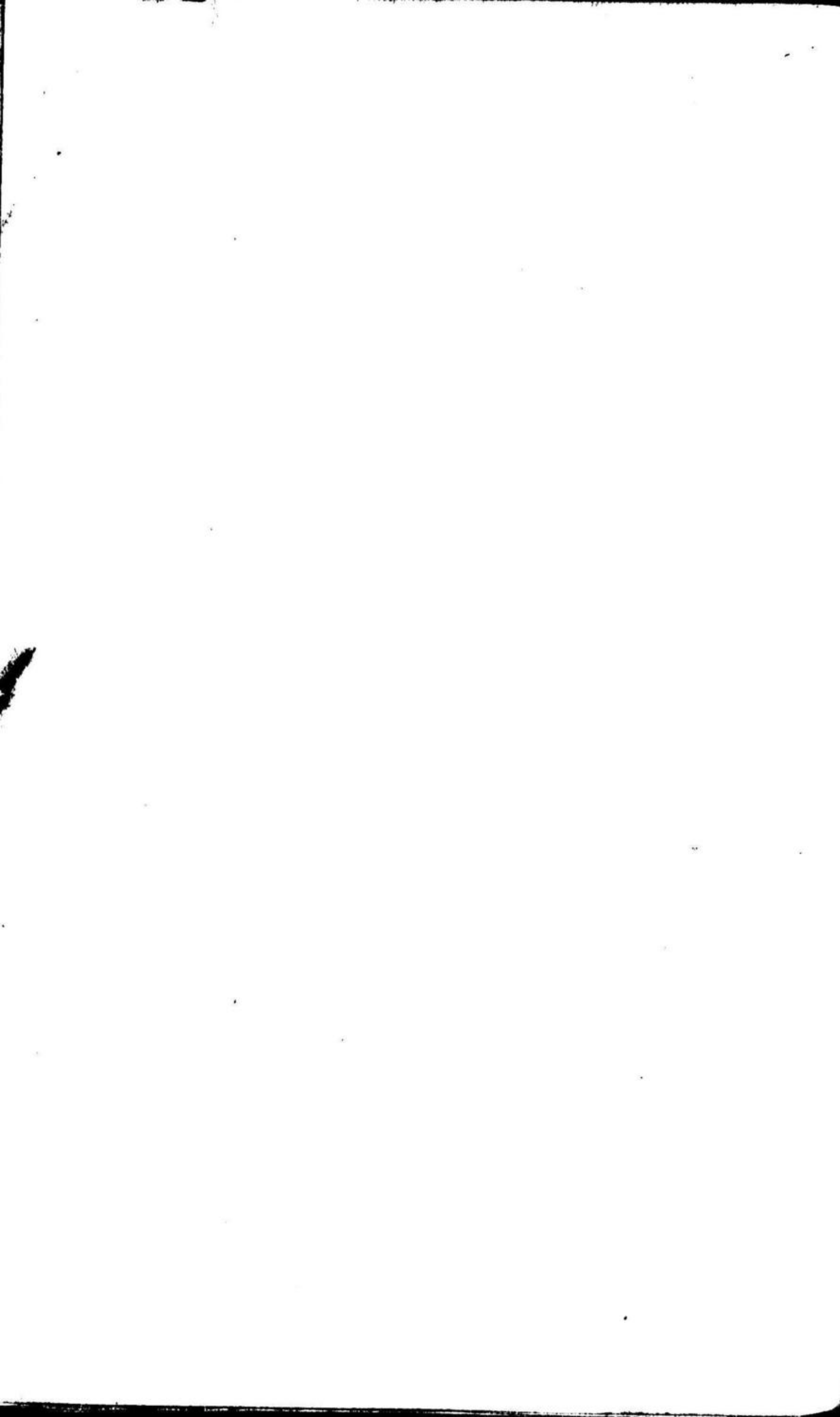


OBSERVATIONS

O N

LITERARY PROPERTY.



OBSERVATIONS

ON

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LITERARY PROPERTY.

BY

WILLIAM ENFIELD, LL. D.

