A

VINDICATION

OF THE

EXCLUSIVE RIGHT

OF

AUTHORS

TO

THEIR OWN WORKS:

A SUBJECT NOW UNDER CONSIDERATION

BEFORE THE

TWELVE JUDGES of ENGLAND.

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M DCC LXII.

A

VINDICATION, &c.

IT will, perhaps, be matter of ſurprize to thoſe who are not accuſtomed to the uſe of artificial reaſon, that a queſtion ſhould be made—Whether, at common law, an author hath a perpetual and excluſive right to ſell his own works?

This queſtion nevertheleſs, ſimple as it ſeemeth, hath exerciſed the talents of ſome of our ableſt advocates; and hath been found of ſuch difficulty and importance, as to be referred to the conſideration of the twelve judges; before whom, after repeated arguments, the ſubject ſtill lieth open for farther diſcuſſion: A circumſtance which reflects honour on the judicature of this country, where matters of private property are not haſtily or capriciouſly determined, but thus undergo

the moſt patient, ſolemn and impartial examination.

Were wiſhes to prevail in an adjudication of this nature, one would incline to wiſh, that an author's right to the works of his own mind, the moſt noble operation of which human nature is capable, ſhould be under the protection of the ſtate, and rendered as ſecure and extenſive as any mode of property whatever. At the ſame time, it muſt be confeſſed, that there are many circumſtances which place the caſe of authors in an unfavourable light; when we conſider the ſhameful and licentious uſe of the preſs, which daily teems with rank obſcenity and virulent defamation; we are almoſt induced to deſire that a right thus groſsly abuſed, ſhould be confined within the cloſeſt reſtrictions.

A diſpaſſionate mind, however, will diſtinguiſh between the caſe of ſuch licentious writers and the cauſe of authors in general. Let us leave them who are guilty of ſuch flagrant abuſes, to the puniſhments which the law hath provided: but let not their example, influence our judgment to the

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prejudice of thoſe, and we can boaſt of many among us, who do honour to their country and to their ſpecies.

Diveſting ourſelves therefore of favour on the one hand, and of prejudice on the other, let us examine on which ſide the merits of this queſtion ſeem to incline; for it might juſtly be deemed vain and preſumptuous, to conclude poſitively with reſpect to a ſubject, on which perſonages of ſuch eminent abilities ſtill find reaſon to ſuſpend their judgment.

In order to attain a juſt idea of the right under conſideration, it may be neceſſary to examine the nature and extent of property in general on the grounds of natural reaſon, as alſo on the principles of law: and as the arguments in the following ſheets are addreſſed to men of literature in general, the writer will endeavour, as far as poſſible, to avoid all technical language and juridical ſubtleties.

It is admitted, that in the firſt rude ſtate of nature, all men had equal right to the uſe of vacant ſubjects which lay in common; and ſuch communion, for ſome time, ſup- plied the place of property. But this c

mon right continuing no longer than while the occupant was in actual poſſeſſion, inconveniencies aroſe which made way for the eſtabliſhment of *property*: by which is underſtood, a perpetual excluſive right in the poſſeſſor, to retain certain ſubjects till he hath ſignified his intention to abandon them.

Such a right being ſettled, it became in its nature *tranſmiſſible*; for he who hath a perpetual excluſive dominion over any ſubject, may either alienate it in his life-time, or transfer it at his death *: and that either abſolutely, or under ſuch limitations as he ſhall think proper to impoſe.

The ſubjects over which property may be exerciſed, are, in their general diviſion, either the productions of nature, or the inventions of art; or they partake of both. If men may claim an abſolute and excluſive right over the things of nature, a *fortiori*, they may claim ſuch a right over ſubjects of their own creating or improving.

* This is admitted by all the writers on the law of nature: even they who doubt whether the power of making a will proceeds from the law of nature or from poſitive inſtitution, do nevertheleſs allow of donations *Mortis Cauſa*.

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The writers on the law of nature, require three qualities to conſtitute an object of property; 1ſt, That the ſubject by itſelf, or by its connexion with other things, be capable of affording ſome benefit to mankind, either immediately or mediately. 2dly, That it be open to the acquiſition of mankind, and reducible under the cuſtody of man. 3dly, That the poſſeſſor have the power of excluding others from ſharing the benefit with him.

Now a literary copy partaketh of all theſe qualities.—It is capable of being uſeful to mankind—It may be kept under ſafe cuſtody—And the owner may exclude others from participation.

But he who inventeth or improveth any ſubject, hath not only a property in the individual thing invented or improved, but he may multiply the ſubject by framing others after the ſame model, and his right of property is the ſame over all.

The faculties of human nature, however, being perhaps nearly equal, therefore he who brings any invention or improvement into ſociety,

ſociety, cannot ſet bounds to the ingenuity of others, or preclude them from the power of imitation. They may, according to their degree of ſkill, model other materials, without his leave, into the like form; and thereby gain an excluſive right in that individual ſubject of imitation, which they likewiſe, in their turn, may multiply.

Having deduced this imperfect ſketch of the ſtate of property from the principles of natural reaſon, it remains to conſider how far the law hath thought proper to abridge or extend theſe natural rights.

