AN ARTICLE

ON

LITERARY PROPERTY.

FROM

THE NEW YORK REVIEW, No. VIII.

APRIL, 1839.

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THE interest manifested in this country, as well as in Europe, on the subject of an INTERNATIONAL COPYRIGHT LAW, has induced the Publisher to reprint, in a separate form, (by permission of the Proprietors,) the article on LITERARY PROPERTY, which appeared in the *New York Review* for April, 1839.

46 Broadway, New York.

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FROM THE NEW YORK REVIEW,

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ART. I.—1. *Remarks on Literary Property, by* PHILIP H. NICKLIN, A. M., etc., etc. Philadelphia: 1838.
2. *Plea for Authors, and the rights of Literary Property.* New York: 1838.

THE prodigious increase, within the last ten years, of republications in this country of the works of British authors, and their sale at an incomparably cheaper rate than the English originals—are topics of common remark among those who pay any attention to matters of literature. Few, however, even among those most interested in the subject, but must have been surprised to learn, from a report made to the senate during the last congress, "that the number of persons employed in the United States in the various branches connected with book-making and periodical publication, has been estimated at two hundred thousand—and the capital employed in those branches, at from thirty to forty millions of dollars."* Few persons, moreover, have probably been at any more pains than the committee who made that report, to ascertain whether the great mass of these republications, which, simply from the circumstance of their *cheapness*, seem to have been considered as "advantageous to the people," are precisely of the character requisite for their improvement in learning, taste, morals, or religion;—whether they really tend to advance the standard of popular education, facilitate the diffusion of true knowledge, or add to our stock of sound principles and valuable facts—whether, in short, they assist in accomplishing

* See Report of Committee on Patents, &c., June 25, 1838.

the great en. proposed by that article of our national compact, by which congress is empowered "to promote the progress of science and the useful arts"—or whether, on the other hand, many of these productions may not be *dear* at any price.

Still fewer of the "people," we apprehend, have concerned themselves with the question, so hastily decided by this committee, as to whom the public is indebted for the benefit which it derives from such amongst these works as are really valuable; and we fear that even the small number of those who do acknowledge any obligation on that score to their authors, are unprepared fully to admit the justice and equity of *their* claims to remuneration. The "enterprising" republishers, although well aware of the advantages accruing to themselves from the wholesale and indiscriminate prosecution of a trade in which they obtain the staple commodity for nothing, and are therefore enabled to dispose of their wares at a lower rate but higher profit, are not, on that account, we suspect, more willing to allow an adequate compensation to the producers of the raw material. They certainly dispute the right of foreign authors to that reward to which, in common justice and natural equity, we conceive them to be entitled, and of which the federal constitution holds forth the promise.

The grievances of which English authors have compl[illegible]ined are twofold — those affecting their property, and those affecting their reputation, from the imperfect, mutilated, and interpolated republications of their works. The latter of these injuries they undertook, in the first instance, to counteract, by designating a respectable English house, of which a branch was established in this city, as the sole authorized publishers of their works in America. They then petitioned congress to amend the existing law of copyright, so as to embrace the works of foreigners residing abroad, as well as of authors who are citizens or residents of the United States. A report favorable to the prayer of their petition was made in February, 1837, by a select committee of the senate, of which Mr. Clay, of Kentucky, was the chairman; but as this took place shortly before the expiration of that congress, the bill brought in in pursuance of his report was not acted upon during the remainder of its term. Nor was the matter taken up at the first or extraordinary session of the succeeding congress. At an early period, however, of the second session of this congress, which commenced at the usual time of the first annual meetings, the bill reported at the former congress was again presented in the senate by Mr. Clay,

and on his motion referred to the standing committee on patents and the patent office, together with sundry other petitions and memorials from our own citizens, in favor of the pending application by the British authors, as well as several remonstrances against their relief. The remonstrants were a numerous class of citizens, embracing booksellers, paper makers, printers, bookbinders, type founders, and others, whose interests were supposed to be involved in the question. A report was subsequently made by this committee adverse to the claim of foreign authors, on the ground of the objections urged by the remonstrants, which were adopted and reinforced by the committee. This report was also made shortly before an adjournment of congress, and was not acted upon during the session. At the commencement of the present session, the whole subject was again referred to a new committee; but as no report has been made, at the time of our writing, it is not probable anything will now be done.

In the interval which occurred between the two reports, already made, the publications of which the titles are prefixed to this article made their appearance. The first of them, is the production of the senior partner of a well known house of law booksellers and publishers, in Philadelphia; and is in form, an introduction to a reprint of a paper on the subject of copyright, from Napier's Supplement to the *Encyclopedia Britannica*. Its author is decidedly against an international copyright — *at present*; but regards both the English and American statutes, regulating the property of authors in their works, as unjust, because they reduce to a term of years, that which, he contends, should be perpetual. He considers that the repeal of those statutes, and the restoration of the rights of authors to the ground on which they stood at common law, as not only required by justice, but by policy also — since the result, he conceives, would be to "produce good and *cheap* books." He exhibits, moreover, some practical arguments, founded on arithmetical calculations, which "extinguish," as he has it, "the notion of *monopoly*, which some suppose would be conferred on authors, by perpetual copyright, simply, because their interest will induce them to sell at low prices* — to the *booksellers*, we presume he means; and we draw this inference, from the fact which he afterwards discloses, that "what the law now takes from authors, for the sake of the public, *inures for the benefit of publishers*." He therefore concludes in favor of "a universal

* See "Remarks on Literary Property," p. 54.

republic of letters;" but thinks that "charity should begin at home," though "when the time comes for it to go abroad," he conceives that "the law of literary property should be uniform throughout the world, and a free trade established in books."

The second of these tracts, is from an anonymous advocate of international copyright. It is expressly intended to promote the cause of the petitioners to congress, and he agrees with the other writer, in contending for perpetual copyright, although his clients have not petitioned for it. He draws his principles, too, from the same source as Lord Camden, who in arguing *against* a political right, was described by an eminent author of that day, as trampling on the common law, and in his *visions*, "seeing a dagger before him," which he called the *law of nature*.* Were not the blindness and indiscretion of parties concerned in interest, or as volunteer counsel, almost proverbial, we should think it rather odd that it did not occur to either of these writers, that perpetual copyright can only be restored in this country by an amendment of the federal constitution—or, if aware of the necessity of such a measure, to effect their object, that they did not propose it. Perhaps, however, they were not so simple as to believe that there was the remotest chance of obtaining the alteration, if at all, within a period equal to that for which copyrights are secured under the existing laws. For all useful purposes, therefore, their publications might almost as well have never issued from the press; unless they were intended (which we cannot suppose) to prevent foreign authors from obtaining what may have been in their power, by engaging them in schemes not reducible to practice. We therefore dismiss these publications for the present from our notice, and merely avail ourselves of the occasion they afford, to proceed with the discussion commenced in the article upon steam navigation, in the last number, which related, as our readers may remember, to the power vested in congress by the constitution, "to promote the progress of science and the useful arts," and which we promised to pursue, in reference to this question of literary property.

It was there contended, more particularly, with respect to patented inventions, that the grant by the individual states to congress, of this power, to be executed "by securing for limited times to authors, the exclusive right to their respective writings and discoveries," was the grant of an exclusive power of legislation on the

* See a letter, signed *Corregio*, by the author of JUNIUS. *Woodfall's Junius*, v. 2, p. 168.

subject. In a confederated government, like that of the United States, it seems indeed difficult to conceive, in what manner that object could possibly have been secured, except by vesting such exclusive power in a paramount authority; and the necessity of such a power to the attainment of the end, was certainly an adequate reason for vesting it in the supreme legislature of the union. The power under consideration, comes within that class of cases enumerated in the thirty-second number of the "Federalist," to which the exercise of a similar power by the state, would be repugnant and contradictory to the grant to congress. The example which the learned and eloquent author of that paper selected to illustrate his reasoning, involved a contradiction, by direct implication, from the force of the terms. It was an example, taken from the power of congress to establish a *uniform* system of naturalization; and it was argued by Mr. Hamilton, that such power must necessarily be exclusive, because if each state could prescribe a distinct rule, the rule of congress could not be uniform. In the present case, we hold that the power given is necessarily exclusive, not only from the *terms* but from the *nature* of the grant. The words are, that congress shall have power to secure the exclusive right of authors and inventors "for limited times." Now, if a state have a concurrent power with congress over the subject, it must be a power arising from the unceded portion of its sovereignty, and, consequently, a power to grant *without limit of time*. But how could congress secure to the author or inventor, for a limited time, the enjoyment of that which a state might grant to another forever.

