LIEBER

ON INTERNATIONAL COPYRIGHT.

ON

INTERNATIONAL COPYRIGHT,

IN A LETTER

TO THE

HON. WILLIAM C. PRESTON,

SENATOR OF THE UNITED STATES.

SUUM CUIQUE.

BY FRANCIS LIEBER.

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TO THE

HON. WILLIAM C. PRESTON.

DEAR SIR,

IN addressing to you this letter on a subject, on which I know full well that I am unable to communicate to you any material information, I feel that I stand in need of your indulgence. My only reason for taking this liberty, is the desire of expressing a grateful acknowledgment, due from every one who considers our national honor and interest to be involved in the question of international copyright, to you, and to all who take an active part in bringing about a law which the plainest justice seems strongly to demand; and who are not disheartened by repeated failures from persevering in this just cause. I thank you most sincerely for you promise to persevere until justice shall have received its due. Perhaps I have been prompted, likewise, by the desire of inviting through your name, that degree of attention at the hands of the public, which it otherwise might not have felt inclined to bestow upon these fugitive lines.

The subject of an international copyright law does not appear to attract that general attention in our country, which fairness, justice, expediency, our own advantage and our reputation, nevertheless, call for, and which, it cannot be doubted, they would command, were the subject more widely and more thoroughly understood. It is my intention, therefore briefly to exhibit the most important points connected with it in as clear and popular a manner as the character of the subject may admit.

By international copyright is understood copyright, acknowledged and mutually protected by various independent nations, so that a copyright having originated in one nation, is of equal legal value among the people living under a different independent government; and by copyright is understood the exclusive right of multiplying compositions and conceptions, which are represented upon paper, in other words of multiplying original books, music, maps and engravings.* This ex-

* The term copyright has not yet been extended, in England or the United States, to statues, pictures, &c., and casts or copies of them on canvass, &c. In several other countries the corresponding term comprehends the right of multiplying by way of copy (whether in the same dimensions or not) any work of science or the fine arts, and, moreover, whether this multiplication be in or upon materials, or not. Thus the Prussian law secures the author of a dramatic composition against its unauthorized performance for gain; for, this performance is justly considered a *publication* or multiplication of the original. The same is the case in France.

clusive right of multiplying the copies of a composition or conception is at least by far the most essential part of that "property which an author, or his assignee, has in a literary work," as Blackstone defines the term Copyright; and the only one of great importance in political or civil intercourse. Wherever laws have been enacted to acknowledge copyright internationally, they are founded upon the principle of reciprocity, that is, a state says: Such is the protection which I grant to literary property of authors subject to my government, and likewise to that of all foreign authors, whose government grants to my citizens all the protection it affords to its own respecting literary property. By an act of parliament, 1 Victoria, c. 59, (July 31, 1838,) "protection is afforded within her majesty's dominions to the authors of books first published in foreign countries, and their assigns, in case, where protection shall be afforded in such foreign countries to the authors of books first published in her majesty's dominions, and their assigns." The last paragraph of the Prussian copyright law of June 11, 1837, the most comprehensive law of the kind, I believe, in existence, runs thus: "This whole law shall have force respecting works first published in a foreign state, if the laws of that state grant all the rights established by them

respecting works first published there, likewise to works first published in our dominions."

We cannot correctly understand the question of international copyright, if we do not first clearly present to our minds the nature of literary property in general, on which, therefore, a few remarks will be offered, before we proceed to the main subject. Probably there exist, respecting no species of property, so radically erroneous notions, as those entertained with regard to literary property, partly because it is incorporeal,* as the law term is, and the foundation for the title of this property was for a long time imagined to exist where it actually does not exist; partly owing to other circumstances, peculiar to this species of property, as we shall presently see. It was, perhaps, natural that the human mind should not at once distinguish between the following several, nevertheless, totally different things; the property in the individual book, consisting of paper, the print upon it, and the binding; secondly, the possession and ownership of a manuscript; thirdly, the copyright, or, in other words, the exclusive right freely to dispose of the conditions on which the composition or literary work shall be published, that is, multiplied;

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* 2 Blackst. 4.

and, lastly, the thoughts contained in the compositions, and conveyed by the signs or characters printed (in colored ink) upon (white) paper. Hence the many erroneous arguments, which we find in the history of literary property, drawn from the false position, that by the very act of publication the author deliberately resigns any particular right in his manuscript, except in the material itself; or those arguments drawn from the mere possession of a manuscript, which, however, as we all know, may be purchased, for instance at auction, by a collector of autographs, without acquiring in any degree the right of publication, that is, of multiplying the work; or those arguments drawn from the perfect freedom of mind and thought, defying all limitation and circumscription by laws of property; or, lastly, those derived from the rightful possession of the book, that is, a single copy, the purchase of which, it was maintained, establishes a perfect right for its owner, of doing with it whatever he chooses, and, consequently, also that of transcribing, reprinting, or multiplying it in any way he thinks fit. It will presently be seen how untenable all these arguments are, because they are founded upon a false original view of the subject.

Whatever origin of individual property and its

rightfulness speculative philosophy may establish, all those who maintain the justice and necessity of individual property, and the actual impossibility of eradicating it, who form the overwhelming majority of mankind, from its rudest wandering stage to its existence in broadly organized states and refined societies, and from whom religious fanatics, shallow reasoners or enthusiastic philosophers only, have formed, from time to time, comparatively speaking, inconsiderable exceptions—all agree, however unjust many specific titles, and doubtful in their character others may be, that the most undeniable title to individual property has ever been established, and must for ever be so, by personal, individual production, that is changing by personal labor, skill, ingenuity or pains, with the aid of natural agents, the shape or substance of what exists, or giving value, that is utility or desirableness, to what had none before, or increasing their degree of desirableness. The idea that the first individual of a future nomadic tribe, who catches an animal, tames it and makes it subservient to his peculiar wants, should not have the right to say that this is peculiarly his own, because he has had all the trouble of catching and taming, feeding and taking care of it; that the milk of the mare does not exclusively belong to him who caught and domesticated her;

or that the industrious fisherman should not have the indisputable right of calling the fish or the seal which he has caught, by exposing himself to the dangers of the sea, individually his own, is so preposterous that no one would listen to this position, were it seriously advanced. The right of calling that my own which I have first appropriated, changed, fashioned and improved, upon which, in short, I have first bestowed value, if it did not belong to some one else before I appropriated it to my particular use, rests upon that primitive and direct consciousness, which in every chain of argument must form the first starting point, which we never can dispense with, not even in mathematics, and which, therefore, lies beyond absolute proof, and forms its foundation. To whom should the product belong, if not to the producer? Individual property is absolutely necessary for society, peace and civilization; and to some one it must belong. Property is so direct an effect of man's nature, that it precedes government, if we understand by the term Government, those more stable institutions only which spring up when men begin to live in those societies called more particularly States, and if we do not designate by Government the existence of every sort of authority or of any superiors and inferiors. If we give

to Government this latter meaning, in which indeed we must frequently take it in our philosophical speculations, man never exists without it, and government is as primeval an institution as property, both existing always and necessarily along with him, because they are the infallible effects of his nature. In this sense, family, property and government are coeval.*

Stable governments and states proper, that is political societies fixed in some sort or other, only grow up after men have begun to till the ground; when they have passed from the roving and no-

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* I have shown in the first volume of the Ethics, why I consider the view that things, unappropriated by any individual person or by society, belong on that account to all, erroneous and leading to several very serious misconceptions. These things belong to no one; but not, therefore, to all. They are not yet property. The words property or "Belonging to," have no meaning, if they do not designate a particularization of ownership. An individual relation between the thing owned and the person owning, is the chief element of the idea conveyed by the word property. In this alone lies the right of any one to appropriate things unappropriated. A fruit, on an island in the Pacific, never seen or touched by human eye or hand, and decayed before any one knew of its existence, has been as little the property of all, as the stars of the heavens are property of all, although they belong to the material world, and are, nevertheless, unappropriated. What would render it so ridiculous to pronounce the heavenly bodies property of all mankind? Simply the fact, that every one is conscious that we have no control, no disposing influence over them. The same is the case with all things over which no disposing influence exists. They belong to no one, until this effect of appropriation begins. It is, likewise, thus only possible to show why property, beyond personal production, is not, on that account, spoliation. Property is the reflex of man's all-important individuality in the material world around him.

