NATURAL RIGHT OF PROPERTY IN INTELLECTUAL PRODUCTION.

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By "natural right" is meant a right pertaining to a person or his property, existing independently of specific statute law, a right instinctively and universally recognized by all civilized peoples and many uncivilized. Property-subject-matter is anything capable of reduction to personal possession and having value in exchange; "property" is such subject-matter in which some person has an exclusive right. By "intellectual production" is meant the visible expression of a mental conception, the work of both brain and hand, the two chief types of which are the writings of authors and inventions in the useful arts made by inventors. The practical question to be briefly discussed is whether and to what extent authors and inventors have a natural exclusive right to the reproduction of the visible expression of their respective mental conceptions.

That there are natural rights of different kinds, including a natural right of property, is a proposition resting on the highest authority, the clearest reason, and the common experience of all peoples in all ages. The Declaration of Independence is expressly based on certain natural rights, stating the proposition thus:

"We hold those truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the pursuit of Happiness."

Blackstone says:

"The rights of persons considered in their natural capacities are also of two sorts, absolute and relative."

"By the absolute rights of individuals we mean those which are so in their ordinary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it."

He then catalogues these absolute rights thus:

"I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."

"II. Next to personal security the law of England regards, asserts, and preserves the personal liberty of individuals."

"III. The third absolute right inherent in every Englishman is that of property; which consists in the free use, enjoyment, and disposal of all his acquisitions without any control or diminution, save only by the laws of the land."

These will suffice for citations of high authority. That they are in accordance with the clearest reason and the plain principles of natural equity is a proposition which proves itself.

Now, as to common experience. If, for instance, an Indian kills a wild beast of the forest and of the skin makes raiment, or from a sapling fashions a weapon, all his fellows, though wholly uncivilized, instantly recognize and perpetually respect his exclusive right thereto. Or, if one Indian has thus produced raiment and another has thus produced a weapon, and the two producers exchange the one for the other, all their fellows instantly and perpetually recognize their respective exclusive rights in the things thus procured by exchange. This illustration but typifies the common experience of the human race ever since the first dawn of the idea of rights and wrongs.

It may then be taken as an established proposition that whatever thing that is property-subject-matter which a man makes out of materials belonging to no one else, is his exclusive property by natural right.

Let us inquire just here for what essential purposes property exists at all. They are just two and only two. One is that the possessor may use the thing himself. The other is that the possessor may exchange it (or its use) for other property. These are two necessary and inseparable incidents of property. They are the essential purposes for which it exists.

We may now inquire whether an "intellectual production," the visible expression of a mental conception, the work of both brain and hand, is property-subject-matter. To be property-subject-matter it must be capable of reduction to possession and have value in exchange. "Intellectual production" has both of these qualities to the full, and is therefore property-subject-matter in every sense. And, as we have just seen, whatever property-subject-matter a man makes out of materials belonging to no one else — a condition peculiarly true of the visible expression of the mental conception of an author or inventor — is his exclusive property by natural right. It follows that the "intellectual production" of an author or inventor, the visible expression of his mental conception, is his by natural right.

But why continue to reiterate the words "visible expression of a mental conception"? Why not, in the case of the author, say

"book"? Because "visible expression of a mental conception" is exactly what is meant, and "book" is not exactly what is meant. The "book" is, in one sense, the creation of the paper-maker, the printer, and the book-binder. The author's creation is quite another thing. The "book" is the vehicle and the author's creation is the passenger. The paper, the binding, and the same printed words (in some other order) may all be present, and the author's creation not be there. The "visible expression of a mental conception" is the valuable thing created by the author. It is that which is his to use and sell,—not the paper, binding, and printed words, (irrespective of their order;) and a part of the confusion of ideas relative to an author's natural right has arisen from a failure to distinguish between the author's creation and the "book."

