A

TREATISE

ON THE

LAWS OF LITERARY PROPERTY,

COMPRISING

THE STATUTES AND CASES

RELATING TO

BOOKS, MANUSCRIPTS, LECTURES; DRAMATIC AND MUSICAL COMPOSITIONS; ENGRAVINGS, SCULPTURE, MAPS, &c.

INCLUDING THE

PIRACY AND TRANSFER OF COPYRIGHT;

WITH A

HISTORICAL VIEW,

AND

DISQUISITIONS ON THE PRINCIPLES AND EFFECTS OF THE LAWS.

By ROBERT MAUGHAM,

SECRETARY TO THE LAW INSTITUTION,

Author of the "Law of Attornies," &c.

"I have entered into a work touching Laws, in a middle term, between the speculative and reverend discourses of Philosophers, and the writings of Lawyers."—BACON.

LONDON:

PUBLISHED BY LONGMAN, REES, ORME, BROWN, AND GREEN, PATERNOSTER ROW;

HENRY DIXON, 19, CAREY STREET, LINCOLN'S INN;

ADAM BLACK, EDINBURGH.

1828.

J. EVANS, PRINTER, 91, BARTHOLOMEW CLOSE, LONDON.

TO

THE RIGHT HONORABLE

JOHN SINGLETON, LORD LYNDHURST,

LORD HIGH CHANCELLOR OF GREAT BRITAIN,

ETC. ETC. ETC.

MY LORD,

HAVING composed a Treatise on the progress and present state of the Laws of Literary Property, with some Disquisitions on their Principles, and an examination of their effect on the interests of Literature, I was naturally desirous to dedicate my labors to the distinguished CHIEF of that COURT where those laws are the most appropriately administered---where they have ever received the most liberal construction---and where the most effectual remedy is afforded for the injuries of authors, and the proprietors of their copyright.

A work thus devoted to the investigation of the rights and interests of the *Scholar* and the *Artist*, it is no small privilege to be permitted to dignify with the name of a NOBLEMAN, alike distinguished by his profound knowledge of the law, and his taste for the elegant arts, and the pursuits of literature.

It was not long ago observed by your Lordship, during a debate in the Senate, " That it would be wise not to over-
" whelm the Judges with business; making them, in too
" many instances, slaves to the *technical* part of their profession
" —that they should have the opportunity of *cultivating general*

" *literature,* and be allowed the leisure to return to the pleasant
" pursuits of early years, which, it was to be lamented, too
" many of the Bar (greatly to the injury of the profession)
" were obliged to suspend."

Since the expression of these enlightened sentiments, your Lordship has been elevated to those seats of Legislation and Justice, where the influence of such opinions will embellish Wisdom with the grace of Refinement.

To the friends of literature it must be peculiarly gratifying that your Lordship has spared, from the weighty duties of your high office, some moments to the encouragement of genius, and bestowed your presiding sanction at assemblies convened for its stimulus and reward.

Encouraged by the noble interest which your Lordship has thus evinced in the cause of letters, and grateful for the permission with which I have been distinguished, I beg to dedicate this work to ONE, who, by a rare combination of excellence, has attained the highest judicial station in this great Empire.

I have the honor to be,

MY LORD,

With the deepest respect,

Your Lordship's

Much obliged and very humble Servant,

ROBERT MAUGHAM.

Great James Street,
October 24th, 1828.

LAWS OF LITERARY PROPERTY.

Introductory Dissertation.

THE promotion of learning seems, at the earliest periods of our history, to have been a favorite object, not only of our ancestors in their individual capacity, but of our system of jurisprudence. Thus schools and colleges were established and endowed in all parts of the kingdom, by the munificence even of private men. Scarcely a town existed, where an edifice of splendour or utility (now too often crumbling to ruins) was not devoted, like the halls of classic instruction, to the purposes of intellectual improvement. It was not beneath the dignity of the law to co-operate, in a noble spirit of protection, with this general feeling towards the cultivation of letters. It was not deemed inconsistent with the policy of our legal system (however objectionable it may now appear to the legislative philosopher) to grant to the *scholar* a partial immunity in the administration of its criminal code, which was denied to the uneducated offender. Justice relaxed its severity in favor of Learning; and, in veneration for those rare attainments of the mind by which the world has been humanized, Mercy interposed its hand, and saved the "learned clerk" from an ignominious fate. Still further,—the prompt and efficacious remedy with which the lords of the soil had armed themselves, in the form of distress for rent, for suit, or services, was superseded, not only in favor of the needful implements of husbandry and trade, but the *books of a*

scholar were also respected as sacred property, devoted to the service of mankind.

The contrast is singular between the favor which was thus shown to literature in times comparatively savage, and the discouragement it encountered during the refinement of the last century. In the ages of semi-barbarism we perceive every inducement presented to the ingenious student for the improvement of his faculties, and the cultivation of letters. In the era of boasted enlightenment, we witness the curtailment of rights, and the imposition of burthens!

The dawning of a better day seems, however, of late to have appeared in our system of jurisprudence. The legislature, moved by the enlightened spirit of some of its members, has indicated a liberality of feeling, on many recent occasions, towards the interests of science, literature, and art, which may reasonably encourage the expectation, that the claims of justice will, in future, be more favorably considered than on former occasions, and the injury diminished, if not entirely removed.