madic life into the agricultural; when they begin to assimilate their labor and experience or knowledge, with the soil; when they no longer merely gather but produce with the assistance of the earth and other natural agents; when, in brief, they possess property in the soil and they perceive the urgent necessity of protecting this as well as the intercourse between the neighboring possessors of the soil, arising out of the possession of this property. It is the first species of property which very decidedly and palpably presents itself to the human mind, with the absolute necessity of its being protected by a stronger force than that of the individual, which, in a great measure, is sufficient to protect the little personal property of the earlier stages, such as arrows, cloaks and tents.* Civilization, with each progress it makes, confers value upon subjects which had none before, because they were not wanted, not desired. Gradually a great variety of property arises which it is as necessary to protect as landed property. We see then that property is not the creature of government, as has

* Hence the fact that landed property is called in English law "real property;" because, when the term came into use, this was infinitely the most important species of property; so much so, that it became necessary, in later times, to enact specific statutes in order properly to protect other property likewise, for instance, shares, stocks, &c.

been asserted. It is no more so, than individual liberty or the right of existence are creatures of government. They exist, and government acknowledges them, because one of its greatest objects is to protect them. With far greater truth might it be maintained that government is the creature of property. There is indeed some property created by government; but it is but a minimum compared to the immense bulk of property existing all over the earth. It is not maintained, that government cannot regulate the transfer of property, prune certain species of it, and influence it in various ways. For, there are other demands of primary importance, especially the one that men must and ought to live in society, which it is our imperative duty to reconcile to other demands. But it is, indeed, maintained, that property is not held as a boon of government or originally as a boon of society, most especially not the property which is the product of personal skill, individual exertion and particular knowledge. The sweeping remark that property is the creature of government, is as erroneous as the assertion would be that government makes crime by acknowledging certain wicked acts to be such, and therefore to be punishable, and that, on the other hand, it takes away guilt from other wicked acts by not acknow-

ledging them as crimes, that is by abstaining from punishing them. The family affords us with instances for both cases. Most codes do not, for good reasons, acknowledge individual property of the members of the same family living under one roof, in the various articles of daily use; nor do they acknowledge that a minor, under such circumstances, can commit robbery against his parents or other members of the family. Yet we all know, that although the law does not acknowledge the crime, it remains a very grievous one, in the eye of every virtuous man, if a minor steals from his brother, what belongs to him, although this property is not acknowledged by the government. History amply proves what has been here advanced. No where do we find the original invention of property; every where government is in a process of acknowledging it; no where do people say let us have property; every where it exists already; it exists before society; no where does the law first enact the meaning of the word Property. It is found already, coeval with law. Even the origin of the laws of inheritance is an acknowledgment on the side of government, and that even a gradual one, of usages having grown up out of the feelings of men. When at a later period the state becomes more and more a distinctly political so-

ciety, and its actions likewise become more distinct, many positive regulations are made, no doubt; but the process of mere acknowledgment is likewise all the time going on, and must be so, as long as society continues to be a living, therefore, a changing and transforming thing.

That property is the creature of government, is the slavish doctrine of Asia, where it is a principle, universally maintained, at least in theory, that the prince is the original and absolute owner of all the soil, and the people are mere tenants at will; or of so degenerate periods as that of Louis the Fourteenth, who, indeed, advanced a theory not very unlike it.

We find, therefore, that the vast majority of all laws, referring to property, belongs, in all countries, to that bulk of laws which must ever form the large foundation of all enacted law; that law which spontaneously and necessarily springs up from out the intercourse of the people, in the shape of custom, usage, observance, and which at a later period becomes acknowledged by the government—the common law of the land; that law which in all regions, without exception, constitutes not only the vast basis of all statute law, but at the same time, that inexhaustible stock from which the unavoidable insufficiency of all statute law

must and can alone be eked out. Nearly all the most important laws, all fundamental laws, are acknowledged, not invented by government. Lord Coke distinctly maintains that Magna Charta is a declaratory act; it did not invent or create the privileges and principles which it contains; it only declared, it acknowledged them, solemnly and distinctly. "Our custom," or "our usage," is the term with which all early free nations resist the encroachments of wayward or regardless power, or endeavor to give the appearance of legality to arrogations on their part. Nor can I omit mentioning here, the wise and philosophic law maxim of the ancient jurist, that the right is not derived from the rule, but the rule is abstracted from (grows out of) the right, which exists already.*

It has ever been most amply acknowledged, that whatever a man righteously or lawfully produces by his own hands, (which always includes their being directed by some skill or knowledge, that is by his mind,) and with his own sweat, is his, and his only; and it is not his and his only, if he has not the right of disposing of it according to his pleasure; for, possessing a thing in right of pro-

* Ne ex regula jus sumatur, sed ex jure, quod est, regula fiat.

perty, is "to have the sole right of using and disposing of it." There is no other meaning to the word of owning. Yet no man can *create* any thing; it is a well-acknowledged truth, that no where an increase of matter takes place. Production does not mean creation. But the greater man's own personal activity, skill, perseverance, exertion, trouble or sacrifice have been, in order to produce a certain thing; the greater the share is which they have in the new product conjointly with other agents, made tributary by man's exertion and knowledge; the more clearly established is also his title of property in his product, and consequently the more unjust or cruel it is to deprive him of it. Hence, no civilized government considers itself entitled to take part of a fortune, which a man himself has personally gained; but considerable shares are often taken before a large property descends by way of inheritance to one that did not make it. It would be more cruel to rob a man of a hide, which he has dressed with much care and at considerable trouble, in order to use it for the protection of his body, than the depriving him of a fruit which he but that moment plucked from an unappropriated tree. It is more unjust to deprive a man of a cow, which he has bought with the savings of his wages, than to

spoliate another of a grant of land, given for no service. We must farther observe, that the more a producer unites with his manual labor intellectual exertion, the more, for instance, he directs his physical endeavors by a judicious choice of means, or by making the natural agents—light, heat, cold, wind, water, drought—subservient to his use by sound judgment, the more readily does the universal voice of mankind acknowledge his individual title of property in the product effected by this combination of judgment, agents and material. Indeed, the more man's judgment and intellect are active in conferring value, the more he approaches to the creating of a new thing.

Both personal and intellectual activity appear clearest in a literary production; and if any product of individual activity has any claim whatever to an individual title of property, it is a literary composition; if there exists any species of property not made by government, but existing by its own spontaneous right, and which requires only to be acknowledged by way of protection on the part of government, it is literary property; if there is any property which does not trench upon the rights of others, and exists without any sacrifice of theirs; in brief, if there is any property peculiarly innocent and inoffensive in its character, it is literary pro-

perty. It has always been held so, until untoward circumstances have warped and distorted the notions respecting it. In England literary property was considered property at common law, that is, it was believed, that in order to make it good property, no particular statute, mentioning this species of property, was any more necessary, than that a particular variety of apples, or any species of fruit, cannot be considered individual good property, because no statute protects that variety or species.* We find the same view in Germany. Luther already writes: "What does that *mean*, my dear gentlemen printers, that one robs so publicly the other and steals from him what is his own? It is a manifestly unfair thing, that we shall sacrifice labor and expenses, and others shall have the profit of it, we, however, the loss."† So he calls the piratical

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* 4 Burr. 2303; and Holliday's Life of Mansfield, p. 215.

