chitty's Reports, King's Bench.
Civil Gov.	Locke's Civil Government.
Cl.	Clause.
Cliff.	Clifford's Reports, U. S. Circuit Court, 1st Circuit.
Cobb. Parl. Hist.	Cobbett's Parliamentary History.
Coke	Coke's Reports, Br.
Coll.	Collyer's Reports, Chancery, Br.
Com. (Bl.)	Blackstone's Commentaries.
Com. (Kent)	Kent's Commentaries.
Com. Dig.	Comyns's Digest.
Com. L. R.	Common Law Reports, Br.
Cong. Globe	Congressional Globe, Washington, D. C.
Const. Hist.	Hallam's Constitutional History.
Const. Lim.	Cooley's Constitutional Limitations.
Construction Stat. & Const. Law	Sedgwick's Construction of Statutory and Constitutional Law.
Coop. *temp.* Cottenham	Cooper's Chancery Reports, time of Lord Cottenham.
Coop. *temp.* Eldon	Cooper's Chancery Cases, time of Lord Eldon.
Cowp.	Cowper's Reports, King's Bench.
Cox	Cox's Cases in Equity, Br.
Cranch C. C.	Cranch's U. S. Circuit Court Reports, District of Columbia.
Curtis	Curtis's Reports, U. S. Circuit Court, 1st Circuit.
Daily Reg. (N. Y.)	Daily Register, New York. N. Y.
Day (Conn.)	Day's Reports, Supreme Court of Errors, Connecticut.
Deady	Deady's Reports, U. S. Circuit and District Courts, Oregon and California.
De G. & J.	De Gex and Jones's Reports, Chancery, Br.
De G. M. & G.	De Gex, Macnaghten, and Gordon's Reports, Chancery, Br.
De G. & Sm.	De Gex and Smale's Reports, Chancery, Br.
De Jure B. ac P.	Grotius de Jure Belli ac Pacis.
De Jure Nat. et Gent.	Pufendorf de Jure Naturæ et Gentium.
Dow. & L.	Dowling and Lowndes' Practice Reports, Br.
Dow. & Ry.	Dowling and Ryland's Reports, King's Bench.
Dow. Pr. Cas.	Dowling's Practice Cases, Br.
Drew.	Drewry's Reports, Chancery, Br.
Duer (N. Y.)	Duer's Reports, Superior Court of the City of New York.
East	East's Reports, King's Bench.
Eden	Eden's Reports, Chancery, Br.
Edw. Ch. (N. Y.)	Edwards's Chancery Reports, New York.
Eq.	Equity.
Eq. Jur.	Story's Equity Jurisprudence.
Eq. Rep.	Equity Reports, Br.

Esp.	Espinasse's Nisi Prius Reports, Br.
Exch.	Exchequer.
Exch. Eq.	Exchequer Equity.
Exch. Rep.	Exchequer Reports (Welsby, Hurlstone, and Gordon), Br.
Giff.	Giffard's Reports, Chancery, Br.
Gray (Mass.)	Gray's Reports, Supreme Court, Massachusetts.
Grotius de Jure B. ac P.	Grotius de Jure Belli ac Pacis.
H. L.	House of Lords.
H. L. C.	House of Lords Cases (Clark).
Hall & Tw.	Hall and Twells's Reports, Chancery, Br.
Hallam Const. Hist.	Hallam's Constitutional History.
Hans. Parl. Deb.	Hansard's Parliamentary Debates.
Har. & W.	Harrison and Wollaston's Reports, King's Bench.
Hare	Hare's Reports, Chancery, Br.
Harring. (Del.)	Harrington's Reports, Superior Court and Court of Errors and Appeals, Delaware.
Hem. & M.	Hemming and Miller's Reports, Chancery, Br.
Hodges	Hodges' Reports, Common Pleas, Br.
Holmes	Holmes's Reports, U. S. Circuit Court, 1st Circuit.
Hopk. Ch. (N. Y.)	Hopkins's Chancery Reports, New York.
How.	Howard's Reports, United States Supreme Court.
How. Pr. (N. Y.)	Howard's Practice Reports, New York.
Hurl. & C.	Hurlstone and Coltman's Reports, Exchequer, Br.
Hurl. & N.	Hurlstone and Norman's Reports, Exchequer, Br.
Ill.	Illinois Reports, Supreme Court.
Inst.	Coke's Institutes.
Inst. of Nat. Law	Rutherforth's Institutes of Natural Law.
Int. Rev. Rec.	Internal Revenue Record, New York, N. Y.
Ir. Ch.	Irish Chancery Reports.
Ir. Eq.	Irish Equity Reports.
Ir. Law Rep. n. s.	Irish Law Reports, New Series.
Jac.	Jacob's Reports, Chancery, Br.
Jac. II.	James the Second.
Jac. & W.	Jacob and Walker's Reports, Chancery, Br.
Johns. & H.	Johnson and Hemming's Reports, Chancery, Br.
Johns. Rep. (N. Y. 2d ed.)	Johnson's Reports, Supreme Court, New York, 2d edition.
Jones & Sp.	Jones and Spencer's Reports, Superior Court of the City of New York.
Jur.	Jurist, London.
Jur. n. s.	Jurist, New Series, London.
Kay	Kay's Reports, Chancery, Br
Kay & J.	Kay and Johnson's Reports, Chancery, Br.
K. B.	King's Bench.
Ken.	Kenyon's Reports, King's Bench.
Kent Com.	Kent's Commentaries.
L. J.	Lord Justice.
L. J. Ch.	Law Journal, Chancery, London.
C. P.	Common Pleas.
K. B.	King's Bench.
L. J. n. s. Ch.	Law Journal, New Series, Chancery, London.
C. L.	Common Law.
C. P.	Common Pleas.
Exch.	Exchequer.
Exch. Eq.	Exchequer Equity.
Q. B.	Queen's Bench.
L. T. n. s.	Law Times, New Series, or Law Times Reports, London.
L. T. R.	Law Times (Old Series), London.
L. & Eq. Reporter	Law and Equity Reporter, New York, N. Y.
Law Rep. Ch.	Law Reports, Chancery Appeal.
C. P.	Common Pleas.
Eq.	Equity.
Exch.	Exchequer.

Law Rep. H. L.	Law Reports, House of Lords.
Q. B.	Queen's Bench.
Stat.	Statutes.
Law Reporter	Law Reporter, Boston, Mass. (See Monthly Law Reporter.)
Leg. Gaz.	Legal Gazette, Philadelphia, Pa.
Leg. Int.	Legal Intelligencer, Philadelphia, Pa.
Lib.	Book.
Locke Civ. Gov.	Locke's Civil Government.
Lofft	Lofft's Reports, King's Bench.
McLean	McLean's Reports, U. S. Circuit Court, 7th Circuit.
Mac. & G.	Macnaghten and Gordon's Reports, Chancery, Br.
Macq.	Macqueen's Reports, House of Lords, Scotch Appeals.
Man. & Gr.	Manning and Granger's Reports, Common Pleas, Br.
Martin (Orleans T.)	Martin's Orleans Term Reports.
Mason	Mason's Reports, U. S. Circuit Court, 1st Circuit.
Mass.	Massachusetts Reports, Supreme Court.
Maugham Laws of Lit. Prop.	Maugham's Laws of Literary Property.
Maule & S.	Maule and Selwyn's Reports, King's Bench.
Me.	Maine Reports, Supreme Court.
Mees. & W.	Meeson and Welsby's Reports, Exchequer, Br.
Meriv.	Merivale's Reports, Chancery, Br.
Mich.	Michigan Reports, Supreme Court.
Minn.	Minnesota Reports, Supreme Court.
Mod.	Modern Reports, King's Bench.
Monthly Law Rep.	Monthly Law Reporter, Boston, Mass. (Continuation of the Law Reporter.)
Moody & R.	Moody and Robinson's Reports, Nisi Prius, Br.
Moore	Moore's Reports, Common Pleas, Br.
Moore & Sc.	Moore and Scott's Reports, Common Pleas, Br.
Mor. Dict. of Dec.	Morison's Dictionary of Decisions, Scotland.
Mor. Dict. of Dec. Lit. Prop. App.	Morison's Dictionary of Decisions, title Literary Property, Appendix.
M. R.	Master of the Rolls.
My. & Cr.	Mylne and Craig's Reports, Chancery, Br.
Nev. & M.	Nevile and Manning's Reports, King's Bench.
New Rep.	New Reports, Equity and Common Law, Br.
Niles Reg.	Niles's Register, Baltimore, Md.
N. S.	New Series.
N. Y.	New York Reports, Court of Appeals.
N. Y. Leg. Obs.	New York Legal Observer, New York, N. Y.
N. Y. Superior Ct.	New York City Superior Court Reports.
N. Y. Supreme Ct.	New York Supreme Court Reports.
N. Y. Weekly Dig.	New York Weekly Digest, New York, N. Y.
On ap.	On appeal.
Op. Atty-Gen.	Opinions of the Attorney-Generals of the United States.
Paige (N. Y.)	Paige's Chancery Reports, New York.
Paine	Paine's Reports, U. S. Circuit Court, 2d Circuit.
Pa. Law Jour. Rep.	Pennsylvania Law Journal Reports.
Pat. App. Cas.	Paton's Appeal Cases, House of Lords, Scotch Appeals.
Pet.	Peters's Reports, United States Supreme Court.
Petersd. Abr.	Petersdorff's Abridgment.
Phila. (Pa.)	Philadelphia Reports.
Phillips	Phillips's Reports, Chancery, Br.
Pick. (Mass.)	Pickering's Reports, Supreme Court, Massachusetts.
Pittsb. Leg. Jour. n. s.	Pittsburgh Legal Journal, New Series, Pittsburgh, Pa.
P. J.	Presiding Justice.
Plow. Com.	Plowden's Commentaries or Reports, King's Bench.
Pufendorf de Jure Nat. et Gent.	Pufendorf de Jure Naturæ et Gentium.
Q. B.	Queen's Bench.

Q. B.	Queen's Bench Reports.
Rev. Stat.	Revised Statutes of Great Britain.
Ridg. L. & S.	Ridgeway, Lapp, and Schoales's Irish Term Reports.
Rob. (N. Y.)	Robertson's Reports, Superior Court of the City of New York.
Russ.	Russell's Reports, Chancery, Br.
Russ. & My.	Russell and Mylne's Reports, Chancery, Br.
Ryan & M.	Ryan and Moody's Reports, Nisi Prius, Br.
S.	Section.
Sawyer	Sawyer's Reports, U. S. Circuit and District Courts, 9th Circuit.
Sc. Sess. Cas.	Cases in the Court of Session, Scotland.
Scott	Scott's Reports, Common Pleas, Br.
Scott N. R.	Scott's New Reports, Common Pleas, Br.
Sedgwick Construction of Stat. & Const. Law	Sedgwick's Construction of Statutory and Constitutional Law.
Ser.	Series.
Serg. & R. (Pa.)	Sergeant and Rawle's Reports, Supreme Court, Pennsylvania.
Show.	Shower's Reports, King's Bench.
Sim.	Simons's Reports, Chancery, Br.
Sim. n. s.	Simons's Reports, New Series, Chancery, Br.
Sim. & St.	Simons and Stuart's Reports, Chancery, Br.
Skin.	Skinner's Reports, King's Bench.
Stark.	Starkie's Reports. Nisi Prius, Br.
Story	Story's Reports, U. S. Circuit Court, 1st Circuit.
Story's Eq. Jur.	Story's Equity Jurisprudence.
Swans.	Swanston's Reports, Chancery, Br.
Sweeny (N. Y.)	Sweeny's Reports, Superior Court of the City of New York.
Taml.	Tamlyn's Reports, Rolls Court, Br.
Tan. Dec.	Taney's Decisions, U. S. Circuit Court, District of Maryland.
T. R.	Term Reports (Durnford and East), King's Bench.
U. S.	United States.
U. S. Pat. Off. Gaz.	Official Gazette of the United States Patent Office, Washington, D. C.
U S. Rev. St.	United States Revised Statutes.
U. S. St. at L.	United States Statutes at Large.
V. C.	Vice-Chancellor.
Ves.	Vesey's (Junior) Reports, Chancery, Br.
Ves. & B.	Vesey and Beames's Reports, Chancery, Br.
Vict.	Victoria.
Victorian Law Rep.	Victorian Law Reports, Australia.
Vin. Abr. Stat.	Viner's Abridgment, title Statute.
Wall.	Wallace's Reports, United States Supreme Court.
Wall. Jr.	Wallace, Jr.'s Reports, U. S. Circuit Court, 3d Circuit.
Wash. C. C.	Washington's Circuit Court Reports, United States, 3d Circuit.
W. Bl.	Sir William Blackstone's Reports, King's Bench and Common Pleas.
W. & M.	William and Mary.
W. R.	Weekly Reporter, London.
Weekly Notes of Cases	Weekly Notes of Cases, Philadelphia, Pa.
Wend. (N. Y.)	Wendell's Reports, Supreme Court, New York.
West. Law Jour.	Western Law Journal, Cincinnati, Ohio.
Wils. C. C.	Wilson's Chancery Cases, Br.
Woodb. & M.	Woodbury and Minot's Reports, U. S. Circuit Court, 1st Circuit.
Y. & C. Exch.	Younge and Collyer's Reports, Exchequer Equity, Br.

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		22 W. R. 750.	
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White *v.* Geroch	1819	2 Barn. & Ald. 298 1 Chit. 24.	142, 144, 176, 290.
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v. Wilson	. . .	Cited 1 Mac. & G. 46	538.

THE

LAW OF COPYRIGHT AND PLAYRIGHT.

THE LAW

OF

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THE ORIGIN AND NATURE OF LITERARY PROPERTY.

When Anne was Queen of England, Parliament passed An Act for the Encouragement of Learning, which declared that an author should have the sole right of publishing his book for a named term of years, and prescribed penalties against piracy. Whether the origin of copyright is to be found in this legislation or in the common law; whether the common-law right, if it existed, was taken away or abridged by the statute; whether since 1710, when the 8 Anne, c. 19, became a law, copyright in a published work has existed only by statute, — are questions which have divided the opinions of jurists and statesmen for more than a century. For half a century after the act of Anne was passed, the chancery courts, in administering the law, did not doubt that, by the common law and independently of legislation, there was property of unlimited duration in printed books. In 1769, this principle was affirmed by the Court of King's Bench.[1] Five years later, the House of Lords, on an equal division of the judges, declared that the common-law right, after publication, had been taken away by the statute of Anne, and that authors had no rights in their published works except under that act.[2] This has since been the law of England. The English statute was copied by Congress in 1790, and the construction put upon it by the House of Lords was followed by the Supreme Court of the United States in 1834.[3] Some of the ablest jurists of England and America have con-

[1] Millar *v.* Taylor, 4 Burr. 2303.
[2] Donaldson *v.* Becket, 4 Burr. 2408.
[3] Wheaton *v.* Peters, 8 Pet. 591.

tended that this exposition of the law is wrong; others have maintained that it is right.

The discussion of the subject has given rise to four theories concerning the nature of copyright: —

First. That intellectual productions constitute a species of property founded in natural law, recognized by the common law, and neither lost by publication nor taken away by legislation.

Second. That an author has, by common law, the exclusive right to control his works before, but not after, publication.

Third. That this right is not lost by publication, but is destroyed by statute.

Fourth. That copyright is a monopoly of limited duration, created and wholly regulated by the legislature; and that an author has, therefore, no other title to his published works than that given by statute.

The chief question to be determined is, whether copyright is a natural right of property, based on and governed by the same general principles which underlie all property; or whether it is an artificial right, — a monopoly which has been created by the legislature, and may at any time be swept away by the same power. The true solution of this problem can be reached only by an examination of the fundamental principles on which the right of property rests. The questions to be considered are these: —

I. Has an author, by the common law, a property in his intellectual productions?

II. Is such property lost by publication?

III. May it rightfully be taken from the owner by the legislature?

IV. Has it been taken away or abridged by statute?

All the great writers on natural law agree in placing the origin of property in preoccupancy. They differ in the grounds and reasons advanced in support of this theory. Grotius and Pufendorf hold that this right is based on social compact; that there must have been a previous implied assent, or tacit agreement, that the first occupant should become the owner. Barbeyrac, Titius, Locke, Blackstone, and others maintain that such tacit agreement is not necessary, and that the right was

created by the act of occupancy alone. All, however, reach the same conclusion, that, in that early age, when all land was common, each person became entitled to hold to his own exclusive use that which he first occupied.[1] This act vested in one man a right which was respected by his fellows, and gave birth to ownership. And this was the theory of the Roman jurisconsults.[2]

Preoccupancy is first possession; and this is given by creation, by production. The creator is the first possessor of that which he creates. In labor, then, is found the origin of the right to property. Occupancy implies labor. It implied labor in the beginning; for to take and hold possession of a part of the unoccupied land were impossible without bodily exertion. Still more was physical effort required in later times, when occupancy represented distance overcome, toils endured, and dangers passed. Indeed, Locke, Barbeyrac, Titius, and others expressly hold that the principle of occupancy is based on labor.[3] In commenting on the statement of Paulus, the Ro-

[1] Grotius de Jure B. ac P. lib. ii. c. 2, 3; Pufendorf de Jure Nat. et Gent. lib. iv. c. 4, 6; Locke, Civil Gov. c. 5; 2 Bl. Com. c. 1.

[2] Maine Ancient Law, c. 8.

[3] Barbeyr. Puf. lib. iv. c. 4, § 4, n. 4; 2 Bl. Com. c. 1.

Locke's theory, that labor is the origin of the right of property, is thus explained in his own language:—

"Though the earth and all inferior creatures be common to all men, every man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labor with and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labor something annexed to it that excludes the common right of other men. For, this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to; at least where there is enough, and as good, left in common for others.

"Thus this law of reason makes the deer that Indian's who hath killed it; it is allowed to be his goods who hath bestowed his labor upon it; though, before, it was the common right of every one. And amongst those who are counted the civilized part of mankind, who have made and multiplied positive laws to determine property, this original law of nature, for the beginning of property, in what was before common, still takes place; and, by virtue thereof, what fish any one catches in the ocean, — that great and still remaining common of mankind, — or what ambergris any one takes up here, is, by the labor that removes it out of that common state nature left it in, made his property who takes that pains about it. And, even amongst us, the hare that any one is hunting is thought his who pursues her during the chase; for, being a beast that is still looked upon as common and no man's private possession, whoever has employed so much labor about any of

man lawyer, that creation — which implies labor — is an original mode of acquiring property, Grotius thought that this, instead of being classed as a distinct and peculiar mode of acquisition, should be referred to that of occupancy.[1]

We find, then, the principle of labor expressly advanced by some of the public jurists to explain the origin of property, not denied by others, and in harmony with the theories of all. And this has continued a fundamental principle, both in theory and practice, throughout the entire history of property. The principle is as old as property itself, that what a man creates by his own labor, out of his own materials, is his to enjoy to the exclusion of all others. It is based not only on natural right, but also on the necessities of society, being essential to the promotion of industry. Before the time of written law, Abraham maintained his right to a well because he had "digged this well;"[2] and, more than a century later, his son Isaac successfully claimed it as his father's property.[3] Even the savage claims for himself the game which he has secured by his own toil, — the fishes which he has caught, the trees which he has felled, and the acorns which he has picked up under the oak. As Locke says, "The grass my horse has bit, the turfs my servant has cut, and the ore I have digged, in any place where I have a right to them in common with others, become my property, without the assignation or consent of anybody. The labor that was mine removing them out of that common state they were in hath fixed my property in them."[4] And, where the science of law has attained its highest state, there is no purer, stronger, better title to property than that acquired by production. To him belongs the harvest whose toil has produced it; to him, the fruit who has planted the tree. This is the natural mode of acquiring property; while succession, purchase, gift, are derivative. It is not only the oldest, but the most meritorious; because what is held by this title must have been earned by the sweat of the brow, while acquisition by purchase, gift, or inheritance, is not inconsistent with

that kind as to find and pursue her, has thereby removed her from the state of nature wherein she was common, and hath begun a property." Civil Gov. c. 5.

[1] De Jure B. ac P. lib. ii. c. 3.
[2] Gen. xxi. 30.
[3] Gen. xxvi. 15, 18.
[4] Civil Gov. c. 5, § 28.

idleness. "The most natural claim to a thing," says Rutherforth, "seems to arise from our having made it; for no one appears to have so peculiar a right in it as he who has been the immediate cause of its existence."[1]

Ownership, then, is created by production, and the producer becomes the owner. This principle is general, and covers all productions, — the whole field of labor. It cannot be applied to the produce of one kind of labor, and withheld from that of another. It matters not whether the labor be of the body or of the mind. The yield of both comes under the same fundamental principle of property, which recognizes no distinction between the poet and the peasant in the ownership of their productions. No theory, no explanation, no consideration, has been advanced by the great writers to account for the inviolability of property in the produce of bodily labor, which does not apply with equal force and directness to property in the fruits of intellectual industry. No vital qualities have been assigned to one which are not equally inherent in the other. All the attributes and conditions marked out by Pufendorf as essential to the constitution of property are found in intellectual productions.[2] In other words, neither in its origin nor in its essential qualities is literary property *sui generis;* but it is simply a division, a species, of general property. It is subject to all the fundamental rules governing the acquisition, possession, and transmission of property. It is acquired by labor, succession, gift, purchase; transmitted by sale, donation, bequest; lost by abandonment. It may be injured, stolen, borrowed and lent, mortgaged and pawned. It may be the subject of contract, bargain, trade, fraud. Published, it may be seized by creditors. Disraeli says you may fill warehouses and freight ships with it.[3]

[1] Inst. of Nat. Law, b. i. c. 3, § 11.

[2] De Jure Nat. et Gent. lib. iv.

[3] "The origin of the property is in production. As to works of imagination and reasoning, if not of memory, the author may be said to create; and, in all departments of mind, new books are the product of the labor, skill, and capital of the author. The subject of property is the order of words in the author's composition: not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined; nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation. The nature of the right of an author in his works is analogous to the rights of ownership in other personal property." Erle, J., Jefferys *v.* Boosey, 4 H. L. C. 867. "A production of the mind

That there is an important dividing-line between property in the results of manual and in those of intellectual labor is clear. The former is corporeal; the latter, without material substance. Literary property is not in the material which preserves the author's production, and is the means of its communication to others, but in the intellectual creation, which is composed of ideas, conceptions, sentiments, thoughts. It is in what is conveyed by the words of the manuscript or the printed page, and not in the paper or parchment. It is in an invisible, intangible creation of the mind, fixed in form and communicated to others by language. Incorporeal itself, it is generally attached to the corporeal.

It has been maintained that material substance is an essential attribute of property, — that nothing can be the subject of ownership which is not corporeal. This is an error which has arisen from the assumption that materiality is essential to the determination of the identity of a thing. It is clear that a thing must be capable of identification, in order to be the subject of exclusive ownership. But when its identity can be determined so that individual ownership may be asserted, it matters not whether it be corporeal or incorporeal. The spirit both of natural and of artificial law is to assign an owner to every thing capable of ownership. The very meaning of the word "property" in its legal sense is "that which is peculiar or proper to any person; that which belongs exclusively to one." The first meaning of the word from which it is derived — *proprius* — is "one's own." Property in what is written on paper, as wholly distinct from that in the paper itself, is expressly conceded by Pufendorf; who denounces the doctrine of the Roman lawyers, that, when one man wrote any thing on the parchment of another, the writing belonged to the owner of the blank material, on the ground that "the writing is of more worth than the paper."[1]

Whatever, then, having the other requisites of property, can be identified, becomes a proper subject of ownership. This

is property in every essential sense in which a production of the hands is the producer's property." Robertson, J., Grigsby *v.* Breckinridge, 2 Bush (Ky.), 485.

[1] De Jure Nat. et Gent. lib. iv. c. 7, § 7.

attribute is found no less marked in intellectual than in manual productions. The identity and ownership of the former can be determined as easily and precisely as those of the latter. "I confess I do not know," said Mr. Justice Aston, "nor can I comprehend, any property more emphatically a man's own, nay, more incapable of being mistaken, than his literary works."[1] The absurdity of arguing that the poetry of Tennyson cannot be distinguished from that of Longfellow, or the prose of Carlyle from that of Emerson, would seem to be sufficiently apparent. And yet the corner-stone of the theory that there can be no property in intellectual productions was laid a century ago, by an English judge, on the error that such productions, being incorporeal, are "not capable of distinguishable proprietary marks;" and therefore cannot be the subject of property, since ownership cannot be determined.[2] Indeed, so complete may be the identity of an incorporeal literary composition, that, even when it has no existence in writing or print, it may be preserved in its entirety for ages in the memory; passing from generation to generation, from country to country. The composer will conceive and give expression to a musical composition without putting a note on paper. It is a creation, without material form, in the realm of the imagination; but so complete is its incorporeal, invisible form, so marked its individuality, so distinctly perceptible to the musical mind, that another will reproduce it "by ear," without the aid of written or printed notes.

Corporeal possessions perish; but time does not destroy or efface what is best in literature. The intellectual creations of the Romans have come to us, through twenty centuries, more completely preserved than their temples; and, while many of their monuments of stone and brass can no longer be distin-

[1] Millar *v.* Taylor, 4 Burr. 2345.

"The identity of a literary composition," says Sir William Blackstone, "consists entirely in the sentiment and the language: the same conceptions, clothed in the same words, must necessarily be the same composition; and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no man (it hath been thought) can have a right to exhibit it, especially for profit, without the author's consent." 2 Com. 406.

[2] Yates, J., Millar *v.* Taylor, 4 Burr. 2365–2366.

guished, the identity of their intellectual monuments, small even as the gems of Horace, remains whole. That greatest creation of ancient genius, the Iliad, has not only preserved its identity through nearly thirty centuries, but, according to Jacobs and other Greek scholars, it was recited from memory at the Greek festivals for ages before it was "imprisoned in written characters." [1]

What Effect has Publication on the Author's Rights?

It may, then, be assumed that before publication an author has, in the fruits of his intellectual labor, a property as whole and as inviolable as that which exists in material possessions; that he has supreme control over such productions, may exclude others from their enjoyment, may dispose of them as he pleases. It is generally conceded that the author has this right while the work is in manuscript. But it has been argued that publication is an abandonment of the work to the public; that as soon as published it becomes *publici juris*, and the author's

[1] "With respect to the first of these grounds, that copyright cannot be the subject of property, inasmuch as it is a mental abstraction too evanescent and fleeting to be property, and as it is a claim to ideas that cannot be identified, nor be sued for in trover or trespass, the answer is, that the claim is not to ideas, but to the order of words; and that this order has a marked identity and a permanent endurance. Not only are the words chosen by a superior mind peculiar to itself, but in ordinary life no two descriptions of the same fact will be in the same words, and no two answers to your Lordships' questions will be the same. The order of each man's words is as singular as his countenance; and although, if two authors composed originally with the same order of words, each would have a property therein, still the probability of such an occurrence is less than that there should be two countenances that could not be discriminated. The permanent endurance of words is obvious, by comparing the words of ancient authors with other works of their day: the vigor of the words is unabated; the other works have mostly perished. It is true that property in the order of words is a mental abstraction: but so also are many other kinds of property; for instance, the property in a stream of water, which is not in any of the atoms of the water, but only in the flow of the stream. The right to the stream is not the less a right of property, either because it generally belongs to the riparian proprietor, or because the remedy for a violation of the right is by action on the case, instead of detinue or trover. The notion of Mr. Justice Yates, that nothing is property which cannot be ear-marked, and recovered in detinue or trover, may be true in an early stage of society, when property is in its simple form, and the remedies for violation of it also simple; but is not true in a more civilized state, when the relations of life and the interests arising therefrom are complicated." Erle, J., Jefferys *v.* Boosey, 4 H. L. C. 868.

property lost, except as far as it may be protected by statute. The effect of this theory is to deny to the author all property except that which he has in the paper on which his thoughts are written. While the manuscript is in his possession, it is his only by virtue of his property in the material; when he parts with his paper, he loses his entire property. Others admit the existence of a property other than that in the paper, but maintain that when published it is taken from the owner by force of the statute.

If by publication this species of property is lost to the owner, it must be on the principle of abandonment or of contract. No other theory has been, and no other can be, advanced. Let us, then, examine each.