It was said, indeed, by one of the most able judges that ever sat in our state courts,* "that if an author or inventor, instead of resorting to the act of congress, should apply to the state legislature for an exclusive right to his production, there is nothing to prevent the state from granting such exclusive privilege, provided it be confined, in its exercise, to the particular jurisdiction." If this be so, then may the state legislatures pass copyright and patent laws, embracing foreigners within their provisions, although to render such laws effectual for any beneficial end, every state must adopt them. But none such have been passed since the ratification of the federal constitution, and this omission, of itself, affords a practical construction of the article in question, which confirms our position; and, with all due submission to the constitutional jurist, whose opinion we

* By KENT, Ch. J., in *Livingston* vs. *Van Ingen*, 13 Johns. Rep.

have quoted, and whose learning, talent, and integrity, none hold in higher estimation than ourselves — if that opinion be correct, one, of two things, must follow — either that congress may secure to an author or inventor an exclusive right to his writing or discovery, and a state, following so far the example of congress, as to regard commentators, or even interpolators, as authors, within the statute, secure to another person the exclusive right to publish the same production, within its own jurisdiction; or that congress cannot secure such right to the former, after the state has secured it to the latter. In the first conclusion, this consequence seems to be involved, that congress may grant an exclusive right to one person, to the use or benefit of a certain thing, throughout the union, and that a state may grant to another an exclusive right to the use and benefit of the same thing, within its particular jurisdiction; in other words, that over the same subjects, and within the same jurisdiction, two co-ordinate powers may grant *exclusive* privileges to *different* persons! The other branch of the dilemma, supposes the individual state to derogate, by an assumption of power, from the express terms of its grant to the general government, and actually to exercise an exclusive power to secure privileges, in direct contradiction to the terms of the power ceded to congress. Nor does it, as we humbly conceive, obviate this repugnancy, to say, that "when these separate powers come into direct conflict, the grant of the state must yield to the supreme law of the land" — because the repugnancy is, from the nature of the subject, different from that arising under the power of congress, to which that observation refers, and is directly deducible from the propositions themselves, and not from any casual effects or consequences arising from the accidental collision of concurrent jurisdictions.

The power in question is moreover exclusive, from *the nature of the grant;* because if each state have a concurrent power with congress, its exercise would defeat the two fold object, for which the federal constitution intended to provide. That object, as we have shown, on the former occasion, was to secure to the public the benefit and transmission of inventions, as well as to secure to genius a reward for its productions and discoveries. But if the individual states have a concurrent power with congress, neither branch of this double object can be secured by the federal legislature. For, if to secure the first, congress prescribe twenty-eight years as the limit of exclusive rights, and render them common at the expiration of that period, each state might fix a

different period, or secure a right of property to authors and inventors without any limitation of time. Nor could the second branch of the object be secured by congress, if the states could exercise a concurrent power, because each state might, on that supposition, reduce the term of exclusive enjoyment to a *minimum*, or declare the fruits of genius and learning to be common property. But the purpose we have in view, requires a fuller development of the origin and nature of the property meant to be regulated, and of the general policy of this article of the constitution; and we trust that its importance to the high interests of literature and science, will justify us in going into a thorough examination of the matter, even though the discussion should appear somewhat technical and abstruse.

Previously to any positive law affecting the subject, it is difficult to conceive a process of reasoning, founded on strict legal principles, by which the right of exclusive enjoyment, and the right of transmission, could be denied to any modification of property. The moment any thing was acknowledged as *property*, from that moment it would seem to follow, that the great principles common to all property must apply to it; and therefore an acknowledgment that the products of an author's genius were subjects of property, induced, as a necessary consequence, both the right of exclusive enjoyment and the power of transmission. But both the premises we have assumed, and the conclusions drawn from them, were denied by certain English jurists, and denied, as is abundantly evident, from a complete misconception of the principles upon which the right of property is founded.* A *state of nature* had been opposed, by the learning of preceding ages, to a state of society; and certain rights, supposed to be derived from the one, were considered as original principles variously modified by the other. But we believe most sound lawyers, as well as most sober metaphysicians, on both sides of the Atlantic, have renounced all faith in that ancient speculation, and now agree in regarding the *state of nature* as one in which the genius and talents of mankind would be forever useless and unprofitable. As society is an indispensable requisite of human improvement, it is to the social state that we ought to look for the original of all our social rights, and amongst them, of the right of property; and although it is not extraordinary that those who

* See the opinion of Mr. Justice Yates, in *Miller* and *Taylor*, and those of Lord Camden, and the judges who agreed with him, in *Donaldson* and *Beckett*, 4 *Burrow's Report*, 2303.

looked to a visionary state from which to derive their principles, should have been led into error, it is strange, indeed, that those who rested the right to property on the slender basis of bodily labor, or the slighter foundation of occupancy, should have rejected the more intelligible title of invention and discovery.

The claims of inventors and authors are so congenial to our notions of natural justice, they fall in so easily and accord so harmoniously with all the ideas we derive from the ultimate objects of society in establishing the right of property, that some ill founded principle, some imagined ill consequence, or some inveterate prejudice, must have prevented the full admission of this right, arising, as it does, from individual merit, and springing into existence at the command of individual power. Two causes, we think, may be enumerated, as having concurred in producing this erroneous opinion: first, a misconception of the grounds on which the right of property ultimately rests; and secondly, the inconvenient consequences supposed to result from the admission of the principle, in its particular application to the productions of the mind. The former was rather the avowed, while the latter was, perhaps, the secret cause of the opinions of some of the judges, in the celebrated cases of literary property, in England.* It was thought that if an author had a right of property in his writings, — a right which was exclusive and transmissible *ad infinitum* to his legal representatives, — a formidable barrier would be opposed to the progress of both art and science; and that as each successive heir would be interested to draw as great pecuniary gain as possible from the work of his ancestor, a *tax*, indefinite in duration and amount, might be levied on posterity, and the advancement of science and the arts proportionally impeded. Improvement had hitherto been unrestrained, and letters had as yet been transmitted from age to age, without any other exaction than the tribute which fame pays to the memory of genius.† The result of admitting an exclusive and perpetual right of property in the fruits of intellectual labor, could not be fully estimated, but that it would operate as a clog to the advancement of knowledge, and retard

* *Miller* vs. *Taylor*, in the King's Bench, and *Donaldson* vs. *Beckett*, in the House of Lords, reported [illegible] executively in 4 *Burrow*.

† "Glory," said Lord Camden, "is the reward of science, and those who deserve it, scorn all meaner praise." Although we do not agree with his lordship, in the full extent of his assertion, yet are we much further from agreeing with a contemporary, in considering it "*dishonest, insolent, bombastic*," *or* "*puerile.*" See N. A. R. No. 102, pp. 287—290.

the progress of society, was thought clear, to demonstration. Yet to deny to authors the fair profits derivable from their talents and their exercise, was of itself at variance with every idea of natural justice, and every dictate of liberal policy. It was, in effect, to deny to genius its appropriate reward; and to withhold one of the strongest stimulants to exertion.* From a balanced consideration, therefore, of both sides of this important question, a compromise was at length effected, by which the claims of the author were acknowledged, his rights protected, and his reward secured; whilst a public interest was effectually created, and an immunity from too great a burden provided for posterity.

From this rapid sketch may be collected both the origin and policy of the act of the British parliament,† limiting the rights of authors to a term of years. With a full knowledge of that statute, and of the principles and policy upon which it was founded, according to the exposition given of it by the court of the last resort in Great Britain, the several states ceded to congress a power "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."‡ The English law limited the right to a term of years. The power ceded by our constitution, was to secure it "for limited times." The former restricted the right to a definite period; the latter adopted the same principle, and pointed to the same object, but left the quantum of interest, *and nothing else*, to the discretion of the national legislature. Thus it is manifest, that in conformity with the policy of the British statute, the power in question was vested in congress, with the same means and for a similar end. The *ultimate object* of the power, was the advancement of science and the useful arts; the *means* by which congress were to effect that end, was by securing to authors a right of property in their works for limited periods; and the *result* has been a transfer to the public of a reversionary interest, in those productions which of common right had belonged exclusively to their authors. This result, and the limitation which produces it, concur in promoting the general end contemplated

* 8 Anne, c. 19, 1709.

† As was observed by Lord Chancellor Northington, in Donaldson's case, "it might be dangerous to vest a perpetual right of property in authors. For as that would give them the sole right to *publish*, it would also give them a right to suppress; and then those booksellers who are possessed of the works of the best of our authors, *might totally suppress* them." 4 *Burr.* 2392.

