A

LETTER*

FROM

AN AUTHOR,

TO

A MEMBER OF PARLIAMENT;

CONCERNING

LITERARY PROPERTY.

1747.

SIR,

IT seemeth to me an odd circumstance, that, amidst the justest and safest establishment of PROPERTY, which the best form of government is capable of procuring, there should yet be one species of it belonging to an order of men, who have been generally esteemed the greatest ornament, and, certainly, are not the least support of civil policy, to which little or no regard hath been hitherto paid. I mean, the *right of property* in AUTHORS to their *works*. And surely if there be *degrees of right*, that of *Authors* seemeth to have the advantage over most others; their property being, in the truest sense, their *own*, as acquired by a long and painful exercise of that very faculty which denominateth us MEN: And

* The following information, communicated by a friend, may be acceptable to the reader. *R. W.*

"The question, discussed in this letter, came afterwards before the Court of King's Bench in the case of Millar *versus* Taylor: And, on Feb. 7, 1769, that Court gave judgment in favour of the perpetual and exclusive right of an Author, by the common law, to print and publish his own works. The question was revived in the case of Donaldson *versus* Becket; which came before the Court of Chancery. The Lord Chancellor decreed in conformity to the opinion of the Court of King's Bench. But, upon an appeal from this decree, it was reversed by the House of Lords on the 22d of February, 1774."

And if there be *degrees of security* for its enjoyment, here again they appear to have the fairest claim, as *fortune* hath been long in confederacy with *ignorance*, to stop up their way to every other kind of acquisition.

History indeed informeth us, that there was a time, when men in public stations thought it the duty of their office to encourage letters: and when those rewards, which the wisdom of the Legislature had established for the learned in that profession deemed more immediately useful to society, were carefully distributed amongst the most deserving. While this system lasted, *Authors* had the less occasion to be anxious about literary property; which was, perhaps, the reason why the settlement of it was so long neglected, that at length it became a question, whether they had any property at all.

But this fond regard to learning being only an indulgence to its infant age; a favour, which, in these happy times of its maturity, many reasons of state have induced the public wisdom to withdraw; *letters* are now left, like *virtue*, to be their own reward. We may surely then be permitted to expect that so slender a pittance should, at least, be well secured from rapine and depredation.

Yet so great is the vulgar prejudice, against an *author*'s property, that when, at any time, attempts have been made to support it, against the most flagrant acts of robbery and injustice, it was never thought prudent to demand the public protection as a *right*, but to supplicate it as a *grace*: and this, too, in order to engage a favourable attention, conveyed under every insinuating circumstance of address; such as promoting the paper manufactory at home; or augmenting the revenue, by that which is imported from abroad.

The grounds of this prejudice are various. It hath been partly owing to the complaints of unsuccessful writers against booksellers, for not bringing their works to a *second edition*; and partly, to the complaints of little readers against successful ones, for a contrary cause; when, to the great damage of the purchasers of the *first* edition, they have fraudulently improved a *second*. For the proprietor professing to sell only his paper and print, and not the doctrine conveyed by it; the purchaser, who has nothing else for his money, never reckons (and often with

with good reason) his improvement for any thing. So that when a *second* edition lesseneth the price of the *first*, he very naturally thinks himself tricked of his money.

Another ground of prejudice, is the unfair advantage made of the author's property, by booksellers: which, if true, would be just as good a reason for refusing him the public protection, as it would be to turn all those estates upon the common, which one of your *Peter Walters* has out at nurse. For why should it be expected of an author, and of no one else, to become sage before he be entrusted with his own? Let him but share in the common security, and he will soon learn the value of property, and how to use it like his neighbours. As it is, we need not wonder, he should be disposed to part with that, for little, which he is unable to preserve but at great hazard and expence.

A third ground of prejudice is the odious sound of the word MONOPOLY. But this is taking the thing in question for granted, *viz.* that an author hath no right of property: for a *monopoly* is an exclusive *privilege* by *grant* of doing that, which all men have a claim to do; not an exclusive *right* by *nature* of enjoying what no one else has a claim to. So that to make this a monopoly, is making a *proprietor* and a *monopolist* the same.