No principle of law is more firmly established than that there can be no abandonment of property without the consent of the owner. This is conceded by all the writers on natural law, and denied by none. "A thing is understood to be abandoned," says Grotius, "when it is cast away; unless it appears that it was so cast away only for a time, and with intention to reclaim it."[1] Pufendorf says:—

"To make a thing completely abandoned or forsaken, two points are necessary: first, that the person refuse to own it for the future; and, secondly, that he divest himself of the possession by leaving the thing or casting it away. If either of these conditions be wanting, the property is not vacated. Thus, if I throw a thing by, yet without intention to quit my right in it, I do not prejudice myself by that action. And, on the other hand, though I am resolved utterly to quit my title to a thing, yet, unless I actually cast it off, I am still the proprietor."[2]

In his notes on the same jurist, Barbeyrac adds:—

"To authorize us, then, to look upon a thing as abandoned by him to whom it belonged, because he is not in possession, we ought to have some other reasons to believe that he has renounced his personal right to it. Now, as I have observed, we may presume this in respect to those things which remain such as nature has produced them, especially such as are very numerous or are of a vast extent; though Mr. Titius does not make that distinction, and maintains that one may be master of the sea, although he be not in possession. But as for other

[1] De Jure B. ac P. lib. ii. c. 4, § 4.
[2] De Jure Nat. et Gent. lib. iv. c. 6, § 12.

things, which are the fruits of human industry, and are either produced by nature, or are put into a new form, or are tamed, or are hunted out of their holes, — all this is done with great labor and contrivance, usually; and it can't be doubted but every one would preserve his right to them till he makes an open renunciation; and so they ought to be looked upon as his, though he does not keep them ever after, or he loses the possession by some accident, which may easily happen, and is almost unavoidable."[1]

Even when goods, supposed to be lost, were found, the law, both in ancient and modern times, has jealously guarded the rights of the owner. Pufendorf cites, after Ælian, a law of the Stagirites, which reads, *ἃ μὴ κατέθου μὴ λάμβανε*: "Take not up what you did not lay down."[2] According to Ulpian, it was theft for a person to convert to his own use, *animo lucrandi*, property found, when there was no reason to believe it had been abandoned. Even title by prescription or usucaption, which grows out of long undisturbed possession, is based on the same principle; for the consent of the owner is implied from long neglect to claim his property.

To constitute abandonment, then, there must be intention; without it, there can be no abandonment. Literary and material property are equally governed by this principle. But such intention is expressly denied by the author, who never ceases to claim his rights of ownership. In publishing his book, he maintains a vigilant watch over his property, and loudly protests against its spoliation. The theory of abandonment, therefore, must be rejected.

If, then, the ownership is transferred by publication from the author to the public, it must be by agreement, express or implied. In the language of Pufendorf, "The concurrence of two wills is required, — the giver's and the receiver's."[3] What, then, is the compact between the author and the public? In consideration of a sum of money, the author gives to the reader the means of intellectual improvement or enjoyment contained in a book. Now, a book consists of two elements, — the corporeal and the incorporeal; the material, — paper, printing, binding, — and the thoughts, ideas, sentiments, conceptions,

[1] De Jure Nat. et Gent. lib. iv. c. 6, § 1, n. 1.
[2] Ibid. lib. iv. c. 6, § 12.
[3] Ibid. lib. iv. c. 9, § 2.

which constitute the invisible creation of the mind. The former is simply a channel of communication, a vehicle of conveyance, for the latter. The author impliedly says to the reader: "I will grant you the perpetual privilege of using my literary production in return for a small sum of money, but on condition that you do not injure it and render it worthless, as a source of profit to me, by multiplying and circulating copies. I will provide you with a manuscript or printed copy to enable you to read and enjoy the work. That copy shall be yours to keep for ever, or to dispose of as you please; but in the intellectual contents of the book you have simply a right of use in common with thousands of others. This property and the right of multiplying it I reserve to myself. It is worth twenty thousand dollars; but I will admit you to a common use of it for one dollar."

These terms are accepted by the buyer, who is willing to pay the named price for the enjoyment, instruction, or information to be derived from reading the book. He thus becomes the owner of the entire property in the material substance of the book; and with the book, as such material substance, he may do as he pleases. But in the intellectual contents of the book, — the literary creation, — he acquires a right not of property, but of use. He is simply privileged to make of it certain uses which are implied in the contract. He is entitled to all the enjoyment, improvement, instruction, and information to be derived from reading the book. He may lend the book to be read by another; may sell it, or give it away, or destroy it. That particular copy is his to keep for ever. All these uses are within the terms of purchase, — are covered by the consideration passed. They do not injure the author's property, or depreciate its value. But as the author grants simply the use of his literary production, reserving to himself the exclusive ownership, the buyer may not exercise any proprietary rights, or in any way interfere with the author's property. To multiply copies of the work is a violation of the contract, — a direct invasion of the author's rights, an appropriation of his property, which has no warrant in law, no justification in equity. There is no contract, express or implied, no understanding that the buyer of a copy of the book is a purchaser of the right to multiply

copies. This right may be worth twenty thousand dollars, while the amount given for the book is but one dollar. No consideration is paid for the copyright; and there is a principle of justice older than written law, that property can be acquired only by a valid consideration, or with the owner's consent. To say that property worth twenty thousand dollars may be acquired for one dollar, against the will of the owner, is a violation of the first principle of construing contracts.

The rights which vest in the purchaser of a book have been aptly compared with those acquired by the buyer of a ticket to a place of public amusement. The latter is entitled to all the enjoyment, instruction, and information to be derived from witnessing the performance. He may, perhaps, give or sell his ticket to another, who may enjoy the same advantages in his stead. He has paid for one seat in the theatre, and he may claim the right to use it. But no one will argue that the privilege of using one ticket carries the right to multiply it a thousand-fold; that the holder may print other tickets, and sell them for his own profit; that the right of admission vests any right of property in the theatre or the play. In this case, the ticket-holder is entitled to just what he pays for. So the buyer of a book is entitled to just what he pays for, and no more; and nothing can be clearer than that, in paying for a copy of the book, he does not pay for the copyright.

"All the knowledge which can be acquired from the contents of a book," said Mr. Justice Willes, "is free for every man's use: if it teaches mathematics, physic, husbandry; if it teaches to write in verse or prose; if, by reading an epic poem, a man learns to make an epic poem of his own, — he is at liberty. . . . The book conveys knowledge, instruction, or entertainment; but multiplying copies in print is a quite distinct thing from all the book communicates. . . . And there is no incongruity to reserve that right, and yet convey the free use of all the book teaches." [1]

If the author should furnish the reader with a manuscript copy with the same understanding that is created by the delivery of a printed one, no one would claim that the manuscript might be lawfully published without the consent of the author;

[1] Millar *v.* Taylor, 4 Burr. 2331.

yet the contract is the same in both cases. How, then, can the rights of the parties be changed? As early as 1758, it was held in England that permission given to take a copy of Clarendon's manuscript history did not carry the right to print such copy, even a century after the author's death. The court said that any use might be made of the copy except publication.[1]

According to Grotius, the exclusive right of using and transferring property is a necessary consequence of the recognition of the right of property itself.[2] It is the peculiarity of literary property that only by the multiplication of copies can it have any value to its owner; by publication alone can the author secure the reward of his labor. Without this, his toil is without fruit, his property without value. Can it, then, be a sound principle of law, of ethics, of reason, that property is lost by the very act which alone gives it value? Those who concede to intellectual productions all the essential attributes of property before publication, but insist that such property is destroyed by publication, say in effect to men of letters: "Every man is entitled to the fruits of his labor. You are sole owners of your productions. Your literary property is sacred, and shall continue inviolable *as long as you do not use it;* but beware of publication, which, though the only road to reward, is a certain one to ruin. Your manuscript is yours for all purposes except publication. You may read it, lend it to your neighbor, lock it up in your safe, burn it; but you must keep it from the printer."

Such reasoning is a burlesque, which might be entertaining if it were confined to theory; but reduced to practice, as it has been, it becomes grievously serious.

It is a ridiculous doctrine which recognizes the existence of a species of property, and yet pronounces its only use unlawful and self-destructive. If the property is recognized, a mode of use must be conceded. To say that authors have rights of property in their literary productions, and that they are lost by publication, which is their only source of value, is absurd. It is destructive of the first principles, the essence, the very notion, of the right of property. "Property," says Pufendorf,

[1] Duke of Queensbury *v.* Shebbeare, 2 Eden, 329.

[2] De Jure B. ac P. lib. ii. c. 6, § 1.

"implies a right of excluding others from your possession, which right would be altogether insignificant, if it could not be effectually exercised; 'twould be in vain for you to claim that as your own which you can by no means hinder others from sharing with you." [1]

This view of the law was well expressed a century ago, by a learned English judge, when the Court of King's Bench affirmed the perpetuity of literary property. Mr. Justice Aston said: —

"It is settled and admitted, and is not now controverted, that literary compositions, in their original state, and the incorporeal right of the publication of them, are the private and exclusive property of the author; and that they may ever be retained so; and that, if they are ravished from him before publication, trover or trespass lies. I should be glad to know, then, in such a case, where the property is admitted, how the damages ought to be estimated by a jury. Should they confine their consideration to the value of the ink and paper? Certainly not. It would be most reasonable to consider the known character and ability of the author, and the value which his work, so taken from him, would produce by the publication and sale. And yet, what could that value be, if it was true that the instant an author published his works they were to be considered by the law as given to the public, and that his private property in them no longer existed? The present claim is founded upon the original right to this work, as being the mental labor of the author, and that the effect and produce of the labor is his. It is a personal, incorporeal property, salable and profitable. It has *indicia certa;* for, though the sentiments and doctrine may be called ideal, yet, when the same are communicated to the sight and understanding of every man, by the medium of printing, the work becomes a distinguishable subject of property, and not totally destitute of corporeal qualities.

"Now, without publication, 'tis useless to the owner, because without profit; and property without the power of use and disposal is an empty sound. In that state, 'tis lost to the society in point of improvement, as well as to the author in point of interest. Publication, therefore, is the necessary act and only means to render this confessed property useful to mankind and profitable to the owner. In this they are jointly concerned. Now, to construe this only and necessary act to make the work useful and profitable, to be destructive at once of

[1] De Jure Nat. et Gent. lib. iv. c. 5, § 1.

the author's confessed original property, against his expressed will, seems to be quite harsh and unreasonable. . . .

"But it was said at the bar, 'If a man buys a book, it is his own.' What! is there no difference betwixt selling the property in the work and only one of the copies? To say, 'Selling the book conveys all the right' begs the question. For, if the law protect the book, the sale does not convey away the right, from the nature of the thing, any more than the sale conveys it where the statute protects the book. The proprietor's consent is not to be carried beyond his manifest intent. Would not such a construction extend the partial disposition of the true owner beyond his plain intent and meaning? which, from the principles I have before laid down, is no more to be done in this compact than in the case of borrowing or hiring. Can it be conceived that, in purchasing a literary composition at a shop, the purchaser ever thought he bought the right to be the printer and seller of that specific work? The improvement, knowledge, or amusement which he can derive from the perusal is all his own; but the right to the work, the copyright, remains in him whose industry composed it. The buyer might as truly claim the merit of the composition, by his purchase, in my opinion, as the right of multiplying the copies and reaping the profits.

"The invasion of this sort of property is as much against every man's sense of it as it is against natural reason and moral rectitude. It is against the conviction of every man's own breast who attempts it. He knows it not to be his own; he knows he injures another; and he does not do it for the sake of the public, but *mala fide et animo lucrandi*."[1]

Those who contend that authors can have no property in their published works, except under the statute, lay great stress on the assumed analogy between literary productions and inventions. It is argued that the latter are clearly a monopoly, and therefore the former must be; that inventors are entitled to no rights in the productions of their genius, except those conferred by the patent-laws; and therefore authors have no property in their books other than that secured by the copyright statutes. In considering the nature of literary property, it is not material to determine whether inventions may or may not be the subject of property, or whether they do or do not constitute a monopoly. If they are not

[1] Millar *v.* Taylor, 4 Burr. 2340–2342.

analogous to literary productions, the argument from one to the other does not hold. If there be an analogy, it does not follow that, because property has not been recognized in one, it does not exist in the other. It is a question whether inventions are a proper subject of property. To assume that they are not, and on that assumption argue that the same is true of intellectual productions, is a shallow *petitio principii*. This fallacy has been well exposed by one of the soundest of English lawyers. After maintaining that there is a distinction between literary productions and inventions, Sir William Blackstone says: "But supposing, after all, that there was no real distinction between literary and mechanical compositions, yet the conclusion drawn from this argument is very illogical and unjust. If it be reasonable to allow a property in a literary production (and I submit it is highly so), can we argue thus? Books and machines are of the same nature; no property is allowed in a machine; therefore, none should be allowed in a book. The argument would rather stand thus: Books and machines are of the same nature; property should be allowed in books; and, therefore, it should also be allowed in machines. But, since they are of natures very different, both arguments will fall to the ground." [1]

The principles above set forth are equally applicable to works of the drama, music, sculpture, and painting. Here also the laborer is entitled to the full fruits of his labor. As reward in these cases often comes not from publication in print, but from representation or performance on the stage, or public exhibition, it is also contrary to the first principles of property that ownership should be lost by such public representation, performance, or exhibition. The producer of a drama or a musical composition, a painting or a statue, is entitled to its exclusive public use, whether by circulating copies or by performing or exhibiting the original.

How far Government may Interfere with Literary Property.

Assuming it to be the true doctrine, that literary property, both before and after publication, is founded on the same prin-

[1] Tonson *v.* Collins, 1 W. Bl. 344.

ciples, has the same essential attributes, is the same in every respect, as ordinary property, it necessarily follows that it must be governed by the same fundamental rules, and protected by the same great safeguards that are thrown around all property. Whatever violates the sanctity of one violates the sanctity of the other. How far, then, may the legislature interfere with those material possessions which constitute private property?

To preserve the sanctity of property has ever been a chief function of government. Next to protecting the lives and liberties of the people, it is the highest. Centuries ago, it was foreseen that sovereignty itself was to be feared as the most dangerous enemy of this right. As a bulwark against invasion from this source, the Magna Charta was made to declare that property should not be taken from the owner, except by the "law of the land." The same great guaranty has been sacredly treasured through more than six centuries of English history. It has been firmly implanted in the Constitution of the United States, which declares that private property shall not be taken for public use without just compensation, and in the constitution of every State. There are, however, cases in which the government may rightly interfere with private property against the will of the owner. On the universal principle of eminent domain, recognized by all writers on jurisprudence, and grafted in the constitutional law of America, the property of the individual is subordinate to the general welfare, and may, without his consent, be taken for public uses. But even here the powers of the State are sharply defined and strictly limited; since no property can be taken except for public uses, and none without just compensation.[1] These two conditions — public use and compensation — must always exist. Without either, the taking is unlawful. It is true that the line between what is and what is not a public use has not been clearly drawn. But the use must be open to all persons, — not one, or a few, — and it must be demanded by public necessity, convenience, or welfare. There must exist "the necessity of accomplishing some public good, which is otherwise impracti-

[1] Grotius de Jure B. ac P. lib. iii. c. 19, § 7; c. 20, § 7; Pufendorf de Jure Nat. et Gent. lib. viii. c. 5, §§ 3, 7; 2 Kent, Com. 339, and the authorities there cited; Cooley, Const. Lim. 530, 559.

cable."[1] "That only can be considered" a public use, says a high authority, "where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty (perhaps impossibility) of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide."[2] On this principle, railroads, canals, and highways may be run through rich farms without the owner's consent; capitols, custom-houses, and court-houses built on valuable private lots; levees thrown up; marshes drained; cities supplied with pure water; and other measures of general utility effected.

The legislature may also interfere with private property to abate a nuisance, or to protect persons or property from danger or injury. Again, in the interests of society, certain restrictions as to the succession of the ownership of property, as to the power of the owner to control it by will, may be imposed by positive law.

To these principles literary property is no exception. If a nuisance, it may be abated. If harmful to society, as obscene literature is, it may be seized. If damaging to the property of others, as libellous publications may be, it may be suppressed. If needed for necessary public uses, it may be taken against the will of the owner, who must, however, be compensated. In these respects, it is subject to the same rules and conditions which govern other species of property.

But the legislation which reduces the ownership of literary property from perpetuity to a term of years does not proceed on any of these principles. Such property is not claimed to be a nuisance, or detrimental to the proprietary rights of others. The doctrine of eminent domain has never been pleaded in justification of such legislation. Nor can it be; for the two vital principles of that doctrine — public use and compensation — are wanting. It is true that literature is for the general good of society. In a certain sense, it is for public use; but only in the sense in which all kinds of merchandise and wares may be said to be *pro bono publico*. The use made of

[1] Cooley, J., People *v.* Salem, 20 Mich. 481.
[2] Cooley, Const. Lim. 533.

books is of the same public nature as that made of grain, fuel, textile fabrics, &c. But this is wholly different from that public use which is contemplated by the doctrine of eminent domain. The owners of these commodities cannot rightfully be made to contribute them to the public demand, either with or without compensation, except perhaps in an extreme case not likely to arise. The case of literature is precisely analogous. There is no difference in principle between a statute which requires an author to surrender his works to the public at a prescribed time, and one which would compel the owner of the Mammoth Cave, after a term of years, to admit visitors without charge to view its subterranean wonders; or one which would limit the ownership of mines or fields to a term of years.

Again, no compensation is made for literary property appropriated by statute. Sophistry may assert that statutory protection produces an enhanced value during the term prescribed, and that this is an equivalent for the final loss of the copyright. Conceding, for the sake of the argument, what is not conceded in fact, that there is an increase in value wholly due to the statutes, this cannot be regarded, on any principle of natural or constitutional law, as taking the place of that indemnity which is a vital constituent of the doctrine of eminent domain. This must be not conditional, but absolute; not doubtful, but certain; not left to the future, but determined when the property is taken.[1] It is an established principle of the doctrine of eminent domain, that, when a part of private property is taken for public purposes, the enhanced value thus given to the remainder may be considered in determining the remuneration due the owner; but this affords no analogy to justify the taking of the whole on an undetermined, doubtful, supposititious, or, perhaps, no compensation, as in the case of literary property.

The conclusion, then, is inevitable, that the copyright statute which deprives authors of property in their intellectual productions after a term of years, cannot be defended on any principle which sanctions the taking of private property for public uses, or which justifies the regulation of private property for the common welfare. No one will contend that the State has

[1] 2 Kent, Com. 339; Cooley, Const. Lim. 559 *et seq.*

any right to control proprietary rights in an unpublished work, that it may compel the author to publish his production for the benefit of society. And, yet, to interfere with the author's rights in a manuscript is the same in principle as to regulate his rights in a printed composition. The right of property is the same after as before publication. It is as inviolable in one case as in the other.

Has the Common-law Property in Published Works been Taken Away by the Legislature?

I have endeavored to show that the ownership of literary property is perpetual by the common law, and that it cannot rightly be taken away or abridged by the legislature. It remains to be considered whether it has been so taken away or abridged. That the acts of Parliament and of Congress have been judicially construed to have this effect, and that this construction is the settled law of England and of the United States, is well known. The examination of the subject, then, involves the inquiry, whether the law has been rightly expounded by the courts. It will be necessary to consider the statute of Anne alone.[1] No English or American statute since passed has by express words taken away the common-law copyright in a book; and, in interpreting the meaning of the several acts, the courts have simply adopted the judicial construction given to the statute of Anne by the House of Lords in 1774.

It is a fact which may be regarded as judicially conceded, that copyright in printed books was not created by legislation, but that it existed by the common law long before, and when the statute of Anne was passed.[2] This doctrine was declared by the King's Bench in Millar *v.* Taylor;[3] and it has never been judicially overruled. It was expressly approved by a majority of the judges in Donaldson *v.* Becket;[4] and was in effect affirmed in that case by the House of Lords, whose judgment was not, that copyright had been created by the statute of Anne, but that the common-law right had been superseded by the statutory. The Parliament of Anne, therefore, in passing a law for the protection of literary property, was dealing with

[1] 8 Anne, c. 19.
[2] See History of Literary Property, *post*, pp. 58–68.
[3] 4 Burr. 2303.
[4] Ibid. 2408.

an existing, recognized right; and the statute affords ample internal evidence that this fact was clearly known and acted on by the members.[1] It is a settled principle of construction, that a statute cannot rightly be interpreted as taking away a common-law right, unless express words are used for that purpose, or a clear intention to that effect is apparent.[2] It cannot be successfully claimed that the statute of Anne by express language destroyed the common-law right. Had this been so, the contrary construction could not have been given to the act by the courts during more than half a century after its passage, and its meaning could not have been the subject of so much doubt and learned discussion. The sole ground, then, on which the statute could be construed as taking away or abridging the common-law right was a clearly implied intention of Parliament to that effect. That such intention was not clearly implied is shown by the following facts: —

1. For half a century after the statute became a law, it was the uniform practice of the chancery courts to grant injunctions protecting the common-law property in printed books in which the statutory copyright had expired.[3] Had there been any ground for the belief that Parliament had intended to destroy the common-law right, or any reasonable doubt as to the meaning of the statute, no injunction of this kind would have been granted.[4] "Every adjudication upon the act since it was passed," said Mr. Justice Willes in 1769, "is an authority that there never was an idea that this act had decided against the property of authors at common law."[5]

[1] "The particular wording of the enacting clause is very material, as it precisely adopts the identical expressions used in the decrees, ordinances, and statutes referred to; alike speaking of the right of authors as a known, subsisting, transferable property. I am not satisfied with saying that such right may be implied from the words: they are so express that the legislature cannot be otherwise understood than as speaking of a known property. 'The copy of the book,' 'the title to the copy,' is a technical recognition of the right, in the words of the act." Aston, J., Millar *v.* Taylor, 4 Burr. 2350.

[2] Sedgwick, Construction of Stat. & Const. Law, 75, 342; Potter's Dwarris on Statutes, 185, 219.

[3] See *post*, pp. 70, 71.

[4] "There never was a doubt in the Court of Chancery, till a doubt was raised there from decency upon a supposed doubt in this court in the case of Tonson and Collins [brought in 1760]. There is not an instance of an injunction refused, till it was refused upon the grounds of that doubt. The Court of Chancery never grants injunctions, in cases of this kind, where there is any doubt." Lord Mansfield, Millar *v.* Taylor, 4 Burr. 2400.

[5] Ibid. 2384.

2. In the three law cases, Tonson *v.* Collins,[1] Millar *v.* Taylor,[2] and Donaldson *v.* Becket,[3] in which the defendants sought to show that there was no copyright in printed books except under the statute, the chief ground on which this theory was based was, not that the common-law right had been taken away or abridged by the statute, but that copyright was created by the statute, and hence did not exist by the common law. This reasoning would not have been advanced, if the intention of Parliament to abridge an existing right had been clear.

3. In Millar *v.* Taylor, the King's Bench, on the opinion of three of its four judges, decided that the statute of Anne did not take away the common-law right.

4. Six of the twelve judges, including Lord Mansfield, in Donaldson *v.* Becket were of the same opinion.

This evidence is conclusive that there was neither an expressed nor a clearly implied intention to interfere with the common-law right.

The effect which Parliament intended that the statute should have, can be satisfactorily determined by considering the purpose for which the act was needed, and for which it was passed. The most direct and valuable evidence on this point is afforded by the petitions which were made by booksellers to Parliament, and in answer to which the law was enacted. That of 1709, which immediately preceded the introduction of the bill, expressly set forth the fact that copyright was recognized by the common law, and that a remedy was afforded by the common law for its protection. But this remedy was inadequate. What was wanted, and what was asked for, was a more effective remedy, — a speedier and more direct means of protecting literary property and punishing pirates than that afforded by the uncertain, cumbersome machinery of the common law.[4]

[1] 1 W. Bl. 301, 321.
[2] 4 Burr. 2303.
[3] Ibid. 2408.
[4] "This act was brought in at the solicitation of authors, booksellers, and printers, but principally of the two latter; not from any doubt or distrust of a just and legal property in the works or copyright (as appears by the petition itself, p. 240, vol. xvi., of the Journal of the House of Commons), but upon the common-law remedy being inadequate, and the proofs difficult to ascertain the damage really suffered by the injurious multiplication of the copies of those books which they had bought and published. And this appears from the case they presented to the members at the time. All the sanction they could obtain was a protection

To these appeals for additional protection for property, whose ownership was of unlimited duration, it is not likely that Parliament would respond by reducing that ownership to a short term of years, and by imposing upon authors the oppressive tax from which they were free under the common law, of giving to public libraries nine copies of every book published. It is hardly conceivable that, under these circumstances, they would pass a measure so important as one sweeping away a long-existing right of property, without expressing such intention in the most unmistakable language. Parliament avowedly legislated in the interests of literature, and for the better protection of literary property. If it had been intended to destroy or abridge the existing rights of authors, it would have been mockery to entitle the statute An Act for the Encouragement of Learning, and to declare that it was designed "for the encouragement of learned men to compose and write useful books." The prayer of the petitioners was that "confiscation of counterfeit copies be one of the penalties to be inflicted on offenders."[1] Parliament was thus plainly asked to provide penalties against piracy, in addition to the remedies afforded by

of their right, by inflicting penalties on the wrong-doer." Aston, J., Millar *v.* Taylor, 4 Burr. 2350.

The petition presented Dec. 12, 1709, set forth, "That it has been the constant usage for the writers of books to sell their copies to booksellers or printers, to the end they might hold those copies as their property, and enjoy the profit of making and vending impressions of them; yet, divers persons have of late invaded the properties of others, by reprinting several books, without the consent, and to the great injury, of the proprietors, even to their utter ruin, and to the discouragement of all writers in any useful department of learning." 16 Commons' Journal, 240.

Among the reasons given in support of the application for a bill was the following: "The liberty now set on foot of breaking through this ancient and reasonable usage is no way to be effectually restrained but by an act of Parliament. For by common law a bookseller can recover no more costs than he can prove damage; but it is impossible for him to prove the tenth, nay, perhaps the hundredth, part of the damage he suffers; because a thousand counterfeit copies may be dispersed into as many different hands all over the kingdom, and he not able to prove the sale of ten. Besides, the defendant is always a pauper; and so the plaintiff must lose his costs of suit. No man of substance has been known to offend in this particular; nor will any ever appear in it. Therefore the only remedy by the common law is to confine a beggar to the rules of the King's Bench or Fleet; and there he will continue the evil practice with impunity. We therefore pray that confiscation of counterfeit copies be one of the penalties to be inflicted on offenders." 4 Burr. 2318.

[1] Ibid.

the common law. They passed a law for that purpose. There is nothing in the statute, nothing in any contemporaneous record, showing that the legislature had any other purpose in view.

The declaration in the statute that the author of a book, or his assign, shall have the sole right of printing it for a specified period, "and no longer," has been cited to show that Parliament intended to restrict the ownership of literary property to a term of years. But the words, "and no longer," apply only to the penalties prescribed by the statute, and cannot rightly be construed as affecting the common-law right or remedies. The right to sue for the statutory penalties was given for a term of years, "and no longer;" but, both during this term and after its expiration, the common-law remedies remained unimpaired. "The words, 'no longer,'" said Lord Mansfield, "add nothing to the sense, which is exactly the same whether these words are added or not."[1]

If it had been intended to destroy the common-law right, and to make the statutory the only protection for literary property, not only would this purpose have been made clear beyond doubt and dispute, but the provisions of the statute would have been very different. The statutory means for protection would have been at least as complete as those afforded by the common law. The ordinary remedies by injunction and by action for damages would have been expressly provided. The facts that the only remedies given were penalties, that the forfeited copies were not to be given to the injured owner, but were to be destroyed, and that the money penalty might be recovered, not exclusively by the person aggrieved, but by a common informer, are in harmony with the construction that the statute was not designed to disturb the common-law rights and remedies. They are not reasonably consistent with the view that Parliament, in passing the statute, intended to take away the common-law right.

