BOOK I.

HISTORICAL VIEW OF THE LAW.

LAWS OF LITERARY PROPERTY.

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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. s. 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.