EA EST VIS DOMINII, UT DE REBUS QUÆ TANQUAM PROPRIÆ AD NOS PERTINENT,
PRO ARBITRIO NOSTRO DISPONERE, ET AB EARUNDËM USU QUOSVIS ALIOS ARCERE
POSSIMUS, NISI PER PACTA IUS SINGULARE A NOBIS SIBI QUÆSIVERINT.

PUFFENDORF.

L O N D O N :

Printed for JOSEPH JOHNSON, No. 72, St. Paul's Church-Yard.

MDCCLXXIV.



T O

THOMAS BUTTERWORTH BAYLEY,
ESQUIRE,

FELLOW OF THE ROYAL SOCIETY.

DEAR SIR,

THE subject of these observations has, I doubt not, engaged your attention. A mind like yours cannot be indifferent to the rights of your fellow-citizens. The same enlarged views and active spirit, which engage you to execute the difficult and useful offices of magistracy with unwearied assiduity and distinguished reputation, must lead you to interest yourself in every thing which materially concerns the public. You are, I am persuaded, desirous to see genius and philosophy fully protected and
liberally

liberally encouraged, and the rights of authors perfectly secured, by the state. This attempt to ascertain the nature and foundation of these rights, and to evince the reasonableness of granting them a permanent legal security, I therefore beg leave to inscribe to you.

ON this occasion, permit me the satisfaction of publicly expressing the respect which I entertain for your merit, and the gratitude with which I recollect every instance of your friendly attention and regard.

I am,

DEAR SIR,

Your much obliged Friend,

and most obedient Servant,

WARRINGTON ACADEMY,
May 26, 1774.

WILLIAM ENFIELD

P R E F A C E.

THE rights of Property are dear to every man. While Authors have the common feelings of men, it cannot be expected that they should be indifferent to these rights. It is neither in the power of Philosophy to silence, nor of Glory to satisfy, the cravings of nature: and Fortune hath seldom been upon such good terms with the Muses, as to be liberal of her favours to the man whom they have distinguished. The world must not therefore be surpris'd, if the Philosopher sometimes leaves the midnight lamp, and the lonely cell,

Where he doth oft outwatch the Bear
With thrice great Hermes, or unspere
The spirit of Plato;

to go abroad among vulgar mortals, in search of his daily bread. Since an Author has the same wants with other men, why should he not have the same means of supplying them, and the same prospect of success?

Mrs.

MRS. MACAULAY, in her late spirited Apology for Authors, has shown that they *may* receive the profitable as well as honorary fruits of their labour, without any degradation of their character. It is the design of this publication to pursue the subject *still farther*, and show, that Authors have a *natural right* to these fruits, and a reasonable claim to protection from the state in the enjoyment of them.

If the principles here advanced be just, it may be expected from the wisdom and equity of the British Legislature, that the temporary security which is now given to Authors, will hereafter be improved into a legal establishment of perpetual Copy-right.

ESTO PERPETUA!

OBSERVATIONS

O N

LITERARY PROPERTY.

ALL the objects on which the right of property can be exercised may be divided into corporeal and incorporeal. These two species of property are thus defined by Judge Blackstone*:
“ Corporeal possessions consist of such things as affect the senses, such
“ as may be seen and handled by the body; incorporeal, are not the
“ object of sensation, can neither be seen nor handled, are creatures
“ of the mind, and exist only in contemplation.”

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CORPOREAL

* Commentaries on the Laws of England, Book II. Chap. 2.

CORPOREAL and incorporeal objects are equally capable of becoming personal property. The fruits of nature, the land which produces them, and every visible object around us, excepting only those things which from their nature cannot be secured and retained in distinct portions, as light, air, and perhaps the sea, may be appropriated. The right of property may be exercised upon every article of convenience or ornament which can be produced by labour. It may also be exercised on many things which are not in any respect objects of sight, but subsist merely in idea. The power, for instance, of nominating another to any office, or of holding that office one's self; the right of bearing a certain title and enjoying the honours annexed to it; the liberties and franchises of individuals or corporate bodies; are all exclusive possessions, in which the right of property is as real and perfect as in the possession of houses and lands.