‡ Cons. U. S., Art. 1, § 8.

by the constitution; the one, by giving to men of genius the excitement of a secured property in their writings; and the other, by extending (after the expiration of the term limited) the free use of the effective produce of invention to the whole community.*

The general end of the power, and the profitable result to the public in the reversionary interest, being then equally apparent, it is not less obviously the meaning of the constitution, that congress should "secure the exclusive right of authors and inventors," by the exercise of an exclusive power of legislation. This we have already inferred from the *mere words* of the constitution; but the view now given of the origin and policy of the article in question, whilst it more fully explains the principles which must have influenced the framers of that instrument, appears abundantly to confirm the reasoning which first led us to such a conclusion. If that conclusion and the principles here stated be admitted, it will easily be seen that the grant of exclusive privileges by a state in that which, according to the intent of the constitution, may be secured by copyright or by patent from the United States, is voidable as affecting other interests besides those of authors and inventors — interests equally intended to be secured under the power granted by the several states to the government of the union. It is, however, difficult to bring the full force of this argument home to the mass of any community, and impossible, perhaps, to reduce it to the level of their comprehension, who, professing to have read and understood the English cases of literary property, can impute *presumption and folly* to the great Lord Camden, without dread of a retort of the charge upon themselves, or deny the legal abilities and learning of Sir Joseph Yates, without suspicion of their incompetency to decide upon the character of a judge, of whose name and reputation they probably do *not affect* to be ignorant.†

* These views of the doctrine deducible from the English cases, in regard to the effect of the statute of Anne, upon the rights of authors at common law, and the identity in principle and policy of the power of congress with that statute, were exhibited by President Duer, in the controversy referred to in the article on steam navigation, in our last number, — and have since been sanctioned by the supreme court of the United States, in *Wheaton* v. *Peters*, 8 Peters' Rep. 591.

† Of the reputation of Lord Camden, as a lawyer, a judge, a statesman, and a patriot, it cannot be necessary to remind our readers. Although evidently no favorite of JUNIUS, yet that extraordinary writer "believed the character of this friend and coadjutor of Chatham, and 'patron of America,' to be fertile in every good and great qualification," and called on him at an important crisis in the history of the British constitution, "to stand forth in defence of the laws, and exert, in the cause of truth and justice, those great abilities with which he was entrusted for the benefit of mankind."—*See Woodfall's Junius*, v. 2. p. 147. The name and character of Mr. Justice Yates, are also immortalized in the letters of this

The right of each citizen to the future enjoyment of the productions of literature, of discoveries in science, and improvements in the arts — the benefit personally derived from them concerns so many, and concerns them so remotely — that it is scarcely known as an actual advantage, nor is its privation felt as a sensible and real loss. The disturbance of such a right, affects the interests of no combination of individuals; it can only be perceived by its operation upon future prosperity, and to trace that downwards to individual comfort, ease, and opulence, is a matter of some difficulty; and even if done with strength and clearness, would not agitate the multitude, intent upon the pursuit of nearer objects, with any powerful emotions. To the eye of genuine and intelligent philanthropy, it is nevertheless an interest of great magnitude; and in proportion as its effects are remote, and less likely to enlist the passions in its favor, does it need all the aid that a firm, unshrinking reason can afford it. It is obvious, therefore, that to insist, at this period, upon the restoration of perpetual copyright, is to contend for that which is not less erroneous in policy, than unattainable in practice; and the advocates of a measure neither solicited nor suggested by the British or the American petitioners for international copyright, are not in effect more hostile to their cause than those who deny the original right of authors to any property whatsoever in their works. Indeed, there is good reason to believe that the impediments and difficulties which have hitherto prevented the success of the application to

"*great unknown*," as well as in the reports of Sir James Burrow. The former imputes the removal of "this *great and upright* judge from the king's bench to the common pleas, to the *jealousy of Lord Mansfield;* with whom his judicial opinions, especially on political questions, were often at variance. In a debate which took place in the house of commons, December 6, 1770, on a resolution to inquire into the administration of criminal justice, particularly in cases relating to the liberty of the press, an eminent whig orator asserted, that "a late judge, equally remarkable for his *knowledge and integrity*, was solicited to favor the crown, in certain trials then depending; but this *great, this honest judge*, being thus solicited in vain, a letter was sent to him directly by a *great personage*, but as he suspected it to contain something dishonorable, he sent it back unopened. *The excellent person* who was thus tempted to disgrace and perjure himself, and to betray and ruin his country, could not die in peace till he had disclosed this scene of iniquity, and warned his fellow-citizens of their danger." Woodfall added to his report of this speech, the following: "N. B, Sir Joseph Yates was the judge meant. When the letter from the great personage was mentioned, Lord North, and the rest of the treasury bench, stared at one another, but did not utter a single sentence by way of contradiction."—*See Woodfall's Junius*, v. 1. p. 255. Ignorance of such a character, certainly argues that he who confesses it "must be himself unknown." But this is not equal to the absurdity of a reviewer's mistaking the author of the *Elements of Criticism*, who, as a Scotch judge, was styled by courtesy, Lord Kames, for a peer of parliament; or, a *lawyer's* supposing the opinion of his titular lordship, in the case of *Hinton* v. *Donaldson*, before the cou. f sessions, at Edinburgh, to have been delivered in the house of lords, at We minster.

congress, have arisen more from fears and scruples entertained by some of the most liberal and philosophical minds in the senate, lest the proposed amendment of the law might affect injuriously the interests intended to be secured by the constitution to the PUBLIC, than from any undue regard to the interested clamor of those who have remonstrated against it.

Previously to the adoption of the federal constitution, it had been made, as we have seen, a question in England — whether an author had any natural or common law-right of property in his works, — and that it was declared by a majority of the judges, when solemnly called on for their opinions by the house of lords,* that such right had indeed existed before the statute of Anne, but was by force of that act transferred to the public, upon the expiration of the term for which the copyright was secured by it to the author. Whether this opinion were sound or not, is now immaterial. Such, at all events, was the decision of the lords, and such was the settled law, both in England and America, when our national constitution was adopted. The framers of that instrument being called together for the purpose of defining the powers and establishing the form of a new federal government, and not for the purpose of resolving judicial doubts, touching an author's or inventor's right, took the subject as they found it, and simply reserved to the legislature of the union a limited but *exclusive* power of interference in regard to it. And in this they acted, as we shall contend, upon more enlarged views and with a more liberal policy, than congress, when it came to execute the power, seems to have penetrated.

* In *Miller* v. *Taylor*, the court of King's Bench, in 1769, gave judgment in favor of the subsisting copyright; Lord Mansfield, Chief Justice, Mr. Justice Willes, and Mr. Justice Aston, holding that copyright was perpetual by the common law, and not limited by statute, except as to penalties, and Mr. Justice Yates, who died in 1770, dissenting from them. In 1774, the same question was brought before the house of lords, in *Donaldson* v. *Becket*, when eleven judges delivered their opinions upon it. Four of them held, with Lord Camden and the deceased Sir Joseph Yates, that no right of property existed in an author, independently of the act of parliament; whilst five agreed with Lord Mansfield's opinion in the former case, that the common law right was not divested by the statute; Lord Mansfield himself declined from delicacy, as a peer, giving any opinion on this occasion, but he was understood to adhere to that he had delivered in Miller and Taylor. The remaining two judges admitted the existence of the right anterior to the statute, but were of opinion that a reversionary interest was thereby created, which at the expiration of the term secured by cumulative remedies to the author became vested in the public. These two, agreeing with the four, upon the general question as to the limitation of the right, formed the majority. Had Lord Mansfield delivered his opinion, the twelve judges would therefore have been equally divided. But the lord chancellor, (Thurlow,) agreed with the two judges, and his predecessor, Lord Camden, with the four. Their union carried a large majority of the peers with them. *See* 4 *Burrow's Reports, ubi sup.*

We have already adduced the reasoning in support of the exclusive nature of this power, which is substantially the same that was urged in the controversy respecting the exclusive right granted by this state to Messrs. Livingston and Fulton. The arguments against the exclusive nature of the power vested in congress, deduced on that occasion, from the nature and office of a patent or a copyright, in merely securing a title or right of property, without conferring a right of sale or of use, and the objections drawn from the right of legislation retained by the states in regard to their purely internal trade and intercourse, and their police, health, and inspection laws, were in effect met and refuted by the late Chief Justice Marshall, in his opinions — declaring that a coasting license not only ascertains the national character and ownership of a vessel, but confers the right of navigation ;* — that a right to import goods involves the right to sell them ;† and that whenever these rights come in collision with state laws, passed in virtue of a concurrent or of an independent right of legislation on these, or any other subjects, and the exercise of the federal and state authorities are found repugnant or irreconcilable to each other — the state law must yield to the superior power of congress. So the letters-patent, or the instrument given as evidence of a copyright, not only ascertains the title of the patentee or grantee as an inventor or author, but confers on them the same paramount and exclusive right of using, and vending to others to use, their discoveries and writings.

