THE

CASES

OF THE

APPELLANTS *and* RESPONDENTS

IN THE CAUSE OF

Literary Property,

BEFORE THE

HOUSE of LORDS:

WHEREIN

The Decree of Lord Chancellor APSLEY was reverſed, 26 Feb. 1774.

WITH

The genuine ARGUMENTS of the COUNCIL, the OPINIONS of the JUDGES, and the SPEECHES of the LORDS, who diſtinguiſhed themſelves on that Occaſion.

With NOTES, OBSERVATIONS, and REFERENCES.

By a GENTLEMAN of the INNER TEMPLE.

LONDON:

Printed for J. BEW, Pater-noſter-Row; W. CLARKE, oppoſite Lincoln's Inn Gate, Lincoln's Inn Fields; P. BRETT, oppoſite St. Clement's Church, in the Strand; and C. WILKIN, Orange-Street, Red-Lion-Square.

M.DCC.LXXIV.

PREFACE.

THE ſhrewd Remark of the School Boy, on his being reprimanded for ſtealing the Old Woman's Gingerbread *Letters*, viz. *that he underſtood, that the ſupreme Judicature of* Great Britain *had lately determined that* lettered *Property was common*; though related of a School Boy, would not, in my Opinion, diſgrace the firſt Abilities; for it is obſervable, that there is no ſuch Epithet as *literary*, in the *Engliſh* Language, but *lettered* is to be found, and is always uſed in the Senſe, and applied for the Purpoſe of expreſſing the ſelf ſame Meaning, the Schoolboy wiſhed to convey, when he made the above Obſervation. So that *lettered Property*, and not *literary Property*, ſeems to be the Subject Matter of the following Sheets.

I preſume the Reader will require no Apology for this Publication, as the following Arguments, Opinions, and Speeches, are confeſſedly the moſt intereſting and able that have been delivered either in the Houſe of Lords, or in *Weſtminſter* Hall, ſince the Statute of Queen *Anne*. Their Subject is of ſpecial Concernment to the Gentlemen of the Profeſſion, and to all thoſe who are any ways concerned in *lettered* Productions, or deſirous of reading ſome of the beſt Arguments, Opinions, and Speeches, delivered by the greateſt Men, the firſt Lawyers and Statesmen in this Country, on the Definition of a moſt difficult and important Queſtion.

The Reader will find an incredible Fund of Learning and Knowledge; and among other intereſting and able Diſquiſitions, the following ones are moſt learnedly debated, viz. the Hiſtory of the Statute of the 8th of Queen *Anne*; the Hiſtory of Injunctions, relative to *lettered* Property; the

general Rules of Law for the Conſtruction of the legal Senſe of the Term private Property; which is alſo defined philoſophically, and conſidered in the ſeparate Lights of being corporeal and ſpiritual; the Nature of Patents, Privileges, and Grants of the Crown are minutely entered into; and theſe ſeveral Inquiries are embelliſhed with great (1) Elegance and Force of Language, and illuſtrated with many appoſite and judicious Obſervations.

This Deciſion of the Lords hath very conſiderably ſhaken the Law (2) Patent, and reduced its *excluſive* Right to print, within the *incluſive* Compaſs of a Nut-ſhell; much to the Honor and Intereſts of the Profeſſion; the Works of (3) *Shakeſpeare*, of *Addiſon*, *Pope*, *Swift*, *Gay*, and many other excellent Authors of the preſent Century, are, by this Reverſal, declared to be the Property of any Perſon, who chuſes to be at the Expence of Paper and Print.

It would have been tedious and tautologous, to have repeated the Arguments of the Council, or the Caſes and Authorities cited by them, as they are all of them ſo very fully and amply ſet forth, and ſo elaborately expatiated upon, canvaſſed, and diſcuſſed, not only by the Appellants, in their printed Caſe; but alſo by the Judges in their Opinions; together with the Reaſons, whereon they were founded.

We have made ſeveral Extracts from *Catharine Macaulay*'s "Modeſt Plea for Copy Right;" and alſo tranſcribed Lord *Kames*'s (4) ſenſible Opinion, on the Statute of the 8th of Queen *Anne*.

(1) It ſeems almoſt unneceſſary to intimate to the Reader, that we, in the above Obſervation, particularly allude to Lord *Camden*'s Speech.
(2) See Baron *Eyre*'s Opinion, Fol. 34. Lord *Camden*'s Speech, Fol. 50.
(3) Id. 35.
(4) See End of Appendix.

Lord

PREFACE.

Lord *Camden*'s Speech is elegant and forcible, in reſpect to Language; and contains the ſoundeſt Doctrine with reſpect to Law, Equity, and Juſtice.

The Opinion of Mr. Baron *Eyre* is delivered with the Erudition of a Scholar, the Acuteneſs of an able Lawyer, and the Accuracy of a ſound Reaſoner.

Though Lord *Mansfield* declined ſpeaking to the Queſtion in the Houſe, and though Mr. Juſtice *Yates* had not an Opportunity of delivering his Opinion there; yet as the former hath, been pleaſed to ſignify his Sentiments elſewhere, and the latter too, on the ſame Queſtion, and as they differed in Opinion we wiſh to mention them both on this Occaſion.

Sir *James* (5) *Burrow* obſerves, "that except in this Caſe of *lettered Property*, and of *Perrin* v. *Blake*, then (6) depending by Writ of Error, in the Houſe of Lords, wherein Mr. Juſtice *Yates* differed with the other three Judges, every Rule, Order, Judgment, and Opinion had, been (as far as Sir *James* could recollect) unanimous."

Sir *James* (5) alſo obſerves, that ſuch Unanimity "gives Weight and Diſpatch to the Deciſions, Certainty to the Law, and infinite Satisfaction to the Suitors."

And we, in our Turn, beg Leave to obſerve, that the two only Caſes, wherein the Judges of the Court of *King's Bench* differed in Opinion, have both ſince been determined agreeable to the Opinion of the diſſenting Judge, the late Mr. Juſtice *Yates*; and we beg Leave alſo to obſerve further, that

(5) *Bur.* Lit. Prop. 112.

(6) However ſingular the Opinion of Judge *Yates* was in the *Court of King's Bench*, it afterwards appeared, that the Majority of the Judges in the *Exchequer* Chamber, were influenced by his ſtrict Attachment to eſtabliſhed Rules of Law; and accordingly reverſed that unprecedented Deciſion of the Court of *King's Bench*, and thereby reſtored the venerable Train of preceding uniform Judgments, upon the ſame Point, to its former Authority.

the

the Court of *King's Bench*, in their Judgment in *Perrin* v. *Blake*, in a liberal Spirit ſoared above *nugatory* Refinements, and *ſenſeleſs* Diſtinctions, ariſing from *the ſtrict Letter of the Law*; and laughed at thoſe Reſtrictions, by which a Court of Equity eſteems itſelf bounden; and that Judge *Yates*, from an *illiberal* Habit of Attachment to eſtabliſhed Laws, was of a direct contrary Opinion; but his *antiquated* Arguments were eaſily anſwered, by the Court's obſerving, that there were Lawyers of a different *Bent of Genius* and *Mode of Education* (from that Part of the Bench, which concurred in the Judgment) who choſe to adhere *to the ſtrict Letter of the Law*.

Perhaps, when theſe ſpecial Circumſtances, attending this Difference of Opinion, are maturely conſidered, the boaſted Unanimity of the Court of *King's Bench*, may not have always been happy in its Conſequences to the Suitors of *that* Court.

In reporting the Arguments of the Council, I have not ſcrupulouſly followed the Style and Method of the Speaker; I hope, however, the Reader will do me the Juſtice to believe, that the *Subſtance* of what was delivered, is faithfully reported; but oftentimes in my own Words; Every Defect therefore in Point of Method or Expreſſion, which the Reader meets with, I alone am anſwerable for; though I flatter myſelf the learned Gentlemen, whoſe Sentiments I have thus delivered, will not often find themſelves or their Characters, greatly wronged in that Reſpect.

I do moſt humbly beg Pardon of the Lords and the Judges, for innumerable Injuries I muſt have done them, as to *Language* and Argument. I did not take my Notes in ſhort Hand; I watched the *Senſe*, rather than the *Words*; and therefore may often uſe ſome of my own: not being bleſſed with the quickeſt natural Parts, I may have miſapprehended

Topics

Topics and Allufions; I may have made Blunders in the Senſe, by endeavouring to rectify thoſe of my Pen; theſe are Imperfections which Diligence could not cure. I am only concerned, leſt my Errors ſhould be imputed, not to myſelf, but to thoſe able and illuſtrious Lords and Judges, whoſe Diſcourſes, I may happen (through my own Infirmities) to have miſrepreſented.

As the ſame Arguments were uſed, and the ſame Grounds gone on, in this Appeal, as in the Cauſe of *Millar* v. *Taylor*, we beg Leave to recommend to the Reader, an attentive Peruſal of "The Queſtion concerning *literary Property*, publiſhed by Sir *James Burrow*, in Quarto, A. D. 1773," wherein he will find the ſeparate Opinions of the four Judges; and the Reaſons given by each, in Support of his Opinion. The very able Argument of *Arthur Murphy*, Eſq; who was Council for the Defendant in the ſaid Cauſe, is alſo moſt worthy of Peruſal; which Argument he delivered in the Court of *King's Bench*, *7 June* 1768. And as this ſame Queſtion hath undergone the Inveſtigation of the Lords of Seſſion, in *Scotland*, in the Cauſe of *Hinton* v. *Donaldſon & al.* we wiſh the Reader to peruſe the able and judicious Arguments and Opinions, delivered by the Council and Lords, in that Kingdom, on that Occaſion; which are all to be found, and well taken, by *James Boſwell*, Eſq; one of the Council in the Cauſe; they were publiſhed in *London* and *Edinburgh*, in Quarto, in the Year 1774.

The ingenious Argument of *Francis Hargrave*, Eſq; one of the Council for the Defendants in *Chancery*, in the Cauſe of *Becket & al.* v. *Donaldſon* and another, and which Mr. *Hargrave* favoured the Public with in Print, not having an Opportunity of

of delivering it in the *proper* and *regular* Manner, which well deſerves the Notice of the curious Reader.

To conclude. Mrs. *Macaulay* obſerves, that "if ſome poſitive Law does not lend its Aid to the Support of the tottering State of Literature in this Country, this Deciſion will be a more mortal Stab to the Freedom, Virtue, Religion, and Morals of the People of *England*, than the unthinking Multitude in general at preſent apprehend." *Quere.*

CONTENTS.

In Favour of the COMMON LAW *lettered* PROPERTY.	Page
1. Lord *Lyttleton.*	55
2. Lord Chief Baron *Smythe.*	43
3. Mr. Juſtice *Aſton.*	39
4. Mr. Juſtice *Willes.*	38
5. Mr. Juſtice *Blackſtone.*	36
6. Mr. Juſtice *Aſhhurſt.*	35
AND	
7. Mr. Juſtice *Nares.*	35

In Favour of the STATUTE LAW *lettered* PROPERTY.	Page
1. Lord Chancellor.	55
2. Lord *Camden.*	48
3. Biſhop of *Carliſle.*	56
4. Lord Chief Juſtice *De Grey.*	44
5. Mr. Baron *Adams.*	43
6. Mr. Juſtice *Gould.*	42
7. Mr. Baron *Perrott.*	40
AND	
8. Mr. Baron *Eyre.*	31

ERRATA.

Page 20, for *cur*, read *one*. Page 28, for *Vac.* read *Term.* Page 36, for *in like Manner as*, read *and was of the ſame Opinon with*. Page 41, for *fine*, read *fine*.

Literary Property.

HOUSE of LORDS.

Alexander Donaldſon, *and* John Donaldſon, *Bookſellers*, — — — } Appellants.

Thomas Becket, Peter Abraham de Hondt, John Rivington, William Johnſton, William Strahan, Thomas Longman, William Richardſon, John Richardſon, Thomas Lowndes, Thomas Caſlon, George Kearſley, Henry Baldwin, William Owen, Thomas Davies, and Thomas Cadell, *Printers and Bookſellers*, — — — — } Reſpondents.

CASE of the APPELLANTS.

ON the 21ſt of January, 1771, the Reſpondents filed their Bill in the High Court of Chancery, and, among other Things, charged, that one JAMES THOMPSON was the Author of a Tragedy called SOPHONISBA, and of a Poem entitled SPRING. — Bill filed Jan. 21, 1771. James Thompſon, Author of the Book in Queſtion.

And that, on or about the 16th Day of January, 1729, He, the ſaid JAMES THOMPSON, by *Indenture*, bargained and ſold *true Copies* of the ſaid Works to one ANDREW MILLAR, together with the ſole and excluſive Right of printing the ſame, for the Sum of £137 : 10. — 16th Jan. 1729, he ſold to Millar the Poem called Spring.

That the ſaid JAMES THOMPSON was alſo the Author of other Poems, entitled SUMMER, AUTUMN, WINTER, BRITANNIA, a Poem ſacred to the Memory of Sir ISAAC NEWTON, an Hymn on the Succeſſion of the SEASONS, and an Eſſay on DESCRIPTIVE POETRY. — James Thompſon, Author of three Poems and Hymn.

And that on the 28th Day of July, 1729, He, the ſaid JAMES THOMPSON, bargained and ſold the ſeveral Copies of the laſt mentioned Poems to one JOHN MILLAN, together with the ſole Right of printing the ſame, for £105. — 28th July, 1729, ſold ſame to John Millan.

The Reſpondents further charged, that, by Indenture, bearing Date the 16th of June, 1738, JOHN MILLAN ſold to ANDREW MILLAR the Copies of the laſt mentioned Poems, and the Right and *Property* of printing, publiſhing, and vending the ſame, for the Sum of £105. — 16th June, 1738, John Millan ſells the laſt Poems to A. Millar.

That ANDREW MILLAR departed this Life in June, 1768, leaving JANE MILLAR, (now JANE GRANT) WILLIAM MILLAR, and the Plaintiffs, THOMAS LONGMAN and THOMAS CADELL, his Executors. — June, 1768, Millar died.

13th June, 1769, Millar's Repreſentatives ſold ſame by Auction to the Reſpondents.

That on the 13th of June, 1769, the ſeveral Copies above mentioned, with the ſole Right of printing and publiſhing the ſame, were ſold at the *Queen's-Arms Tavern*, in *St. Paul's Church-Yard*, and that the Plantiffs, in certain Proportions, were the Purchaſers at and for the Sum of £505.

Charge that Appellants ſold without Licenſe from the Reſpondents.

The Reſpondents then proceeded to charge, that the Appellants, notwithſtanding the Premiſes, and without the Licence and Conſent of the Reſpondents, publiſhed and ſold ſeveral Copies of the above mentioned Poems, called THE SEASONS, and the ſaid HYMN on the Succeſſion of the Seaſons, each Copy being bound up in a ſingle Volume, and entitled, The SEASONS, by *James Thompſon*; *Edinburgh*, printed by *A. Donaldſon*, 1768, thereby deriving to themſelves great Gain, to the Detriment of the Reſpondents, who claimed to themſelves the whole Profit ariſing from the Publication and Sale of the ſame.

Charge that Appellants refuſe to render an Account.

And the Reſpondents further charged, that the Appellants had not at any Time purchaſed from the ſaid JAMES THOMPSON the Right of printing and publiſhing the ſaid Poems; but inſiſted, notwithſtanding, upon the Liberty of ſelling the ſame, without accounting to the Reſpondents for the Price thereof.

Prayer of the Bill.

The Reſpondents, therefore, prayed that the Appellants might come to an Account with the Reſpondents, for all the Money by them received by Sale of the Poems, and pay the ſame to the Reſpondents, and ſhould for the future be reſtrained, by an Injunction, from publiſhing and vending any Copies of the ſaid Poem, called the SEASONS, and the HYMN.

The Anſwer of the Appellants.
28 Years Monopoly by 8th Anne, Chap. 19, not elapſed.
Deny excluſive Right claimed by Reſpondents.

To this BILL, the Appellants put in their Anſwer, ſworn the 16th of *July*, 1771, and thereby admitted, that the ſaid THOMPSON was the Author of the Poems, called the SEASONS, and the HYMN: But, foraſmuch as twenty eight Years (the longeſt Period allowed by the Statute of Queen *Anne*, for the Monopoly of any new Work) had elapſed ſince the firſt Publication, and before the Appellants had printed or ſold the ſame, they denied (and think themſelves ſtill warranted to deny) that the Reſpondents had, or could then have the ſole Privilege of printing and uttering the SEASONS and the HYMN: And they admit the Publication and Sale of the ſaid Poems, as charged by the Bill.

Appellants admit Publication of the Poems,

Death of Millar, and the Charges in the Bill.

They admit alſo the Death of ANDREW MILLAR, and the Purchaſe made by the Reſpondents at the *Queen's-Arms Tavern*.

On the Part of the Reſpondents, ſeveral Witneſſes were examined, and the ſaid JOHN MILLAN depoſed, that THOMPSON was the Author of the ſecond Parcel of Poems in the Bill mentioned, and wrote great Part of the ſame at his Houſe. That they were afterwards aſſigned to him by THOMPSON, and that he conveyed all his Right therein to ANDREW MILLAR.

Upon this State of the Caſe, it is obſervable that the Reſpondents derive a Title through Executors, *ex Nomine*; and not by Means of any ſpecific Device to them. From this it is conjectured, that they mean to claim ſome *Chattel* or other, and to complain of a Wrong done to that Species of Property.

Of Chattels it is certain, that they all go abſolutely to Executors, together with all the Rights, which can exiſt in them. The Caſe is the ſame of Rights purely incorporeal, which lie *only in Action*, and are independent of any Subject real or perſonal, if they are for Terms of Years, as an Annuity, a Franchiſe, or a Privilege, (ſuch as Monopolies, &c.) for a limited Time. But it is conceived, that a perpetual Annuity, Franchiſe, or Privilege, muſt be a Fee Simple, and deſcend to Heirs. If this be ſo, the main Difficulty will then conſiſt in aſcertaining the Chattel claimed by the Reſpondents, and how and in what Manner the Wrong complained of applies to it.

The Bill was penned with extreme Caution by the Reſpondents, ſolicitous, as it ſhould ſeem, to avoid entangling themſelves in a Variety of Circumſtances, which yet make Part of the SPECIAL VERDICT in the Cauſe of MILLAR and TAYLOR; and, in the (1) Report of Sir *James Burrow*, are ſtated to be highly material, although in ſupport of that Opinion no Reaſon is alledged. It may, therefore, be inferred, that the preſent Attempt is an Experiment to try how far the Doctrines of that Caſe may be extended beyond the Caſe itſelf. What was done with the Poems in Queſtion, between the Time of their being firſt written and the 16th of January, or the 28th of July, 1729, (when the Copies were ſold) does not appear in any

(1) See Fol. 9, 10, 126. of this Report, publiſhed in 4to under the Title of "The Queſtion concerning Literary Property," in the Cauſe of *Millar* v. *Taylor*; by Sir *James Burrow*, Knight. A. D. 1773.

Part

Part of theſe Proceedings. The Reſpondents have not thought fit, in Support of their Claim, to alledge that the Author had neither publiſhed, ſold, nor given *true Copies* of them, to other Perſons before thoſe particular Days; indeed, ſuch an Allegation could not have been made with Truth, becauſe it is notorious that they were publiſhed at ſeparate and diſtinct Times, as they happened to be written. The Seaſons, in particular, were found by the ſpecial Verdict, in the Cauſe of *Millar* and *Taylor*, to have been publiſhed in the Year 1727, at *ſeveral Times* between the Beginning of the Year 1727, and the End of the Year 1729, and of Courſe many *true Copies* of them were ſold to various Perſons, before the Purchaſes by *Andrew Millar* and *John Millan* ſuppoſed by the Bill. But it is immaterial to the preſent Claim, in what Manner, or with what View the Author publiſhed originally, ſince if any Property adhered to him, after and notwithſtanding the firſt Publication, the ſame, without any Manner of Doubt, was diſpoſable by him at his pleaſure.

Upon the ſame Principle, the Reſpondents have induſtriouſly declined to charge, (2) *that the ſaid James Thompſon was a natural born Subject, or reſident in that Part of Great Britain, called England*; or that the Poems in Queſtion *were firſt printed and publiſhed in the City of London, the ſame having never before been publiſhed elſewhere*; meaning, apparently, to inſiſt that the Right which they claim, being derived from *Property*, cannot depend for its Exiſtence on ſuch Accidents: And that, therefore, this Caſe has to do with that of Foreign Books, *which do not*, in their Apprehenſion, *ſtand on a different Footing from Copies printed and publiſhed in the City of London* (3).

The Reſpondents have, for the above-mentioned Reaſons, declined to charge (if the Truth be ſo) that the Work now in Queſtion *was* (4) *upon the ſaid Purchaſes of the ſeveral Parts thereof, by the ſaid* ANDREW MILLAR *and* JOHN MILLAN, *reſpectively, and before the Publication thereof, duly entered in the Regiſter of the Company of Stationers of the City of London, as the whole and ſole Property of the ſaid Andrew Millar and John Millan*; to avoid the Appearance of Recourſe to a STATUTE, made in their Favour, but now under the ill Luck of being thought an Impediment. The Reſpondents, by the Omiſſion of the above Circumſtances, intend, no doubt, for Reaſons ſufficiently obvious, (if the Foundation of their Argument were ſound) that the *Species of Right*, to which they ſet up their Claim, is not liable to a *Suppoſition* that *the Author has relinquiſhed the Copy, and conſequently given a general Licence to print* (5).

They deny that (5) *many of the beſt Books fall under that Deſcription, and that a very little Evidence might be ſufficient, after the Author's Death, to imply ſuch a tacit Conſent; as if the Book had not been* ENTERED *before Publication that it would be a Circumſtance to be ſubmitted to a Jury, "That the Copy was intended to be left open."* In Fact, Mr. Thompſon, their Author, died in 1748, and they diſregard the Reſt of the Inference. Beſides, if they had admitted the Circumſtance above ſtated to be material to *themſelves*, it would have been equally ſo to the *Author*, who likewiſe omitted to enter his Poems in the Stationers' Regiſter.

For the ſame Reaſon, they have not pretended (2) *that, from the Time of the ſaid two ſeveral Purchaſes,* ANDREW MILLAR *and* JOHN MILLAN, *and the Executors of the former, and their Aſſigns, have printed and ſold the ſaid Works as their Property, and now have, and conſtantly have had a ſufficient Number of Books expoſed to Sale at a reaſonable Price.* To their unbounded Claim of *Property*, it is certainly repugnant, that the Owner ſhould be obliged to part with it at any Price, but that which he ſets himſelf. Nor will they admit (5) *that their Relief may be rebutted by ſhewing that they mean to inhance the Price; which is againſt Law.* There is certainly no Law againſt it. The Statutes of (6) *Richard the Third*, and (7) *Henry the Eighth*, relate to the Importation of Books from Foreign Parts, and extend no Care to *Property* or *Privilege*: And the Price of Books has nothing to do with *Ingroſſing, Foreſtalling, Regrating*, or any other Offences againſt the Police of a public Market.

The Reſpondents have likewiſe forborne to charge, that, (2) *before the Reign of Queen*

(2) See the ſpecial Verdict, in *Millar* v. *Taylor*, id. Fol. 5.
(3) *Id.* Fol. 9.
(4) See Special Verdict. *Id.* Fol. 8.
(5) *Id.* Fol. 10.
(6) 1 *Rich.* III. Chap. 9. Sect. 12.
(7) 25 *Hen.* VIII. Chap. 15. whereby 1 *Rich.* III. Chap. 9. Sect. 12. is repeale

Anne,

Anne, it was usual to purchase from Authors the perpetual Copy-right of their Books, and to assign the same from Hand to Hand for valuable Considerations, and to make the same subject to Family Settlements for the Provision of Wives and Children: perhaps as judging, that if such a Property had *always existed* at Common Law, the Purposes to which it hath been applied, would be perfectly immaterial, and, if it *did not exist*, the Application of it to Family Interests would not be a sufficient Ground, to build up a *new and unheard-of Property*; perhaps conceiving, that *what was done among others* would not be received as Evidence in the Court of Chancery; perhaps convinced that no such Usage could be proved, or that such Usage, if stated in all its Circumstances, would be seen advantageous to Booksellers only, and not to Authors, and upon the Whole might turn out just so much of nothing to their Purpose.

(1) They have likewise avoided to charge any supposed BYE-LAWS of the Stationers Company, perhaps aware, that such BYE-LAWS would imply a special Right *created* by themselves, and extending only to their own Members; perhaps, considering that the Appellants (not being Members of that Company) would not be affected by such BYE-LAWS, even to the extent of making them competent Evidence: Perhaps, apprehending that such BYE-LAWS would throw a Light upon the imaginary Usage above mentioned, and by revealing the *Origin, Nature and Extent of the Property* contended for, point the Force of it against their own Argument.

The Question, therefore, before the Court of Chancery, stood in this simple Form: Whether the Author, having sold and delivered, for a competent Price, ONE or FIVE HUNDRED TRUE COPIES of his Work, retains in each of the Copies so sold and delivered (by the true Construction of such Contract) the *mere and absolute Dominion* and Property, conveying to the *Vendee* no more than a special and limited Use thereof; or *è converso*, whether such *Vendee*, or rather *Baillée*, acquires (by the true Construction of the Contract of Sale and Delivery) no absolute Property to *himself*, but only a Right of using, to a certain Extent, the Property of *another*?

If this Proposition be maintainable by the Respondents, the Consequence insisted upon is, that in respect of the Property so retained, the mere and absolute Owner, viz. THE PERSON WHO HAS SOLD, may maintain an Action for the exclusive Use of it by the *Baillée*, viz. the BUYER.

To avoid the difficulty of making out the whole of this Idea, some have taken Part of it, and they divide it thus.

Every Book, they say, consists of Two distinct Parts, the material Part, namely, the Paper, Print, and Binding, which is a Manufacture; and the immaterial Part, namely, the Doctrine contained in it, which is the Facture of the Mind. The Property in the material Part passes according to the Law in all other Cases; but the Property in the immaterial Part remains to the Author, which is about as intelligible, as if one should state JOHN to be the Owner of the CARCASE and LIMBS of the Horse, and THOMAS the Owner of his Colour, his Shape, Speed and Mettle.

This seems to have led to an elaborate Discussion of the Principles of Property; whether it could exist in an Idea for want of Substance, Physical Locality, distinguishing Marks, and many other Enquiries of the same Abstract Nature. A mere *scio-machia*, wherein, by no uncommon Accident, the Absurdity of the Position made a serious Answer seem ridiculous.

Some have stated the *Property* to exist in the Profits of Sale, which (as they assume for the Purpose) belong to the original Author. But this is only substituting another, and as it seems, a less proper Phrase in the place of the Word MONOPOLY, which, to use the Words of *Brook*, is *Property not properly known*. The Privilege, however, of Monopoly is an Interest or Estate well known to the Law. It only remains to shew what Title the Author has to it.

(2) Some have contented themselves with declaiming upon the *Moral Fitness*, the *Reasonableness*, the *Justice*, and *Public Conveniency* of putting into the Hands of an AUTHOR the Means of raising upon the World, for his own Profit, the utmost Sum of Money for the Use

(1) See *Bur. Lit. Prop.* 5, 6, 7.
(2) See Mrs. *Macaulay's* "Modest Plea for the Property of Copy-right," 4to. A. D. 1774.

of

of his Book, and this can only be done by giving him a MONOPOLY. Now, if the Truth of all this were admiſſible and clear, it would prove, *at moſt*, that it OUGHT *to be* done, NOT that it *has been* done; and that thoſe, who alone *can* do it, ought to conſider and pronounce upon it. But, in fact, *they* have conſidered of it, and pronounced upon it otherwiſe.

Some contend, that ſuch a Monopoly is already eſtabliſhed by Law, and appeal to Uſage for the Proof of it: But the Uſage adduced is incompetent, for want of Time beyond Memory, and, in Truth, does not exiſt, as appears abundantly by the Inſtances produced to prove it.

Some draw their Proof of the Common Law from the INJUNCTIONS granted by the Court of Chancery, admitting (or rather inſiſting) that ſuch INJUNCTIONS ought to be granted, ONLY where the Common Law is known and clear; admitting alſo, that the Caſe is NEW to the Common Law, and was therefore properly ſent thither by the Court of Chancery. After which, it will not be wonderful if *Injunctions*, granted in a COURT of EQUITY, ſhould not be thought an indiſputable Proof of the Common Law.

On the 16th of November 1772, the Cauſe came on to be heard in the high Court of Chancery, when the Court was pleaſed to decree, that the Injunction, which had been granted, *pendente Lite*, to reſtrain the Appellants from publiſhing any more Copy or Copies of the ſeveral Poems or Hymn, or any of them, ſhould be made perpetual, "and that it be "referred to a Maſter in Chancery to take an Account of what had been received by the "Appellants, or either of them, or by any other Perſon, by their or either of their Order, or "for their or either of their Uſe, by, from, or on Account of publiſhing and ſelling of the "Poems in the Pleadings mentioned, and that the Appellants ſhould pay to the Reſpondents, "what ſhould be found due from them on the Ballance of the ſaid Account, and reſerve the "Conſideration of Coſts until after the Maſter ſhould have made his Report." 16th Nov. 1772. Decree.

The Appellants, apprehending themſelves to be aggrieved by this Decree, have appealed from it, and humbly hope that it will be reverſed, for the following, among other

REASONS.