So far was it from the intention of Parliament to interfere with the existing rights and remedies of authors, that a declaration was put into the statute, which, in the opinion of three

[1] 4 Burr. 2406. "What the act gives with a sanction of penalties is for a term; and the words, 'and no longer,' add nothing to the sense, any more than they would in a will, if a testator gave for years." Willes, J., Ibid. 2353.

of the four judges in Millar *v.* Taylor, was intended expressly to save the common-law right, and to guard against the possibility of the statute being construed to take away that right. Section 9 declared "that nothing in this act contained shall extend, or be construed to extend, to prejudice or confirm any right that the said universities, or any of them, or any person or persons, have, or claim to have, to the printing or reprinting any book or copy already printed or hereafter to be printed." "It has been said," remarked Mr. Justice Aston, "that this was inserted that the rights which the universities or others had under *letters-patent* might not be affected. There can be no ground for this; for the act does not at all meddle with letters-patent, or enact a title that could either prejudice or confirm them. This proviso seems to be the effect of extraordinary caution that the rights of authors at common law might not be affected; for, if it had not been inserted, I apprehend clearly, they could not have been taken away by construction, but the right and the remedy would still remain unaffected by the statute." [1]

If the reasoning which has here been followed be correct, the only sound conclusions are these: —

[1] 4 Burr. 2352. "Had there been the least intention," said Lord Mansfield, "to take or declare away every pretence of right at the common law, it would have been expressly enacted, and there must have been a new preamble, totally different from that which now stands. But the legislature has not left their meaning to be found out by loose conjectures. The preamble certainly proceeds upon the ground of a right of property having been violated, and might be argued from as an allowance or confirmation of such right at the common law. The remedy enacted against the violation of it, being only temporary, might be argued from as implying there existed no right but what was secured by the act. Therefore, an express saving is added, 'that nothing in this act shall extend or be construed to extend to prejudice or confirm any right,' &c.; 'any right' is manifestly any other right than the term secured by the act. The act speaks of no right whatsoever but that of authors, or derived from them: no other right could possibly be prejudiced or confirmed by any expression in the act. The words of the saving are adapted to this right: 'Book or copy already printed, or hereafter to be printed.' They are not applicable to prerogative copies. If letters-patent to an author or his assigns could give any right, they might come under the generalty of the saving. But so little was such a right in the contemplation of the legislature, that there is not a word about patents in the whole act. Could they have given any right, it was not worth saving; because it never exceeded fourteen years." Ibid. 2406.

"What," asked Mr. Justice Willes, "was the right to be saved, either as to books already printed, or much more as to books hereafter to be printed, but the common-law right? Without this proviso it might fairly have been argued, that there is nothing in this act which can prejudice the property of authors in the copy." Ibid. 2334.

Literary property, like all property, has its origin in natural law, and not in legislation; it is, therefore, a natural and not an artificial right.

It has the same general attributes, is governed by the same general principles, and is subject to the same general conditions, that obtain in the case of all property.

Its ownership, like that of all property, is transferred only with the consent of the owner. It is no more lost by publication than the ownership of land is lost by a grant of the privilege of hunting, felling timber, or digging minerals, within its borders.

The legislature may rightfully interfere with it, only as it may interfere with other property.

In passing the statute of Anne, Parliament did not intend to destroy or prejudice the common-law rights and remedies of authors. The judicial interpretation given to that act by the House of Lords, in 1774, is contrary not only to right and justice, but to the true purpose and meaning of the statute as determined by settled rules of construction.

Judicial History relating to the Origin and Nature of Literary Property.

A review of the judicial history of this subject will show that common-law copyright in published works was recognized by the English courts until 1774; that this principle has been maintained by many of the most learned British jurists; and that the decisions which support the prevailing doctrine rest on one disputed precedent, like a pyramid on its apex.

Prior to the statute of Anne, authors had a perpetual property in their works, by the common law.[1] During half a century after this statute was passed, its meaning was not disputed; it being generally understood that the only purpose and effect of the act was to provide a cumulative remedy against piracy. The Court of Chancery proceeded uniformly on this assumption, and granted, between 1735 and 1752, not fewer than five injunctions restraining piracy of printed books not protected by the statute.[2] The injunctions were granted and

[1] See History of Literary Property, *post*, pp. 58–68.

[2] Eyre *v.* Walker, Motte *v.* Falkner, Walthoe *v.* Walker, Tonson *v.* Walker, cited 4 Burr. 2325; Tonson *v.* Walker, 3 Swans. 672.

acquiesced in on the ground that the ownership of literary property was perpetual by the common law, and had not been taken away or abridged by the statute. These were equity decisions; but, in speaking of their weight, Lord Mansfield said that "the judicial opinions of those eminent lawyers and great men who granted or continued injunctions, in cases after publication, not within 8 Queen Anne, 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. I look upon these injunctions as equal to any final decree."[1] "The whole jurisdiction exercised by the Court of Chancery since 1710," said Mr. Justice Willes in 1769, "against pirates of copies, is an authority that authors had a property antecedent to which the act gives a temporary additional security."[2]

In 1760, the plea was first raised in an English court of law, that the purpose and effect of the statute of Anne were to give to authors a limited monopoly in their productions; that copyright had been created by the statute, and existed only by virtue of it; and that no author had an exclusive right to his book after publication, and consequently no remedy against piracy, except under the statute. This theory found no favor with the judges, who had not, however, the opportunity to expose its unsoundness; for the case was discovered to be one of collusion, and was therefore thrown out of court. But all of the judges are known to have favored the plaintiff.[3]

[1] Millar *v.* Taylor, 4 Burr. 2399. "They considered the act," said Lord Mansfield, "not as creating a new offence, but as giving an additional security to a proprietor grieved; and gave relief without regard to any of the provisions in the act, or whether the term was or was not expired. No injunction can be obtained till the court is satisfied that the plaintiff has a clear legal right. And where, for the sake of the relief, the Court of Chancery proceeds upon a ground of common or statute law, their judgments are precedents of high authority in all the courts of Westminster Hall." Ibid. 2407.

[2] Ibid. 2323.

[3] Tonson *v.* Collins, 1 W. Bl. 301, 321. "I have been informed, from the best authority, that, so far as the court had formed an opinion, they all inclined to the plaintiff." Willes, J., Millar *v.* Taylor, 4 Burr. 2327. In 1765, doubtless in consequence of the legal questions raised but not decided in Tonson *v.* Collins, the Lord Chancellor dissolved the injunction which had been granted against the publication of a book in which the copyright had expired. Osborne *v.* Donaldson, and Millar *v.* Donaldson, 2 Eden, 328. As early as 1748, it was held in Scotland that copyright in a published book

Soon after, the same plea was again offered in defence of piracy. The fact that this was a bold attack upon the citadel of literary property; that the work in controversy was Thomson's Seasons; that in the contest were the first lawyers of the English bar; that Lord Mansfield, then in the noon of his fame, as Chief Justice of the King's Bench, presided over the trial, — make the case of Millar *v.* Taylor one of the most important, as it is one of the most famous, in the English reports. The action was brought in 1766, and was decided by the Court of King's Bench in 1769.[1] The copyright secured by the statute of Anne had expired. The direct issue was raised, whether a right of property in a published work was given by the common law.

The origin and nature of literary property were discussed by the judges in the most elaborate opinions that have ever been pronounced on the subject. The questions considered were: 1. Whether intellectual productions have the attributes of property; 2, whether the exclusive right of an author to multiply copies of his book existed by the common law, and had been recognized prior to the statute of Anne; 3, whether this right is lost by publication; 4, whether it had been taken away or abridged by the statute of Anne.

Three of the four judges — Lord Mansfield, and Justices Aston and Willes — maintained, with a degree of learning and thoroughness that has not since been equalled in the examination of this question, that literary property did exist by the common law, and that its ownership was neither lost by publication nor abridged by the statute of Anne. Their opinions were founded on the general principle underlying all property, that the laborer is entitled to enjoy the fruits of his labor, whether manual or mental, that the common-law existence of literary property was attested by the history of two centuries; that the author's rights could not be prejudiced by publication, which was the only means of rendering his property useful or

did not exist by the common law independently of the statute of Anne. Midwinter *v.* Hamilton, 10 Mor. Dict. of Dec. 8295; on ap. (Midwinter *v.* Kincaid) 1 Pat. App. Cas. 488. To the same effect are Hinton *v.* Donaldson, decided in 1773, 10 Mor. Dict. of Dec. 8307; Cadell *v.* Robertson (1804), Ibid. Lit. Prop. App. 5; on ap. (1811) 5 Pat. App. Cas. 493.

[1] 4 Burr. 2303.

valuable; that the obvious intent of the legislature in framing the act of Anne was to provide a cumulative remedy against piracy, without disturbing the existing right of literary property; and that there was nothing in the act to indicate that such was not its sole object and effect. The sound and enlightened views expressed by Lord Mansfield may well be quoted here: —

"From premises either expressly admitted, or which cannot and therefore never have been denied, conclusions follow, in my apprehension, decisive upon all the objections raised to the property of an author in the copy of his own work, by the common law. I use the word 'copy' 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. 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 incorporeal 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. . . .

"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 for ever, though neither the author nor his representatives should have any manuscript whatsoever of the work, — original, duplicate, or transcript. . . .

"If the copy belongs to an author after publication, it certainly belonged to him before. But, if it does not belong to him after, where is the common law to be found which says there is such a property before? All the metaphysical subtleties from the nature of the thing may be equally objected to the property before. It is incorporeal; it relates to ideas detached from any physical existence. There are no *indicia*; another may have had the same thoughts upon the same subject, and expressed them in the same language, *verbatim*. At what time and by what act does the property commence? The same string

of questions may be asked upon the copy before publication. Is it real or personal? Does it go to the heir or to the executor? Being a right which can only be defended by action, is it, as a *chose in action*, assignable or not? Can it be forfeited? Can it be taken in execution? Can it be vested in the assignees, under a commission of bankruptcy?

"The common law as to the copy before publication cannot be found in custom. Before 1732, the case of a piracy before publication never existed; it never was put or supposed. There is not a syllable about it to be met with anywhere. The regulations, the ordinances, the acts of Parliament, the cases in Westminster Hall, all relate to the copy of books after publication by the authors. Since 1732, there is not a word to be traced about it, except from the four cases in chancery. . . .

"From what source, then, is the common law drawn, which is admitted to be so clear in respect of the copy before publication? From this argument: 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. 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; with other reasonings of the same effect.

"I allow them sufficient to show it is agreeable to the principles of right and wrong, the fitness of things, convenience, and policy, and therefore to the common law, to protect the copy before publication. But the same reasons hold after the author has published. He can reap no pecuniary profit, if, the next moment after his work comes out, it may be pirated upon worse paper, and in worse print, and in a cheaper volume. The 8th of Queen Anne is no answer. We are considering the common law upon principles before and independent of that act. The author may not only be deprived of any profit, but lose the expense he has been at. He is no more master of the use of his own name. He has no control over the correctness of his own work. He cannot prevent additions. He cannot retract errors. He cannot amend or cancel a faulty edition. Any one may print, pirate, and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name which he disapproves, repents, and is ashamed of. He can exercise no discretion as to the manner in which, or the persons by whom, his work shall be published. For these and many more reasons, it seems to me just and fit to protect the copy after publication.

"All objections which hold as much to the kind of property before as to the kind of property after publication, go for nothing; they prove too much. There is no peculiar objection to the property after, except that the copy is necessarily made common after the book is once published. Does a transfer of paper upon which it is printed necessarily transfer the copy, more than the transfer of paper upon which the book is written? The argument turns in a circle: 'The copy is made common, because the law does not protect it; and the law cannot protect it, because it is made common.' The author does not mean to make it common; and, if the law says he ought to have the copy after publication, it is a several property, easily protected, ascertained, and secured. The whole, then, must finally resolve in this question, whether it is agreeable to natural principles, moral justice and fitness, to allow him the copy after publication as well as before. The general consent of this kingdom for ages is on the affirmative side. The legislative authority has taken it for granted, and interposed penalties to protect it for a time."[1]

After the most thorough examination of the general scope and purpose of the statute of Anne, the circumstances under which it was passed, and especially the language employed to express its meaning, the three judges in the majority agreed that to interpret the statute as creating a right for a term of years, or as destroying an existing right, was contrary to the obvious intent of the legislature, the plain meaning of the act, and the most natural and established rules of construing statutes. Lord Mansfield thought that it was "impossible to imply this act into an abolition of the common-law right, if it did exist; or into a declaration that no such right ever existed. . . . Had there been the least intention to take or declare away every pretence of right at the common law, it would have been expressly enacted; and there must have been a new preamble, totally different from that which now stands."[2]

Mr. Justice Yates, dissenting from the conclusions reached by his associates, argued that there could be no property in intellectual productions; that the sole right of an author to the copy of his published works was unknown in England before the statute of Anne; and that copyright was a limited monopoly created, and wholly regulated, by that act.

[1] 4 Burr. 2396–99.

[2] Ibid. 2405, 2406.

The thoughtful student will seek in vain in the reported opinion of this judge for good reasons to support his remarkable theory. Those who are convinced by the sound reasoning of the court, and are led to the conclusions reached by it, will look upon his exposition of legal principles as wholly unsound, his reasoning as sophistry, and his statement of facts as contrary to plain history. This bad law, sophistry, and perversion of facts, were woven into a solemn judicial opinion, which is plausible enough to have misled many intelligent men, but which was doubtless heard with surprise by the other judges of the court.

Mr. Justice Yates asserted that "nothing can be the object of property which has not a corporeal substance."[1] And yet materiality is no more essential to the right of property than is color or shape. A subject of property must be capable of identification, in order that ownership may be asserted. This is a necessary attribute of property; and, where it exists with the other essential qualities, it matters not whether the thing be corporeal or incorporeal.

He denied that intellectual productions could be the subject of property, because they could not be identified.[2] And yet he admitted the king's property in prerogative copies; that members of the stationers' company had exercised the exclusive right of printing books; that injunctions had been granted protecting authors from piracy; and that the statute of Anne

[1] 4 Burr. 2361. "But the property here claimed," he continued, "is all ideal: a set of ideas which have no bounds or marks whatever, nothing that is capable of a visible possession, nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment than by mental possession or apprehension; safe and invulnerable from their own immateriality; no trespass can reach them; no tort, affect them; no fraud or violence, diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself; and these are what the defendant is charged with having robbed the plaintiff of." Mr. Justice Thompson said, that this view of the nature of copyright "would hardly deserve a serious notice, had it not been taken by a distinguished judge." Wheaton *v.* Peters, 8 Pet. 678.

[2] "There is another maxim, too," he said, "concerning property, 'that nothing can be an object of property that is not capable of distinguishable proprietary marks.' . . . Now, where are the *indicia* or distinguishing marks of ideas? What distinguishing marks can a man fix upon a set of intellectual ideas, so as to call himself the proprietor of them? They have no ear-marks upon them; no tokens of a particular proprietor." 4 Burr. 2365–66.

gave a monopoly in books for a limited term. Every one of these conceded facts shows the falsity of the assertion that intellectual productions are incapable of identification. Worse than useless would have been the statute securing the exclusive right of printing a literary composition, if the ownership of such production were beyond the possibility of determination. The very admissions of Mr. Justice Yates show that the *meum* and *tuum* line can be drawn and preserved with the same ease and precision in the case of literary productions as in that of lands or bonds.

Equally fallacious is his argument, that there can be no property in intellectual productions because they are not capable of separate possession.[1] The possession of any kind of property is often, and may always be, theoretical. It is only by a fiction of the law that the owner is said in many cases to be in possession of real property. He cannot actually and personally possess extensive lands. He may be the owner of estates in opposite parts of the world, — of fields which he never sees. The legal possession is in him; the actual possession, with the right of use, may be in another. So personal property is transferred, with the right of use, to the actual possession of any person, without prejudice to the owner's title. It is the right of ownership which gives the title to legal possession. Where this right exists, it matters not whether or not the property is in the actual possession of the owner. When the property is identified and the legal title established, the law protects the rightful owner. The same is true of literary property. This principle was conceded by Mr. Justice Yates, in the case of material possessions. "But how can an author," he asked, "after publishing a work, confine it to himself?"[2] This is

[1] 4 Burr. 2357, 2363, 2384, 2385.

[2] "It is not necessary, I own, that the proprietor should always have the total actual possession in himself. A potential possession, a power of confining it to his own enjoyment, and excluding all others from partaking with him, is an object or accident of property. But how can an author, after publishing a work, confine it to himself? If he had kept the manuscript from publication, he might have excluded all the world from participating with him, or knowing the sentiments it contained. But by publishing the work the whole was laid open; every sentiment in it made public for ever; and the author can never recall them to himself, never more confine them to himself and keep them subject to his own dominion." 4 Burr. 2363.

equivalent to asking how the owner who has vested the use of his lands in another, or has sent his vessels and cargoes in charge of another to distant seas, can confine his property to himself.

He admitted that property is acquired by labor; but argued that the property created by mental labor is in the material manuscript, which merely preserves the results of the author's industry, and not in the intellectual production, which alone is the fruit of that industry.[1]

He conceded that an author has an exclusive right to his production while it is in manuscript, and that it may pass from his possession into that of others; but that no one is entitled to publish it without authority.[2] The unlicensed publication of a composition cannot be any violation of property in the material manuscript, since that may be returned without injury to the author after publication; or publication may be from a copy, leaving the original undisturbed in the author's possession. The only ground on which the author may prevent the publication of his manuscript is that of property in the incorporeal, literary composition. But Mr. Justice Yates denied the existence of this ground, in holding that an intellectual production could not be the subject of property. He conceded that the owner might lend his manuscript to another person with the stipulation that it should not be published; but he denied, what is the same in principle, that the owner might publish his manuscript with the stipulation or contract that no person, without authority, should republish it.[3] He defended the right of the author before publication, on the ground that the manuscript is then in "his dominion." But, when the author has intrusted his manuscript to another, it is in his dominion only by a fiction of law. On the same principle, the literary property in the work, after publication, continues in the dominion of the author until his title in the property ceases. If Mr. Justice Yates intended to maintain, that manuscript, but not published, productions may be the subject of property, the fallacy was well exposed by Lord Mansfield, who forcibly pointed out that every argument against the existence of liter-

[1] 4 Burr. 2357. [2] Ibid. 2360, 2364, 2378. [3] Ibid. 2364.

ary property after publication applies with equal force to the existence of such property before publication.[1]

Mr. Justice Yates asserted that the act of publication is "a gift to the public," and that the "author must be deemed to intend it" as such.[2] And yet the author loudly protests against the unlicensed appropriation of his work, and never ceases to assert his ownership.[3]

He declared that property in copies was unknown before the statute of Anne was passed. And yet the twelve sworn jurymen sitting before him had found, after careful investigation, "that before the reign of her late Majesty, 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 for the provision of wives and children."[4]

He said that in framing the statute of Anne "the legislature had no notion of any such things as copyrights as existing for ever at common law; but that, on the contrary, they understood that authors could have no right in their copies after they had made their works public, and meant to give them a security which they supposed them not to have had before."[5] And yet, as has been shown, the very persons who petitioned for that act, and who were instrumental in securing its passage, expressly informed Parliament, in written language whose meaning could not be mistaken, that authors then had and previously had had in their published works exclusive rights, which were perpetual by the common law.

Because the word "vesting" was used by Parliament, he urged that there could have been no property in books before

[1] 4 Burr. 2397.

[2] Ibid. 2363.

[3] "With respect to the third objection, that by publication the property is given to the public: if it is meant as a fact that the author intends to give it, it is contrary to the truth; for the proprietors of copyright have continuously claimed to keep it. If it is meant that the publication operates in law as a gift to the public, the question is begged, and the reasoning is in a circle. For the question being, whether the law protects copyright after publication, the reasoning in law is, that the law does not so protect it, because publication operates as a gift to the public; and the reasoning in fact is, that the publication must be taken to operate as a gift to the public, because after publication the law does not protect copyright." Erle, J., Jefferys *v.* Boosey, 4 H. L. C. 872.

[4] 4 Burr. 2306.

[5] Ibid. 2390.

the act of Anne.[1] And yet this word is found only in the title, which is not an essential part of the act; while the word "secured" is employed in the body of the statute.[2]

He believed that "the property of authors must be subject to the same rule of law as the property of other men is governed by."[3] And yet he offered three hours of special pleading to show that this "same rule" was not applicable to literary property.

"The labors of an author," he said, "have certainly a right to a reward."[4] And yet he alone, of the four judges whose duty it was to see that that right was protected, declared the only means by which such reward is possible to be a bar to its realization.

Having thus argued that the industry of authors was entitled to no protection from English law other than what the legislature might choose to give, and having sought to support this position by extra-judicial objections to the just rights claimed for men of letters,[5] he did not hesitate to declare: "I wish as sincerely as any man that learned men may have all the encouragements and all the advantages that are consistent with the general right and good of mankind."[6]

[1] 4 Burr. 2389.

[2] "The word 'vesting' in the title cannot be argued from as declaratory that there was no property before. The title is but once read; and is no part of the act. In the body, the word 'secured' is made use of." Lord Mansfield. ibid. 2406.

[3] Ibid. 2359.

[4] Ibid. 2360.

[5] "I have before observed the dangerous snares which this ideal property will lay, as it carries no proprietary marks in itself, and is not bound down to any formal stipulations. So obscure a property, especially after the work has been a long while published, might lead many booksellers into many litigations. And, in such litigations, many doubtful questions might arise: such as, whether the author of the work did not intend it as a gift to the public; whether, since that, he has not abandoned it to the public, and at what time; disputes also might arise among authors themselves, whether the works of one author were or were not the same with those of another author; or whether there were only colorable differences, — a question that would be liable to great uncertainties and doubts. So, whether those who should compile notes on a publication, and should insert the text, should be liable to an action for it; or, if the notes were good, the author might refuse the publication of them." Ibid. 2394.

[6] Ibid. 2394. "But if the monopoly," he continued, "now claimed be contrary to the great laws of property, and totally unknown to the ancient and common law of England; if the establishing of this claim will directly contradict the legislative authority, and introduce a species of property contrary to the end for which the whole system of property was established; if it will tend to embroil the peace of

As Chief Justice of the Court of King's Bench, Lord Mansfield now pronounced one of the grandest judgments in English judicial literature. It may well be given in the language of Mr. Justice Aston: "Upon the whole, I conclude, that upon every principle of reason, natural justice, morality, and common law; upon the evidence of the long-received opinion of this property appearing in ancient proceedings and in law cases; upon the clear sense of the legislature, and the opinions of the greatest lawyers of their time in the Court of Chancery since that statute, — the right of an author to the copy of his work appears to be well founded; and that the plaintiff is therefore, upon this special verdict, entitled to his judgment. And I hope the learned and industrious will be permitted from henceforth not only to reap the same, but the profits of their ingenious labors, without interruptions, to the honor and advantage of themselves and their families." [1]

Thus, in the tribunal over which Lord Mansfield presided, the cause of piracy suffered a signal and deserved defeat. But in 1774 the attack on literary property was renewed, in the House of Lords, in the case of Donaldson *v.* Becket,[2] which had been brought on appeal from the Court of Chancery, where an injunction had been granted in conformity with the law as declared in Millar *v.* Taylor.

Eleven judges were ordered to give their opinions on the same vital questions that had been exhaustively reviewed and settled, five years before, by the King's Bench. Ten were of opinion that at common law the author of an unpublished literary composition had the sole right of publishing it for sale, and might bring an action against any person who published the manuscript without his consent. One dissented from this view.

Eight maintained that by the common law the author's exclusive rights were not lost or prejudiced by publication; in other words, that copyright in a published work existed by the common law.

society with frequent contentions, — contentions most highly disfiguring the face of literature, and highly disgusting to a liberal mind; if it will hinder or suppress the advancement of learning and knowledge; and, lastly, if it should strip the subject of his natural right — if these or any of these mischiefs would follow, I can never concur in establishing such a claim."

[1] 4 Burr. 2354.

[2] Ibid. 2408.

Three believed that publication was an abandonment of the common-law property. Seven of the eleven judges expressed the opinion, that the ownership of literary property was perpetual by the common law.

Five maintained that the statute of Anne did not destroy, abridge, or in any way prejudice the common-law property in a published work, and did not deprive the author of his common-law remedies. Six contended that the common-law right, after publication, was taken away by the statute, to which alone the author must look for protection.[1]

Lord Mansfield, being a peer, did not deliver an opinion; but it was well known that he firmly adhered to the enlightened doctrines which he had before advocated.[2] Including him, the twelve judges were evenly divided in opinion as to whether the statute of Anne had abridged the author's common-law property, or left it perpetual: while nine to three believed that, under the common law, publication was not an abandonment of the author's rights; or, in other words, that his property was the same after as before publication.

Chief among those who advised the Lords that literary property was not less inviolable than any species of property known to the law of England, was Sir William Blackstone, whose teachings will ever be a pure fountain source of knowledge for all students of English jurisprudence.

[1] The questions submitted to the judges were as follows:—

1. "Whether at common law an 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." Ten judges, or eleven including Lord Mansfield, answered yes; and one, no.

2. "If the author had such right originally, did the law take it away, upon his printing and publishing such book or literary composition? and might any person afterward reprint, and sell for his own benefit, such book or literary composition, against the will of the author?" No, eight; including Lord Mansfield, nine. Yes, three.

3. "If such action would have lain at common law, is it taken away by the statute of 8th Anne? And is an author by the said statute precluded from every remedy, except on the foundation of the said statute, and on the terms and conditions prescribed thereby?" No, five; including Lord Mansfield, six. Yes, six.

4. "Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity by the common law?" Yes, seven; with Lord Mansfield, eight. No, four.

5. "Whether this right is in any way impeached, restrained, or taken away by the statute 8th Anne?" No, five; with Lord Mansfield, six. Yes, six. 4 Burr. 2408.

[2] See ibid. 2417.

Lord Camden now moved the judgment of the House, and exerted his influence on the wrong side. He declared that there was no foundation for the perpetual ownership of literary property, either in the common law or in the principles of sound policy or good sense. That his specious harangue should have turned the scale, as it is said to have done, is certainly not to the credit of the House of Lords. The absurd character of the speech is well shown by the following specimen: —

"If there be any thing 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 mind, for the common welfare of the species? Those great 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 letter-press. When the bookseller offered Milton five pounds 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 and 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."[1]

It would seem that this extravagant speech would have moved the peers only to disgust; that the highest judicial tribunal of England, deliberating on one of the greatest questions ever brought before it, would have been guided by the pure principles which had been so forcibly expounded by the Chief Justice and the profoundest jurists of England, rather than by the fallacious theories of Judge Yates and the Sophomoric rhetoric of Lord Camden. But it was not so. Contrary to right and reason, it declared that literary property may be lost by the only act — publication — which renders it useful; contrary to the intention of that body, as it had been judicially interpreted for half a century, it decided that Parliament, in legislating "for the encouragement of learned men to compose and write useful books," meant to afford such encouragement by taking from authors far more than it gave to them; contrary to these and other considerations, it fixed in English jurisprudence an unjust law, which has ruled the legislatures and courts of England and America for a century.

It would be natural to suppose that if the House of Lords had been moved by a sincere desire to reach the truth, to ascertain what the law really was, to rest their judgment on a foundation of rock, they would have sought the opinion of that chief justice sitting in their presence whose profound knowledge of the law had given honor to English jurisprudence in every country of Europe; whom Lord Campbell pronounced "the brightest ornament to the profession of the law that appeared in England during the last century;"[2] who, in the language of Lord Thurlow, himself a great jurist, was "a surprising man; ninety-nine times out of a hundred, he was right in his decisions and opinions; and, when once in a hundred times he was wrong, ninety-nine men out of a hundred would not discover it."[3]

[1] 17 Cobb. Parl. Hist. 999.

[2] 4 Lives of the Chief Justices, 13.

[3] See Foss's Judges of England, 471. Lord Chatham, long the political opponent of Lord Mansfield, comparing him with those great jurists,

Nor was this mere rhetoric. For it is a matter of history that, of the many thousand judgments pronounced by him during the third of a century that he was chief justice of the Court of King's Bench, all but two received the unanimous approval of his associate judges; and, what is still more remarkable, only two were reversed on appeal to a higher tribunal; and, what is more extraordinary still, in all this time, when among the political opponents who argued causes before him were such lawyers as Dunning and Erskine, there never was a bill of exceptions tendered to his direction.[1] And yet among his judgments were many that have become historic. When the law was yet unsettled, he proclaimed from the English bench that the owner's title to a wreck, when no living thing had come to the shore, was superior to that claimed by the king; that governors of English provinces must answer in English courts for wrongful acts against individuals; that Turks, Hindoos, men of every creed, might be sworn as witnesses in English courts, according to the forms of their own religion; that

> "Slaves cannot breathe in England: if their lungs
> Receive our air, that moment they are free;
> They touch our country and their shackles fall."