In reference, however, to the subject now under consideration, it is perhaps necessary to remark, that the property which an author may have in his writings appears to be somewhat different from that which an inventor may have in his discoveries. The former has no beneficial use or property whatever, independent of what may be derived from the sale of them ; the latter may, in a very restricted sense, use his invention for purposes of profit : to both, however, a right of sale is indispensable — but more manifestly so in the first case than in the last. Every other subject of property may be partially enjoyed, though the right of sale be restricted or forbidden ; but the right of property of authors and inventors is so essentially connected with the right of sale, that the inhibition of that right annihilates the whole subject. The right of sale, therefore, is, in these instan-

* *Gibbons* v. *Ogden*, 9 Wheaton's Reports, 1.
† *Brown* v. *Maryland*, 10 Wheat. Rep. 446.

ces, an elementary principle in the very idea of property — separate it from the other elements, and the complex legal notion of property is destroyed. The *value*, the thing intended to be secured, is lost to it. All human laws proceed upon the assumption of value as implicitly involved in the idea of property; and as new discoveries in science, and new improvements in the arts, give rise to new modifications of property, the first thing that attracts the attention of the legislature to any subject as being capable of appropriation or exclusive ownership, is its value. Accordingly, we find that the laws passed by congress in virtue of the constitutional power we are now considering, secure to an author, or his assignee, "the sole right and liberty of printing, reprinting, publishing, and *vending*" his works; and to a patentee "the full and exclusive right and liberty of making, constructing, using, and *vending to others* to be used," his invention or machine, within the times limited for the enjoyment of their respective privileges.

Now, although all things which have a use, have also a value independent of the right of sale; yet in most subjects, the use without the right of sale, constitutes an adequate value. Land, for instance, if not allowed to be transferred by sale, by devise, or descent, would nevertheless possess that value, which would require the law to guard, to define, and to regulate its enjoyment; and however important the right of sale may be to the full enjoyment of all property, it is, in most cases, but an *accessary*. In the instance in view, however, it is the *principal*. In other subjects, a right of sale is implicitly involved in every contract of absolute transfer, as a necessary incident; but when an author sells a printed copy of a book, of which he has secured a copyright, the right which is transferred, is merely a right to the individual book — the general power of sale, both of the copyright, and of other copies of his work, still remaining in him. The purchaser, however, of the copyright, is the purchaser of the general right of vendition. This is the principal in the nature of such a contract. It is the subject-matter, the thing to be disposed of *quod ipso venditione, solum fruitur;* and as the right to sell is the principal and beneficial right, the right to use is a secondary and necessary one — and both are assignable. The nicety and solidity of the distinction which has been attempted between the security of the author's *title*, and his right to publish or use his book — or sell it to others, to publish or use — may therefore be clearly seen. An author, according to that distinction, is secured in his right to sell — but he, or his

vendee, is not thereby authorized to publish or use, and may be prohibited by the states from either — but, peradventure, none will *buy* what none may *use!* The author, then, by securing his copyright under the act of congress, enjoys a "perfect title" to that which he cannot use — which nobody will buy — and from which no earthly benefit can be derived by anybody — this being the effective result of a power vested in the paramount authority of the national government, given by the constitution, for the express purpose of "promoting the progress of science and the useful arts." This, too, is what has been in effect asserted in high places, to be the amount of the "exclusive right," secured by congress to authors and inventors, in virtue of that power. It may be so. The point has been labored with great earnestness; and as we do not wish, though critics by profession, to be thought fastidious, we are willing, if certain grave judges and senators persist in the assertion, to admit it to be a "TITLE;" but then they must, with equal candor, confess that though even "a perfect title" — it is a title to — *nothing!* It has, we allow, a just claim to the praise of great abstract beauty; but in return, those learned and venerable persons must acknowledge, that it is of no possible *use* under heaven.

To show, however, that the right of property may be secure, though the use and enjoyment of it be prohibited, the laws regulating the use of certain descriptions of property within the jurisdiction of a state, or of a municipal corporation, have been instanced. How far the exercise of this right of property is liable to be controlled and regulated by the municipal laws of the several states, depends in a great measure on the principles recognised and established in the cases last referred to, as decided in the supreme court of the United States. In the celebrated case of Livingston and Van Ingen,* in the court of errors of this state, it was held that the legislature of a state may prohibit the use, within its jurisdiction, of any particular invention, as noxious to the health, injurious to the morals, or in any respect prejudicial to the welfare of its citizens. But besides the qualification that this assertion must receive from the subsequent doctrine of the federal court, we apprehend that the government of the union must possess exclusively the power to determine, whether an invention, for which a patent is sought, be useful or pernicious, or in other words, whether it be one for which a patent ought to be granted. The object of the constitutional power, vested in con-

* 9 Johns. Rep. 507.

gress, to secure an exclusive right to inventors, is the promotion of the "useful arts." An invention, useless or pernicious, would not, we conceive, be a proper subject for the exercise of that power. But should a patent for such an invention have unadvisedly been issued, there can be no doubt that the federal authority might repeal the patent, and interdict the use of the noxious discovery. If a thing in itself pernicious, be patented, the patentee could recover no damages for the infringement of his right, as his patent would confer no right of property upon him. If it be useful in itself, but the art or manufacture to which it relates be injurious in its exercise to the public health, the patent would afford no protection for the nuisance — because private interest must yield to the public good, and not because the federal power is superseded or controlled by the state law. So, if the author of an immoral or libellous book, prosecute for an invasion of his copyright, he could recover no compensation in damages; and if prosecuted for his offence against the state laws, the authority of the union would not protect him — because, in the one case, his copyright would invest him with no property in his work, and in the other, would convey no right to use it, to the injury of others. Nor in any case, would the patentee of a newly invented vehicle, any more than the owner of a stage coach conveying the United States mail, be entitled to pass over a state turnpike road without paying the tolls; nor a patented steamer be permitted to ply on a ferry established by state authority, without being subject to refund the accustomed ferriage for its passengers, or to the penalties provided in case of such violations of the particular right to the ferry — any more than such steamer or any other vessel would be exempted from either, by its coasting license.

Restrictions of this nature are general in their operation. They are not confined to patentees, and in no sense do they derogate from the exclusive power of congress in relation to the promoting of science and the useful arts. While a construction of the constitution — admitting that the states, in the exercise of an absolute discretion, may prohibit the introduction, use, or sale of any particular invention or book, for which a patent or copyright had been regularly obtained — would render the power of congress completely nugatory, and the states would retain substantially the very power they had nominally surrendered. This power of securing to authors and inventors a right of beneficial ownership in their writings and discoveries, has been transferred to congress; and any encouragement to discovery, invi-

tation to the introduction of improvements in the arts, or attempt to stimulate the labors and ingenuity of men of literature and science, on the part of a state, which interferes with or prevents the exercise of that power, is a resumption of an authority fairly and on good considerations yielded to the general government.

The several states, nevertheless, retain all other means of rewarding genius, talent, and enterprise, promoting science, encouraging new discoveries, and inviting improvements in the arts, except the power thus ceded to the union. And although an individual state can neither secure to an author an exclusive property in his writings, nor for any known or used invention grant exclusive privileges in the use of a thing which may become the subject of a patent, yet it may direct its legislation to promote the progress of learning, encourage new discoveries in science, and invite and reward the introduction of improvements in all the liberal and useful arts, in any other way that ingenuity and good policy may dictate, and which does not interfere with the exercise of the power vested for the same purposes in congress. And the reason of the difference is simply this: that all other modes of accomplishing those purposes may, without danger of being defeated by the clashing laws of co-ordinate legislatures, be safely retained by the several states; while the simple mode of securing *a right of property*, must be committed to the supreme authority alone; for in the peculiar political condition and circumstances of the country, that end cannot otherwise be effected.

If, therefore, we consider the broad and general proposition, we shall naturally be led to the qualifications which limit the authority of the individual states in the exercise of their sovereignty over the subject. If the use of an invention or the circulation of a book be prohibited, because from the peculiar condition and circumstances of a particular state, that invention or publication, which is elsewhere beneficial, is there contrary to the public good, a power of legislation is merely exercised which is inherent in every sovereign member of the federal union. From the nature of that union, though each state have a right to judge and act, it has no power to render its acts obligatory. A provision is wisely made for the purpose of bringing the validity of the exercise of such judgment to a legal test; and the means of obtaining a definite judicial opinion upon every constitutional question, is clearly pointed out by law. Each state has a right to exercise its discretion upon all constitutional points, as to the limits of its own power; but the legality

of that discretion may be questioned, and the law finally controlled or settled by the supreme judicial power of the union.