The principles which now prevail on the Law of Copyright, it is well known, are totally at variance with the opinions of many distinguished judges, and especially of Lord MANSFIELD and Mr. Justice BLACKSTONE. It has, therefore, been remarked by Professor CHRISTIAN, that every person may still be permitted to indulge his own opinion upon the propriety of the law, without incurring the imputation of arrogance.

We shall accordingly avail ourselves of the privilege thus conceded, and discuss the several statutes by which the interests of literature are affected, trace their successive stages, and examine the principles on which they are founded.

In this preliminary part of the Treatise, the disquisition will be brief and general; but we deem it necessary to advert to some of the leading points in this great literary controversy, before we enter on the details of the subject; the

more especially as some of them must necessarily be of a technical nature, and we are desirous of engaging the attention, not of the professional student alone, but of every one who is interested in the progress of learning and science.

Although the view which we must take of this subject will be unpalatable to many, there are, happily, several encouragements to the undertaking, which in no slight degree lead us to expect a favorable reception, as well with the public in general, as the liberal of all classes, and the learned in particular.

"Indeed, all arguments in support of the rights of learned men in their works must ever be heard, said Lord KENYON, with great favor, by men of liberal minds, to whom they are addressed(1)."

The enlightened spirit in which this feeling was expressed, was entertained in an equal degree by Lord HARDWICKE. The Attorney-General of his time had argued that the Copyright Act, being a monopoly, ought to receive a strict construction. "I am quite of a different opinion," said his lordship; "it ought to receive a *liberal* construction. It is very far from being a monopoly. It is intended to secure the property of books in the authors themselves, or the purchasers of the copy, as some recompense for their pains and labor in composing works useful to the learned world(2)."

Fortified by these high authorities, we may venture to arraign the present code, under which we think that literary property is oppressed with severer restrictions and greater burthens than any other production of human industry.

Not only is its *duration* limited to the short period of twenty-eight years, but it is *taxed* for the benefit of wealthy corporations, to an amount always burthensome, and frequently destructive of all the remuneration it would otherwise afford. Indeed, the impolicy, as well as the injustice,

(1) 7 T. R. 627. (2) 2 Atk. 143.

of the existing laws, must be admitted by every one who is in the least degree acquainted with the subject, and possessed of the smallest share of impartiality. Even the Universities acknowledge (as well they may) that the limitation of the term is grossly unjust; and all classes must pronounce the imposition of eleven copies of all kinds of publications, to be contrary to every principle of equity.

That it may not be supposed we enter on this critical part of our task with a feeling drawn only from the complaints of disappointed authors, or that we are disposed to put a forced and unmerited construction on the acts of the legislature, it may be remarked, that Sir *John Dalrymple*, one of the counsel (in the cause of Donaldson v. Beckett) who opposed the perpetuity of copyright, expressly urges that "this Act of Queen Anne, which was ushered in under the idea of encouraging literature, was very far from having such a tendency. What (he demanded) did the authors and booksellers gain? Why, a perpetuity was changed to a term of fourteen years only. A price was fixed, and a clause inserted, to force them to send copies to public libraries. What encouragements are these? They, on the contrary, were discouragements."

The history of these statutes regarding literary property, and the construction which they have received, present a striking proof of the injustice of their nature.

Nothing, in the first place, could be worse than their *origin;* and they have consistently continued in a state of undeviating oppression and severity. They were established in the most despotic periods of our political annals, and were designed for the express purpose of suppressing all free inquiry, and the diffusion of all kind of knowledge, in any way relating to the affairs of the church and state.

But although no book of any kind whatever could then be published without the license of the constituted authorities, and though (compared with the present laws) *the moderate number of three copies* were required to be delivered to

the King's librarian and the Vice-Chancellors of the two Universities, still there was *no restraint* on the *duration* of an author's rights. So long as the press could be held in sufficient subjection, it was not the intention, even during the most arbitrary administration of the affairs of Government, to curtail the property of inoffensive writers, or burthen them with exactions unknown to other classes of the community. Barring the sacred ground of theology and politics, the learned and ingenious of those times were allowed to exercise their talents, and reap the fruits of their intellectual labor, like every other subject of the realm, liable only to the tax, which, although obnoxious enough in *principle*, was comparatively mild in *amount*.

"When," to use the language of MILTON, "books were as freely admitted into the world as any other birth; when the issue of the brain was no more stifled than the issue of the womb; when no envious junto sat cross-legged over the nativity of any man's intellectual offspring,"—when the licensing system ceased, and men were permitted to publish their works on their own responsibility,---this exaction of three copies soon ceased altogether.

It was reserved for the "Augustan age of English literature,"—for the days of Pope, Swift, and Addison,—to revive this odious impost, and to increase it in a *threefold* degree! To the same enlightened era we are indebted for the reduction of the *perpetual* right, which the justice of the ancient law of the land had previously protected, down to a space, often briefer than that which was occupied in the composition of the work!