It will be foreign to the preſent deſign, to enter into the various modifications of property which the law hath created over the things of nature. For the preſent purpoſe, it will be ſufficient to examine what regulations it hath eſtabliſhed with reſpect to ſubjects of invention or improvement, which alone apply to the queſtion under conſideration.

Theſe ſubjects are very various in their nature. Some argue great ſkill in the deſign, and are extremely facile in the execution.

cution. In others, there is little merit in the design, but great labour in the execution. Some wholly serve the end of public utility; others are chiefly matters of ornament and amusement. In few words, in some the labour of the hand prevails, in others the work of the mind: for some idea is requisite in the construction of the most simple subject of invention.

Hence we may readily perceive a fertile source of inconvenience. One who by great ingenuity and application of mind had given existence to a subject, was liable to be deprived of the fruits of his discovery by an imitator, whose chief merit perhaps was manual.

To remedy this hardship, and to secure the original inventor in the exclusive enjoyment of the profits arising from his own discovery, the interposition of the state was necessary. But as the best institutions are liable to abuse, so the remedy which was appropriated to guard the right of inventors, was perverted to protect an unjust claim in those who could not plead the merit of invention.

Many ſuch, by falſe or partial repreſentations, or perhaps by corrupting the miniſters of government, obtained excluſive privileges, which gave birth to monopolies: A monopoly* being a grant for the ſole making or ſelling, &c. of any thing, whereby *others are reſtrained of a freedom they had before, or hindred in their lawful trade*: for of a new invention, there can be no monopoly.

Yet, even in regard to new inventions, where the powers of the mind and body conſpire to produce ſome mechanical ſubject, the excluſive right of the inventor ought to be limited to a certain time, in which he may be preſumed to have reaped the juſt fruits of his diſcovery, and to have made a proviſion for his family. The invention then ſhould be thrown open for the benefit of thoſe who have the art to imitate the thing invented: every machine being an object of trade, which, according to the policy of all ſtates, ſhould be as free from reſtrictions as poſſible.

Theſe leading obſervations being premiſed, let us next conſider the nature of a literary copy, and examine whether it may not be

* 3d Inſt. 181.

eſſentially diſtinguiſhed from a machine: for if we can eſtabliſh a real difference between them, we ſhall demoliſh the ſtrongeſt hold, wherein the opponents of literary property have entrenched themſelves.

A literary copy or book may be conſidered, 1. As an ideal or doctrinal compoſition. 2. As a manual or mechanical compoſition *.

With regard to the firſt, it is not neceſſary that the ideas be original. It is ſufficient, that by a new combination of known ideas, the author has produced a different compoſition, or eſtabliſhed a different doctrine. Nay, a mere compilation, in which there may not be a ſingle idea of the compiler's, is ſufficient to veſt an excluſive right in a copy; as in a report book, for example. Farther, being the author of the language only, is a good ground for maintaining an excluſive right in a copy, though the ideas belong to another. Thus a tranſlator may claim ſuch a right, being, in reſpect to thoſe who are not ſkilled in the original, the parent of a new doctrine.

* Theſe two general diviſions are ſufficient for the purpoſe of the preſent argument: though each might be branched out into ſeveral ſubdiviſions.

With reſpect to the mechanical compoſition, it is not requiſite to perfect an author's right to his copy, that the writing ſhould be of his own hand; for he who employs an emanuenſis, has as compleat a right to the copy as if he had penned it himſelf: the emanuenſis having, or being ſuppoſed to have, a conſideration for his manual labour. The ſame may be ſaid of printing. The printer is *Quaſi*, and in lieu of, an emanuenſis, being paid by the author for his art and mechanical operation.

From hence, perhaps, we may be able to collect ſome eſſential diſtinctions between a book and a machine or utenſil. In the latter, the completion of the piece of *mechaniſm* is the *end* to which the ideas of the inventor are directed. In the former, there are two ſets of ideas, tending to different ends. One ſet is applied to the framing of the *doctrinal* compoſition, which is the end the author propoſes; the other is directed towards the executing of the *mechanical* compoſition, which is the end * the printer

* This diſtinction will be illuſtrated by the reaſoning in the caſe of the earl of Yarmouth againſt Darrel, which will be cited hereafter.

has

has in view. Therefore in a book, the *mechanical* part, that is, the writing or printing, is, with respect to the author, only the *mean* for promulging the doctrinal part, which is the *end*.

Farther, a machine, as has been intimated, if exhibited to view, may be copied or imitated without the leave of the inventor; therefore, as has been shewn, it wants a distinguishing characteristick of property. But an author may produce his copy, may use it in public, and suffer it to be inspected, and yet no one without his consent can make themselves masters of the contents. Therefore if they propose to reap any benefit from the composition, they must entitle themselves to the expected advantage under such conditions as he thinks proper to impose, where he is not restrained by positive institution: and he hath certainly a perpetual exclusive dominion over that subject which he can use in public, and which nevertheless another cannot imitate against his will.

Again, a machine is in itself, as soon as it is compleated, an object of trade, and con-

ſequently the property, as has been obſerved, ought to be limited. On the contrary, a literary copy is only an object of trade, *quatenus* its *mechanical* compoſition; that is, the printing, &c. Therefore if the queſtion was, whether a printer ſhould have a perpetual excluſive right of printing, the argument which places a book on the ſame footing with a machine, might perhaps apply with ſome force.