It may, then, be safely conceded, that a state legislature has full right to exercise its judgment in prohibiting the use of a patented invention, or the publication of a work of which the copyright has been secured; and if the invention or the book be injurious to a particular state, it is not unfair to suppose, that its use or circulation in that state may be justly proscribed. The intent of the power vested in congress was not to secure certain benefits for all the states at the expense of the vital interests of any one of them. The object of that power was very different: it was simply to enable congress to secure to inventors and authors the exclusive right of property in their discoveries and writings, for limited times; and the common right of enjoyment to the public, after the limitation had expired. The inhibition, therefore, of the use of an invention or the circulation of a book, injurious to the interests of a particular state, can never frustrate the object of that power. The author still retains the exclusive right to sell to whomsoever will buy — the state may determine, as well as individuals, that it does not choose to buy. The case does not come within the meaning of the constitution. It is one of those things which are tacitly excepted. Granting, then, that such a law may be passed, and be determined by the court in the last resort to be constitutional, it by no means follows that all prohibitions, much less prohibitions of an invention secured by patent, of a book for which a copyright has been obtained, of an article of commerce or manufacture duly permitted, or of a vessel sailing or *steaming* under a coasting license, and of which the use in every instance is acknowledged to be beneficial, are equally lawful. Cases may perhaps arise, in which even these might be subject, on peculiar grounds, to a rightful prohibition; but then the distinguishing peculiarity must be such, as to show the case to be equally an exception to the intent and meaning of the power limiting the sovereignties of the particular states. On no other certainly, except on this, or an equivalent supposition, can such prohibitions be supported. Upon such, they may; but it is manifest that a prohibition resting upon such grounds is very different from an interdict resting upon none, nor defencible upon any, but *stat pro ratione, voluntas.* Those, on the contrary, which we have enumerated, are inhibitions upon the principle of a specified necessity of exception, leaving the general law not only unquestioned, but confirmed.

We have thus shown, we trust conclusively, that the power

vested in congress, "to promote the progress of science and the useful arts," by the means prescribed in the constitution, and pursued in detail by the statute, are necessarily exclusive of all state legislation on the subject; and that those means, (being the securing to authors and inventors, for a limited period, the exclusive enjoyment of that right of property which had antecedently existed without such limitation, but was thus restricted for the public good,) would not, upon any other construction, prove effectual. We have stated, moreover, all the necessary limitations and qualifications of this doctrine, which have occurred to our memory, or presented themselves to our imagination; and we have answered, as we believe, satisfactorily, every objection of which we have heard or read, or which we have been able to anticipate or conceive. It now remains to inquire, in reference to the question immediately before us, whether the laws passed by congress, in virtue of that power, be that full and perfect execution of it which the constitution requires.

The power of congress, though paramount and exclusive, is limited as to the means by which the end proposed by it is to be effected — namely, to the securing the right of property, in works of genius and invention, to their authors. But the words of the constitution neither express or imply any other restriction, nor is any different or farther limitation to be inferred from the nature of the grant, save those exceptions which necessarily arise from the nature of the subjects, and are tacitly adopted in every regulation affecting the rights of property — such as the legal ability of parties to hold and dispose of it. But the acts passed by congress in virtue of the power do make a discrimination, neither warranted by the express terms of the constitutional provision, nor arising by implication, either from the terms themselves, or from the nature of the grant, or of its subject.* They restrict the benefit of the constitutional provision to such authors only as are "*citizens of the United States, or residents within the same*;" so that no foreign author, residing abroad, can secure, under the law as it now stands, the exclusive enjoyment of that which the constitution recognises as property, whoever may be its owner, or wheresoever he may reside. At common law, no such distinction was known. The property of foreign authors in their works was protected upon the same general principles which protected any other property held by foreigners within its jurisdiction, whether the owner was within the realm or not;

* The acts of 1790 and 1831.

and long before the statute of Anne, an ordinance of the two houses of parliament, during the Commonwealth, prohibited the printing of any book without the consent of the *owner*, or the importing it without his consent, if printed abroad, upon pain of forfeiting the same to the owner, without discrimination either as to the national character of the author, or as to the language in which his book was written, and without distinguishing whether an imported work had been written at home or abroad, or whether it had been originally printed in England or not. Neither does the subsequent act, though it narrows down the perpetual right of property of authors to a limited interest, make any difference as to the capacity of natives, denizens, or aliens, to enjoy it; and it is notorious that foreigners, and especially our own countrymen, from community of language, are in the practice of securing copyrights under that act, whether they reside within the British dominions, or have never departed from their native land.

It is true, indeed, that the attention of parliament has recently been called to the injuries sustained by English authors, from the unauthorized publication of their works in this, and other foreign countries, in which a contrary policy prevails; and a bill was introduced at the last session, to restrict the benefits of copyright in England, to the subjects or citizens of those foreign governments, only, who extend the same protection to British authors as to their own. But the manner in which this proposition was received, was far from manifesting any disposition in the house of commons to adopt it. Those who were unwilling to depart from the compromise, effected by the statutes of Anne, from fear, on the one hand, of danger to authors from such an interference with the general principles upon which their right is recognised as property — on the other, from jealousy of further impediments to the free circulation of their works — seem united in their opposition to the measure. And, besides, the question stands on very different ground in the two countries. In Great Britain, international copyright is proposed as a restriction upon existing rights; and there no limitation exists of the powers of parliament over the subject; whilst in the United States, where the power of congress is defined in the constitution, a restriction is sought to be removed in a case in which the variance in the law from the authority conferred by the constitutional power, is not less repugnant to the spirit and meaning of the constitution, than to the principles of sound and enlightened policy. These propositions we proceed to prove, and the arguments depending

on the question of property, seem to us to establish them both.

Mr. Clay, in his report upon the memorial presented by the English authors to the senate, in 1837, not only considers "it established, that literary property is entitled to legal protection," but that it thence "results that this protection ought to be afforded wherever the property is situated. A British merchant," he observes, "brings, or transmits to the United States, a bale of merchandize, and the moment it comes within the jurisdiction of our laws, they throw around it an effectual security. But if the work of a British author is brought to the United States, it may be appropriated by any resident here, and republished, without any compensation whatsoever being made to the author. This distinction in the two descriptions of property, the committee think *unjust*." Did it not occur to them that it was also unconstitutional?

We do not mean to affirm that every unjust law is, *therefore*, unconstitutional. But we aver that if the injustice is inherent in the law itself, or necessarily results from its operation——*prima facie* evidence is thereby afforded of its invalidity. If the law purporting to carry into effect a constitutional power, directed to be executed by the legislature, vary in its terms, or provisions, from those of the power, either by the omission of words contained in it, or the insertion of words which it does not contain; or if it prescribe forms to be observed in its execution, inconsistent with the grant, or with its terms, and injustice is found to be the consequence — the presumption is still stronger against the constitutionality of such law. But where the constitution aims to secure a right already vested, or to create a vested right in things not previously recognised as property, and the injustice manifestly arises from a departure in the law from the express terms of the power — or from the adoption of forms, or other conditions, precedent to the enjoyment or vesting of the right, neither prescribed nor contemplated by the constitution itself, the evidence of repugnancy becomes conclusive.

That the constitution considers the right of property in question, as a right antecedently vested, has already, we trust, been rendered clear, from the state of the law regulating this species of property, before the adoption of the federal government. Until that epoch, it had been governed either by the common law, or by the statutes of the several colonies, or states; and should authority on this point be requisite, in addition to our former argument, we refer to the constitution itself. The words of the article, by which the power is conferred on congress, ex-

pressly recognise this species of property as pre-existing, inasmuch as the object they declare, is "to *secure*," and not "to *create*," for authors and inventors, "*the* exclusive," and not "*an* exclusive" enjoyment of their writings and discoveries. Now the argument of the English judges, whose opinions prevailed in establishing the existence of copyright at common law, so far as they were drawn from the words of the act of parliament, which are by no means so explicit as those of the constitution, was founded merely on the former of these expressions; the words in the body of the English statute, being "to secure *an* exclusive right" to authors, whilst its title purported "*to vest*" them. And on these latter expressions, the minority had in part grounded their contrary argument, that the right had been *created* by the statute. To prevent all future doubt or cavil, therefore, it would seem the federal convention were more studious of precision in the terms they adopted.