Still, it seems that a remnant continued of the juster feeling of the olden time; for though the *language* of the statute limited the administration of justice to fourteen years, (as modern ingenuity construed it) its *spirit* was understood to apply only to the penal enactments against piracy,---leaving untouched the ancient remedy for the recovery of actual damages. This, it seems, was an *honest blunder*, into which

even the marauders on literary property had fallen; and in future they were enlightened by the expounders of the law, and permitted to rove at large over the legalized spoil.

We reserve to another part of the Treatise the investigation of the reasoning or sophistry by which it was thus established, to the satisfaction of *five* out of *eight* judges, that the Act of Anne,—in its preamble expressly professing "to prevent injury to authors, and to encourage learned men to write useful books,"—really reduced the perpetuity in copyright (which existed, according to a majority of the judges, at common law) to fourteen years! yet, such had been the plain interpretation by the common sense of all parties, that not one of the graduates or students of any of the Universities, nor even the lower order of publishers, however piratically inclined,—no one, from the 8th of Anne, in 1710, until 1774, ever dreamt of such a construction. After no less, however, than sixty-four years, some one, with more technical ingenuity than love of literature, enjoyed "the bad eminence" of overthrowing the evident spirit and intention of the act, by the supposed ambiguity of its language.

We have seen thus far, that whenever the rights of authors were brought before Parliament, they were generally abridged, or their burthens increased. Even the favorable construction which the legislature itself put upon the statute of Anne, with regard to those books which (requiring not the aid of penalties to protect them) were not registered, their interpretation was so inefficiently expressed, that it was held by the judges not to control the literal meaning of the previous statute. Hence, in the year 1812, it was decided that the eleven copies of every book, whether it sought the protection of the statute or not, must be delivered according to its provisions.

It was soon after the infliction of this last blow to the interests of literature, that the injuries of authors were again introduced to Parliament. Some mitigation of the library tax was requested. The Committee to which the subject was referred, recommended that *one* copy should be delivered

to the British Museum *only*, or at all events that the number should be restricted to *five* copies. The House, however, was inexorable. The whole eleven copies were persisted in, and the only advantage which the proprietors of copyright obtained—wrung, it seems, with a "slow consent," but which for very shame could not be refused,—was the extension of the term to twenty-eight years *certain*, which had previously depended on the life of the author, and a further term in case he lingered beyond that time, until the close of his existence, leaving his family to be provided for by precarious benevolence, or the stinted relief of parochial charity.

Although the advocates of the Universities were thus inflexible in exacting the full penalty of their "bond;" it must be allowed they liberally and strongly enforced the rights of authors in some other important respects.

Professor Christian stated, with considerable ability, the hardship and absurdity of the law as it then existed. "If an author when he is advanced in age offer a valuable work for sale, as the production of the labor of a long life, he will have the mortification to be told, that the price of his work must necessarily be much lower, than if he had completed it twenty or thirty years sooner at an earlier period of life. Thus, (said he) when the work is more valuable to the rest of the world, it becomes less profitable to the author and his family."

Whilst the learned Professor thus does justice, with good feeling and eloquence to the cause of letters, on a topic in which his *alma mater* was unprejudiced, it may be useful to notice what has been done on this important part of the subject by the legislature, in reference to the same kind of rights, when *in the hands of a powerful corporate body*, instead of a helpless individual.

The decision which the House of Lords, in its judicial capacity, pronounced in the year 1774, upon the construction of the statute of Anne, equally affected the Universities as

the public in general; and as there was no exception in the statute in favor of copyrights held by the Universities, their duration was brought down, like those of individuals, to twenty-eight years; and the clause in favor of surviving authors could not apply to a corporate body. The Universities therefore applied to Parliament to restore, in their collective case, the right which had been taken from individual authors, and they succeeded in their application. A legal anomaly, somewhat curious, must follow this enactment.—The copyrights held by the Universities consist of works, which of course are not composed by a body of men appointed by the Universities, or paid out of their funds. They have been either purchased of individual authors (which we may conjecture is not often the case), or bequeathed by them. Now the author can convey or bequeath that only which by law he possesses, namely, a short lease in the property; yet the corporate purchasers or legatees receive, as it were, the freehold inheritance to themselves and their successors for ever! Such is the measure of equal justice, and legal consistency, which is manifested on the face of these statutes.

The state of the law in other countries affords not only a strong and additional argument in favor of the policy of extending the rights of authors, and diminishing the burthens of literature; but indicates the sentence of other nations on the injustice of our regulations.

In the NETHERLANDS, *three* copies only are required to be deposited in the public libraries.—In AUSTRIA, *two*.—In FRANCE, before the revolution, four copies, but since that event, *two* only are required for the national library. In AMERICA, PRUSSIA, SAXONY, and BAVARIA, only *one* copy can be demanded.

It is remarkable, also, that in all these instances the copies are not required unless the exclusive copyright is reserved. And whilst such is the state of the law over all Christendom, (except in this part of it) in regard to the imposition of the library copies, it is observable that there,

too, the *duration of the right* is either perpetual, or considerably more extensive than the term allowed in this country.

Thus, in *France*, the term of copyright is twenty years after the decease of the author. In most, if not all, of the *German* states, it is perpetual.

If the comparative superiority of the practice on the continent were not well authenticated, we should have anticipated the contrary to be the case. We have been too much accustomed, amidst the conflicts with our neighbours, to laud our own laws and institutions, and utterly to condemn every thing belonging to those by whom we were opposed. We suspect, that besides the evident improvement which might be effected by imitating this better code of literary jurisprudence, there may yet be made other discoveries, by which it will appear that we have not altogether monopolized the maxims of wisdom and justice.