A fourth ground of prejudice is the favourite sound of LIBERTY, in these times commonly used for LICENTIOUSNESS; and apparently so on this occasion. For *liberty* signifies the power of doing what one will with one's own; which is the *right* we here contend for: and *licentiousness* the doing what we will with another man's; which is the *wrong* we seek to redress. So that, as sure as *licentiousness* destroys *liberty*, so certain is it, that the protection of the *right* in question adds strength and vigour to it.

But it is not my design to defend the *use* men *make* of property; but to vindicate the *right* they *have* in it. For were it not for these *prejudices*, could we easily think that a printseller or engraver should be able to obtain that for his baubles, which LEARNING hath so long sued for in vain? I shall therefore go to the bottom of *them*; and, as they all support themselves on the

 false

false logic here detected, *the taking the thing in question for granted*, I shall shew, that an author has an undoubted right of property in his works.

Things susceptible of PROPERTY must have these two essential conditions; that they be *useful* to mankind; and that they be capable of having their possession *ascertained*. Without the *first*, society will not be obliged to take the *right* under its protection; and, without the *second*, it will never venture upon the trouble.

Of these, some are *movable*, as goods; some *immovable*, as lands: and they become property either by first *occupancy*, or by *improvement*.

Of *movables*, some are things *natural*; others, things *artificial*. Property in the first is gained by occupancy; in the latter, by improvement.

Movable property, arising from improvement, is of two sorts; the product of the *hand*, and of the *mind*; as an *utensil* made; a *book* composed. For that the product of the *mind* is as well capable of becoming property, as that of the *hand*, is evident from hence, that it hath in it those two essential conditions, which, by the allowance of all writers of laws, make things susceptible of property; namely, common *utility*, and a capacity of having its possession *ascertained*.

Both these sort of things, therefore, being capable of property, we are next to consider, as they are so different in their *natures*, whether there be not as great a difference in the *extension of their rights*.

In the first case, then, it is agreed, that property in the product of the hand, as in an utensil, is confined to the individual thing made; which, if the proprietor thinks not fit to hide, others may make the like in imitation of it; and thereby acquire the same property in their *manual work*, which he hath done in his.

But, in the other case of property in the product of the mind, as in a *book* composed, it is not confined to the original MS. but extends to the *doctrine* contained in it; which is, indeed, the true and peculiar property in a book. The necessary consequence of which is, that the owner hath an exclusive right of transcribing or printing it for gain or profit.

This

This *difference*, in these *two sorts* of property, arises from an equal difference in the *things:* as will appear by considering the *different nature of the works*; and the *different views of the operators.*

With regard to the *nature of the work:* an *utensil*; and a *book* only considered as a composition of paper, and ink drawn out in artificial characters, are both works of the *hand*; and, as such, the property is confined to the individual thing. But a *book* considered merely in this light, is considered inadequately and unjustly; the complete idea of a book being such a composition as is here spoken of, together with a *doctrine contained.* But under this idea it assumes another nature, and becomes a *work of the mind.* We have proved a work of the *mind* to be susceptible of property, like that of the hand. Now if the property in a *book* be confined to the individual volume, here is a work of the *mind* executed without any property annexed: the property in the *individual* volume, arising from its being *merely* the work of the *hand.* A doctrine *absurd in speculation*, as it is making manual and mental operation one and the same, which are two distinct and different things: and *unjust in practice*, as it depriveth the owner of a right annexed by nature to his labour. Again, in the *utensil* made, the principal expense is in the *materials employed*; which, whoever furnisheth, reasonably acquires a property in the thing made, though made by imitation. On the contrary, in a *book* composed, the principal expence is in the *form* given: which as the original maker only can supply, it is but reasonable, how greatly soever the copies of his work may be multiplied, that they be multiplied to his own exclusive profit.