But whether the right in this country be derived from that code, which, in the absence of positive legislation, appeals to the immutable principles of justice, or whether it owe its efficacy to the constitution alone, is, perhaps, immaterial. We have already taken some pains to prove that the power vested in congress, to secure this right, has, both from the terms and nature of the grant, excluded all legislation upon the subject by the respective states. Since this unqualified and total surrender of all power in relation to the subject, to the general government, no state legislature can secure to authors, whether citizens or foreigners, the exclusive right to their works, because the terms of the grant include all authors whatsoever — nor since that surrender, has any state attempted to do so. It cannot so be secured, either to citizens or foreigners, "for limited periods," because the grant to congress would be nugatory, if it could. Nor can it be secured *without limit of time*, because such a grant, either by congress, or by a state, would defeat the reversionary interest intended by the constitution to be reserved for the public, at the expiration of the author's exclusive term of enjoyment. So that whatever portion of the power is suffered to remain unexecuted by congress, must forever remain unexecuted by the several states. It follows, then, either that congress are bound to execute the power to its full extent, or that it rests in their discretion to execute it, either wholly or partially, or not at all.

The grant, in this case, stands in this respect on precisely the same footing with every other grant to congress of power, of which the future exercise by a state is inhibited, either in ex-

press terms, or by necessary implication — upon the same footing as the powers to provide for the payment of the public debt — for the expenses of the government — for organizing, disciplining, and calling forth the militia — to regulate commerce, and to establish a uniform system of naturalization. As well, therefore, might it be asserted, that the grant of these powers does not impose a corresponding duty upon congress, to levy the requisite taxes, or make the necessary appropriations for the preservation of the public faith — the support of civil government, or military defence of the nation — to render the militia of the states an available force for executing the laws of the union, suppressing insurrections, and repelling invasions — to promote commerce and navigation, both foreign and domestic, and render their prosecution advantageous and secure — and to provide for the admission of foreigners to the privileges of citizenship. As well might it be asserted that these are not duties incumbent upon congress, as denied that the grant of the power "to promote the progress of science and the useful arts," does not necessarily involve the obligation to pass the laws requisite for the effectual accomplishment of the object, *ut res magis valeat quam pereat*, and that, too, as fully and as comprehensively as that object is declared by the constitution. We conceive that congress has equal authority, and no more discretion in the one case than in the other — nay, that in this case, they have less discretion, for the means by which this power is to be executed, except as to the definite limitation of time, and the details of formal regulation, are prescribed by the constitution — whilst a choice of means for executing the other powers is left to the discretion of congress. But as congress cannot restrict in its execution, the power first enumerated, to the payment of one portion of the public debts, and not of another — to the support of the civil government, in exclusion of the national defence; as they cannot omit to establish a uniform system of militia for the states — or establish a system in one state and not in another; as they cannot neglect the regulation of commerce, or provide merely for that with foreign nations, and not for that among the states — or protect the one and leave the other to protect itself; and as they cannot, by refusing to pass laws for the naturalization of foreigners, in effect, declare that none shall be admitted to the rights of citizenship — nor extend those privileges to the natives of some foreign countries and not of others: — so, neither, can congress wholly disregard the duty of promoting science and the useful arts, by the means prescribed in the constitution; nor limit those

means in their operation, so as to render incomplete the execution of the power.*

The full power surrendered by the states, was not vested in congress to enable them to confer personal privileges upon our own citizens, to the exclusion of foreigners, but to secure to *authors*, whether native or foreign, resident or absent, the same equal and exclusive right of property in their works, and to extend to the productions of genius that protection which the laws of all civilized nations afford to every other species of personal property within their jurisdiction, whether the person of the owner be so or not. If congress may, in the exercise of their political discretion, confine these benefits to citizens or residents of the United States, so might they, on the other hand, exclude from their enjoyment all authors who were not aliens or residents of foreign states, or render the advantages of copyright dependent upon sex or complexion: for the distinction actually adopted by the law, tends no more directly than these, to effect the end for which the power was given by the constitution. That end was not merely to foster native genius, encourage indigenous talent, and reward domestic invention—but for the catholic purpose of "*promoting science and the arts.*" This is regard-

* The duty of congress to execute the power, is too plain, in some of these cases, ever to have been questioned. In others, it has been disputed, and affirmed. 1. Where the payment of a sum of money is stipulated by treaty, it was held in reference to the treaty with Great Britain in 1794, that congress was bound to provide for its payment, not only on the general grounds of the obligation to pass a law necessary to carry into effect a treaty, duly made under the power given for that purpose by the constitution, but that they were also bound by the specific obligation of providing for the payment of a debt. A majority of the house of representatives eventually agreed to make the requisite appropriation of money, whilst they adopted a resolution denying that it was obligatory upon them to pass every law necessary to carry into effect a treaty, without deliberating upon its expediency, and disclaimed the power to interfere in making treaties. As the majority of the house had nevertheless declared their disapprobation of the treaty, the only remaining motive for the appropriation, must have been the obligation to provide for the payment of the debt. 2. In the case of the *United States* v. *The Brigantine William*, in the district court of Massachusetts, it was declared, that under the power to regulate commerce, congress could not annihilate or interdict it entirely with foreign nations, although the court decided that an indefinite embargo was within the constitution. (*Hall's Law Journ.* 255. 1 *Kent's Comm.* 405.) 3. Although it was held by the U. S. circuit court for the district of Pennsylvania, in 1792, that the states retained a concurrent power of naturalization; that decision was soon questioned, and afterwards overruled in the same court; and it has since been regarded as settled law, that this power is exclusively vested in congress, there being a direct repugnancy and incompatibility with the objects of the constitution, in the exercise of this power by the states. (2 *Wheat.* 269. 5 *Wheat.* 48.) And it was frequently declared as a general principle, by the late Chief Justice Marshall, that where an exclusive power is vested in congress, in relation to subjects previously within the power of state legislation, they are bound to execute it, and not suffer it to lie dormant, or fall into disuse. *See Wheat. Rep. ubi sup.*

ed by the federal constitution as an universal cause, in which every nation and every people have a common and an equal interest — an interest which binds them to each other, by ties stronger than those of their common humanity; and to advance that cause, it pursues an enlightened policy, which secures an immediate benefit to the author of every work of science or of art, in whatsoever language written, in whatsoever clime produced, and in whatsoever country he may prefer to dwell. It recognises a "republic of letters," upon the broad basis of political equality — extends the protection of law to the creations of the mind as well as of hands, and administers the same justice to a La Place and a Bowditch, a Babbage and a Whitney, an Addison and an Irving, a Campbell and a Bryant.

If the conclusion to which we have arrived on this point of constitutional jurisprudence be correct, it is imperative upon congress to extend the protection of copyright to the works of all authors whatsoever, by striking out the unwarrantable words of limitation from the existing law. This simple amendment would be preferable to entering upon a perplexing course of countervailing and discriminating legislation, or a tedious round of diplomatic negotiation upon the subject of international copyright, in which the right of the public would be apt to be sacrificed to the interests of individuals; at all events, by ingrafting upon the law that universal principle of justice with respect to property which the constitution contemplates, we could insist with a better grace, and with greater consistency, upon the same justice from others: whilst the best, and only atonement, that congress can offer for hitherto omitting to perform that duty, is no longer to defer it; and to bear in mind for the future, the admonition of the great Athenian orator to his countrymen, that "although past moments cannot be recalled, past errors may be repeated."

But if congress should happen to disagree with us upon the construction of the constitution — and should happen to be right, — then we submit that sound policy and expediency require this alteration of the law. All the arguments we have adduced to show that justice demands it, apply with equal force to prove that policy enforces that demand, and overrules every argument from inconvenience by which the present discrimination is defended. "Honesty is," indeed, "the best policy," among nations, as well as among individuals; and "justice must be done, at whatever hazard," is a precept of higher obliga-

tion, than any of human authority. The report, however, made on behalf of the committee on patents, presented to the senate on the twenty-fifth of June last, by Mr. Ruggles of Maine, considers "the property of an author in his work, of a peculiar character, not absolute but special, subject to conditions and limitations. As between nations, it never has been regarded as property standing in the footing of wares or merchandise, nor as a proper subject of national protection against foreign spoliation. It has been left to such regulations as every government has thought proper to make for itself, with no right of complaint or interference by any other government. International copyright, in strict sense, has no existence; although in some instances voluntary legislation has extended to foreign authors the same rights that are enjoyed by citizens. So far, then, as the practice and usage of nations go, this government is under no obligation to extend to the subjects of any foreign power, exclusive copyright privileges."* But, passing over the assumption that no such obligation is imposed on congress by the constitution — we would, with all due respect, observe, that upon some of the questions so summarily decided, this committee differ not only from the former committee of the senate, but from the committee of the house of representatives, who introduced the bill in 1831, which became the present law. Mr. Verplanck, the learned chairman of the latter, alleged in his report, that "upon the first principles of proprietorship, an author has an exclusive and perpetual right, in preference to any other, to the fruits of his labor. *Though the nature of literary property is peculiar, it is not the less real and valuable.* If labor in producing what was before unknown, will give title, then the literary man has a title perfect and absolute."† The report of Mr. Ruggles differs, also, from the decision of the supreme court of the United States, in the case of *Wheaton* and *Peters*, to which we have before referred — to say nothing of its magnanimous repudiation of the doctrine of the court of king's bench, in *Miller* and *Taylor*, and of the authority of *Donaldson* and *Beckett*, in the court of the last resort in England, although the latter had been recognised and adopted in the highest judicial tribunal of our own country. We would also venture to suggest, that the conclusion so hastily drawn by the committee, is founded not only upon a misconception of the law, but upon a fallacy, if not an entire oversight