I. The Object contended for by the Reſpondents, is of ſo abſtruſe and chimerical a Nature, that it is hardly capable of being defined. It is ſometimes called PROPERTY, and for the Sake of Diſtinction, LITERARY PROPERTY. The Word PROPERTY has various Significations. In a Philoſophical Senſe, the Qualities, inherent in any Subject or Thing, are called its PROPERTIES. In a Civil Senſe, PROPERTY is CORPOREAL or INCORPOREAL. CORPOREAL PROPERTY is the actual Poſſeſſion of ſome Subſtance, with the Power of enjoying and diſpoſing of it. The Object now contended for is not CORPOREAL PROPERTY. INCORPOREAL PROPERTY is of two Sorts; Firſt, it is a Right relating to ſome Subſtance, as a Right to take the Profits of Land, without having the Poſſeſſion of the Land, or a Title to it. 2dly, It is a right to exerciſe ſome Faculty, or to do ſome particular Thing for Profit. The Perception of the Profits, is a taking of ſome Subſtance, or CORPOREAL PROPERTY; and hence the *incorporeal Right* is metaphorically called PROPERTY. The Word, thus uſed, becomes equivocal, importing alternately the *Right* and the Profits reſulting from the *Right*. In like manner *Land* and the *Right* to it, are both called PROPERTY. If the Object of the Reſpondents be an *incorporeal Right*, it is a mere Right to do ſome particular Thing for Profit. The Thing to be done is the *multiplying of Copies of Books*. The SOLE RIGHT of *multiplying Copies*, is a *ſole Right* to exerciſe a *natural Faculty*, and this, it is obvious, is an EXTRAORDINARY PRIVILEGE. A ſole Right to take the Profits ariſing from the Exerciſe of a *natural Faculty*, is a MONOPOLY in itſelf very extraordinary. This PRIVILEGE and this MONOPOLY, the Reſpondents chuſe to call their *Property*, and they are to maintain their

Title to it at *Common Law*. But by that Law, it is ſubmitted, on the Part of the Appellants, that the PRIVILEGE and MONOPOLY never did, and never can exiſt.

II. A Right at Common Law muſt be founded upon Principles of CONSCIENCE and NATURAL JUSTICE. CONSCIENCE and NATURAL JUSTICE are not local or municipal. NATURAL JUSTICE is the ſame at *Athens*, at *Rome*, in *France*, *Spain*, and *Italy*. Copies of Books have exiſted in all Ages, and they have been multiplied; and yet an *excluſive Privilege*, or the *ſole Right* of ONE MAN to multiply Copies, was never dictated by NATURAL JUSTICE in any Age or Country, and of courſe the *ſole Liberty of vending Copies* could not exiſt of *common Right*, which gives an equal Benefit to all.

III. An EXCLUSIVE PRIVILEGE to exerciſe a *natural Faculty* is an Encroachment upon the Rights of Man. A NATURAL FACULTY differs from the Execution of an OFFICE. An OFFICE is the Work of civil Policy, and being of *poſitive Inſtitution*, may be granted to ONE, without Injury to the Reſt: But when that, which of *common Right* ſhould be free to all, becomes confined to any ONE MAN, or any BODY OF MEN, the reſt of the Community ſuffer an Abridgement of their natural Liberty. But ſuch a Reſtraint of the LIBERTY of MANY, for the Sake of ONE, was never eſtabliſhed by NATURAL JUSTICE. If it ever has exiſted, it has been the *Creature* of the CIVIL MAGISTRATE upon Principles of Policy; but the Reſpondents diſclaim the Aid of the LEGISLATURE upon the preſent Queſtion, and derive their Claim from the COMMON LAW.

IV. The Common Law has ever regarded *public Utility*, the MOTHER of *Juſtice* and of *Equity*. *Public Utility* requires that the Productions of the Mind ſhould be diffuſed as wide as poſſible, and therefore the *Common Law* could not, upon any Principles conſiſtent with itſelf, abridge the Right of multiplying Copies. When the *Common Law* took Root in this Kingdom, Literary Compoſition ſtood, in regard to the Manner of making it public, upon the ſame Footing as in *Greece* or *Rome*. WRITING was, in thoſe States, the *only Method* of multiplying Copies. To tranſcribe or copy out a Book was the Right of every Individual; there was no other Way of propagating Knowledge: Of a perpetual Right in ONE MAN to write out Books or to make Copies, there is not a ſingle Trace in any Author that has come down from Antiquity. ATTICUS retained a Number of Slaves trained up to Writing, and it appears in TULLY's Epiſtles, that ATTICUS tranſcribed, not only for his own Uſe, but to ſell again to CICERO.

In like Manner the natural Liberty of tranſcribing Books was never checked by the Common Law. From AMES, and other Compilers of the Hiſtory of Letters, we learn, that, from the ſlow Progreſs of *tranſcribing*, Books were held up at an enormous Price. *Livy* was ſold for 120 Crowns of Gold for each Book, and a French Romance, called "*Le Romant de la Roſe*," was ſold for 33l. 6s. 6d. The Common Law could not with Juſtice uphold a Price ſo prejudicial to the Cauſe of Learning. Accordingly he, who poſſeſſed a BRACTON or a CHAUCER, had an undoubted Right to make as many *true Copies* as he pleaſed. A MONOPOLY would have been pernicious, and Learning, in Conſequence, muſt have gone to Ruin.

V. The *Common Law* is IMMEMORIAL USAGE. If, therefore, THERE WAS A TIME, when the PRIVILEGE and MONOPOLY, now contended for, could not, and in Fact did not exiſt at *Common Law*, they never can exiſt by *that Law*. But SUCH A TIME has been, namely, from the Beginning of our Hiſtory down to the GREAT ÆRA of Printing; and Printing (which is *only* a more expeditious Method of multiplying Copies) it is contended, could not change the Principles of Right and Wrong, or innovate the Law.

Printing was invented at Mentz in Germany, Anno 1458.

In 1471 CAXTON, a Mercer, of London, brought the Art into this Kingdom. In Acts of Parliament it is called a *Trade*, or *Manufacture of the Kingdom*. To exerciſe the Art was the Right of the Subject; in this Light the firſt Printers conſidered it. CHAUCER's Works were printed by CAXTON 1498, when the Author had long been dead. Another Edition of *Chaucer* was ſoon given by *Thomas Godfrey*. *Littleton*'s Tenures were printed

printed 1481, by John Lettou, and in a ſhort Period, by Richard Pinſon 1526, by Thomas Berthelet 1330, by Willam Raſtall 1534, by Robert Redman 1540. Pinſon, indeed, ſays, in the Wit of that Age, that Redman ſhould be called *Rudeman*, *quia Hominem rudiorem vix invenias*. He abuſes *Redman's* Edition, but not a Word about an Invaſion of Property.

Objection. It is ſaid on the Part of the Reſpondents, that the Name "*Copy of a Book*," has been a Term *for Ages*, to ſignify the *ſole Right* of *printing*, *publiſhing*, and *ſelling*, and that this *Species of Property* has exiſted in *Uſage* as long *as the Name*.

Anſwer. It is admitted on the Part of the Reſpondents, that there is no Bye-Law or Ordinance relative to Copies till after the Year 1640. The Uſage, whatever it be, is therefore not immemorial.

Objection. From the Erection of the Stationers Company, *Copies* were entered as *Property*, and *Pirating* was puniſhed.

Anſwer. The Common Law, according to this, begins with the Stationers Company.

The firſt Charter was 1556, 3 & 4 *Phil.* and *Mar.* The Grant was founded on Principles of Bigotry, to *prevent*, as it recites, *the Renewal of great and deteſtable Hereſies*. The new Members of the Company (in Number 97) were made *literary Conſtables* to ſearch for Books, &c. and, though the Crown had no Right over the Trade of Printing, it was ordered, "*That no Man ſhould exerciſe the Myſtery of Printing, unleſs he be of the Stationers Company, or have a Licence.*"

To this Company ſo conſtituted, and thus armed with a GENERAL WARRANT, we are referred for Evidence of the *Common Law*.

Objection. Anno 1558, the Charter was confirmed in the 1ſt of Elizabeth. In *that Year* there are *Entries of Copies* to particular Perſons, and down from that Time.

Anſwer. Patent Rights began ſoon after the firſt Introduction of Printing. FROISSART's *Chronicles of England, France, and Spain* were publiſhed, *Privilegio a Rege indulto*, by RICHARD PINSON, 1525. From that Time the Patents "*ad ſolum imprimendum*" were innumerable. Men, who had ſuch Rights, might enter their Books as *Property* in the Stationers Regiſter. But neither the *Patent*, nor the *Entry*, can be now received as Evidence of a *Common Law Right*. The Charter comprehended all the Printers in England: The new Company had the *ſole Privilege* of Printing, and they agreed to divide the Spoil among themſelves; but AUTHORS *were not Parties* to the Agreement.

Objection. The Stationers Company was empowered to make Bye Laws.

Anſwer. They were; and thoſe BYE-LAWS might create a *relative Right* among the Members of the Company.

In 1681, a BYE-LAW declares, that where a Book was entered to any Member, ſuch Perſon, *by the antient Uſage of the Company*, was *reputed* and *taken* to be the PROPRIETOR. By *antient Uſage of the Realm* had been more conducive to the Point. But it was not competent to the Stationers Company to make Laws for the reſt of the Kingdom; and, if it had, it would NOT be *Common Law*.

Objection. The Decrees of a STAR CHAMBER have been cited as ſtrong Authorities in Support of the Bye-Laws and Cuſtoms of the Stationers Company.

Anſwer. The STAR CHAMBER was a *criminal Court*, and had not conſtitutional Authority to determine *civil Rights*. That Court has been long ſince aboliſhed, without Regret, and it is the Happineſs of the Subject, that the *Common Law* has flowed through *purer Channels*.

Objection. It has been ſaid, that a STAR-CHAMBER *Decree*, 1637, expreſly ſuppoſes a *Copy-Right* to exiſt, otherwiſe than by *Patent*, *Order*, or *Entry*; which could only be by *Common Law*.

Anſwer.

Answer. The relative Rights of the Company were supported *per fas et nefas*, in thoſe Times of high Prerogative: *Licences* from the ARCHBISHOP OF CANTERBURY were frequent, and ſuch LICENCES, it is ſubmitted, were neither PATENT, ORDER, or ENTRY. And, moreover, a *Common Law Right* is never *expreſsly* mentioned in any *Ordinance*, *Proclamation*, or *Bye-Law*. It is often called the *Right*, *Privilege*, *Authority*, or *Allowance* SOLELY TO PRINT. Had the STAR-CHAMBER, and the HIGH COMMISSION COURT, expreſsly ſtated a *Common Law Right*, it could not be received as an Authority in Point; and it is ſubmitted, that a *Common Law Uſage* cannot ariſe by *mere Implication* from *dark Hints* of the STAR-CHAMBER.

The ſame Argument applies to *Acts* of the *Privy-Council*, to *Edicts*, *Proclamations*, the *Ordinance* of the TWO HOUSES in 1642, and all the *Ordinances* during the Uſurpation. This whole Body of Precedents forms the Hiſtory of *Deſpotiſm*, NOT of the *Common Law*. The moſt that can be ſaid in their Favour is, that they ſupported an Uſage firſt ſet on Foot by *Acts of Parliament*, by *Patents*, *Bye-Laws*, &c.

Objection. It has been ſaid, that in thoſe Times *Copies* were protected by a much ſpeedier and more effectual Remedy than *Actions at Law*, or *Bills in Equity*.

Anſwer. One ſucceſsful *Action at Law* would have been a better Proof of the Right, than a thouſand Inſtances of *arbitrary Power*.

Objection. The LICENSING ACT has been called in Aid by the Reſpondents, and they obſerve, that the printing of any Book WITHOUT CONSENT of the OWNER is forbid by that Act.

Anſwer. The OWNERSHIP was created by *Patent*, *Order*, *Bye-Laws* of the Stationers, &c. and if that Act recognized a *Right ſo created*, it was an ACT OF THE LEGISLATURE; but the Act, with all the other Encroachments upon Liberty, has long ſince gone to Reſt, to revive no more.

Objection. It has been ſaid, that ſoon *after the Expiration* of the LICENSING ACT, 9th May, 1679, 31 Car. II. there was a Caſe, as appears by LILLIE's ENTRIES, fol. 67, Hilary Term, 31 Car. II. (1) *Ponder* v. *Bradyll*, for printing 4000 Copies of the *Pilgrim's Progreſs*, whereof the Plaintiff was *Proprietor*.

Anſwer. It is a *Declaration*, ONLY, in the Book of a *Special Pleader*, and if the Defendant printed and expoſed to Sale FOUR THOUSAND BOOKS, he was left in Poſſeſſion of them.

Objection. The Reſpondents, as if conſcious that the Ground of Bye-Laws of the Stationers, Ordinances, &c. is not tenable, reſort to a *Court of Equity*, and rely much upon the Injunctions that have iſſued out of the *Court of Chancery*.

Anſwer. The Injunctions of CHANCERY may be all drawn into a narrow Compaſs, and it will be ſeen, that they do not apply to the Point in Queſtion.

I. *Injunctions before the 8th of Anne, c. 19.*

15th Nov. 1681. Stationers againſt Lee, (2) for printing Pſalters and Almanacs.
17th Nov. 1681. Stationers againſt Wright (3), for publiſhing Almanacs.
9th and 22d Feb. 1709. Stationers againſt Partridge, (4) for ſelling Almanacs.
All theſe are Prerogative Rights.

II. *Injunctions upon the Right given by the Statute of Queen Anne.*

9th Nov. 1722. (5) Knaplock againſt Curl, for printing Prideaux's Directions to Church-Wardens.

(1) *Bar.* Lit. Prop. 19.
(2) *Bar.* Lit. Prop. 31. 96.
(3) *Id.* 96.
(4) *Id.* 31, 96, 121.
(5) 2 *Black.* Com. 407. 4 *Vin.* Abr. 278. pl. 3.

11th

11th Dec. 1722. Tonſon againſt Clifton, for Sir Richard Steele's Conſcious Lovers.
19th and 23d May, 1729. Gulliver againſt Watſon, (1) for printing Pope's Dunciad.
28th Nov. 1735. Motte againſt Faulkner (2) for Pope and Swift's Miſcellanies.
27th Jan. 1736. Walthoe againſt Walker, (2) for Nelſon's Feſtivals.
6th Dec. 1737. Baller againſt Watſon, (3) for Gay's Polly.
13th March, 1740. Gyles againſt Wilcox, (4) for Hale's Pleas of the Crown.
19th May, 1740. Read againſt Hodges, (5) for Hiſtory of Peter the Great.
6th Nov. 1757. Tonſon againſt Mitchell, for Byng's Expedition to Sicily.

III. *Injunctions for printing unpubliſhed Manuſcripts without Licence from the Author.*

24th May, 1732. Webb againſt Roſe, (6) for Webb's Conveyancer.
5th June, 1741. Pope againſt Curl, (7) for printing Pope's Letters.
13th June, 1741. Forreſter againſt Waller, (8) for Forreſter's Reports.
Duke of Queenſbury againſt Shebbeare, (8) for Clarendon's Life.
Trinity Term, 1768. Macklin againſt Richardſon, for printing Love A-la-Mode.

IV. *Injunctions as to Old Books after the 21 Years granted by the 8th Anne.*

9th June, 1735. Eyre againſt Walker, (2) for The Whole Duty of Man.
N. B. This could not be the Old Duty of Man; if it was, the Right muſt have been founded upon an Aſſignment from the Author, and the Author is unknown to this Hour.
30th April, and 11th May, 1752. Tonſon againſt Walker, (9) for Dr. Newton's Milton.

V. *Injunctions relative to Books after the Twenty-eight Years given by the 8th Anne.*

Trinity Term 1765. Millar againſt Donaldſon, (10) for Thompſon's Seaſons—Pope's Iliad—Swift's Works, with the Life and Notes by Dr. Hawkeſworth.
Here as to Swift's Works, (the Notes and Life being within the Statute) the Injunction was continued.
As to *Thompſon's Seaſons*, and *Pope's Iliad*, (being beyond the 28 Years of 8th Anne) the Injunction was diſſolved.
From theſe Caſes it appears, that the *General Queſtion* touching "the *Common Law Right*" has never been determined by any CHANCELLOR.

VI. MECHANICAL INSTRUMENTS, and alſo PRINTS made by *Engravers*, have ever been open to all Artiſts, unleſs ſecured to the INVENTOR by *Patent*, or by *Act of Parliament*. Between *ſuch Inventions* and *Copies of Books* no ſenſible Diſtinction can be made. An *Orrery* repreſents the *Planetary Syſtem*: He, who makes one after the firſt Model, takes the Science of Aſtronomy as repreſented by the *Orrery*: And he, who prints a Book, takes the *Author's Sentiments*.——Where is the Difference?

(1) 4 *Vin.* Abr. 278, 279.
(2) *Bur.* Lit. Prop. 27, 61. 2 *Black.* Com. 407.
(3) 2 *Black.* Com. 407. 4 *Vin.* Abr. 479.
(4) 2 *Tr. Ath.* Rep. 141. pl. 130.
(5) 2 *Tr. Ath.* Rep. 142, 143.
(6) *Bur.* Lit. Prop. 33, 34. 2 *Black.* Com. 407.
(7) *Bur.* Lit. Prop. 28, 34. 2 *Tr. Ath.* Rep. 343. 2 *Black.* Com. 407.
(8) *Bur.* Lit. Prop. 34, 2 *Black.* Com. 407.
(9) *Bur.* Lit. Prop. 28, 61. 2 *Black.* Com. 407.
(10) *Bur.* Lit. Prop. 31, 97.

Answer. The relative Rights of the Company were supported *per fas et nefas*, in thoſe Times of high Prerogative: *Licences* from the ARCHBISHOP OF CANTERBURY were frequent, and ſuch LICENCES, it is ſubmitted, were neither PATENT, ORDER, or ENTRY. And, moreover, a *Common Law Right* is never *expreſsly* mentioned in any *Ordinance*, *Proclamation*, or *Bye-Law*. It is often called the *Right*, *Privilege*, *Authority*, or *Allowance* SOLELY TO PRINT. Had the STAR-CHAMBER, and the HIGH COMMISSION COURT, expreſsly ſtated a *Common Law Right*, it could not be received as an Authority in Point; and it is ſubmitted, that a *Common Law Uſage* cannot ariſe by *mere Implication* from *dark Hints* of the STAR-CHAMBER.

The ſame Argument applies to *Acts* of the *Privy-Council*, to *Edicts*, *Proclamations*, the *Ordinance* of the TWO HOUSES in 1642, and all the *Ordinances* during the Uſurpation. This whole Body of Precedents forms the Hiſtory of *Deſpotiſm*, NOT of the *Common Law*. The moſt that can be ſaid in their Favour is, that they ſupported an Uſage firſt ſet on Foot by *Acts of Parliament*, by *Patents*, *Bye-Laws*, &c.

Objection. It has been ſaid, that in thoſe Times *Copies* were protected by a much ſpeedier and more effectual Remedy than *Actions at Law*, or *Bills in Equity*.

Anſwer. One ſucceſsful *Action at Law* would have been a better Proof of the Right, than a thouſand Inſtances of *arbitrary Power*.

Objection. The LICENSING ACT has been called in Aid by the Reſpondents, and they obſerve, that the printing of any Book WITHOUT CONSENT of the OWNER is forbid by that Act.

Anſwer. The OWNERSHIP was created by *Patent*, *Order*, *Bye-Laws* of the Stationers, &c. and if that Act recognized a *Right ſo created*, it was an ACT OF THE LEGISLATURE; but the Act, with all the other Encroachments upon Liberty, has long ſince gone to Reſt, to revive no more.

Objection. It has been ſaid, that ſoon *after the Expiration* of the LICENSING ACT, 9th May, 1679, 31 Car. II. there was a Caſe, as appears by LILLIE's ENTRIES, fol. 67, Hilary Term, 31 Car. II. (1) *Ponder* v. *Bradyll*, for printing 4000 Copies of the *Pilgrim's Progreſs*, whereof the Plaintiff was *Proprietor*.

Anſwer. It is a *Declaration*, ONLY, in the Book of a *Special Pleader*, and if the Defendant printed and expoſed to Sale FOUR THOUSAND BOOKS, he was left in Poſſeſſion of them.

Objection. The Reſpondents, as if conſcious that the Ground of Bye-Laws of the Stationers, Ordinances, &c. is not tenable, reſort to a *Court of Equity*, and rely much upon the Injunctions that have iſſued out of the *Court of Chancery*.

Anſwer. The Injunctions of CHANCERY may be all drawn into a narrow Compaſs, and it will be ſeen, that they do not apply to the Point in Queſtion.

I. *Injunctions before the 8th of Anne, c.* 19.

15th Nov. 1681. Stationers againſt Lee, (2) for printing Pſalters and Almanacs.
17th Nov. 1681. Stationers againſt Wright (3), for publiſhing Almanacs.
9th and 22d Feb. 1709. Stationers againſt Partridge, (4) for ſelling Almanacs.
All theſe are Prerogative Rights.

II. *Injunctions upon the Right given by the Statute of Queen Anne.*

9th Nov. 1722. (5) Knaplock againſt Curl, for printing Pridcaux's Directions to Church-Wardens.

(1) *Per.* Lit. Prop. 19.
(2) *Per.* Lit. Prop. 31. 96.
(3) *Id.* 96.
(4) *Id.* 31, 96, 121.
(5) 2 *Black.* Com. 407. 4 *Vin.* Abr. 278. pl. 3.

11th

11th Dec. 1722. Tonſon againſt Clifton, for Sir Richard Steele's Conſcious Lovers.
19th and 23d May, 1729. Gulliver againſt Watſon, (1) for printing Pope's Dunciad.
28th Nov. 1735. Motte againſt Faulkner (2) for Pope and Swift's Miſcellanies.
27th Jan. 1736. Walthoe againſt Walker, (2) for Nelſon's Feſtivals.
6th Dec. 1737. Baller againſt Watſon, (3) for Gay's Polly.
13th March, 1740. Gyles againſt Wilcox, (4) for Hale's Pleas of the Crown.
19th May, 1740. Read againſt Hodges, (5) for Hiſtory of Peter the Great.
6th Nov. 1757. Tonſon againſt Mitchell, for Byng's Expedition to Sicily.

III. *Injunctions for printing unpubliſhed Manuſcripts without Licence from the Author.*

24th May, 1732. Webb againſt Roſe, (6) for Webb's Conveyancer.
5th June, 1741. Pope againſt Curl, (7) for printing Pope's Letters.
13th June, 1741. Forreſter againſt Waller, (8) for Forreſter's Reports.
Duke of Queenſbury againſt Shebbeare, (8) for Clarendon's Life.
Trinity Term, 1768. Macklin againſt Richardſon, for printing Love A-la-Mode.

IV. *Injunctions as to Old Books after the 21 Years granted by the 8th Anne.*

9th June, 1735. Eyre againſt Walker, (2) for The Whole Duty of Man.
N. B. This could not be the Old Duty of Man; if it was, the Right muſt have been founded upon an Aſſignment from the Author, and the Author is unknown to this Hour.
30th April, and 11th May, 1752. Tonſon againſt Walker, (9) for Dr. Newton's Milton.

V. *Injunctions relative to Books after the Twenty-eight Years given by the 8th Anne.*

Trinity Term 1765. Millar againſt Donaldſon, (10) for Thompſon's Seaſons—Pope's Iliad—Swift's Works, with the Life and Notes by Dr. Hawkeſworth.
Here as to Swift's Works, (the Notes and Life being within the Statute) the Injunction was continued.
As to *Thompſon's Seaſons*, and *Pope's Iliad*, (being beyond the 28 Years of 8th Anne) the Injunction was diſſolved.
From theſe Caſes it appears, that the *General Queſtion* touching "the *Common Law Right*" has never been determined by any CHANCELLOR.

VI. MECHANICAL INSTRUMENTS, and alſo PRINTS made by *Engravers*, have ever been open to all Artiſts, unleſs ſecured to the INVENTOR by *Patent*, or by *Act of Parliament*. Between *ſuch Inventions* and *Copies of Books* no ſenſible Diſtinction can be made. An *Orrery* repreſents the *Planetary Syſtem*: He, who makes one after the firſt Model, takes the Science of Aſtronomy as repreſented by the *Orrery*: And he, who prints a Book, takes the *Author's Sentiments*.——Where is the Difference?

(1) 4 *Vin.* Abr. 278, 279.
(2) *Bur.* Lit. Prop. 27, 61. 2 *Black.* Com. 407.
(3) 2 *Black.* Com. 407. 4 *Vin.* Abr. 479.
(4) 2 *Tr. Aſh.* Rep. 141. pl. 130.
(5) 2 *Tr. Aſh.* Rep. 142, 143.
(6) *Bur.* Lit. Prop. 33, 34. 2 *Black.* Com. 407.
(7) *Bur.* Lit. Prop. 28, 34. 2 *Tr. Aſh.* Rep. 342. 2 *Black.* Com. 407.
(8) *Bur.* Lit. Prop. 34, 2 *Black.* Com. 407.
(9) *Bur.* Lit. Prop. 28, 61. 2 *Black.* Com. 407.
(10) *Bur.* Lit. Prop. 31, 97.

VII. *Prerogative Copies*, such as the *Bible*, and Books of *Divine Service*, do not apply to the preſent Caſe. They are left to the Superintendance of the Crown, as the HEAD and SOVEREIGN of the STATE, upon Principles of *public Utility*. To aſcribe to the CROWN a perpetual Right to the BIBLE upon *Principles of Property*, is to make the CROWN turn BOOKSELLER. If it be true, that the KING paid for the Tranſlation of the Bible, it was a Purchaſe made for the whole BODY OF THE PEOPLE, for the *Uſe of the Kingdom*.

Acts of Parliament, it is admitted, are the Work of the LEGISLATURE, and therefore under the Direction of the CROWN, as the *executive Part* of the CONSTITUTION. *Property*, therefore, is NOT the Foundation of *Prerogative Copies*.

King Charles I. publiſhed a Tranſlation of *David's Pſalms*, written, as his MAJESTY ſays in the Preface, by his ROYAL FATHER. But the Idea of a *perpetual Property* was not then conceived, and therefore a *Patent* was granted to *give the ſole Right* to the BOOKSELLER.

Objection. It has been ſaid, that the Authority of ſuch a Man as MILTON is of great Weight. He is repreſented as ſpeaking, *after much Conſideration*, on the *very Point*, and his Words are, "(1) *The juſt retaining of each Man's Copy, which God forbid ſhould* "*be gainſaid.*"

Anſwer. MILTON, in the Cloſe of his famous Speech "*for the Liberty of unlicenſed Printing*," in 1644, ſays, the *Ordinance* of the two Houſes for ſubjecting the Preſs to a *Licenſer* was obtained by indirect Means. "*It may*," ſays he, *be* "*doubted whether there was not in it the Fraud of ſome* OLD PATENTEES *and* "MONOPOLIZERS *in the Trade of Bookſelling, who, under the Pretence of the Poor* "*in their Company not to be defrauded*, and the juſt retaining of each Man's "Copy *(which God forbid ſhould be gainſaid) brought divers gloſſing Colours to* "*the Houſe*," &c.

MILTON's Idea of *each Man's Copy* ariſes from the old PATENTEES and MONOPOLIZERS, and certainly, while there was a RELATIVE PROPERTY in the Stationers Company, the poorer Members ought not to be defrauded. He does not ſay, how long the *Copy* ſhould be *retained*, and that is the Point in this Cauſe. It may be preſumed, MILTON could not wiſh, that *Paradiſe Loſt*, which was ſold for 5l. and two further Sums of 5l. to be paid conditionally, ſhould continue a SPLENDID FORTUNE in the Hands of a BOOKSELLER, and his GRAND-DAUGHTER be obliged to beg a *Charity-Play* at Drury-Lane Theatre, 1752.

Doctor (2) SWIFT and Mr. PULTENEY were both clearly of Opinion, that there was a *Common Law Right* and the Opinion of ſuch a Man as Mr. PULTENEY, who was for Years of the firſt Ability in Parliament, my be allowed to have ſome Weight.

Doctor WATTS publiſhed a Volume of Sermons in 1720: Mr. LONGMAN, one of the Reſpondents, republiſhed it in 1758; and though the Period of 28 Years was expired, a *Common Law Right*, if it exiſted, would have protected the *Property*: But the Reſpondent, LONGMAN, annexed to his Edition a *Patent* for 14 Years, dated the 21ſt March, 1758.

VIII. Whatever Encouragement may be due to AUTHORS, the *Common Law* cannot, after the Silence of Ages, pronounce at once upon a *new Species of Right*, which has been hitherto "*Property not properly known.*"

Bank Notes are of a Value well aſcertained, and yet the Common Law did not adapt itſelf to that *Emergence of Commerce*, but it was for the LEGISLATURE (3) to make the ſtealing it or taking it by a Robbery a FELONY.

IX. The Statute of Queen Anne was not *declaratory* of the COMMON LAW, but *introductive* of a NEW LAW, to *give* learned Men a Property which they *had not before*.

Objection. It has been contended on the Part of the Reſpondents, that the Act of Queen Anne is an ACCUMULATIVE STATUTE, declaring *the Common Law*, and giving *additional Penalties*.

(1) *Milton's* proſe Works, 1 Vol. 4to. Fol. 172.
(2) See 3 Vol. of *Swift's* Letters.
(3) See 2 *Geo.* II. Chap. 25.

In

In ſupport of this, a Pamphlet, ſaid to have been given to the Members in 1709, has been cited, and it appears that the Bookſellers meant to inculcate the Idea of *antient Uſage*, but what that *Uſage* was, how it took its Origin, and how it was ſtated in the Pamphlet, the Extract leaves in Obſcurity.

Anſwer. Cotemporary Expoſition will, no doubt, deſerve Attention. To this End, the *Hiſtory* of the Bill, as it ſtands upon the *Journals* of the HOUSE of COMMONS, together with the Account of the *Conference* with the LORDS, will clearly evince, that the LEGISLATURE were not employed in SECURING an *antecedent Property*, but expreſsly declared, "that AUTHORS and Bookſellers had the *ſole* "*Property of Books* VESTED in them, by *that Act*, for the Terms therein men-"tioned." (1) When the Bookſellers Petition was preſented; alſo their 2d Petition, 2d Feb. 1709—14th March 1709, reſolved that the Title be a Bill for *the Encouragement* of *Learning*, by VESTING the COPIES in the Authors or Purchaſers, &c. 5th April the Bill returned from the Lords—5th April 1710, a Conference with the Lords and Mr. ADDISON, one of the Commons.