Let us next consider it, with regard to the *different views of the operators.* He who makes an utensil, in imitation of another he sees made, must necessarily work with the same ideas the original operator had, and so fitly acquires a property in the work of his own hands. But the most learned book in the world may be copied by one who hath no ideas at all. What pretence, then, hath such a one to property, in a work of the *mind*, who hath employed, in copying it, only the labour of the

hand;

hand; and which tends but to make his theft the more impudent, as he steals what he doth not understand?—*Again*, in an utensil made, the framer of it hath plainly no regard to any one's benefit but his own: and he must finish it before it can be fitted for his use. His end, then, being obtained in that individual piece of work, it is but reasonable his property should there terminate. In a mental work, the thing turns the other way. Here the contriver may himself enjoy all the fruits of his discoveries without drawing them out scholastically in form. When he doth this, it is but candid to suppose that it is done for the benefit of others. Can any thing, therefore, be more just than that he should be owned and protected in a property, which he hath not merely acquired to himself, but which is generously objective to the benefit of others?

In a word, to insist once again upon what hath been said.—If an *author* have only a property in his individual manuscript, he hath, truly speaking, no property, in his book, at all; that is, as his book is a work of the mind; which, in this case, still lies *in common*. The consequence is, (as appears from the explanation of property given above) *that no property ariseth from a thing susceptible of property*: nay, which is still more absurd, *from a thing actually become property*; as being attended with all those essential conditions from whence property ariseth. To deny an author, therefore, or his assigns, an exclusive privilege to print and vend his own work, seemeth to be a violation of one of the most fundamental rights of civil society.

But here let it be observed, that, in our division of *artificial movables*, into the *two* sorts, of *manual* and *mental*, we purposely omitted a *third*, of a complicated nature, which holds of both the other in common; as reserving it for this place, to support and illustrate what hath been said above of the two more simple kinds: and that is, of *mechanic engines*. Now these partaking so essentially of the nature of *manual* works, the maker hath no *perfect* right of property in the *invention*—For, like a common utensil, it must be finished before it can be of use to himself; like that, its materials are its principal expence; and like that, a successful imitator

must

must work with the ideas of the first inventor: which are all reasons why the property should terminate in the individual machine. Yet because the operation of the mind is so intimately concerned in the construction of these works, their powers being effected and regulated by the right application of geometric science, all states have concurred in giving the inventors of them a licence of monopoly, for a term of years, as on a claim of right. Now the reason of this, we say, can be explained only on the principles here advanced, that the constructor of a piece of mechanism hath his property confined to the individual thing made; and the composer of a scholastic work hath *his*, extended to the ideal discourse itself. And a mathematical machine holding of the nature of both, but more essentially of the former, there was no way of adjusting and satisfying an *imperfect right* but by such a grant as is here mentioned.

But it is no unfrequent practice for the claimants of a *perfect right* to apply to the magistrate, or Legislature, for the better *security* of *an acquired* property, in the same manner that claimants of an *imperfect right* do, *to acquire* property: sometimes, to the one for a *licence*; and sometimes, to the other for an *Act of Parliament*. Yet from thence to conclude, that the claimants of a *perfect right* have, by such application, waved or given up their claim; or that the magistrate or Legislature have, by their *licences* or *acts* of exclusive privilege for a certain time, either abridged or superseded that claim, appears, to me, the highest absurdity; as it will, I am persuaded, to others, on reflecting upon the plain and obvious reasons why the petitioners *seek* this additional security, for the enjoyment of a natural right; and why the magistrate and Legislature *grant* it only for a certain term of years.