* Report of patent committee, 25th cong., 2d sess., doc. p. 494.
† See senate doc. 1831.

with respect to the peculiar circumstances which actually distinguish this species of property from all others, and especially of that essential difference which prevented any necessity, until of late years, of its being "regarded as a proper subject for national protection against foreign spoliation." We would ask the learned chairman of the committee, both in his official and in his professional capacities, (for it seems he sometimes acts, on the same occasions, in both,) why there has existed no "complaint or interference by any other government," against such "spoliation?" Was it not probably, that until recently, a case of infringement upon the property of foreign authors could rarely occur. From the circumstance of their works being contained in a foreign language, the demand for them in other countries than their own, rarely offered sufficient inducement for "spoliation," especially as it would in general have been cheaper for the booksellers to have imported, than to have republished such works. Except with regard to piratical editions printed abroad for publication and sale at home, no such question can exist between any other nations than those using the same vernacular tongue; and before the political separation of this country from Great Britain, there were none such known in the "republic of letters," but the *thirty-eight nations* of modern Germany. Into this paradise of authors, printers, and booksellers, the tempter entered in the beginning — and his "spoliations" did give rise to "complaints" loud and deep, and long continued, until at last they produced "interference" by the different "governments;" and we beg leave to recall the attention of the committee, to certain resolutions of the Germanic diet, adopted the ninth of November, 1837, as republished in Mr. Nicklin's book, which, as appears from their report, they had before them. This act protects, for the term of ten years, all works published in one of the states of the confederation, from piracy in any of the others; which protection is in addition to that afforded by the particular laws of the state in which the book is published; while the right to literary property in the confederate states, and in other parts of Germany, is generally perpetual. In Prussia, especially, the law has been rendered, within the last two years, more favorable to the authors of other states, than even that of the confederation.

The same considerations both of justice and policy, which dictated these measures in Germany, apply with equal force as between this country and that from which we derive our lineage as well as our language and literature, and strongly recom-

mend the removal of a restriction which, as no similar one exists in Great Britain, would require no international compact, to render the benefit of copyrights reciprocal. If the authors of that nation have already an equitable claim, either from the fact that no such discrimination exists there in their favor — or from the injustice of excluding their property from the protection given by our laws to every other species of British property within our jurisdiction — it rests upon those who insist upon the impolicy of such a measure, to show that it would be so injurious as to justify, upon some undoubted necessity of self preservation, or some over-ruling consideration of expediency, the denial of that reciprocity which is observed in all other cases. By a fair interpretation of the code which regulates the intercourse between civilized nations, this reciprocity would, on an ordinary occasion, be due from that comity, which should be maintained amongst them, and which should be cherished especially between two nations descended from a common stock, speaking the same language, whose political and civil institutions, though differing in form, are essentially the same in their liberal spirit and free principles — between two nations, who are ONE PEOPLE.

The objection to this equitable treatment of British authors, on the ground of policy, amounts to this, that "in a country like our own, where the sovereignty resides in the people, it is necessary that every means should be adopted for their cheap instruction. The works of foreign writers can, by means of excluding them from protection, be furnished at a lower rate, and consequently are better adapted for this purpose, and the people would be foolish to deprive themselves of an advantage so obviously convenient." This argument, though substantially the same that is seriously urged in the remonstrance against Mr. Clay's bill, by certain booksellers and publishers who now enjoy a monopoly of this cheap instruction of the people, and bearing, moreover, a strong resemblance to some observations made upon the introduction of the bill into the senate, seems to have been suggested by some remarks of the illustrious Mr. Gregsbury, M. P. of Manchester buildings, Westminster — who, in conferring with one Mr. Nicholas Nickleby, touching the office of private secretary to a leader in the house of commons, observed, that "with regard to such questions as are not political, I should wish my secretary to get together a few little flourishing speeches of a patriotic cast. For instance, if any preposterous bill were brought forward for giving *poor grubbing devils of authors a right to their own property*, I should like to say, that I for

one would never consent to opposing an insurmountable bar to the diffusion of literature among *the people*, — you understand? That the creations of the pocket being man's, might belong to one man, or one family; but the creations of the brain being God's, ought, as a matter of course, to belong to the people at large; — and if I was pleasantly disposed, I should like to make a joke about posterity, and say that those who wrote for posterity should be content to be rewarded by the approbation of posterity. It might take with the house, and could never do me any harm, because posterity can't be expected to know anything about me, or my jokes either, — don't you see?" 'I see *that*, sir,' replied Nicholas. "You must always bear in mind in such cases as this, where our interests are not affected," said Mr. Gregsbury, "to put it very strong about the people, because it comes out very well at election time; and you could be as funny as you liked about the authors, because I believe the greatest part of them live *abroad*, and are not voters."*

It has, nevertheless, been deemed advisable, by the anonymous advocate of the foreign authors, to answer such an argument, though not without a proper apology for doing so; and when he does come to the point in his "Plea," his refutation is so edifying, that we shall give it at length in his own words:

"To an argument so base and profligate, we must beg pardon of our readers for replying. Such a course would be a flagrant violation of the plainest dictates of common justice. The national welfare of a people, in the time of our forefathers, was considered to have no surer basis than independence and moral honesty. Robbery has in no code of modern political science been made the basis of national aggrandizement; and those nations of antiquity who resorted to such means, soon found that the tenure of their property was rather precarious. Instead of wisely employing the labor of their citizens in the production of wealth, they squandered their efforts in unprofitable attempts to appropriate the property of their neighbors. Had they not mingled with their rapacity some nobler elements of national grandeur, their revolutions and their fate would have created as little interest as the petty warfare of the Tartar hordes. A nation should, indeed, be desirous of the education of its members, but it is their *moral* education it should first secure. That education is contained in no *book* of human origin. The sternest justice can detect no copyright in it. 'With God for its author, and salvation for its object,' it is open to all mankind.

* Life and adventures of Nicholas Nickleby, 8vo. p. 105.

Let them study that book in the spirit that can alone make its teachings available. They will need no other instruction in their duty. They will there be taught that fraud and injustice can effect no good object. They will there learn that the attainment of the noblest objects admits of no base means. If the injustice of taking property without remuneration be conceded to be wrong, — and even the savage recognises this principle, — the christian will feel still more deeply the sin and the degradation of such conduct. He will estimate the act not only by the injury to the sufferer, but he will lament the moral deterioration of the being who commits it. The happiness of nations and their true welfare are incompatible with a depraved moral sentiment, and the education, — mere intellectual education, — which must be obtained by wading through the filthy ways of injustice and fraud, can have but little other effect than to make a nation of sharpers. Such a reputation we disclaim for our people. They are too honest to come willingly under such a censure. They are too commercial, too wealthy, to wish for the destruction of those principles that sustain themselves. But if we were not too honest, we should at least be too proud, to be dependent on the crumbs that fall from the richer intellectual banquets of Europe. Does our situation require a literature, we shall provide one for ourselves, and not take, at second hand, articles unfit for our use.

"If the objection just stated appeals forcibly to our conscience and our self-respect, there is another which is founded on the danger threatening our free institutions from this very source. Honesty will always be found the best policy, and never was there a case where it has received a more forcible illustration than the present. The 'better education of the people' has been alleged for the continuation of our copyright law in its present state. Never were means resorted to so likely to defeat their own ends. Ask the tender parent to whom he would intrust the nurture and admonition of his favorite son. His reply would certainly be, to one of his own principles, and who from an interest in the welfare of his pupil would be most able and most disposed to consult his advantage. But the government of the United States, did they propose such an object, would certainly not select for instructors of their people writers who, not only smarting under the sense of injustice, felt unfavorably to that people, but who from habit and early instruction under a very different state of things, were the most objectionable sources to which they could apply. From feeding on aliments, much of which was not prepared for us, but suited to the palates of a widely different people, we have spoiled our taste for the more wholesome Spartan broth that befits our condition. The plainness of our republican institutions grows vulgar beside the gorgeous vanities of aristocratic pomp. Instead of rivalry in all that constitutes the true worth of men and nations, we are induced

from the deleterious stimulants to which we have accustomed ourselves, to enter on a foolish contest of luxury and frivolity wholly unbefitting our station and our means."—*Plea for Authors*, pp. 28–9.