† Luther's Works, vol. xi., 34, quoted in Hitzig's pamphlet on the Prussian Copyright Law. Mr. Hitzig, at present one of the higher law officers in the highest court in Prussia, and one of the distinguished savans in Berlin, was thrown out of employment, with so many other officers, in the year 1806, when Prussia was conquered and reduced to a small part of its former territory. It was the time when the distinguished Hoffmann, at a later period member of the same court with Mr. Hitzig, became first a painter, and afterwards director of the opera at Dresden. Hitzig chose the book trade. His shop became the rendezvous of the most intelligent and patriotic men in Berlin during the time of the gloomiest oppression. When the French were expelled

printing of his translation of the bible, in his Warning respecting the Wittenburg Printing of the Bible, "a right great robbery, which God assuredly will punish, and is ill-befitting for any honest christian soul." The reader will remark, that these words were written at the very outset of printed literature.

Although, however, the title in literary property seems to be so just and clear, and a correct, or nearly correct view was at first entertained, when, in the course of civilization, especially by the art of printing, this species of property received a pecuniary value; *it is nevertheless true*, that its essential character has been more obscured perhaps than that of any other property. The reasons of this apparently surprising fact are plain. When books were multiplied by transcription only, their number was comparatively so very small, and the process of multiplication so expensive, so slow, and, besides, so uncontrollable, that the work could not retain any pecuniary value for the author.

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from Germany, Mr. Hitzig returned to the department of justice. The minister of justice communicated to Mr. Hitzig all the information which had been gathered preparatory to a new copyright law, with the bill itself, asking his opinion, which Mr. Hitzig was eminently calculated to give, both as a jurist and former bookseller, as well as on account of the high character he enjoys as a man and scholar. When the Prussian law was promulgated, Mr. Hitzig wrote the above pamphlet, giving the motives of each provision of the law.

This it could attain only with the discovery of the art of printing, or some process of rapid and cheap multiplication. Even then, however, the books were sold at first, in so small a number, and the whole process of multiplying was yet so expensive, that no profit of any importance accrued to the author. This simple fact had a two-fold effect; on the one hand this species of property received a pecuniary value at a very late period only, when all other kinds of property had already been acknowledged in some sort or other, either by distinct laws, or by repeated judicial action, so that to some persons it appeared as though it was no property because there was no distinct law for it; on the other hand, the author deriving no profit from the work, the publisher seemed generally to be the only person interested in this property, by way of profit, and the author only by way of reputation, or the correctness and beauty of the edition.

We find this error prevalent at an early period in several countries, and, consequently, meet with so many failures, in establishing by sound arguments the just title of literary property. For, while it was evident that the publisher's business was only the making of the *book*, not the producing of the literary *work*, it was felt at every stage of the discussion, that no peculiar title of property could be

retained in the individual book, or copy so soon as purchased by another; yet it was felt likewise that the question of literary property necessarily resolved itself into the finding of a title enduring beyond the purchase of an individual copy. Hence all those arguments, which have been urged on the ground that by my fairly buying a book it becomes bona fide mine; consequently, I can do with it whatever I like, and, among other things, I may multiply it as often as I choose. Another and very strong reason why there should have been so much vagueness and injustice respecting literary property, is to be found in the peculiarity that its value consists chiefly in the right of multiplying the work. It is a right which can be easier infringed than almost any other right or property. Other property remains near its owners or his agents; this property, however, requires the more specific protection of government, the farther society advances, and the cheaper, in consequence, the means of multiplying become, as well as the greater the demand for books becomes. Specific laws and privileges, exhibited to the public at the beginning of the book, were asked for at the hands of governments. When they had once been granted, the belief soon grew up as though they had first created this species of property; as though

the whole title of property was a boon granted in that privilege as a gracious reward for the toil of the scholar, and an incitement for similar exertion to others. This was a fatal mistake, which in a very high degree indeed continues to be entertained by many people to this day. They consider the fact that a specific law protects literary property for a limited term, or that copyright is guaranteed by the constitutions, as an evidence that this property is the creature of grace, a thing made by society for some real or supposed benefit which it expects to derive from this gracious grant. This error has always been much promoted by the fact that literary property is not material; it cannot be grasped, or presented in bulk and size, but belongs, to what Say would call the class of "immaterial products." It requires, therefore, more reflection and some power of abstraction to acknowledge it. Sergeant Talfourd distinctly stated, a short time ago, in the commons, that the act of parliament, 8 Anne, c. 19, for the encouragement of literature, has been of infinite injury to literary property, in the way I just have indicated. In Germany, where many of the Austrian booksellers lived for a long time chiefly by pirating German works, the fact, that specific privileges against literary piracy were granted by the German emperor, was actually

claimed by those piratical republishers, justly excluded from the Leipsic book fair, as unfit to meet with their brethren engaged in honest trade, as a proof that they had a right to pirate the unprivileged books. The specific promise of protection was assumed as evidence that it made, created the property. Because the same emperor granted at times letters of safe-conduct to individuals, had, therefore, every highway robber or waylaying nobleman a right to plunder all others who were not provided with a safe-conduct? "What?" says Lichtenberg, a distinguished German author of the last century, "because privileges promise to some persons specific protection, is it on that ground lawful to pirate those books which are not furnished with this sign of protection? May I assault that man who cannot defend himself, or has not money, or lacks an opportunity of buying arms? May I rob that garden, at the door of which there is no sign with the words: Beware of spring guns? May I cut down the trees of an alley, because no sign-post near it threatens with public whipping, or steal the plough, because it lies unchained in the field?"*

An additional reason we find in another pecu-

* Quoted in Hitzig.

liarity of that property. Books affect the mind, the course of ideas. Wheat bread affords the same nourishment under a Titus as under a Caligula; woollen cloth warms as much, and no more, under a wise Elizabeth, as under a puerile James. It is far different with books, and yet they are an article of trade, a commodity. They may be good, and yet be feared by tyrants; they may be wicked, and yet relished by a degenerate class of readers, and must be discountenanced by all good governments. Books may disturb the private or public peace. Some sort of peculiar action of government towards them has, therefore, at all times existed. This action, however, was more especially increased, when, in the sixteenth and seventeenth centuries, the power of the prince rapidly rose at the expense of the many aristocratic and corporative powers, which had existed in the middle ages. This swaying power very naturally perceived the great importance of that new agent, the art of printing, which came into play nearly at the same time when the concentration of monarchical power was making rapid strides. The concentrated power of the modern monarchies found it necessary to establish a control over this new and vast agent, which seriously indicated that, within a short space of time, it

would leave almost every other agent of society far behind, in vigor and irresistible activity. The censorship was established, and, in nearly all countries, books could not be issued at all, except with the specific permission or privilege of the prince. This permission or Imprimatur was frequently changed into a privilege. When this was once established, the next and very natural step was to designate the period for which this privilege should last; and this, natural enough, led to the erroneous idea, that the whole privilege was a boon of that power which had the right thus to circumscribe its duration; in short, an act of grace on the part of the prince to the publisher.

It is, however, cheering to observe, that universally, with the advance of political civilization and a clearer perception of individual rights, the acknowledgment of literary property has likewise advanced, and the true basis upon which its justice rests has been more and more clearly perceived in countries where the true ground had been lost sight of. It was one of the early acts of the first French revolution to acknowledge literary property on a comprehensive principle; all modern constitutions acknowledge it. At least, I do not remember a single exception. If there are any, they must be in South America, and might be

easily accounted for by the little attention which this property may have yet attracted in some of those states. Every where we find the period during which protection is guaranteed, extended; in several countries, to the end of the natural life of the author, as the minimum period. The Act of Union of the Germanic Confederacy, of June 8, 1815, provides, in article 18, "that the diet (that is the congress of the ministers of the various members) at its first meeting, shall occupy itself with the making of uniform decrees (that is for the whole of Germany) respecting the protection of the rights of authors." It will be observed that the "rights of authors" are fully acknowledged as already existing; the fundamental law speaks of protection only. Every where, indeed, we find the whole question more and more reduced to that point where the right truly centres. And where is this?