Objection. Of this Evidence the Reſpondents feel the Weight, and therefore they reſort to a *Variety of Comments* upon the STATUTE itſelf.

They rely much upon the *Preamble*: The Words are, "Whereas Printers, "Bookſellers, and other Perſons, have of late frequently *taken the Liberty* of "printing, &c. Books and other Writings without the Conſent of the Au-"thors or Proprietors of ſuch Books, to their very great Detriment, and too "often to the Ruin of them and their Families; for preventing therefore *ſuch* "*Practices*, for the future, &c."

From the Words "*taking the Liberty*," and "*ſuch Practices*," it is inferred that the Perſons within the Deſcription of them, were WRONG DOERS. A Queſtion is put, When the Legiſlature ſpeak of a Liberty taken, could they mean a *Claim founded on any Right?* And by "*Practices*," did they mean to deſcribe the Exerciſe of *a legal Right?* The Word "Practices" is properly applied to the doing of *illegal Acts*.

Anſwer. If they were *wrong Doers*, the LEGISLATURE has uſed the mildeſt Terms in the Compaſs of our Language; but it is ſubmitted that they were not *Treſpaſſers*. After the final Extinction of the licenſing Act, 1694, Men had a Right to re-print Books in the ſame Manner as PRINTSELLERS had lawful Authority to copy, engrave, and publiſh *all Works, Deſigns, and Prints* which were not ſecured to the INVENTORS by PATENT for a Term of Years: and yet the Legiſlature by 8 Geo. II. Chap. 13. in the very ſame Words recites in the Preamble, "Whereas divers Printſellers, &c. have of late frequently *taken the Li-*"*berty* of copying, engraving, &c. and for preventing therefore *ſuch Practiſes*, &c.

Again, in the 7 Geo. III. Chap. 38. the Printſellers who *engraved* and expoſed to Sale the *Deſigns* and *Prints* of the late WILLIAM (2) HOGARTH, after the Period of fourteen Years granted to him by PARLIAMENT, are in that Act

(1) See Com. Journ. 12 Dec. 1709.

(2) "There is nothing can be more ſimilar, than the Art of Engraving is to literary Compoſition; I will illuſtrate this Propoſition by the Works of Mr. *Hogarth*, who, in my humble Opinion, is the only truly original Author, this Age hath produced in *England*. There is ſcarcely any Character of an excellent Author, that is not juſtly applicable to his Works; what Compoſition!—what Variety!—what Sentiment!—what Fancy!—what Invention and Humour we diſcover in all his Performances! in every one of them an entertaining Hiſtory, a natural Deſcription of Characters, and an excellent Moral: I can read his Works over and over again: *Horace*'s Characteriſtic of Excellency in Writing is verified in *Hogarth*'s Prints, *decies repetita placebit*; every Time I peruſe them, I diſcover new Beauties, and receive freſh Entertainment. Can I ſay more in Commendation of the literary Compoſitions of a *Barker*, or a *Sciſſi*? There is great Authority for this Parallel. The Legiſlature hath conſidered the Works of Authors and Engravers in the ſame Light; they have granted the ſame Protection to both; and it is remarkable, that the Act of Parliament for the Encouragement of thoſe who invent Engravings, runs almoſt in the ſame Words, as the Act for the Protection of literary Compoſitions." See Lord *Gardenſtone*'s Argument on giving his Opinion, upon the Queſtion of Literary Property, between *Hinton* and *Donaldſon*, in *Bojtwell*'s *Scotiſh* Deciſion of the Court of Seſſion, in that Cauſe, publiſhed at *Edinburgh* in 4to. A. D. 1774.

called

called the PROPRIETORS of the Copies of WILLIAM HOGARTH's Works, and then the LEGISLATURE proceeds to *reſtrain* theſe very PROPRIETORS *from* vending the Copies, which were their *legal Property*.—Thus it is plain, that the LEGISLATURE ſpeaking of a *legal Right*, deſcribed it by the Words "*taking the Liberty*," and ſuch "*Practices*."

If by the Terms, "taking the Liberty," and ſuch "*Practices*," it can, by fair Conſtruction, be intended that *Injuſtice*, *Fraud* and *Rapine* are implied, the like Imputation is thrown upon the *Purchaſers*, who exerciſed a *legal Right*, and are allowed to be PROPRIETORS.

It may be preſumed, that if the LEGISLATURE had perceived actual *Guilt* or *illegal Practices*, they would, agreeably to their own Dignity, have kept no Terms with Men, who *violated Laws*, and *wrought the Ruin of Families*.

But Learning, to the Honour of the LEGISLATURE, was to be encouraged; and it may be aſked, if the *Statute* of *Queen Anne* did not *create a new Property*, what was done for Learning?

If the Right was *conferred* by the Act, How did the LEGISLATURE *find* the Property in Authors?

If the LEGISLATURE had the faineſt Idea of a *pre-exiſting Property*, why was the *ſole Right* of reprinting Books, which had been *previouſly* publiſhed, reſtrained to twenty-one Years, and *no more*? A ſtrange Way of *encouraging Learning*, by abridging *ancient Rights*!

If the *Act of Queen Anne* intended merely to give *additional Penalties*, by Way of new Fences to a *common Law Right*, Why give thoſe Penalties for fourteen Years only? If the Property is *perpetual*, Why ſhould not the Remedy be *co-extenſive*?

If by "Copy" be underſtood a *perpetual Property*, the Author who ſold his Copy under the Idea of a Transfer *for fourteen Years only*, may be told by an *artful Bookſeller*, that *more was meant than meets the Ear*, and that *a Sale of his Copy* imports a SALE FOR EVER. The Conſequence will be, that, inſtead of encouraging Learning, a Snare has been *unwittingly* ſpread for Men of Genius and Induſtry, and the *Claſs* of the STATUTE, which gives a Reverſion to the AUTHOR at the End of fourteen Years, *if he live ſo long*, will be eluded by the Craft, and, as MILTON phraſes it, by the *Sophiſms of Merchandize*.

If the Book, at the End of fourteen Years, reverts to the Author, his Intereſt is ſerved: If it does not, the LEGISLATURE, by ſuch a Conſtruction, has extended no Benefit *to learned Men*.

But happily it appears that PARLIAMENT has reviſed its own Acts, and in Terms as clear as the Engliſh Language affords, declared, that the *Property* was *given* by the Act of Queen Anne. FOR

7. Geo. II. Chap. 24. is intitled, "An Act for granting to *Samuel Buckley* the ſole Liberty of printing and reprinting the *Hiſtories of Tacitus*." The Preamble recites, "that *Buckley* at a very great Expence had prepared an Edition of TACITUS in 3 Volumes Folio, "and their Wives," Whereas the ſole *Liberty of printing and reprinting Books* for the *Term of fourteen Years*, to commence from the Day of the publiſhing the ſame, GRANTED TO THE PROPRIETORS by an Act made in the 8th *Year of Queen Anne*, intitled, an Act for the *Encouragement of Learning*, by VESTING the Copies of printed Books in the AUTHORS or PURCHASERS, &c.

Of the Words and Meaning of the Legiſlature, we are now *judicially informed* by the 8th *Geo.* II. Chap. 13. He that runs may read the following Recital of the Statute: "*The ſole Liberty of printing and reprinting* for the Term of fourteen Years GRANTED by the Statute of Queen Anne."

The Act was made for *the Encouragement of Learning*. Nobody has called the Juſtice, Policy, or Wiſdom of the Legiſlature in queſtion.

X. Y.

X. The Notion of "a PERPETUAL PRIVILEGE and MONOPOLY," hath been within theſe few Years, hatched among the Bookſellers; who now come with *gloſſing Colours*, and, *under a Pretence of ſerving the Cauſe of Literature*, but mean really and only to get the *Fruits of Genius* into their own Hands, for ever. The Conſequences of this new Doctrine (were it eſtabliſhed) would be fatal to the *Intereſt of Letters*, and the *Fame* of every valuable Author.

Books may be held up at too high a Price. Notes and Illuſtrations may be wanted, and generally are, in thirty or forty Years; not only the *Manners*, but even *Science* itſelf changes in the Progreſs of Time. *Moral Philoſophy*, and *Mathematicks* ſhould keep pace with the Viciſſitudes of the World. Uſeful Commentaries upon valuable Works cannot be made without the Licence of the BOOKSELLER, who has purchaſed the Copy: His *Avarice*, his *Timidity*, or his *Want of Senſe* may tell even the ORIGINAL AUTHOR, that he ſhall not re-print his OWN BOOK with further Improvements. If the Author ſhould happily be permitted to do it, it muſt be upon the Bookſeller's Terms; but more probably the Frugality of the BOOKSELLER will grudge an additional Expence, and taking upon him to *pronounce upon Wit*, he may ſay, that he likes the Book as it is.

MILTON, in his famous Speech, has thought this Head of Argument an important Topic againſt a *Licencer of the Preſs*. His Words are, "What if the "Author ſhall be one ſo *copious of Fancy*, as to have MANY THINGS, well "worth *the adding*, come INTO HIS MIND after LICENSING, while the Book "is yet under the Preſs, which not ſeldom happens to the beſt and diligenteſt "Writers, and that perhaps a dozen Times in one Book. The Printer dares "not go beyond his licenſed Copy; ſo often then muſt the Author TRUDGE "TO HIS LEAVE-GIVER, that thoſe his NEW INSERTIONS may be viewed; "and many a Jaunt will be made, ere that Licencer (for it muſt be the ſame "Man) can either be found, or found at leiſure: Mean while either the Preſs "muſt ſtand ſtill, which is no ſmall Damage, or the Author LOSE HIS ACCU-"RATEST THOUGHTS, and ſend the Book forth into the World, WORSE "THAN HE COULD MAKE IT, which to a diligent Writer is the GREATEST "MELANCHOLY and VEXATION that can befall."

In the Caſe of a *perpetual Privilege and Monopoly*, the Bookſeller becomes the Author's LEAVE-GIVER: Many a Jaunt may be made that his new INSERTIONS may be viewed, and at length he may ſit down with the MELANCHOLY and VEXATION of leaving his Book WORSE THAN HE COULD MAKE IT.

XI. Should the Work, purſuant to the Statute of Queen Anne, *revert* to the AUTHOR in fourteen Years, he will become the Guardian of his own Fame; and, in Conſequence, *learned and induſtrious Men will be enabled to reap not only the Fame, but the Profits of their Labours, to the Honour and Advantage of themſelves and their Families.*

Objection. It has been colourably ſaid, that for *a perpetual Property* Authors may raiſe in their Demand, and gain a much LARGER SUM for the *Copy*; or they may publiſh upon their own Account, and feel the Pulſe of the Public before they diſpoſe of the Copy.

Anſwer. Except one or two very modern Inſtances, a competent Price has not been given. If Bookſellers have hitherto been dealing under an Idea of a PERPETUAL MONOPOLY, they have not paid an adequate Compenſation for it, and the ſame Phlegm will govern their future Tranſactions. It is a melancholy Conſideration, that even a Writer of Mr. THOMPSON's Merit does not appear to have received ONE HUNDRED POUNDS for the Poems of the SEASONS. The whole

Sum paid to him for a Variety of Articles was 242l. 10s. The Tragedy of SOPHONISBA, at the old Price for a Play, was worth 105l. The Poem, facred to the Memory of Sir ISAAC NEWTON, BRITANNIA, and an Eſſay on *Deſcriptive Poetry*, from the Pen of THOMPSON, were worth a conſiderable Sum. How much remains for the Seaſons? no Work of late Years has been more generally received: The Profits to MILLAR muſt have been large, and, after all, the Copy ſold for 505l. at a public Auction.

If Authors had always Acceſs to a CLARENDON PRESS, where the preciſe Number ordered would be printed, *and no more*, the Impreſſion might be diſtributed to the London Booksellers, and an Author might ſtand the Hazard. But AUTHORS are not often in that Situation, and, beſides, the immediate Expence of Paper and Print is not favourable to ſuch Experiments.

A Period of fourteen Years is a fure Teſt of every Book. If, after that Time, it be worth reprinting, the Authors ACCURATEST THOUGHTS may be interwoven, and the *Fame* and *Profit* will accrue to the Man of Labour and Invention.

But if a PERPETUAL PRIVILEGE and MONOPOLY are to interrupt his Hopes, the PURCHASERS of the *Copy* will be enriched, and, in the emphatic Words of DRYDEN, "It will continue to be the Ingratitude of Mankind, that they who "TEACH WISDOM by the SUREST MEANS, ſhall generally live poor AND "UNREGARDED; as if they were born ONLY FOR THE PUBLIC, and had no "Intereſt in their own well-being, but were to be LIGHTED UP LIKE TAPERS, "and *waſte* themſelves for THE BENEFIT OF OTHERS."

E. THURLOW.

J. DALRYMPLE.

AR. MURPHY.

CASE of the RESPONDENTS.

Mr. Thompſon was Author of a Poem entitled *Spring*, and on 16th Jan. 1728, aſſigned the Copyright to Andrew Millar.

JAMES THOMPSON, late of Richmond, in Surry, Eſq; deceaſed, was, in his Lifetime, the Author of a Tragedy called *Sophoniſba*, and alſo a Poem intitled *Spring*.—In January, 1729, Andrew Millar (now deceaſed) contracted with Mr. Thompſon for the Purchaſe of the ſaid Tragedy and Poem; and, by Indenture, dated the 16th of January, 1729, Mr. Thompſon, in Conſideration of 137l. 10s. paid to him by the ſaid Andrew Millar, did aſſign to the ſaid Andrew Millar, his Executors, Adminiſtrators, and Aſſigns, the true Copies of the ſaid Tragedy and Poem, and the ſole and exclusive Right and Property of printing the ſaid Copies, for his and their ſole Uſe and Benefit: And alſo all Benefit of all Additions, Corrections, and Amendments, which ſhould be afterwards made in the ſaid Copies.

Mr. Thompſon was alſo the Author of the following Poems, viz. a Poem called *Summer*, a Poem called *Autumn*, a Poem called *Winter*, a Poem called *Britannia*, a Poem *ſacred to the Memory of Sir Iſaac Newton*, an *Hymn on the Succeſſion of the Seaſons*, and an *Eſſay on deſcriptive Poetry*; and, in Conſideration of 105l. which, by a Receipt under his Hand, dated 28th of July, 1729, he acknowledged to have received from John Millan, of the Pariſh of St. Margaret, Weſtminſter, Bookſeller, Mr. Thompſon ſold to the ſaid John Millan the Copies of the ſeveral Poems laſt mentioned, with the ſole Right of printing and publiſhing them, together with ſuch Alterations and Additions as the Author ſhould afterwards occaſionally make.

Mr. Thompſon was Author of the *Seaſons*, and other Poems, and aſſigned the ſame, and his Right in the Copies thereof, to John Millan

About

About June, 1738, the ſaid Andrew Millar contracted with the ſaid John Millan for the Purchaſe of the ſeveral Poems laſt mentioned, ſo ſold to him by Mr. Thompſon: And, by Indenture, dated 18th June, 1738, John Millan, in Conſideration of 105l. paid to him by Andrew Millar, did aſſign unto the ſaid Andrew Millar, his Executors, Adminiſtrators, and Aſſigns, the ſeveral Copies of the Poems laſt mentioned, with all the Corrections, Alterations, and Additions, which the Author had made, or ſhould make; and all the Right, Title, Intereſt, Property, Claim, and Demand of the ſaid John Millan to, or in, the ſaid Copies. And alſo, the ſeveral Plates of the Prints of the ſaid *Seaſons*, and the Plate of the Print in the Frontiſpiece of the ſaid *Seaſons*: And alſo, the Plate of the Print of Sir Iſaac Newton's Monument: All which Prints had been uſually bound up with the ſaid Poems and Pieces.

18th June, 1738, John Millan aſſigned the Copies of the Poems, which he had purchaſed of Mr. Thompſon, to Andrew Millar.

By Virtue of the aforeſaid Indenture, Andrew Millar became lawfully intitled to all the Profits ariſing by the printing and publiſhing of the ſeveral Poems before-mentioned, and to the ſole and exclusive Property and Right of printing Copies of them, and of vending and diſpoſing of the ſame.

Andrew Millar died in June, 1768, having firſt made his Laſt Will, in Writing, dated 20th February, 1768; and thereof appointed his then Wife, Jane Millar, (now Dame Jane Grant) William Millar, Thomas Longman, and the Reſpondent, Thomas Cadell, Executors.

In June, 1768, Andrew Millar died, having, by his Will, appointed his Wife Jane, (now Dame Jane Grant) W. Millar, Tho. Longman, and T. Cadell, his Executors.

Soon after Andrew Millar's Death, his Will was duly proved by his Widow, the ſaid William Millar, and the Reſpondent Thomas Cadell, who thereby became intitled to the ſeveral Copies of the Poems before mentioned to have been purchaſed by the ſaid Andrew Millar, and to the ſole Right of printing, publiſhing, and vending them.

The Teſtator's Widow, William Millar, and Thomas Cadell, proved the Will

On the 13th June, 1769, the Copy-right of the ſeveral Poems before mentioned, with the ſole Right of printing, publiſhing, and vending them, was ſold, by Order of Andrew Millar's Executors, by Auction, at the Queen's Arms Tavern, in Saint Paul's Church-yard, London. At this Sale, the Reſpondents purchaſed the Copy-right of the ſaid Poems, in the Proportions, and for the Prices, following, viz. John Rivington purchaſed one fifteenth Part of the ſaid Copy-right for 32l. 12s. William Johnſton, another fifteenth Part for 32l. 12s. William Strahan, another fifteenth Part for 32l. 12s. Thomas Longman, another fifteenth Part for 32l. 12s. William Richardſon, and John Richardſon, two twelfth Parts for 88l. 10s. Thomas Lowndes, one-twelfth Part for 43l. Thomas Caſlon, one-twelfth Part for 43l. George Kearſley, one-twelfth Part for 42l. Henry Baldwin, one-twelfth Part for 42l. Thomas Cadell, one-fifteenth Part for 32l. 12s. William Owen, one-twelfth Part for 41l. 10s. Thomas Davies, one-twelfth Part for 42l. and Thomas Becket and Peter Abraham De Houdt purchaſed of the ſaid Thomas Davies one-twenty-fourth Part for 21l. Afterwards the Reſpondents reſpectively paid to the Executors of Andrew Millar the ſeveral Sums of Money agreed at the Auction to be given for their ſeveral Parts of the Copy-right in the ſaid Poems, and thereby became intitled to the ſaid Copy-right, in the ſeveral Proportions before mentioned.

13th June, 1769, the Copy-right of the before mentioned Poems put up to Auction, by Order of Andrew Millar's Executors, and ſold in Parts to the Reſpondents.

After the Purchaſe by the Reſpondents of the *Copy right* in the ſaid Poems, the Appellants, notwithſtanding the ſole and exclusive Right which the Reſpondents claim of printing, publiſhing, and vending of the ſaid Poems, publiſhed and ſold ſeveral thouſand Copies of the ſaid Poems called *Spring*, *Summer*, *Autumn*, and *Winter*, and the ſaid *Hymn on the Succeſſion of the Seaſons*, in a Volume intitled, *the Seaſons, by James Thomſon; Edinburgh, printed by A. Donaldſon*, 1768; and thereby acquired conſiderable Profits, to the great Loſs and Prejudice of the Reſpondents.

The Appellants, without Conſent of the Reſpondents, publiſhed and ſold Copies of Mr. Thompſon's *Seaſons*, and of the *Hymn on the Succeſſion of the Seaſons*.

Upon

[illegible] January, 1771, Respondents filed a Bill in Chancery against the Appellants for an Account of the Copies sold, and to restrain them from selling any Copies in future.

Upon this, the Respondents applied to the Appellants to stop the Sale of the Poems and Hymn, so published and sold without the Consent of the Respondents, and for an Account of the Number of Copies sold, and of the Monies which had been received for them. But the Appellants refusing either to stop the Sale, or to Account; the Respondents, on the 21st of January, 1771, filed a Bill in Chancery against the Appellants; thereby stating the several Facts before mentioned, and praying that the Appellants might answer the Premises, and come to an Account with the Respondents for the Money which the Appellants had received by the Sale of the said Poems and Hymn; and that the Appellants might for ever after be restrained by the Injunction of the Court from publishing the said Poems and Hymn, and from selling any Copies of them in future, and for general Relief.

[illegible] of the Appellants [illegible] 16th July, 1771.

On the 16th and 20th July, 1771, the Appellants put in their Answers, and thereby admit, That Mr. Thomson was the Author of the several Poems mentioned in the Bill, but deny all Knowledge of the several Assignments, which the Bill states, of the Copies of the said Poems; and say, that they believe that Mr. Andrew Millar, by Virtue of the several Indentures mentioned in the Bill, or by any other Means, did not become intitled to the Copyright in the Poems before mentioned, for a longer Time than the several Terms limited by an Act passed in the eighth Year of her late Majesty Queen Ann, intitled, *An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors, or Purchasers of such Copies, during the Times therein mentioned.* The Clauses relied upon in the Answer of the Appellants are, that by which it is enacted, (1) *That the Author of any Book, or Books, then already compos'd, and not printed or published, or that should thereafter be compos'd, and his Assignee, or Assigns, should have the sole Liberty of printing and reprinting such Book, and Books, for the Term of fourteen Years, to commence from the Day of first publishing the same, and no longer*; and a Proviso, by which it is further enacted, (2) *That after the Expiration of the said Term of fourteen Years, the sole Right of printing and disposing of Copies shall return to the Authors thereof, if they are then living, for another Term of fourteen Years.* The Appellants, in their Answers, also say, That the Copies of the several Works, in the Bill mentioned to have been written by Mr. Thomson, having, as appears by the Bill, been assigned by him, and first published, in 1729; the sole Right of printing, publishing, and selling the same could not be extended beyond the Term of twenty-eight Years, from the Time of such first Publication, which Term expired in 1757; and deny, that during the said Term they were concerned in the printing, publishing, or selling any Copies of the said Works. They admit the Death of Andrew Millar; and that, before his Death, he made his last Will, and appointed such Persons Executors, as in the Bill are named; and that it was proved in Manner therein mentioned. But they insist, for the Reasons aforesaid, that the Executors of Andrew Millar did not, by his Will, or otherwise, become intitled to the sole Right of printing and publishing the said Poems. The Appellants admit in their Answers, that they have, since the Expiration of the said Term of twenty-eight Years, without the Consent of the Respondents, printed, published, and sold several Copies of the Poems in the Bill mentioned; and insist, *that unless the Respondents are able to make out a Title to the sole and exclusive Property of the said Poems, paramount the aforesaid Act of Parliament*, the Appellants are, by Virtue of that Act, well authorised in printing, publishing, and selling the said Poems, and are not compellable to account for, or discover the Number of Copies they had printed, published, or sold, and ought not to be restrained from the further Publication and Sale of the same; and, therefore, claim the Benefit of the said Act of Parliament, as if they had pleaded the same in Bar to the Relief and Discovery sought by the Bill.

[illegible] Nov. 1771, the Respondents amend their Bill making the Respondent, Thomas Cadell, a Party.

On the 17th November, 1771, the Respondents obtained an Order for leave to amend their Bill; and it was amended accordingly, by making the Respondent, Thomas Cadell, whose Name was before omitted, a Party.

(1) By Sect. 1.

(2) By Sect. 11.

After-

Afterwards, the Reſpondents replied to the Anſwer of the Appellants; and they rejoined: And then the Cauſe being at Iſſue, two Witneſſes were examined by the Reſpondents to prove Mr. Thompſon the Author of the before mentioned Poems, and the ſeveral Aſſignments of the *Copy-right* in them to Andrew Millar, and the Sale, by his Executors, to the Reſpondents.

On the 16th November, 1772, the Cauſe was heard before the Right Honourable the Lord Chancellor, when his Lordſhip was pleaſed to decree, That the Injunction, which had been before granted in the Cauſe, ſhould be made perpetual; and that it ſhould be referred to the Maſter to take an Account of what had been received by the Appellants, or either of them, or by any other Perſon by their Order, or for their Uſe, from the Publication and Sale of the Poems in the Pleadings mentioned, and that the Appellants ſhould pay unto the Reſpondents what ſhould be found due to them on the Balance of the ſaid Account; and his Lordſhip reſerved the Conſideration of Coſts until the Maſter ſhould have made his Report; and any of the Parties were to be at Liberty to apply to the Court as there ſhould be Occaſion.

16th Nov. 1772, the Lord Chancellor's Decree for the Reſpondents.

From this Decree the Appellants have brought their Petition and Appeal, praying that it may be reverſed. But the Reſpondents are adviſed, and humbly beg leave to contend, that the Decree of the Lord Chancellor is juſt and equitable, and ought to be affirmed; and that the Petition and Appeal ought to be diſmiſſed with Coſts, for the following (amongſt other)

REASONS.

I. The Claim of Authors to the ſole and excluſive Right of printing and publiſhing their own Works, is founded upon Principles of Reaſon and natural Juſtice. It is juſt and equitable, that thoſe, who labour in the Advancement of Knowledge, and communicate their Ideas in written Compoſitions to the Public, ſhould have a Recompence; and in order to obtain a ſuitable one, Authors, when they publiſh their Works, mean to reſerve to themſelves the Right of multiplying printed Copies; and the Nature of Printing, and the Circumſtances attending a Publication, being conſidered, there is an *implied Agreement*, on the Sale of each particular Copy, that the Purchaſer ſhall not invade the beneficial Right of multiplying Copies intended to be reſerved by the Author.

II. From the firſt Introduction of the Art of Printing into England, this peculiar Species of Property has been known by the expreſſive Name of *Copy-right*; has continually been the Subject of *Sale*, *Gift*, and *Family Settlement*; has always been protected from Invaſion; and, in ſome Inſtances, has even been *recognized by the Legiſlature*.

III. It is a Point too well eſtabliſhed to be denied, that at *Common Law*, the ſole and excluſive Right of multiplying for Sale the Copies of Acts of Parliament, Proclamations, and other Papers of a *public* Nature, belongs to the King, and his Patentees; not in conſequence of any Prerogative over the Art of Printing, but on Account of his peculiar Intereſt, as the *executive Power*, in all Publications and Acts of State flowing from himſelf, or Parliament. This ſhews, that an *Intereſt* or *Property* ſimilar to that claimed by Authors, *may* ſubſiſt at *Common Law*; and though the Reaſons, on which Authors claim an *Intereſt* in their own *private* Copies, are not preciſely the ſame as thoſe from which the *Intereſt* of the Crown in *public* Copies is derived, yet they are not

less forcible; but give to Authors a Title of Property, as well founded in *Juſtice*, as the Title of the Crown is founded in *Policy*, and one equally conſiſtent with Public Utility.

IV. There is nothing in the Statute of Queen Ann to take away that Intereſt or Property, to which Authors were before intitled in the Publication and Sale of their own Works. The Object of that Statute was to ſecure Literary Property by Penalties from Piracy and Invaſion; and though the Protection given is only *temporary*, yet, ſo far from being made ſo under an Idea of the Legiſlature, that Authors had no Property in their Works before, or with an Intention to limit its Duration, the Statute expreſly declares, that nothing contained in it ſhall *prejudice* or confirm any Right which the Univerſities, *or any Perſon or Perſons*, might claim to the printing or reprinting of any Book or Copy *then* printed, or *afterwards* to be printed.

V. Since the Statute of Queen Ann, many Injunctions have been granted by the Court of Chancery to reſtrain the Invaſion of *Copy-right*, notwithſtanding the Expiration of the Term during which *only* the Statute gives a Protection by Penalties; and the Opinion of the Chancellors, who granted ſuch Injunctions, has been confirmed by a Judgment of the Court of King's Bench in Favour of Literary Property, which was given after ſolemn Argument.

VI. Upon the Faith of the Protection, which has hitherto been given to Literary Property independently of the Statute of Queen Ann, great Sums of Money have been expended in purchaſing *Copies*; and if ſuch Protection ſhould be now withdrawn, many Hundred Families will loſe their whole Eſtates, and neceſſarily be involved in Ruin.

AL. WEDDERBURN.

J. DUNNING.

FRA^s. HARGRAVE.

ARGUMENTS

ARGUMENTS

OF THE

COUNCIL FOR THE APPELLANTS.

Mr. Attorney General *Thurlow.*

I SHALL endeavour, my Lords, to ſhew that the Decree of the Court of Chancery, pronounced on the 16th Day of November, 1772, in Favour of the Reſpondents, to be highly injurious to the Appellants, my Clients; and that what is termed LITERARY-PROPERTY, is not warranted or ſecured at Common Law. The Idea inculcated by what is called a *Publication*, is not that myſterious Thing the bookſelling Trade would make it, being ſimply a Multiplication of Copies; and whether they were multiplied to the Number of five or five hundred, ſignifies not an Iota to the Matter in Diſpute. Previous to the Invention of Printing, Scribes, for copying an Author's Work, obtained a greater Remuneration than Perſons who, ſince the Invention of Printing, diffuſe Writings by Means of certain Types.