Let us recur again to the essential purposes for which property exists, to wit, that the producer may use it himself or that he may exchange it for other property—an exchange for money being, in common parlance, a sale. The manner of utilization of an article of property depends upon the nature of the article and the purposes it is designed to subserve. One does not eat with his coat or cover his nakedness with a spoon. The use for which the author's visible expression of his mental conception is designed is to usefully or agreeably affect the human mind. It is its ability to do this which gives it value in exchange. The author—generally through his publisher—makes many reproductions of the visible expression of his mental conception, in order that he may exchange them for money, just as a manufacturer of coats produces many coats, although he can wear but one, that he may exchange them for money. And he who appropriates the author's visible expression of his mental conception without compensation wrongfully appropriates the property of the author, just as he who without compensation appropriates the clothing-maker's coats wrongfully appropriates the clothing-maker's property. It cannot be urged with reason that the labor involved in the production of the visible expression of the author's mental conception is less than the labor involved in producing the mass of coats, even though the account of the labor begins with the taking of the wool from the back of the sheep; no one would call to mind Milton's Paradise Lost, Shakespeare's Hamlet, or Hawthorne's Scarlet Letter, and say that.

Doubtless some large fraction of the doubt which exists upon this question in the minds of men who are wholly sane and wholly honest arises in part from modern custom and in part from the fact

that the visible expression of the author's mental conception has not the three dimensions of length, breadth, and thickness, or, in other words, is incorporeal. Modern custom must have more to do with it than the incorporeal nature of the thing, because incorporeal property is no new thing under the sun. McLeod, in his article on copyright, in the Political Encyclopædia, says: "It is probable that nineteen-twentieths of existing wealth is in this form;" however that may be, the franchises of ferries, railways, telegraph companies, telephone companies, and those which pertain to patents, trade-marks, good-will, shares in incorporated companies, and annuities of all sorts, are familiar instances of incorporeal property in large masses. It must be that the modern custom of plundering the foreign author at the sweet will of the American publisher has been the larger factor in blunting the perceptions of many men about the right and wrong of this unauthorized appropriation of the property of others.

Most lawyers will agree that if the common law has recognized the natural right of the author, such recognition is an excellent piece of evidence that such natural right exists, for the common law is that great body of law not to be found in the statutes, which took its rise in England, which is the result of hundreds of years of human experience, and the whole of which is practically developed out of the natural rights of men. Therefore let us look into that matter a little. As a matter of course this question could never have arisen practically in England until some years after the introduction of the art of printing into that country by Caxton in 1474.

The first English copyright statute was the Statute of Anne, so called, passed in 1710, so that there were some two hundred years prior to that in which the owners of books were compelled to rely on the common law for all prevention of piracy, and the reports contain cases scattered along those two hundred years in which the damages were awarded at common law for the infringement of the author's exclusive right of reproduction. Of this Statute of Anne and of the time preceding it, McLeod says:

> "It is quite impossible to read this act without seeing that it distinctly recognizes copyright as existing already and independently of the act. All that it did was to indicate certain statutory penalties for its infringement, but that, by a well-known rule of law, in no way affected proceedings at common law. We have seen that the courts of law never raised the slightest doubt as to the existence of copyright at common law."

This Statute of Anne gave the authors of works then existing and their assigns the sole right of printing the same for twenty-

one years from April 10, 1710; it gave the authors of works not then printed and their assigns the exclusive right for fourteen years, and if the authors were alive at the end of the first fourteen years they could have a prolongation for another similar term. As the act gave twenty-one years of exclusive right for works then existing, no question of copyright at common law could or did arise until after 1731. McLeod sets out certain injunction cases coming on after that time thus:

"In 1735 Sir Joseph Jekyll granted an injunction in the case of Eyre *v.* Walker, to restrain the defendant from printing the Whole Destiny of Man, the first assignment of which had been made in December, 1657, being seventy-eight years before. In the same year, Lord Talbot, in the case of Matte *v.* Falkner, granted an injunction restraining the defendant from printing Nelson's Festivals and Fasts, printed in 1703, during the life of the author, who died in 1714. In 1739 Lord Hardwicke, in the case of Tonson and another *v.* Walker, otherwise Stanton, granted an injunction restraining the defendant from printing Milton's Paradise Lost, the copyright of which was assigned in 1667, or seventy-two years before. In 1752 Lord Hardwicke, in the case of Tonson *v.* Walker and Merchant, granted an injunction, restraining the defendants from printing Milton's Paradise, or Life, or Notes. All this time there had never been any solemn decision by the King's Bench as to the existence of copyright at common law, or as to how it was affected by the Statute of Anne. But the court of chancery never granted an injunction unless the legal right was clear and undisputed. If there had been any doubt about it, they would have sent it to be argued in a court of common law."