But an author's right to a literary compoſition, depends on different principles. It is a compleat compoſition before it is printed, and before it comes to be an object of trade. The author may ſell his original manuſcript to one man abſolutely for a groſs ſum: but if he cannot obtain an adequate ſum at once, or if he rather chooſes to depend on an uncertain compenſation to be collected by gradual returns, he may then multiply his copies, and diſpoſe of them to ſeveral, each for a ſmall conſideration, ſtill reſerving to himſelf the abſolute propriety over the original manuſcript. In which caſe, natural reaſon and juſtice determine that every copy which is multiplied, ſhall be multiplied for his benefit: and it ſeems the ſtrangeſt doc-

trine

trine imaginable to contend that the art of printing, which has facilitated the circulation of literary copies, ſhould reſtrain or prejudice the author's right.

The law will always adapt its inſtitutions to the principles of natural reaſon, and guard the rights of an ingenious and induſtrious individual, unleſs the protection it affordeth ſhould tend to work ſome public wrong, in which caſe artificial reaſon will ſtep in and ſuggeſt ſome medium, to reconcile, as far as poſſible, ſuch diſcordant intereſts.

But in the preſent inſtance, no public injury can enſue from an author's perpetual excluſive right over his own works. It has no tendency to prejudice the intereſt of trade, for ſo far as the mechanical part of literature is concerned, *no* excluſive right is ſet up or pretended.

Neither hath it any tendency to confine the powers of genius; for he who obtaineth my copy may appropriate my ſtock of ideas, and, by oppoſing my ſentiments, may give birth to a new doctrine; or he may coincide with my notions, and, by employing different

different illuſtrations, may place my doctrine in another point of view: and in either caſe he acquireth an excluſive title to his copy, without invading my property: for though he may be ſaid to build on my foundation, yet he rears a different ſuperſtructure. An *inconſiderable* addition or improvement however, will not ſupport his claim: the ſupplying literal or verbal omiſſions, or the correcting of literal or verbal errors, for inſtance, will not be ſufficient to found a new right in him: and a jury endued with the ſlighteſt degree of common underſtanding may, be the ſubject what it will, diſtinguiſh, or be taught to diſtinguiſh, where the difference is eſſential, and where it is evaſive.

Nevertheleſs it has been urged by a late ſhrewd and ingenious writer *, that an author's property is not *real* but *chimerical*. "Property," ſays he, "is either corporeal "or incorporeal. It is admitted that this "property conſiſts principally in the ideas, "though it be likewiſe inherent in the form "and compoſition of the piece, by which it "is moſt eaſily diſtinguiſhed and aſcertained.

* See an ENQUIRY *into the Nature and* ORIGIN *of Literary Property.*

" Therefore it is incorporeal, yet it totally " differs from every other incorporeal right, " either original or derivative." He farther obſerves, " that admitting this property, it " ſhall be governed by the rules of other " property. As if," ſaith he, " the chil- " dren could inherit, or the wife be dow- " able of an author's lofty and ſublime con- " ceptions." He then proceeds to give other inſtances where the author's right to his copy cannot be governed by the rules of property which he exemplifies: and indeed his concluſions would be as juſt as they are ingenious, were the property under conſideration of the nature which he ſuppoſeth.

It will not be neceſſary, however, to refute the arguments of this writer *ſeriatim*, ſince the principles themſelves from whence they are deduced, appear to be altogether indefenſible.

This property, ſaith he, is not *real*. This is true, in the technical ſenſe of the word. But here lieth the error. He uſes the word *real* ambiguouſly, not only as oppoſed to *chimerical*, but as contradiſtinguiſhed from *perſonal* property. Thus when he ſaith, the

children

children cannot *inherit*, or the wife be *dowable* of a literary copy, his concluſions are juſt, in the technical ſenſe of thoſe words. For an *inheritance*, and even a *freehold* cannot ſpring but out of lands, tenements, or hereditaments: or, as the old lawyers would phraſe it, ſomething which ſounds in the realty. But though this property is not *inheritable*, it is *tranſmiſſible*; that is, it may be transferred by the proprietor in his life-time; it may be bequeathed by will; or it may be divided according to the directions of law, in caſe of inteſtacy.

Again, it is true, that a wife is not dowable of this property, becauſe *dower* muſt iſſue out of lands or tenements: but a wife will be intitled, under the ſtatute of diſtribution, to her ſhare or portion of the profits ariſing from the ſale of this property.

This leads us to conſider an author's right to his copy in another point of view, in which it will appear to have all the qualities of property, and to be eaſily governed by the known and eſtabliſhed rules of law.

Let us ſuppoſe then a literary copy to be a perſonal thing, and it will be found to have every

every quality, by which the common law of England hath defined and described this ſpecies of property. For it may be acquired, 1. By the king's *prerogative*. 2. By *gift*. 3. By *ſale*. 4. By *theft*. 5. By *teſtament*. 6. By *adminiſtration* *.

It may likewiſe be recovered in the ſame manner as any other perſonal property: for if any one wrongfully poſſeſſeth himſelf of an author's copy, he may ſue what the law calls a mixed action againſt him; that is, an action to recover as well the thing demanded

* The diviſion of property into corporeal and incorporeal makes no difficulty in this caſe. For though the ſentiment or doctrine, conſidered abſtractedly, is incorporeal and ideal, yet, being impreſſed in viſible characters on the paper, the manuſcript copy is a corporeal ſubject.