There can indeed be no subject which ought to engage the attention of the friends of literature, and the reading public, in a higher degree than the rights of authors and publishers, and the means by which the literature of Great Britain may be enabled to *compete* with, if it cannot surpass, the excellence and cheapness of the continental press.

It may fairly be asked, what is the consequence to literature in general, and the community at large, of this juster system of literary protection, which thus prevails amongst the other nations of Europe? Following the objections which have been raised by the adversaries of improvement, it may be demanded, Do the continental writers and their publishers *abuse* the power which the laws afford them? Do they (as it has been idly imagined would be the case here) *suppress* valuable works, or limit their diffusion and usefulness by *exorbitant prices*? No!

In France, as Dr. Johnson observed, they have a book on every subject. In Germany, the abundance of literary

works is still more extensive. In both countries, the price of books is beyond all proportion lower than in Great Britain. Compare, also, the literature of France and Germany, where the one is limited (though not to the contracted period of twenty-eight years), and the other is free. Does the perpetuity of German copyright render the writers of that country less original or profound than those of France? Does it tend to a superficial manner of writing? No! we believe there are of late years more great and original works of enduring excellence published by the German press, than by that of any other country.

Let it be recollected, also, that the limited and stinted protection which is here allowed to intellectual labor, was not declared to be the law of the land until the year 1774. Anterior to that time, a more liberal rule was *understood,* if not expressed; and it seems not that the wider latitude of literary rights which then prevailed, was productive of the mischiefs that have been anticipated.

Many of the great and lasting works, which constitute the glory of English literature, and shed a bright lustre upon the age in which they arose, were composed before this exposition of the law was announced. True it is, that, in spite of that interpretation, numerous accessions of a standard nature have been made to the treasures of national learning; but these have been encouraged by other means than Acts of Parliament---they have been produced, in spite of them, by the irrepressible energy of a few of our distinguished countrymen.

It cannot be urged that we have no EXPERIENCE to guide us in the melioration of the law. It was not, as we have seen, until about fifty-three years ago, that the construction now put upon the old statutes was attempted; so that in all time, since the first book was published in this country, until the reign of Queen Anne, did a perpetuity in copyright exist,---not only without prejudice, but with benefit to the public; and since the passing of the statute in question

until the year 1774, no evil was imagined to arise by extending to literary property the common protection afforded to all other. Nay more, to show that the chain of experience has been unbroken,---before the lapse of a single year, the Universities obtained the restoration of *their* rights, and have enjoyed them to the present time. No disadvantage has arisen to the interests of literature, or the public, by allowing to the Universities that privilege which has been denied to the authors of the very works they possess. If an experiment were necessary before justice could be done to literary men, it has therefore been sufficiently made; and the time, we should presume, has now arrived, when this deep stain on our statute-book may be for ever erased, and even-handed justice dealt alike to all.

It cannot be denied that private interest should yield to the public good; but in this instance, the community, so far from being benefited by the united evils of unequal restraint and anomalous taxation, evidently sustains an injury.

If, however, there be a reasonable doubt on the policy of administering just and equal laws, surely those who devote their lives to the interests of literature and philosophy, are entitled to the "benefit of the doubt." Surely no man of honorable spirit,---not to say of a liberal one,---can hesitate on the propriety of giving unlimited copyright, at least, a *fair trial.*

If, contrary to all reason, as well as all experience, mischief should arise, then, but *not till then*, let the fetters be new riveted, and let the yoke and the burthen be replaced on the shoulders of the ingenious and the intelligent.

We have thus given a brief sketch of the condition in which literary property is situated, and the circumstances which have attended it. We trust that the wrongs at which we have taken a hasty glance, are calculated to excite some degree of attention, even in the minds of those whom they do not personally affect, and that a full examination of the subject will be patiently encountered. The public have an equally

strong interest, and a positive duty, in promoting the general adoption of just principles—each man being individually concerned in enforcing and upholding that which is right and just; since the mischief that is done to his neighbour to-day, may be perpetrated on himself to-morrow.

In arranging the PLAN AND GENERAL DIVISIONS OF THE WORK, it has beenthought most desirable in the *first* book—after defining the nature oliterary property, and considering its claims to protection under the comprehensive provisions of the common law—to take a historical view of the origin and progress of the legislative regulations—subdivided under the general heads, of the *duration* of copyright, and the *tax* imposed upon the publication of books. We shall thus be enabled fully to trace thesubject from the memorable invention of printing, through the interesting periods in our history which immediately succeeded. And we shall also have an opportunity of shewing the interest which many celebrated works have attained in the annals of the law, as well as of literature.

This course indeed appeared necessary as well as interesting; for although the last Act of Parliament on the copyright of books has incorporated the provisions of the former statutes, the *past* require to be referred to for the purpose of assisting the construction of the *present*. The old statutes, however, will be printed in the smallest type, and appended to their analysis by way of notes.