IN the class of incorporeal possessions is included that species of property which is to be the subject of our present enquiry, Literary Property, or the right which an Author hath to the productions of his genius and mental abilities.

A LITERARY work may be defined, a series of thoughts and expressions produced by the continued exertion of the powers of the
mind.

mind. "The identity of a literary composition," says Judge Blackstone, "consists entirely in the sentiment and the language; the same conceptions cloathed in the same words must necessarily be the same composition." *

AFTER a literary work is produced or composed, it may subsist in various forms: it may remain lodged in the author's memory; it may be recited *viva voce*; it may be written, or it may be printed: but in all these forms it is still the same work; and these are only incidental circumstances which do not at all change its nature, or affect its identity. Literary property doth not consist in the exclusive possession of the books in which a composition is written or printed, but in the exclusive possession of the composition itself. This is indeed a kind of property invilible and untangible; but it is not on that account the less real. When a man has composed a poem, or invented a new series of mathematical demonstrations, if he has never printed his work, committed it to writing, or even suffered it to pass from his lips, he has a clear perception of the reality of his work, and very well knows what he speaks of, when he calls the composition his own. And any one, to whom the work is in any manner communicated, easily perceives what it is which constitutes its identity—that it is,

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* Commentaries, Book II. C. 26.

the same thoughts, ranged in the same order, and cloathed in the same language.

THAT the author of any literary composition has a natural right of property in the work, is the point now to be established. To prepare the way for the proof of this position, it will be necessary that we should examine the grounds on which the right of property in general rests, and observe the manner in which it is obtained.

HERE the principal question is, Whether this right is founded on the general laws of nature, and takes place prior to the institution of civil society, or whether it must be the consequence of mutual consent and agreement? And this is by no means a question that "favours too much of nice and scholastic refinement," as Judge Blackstone represents it: it is of fundamental importance, since the decision of it must determine whether the rights of property are to be ranked among the adventitious benefits of society, which, deriving their being from the civil power, may be restricted or annihilated according to the will of legislators; or whether they are to be considered as a part of the sacred deposit which the people entrust in the hands of their governors; which they are bound by the nature of their office to preserve and defend; and the smallest scruple of which
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they have no power to give up, unless the security of the remainder, or the general good of their constituents, requires it.

CONCERNING this question different opinions have been entertained and supported by the most eminent writers on the subject of natural law. Puffendorf, who strongly insists on the necessity of an agreement, either express or tacit, as the foundation of the right of property, and has treated the subject at large,* chiefly rests his opinion upon the following arguments, which seem to contain the substance of what hath been urged on this side of the question—; That it is only on the supposition of such an agreement, in which an exception must be implied for cases of extreme necessity, that a right of invading another's possession in such cases can be justified; since if property is grounded on a natural and absolute right, no necessity can authorise a man to invade it—: That if occupancy be a sufficient foundation for property, the first sight of any thing would be so too—: And that all men, having originally an equal and common property in the goods of nature, no individual can take to himself the exclusive possession of any part of them without the consent of his brethren.

To the first of these arguments it is obvious to reply, that the act

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* Vide Puffendorf. de Jure. Lib. IV. C. IV.

of seizing another's possessions in the case of extreme necessity is rather to be excused, as sacrificing a secondary law of nature to the first, that of self-preservation, than to be justified, on the idea of any supposed exception in an imaginary agreement.

IN answer to the second argument it may be observed, that the first occupancy of any thing indicates to others an intention to appropriate it, which is not the case with the first sight of it; and that occupancy must from the nature of the thing be more limited than first sight; and therefore will not give one individual such a power of excluding others from a reasonable share in the common stores of nature.