The argument drawn by the writer of the Enquiry from the propoſition that "ideas are not ſuſceptible "of property," may be granted without admitting his concluſions. For though ideas conſidered abſtractedly, are not ſuſceptible of property, yet when impreſſed in *viſible permanent characters* on paper, they then become as it were incorporated, and a literary copy is thereby made the property of the author. But, ſays the writer, when it is publiſhed, it becomes common. No—the author ſufficiently intimates his intention to appropriate it to his own uſe, by publiſhing it for gain, at a certain price.

as damages againſt the wrong doer for the unjuſt detention: and we may challenge the oppoſers of literary property, to produce an inſtance where it cannot be governed by the eſtabliſhed rules of law.

Having conſidered this right on the general principles of law, let us now proceed to the examination of thoſe *particular caſes*, wherein literary property has come under conſideration; and we ſhall find that the arguments of the moſt eminent lawyers, and the ſenſe even of the legiſlature itſelf, are all in favour of the author's excluſive right.

It is true, that the preciſe queſtion now under ſolemn deliberation before the twelve judges is of the firſt impreſſion: therefore, where we cannot reſt our arguments on a poſitive adjudication in point, we muſt be content to reaſon by analogy and inference: and the firſt caſe which occurs for this purpoſe is that of the Company of Stationers againſt Seymour *.

The Company, as Patentees, brought an action of debt againſt *Seymour*, for printing

* 1 Mod. 256.

Gad-

Gadbury's Almanacks: and Pemberton, on behalf of the Company, obſerved that "there was once a queſtion how far a "grant for the ſole printing of any *particu-* "*lar* book, ſhould ſtand good againſt them "who claim a *property in the copy*, para- "mount to the King's grant? And opinions, "ſaith he, were divided upon the point. "But he urged, that the defendant in this "caſe made *no title to the copy*, but only "pretended a nullity in the patent. The "book, he concluded, which this defend- "ant has printed, has no *certain author*: "and then, according to the rule of "law, *the King has the property*; and by "conſequence may grant his property to "the Company."

Here we find that the arguments at the Bar clearly and expreſsly acknowledge the author's right of property to his copy, which, in ſome caſes, is paramount the King's grant: and we ſhall ſee that theſe arguments are farther corroborated by the opinion of the Court, who reſolved, "that "Almanacks may be accounted prerogative "copies: and added, that ſince printing

" hath been invented, and is become a com-
" mon trade, *ſo much of it as hath been kept*
" *incloſed, never was made* COMMON: but
" that matters of *ſtate*, and things concern-
" ing the government, were never left to
" any man's liberty to print that would:
" that *though printing be a new invention,*
" *yet the uſe and benefit of it is only for men*
" *to publiſh their works with more eaſe than*
" *they could before*—That men had ſome
" other way to publiſh their thoughts before
" printing came in; and foraſmuch as print-
" ing has always been under the care of
" government, it may well be preſumed that
" the former way was too—That there is *no*
" *particular author* of an Almanack: and
" then, by rule of law, the *King has the*
" *property in the copy*—That the additions
" which are common in Almanacks, do
" not alter the caſe, no more than if *one*
" *ſhould claim a property in another man's*
" *copy*, by reaſon of ſome inconſiderable ad-
" ditions of his own."

From this opinion of the court, we may collect, that ſo much of printing, as *has been kept incloſed*, that is, the ſubject of thoſe copies

copies which the prerogative has appropriated, and which relate to matters of ſtate, &c. never was made common; or in other words, never was open to be diſcuſſed and printed by every author who choſe to publiſh his ideas on thoſe ſubjects. This propoſition we ſee is à negative pregnant: for the plain inference from hence is, that in ſuch copies which do not concern the government or public conſtitution, the author might claim a right, paramount the prerogative.

This inference is ſupported by what follows: For we find that *one principle* on which the court determined the merits of this caſe, was that an Almanack had no *particular author*, therefore the King had a property in the copy. Conſequently where there is a particular author, the prerogative cannot take place, much leſs can a right accrue to a ſubject.

Again, it was reſolved by the court, that from an inconſiderable addition, no one ſhould claim a property in *another man's copy*; which is a farther *expreſs* acknowledgement of the author's *excluſive* right.

Moreover

Moreover it is material to obſerve, that the court on this occaſion declared the uſe and benefit of printing to be that "men "might publiſh their works with more eaſe "than before." But ſhould the opinion prevail that an author has no excluſive right in his copy, then printing, which was intended for his benefit, and contrived to circulate his works with *more eaſe*, will impoſe new hardſhips on him, and prove of the utmoſt prejudice to his intereſt.

But the next caſe which comes under conſideration, applieth perhaps yet ſtronger to ſupport the principles and diſtinctions above advanced in favour of the author's right.

It is the caſe of the Earl of Yarmouth, as Patentee, againſt Darrel *; in which it was contended, on the principles of the foregoing caſe, that "where no individual "perſon can claim a property in a thing, "there the King hath a right veſted in "him by law: And that where there is *an* "*inherent prerogative in the King, when-*

* 3 Mod. 75.