The various classes who are interested in literary undertakings —in securing them from invasion, or avoiding the consequences of violating the law—in the mode of transferring copyright and the contingent interests of authors—must naturally be desirous to ascertain the decisions which have occurred in the courts of justice regarding these subjects. And although in some respects the law remains imperfectly defined, still it appears highly important to collect, and appropriately arrange, the legal doctrines which have been pronounced, and the facts and principles on which they are grounded. In the *second* book, therefore, besides treating of the duration and extent of copyright, of the library tax, and the registry at Stationers' Hall, it has been deemed necessary to devote a considerable portion of the treatise to the details of *pirating copyright*, its *transfer*, &c. These, it is presumed, will be found of great practical utility, both to authors and publishers.

The *third* book, and the notes which follow it, contain the disquisitions on the principles of the laws and their effect on literature.

ANALYTICAL TABLE OF CONTENTS.

THE PRESENT STATE OF THE LAW.

- Duration and Extent of Copyright.
  - 1. Copyright in Books *generally*
    - Analysis of the Statute, 54 Geo. III. c. 156.
      - Its general Scope.
      - Term of Copyright in Books.
      - Penalties for Pirating Copyright.
      - Copyright of Authors,
        - dying before the first 14 years;
        - living after 28 years.
      - Limitation of Proceedings.
    - Digest of Cases .....
      - On the Duration of Copyright.
      - Its Extent,
        - Manuscripts,
        - Printed Books,
        - Musical Compositions.
  - 2. Copyright in Engravings, Etchings, and Prints; Maps and Charts.....
    - Analysis of the Statutes.
    - Digest of Cases,
  - 3. Copyright in Sculpture, Models, and Casts.....
    - Analysis of the Statutes.
    - Construction of the Statutes.
  - 4. Excluded Works, as injurious to.....
    - Public morals,
    - Religion,
    - Public peace and justice,
    - Private individuals,
    - Copyright—Piracy.
  - 5. *Special* Copyright of the ..
    - Crown,
      - Law Books, Almanacks, Latin Grammar.
      - Statutes and other Acts of State.
      - Bibles and Common Prayers.
    - Universities,
  - 6. Of publishing Parliamentary and Judicial Proceedings.

THE PRESENT STATE OF THE LAW, *continued.*

- **Library Tax and Registry at Stationers' Hall.**
  - 1. Analysis of the Statute, 54 Geo. III. c. 156.
    - The tax on original Works,
      - 2d. and subsequent Editions.
      - periodical Publications.
      - Maps and Prints.
    - The Quality of the Paper.
    - The places of delivering the Books.
    - The Penalties for Non-delivery.
    - Registry of Books at Stationers' Hall.
    - Duty of the Warehouse-keeper.
    - Penalties for Non-registration.
  - 2. Construction of the Act ..
    - Works included,
    - excluded.

- **Pirating Copyright.**
  - 1. Printed Books .....
    - Original Works.
    - Notes and Additions
    - Abridgments.
    - Compilations.
    - Translations.
  - 2. Manuscripts .....
    - Unpublished MSS. in general.
    - MSS. of deceased Persons.
    - Private Letters, literary and general.
  - 3. Lectures .....
    - written.
    - oral.
  - 4. Dramatic Works .....
    - Unpublished Plays.
    - Representing published Plays.
  - 5. Unregistered Works.
  - 6. Fine Arts .....
    - Engravings and Prints.
    - Sculpture.
    - Maps, Charts, and Plans.
    - Musical Compositions.
  - 7. Remedies .....
    - By Damages at Law.
    - Penalties under the Statutes.
    - Injunction in Equity.

THE PRESENT STATE OF THE LAW, *continued.*

Transferring Copyright, &c.
- 1. Transferring Copyright generally.
- 2. Contracts of Authors and Booksellers.
- 3. Bequeathing Copyright.
- 4. Seizure of Copyright, in Execution by Creditors. / Bankruptcy.

PRINCIPLES OF THE LAWS, AND THEIR CONSEQUENCES.

Duration.
- 1. The Objections to a Perpetuity considered.
- 2. The Injustice and Impolicy of the Limitation.

Tax.
- 1. The Grounds of the Library Claim examined.
- 2. Effect of the Tax on Authors. / Literature.

Notes, comprising Authorities on the Injustice and Impolicy of the Law.

Table of litigated Works, and Names of Cases.

Index.

BOOK I.

HISTORICAL VIEW

OF

THE LAW.

LAWS OF LITERARY PROPERTY.

BOOK I.

Historical View.

FIRST PART.

OF THE DURATION OF COPYRIGHT.

CHAP. I.——FROM THE INVENTION OF PRINTING, TO THE STATUTE 8 ANNE, 1710.

SECT. 1.——*Of the definition and nature of Literary Property.*

LITERARY PROPERTY, or COPYRIGHT, may be defined to be the ownership or rightful possession to which an author, or the person to whom he assigns it, is entitled in the *copy*(1) or original manuscript of his literary works; and it comprises the exclusive right of printing and publishing copies of any literary performance, including engravings, musical compositions, maps, &c.(2)

Lord MANSFIELD adopted the word "copy" in the *technical sense* in which, he said, that name or term had been used for ages, to signify an *incorporeal right* to the *sole* printing and publishing of something intellectual, communicated by letters(3).