It has been said already, that it is not the manuscript, nor the individual book, as all the piratical publishers like to represent it. Thus the Austrian republishers* stated in their answer to the urgent memorial which the German publishers had addressed to the congress of Vienna, in 1815,

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* In Hitzig, as above.

where, among other things, the German affairs were remodelled, after the downfall of Napoleon, that "the publisher buys from the author, for whatever price they agree upon, the *copy* of the *manuscript* only, and not the right of publication. This his government grants him for its own territory; for foreign states that same government cannot grant it. The subject of a foreign state buys a *copy* of the *printed* edition, likewise for a certain price, in order to imitate this piece of manufacture, if his government permits it, and the *foreign publisher* has as little right to complain as the foreign trader in shawls, cloth, steel has, of any injury done to him there where government prohibits him from trading, in order to protect its own subjects."

"The book is no intellectual, independent thing, ... it is a piece of manufacture upon paper, with signs of thoughts printed upon it. It contains no thoughts (sic!); these must be produced in the head of the intelligent reader." (Yes, and what is very strange, these thoughts may be, as in the case before us, the very opposite from those which the sagacious author desires to produce.) "It is an article of trade, which we obtain for money; every government, however has the duty to stem the avoidable export of national capital,

(here we have the old beautiful theory of the balance of trade), "to encourage the domestic manufacture of goods first produced in foreign countries (sic!), and by no means to impede the industry of its own citizens for the enrichment of foreign manufacturers." (sic!)

"Whoever does not choose to see his book printed in foreign states, must abstain from printing and selling it in his own state." (Whoever does not choose to have his pippins robbed must not plant them in his orchard, but raise them in his closet. Whoever does not want his pockets picked must not put any thing into them, or must sew them up, or not go abroad.)

This is Austrian philosophy and enlightened political economy. This is the Austrian view of literature; a literary work, a piece of Manchester calico, and a Connecticut tin pot, are all the same. This is—we confidently hope, it soon will be no more so—to this moment likewise, American philosophy, political economy and generosity with respect to book trade! Many readers, indeed, will be startled at these gross views, thus concentrated; but let them be still more startled when they are told, that however hideous they may appear, they are nevertheless essentially the principles upon which ourselves continue to act.

In reading these arguments of the worthy Austrian pirates, luminous ideas crowd so fast upon us, that we can hardly find room to express them. How is it, if an author gives away an autograph manuscript to a collector of autographs, but retains a copy? Has the collector, who is the lawful owner of that manuscript, that is of the paper with signs of ink upon it, on that account the right to give or sell it to a bookseller for publication? According to the above theory, he undoubtedly has. The book, they farther observe with rare sagacity, is a thing, something white, called paper, with something black, called ink, upon it, and a man can do with it what he likes, except where the government prohibits it. So the whole right of literary property is a thing absolutely made and invented by government, a monopoly. Why government always grants the monopoly to the author, and not sometimes to some one else, when the author is living, or why, if this were done, it would be considered downright pillage, is not shown. Forsooth even the Austrian piratical printer, thinks it is fair that the author should have the monopoly; but why? Is there any other reason, but, because it is felt that his work is his own, and that, after all, it is no monopoly? But so far does their philosophy not penetrate. I

suppose it has never been doubted that a man's body and all that belongs to it is his own, bona fide his own. Yet governments have at times ordained to cut the hair or trim the beard in a peculiar fashion. To some this may appear a little oppressive; "Oh," the Austrian pirate would say, "if you do not choose government to interfere with your beard, keep the hair back, but if you allow it to grow forth, you must not complain if government grants you permission to let it grow only on certain conditions."

It remains, however, to be shown, whether the possessor of a book, actually have the right to do with it what he likes, even according to the view of those whose opinion on literary property has just been given. With that single copy, which he has purchased, he undoubtedly has. He may cross for instance with ink a whole sentence, and write the contrary over it. Suppose he were to publish the book in that garbled manner, in a foreign country, still under the name of the first author, would not even the Austrian pirate, confess there was some slight degree of unfairness in the proceeding? Yet why should it be unfair? Has not the defacer bought the book, and can he not do with it whatever he has a mind to do, where government does not prohibit it? Perhaps, even

those gentlemen, have here a dim and distant perception that there is a difference between the book and the literary work or composition ; that the one belongs to the purchaser, who can do with it what he lists, and though he were to make paste-board of Napoleon's work on Egypt, but that the other remains the author's. How else is the whole case of plagiarism to be explained ? Even there where government allows free republication to "stem the avoidable exportation of national capital," it is considered dishonorable if B copies a passage from the work of C, into his own work, and gives it as his own. If the Austrian doctrine be correct, that is if there be no difference between the book and the work, and the whole be but a piece of manufactured good, which of course I have a full right to cut and alter according to my fancy, B, the piratical author, has acquired as full and extensive a right over every part of the purchased book as the republisher. This is undeniable, and if by buying a book we buy all and every thing appertaining to it, or connected with it, B has as much right to give a passage of C's book as his own, as I have a right to eat the fruit purchased for my money, although another has produced it, because he has relinquished, for my equivalent,

the whole of the fruit; and not a particle to be called his, remains in the fruit.

Nor is it the thought in which the right of literary property consists. A thought, an idea, of itself is not a thing that can be *owned*, and of course not be protected by government. There is no command over thought. If it were so, the piratical publisher would have indeed a right to prosecute me, if, in reading a publication of his, it should happen to convey to me, besides the thoughts of the author, also thoughts on the wretched printing, gray paper, or pale ink, because I did not pay for these additional thoughts; I only paid for the thoughts intended by him to be conveyed.

The right of the author's property lies in the composition, the *work*; this is the *product*, in which the author has invested his labor, skill, ingenuity and accumulated knowledge (or labor saved) of previous study, as we invest the same in all products; it is, as has been stated before, what Say calls an immaterial product, but not the less a real product for all that. It is "incorporeal," although the produce of it is not; as the father is entitled to the labor of his children under age. He does not own their bodies; he owns their labor; and his property is incorporeal, although

its effects are not; for instance, when he sets his children to work in the field, which brings him grain. Thought is not marketable; but invested thought, ingenuity, calculation, combination, is daily brought to market. This literary *work* forms a separate independent product of its own, and is bona fide the author's own. It cannot belong to any one else. The author has truly and verily produced it; he is the owner; and he would not be the owner if he could not dispose of the work as he pleases. Many individuals may have, and actually have daily the same thought, but no two individuals can produce the same composition. The work, the composition, that immaterial or incorporeal product, has nothing to do with either manuscript or book. Casting the *work* into a *book* is only one way of publication; another is, for instance, the performance on the stage, and every well-regulated copyright law, for instance that of France, as we have seen, protects the author against piratical publication of a dramatic composition in the shape of performance on the stage. If it were possible to impart a whole comedy from memory to the actors, who for a compensation have obtained the right of performing it, and other theatres were to perform it, they would in France be guilty of pirating the work,

which work in this case would exist without manuscript or book. A professor might sell the permission of taking down his lectures while he is delivering them, and of publishing them, if he has a perfect confidence both in himself and the employed stenographer. Here would be a sale of a work without manuscript. The copyright laws of several countries distinctly prohibit the unauthorized publication of lectures, written down during delivery, for instance that of Prussia. No abuse of manuscript or copy can take place in this case, still the unauthorized publication of the lecture is robbing the *work* from its owner, who is the owner because he is its producer. The purchaser buys the book, not the work; part of the rights over the work are bought by the publisher. With the book the purchaser may do what he likes; he may read it, he may read it to others, he may lend it to others. But this must not become a second publication. It might become a decidedly important question, whether the purchaser of a book would have the right of assembling multitudes and read to them the work, without additions or commentaries of his own. It would stand on the same ground with the performance of a drama in the theatre. Indeed, peculiarly skilled people do read in Europe, for money, dramatic pieces to

assembled numbers. Suppose a professor should read only the book of his colleague to his hearers. The case of circulating libraries deserves attention in this point of view. Speaking in a strictly legal sense, there is in my mind no doubt but that the making a business of lending out books for money, is publication. Still we do not prohibit the lending out of books for money of copyrighted works, either because we consider it an exception on the ground of sovereign expediency, or because the trouble of protection would in this case be greater than the advantage to be obtained; or, lastly, because it is no essential injury to the author, for it is generally found that by whatever means the perusal of a work is promoted, its sale will likewise be promoted.*

The philosopher Kant founds the justice of copyright—seeing the impossibility of attaching it to the book—in the fact, that writing a book is communing, speaking by signs to the public; the author has a right to prescribe the conditions on which he may be heard. The publisher is the doorkeeper, who admits, for a stipulated fee, (the

* Thus, indeed, it is frequently found that the gradual publication of novels in periodicals prepares only a greater sale when the novel comes to be published entire.

price of the book,) the hearer (i. e. the reader) into the lecture room. I think this view is liable to some substantial objections; the circulating library, in particular, cannot well be disposed of by this theory, unless, indeed, it be said at once, that among the conditions for which the purchaser pays his money, is this, that he may lend it to others for gain as well as gratis. At any rate, we stand in need of no comparisons or similes; the ownership in a literary work is as clear, direct, real and sound as any existing, and more so than most others; it needs no metaphorical prop.