THE third argument deserves a more particular consideration. It seems grounded on a false idea of the nature of that claim which mankind in general have to the things about them, prior to occupancy or private possession. This claim doth not by any means appear to carry in it the idea of property. Whether we consider the natural powers of man in connection with his natural wants; or whether we have recourse to the express grant recorded in Scripture; it is sufficiently evident, that when he was first placed upon the earth, it was the intention of his Creator, that he should take possession of
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such things as were suited to his nature and necessities. But his having a natural capacity or even an explicit authority to do this, did not give him a property in any thing, till, in consequence hereof, he actually possessed himself of some part of the stores which were set before him. The permission or grant being general with respect to the objects of possession, and being given in common to all the human race, was rather the donation of a power to acquire the right of property, than of the actual right. The original state of mankind with respect to the goods of nature resembles that of children, sitting down to the table of their common parent, who has set before them an abundance of provision, and given them a general power to partake of it, without assigning to each his particular portion; every one takes what he pleases, and what he takes becomes his own, though before he had no property in it, and though there was no prior agreement among them what part each should take. Or, to make use of a more familiar simile; it resembles money thrown among a crowd, with respect to which, the general intention of the donor that it should be distributed among them is evident, but no individual can claim a property in any part of it till he has made it his own by actual seizure.

It is the act of occupancy, then, which in a state of nature first gives
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the right of property. And this must have taken place, and must have been a sufficient claim, without any previous agreement or consent of the general body. For it was not possible for any assembly to have been summoned, or any deliberate convention to have been formed, by which each individual took to himself that portion of the common stock which he wanted for his immediate support. Speaking concerning this original state of mankind, Mr. Locke with his usual strength of argument asks, "Will any one say, that a man had no right to the acorns and apples he appropriated, because he had not the consent of all mankind to make them his own? Was it a robbery, thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved notwithstanding the plenty God had given him."* A right of property being necessary to that use and consumption of the gifts of nature without which men could not have subsisted, and occupancy being at first the only possible way of acquiring this right; occupancy must have been in itself originally sufficient to establish it.

LABOUR bestowed upon any subject which has been before appropriated, must give a man another claim to the exclusive possession of it. If there be any thing which a man may call his own, independently
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* Locke on Government, Book II. C. V.

of the will of another, it is surely his own person, and the use he makes of his powers in acts of labour. If occupancy gives him a right to any subject in its natural state, surely any additional value or use which it may acquire in consequence of his industry or ingenuity, being derived entirely from him, must belong exclusively to him. If lands are improved by manure, and enriched with fruits by culture, as the proprietor has a right by original occupancy or subsequent grant to the soil, he has doubtless an equal right, originating in himself, to the produce of the ground: and if from any part of this produce he has the ingenuity to manufacture articles of cloathing or defence for himself, the materials themselves, and the improvement of these materials, being both the fruit of his own labour, must undoubtedly belong to him as personal property, without the consent of any one, and to the exclusion of all foreign claims. A man's labour, if any thing in the world, is originally, naturally, and independently his own: whatever, therefore, is added to the value of any subject by labour, must originally belong to the labourer. Labour has a kind of creating power, bringing into existence something of real value, which had before no being, and consequently no owner; the property of which must therefore reside in the person who gave it existence. As much, for instance, as manufactured cloth is more valuable than the native wool of which it is composed, so much of real substance

capable of becoming property arises out of labour, and whatever be the additional value hereby given to the whole, must naturally belong to the manufacturer.

THERE are, then, two sources of property, occupancy and labour, which may either subsist separately or be found united; but which always, wherever they are found, give a clear and natural right of property, independent of all social agreement or civil authority.

WITH respect to incorporeal objects, the right of property must be originally derived either from primary possession or labour. They are, properly speaking, incapable of occupancy: but primary possession, though not precisely the same thing with occupancy in corporeal and visible objects, as far as respects the present question is perfectly analogous to it. All incorporeal objects to which a man can lay the claim of primary possession, or to which he hath given existence by labour, are then his property by a right founded in nature; and among others, his literary productions.

IT has indeed been asserted, that there can be no property at all in thoughts and sentiments. And it is not to be wondered at that they who are chiefly conversant with title-deeds of lands, should have
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some difficulty in conceiving of a settled property in the shadowy and insubstantial world of ideas. But surely nothing more peculiarly belongs to a man than his own ideas. Many Philosophers teach us that there is nothing else which a man can properly call his own: nay some have proceeded so far as to assert that there is nothing in nature except mind, and its exertions, producing ideas. Thus Philosophers on the one hand deprive us of material possessions, and Lawyers on the other of such as are spiritual, and between them leave us a property in—nothing. It is, however, capable of satisfactory proof, that the train of thoughts and sentiments which a man forms in his mind, though compounded of ideas which might have before existed in other minds, and expressed in words which have before been used, is nevertheless truly and properly his own.