Mr. Justice ASTON also observed, that "the copy of a book seemed to have been not familiarly only, but *legally*, used as a technical expression of the author's sole right to print and publish: and that these expressions in a variety of instruments were 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 were active, operating in its protection(4).

The right of an author to the exclusive use and publi-

(1) "Copy," the autograph, the original, the archetype; that from which any thing is copied. *Johnson.*——"The first of them I have forgotten, and cannot easily retrieve, because the *copy* is at the press. *Dryden.*

(2) Tomlin's Law Dict. Articles "Literary Property" and "Copyright."

(3) 4 Burr. 2396.

(4) Ib. 2346. "*Copy* of a book," was likewise described by Mr. Justice *Willes* as the term which had been used for ages to signify the sole right of printing, publishing, and selling copies thereof. 4 Burr. 2311.

cation of his own literary compositions, is classed by Sir W. BLACKSTONE amongst the species of property acquired by *occupancy*, being grounded on labor and invention(1).

When a man, says the learned Commentator, by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that *identical* work as he pleases; and any attempt to vary the disposition he has made of it, appears to be an invasion of the right. Now the identity, says he, of a literary composition, 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 other man, it hath been thought, can have a right to exhibit it, especially for profit, without the author's consent(2).

It will not be necessary to enter into any elaborate consideration of the arguments on the origin of property. There seems no rational ground for creating a distinction between literary and any other species of property. The rights of each are equally entitled to protection. Such a distinction cannot be founded upon the degree of *labor* bestowed in the acquisition of other objects of property. Even the right to the possession of land has been acquired as often by good fortune as by merit, and is frequently retained without the bestowment of labor. The property in a literary work may be acquired in the same way. The first thought may have been accidental, which labor has enlarged and improved. The descendants of those who have produced intellectual treasures, are as well entitled to inherit them, as the posterity of the accumulators of land or money. To say, that the *definition of property* in the old legal authorities does not include the property in question, can be nothing to the purposes of justice. If it does not include it, the definition is a bad one, because it is not sufficiently comprehensive. Besides, if literary works possess none of the usual characteristics of property, according to its present technical de-

(1) 2 Blac. Com. 405.

(2) Ib. 406. The Roman law adjudged, that if one man wrote any thing on the paper or parchment of another, the writing should belong to the owner of the blank materials; meaning thereby the *mechanical* operation of writing, for which it directed the *scribe* to receive satisfaction; for, in works of *genius and invention*, as in painting on another man's canvas, the same law gave the canvas to the painter. As to any other property in the works of the understanding, the law is silent; though the sale of literary copies, for the purposes of recital or multiplication, is certainly as ancient as the times of Terence(*a*), Martial(*b*), and Statius(*c*).

(*a*) Prol. in Eunuch, 20. (*b*) Epigr. i. 67, iv. 72, xiii. 3, xiv. 194.

(*c*) Juv. vii. 83.

scription, let them form a class of themselves. Injustice should not be done for the sake of preserving consistency in verbal or metaphysical distinctions, which have nothing but their antiquity to support them.

It is held by all the law authorities, that an author possesses a strictly legal property in his literary labors, whilst they remain in manuscript. There can be no real distinction in the nature of the property, in the sentiments or ideas and language, before and after publication. The law which prohibits the publication of his *manuscript* without his consent, should also protect the *printed copy*, and prevent the appropriation of the profit of publication by any other person than the author.

The definitions adduced by those who argue that there is a *want of "property"* in literary works, are evidently very inadequate to the objects of property in the present advanced state of society. They are adapted to things in a *primitive*, not to say imaginary, state; when all things were in common; when that common right was to be divested by some act to render the thing privately and exclusively a man's own, which, before it was so separated and distinguished, was as much the property of another.

These definitions also, it has been justly observed(1), will be found principally to apply to the *necessaries of life*, and the grosser objects of dominion, which the immediate natural occasions of men called for; and therefore the property so acquired by occupancy, was required to be an object *useful* to men, and capable of being *fastened on*. Enough was to be left for others. As much as any one could use to the advantage of life before it spoiled, in so much he could fix a property. Whatever was beyond this, was more than his share, and belonged to others.

These definitions give a sort of property little superior to the legal idea of a beast-common; the bit of mouth snatched, or taken for necessary consumption to support life. Thus ruminating back to the *origin* of things, men lose sight of the *present* state of the world, and *end* their enquiries at that point where they should *begin* their improvements.

But distinct properties, says Pufendorf(2), were not settled at the same time, nor by one single act, but by successive degrees, nor in all places alike; but property was gradually introduced, according as either the condition of things, the number and genius of men required, or as it appeared requisite to the common peace.

Since those supposed times of universal communion, the objects of property have been much enlarged by discovery, invention, and arts. The mode of obtaining property by occupancy has been abridged; and the precept of abstaining

(1) Millar v. Taylor, 4 Burrow, 2339. (2) B. 4, c. 4, sec. 6.

from what is another's, enforced by laws. The rules attending property must therefore keep pace with its increase and improvement, and must be adapted to every case.

A DISTINGUISHABLE EXISTENCE in the thing claimed as property, *an actual value* in that thing to the true owners, are its essentials; and these are not less evident in the case of literary property, than in the immediate objects of those definitions which relate to the primitive condition of things.