But if this objection be relieved from the leaven of selfishness which pervades the remonstrance, and the prejudice which infects the report, and stated as seriously and as forcibly as were the apprehensions expressed in the senate by Mr. Buchanan, it will not appear more tenable. That intelligent and able senator was fearful, as were Mr. Warburton and others, in the house of commons, lest the introduction of international copyright might prevent, in some measure, the diffusion of knowledge, and impede the circulation of valuable books, by increasing the prices at which they can now be afforded. We apprehend, however, no such consequences — at least none that can counterbalance the advantages which would result from the proposed measure. None such, certainly, result from the law of copyright, even in Great Britain, where the privilege is actually enjoyed by foreigners. The apprehensions of Mr. Buchanan were, therefore, much more reasonable, than those of the members of the British parliament — because here, the same privilege does not exist. But in both countries, the publication of valuable works is materially promoted by the security which the law affords to the property which their authors possess in them. Otherwise the whole system devised for their protection must be erroneous in principle and delusive in practice. Nor can there be any danger of restraint upon their circulation, so long as the interests both of authors and publishers concur in extending it. So far from any such consequence resulting from experience in regard to our own authors — the restriction of copyright to their works is alleged as a grievance, and considered as an impediment to their circulation. The right secured to authors, was intended for their encouragement and reward, and thereby to promote the interests of science and the spread of knowledge; and most assuredly it cannot be pretended, that it so much enhances the prices of their works, as to diminish their production or limit their circulation. In England, indeed, there are other causes which produce that effect — such as the excise upon paper and other materials — the stamp duties, and other taxes upon advertisements — the form and mode of publication — all of which operate injuriously there, but are unknown with us. In both countries, however, the necessary tendency of a compensation paid to authors, is to reduce the profits of publishers, without

transferring the whole of this additional charge to the purchasers of books. Nothing, therefore, need be apprehended on that account; for so far as the extension of copyright to foreign authors might reduce the sale and circulation of their works, it could rarely effect that result, except in cases where the restraint would be salutary, upon the score either of economy, or of morals: and nothing can be more unfair and fallacious, than to offer, as evidence of the effect of the extension of our law of copyright upon the cost of such works, a comparison of the prices charged in London and Edinburgh, for books of which the first editions usually appear in the quarto or octavo form, with those of the octavo or duodecimo copies republished in Boston, Philadelphia, or New York. A truer test might have been given, by comparing the latter with the prices at which the copyright productions of our own authors are afforded by our publishers.

It is next alleged by the remonstrants, "that a capital of thirty millions of dollars is employed in republishing the works of English authors in this country, and if the proposed law is passed, thousands of men, women, and children, will be thrown out of employment." In answer to this, it has been shrewdly remarked, "that in attempting to prove the mischief which would thus ensue, the remonstrants have unwittingly pointed out the great injustice done to foreign authors, under the existing law — inasmuch as they show that, for the advantageous employment of so many thousands of American citizens, they are indebted to those authors alone; and in return, suggest that these very authors should be robbed of the fruit of their labor, and not receive the smallest pittance in return for the employment and subsistence given to thousands — the wealth accumulated by many, and the amusement and instruction passed down from generation to generation." That the "booksellers, paper-makers, printers, book-binders, type-founders, and others, whose interests are *supposed*," as Mr. Ruggles cautiously expressed it, "to be involved in this question," should in pure desperation have resorted to such arguments, is by no means wonderful; but we must confess our unfeigned surprise at finding them adopted by a committee of the senate of the United States, and our utter astonishment at their stating in their report, what it would hardly have been decent in persons of the respectable occupations above enumerated, to have ventured on in their remonstrance — that the British authors, whose memorial had also been referred to them, having failed in establishing an English house of publi-

cation in New York, in the hope of securing the exclusive benefit of their works, "only want the aid of congress to enable them to monopolize the publication here, as well as in England, of all English works, for the supply of the American market." And if they had actually succeeded in the attempt — what then? Would it have been unpardonable in them to have monopolized the productions of their own talents and exertions — the enjoyment of their own property? The committee, indeed, seem to think that it would; and appear, moreover, somewhat offended, that these British authors should avail themselves of their privilege even in England.

We apprehend, however, that the learned chairman must have taken another lesson from our friend *Gregsbury*, in thus attempting to fix the odious imputation of *monopoly*, upon a species of property which is considered by all civilized nations to be equally entitled to the protection of the laws, as any other; and to which, consequently, the same invidious term might be applied with equal propriety. But we can scarcely persuade ourselves, that in the course of his professional researches, the following trite, definition, can have escaped his observation. "Monopolies," says Sir Edward Coke, "are sole grants of any trade or occupation, or of exclusive privileges, *which ought to be common.*" While, therefore, we freely admit, that monopolies are grants against common right, and equally at variance with sound principles of political economy, and the liberal spirit of the common law, and that they are regarded with a jealous eye by both, as unfriendly to the great rule of public utility;—while we hold that they are only to be justified, when, by their introduction, some public good is to be secured, or some public evil averted, —that even a valuable consideration given for them cannot in every case indemnify the community, as they are excusable, only, on the ground of their subservience to the public interest; —and while we doubt whether that great end is ever effectually promoted by laws which philosophy disavows and experience condemns;—while we acknowledge all this, we deny that the exclusive right of an author to his writings, is a monopoly, in any other sense than that which is adopted by that school of unsound morality, false philosophy, and destructive politics, which proscribes the enjoyment by individuals, of the fruits of their industry and genius — of their bodily labor as well as of their mental toil — and asserts, as its favorite dogma, that "*all property should be held in common;*" and though it affects exclusive

pretensions to liberality, would refuse an appropriate reward even to him —

" . . . . . . qui
Servavit trepidam, flagranti ex æde, Minervam."

But it is not true, that these British authors sought "to monopolize," in any sense, "the publication here, as well as in England, of all English works." On the contrary, they were content with the provisions of Mr. Clay's bill, reported at the former session, restricting the protection which it secures, to works published after its passage. This bill was the principal matter referred to Mr. Ruggles' committee, and against its passage the remonstrance of the American publishers was expressly directed. These facts all appear upon the face of the report, as well as that "these British authors" are not the only persons, nor the only authors, who petition congress on the subject. The committee themselves tell us, that "among the memorials referred to them, are three, bearing the signatures of a number of highly respectable literary gentlemen — citizens of the United States — asking for the extension of copyright to foreign authors, on the ground of justice to them, *and of the benefit which would thereby accrue to American authors.*" And what adds resistless force to their application, is, that the original exclusion of foreigners from the full benefit of copyright, was avowedly intended for the encouragement of our own writers. Unfortunately, this is not a solitary instance in which, in the usual precipitancy of congressional proceedings, an inadvertent departure from the true principles of political economy, or a careless indifference to the beneficent intentions of the constitution, has led to error in our legislation, — else it would seem inexplicable that neither the congress which first adopted the restriction, nor the one which renewed it, should not have foreseen, that instead of encouraging American *authors*, it would inure to the sole advantage of those American *publishers*, who draw their support from the appropriation of foreign talent to their own use; and that so long as they are permitted to import works from abroad and republish them here, free from the burden of remuneration to their authors, they will rarely be disposed to purchase the productions of their own countrymen.* Else, too, it would ap-

* We take pleasure in acknowledging that there are some signal exceptions to this practice, among our most respectable and intelligent publishers — who are not only distinguished for their liberal dealing with native authors, but from a sense of justice, have united in the effort to remove the existing restriction upon the rights of foreigners.

pear more strange, that a statesman, of the penetration and sagacity of Mr. Clay, when he perceived both the injustice and impolicy of the existing discriminations, should not have considered whether these questions of justice and policy had been left open by the framers of the constitution, to the discretion of the legislature which they created; or whether they had not been deliberately settled by that instrument to which congress owes not only all its authority, but its very existence.

Having thus disposed of the objections against the removal of this invidious distinction — drawn from considerations of policy and expediency — we might pursue our advantage, by an affirmative demonstration of both. But we have already exceeded our proper limits, and should probably exhaust the patience of our readers, were we to engage in any such work of supererogation. We confess, moreover, an anxiety that this great question should be decided, as we hope and trust it will be, upon the ground of the constitution — not from any distrust of the independent argument in support of the policy and expediency of the measure — much less from mere pride of opinion, — but that the right in controversy may be established, upon the same permanent basis with the inviolability of contracts, and other rights springing from moral obligation, or political justice, as a fundamental principle of our national compact, and thus take its rank among those provisions, which constitute the chief glory of the federal government, and afford the surest pledges of its stability.

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