THE right of property in literary works rests on the solid grounds of primary possession and labour. Though an author has not seized any thing to himself out of the common stock (which in the present case is impossible, the work having had no existence till he gave it birth) yet he has a claim to the right of property at least equal to that of occupancy, primary possession. The work which he possesses was never in any other hands, nor was ever a part of a common stock, on which all men had a general claim: no one therefore can have the

slightest pretensions to any degree of right in it, except himself. The plea of an original general grant of the goods of nature to mankind, and the consequent necessity of mutual compact in order to distribution, can have no weight here. So that on this ground alone the right of authors to their own works is at least as clear, as that of the first men to the fruits of the earth, which they seized and consumed for their support.

THIS natural right will be still more evident, if we consider it as founded upon labour. It is the continued exertion of mental abilities, which gives existence to any literary work. And it is not more evident, that the corn which the husbandman gathers into his barn is the fruit of his labour in manuring the ground, sowing the seed, and gathering in the harvest; than that a train of ideas and words, not to be found in any other work, hath been the result of genius and understanding industriously employed to produce this effect. If therefore the former hath an undoubted right of property in the things to which his industry hath given being (as hath before been shown) it is evident beyond dispute that the latter must have the same. Though this point is of fundamental importance in the present question, it is at the same time so exceedingly evident, that no amplification can make it more so. The cause may therefore safely be rested upon this

plain

plain and simple state of the argument. Labour gives a man a natural right of property in that which he produces : literary compositions are the effect of labour ; authors have therefore a natural right of property in their works.

It appears then, that literary property has all the foundation in nature, which any kind of property can have, and more than belongs to many kinds, which are however admitted without dispute. Some depend wholly upon occupancy or primary possession ; some wholly upon labour : but an author's right to his literary composition has a clear foundation in both. No man, therefore, can have a better right to the house which he has built on his own ground and with materials which he has purchased or collected from his estate, than an author has to the productions of his genius and industry.

If we refer the cause to the decision of common sense, and the natural principles of equity, this right will be no less evident. “ In
“ this various world, different men are born to different fortunes :
“ one inherits a portion of land ; he cultivates it with care, it pro-
“ duces him corn and fruits and wool : another possesses a fruitful
“ mind, teeming with ideas of every kind ; he bestows his labour in
“ cultivating *that* ; the produce is reason, sentiment, philosophy.
“ It

“ It seems but equitable, that a fair exchange should be made of
 “ these goods ; and that one man should live by the labour of his
 “ brain, as well as another by the sweat of his brow.”

THIS point being established, it follows, that whatever can be asserted with truth concerning property in general, may fairly be applied to this particular kind of property.

Now, in the first place, it is essential to the very idea of property that it should be *exclusive*, that is, that while any thing continues to belong to one person, it cannot in the same sense belong to another. * With respect to land, for instance, the dominion of the ground may belong to one person, the fruit which it produces may belong to a second, and the timber which grows upon it to a third ; but the owner of each distinct share has an entire and absolute right to his respective part, which neither of the other proprietors, nor any other person whatever may invade. Property cannot be a vague indeterminate right of mankind at large to partake of the gifts of nature, but must
 imply

* Est porro proprietas, seu dominium jus, quo alicujus rei velut substantia ita ad aliquam pertinet, ut eodem modo in solidum non pertineat ad alium hominem:

imply an exclusive appropriation of certain objects to one individual, or a number of individuals formed into one aggregate body.

LITERARY property, therefore, as well as all other kinds, must be exclusive: that is, no person whatever can have a right to enjoy the benefit of this property, except the author, and those to whom he assigns over that right. An author having the same natural right to his composition, as the possessor of lands to the fruits which they produce; no other man can have any claim to the profits arising from the former, more than to those arising from the latter. To take possession of any work, for any purposes which interfere with the interest of the author, farther than he himself or his assigns assent to it, is, on the principles of natural law, no less an invasion of property, than that of plundering a man's granaries or his coffers.