The essential difference between the book and the literary work may be strikingly shown in a popular manner. A young lawyer buys Blackstone's Commentaries; he writes his own name on the fly-leaf or the inside of the cover. No one, who opens the book, finds any objection, because these are the places where the owner of a book usually puts his name, so that the individual book may be distinguished from other *copies* of the same work. Let him, on the other hand, strike out the name of Blackstone, on the title-page, and put his own instead of it. Every one would laugh at the egregious folly, because this is the place where usually the author of the *work* puts his name, and although that identical

book became the true property of the young lawyer, the work conveyed in or by that book, or of which the book is but a *copy*, continues to be Blackstone's, and cannot be affected by the purchase, nor can it ever become another's, although part of the disposal over it, that is, its multiplication, may be sold, while another part, for instance the right of making changes, is not sold.

Of those who, of late, have denied the right of property in literary works, one of the most distinguished is Mr. Augustin Charles Renouard, in his work on the Rights of Authors in Literature, Sciences and the Fine Arts, in French.* Some of the chief points of this work are, that property cannot be predicated of thought, and consequently, the term Literary Property ought to be banished from the language of the law; that, nevertheless, the sole right of multiplication ought to be secured to the author for a limited time, on account of his merit, the advantage he bestows upon society; and that lastly both theories amount pretty much to the same thing. Every one of these positions is directly or indirectly erroneous. Property can indeed not be predicated of thought; no one has

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* The Jurist, of October, 1839, Boston, has a full article on Mr. Renouard's theory.

ever claimed it, but it can be predicated of composition, of works. Mr. Renouard, and many others before him, maintain that a work (they mean the manuscript) is undoubtedly the author's property, but that by publishing it, he deliberately abandons all specific right respecting his composition. This is begging the question, for it takes for granted the very point under discussion. We wholly deny it. Indeed so far from conceding this position, I rather maintain that, if the author does not first acquire the title of property by his act of publication, he certainly avails himself for the first time of the value of his property by publishing his work; and, for all civil intercourse, property is as though it had no existence, so long as the owner cannot affix exchangeable value to it.* Indeed we do not call all things which are our own, our property on that account. No one will doubt that his arms, his legs are his own, but they are not called his property, because they have no exchangeable value; while a girl's tresses might be called her property, because she can cut them off and sell them to the hair-dresser. To say then, that a composition is

* This is another strong reason why we cannot speak of general or common property, belonging to all, before the great division took place. The chief reason for the desirableness of property is the exchangable value of itself, or of that, which we derive from it.

the property of the author so long as he chooses to keep it in his desk, but that he forfeits his ownership so soon as he publishes the composition, is saying, this is your property, but the act itself of availing yourself of that property deprives you of it; which is absurd. Secondly, If the exclusive right of multiplication depends upon the merit of the work, the advantage which society derives from it; it becomes a very necessary and serious question before granting the exclusive right, whether the work has any merit, whether it be not injurious. Who would decide whether the majority of all books printed now a days are beneficial or the contrary? Literary property is not protected on the specific ground of merit, but like all other property, because it is of essential importance to society that individual property should always be protected, very few and palpably injurious cases only excepted. Many sons of rich men are ruined because they inherit a large fortune, nor would it be in many cases difficult to predict that a rich inheritance will ruin a certain individual. Yet we do not interfere and throw the individual upon his own resources, which would be for his benefit, because general protection of property is incalculably more important. Most governments interfere when a female prostitutes her charms for

money; but they do not interfere if a handsome woman sells her charms in obtaining a rich husband by means of them, although she despises him, base as the act is; because interference would be worse. So we must protect all works, bad, foolish or good, on the general ground that they are property, and we can make exceptions only in cases of flagrantly immoral or palpably injurious books. Lastly, the ground upon which we base literary property, is of the greatest importance respecting international copyright, as we shall presently see.

Property, or the means of acquiring it, must unite various qualities, in order to be fairly entitled to the protection of property.

It must be capable of being protected, and the trouble of protection must not be out of all proportion to the value protected. Stray pigeons are unprotected in nearly all countries; yet, sometimes, they are of considerable value to pigeon fanciers, pairs having sold as high as thirty dollars.*

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* These pigeons may be instanced as a species of property, unacknowledged by government, yet considered bona fide property by the persons interested in it. There was formerly, and in all probability there is still, a club of pigeon fanciers in the city of Berlin. At its meetings stray pigeons were valued, and the ownership proved. The owner had the right to claim the pigeon for payment of part of the adjudged value; others had to pay the whole value.

It must be lawfully gotten; which of course means, that before property can forfeit protection, it must be proved to be unlawfully gotten, or in other words, not to be the property of its present possessor.

It must not work decided evil by its own tendency. The beauty of a young female may, in the light of political economy, undoubtedly receive value by prostitution, as any other natural gift, for instance the talent for music; yet society does not only withhold protection from this trade, but discountenances it by law.*

On the other hand, it is a general principle of the highest importance that the whole society is most deeply interested in the utmost protection of every species of property, which is not objectionable on the grounds just enumerated. For the greatest possible security of property and its pursuit, is the greatest possible inducement to its

* Where prostitution stands under the police, and permission to keep houses of ill-fame is granted, as in Paris, it is avowedly only with the view of preventing still greater mischief; and it must be observed as a very striking fact, which we learn from the excellent work of Patent-Duchatelet on the Prostitution in Paris, that the whole surveillance over prostitution in that city, with all the regulations, most rigidly enforced, the police bureaus for that particular branch, the numerous clerks, physicians, &c., and the great restrictions to which the houses of ill-fame are subjected, does not exist by law, but by connivance of the whole society only. It is, perhaps, the most striking instance of the all-sovereign power of opinion.

accumulation, to industry and civilization. Literary property, besides the plain justice of its origin, unites all the qualities of good and beneficial property for which protection is or may be claimed. It is capable of protection; it is just to protect it, because the pecuniary reward obtained by the author is, in most instances, but a very disproportionate return for the toil and labor invested in his work, and society is greatly interested in its protection, in order to offer an incentive to gifted men, who are not in easy circumstances, and ought to to provide, like good citizens, for their families.

Indeed, among the various unreasonable arguments against copyright, and especially international copyright laws, we find even that, which is believed to be founded upon the little reward which, after all, awaits, in most cases, the most laborious literary or scientific inquiries, in the shape of money for the sale of the copyright. It is, moreover, advanced that the author is rewarded by the reputation which he acquires. If this argument holds, a man who cultivates his garden or farm chiefly or partly for the sake of pleasure or health, must not be protected in the property which he may acquire by the sale of part of his produce, which may amount to far less than his experiments have cost him; or we would have the right to spoliate a

day-laborer of his little savings, which he may have contrived to lay up at the end of the year, because they are but trifling, after all. The soldier, minister, physician, lawyer and politician acquire likewise reputation along with their pecuniary rewards; so do many distinguished farmers, engineers, manufacturers and machine builders. Are they, nevertheless, not protected in the property acquired by their profession?