Errare, mehercule, malo cum Platone quam cum istis vera sentire. Rightly, then, did the continental lawyers place the bust of Lord Mansfield beside those of Grotius and D'Aguesseau.[2]

Somers and Holt, said: "I vow to God, I think the noble lord excels them both in abilities."

[1] 3 Campbell's Lives of the Chief Justices (4 vols., London), 265, 266.

[2] Probably no English judge of the last century studied the subject of literary property so thoroughly as did Lord Mansfield. In concluding his opinion in Millar *v.* Taylor, 4 Burr. 2407, he said: "The subject at large is exhausted, and therefore I have not gone into it. I have had frequent opportunities to consider of it. I have travelled in it for many years. I was counsel in most of the cases which had been cited from Chancery; I have copies of all from the Register Book. The first case of Milton's Paradise Lost was upon my motion. I argued the second, which was solemnly argued by one on each side. I argued the case of Millar against Kincaid, in the House of Lords. Many of the precedents were tried by my advice. The accurate and elaborate investigation of the matter in this cause, and in the former case of Tonson and Collins, has confirmed me in what I always inclined to think,—that the Court of Chancery did right in giving relief upon the foundation of a legal property in authors, independent of the entry, the term for years, and all the other provisions annexed to the security given by the act."

That the peers did not seek light from this pure source, that they did not follow the safe counsel of that great teacher of law, Sir William Blackstone, is as little to their credit as the unsound and unjust law they proclaimed. And Lord Mansfield himself has been justly censured, that at this, the greatest crisis in the history of literary property, he allowed a trivial matter of etiquette to prevent him from repeating and emphasizing those unanswerable arguments on which his great judgment of five years before rested. Perhaps he did not realize that the grand structure of literary property was in danger of falling, — that his peers could be moved by the empty declamation of Lord Camden to set aside the authority of two centuries, and proclaim a doctrine condemned by the best lawyers of England.

The only question decided in Donaldson *v.* Becket, in conformity with the expressed opinions of a majority of the judges, was that the common-law copyright in a book after publication in print was taken away by the statute of Anne. On this point alone the House of Lords can be rightly said to have overruled the judgment in Millar *v.* Taylor. Two-thirds of the judges who advised the Lords, or three-fourths including Lord Mansfield, held to the doctrine that, in the absence of any statute, literary property exists by the common law, and is not lost or prejudiced by publication. There is nothing in the judgment of the House of Lords to unsettle this doctrine, or to overrule the authority of Millar *v.* Taylor as far as it affirmed it. On the other hand, the decision in Donaldson *v.* Becket, that common-law copyright in published works was taken away by the statute of Anne, necessarily implied the existence of that right.[1]

The judgment rendered by the House of Lords in 1774 has continued to represent the law; but its soundness has been questioned by very high authorities. In delivering the opinion of the full bench of the Court of Exchequer in 1851, in Boosey

[1] Referring, in the House of Lords, to the judgment in Donaldson *v.* Becket, and the different opinions expressed by the judges on the questions, whether there was copyright at common law, and whether it had been taken away by the statute, Lord Brougham said: "This House, however, reversed the decree under appeal, in accordance with the opinion given on the main point by the majority of the judges; and, upon the general question of literary property at common law, no judgment whatever was pronounced." Jefferys *v.* Boosey, 4 H. L. C. 961.

v. Jefferys, Lord Campbell said: "The first question discussed before us was whether authors have a copyright in their works at common law. This is not essential for our determination of the present case. If it were, we are strongly inclined to agree with Lord Mansfield and the great majority of the judges, who, in Millar *v.* Taylor and Donaldson *v.* Becket, declared themselves to be in favor of the common-law right of authors."[1] And when the same case came before the House of Lords, in 1854, although the consideration of this subject was not essential to the determination of the issue before the house, Mr. Justice Erle delivered an elaborate argument in support of the doctrine maintained by Lord Mansfield.[2] Mr. Justice Coleridge gave expression to similar views, and added: "If there was one subject more than another upon which the great and varied learning of Lord Mansfield, his special familiarity with it, and the philosophical turn of his intellect, could give his judgment peculiar weight, it was this. I require no higher authority for a position which seems to me in itself reasonable and just."[3] In the Scotch case of Cadell *v.* Robertson, decided by the Court of Session in 1804, Lord Monboddo, dissenting from the opinions of his colleagues, maintained that copyright existed in a published work by the common law, and was not taken away by the statute of Anne.[4]

In the United States, the authorities have been divided not less than in England, regarding the origin and nature of literary property. Indeed, the doctrines there prevalent have ruled our courts. In 1834, it became the duty of the Supreme Court of the United States, in the case of Wheaton *v.* Peters, to declare the meaning of the law of 1790, and to determine the same question that had been decided by the Court of King's Bench in 1769, and by the House of Lords in 1774; viz., whether copyright in a published work existed by the common law, and, if so, whether it had been taken away by statute. The court held that the law had been settled in England to the effect that, since the passing of the 8 Anne, c. 19, an author had no right in a published work excepting that secured by statute; that there

[1] 6 Exch. Rep. 592.
[2] Jefferys *v.* Boosey, 4 H. L. C. 866–877.
[3] Ibid. 903.
[4] 5 Pat. App. Cas. 518.

was no common law of the United States, and that the common law as to copyright had not been adopted in Pennsylvania, in which State the cause of action before the court arose; that, by the copyright statute of 1790, Congress did not affirm an existing right, but created one.[1]

This judgment, like that of the House of Lords in Donaldson *v.* Becket, which was followed, rests on a divided opinion of the judges. Three agreed with Mr. Justice McLean, who delivered the opinion of the court, two dissented, and one was absent.

In opposing the opinion of the majority, Justices Thompson and Baldwin expounded the true principles governing literary property, with a clearness and force, a comprehensive grasp, that recall the great arguments on this question by Sir William Blackstone, Lord Mansfield, and Justices Aston and Willes. Their opinions are among the most masterly to be found on the subject of copyright. Mr. Justice Thompson based his argument on the firm ground, that "the great principle on which the author's right rests is, that it is the fruit or production of his own labor, and that labor by the faculties of the mind may establish a right of property as well as by the faculties of the body." "Whether literary property," he added, "is *sui generis*, or under whatever denomination of rights it may be classed, it seems founded upon the same principle of general utility to society which is the basis of all other moral rights and obligations. Thus considered, an author's copyright ought to be esteemed an inviolable right established in sound reason and abstract morality."[2] He then maintained that the right of an author in his published works was recognized and protected as property by the common law in this country; that it was farthest from the intention of Congress, in legislating for the "encouragement of learning," to take away or abridge that right; and that the statute could not be properly construed to have that effect. "Congress having before them," he said, "the statute of Anne, and apprised of the doubt entertained in England as to its effect upon the

[1] 8 Pet. 591, 654.

[2] Ibid. 670, 672. The language quoted is taken from the separately published report of Wheaton *v.* Peters, 110, 112.

common-law right, if it had been intended to limit or abridge that right, some plain and explicit provision to that effect would doubtless have been made; and not having been made, is, to my mind, satisfactory evidence that no such effect was intended." [1] Speaking of the first copyright law passed in 1790, he said: "Protection is the avowed and real purpose for which it is passed. There is nothing here admitting the construction that a new right is created. The provision in no way or manner deals with it as such. It in no manner limits or withdraws from the right any protection it before had. It is a forced and unreasonable interpretation, and in violation of all the well-settled rules of construction, to consider it as restricting, limiting, or abolishing any pre-existing right." [2]

[1] 8 Pet. 696.

[2] Ibid. 692. "In construing statutes," said Mr. Justice Thompson, "three points are to be regarded: the old law, the mischief, and the remedy; and the construction should be such, if possible, to suppress the mischief and advance the remedy. 1 Bl. Com. 87; Bac. Abr. Stat. I. pl. 31, 32. An affirmative statute does not abrogate the common law. If a thing is at common law, a statute cannot restrain it, unless it be in negative words. Plow. Com. 113; 2 Kent, Com. 462; 2 Mason, 451; 1 Inst. 111, 115; 10 Mod. 118; Bac. Abr. Stat. 9. Where a statute gives a remedy where there was one by the common law, and does not imply a negative of the common-law remedy, there will be two concurrent remedies. In such case, the statute remedy is accumulative. 2 Burr. 803-5; 2 Inst. 200; Com. Dig., Action upon Statute, C.

"Considering the common-law right of the author established, and with these rules of construing statutes kept in view, I proceed to the consideration of the acts of Congress.

"The first law was passed in the year 1790 (Story's ed. of Laws of United States, vol. i. p. 94), and is entitled 'An Act for the encouragement of learning, by *securing* the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned.'

"The first section declares, that 'the author of any book or books already printed, being a citizen of the United States, &c., and who hath not transferred the copyright to any other person, and any other person, being a citizen of the United States, &c., who hath purchased or legally acquired the copyright of such book, in order to print, reprint, publish, or vend the same, shall have the *sole right* and liberty of printing, reprinting, publishing, and vending the same, for fourteen years *from the recording the title thereof* in the clerk's office, as hereinafter directed.' The like provision is made with respect to books or manuscripts not printed, or thereafter composed. The title and this section of the act obviously consider and treat this copyright as property, — something that is capable of being transferred; and the right of the assignee is protected equally with that of the author; and the object of the act, and all its provisions, purport to be for *securing* the right. Protection is the avowed and real purpose for which it is passed. There is nothing here admitting the construction that a new right is created. The provision in no way or manner deals with it as such. It in no manner limits or withdraws from

These doctrines were also maintained with clearness and force by Mr. Justice Baldwin.

"If authors had not a right of property by the common law," he said, "or if that part of the common law has not been adopted here, it becomes a matter of serious inquiry what the public and the profession are to consider as evidence of the law, and the rules as to right and remedy by which other property is to be governed. If the judicial history of the law of copyright does not establish its existence independent of statutes in England, and if the acts of Congress passed professedly for the *encouragement* of *learning*, *by securing* the copyright of authors, is, by fair construction, an abrogation of the common-law right, I am much mistaken if the opinion of the majority of the court in this case does not, in its consequences, open a new epoch in the history of our jurisprudence. I, for one, must look to other than the accustomed sources of information to find the common law, to new tests of its adoption here, and new rules of construing statutes, as well in their effect on the pre-existing law of property as the settled principles by which their provisions are interpreted. There are none more ancient or sacred than that the common law can be altered only by act of Parliament; that statutes and usages which derogate from its rules shall be construed strictly, and not be extended by equity beyond their words or necessary implication; and that a statute which gives an additional remedy, or inflicts new penalties and forfeitures for the violation of a right, leaves the injured party the option of appealing to the statute or common law for redress. In the application of these principles to the acts of Congress on copyright, there can be found no one provision which either professes, or

the right any protection it before had. It is a forced and unreasonable interpretation, and in violation of all the well-settled rules of construction, to consider it as restricting, limiting, or abolishing any pre-existing right. Statutes are not presumed to make any alteration in the common law further or otherwise than the act expressly declares. And, therefore, where the act is general, the law presumes it did not intend to make any alteration; for, if such was the intention, the legislature would have so expressed it. 11 Mod. 148; 19 Vin. Abr. 512, Stat. E. 6, pl. 12; and hence the rule as laid down in Plowden. If a thing is at common law, a statute cannot restrain it, unless it be in negative words. It is in every sense an affirmative statute, and does not abrogate the common law." 8 Pet. 691.

by implication can be construed, to alter the common law. Their titles and enactments are affirmative and remedial for the security of the right of property in authors." [1]

The meaning of the first American copyright law, therefore, as construed by these jurists, was the same as that of the first English copyright law as interpreted by the Court of King's Bench in 1769; viz., that it did not create a right, but gave a cumulative security or protection to one already existing. It did not, therefore, abridge the ownership of literary property, perpetual under the common law.

The judgment of the court, as has been seen, was based on two grounds: 1. That the common law of England did not prevail in the United States. 2. That in England it had been decided that the common-law property in published works had been taken away by statute. The first position rested on a foundation of sand, which has since been swept away. "The whole structure of our present jurisdiction," said Mr. Justice Thompson in his dissenting opinion, "stands upon the original foundation of the common law." The doctrine is now well settled in this country, that a complete property in unpublished works is secured by the common law. This was admitted by the Supreme Court in Wheaton *v.* Peters. It has since been repeatedly affirmed by the same tribunal, by the Circuit Court of the United States, and by every State court in which the question has been raised.[2] If the common law thus prevails in the United States with reference to unpublished productions, there is no principle, independently of the statute, by which it can be held not to prevail in the case of published works.

The controlling question in Wheaton *v.* Peters was whether this common-law right, after publication, had been taken away by the statute of 1790. The doctrine had been settled in England, that copyright in a published work existed by the

[1] See Mr. Justice Baldwin's opinion in the separately published report of Wheaton *v.* Peters, 134, 152.

[2] See *post*, p. 101. The statute "to promote literature" passed by the State of New York in 1786 expressly recognized the common-law rights of authors Section 4 provided "that nothing in this act shall extend to affect, prejudice, or confirm the rights which any person may have to the printing or publishing of any book or pamphlet at common law, in cases not mentioned in this act." 2 Laws of New York (Jones & Varick's ed., 1789), 320.

common law. Donaldson *v.* Becket decided simply that this right had been taken away or superseded in England by the act of Anne. But this statute did not change or affect the common law in the United States, for the obvious reason that the statute had no operation here. Whether Congress intended to take away this right, whether the statute of 1790 could rightly be construed to take it away, was an open question in this country. Had the court recognized this as the pivotal point in the case, and, after an examination of the fundamental principles of literary property and the rules of statutory construction, not less thorough than that found in the opinions of the dissenting judges, had reached the conclusion, that there was no right in a published work except that secured by the statute, the judgment would still be open to criticism. But in holding that the common-law right, if it existed in this country, had been taken away by statute, the court simply followed the doubtful and disputed precedent of the House of Lords, without testing its soundness. The judges in the minority grounded their opinions on fundamental principles, which are not shaken by any reasoning to be found in the opinion of the court. These considerations deprive Wheaton *v.* Peters of much of its weight as an authority.

The main question decided by the Supreme Court in 1834 has not since been brought before that tribunal; consequently, the judgment of that year has continued to represent the law in this country.

The law which for a century has denied to men of letters in England and America the full fruits of their labor has grown out of the groundless theories of one man; and these originated not with the judge, but with the advocate. As a lawyer, Joseph Yates had been retained in the first controversy that arose in an English court of law under the statute of Anne, and argued in vain to establish the theory that copyright was a monopoly.[1] If a decision had been reached, this plea would doubtless have received from the court a condemnation so unanimous and decided as to have destroyed all hope of its success thereafter. Unfortunately, however, this opportunity

[1] Tonson *v.* Collins, 1 W. Bl. 321.

was not given to the court, and when the question was next brought before the King's Bench, Joseph Yates was one of the judges, and reiterated the same arguments on the bench that he had offered at the bar.

Courts are too often the slaves of precedent. Too often do they use a foundation already prepared, without examining its strength, rather than build a new one; too often do they follow a decision without questioning its validity. Thus, an unsound law rooted in our jurisprudence may prevail for generations. A more marked illustration of this evil can nowhere be found than in the judicial history of copyright in England and America during the past century. The fundamental principles governing literary property were never more thoroughly examined than by the judges of the King's Bench in 1769. They based their judgment on a foundation of rock. That foundation was afterward rejected by the House of Lords, who selected one of sand. The wisdom of this change has since been assumed by the majority, not proved. No court has since gone back of that decision, or tested its soundness. It has ruled the courts of two nations for a century. The rock foundation of 1769 is hidden with sand and drift; its strength, known only to those who dig below the surface. When the British Parliament was asked (1837–42) to throw around literary property the same protection given to every other species, the reply was: "The House of Lords has declared that in published books there are no rights except what the legislature may choose to give." When the House of Lords, in 1854, sitting as the highest court known to English law, was advised to recognize the full rights of the author to the fruits of his labor, it followed the precedent of 1774.[1] When the Supreme Court of the United States was urged, in 1834, to rise above precedent, and to found its judgment on the universal principles of property, the majority declared that the law of literary property had been settled since 1774.[2]

The anomaly of the present law of copyright is apparent to many thoughtful persons.[3] Literary productions are the one

[1] Jefferys *v.* Boosey, 4 H. L. C. 815.

[2] Wheaton *v.* Peters, 8 Pet. 591.

[3] This has been pointed out by Hood with no less truth than wit. "Literary property is the lowest in the market. It is declared by the law only so many years' purchase, after which the private right becomes common;

great species of property which the law has left without that protection to which it is entitled. Even to inventions a protection is guaranteed by the United States which is denied to literature; for our laws make no distinction 'tween a native and a foreign applicant for a patent, while the works of a foreign author are laid open to piracy. The manufacturers, farmers, and manual laborers of England and the United States toil in the confidence that the fruits of their industry will be protected and shielded for their children by the same law that defends their lives and liberties. The maker of a piece of cloth, a box, a wagon, or a house, has therein a title whose duration is not limited. His property is protected because it is the product of his labor. But time and money spent in producing a work of

and, in the mean time, the estate being notoriously infested with poachers, is as remarkably unprotected by game-laws. An author's winged thoughts, though laid, hatched, bred, and fed within his own domain, are less his property than is the bird of passage that of the lord of the manor on whose soil it may happen to alight. An author cannot employ an armed keeper to protect his preserves; he cannot apply to a pinder to arrest the animals that trespass on his grounds; nay, he cannot even call in a common constable to protect his purse on the king's highway! I have had thoughts myself of seeking the aid of a policeman, but counsel learned in the law have dissuaded me from such a course: there was no way of defending myself from the petty thief but by picking my own pocket! Thus I have been compelled to see my own name attached to catchpenny works, none of mine, hawked about by placard-men in the street; I, who detest the puffing system, have apparently been guilty of the gross forwardness of walking the pavement by proxy for admirers, like the dog Bashaw! I have been made, nominally, to ply at stage-coach windows with my wares, like Isaac Jacobs with his cheap pencils, and Jacob Isaacs with his cheap penknives to cut them with; and without redress. For whether I had placed myself in the hands of the law, or taken the law in my own hands, as any bumpkin in a barn knows, there is nothing to be thrashed out of a man of straw. Now, with all humility, if my poor name be any recommendation of a book, I conceive I am entitled to reserve it for my own benefit. What says the proverb? 'When your name is up, you may lie abed.' But what says the law;—at least, if the owner of the name be an author? Why, that any one may steal his bed from under him, and sell it; that is to say, his reputation, and the revenue which it may bring.

"In the mean time, for other street frauds there is a summary process. The vender of a flash watch, or a razor 'made to sell,' though he appropriates no maker's name, is seized without ceremony by A 1, carried before B 2, and committed to C 3, as regularly as a child goes through its alphabet and numeration. They have defrauded the public, forsooth, and the public has its prompt remedy; but for the literary man, thus doubly robbed of his money and his reputation, what is his redress but by injunction, or action, against walking shadows?—a truly homœopathic remedy, which pretends to cure by aggravating the disease." 6 Hood's Works (10 vols. London), 381.

literature capable of doing good to men through all coming time, give to the producer no title beyond a brief term of years. If Tennyson or Darwin, Emerson or Worcester, had spent their lives in making bricks, digging for gold, or hunting for diamonds, no English law would deny them everlasting title to the products of their industry.

The law which puts an arbitrary terminus on the ownership of literary property is the same in principle with one that would abridge the farmer's right to his orchards and grainfields. If there were the remotest danger that this principle would ever be applied to material possessions, every English tongue would clamor for a new Magna Charta. Its actual application would raise every Saxon hand in rebellion. And yet, for a century, the same principle has been applied with impunity to a species of property no less valuable, no less inviolable.[1] To-day the English nation says to its greatest poet: "Queen Mary shall be yours for forty-two years, and no longer." If the same genius had made a beer-barrel, his title to it would run against all future time. To take from one and give to all is not less communism in the case of literary property than it is in that of any other kind of property. There is still too much truth in Thomson's words: —

> "Is there no patron to protect the Muse,
> And fence for her Parnassus' barren soil?
> To every labor its reward accrues,
> And they are sure of bread who swink and moil:
> But a fell tribe the Aonian hive despoil,
> As ruthless wasps oft rob the painful bee;
> Thus while the laws not guard that noblest toil,
> Ne for the Muses other meed decree,
> They praised are alone, and starve right merrily."

During this century, the progress in legislation has been steady toward a juster recognition of the rights of authors. In England, the absolute duration of copyright has, by two exten-

[1] "We should be all shocked if the law tolerated the least invasion of the rights of property in the case of merchandise; whilst those which justly belong to the works of authors are exposed to daily violation, without the possibility of their invoking the aid of the laws." Report in favor of international copyright, submitted to the United States Senate by Henry Clay, in 1837. 2 Senate Documents, 24th Cong. 2d Sess. (1836–37), Rep. No. 179.

sions, been made three times greater than it was before 1814. The exclusive right of dramatists and composers to represent their productions on the stage has been recognized and protected by statute. Statutory protection has been provided for works of art. Foreign authors and dramatists have been admitted to the privileges of the English laws. The nation is now, doubtless, on the eve of another important advance toward a higher recognition and better protection of property in intellectual productions. The Royal copyright commissioners, whose report was submitted to Parliament in June, 1878, recommend that the duration of copyright be enlarged; that all works be effectively protected against piratical translation, abridgment, and dramatization; and that the same privileges provided for Englishmen be given to foreign authors. The International Literary Congress, which was called together by the *Société des Gens de Lettres de France*, and met in Paris in June, 1878, under the presidency of Victor Hugo, affirmed the principle that the right of an author to his intellectual productions is a species of property whose ownership is unlimited in duration, and declared that in all countries better protection should be provided for the fruits of literary labor. Similar good signs are to be found in the judicial treatment of questions relating to copyright. While authors have suffered much from narrow and unsound decisions, there are many recent cases in which the courts have risen to a high level in determining rights of literary property, and there are indications that such rights will be better understood and recognized in the future than they have been in many instances in the past.

The progress of legislation and jurisprudence is constantly uprooting bad laws. The light of to-day shows the mistakes of yesterday. The errors of to-day will be exposed by the enlightenment of to-morrow. Progress is fatal to wrong. Time alone will show whether the grand principles governing literary property so well expounded by Lord Mansfield and other great jurists will again prevail; whether the judgment proclaimed by the Court of King's Bench in 1769 will again be recognized as the true law; whether the truth will again become clear to all, as it was to Mr. Justice Thompson when he said, "Every principle of justice, equity, morality, fitness, and sound policy, con-

curs in protecting the literary labors of men to the same extent that property acquired by manual labor is protected;" [1] and as it was to Mr. Justice Baldwin when he maintained, that "to place the proprietors of literary property on a worse footing in courts of equity than the owners of other property would not only be subversive of all principles of justice, but in direct repugnance to the spirit of the Constitution and laws." [2] But, until these things shall come to pass, an inviolable right will be denied to men of letters.[3]

[1] Wheaton *v.* Peters, 8 Pet. 672.

[2] See opinion of Mr. Justice Baldwin, in the separately published report of Wheaton *v.* Peters, 134, 139.

[3] "We are surprised at the undefined state of property, in those early stages of society, when piracy is considered a noble employment, fit to be extolled by bards; but we must not forget that there are rights of property to this day unacknowledged, which future generations will consider as sacred as we do those acknowledged centuries ago. Because there was no copyright in early times, — because there were no books, or books did not yield any profit to make copyright worth any thing, — it is believed by many, to this day, that copyright is an invented thing, and held as a grant bestowed by the mere grace and pleasure of society; while, on the contrary, the right of property in a book seems to be clearer and more easily to be deduced from absolute principle than any other. It is the title of actual production and of preoccupancy. If a canoe is mine because I made it, shall not that be mine which I actually created, — a composition? It has been asserted that the author owes his ideas to society: therefore, he has no particular right in them. Does the agriculturist not owe his ideas to society, present and past? Could he get a price for his produce except by society? But a work of compilation, it is objected, is not creation or invention. In the form in which it is presented, it is invention. The ideas thus connected, though they are, separately, common stock, like the wild pigeons flying over my farm, are the compiler's, are preoccupied by him, and belong to him in their present order and arrangement. The chief difficulty has arisen from the fact that ideas thus treated, thrown into a book, had for a long time no moneyed value to be expressed numerically, and that copyright has therefore not the strength of antiquity on its side. . . . It strikes every one nowadays as very barbarous, that in former times commodities belonging to any foreign nation were considered as good prize; yet we allow robbing in the shape of reprint, to the manifest injury of the author. The flour raised in Pennsylvania has full value in Europe, and is acknowledged as private property; but the composition of a book, the production of which has cost far more pains, is not considered as private property." Lieber, 2 Political Ethics (Woolsey's ed. Phila. 1875), 121.

HISTORY OF LITERARY PROPERTY.

THE history of literary property in England may be traced with satisfactory precision through this and the preceding century; but beyond that the recorded facts are of doubtful import, and their interpretation has given rise to conflicting opinions. It has been claimed, that since the introduction of printing into England, in the latter half of the fifteenth century, the right of publishing and selling a literary production has existed as a species of property.[1] There is, however, no direct evidence that copyright was recognized by the law as a species of private property before 1558. In 1534, Henry VIII. granted to the University of Cambridge the right of printing certain books, in which the crown claimed a prerogative right.[2] Afterward, patents *cum privilegio* were granted to individuals. From the middle of the sixteenth to the close of the seventeenth century, numerous decrees, ordinances, and acts, relating to the publication of books, were passed; but what was their relation to literary property, or their effect upon the rights of authors, cannot be determined with precision.

Decrees were promulgated by the Star Chamber in 1556, 1585, 1623, and 1637, regulating the number of presses and the manner of printing throughout the kingdom, providing for the licensing of printing, and prohibiting the publication and importation of unlicensed books.[3] Ordinances and acts for

[1] The date of the introduction of printing into England has been a subject of dispute. According to the generally received account, the art was brought from Holland by John Caxton, about 1471; but it has also been claimed to have been first practised at Oxford, in 1468.

[2] Baskett *v.* University of Cambridge, 1 W. Bl. 105.

[3] In 1556, by a decree of the Star Chamber, it was forbidden, among other things, to print contrary to any ordinance, prohibition, or commandment in any of the statutes or laws of the realm; or in any injunction, letters-

like purposes were passed by Parliament at various times from 1643 to 1692.

These decrees and ordinances have occupied a prominent place in the controversy concerning literary property, and have been cited by high authorities as showing that the property of an author in his book was recognized and protected during this period as a common-law right. But whatever benefit they may have been to authors, by affording additional protection to their productions, either fully or in part, their primary and chief object was the regulation of the press for political and ecclesiastical purposes. Every reader of English history knows to what unwarrantable extremes the crown went during this period in preventing the liberty of the press, and to what a despotic censorship all publications, and especially those relating to politics and religion, were subjected.[1] The declared

patent, or ordinances set forth or to be set forth by the queen's grant, commission, or authority. By another decree, dated June 23, 1585, every book was required to be licensed, and all persons were prohibited from printing "any book, work, or copy against the form or meaning of any restraint contained in any statute or laws of this realm, or in any injunction made by her Majesty or her Privy Council; or against 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." In 1623, a proclamation was issued to enforce this decree; reciting that it had been evaded, among other ways, "by printing beyond sea 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." In 1637, the Star Chamber again decreed that "no person is 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." 4 Burr. 2312. For the "rules and ordinances made and set forth by the Archbishop of Canterbury and Lords of the Privy Council in the Star Chamber, for redressing abuses in printing," see Strype's Life of Archbishop Whitgift, Appendix No. xxiv.