Property, my Lords, of whatever Kind, is that which is begun by Occupancy, and continued by Poſſeſſion. Metaphyſicians talk of Property in Life or Limb, in Fame, Honor, and Character; but this is not a Language Lawyers can adopt. There is, alſo, ſuch a Thing as Property by Specification; but under what Denomination is Literary Property to be arranged? Is it corporeal or incorporeal? If corporeal, it is deſcendible, like any other Chattel; if incorporeal, how is its Incorporeality to be aſcertained? how ſpecifically diſtinguiſhed from its Appendage or Adjunct, the corporeal Part? To ſay that a Man has a Property in the Ideas of a Book, and none in the Book itſelf, is as if one ſhould affirm that a Man has a Property in the Coloring of a Picture, but none in the Canvaſs on which that Coloring is laid; or as if Mr. (1) Harriſon had a Property in the Diſcovery made by his Time-Piece, but none in the Wheels or mechanical Parts of which it is compoſed: a Notion to the laſt

(1) Lord *Camden*, as Lord Chief Juſtice of the *Common Pleas*, on a Queſtion referred for the Conſideration of that Court, on a Trial before him, Whether a Man might exerciſe as many Trades as he had worked at, or ſerved ſeven Years Apprenticeſhip to? in giving the Opinion of the Court, which was in the Affirmative, obſerved, "That Mr. *Harriſon* ſerved an Apprenticeſhip "to the Trade of a Carpenter, but that for 26 Years had been a Watchmaker; and though he had "never ſerved as an Apprentice to the Trade of a Watchmaker, was the beſt Maker of Time-Pieces "in the World, and the Parliament had given him 5000l. towards finding out the Longitude by the "Help of his Watches or Time-Meaſurers: And ſhall this Man (ſaid Lord *Camden*) be hindered "from making Watches, and exerciſing the Trade of a Carpenter alſo, if he pleaſes?" *Wils. Rep.* C. B. 169.

laſt Extreme abſurd! Applying this to the Caſe of an Author; if he had any diſtinct excluſive Property in a Book, ſeparate from the material and corporeal Part, I have no Objection to admit this excluſive Property, provided he will demonſtrate to me *quo Jure* the Property accrues.

I ſhould now, my Lords, proceed to conſider the Senſe of the Word Property, and to define it philoſophically, and in the ſeparate Lights of being corporeal and ſpiritual; but as your Lordſhips are in Poſſeſſion of the printed Caſe of the Appellants, you are in Poſſeſſion of every Thing in my Power to urge in that View of the Subject; I will not therefore preſume to draw the Attention of your Lordſhips unneceſſarily, by troubling you with a Repitition of what I am perſuaded you are all ſo well informed of.

The Bookſellers, my Lords, have not, till lately, ever concerned themſelves about Authors, but have generally confined the Subſtance of their Prayers to the Legiſlature, for the Security of their own Property; nor would they probably have, of late Years, introduced the Authors as Parties in their Claims to the Common Law Right of excluſively multiplying Copies, had they not found *that* neceſſary to give a colorable Face to their Monopoly. For ſeveral Caſes exemplifying this Obſervation I beg Leave again to refer your Lordſhips to the ſaid printed Caſe; all the Grants, Charters, Licences, and Patents from the Crown, as well to corporate Bodies as Individuals, (which are traced far back in the ſaid printed Caſe) ſpecifically prove, that if there had been any inherent Right of excluſively multiplying Copies, ſuch Inſtances of exerting the Royal Prerogative would have been unneceſſary. The Statute of Queen (1) *Anne* is not merely an accumulative Act, declaratory of the Common Law, and giving additional Penalties, but a new Law to give learned Men a Property which they had not before; and it is an incontrovertible Proof that there previouſly exiſted no Common Law Right, as contended for by the Reſpondents; nor hath the Queſtion touching the Common Law Right ever been deciſively determined by any Chancellor. Many Caſes, my Lords, ſome before 8 An. Chap. 19. and others immediately upon that Statute, generally inferring, that the grand Queſtion touching the Common Law Right, had never been deciſively determined by any Chancellor; will be found collected in our Point of View, and in chronological Order, in the ſaid printed Caſe.

No ſuch Idea, my Lords, as that of an excluſive Right to multiply Copies prevailed previous to, or indeed long after, the Invention of Printing. This is inſtanced in ſeveral Caſes, adduced for that Purpoſe, by the Appellants, in their ſaid printed Caſe, where one Writer complains of another for printing his Works, not on account of any Violation of Property, but merely becauſe the Party complained of had printed them inaccurately. Literary Property conſiſts only in the Imagination; it never, till it was found advantageous, entered into the Head, of Bookſellers themſelves; Authors never conceived the Notion of any Property

Since the above reported Compliment, the Parliament have granted Mr. *Harriſon* the further Sum of 8750l. for the Diſcovery of the Invention of his Time-Keepers, by Stat. 13, Geo. III. Chap. 77, Sect. 29. And the late Mr. Juſtice *Yates*, in giving his Opinion on this very Queſtion of *Literary Property*, obſerved, that Examples might be mentioned of as great an Exertion of natural Faculties, and of meritorious Labour in the mechanic Inventions, as in the Caſe of Authors. "We have "(continues the Judge) a recent Inſtance in Mr. *Harriſon*'s Time-Piece, which is ſaid to have coſt "him near 50 Years application; and might not he inſiſt upon the ſame Argument, the ſame Chain "of Reaſoning, the ſame Foundation of moral Right, for Property in his Invention, as an Author "can for his?" See *Bar.* Lit. Prop. 70, 102.

(1) 8 *An.* Chap. 19. An Abſtract whereof is added by Way of Appendix.

veſting

veſting in them, but what was given by Statute, by Patent, the licenſing Acts the royal Privilege, or in Virtue of the Inſtitution of the Stationers Company. What is called Literary Property gave riſe to a ſcandalous Monopoly of ignorant bookſellers, who, fattened at the Expence of other Mens Ingenuity, grew opulent by Oppreſſion. As the Lords of Seſſion have freed (1) Scotland from ſuch a Monopoly, I ſincerely hope your Lordſhips, following ſo praiſe-worthy an Example, will emancipate this Kingdom from ſuch an odious Oppreſſion.

Sir John Dalrymple.

It ſhould be conſidered, my Lords, that this pretended Property, which is ſuppoſed to have a Foundation in Common Law, cannot in the Records of the Common Law Courts any where be found: If you ſpeak of the Subject before the Act of Queen *Anne*, you hear of nothing but licenſing Acts, and the Company of Stationers —My Lords, during the tory Reign of King Charles the Second the Bookſellers were the mere Engines of the Court's Deſigns, and therefore the licenſing Act ſufficed; — it was the ſame through the tory Reign of King James the Second, while it was the Court ſide of every Queſtion that could alone be handled with ſafety; the licenſing Act gave that Property to the Bookſellers, which was ſufficient for their Purpoſe. In the whig Reign of King William they began to move out of the old Sphere, and then we accordingly find new Movements. In the tory Reign of Queen *Anne* they looked out for freſh Securities; then firſt appeared a new Trade. My Lords, the Bookſellers then found they could make as much or more by abuſing the Sovereign, her Parliament, her Council, her Servants, and her Government, than they could before make by the Support of them. Printing Books thus coming into Oppoſition to the Court, the Trade laboured hard to eſtabliſh a Right to their Copies independent of the Court. They applied every where for the Means of eſtabliſhing that Right; but were forced at laſt to have recourſe to Parliament to eſtabliſh and veſt in them a Right which the Common Law did not give them.

My Lords, the Hiſtory of the Act of Queen *Anne* deſerves your Lordſhips Attention: What was the View of the Bookſellers? Abſurdity on the very Face of it. They applied for an Act, veſting in them a Property for fourteen Years which they pretend to have derived from the Common Law, for Futurity. Can it be ſuppoſed that Men who were any Ways clear in their perpetual Right, would apply for a freſh Right for fourteen Years only? It could not be. They knew their own Situation; they knew the Rottenneſs of their pretended Right, and wanted a new real one, inſtead of the old imaginary one.

Yet, my Lords, this Act, which changed their Perpetuity to a Term of fourteen Years, was obtained at a Period when the Intereſts of Learning was far from being without good Support: *Addiſon*, after being the Friend of many Miniſters, became Secretary of State; and *Swift* was high in the Eſteem, and an Adviſer of the Heads of another Party. Happy would it be, my Lords, if Miniſters had always ſuch Friends, and ſuch Adviſers!

But, my Lords, this Act of Queen *Anne*, which was uſhered in under the Idea of encouraging Literature, was very far from having ſuch a Tendency. It was to encourage Bookſellers, but not Authors; however, ſuppoſing both intereſts the ſame, — What did they gain? Why, a Perpetuity was changed to a Term of

(1) See *Boſwell's* Deciſion of the Court of Seſſion, upon the ſame Queſtion, in the Cauſe of *Hinton v Donaldſon & al.* 4to, 1774.

fourteen

fourteen years only. A Price was fixed, and a Clauſe inſerted to force them to ſend Copies to public Libraries — What Encouragements are theſe? — They, on the contrary, were Diſcouragements. — All which is ſufficient to ſhew that the Bookſellers never dreamed of a ſerious Property at Common Law for Perpetuity; had they ſuch a Notion they would have petitioned againſt the Act.

Obſerve, My Lords, the Title of the Act: *To veſt* the Copy-rights: that is, my Lords, to *give* them a Right they had not before; a marked Expreſſion which could not be miſtaken.—And though the Word *ſecured* is uſed in the Body of the Act, it does not enter there as the Signification of a different Idea: it is the ſame Idea: the Bill was to veſt a new Property, and provide accordingly, and inflicts Penalties, after which the Word *ſecures* occurs, and is uſed perfectly conſiſtent with the former Term.

What could be more abſurd, my Lords, than an Act to veſt a perpetual Right to a ſet of Perſons for a limitted Term, and inflicting Penalties? Lord Shaftſbury tells us that Ridicule is the Teſt of Truth: let us try ſuch an Act by that Teſt. I will read an imaginary Act which enacts ſuch Purpoſes.

An Act for the Encouragement of PLANTING, *by veſting* THE SHOOTS OF HEDGES *and* BRANCHES OF TREES, IN THE PLANTERS, *during the Times therein mentioned.*

"WHEREAS *Botaniſts, Floriſts, Gardeners, Nurſerymen*, and other perſons, have of late frequently taken the Liberty of *planting, tranſplanting*, and *advertizing*, or cauſing to be *planted, tranſplanted*, and *advertiſed, Hedges, Trees*, and *other Plants*, without the Conſent of the Proprietors of ſuch *Hedges, Trees*, and *other Plants*, to their very great Detriment, and too often to the Ruin of them and their Families." "For preventing therefore ſuch Practices, for the future, and for the Encouragement of *ingenious* Men to *ſet* and *rear up neceſſary Hedges* and *Trees*, may it pleaſe your Majeſty, that from and after the *firſt* Day of *April*, 1774, the *Planter* of any *Tree* or *Trees*, or of any *Hedge* or *Hedges*, already *planted*, who hath not transferred, to any other the *Shoot or Shoots, Branch or Branches*, of ſuch *Hedge* or *Hedges, Tree* or *Trees*, Share or Shares thereof, or the *Botaniſt or Botaniſts, Floriſt or Floriſts, Gardener or Gardeners, Nurſeryman or Nurſerymen*, or other Perſon or Perſons, who hath or have purchaſed or acquired, the *Shoot* or *Shoots, Branch* or *Branches, of any Hedge* or *Hedges, Tree* or *Trees*, in order to *plant or tranſplant* the ſame, ſhall have the ſole Right and Liberty of *planting* ſuch *Tree* and *Trees*, and ſuch *Hedge and Hedges*, for the Term of 21 Years, to commence from the ſaid *firſt* Day of *April*, and no longer; and that the *Planter* of any *Tree* or *Trees, Hedge* or *Hedges*, already *planted*, and not *reared, grown up*, or that ſhall hereafter be *planted*, and his Aſſignee or Aſſigns, ſhall have the ſole Liberty of *planting and tranſplanting* ſuch *Hedge* and *Hedges, Tree and Trees*, for the Term of 14 Years, to commence from the Day of the firſt *advertizing* the ſame and no longer; and that if any other *Botaniſt, Floriſt, Gardener, Nurſeryman*, or other perſon whomſoever, from and after the *firſt* Day of *April*, 1774, within the Times granted and limited by this Act, as aforeſaid, ſhall *plant, tranſplant, import, cut or break down*, or cauſe to be *planted, tranſplanted, imported, cut or broken down*, any ſuch *Hedge* or *Hedges, Tree or Trees*, without the Conſent of the Proprietor or Proprietors thereof, firſt had and obtained in writing, ſigned in the Preſence of two or more credible Witneſſes; or knowing the ſame to be ſo *planted, tranſplanted, imported, cut* or *broken down*, without the Conſent

Conſent of the Proprietors; ſhall ſell, *advertize* or expoſe to Sale, or cauſe to be ſold, *advertized*, or expoſed to Sale, any ſuch *Hedge* or *Hedges*, *Tree or Trees*, without ſuch Conſent, firſt had and obtained, as aforeſaid, then ſuch Offender or Offenders ſhall forfeit ſuch *Hedge* or *Hedges*, *Tree or Trees*; and all and every *Leaf* or *Leaves*, being Part of ſuch *Hedge* or *Hedges*, *Tree or Trees*, to the Proprietor or Proprietors of the *Shoots or Branches* thereof; who ſhall forthwith *damage* and *deſtroy* them; and further, that every ſuch Offender ſhall forfeit one Penny for every *Root* which ſhall be found in his, her, or their Cuſtody, either *planted* or *planting*, *advertized*, or expoſed to Sale, contrary to this Act: one Moiety, &c."

"II. And whereas many Perſons may through Ignorance offend againſt this Act, unleſs ſome Proviſion be made, whereby the Property in every ſuch *Hedge and Tree*, as is intended by this Act to be ſecured to the Proprietor or Proprietors thereof, may be aſcertained, as likewiſe the Conſent of ſuch Proprietor or Proprietors, for the *planting* or *tranſplanting* of ſuch *Hedge* or *Hedges*, *Tree or Trees*, may from Time to Time be known," Be it therefore further enacted, by the Authority aforeſaid, that Nothing in this Act contained, ſhall be conſtrued to extend, to ſubject any *Botaniſt*, *Floriſt*, *Gardener*, *Nurſeryman*, or other Perſon whomſoever, to the Forfeitures or Penalties, therein mentioned, for or by reaſon of the *planting* or *tranſplanting* of any *Hedge* or *Hedges*, *Tree or Trees*, without ſuch Conſent, as aforeſaid, unleſs *a Sprig or Spray to the Shoots* of ſuch *Hedge*, *or Hedges*, *or a Bud*, *or Leaf of a Branch of ſuch Tree or Trees*, hereafter *advertized*, ſhall, before ſuch *Advertiſement*, be *depoſited among the natural Curioſities in the* BRITISH MUSEUM, *and the ſame* be entered in the Regiſtry Book, in ſuch Manner, as hath been uſual, which Regiſter Book ſhall at all Times be kept at the *ſaid* MUSEUM: and unleſs ſuch Conſent of the Proprietor or Proprietors, be in like Manner entered as aforeſaid, for every of which ſeveral Entries, Sixpence ſhall be paid, and no more, which ſaid Regiſter Book may, at all ſeaſonable and convenient Times, be reſorted to, and inſpected by any *Botaniſt*, *Floriſt*, *Gardener*, *Nurſeryman*, or other Perſon, for the Purpoſes before mentioned, without any Fee or Reward, and DANIEL CHARLES SOLANDER, *Doctor of Phyſic and of Law*, *or his Succeſſor in Office*, *in the ſaid* MUSEUM, ſhall, when and as often as thereunto required, give a Certificate under his Hand, of ſuch Entry or Entries, and for every ſuch Certificate may take a Fee, not exceeding ſix Pence."

Sprigs or Sprays of Shoots of Hedges, Buds or Leaves of Branches of Trees, to be depoſited before adverti-zing in the Regiſtry Book of the BRITISH MUSEUM.

Which may be inſpected, at any Time, without Fee.

Doctor Solander, &c. to give Certificate of ſuch Entry.

"III. Provided nevertheleſs, That if the *ſaid* DANIEL CHARLES SOLANDER, *or his Succeſſor in Office*, for the Time being, *in the ſaid* MUSEUM, ſhall refuſe or neglect to regiſter, or make ſuch Entry or Entries, or to give ſuch Certificate, being thereunto required, by the *Planter* or Proprietor of ſuch *Shoot or Shoots*, *Branch or Branches*, in the Preſence of two or more credible Witneſſes, that then ſuch Perſon or Perſons, ſo refuſing, Notice being firſt duly given of ſuch Refuſal, by an Advertizement in the *Gazette*, ſhall have the like Benefit, as if ſuch Entry or Entries, Certificate or Certificates, had been duly made and given; and that the ſaid DANIEL CHARLES SOLANDER, *and his Succeſſors for the Time being*, ſo refuſing, ſhall for any ſuch Offence *reſpectively* forfeit, to the Proprietor of ſuch *Shoot* or *Shoots*, *Branch or Branches*, the Sum of £.20 to be recovered, in any of his Majeſty's Courts of Record at *Weſtminſter*, &c.

Penalty of Refuſal.

"IV. Provided always, and it is hereby enacted, that nine *Shoots* of each *Hedge* or *Hedges*, and nine *Branches of* each *Tree or Trees*, that from and after the ſaid *firſt* Day of April 1774, ſhall be *planted* and *adverti*ſed, as aforeſaid, or *tranſplanted* and *advertiſed*, ſhall by the *Planter* and *Planters*, *or Tranſplanter and Tranſplanters* thereof, be delivered to

After firſt of April, 1774, nine Shoots of each Hedge, and nine Branches of each Tree, ſhall be delivered to

Doctor Solander to the Use of the Royal Gardens, &c.

to the said DANIEL CHARLES SOLANDER, *or his Succeſſor*, for the Time being, *at the ſaid* MUSEUM, before ſuch *Advertiſement be inſerted in any public Paper* for the Uſe of the *Royal Garden at Kew, the Botanic Garden, belonging to the Company of Apothecaries, at Cheſea, the Garden belonging to* JOHN HILL, *Doctor in Phyſic, at* BAYSWATER, *the Nurſery Grounds, at Brompton, Kenſington, Turnham-Green, Brentford, and Highgate, in the ſaid County* of MIDDLESEX, reſpectively, and for the Uſe of the Nurſery Ground at South *Lambeth*, in the County of *Surry*; which ſaid DANIEL CHARLES SOLANDER, *and his Succeſſor in the ſaid Office, for the Time being*, is hereby required, within ten Days after Demand, by the Keepers of the reſpective *Gardens and Nurſeries*, or any Perſon or Perſons, by them, or any of them, authorized, to demand the ſaid *Shoots and Branches* to deliver the ſame, for the Uſe of the aforeſaid *Gardens and Nurſeries*; and if any Proprietor, *Botaniſt, Floriſt, Planter, Tranſplanter, Gardener, or Nurſeryman*, or *the ſaid* DANIEL CHARLES SOLANDER, *or his Succeſſor, for the Time being*, ſhall not obſerve the Directions of this Act therein, that then he and they ſo making Default, in not delivering the ſaid *planted Shoots and Branches* as aforeſaid, ſhall forfeit, beſides the Value of the ſaid *planted Shoots and Branches*, the Sum of five Pounds for every *Shoot or Branch*, not ſo delivered, as alſo the Value of the ſaid *planted Shoot or Branch*, not ſo delivered, the ſame to be recovered by *the Royal Family, the ſaid Company of Apothecaries, the ſaid* JOHN HILL, *and the Owners or Proprietors of the ſaid Nurſeries and Gardens*, with their full Coſts, reſpectively."

Penalty on Perſons refuſing to deliver the Shoots and Branches after Demand

"V. Provided, that Nothing in this Act contained, do extend, or ſhall be conſtrued to extend, to prohibit the Importation, vending, or ſelling of any *Hedges or Trees planted* beyond the Seas, any Thing in this Act contained to the contrary notwithſtanding."

This Act not to prohibit the Importation of Shoots planted beyond Sea

"VI. Provided, that Nothing in this Act contained, ſhall extend, or be conſtrued to extend, either to prejudice or confirm any Right that the ſaid *Royal Family, the Company of Apothecaries*, JOHN HILL, *or the reſpective Keepers of the ſaid Nurſeries or Gardens*, or any of them, or any Perſon or Perſons have, or claim to have, to the *planting* or *tranſplanting any Hedge or Hedges, Tree or Trees*, or *Shoot or Branch* already *planted*, or hereafter to be *planted*."

This Act not to prejudice the Right of the Royal Family &c.

"VII. Provided always, that after the Expiration of the ſaid Term of 14 years, the ſole Right of *planting* or diſpoſing of *Shoots or Branches*, ſhall return to the *Planters* thereof, if they are then living, for another Term of 14 years.

After the 14 years, the Right of planting, &c. returns to the Planters for other 14 Years.

Now, my Lords, does it not from hence appear that an Act to convert a Perpetuity into a limitted Term is abſurd upon the Face of it? And may we not from hence conclude that the Bookſellers, when they applied for the Act of Queen *Anne*, knew they had no perpetual Common Law Right?

My Lords, this perpetual Right which they want would, inſtead of being beneficial to the Intereſts of Literature, be pernicious to it. It would encourage the Spirit of writing for Money; which is a Diſgrace to the Writer, and to his very Age. My Lords, why ſhould not Honour and Reputation be powerful Inducements enough for Authors, without that mean one of Profit? Foreigners know no ſuch exorbitant pecuniary Rewards as have diſgraced this Country. The Germans get nothing by writing. The Italian States are ſo ſmall that no Literary Property can exiſt, as the Bookſellers of one State would immediately print upon thoſe of another.—In France the Sums given to Authors are too ſmall to have this Effect. My Friend, Mr. Hume, has told me that Rouſſeau aſſured him he had but fourſcore Lewis-d'ors

d'ors for the Copy of his Emile. Such Sums as we hear of in *England*, are merely an Encouragement to the mercenary Spirit of Writing, not to the Merits of it.

But farther, my Lords, if you give this Perpetual Right to publiſh, you give the ſame Right to ſurpreſs. If an Author is to have this Excluſive Right to his Works after Publication, he may ſurpreſs them at will, or at leaſt ſtop the future Publication of them. My Lords, this is not a mere imaginary Idea; it is poſſible, and even probable.

My Lords, I ſhall beg Leave to ſtate a Suppoſition. Suppoſe there was a Man (1) who, with the utmoſt Diligence and Attention, ſought into the Records of his Country, and alſo of foreign ones, for State-Papers to illuſtrate Hiſtory; ſuppoſe he meet with ſuch Succeſs in this Imployment as to make Diſcoveries of the higheſt Importance: Suppoſe, when his Book comes to be publiſhed, that inſtead of receiving that public Applauſe which he might perhaps have Reaſon to expect, he, on the contrary, finds himſelf hunted down for that very Circumſtance which ought to have added to his Fame. Suppoſing there was ſuch a Man, my Lords, muſt he not be uncommonly firm and reſolute to bear up againſt the illiberal Voice of the Publick? muſt he not be tempted to ſuppreſs a Book, when he found it thus received, notwithſtanding the Injury which he would thereby do to, I may ſay, his Country?

Printers and Bookſellers, my Lords, are not remarkable for too much Modeſty; Authors are generally proud, and of ſo old-faſhioned a Turn of thinking, that if a great Man gives them a Promiſe, they are weak enough to imagine it is to be kept; that Bookſellers are alſo exceedingly vain, and take every Advantage of Authors which they can, adding their Name to their Cauſe, merely from Motives of Self Intereſt: otherwiſe they would have got Mr. *Addiſon* to have aſſiſted them with his Influence while he was in Power. A numerous Multiplication of Copies is of late Date; *Shakeſpear*'s Works have gone through but two Editions of 500 each in two Centuries, and 11000 of *Smollet*'s Hiſtory of England, the worſt of the many bad Hiſtories of *England* extant, have been ſold in a very ſhort Time; when large Numbers were firſt printed, the Arts of reviling the Sovereign, abuſing the Miniſter, and libelling every Officer of Government were diſcovered; Arts happily baniſhed in this quiet Era! *Junius* had an enflamed Imagination, a weak Head, and a worſe Heart; in the Cauſe of *Midwinter*, both Plaintiff and Defendant reſembled Fencers with Skates on, treading upon Ice, as they both went farther than they either of them intended; *Alexander Donaldſon*, his Client, never printed a Work either within the Time of the Limitation of the 8th of Queen *Anne*, or in the Life-time of the Author; Bookſellers opprobriouſly term Men who laudably enlarge the Circle of Literature, by giving new Editions of Works of Merit, Pirates; the Reverſal of the Decree of the Court of *Chancery*, will rather be of Service to Authors than diſſervice; there are now 20000 Printers in London; and in order to convince your Lordſhips, of the Truth of the Aſſertion, I beg leave to trouble your Lordſhips, with a particular Circumſtance in Proof thereof. I happened to be upon the Streets when a Lord Mayor two Years ſince was coming

(1) Sir *John*, we preſume, here alludes to his "Memoirs of *Great Britain*," publiſhed in 1773, and for the Copy Right of which having received near £1000, he hath, as we are well informed, ſince the final Deciſion of this Cauſe, honourably aſſigned his reverſionary, as well as his original Right, to the Purchaſer.

to the Houſe of Commons, to anſwer for having diſcharged a City Printer out of the Hands of a Meſſenger of that Houſe. The Cavalcade was numerous; but I obſerved only half the Number of Printers, who uſually make up the mob. I aſked the Reaſon of it, and was informed, that ten thouſand of them were gone to Tyburn to ſee a Brother Printer hanged: ſo that I found they were divided in Opinion, whether they ſhould conduct one Friend to the Gallows, or another Friend to the Houſe of Commons.

ARGUMENTS of the COUNCIL for the RESPONDENTS.

Mr. Solicitor General, Fielder.

ONE of the learned Pleaders, my Lords, on the other Side of the Queſtion, hath entered into the Argument with great Ability; his Definition of the Word *Property* is ſhrewd, metaphyſical and ſubtile; but I hope to be able to convince your Lordſhips, that ingeniouſly as that word hath been defined, it is nevertheleſs erroneous.

Literary Property, my Lords, hath, by thoſe who have ſpoke before me, been ſaid to be ſo abſtruſe and chimerical, that it is not poſſible to define it. The Interpretation they have put upon the Word *Property* is, that it implies ſomething corporeal, tangible and material. I beg Leave to differ from this Opinion, and to point out how common it is for Terms to be miſapplied, as to their Import.

The Word *Property*, my Lords, hath, by the ableſt Writers, been called *Jus utendi, fruendi, diſponendi*; it is therefore evident that any Idea, although it is incorporeal in itſelf, yet, if it promiſes future Profit to the Inventor of it, is a Property. And the latter Word hath, through Inaccuracy, been uſed as deſcribing that, over which a Poſſeſſor holds an abſolute Reign, Dominion, or Power of Diſpoſal. The ſubject Matter may be immaterial, and yet liable to be appropriated. Property changes its Nature with its Place: In *England*, Portions of Land are private Property, among the *Arabs* and *Tartars* no ſuch Idea prevails; they look upon Cattle and Chattels as the only private Property. Among the *Americans*, in certain Diſtricts, Land is conſidered as Property, but not as the Property of Individuals; as the Inhabitants live upon the Gains of hunting, a Circumference of Land, ſufficient for them to hunt on, is conſidered as the general Property of one Tribe or Nation.

The Lawyers Mode of deſcribing Property, my Lords, is exceedingly trite and familiar; they generally divide it into corporeal and incorporeal, and in the preſent Caſe it hath been ſaid to commence by Occupation, and continue by Poſſeſſion. This is a narrow Scale of Argument. In the Courts of Law it is univerſally admitted, that Matters incorporeal are nevertheleſs Matters of Property, and the Lawyers Diviſion of it proves that Matters not in Occupancy or Poſſeſſion, are yet of Value, and can be ſold or given over, as in the Caſes of Manors and Advowſons, Remainders and Reverſions. They can be ſold by Aſſignment, and the Mode of Sale is by Title.

Poſſeſſion,

Poſſeſſion, my Lords, is uſually deſcribed as originating from two Things, Livery and Grant. Under the latter Title, in ſome Degree, ſtands Literary Property; but it is not to be conſidered as originating from Crown Grants, for excepting the prerogative Copies, the Crown has no Right, and in the firſt of thoſe (the Bible) no farther Right, than in that particular Tranſlation, publiſhed in the Reign of King *James* the *Firſt*.

Every Inventor, my Lords, has a Right to the Profit of his Invention; and as I find that *Grotius* has not eſcaped the Attorney General's Reſearches, I am much ſurpriſed that in his Definition of Property, the learned Pleader hath not hit upon a Poſition which is directly in Point; for *Grotius* informs us, that *Paulus*, a *Roman* Lawyer, declared that one Mode of acquiring Property was Invention, and that from the Nature of Things, he who made a Matter, was the Owner of it.

This, my Lords, is a much more liberal Conſtruction of the Word Invention, than hath been put on it by the other Side, who have taken it up in its vulgar Acceptation, and only given it Alluſion to Trifles, ſuch as the finding Shells on the Sea-ſhore, &c.

It hath been contended, my Lords, that the Maker of an Orrery is in the ſame Predicament as an Author, when he publiſhes. Such Alluſion comes not to the Point; the firſt Sheet of an Edition, as ſoon as it is given Impreſſion, in a Manner ſubjects an Author to the Expences of a whole Edition, and if that Edition is 5000 in Number, the Author is not repaid for his Labour and his Hazard, till the laſt of the 5000 is ſold The Maker of an Orrery is at no other Trouble and Charge, than the Time, Ingenuity and Expence, ſpent in making one Orrery; and when he has ſold that one, he is amply paid. Orrery-making is an Invention, and the Inventor reaps the Profit accruing from it. Writing a Book is an Invention, and ſome Profit muſt accrue after Publication; Who ſhall reap the Benefit of it?