In the common administration of justice, the way, in use, to restrain the invasion of property, is to oblige the offender to repair the damages sustained. Now such is the nature of the property in question, that it may be long invaded before the sufferer can discover the offender: so that such a one having a fair chance not to be detected; and if detected, a certainty of refunding only what he hath unjustly gained; bad men will have but too great encouragement to invade their neighbours'

property,

property. Therefore, to counteract this undue temptation, it was natural for such proprietors, in their own defence, to apply to the state for additional and accumulative penalties against the invaders of their right. In which, they act but as the State itself doth for the security of Government in general; when, for the support of that natural *allegiance*, which all men owe to the society under which they chuse to live, and whereby they are protected, *it* addeth, by *positive* laws, the additional sanction of oaths, and other solemn engagements. Now if the *State*, in this case, can never be supposed to have waved or superseded its natural claim to allegiance, and to rest it solely on the oaths taken, or the engagements made; what reason have we to think that the subject, in his turn, when he applies to the State for *protection*, in the instance in question, should give up or impeach his natural right, while his only purpose is to seek additional security for the enjoyment of it?

This leadeth us to our second question, Why the Magistrate and Legislature *restrain* this additional sanction to a certain term of years. And the reason is evident. The petitioners neither require more; nor doth the State find, that more is needed. The great temptation to invade this property being while the demand for it is great and, frequent; which is, generally, on the first publication of a book, and some few years afterwards. While this demand continueth, the proprietor hath need of all additional sanctions, to oppose to the force of the temptation: But when, in course of years, the demand abateth, and, with it, the temptation; the common legal security of natural rights is then sufficient to keep offenders in order.

However, as clear and undoubted a property as this is by nature, and the common principles of society, it cannot be denied, but that the Legislature may abridge, suspend, or abrogate it within its own jurisdiction, as it is accustomed to do with several other the like rights, for the sake of the whole. But, then, it must be done by *express* declaration and decree: implication, inference, or any mere law-consequence, or even a mistake of judgment in the Legislature, going on a supposition that there was no natural right where indeed there was, would

be,

be, simply, insufficient to abrogate it. And the reason is plain, because the *believing* a thing to be no natural right, doth not infer a *judgment*, that the enjoyment of it, as such, would be hurtful to the Society; which judgment is the only cause of the Legislature's abridging or abrogating a natural right.

This was necessary to premise, in order to set a case in its true light, which hath, above all others, encouraged the invasion of property; though the *Act*, from whence it arises, was solely contrived to prevent that invasion. I mean the Act of the Eighth of Queen *Anne*; which ignorance and knavery have concurred to represent as a *restrictive*, and not *accumulative* law; and consequently, to suppose it *the sole foundation*, instead of *an additional support*, of literary property. It is intitled, *An Act for the Encouragement of Learning*; in which an exclusive right of property, under certain conditions, is secured, by particular penalties, to authors, and booksellers claiming under them, for the term of one and twenty years.

Now in this Act, we are so far from finding any *declaration* to abridge, suspend, or abrogate this natural right (which, as we say, *would be* indeed sufficient to dissolve it) or any *expression intimating the opinion* of the Legislature against its existence (which, as we say, *would not be* sufficient); that, on the contrary, there is in the preamble of it, an *expression* plainly declarative of their opinion, that authors had a right, prior to this Act; and, towards the conclusion, a *proviso*, which leaves the question of the right, free from, and undetermined by, what is, in this statute, enacted concerning property.

The *expression* is this,—**Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, Books, and other Writings, without the Consent of the Authors or PROPRIETORS of such Books or Writings, to their very great Detriment, and too often to the Ruin of them and their Families,** *&c.*—Now, could the injured parties, here mentioned, be *proprietors* of that in which they had no property?

Or

Or did the Legislature, in a law for the regulation of so momentous a branch of what was deemed and claimed as *property*, use the terms of the subject in question inaccurately or unfitly? If it were possible to think so of a *British* Legislature, the supposition would be excluded *here*; because, not only the *expression*, but the *sentiment*, necessarily supposes that they used the word PROPRIETORS in its strict and and exact signification: it being a representation of the bad effects from the liberty taken of printing and reprinting books, without the consent of the authors, or their assigns.