If, then, literary property is not a thing made by government, no monopoly, and the term for which protection is granted by the law, is notwithstanding limited, whilst most other property enjoys protection ad infinitum, it must be proved that protection, after a certain period becomes too troublesome; or that the property, in most cases, loses its value after a reasonable time; or that society, for some reason or other, is too deeply interested in debarring farther protection: in order to give any color of justice to the spoliation. For spoliation it always remains, because it was originally no boon of government, no grant, as little as the farm of the agriculturist is, which he first rescued from wilderness uninhabited, and unappropriated by any one. Government does not say, you have had this farm long enough; your children shall have no benefit of it; we allow henceforth

any one to plunder your fields, or take from you their produce when you carry it to market at home or abroad. On the contrary, if the cotton produced by our planter were unjustly seized upon in a foreign port, our government would protect the planter; it would seek redress, and go as far as to make reprisals if redress were not granted.

I have dwelt so long on the essential character of literary property in general, and that, in which it truly consists—the literary work; because the question of international copyright laws can only be solved, if we keep this point strictly in view. It is no monopoly; it is the author's own, if ever any thing could rightfully be called an individual's own. Now, it is one of the greatest and most beneficent effects of civilization, that we acknowledge rights beyond the limits of the state; that we acknowledge rights where we can no longer be forced to acknowledge them; that we acknowledge rights when we cannot acknowledge the citizen, but merely the man, in the interested individual. In the earliest times, all property of foreigners, met with on the high seas, is considered a perfectly fair subject of plunder. It is taken and carried away to be sold. The property of foreigners within the territory of a certain state must in those periods be protected by specific

grants, charters and treaties. The various Greek confederacies granted to single foreigners or whole states the asylia, or exemption from piracy, or any other forcible seizure. At present, however, a barrel of flour, ground in Rochester, in the state of New-York, is considered to be as fair property, and is protected accordingly, in the port of Lisbon as at home. In many countries a foreigner could formerly bring no action against a citizen of that country. Who was he? A mere foreigner; what has he to do with our laws? The Chinese government would say to an Englishman who should complain against an American, both residing at Canton: "Who are you, barbarians? Fight it out among yourselves." But a Frenchman may bring an action against an Italian, in an American or English court, or that of any other civilized country. Nay, the very person of the foreigner was originally not acknowledged. Hostis (enemy) and Peregrinus (foreigner) were synonymes. Wrecks were lawful prize; first all wrecked goods were so, even those belonging to citizens of the same state. Then it became law, that wrecked goods belonging to foreigners only should be lawful prize. The person of the unfortunate sailor wrecked on foreign shore, was forfeited; he was made a slave. Have the civilized governments, who no longer pretend to so bar-

barous a right, made the personal rights of these sailors, or only acknowledged them in the progressive course of civilization? "In all that is good, of which we speak here, there is nothing more excellent, nor more comprehensive, than the tie of union among men, and as it were a society and communion of every thing useful, and good will toward all men; which existed with the first origin, shows itself gradually more and more, first in the family and relationship; then comprehending the whole human species—which affection of the human mind is called justice."*

In an analogous manner we see, that the more the barbarous idea vanishes, that the author is little better than a slave, who owns his property from no inherent right, but merely at the gracious pleasure of his own government, the more vanishes likewise the gross barbarous idea that his property may be forcibly taken from him, wherever we can lay hold on it in foreign parts. I have mentioned already three instances of international copyright law. The King of the French speaks of the necessity of such laws in his last throne speech. If the newspapers inform us correctly, there are now transactions going on between Belgium and

* Cicero de Finibus V. 23.

France, the former having for centuries robbed and plundered the French authors to their greatest injury. Wherever the people of different sovereign states speak the same language, the question of international copyright law becomes as important as that of copyright law in general. For, the value of the work is founded in the language, which language extends beyond the state; just as the value of Michigan flour is founded upon the human organism, upon hunger, which hunger extends beyond the political limits of the state, and the value of the flour extends consequently likewise as far as hunger is felt. Man can produce nothing without certain agents, already existing, being seized upon by him; and existing wants, calling for it. The miller makes use of the water; the mariner seizes upon the wind; the farmer upon the rain; the bleacher upon sunshine. With the aid of these agents they confer value upon certain materials. The agent already existing, for the author, is the language; he seizes upon it, and confers value upon his conception by casting it in that language. He has an undeniable right, which civilization ought to deny no human being, to offer, directly or through some one authorized by him, his product in the best market, where it may obtain the highest price. If the

advantage of authors is thus doubled and trebled, by their being able to write for two nations at once, do they enjoy any greater advantage than civilization bestows upon every industrious man? Does the Sheffield knife-grinder not reap the advantage from civilization allowing the merchant quietly to carry his steel-ware to the best market? Is it not universally blessed as one of the most legitimate advantages of civilization, that it opens more and more distant marts? And who will say that it is not perhaps in the great plan, laid down for human progress, that increased reward and consequently increased literary activity resulting from the vaster public, extending over various countries, shall be substituted for the lessened literary production resulting from the lessened number of idioms? For it is an undeniable fact, that Languages pass through the various chief stages of literary production, not so much Countries. Languages, not countries, have their epic, romantic, dramatic periods.

But, it is objected, have we not the right to deny copyright to English authors? Are we not a sovereign nation? If right means that we have the power to do it, then we do possess the right, in the same degree as the Algerines did possess the right to plunder any christian vessel. For they too were sovereign, and among other laws made

this, that christian property should not be acknowledged by them. If it be so, I do not know, whence we could claim any right to chastise them; and if the Algerines were right, Decatur or those that sent him, must have been butchers, We sent our ships to punish the Algerines, and demand our property, because we felt that no one has a right to plunder, or that every one has a perfect right to protect his own, whatever the laws of the plundering country may be; and, however inexpedient it might be, as to the absolute right I have no manner of doubt, that a power would be perfectly justifiable to force another by reprisals, or any other forcible means, to respect the property of its own citizens in the shape of copyright. France would have the right to force Belgium to abstain from literary piracy. If right and power or advantage are confounded, we might waylay West India sugar, and possibly get it cheaper, than we now do, when we have first to produce values, with which alone we can buy that sugar, and, when we have bought it, have for all this trouble no earthly advantage but the mean one of being conscious that we have obtained it in an honest way, while we might have sweetened our tea so cheaply for the little trouble of sending a fast sailing clipper, manned with a few desperadocs, to our neighboring seas.

In what does the value of a literary work for the author consist, besides the lofty pleasure of an active mind in conceiving and sketching out new thoughts and tracing truth? The pecuniary value consists in the exclusive right of multiplication; the other value, in his reputation; and in both we wantonly injure him. We rob him in the first, and we allow our republishers, to bestow the least possible care upon the printing, or to curtail, mutilate and deface works in order to make books of them more fit for a hasty sale. Those that have bestowed the least attention upon the subject can easily understand the grief with which Kant saw some of his lectures published by an unauthorized hand, in a garbled state; or the fervor with which Justus Lipsius calls for protection against unauthorized and mutilated publications of the lectures he had delivered.*

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* We find at the beginning of Justus Lipsius' De Cruce Libri tres, Amstelodami 1670, the following words under the inscription, Justus Lipsius ad Lectorem: "Habes lector quae de cruce scripsimus sed germana. Antea atque alibi edita quae (credas hoc nobis,) non sunt nostra. Quid ergo? Non illa dictarimus? Fortasse. Sed o imperitiam! quasi edendi illo fine. Reverentior posteritatis sum: et aliud scio esse schedia aliud opera; nec subitaria haec nostra dedicanda in memoriae templo. Quid, quod alii gravius etiam peccant? qui excipiunt aut intercipiunt dicta aut oratiunculas nostras, et in contumeliam mei divulgant. Aliter non accipio. Aevum hoc, ut multis delictis fibulam, ita petulantiae et licentiae laxat: et quod avet procacissimus quisque, id etiam audet. Ego semel et serio testor, audite qui in Europa. *Nihil meum est, aut erit, quod*