"*ever*

" *ever he exerts it, all other perſons are bound* " *who were at liberty before.*"—On this occaſion likewiſe it was argued, that " the King " had as great a prerogative in writing any " thing of a public nature, as he hath in " printing of it: and that printing was as " an art *excluſive of the thing printed.*"

The court likewiſe, in this caſe, raiſed a diſtinction between " things of a *public* " uſe, and thoſe things which are public in " *their nature.*"

From hence it may be collected, that if the thing printed be of a *public nature*, it becomes a prerogative copy: or if no individual perſon can claim a property, then likewiſe the prerogative takes place.

Where the thing printed is not of a *public nature*, that is, not relative to matters of ſtate, though it be of *public uſe*, yet the author has an excluſive right to his copy.

But, ſays the writer above-mentioned, "The " knowledge, ſentiment, and doctrine con- " tained in a book, are compoſed of ſimple " ideas, and ariſe from our perception of " their

" their agreement or disagreement. Per-
" ception is a power or quality of the
" mind: to possess this quality exclusively
" is to restrain all men from exercising their
" faculties on their own ideas."

The ingenious writer is here combating with shadows presented by his own imagination. The exclusive right contended for, is so far from having a tendency to restrain others from the exercise of their faculties, that it contributes to enlarge them; as it affords encouragement for authors to compose works on which others may employ their intellectual talents, and thereby multiply their perceptions.

But justice forbids that they should *directly* convert that very subject to their own pecuniary advantage, which has given them an opportunity of exercising and extending their ideas. He who buyeth a book, payeth only for the individual book so bought, but doth not purchase a priviledge of multiplying the copies. He pays but a small consideration for it, in proportion to the value of the original manuscript; for this reason, because there is an implied condition, annexed

to

to the ſale of each book, that every impreſſion ſhall be for the benefit of the author, who is to gather his profits by ſlow returns.

The purchaſer may indeed *indirectly* raiſe a pecuniary benefit from his purchaſe: ſince the agreement or diſagreement he diſcovereth in the ideas which compoſe the book, may be the foundation of a new compoſition, in which he may either contravert, or farther illuſtrate the principles of the book ſo purchaſed.

This brings us to examine into the title to copies of *antient authors*. Theſe, ſays the writer, are no more ſuſceptible of property than the elements of air and water, which are for the common benefit of mankind: and, he adds, *all copies are of the ſame nature.* So that upon this principle, an author hath no property even in his individual manuſcript; any one, conſequently, might, without any injury to this writer, have ſeized his copy in its paſſage from the eſcrutoire to the preſs. Moreover, if it is no more ſuſceptible of property than the elements of air and water, then it could not become the ſubject of prerogative, which our author

will

will not contend. Such are the extravagances which result when ingenuity attempts to writhe and torture arguments, in order to make them quadrate with erroneous principles!

To prove, however, that antient copies are not susceptible of property, he supposeth a manuscript of Menander to be rescued from the dust. " *The editor of this copy* " *could not*, saith he, *derive to himself an* " *exclusive right by occupacy or improvement*: " *nor can the king grant to him the sole right* " *of printing it for a term of years, because* " *he is not the inventor, nor is it of a public* " *nature and importance, relating to the good* " *and benefit of the subject.*"

In support of this doctrine, he citeth the case of the *Earl of Yarmouth against Darrel*, above-mentioned. But if he had maturely considered that case, he would have found that the reasoning it contains, was by no means favourable to his general principles, or applicable to the particular purpose for which he hath cited it.

The propoſition there laid down, "that "the king cannot grant a patent unleſs the "invention be new," doth not prove that the prerogative is barred with reſpect to antient copies. Though the king cannot grant an excluſive right in them, on the principle of their being new inventions, yet he may make ſuch grant upon a different principle—which is, that of there being no individual, particular, or certain author, who can make title to the copy, whereby the property veſts in the king, who may grant it to another.

This prerogative with regard to antient copies hath been frequently exerciſed; Queen Elizabeth, amongſt others, granted a patent for printing *Corderius*; and though booksellers do often multiply new impreſſions without reſtraint, yet the inherent prerogative being in the king, whenever he exerts it, he excludeth all others, and their right is diveſted.

It remaineth now to enquire into the ſenſe of the legiſlature concerning the right in queſtion. The firſt ſtatute on this ſubject is, the act of the 13th and 14th of Charles

the Second, for regulating of printing. Every one acquainted with the hiſtory of thoſe times, knows the occaſion and view of this act, which, notwithſtanding its ſpecious title, hath a direct tendency to impoſe the moſt heavy and ſervile ſhackles on literature. Happily it is expired; and we hope that an inſtitution ſo repugnant to the principles of a free government, will never be revived.

Yet even this act, ſo injurious to literature, acknowledgeth and guardeth the excluſive right of authors to their copies. For it enacts, "*That no perſon ſhall print any copy which* "*another hath by virtue of letters patent, or* "*which ſhall be otherwiſe granted or aſſigned* "*to him,* WITHOUT LEAVE OF THE "OWNER."

The next act which comes under conſideration, is the 8th of Anne, entitled, "An "act for the encouragement of learning, by "veſting the copies of printed books in the "authors or purchaſers of ſuch copies, dur-"ing the times therein mentioned."