Authors, my Lords, both from Principles of natural Juſtice, and the Intereſt of Society, have the beſt Right to the Profits accruing from a Publication of their own Ideas; and as it hath been admitted on all Hands that an Author hath an Intereſt or Property in his own Manuſcript, previous to Publication, I deſire to know who can have a greater Claim to it afterwards? It is an Author's Dominion over his Ideas, that gives him Property in his Manuſcript originally, and nothing but a Tranſfer of that Dominion or Right of Diſpoſal can take it away. It is abſurd to imagine that either a Sale, a Loan, or a Gift of a Book, carries with it an implied Right of multiplying Copies; ſo much Paper and Print is ſold, lent or given, and an unlimited Peruſal is warranted from ſuch Sale, Loan or Gift: but it cannot be conceived, that when five Shillings is paid for a Book, the Seller means to tranſfer a Right of gaining one hundred Pounds; every Man muſt feel the contrary, and confeſs the Abſurdity of ſuch an Argument.

I have in my Hand, my Lords, a Copy of the original Grant of King *James* the *Firſt* for printing ſome Poems of his writing, which, excepting the royal Stile in the Beginning, runs in the ordinary Phraſe of an Author's Aſſignment of Copy-right to a Bookſeller; nay, indeed, it is more ample, for it not only tranſfers the Right of the Matter then publiſhed, but alſo tranſfers a Right to every Thing he ſhould thereafter be pleaſed to write.

Ames's Typographical Hiſtory ſeems particularly worthy your Lordſhip's Notice, and alſo the Application of the Printers in *Prynne*'s Time to ſuppreſs and call in the Patents for printing and publiſhing the Bible; the Applicants terming thoſe Patents a Sanction for Monopolizers, the Matter was heard by Council, when *Prynne* pleaded on one Side of the Queſtion, and his Anſwer turned on nine Points, in one of which that celebrated Lawyer declared, that the moſt ſerious and ſolid Objection againſt the Printers was, the inherent Common Law Right for an Author to multiply Copies. This is one ſtrong Proof that in the worſt of Times the *Jus naturale* reſpecting Literary Property was not forgot. Licenſes in general prove not that Common Law Right did not inherently exiſt, but were the univerſal Fetters of the Preſs at the Times in which Authors were obliged to obtain them.

With Regard to the Statute of Queen *Anne*, my Lords, I am very willing to let that reſt on the ſame Grounds the Attorney General hath placed it, viz. that if it gives no Right, it takes none away. But I cannot help obſerving, that it contains a poſitive Clauſe, to let the Matter reſpecting a Common Law Right, remain preciſely in the State in which it was, when that Act paſſed: and that the Court of *Chancery* conſiders that ſuch a Right does exiſt, is evident from the ſeveral Injunctions that Court hath granted ſince the enacting of the Statute, which do not govern thoſe Injunctions, as it doth not particularly ſpecify how the Court of *Chancery* is to act. The Caſe of *Pope* v *Curl*; of *Guyne* v Doctor *Shebbeare*, and the Caſe of *Linzet & Richardſon* v *Owen* in *Mich.* Term, 1760, before the late Earl *Northington*; this laſt was a Bill by the *Common Law* Patentees againſt a Bookſeller for not printing *Cunningham*'s Law of Bills of Exchange, &c. at the Law Preſs; when the Chancellor declared the ſaid Book not within the Law Patent. The Caſe of *Dodſley* v *Kinnerſly*, in 1761, before Sir *Thomas Clark*, Maſter of the Rolls. The former prayed an Injunction againſt the latter, for abſtracting Part of Dr. *Johnſon*'s *Raſſelas*, and publiſhing ſuch Abſtract in a Magazine. The Caſe of *Baſket & al.* v *Woodfall & al.* at Lincoln's Inn Hall, after *Hil.* Vac. 1762. this was a Bill by the Statute Law Patentees againſt the Common Law Patentees for printing the Statutes; when the ſame Chancellor delivered himſelf in Favor of the Plaintiffs. Theſe Caſes, I mention as ſo many Inſtances and Proofs of my laſt Obſervations. I entirely agree, my Lords, in Opinion reſpecting Literary Property, with Sir *Thomas Clarke*, who was a moſt able Lawyer and upright Judge.

I hope, my Lords, Sir *John Dalrymple*'s Memoirs of *Great Britain*, will not be ſuppreſſed, as I have Reaſon to lament its Author intends. I admit it to be true, that *Atticus* employed his Slaves in tranſcribing, but that even then the Expence was ſo enormous, that although he was a Man of great Fortune, he was, from a Principle of Oeconomy, under the Neceſſity of ſelling his Library; and *Cicero*, who was alſo a rich Man, was, from the ſame Principle, unable to purchaſe it. I therefore earneſtly invoke your Lordſhips to ſanctify the final Determination of a Queſtion, founded on natural Juſtice, and the Intereſt of Society, by affirming the Decree.

IT has been very falſely aſſerted, my Lords, that this Property, before the Act of Queen *Anne*, was not to be found at Common Law, and Attempts have been made to prove, that no Caſes of it are to be produced; but, my Lords, this is not reaſoning to the Purpoſe; we muſt conſider the Times which we examine, and the Nature of the Property in Queſtion: In Ages wherein Civility had made but ſmall Progreſs, it would be abſurd to look for Litigations of a Property ſo little valued and ſo ſeldom diſputed; but, my Lords, the Want of Precedents in ſuch a Caſe proves nothing againſt us: there are many unqueſtionable Common Law Rights, for which you can find no Precedent, ſo far back as *Richard* the *Second*. How, my Lords, is it to be ſuppoſed, that the Deciſions relative to ſo peculiar a Property, are to be clearly aſcertained, through an Age, wherein we have only a dim Light to view Objects, of much greater Importance? Where would be the Equity, if I may ſo expreſs myſelf, of our Conſtitution, if we were to eſtabliſh it by ſuch remote Precedents? Can any one wonder that we have only a dim View of this Property in Ages when nothing was clear but Injuſtice and Oppreſſion? The Nature of the Property ſhews at firſt Sight, that it would be in vain to look far back, for Deciſions in its Favour, even ſuppoſing that from other Circumſtances the Exiſtence of it was unqueſtionable. Mr. *Dunning*.

My Lords, the little Eſtimation and dubious Circumſtances that attended the Copy-right to the *Paradiſe Loſt* of *Milton*, is no Proof againſt the Exiſtence of a deciſive Right. That Poem was ſo much neglected, that the Bookſeller had perhaps as much Reaſon to complain of his Bargain as the Author. It was the Fault of the Age; and had the ſame Inattention and want of Taſte continued, the Property for which we contend would, perhaps, to this Day have never been litigated; but certainly, my Lords, the Right, in Caſe of Litigation, would not thereby have been injured.

Attempts, my Lords, have been made to prove that the Eſtabliſhment of this Right would be injurious to Literature; a ſtrange Aſſertion ſurely. It is as muchas to ſay, thar rewarding Authors in proportion to their Merit, is the way to diſcourage their productions; an Argument too weak to make an impreſſion on your Lordſhips. So very far is this from being the Caſe, that it is evident the Money given for Copy-Right has increaſed with the Increaſe of Security that has been given to the Property. Go back to *Milton's* Time, and from thence advance gradually to Queen *Ann's* Reign, when the Act of fourteen Years Right was one Encouragement to the Booklellers, followed by ſome conſiderable Emoluments in their Way to Authors; then, my Lords, reflect on the Progreſs which has been made ſince, and permit me to call your Attention on three famous Works, Mr. *Hume's* and Dr. *Robertſon's* Hiſtories, and Dr. *Hawkeſworth's* Voyages; the Sums given for the Copies of the former, at that Time unparallelled, followed the Security of the Property, which flowed from ſeveral Injunctions granted by *Chancery*: and the yet greater Sum given for the latter, followed an actual Determination of the King's-Bench in Favour of this very Property. My Lords, I conceive that whoever reads the Books will not find it poſſible to account for the Sum in one Caſe ſo much exceeding thoſe in the other, unleſs it be attributed to this Cauſe; that the Merit of the Voyages is to be claſſed with that of the Hiſtories, which will

Ames's Typographical Hiſtory ſeems particularly worthy your Lordſhip's Notice, and alſo the Application of the Printers in *Prynne's* Time to ſuppreſs and call in the Patents for printing and publiſhing the Bible; the Applicants terming thoſe Patents a Sanction for Monopolizers, the Matter was heard by Council, when *Prynne* pleaded on one Side of the Queſtion, and his Anſwer turned on nine Points, in one of which that celebrated Lawyer declared, that the moſt ſerious and ſolid Objection againſt the Printers was, the inherent Common Law Right for an Author to multiply Copies. This is one ſtrong Proof that in the worſt of Times the *Jus naturale* reſpecting Literary Property was not forgot. Licenſes in general prove not that Common Law Right did not inherently exiſt, but were the univerſal Fetters of the Preſs at the Times in which Authors were obliged to obtain them.

With Regard to the Statute of Queen *Anne*, my Lords, I am very willing to let that reſt on the ſame Grounds the Attorney General hath placed it, viz. that if it gives no Right, it takes none away. But I cannot help obſerving, that it contains a poſitive Clauſe, to let the Matter reſpecting a Common Law Right, remain preciſely in the State in which it was, when that Act paſſed: and that the Court of *Chancery* conſiders that ſuch a Right does exiſt, is evident from the ſeveral Injunctions that Court hath granted ſince the enacting of the Statute, which do not govern thoſe Injunctions, as it doth not particularly ſpecify how the Court of *Chancery* is to act. The Caſe of *Pope* v *Curl*; of *Guyne* v Doctor *Shebbeare*, and the Caſe of *Linnet & Richardſon* v *Owen* in *Mich.* Term, 1760, before the late Earl *Northington*; this laſt was a Bill by the *Common Law* Patentees againſt a Bookſeller for not printing *Cunningham's* Law of Bills of Exchange, &c. at the Law Preſs; when the Chancellor declared the ſaid Book not within the Law Patent. The Caſe of *Dodſley* v *Kinnerſly*, in 1761, before Sir *Thomas Clark*, Maſter of the Rolls. The former prayed an Injunction againſt the latter, for abſtracting Part of Dr. *Johnſon's Raſſelas*, and publiſhing ſuch Abſtract in a Magazine. The Caſe of *Baſket & al.* v *Woodfall & al.* at Lincoln's Inn Hall, after *Hil.* Vac. 1762. this was a Bill by the Statute Law Patentees againſt the Common Law Patentees for printing the Statutes; when the ſame Chancellor delivered himſelf in Favor of the Plaintiffs. Theſe Caſes, I mention as ſo many Inſtances and Proofs of my laſt Obſervations. I entirely agree, my Lords, in Opinion reſpecting Literary Property, with Sir *Thomas Clarke*, who was a moſt able Lawyer and upright Judge.

I hope, my Lords, Sir *John Dalrymple's* Memoirs of *Great Britain*, will not be ſuppreſſed, as I have Reaſon to lament its Author intends. I admit it to be true, that *Atticus* employed his Slaves in tranſcribing, but that even then the Expence was ſo enormous, that although he was a Man of great Fortune, he was, from a Principle of Oeconomy, under the Neceſſity of ſelling his Library; and *Cicero*, who was alſo a rich Man, was, from the ſame Principle, unable to purchaſe it. I therefore earneſtly invoke your Lordſhips to ſanctify the final Determination of a Queſtion, founded on natural Juſtice, and the Intereſt of Society, by affirming the Decree.

IT

IT has been very falſely aſſerted, my Lords, that this Property, before the Act of Queen *Anne*, was not to be found at Common Law, and Attempts have been made to prove, that no Caſes of it are to be produced; but, my Lords, this is not reaſoning to the Purpoſe; we muſt conſider the Times which we examine, and the Nature of the Property in Queſtion: In Ages wherein Civility had made but ſmall Progreſs, it would be abſurd to look for Litigations of a Property ſo little valued and ſo ſeldom diſputed; but, my Lords, the Want of Precedents in ſuch a Caſe proves nothing againſt us: there are many unqueſtionable Common Law Rights, for which you can find no Precedent, ſo far back as *Richard* the *Second*. How, my Lords, is it to be ſuppoſed, that the Deciſions relative to ſo peculiar a Property, are to be clearly aſcertained, through an Age, wherein we have only a dim Light to view Objects, of much greater Importance? Where would be the Equity, if I may ſo expreſs myſelf, of our Conſtitution, if we were to eſtabliſh it by ſuch remote Precedents? Can any one wonder that we have only a dim View of this Property in Ages when nothing was clear but Injuſtice and Oppreſſion? The Nature of the Property ſhews at firſt Sight, that it would be in vain to look far back, for Deciſions in its Favour, even ſuppoſing that from other Circumſtances the Exiſtence of it was unqueſtionable. Mr. *Dunning*.

My Lords, the little Eſtimation and dubious Circumſtances that attended the Copy-right to the *Paradiſe Loſt* of *Milton*, is no Proof againſt the Exiſtence of a deciſive Right. That Poem was ſo much neglected, that the Bookſeller had perhaps as much Reaſon to complain of his Bargain as the Author. It was the Fault of the Age; and had the ſame Inattention and want of Taſte continued, the Property for which we contend would, perhaps, to this Day have never been litigated; but certainly, my Lords, the Right, in Caſe of Litigation, would not thereby have been injured.

Attempts, my Lords, have been made to prove that the Eſtabliſhment of this Right would be injurious to Literature; a ſtrange Aſſertion ſurely. It is as muchas to ſay, that rewarding Authors in proportion to their Merit, is the way to diſcourage their productions; an Argument too weak to make an impreſſion on your Lordſhips. So very far is this from being the Caſe, that it is evident the Money given for Copy-Right has increaſed with the Increaſe of Security that has been given to the Property. Go back to *Milton's* Time, and from thence advance gradually to Queen *Ann's* Reign, when the Act of fourteen Years Right was one Encouragement to the Booklellers, followed by ſome conſiderable Emoluments in their Way to Authors; then, my Lords, reflect on the Progreſs which has been made ſince, and permit me to call your Attention on three famous Works, Mr. *Hume's* and Dr. *Robertſon's* Hiſtories, and Dr. *Hawkeſworth's* Voyages; the Sums given for the Copies of the former, at that Time unparallelled, followed the Security of the Property, which flowed from ſeveral Injunctions granted by *Chancery*: and the yet greater Sum given for the latter, followed an actual Determination of the King's-Bench in Favour of this very Property. My Lords, I conceive that whoever reads the Books will not find it poſſible to account for the Sum in one Caſe ſo much exceeding thoſe in the other, unleſs it be attributed to this Cauſe; that the Merit of the Voyages is to be claſſed with that of the Hiſtories, which will

will ſcarcely be allowed; yet the Copy-Money much exceeded that of the other. In no way is this to be accounted for, but by ſuppoſing the Bookſellers Liberality to flow from the additional Security, thus given to their Property; and if this is not an Encouragement to Literature, my Lords, I ſhould be glad to be informed what is an Encouragement. It might as reaſonably be aſſerted, that Penſions and Rewards given by a Sovereign to learned Men, did not advance the Intereſts of Learning.

My Lords, the very Act of Queen *Anne* has been brought to prove, that there could not be a previous Common Law Right in the Copies of Books; but, my Lords, nothing can be more futile than ſuch an Idea: let me illuſtrate this by a ſimilar caſe; there paſſed an (1) Act laſt Seſſions to make Turnips, Potatoes, Cabbages, Parſnips, Peaſe, and Carrots Property; now, may Lords, might it not be urged with as much Juſtice, that Turnips and ſo forth were not Property at common Law? Such an Idea would be ridiculous. Acts may paſs to regulate Property, and to inflict Penalties on the Invaſion of it, without in the leaſt derogating from the Principles and Foundation of ſuch Property.

We have been farther told, my Lords, that giving the Property of Copies will be giving the Right of Suppreſſion; but this I conceive is a groundleſs Idea; we are not to ſuppoſe that Books of Inſtruction, Entertainment, or Amuſement, will ever be ſuppreſſed, and as to Books neither inſtructive nor entertaining, the ſooner they are ſuppreſſed the better. Certain, however, it is, that on ſome Subjects they are read in Proportion to their meriting Neglect.

My Lords, it is to me moſt extraordinary to admit an Author hath a Property originally in his Compoſition, and that the firſt Moment he exerciſes his Dominion over that Property, and endeavours to raiſe Profit from it, he looſes it. Publication I cannot conceive to be of ſuch a Nature as to deſtroy that Right to the Matter publiſhed, which is acknowledged an Author hath before it is publiſhed.

One Part of the Argument, my Lords, uſed for the Appellants, is that it would benefit Authors, if no excluſive Right of multiplying Copies exiſted: that is a very ſtrange Aſſertion, and very extraordinary that Authors in general ſhould think otherwiſe. It is cuſtomary for Bookſellers, as Buyers, to buy as cheap as they can, and it is cuſtomary for Authors to ſell as dear as they can; this cannot be the caſe if the Moment a Book is publiſhed every Man hath a Right to print it.

Authors formerly, my Lords, when there were but few Readers, might get but ſmall Prices for their Labours, but the Books above-mentioned have been paid enormous Sums for, eſpecially the laſt. If the Purchaſers of theſe Copies have not the ſole Right of multiplying Copies, how is the difference to be accounted for? not from any uncommon Generoſity in the Bookſellers, not from any Superiority in point of Merit in the Books, but from the Idea of a common Law Right prevailing, and from that Idea's being eſtabliſhed by the Determination of the Court of *King's-Bench* in the caſe of *Millar* and *Taylor*; for it is idle to contend that the Subject of the preſent Appeal is not exactly on the ſame Grounds.

The Appellants, my Lords, want to ſanctify the Importation of *Scotch* Books into *England*, in the ſame manner as the Importation of *Scotch* Cattle. The Book on which the preſent Cauſe is grounded, was written, indeed, by a *Scotchman*, but it was written in *Engliſh*, and originally printed in *England*. The Appellants had invaded

(1) 13 *Geo.* III. Chap. 32.

invaded the legal Purchaſer, by printing a Copy in *Scotland*, and offering it to Sale in *London*; I hope, therefore, that your Lordſhips will teach them that Literary Property is ſacred, by affirming the Decree.

The Lord Chancellor put the three following Queſtions to the Judges, viz.

Lord Chancellor put three Queſtions to the Judges.

I. *Whether at Common Law, the Author of any literary Compoſition had the ſole firſt Right of printing and publiſhing the ſame for Sale, and could bring an Action againſt any Perſon for publiſhing the ſame, without his Conſent?*

II. *If the Author had ſuch Right originally, did the Law take it away upon his printing and publiſhing the ſaid literary Compoſition, or might any Perſon reprint and publiſh the ſaid literary Compoſition, for his own Benefit, againſt the Will of the Author?*

III. *If ſuch Action would have laid at Common Law, is the ſame taken away by the Statute of Queen Anne? or is an Author precluded by ſuch Statute from any Remedy, except on the Foundation of the ſaid Statute.*

After the above Queſtions had been twice read, and put to the learned Judges, Lord *Camden* moved that the two following might alſo be put, viz.

Lord *Camden moved* for two additional Queſtions, which were alſo put to the Judges

IV. *Whether the Author of any literary Compoſition, or his Aſſigns, had the ſole Right of printing and publiſhing the ſame in Perpetuity by the Common Law?*

V. *Whether this Right is any ways impeached, reſtrained, or taken away by the 8th of Queen Anne?*

They were immediately read by the Lord Chancellor, and put to the Judges accordingly.

The OPINIONS of the JUDGES.

The Chancellor obſerved, that "as the learned (1) Judges might entertain diſſimilar Opinions upon the Subject, their Lordſhips Attendance was required to hear the Opinion of each Judge delivered ſeriatim."

Mr. Baron Eyre.

Great Pains, my Lords, hath been taken by the ingenious Council for the Reſpondents, to avoid conſidering the Subject as at all connected with *metaphyſic Subtilties*; ſuch an Attempt, though highly praiſe-worthy in thoſe who have the Intereſt of their Clients at Heart, is, however, totally impracticable, as every Endeavour to diſclaim the Uſe of metaphyſic Reaſoning, tends only to ſhow how neceſſary it is to the accurate Diſcuſſion of the Subject: The Queſtion, in Fact, is reſpecting a Right to *appropriate Ideas*: The Objects over which, a Right and

(1) N. B. Lord Chief Juſtice *Mansfield* delivered no Opinion, but his Lordſhip's *Sentiments* may be *ſeen*, in *Bar.* Lit. Prop. 112. &c.

in

in which an *exclusive Property* is claimed, are incoporeal Existences, which cannot be treated of with any Degree of Accuracy, without having Recourse to the Aid of scientific Disquisition: The *Thinking Faculty*, common to all, should likewise be held common, and no more be deemed subject to exclusive Appropriation, than any other of the common Gifts of Nature.

I am therefore clearly of Opinion, as to the *first* Question, that "*at Common Law the Author of a literary Composition, hath no Right of printing and publishing the same for Sale*," which is also an Answer to the *second* Question; for if an Author had no Right at all, *neither he or his Assigns could have any in Perpetuity by the Common Law*. From the very nature of the Contents of a Book, they are incapable of being made Objects of Common Law Property; nothing can be predicated of them, which is predicable of every other Species of Property subject to the Controul, and within the Limits of the Protection of the Common Law. A Right to appropriate Ideas, is a Right to appropriate something so ethereal as to elude Definition; so intellectual as not to fall within the Limits of the human Mind to describe with any tolerable Degree of Accuracy. Ideas, if convertible into Objects of Property, should bear some feint Similitude to other objects of Property; they do not bear any such Similitude, they are altogether *anomalous*. They cannot pass by Descent to Heirs; they were not liable to Bequest; no characteristic Marks remain whereby to ascertain them; and they are such Incorporealities as not to be subject to any one of the Conditions which con-stitute the very Essence of Property original or derivative; are such Incorporealities liable to *exclusive appropriation*, by any Right founded in the Common Law.

No traces, my Lords, of such a Common Law Right are to be found amongst the Greeks or Romans; nor do the municipal Laws of any Country warrant the supposition of a Right of the Kind existing; yet both Greeks and Romans were careful in arranging every Matter susceptive of Property under its distinct Head.

But here, my Lords, lies another insuperable Difficulty. Admitting ideas liable to exclusive Appropriation, and thus to become Objects of Property; in treating of them as such, how would you class, how arrange them? Would you recount them as simple, complex, combined, or multifarious? as being so many, Species *ejusdem Generis*? or would you resort to Truth and common Sense, and say they are not to be classed, arranged, defined, or ascertained? They are not subject to Alienation, Transmission, Grant, or Delivery; and yet they are Objects of Property, to the exclusive Right of appropriating which, Men are clearly entitled by the Common Law, and by every Principle of natural Justice.

For, my Lords, upon a Supposition that Ideas are produced by a thinking Faculty, *common to all Men*, it becomes a Question whether it is consonant to the Principles of natural Justice, to appropriate that to the exclusive Benefit of *one or a few*, which was designed as a common Gift distributed to *all*.

If, my Lords, the Notion of a Common Law Right should be reprobated, such Reprobation carried with it an explicit Answer to the latter Part of the *first* and to the *second* Question: There being no Common Law Right., "*An Author could* "*not bring his Action against any Person for publishing his literary Composition with-*" *out his Consent.*"

I consider, my Lords, an exclusive Appropriation of Literary Works, a MONOPOLY, against every Kind of which the Statute of *James* I. has sufficiently provided.

Even

Even Monopolies, in ſome Caſes, are allowable, but then the State has taken Care to allow them only *for a convenient Time.*

Previous, my Lords, to the Invention of Printing, the Idea of a Common Law Right, has not been ſuggeſted; and ſubſequent to the Invention of this uſeful Art, ſo little Notion had Authors of a Right at Common Law to excluſive Appropriation, that before the Inſtitution of the Stationers Company, they had Recourſe to the Legiſlature for a Licenſe, Grant, Patent, or Privilege; after the Inſtitution of the Stationers Company the only Mode thought of to ſecure the Appropriation of a Literary Compoſition was, by an Entry in the Records of that Company, and the Perſon in whoſe Name the Book was entered, let him come by it how he would, was deemed the Proprietor, the Author never being ſo much as mentioned on theſe Occaſions.

As to the Caſes which, my Lords, the Reſpondents Counſel have adduced to prove the Sentiments of the Court of *Chancery* in Favour of a Common Law Right, it is obſervable, That although the Court of *Chancery* had frequently granted Injunctions, it cautiouſly avoided giving any final Adjudication upon the Matter. An *antecedent Common Law Right* was never hinted at; nor were the Injunctions granted in the Caſes cited, at all in point; they had been granted on the Appearance of ſomething fraudulent upon the Face of the Tranſaction; as in the Caſe of *Pope v. Curl.*

Injunctions, my Lords, do not prove the Chancellor's Opinion upon a Matter of Common Law Right, in Confirmation of which, I will venture an Anecdote. There is a Paper now exiſting, containing ſome Notes Lord *Hardwicke* had taken down, which ſet forth the ſole and excluſive Right of an Author at Common Law, to multiply Copies for Sale. In the Margin of which Paper, and oppoſite to this very Paſſage, there is in Lord *Hardwicke's* own Hand Writing, a very large Q. which proves that his Lordſhip entertained Doubts, reſpecting the Legality of the Poſition.

The Council, my Lords, for the Reſpondents, have ſlipped over the Caſe of mechanical Inventions; and they are highly commendable for ſo doing, as they were well aware how ſtrenuouſly every Argument drawn from the Caſe of mechanical Inventions would militate againſt the Intereſt of their Clients.

Conſider, my Lords, a Book preciſely upon the ſame Footing with any other mechanical Invention. In the Caſe of mechanic Invention, Ideas are in a manner embodied, ſo as to render them tangible and viſible; a Book is no more than a Tranſcript of Ideas; and, whether Ideas are rendered cognizable to any of the Senſes, by the Means of this or that Art, of this or that Contrivance, is altogether immaterial: Yet every mechanical Invention is common, whilſt a Book is contended to be the Object of excluſive Property! So that Mr. (1) *Harriſon*, after conſtructing a Time-Piece, at the Expence of Fifty Years Labour, hath no Method of ſecuring an excluſive Property in that Invention, unleſs by a Grant from the State; yet, if he was in a few Hours to write a Pamphlet, deſcribing the Properties, the Utility and Conſtruction of his Time-Piece, in ſuch Pamphlet he would have a Right ſecured by Common Law, though the Pamphlet contained

(1) *See ante* Fol. 19. Note 1.

exactly the same Ideas on Paper, that the Time-Piece did in Clock-Work Machinery! The Cloathing is dissimilar; the Essences cloathed are identically the same.

The Exactitude, my Lords, of the Resemblance between a Book and any other mechanical Invention, form various Instances of Agreement. There is the same Identity of intellectual Substance; the same spiritual Unity. In a mechanic Invention the Corporeation of Parts, the Junction of Powers, tend to produce some one End. A literary Composition is an Assemblage of Ideas so judiciously arranged, as to enforce some one Truth, lay open some one Discovery, or exhibit some one Species of mental Improvement. A mechanic Invention, and a literary Composition, exactly agree in Point of Similarity; the one therefore is no more entitled to be the Object of Common Law Property than the other; and as the Common Law is entirely silent with respect to what is called Literary Property, as antient Usage is against the Supposition of such a Property; and as no exclusive Right of appropriating those other Operations of the Mind, which pass under the Denomination of mechanical Inventions, is vested in the Inventor by Common Law; for these Reasons, I declare myself against the Principle of admitting the Author of a Book, any more than the Inventor of a Piece of Mechanism, to have a Right at Common Law to the exclusive Appropriation and Sale of the same.

I am of Opinion, my Lords, in Answer to the *third* Question, that "*if such Action would have lain at Common Law, the same is taken away by the Statute of Queen* Anne; *and an Author is precluded by such Statute, from any Remedy, except on the said Statute*;" and in Answer to the *fifth* Question, I am of Opinion, that "*this Right is totally impeached, restrained, and taken away by the 8th of Queen* Anne," for every Principle of a Common Law Right is effectually exploded, by the Adoption of the Word "*vest*" in the Title, the Words "*taken the Liberty*" in the Preamble, and the Mode of Expression used in the *first* Clause of the Act, of giving an Author an exclusive Property for fourteen Years, *and no longer*.

I know, my Lords, of no Right the Crown has at Common Law to print what are deemed Crown Copies; such exclusive Right originating only from an Exertion of the Prerogative. Before the Invention of Printing it was proper for the Crown to have Copies of the public Acts taken from the Parliamentary Rolls, to transmit to the Sheriffs of the several Counties; and Printing being no more than an expeditious Art of transcribing Copies, the same Power, and for pretty much the same Ends, continues now to be a Part of the Crown's Prerogative; and as the Crown takes Care to have the Statutes printed for the public Promulgation of the Law, so by Virtue of the same Authority, Bibles and Common-prayer Books are printed, and the Copies of them thus multiplied for the Service of Religion, which it becomes the chief Magistrate to protect. But no Common Law Right is vested in the Crown of thus printing and multiplying crown Copies. As to the *second* Question, I am of Opinion,

"*If the Author had such Right originally, that the Law took it away upon his printing and publishing the literary Composition*, and that *any Person might reprint and publish the said literary Composition, for his own Benefit, against the Will of the Author.*"

The

Mr. Juſtice *Nares.*

The hiſtorical Nature, my Lords, of the Caſe hath been ſo learnedly and fully agitated in the Hearing of the Houſe, that I ſhall decline entering into it, and reſt my Opinion on general Concluſions, deduced from Principles which ariſe from fair Argument.

I cannot, my Lords, help obſerving with Mr. *Dunning*, that, as it is admitted on all Hands that an Author hath a beneficial Intereſt in his own Manuſcript before Publication, it is a moſt extraordinary Circumſtance, that he ſhall loſe that beneficial Intereſt, the very firſt Moment he attempts to exerciſe it.