The *proviso*, in the conclusion, is in these words:—**Provided that nothing in this Act contained shall extend, or be construed to extend, either to PREJUDICE OR CONFIRM any RIGHT that the said Universities, or any of them, or any PERSON or Persons have, or claim to have, to the Printing or reprinting any Book or Copy already printed or HEREAFTER TO BE PRINTED**——Now, though it may be easily granted, that one purpose of this *proviso* was to leave undecided all claims, or pretences of claim, to exclusive printing, from patents, licenses, *&c.* yet the large wording of it appears to have a particular aim at obviating such misconstruction of the Statute, as if the additional temporary security, thereby given, either implied that there was no right of property before, or else abrogated what it found. And the having these two things in its intention, *viz.* the *natural right*, and that which is *founded on patents*, seems to be the reason of its saying that it neither PREJUDICED NOR CONFIRMED: It being unjust to *prejudice* a plain *natural right*; and inexpedient to *confirm* an unexamined claim by *patent*. For what the Legislature's sense was of this *natural right*, appears from what hath been observed of their use of the word *proprietors*, in the preamble.

But lastly, in cases where the sense of the Legislature is uncertain or obscure, There the interpretation of the supreme Magistrates of Justice hath been always deemed to have the force of a legal decision. And this decision hath been made in favour of property, on the *Act* in question. For, in the High Court of Chancery, actions for damages have been sustained, where the action for forfeiture

forfeiture and penalties on this statute was not competent in any other Court: Which shews, that that great Magistrate did not consider this *Act* as a *restrictive*, but as an *accumulative* law. It being a rule, that *positive correctory laws* are to be *strictly* interpreted. For in every civil society, experience shews, that the subject, in many cases, must be put under restraint with regard to things in themselves lawful, merely because of the bad consequences, to the public, by the abuse of liberty. But, in all such *restrictive* laws, right reason, at the same time, forbids these laws to be extended, in the smallest particular, beyond the letter of the Act. To do otherwise would be abridging liberty, without authority of law, which is the same thing with private violence. This plainly shews the judgment of the High Court of *Chancery* to be, that there was a right of property previous to the Statute; which the Statute had neither abrogated nor abridged; and, on that right, the action was sustained, where the action for forfeiture and penalties was not competent. For an additional security of property, made for the benefit, and at the request of the proprietors, can never be deemed to exclude them from having recourse, at pleasure, to that legal remedy, which, on the common principles of a Court of Equity, they had a claim to, prior to the grant of such additional security.

All this laid together, it seems abundantly evident, that no right is taken away by this *Act*, which authors, or their assigns, had before the making of it. And consequently that it is no *restrictive*, but an *accumulative* law, brought in aid of a *natural* right, whose reality I have here endeavoured to support.

But now, Sir. when I consider to whom I have addressed these reflections, I find myself in the foolish situation of that old *Greek* Sophist, who would needs entertain *Hannibal* with a lecture on the art of war. And if my impertinence escape his censure, I shall be indebted only to your distinguished character of politeness, and general candour, as well as to your known partiality and friendship for the Author: For I have ventured to give my thoughts on a question of law, before One, to

whose

whose superior eminence in that profession, we see joined a force of reason and splendor of eloquence, which make truth reverenced by those it detects; and justice amiable even to those it punishes. But where should an *author* turn, if not to him who hath, on all occasions, so generously lent his ministry to the support and protection of letters, whenever they have been reduced to apply to justice for relief; and to whose successful patronage they are principally indebted for that share of security which they, at present, enjoy? For (to conclude my application to you, in behalf of learning, with the words of your favourite AUTHOR) "Non causidicum nescio "quem, neque proclamatorem, aut rabulam conquirimus, "sed eum virum qui primum sit ejus artis antistes: Qui "scelus fraudemque nocentis possit dicendo subjicere "odio civium, supplicioque constringere; idemque in-"genii præsidio, innocentiam judiciorum pœna liberare; "idemque languentem labentemque populum aut ad "decus excitare, aut ab errore deducere, aut inflammare "in improbos, aut incitatam in bonos, mitigare."

I am, &c.