If the author has in any degree that love of truth, that enthusiasm of knowledge and noble ambition of rendering some substantial service in the advancement of learning and literature, without which either is deprived of its vital spark, and which it is the greatest interest of all society to foster for the sake of every thing that is sacred to civilized man—if an author has any self-respect and has written his work to the best of his ability, and deposited in it the results of long and many meditations, weary research, industrious observation, and, perhaps, painful experience, or the fruits of his best and most inspired moments; then it is cruel, indeed, for him to see some one else who has no earthly claim upon him or the public, purposely mutilating or garbling, from niggard negligence, the work to which the author has staked his reputation and name, and to make which as perfect as his abilities would allow, he has spared neither time, labor, nor the sacrifice of money and many enjoyments, perhaps of health. Does the

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non de autographo meo, et me volente, sit expressum. Quicumque aliter, mihi injuriam facit, vobis fucum. Deus bone, hæc monenda publice esse? Ecce in bona opesque externas jus est, non vivo mihi solum sed mortus et solatium fati est voluntas ultra fatum: in istis animi et ingenii vere bonis non idem erit? Reprimite Principes qui potestis: et vos lectores qua potestis: illi puniendo, vos spernendo."—How true! How applicable to our case!

author who asks protection against such injury claim any thing more but what every human being has a right to claim, which you must grant him if he be your fellow-citizen, and which you ought to grant him because he is your fellow-man! Have we as men, and especially as christians, a right to deny the plainest justice to foreigners, solely because we may do it with impunity, and, perhaps, imagine, that some advantage accrues to our nation from it? "Those," says Cicero, "who have regards for their fellow-citizens only, and not for foreigners, tear asunder the great community of men, and if that ceases, benevolence, liberality, goodness, justice will be radically destroyed."* Let us consider a real case. Mr. Hallam has published his Introduction to the Literature of Europe. The work must have cost him many years labor and study. It is an extensive work, which cannot command as large a sale as many trifling books. Hardly was it published in England, when an American bookseller advertised a republication, and a cheap edition appeared at Brussels. Is this a state of civilization, that is, of mutual, candid acknowledgment of justice, fair-

* Qui autem civium rationem dicunt habendam, externorum negant, hi rumpunt communem humani generis societatem, qua sublata beneficentia, liberalitas, bonitas, justitia funditus tollitur.—Cicero de Off. iii, 5.

ness, liberality? Or is it a state of barbarity, of pilfer and plunder, meanness and violence? Is this a state of things, as two gentlemen would like to exist between them? And what else is international law in its purity, but the application of the principle of gentlemanliness, that is of candor, fairness, liberality and mutual respect, to the intercourse of nations? Barbarous or degenerate nations treat one another like ruffians or blackguards; civilized and elevated nations like gentlemen.

Utility or desirableness are the two things which confer value upon any product or exchangeable article. It is the just order of things, that he who has conferred this utility upon a thing, enjoy a proportionate share of those values which the consumers or those that desire the article give in exchange for it. It is the principle which lies at the bottom of all industry, the moving power without which all interchange between men would be at an end. Yet this fairest of all rewards is denied to the fairest of all producers, the author, so soon as we decline the grant of international protection of literary property. The consumer throws large profits into the laps of those who had no share in producing the desired article, who employed neither labor nor capital in the product, that is the work, whatever capital they may employ to pro-

duce the book. If thousands in this country have derived benefit and pleasure from the perusal of Walter Scott's productions, was he not fairly entitled to a share in those values which the American readers were obliged and willing to pay in order to obtain the pleasure and benefit of the books which contained his works? It may indeed be convenient for a few to "skim the cream of other people's wit," but the question is whether it be right, whether it be just? whether we ought, in conscience, to deny an honest class of society those rights which we readily grant to all others?

Perhaps it will be answered here, that we derive great advantage by the reprinting of foreign works, in two ways: first, by keeping that capital which would go into a foreign country to pay the foreign author, in our own country, and enriching with it our own republishers; secondly, by enabling the public at large to buy the republished works cheaper.

Even though it were so, it would nevertheless be unjust, and there is no greater truth in all politics, than that the shrewdest cunning and the merest expediency can never hit upon a better means of essentially promoting their own ends, than, before all, essential justice towards all. It is the broadest, safest, truest and most enduring

foundation of all prosperity and success. It will always prove so in the long run, whatever the appearance to the contrary at the moment may be. No sacrifice is ever made to essential and even lofty justice, which does not make returns with ample interest. Yet even though it were not so, justice stands above utility; and we, boasting of civilization and refinement, should not take a meaner view than that which was pronounced two thousand years ago by a profound statesman: Justice is to be cultivated on its own account.*

With respect to the publishers in our own country, who derive much benefit from republications without allowing a share of the profit to the lawful proprietors of the literary product, it is to be observed that but few share in this profit. These indeed may make large profits, but an overwhelming majority of our publishers do not share in it, and would have no objection against so just a law as one which should internationally protect literary property. I speak after having made some inquiry. I found not one bookseller among those whom I consulted in Boston, who made any objection, provided the capital already embarked in republication, under the sanction of the law of the land,

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* Cicero.

were properly protected, which is no more than justice requires. I found in other cities, where my inquiries, however, were not so extensive, numerous respectable publishers of the same opinion. I do not hesitate to say, that an inquiry, conducted with any degree of care, would show the number of American publishers, who are anxious to see the present state to be continued, to be very small indeed.

What is the advantage the public derives from republications unauthorized by the authors? We are told that our people are enabled to purchase the books for a far lower price than they would do, if the American republishers were obliged to pay for the copyright to a foreign author. This is but partly true. All those books which are largely and permanently desired by the public, are, on the one hand cheap, where copyright is protected, because a profit, hardly felt by the purchaser on each copy, becomes a valuable revenue for the author, on account of its constant repetition. On the other hand, the book being in great demand, the unauthorized republisher raises its price as high as circumstances will permit, and almost the whole difference is this, that besides the fair profit which he would make on the investment of his capital, he appropriates also that profit which, if

justice prevailed, he would have to pay to the lawful owner of the literary property. In addition to this fact, it ought to be remembered, that the publishers, forming as they do a comparatively small class, there is far more understanding with one another among them than among the members of other trades. This is not only harmless, in all fair things, but desirable; in the case, however, which we consider, it prevents, in a very considerable degree, competition, so that the public are far from reaping the whole advantage of the fact that no copyright has been paid for, but the republisher alone gains it. As to the capital which would flow out of the country in the way of payment for the copyright, it would always be but a trifling sum, considered as part of the national wealth, and, moreover, does in no way differ from the money paid for any other desirable article. Value for value. The times of the once far famed balance of trade, it is to be hoped are past, at least in our country. The world lives upon exchange; what flows out of it must come back, if we only produce values with which to fetch it back. The work of an author is a value, else no money would be paid for it; thus one value flows in while another flows out. We shall presently see, however, that the law as it stands now, or rather the absence of law, forces

likewise capital out of our country and prevents other capital from flowing into it, and thus counteracts the pretended advantages.