The learned author of the *Letter to a Member of Parliament on the Subject of literary*

literary Property, has, with great acuteneſs, proved this to be not a *reſtrictive*, but an *accumulative* law; and conſequently not the ſole foundation, but an additional ſupport of literary property. This he infers from the *preamble*, which ſets forth the bad effects ariſing from the liberty taken of printing and reprinting books, without the conſent of the authors or *proprietors*. "Now," ſaith he, "could the injured parties here mentioned be *proprietors* of that in which they had no property? Not only the *expreſſion*, but the *ſentiment*," he adds, "neceſſarily ſuppoſes the word Proprietors to be uſed in its ſtrict and exact ſignification."

Did theſe arguments want a ſupport, we might add, that if we could ſuppoſe the legiſlature to have uſed the word *proprietors* inaccurately, or, as denoting a poſſeſſion without right; yet what follows would deſtroy ſuch a ſuppoſition. For the firſt clauſe in the act provides, that "*the author of any* "*book*, WHO HATH NOT TRANSFERRED "*the copy to any other, or the bookſeller* who "hath PURCHASED or ACQUIRED *any copy*, "*ſhall have the ſole right of printing for the* "*term of twenty-one years.*"

Here

Here it is manifeſt that the act does not *create* a right in the author or bookſeller, but preſumes a right already ſubſiſting. It is obſervable, that the words above-cited, refer to tranſactions between the author and bookſeller *prior to the act*.—Could an author *transfer* that in which he had not a legal exclufive property?—Could the bookſeller *purchaſe* or *acquire* what the author had no right to *convey* or *transfer*.

Nothing can be more clear than the expreſſion and ſentiment of the legiſlature: having it in contemplation to grant an *additional* ſupport for the encouragement of learning.—For this purpoſe it provides, that if the author hath *not* transferred his *right*, he ſhall be intituled to ſuch additional ſupport for a certain term; that is, he ſhall have the ſole right (already ſubſiſting) ſtrengthened and ſecured by the penalties which follow. But if he *hath* transferred it, then the bookſeller, who hath purchaſed it, ſhall be intitled for the like term to the ſame additional benefit. There is no right *created*, but a right acknowledged as exiſting either

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in the author, or transferred to the bookseller, *before the making of the act*, is confirmed by inflicting *certain* penalties on the invader*.

This

* The writer of the Enquiry asks, "If this be a natural right, to what purpose was the act of parliament made by which the property of each copy was established for a term of years? All affirmatory acts," he concludes, "strengthen and extend the common law; whereas this establishes for a time a right, which, if natural, must have existed at all times."

But this interpretation of the act is clearly erroneous. It hath been shewn above, that the act establisheth *no* right, but takes up a *right* already established, which it guards by additional penalties. It is the *penalty*, not the *right*, which is established for a time: and there was good sense in this provision. For at common law, a jury must be under difficulty in estimating damages for the invasion of an author's property; which, from the nature of the wrong, are not easily ascertained. Therefore, in aid of this right at common law, the act provideth, that "every book exposed to sale without "consent of the proprietor obtained in writing, shall "be forfeited and made waste paper of: and farther, "that the offenders shall forfeit one penny for every "sheet in his custody, or exposed to sale." Every one knows, that it is a usual practice to strengthen a remedy at common law by the additional sanction of a statute; and the reason why this additional sanction is restrained to a number of years, is well accounted for

by

This being the ſtate of literary property, as it is founded both on the principles of natural reaſon and of law, let us, in the next place, view it in the point of convenience and inconvenience, and examine whether an excluſive right is likely to be favourable or prejudicial to the cauſe of literature.

In the diſcuſſion of this point, the writer of the Enquiry obſerveth, that " in *England*, " the revival of letters was coeval with the " introduction of printing, and that authors by the author of the letter above-quoted. " The " great temptation," he obſerves, " to invade this pro- " perty being while the demand for it is great and fre- " quent, which is generally on the firſt publication of " a book, and ſome few years afterwards." They who applied for this act, had in view the author's immediate benefit only, and did not extend their thoughts to futurity, from a preſumption probably that, after a certain term, the returns of profit being very ſlow, there would be little temptation for piracy: therefore the common law was thought ſufficient to guard a right ſo unlikely to be invaded. Grant the temptation to have continued however, yet we too often find, that petitioners to the legiſlature have not the generoſity to carry their concern beyond themſelves and their immediate connections, but are content to leave poſterity to guard their own rights.

" had

"had but little encouragement, either by
"public or private liberality."

In this, however, he ſeems to contradict the concurring evidence of hiſtory. It is certain, that at the revival of letters, authors met with extraordinary countenance and encouragement. Witneſs *Eraſmus*, *Budæus*, and other learned men, who, in the renaſcent ſtate of literature, met with the moſt noble and generous reception from the great, and were even courted by contending princes.

At this time, the writer continues, "the cuſtom firſt aroſe by which authors claimed the ſole right of multiplying impreſſions of their books." If we trace the progreſs of literature, however, we ſhall find that this claim aroſe much later, and that it derived its ſource from principles to which the writer has not adverted.