[1] "It is natural to suppose that a government thus arbitrary and vigilant must have looked with extreme jealousy on the diffusion of free inquiry through the press. The trades of printing and bookselling, in fact, though not absolutely licensed, were always subject to a sort of peculiar superintendence. Besides protecting the copyright of authors, the council frequently issued proclamations to restrain the importation of books, or to regulate their sale. It was penal to utter, or so much as to possess, even the most learned works on the Catholic side; or, if some connivance was usual in favor of educated men, the utmost strictness was used in suppressing that light infantry of literature, — the smart and vigorous pamphlets with which the two parties arrayed against the church assaulted her opposite flanks. Stow, the well-known chronicler of England, who lay under a suspicion of an attachment to popery, had his library

purpose of the Stationers' Company, chartered by Philip and Mary in 1556, was to prevent the propagation of the Protestant Reformation. After reciting that several seditious and heretical books, both in rhymes and tracts, were daily printed, renewing and spreading great and detestable heresies against the Catholic doctrine of the Holy Mother Church, the charter provided for the suppression of this evil by constituting ninety-seven named persons an incorporated society of the art of a stationer, and ordered that no person not a member of this society should practise the art of printing. The master and wardens of the society were empowered to search, seize, and burn all prohibited books, and to imprison any person found exercising the art of printing without authority.[1] From 1556 to 1641, the crown exercised over the press an unlimited authority, which was enforced by the summary powers of search, confiscation, and imprisonment given to the Stationers' Company, and by the Star Chamber, whose jurisdiction was then supreme.

searched by warrant, and his unlawful books taken away; several of which were but materials for his history. Whitgift, in this as in every other respect, aggravated the rigor of preceding times. At his instigation, the Star Chamber, 1585, published ordinances for the regulation of the press. The preface to these recites 'enormities and abuses of disorderly persons professing the art of printing and selling books' to have more and more increased, in spite of the ordinances made against them, which it attributes to the inadequacy of the penalties hitherto inflicted. Every printer, therefore, is enjoined to certify his presses to the Stationers' Company, on pain of having them defaced, and suffering a year's imprisonment. None to print at all, under similar penalties, except in London, and one in each of the two universities. No printer who has only set up his trade within six months to exercise it any longer, nor any to begin it in future until the excessive multitudes of printers be diminished and brought to such a number as the Archbishop of Canterbury and Bishop of London for the time being shall think convenient; but, whenever any addition to the number of master printers shall be required, the Stationers' Company shall select proper persons to use that calling, with the approbation of the ecclesiastical commissioners. None to print any book, matter, or thing whatsoever, until it shall have been first seen, perused, and allowed by the Archbishop of Canterbury or Bishop of London, except the queen's printers, who shall require the license only of the chief justices. Every one selling books printed contrary to the intent of this ordinance to suffer three months' imprisonment. The Stationers' Company empowered to search houses and shops of printers and booksellers, and to seize all books printed in contravention of this ordinance, to destroy and deface the presses, and to arrest and bring before the council those who shall have offended therein." Hallam, 1 Const. Hist. (3 vols., London), 238. See also vol. iii. p. 2.

[1] Maugham, Laws of Lit. Prop. (London, 1829) 12.

The despotic decrees, which, for more than three-quarters of a century, had served to control the press, expired with the abolition of the Star Chamber in 1641. But their spirit and worst features were revived by various ordinances passed by Parliament during the next half century, which likewise had for their main object the censorship of the press. Such were the ordinances of 1643, 1647, 1649, and 1652.[1]

The Licensing Act of Charles II.,[2] passed in 1662, is often cited as a marked recognition of the rights of authors in their literary property. But, like all the preceding enactments, it was aimed directly and chiefly at the press.[3] Its preamble and provisions disclose the same tyrannical purposes that are so prominently indicated in the earlier ordinances.[4] In the spirit of the Star Chamber decrees, it ordered that no person should

[1] The ordinance of 1643, c. 12, recited in its preamble that "divers good orders have been lately made by both Houses of Parliament for suppressing the great late abuses and frequent disorders in printing many false, forged, scandalous, seditious, libellous, and unlicensed papers, pamphlets, and books, to the great defamation of religion and government." It then ordered that no book, pamphlet, or paper be printed or sold, unless first approved and licensed by persons appointed for this purpose by Parliament. To enforce this provision, the master and wardens of the Stationers' Company, and other designated persons, were authorized and required to search for and seize unlicensed printing-presses and scandalous or unlicensed papers, pamphlets, or books; to arrest the authors and printers; and, "in case of opposition, to break open doors and locks."

Of similar import, and for the same primary purpose of controlling the press, were the ordinances of 1647, c. 95, 1649, c. 60, and 1652, c. 34. Scobell's Acts.

[2] 13 & 14 Car. II. c. 33. Keble's Statutes at Large, 1250.

[3] Indeed, while the bill was pending, the king sent a special message to the House of Commons, saying that the passing of the act was necessary to the peace of the kingdom, as the exorbitant liberty of the press had been a great occasion of the late Rebellion, and the schisms in the church; and urging the House "to give a speedy dispatch to that bill." 8 Commons' Journal, 425.

[4] What could be more in harmony with the spirit of the Star Chamber proceedings than its preamble!

"Whereas the well government and regulating of printers and printing-presses is matter of public care and of great concernment, especially considering, that, by the general licentiousness of the late times, many evil-disposed persons have been encouraged to print and sell heretical, schismatical, blasphemous, seditious, and treasonable books, pamphlets, and papers, and still do continue such their unlawful and exorbitant practice, to the high dishonor of Almighty God, the endangering the peace of these kingdoms, and raising a disaffection to his most excellent Majesty and his government; for prevention whereof, no surer means can be advised than by reducing and limiting the number of printing-presses, and by ordering and settling the said art or mystery of printing by act of Parliament, in manner as hereinafter is expressed."

presume to print "any heretical, seditious, schismatical, or offensive books or pamphlets, wherein any doctrine or opinion shall be asserted or maintained which is contrary to the Christian faith, or the doctrine or discipline of the Church of England, or which shall or may tend or be to the scandal of religion or the church, or the government or governors of the church, state, or commonwealth, or of any corporation or particular person or persons whatever." It then prohibited the publication of unlicensed books, prescribed regulations as to printing, and empowered the king's messengers, and the master and wardens of the Stationers' Company, to seize books suspected of containing matters hostile to the church or government. It was necessary to print, in the beginning of every licensed book, the certificate of the licenser, to the effect that the book contained nothing "contrary to the Christian faith or the doctrine or discipline of the Church of England, or against the state and government of this realm, or contrary to good life or good manners, or otherwise, as the nature and subject of the work shall require." To prevent fraudulent changes in a book after it had been licensed, a copy was required to be deposited with the licenser when application was made for a license.

The Licensing Act was continued by several acts of Parliament till 1679. It was re-enacted in 1685,[1] and again in 1692,[2] and finally expired in 1694.

It is plain, then, that the primary and chief object of all the decrees, ordinances, and acts promulgated, either by the Star Chamber or by Parliament, prior to the act of Anne, in 1710, was the regulation of the press, and the suppression of all writings obnoxious to the government or the church. But most, if not all, of them contained clauses recognizing property in books, and providing for its protection. What the extent of this protection was, or what was the exact *status* of literary property, cannot be precisely determined.

The Star Chamber decree of 1623, promulgated to secure the enforcement of that of 1585, contained a clause referring to persons in whom the sole right of printing a book was vested "by letters-patent or lawful ordinance or authority."

[1] 1 Jac. II. c. 17, s. 15. [2] 4 W. & M. c. 24, s. 14.

The later decrees and ordinances contained express clauses recognizing and providing for the protection of private property in books. The Star Chamber decree of 1637 ordered that no person should "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] The ordinance of 1643 prohibited the printing or importing of any book that had been lawfully licensed and entered in the register of the Stationers' Company, "for any particular member thereof, without the license and consent of the owner." The penalty prescribed was forfeiture of the book to the owner, "and such further punishment as shall be thought fit." This clause was repeated in the ordinances of 1647, 1649, and 1652.[2]

The clause in the Licensing Act of Charles II., intended for the protection of literary property, prohibited any person from printing or importing, without the consent of the owner, any book which any person had the sole right to print, by virtue of letters-patent, or "by force or virtue of any entry or entries thereof duly made, or to be made, in the register book of the said Company of Stationers, or in the register book of either of the universities." The penalty of piracy was forfeiture of the book, and six shillings and eight pence for each copy; half to go to the king, and half to the owner.[3]

Here we find express statutory provision for the protection of literary property. But it is contended by some that these clauses were applicable only to members of the Stationers' Company; and were, therefore, no benefit to authors outside of that organization. On the other hand, it is maintained that the protection was intended for all books and all authors, whether within or without the Company of Stationers. This question cannot be determined satisfactorily from the language of the acts, and little light is thrown upon it by contemporary records. Carte, the historian, writing in 1735, after a careful examination of the records of the Stationers' Company and other documents, had no doubt that the property clauses

[1] 4 Burr. 2312. [2] Scobell's Acts.
[3] 13 & 14 Car. II. c. 33, s. 6; Keble's Statutes at Large, 1250.

in the ordinances under consideration were intended for the benefit of all authors.[1] Most of the judicial proceedings of the Star Chamber are missing; and no record of any prosecution for printing without license, or against letters-patent, or pirating another's copy, or "any other disorderly printing," has been found. Mr. Justice Willes said that "it is certain that down to the year 1640, copies were protected and secured from piracy by a much speedier and more effectual remedy than actions at law or bills in equity. No license could be obtained to print another man's copy; not from any prohibition, but because the thing was immoral, dishonest, and unjust. And he who printed without a license was liable to great penalties."[2]

That the sole right of publishing a book existed as a species of property during this early period of English history is established by ample evidence, aside from that afforded by the decrees and ordinances which have been cited. Indeed, in his famous speech for the liberty of unlicensed printing, published in 1644, against the ordinance of 1643, Milton shows how fully the right of an author to his productions was then recognized, in theory at least, when he says, that "one of the glosses used to color that ordinance, and make it pass, was the just

[1] "'Tis certain," says Carte, "that no printer, since the invention of the art of printing, ever had in England a right to print the works of another man without his consent. There ever was a property in all books here printed; and for the making of it known, the better to prevent all invasion thereof, when the Stationers' Company were incorporated, all authors, and the proprietors to whom they sold their copies, constantly entered them in the register of that company as their property. The like method was taken with regard to foreign books, to which no subject of England could pretend an original right. To prevent the inconveniences of different persons engaging (perhaps unknown to one another) in printing of the same work (which might prove the ruin of both), the person who first resolved on it, and entered his design in that register, became thereby the legal proprietor of such work, and had the sole right of printing it; so that there has scarce ever been a book published in England but it belonged to some author or proprietor, exclusive of all other persons. This is evident to every one who hath ever viewed the stationers' register, from the erection of that company down to the year 1710, when the act 8 Anne was passed, which refers to this as an unusual practice. It was indeed so customary that I hardly think there ever was a book (unless of a seditious nature) printed till within forty years last past, but, however inconsiderable it was for size or value, the property thereof was ascertained, and the sole right of printing it secured to the proprietor, by such entry." Published in Reasons for a Farther Amendment of the Act 54 Geo. III. c. 156, by Sir Egerton Brydges (London, 1817).

[2] 4 Burr. 2313.

retaining of each man his several copy; which God forbid should be gainsaid."[1] In Millar *v.* Taylor, the jury found, "that, before the reign of her late Majesty, 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 for the provisions of wives and children."[2] In the same case, Lord Mansfield said, "I use the word 'copy,' 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."[3]

For a century and a half before the reign of Anne, an extensive traffic was carried on in copyrights by members of the Stationers' Company, who invested much capital in buying from authors the right to publish their books. Carte "was surprised, on carefully examining one of the registers in Queen Elizabeth's time, from 1576 to 1595, to find, even in the infancy of English printing, above two thousand copies of books entered as the property of particular persons, either in whole or in shares, and mentioned from time to time to descend, be sold, and be conveyed to others."[4] These entries, showing that copies were entered as property, appear as early as 1558.[5]

[1] Carte says that in 1641, "when do so enjoy a property, all scholars will be utterly deprived of any recompense from the stationers or printers for their studies or labor in writing or preparing books for the press.'" Printed by Brydges, see *ante*, p. 60, note 1.

[2] 4 Burr. 2306. The same fact had before been found by the jury in Tonson *v.* Collins, 1 W. Bl. 326.

[3] 4 Burr. 2306. Mr. Justice Willes said: "'The name 'copy of a book,' which has been used for ages as a term to signify the sole right of printing, publishing, and selling, shows this species of property to have been long known, and to have existed in fact and usage as long as the name." Ibid. 2311.

[4] Printed by Brydges. See *ante*, p. 60, note 1.

[5] "In 1558, and down from that time, there are entries of copies for the licentiousness of the press was carried to the greatest height, and there wanted not persons to insinuate to the members of the then House of Commons that it would be convenient to lay all copies open for every printer that pleased to publish them, Featley, Burges, Gouge, Byfield, Calamy, Seaman, and several other divines, favorites of the prevailing party in that House, thought it proper to sign a paper declaring, 'that to their knowledge very considerable sums of money had been paid by stationers and printers to many authors for the copies of such useful books as had been imprinted; in regard whereof (they say), we conceive it to be both just and necessary that they should enjoy a property for the sole imprinting of their copies; and we further declare that, unless they

During the reign of Charles II., there were decided several controversies concerning the right of printing certain books, which have been cited as showing that the crown claimed a property in copies analogous to that belonging to the author. The books thus claimed by the king were known as prerogative copies, and comprised the English translation of the Bible and the Common Prayer-book, as well as all extracts from them (such as primers, psalters, and psalms), almanacs, law reports, acts of Parliament, and the Latin Grammar.

The first reported case of this kind was decided in 1666. Atkins, claiming the right as the king's patentee to print all law books, had obtained an injunction restraining the members of the Stationers' Company from printing Rolle's Abridgment. An appeal was taken to the House of Lords, where it was argued that the laws belonged to the king, who paid the judges who pronounced them. The Lords, agreeing "that a copyright was a thing acknowledged at common law," held "that the king had this right, and had granted it to the patentees."[1]

The next case was that of Roper *v.* Streater, decided in 1672. Roper, who had bought from the executors of Mr. Justice Croke the third part of his reports, brought an action against Streater for printing it without authority. Streater was a law patentee, and pleaded the king's grant. The Common Pleas decided in favor of the plaintiff, on the ground that he, "by purchase from the executors of the author, was owner of the copy

particular persons. In 1559, and downward from that time, there are persons fined for printing other men's copies. In 1573, there are entries which take notice of the sale of the copy and the price. In 1582, there are entries with an express proviso, 'that, if it be found any other has a right to any of the copies, then the license touching such of the copies so belonging to another shall be void.'" Willes, J., 4 Burr. 2313.

In 1681, when all legislative protection had ceased, the Stationers' Company made a by-law, which,—after reciting that members of the company had a great part of their estates in copies, and that by the ancient usage of the company such persons had always been reputed the owners of such books or copies as had been entered to them in the register of the company, and ought therefore to have the sole printing of them — provided a penalty for the invasion of such right. A similar by-law was passed in 1694, which, after reciting that copies had been "constantly bargained and sold amongst the members of this company as their property, and devised to children and others for legacies, and to their widows for their maintenance," ordained that no book entered by one member should be printed or sold by another without license. 4 Burr. 2306.

[1] Carter, 89; 4 Burr. 2315.

at common law." This judgment was reversed in the House of Lords, where it was held that "the copy belonged to the king." [1]

The case of the Stationers' Company against Seymour, in 1677, was a controversy between the plaintiffs as grantees of the crown, and the defendant, who had printed Gadsbury's Almanac, without license. The court held that the property of an almanac which has "no particular author" was in the king; and that the "prognostications" added by the defendant "do 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." [2]

The king's property in prerogative copies was recognized in 1681, in suits brought by the Stationers' Company against Lee [3] and against Wright.[4]

Opinions differ as to the nature of the right thus claimed by the crown. Lord Mansfield emphatically maintained that it was founded on the same principles of property which govern in the case of individuals, and that it could be defended on no other ground.[5] By others it has been regarded as an

[1] Skin. 231; 1 Mod. 257; 4 Burr. 2316.

[2] 1 Mod. 256; 4 Burr. 2316. In 1775, the Common Pleas decided against the validity of the crown patent for the exclusive printing of almanacs. Stationers' Company *v.* Carnan, 2 W. Bl. 1004. See also Stationers' Company *v.* Partridge, 10 Mod. 105; 4 Burr. 2402.

[3] 2 Show. 258. See also Stationers' Company *v.* Parker, Skin. 233.

[4] Skin. 234; 4 Burr. 2328.

[5] "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, — an action upon the case, or a bill in equity.

"There were no questions in Westminster Hall before the Restoration, as to crown copies. The reason is very obvious; it will occur to every one that hears me. The fact, however, is so; there were none before the Restoration. Upon every patent which has been litigated since, the counsel for the patentee (whatever else might be thrown out, or whatever encouragement they might have, between the Restoration and Revolution, to throw out notions of power and prerogative), have tortured their invention to stand upon property. Upon Relle's Abridgment, they argued from the Year Books, which are there abridged, that the Year Books, having been compiled at the king's expense, were the king's property, and therefore the printing of them belonged to his patentee. Upon Croke's Reports, they contended that the king paid the judges who made the decisions; *ergo*, the decisions were his. The judges of Westminster Hall thought they belonged to the author; that is, to the purchaser from, or the executor of, the author: but, so far,

exercise of naked prerogative, based on reasons of church and state.[1]

the controversy turned upon property. In Seymour's Case, 1 Mod. 256 (who printed Gadbury's Almanac without leave of the Stationers' Company, who had a patent for the sole printing of almanacs), Pemberton resorted to property. He argued, besides arguing from the prerogative, that an almanac had no certain author: therefore the king has the property; and, by consequence, may grant his property. It was far fetched; and it is truly said that the consequence did not follow. For, if there was no certain author, the property would not be the king's, but common. Pemberton was a very able lawyer, and saw the necessity of getting a property, if he could make it out. . . .

"Acts of Parliament are the works of the legislature; and the publication of them has always belonged to the king, as the executive part, and as the head and sovereign. . . .

"The copy of the Hebrew Bible, the Greek Testament, or the Septuagint, does not belong to the king: it is common. But the English translation he bought; therefore it has been concluded to be his property. If any man should turn the Psalms, or the writings of Solomon or Job, into verse, the king could not stop the printing or sale of such a work: it is the author's work. The king has no power or control over the subject-matter: his power rests in property. His whole right rests upon the foundation of property in the copy, by the common law. What other ground can there be for the king's having a property in the Latin Grammar, which is one of his ancient copies, than that it was originally composed at his expense? Whatever the common law says of property in the king's case, from analogy to the case of authors, must hold conclusively, in my apprehension, with regard to authors." Lord Mansfield, Millar *v.* Taylor, 4 Burr. 2401–2405. See remarks of same judge, 4 Burr. 2402, on the case of the Stationers' Company *v.* Partridge; and 4 Burr. 2404, on the decision in Baskett *v.* University of Cambridge. See also views of Mr. Justice Willes, Millar *v.* Taylor, 4 Burr. 2328–29, 2332.

[1] "Upon the whole of this prerogative claim of the crown, it appears to me, that the right of the crown to the sole and exclusive printing of what is called prerogative copies is founded on reasons of religion or of State. The only consequences to which they tend are of a national and public concern respecting the established religion or government of the kingdom; and have no analogy to the case of private authors. There is no instance of the crown's intermeddling with, or pretending any such right in, private compositions. . . . It is mentioned as one ground of the king's right to print them, that some of these prerogative books were composed at his expense. But in fact it is no private disbursement of the king, but done at the public charge, and part of the expenses of government. It can hardly be contended that the produce of expenses of a public sort are the private property of the king, when purchased with public money. He cannot sell nor dispose of one of those compositions. How, then, can they be his private property, like the private property claimed by an author in his own compositions!" Yates, J., Millar *v.* Taylor, 4 Burr. 2383, 2384.

In moving the judgment of the House of Lords in 1828, in Manners *v.* Blair, 3 Bligh, N. S. 402, which was a controversy involving the right of the crown to grant a patent for the exclusive printing of Bibles, Lord Chancellor Lyndhurst said: "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 be-

According to Sir William Blackstone, the king, as the head of the state, had the right of promulgating, and consequently the exclusive privilege of printing, all acts of Parliament, proclamations, orders of council, &c.; and, as head of the church, the right to publish the liturgies and books of divine service; while his claim to the exclusive printing of the Bible rested also on the additional ground of his having paid for the translation. "He is also," says the same authority, "said to have a right by purchase to the copies of such law-books, grammars, and other compositions as were compiled or translated at the expense of the crown." [1]

It has been shown that literary property existed and was recognized during at least a century and a half prior to 1710, when the first copyright statute went into force. What was the origin of this property, the source of its existence? There is not a clause or a word in any of the decrees, acts, or ordinances relating to books from the earliest, passed in 1556, to the latest, in 1692, that can be construed as creating copyright. Whether these enactments were applicable to all authors, or were intended only for the benefit of the members of the Stationers' Company, is immaterial to the present inquiry. They simply provided remedies, more or less complete, for all or a

come 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 Exchequer, 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."

[1] 2 Com. 410. See also as to prerogative copies, Baskett *v.* University of Cambridge, 1 W. Bl. 105; Baskett *v.* Cunningham, Ibid. 370; Eyre *v.* Carnan, 5 Bac. Abr. Prerog. F. 5; Universities of Oxford and Cambridge *v.* Richardson, 6 Ves. 689; Grierson *v.* Jackson, Ridg. L. & S. 304.

few owners of a species of property not newly created, but found existing. None of them referred to any term during which the remedies were to continue, or abridged in any way the duration of the ownership of the property. Old acts expired and new ones were passed; but before the first and after the last, and independently of all of them, property in copies was a recognized fact.[1] Nor is there any other legislative act during this period to account for the origin of literary property. Its existence, then, could have been only by the common law.

This conclusion is amply confirmed by the authorities. In the earliest reported case concerning literary property, the House of Lords, in 1666, unanimously agreed that "a copyright was a thing acknowledged at common law."[2] Mr. Justice Willes declared that the Star Chamber decree of 1637 "expressly supposes a copyright to exist otherwise than by patent, order, or entry in the register of the Stationers' Company, which could only be by the common law;"[3] and that, in passing the ordinance of 1643, both Houses of Parliament took it for granted that copyrights "could only stand upon the common law."[4] Of the Licensing Act of Charles II., the same jurist said: "The sole property of the owner is here acknowledged in express words as a common-law right; and the legislature who passed that act could never have entertained the most distant idea that the productions of the brain were not a subject-matter of property."[5]

[1] Mr. Justice Aston thought, "This idea of an author's property has been so long entertained that the copy of a book seems to have been not familiarly only, but legally, used as a technical expression of the author's sole right of printing and publishing that work; and that these expressions, in a variety of instruments, are not to be considered as the creators or origin of that right or property, but as speaking the language of a known and acknowledged right, and, as far as they are active, operating in its protection." 4 Burr. 2346.

[2] Atkins's case, Carter, 89; 4 Burr. 2315.

[3] 4 Burr. 2313.

[4] "The licentiousness of libels induced the two Houses to make an ordinance which prohibited printing, unless the book was first licensed and entered in the register of the Stationers' Company. Copyrights, in their opinion, then, could only stand upon the common law; both Houses take it for granted. The ordinance, therefore, prohibits 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. This provision necessarily supposes the property to exist; it is nugatory if there was no owner. An owner could not at that time exist but by the common law." Ibid. 2314.

[5] "In 1662, the act of 13 & 14 C. II.

The booksellers, who, just before the statute of Anne was passed, petitioned Parliament for additional protection against piracy, admitted that they had a property in copies which could then exist only by the common law.[1] This fact was recognized by Parliament in passing the statute of Anne; and, after this act went into force, it was the uniform practice of the Court of Chancery to grant injunctions protecting common-law copyright in published works. The common-law existence of literary property was expressly affirmed by the Court of King's Bench in Millar *v.* Taylor;[2] whose judgment, as far as it affirmed the existence of the property as a historical fact, has never been reversed. The same doctrine was expressly approved by a majority of the judges, who advised the House of Lords in Donaldson *v.* Becket.[3]

The history of literary property, from the middle of the sixteenth to the close of the seventeenth century, shows: —

First. The existence of such property is traced back by record to 1558, when an entry of copies appears in the register of the Company of Stationers; and, by probability, to the latter part of the fifteenth century, when printing was introduced into England.

Second. There is no legislation during this period creating this property, or conferring ownership; none abridging its perpetuity, or restricting its enjoyment.

Third. Its existence, then, is due to the common law, and

(the Licensing Act) prohibits printing any book, unless first licensed and entered in the register of the Stationers' Company. It also prohibits printing without the consent of the owner, upon pain of forfeiting the book and 6*s.* 8*d.* each copy; half to the king, and half to the owner; to be sued for by the owner in six months; besides being otherwise persecuted as an offender against the act. The act supposes an ownership at common law. And the right itself is particularly recognized in the latter part of the third section of the act, where the chancellor and vice-chancellor of the universities are forbid to meddle with any book or books the right of printing whereof doth solely and properly belong to any particular person or persons. The sole property of the owner is here acknowledged in express words as a common-law right; and the legislature who passed that act could never have entertained the most distant idea that the productions of the brain were not a subject-matter of property. To support an action on this statute, ownership must be proved, or the plaintiff could not recover; because the action is to be brought by the owner, who is to have a moiety of the penalty." 4 Burr. 2314.

[1] See *ante*, p. 22 and note 4.

[2] 4 Burr. 2303.

[3] Ibid. 2408.

this necessary conclusion is supported by contemporary and later authorities.

It is for those who believe with Judge Yates and Lord Camden that literary property "is all ideal," and was unknown in England before the statute of Anne, to explain away this century and a half of its recognized existence. It is for those who, with Lord Macaulay, contend that copyright is a monopoly, who believe with Baron Pollock that it "is altogether an artificial right, a creature of the municipal law, and has no existence by the common law of England,"[1] to point to the legislation that created it or made it a monopoly; and, if the statute of Anne is cited for this purpose, — none earlier can be cited, — it is for them to reconcile with their theory the acknowledged existence of literary property independent of any legislation during the century and a half preceding that statute.

That literary property was shielded from arbitrary and oppressive government interference during this early period of English history, is not claimed. At a time when many rights of the subject were held subordinate to the pleasure of the crown, the title of an author to the fruits of his industry was no exception. When the labors of literary men were neutralized by the despotic regulation and suppression of the publication of books, it was an unwarranted invasion of private property that would not have been tolerated in later times. But the inquiry with which we are now most concerned is, not whether literary property was strictly inviolable in these times, but whether it had an acknowledged existence, — the affirmative of which is denied by those who maintain that copyright is a creature of legislation.

When the Licensing Act had finally expired in 1694, and there was no legislative restriction on the piratical printing of books, men of letters and booksellers began to complain loudly of the evils of piracy. In 1703, 1706, and 1709, the owners

[1] "Copyright is altogether an artificial right, not naturally and necessarily arising out of the social rules that ought to prevail among mankind assembled in communities, but is a creature of the municipal law of each country, to be enjoyed for such time and under such regulations as the law of each state may direct, and has no existence by the common law of England." Jefferys *v.* Boosey, 4 H. L. C. 937.

of copies petitioned Parliament for a law to protect their copyrights more effectively. It was in answer to these appeals that the 8 Anne, c. 19, became a law, in 1710. This was the first English statute distinctly affirming copyright and providing for its protection. It was entitled "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." The preamble declares that "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;" and that the object of the act is to prevent "such practices for the future, and for the encouragement of learned men to compose and write useful books."

It provided that the owner of the copyright in any book already printed should have the exclusive right of publishing it for twenty-one years; and that the author of any book not then published should have the sole liberty of publishing it for fourteen years from the time of first publication. At the end of this period, the same right was continued in the author, if living, for another term of fourteen years. Any person who should publish, import, or sell piratical copies was made liable to forfeit such copies to the owner of the copyright, to be by him destroyed, and to pay one penny for every sheet found in his possession. One-half of this penalty was to go to the queen, and the remainder to any person who should sue for it. There was a proviso, however, which permitted the importation and sale of "any books in Greek, Latin, or any other foreign language, printed beyond the seas." That no person might offend against the act through ignorance, it was provided that no book should be entitled to protection unless the title to the copy had been entered, before publication, in the register-book of the Company of Stationers, which should always be kept open for inspection at the hall of the company. The act further required nine copies of every book to be delivered to this company, for the use of the royal library in

London, the universities of Oxford and Cambridge, the four universities in Scotland, Sion College in London, and the Library of the Faculty of Advocates in Edinburgh.

