REMARKS ON THE LAW OF LITERARY PROPERTY IN DIFFERENT COUNTRIES, AND THE PRINCIPLES ON WHICH IT IS FOUNDED

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BY

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"Proputty, proputty, proputty—that's what I 'ears 'em saäy—"
TENNYSON.—*Northern Farmer, New Style.*

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THE LAW OF LITERARY PROPERTY

IN DIFFERENT COUNTRIES,

AND THE PRINCIPLES ON WHICH IT IS FOUNDED.

I.

The question what are the principles which ought to regulate the law of property in literary compositions may be approached from one of two standpoints, and accordingly as one or the other of these is adopted, so will the method appropriate to it be applied to the solution of the problem.

If literary property constitutes a class by itself, the settlement of the vexed questions which hang round the subject of copyright must be attempted by confining the attention to the persons immediately affected, any analogies afforded by property in other things being rejected as misleading, or at best inapplicable to the endeavour fairly to adjust the competing claims of authors and book buyers. If on the other hand literary property is a species of the genus "Property," then copyright is simply a particular case of ownership in general, and we must endeavour to apply considerations of the same sort to authors which apply to owners of other property; and if the principles which ought to regulate the law of property in general are known, the law which ought to regulate copyright may be deduced from them.

The first question which arises, therefore, is whether the

term " literary property " is correct ;—in other words, does the word " property " in that phrase really stand for property, or is it only used by way of a remote and fanciful analogy ?

To answer this we must go a step further, and ask what is the differentia of property in general, and does literary property possess it.

According to one view, and that, no doubt, the popular one, " property" is some *thing* which the owner has a right to use ; a notion which finds its expression in the question-begging interrogatory, " May I not do what I like with my own ? "

Strictly speaking, however, " property" is the right which the owner enjoys, and the thing owned is the subject matter of property. Jurisprudential analysis makes it clear that there are no such things as rights, save as the result of duties, and in this view property consists of the sum of the remedies which the law (if we are talking of legal property) gives the owner to restrain other people from any violation of their duties with respect to the thing owned.

But is a man's mere right to use something, in other words, the mere duty laid on the rest of the world to abstain from molesting him when he is using it, enough to warrant us in saying that he has a right of property in that thing ?

There are some things which every one has the right to use. Such are the sea or a navigable tidal river for fishing, a highway, or an expired patent. Such things, though often spoken of as " common property," are not strictly the subject matter of rights of property, or, as we say in common parlance, though it is an ellipsis which sometimes leads to confusion, they are not property at all.

Something then besides the right to use, is required to

constitute ownership. If the first notion generally excited by the word "property" is expressed in the phrase, "May I not do what I like with my own?" not far behind it lies the notion, "No one shall touch my property without my leave," and this last notion an owner will often push to an unwarrantable length, becoming the victim of an insidious fallacy which runs as follows:—

(1.) Because the law prevents other people dealing with subject matter X in modes A.B.C. I call X mine.

(2.) Because X is mine I am entitled to prevent other people dealing with it in modes E.F.G., &c., to the end of the alphabet.

But apart from this exaggeration, this popular notion goes to the root of the matter. It is not the owner's right but the owner's *exclusive* right to use the subject matter which constitutes his property in it, and the owner's exclusive right is only another expression for the compulsion laid on every one else to abstain from using it, it may be by positive law, or the fear of punishment at the hands of the State if a legal duty is violated, or it may be by the moral compulsion exercised by the prevailing sentiment of the community, or it may be by the dictates of his own conscience, or by fear of the consequences of sin.

It is not difficult to see how the popular notion which identifies ownership with the right of using the thing has sprung up. In the cases where it is physically possible for a number of people to be using the subject concurrently, the duty of each to abstain from interfering with his neighbour's enjoyment will suffice to ensure to each the actual opportunity; but it is otherwise in the large and striking class of cases where the subject matter is monopolised or consumed by use. In such cases evidently

the man who has the exclusive right of using will be the only man who can rely upon having the physical opportunity of doing so. My power of eating my cake to-morrow will depend on the duty of other people to abstain from eating it to-day. Assuming a tract of land answering to the popular but incorrect notion of an English common, my mere right is enough to ensure me the actual enjoyment of walking there whenever I feel inclined, but with respect to any wild fruits that may grow there my mere right to gather them is not enough to ensure me the actual enjoyment of them if I do not happen to be the first comer. No doubt the earliest subjects of property were things which were consumed or necessarily monopolised in the act of using, such as the hunter's weapons or the spoils of the chase. It was observed as a matter of fact that with respect to such things the owner only had the physical opportunity of using them; this practical result overshadowed and usurped the name of its juridical cause, the right of the owner to compel others to abstain; and then it seems to have been assumed that the physical opportunity of using must always be co-extensive with the right, and so the two notions got confused together.

With the economic progress of society the number of things which are common property (so-called) continually decreases. Exclusive rights acquire a money value, and it becomes worth while to enforce prohibitions which in an earlier stage of society it was not worth while to enforce. Interests arise which clamour loudly for legal recognition, or claim legal protection as their due. The tendency is strong to grant what seems to be a boon to definitely ascertainable people, while the *locus standi* of the public to object is hardly admitted.* When the waste land

* A good example is afforded by the demand for indefeasibility of title to words, &c., registered as trade-marks, that is to say to prevent manufacturers at

surrounding the old Teutonic village was allotted in severalty it became the property of the cultivator, and others lost their liberty of having recourse to it. In the three mile belt of sea surrounding the English coast, from which foreign fishermen are excluded, we see to-day the intermediate stage in which a thing is the subject matter of property as between State and State, but common to all the subjects of the owning State.

The supposed antithesis between liberty and *order* has been a fertile theme, but our analysis suggests the existence of an antithesis between liberty and *property*. Property consists in restrictions laid upon the natural liberty of all the world, except the owner, of dealing with the thing owned. In this restriction of liberty we find the essential characteristic of property of which we were in search. Literary property, then,which consists in restrictions on the liberty of every one except the owner to multiply copies of his book is rightly so-called, and not merely by way of a fanciful analogy, and the rights of authors ought to be regulated by the same principles as the rights of other owners.

This is just the principle invoked by those who put the claims of authors highest, and they appear to found on it a claim to perpetual and universal copyright, but does this result necessarily follow ?

It is difficult to see any argument for perpetual restriction on the right of multiplying copies of an author's book, on the ground of the abstract rights of authors to literary property, which would not be equally good as an

large describing their goods by registered words even though they may turn out to be descriptive words in common use heretofore.

It is not questioned that such words might get upon the register in spite of the scrutiny of the registrars and the watchfulness of interested traders ;—but it is strangely contended that it is as absurd to deny indefeasibility on this ground as it would be to impose a protective duty for the sake of two or three producers.—(MR. ARTHUR ARNOLD'S letter in the *Times* of March 17, 1883.)