If I remember right, the art of printing was firſt introduced into this kingdom by the famous Caxton, towards the beginning

of the reign of Henry the VIIth *. Printers, at this time, were themſelves men of erudition, and maintained a liberal and friendly correſpondence with the learned. Their art, however, at firſt was rude, and perhaps was not uſed ſo much with a view to expedite the circulation of copies, as to relieve from the fatigue and expence of tranſcribing, and to give a more permanent character to the works of genius. If we reflect on the early ſtate of literature, this will appear more than conjecture.

In the reign of Henry the VIIth, it was in its infancy. The preſs, at that time, was more employed in printing old copies, than in giving birth to new productions. The king himſelf, though a man of parts, was not diſtinguiſhed by his love of literature. It is mentioned, as one of his accompliſhments, that he underſtood Latin, though he generally read French. In few words, his atten-

* He was invited in the latter-end of the reign of Henry VI. but, if recollection does not miſlead me, he did not come till the time above-mentioned. However, ſtrict chronological accuracy is not neceſſary on this occaſion.

tion

tion was divided between his anxiety to eſtabliſh his throne, and his endeavour to amaſs treaſure: as to his munificence, it was confined to ſpies and informers.

In the ſucceeding reign, indeed, learning made a rapid progreſs. The king himſelf was an author. The great men of that age, encouraged and rewarded thoſe talents which they cultivated themſelves. Wolſey was a patron of literature; ſo was the great Sir Thomas More. Even the fair ſex at this time made a figure in the learned circle: and there are now extant ſome well-penned letters, in the Latin tongue, from Sir Thomas More's daughter to Eraſmus.

The learning of this period, however, was confined to eccleſiaſticks, with a few perſons of rank, who applied themſelves to letters with that eagerneſs and aſſiduity generally beſtowed on the attainment of a new accompliſhment, which is becoming faſhionable. As to the bulk of the people, they were ſo illiterate, that to be capable of reading merely, was a proof of no common education.

In the reign of Elizabeth, literature reaped a bounteous harveſt. The reign of this learned princeſs produced the great Bacon, Raleigh, &c. Nor muſt we forget the learned Johnſon; nor him, above all, whoſe lofty genius ſoared ſuch towering heights, as no one ſince has been capable of attaining. In this reign, the Engliſh tongue received its firſt poliſh. Literature, however, ſtill diffuſed itſelf by very ſlow degrees among the bulk of the people, and made little progreſs in the ſucceeding reign.

The learning of this reign was, for the moſt part, mere pedantry, and exhauſted itſelf chiefly in polemical controverſy and ſcholaſtic ſubtleties, which contribute rather to perplex than to improve the underſtanding.

It was the reign of the unfortunate Charles, which contributed more than all thoſe preceding, to enlighten the bulk of the people. During the miſerable contentions of that period, appeals were made to the public from both parties: and whoever reads the ſpeeches and remonſtrances of thoſe days, will find them penned with a native ſtrength, preciſion and dignity of diction, free from thoſe

galliciſms

gallicisms which have contributed to enervate our language. About this time too, many admirable treatises were published on the art of government; which opening the eyes of the multitude, made them acquainted with their importance in the state, and at the same time rendered them anxious to improve the means, by which they acquired a *knowledge so essential to their interest* and freedom.

This happy tendency of literature was so obvious, that after the restoration, ungenerous endeavours were used to depress it. With this view the act was framed which has been quoted above, and which was calculated to subject works of genius in every kind to the tyranny of a licenser. But this was not all. The manners of the times contributed to the debasement of literature, as much as the restrictions of the legislature. *Sævior luxuria incubuit.* In a gay and voluptuous court, every thing serious and manly was perverted into an object of ridicule; and the wit of those days was downright ribaldry.

Real learning, from hence, remained some time at a stand, till it shone forth in its

full

full luſtre in the days of queen Anne. Then it was that the leading men in the adminiſtration were ſcholars and patronizers of learning. Then it was that a long catalogue of *Literati* reflected glory on the age they lived in. Then it was that the elegant Addiſon daily circulated his excellent eſſays, in the familiar channel of a news-paper.—A circumſtance, which has contributed perhaps more than any other to diffuſe a taſte for literature among all orders of men.

The avidity of the public for the productions of the learned, and the encouragement afforded to authors, tempted every one who was illuminated with the fainteſt ray of genius, to turn his mind to literary purſuits. Hence the number of authors hath daily increaſed, in proportion as readers have multiplied.

The public, therefore, properly ſpeaking, are now become the patrons of learning; authors are grown ſo numerous, that all cannot be taken under the eſpecial patronage of the great.

From this deduction, we may clearly diſcover the reaſon why the author's excluſive right

right was never worth claiming before, nor indeed for ſome time after, the invention of printing. It was not, as the writer inſiſts, "becauſe it could never be executed before." For the right was always inherent, and might always have been executed: but we find that learning was, in its infant ſtate, confined within a very narrow ſphere. The author could have no dependance on the *number*, but on the *quality* of his readers. Nevertheleſs, we muſt not infer from the paucity of purchaſers, what the writer ſuppoſes, that "the gains of the author were therefore "ſmall." The contrary is manifeſt. Men of learning in thoſe days not only received liberal gratuities from the bounty of their patrons, but few of them were without *annual ſtipends*: therefore they were under no neceſſity of being anxious about the circulation of their copies.