In 1769 the question came before the Court of King's Bench — the court of last resort in England except the House of Lords — in the famous case of Miller *v.* Taylor (4 Burr. 2303), and it was held — three judges in the affirmative to one in the negative — that the common law right existed. In 1774 the question again came before the Court of King's Bench in the case of Becket *v.* Donaldson (4 Burr. 2408), and it was again decreed that the common law right existed. The case was immediately appealed to the House of Lords and there the eleven judges gave their opinions on the following points:

"(1) Whether at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent?"

On this question there were eight judges in the affirmative and three in the negative.

"(2) If the author had such right originally, did the law take it away, upon his printing and publishing such book or literary composition; and might any person, afterward, reprint and sell for his own benefit such book or literary composition against the will of the author?"

This question was answered in the affirmative by four judges and in the negative by seven.

"(3) If such action would have lain at common law is it taken away by the Statute of 8 Anne, and is an author by the said statute precluded from every remedy, except on the foundation of said statute and on the terms of the conditions prescribed thereby?"

Six of the judges to five decided that the remedy must be under the statute.

"(4) Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity by the common law?"

Which question was decided in favor of the author by seven judges to four.

"(5) Whether this right is in any way impeached, restrained, or taken away by the Statute 8 Anne?"

Six to five judges decided that the right is taken away by the statute.

This decision is squarely to the effect that the common law right was in full force up to the passage of the Statute of Anne, April 10, 1710. There was a clear preponderance of judges to this effect, but it was also decided — six judges to five — that the Statute of Anne took away the common law right. Lord Mansfield, as one of the judges of the Court of King's Bench, had decided that the Statute of Anne had not taken away the common law right; as a peer he refrained from voting, through motives of delicacy; had he voted in the House of Lords the decision of the Court of King's Bench that the Statute of Anne had not taken away the common law right would have stood unreversed.

This was in 1774 and at a time when the common law was operative more or less in the American Colonies, and no reason can be seen why in an American State which has adopted the whole body of the common law, the exclusive right called copyright is not to-day in force, independently of existing statutes, for it is not likely that any State has adopted or re-enacted the Statute of Anne, already referred to.

In tracing this matter down to 1774 we come within a few years of the time when the Constitution of the United States of America was adopted, and what is found in the Constitution about authors and inventors must have been written in the light of the litigations just referred to: The clause of the Constitution which authorizes the grant of copyright and patents is to be found in Article 1, section 8.

"The Congress shall have power * * to promote the progress of science and the useful arts by securing, for limited times, to authors and inventors, the exclusive rights to their respective writings and discoveries; * * * also to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

The well-informed men who framed the Constitution could not have been ignorant of the decision of the House of Lords, for that was a famous decision of wide-spread interest and notoriety. They were framing a grant of *delegated* powers to the General Government. Even though they may have known that such of the States as fully adopted the common law adopted with it the recognition of the author's natural right, they must have known equally well that the General Government would have no common law, and that an exclusive right, bounded by the limits of a State, would be of comparatively little value.

It has been supposed that the United States Supreme Court has made some decision against the common law right. It has never made any such *decision.* The case upon which such supposition is based is that of Wheaton *v.* Peters (8 Peters, 591), decided in A. D. 1834. What it did decide is this:

"It is clear there can be no common law of the United States. * * * When therefore a common law right is asserted, we must look to the State in which the controversy originated."

The case having originated in Pennsylvania, the Supreme Court proceeds to say:

"If the common law in all its provisions has not been introduced into Pennsylvania, to what extent has it been adopted? Must not this court have some evidence on this subject?"

And it found that it had no evidence on the subject. By way of *obiter dictum* the court did say some things about the common law right. It said, for instance, that—

"The argument that a literary man is as much entitled to the product of his labor as any other member of society cannot be controverted;"

and then it proceeded to say:

"And the answer is that he realizes this product by the transfer of his manuscripts or in the sale of his works when first published."

Apply this logic to the coat-maker's wares and it follows that if the coat-maker sells one coat to A, then B, C, and all the rest, may each take a coat without paying for it.

The Supreme Court proceeded further, in this wise:

"In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? * * *

Does the common law give a perpetual right to the author and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention after he shall have sold it publicly."