The Statute, my Lords, does not take away the Common Law Remedy, although it gives an additional one, as in the Caſe of an (1) Action for maliciouſly ſuing out a Commiſſion of Bankruptcy, although the Statutes of Bankruptcy have provided an additional Penalty for that Offence by the Bond given to the Chancellor. I am therefore, my Lords, of Opinion, as to the *firſt* Queſtion,

That "*at Common Law, the Author of any literary Compoſition, hath the ſole Right of printing and publiſhing the ſame for Sale, and may bring an Action againſt any Perſon, for publiſhing the ſame without his Conſent.*" As to the *ſecond* Queſtion,

"*If the Author had ſuch Right originally, that the Law did not take it away, upon his printing the ſaid literary Compoſition, and that no Perſon might reprint and publiſh the ſaid literary Compoſition for his own Benefit, againſt the Will of the Author;*" as to the *third* Queſtion,

"*If ſuch Action would have laid at Common Law, the ſame is not taken away by the Statute of Queen* Anne; *nor is an Author precluded by ſuch Statute from any Remedy, except on the Foundation of the ſaid Statute;*" as to the *fourth* Queſtion,

That "*the Author of any literary Compoſition, and his Aſſigns, have the ſole Right of printing and publiſhing the ſame in* PERPETUITY, *by the Common Law;*" and as to the *fifth* Queſtion, I am of Opinion,

That "*this Right is no ways impeached, reſtrained, or taken away, by the 8th of Queen* Anne.

Mr. Juſtice *Aſhburſt.*

The Claim of Literary Property, my Lords, is warranted by the Principles of natural Juſtice and ſolid Reaſon. Making an Author's intellectual Ideas common, means only to give the Purchaſer an Opportunity of uſing thoſe Ideas, and profiting by them, while they inſtruct and entertain him; but I cannot conceive that the Vendor, for the Price of Five Shillings, ſells the Purchaſer a Right to multiply Copies, and ſo get Five Hundred Pounds.

Literary Property, my Lords, is to be defined and deſcribed as well as other Matters, which are tangible. Every Thing is Property that is capable of being known or defined, capable of a ſeparate Enjoyment, and of Value to the Owner. Literary Property falls within the Terms of this Definition. According to the Appellants, if a Man lends his Manuſcript to his Friend, and his Friend prints it, or if he loſes it, and the Finder prints it, yet an Action would lie (as Mr. Juſtice *Yates* (2) admitted) which ſhews that there was a Property beyond the Materials, the Paper and Print. A Man, by publiſhing his Book, gives

(1) See the Caſe of *Chapman* v. *Pickersgill*, in *Wils.* Rep. C. B. 145.
(2) See *Bar.* Lit. Prop. 69.

the Public nothing more than the Uſe of it. A Man may give the Public a Highway through his Field, and if there is a Mine under that Highway, it is nevertheleſs his Property. It hath been ſaid, that when the Bird is once out of the Hand, it becomes common, and the Property of whoever catches it; this is not wholly true, for there is a Caſe upon the Law Books, where a Hawk with Bells about its Neck had flown away; a Perſon detained it, and an Action was brought at Common Law againſt the Perſon who did detain it; a Book, with an Author's Name to it is the Hawk, with the Bells about its Neck, and an Action might be brought againſt whoever pirated it.

Since the Statute of Monopolies, my Lords, no Queſtions can exiſt about mechanical Inventions. Manufactures were at a very low Ebb till Queen *Elizabeth*'s Time. In the Reign of *James* the *Firſt*, the Statute of Monopolies was paſſed; ſince that Act no Inventor can maintain an Action without a Patent. The Policy of Kingdoms, and Preſervation of Trade, exclude them. The Appellants are contending for the Right of Printing; but the Right of exerciſing a Trade with another Man's Materials, cannot be allowed, either by Reaſon, or natural Juſtice. A Miller may grind Corn, and a Carpenter may build a Houſe; but the firſt is not warranted in grinding any Corn but his own; nor the Carpenter in building a Houſe with another Man's Wood. The Caſes of *Eyre* v. *Walker*, and *Tonſon* v. *Walker*, happened ſince the Statute.

With Regard, my Lords, to the Queſtion; Its being capable of Perpetuity, few Subjects are ſo. Even Land, the moſt tangible Species of Property, may be waſhed away by the Sea, and therefore may be rendered incapable of being perpetually enjoyed. I am however of Opinion, that the Reſpondents are entitled to as full an Enjoyment, as the Nature of the Caſe will allow.

As ſoon as Mr. Juſtice Aſhhurſt *had concluded his Opinion, he informed the Houſe, that Mr. Juſtice* Blackſtone *being confined with the Gout, had ſent by him his Opinion in writing, which he had deſired him to beg Leave of the Houſe to permit him to read, which being granted, he accordingly did. As Mr. Juſtice* (1) Blackſtone *anſwered in general Terms the* five *Queſtions, in like Manner, as his Brethren* Nares *and* Aſhhurſt, *we decline the Repetition; and for Judge* Blackſtone's read, *preſume to ſubſtitute his* printed *Opinion, on this Queſtion of* LETTERED (2) *Property.*

Mr. Juſtice Blackſtone.

" THIS my Lords, is a Species of Property, which, being grounded on " Labor and Invention, is more properly reducible to the Head of Occupancy " than any other; ſince the Right of Occupancy itſelf is ſuppoſed by Mr. (3) *Locke*, " and many (4) others, to be founded on the perſonal Labor of the Occupant; and " this is the Right, which an Author may be ſuppoſed to have in his own original " literary Compoſitions: ſo that no other Perſon, without his Leave, may publiſh " or make Profit of the Copies. When a Man by the Exertion of his rational " Powers has produced an original Work, he has clearly a Right to diſpoſe of

(1) It is obſervable, that the Opinion of this conſummate Lawyer, and able Judge, on the two moſt important Queſtions, that were ever agitated in this Country, touching *conſtitutional* and *legal* Power, the one affecting the Right of Election, and the other that of private Property; hath been unanimouſly applauded, in both Houſes of Parliament.

(2) See our Preface.

(3) On Govern. Part 2. Chap. 5.

(4) See 2 *Black.* Com. Chap. 1. P. 8.

" that

" that identical Work as he pleaſes, and any Attempt to take it from him, or vary " the Diſpoſition he has made of it, is an Invaſion of his Right of Property. Now " the Identity of a literary Compoſition conſiſts entirely in the *Sentiments* and the " *Language*; the ſame Conceptions, cloathed in the ſame Words, muſt neceſſarily " be the ſame Compoſition: and whatever Method be taken of conveying that " Compoſition, to the Ear, or to the Eye, of another, by Recital, by Writing, or " by Printing, in any Number of Copies, at any Period of Time; it is always the " identical Work of the Author, which is ſo conveyed; and no other Man can " have a Right to convey or transfer it, without his Conſent, either tacitly or " expreſsly given. This Conſent may perhaps be tacitly given, when an Author " permits his Work to be publiſhed, without any Reſerve of Right, and without " ſtamping on it any Marks of Ownerſhip: it is then a Preſent to the Public, like " the Building of a Church, or the laying out a new Highway: but in Caſe of a " Bargain for a ſingle Impreſſion, or a Sale or Gift of the Copy Right, the Rever- " ſion is plainly continued in the original Proprietor, or the whole Property tranſ- " ferred to another.

" The *Roman* Law, my Lords, adjudged, that if one Man writes any Thing, " though never ſo elegantly, on the Paper or Parchment of another, the Writing " ſhould belong to the original Owner of the Materials, on which it was written (1): " meaning certainly nothing more thereby, than the mere mechanical Operation of " writing, for which it directed the Scribes to receive a Satisfaction; eſpecially as, " in Works of Genius and Invention, ſuch as a Picture painted on another Man's " Canvas, the ſame (2) Law gave the Canvas to the Painter. We find no other " Mention in the civil Law of any Property in the Works of the Underſtanding; " though the Sale of literary Copies, for the Purpoſes of Recital or Multiplication, " is certainly as ancient as the Times of (3) *Terrence*, (4) *Martial*, and (5) *Statius*. " Neither with us in *England* hath there been any direct Determination upon the " Right of Authors, at the Common Law; but much may be gathered from the " frequent Injunctions of the Court of *Chancery*, prohibiting the Invaſion of this " Property: eſpecially, where either the Injunctions have been (6) *perpetual*, or " have related to unpubliſhed Manuſcripts (6) or to ſuch ancient Books, as were not " within the Proviſions of the Statute of Queen (6) *Anne*. Much may alſo be " collected, from the ſeveral legiſlative Recognitions of (7) Copy Rights; and " from the adjudged Caſes at Common Law, wherein the Crown hath been con- " ſidered as inveſted with certain prerogative (8) Copy Rights; for if the Crown

(1) " *If* Titus *ſhould write a Poem on Hiſtory, on your Paper or Parchment, not* Titus, *but you would be conſidered as the Owner thereof.*" Inſt. 2. 1. 33.

(2) Inſt. 2. 1. 33.

(3) Prol. in *Eunuch.* 20.

(4) Epigr. I. 67. IV. 72. XIII. 3. XIV. 194.

(5) Juv. VII. 83.

(6) See Caſe of Appellants. Fol. 8, 9.

(7) A. D. 1629. Chap. 60. *Scobel.* 92. 13 & 14 *Car.* II. Chap. 33. 10 *An.* Chap. 19. Sect. 112. 5 Geo. III. Chap. 12. Sect. 26.

(8) *Carr.* Rep. 89. Mod. Rep. 257. 2 *Bur.* Rep. 661.

" is capable of an exclusive Right, in any one Book, the Subject seems also capa-
" ble of having the same Right, in another!" 2 *Black.* Com. Chap. 26. Sect. 8. P. 405, 406, 407. see *Bur.* Lit. Prop. 13, 63.

The Copy Right of Authors, my Lords, is an Estate personal, it is assignable, and every Man conceives what it means; I declare it as my Opinion, that an Author hath an indisputable Power and Dominion over his Manuscript; that this Power is not alienated, when the Manuscript is printed and published; that the Author hath an exclusive Right of multiplying Copies, according to the Common Law, which is founded on Reason and Truth. This Claim of Right began with Printing, and for this especial Reason, because Copies could not be easily multiplied but by the Press; and therefore, that from which no Profit could be got, was hardly a Property.

In the Course of the Arguments, this Claim hath been called by the odious Name of a Monopoly. This is a popular Argument; but *Argumenta ad Populum* are not always well founded; and upon proper Investigation, this appears to be more specious than real.

Copy Right does exist, my Lords, independent of Patents, Privileges, Star-chamber Decrees, or the Statute of Queen *Anne*. Innumerable Instances occur to prove this; but more particularly the Case of *Tillotson*'s Sermons, for the Copy Right of which the Arch-bishop's Family received twenty five hundred Pounds, after the Expiration of the licensing Act, and previous to the Act of Queen *Anne*; my Opinion upon the *first*, *second*, and *fourth* Questions, is, that at Common Law an Author hath 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; and likewise that, after Publication, an Author or his Assigns, hath an exclusive Right in Perpetuity of multiplying Copies.

Which Right, my Lords, the Statute of Queen *Anne* does not take away. It is an Act very inaccurately penned, but nevertheless it conveys to my Mind no Idea of the Legislature's entertaining an Opinion, that at the Time of passing it, there was no Common Law Right; the Word "*vesting*" appearing in the Title hath given rise to such an Idea, but the Preamble contradicts it in the fullest Manner; the Words of it are, "Whereas certain Printers and Booksellers have taken the Liberty of printing and reprinting, &c. &c." the Phraseology of this Sentence plainly proves, that a known Right previous to that Statute, existed; the Legislature would not have termed the Exercise of what was common to all, *taking a Liberty*, had they not understood that a Right in Perpetuity existed at Common Law; the Words of the Preamble to the Bill would probably have been, "Whereas certain Printers and Booksellers claim a Right of printing, &c." And the Intention of the Word *printing* shews that the Idea prevailed that an Author's Property went farther than the first Publication.

The Universality of the saving Clause, my Lords, convinces me that the Right at Common Law, which I have supposed to have existed antecedent to that Act, is left untouched by it. It is not a particular *Salvo* for the Universities, and the Holders of Copy right by Patent, but it is general, mentioning the Words "*all Persons.*"

In

In Anſwer, my Lords, to the *third* and *fifth* Queſtions, I am of Opinion, that an Action at Common Law is not any ways impeached, reſtrained, or taken away by the Statute of Queen *Anne*; nor is the Author precluded by ſuch Statute from any Remedy, except on the Foundation of the ſaid Statute, and the Terms and Conditions preſcribed thereby (1).

I beg Leave, my Lords, to read the Sentiments of a learned (2) Judge, in Favour of Literary Property, as reported by an able (3) Lawyer: I agree with the three Judges who have ſpoke before me, that it is a Property, and that it belongs to an Author independent of any ſtatutary Security. It is not neceſſary, for any Man to advert either to the *Grecians* or *Romans* to diſcover the Principles of the Common Law of *England*. Every Country hath ſome certain general Rules which govern its Law; our Common Law hath its Foundation in private Juſtice, moral Fitneſs, and public Convenience; the natural Rights of every Subject are protected by it, and there does not exiſt an Argument amounting to Conviction, that an Author hath not a natural Right to the Produce of his mental Labor. If this Right originally exiſted, what but an Act of his own can take it away? By Publication he only exerciſes his Power over it in one Senſe; when one Book is ſold it never can be thought that the Purchaſer hath poſſeſſed himſelf of that Property which the Author held before he publiſhed his Work. A real Abandonment on the Part of the firſt Owner muſt take Place, before his original Right becomes common. Mr. Juſtice *Aſton.*

In all Abandonments, Judge *Yates* hath defined, my Lords, that two Circumſtances are neceſſary; an actual relinquiſhing the Poſſeſſion, and an Intention to relinquiſh it; in the preſent Caſe neither can be proved. Many Manuſcripts have not been committed to the Preſs till Years after they were written, the Poſſeſſion of them for a Century does not invalidate the Claim of the Author or his Aſſigns. With Regard to mechanical Inſtruments, becauſe the Act againſt Monopolies hath rendered it neceſſary for the Inventors of them to ſeek Security under a Patent, it can be no Argument that in Literary Property there ſhould be no Common Law Right. I think it would be more liberal to conclude, that previous to the Monopoly Statute, there exiſted a Common Law Right, equally to the Inventor of a Machine, as to the Author of a Book.

A Variety of Arguments might be, my Lords, drawn from the Nature of the Property, and the Conſtruction which would rationally be put upon the Act of Publication, but to me they ſeem ſuperfluous; I am therefore of Opinion in the affirmative, as to the *firſt*, *ſecond*, and *fourth* Queſtions.

With Regard to the Statute of Queen *Anne*, my Lords, it is no more than a temporary Security, given by the Legiſlature to the Author, enabling him to recover Penalties, and bring a Matter of Complaint againſt any Perſon who printed upon him to a more certain Iſſue than by an Action at Common Law. It is an Act paſſed for the Encouragement of learned Men, and being ſo termed in its Title, it

(1) See this Judge's Opinion more at large, in *Bur.* Lit. Prop. 9.
(2) Lord *Mansfield*, which ſee in *Bur.* Lit. Prop. 112.
(3) Sir *James Burrow.*

is

is a ſufficient Proof, that it is no Bar to the Common Law Right, which exiſted previous to its being enacted. It is evident from the wording of it, that it means to give an additional Security to a Right, which they who paſſed the Act knew exiſted. Beſides, the Manner of paſſing it is in Favour of this Idea. I have ſeen the original Bill as preſented to the Committee appointed to bring it in, and it then had a long flouriſhing Preamble, which the Committee ſtruck out. Thoſe who were ſanguine for the Petitioners, begged a Perpetuity by Statute. The Enemies to them at firſt refuſed to grant any ſtatutary ſecurity. The Bill gave particular Trouble in paſſing; there were ſeveral Conferences between the two Houſes upon it; and the very Day it paſſed, it was ſo backward, that the Queen did not come to the Houſe till three in the Afternoon. Beſides, the ſaving Clauſe is clearly a *Salvo* to the Common Law Right. The Idea is as forcibly expreſſed, as Words can deſire.

The Injunctions granted by the Court of *Chancery*, the Multitude of Circumſtances deducible in Favour of *Literary Property* from the natural Rights of the Subject, the immediate Nature of the Property, the Idea uniformly entertained of its Exiſtence from the Era of the Commencement of Printing to the preſent Day; as well as my Conſtruction of the Statute of Queen *Anne*, oblige me in Anſwer to the *third* and *fifth* Queſtions, to declare my Opinion, that an Action at Common Law is not any Ways impeached, reſtrained, or taken away by the 8th of Queen *Anne*. (1)

Mr. Burnet's Argument.

The Argument for the Exiſtence of a Common Law Right, and the Definition of Literary Property, as chattel Property, is, my Lords, in my Idea exceedingly ill-founded and abſurd. If Literary Property is a Chattel, then upon the Death of the Poſſeſſor of a Manuſcript, any ſimple contract Creditor may oblige his Family or Aſſigns to give it up, and ſuffer him to print it. An Author certainly hath a Right to his Manuſcript; he may line his Trunk with it, or he may print it. After Publication, any Man may do the ſame; your Lordſhips may turn Printers if you chuſe, and print it. From the Patents, the Privileges, the Star-chamber Decrees, and the licenſing Acts, it is evident that in thoſe Days no Idea was entertained of an Author's having any Claim to the excluſive Right of printing, what he had once publiſhed: If a Manuſcript is ſurreptitiouſly obtained, an Action at Common Law will certainly lie for the corporeal Part of it, the Paper. So if a Friend to whom it is lent, or a Perſon who finds it, multiplies Copies, having ſurrendered the original Manuſcript, he hath ſurrendered all that the Author hath any Common Law Right to claim.

The Right under Patents and Privileges was, my Lords, a Right petitioned for by Printers, without any thought of an Author's entertaining an Idea, that he had any Claim. As to the Stationers Company, ſurely we are not to look for the Common Law among them. All their Rules and Orders are for the Security of ſuch peculiar Works, as their own Members had been wont to print. An Inventor of a Machine or mechanical Inſtrument, like an Author, gives his Ideas to the Public. Previous to Publication, he poſſeſſes the *Jus utendi, fruendi, et diſponendi*, in as full an Extent

(1) See this Judge's Opinion more at large, in *Bur.* Lit. Prop. 40.

as

as the Writer of a Book; and yet it never was heard that an Inventor, when he ſold one of his Machines, or Inſtruments, thought the Purchaſer, if he choſe it, had not a Right to make another after its Model. The Right of excluſively making any Mechanical Invention is taken away from the Author or Inventor by the Act againſt Monopolies of the 21ſt of *James* the Firſt. Which Act ſaves prerogative Copy Rights, and which would have mentioned what is now termed Literary Property, had an Idea exiſted that there was a Common Law Right for an Author or his Aſſigns excluſively to multiply Copies. The Arguinent, that when a Book is publiſhed and ſold, there is an implied Contract between the Author and Purchaſer cannot be maintained. The Purchaſer buys the Paper and Print, the corporeal Part of his Purchaſe; and he buys a Right to uſe the Ideas, the incorporeal Part of it.

The Doctorine, my Lords, of implied Contracts will not hold, as it is improbable. The Author ſuſtains a Loſs but no Injury, from another's printing his Copy. *Damnum ſine injuria* is an eſtabliſhed Maxim of Law. As another by multiplying Copies reap Profit, the original Author ſuſtains a Loſs, but he ſuſtains no Injury. To be injured a Man muſt looſe his Right; that Right muſt be founded in Law; and where the Law gives no Remedy, an Author can claim no Right; the Matter is common to all. It hath been ſaid, that a Declaration hath been filed on an Action at Common Law, for the Invaſion of Copy Right; but it hath not been found, although every Law book hath been ranſacked for the Purpoſe, that a Trial was ever had at Common Law. An incontrovertible Proof that there is not a Lawyer in *Weſtminſter* Hall who ſuppoſe that there exiſt any Right at Common Law. The preſent Claim is neither more nor leſs than a Claim for a Monopoly, and all Monopolies are odious to the Common Law.

My Lords, the Arguments of the Council, and the Opinions of thoſe on the other Side of the Queſtion are more ingenious than convincing. I anſwer therefore the Firſt, Second and Fourth Queſtions in the Negative, being of Opinion that there never exiſted a Common Law Right, and that an Author hath no Claim to his Manuſcript after Publication.

Reſpecting the Statute of Queen *Anne*, my Lords, I am perfectly convinced that it is the only Security that Authors or Booktellers have. That it gives a Right for fourteen Years to the Holders of Copies, and after that Period the Right reverts to the Authors for fourteen Years longer. I declare that all the metaphyſical Subtlety or Definition which the ableſt Logician can muſter, cannot give any other Senſe to the Words "for the Encouragment of Learning, and for veſting a Right in Authors," in the Title to the Act, than a Creation of a Property, not a further Security for one. The Preamble and expreſs Meaning of every Clauſe of the Act afford ſtrong Arguments in Favour of the Opinion I am laying down. The Words, "*and no longer*," are clear and concluſive; out of the Power of Argument to ſurmount. They ſhew that the Legiſlature thought it a great Favour to grant any, even a limited Security, and that they might not be miſunderſtood, they have expreſſed their Idea in the fulleſt Terms. After theſe Words it is in the higheſt Degree abſurd to contend, that any ſaving Clauſe can be ſo conſtrued as to affect, and indeed deſtroy the moſt ſubſtantial Meaning of the enacting Part of the Act. The ſaving Clauſe is evidently a *Salvo* for thoſe who hold a Patent-right to Copies; and as it

would have been tedious to have enumerated all, the Univerſities are mentioned, as being the greateſt Holders under that Kind of Deſcription.

In order, my Lords, to enforce this Obſervation, and the Concluſion I draw from the Words, *and no longer*, in the enacting Clauſe, I beg Leave to cite the Caſe of an Attainder, in the Reign of *Edward* the VIth. being taken off by an Act of Parliament many Years afterwards, which Act, in the enacting Clauſe, took off the Attainder in the fulleſt and moſt entire Manner, and afterwards contained a ſaving Clauſe for certain Leaſes granted by the King, who paſſed the Bill of Attainder. One of the Holders of the Leaſes brought an Action againſt the Family relieved from the Attainder, and grounded his Claim upon the ſaving Clauſe; but the Court adjudged againſt him. for that the Attainder being entirely taken off by the enacting Clauſe, it was idle to contend that any ſaving Clauſe could impeach it, or ſecure a Right held under the Idea of the Attainder (1).

With regard, my Lords, to the Injunctions cited on the Occaſion, the Court of *Chancery* muſt have uniformly miſtaken the Law, if they had not granted them under the Idea of the Statute.

The Act itſelf, my Lords, gives no more Remedy with its Penalties, than it does without them. An Author in the firſt Place, is allowed to damaſk all the Books pirated upon him; by damaſking I underſtand, turn to waſte Paper and line Trunks, which Linings are figured like Damaſk. What remedy is this? none in the world. Then again, a Penny per Book is to be recovered, half of which goes to the Informer and half to the King; here therefore the Author gets nothing. The Statute affords him Grounds for a Remedy in Equity. The Court of *Chancery*, by an Injunction and a Decree, not only ſtops the Sale of the pirated Copies, but alſo obliges the Pirate to account for what he hath ſold. This is a Satisfaction; this is an actual and an effectual Remedy. To ſuppoſe that the ſaving Clauſe maintains a Perpetuity of Property, is to ſuppoſe that the Act grants an Author fourteen Years *and no longer*, except *for ever*; which is ſo barefaced, ſo egregious an Abſurdity, that no Man of Senſe can be the Dupe of it. That the Court of *Chancery* never dreamt of a Common Law Right, I prove by a Caſe between the Stamp Office and a News-paper Printer. *Rayner*, a Printer, got into the *Fleet*, and there printed News-papers without Stamps; the Stamp Office prayed an Injunction, the Court refuſed it, and told them the Statute having enacted, that a Penalty was to be paid on Conviction, they muſt proſecute to Convicton under the Statute, and they had a Right to the Penalty, but they could not, upon the Principles of Common Law, prevent the Printer from continuing his Trade. This proves that Statute Laws are unneceſſary where Remedies can be had at Common Law.

The Printers who claim the Right of Perpetuity, deſerve ſevere Animadverſion, Inſtances are innumerable, all tending to corroborate any Opinion that there was no Right at Common Law previous to the 8th of Queen *Anne*, and that if there was, that Statute entirely and effectually took it away.

Mr. Juſtice *Aſton.*

I agree, my Lords, that an Author hath a Right at Common Law to his Manuſcript, previous to Publication. With regard to the Statute of Queen *Anne*, and in anſwer to the *third* and *fifth* Queſtions, I conceive the Act entirely takes away any previous Right an Author might have, and that he is precluded thereby

(1) See *Walſingham's* Caſe, in *Plowd.* Com. 565. and *Altonwood's* Caſe, in 1 *Co.* Rep. 47. *a.*

from

from any Remedy, except on the Foundation of the ſaid Statute, and the Terms and Conditions preſcribed thereby.

Mr. Baron *Adams.*

The Nature, my Lords, of Patents, Privileges, and Grants of the Crown, reſpecting Books, have been ſo very learnedly traced, and that too to a very early Period, and ſuch a Variety of Inſtances have been cited, all inconteſtably proving, that till of late Years no Idea was entertained, that a Common Law Right exiſted, reſpecting literary Property. For theſe Reaſons I decline entering into a minute Inveſtigation of the ſaid Patents: Obſerving on the Caſes, I am clearly of Opinion that, previous to the Statute of Queen *Anne*, Authors and Printers had no Security but by Patents, and therefore I anſwer all the Queſtions in the Negative.

Ld. Chief Baron *Smythe.*

In anſwer, my Lords, to the *firſt*, *ſecond*, and *fourth* Queſtions, the Caſes prove, and it is allowed, that Literary Property is Property previous to Publication, and that Publication cannot alter it; for that Publication neither makes it a Sale, a Gift, a Forfeiture, nor an Abandonment, which are the only Ways that a Perſon can part with his Property. When a Man publiſhes his Manuſcript, he ſells to one Perſon only, one Book, and the Uſe of that one Book, without any Deſign of allowing the Purchaſer to multiply Copies: If he gives a Book away, he gives it under the ſame Reſtrictions; a Forfeiture always implies a Crime, and then the Right of Property becomes veſted in the Crown; an Abandonment cannot be without an Intent of relinquiſhing his Right; and ſuch Intent is not deducible from a Publication of the Ideas written by an Author. In the Caſe of *Pope* v *Curl*, the Letters were the Property of thoſe to whom they were ſent; but the Ideas remained as Matter of Right veſted in the Sender. In the Caſe of Lord *Shafteſbury*'s Manuſcript, the ſame Deduction followed; for Mr. *Gwynne* ſold to *Shebbeare* what he had no Authority from the Author, (Lord *Shafteſbury*) or his Aſſigns, to diſpoſe of. There was no act of Diſhoneſty on the Part of *Shebbeare* although the Manuſcript was ſurreptitiouſly obtained, and the Family had a Remedy.

Some Lawyers, my Lords, yet alive, remember the Caſe of Lord Chief Baron *Gilbert*'s Manuſcripts, which he deviſed to Baron *Clarke*; the Baron never publiſhed them, but a Hackney Writer, whom he employed, took an Opportunity of copying them, and thoſe ſtolen Copies were committed to the Preſs. The ſame Argument lay againſt pirating after, as before Publication.

It hath, my Lords, been mentioned, that a Man made his landed Eſtate common, by giving a Part of it to the Highway; but it ſurely will not be contended, that although he gave a Part of his Eſtate for ſuch a Purpoſe, that any Perſon but himſelf had a Right to the Trees on it, or the Mines beneath it. The Arguments in the Caſe of *Baſket* and the Univerſity of *Cambridge*, is grounded on theſe Principles. This Caſe is reported in *Burn*'s (1) Eccleſiaſtical Law, and Sir *James* (2) *Burrows*'s Reports.

The Caſes of *Eyre* v *Walker*, and others, which have been mentioned, both at the Bar, and by the Judges, were all after the *Twenty-one* Years were expired, and which, Redreſs being obtained, ſpeak in Favour of the Common Law Right:

(1.) 8vo. Edit. Vol. I. P. 453. (2) 2 *Bur.* Rep. 66.

and the Caſe of the Seſſions (1) Paper corroborates my Opinion. In order to alarm your Lordſhip's Paſſions, two very odious Names have been thrown out, "*Perpetuity*" and *Monopoly*;" neither of which, I think, applies to the preſent Claim; the firſt being entirely out of the Queſtion, and the latter Lord *Coke* has defined to mean a Grant from the Crown, to vend any ſingle Matter.

As to mechanical Inventions, I do not know, my Lords, that previous to the Act of 21 *James* I. an Action would not lie againſt the Perſon who pirated an Invention. An Orrery none but an Aſtronomer can make; and he may faſhion a ſecond as ſoon as he hath ſeen a firſt: It is then in a Degree an original Work. Whereas, in multiplying an Author's Copy, his Name as well as his Ideas are ſtolen, and it is paſſed upon the World as the Work of the original Author, although he cannot poſſibly amend any Errors which may have eſcaped in his firſt Edition, nor cancel any Part, which ſubſequent to the firſt Publication, appears to be improper. In anſwer, my Lords, to the *firſt*, *ſecond*, and *fourth* Queſtions in the Affirmative,

The Statute of Queen *Anne*, my Lords, I conſider as a Compromiſe between Authors and Printers, contending for a Perpetuity, and thoſe who deny them any Statute Right. There are general Rules for the Conſtruction of all Statutes; one is that it ſhall never be interpreted ſo as to be unreaſonable; another, that no Clauſe can be conſtrued ſo as to make it inconſiſtent with any former Clauſe; it ſhall neither be repugnant, nor inconſiſtent. With regard to this Statute, we muſt not reject the ſaving Clauſe, nor the Motive for which it was made, viz. the Advancement of Learning. The Word *veſting*, if it can be tortured ſo as to tell againſt the preſent Claim, is ſufficiently qualified and done away by the Word *ſecure*, which occurs in the enacting Clauſe, and which plainly implies a Security for ſomething pre-exiſting. The Preamble gives full Authority to this Conſtruction, the Word *re-printing* particularly implying a Right after the firſt Publication; and the word *Purchaſer*, (which is one of the Parties mentioned by the Act as being ſecured in his Property) indicates moſt amply a previous Right, for Nobody can be thought to purchaſe what another has not a Right to ſell. The Satute affords the Holders of Copy-right a more efficacious Remedy than the Common Law, but it by no Means impeaches, reſtrains, or takes away the Common Law Right. I therefore anſwer the *third* and *fifth* Queſtions in the Negative.