Respecting the second class of books, namely those that are not largely desired, or are of a kind that they are reprinted in newspaper form, it is true with regard to some, or may be so as to most of them, that the public obtain them cheaper than they would otherwise. But there is a disadvantage connected with these publications, which does indeed not fall within the precise province of political economy, but is nevertheless great. The books belonging to this class are generally of a very light character; they are forced upon the public frequently in a slovenly and incorrect state, and, as to those published in newspaper form, on a very large scale. All these circumstances produce two results: they promote that mere reading for reading's sake, to fill out vacant time and vacant minds; to satisfy a craving for reading without reflection—a licentiousness of reading as it might be called, because it is a craving desire unguided by any judgment; and the books or other publications being in a shape not to demand any respect or desire of retaining them, they are naturally treated as mere means to satisfy the appetite of the moment. There is no repernsal, because the

book is allowed to perish the moment after it has been gorged; there is no reflection, no purpose and no profit of reading. It has been very hastily remarked, that all reading is beneficial; for, however trivial the book may be, it will convey some information, and leave an increased desire for reading more. An unfounded remark, hardly worthy of being refuted. We might as well say all drinking, all eating is beneficial. When hurried, worthless, perhaps morally injurious reading interferes with labor, not only at the time when the reader is actually occupied with the book, but also by indisposing him for labor, and when injudicious and crammed reading renders the mind dull and heavy, instead of acute, fills it with a chaotic mass of indifferent matter, and unfits it for all sounder reflection—reading is not desirable. Inquiry, however, will show that such is actually the reading with some classes, especially with many working young women in our large cities. Do I then ask from government aid to direct judicious reading, to interfere with so private a subject? I am far from desiring so odious an interference; but I do desire our government to perform an act of justice, which, happily, will at the same time prevent, in a considerable degree, a great mischief; and I was desirous of showing that that, which many

exhibit as an advantage and reason why we should continue to be unjust, is, on the contrary, a great disadvantage. In short, I do believe that by our denial of justice, we additionally injure ourselves by inundating the country with the lightest literature offered in the least respectable form.

We have before considered the injustice done to foreign literary producers. The denial of an international copyright law operates with equal injustice, perhaps with greater, towards our own authors, and decidedly to our greater national disadvantage.

The author of the History of Ferdinand and Isabella informs us in his preface that, as early as in the year 1826, he was occupied with his noble work. Ten years of very ardent and continuous labor, besides his talent and skill, are invested in that book. His reputation is now made, both here and in Europe. He is, as the papers have informed the public, engaged in writing the History of the Conquest of Mexico. England offers for some classes of books, an infinitely better mart than our own country. Suppose that author has the legitimate desire of earning, in some degree at least, in a pecuniary way, through this new work, the advantages of his reputation established by the first book. In doing this, he would only do what

every producer does, that is, the capital, (in this case his reputation,) gained by one product, is invested in the second product, to produce a greater gain, and so on with all successive productions. Suppose the author desired to offer the sale of his copyright in England; has he no right to do it? Yet he cannot do it; the English say, you will not grant copyright to our authors, so we will not to yours. Is this protecting our own citizen in a lawful and laudable pursuit; one that redounds to our honor and sheds lustre on our whole country? For, such works as Ferdinand and Isabella add greatly to the respect paid by foreign nations to that of the author, and essentially promote esteem, good-will and easy intercourse among nations, while no citizen of the nation to which the author belongs, whose reputation transcends the barriers of states or languages, goes into foreign countries, in whatever pursuit, without enjoying a share of the good effects, thus produced by an eminent mind. Is this the reward of gratitude? Is it judicious to prevent the value which he would have received for his copyright in England from flowing into our country?

The following is another striking instance. If a letter, under the signature of Mr. Catlin, pub-

lished in the papers, be correct—and there is no reason for suspecting its genuineness—this gentleman, who knows that a work such as he contemplates, with many costly engravings, finds a far readier sale in England, where there are more wealthy individuals, than with us, was obliged to go to that country in order to publish his work there. Otherwise he could not have obtained the English copyright, without which he could not have made it worth his while to publish his work. Here then we have forced the production of much value out of our own country, because, by denying international copyright, we deny indirectly to our citizens that protection which every other producer enjoys, and which it is one of the primary objects and most sacred duties of all governments to bestow upon every one of their subjects.

Lastly, it is evident, in fact it is acknowledged by our republishers, that it is not worth their while to pay for literary home production in those branches in which England can produce as much or more than we can; because they find books with ready-made reputations in as large a number for republication as they wish, and their profit, of course, is greater upon those books, than it would be upon others, for which they must pay copy-

right.* The consequence will be, that authors, who can make it worth their while, will go to England to publish their works in that country; while our own literature will remain in a languishing state. Some few highly distinguished minds will struggle now and then through these as through other difficulties; but an active, healthy, creative and diffused national literature does not depend upon a few literary or scientific eminences alone, but upon a general state of mental activity, purity of taste and mutual encouragement. It is so in the arts; it is so in all spheres. The flourishing state of any branch depends upon general activity, upon and out of which the lofty reputation of the peculiarly favored individual arises; and originality, without which no illustrious period of any species

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* Some American publishers have freely stated this fact to me. Mr. Washington Irving, in a letter to the editor of the Knickerbocker, January number, 1840, on the subject of the international copyright, says: "How much this (the American) growing literature may be retarded by the present state of our copyright law, I had recently an instance, in the cavalier treatment of a work of merit, written by an American, who had not yet established a commanding name in the literary market. I undertook, as a friend, to dispose of it for him, but found it *impossible to get an offer from any of our principal publishers. They* even declined to publish it at the author's cost, alleging that it was not worth their while to trouble themselves about native works, of doubtful success, while they could pick and choose among the successful works daily poured out by the British press, *for which they had nothing to pay for copyright.* This simple fact spoke volumes to me, as I trust it will do to all who peruse these lines." This rejected work is now one of the most popular.

of human activity can be imagined, can never exist, except where there is this diffused and united, independent exertion. Raphael did not spring up single and alone; he is but the most prominent peak of a gradually rising mountain chain. Our own protection then, as well as justice towards others, demand the passage of a law, which, it ought once more to be observed, appears to many like a grant, because the law is passed, and the international acknowledgment of literary property does not exist without it. But so are many things of which men have been unjustly deprived, restored to them by specific law; yet that law does no more than do justice. The liberty of the press is as natural to man, after the invention of printing, as the liberty of speech; yet many nations are deprived of it, and many others enumerate it specifically in their fundamental laws, from which, indeed, not a few have actually inferred that it is a modern thing, made and granted by government. The Turks formerly levied an annual tribute of fine and healthy christian boys, to be educated at Constantinople for the civil and military service of the Porte. This cruel practice has been discontinued, and cannot be renewed so long as the late hatti-sherif, protecting the property, person and religion of all subjects to the Ottoman

sceptre, is a living law and not a dead letter. Will it be said on this account, that the christian father had no absolute right to his son; that he retains him in his family by way of grace, of a monopoly? The international copyright law in this respect stands upon the same ground upon which powers used to make particular treaties with piratical states, according to which the flags of the contracting powers and their property were mutually respected. Property ought to have been acknowledged without it; but since it was not, it was better to make a treaty and pass a law; yet this law grants no particular boon; it only grants what in justice ought never to have been denied. There are many things which unjustly have been denied for centuries, because he who denied had the power to do it; and it becomes necessary to establish the rightful state of things by positive law, yet that law does not on that account necessarily grant a favor.

Why should we deny to others that which we find many have established from a sense of justice alone. The Germanic states, independent and sovereign, have established international copyright. Does the situation of the countries, their distance from one another affect the principle of the ques-

tion? And do the steam-ships not bring us close to England? Nor can it be objected that our position is peculiar in this respect, that England, publishing so much more and having so great a start of us in literature, our advantage in republishing is too great to give it up. Prussia grants free and unconditional reciprocal international copyright; yet every one knows that at Leipzic, in Saxony, a large majority of all German works are published, owing to the peculiar organization of the trade in that country. Prussia did not say: "I shall have the advantage, if I allow the republication of Saxon publications, although they may republish Prussian works," but she did justice as candor required it. Should we of all nations remain behind—we, who acknowledge no other master but Justice? If we have denied justice so long, let us not assume this very ground for continuing longer, from fear of confessing our wrong. It is with nations as with private individuals; no nobler act than the manly acknowledgment of wrong by repairing it so soon as discovered. It is easy to be explained why this acknowledgment should not have been as rapid as many desired it. It is our happy lot that our laws must justly poise the interests of many. But

it is high time that we should now willingly follow the voice of civilization, of national honor, of conscience, of justice, fairness and righteousness.

I am, with sentiments of high regard,

My dear Sir,

Your obedient servant,

FRANCIS LIEBER.

South Carolina College,
March, 1840.