This reasoning entirely overlooks a certain radical difference between inventions and writings, in that a patent for the former must necessarily cover the *idea* of the improvement, while a copyright does not, wherefore, from necessity, the inventor's natural right cannot be permitted to hold in practice, as will be more fully explained hereinafter. These considerations seem to be all that it is necessary to say about this *obiter dictum* of the Supreme Court concerning the common law right.

It is sometimes attempted to stigmatize a patent or a copyright as a monopoly. It is precisely that kind of a monopoly which a man enjoys as regards a horse or a piece of land which he owns, and in no other sense. Blackstone says that a monopoly is —

"A license or privilege whereby the subject in general is restricted from that liberty of manufacturing or trading which he *had before*."

The law dictionaries define it in the same way. A monopoly takes away from the public enjoyment of something which the public before possessed. Neither copyright nor patent does this, for neither can be applied to a thing which is not *new;* neither can be applied to anything which the public before possessed. In order to make a monopoly out of a copyright or patent, one must rest his assertion on a definition which makes the ordinary ownership of a horse or a house a monopoly.

Sometimes it has been argued that if the theory is correct that there is a natural right of property in intellectual productions, it naturally and inevitably follows that the producer or his representatives must have such right forever, and that such an extraordinary consequence demonstrates the unsoundness of the theory. Not at all. Natural right does not necessarily mean perpetual right. In all forms of society all kinds of property are held under such conditions and limitations as society deems reasonable. Under the right of eminent domain governments take private property for public use, on suitable remuneration, when public necessity and convenience demand it. In some cases private property is taken for public use without compensation, notably when a man's building is torn down to prevent the spread of a conflagration. The disposition of property by last will and testament is regulated and limited by law. In not to exceed the

term of one hundred years the entire value of almost every specific piece of property is taken from the owner by the public in the form of taxes, in return for the protection and security which society gives. It is therefore entirely reasonable that society should set a limit to the enjoyment of the natural right of property in intellectual productions.

It only remains to consider the radical difference already briefly referred to between the original writings of an author and an invention in the useful arts. Copyright gives no exclusive possession of the author's ideas; it is only the form of expression in which the author clothes his ideas that is protected by copyright; one may by long reading and study become possessed of a thorough knowledge of every principle and fact stated by any eminent author — Darwin, for instance — and if he write them out in an original dress he infringes no copyright belonging to Darwin or his representatives. No two men ever originate the same forms of expression, to any considerable extent, wherefore no such difficulty about the allowance of the exercise of the natural right can ever arise as has arisen already with reference to inventions in the useful arts. A patent for a new and useful invention (a machine, for instance) covers not only the precise mechanism in which the inventor embodies the principle of his improvement, but it also covers, and that necessarily, all the equivalents thereof, for otherwise a patent would give nothing in the semblance of protection. In other words, a patent covers the inventor's idea, while a copyright never does. Experience has shown that the same mechanical ideas are originated over and over again, by one inventor after another. We have seen that the foundation of the natural right is based upon the fact that the thing to which it pertains is made by the producer out of materials belonging to no one else. Each original inventor of an improvement in the useful arts has therefore precisely the same kind of a title to the exclusive enjoyment thereof, a subsequent inventor just as much as an earlier inventor, but since there can be no such thing as two exclusive rights to the same thing, it cannot be permitted to either. This is by no means a mere fanciful speculation. During the year ending June 30, 1891, which is like other years in this regard, there were forty thousand applications made to the United States Patent Office for patents for inventions, and fifteen thousand of them were rejected, nearly all of these rejections being based upon the fact that the improvement forming the subject-matter of these applications was not new, although each of them

was original with the person who made the application, and he made such application not knowing that the same thing had been invented before.

As Judge Shepley said (1 Holmes, 503):

> "If to-day you should invent an art, a process, or a machine, you have no right at common law nor any absolute natural right to that for seven, ten, fourteen, or any given number of years, against him who invents it to-morrow, without any knowledge of your invention, and thus cut me and everybody else off from the right to do to-morrow what you have done to-day."

Judge Shepley stated the right conclusion, but he omitted to say that while the exclusive natural right to an invention is a correct thing in theory, its exercise is suppressed through necessity.