With reſpect to the firſt Queſtion, my Lords, there can be no Doubt, that an Author has the ſole Right to diſpoſe of his Manuſcript as he thinks proper; it is his Property, and till he parts with it, he can maintain an Action of Trover, Treſpaſs, or upon the Caſe againſt any Man who ſhall convert that Property to his own Uſe; but the Right now claimed at the Bar, is not a Title to the Manuſcript, but to ſomething, after the Owner has parted with, or publiſhed his Manuſcript; to ſome Intereſt in Right of Authorſhip, to more than the Materials or Manuſcript on which his Thoughts are diſplayed, which is termed Literary Property, or an excluſive Privilege of multiplying Copies of the Manuſcript or Book, which Right is the Subject of the ſecond Queſtion propoſed to us.

(1) See the Cauſe of *Manby & al. v Owen & al.* in *Bur.* Lit. Prop. 33, 128.

Now

Now if there exists any incorporeal Right or Property, my Lords, in the Author detached from his Manuscript, no Act of Publication can destroy it. Can then such Right or Property exist at all? Does such a Right come within the Knowledge or Reach of the Common Law? In answer to the first of these Queries, I acknowledge, though this claim of Property is abstract and ideal, novel and refined, it is yet intelligible, and may as easily be made to exist for ever as for a Term of Years; but in order to know whether it is protected by Law, a preliminary Question is necessary: Whether it has been so determined in its Favour by the great and learned Men who have been my Predecessors in a regular Course of Judicature; it is not for me to shake a respectable series of Decisions, and unhinge the Foundations of an established Right, by any *a priori* Reasoning of my own; but after investigating the Decisions of the Courts of Common Law, I can find no such determinations. What is Common Law now, must have been so three hundred Years ago, when Printing was invented. No Traces of such a Claim are to be met with prior to the Restoration. Very few Cases of this Kind happened in *Charles* the *Second's* Time, or before the licensing Act, and those few were determined upon the prerogative Right of the Crown. The executive power of the Crown drew after it this prerogative Right, which extended to all Acts of Parliaments, Matters of Religion, and Acts of State. The Case of *Baskett* and the University of *Cambrige*, which was a late one of the same Kind, appeared upon the Pleadings to be a Question arising between two Parties who claimed under concurrent and inconsistent Grants of the Crown. My late honourable and learned Friend (Mr. (1) *Yorke*) who argued that Case, endeavoured to shew that his Client's Right might arise from the Power of the Crown, and to illustrate his Argument, said, it might perhaps be "Property founded on Prerogative,"—a Language, however allowable for Council, not very admissible by, or intelligible to a Judge, but the Certificate in the above Cause does not say a Word of Property, and indeed if such a Claim as that had been founded on Property, every one would have as good a Right to publish Abridgments of the Statutes, as of any other Book.

Lord *Northington*, my Lords, granted Injunctions on behalf of Publications which he considered as Matters of State, but left such Works as "The Whole Duty of Man," to their common Remedy at Law. When Works of Literature, encouraged by the Facility of Printing, began to spread, we find the Cases multiply. Of these, however, I lay entirely out of the Question, all those which appear to be Cases between rival Patentees of the Crown; all those relating to the Stationers Company; all those concerning Religion, Law, or the State; and all unpublished Manuscripts.

I shall premise too, my Lords, before I examine the Cases which happened after the Statute, that I am of Opinion, that the Statute gives Authors and their Assigns, a general Right not connected with the Penalty, and that the statutable Right falls under the Protection of a Court of Equity; and may claim the Benefit of an Injunction. To obtain such an Injunction, it is by no means necessary that the Plaintiff should make out a clear indisputable Title. It may be granted on a reasonable

(1) *Offendent Terris hunc tantum Fata, neque ultrà esse sinent.* Virg.

Pretence,

Pretence, and a doubtful Right, before the Hearing of the Cauſe; nor is it an Objection that the Party applying for it has a Remedy at Law. No Bill for an Injunction is to be found before the Statute.

The Cauſes, my Lords, which have come before the Court of *Chancery*, ſince the Statute, I find to be 17 in Number; of theſe, eight were founded on the Statute Right: in two or three, the Queſtion was, whether the Book was a fair Abridgement? and all the Reſt were Injunctions granted *ex Parte*, upon filing the Bill, with an Affidavit annexed. In theſe Caſes the Defendant is not ſo much as heard, and can I imagine that ſo many illuſtrious Men who preſided in the Court of *Chancery*, would, without a ſingle Argument, have determined ſo great and copious a Queſtion, and which has taken up ſo much of your Lordſhips Time? In fact, none of them wiſhed to have it ſaid, he had formed any Opinion on the Subject.

In the famous Caſe of *Tonſon* and *Walker*, my Lords, of which I have an accurate Note of my own taking, Lord *Hardwicke* ſaid, before the Defendant's Council began to argue, "I am inclined to ſend a Caſe to the Judges, for I doubt whether the Matter has been judicially determined; but wiſh to hear what the Defendant ſays as to Dr. *Newton*'s Notes, however I may determine the general Queſtion, either upon the Common Law or the Statute." The Maſter afterwards reported the Variations between the two Books to be colourable and illuſory only, and therefore the Injunction was made perpetual. Since that Time during the laſt twenty Years, or more, the main Queſtion has been fluctuating, and in Agitation.

From my own Experience at the Bar, my Lords, I know that the ſucceſſive Chancellors and Maſters of the Rolls, Lord *Northington*, Lord *Camden*, Sir *Thomas Clarke*, &c. have all looked upon the Caſe as undetermined, it may now therefore be fairly treated as a new Queſtion, and indeed it has been argued as ſuch upon general Principles. Let us conſider what Weight thoſe Principles have which are laid down as the Foundation of this new Species of Property; I have heard but of one, namely, that ſuch a Claim is conſiſtent with the moral Fitneſs of Things. This Idea of moral Fitneſs is indeed an amiable Principle, and one cannot help wiſhing all Claims derived from ſo pure a Source might receive all poſſible Encouragement; but this Principle is no univerſal Rule of Law, nor can it be made to apply in all Caſes. Beautiful as it may be in Theory, to reduce it into the Practice and Execution of Common Law, would create intollerable Confuſion; it would make Laws vain, and Judges arbitrary; nor is it poſſible to ſupport the Reſpondents Claim upon theſe Principles and not allow their Operation, in a Variety of other Caſes, where it is confeſſed on all Hands they cannot be allowed.

Abridgements of Books, my Lords, Tranſlations, Notes, as effectually deprive the original Author of the Fruit of his Labours as direct particular Copies, yet they are allowable. The Compoſers of Muſic, the Engravers of Copper Plates, the Inventors of Machines, are all excluded from the Privilege now contended for; but why, if an equitable and moral Right is to be the ſole Foundation of it? their Genius, their Study, their Labour, their Originality is as great as an Author's, their Inventions are as much prejudiced by Copyiſts, and their Claim in my Opinion ſtands exactly on the ſame Footing; a nice and ſubtle Inveſtigation may perhaps find out ſome little logical or mechanical Differences, but no ſolid Diſtinction in the rule of Property that applies to them can be found.—If ſuch a perpetual

perpetual Property remains in an Author, and his Right continues after Publication, I cannot conceive what ſhould hinder him from the full Exerciſe of that Right in what Manner he pleaſes; he may ſet the moſt extravagant Price he will upon the firſt Impreſſion, and refuſe to print a ſecond when that is ſold. If he has an abſolute Controul over his Ideas when publiſhed, as before, he may recal them, deſtroy them, extinguiſh them, and deprive the World of the Uſe of them ever after; his forbearing to reprint is no Evidence of his Conſent to abandon his Property, and leave it as a Deriſect to the Public.

But it is ſaid, my Lords, that the Sale of a printed Copy is a qualified or conditional Sale, and that the Purchaſer may make all the Uſes he pleaſes of his Book, except that one of re-printing it; but where is the Evidence of this extraordinary Bargain? or where the Analogy of Law to ſupport the Suppoſition? In all other Caſes of Purchaſe, Payment transfers the whole and abſolute Property to the Buyer: there is no Inſtance where a legal Right is otherwiſe transferred by Sale, or an Example of ſuch a ſpeculative Right remaining in the Seller; it is a new and metaphyſical Refinement upon the Law; and Laws, like ſome Manufactures, may be drawn ſo fine as at laſt to loſe their Strength with their Solidity. —When Printing was firſt introduced, Cardinal *Wolſey* warned King *Henry* VIII. to be cautious how he encouraged it, as a Matter which might be dangerous to the State. The Event however did not prove it ſo, and therefore the Statute of the 21ſt of *James* I. excepted it, as a reaſonable and allowable Monopoly.

The ſubſequent licenſing Act, my Lords, gave only an adventitious Right; and thus it reſted till the Statute of Queen *Anne*. The ſtatute certainly recognizes no Common Law Right, *hinc illæ lachrymæ!* Nor can I ſuppoſe this Omiſſion happened through Ignorance or Inadvertence, when I ſee ſuch great Law Names as *Holt*, *Cooper*, *Harcourt*, *Somers*, &c. in the Liſt of that Parliament. This Act adopts the Language of the old Privileges in Terms, 14 Years had been the Term before granted to Inventors, a Specification of the Work too, as in the Caſe of Machines, was preſcribed; nor do I recollect an Inſtance where a Statute gives ſuch a temporary Remedy as is here granted in Aid of an abſolute Common Law Right.

If ſuch a Right, my Lords, exiſted at Common Law, and it remained unimpeached by that Statute, why that Anxiety in Authors and Booksellers afterwards to obtain another Sanction for their Property? Whence thoſe different Applications to Parliament, in the Year 1735, 1738, 1739, for a longer Term of Years, or for Life in this Kind of Property, and afterwards to get an Act to prohibit the Liberty of printing Books in foreign Kingdoms, and ſending them back again? The Truth is, the Idea of a Common Law Right in Perpetuity, was not taken up till after that Failure in procuring a new Statute for an Enlargement of the Term; if (ſay the Parties concerned) the Legiſlature will not do it for us, we will do it without their Aſſiſtance, and then we begin to hear of this new Doctrine, the Common Law Right, which, upon the whole, I am of Opinion, cannot be ſupported upon any Rules or Principles of the Common Law of this Kingdom. I therefore, my Lords, anſwer the *firſt*, *third*, and *fifth* Queſtions in the Affirmative; and the *ſecond* and *fourth* in the Negative.

THE

THE SPEECHES OF THE LORDS.

AFTER, my Lords, what the Lord Chief Juſtice hath ſo ably enforced, there will be little Occaſion for me to trouble your Lordſhips; nor will the preſent State of my Health, and the Weakneſs of my Voice, allow me to exert myſelf, were I ever ſo much inclined; but the Nature of my Profeſſion, and the Duty I owe to this Houſe, will not ſuffer me to remain ſilent, when ſo important a Queſtion is to be determined. The fair Ground of the Argument has been very truly ſtated to you by the Lord Chief Juſtice; I hope what was Yeſterday ſo learnedly told your Lordſhips. will remain deeply impreſſed on your Minds.

The Arguments, my Lords, attempted to be maintained on the Side of the Reſpondents are founded on Patents, Privileges, Star-chamber Decrees, and the Bye Laws of the Stationers Company; all of them the Effects of the groſſeſt Tyranny and Uſurpation; the very laſt Places in which I ſhould have dreamt of finding the leaſt Trace of the Common Law of this Kingdom: and yet, by a Variety of ſubtle Reaſoning and metaphyſical Refinements, have they endeavoured to ſqueeze out the Spirit of the Common Law from Premiſes, in which it could not poſſibly have Exiſtence.

They began, my Lords, with their pretended Precedents and Authorities, which they endeavoured to model in ſuch a Manner, as to extract from them ſomething like a Common Law Principle, upon which their Argument might reſt. I ſhall invert the Order, and firſt of all lay out of my Way the whole Bede-role of Citations and Precedents which they have produced; that heterogeneous Heap of Rubbiſh, which is only calculated to confound your Lordſhips, and miſlead the Argument. After the firſt Invention of Printing, the Art continued free for about fifty Years; I mean to lay no Streſs upon this; I mention it only hiſtorically, not argumentatively; for as the Uſe of it was little known, and not very extenſive, its want of Importance might protect it from Invaſion; but as ſoon as its Effects in Politics and Religion were felt, all the crowned Heads in *Europe* at once ſeized on it, and appropriated it to themſelves. Certain it is, that in *England*, the Crown claimed both the Power of licenſing what ſhould be printed, and the Monopoly of Printing. Two Licenſes were granted to thoſe who petitioned for them. An Author not only was obliged to ſue for a Licence to print at all, but he was alſo obliged to ſue for a ſecond Licence that he might print his own Work.

When the King, my Lords, had once claimed the Right of Printing, he ſecured that Right by Patents and by Charters. Still further to ſecure his Monopoly, he combined the Printers, and formed them into a Company, then called the Stationers Company, by whoſe Laws, none but Members could print any Book at all. They aſſumed Power of Seizure, Confiſcation and Impriſonment, and the Decrees of the Star-chamber confirmed their Proceedings. Theſe Tranſactions, I preſume, have no Relation to the Common Law; and when they were eſtabliſhed, where could an Author, independent of the Company, print his Works, or try his Right to it? Who could make head againſt this arbitary Prerogative, which ſtifled and ſuppreſſed

ſuppreſſed the Common Law of the Land? Every Man who printed a Book, no matter how he obtained it, entered his Name in their Books, and became a Member of their Company: then he was complete Owner of the Book. Owner was the Term applied to every Holder of Copies; and the word Author does not occur once in all their Entries. All Societies, good or bad, arbitrary or illegal, muſt have ſome Laws to regulate them. When an Author died, his Executors naturally became his ſucceſſors. The Manner in which the Copy-Right was held, was a kind of Copy-hold Tenure, in which the Owner has a Title by Cuſtom only, at the Will and Pleaſure of the Lord. Two ſole Titles by which a Man ſecured his Right was the royal Patent and the Licenſe of the Stationers Company; I challenge any Man alive to ſhew me any other Right or Title; Where is it to be found? ſome of the learned Judges ſay the Words *or otherwiſe* in the Statute of Queen *Anne* relate to a prior Common Law Right; To what common Law Right could theſe Words refer? At all the Periods I have mentioned the Common Law Rights were held under the Law of Prerogative. It was the general Opinion that there was no other Right, and the corrupt Judges of the Times ſubmitted to the arbitary Law of Prerogative. In the Caſe of the Stationers Company againſt *Seymour*, all the Judges declared that Printing was under the Direction of the Crown, and that the Court of *King's Bench* could ſeize all Printers of News, true or falſe, lawful or illicit. But if it was made Uſe of to protect Authors, what was this Protection? a Right derived under a Bye Law of a private Company; a Protection ſimilar to that which we give the great *Mogul*; when we want any Grant from him, we talk ſubmiſſively, and pay him Homage, but it is to ſerve our own Purpoſe, and to feaſt him with a Shadow that we may attain the Subſtance. In ſhort, the more your Lordſhips examine the Matter, the more you will find that theſe Rights are founded upon the Charter of the Stationers Company and the royal Prerogative; but what has this to do with the Common Law Right? for never, my Lords, forget the Import of that Term. Remember always that the Common Law Right now claimed at your Bar is the Right of a private Man to print his Works for ever, independent of the Crown, the Company, and all Mankind. In the Year 1681 we find a Bye Law for the Protection of their own Company and their Copy Rights, which then conſiſted of all Literature of the Kingdom; for they had contrived to get all the Copies into their own Hands. In a few Years afterwards the Revolution was eſtabliſhed, then vaniſhed Prerogative, then all the Bye Laws of the Stationers (1) Company were at an End; every Reſtraint fell from off the

(1) If (ſaith *Catharine Macaulay*, a female elegant Writer) all literary Works were, at the Time of the Revolution, in the Hands of the Stationers Company, the Ravages which muſt have been made on this Property, by a Number of Invaders, were the Property not ſecured by a ſuppoſed common Law Right, would have obliged them before ſuch a Term of Twenty Years were expired, to have have had Recourſe to the Legiſlature for a legal Security. The Proprietors of Copy-Right aſſert, that the Statute of the 8th of Queen *Anne* was granted on the Principle of facilitating Legal Redreſs. Had it been taken in the Senſe of a full Deciſion in the Caſe, ſurely ſuch a Number of Proprietors of old Copies, as now ſuffer by the preſent Deciſion, would not have laid out their Fortunes on ſuch untenable Property; but if it is ſo very obvious that no Common Law Right exiſts for ſecuring Copy-Right, ſurely the granting Injunctions could only tend to deny to one Party, what the Law entitled them to, and to amuſe the other to their greater Ruin." See "Modeſt Plea for Property of Copy Right," P. 12. in Notes.

Preſs, and the old Common Law of *England* walked at large. During the ſucceeding (1) Fourteen Years, no (1) Action was brought, no Injunction obtained, although no illegal Force prevented it; a ſtrong Proof, that at that Time there was no Idea of a Common Law Claim. So little did they then dream of eſtabliſhing a Perpetuity in their Copies, that the Holders of them finding no Prerogative Security, no Privilege, no licenſing Act, no Star-chamber Decree to protect their Claim, in the Year 1708 came up to Parliament in the Form of Petitioners with Tears in their Eyes, hopeleſs and forlorn; they brought with them their Wives and Children to excite Compaſſion, and induce Parliament to grant them a *ſtatutory* Security. They obtained the Act. And again and again ſought for a further legiſlative Security.

"Thus, my Lords, ſtands the Pretence on the Score of Uſage, of which your Lordſhips have heard ſo much on one Side the Queſtion. I come now to conſider upon what Foundation ſtand the Prerogative Copies; and theſe were in fact Caſes between Co patentees (for I muſt conſider the Stationers Company itſelf as a Patentee of the Crown), and no Authorſhip Right occurs here. The Right in the Crown is ſuppoſed to come either from Purchaſe or Contract; and our Law argues from Principles, Caſes, and Analogy; but not a Word of this in the Judgment of the Court; but the Arguments of Council are adduced to prove the point. The Argument of Council is a ſorry Kind of Evidence indeed, in moſt Caſes it would be very dangerous to rely on it, but here it is ſuch Stuff as I am aſhamed to mention. You have them at length in *Carter*. Firſt, it is put on the Topic of Prerogative, next of Ownerſhip. 1. *Henry* the *Sixth* brought over the Printers and their Preſſes, *ergo*, ſay the Council, he has an abſolute Right to the whole Art, and all that it can produce. 2. Printing belongs to Nobody, and what is Nobody's is of courſe the King's. 3. The King pays his Judges, *ergo*, he purchaſes that Right for a valuable Conſideration. 4. He paid for the Tranſlation of the *Bible*, therefore, forſooth, he bought a Right to ſell *Bibles*. Away with ſuch trifling! Mr. *Yorke* put it on its true footing. Ought not the Promulgation of your venerable Codes of Religion and of Law to be intruſted to the executive Power, that they may bear the higheſt Mark of Authenticity, and neither be impaired, or altered, or mutilated? Theſe printed Acts are Records themſelves, are Evidence in a Court of Law, without recurring to the original parliamentary Roll. Will you then give this honourable Right to your Sovereign as ſuch? or will you degrade him into a Bookſeller? indeed, had he no other Title to this Diſtinction, that could hardly be maintained. But if this will not ſerve the Purpoſe, recourſe is next had to Injunctions; they, it is ſaid, have put the Right out of Doubt: nay, Lord *Hardwicke*'s Name is triumphantly brought on the Stage, and he is declared to have abſolutely decided the Point: no man, I am ſure, can venerate his Name (which will be dear to Poſterity as long as Law and Equity remain) more than I do. But this boaſted Caſe, like all the Reſt that have been produced, entirely fails in the Proof; and when my Lord Chief Juſtice *De Grey*, read his own

(1) "It is to be preſumed (ſays Mrs. *Macaulay*) that, during this Space of Time, there were few or no Inventors, and that this Property, as in other Caſes of Property, was for a long Time effectually ſecured by the Common Senſe of the People." See *Macaul.* Plea. P. 12.

Note

Note of what Lord *Hardwicke* ſaid upon the Occaſion, it appeared that Lord *Hardwicke*'s Words had been twiſted to an oppoſite Meaning to what he intended. All the Injunction Caſes have been ably gone through. I ſhall only add, in general Terms, that they can prove Nothing: they are commonly obtained for the Purpoſe of ſtaying Waſte, and the Prevention of irreparable Damage. They muſt therefore in their Nature be ſudden and ſummary, or the Benefit of them would be loſt before they were obtained, and they are granted though the Right is not clear, but doubtful. The Queſtion, whether I can maintain my Right againſt the Deviſee or the Heir at Law, may be diſcuſſed afterwards at Leiſure; but unleſs upon ſhewing a reaſonable Pretence of Title you in the mean Time tie up the Spoiler's Hands who is felling my Timber, or ploughing my Paſture; my Remedy is gone, or comes too late to prevent the Miſchief. What then if a thouſand Injunctions had been granted, unleſs the Chancellor at the Time he granted them had pronounced a ſolemn Opinion, that they were grounded upon the Common Law? It would only come to this at laſt, that the Right in Queſtion was claimed on one Side and denied on the other: therefore till the Matter was tried and determined, let the Injunction go. Lord *Hardwicke* after twenty Years Experience, in the laſt Caſe of the Kind that came before him, declared that the Point had never yet been determined. Lord *Northington* granted them on the Idea of a doubtful Title; I continued the Practice upon the ſame Foundation; and ſo did the preſent Chancellor. Where then is the Chancellor who has declared *ex Cathedra* that he had decided upon the Common Law Right? Let the Deciſion be produced in direct Terms. It is amazing that we ſhould have been ſo long amuſed with this Kind of Argument, from ſuch vague Authorities!

At length, my Lords, having removed every ſtumbling Block that oppoſed our Progreſs to the pure Source of Common Law; having cleared the Way of all thoſe ſpurious, pretended Authorities, which will not bear the Teſt of a moment's ſerious Examination, the Queſtion begins to aſſume its natural Shape: Here then I feel myſelf upon my own Ground, and I challenge any Man to produce any Adjudication, a Precedent, a Caſe, or any Thing like legal Authority on which this Claim can be grounded. Does there a *Scintilla*, a Glimpſe of Common Law appear under any of thoſe different Heads I have mentioned, and which have been ſo often repeated to us? For my own Part, I find nothing in the whole that favours of Law, except the Term itſelf, Literary *Property*. They have borrowed one ſingle Word from the Common Law, and have raked into every Store houſe of literary Lumber to find out how to apply it to the Subject, and to deduce ſome Principles to which it may refer, and be governed by. And now what are they? What are the Foundations of this Claim in the *Engliſh* Common Law? Why, in the firſt Place, ſay the Reſpondents, every Man has a Right to his Ideas.—Moſt certainly every Man who thinks, has a Right to his Thoughts, while they continue HIS; but here the Queſtion again returns; when does he part with them? When do they become *publick Juris*? While they are in his Brain no one indeed can purloin them; but what if he ſpeaks, and lets them fly out in private or public Diſcourſe? Will he claim the Breath, the Air, the Words in which his Thoughts are cloathed? Where does this fanciful Property begin,

or end, or continue? Oh! fay they, the Ideas are marked in black and white, on Paper or Parchment——now, then, we get at fomething; and an Action, I allow, will lie for Ink and Paper: but what fays the Common Law about the incorporeal Ideas, and where does it preſcribe a Remedy for the Recovery of them, independent of the Materials to which they are affixed? I ſee nothing about the Matter in all my Books; nor were I to admit Ideas to be ever ſo diſtinguiſhable and definable, ſhould I therefore infer they muſt be Matters of private Property, and Objects of the Common Law? But granting this general Poſition, we get Footing but upon one ſingle Step, and new Doubts and Difficulties ariſe whenever we attempt to proceed. Is this Property deſcendible, transferrable, or aſſignable? When publiſhed, can the Purchaſer lend his Book to his Friend? Can he let it out for Hire as the Circulating Libraries do? Can he enter it as common Stock in a Literary Club, as is done in the Country? (Every Thing of this Kind, in a Degree, prejudices the Author's Sale of the Impreſſion.) May he tranſcribe it for a Charity? Then what Part of the Work is exempt from this deſultory Claim? Does it lie in the Sentiments, the Language, and Style, or the Paper? If in the Sentiments, or Language, no one can tranſlate or abridge them. *Locke*'s Eſſay might perhaps be put into other Expreſſions, or newly methodized, and all the original Syſtem and Ideas be retained. Theſe Queſtions ſhew how the Argument counter-acts itſelf, how the Subject of it ſhifts, and becomes public in one Senſe, and private in another: and they are all new to the Common Law, which leaves us perfectly in the Dark about their Solution? And how are the Judges, without a Rule or Guide, to determine them when they ariſe, whoſe Books and Studies afford no more Light upon the Subject than the common Underſtandings of the Parties themſelves? What Diverſity of Judgments! what Confuſion in Opinion muſt they fall into! without a Trace or Line of Law to direct their Determination! What a Code of Law yet remains for their Ingenuity to furniſh, and could they all agree in it, it would not be Law at laſt, but Legiſlation. But 'tis ſaid that it would be contrary to the Ideas of private Juſtice, moral Fitneſs and public Convenience, not to adopt this new Syſtem. But who has a Right to decide theſe new Caſes, if there is no other Rule to meaſure by but moral Fitneſs and equitable Right? Not the Judges of the Common Law, I am ſure. Their Buſineſs is to tell the Suitor how the Law ſtands, not how it ought to be; otherwiſe each Judge would have a diſtinct Tribunal in his own Breaſt, the Deciſions of which would be as irregular and uncertain and various, as the Minds and Tempers of Mankind. As it is, we find they do not always agree; but what would it be, if the Rule of Right was always the private Opinion of the Judge, as to the moral Fitneſs and Convenience of the Claim? Caprice, Self-intereſt, Vanity would by Turns hold the Scale of Juſtice, and the Law of Property be indeed moſt vague and arbitrary (1). That excellent Judge, Lord

(1) This noble Debater on another Occaſion thus emphatically defined the Deſcription of a Judge: "It is the Law of Tyrants; it is always unknown; it is different in different Men; it is caſual, and depends upon Conſtitution, Temper, and Paſſion; in the beſt, it is oftentimes Caprice; in the worſt, it is every Vice, Folly, and Paſſion, to which human Nature is liable." Lord *Camden*'s Argument in *Huddon* and *Merſey*. 4to. Edit. 1771. "Alteration of Records." 4to. 1769.

Chief

Chief Juſtice *Lee*, uſed always to aſk the Council, after his Argument was over, "Have you any Caſe?" I hope Judges will always copy the Example, and never pretend to decide upon a Claim of Property, without attending to the old black Letter of our Law, without founding their Judgment upon ſome ſolid written Authority, preſerved in their Books, or in judicial Records. In this Caſe I know there is none ſuch to be produced."

With reſpect to (1) Inventors, my Lords, I can ſee no real and capital Difference between them and Authors; their Merit is equal, they are equally Beneficial to Society, or perhaps the Inventor of ſome of thoſe Maſter-pieces of Art, which have been mentioned, have there the Advantage. All the Judges who have been of a different Opinion, conſcious of the Force of the Objection from the Similarity of the Claim, have told your Lordſhips they did not know but that an Action would lie for the excluſive Property in a Machine at Common Law, and choſe to reſort to the Patents. It is indeed extraordinary that they ſhould think ſo, that a Right that never was heard of, could be ſupported by an Action, that never yet was brought. If there be ſuch a Right at Common Law, the Crown is an Uſurper; but there is no ſuch Right at Common Law, which declares it a Monopoly; no ſuch Action lies; Reſort muſt be had to the Crown in all ſuch Caſes. If then there be no Foundation of Right for this Perpetuity by the poſitive Laws of the Land, it will, I believe, find as little Claim to Encouragement upon public Principles of ſound Policy, or good Senſe.

If (2) there be any thing in the World, my Lords, common to all Mankind, Science and Learning are in their Nature *publici Juris*, and they ought to be as free and general as Air or Water. They forget their Creator, as well as their Fellow-creatures, who wiſh to monopolize his nobleſt Gifts and greateſt Benefits. Why did we enter into Society at all, but to enlighten one another's Minds, and im-

(1) Mrs. *Macaulay* obſerves, that "with the Intention of depriving Authors of the honeſt, the dear bought Reward of their Literary Labours, they have been levied with the Inventors of a very inferior Order: but ſupporting the Improvement of the human Mind is not more worthy the Attention of the Legiſlature than the luxurious, or at leaſt thoſe Conveniences, which are not abſolutely neceſſary to the Eaſe of common Life, were the Inventor of inferior Order, and the Author to ſtand upon the ſame Footing, in regard to Fame and other Circumſtances, for the Emoluments ariſing from their different inventive Productions; the Inventor of inferior Order would find himſelf much better rewarded than the Authors, for his Ingenuity; for every common Capacity can find out the Uſe of a Machine. But it is a Length of Time before the Value of a Literary Publication is diſcovered and acknowledged by the vulgar; and before the Merits of a Work of this kind, in regard to the honeſt Intention of the Writer, and the Execution of the Compoſition is in general allowed, the Malice of Party Prejudice, and the Lowneſs of Self-intereſt, when it prevails in the Characters of the greater Number of Individuals, may for a long Term of Years keep back the Sale of a Book, which teaches an excluſive Doctrine, or tells important Truths to the Public." See *Macaul.* Plea, P. 17, 18.