If any bookseller or printer should sell or offer for sale a book "at such a price or rate as shall be conceived by any person or persons to be too high or unreasonable," the price might be reduced and fixed at a reasonable figure by the Archbishop of Canterbury, the Chancellor or Lord-keeper of the Great Seal, the Bishop of London, the Chief Justices of the Queen's Bench and Common Pleas, or other designated officials. This provision was repealed in 1739 by the 12 Geo. II. c. 36.

The act of Anne prohibited any one from importing a book which had been printed without the written consent of the owner of the copyright. There is no reason why this provision should not have been held sufficient to prevent the importation of English copyrighted books reprinted abroad without due authority; excepting of course those reprinted in a foreign language, which came under a special proviso. But in 1739 was passed the 12 Geo. II. c. 36, whose preamble recited that "the duties payable upon paper imported into this kingdom to be made use of in printing greatly exceed the duties payable upon the importation of printed books, whereby foreigners and others are encouraged to bring in great numbers of books originally printed and published in this kingdom, and reprinted abroad, to the diminution of his Majesty's revenue and the discouragement of the trade and manufacture of this kingdom." The statute then provided for a forfeiture of copies, and imposed penalties in the case of the unauthorized importation of all copyrighted books originally published in England and reprinted abroad. This act was temporary; but it was several times renewed.

The act of Anne extended protection to two classes of books: 1, those already published, in which copyright was vested for twenty-one years; 2, those not then published, for which a term of fourteen years was secured. The copyright, therefore, in books of the first class expired at the end of twenty-one years, or in 1731; and hence, whatever protection was granted by the court after that year to a book published before the statute was

passed, must have been on the ground that copyright was founded in the common law. Not fewer than five cases of this kind are recorded in the quarter of a century following 1731. In 1735, injunctions were issued by Sir Joseph Jekyll, Master of the Rolls, against printing a book entitled The Whole Duty of Man, which had first appeared in 1657;[1] and by Lord Talbot, protecting Pope's and Swift's Miscellanies, many of which had been published before 1710.[2] In 1736, Sir Joseph Jekyll granted an injunction protecting Nelson's Festivals and Fasts, which had originally appeared in 1703;[3] and, in 1739, Lord Hardwicke restrained the unauthorized publication of Milton's Paradise Lost, to which the plaintiff derived title under an assignment made by the author, in 1667.[4] Another injunction was granted by this judge, in 1752, against printing an edition of the same poem, with a biography by Fenton, and notes by Bentley and Dr. Newton. The biography and the notes had been published after the statute, and were within its protection; but the poem did not come within the provisions of the act.[5]

All of these books had been originally published before the passing of the copyright statute; and all of the injunctions were granted after the statutory term had expired. None of the cases, therefore, were within the statute. The court did not hesitate to recognize and protect the author's common-law rights in his published work.

In 1760, an action was brought by Tonson against Collins, for piracy of the Spectator, in which the plaintiff claimed the exclusive right of publication by assignment from Addison and Steele. The defence was set up that there was no property in a published work, except that secured by the statute, and that the statutory copyright in the Spectator had expired. The

[1] Eyre *v.* Walker, cited 4 Burr. 2325.

[2] Motte *v.* Falkner, Ibid.

[3] Walthoe *v.* Walker, Ibid.

[4] Tonson *v.* Walker, Ibid.

[5] Tonson *v.* Walker, 3 Swans. 672. Lord Hardwicke thought there might be some question about the plaintiff's right to restrain the publication of the poem; but he granted the injunction against the publication either of the poem, or the notes and biography. "If the inclination of Lord Hardwicke's own opinion," said Mr. Justice Willes, "had not been strongly with the plaintiff, he never would have granted the injunction to the whole, and penned it in the disjunctive; so that printing the poem, or the life, or Bentley's notes, without a word of Dr. Newton's, would have been a breach. The injunction is not barely to the selling of that book, of which Newton's notes made a part, but to future printing." 4 Burr. 2326.

case was found to be one of collusion, and no decision was rendered.[1]

In 1769, the origin and nature of literary property were exhaustively discussed by the judges of the King's Bench, of which Lord Mansfield was chief justice, in the case of Millar *v.* Taylor, which yet stands out as one of the great landmarks in the history of this controversy.[2] The book in controversy was Thomson's Seasons, which had been first published by the poet in 1727–30. The copyright was then sold to Andrew Millar, who was the owner of it in 1763, when Robert Taylor issued an edition without license. In 1766, Millar brought an action for piracy; and, as the term of years secured by the statute of Anne had expired, the direct issue was raised whether a perpetual property, by common law and independent of the statute, remained in the author and his assigns after publication. Lord Mansfield and Justices Aston and Willes maintained the affirmative, in elaborate opinions, while Mr. Justice Yates contended that copyright was the creature of the statute. The judgment of the court was that copyright was founded in the common law, and that it had not been taken away by the statute of Anne, which was intended merely to give for a term of years a more complete protection.

In 1774, the authority of this decision was overruled by the House of Lords, in the case of Donaldson *v.* Becket.[3] Several questions relating to the origin and nature of literary property were submitted to the judges, among whom there was a marked diversity of opinion. A majority held that, by the common law, an author had the exclusive right of publishing his book; and that this right was not, by virtue of the common law, lost or prejudiced by publication. But the only question on which judgment was passed was whether the common-law right in a published book had been destroyed by the statute of Anne. The affirmative was maintained by six, and the negative by five, judges. Lord Mansfield, being a peer, did not express his opinion; but it was well known that he adhered firmly to the view that the common-law right had been in no wise impaired by the statute. Including him, the judges were evenly divided on this question.

[1] Tonson *v.* Collins, 1 W. Bl. 301, 321.
[2] 4 Burr. 2303. [3] Ibid. 2408.

In moving for judgment, Lord Camden made a specious harangue against the rights of authors, and the House of Lords declared that the statute had taken away all common-law rights after publication; and hence that, in a published book, there was no copyright except that given by the statute.[1]

The judgment of the House of Lords very naturally caused much alarm among men of letters, and especially among the London booksellers, who had invested much money in copyrights which they had supposed to be perpetual, but which were now left without protection. Application was made to Parliament for a law vesting in authors and their assigns the copyright of such books as were not protected by the statute of Anne. A bill for that purpose was passed by the House of Commons, in May, 1774; but it was rejected by the Lords, and hence failed to become a law.

The universities now applied to Parliament, and obtained, in 1775, an act "for enabling the two universities in England, the four universities in Scotland, and the several colleges of Eton, Westminster, and Winchester, to hold in perpetuity their copyright in books given or bequeathed to the said universities and colleges, for the advancement of useful learning and other purposes of education."[2] Thus, what was denied to literature was granted to these wealthy corporations.

In 1801, the provisions of the English copyright statutes were extended to Ireland by 41 Geo. III. c. 107; which also provided for the recovery of damages by action in cases of piracy, increased the penalty from one to three pence a sheet, and imposed a heavier tax upon authors, by requiring them to give eleven instead of nine copies to public libraries.

The duration of copyright granted by the Parliament of Anne in 1710, — fourteen years absolute, with a contingent term of the same length, — continued without change till 1814, when it was enlarged to the absolute term of twenty-eight years, without provision for extension, except that, if the author were living at the end of that period, his copyright was to continue during his life.[3]

[1] For a fuller treatment of the cases of Millar *v.* Taylor and Donaldson *v.* Becket, see *ante*, pp. 28 *et seq.*

[2] 15 Geo. III. c. 53. The same privileges were conferred upon Trinity College, Dublin, in 1801, by 41 Geo. III. c. 107.

[3] 54 Geo. III. c. 156.

Early in the reign of Victoria, it was thought to be "high time that literature should experience some of the blessings of legislation," and earnest efforts were made to secure an extension of the term during which authors might enjoy the profits of their works. The movement was begun in Parliament, under the lead of Sergeant Talfourd, in 1837, and ended with the passing of the copyright law of 1842.[1] Sergeant Talfourd and many, if not all, of his supporters believed, and stoutly maintained, that the title of an author to his intellectual productions was the same as that of a land-owner to his estates, and that it was as clearly contrary to right and justice for Parliament to limit the ownership of the former as it would be to abridge that of the latter. The claims of literature, therefore, were presented on their only true basis of property, and not of expediency. But there was so little hope of gaining a complete victory that Parliament was not asked to proclaim the perpetuity of the ownership of literary property, but merely to extend the term of statutory copyright so as to continue for sixty years after the death of the author. This was clearly a compromise of the rights of authors, and was so understood by the friends of the bill; but it was looked upon as a decided advance upon the existing law, and the best that could be hoped for under the circumstances. The result proved that this feeling was well grounded; for so strong was the opposition to the just claims of literature that the term of copyright was fixed at forty-two years, or during the life of the author, and seven years after his death, in case this should be a longer period than forty-two years.

Mr. Sergeant Talfourd represented the cause of letters in the House of Commons with eloquence and perseverance.[2] He

[1] 5 & 6 Vict. c. 45.

[2] "Although I see no reason," said Mr. Sergeant Talfourd, "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 a 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

was aided by the petitions of the most distinguished British authors, including Wordsworth, Sir Walter Scott, Archibald Alison, Sir David Brewster, Professor Wilson, Thomas Carlyle,

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.' . . .

"The term allowed by the existing law is curiously adapted to encourage the lighest 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 phraseology 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 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, Sergeant-at-Law, London, 1840.

Thomas Hood, Thomas Campbell, Charles Dickens, Robert Browning, Douglas Jerrold, Leigh Hunt, Mary Russell Mitford, and others. Among other things, it was said that the existing law was "curiously adapted to encourage the lightest works, and to leave the noblest unprotected;" and that its effect, in the case of many of the best works of literature, was to deprive the author and his children of their property just when it became the most valuable. This, as well as the injustice of terminal copyright in general, was forcibly shown by the facts given in the petition of Sir Archibald Alison. He said that he had given twenty-five years' labor to his History of Europe, and had spent £4,000 in visiting the Continent, and securing the material necessary to its preparation. It was not expected that a work of such magnitude and so costly (the price of the seven volumes being then £4 15s.) would get into general circulation in Great Britain, even under the most favorable circumstances, "till the accuracy of the information it contains is tested by the examination of intelligent persons of all the countries whose transactions it embraces, and its reputation, if it is to attain any, is reflected to this country from the adjoining empires." At that time a third edition of the work had been called for, and it had been translated into French and German. It gave, therefore, good promise of success; yet, judging of the future profits from what he had then received, the author did not expect to be indemnified in less than fourteen years for the actual outlay in its preparation; while, if the work should stand the test of time, it could not "be expected to come into general circulation for many years more, and would probably be on the eve of reaching its highest point at the time when the copyright of it, under the existing law, would expire." [1]

[1] The case of Mr. Alison is representative of a class of authors, by no means small in number, whose works are among the most valuable contributions to literature. His petition was as follows: —

"That, with a view to the collection of the materials and the acquisition of the local information requisite for a work of such magnitude, it was unavoidably necessary for your petitioner to visit in person the principal countries in Europe, and purchase the works, in all its languages, bearing upon so extensive a subject.

"That, during the last twenty-five years, your petitioner has, with this view, six times repaired to the Continent, and repeatedly visited the principal parts of France, Italy, Switzerland,

The key-note of the opposition on this occasion was furnished by Lord Camden's absurd harangue in the last century. It

and Germany; that the cost of these journeys has already exceeded £1,500, and the expense of the books found to be necessary for the compilation of the undertaking has amounted to above £2,000. If your petitioner lives to complete his undertaking, his total expenditure on account of it will be about £4,000.

"That, during the last twenty-five years, he has been engaged, almost without interruption except by his professional avocations, in the study and reading requisite for the collection of his materials; and for the last twelve has been sedulously occupied in the composition of the work, which already extends to seven thick volumes, octavo.

"That the sale of the work of such magnitude, and so costly (the price of the seven volumes being £4 15s.), especially when undertaken by an author wholly unknown to the public, necessarily was at first very slow.

"That it must be obvious to every one acquainted with the subject, that a work of such magnitude and expense, the cost of it when completed being £5 10s. cannot be expected to get into general circulation in this country, even under the most favorable circumstances, till the accuracy of the information it contains is tested by the examination of intelligent persons of all the countries whose transactions it embraces; and its reputation, if it is to obtain any, is reflected to this country from the adjoining empires. It is now undergoing this ordeal, and is in course of publication at Paris in the French language, and of translation at Leipsic into the German.

"That your petitioner has not disposed of the entire copyright of any part of the work, but merely sells to his publishers each successive edition of it as it is called for by the public. Two editions have already been printed, and a third will shortly go to press.

"That your petitioner, judging of the future profits of the work by what he has already received, cannot expect to be indemnified for the actual outlay expended in its prosecution, with the interest at the lowest rate on the sums from the period at which they were advanced, in less than fourteen years.

"That, if the work should stand the test of time and general examination, it cannot be expected to come into general circulation for many years more, and would probably be on the eve of reaching its highest point at the time when the copyright of it, under the existing law, would expire.

"That no person can be more strongly impressed than your petitioner is with the extremely uncertain nature of every literary reputation, and the very small number of works which ever survive more than a few years beyond the period of their publication. But if his history, from the labor and expense bestowed on its composition, is destined to survive its author, and if the sale of it shall continue when the work is finished, at the same average rate at which it has gone on since the publication commenced, he will be reimbursed for his advances in fourteen years from the period of publication; in fourteen more, he will be remunerated at about one-half the rate which he would have obtained if he had devoted the same time and labor on any of the ordinary publications of the day. But at the same rate of sale, should the copyright be continued for thirty or forty years longer, the work would become a property of great value to your petitioner's family."

Mr. Hood's petition was not presented to the august body to whom it was addressed. It contains so much truth and wisdom mingled with wit, that his language may well be given here:—

"The humble petition of the undersigned, Thomas Hood, Sheweth, —

was assumed, as a matter of course, that an author had no more claim to works on which he had devoted years of toil and

"That your petitioner is the proprietor of certain copyrights which the law treats as copyhold, but which, in justice and equity, should be his freeholds. He cannot conceive how Hood's Own, without a change in the title-deeds as well as the title, can become Everybody's Own hereafter.

"That your petitioner may burn or publish his manuscripts at his own option, and enjoys a right in and control over his own productions which no press, now or hereafter, can justly press out of him.

"That as a landed proprietor does not lose his right to his estate in perpetuity by throwing open his grounds for the convenience or gratification of the public, neither ought the property of an author in his works to be taken from him, unless all parks become commons.

"That your petitioner, having sundry snug little estates in view, would not object, after a term, to contribute his private share to a general scramble, provided the landed and moneyed interests, as well as the literary interest, were thrown into the heap; but that, in the mean time, the fruits of his brain ought no more to be cast amongst the public than a Christian woman's apples or a Jewess's oranges.

"That cheap bread is as desirable and necessary as cheap books; but it hath not yet been thought just or expedient to ordain that, after a certain number of crops, all cornfields shall become public property.

"That, whereas in other cases long possession is held to affirm a right to property, it is inconsistent and unjust that a mere lapse of twenty-eight or any other term of years should deprive an author at once of principal and interest in his own literary fund. To be robbed by Time is a sorry encouragement to write for Futurity!

"That a work which endures for many years must be of a sterling character, and ought to become national property; but at the expense of the public, or at any expense save that of the author or his descendants. It must be an ungrateful generation that, in its love of cheap copies, can lose all regard for 'the dear originals.'

"That, whereas your petitioner has sold sundry of his copyrights to certain publishers for a sum of money, he does not see how the public, which is only a larger firm, can justly acquire even a share in copyright, except by similar means; namely, by purchase or assignment. That the public, having constituted itself by law the executor and legatee of the author, ought in justice, and according to practice in other cases, to take to his debts as well as his literary assets.

"That, when your petitioner shall be dead and buried, he might with as much propriety and decency have his body snatched as his literary remains.

"That, by the present law, the wisest, virtuousest, discreetest, best of authors, is tardily rewarded, precisely as a vicious, seditious, or blasphemous writer is summarily punished; namely, by the forfeiture of his copyright.

"That, in case of infringement on his copyright, your petitioner cannot conscientiously or comfortably apply for redress to the law whilst it sanctions universal piracy hereafter.

"That your petitioner hath two children, who look up to him not only as the author of the Comic Annual, but as the author of their being. That the effect of the law as regards an author is virtually to disinherit his next of kin, and cut him off with a book instead of a shilling.

"That your petitioner is very willing to write for posterity on the lowest terms, and would not object to the long credit; but that, when his heir shall apply for payment to posterity, he will be referred back to antiquity.

"That, as a man's hairs belong to his head, so his head should belong to his

pounds of sterling than what Parliament might choose to give him. Indeed, the interests of the author appear to have been entirely overlooked in the discussion. The paramount inquiry was directed to the effect that any change in the law might have on the interests of society; — paper-makers, printers, binders, proof-readers, &c. The opposition was based entirely on matters of expediency, and the fact or the possibility that an issue of property, of right, or of justice, might be involved, in no wise became the subject of inquiry. The Solicitor-General thought "that books should be had for the benefit of

heirs; whereas, on the contrary, your petitioner hath ascertained, by a nice calculation, that one of his principal copyrights will expire on the same day that his only son should come of age. The very law of nature protests against an unnatural law which compels an author to write for anybody's posterity except his own.

"Finally, whereas it has been urged, 'if an author writes for posterity, let him look to posterity for his reward,' your petitioner adopts that very argument, and on its very principle prays for the adoption of the bill introduced by Mr. Sergeant Talfourd, seeing that by the present arrangement posterity is bound to pay everybody or anybody but the true creditor." 8 Hood's Works (10 vols., London), 105.

The various petitions presented to the House of Commons are given in the volume of speeches published by Sergeant Talfourd. See *ante*, p. 75, end of note.

Much evidence was taken by the Royal Copyright Commissioners, whose report was submitted to Parliament in June, 1878, to the effect, that, unless the duration of copyright is long enough, an author cannot realize a fair reward for the time and money which he has spent on a work of lasting value, and that this fact has a marked tendency to lessen the production of such works. In 1845, Wordsworth, then an old man, told Mr. Alexander Macmillan, the well-known publisher, that he had just begun to receive any considerable sums from the sale of his poems. His returns were then about £300 a year; whereas in 1876, in the opinion of Mr. Macmillan, the copyrights of the poet, if they had not expired, would have been worth £1,000 a year. Minutes of the Evidence taken before the Royal Commission on Copyright, p. 16. Mr. Herbert Spencer published his early works at a great loss. It was twenty-four years before his losses were made up by the increasing value of his copyrights. Ibid. 257. In his opinion, no publisher would have undertaken the publication of the International Scientific Series, unless he had "many years to recoup himself." Ibid. 286. Professor Huxley pointed out the ruinous effect which a short term of protection must have on the production of such a work as Cuvier's *Ossemens Fossiles* which is as valuable and as much consulted now as when it was first published, a half a century ago. And the same, he said, is equally true of the whole class of botanical, zoölogical, and anatomical works, and the great mass of illustrated books relating to physical science. Ibid. 307. A like opinion was expressed by Mr. T. H. Farrer concerning several valuable classical dictionaries which he had edited. Ibid. 277. The testimony of these and other witnesses is to the effect, that the extent and quality of literary production are largely influenced by the opportunities which the law gives to authors to realize the pecuniary reward of their labors.

the public at the lowest possible price; and, therefore, no greater inducement should be held out to authors than may be necessary for securing the production of the desired works;" that "he could never bring himself to support any measure which goes further than to give the authors the *minimum* of inducement to produce their works; and he did not think the legislature is in conscience at liberty to go further." Sir Edward Sugden declared that he was "one of those who thought that there was no common-law copyright in the author beyond the manuscript when it was written, or whilst it remained in his own possession."[1] Mr. Strutt alone of the opposition did not forget that the issue was one of property; for he declared that, "from the moment an author puts his thoughts upon paper, and delivers them to the world, his property therein utterly ceases."[2]

Worthy disciples of Lord Camden were these men. Chief among them was Lord Macaulay, who, it will be supposed, might have understood the merits of a cause so vital to his own profession, and represented it with some degree of intelligence. But, bringing the resources and methods of the rhetorician to the discussion of a theme that needed the mind of a jurist and a statesman, he exerted his influence to enforce the fallacies of Yates and Camden. With Yates, he thought that "copyright is a monopoly, and produces all the effects which the general voice of mankind attributes to monopoly." With Camden, he believed that the author's interests were not to be considered in legislating concerning the fruits of his toil. Going beyond either of them, he declared the "principle of copyright" to be "a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget, that a tax on innocent pleasures is a premium on vicious pleasures." Groping in such fog as this, it is not strange that Macaulay did not approach the only true ground on which the copyright question can be properly discussed; viz., property. How little he understood the matter on which he was speaking, will be made apparent to the thoughtful by a representative passage from his speech:—

[1] 43 Hans. Parl. Deb. 3d ser. 555. [2] Ibid. 1071.

"We all know how faintly we are affected by the prospect of very distant advantages, even when they are advantages which we may reasonably hope that we shall ourselves enjoy. But an advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action. It is very probable that, in the course of some generations, land in the unexplored and unmapped heart of the Australasian Continent will be very valuable. But there is none of us who would lay down five pounds for a whole province in the heart of the Australasian Continent. We know that neither we, nor anybody for whom we care, will ever receive a farthing of rent from such a province. And a man is very little moved by the thought that in the year 2,000 or 2,100 somebody who claims through him will employ more shepherds than Prince Esterhazy, and will have the finest house and gallery of pictures at Victoria or Sydney. Now, this is the sort of boon which my honorable and learned friend holds out to authors. Considered as a boon to them, it is a mere nullity; but, considered as an impost on the public, it is no nullity, but a very serious and pernicious reality.

"I will take an example. Dr. Johnson died fifty-six years ago. If the law were what my honorable and learned friend wishes to make it, somebody would now have the monopoly of Dr. Johnson's works. Who that somebody would be it is impossible to say; but we may venture to guess. I guess, then, that it would have been some bookseller, who was the assign of another bookseller, who was the grandson of a third bookseller, who had bought the copyright from Black Frank, the Doctor's servant and residuary legatee, in 1785 or 1786. Now, would the knowledge that this copyright would exist in 1841 have been a source of gratification to Johnson? Would it have stimulated his exertions? Would it have once drawn him out of his bed before noon? Would it have once cheered him under a fit of the spleen? Would it have induced him to give us one more allegory, one more life of a poet, one more imitation of Juvenal? I firmly believe not. I firmly believe that, a hundred years ago, when he was writing our debates for the Gentleman's Magazine, he would very much rather have had twopence to buy a plate of shin of beef at a cook's shop underground. Considered as a reward to him, the difference between a twenty-years' and a sixty years' term of posthumous copyright would have been nothing, or next to nothing. But is the difference nothing to us? I can buy Rasselas for sixpence; I might have had to give five shillings for it. I can buy the Dictionary, the entire, genuine Dictionary, for two guineas, perhaps for less; I might have had to give five or six guineas for it. Do I

grudge this to a man like Dr. Johnson? Not at all. Show me that the prospect of this boon roused him to any vigorous effort, or sustained his spirits under depressing circumstances, and I am quite willing to pay the price of such an object, heavy as that price is. But what I do complain of is, that my circumstances are to be worse, and Johnson's none the better; that I am to give five pounds for what to him was not worth a farthing. The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget, that a tax on innocent pleasures is a premium on vicious pleasures." [1]

Apply this reasoning to the fruits of manual labor, and the satire becomes plain. Ask what interest the farmer, the merchant, the laborer, may feel in what becomes of his life's earnings after his death, when one of the strongest instincts of the father's heart is that the property left by him shall be enjoyed by his children and keep them from want. Often is this holy feeling the highest stimulus to labor, the chief motive in the accumulation of earnings. It is the will of the parent, as it is then the right of the offspring, that the latter shall succeed to the property of the former. And yet Macaulay asked the Parliament of England what interest an author can have in his works after his death! How much better Disraeli spoke on the same theme: —

"There are works requiring great learning, great industry, great labor, and great capital, in their preparation. They assume a palpable form. You may fill warehouses with them, and freight ships. And the tenure by which they are held is, in my opinion, superior to that of all other property; for it is original. It is tenure which does not exist in a doubtful title, which does not spring from any adventitious circumstances. It is not found; it is not purchased; it is not prescriptive. It is original. So it is the most natural of all titles, because it is the most simple and least artificial. It is paramount and sovereign, because it is a tenure by creation. The fault, therefore, that I find, not with the design of the bill, but with the bill itself, is that the title held by such a paramount tenure should for a moment be compromised." [2]

[1] 8 Macaulay's Works (ed. by Lady Trevelyan), 200.
[2] 43 Hans. Parl. Deb. 3d ser. 575.

It is not a pleasant spectacle to contemplate the authors and scholars to whom this century is most indebted begging in vain from the Parliament of Victoria a right which had been enjoyed by the literary men of the Elizabethan age. It is less pleasant to know that their defeat was due to the triumph of such ignorance and sophistry as pervade the notions of Yates, Camden, and Macaulay.

Like the statute of Anne, the 5 & 6 Vict. c. 45, granted copyright in a "book;" but the latter act defined this word "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." The statute also provided for the regulation of the copyright in articles published in encyclopædias, reviews, magazines, and periodicals.

The duration of copyright in books fixed by the law of 1842 has continued to the present time.

In the reign of William IV., authors were freed from a part of the oppressive tax which had been unjustly imposed on them for more than a century. The number of copies required to be delivered to public libraries — which had been nine under the act of 1710,[1] and eleven under that of 1801[2] and that of 1814[3] — was reduced to five in 1836,[4] at which number it was continued by the statute of 1842. The last named law, 5 & 6 Vict. c. 45, provides, that a copy of the best edition of every book published shall be delivered to the British Museum; and, if demanded, a copy, "on the paper of which the largest number of copies of such book or edition shall be printed for sale," shall be given to 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.[5]

In 1835 was passed the 5 & 6 Will. IV. c. 65, vesting in authors the sole privilege of publishing their lectures; so that no one, "by taking down the same in shorthand or otherwise in writing, or in any other way, obtain or make a copy," may publish the lecture without the consent of the author. The latter, however, is required to give notice in writing to "two justices living within five miles from the place where such

[1] 8 Anne, c. 19. [2] 41 Geo. III. c. 107.
[3] 51 Geo. III. c. 156. [4] 6 & 7 Will. IV. c. 110. [5] s. 8.

lecture or lectures shall be delivered, two days at the least before delivering the same." The protection granted does 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 of or according to any gift, endowment, or foundation." There is nothing in this statute to prevent any person from publicly delivering a lecture without the consent of the author.

Copyright in prints and engravings was first granted in 1735 by the 8 Geo. II. c. 13, whose provisions have been modified by several later acts. By 7 Geo. III. c. 38, passed in 1767, the term of protection was extended from fourteen to twenty-eight years.

The first statute for the protection of sculpture was the 38 Geo. III. c. 71, passed in 1798; but this was so defective that the law was revised in 1814 by the 54 Geo. III. c. 56, by which copyright is granted for fourteen years, with provision for an extension of fourteen years.

It was not until 1862 that statutory copyright was conferred upon the authors of paintings, drawings, and photographs. By the 25 & 26 Vict. c. 68, passed in that year, such authors, provided they are British subjects, or resident within the dominions of the crown, may acquire the "sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof, by any means, and of any size, for the term of the natural life of such author, and seven years after his death."

Until 1833, there was no statute securing the exclusive right of representing a dramatic composition, and the few cases which had arisen in the courts gave dramatists little hope of protection for their common-law rights from these tribunals. The act of 3 & 4 William IV. c. 15, was passed in 1833 to meet this want. It gives to the "author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment," the sole liberty of representing, or causing it to be represented, at any place of dramatic entertainment in the British dominions. Protection is extended to both printed and manuscript dramatic compositions. Any person pirating

a play is made liable to the payment of not less than forty shillings for every unlicensed representation, "or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages."