FARTHER, The general idea of property includes an appropriation of the *substance* as well as *use* of things.

JUDGE BLACKSTONE indeed says, that in the earliest ages, he who first began to use any thing acquired therein a transient property, that lasted so long as he was using it, and no longer; or, the right of possession continued for the same time only that the act of possession lasted;

lasted; and that the instant he quitted the use or occupation of any thing, another might seize it without injustice; if, for instance, a man walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, or to wear the other. But such a limited right as this by no means agrees with the idea at present generally received concerning property, which includes the possession of the substance as well as use of any thing; nor could it have been of any important use to those who first possessed it.

If a man had only a usufructuary property in any of the productions of nature around him; if after having used them, he must return them into the common stock, and could not retain them without being guilty of an act of injustice to the public; it is obvious that such an imperfect right would not leave him at liberty to enjoy the fruits of his own labour, or even empower him to supply himself with the necessaries of life. The fruits which he gathers, the water which he drinks, the animals which he kills and eats, are consumed: if therefore his right of property in them were to extend no further than the use of them, he could not preserve his life, without invading the rights of others; and thus all the stores of nature would become useless to those for whose benefit they were provided,

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WHEREFORE does a man prepare for himself a garment, or raise himself a tent, but that he may put on the one, and retire into the other, whenever inclination or convenience prompt him? Without a power of using them constantly for these purposes, of what value is the possession of them? And how can he use them constantly, unless his right in them continues beyond the term of actual possession? In order to give him an exclusive right to his cloaths, can it be necessary that they should be always upon him? Or has he no natural property in the tent he has reared, unless he makes himself a perpetual prisoner in it? In the rudest state of nature, surely men had some more secure and permanent hold of their possessions than this supposes! If it be the dictate of nature in her most savage condition, that men shall eat and drink, and fence themselves against the inconveniences of the seasons; it must surely be agreeable to the law of nature, that they should possess themselves of those things which are necessary for their support and security, and retain the possession of them as long as they have occasion to use them.

THE illustration commonly adduced from Cicero, in support of the opinion that men had originally and naturally a right to the use of things, but not to their substance, "that the world is like a great theatre, which is common to the public, and yet the seat which

“any man has taken in it, is for the time his own,”—as frequently happens to families where they are made use of instead of arguments—fails in a very essential point. For such a vague and temporary possession is sufficient to answer the purposes of a theatre; but not to accomplish the ends for which nature is furnished with objects suited to the wants of man. To give these their complete use, they must be appropriated; the Author of nature, therefore, who designed that they should be used, designed likewise that they should be made the subject of continued property.

THE right of property then including, in general, a right to retain as well as use those things which are the subject of it; the property of any literary work, with all the advantages accruing from it, must remain with the author till he voluntarily resigns it. That series of ideas and words which constitute his work, is in itself an object of property, entirely distinct from the book in which they are written. And out of this right arises another; that of multiplying copies by transcribing or printing; for the work being his own, he may make what use of it he pleases. These rights no other person can be at liberty to appropriate to himself, without the express or tacit consent of the
author.

author. And no act ought to be construed into a renunciation of his rights, which he himself does not evidently intend as such.

THAT the act of publication ought not to be understood in this light, may be inferred from the general principles of equity. For, “ If a man’s ideas are his own while floating in his brain, it would “ surely be very hard to be deprived of all right to them, the moment “ he turns them to any profit either to himself or others ; as unreason- “ able, as if the farmer were allowed a property in his corn and grais “ while growing in his field, but denied it whenever he brings them “ to market.” But this matter requires a more particular discussion.