But ſince authors and readers are multiplied, the caſe is extremely different. The profits of a copy are now collected by ſlow returns from a number of purchaſers; and if the author has not a right in all the copies which are multiplied from his original manu-

manuſcript, he has, truly ſpeaking, ſcarce any property at all.

We cannot too much applaud the noble indignation which this writer expreſſeth, againſt that baſe ſervitude in which he ſuppoſes authors to be dependant on bookſellers, in conſequence of the excluſive right contended for. But their ſervitude does not ariſe from this principle. Writers of real abilities need not be ſlaves to bookſellers, unleſs the moſt profligate morals and habitual indiſcretion conſpire to make them drag ſuch a galling chain. In this caſe they are not ſlaves as authors, but as men.

It is true, where a taſte for reading is ſo univerſally diffuſed, there will be authors ſuitable to every claſs of readers. Many futile and obſcene productions will be adapted to the prurience and depravity of the great and ſmall vulgar. But writers of ſuch low eſtimation are ſlaves by nature, and it is of no importance to the public who are their maſters.

There is ſcarce a right which the law protecteth which is not liable to abuſe. Its proviſions

viſions nevertheleſs muſt extend to generals, and cannot involve every ſpecific object, which may furniſh a ground for exception.

What a prejudice would the cauſe of literature ſuſtain, were writers deprived of the excluſive right to their own productions, and of the privilege of transferring them? Should this determination ever take place, the public muſt never more expect works of great length and difficulty, the execution of which demand the united contribution of perhaps more than twenty opulent booksellers, who hazard a certain ſum on the proſpect of uncertain gain.

Where will patrons be found among the great, who will ſupport an author in ſuch expenſive and hazardous undertakings? Grant that there are ſuch. Yet how ſhall a writer, perhaps in the vale of obſcurity, climb to the cloſet of the great? Were we even to ſuppoſe a writer himſelf to be in competent circumſtances, a lot not common among the learned, yet few would chooſe to riſk a large and certain expence, to be reimburſed by ſlow and uncertain returns of profit.

Whoever, therefore, attentively conſiders the preſent ſtate of literature, will find that bookſellers are neceſſary intermediate inſtruments between the author and the public. Learning now is not ſo rare a quality as immediately to diſtinguiſh the owner, and attract the notice of the great. Unleſs a writer is happy in particular connections, the bookſeller muſt preſent him to the public. If, however, he gives proofs of real talents, he cannot be kept in dependance, for it will be the intereſt of the bookſeller to reſpect that merit, which redounds to the profit of himſelf as well as of the author.

When a writer hath once made his merit known to the public, he will not long remain a ſtranger to the great. Of whom, in general, it muſt be acknowledged that they are not ſo backward to patronize literature, as ſome unſucceſsful candidates for favour have conſpired to repreſent them. In truth, complaints of this nature generally proceed from ſuch as are unworthy of notice, or who, in the pride of parts, over-rate their merit.

But if an author cannot maintain an exclusive right to his copy, the powers of genius must languish, and few will have an opportunity of producing those excellent talents with which nature hath enriched them. Scarce any productions will issue from the press, but hasty fugitive pieces, calculated to serve the run of the day, and which will excite as little temptation, as they afford opportunity, for piracy.

It were to be wished indeed that authors could receive the whole profits, or sustain the whole loss, arising from the publication of their works; and that booksellers were, what the word importeth, mere venders of copies. But this, however natural and reasonable in speculation, cannot, for the reasons above assigned, be reduced to practice. Few authors, as hath been said, can advance money for a work of any expence, and wait their reimbursement by slow returns. Neither have they, as formerly, the means of procuring the patronage of the great; but must approach them through the channel of the public. Therefore if they have not an exclusive property in their works, and

conſequently a power of transferring ſuch right, learning will ſoon be loſt among us, the gloom of Gothic ignorance will darken the age, and extinguiſh every beam of ſcience.

Having endeavoured to ſhew that a literary copy is a ſubject ſuſceptible of property, that it may be governed by the known and eſtabliſhed rules of law, that the excluſive right contended for will produce no inconvenience, either with regard to the author or to the public, that on the contrary a communion of this right will be injurious to both, and in the end deſtructive of literature, it remains to hope that this right may be judicially eſtabliſhed, and preſerved inviolably to the lateſt poſterity.

May the fruits of genius never be expoſed to rapine and depredation! May they, who are too often deſtitute of the goods of fortune, be ſecured in the enjoyment of the goods of the mind, which they derive from the bounty of nature! May it never be ſaid that the *Common Law* of England ſo renowned for the wiſdom and impartiality of its inſtitutions, affordeth *no protection to the* product

product of learning, which is the parent of every ſocial refinement, the friend of virtue, and the guardian of civil liberty. "Pleni," ſays Tully, "omnes ſunt libri, plenæ ſa-
"pientium voces, plena exemplorum ve-
"tuſtas: quæ jacerent in tenebris omnia, niſi
"literarum lumen accederet. Quam mul-
"tis nobis imagines, non ſolum ad intuen-
"dum, verum etiam ad imitandum, fortiſ-
"ſimorum virorum, expreſſas, ſcriptores re-
"liquerunt? Quas ego mihi ſemper in ad-
"miniſtranda republica proponens, animum,
"& mentem meam ipſa cogitatione homi-
"num excellentium, conformabam."

FINIS.