The provisions of this statute were extended to musical compositions by the 5 & 6 Vict. c. 45;[1] and the term of protection for both dramatic and musical compositions was enlarged from twenty-eight years to that prescribed for copyright in books.

Rights of Foreign Authors in England.

In 1838 was passed the first "Act for securing to authors, in certain cases, the benefit of international copyright."[2] The object of this statute was to enable foreign authors to copyright their books in England, and to secure to English authors similar advantages in foreign countries. The Queen was empowered to direct, by an Order in Council, that the author of a book first published in a foreign country should have copyright therein in the United Kingdom for a specified period, by complying with certain prescribed regulations; but only on condition that similar privileges should be conferred by such country upon English authors.

This law related only to books, and contained no provision for conferring upon authors the exclusive right of representing or performing dramatic pieces and musical compositions first published or publicly performed in a foreign country; and did not apply to prints, sculpture, and other works of art. For the protection of such productions, the 7 & 8 Vict. c. 12, was passed in 1844. It repealed the act above cited, but re-enacted its general provisions relating to books, and extended them to prints, articles of sculpture, and other works of art. Provision was also made for conferring upon dramatists whose works had first been given to the public in foreign countries the sole liberty of representing or performing them for a specified period, in any part of the British dominions. While the 7 & 8 Vict. c. 12, provided for extending protection to foreign books in the

[1] s. 20.

[2] 1 & 2 Vict. c. 59.

original language, it declared that nothing in it should be construed to prevent the printing, publication, or sale of translations of foreign works.[1] By the 15 & 16 Vict. c. 12, passed in 1852, provision was made for the protection of translations of books and of dramatic compositions. The act, however, declared that "fair imitations, or adaptations to the English stage," of foreign dramatic and musical compositions, might be made by any person.[2] This provision was repealed in 1875 by the 38 Vict. c. 12, which empowered the Queen, by Order in Council, to protect foreign plays against this species of piracy.

International copyright conventions have been made between Great Britain and the following countries: Prussia and Saxony, in 1846; Brunswick, Thuringian Union, Hanover, and Oldenburg, in 1847; France, in 1851; Anhalt and Hamburg, in 1853; Belgium, in 1854; Prussia (additional), in 1855; Spain, in 1857; and Sardinia, in 1860.

In the general copyright statutes, Parliament has made no express distinction between native and foreign authors. It has granted copyright to "authors," without prescribing any restriction as to nationality. There has been a marked diversity of judicial opinion as to the true meaning of the law on this point. Some jurists have contended that the privileges granted must be presumed to have been intended for British subjects exclusively. Others have maintained that both the spirit and the letter of the law are broad enough to embrace, on equal terms, all authors, whether native or foreign. Prior to 1854, the decisions of the courts on this question were conflicting. In that year, the House of Lords, in the case of Jefferys *v.* Boosey,[3] held, on a divided opinion of the advising judges, that a foreign author, resident abroad, was not entitled to English copyright. In 1868, in the case of Routledge *v.* Low,[4] the same tribunal, protecting the rights of an American author who had been in Canada at the time of the publication of her novel in London, declared that an alien became entitled to English copyright by first publishing in the United Kingdom, provided he were anywhere within the British dominions at the time of

[1] s. 18. [2] s. 6. [3] 4 H. L. C. 815.
[4] Law Rep. 3 H. L. 100.

such publication. This judgment has continued to represent the law.

Copyright Legislation in the United States.

The first legislation on the subject of literary property in the United States appears at the close of the Revolution. In January, 1783, Connecticut passed a "Law for the encouragement of literature and genius," with a preamble setting forth that "it is perfectly agreeable to the principles of natural equity and justice 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."[1]

In March of the same year, 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."[2] The views entertained at that early day in this enlightened Commonwealth, concerning the importance and justice of protecting the rights of authors, are expressed in the strong language of the 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. —

The act then declares that all books, treatises, and other literary works shall be the sole property of the authors, if citizens of the United States, their heirs and assigns, for twenty-one years from the date of first publication; and pre-

[1] St. of Conn. (ed. 1786) 133. [2] 1 Laws of Mass. (ed. 1807) 94.

scribes penalties for violations of this right. This law, as well as that of Connecticut, contained a proviso that its benefits should not extend to the citizens of any other State which had not passed a similar law.

At this time, the subject of literary property was brought before the old Congress by sundry papers and memorials; and on the 2d of May, 1783, the following resolution, reported by Mr. Madison, was adopted: —

"*Resolved*, That it be recommended to the several States to secure to the authors or publishers of any new books not hitherto 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 of 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, their executors, administrators, and assigns, by such laws and such restrictions as to the several States may seem proper."[1]

Pursuant to this recommendation, copyright laws were passed by Virginia in 1785,[2] New York in 1786,[3] and by other States, securing to authors, for a limited time, exclusive property in their literary works. Under this system, it was necessary for authors, in order to enjoy the benefits of protection in States other than that in which they resided, to copyright their works in each State having such laws. Authors' rights, therefore, depended on the legislation in the several States, as there was no national law relating to copyright.

In order to afford to literary property, as well as to useful inventions and discoveries, adequate protection throughout the United States by a general law, the Federal Constitution, framed in 1787, empowered Congress "to promote the progress of science and useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."[4] Pursuant to this provision, the first copy-

[1] 8 Journals of Congress, 189. [2] 12 Hening's Statutes at Large, 30.
[3] 2 Laws of New York (Jones & Varick's ed., 1789), 320. [4] Art. 1, s. 8, cl. 8.

right law of the United States was passed May 31, 1790. It was entitled "An Act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned."[1] This statute gave to authors who were citizens or residents of the United States, their heirs and assigns, copyright in maps, charts, and books for fourteen years; and provided for a second term of the same length, if the author should be living at the expiration of the first. The applicant was required, before publication, to deposit, in the clerk's office of the district court in the judicial district where he resided, a printed copy of the title of the book or map, within two months after publication; to publish the record of this fact for four weeks in one or more newspapers printed in the United States; and, within six months after publication, to deliver to the Secretary of State of the United States a copy of the book. The penalty prescribed for publishing, importing, or selling a book in violation of the act was forfeiture of copies to the author or owner, "who shall forthwith destroy the same," and the payment of fifty cents for every sheet found in possession of the offender, — one half to go to the author or owner, and the other half to the United States. The act also provided a remedy against the unauthorized publication of manuscripts belonging to citizens or residents of the United States, — a provision which has been continued by subsequent statutes to the present time.

The next statute relating to copyright was that of April 29, 1802, which went into effect the following January.[2] This required the copy of the record in the district clerk's office, besides being published in a newspaper, to be printed on the title-page of the book, or that immediately following. It also extended the provisions of the act of 1790 to "the arts of designing, engraving, and etching historical and other prints."

The act of Feb. 15, 1819, gave to the circuit courts original cognizance, in equity and at law, of all controversies respecting literary property arising under the laws of the United States."[3]

In 1831, the acts of 1790 and 1802 were repealed, and the law relating to copyright was embodied in one statute.[4] The

[1] 1 U. S. St. at L. 124.
[2] 2 Id. 171.
[3] 3 Id. 481.
[4] 4 Id. 436.

In December, 1830, Mr. Ellsworth from the Committee on the Judiciary,

term of protection was extended from fourteen to twenty-eight years, with provision for a renewal for fourteen years to the author, his widow or children. The conditions to be observed by the author were somewhat changed. He was no longer required, except in the case of a renewal, to publish in a newspaper a copy of the record of filing the title, or to print it on the title-page. The former requirement now disappeared; and, instead of the latter, it became essential to print in the book, or on the map or musical composition, the words which had formerly been used in the case of maps and engravings: "Entered according to act of Congress," &c. A printed copy of the title of the book was to be deposited before publication, and a copy of the book within three months after publication, with the district clerk, who was required to transmit, at least once a year, to the Secretary of State, a copy of such records, with the books deposited. The forfeitures and penalties were similar to those prescribed in the preceding statutes.

Musical compositions were now for the first time expressly provided for, being put on the same footing as books.

By the act of 1834, it was provided that all deeds in writing for the transfer or assignment of copyrights should be recorded in the office where the original copyright had been recorded; and that every such deed which should thereafter be made, and not proved and recorded as prescribed, within sixty days after execution, should be void against any subsequent buyer without notice.[1]

The act of 1846, establishing the Smithsonian Institution, required one copy of every book, map, chart, musical composi-

made to Congress a report, in which the following language was used:—

"Your committee believe that the just claims of authors require from our legislation a protection not less than what is proposed in the bill reported. Upon the first principles of proprietorship in property, an author has an exclusive and perpetual right, in preference to any others, to the fruits of his labor. Though the nature of literary property is peculiar, it is not the less real and valuable. If labor and effort in producing what before was not possessed or known will give title, then the literary man has title perfect and absolute, and should have his reward: he writes and he labors as assiduously as does the mechanic or husbandman. The scholar who secludes himself, and wastes his life, and often his property, to enlighten the world, has the best rights to the profits of those labors: the planter, the mechanic, the professional man, cannot prefer a better to what is admitted to be his own." Reports of Committees, 21st Cong. 2d Sess. (1830–31) Rep. No. 3.

[1] 4 U. S. St. at L. 728.

tion, print, cut or engraving, to be delivered within three months after publication to that institution, and one copy to the Library of Congress.[1] This provision was repealed in 1859, by a statute which further provided that all copyright publications and the records relating to copyrights should be transferred from the State Department to that of the Interior, which was now made the custodian of such publications and records.[2] In 1865, the owner was again required to transmit, within one month after publication, a copy of every book or other copyrighted article to the Library of Congress;[3] and, in 1867, a penalty of twenty-five dollars was imposed for failure to make such delivery.[4]

In 1861, an act was passed providing for an appeal of copyright cases to the Supreme Court of the United States, without regard to the amount in controversy.[5]

In 1865, photographs and negatives were brought within the provisions of the copyright laws.[6]

Until 1856, there was no statute giving to dramatists control over the public representation of their plays. This want was met by the act of August 18 of that year, which conferred upon the author or owner of a dramatic composition, besides the exclusive right of printing and publishing given by previous laws, the sole liberty of performing or causing it to be performed in public. Any person infringing this right was made liable to damages, in a sum not less than one hundred dollars for the first and fifty dollars for every subsequent performance.[7] The provisions of this statute applied only to cases in which copyright was secured under the act of 1831; and, as the benefits of that law were by express words limited to citizen or resident authors, foreign dramatists acquired no rights by the Statute of 1856.

All statutes relating to copyright were repealed in 1870, and the entire law on the subject embodied in one act.[8] No change was made in the duration of copyright. To the things pro-

[1] Act of Aug. 10, 1846, s. 10; 9 U. S. St. at L. 106.

[2] Act of Feb. 5, 1859, ss. 6, 8; 11 U. S. St. at L. 380.

[3] 13 Id. 540.

[4] 14 Id. 395.

[5] 12 Id. 130.

[6] 13 Id. 540.

[7] 11 Id. 138.

[8] Act of July 8, 1870, ss. 85 *et seq.*; 16 U. S. St. at L. 212.

tected by previous statutes were added paintings, drawings, chromos, statues, statuary, and models or designs intended to be perfected as works of the fine arts. A printed copy of the title of every book was required to be filed with the Librarian of Congress before publication; and two copies of the book, to be delivered, within ten days after publication, to the same officer. In the case of paintings and certain other works of art, a description must be filed before and a photographic copy delivered after publication.

In 1873–74, the copyright, with all other statutes of the United States, was revised.[1]

In 1874, it was provided that the copyright notice appearing in a book or on a work of art might be in the form previously in use, or in the words "Copyright, 18—, by A. B."[2]

International Copyright.

The subject of international copyright has been brought before Congress several times, by bill or report; but no law for that purpose has ever been passed. In February, 1837, a petition of British authors, asking protection for foreign works in the United States, was presented to the Senate by Henry Clay.[3] The subject was referred to a select committee, consisting of Messrs. Clay, Preston, Buchanan, Webster, and Ewing of Ohio. In the same month, this committee made a report urging Congress to pass an international copyright law, and submitted a bill for that purpose.[4] In the report was this language: —

"That authors and inventors have, according to the practice among civilized nations, a property in the respective productions of their genius, is incontestable; and that this property should be protected as effectually as any other property is, by law, follows as a legitimate consequence. Authors and inventors are among the greatest benefactors of mankind. They are often dependent exclusively upon their own mental labors for the means of subsistence: and are frequently, from the nature of their pursuits or the constitution of their minds, incapable of applying that provident care to worldly affairs which other

[1] U. S. Rev. St. ss. 4948-4971.
[2] 18 U. S. St. at L. 78.
[3] 2 Senate Documents, 24th Cong. 2d Sess. (1836–37) Rep. No. 134.
[4] Ibid. Rep. No. 179.

classes of society are in the habit of bestowing. These considerations give additional strength to their just title to the protection of the law.

"It being established that literary property is entitled to legal protection, it results that this protection ought to be afforded wherever the property is situated. A British merchant brings or transmits to the United States a bale of merchandise, and the moment it comes within the jurisdiction of our laws they throw around it effectual security. But, if the work of a British author is brought to the United States, it may be appropriated by any resident here, and republished, without any compensation whatever being made to the author. We should be all shocked if the law tolerated the least invasion of the rights of property in the case of the merchandise, whilst those which justly belong to the works of authors are exposed to daily violation, without the possibility of their invoking the aid of the laws.

"The committee think that this distinction in the condition of the two descriptions of property is not just; and that it ought to be remedied by some safe and cautious amendment of the law."

On Feb. 21, 1868, Mr. Baldwin, from the Committee on the Library, reported favorably to the House of Representatives a bill for extending protection to the works of foreign authors. "We are fully persuaded," said the committee, "that it is not only expedient, but in a high degree important, to the United States to establish such international copyright laws as will protect the rights of American authors in foreign countries, and give similar protection to foreign authors in this country. It would be an act of national honor and justice, in which we should find that justice is the wisest policy for nations, and brings the richest rewards."[1]

Bills for extending protection to the works of foreign authors were introduced in the House of Representatives by Mr. Cox of New York, Dec. 6, 1871, and by Mr. Beck of Kentucky, Feb. 21, 1872; and in the Senate, by Mr. Sherman of Ohio, Feb. 21, 1872. Each of these was read twice, referred to the Committee on the Library, and ordered to be printed.[2] On Dec. 18, 1871, a resolution, offered by Mr. Cox, was

[1] House Reports, 40th Cong. 2d Sess. (1867–68) Rep. No. 16. This committee was composed of Senators Morgan of New York, Fessenden of Maine, and Howe of Wisconsin; and Representatives Baldwin of Massachusetts, Pruyn of New York, and Spalding of Ohio.

[2] Cong. Globe, 42d Cong. 2d Sess. (1871–72) parts i. 29, ii. 1174, 1151.

passed by the House, "that the Committee on the Library, be directed to consider the question of an international copyright; and to report to this House what, in their judgment, would be the wisest plan, by treaty or law, to secure the property of authors in their works, without injury to other rights and interests; and, if in their opinion congressional legislation is the best, that they report a bill for that purpose." [1]

The whole subject for the time being seems to have been disposed of by the adverse report made to the Senate, Feb. 7, 1873, by Mr. Morrill of Maine, from the Joint Committee on the Library. This report closed as follows: —

"Your committee are satisfied that no form of international copyright can fairly be urged upon Congress, upon reasons of general equity or of constitutional law; that the adoption of any plan for the purpose which has been laid before us would be of very doubtful advantage to American authors, as a class, and would be not only an unquestionable and permanent injury to the manufacturing interests concerned in producing books, but a hinderance to the diffusion of knowledge among the people and to the cause of universal education; that no plan for the protection of foreign authors has yet been devised which can unite the support of all, or nearly all, who profess to be favorable to the general object in view; and that, in the opinion of your committee, any project for an international copyright will be found upon mature deliberation to be inexpedient." [2]

[1] Cong. Globe, 42d Cong. 2d Sess. (1871–72) part i. 199.

Speeches in favor of Mr. Cox's bill were made in committee of the whole by Mr. Archer of Maryland, March 23, 1872, and afterwards by Mr. Storm of Pennsylvania. Ibid. part iii. 1931, 2410.

On Feb. 12, 1872, Mr. Kelly of Pennsylvania offered the following resolution in the House, which was referred to the Committee on the Library: "Whereas it is expedient to facilitate the reproduction here of foreign works of a higher character than that of those now generally reprinted in this country; and whereas it is in like manner desirable to facilitate the reproduction abroad of the works of our own authors; and whereas the grant of monopoly privileges, in case of reproduction here or elsewhere, must tend greatly to increase the cost of books, to limit their circulation, and to increase the already existing obstacles to the dissemination of knowledge: Therefore, resolved that the Joint Committee on the Library be and it hereby is instructed to inquire into the practicability of arrangements by means of which such reproduction, both here and abroad, may be facilitated, freed from the great disadvantages that must inevitably result from the grant of monopoly privileges such as are now claimed in behalf of foreign authors and domestic publishers." Ibid. part ii. 972.

[2] Senate Reports, 42d Cong. 3d Sess. (1872–73) Rep. No. 409. This committee consisted of Senators Morrill of Maine, Sherman of Ohio, and Howe of Wisconsin; and Representatives Peters of Maine, Wheeler of New York, and Campbell of Ohio.

Thus, Congress has repeatedly refused to grant protection to the works of foreign authors, and in every copyright statute passed since the formation of the government has emphatically declared that such works are legitimate subjects of piracy. This country is put to shame by the legislation of England and other foreign nations on this subject. The English laws, as far as they relate to foreign authors, show a comprehensive liberality, a broad, catholic spirit, not found in those of the United States. Not only are special advantages offered by the international copyright laws to men of letters of any country which will extend reciprocal privileges to English authors, but, in legislating "for the encouragement of learning" in Great Britain, Parliament has made no distinction between native and foreign authors. In the opinion of many statesmen and jurists, the law invites men of learning everywhere to send their productions to the United Kingdom for first publication, that England may become a centre of learning and culture. The most learned judges of the realm, from Lord Mansfield down to Lord Chancellor Cairns, have given this interpretation to the statutes, have maintained that this is the law of the realm. It is true that the decision of the House of Lords in 1854 imposes on a foreign author a condition from which a subject is free;[1] but the former may acquire the full benefit of the statute by his presence within the British dominions at the time of publication. The judgment making even this bodily presence necessary has been shaken to the foundation;[2] and now the Royal Commissioners on Copyright, in their report submitted to Parliament in June, 1878, recommend that, on the condition of first publication in Great Britain, "the benefit of the copyright laws should extend to all British subjects and aliens alike."[3] After reviewing the steady refusal of the United States to grant protection to British authors, either by law or treaty, the commissioners take this enlightened and philosophic position:—

"It has been suggested to us that this country would be justified in taking steps of a retaliatory character, with a view of enforcing inci-

[1] Jefferys *v.* Boosey, 4 H. L. C. 815.
[2] See Chap. IV., Rights of Foreign Authors in Great Britain.
[3] Report of the Royal Commissioners on Copyright, p. xiv, § 64.

dentally, that protection from the United States which we accord to them. This might be done by withdrawing from the Americans the privilege of copyright on first publication in this country. We have, however, come to the conclusion, that, on the highest public grounds of policy and expediency, it is advisable that our law should be based on correct principles, irrespectively of the opinions or the policy of other nations. We admit the propriety of protecting copyright; and it appears to us that the principle of copyright, if admitted, is one of universal application. We therefore recommend that this country should pursue the policy of recognizing the author's rights, irrespective of nationality." [1]

Not less liberal should be the United States. Her gates bearing the inscription *Tros Tyriusque mihi nullo discrimine agetur*, should be opened wide to the authors of all tongues, all races, all creeds. All countries should be one for noble men who labor, in whatever vineyard, for the advancement of knowledge and truth. Whoever shall move Congress to pass a law inviting authors, composers, and artists, of every nation under the sun, to send their treasures of learning, science, and art to our shores, where they shall be protected, will deserve a monument more durable than brass.

[1] Report of the Royal Commissioners on Copyright, p. xxxviii, § 251.

CHAPTER I.

COMMON-LAW PROPERTY IN UNPUBLISHED WORKS.

Literary Property defined. — Literary property is the exclusive right of the owner to possess, use, and dispose of intellectual productions. An intellectual creation without material form may exist in the mind of the author. But it is only when embodied in written or spoken language that it can possess the attributes of property; for it is only by language that it can have any being out of the author's mind, that it can be enjoyed by others, that it can be identified. There can, then, be no property in a production of the mind unless it is expressed in a definite order of words. But the property is not in the mere words alone, — not alone in the one form of expression chosen by the author. It is in the intellectual creation, which language is merely a means of expressing and communicating. The words of a literary composition may be changed by substituting others of synonymous meaning; but the intellectual creation will remain substantially the same. This truth is judicially recognized in the established principle, that the property of the author is violated by an unauthorized use of his composition, with a colorable change of words; the test of piracy being not whether the identical language, the same words, are used, but whether the substance of the production is unlawfully appropriated. So an intellectual production may be expressed in any number of different languages. The thing itself is always the same; only the means of communication is different. The plot, the characters, the sentiments, the thoughts, which constitute a work of fiction, form an immaterial creation, which may be communicated by a hundred different tongues, — by the labial or the sign language of the mute, the raised letters of the blind, the comprehensive characters of stenography. The means of communication

are manifold; but the invisible, intangible, incorporeal creation of the author's brain never loses its identity. The Bible has been translated into all tongues; but its truths, its eloquence, its poetry, have been the same to all nations.

Literary property, then, is not restricted to the one form of language in which thoughts are expressed, but is in the intellectual creation which is embodied in such language. This creation, in whatever language or form of words it can be identified, the author may claim as his property. That there can be no property in thoughts, conceptions, ideas, sentiments, &c., apart from their association, is clear; for they are then incapable of being identified or owned exclusively. But their arrangement and combination in a definite form constitute an intellectual production, a literary composition, which has a distinct being capable of identification and separate ownership, and possessing the essential attributes of property. The property is not in the simple thoughts, ideas, &c., but in what is produced by their association.

The property in an intellectual production is incorporeal, and is wholly distinct from the property in the material to which it may be attached. Indeed, literary property may exist independently of any corporeal substance. It may be as perfect in a production expressed in spoken as in one communicated by written or printed words. A poem when read, a lecture when delivered, a song when sung, a drama when acted, may have all the attributes of property, though not a word has been written or printed. The true test is not whether the thing is corporeal or incorporeal, not whether it is attached to a material substance, but whether it is capable of identification so that exclusive ownership may be asserted. The identity of an intellectual production is secured by the language in which it is expressed; and this is true whether the language be spoken or written. When a composition has not been reduced to writing, it may be more difficult, and in some cases impracticable, to prove the authorship, and thereby to establish a title to ownership. But the manuscript is but a means of proof. And when the title to the ownership is not disputed, or can be satisfactorily established without the existence of a writing, as it may be in many cases, it is immaterial whether the composition has

been reduced to writing, or has been communicated only in spoken words. The Iliad was as valid a subject of property when recited from memory at the Greek festivals as it was when, long afterward, it appeared in written or printed language.[1]

As material property may pass out of the actual or personal possession of the owner, while the legal possession or title is in him, so literary property is within the legal domain of the owner, though it be in the actual possession of another. The owner may part with the paper on which a composition is written, or the book in which it is printed, without forfeiting any proprietary right in the composition itself. The legal title to Clarendon's History was not affected by the fact that a manuscript copy was for a century in the custody of those who were not the owners of the copyright. An intellectual production differs from any material substance in that it is capable of being multiplied or copied indefinitely, and of being used and

[1] "The property in the copy thus abridged, is equally an incorporeal 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 of the copy, thus narrowed, may equally go down from generation to generation, and possibly continue for ever, though neither the author nor his representatives should have any manuscript whatsoever of the work, original, duplicate or manuscript. 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. Gywnne 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." Lord Mansfield, Millar *v.* Taylor, 4 Burr. 2396, 2397.

"A literary composition," said Sir William Blackstone, "as it lies in the author's mind, before it is substantiated by reducing it into writing, has the essential requisites to make it the subject of property. While it thus lies dormant in the mind, it is absolutely in the power of the proprietor. He alone is entitled to the profits of communicating, or making it public." Tonson *v.* Collins, 1 W. Bl. 322.

In Abernethy *v.* Hutchinson, Lord Eldon doubted whether there could be property in lectures which had not been reduced to writing, and refused to grant an injunction on this ground until the question should be determined at law. 3 L. J. (Ch.) 209; s. c. 1 Hall & Tw. 28. As there was no question in this case that the plaintiff was the author and the owner of the lectures for which he claimed protection, his property therein was in no wise affected by the non-existence of a manuscript.

enjoyed at the same time by an unlimited number of persons. The right of property in it is the exclusive right to own and to use the thing itself. The owner may alone enjoy it, and exclude every other person from its enjoyment; or, without parting with the ownership, he may admit others to a private or personal use of the production. For the latter purpose, a copy is made and given to the user, who becomes the owner of the material copy, with a limited right to use and enjoy the intellectual production. But the production itself remains the property of the owner; and the user acquires no rights of ownership entitling him to multiply copies, or otherwise to make a public use of the work. This is a right of property vested solely in the owner.[1]

Difference between Common-Law and Statutory Right. — Property in intellectual productions is recognized and protected in England and the United States, both by the common law and by the statute. But, as the law is now expounded, there are important differences between the statutory and the common-law right. The former exists only in works which have been published within the meaning of the statute; and the latter, only in works which have not been so published. In the former case, ownership is limited to a term of years; in the latter, it is perpetual. The two rights do not co-exist in the same composition; when the statutory right begins, the common-law right ends. Both may be defeated by publication. Thus, when a work is published in print, the owner's common-law rights are lost; and, unless the publication be in accordance with the requirements of the statute, the statutory right is not secured. The common-law property in a literary composition is violated by any unauthorized public use of it, whether by printing and circulating copies, or by reading it in public. Statutory copyright may be infringed by the circulation of copies; but not by publicly reading copies.[2]

Copyright Defined. — Copyright is the exclusive right of

[1] "No disposition," said Lord Mansfield, "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." 4 Burr. 2396.

[2] Statutory playright in a dramatic composition may be violated by publicly reading it.

the owner to multiply and to dispose of copies of an intellectual production.[1] It is the sole right to the copy or to copy it. The word is used indifferently to signify the statutory and the common-law right of the owner in a literary or musical composition or work of art. As there are essential differences between the two rights, one is sometimes called copyright after publication, or statutory copyright; and the other, copyright before publication, or common-law copyright. Copyright is also used synonymously with literary property. Thus, the exclusive right of the owner publicly to read a literary composition, to exhibit a work of art, or to represent a drama, is often called copyright. This is not strictly correct; and, especially in the case of dramatic compositions, there are reasons for distinguishing in name the right of multiplying copies from that of representation. This latter right may well be called playright, for reasons which are given elsewhere.[2]

The Nature and Extent of Common-Law Rights.

In what Productions. — Two principles are settled in English and American jurisprudence: 1. At common law, the owner of an unpublished literary composition has an absolute property therein.[3] 2. When the composition is published in print, the common-law right is lost.[4]

[1] The 5 & 6 Vict. c. 45, s. 2, defines copyright "to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is herein applied." Copyright in a book, as secured by the American statute, is "the sole liberty of printing, reprinting, publishing, . . . and vending the same." U. S. Rev. Sts. s. 4952.

[2] See beginning of Chap. XIII.

[3] Br. Webb *v.* Rose, cited 4 Burr. 2330; Forrester *v.* Waller, Ibid. 2331; Manley *v.* Owen, Ibid. 2329; Duke of Queensbury *v.* Shebbeare, 2 Eden, 329; Millar *v.* Taylor, 4 Burr. 2303; Abernethy *v.* Hutchinson, 1 Hall & Tw. 28; Prince Albert *v.* Strange, 2 De G. & Sm. 652; on ap. 1 Mac. & G. 25; Turner *v.* Robinson, 10 Ir. Ch. 121, 510. Am. Jones *v.* Thorne, 1 N. Y. Leg. Obs. 408; Bartlett *v.* Crittenden, 4 McLean, 300, 5 Id. 32; Little *v.* Hall, 18 How. 165, 170; Banker *v.* Caldwell, 3 Minn. 94; Paige *v.* Banks, 13 Wall. 608; Parton *v.* Prang, 3 Cliff. 537; Carter *v.* Bailey, 64 Me. 458; Kiernan *v.* Manhattan Quotation Telegraph Co., 50 How. Pr. (N. Y.) 194. To the same effect are the authorities cited in the following note and in notes 1, 2, 3, p. 128. See also the authorities cited in considering the common-law property in dramatic compositions, Chap. XIII.