WHAT is now private property, cannot become common till it is abandoned by its present possessor. And can it be supposed that an author, when he publishes a work to make advantage of the sale, means to abandon it ? When he prints and sells copies of his composition, what is his intention ? Is it possible, that when he sells a copy of his work for five shillings, he should intend so far to give up the property of the work to the purchaser, as to empower him to multiply copies, by the sale of which he may perhaps gain five hundred pounds ? It would not be more absurd to suppose that the owner of an estate, by granting his neighbour a path through his grounds, gives him the

property of all the produce of the field. Nothing can be more evident than that an author, when he publishes a work, only intends that the purchaser of a copy of the work, should be entitled to *that copy*, for his own instruction or entertainment and that of his friends, and should reap all the benefit, literary or pecuniary, which can arise from the possession or disposal of it. A right to a single copy being all that the author means to convey by the sale of it, the purchaser cannot hereby acquire the author's right of multiplying copies. The possession of a single copy does indeed put it into the power of the purchaser to print and publish as many copies as he pleases; and if he choose to avail himself of this power, an author, without the aid of civil authority can have no redress: but a power, in this case, by no means confers a right; and till the author has plainly declared his resignation of his right to multiply copies of his composition, this right must continue to belong to him as perfectly as if he had not parted with a single copy.

It will be said, that when an author parts with a copy of his work, he must of necessity part with the ideas and expressions, that is, with the composition itself as well as the book which contains it, to the purchaser; and that therefore the purchaser, having a full possession of the composition, must have a right as well as a power to use it

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for any purpose he shall think proper, and among the rest for that of multiplying copies; unless in the sale an express agreement is made to the contrary.

To this I answer, that the original property of the composition residing in the author, it can only become the property of another, so far as he consents to transfer it; and that he cannot be fairly understood, by the mere act of selling a single copy, to give the purchaser a right of multiplying copies. After having employed the labour perhaps of many years in bringing his work to perfection, no purchaser can imagine, that, for the small price of a single copy he means to grant him an equal right with himself of reaping the profits of his labours. The very act of publishing the work, and selling copies of it for his own benefit, is a virtual declaration that he doth not mean to part with his copy-right. And the selling of each single copy at a price so inadequate to the value of the right of printing and vending copies, is a plain indication that he doth not intend to convey to each individual purchaser the beneficial right of multiplying copies. Every purchaser perceives and understands these virtual declarations, when he buys a copy of any new work which is large and expensive; and will acknowledge that his purchase doth not give him a right immediately to multiply copies and interrupt or prevent the
author's

author's sale. And if it doth not give him this right at the first publication, with respect to large works, it cannot give it him at any time, or with respect to any work; for, since the act of purchasing a copy doth not convey this right, nothing but the author's consent, or the interposition of the civil power, can do it.

THE truth seems to be, that although the purchasing of a single copy may give the purchaser possession of the sentiments and expressions of a work, that is, of the composition itself, it doth not give him such absolute possession of it as to entitle him to a right which the author could not mean to impart, which he plainly declares it to be his intention to reserve to himself, the right of multiplying copies. This right is his by nature; he has neither expressly nor virtually abandoned it; and without his voluntary surrender no other person can have a just claim to it: the right must therefore remain with him still. And it would be as unjust and iniquitous for a person who purchases a copy of his work, to take advantage of the opportunity which this gives him of invading the author's copy-right, as it would be for the tenant of an estate to work a mine of lead, or other valuable ore, which belongs to the estate, without the consent of the owner. The inference which ought to be drawn from the necessity which an author is under to put his right of multiplying copies into
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the power of every purchaser, in order to make any advantage of his work, is, not that the act of publication conveys a right which he never meant to communicate, and for which the purchaser gives no equivalent; but that government ought to secure it against the invasions of those, whose private interest may so far blind their judgment as to lead them to mistake *power* for *right*.

ANOTHER observation concerning property in general, which may be applied to the subject before us, is, that as the right of property includes a right to retain as well as use those things which are the subjects of it, it likewise includes a right to *dispose* of them wherever the nature of the possession will admit of it, and there is no agreement to the contrary. This necessarily follows from what was before advanced. For if a man hath by any means acquired an exclusive right to the substance as well as use of any thing, he must, in a state of nature, be at full liberty to apply it to whatever purposes he pleases himself, or to transfer his own right in it to some other person. In this state, none of his brethren having acquired by the agreement of civil society a power to restrain or rule his actions for the public good; and no other person whatever having, by the supposition, any claim upon the article of property in question; there can be no external power which can have a right to interfere, concerning the manner in
which