There is a material difference greatly in favor of this sort of property, from that gained by *occupancy*, which before its occupation was common to every one; because a literary work is *originally* the *author's;* and therefore unless clearly rendered common by his own act, and full consent(1), it ought still to remain his property.

The *utility* of the thing to man required by the definition in Pufendorf(2) to make it an object of property, has been long exploded, as appears from Barbeyrac's note on this very passage, where it is held an unnecessary and superfluous condition(3).

The best rule both of reason and justice seems to be, to assign to every thing *capable of ownership* a legal and determinate owner.

For the capacity to "fasten on," as a thing of corporeal nature, being requisite in every kind of property, plainly partakes of the narrow and confined sense in which property has been defined by authors in the *original* state of things. A capacity to be *distinguished*, answers every end of reason and certainty, which is the great favorite of the law, and is all that wisdom requires to secure their possessions and profits to men, and to preserve the peace(4).

"Nothing," says Professor Christian, "is more erroneous than the practice of referring the origin of moral rights, and the system of natural equity, to that savage state which is supposed to have preceded civilized establishments, in which literary composition, and of consequence the right to it, could have no existence. But the true mode of ascertaining a moral right, is to inquire whether it is such as the reason, the cultivated reason, of mankind must necessarily assent to. No proposition seems more conformable to that criterion, than that every one should enjoy the reward of his labor, the harvest where he has sown, or the fruit of the tree which he has planted." Whether literary property is *sui generis*, or under whatever denomination of rights

(1) The *constructive* consent, deduced from the act of publication to the world, will be discussed in the next section.

(2) Lib. 4, cap. 5.

(3) Things of fancy, pleasure, or convenience are objects of property, and so considered by the common law: even so insignificant a thing as a popinjay, a monkey, a parrot, or the like; in short, any thing merchandizable and valuable. 12 H. 8. 3. a. b. &c.; Bro. Abr. Tit. "Property," pl. 44; 1 Comyn's Digest. 602.

(4) 4 Burr. 2340.

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 invaluable right, established in sound reason and abstract morality(1).

The consideration of the *objections* advanced against these definitions of the nature of literary property, we defer to that part of the work in which the *justice* of the laws are discussed. The Legislature has thought proper to deal with literary works as "property," and we have deemed it sufficient for the present purpose to state, from the authorities to which we have referred, the general principles by which the question ought to be regulated. We proceed, in the next place, to consider the subject as it stood at the common law, prior to the existence of any statute, and independent of any recognition of the exclusive rights of literary property, either by the State or the Parliament.

SECTION II.

Of the perpetuity of Copyright by the Common Law.

It is a leading principle in the English Law, and forms a just ground of its praise, that it provides redress for every wrong and grievance which the subject may suffer from the invasion of his rights; and the remedy, says COKE, varies and is adapted according to the variety of the right(2).

From the benefit of this general rule of extensive justice, *literary* men ought not to be excluded. The exertions of the mind deserve as much encouragement as those of the body. Whatever may be suggested by the subtilty of legal reasoning, drawn from the origin of property, it is clearly the interest of society to afford that protection to literary labor, which is readily extended to every other species. The reasoning which demonstrates the expediency of guarding the fruits of manual industry, must equally establish the adoption of the same protection to those of intellectual acquirement. Property will not be acquired if it be not protected. The very existence of society, and its best interests, depend on the encouragement of industry; and as national wealth depends on labor, so does knowledge depend on mental exertion. Yet neither the corporeal nor the intellectual powers will be freely and fully exerted, unless they are permitted to enjoy their productions unshackled by restraint, and unencumbered

(1) 2 Comm. 407, note.

(2) 3 Coke 48, a.

by burthens, from which other classes of the community are exempt.

It being intended in this section to review the subject of literary property as it anciently stood, according to the common law, it will be necessary to notice the comprehensive character of this part of our system of jurisprudence: and without following the exact phraseology of the ordinary definitions, we may describe the COMMON LAW to be

The law of this kingdom, as it was generally holden before any statute was enacted in Parliament to alter it. It includes the laws of God and nature. It is grounded upon the general customs of the kingdom, and comprises the principles and maxims of the laws, which are founded upon reason, observation, and experience, acquired by long study, refined by learned men in all ages, and it is thus said to be the "perfection of reason." Its end and object is *justice*, in the most comprehensive sense. It is the common birth-right of the subjects of the realm, for the safeguard and defence, not only of their goods, lands, and revenues, but of their families, fame, property, and lives(1).

The common law is described by BRACTON(2) as *universally comprehensive*. There seems no reason for excluding from its protection any kind of property, however insignificant in its nature, or trifling in its value. The *rules* in regard to property, like the principles of the underwritten law, are of the highest antiquity, and must ever have been the same; but the *objects* to which they are applicable, were not all at once known, and many things have been disputed which were afterwards established as objects of property(3). The claims of justice do not depend on antiquity.

There are many things, the uses of which were unknown in ignorant times, that have now become valuable; and it seems as unjust to shut out from legal protection the intellectual labors of ingenious men, as it would be to declare that the mariner's compass and gunpowder, which were inventions within the period of legal memory, cannot be included in the laws of property(4).