(2) Mrs. *Macaulay* "is ſorry that this noble Truth's Opinion, as to regard with Horror thoſe diabolical Governments who, by arbitrary Decrees and Puniſhments, have barred all the Avenues of arriving at Science and Learning from the Eyes of their People, who, to govern like Beaſts, have endeavoured to deprive of the Uſe of that Reaſon, which was given by the benevolent Creator, for the Preſervation, the Happineſs, and the Glory of the Species. But ſure if there is any thing, which an Individual can properly call his own, it is acquired Science, and thoſe high Gifts of Genius and Judgment, with which the Almighty has ſometimes, as a Mixture of the ſtrongeſt Proof of his Goodneſs, Gifts which, if properly exerted for the Benefit of Mankind, deſerve the Reſpect, the Care, and the Attention of Society." See *Macaul.* Plea, P. 26, 29.

prove

prove our Faculties, for the common Welfare of the Species? Thoſe great Men, thoſe favoured Mortals, thoſe ſublime Spirits, who ſhare that Ray of Divinity which we call Genius, are intruſted by Providence with the delegated Power of imparting to their Fellow-creatures that Inſtruction which Heaven meant for univerſal Benefit; they muſt not be Niggards to the World, or hoard up for themſelves the common Stock. We know what was the Puniſhment of him who hid his Talent, and Providence has taken Care that there ſhall not be wanting the noble Motives and Incentives for Men of Genius to communicate to the World thoſe Truths and Diſcoveries which are nothing if uncommunicated. Knowledge has no Value or Uſe for the ſolitary Owner: To be enjoyed it muſt be communicated. *Scire tuum nihil eſt, niſi te ſcire, hoc ſciat alter.* Glory is the Reward of Science, and thoſe who deſerve it, ſcorn all meaner Views; I ſpeak not of the Scribblers for bread, who teize the Preſs with their wretched Productions; fourteen Years is too long a Privilege for their periſhable Trash. It was not for Gain, that (1) *Bacon, Newton, Milton, Locke,* inſtructed and delighted the World; it would be unworthy ſuch Men to traffic with a dirty Bookſeller for ſo much as a Sheet of Letter-preſs. When the Bookſeller offered *Milton* Five Pounds for his Paradiſe Loſt, he did not reject it, and commit his Poem to the Flames, nor did he accept the miſerable Pittance as the Reward of his Labor; he knew that the real price of his Work was Immortality, and that Poſterity would pay it.

Some Authors, my Lords, are as careleſs about Profit as others are rapacious of it, and what a Situation would the Public be in with regard to Literature, if there were no Means of compelling a ſecond Impreſſion of a uſeful Work to be put forth, or wait till a Wife or Children are to be provided for by the Sale of an Edition (2). All our Learning will be locked up in the Hands of the *Tonſons* and the *Lintots* of the Age, who will ſet what Price upon it their Avarice chuſes to demand, 'till the Public become as much their Slaves, as their own Hackney Compilers are (3).

Inſtead of Saleſmen, the Bookſellers of late Years have foreſtalled the Market, and become Engroſſers. If therefore the Monopoly is juſtified by your Lordſhips Judgement, exorbitant Prices muſt be the Conſequence; for every valuable Author will be as much monopolized by them as *Shakeſpeare* (4) is at preſent, whoſe

(1) Mrs. *Macaulay* obſerves, that "the Names of *Bacon, Newton, Milton,* and *Locke* have been brought in as the high Names of Examples to prove that the literate Gentlemen have laboured in the Literary Way, on the ſingle Motive of delighting and inſtructing Mankind." See *Macaul.* Pref. P. 18, 19, and the Poſt. 22, 24, 2, and 25. for more Particulars of their great Merits.

(2) Mrs. *Macaulay* propoſes "the Perpetual Code for the Encouragement of the learned Writers, to be given to the Booſellers, for every Author in Proſe and Verſe. And that as Mrs. *Macaulay* is going to her Creditors, the Public, with a Deſire to have from their Pity and Generoſity the Gift of the Copyright of her Hiſtorical and Argumentative Works, which have Labour in them, have been long and intricate, and have coſt her Years Labour and Study." See *Macaul.* Pref. P. 27.

(3) Mrs. *Macaulay* "preſumes that ſhe has not only diminiſhed the Force of this Objection, for that the Public cannot want a ſecond Edition of a Work, before they have bought up the firſt." See *Macaul.* Pref. P. 27.

(4) Mrs. *Macaulay* obſerves, that "the Player *Shakeſpeare* is ſuppoſed, to have made a generous Bequeſt to the Public, of every one of his almoſt immortal Productions." See *Macaul.* Pref. P. 19.

Works

Works which he left carelefsly behind him in Town, when he retired from it, were furely given to the *Public* if ever Author's were; but two Prompters or Players behind the Scenes laid hold of them, and the preſent Proprietors pretend to derive that Copy from them, for which the Author himſelf never received a Farthing.——

I paſs over the flimſy Suppoſition of an implied Contract between the Bookſeller who ſells, and the Public which buys the printed Copy; it is a Notion as unmeaning in itſelf as it is void of a legal Foundation. This Perpetuity now contended for is as odious and as ſelfiſh as any other; it deſerves as much Reprobation, and become as intolerable. Knowledge and Science are not Things to be bound in ſuch Cobweb Chains; when once the Bird is out of the Cage—*volat irrevocabile*—*Ireland*, *Scotland*, *America* will afford her Shelter, and what then becomes of your Action? If the Legiſlature had intended to make the Right in Queſtion perpetual, they would have taken Care that the Remedy ſhould be ſo too.

Lord Chancellor *Apſley*.

I declare, I made the Decree entirely as of Courſe, in Purſuance of the Deciſion upon the Right in the Court of *King's Bench*, and as what I decreed, as a Chancellor, was merely a Step in the Gradation to a final and determinate Iſſue in the Houſe of Peers, I am totally unbiaſſed upon the Queſtion, and therefore can ſpeak to it as fairly from my own Senſe of it, as any one of the Judges, or any of the Lords preſent.

The ſeveral Citations and Precedents that have been relied upon at the Bar, are foreign to any Conſtructions which can ſupport the Reſpondents in their Argument; the Authorities derived from the Stationers Company are abſurd; to quote, among the ſeveral extraordinary Entries to be met with in their Books; are the following ones, that one *Sibthorpe* had entered a Book there, "the "Title of which," ſays the Entry, "is to be ſent hereafter; and another Member entered the Name of a Book "*about* to be tranſlated by him;" by which all the reſt of the World were to be reſtrained, in the mean time, perhaps for ever, from tranſlating the ſame. I have in my Hand ſeveral Original Letters from *Swift* to *Faulkner* and others, relative to the Statute of Queen *Anne*, all tending to ſhew the Senſe of the Legiſlature, at the time of paſſing it, to be againſt the Right; and both Houſes rejected the other Bills afterwards, drawn up chiefly by the Advice of Dean *Swift* and the Countenance of Mr. *Addiſon*, which were preſented in the ſame Spirit, and upon the ſame Grounds; I am therefore clearly of Opinion with the Appellants.

Lord *Lyttelton*.

I own I have no great Acquaintance with the Quirks and Quibbles of the Law. I ſpeak to the Matter merely as a Queſtion of Equity; I cannot enter into a deluſive, refined, metaphyſical Argument about Tangibility, the Materiality, or the Corporeal Subſtance of Literary Property; it is ſufficient for me, that it is allowed ſuch a Property exiſts. Authors, I preſume, will not be denied a free Participation of the common Rights of Mankind, and their Property is ſurely as ſacred, and as deſerving of Protection, as that of any other Subjects. It is of infinite Importance to every Country, that the Arts and Sciences ſhould be cultivated and encouraged; where Men of Letters are beſt protected, the

People

People in general will be moſt enlightened, and where the Minds of Men are enlarged, where their Underſtandings are equally matured in Perception and in Judgment, there the Arts and Sciences will take their Reſidence. The Arts and Sciences had their Origin in *Italy*; from thence they fled to a remote Corner of *Aſia*; at length they returned Companions of the all-conquering Arms of the *Roman* Republic; and at laſt they were happily ſeated in this free Country. I am of Opinion, that there are, at preſent, but two Monarchs in *Europe*, who are the Encouragers of the Arts and Sciences, and are themſelves Men of Letters, the King of *Pruſſia*, and the King of *England*. It hath been urged, that Authors write for Fame only; that Glory is their beſt Reward, and that Immortality of Renown is an ample Recompence for their Labours; they therefore do not ſtoop to claim a further Right than that of a firſt Communication of their Ideas to the Public. This is, in a confined Senſe, a proper and a noble Obſervation, but it will not hold generally. I beg your Lordſhips to remember, that Genius is peculiar to no Clime, it belongs to no Country, it is more frequently found in the Cottage than the Palace; it rather crawls on the Face of the Earth than ſoars aloft; when it does mount, its Flight ſhould not be impeded. To damp the Wing of Genius is, in my Mind, highly impolitic, highly reprehenſible, nay, ſomewhat criminal. If Authors are allowed a Perpetuity, it is a laſting Encouragement; making the Right of multiplying Copies a Matter common to all, is like extending the Courſe of a River ſo greatly, as finally to dry up its Sources. I am of Opinion, that the Decree ſhould be affirmed.

Biſhop of Cov. & Lich.

As the Proceedings, my Lords, in this important Cauſe have been carried to ſo great a Length, I ſhould not have preſumed to trouble your Lordſhips with any Thoughts of mine upon the Subject, did I not entertain Hopes of ſhortening your Lordſhips farther trouble, by endeavouring to draw your Attention from the many foreign Topics that have been mixed with the preſent Queſtion: ſuch for Inſtance as the following: In which of the various Claſſes of Right or Property, is this conteſted one to be ranked? Whether it is a Property properly ſo called, or only a right to ſome Property? Whether ſuch Property be a corporeal one, or incorporeal? What is the Subject in which it inheres? Whether it lies in the Letters of a Book, or the Ideas, or in both? Whether it be a perfect, an imperfect, or only a *quaſi* Right? Whether it is real, or perſonal, original or derived? Whence it might derive its Origin, and what is its Extent and Duration? How far it is deducible from ancient Practice, or grounded on the Authority of precedents? How it has ſtood in different Countries, or in our own at different periods, before or after the Art of Printing? and the like.

Speculations of this Kind, however uſeful on ſome Occaſions, and always entertaining, yet I cannot help conſidering them in a great Meaſure foreign to the preſent Point, and am therefore deſirous of having a freſh waved, and your Lordſhips Deliberation reduced to the preſent State of that Right under the Direction of our Legiſlature, which has made, or at leaſt attempted to make, certain expreſs Regulations in it, more particularly that Act in the 8th of Queen *Anne* which has been ſo much tortured and perplexed in Arguments offered at your Lordſhips

Bar;

Bar; but a fair Stating and unforc'd Conſtruction of it, I apprehend to be ſufficient for deciding the whole Controverſy. The Title of the Act runs, "*for the Encouragement of Learning*," and ſome Clauſes in it evidently tend that way, while others have been underſtood in ſuch a Manner, as muſt rather occaſion its Diſcouragement, and made to ſignify either nothing at all, (which is ſurely one of the greateſt Abſurdities in the Interpretation of any Law) or to imply ſomething repugnant to its avowed Intent, by putting Affairs into a worſe Condition than they were in before the Commencement of this favourable Act; nay worſe than others are thoſe who decline the Acceptance of its Benefits, while attended with all thoſe Clogs and Limitations, which are too well known to need a particular Detail. The Method there adopted for this Encouragement of Learning, was, we find, very maturely digeſted in ſeveral Conferences between the two Houſes, and at laſt declared to be (not by ſecuring any original Copy Right, as was propoſed by thoſe Bookſellers who promoted the Bill; but) by veſting Copies of printed Books in the Authors or Purchaſers of ſuch Copies, during the Time therein mentioned, and no longer.—How far this deliberate Alteration of the Phraſe may be deemed a material one, and whether inſiſting on the two diſtinct Significations of theſe Terms, *Veſting* and *Securing* as here circumſtanced, though they may be elſewhere uſed promiſcuouſly; Whether the taking notice of that remarkable Attention in our Law makers to the wording of this Act may not amount to ſomething more than a trifling verbal Criticiſm? whether this veſting of a Right in Authors is merely additional and accumulative, or does not imply a creative Influence *de novo*, an actual Conſtitution of ſuch a plenary Right, as had only an ideal Pre-exiſtence without it?—theſe Points muſt be ſubmitted to your Lordſhips.

I ſhall here only take the Liberty to repeat what has been obſerved on a ſubſequent Statute of the 10th of Queen (1) *Anne*, concerning Stamp Duties laid on Pamphlets, which by expreſsly referring to this before us, and explaining the Nature both of that Copy Right which ſprings from it, and of thoſe others that may be drawn from different Sources, ſeems to put the Intention of both theſe Acts out of Queſtion. The Penalty of a Default here is extended to the Annihilation of all Copy-Rights whatſoever, in theſe words: "Then the Author, Printer, and Publiſher, of ſuch Pamphlet ſhall looſe all Property therein, and in every Copy thereof, although the Title thereto were regiſtered in the Book of the Stationers in London, according to the late Act of Parliament in that behalf, ſo as any Perſon may freely print and publiſh the ſame, without being liable to any Action or Proſecution for ſo doing; *any thing in the ſaid Act of Parliament for veſting Copies of printed Books in the Authors; or in any Bye Law contained; or any cuſtom, or other thing to the contrary notwithſtanding.*" I muſt leave it to your Lordſhips Conſideration whether that Common Law Right, if it ariſes either from *Cuſtom* or *any other thing*, be not here manifeſtly included.

"To return to the former Statute. After the Creation then, or Eſtabliſhment of ſuch an excluſive Right as is conferred upon Authors in the Body of this Act, there comes a *Proviſo*, that *nothing in the ſaid Act ſhall be conſtrued to extend, either*

(1) 10 *An.* Chap. 19. Sect. 11.

to prejudice or confirm any Right that the Univerſities or any Perſons have or claim to have—*i. e.* (according to the moſt natural Conſtruction of theſe Words) any perſons holding *in* or *under* the ſaid Univerſities, or claiming any Privilege of the ſame *Kind*, and on the ſame *Ground* with that of the Univerſities, *i. e.* ſome *poſitive* one given or granted by ſpecial Licence or Letters Patent, by Statute or Charter, as their's evidently is; and all others under the Conſideration of theſe Law-makers are underſtood to be:—whereas *if this Proviſo* were taken in ſo lax and indeterminate a Senſe as to include *any* other Perſons, ſetting up any Claim on *other* Grounds, it will admit *every Body*; and conſequently its reſtrictive Clauſes are reduced to a mere Nullity.

"Neither is the Obſervation drawn from the *Preamble* of this Act to be wholly admitted, nay that the apparently ſoft Terms applied to thoſe ſeveral Perſons who had *of late taken the Liberty to print Books without the Conſent of their reſpective Authors*—that theſe gentle Terms (ſo unuſual in penal Statutes) would ſcarcely have been uſed on this Occaſion if ſuch a Practice as was then and there laid under certain Reſtraints, as deſigned to be branded was antecedently, or abſolutely criminal. But if ſo great Advantage is taken from a general Mention in the Proviſo, of *Perſons* and *Rights*, not there ſufficiently deſcribed, as to afford Room for maintaining the forementioned Abſurdity; if the ſaid Act proves to be ſo inaccurate and defective, (as in Truth it is extremely defective, with regard to the Penalties annexed; the Time of ſuing for them, the Method of ſecuring their Copies to the Univerſities, and other Particulars too notorious to need enlarging upon in this Place) I beg Leave to ſuggeſt an Enquiry to your Lordſhips, (though the Matter does not immediately fall under your preſent Conſideration) whether it be not high Time to have this Faulty Act amended:—let it be reviſed as ſoon as poſſible rather than ſuffered to be under ſo many Imperfections as can ſerve only to enſnare Numbers who are acting ſon the moſt obvious Senſe, and ſuppoſed Validity of it, to their Ruin; and either miſlead others in the Interpretation of ſome eſſential Parts of it; or make the whole uſeleſs, and a dead Letter.——

However, ſo long as this ſame Act does keep its Ground, it muſt be conſidered as ſtanding on Principles directly oppoſite to the Notion of any abſtract independent perpetual Copy-right; which Right, whatever it were ſuppoſed to be originally, is now plainly circumſcribed and ſubjected to certain Reſtrictions; provided always that the ſaid Act be really capable of affecting it in any Reſpect, which ſome Perſons ſeem to doubt of, and others, (if I miſtake not) have gone ſo far as to deny:—and if it once comes to be an eſtabliſhed Maxim, that Acts of Parliament can have no Effect on Claims ſubſiſting at Common Law; in vain ſurely does the Legiſlature employ itſelf in framing any concerning them.—But as this is not yet clearly admitted to be the Caſe, even with the Act before us, which is allowed to be in Force, whatever that Force may be—ſo long as ever it exiſts, it muſt exclude all that Right paramount and inextinguiſhable, which is exhibited along with it; which being dreſſed up at Pleaſure, has made its Appearance under ſo many queſtionable Shapes, and been ſo warmly eſpouſed under every of them; but yet after all the Pains taken with it, is ſtill, I humbly conceive, of too delicate and unſubſtantial a Nature to be laid hold of by common

Appre-

Apprehenſions—too vague and intricate to be perfectly and unanimouſly aſcertained even by the moſt learned Sages of the Law; and too feeble to be ſafely relied on, either for promoting the general ſervice of the Public, or for ſupporting any true, valuable Intereſts of Literature in particular."

I ſpeak, my Lords, to the Queſtion merely as likely to affect the Liberty of the Preſs. I think the confining the Right of multiplying Copies to the Author and his Aſſigns, may prove dangerous to the conſtitutional Rights of the People, and I juſtify this Idea by declaring that the Preſs is the ſole Controler of the Actions of Princes and Miniſters; that if a deſpotic Meaſure is adopted by either, the Freedom of the Preſs will be properly and efficaciouſly exerted in informing the People and rouſing a Spirit of Reſiſtance. I would ſuppoſe on this Ground of my Argument that upon the Occurrence of ſome very unconſtitutional and deſpotic Meaſure, a Pamphlet properly deſcribing the Matter was publiſhed, and that the (1) Miniſter bought up the Impreſſion and Copy Right, thereby choaking the Channel of public Information, and ſecuring in his Cloſet the Secret which might prevent the Loſs of Freedom to the Subject. I am ſatisfied in myſelf, that the Liberty of the Preſs is of ſuch infinite Conſequence in this Country, that if the Conſtitution was over-turned, and the People enſlaved, grant me but a free Preſs and I will undertake to reſtore the one and redeem the other. I am therefore for reverſing the Decree; and, Lord *Effingham* *Howard*.

The DECREE *of the Court of* CHANCERY, *was accordingly reverſed.*

(1) Mrs *Macaulay*, ſays, it would be a difficult Taſk, even in this Country, for a Miniſter to divert one of the neceſſary Channel of Corruption, a Sum ſufficient to bribe an Individual, who would always have it in his Power to repeat his extortionate Demands, but ſuppoſing a Miniſter ſhould ſtand ſo much in Awe of the Doctrine and Reflections of any particular Author, as to expend large Sums and Emoluments to ſuppreſs them, and that he had the Money at Command, he would find it all thrown away in an impoſſible Attempt; for the Public might have Recourſe to the *Iriſh*, and the *American*, who would furniſh them with as many Editions of the Author, as they pleaſed. See *Macaul.* P. 36. 37.

APPENDIX.

APPENDIX.

As the Statute of 8 ANNE, Chap. XIX. Entituled, "*An Act for the Encouragement of Learning, by vesting the Copies of printed Books, in the Authors or Purchasers of such Copies, during the Times therein mentioned;*" hath been so often referred to by the Council, Judges, and Lords, in the above Arguments, Opinions and Speeches, it was thought proper to subjoin an Abstract of it.

"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 and Writings, to their very great Detriment, and too often to the Ruin of them, and their Families: For preventing therefore such Practices for the future, and for the Encouragement of learned Men to compose and write useful Books; it is enacted, That after 10 April, One Thousand Seven Hundred and Ten, the Author of any Book already printed, who hath not transferred to any other the Copies or Shares thereof; or the Bookseller, Printer and other Person, who hath purchased or acquired the Copies of any Book, in order to print or reprint the same, shall have the sole Right and Liberty of printing such Book, for twenty-one Years, to commence from the said tenth Day of April, and no longer; And the Author of any Book already composed, and not printed and published, or that shall hereafter be composed, and his Assignee or Assigns, shall have the like Right and Liberty for fourteen Years, to commence from the Day of the first publishing the same, and no longer; And if any other Bookseller, Printer, or other Person from and after said tenth Day of April, within the Times hereby limited as aforesaid, shall print, reprint, or import, or cause to be printed, &c. any such Book without the Consent of the Proprietor first had and obtained in Writing, signed in the Presence of two Witnesses, or knowing the same to be so printed, or reprinted, without such Consent shall sell, publish, or expose to Sale, or cause to be sold, &c. any such Book, without such Consent first had and obtained, as aforesaid, then such Offender shall forfeit such Book, and every Sheet thereof to the Proprietor, who shall forthwith damask (1), and make waste Paper of them: And every such

Preamble.

After 10 April, 1710, the Authors of Books already printed, who have not transferred their Rights, and the Booksellers, &c. who have purchased Copies, shall have the sole Right of printing them, for the Term of 21 Years: And the Authors of Books not printed, to have the sole Right of printing for fourteen Years.

(1) See Mr. Baron *Perrott*'s Opinion. Fol. 42.

Offender

Penishment of Bookseller, &c. printing without Consent of the Proprietor.

Offender ſhall alſo forfeit one Penny for every Sheet, in his Cuſtody, either printed or printing, publiſhed, or expoſed to Sale, contrary hereto; one Moiety thereof to the Queen, the other Moiety to any Perſon ſuing for the ſame, to be recovered in any Court of Record, by Action of Debt, Bill, Plaint, or Information, in which no Wager of Law, Eſſoin, Privilege, or Protection, or more than one Imparlance ſhall be allowed.

Copies of Books to be entered before Publication in the Regiſter Book of the Company of Stationers.

Which may be inſpected at any Time without Fee.

Clerk of the Company to give a Certificate of ſuch Entry.

"SECT. II. Nothing herein contained ſhall be conſtrued to extend to ſubject any Bookſeller, &c. to Forfeitures or Penalties, for printing or reprinting of any Book without ſuch Conſent, as aforeſaid, unleſs the Title to the Copy thereof hereafter publiſhed ſhall, before ſuch Publication, be entered, in the Regiſter Book of the Company of Stationers, as hath been uſual; which Book ſhall be kept at the Hall of the ſaid Company, and unleſs ſuch Conſent be entered as aforeſaid, for which Entry, Sixpence only ſhall be paid; which Book may be inſpected by any Bookſeller, &c. without Fee; and the Clerk of the ſaid Company, ſhall, when required, give a Certificate under his Hand of ſuch Entry, for which he may take Sixpence."

Penalty of the Clerk refuſing to do ſo.

"SECT. III. If the Clerk ſhall refuſe or neglect to make ſuch Entry, or to give ſuch Certificate, being required by the Author or Proprietor, in the Preſence of two Witneſſes, then ſuch Perſon ſo (1) *refuſing*, Notice being given thereof in the *Gazette*, ſhall have the like Benefit, as if ſuch Entry and Certificate had been duly made and given, and the Clerks ſo refuſing, ſhall forfeit to the Proprietor of ſuch Copy twenty Pounds, to be recovered [as mentioned in Sect. I.]"

After 10 April, 1710, Copies of each Book muſt be delivered to the Warehouſe-keeper of the Company of Stationers, for the Uſe of the Univerſity Libraries, &c.

Warehouſe keeper to deliver the Books 10 Days after Demand.

Penalty of Proprietor, &c. not obſerving the Directions of this Act.

"SECT. V. Nine Copies upon the beſt Paper, ſhall, by the Printer, be delivered to the Warehouſe-keeper of the ſaid Company, at their Hall, before Publication, for the Uſe of the Royal Library, the Libraries of the Univerſities of *Oxford* and *Cambridge*; of the four Univerſities in *Scotland*, of *Sion* College, *London*; and the Library belonging to the Faculty of Advocates at *Edinburgh* reſpectively; by the ſaid Warehouſe-keeper, within ten Days after Demand by any Perſon authorized, to deliver the ſame; and if any Proprietor, Bookſeller, or Printer, or the ſaid Warehouſe-keeper, ſhall not obſerve theſe Directions; he ſhall forfeit, beſides the Value of the ſaid printed Copies, five Pounds for every Copy not ſo delivered, as alſo the Value of the ſaid printed Copy not ſo delivered, the ſame to be recovered by the Queen, the Chancellor, Maſters, and Scholars of any of the ſaid Univerſities, and by the Preſident and Fellows of *Sion* College, and the ſaid Faculty of Advocates at *Edinburgh*, with their full Coſts reſpectively."

Penalties in Scotland how recoverable.

"SECT. VI. If any Perſon incurs the Penalties in *Scotland*, they ſhall be recoverable by Action before the Court of Seſſion."

This Act not to hinder the Importation, &c. of Books in Greek, &c. printed beyond Sea.

"SECT. VII. Not to prohibit the Importation, vending, or ſelling of any Books in Greek, Latin or any other foreign Language printed beyond the Seas."

General Iſſue.

"SECT. VIII. If any Action or Suit ſhall be commenced againſt any Perſon, for doing or cauſing to be done any Thing in Purſuance of this Act, the Defendants may plead the General Iſſue, and give the ſpecial Matter in Evidence; and if upon ſuch Action a Verdict be given for the Defendant, or the Plaintiff become nonſuited, or diſcontinue his Action, Defendant ſhall have his full Coſts, with ſame Remedy as a Defendant by Law hath."

(1) This Part of the Act ſeems very erroneous, for *refuſing* ought to be *refuſed*, to make the Senſe and Meaning, as intended by the Legiſlature.

"SE[C]T.

" SECT IX. Not to prejudice or confirm any Right ſaid Univerſities, or any of them, or any Perſon have, or claim to have, to the printing or reprinting any Book or Copy already printed, or hereafter to be printed."

This Act ſhall not prejudice the Right of the Univerſities.

" SECT. X. All Actions, Suits, Bills, Indictments, or Informations for any Offence that ſhall be committed againſt this Act, ſhall be brought ſued, and commenced within three Months next after ſuch Offence committed."

Actions for Offences againſt this Act, to be brought in three Months.

" SECT. XI. After the Expiration of ſaid fourteen Years, the ſole Right of printing or diſpoſing of Copies ſhall return to the Authors thereof, if they are then living, for another Term of fourteen Years."

After the 14 Years, the Right of printing, &c. to return to the Author for other 14 Years.

Lord KAMES's Opinion of the Act.

Lord *Kames* " knows no Monopoly, that in ſound Politics can be juſtified, except that given to Authors of Books for 14 Years, by an Act of Queen *Anne*, judiciouſly contrived, not only for the Benefit of Authors, but for that of Learning in general; for it encourages Men of Genius to write, and multiplies Books both of Inſtruction and Amuſement; which, by Concurrence of many Editors, after the Monolopy is at an end, are ſold at the cheapeſt Rate; many well diſpoſed Perſons complain, that the excluſive Privilege beſtowed by the Statute upon Authors, is too ſhort, and that it ought to be perpetual; nay it is aſſerted, that Authors have a perpetual Privilege by Common Law; and it was determined (1) lately in the Court of *King's* (2) *Bench*, that by the Common Law of *England*, the Privilege is perpetual. Nothing more frequently happens, than by graſping at the Shadow to loſe the Subſtance; for Lord *Kames* has no difficulty to maintain, that a perpetual Monopoly of Books would prove more deſtructive to Learning, and even to Authors, than a ſecond Irruption of *Goths* and *Vandals*; it is the Nature of a Monopoly to raiſe the Price of Commodities, and by a perpetual Monopoly, in the Commerce of Books, the Price of good Books would be raiſed far beyond the Reach of moſt Readers: they would be ſold like the Pictures of great Maſters; the Works of *Shakeſpeare*, for Example, or of *Milton*, would be ſeen in very few Libraries; in ſhort, the Sale of good Books would be confined to a few learned Men, ſuch as have Money to ſpare, and to a few rich Men, who buy out of Vanity, as they buy a Diamond, or a fine Coat. Faſhions at the *ſame* Time are *variable*, and Books, even the moſt ſplendid, would wear out of Faſhion, with Men of Opulence, and be deſpiſed, as antiquated Furniture: and with Reſpect to Men of Taſte, their Number is ſo ſmall, as not to afford Encouragement, even for the moſt frugal Edition. Thus Bookſellers, by graſping too much, would put an End to their Trade altogether; and Men of Genius would not write, when no Price could be afforded for their Works. At the ſame Time, our preſent Authors and Bookſellers would not be much benefited by ſuch a Monopoly; not many Books have ſo long a Run as 14 Years; and the Succeſs of a Book, on the firſt Publication, is ſo uncertain, that a Bookſeller will give little more for a Perpetuity, than for the temporary Privilege of the Statute: this was foreſeen by the Legiſlature, and the Privilege was wiſely confined to 14 Years, equally beneficial to the Public, and to Authors." See Lord *Kames*'s Sketches of the Hiſtory of Man. Vol. I. B. 2. Sketch VIII. Sect. 7. Page 500. and his Lordſhips Argument, on giving his Opinion, upon the Queſtion of Literary Property, between *Hinton* and *Donaldſon, et al.* in *Boſwell's Scotiſh* Deciſion of the Court of Seſſion, in that Cauſe.

Perpetual Monopoly of Books deſtructive to Learning and Authors.

And would put an End to the Bookſelling Trade.

(1) See *Bur. Lit. Prop, 4to.* 1774.
(2) In the Cauſe of *Millar* v. *Taylor*.