[4] Br. Donaldson *v.* Becket, 4 Burr. 2408; Colburn *v.* Simms, 2 Hare, 543; Chappell *v.* Purday, 14 Mees. & W. 303; Jefferys *v.* Boosey, 4 H. L. C. 815; Reade *v.* Conquest, 9 C. B. n. s. 755; Rooney *v.* Kelly, 14 Ir. Law Rep. n. s. 158; Midwinter *v.* Hamilton, 10

It may be regarded as conceded that the same is true of all kinds of intellectual productions which have been made the subject of statutory copyright, including maps,[1] charts, musical compositions, engravings,[2] photographs, paintings,[3] works of sculpture, &c. In short, all productions of literature, the drama, music, and art, are within the protection of the law. "The property of an author or composer of any work," said Lord Chancellor Cottenham, "whether of literature, art or science, in such work unpublished and kept for his private use or pleasure, cannot be disputed, after the many decisions in which that proposition has been affirmed or assumed."[4]

The Author's Rights absolute before Publication. — The property of an author in his intellectual production is absolute until he voluntarily parts with all or some of his rights.[5] There is no principle of law by which he can be compelled to publish it or to permit others to enjoy it.[6] He has a right

Mor. Dict. of Dec. 8295; on ap. (Midwinter *v.* Kincaid) 1 Pat. App. Cas. 488; Hinton *v.* Donaldson, 10 Mor. Dict. of Dec. 8307; Cadell *v.* Robertson, Id. Lit. Prop. App. p. 16; on ap. 5 Pat. App. Cas. 493. **Am.** Wheaton *v.* Peters, 8 Pet. 591; Pulte *v.* Derby, 5 McLean, 328; Stowe *v.* Thomas, 2 Wall. Jr. 547; Stevens *v.* Gladding, 17 How. 447; Wall *v.* Gordon, 12 Abb. Pr. n. s. (N. Y.) 349; Rees *v.* Peltzer, 75 Ill. 475; Boucicault *v.* Wood, 2 Biss. 34.

[1] Rees *v.* Peltzer, *supra*.

[2] Prince Albert *v.* Strange, *infra*.

[3] Turner *v.* Robinson, 10 Ir. Ch. 121, 510; Parton *v.* Prang, 3 Cliff. 537; Oertel *v.* Wood, 40 How. Pr. (N.Y.) 10; Oertel *v.* Jacoby, 44 How. Pr. (N. Y.) 179.

[4] Prince Albert *v.* Strange, 1 Mac. & G. 25, 42. In the same case, Vice-Chancellor Bruce said: "Such then being, as I believe, the nature and foundation of the common law as to manuscripts independently of Parliamentary additions or subtractions, its operations cannot of necessity be confined to literary subjects. That would be to limit the rule by the example. Wherever the produce of labor is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress." 2 De G. & Sm. 652, 696.

In Tipping *v.* Clarke, 2 Hare, 383, the court did not doubt the existence of common-law property in unpublished books of account.

[5] "The right of the author before publication we may take to be unquestioned, and we may even assume that it never was, when accurately defined, denied. He has the undisputed right to his manuscript; he may withhold it, or he may communicate it, and communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation." Lord Brougham, Jefferys *v.* Boosey, 4 H. L. C. 962.

[6] "There is no law which can compel an author to publish. No one can determine this essential matter of publication but the author. His manuscripts, however valuable, cannot without his consent be seized by his creditors as property." McLean, J., Bartlett *v.* Crittenden, 5 McLean, 37.

to exclude all persons from its enjoyment; and, when he chooses to do so, any use of the property without his consent is a violation of his rights. He may admit one or more persons to its use, to the exclusion of all others; and, in doing so, he may restrict the uses which shall be made of it. He may give a copy of his manuscript to another person, without parting with his literary property in it.[1] He may circulate copies among his friends, for their own personal enjoyment, without giving them or others the right to publish such copies.[2]

[1] Duke of Queensbury *v.* Shebbeare, 2 Eden, 329; Thompson *v.* Stanhope, Amb. 737.

[2] Prince Albert *v.* Strange, 2 De G. & Sm. 652; on ap. 1 Mac. & G. 25; Bartlett *v.* Crittenden, 4 McLean, 300, 5 Id. 32.

"The nature of the right of an author in his works is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copying after publication in print, which is the limited meaning of copyright in its common acceptation, and which is the right of an author, to which the statute of Anne relates. Thus, if after composition the author chooses to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personalty in the like case. He may prevent publication; he may require back the copies wrongfully made; he may sue for damages if any are sustained; also, if the wrongful copies were published abroad, and the books were imported for sale without knowledge of the wrong, still the author's right to his composition would be recognized against the importer, and such sale would be stopped. . . . Again, if an author chooses to impart his manuscript to others without general publication, he has all the rights for disposing of it incidental to personalty. He may make an assignment either absolute or qualified in any degree. He may lend, or let, or give, or sell any copy of his composition, with or without liberty to transcribe, and if with liberty of transcribing, he may fix the number of transcripts which he permits. If he prints for private circulation only, he still has the same rights, and all these rights he may pass to his assignee. About the rights of the author, before publication, at common law, all are agreed." Erle, J., Jefferys *v.* Boosey, 4 H. L. C. 867.

"Undoubtedly," said Mr. Justice Clifford, "the author of a book, or of an unpublished manuscript, or of any work of art, has at common law, and independently of any statute, a property in his work until he publishes it or it is published by his consent or allowance; and that property unquestionably exists in pictures as well as in any other work of art. He has the undisputed right to his manuscript; he may withhold or may communicate it, and communicating, he may limit the number of persons to whom it shall be imparted, and impose such restrictions as he pleases upon the use of it. He may annex conditions, and proceed to enforce them, and for their breach he may claim compensation. Jefferys *v.* Boosey, 4 H. L. C. 815, 962; Millar *v.* Taylor, 4 Burr. 2396; Duke of Queensbury *v.* Shebbeare, 2 Eden, 329. Numerous other decided cases also affirm the same proposition, that the author of an unpublished manuscript has the exclusive right of property therein, and that he may determine for himself whether the manuscript shall be made public at all; that he may, in all cases, forbid its publication by another before it has been published by him or by his consent or allowance." Parton *v.* Prang, 3 Cliff. 518.

So, also, without forfeiting his rights, he may communicate his work to the general public, when such communication does not amount to a publication within the meaning of the statute. Thus, in the United States, a manuscript lecture, sermon, or any literary composition, may be delivered or read to the public by the author, or a dramatic or musical composition publicly performed, and no person without the consent of the author acquires the right to make a similar public use of it, or to print it.[1] And the same is true in England of literary compositions which are not dramatic.

Literary Property Personal, and may be transferred by Parol. —The literary property in an unpublished work is personal, and is subject to the same general rules which govern personal property. It may be transmitted by bequest, gift, sale, operation of law, or any mode by which personal property is transferred. "This property in a manuscript, is not distinguishable from other personal property. It is governed by the same rules of transfer and succession, and is protected by the same process, and has the benefit of all the remedies accorded to other property so far as applicable."[2]

While there has been much discussion as to the necessity of a writing in assigning statutory copyright, it has never been disputed, and is well settled, that the literary property in an unpublished work may be transferred by word of mouth.[3] "Personal property," said Mr. Justice Clifford, "is transferable by sale and delivery; and there is no distinction in that respect, independent of statute, between literary property and property of any other description."[4]

[1] See Chap. XIII.

[2] Allen, J., Palmer *v.* De Witt, 47 N. Y. 538.

[3] Turner *v.* Robinson, 10 Ir. Ch. 121, 510; Little *v.* Gould, 2 Blatchf. 165, 362; Lawrence *v.* Dana, 2 Am. L. T. R. n. s. 402; Palmer *v.* De Witt, 47 N. Y. 532; Parton *v.* Prang, 3 Cliff. 537. "The first section of the English statute of the 8 Anne, c. 19, distinctly recognizes the right to transfer and assign copyright by the common law, although assignments under that act must be in writing and witnessed. The case of Power *v.* Walker, 3 Maule & S. 7, shows that it was the statute and not the common law which required that the assignment should be in writing. It would be a waste of time to add more than that the copyright is incident to the ownership, and passes at the common law with a transfer of the work of art." Smith, M. R., Turner *v.* Robinson, 10 Ir. Ch. 142.

[4] Parton *v.* Prang, 3 Cliff. 550. "Owners of personal property," continued the same judge, "have the right to sell and transfer the same as

No Rights Lost by Parting with Manuscript. — When the owner parts with his manuscript, he does not transfer the exclusive right to copy it, unless there be an express or implied agreement to that effect. Where the second Lord Clarendon had given to Mr. Gwynne the manuscript of his father's History of the Reign of Charles II., and said that "he might take a copy thereof, and make use of the same as he should think fit," the court held, "it was not to be presumed that Lord Clarendon, when he gave a copy of the work to Mr. Gwynne, intended that he should have the profit of multiplying it in print; that Mr. Gwynne might make every use of it except that."[1] And so when Lord Chesterfield told Mrs. Stanhope that she might keep certain letters which he had written to his son, whose widow she was, it was held that he "did not mean to give her leave to print and publish them."[2] Southey did not lose his rights in his manuscript by letting it remain twenty-three years in the possession of a bookseller.[3] "To make a gift of a copy of the manuscript," said Mr. Justice McLean, "is no more a transfer of the right or abandonment of it, than it would be a transfer or an abandonment of an exclusive right to republish, to give the copy of a printed work."[4]

inseparable incidents of the property; and the author or proprietor of a manuscript or picture possesses that right as fully, and to the same extent, as the owner of any other personal property, the same being incident to the ownership. Sales may be absolute or conditional, and they may be with or without qualifications, limitations, and restrictions; and the rules of law applicable in such cases to other personal property must be applied in determining the real character of a sale of literary property. Proper attention to these considerations will furnish the true explanation of many, if not all, the cases referred to by the complainant, which are supposed to support the second proposition for which he contends. Beyond doubt the right of first publication is vested in the author; but he may sell and assign the entire property to another; and if he does so, his assignee takes the entire property, and it is a great mistake to suppose that any act of Congress, at the date of the sales of the picture in this case required that such an assignment should be in writing; and the pleadings show that the sale and delivery in each case were absolute and unconditional, and without any qualification, limitation, or restriction, showing that the entire property was transferred from the complainant and became vested in the respondent."

[1] Duke of Queensbury *v.* Shebbeare, 2 Eden, 329.

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

[3] Southey *v.* Sherwood, 2 Meriv. 435. The injunction was refused on other grounds.

[4] Bartlett *v.* Crittenden, 5 McLean, 41.

But an unconditional sale of a painting is a transfer of the entire property in it.[1]

Limited Assignment. — The owner may make an absolute or a limited assignment of his rights. He may convey the exclusive right to publish his manuscript in one country, and reserve to himself the exclusive right of publication in another.[2] So also he may transfer the sole liberty of representing an unpublished drama in any place, without parting with the similar right for any other place.[3]

Foreigners' Rights.— Whatever may be the disabilities of an alien under the copyright statutes, his rights at common law are the same as those of a citizen.[4] "This incorporeal right or property may be possessed by any one who may acquire or hold personal property in England, as far as the right of property depends upon the common law. The right or property is merely personal; and an alien friend, by the common law, has as much capacity to acquire, possess and enjoy such personal right or property as a natural-born British subject."[5] "The alienage of the author," said the New York Court of Appeals, "is no obstacle to him or his assignee in proceeding in our courts for a violation, or to prevent a violation of his rights of property in his unpublished works."[6]

[1] Parton *v.* Prang, 3 Cliff. 537. See also Turner *v.* Robinson, 10 Ir. Ch. 121, 510.

[2] See Chap. VI.

[3] See Chap. XV., Transfer of Playright.

[4] Jefferys *v.* Boosey, 4 H. L. C. 815; Keene *v.* Wheatley, 9 Am. Law Reg. 33; Crowe *v.* Aiken, 2 Biss. 208; Palmer *v.* De Witt, 47 N. Y. 532.

[5] Wightman, J., Jefferys *v.* Boosey, 4 H. L. C. 885. "By the common law of England," said Maule, J., "aliens are capable of holding all sorts of personal property and exercising all sorts of personal rights." Ibid. 895.

[6] Palmer *v.* De Witt, 47 N. Y. 540. "Real property," said Allen, J., in delivering the opinion of the court, 538, "is governed by the *lex loci rei sitæ*, and an alien can only acquire and have title as permitted by the local law. But not so as to personalty. In Calvin's case (7 Coke, 17 *a*), it was held that 'an alien friend may, by the common-law, have, acquire, and get within the realm by gift, trade, or other lawful means, any treasure or goods personal whatsoever, as well as any Englishman, and may maintain action for the same.' This has always been accepted as the common law of the United States. An alien friend may resort to the tribunals of this State for the prosecution of any right recognized by our laws, or the redress of any wrong cognizable by our courts.

"The right to literary property is as sacred as that to any other species of property. The courts of the State are open to an alien friend pursuing his property, and seeking to recover it from a wrong-doer; and there is nothing in any positive law, or in the policy of the government, which would close the door against the same alien friend

Violation of Common-Law Rights.

The owner's common-law rights are invaded when, without his consent, his manuscript is published in print,[1] when his dramatic or musical composition is publicly performed,[2] or when copies of his work of art are either publicly circulated or exhibited.[3] He is entitled to prevent or to restrain by injunction the unlawful use of his work, and to recover by an action at law for the damages he has sustained.

By Public Reading or Delivery of Lecture. — There is no reported case in which it has been expressly held that the unauthorized delivery in public of an unpublished lecture, or the public reading of a manuscript, is a violation of the owner's common-law rights. But the principle is clear that such use of an unpublished production is piratical. It is the same in principle as the unlicensed representation of a manuscript play. When Abernethy, the distinguished surgeon, sought to restrain the publication in the Lancet of unpublished lectures which he had delivered at St. Bartholomew's Hospital in London, Lord Eldon was "clearly of opinion that when persons were admitted as pupils or otherwise to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of shorthand, yet they could do

seeking protection for the fruits of his mental labor, by restraining its publication against his wishes. The protection offered by the common law to literary labor is very slight at the best; but, such as it is, it is accorded to an alien friend and citizen alike, and both are regarded with equal favor.

"In declaring the rules of law and applying legal remedies for the redress or prevention of wrong, there is no distinction between the right of the banker to his bills and bonds, embezzled and found here in the possession of a wrong-doer, and the right of an author to his manuscript clandestinely or surreptitiously taken and brought here for publication, to his prejudice and the destruction of all its value as property. Both resort to the courts for the protection of acknowledged rights of property, and are entitled to the remedies given by law."

[1] **Br.** Webb *v.* Rose, cited 4 Burr. 2330; Forrester *v.* Waller, Ibid. 2331; Duke of Queensbury *v.* Shebbeare, 2 Eden, 329; Macklin *v.* Richardson, Amb. 694; Millar *v.* Taylor, 4 Burr. 2303; Abernethy *v.* Hutchinson, 1 Hall & Tw. 28. **Am.** Bartlett *v.* Crittenden, 4 McLean, 300, 5 Id. 32; Palmer *v.* De Witt, 47 N. Y. 532; Boucicault *v.* Hart, 13 Blatchf. 47. To the same effect are the cases in which the publication of letters has been enjoined, cited *post*, p. 128, notes 1, 2, 3.

[2] See Chap. XIII.

[3] Prince Albert *v.* Strange, 2 De G. & Sm. 652; on ap. 1 Mac. & G. 25; Turner *v.* Robinson, 10 Ir. Ch. 121, 510.

that only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling." [1]

By Copying Works of Art. — In Turner *v.* Robinson,[2] the defendant was charged with piracy, in having made for sale copies of a painting representing the death of Chatterton. He denied direct copying, but admitted that he had seen the original while on exhibition, and said that he had made his photographs from an arrangement of figures, objects, and scenery, which he had prepared in his own gallery. He further admitted that he had made the arrangement from his recollection of the painting, and with a view of presenting a stereoscopic photograph of the same representation as that given by the painting. The court did not hesitate to declare that this was an unlawful use of the plaintiff's property. "The Stereoscopic Slides," said the Lord Justice of Appeal, "are not photographs taken directly from the picture, in the ordinary mode of copying; but they are photographic pictures of a model itself copied from, and accurately imitating in its design and outline, the petitioner's painting. It is through this medium that the photograph has been made a perfect representation of the painting. Thus the object contrived and achieved, and the consequent injury, are the very same as if the copy had, in

[1] Abernethy *v.* Hutchinson, 1 Hall & Tw. 40. Lord Eldon, however, doubted whether there could be property in lectures which had not been reduced to writing, and granted an injunction on the ground of breach of confidence.

In Keene *v.* Kimball, 16 Gray (82 Mass.), 551, Hoar, J., said: "We do not intend in this decision to intimate that there is any right to report, phonographically or otherwise, a lecture or other written discourse which its author delivers before a public audience, and which he desires again to use in like manner for his own profit, and to publish it without his consent, or to make any use of a copy thus obtained. The student who attends a medical lecture may have a perfect right to remember as much as he can, and afterward to use the information thus acquired in his own medical practice, or to communicate it to students or classes of his own, without involving the right to commit the lecture to writing, for the purpose of subsequent publication in print or by oral delivery. So any one of the audience at a concert or opera may play a tune which his ear has enabled him to catch, or sing a song which he may carry away in his memory, for his own entertainment or that of others, for compensation or gratuitously, while he would have no right to copy or publish the musical composition." See also language of McLean, J., Bartlett *v.* Crittenden, 4 McLean, 303, 304, quoted *post*, p. 122.

[2] 10 Ir. Ch. 121, 510.

breach of confidence, been made on the view, and by the eye; and no court of justice can admit that an act illegal in itself can be justified by a novel or circuitous mode of effecting it. If it is illegal, so must the contrivance be by means of which it was effected."[1]

By Exhibiting Copies. — In Prince Albert *v.* Strange,[2] the defendant was enjoined not only from exhibiting copies of etchings which he had taken from plates unlawfully obtained, but also from selling descriptive catalogues of such etchings. It was contended on behalf of the defendant, that while the owner might prevent the sale or public exhibition of copies of the drawings, it was no violation of any rights of property to publish a mere description of them. The soundness of this distinction was not recognized by the court. "It being admitted," said Lord Cottenham, "that the defendant could not publish a copy, that is an impression of the etching, how in principle does a catalogue, list, or description differ? A copy or impression of the etching would only be a means of communicating knowledge and information of the original, and does not a list and description do the same? The means are different, but the object and effect are similar; for in both the object and effect is to make known to the public more or less of the unpublished work and composition of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others."[3]

This ruling was doubtless correct in this case, because the etchings had been kept wholly private by the owners, and had in no sense been published. But when drawings, paintings, statues, or any works of art, have been published by being publicly exhibited, there seems to be no principle of property which will enable the owner to prevent another from publishing a verbal description of them. When a thing is kept in strict privacy, the owner may have a right to say that even a description of it shall not be made public; but when the thing itself is published, as it may be by being publicly exhibited, though the owner's rights of property are not lost by such publication,

[1] 10 Ir. Ch. 521.
[2] 2 De G. & Sm. 652; on ap. 1 Mac. & G. 25.
[3] 1 Mac. & G. 43.

it is difficult to see how in law they are prejudiced by a mere description in writing of the work.

In what Court Redress Sought. — In the United States, actions, and suits for the infringement of common-law rights, must be brought in a State court, unless a federal court has jurisdiction by virtue of the citizenship of the parties; in which case redress may be sought in either tribunal.[1]

Character of the Work.

In the case of statutory copyright, the theory of the law is that a work, to be entitled to protection, must be original, and innocent, and have some literary, art, or other value, which will contribute to the information, instruction, or enjoyment of others than the owner. It is true that the requirements of the law as to value are by no means exacting, and that statutory copyright may be secured for a production whose merit is little more than nothing. But the statute was not intended to protect a thing utterly destitute of any value as a literary or art production. The question now arises, whether the same principles govern literary property at common law; and whether all protection is to be denied to a production which is not original, valuable, or innocent.

At common law, the author has two general remedies for the protection of his property in a work which he has not himself made public in any way. He is entitled, 1, to prevent its unauthorized publication; 2, to claim damages which he has sustained by such publication. We shall first consider whether the former remedy exists when the work is without the qualities essential to statutory copyright.

Originality. — With respect to originality, the principle seems to be the same whether statutory or common-law protection is claimed. For this consideration affects directly the title of the property. If a person claims to be the owner of an intellectual production, on the ground that it is the creation of his own mind, it is obvious that his title will fail when there is an entire absence of originality, when the production is a mere copy of something else.

[1] See Chap. XII.

Literary Merit. — Is it essential that a manuscript, a statue, or a painting shall have literary or art merit, however little, to be entitled to the protection of the common law? The sound doctrine would seem to be that value, at least market or commercial value, is not an essential attribute of this kind of property. What may be the literary or art merit of the work, what value it may have to the public, or how far it may be useful to society, are not legitimate subjects of inquiry in determining the owner's exclusive right to its control before publication. Property may exist in that which has no commercial value. A person may own a useless swamp, a barren crag, or a sterile waste so worthless that he cannot give it away; yet it belongs to him, and the law will aid him in preventing another from appropriating it, or otherwise unlawfully using it. The same is true of intellectual property. A manuscript may be void of literary qualities, a painting destitute of merit, a statue without art excellence. Yet it may be valued by the owner; and, whether it is or not, he has a right to say that it shall not be made public, or used without his consent. It is immaterial for what purpose the work has been produced, or whether the author did or did not intend it for public use. Were the rule otherwise, the author might be wrongly subjected at any moment to humiliation, loss of reputation, or substantial injury, by the publication of his production against his will. "The question, however," said Vice-Chancellor Bruce, "does not turn upon the form or amount of mischief or advantage, loss or gain. The author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, salable or unsalable, they shall not without his consent be published." [1]

[1] Prince Albert *v.* Strange, 2 De G. & Sm. 694. "What, however," continued the same judge, "can be the defendant's right or that of any person but the owners of the plates to this benefit? It is for them to use, or bestow or withhold, nor can a stranger be allowed to say that they do not want it. They alone are entitled to decide whether, and when, and how, and for whose advantage their property shall be made use of." Ibid. 698.

"What then is the foundation at common law of this exclusive right? Does it exist only when the manuscript is intended to be published? or does it depend upon its pecuniary value or intrinsic merits as a literary composition? To each question we think the reply may be confidently given certainly not. In none of the cases is there any reference to these circumstances or any of them as necessary to be averred or proved in order to establish the rights of the author or the jurisdiction of the court; and in some

This doctrine has been fully recognized in the case of letters, which are considered further on in this chapter; and the principles which have been judicially affirmed in such cases are equally applicable to all kinds of unpublished works.

Writings not Innocent. — The publication of an immoral, seditious, blasphemous, or libellous work, is looked upon as unlawful; and for that reason it has been held that such a work cannot be the subject of statutory copyright.[1] Hence, when the author has published a work of this kind, he is powerless to prevent any other person from republishing it, and he is not entitled to recover for damages sustained through loss of profits by such unauthorized publication.

This principle was extended to unpublished works by Lord Eldon, who held that the common law affords no protection for a manuscript which is not innocent. The question was brought before him in 1817, when the poet Southey applied for an injunction to restrain the publication of Wat Tyler. This poem had been written in 1794, and sent by the poet to a bookseller, who decided not to publish it. The manuscript was not returned to the author; and twenty-three years afterward the poem was published for the first time by the defendant, who had by some means obtained the manuscript, or a copy, without the knowledge or consent of the author. The motion for an injunction was opposed on the ground that the poem was seditious, and therefore the author was entitled to no protection. This view of the law was adopted by Lord Eldon, who, misapplying a *dictum* of Chief Justice Eyre, refused to grant the injunction until Southey should establish his rights at law, and 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

the admitted facts repel the supposition that such proofs could be required. . . . We can perceive no reason for doubting that the exclusive property of an author rests exactly upon the same ground as that of a manufacturer or artist — a painting may be a wretched daub — a statue, a lamentable abortion; yet, should either be purloined by an enemy with the view to secure profits to himself, or to disgrace the artist by its public exhibition, a court of equity would renounce its principles should it refuse to protect the owner, the unfortunate artist, by a peremptory injunction." Duer, J., Woolsey *v.* Judd, 4 Duer (N. Y.), 386.

[1] See Chap. III.

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]

In holding that an author has no right to prevent the publication of a work which he cannot lawfully publish, Lord Eldon overlooked a vital distinction between literary property at the common law and copyright as regulated by the statute. The latter is a right which exists only in a published work, and which entitles the owner to control the publication of a work after he has himself published it. The right relates solely to publication, which is the foundation of the right. When the publication is unlawful, it is clear that the right cannot be enforced; for the statute will not aid one person in restraining another from publishing what neither has a right to publish. Hence, when the protection of the statute is sought, it is proper to inquire whether the character of the work is such as will render its publication unlawful.

But to apply this principle to unpublished works will be destructive of valuable rights of property therein. For a work whose general publication may be objectionable or unlawful may be put to innocent and legitimate uses without being generally published. This fact is recognized by the common law, which does not restrict the rights of property in an unpublished work to its publication, but protects the owner in every harmless use of it. Even though he may not privately or confidentially communicate it to a limited number of persons, for restricted uses, he has a right to keep it to himself, and to say that no person without his consent shall publish or use it in any way whatever. This right to exclude others from its use is as inviolable as the right to publish.[2] The two rights are distinct

[1] Southey *v.* Sherwood, 2 Meriv. 437. "So the injunction," says Lord Campbell, "was refused; and hundreds of thousands of copies of Wat Tyler, at the price of one penny, were circulated over the kingdom." 10 Lives of the Chancellors (5th English ed.), 257.

[2] "Upon the principle, therefore, of protecting property it is that the common law, in cases not aided nor prejudiced by statute, shelters the privacy and seclusion of thoughts and sentiments committed to writing and desired by the author to remain not generally known." Bruce, V. C., Prince Albert *v.* Strange, 2 De G. & Sm. 695.

and independent. The right to publish may be defeated by the fact that the work cannot be lawfully published; but this consideration cannot prejudice the right to prevent publication.

The theory of Lord Eldon is based on the ground that a work immoral, seditious, or libellous, is unlawful, and therefore entitled to no protection. It rests solely on the assumed unlawful character of the production. But the law takes no cognizance of these obnoxious qualities until the work is published. The violation of the law consists in publishing the offensive matter. Publication is the essence of the wrong. Whatever may be the character of the work, it is innocent and harmless in the eye of the law while the owner keeps it to himself; and, because he cannot make any public use of it, he does not thereby lose the right to possess and enjoy it himself, and to exclude others from its use.

Question of Damage affected by Character of Production.— The above considerations apply in determining the right of an author to prevent the unlicensed publication of his work. But the principle is different when he seeks to recover for a loss of profits which he has sustained by such publication. In such case, the market-value of the work will be a legitimate subject of inquiry. For, when the profits of publication are claimed, it must appear that the work can be lawfully published; and it is obvious that the author is not entitled to such profits, when the publication is unlawful by reason of being immoral, seditious, libellous, or blasphemous.[1]

This doctrine was referred to by Lord Chief Justice Eyre, in a case which is not reported, but was cited by Sir Samuel Romily in his argument in Southey *v.* Sherwood.[2] Dr. Priestley, having lost certain unpublished manuscripts in consequence of a mob in Birmingham, brought an action for damages against the hundred, in which he offered to prove by booksellers that the manuscripts were of great pecuniary value for publication. The defence set up was that Dr. Priestley had been in the habit of publishing works injurious to the administration of the gov-

[1] Whether the author may maintain an action for damages, other than the loss of profits, for the unlicensed publication of an obnoxious manuscript, is a question which will not be examined here. It can hardly be considered a question of property.

[2] 2 Meriv. 437.