The absence of judicial authority can form no objection

(1) Co. Lit. 97, 142. Treatise of Laws, p. 2. (2) Lib. 1, c. 3.

(3) There is a case reported in the *Year Book* of a blood-hound, where it was argued, that when out of possession, the property in it ceased---that felony could not be committed of it---that it was not titheable, would not pass by a grant of omnia bona, &c. Yet it was held, "that where any wrong or damage is done to a man, the law gives him a remedy." 12 H. 8, f. 3, a. b. So of a grey-hound. 31 *Eliz. Owen* 93, *Cro. Eliz.* 125.

(4) It was held by Mr. Justice Willes, that the principles of private justice, moral fitness, and public convenience, when applied to a *new subject*, made common law without a precedent---much more when received and approved by usage. 4 Burr. 2312. *For the usage, see the next section.*

to the claim. It was not decided until within a century of the present time that a title to literary property could be maintained, even *prior* to publication; and that according to the principles of the common law, no distance of time, however great, could authorize a publication without the consent of the author: as in the cases of *Lord Clarendon's History* and the *Letters of Pope*. Many other points of law have also been decided in recent times, for which there is no precedent. For instance, it is not many years since, for the first time, it was held actionable at common law to give, knowingly, a false character, on the faith of which credit had been given, and loss sustained---a decision which was evidently founded on the general maxim, that "there is no injury without a remedy."

Having thus shewn the state of the question upon the general and comprehensive principles of the common law, prior to any legislative enactment or recognition, and independently of any judicial authority, we come now to the consideration of the reasonings which have been adduced, and the judgments pronounced by many learned judges on the question of perpetuity, the substance and principal points of which we shall select, and endeavour to present in the most condensed form.

Of all the judges before whom this question has been discussed, the majority have always decided that, by the common law, an author was entitled to the exclusive enjoyment of his copyright in perpetuity.

It is remarkable also, that amidst the many controversies which have taken place on this important subject, it was never in the slightest degree denied that the *manuscript* of an author was protected by the common law, and that it was illegal to take his manuscript, or in any way to use or publish it, without the clear and express consent of the author. On the contrary, in the several cases which have been argued on the extent of the right since the several Acts of Parliament on copyright were passed, it has been all along, even by the advocates whose business and duty it was to contend that under those statutes the term of exclusive copyright was limited to fourteen years, 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 it has been also conceded, that the several cases in Chancery in which injunctions were granted to restrain the printing and publishing of the copy, were agreeable to the common law, and that the relief afforded in those cases was properly given in consequence of the *legal right*(1).

(1) 4 Burr. 2396.

Now it seems impossible to shew that there is any sound distinction by the common law, between the exclusive right to the copy *after* publication, and the right *prior* to it. For, as Lord MANSFIELD observed(1), the common law as to the copy before publication, could not be founded in custom.

Prior to 1732, the case of a piracy *before* publication never existed---it was never put or supposed. There is not a syllable about it to be met with any where. 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.

From what source then, demands his Lordship, 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, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication, how many, what kind of volumes, what print. It is fit he should choose to whose care he will trust the accuracy and correctness of the impressions---in whose honesty he will confide not to foist in additions.

These, and other reasonings of the same effect, are sufficient to shew that it is agreeable to the principles of right, the fitness of things, convenience and policy, and *therefore* to the common law, to protect the copy before publication.

But the same reasons, said the learned judge, hold after the author has published his work. He can reap no pecuniary profit, if the next moment after it comes out it may be pirated upon worse paper, and in a worse print, and in a cheaper volume(2).

The author may not only be deprived of any profit, but lose the expence 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 dis-

(1) 4 Burr. 2397.

(2) It is admitted, that if the literary compositions of an author be taken from him *before* publication, he may maintain an action of trover or trespass. But how are the *damages* to be estimated? Should the jury 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 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?—Per Mr. Justice *Aston*, 4 Burr. 2341.

approves, 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 !

Such are the monstrous conclusions which would follow the admission of the doctrine, that an author loses by the act of publication his exclusive right to the productions of his literary labor.

The claim of the author to the exclusive right of printing and publishing his own work, is founded, says Mr. Justice ASTON(1), 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, saleable 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 destitute of corporeal qualities(2).

But it is said that the copy is necessarily made common after the book is once published.

Now without publication, it is useless to the owner, because without profit ; and property without the power of use and disposal, is an empty sound. In that state, it is lost to society in point of improvement, as well as to the author in point of interest. Publication, therefore, is the necessary act, and the 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 the author's confessed original property, against his express will, seems to be quite harsh and unreasonable ; nor is it at all warranted by the arguments derived from those writers who advance, that by the law of nature property ends when corporal possession ceases(3).

(1) 4 Burr. 2341.

(2) All the metaphysical subtilties from the nature of the thing may be equally objected to the property before publication. 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 defeated 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 ? ——Per Lord *Mansfield*, 4 Burr. 2397.

(3) *Barbeyrac* clearly observes, that the right acquired from taking possession, does not cease where there is no possession ; that perpetual possession is impossible ; that the above hypothesis would reduce property to nothing; that the consent of the proprietor to the renunciation of the right, ought to appear, for as possession is nothing else but an indisputable mark of the will to retain what a man has seized, so to authorize us 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 he has renounced his personal right to it.