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ARGUMENT

IN DEFENCE OF

LITERARY PROPERTY.

[Price One Shilling.]

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IN DEFENCE OF

LITERARY PROPERTY.

By FRANCIS HARGRAVE, Esq.

THE SECOND EDITION:

TO WHICH IS ADDED,

A POSTSCRIPT,

APOLOGIZING FOR THE TIME AND MODE OF FIRST PUBLISHING THE ARGUMENT.

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ADVERTISEMENT.

IT will be eaſy to gueſs, from the Introduction to the following ARGUMENT, for what place it was originally deſigned.—— The opportunity of uſing it in the *proper* and *regular* manner was loſt; and in conſequence of it, I found myſelf obliged to adopt this mode.

THE latter part of the ARGUMENT has been executed with ſo much *haſte*, that I feel myſelf very uneaſy about its reception.—Great pains were taken in laying the foundation; but I am conſcious, that the ſuperſtructure is imperfect.

Lincoln's Inn,
5th Feb. 1774. F. H.

AN

ARGUMENT

IN DEFENCE OF

LITERARY PROPERTY.

THE great queſtion of *Literary Property*, after receiving the ſolemn judgment of a Court of *Common Law* in favour of Authors, has been revived in a Court of *Equity*; and by appeal from thence is now brought before the Supreme Judicature for a final deciſion.

SENSIBLE of the very great importance of the queſtion; foreſeeing what extenſive effects the adjudication of it *muſt immediately* have on the private fortunes of many hundred families; what influence

it may in future have on the progreſs of Science and Literature in this country; and conſcious of my own inequality to arduous undertakings; I cannot enter upon the Argument without very uneaſy ſenſations. Tho' I have devoted myſelf to the ſtudy of the ſubject with long and painful attention of mind; though the extraordinary learning, talents, and induſtry, of thoſe, who heretofore argued the Caſe, have ſupplied me with almoſt every poſſible aſſiſtance; and though the reſult of my own conſideration of the ſubject is the moſt intire conviction of the juſtice of the claim, which I am to ſupport, yet I diſtruſt my own ability to do juſtice to the Caſe; and I ſincerely wiſh, that I could with propriety and honour devolve my ſhare in the Argument on ſome perſon diſtinguiſhed by ſuperior qualifications. But it is now too late to relinquiſh the undertaking; and therefore I ſhall proceed to the execution of it, with a firm reliance on the indulgence of thoſe who compoſe the Noble Aſſembly, to which I have the honour of addreſſing myſelf; and with a full confidence, that they will exerciſe their candor in excuſing my errors and deficiencies, as well as exert their wiſdom in correcting and ſupplying them.

THE queſtion to be determined is ſimply this: *Whether by the Common Law of England an Author and his Aſſigns, after the firſt publication of his Work, have*

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the ſole right of printing and ſelling it? On the one hand, the claim is ſaid to be conſonant to reaſon, founded on principles of natural juſtice, conſiſtent with the intereſts of ſociety, intitled to protection from the *Common Law* of England, and recognized by a ſeries of the moſt reſpectable judicial authorities. On the other hand, it is repreſented as unreaſonable, chimerical, impracticable, oppoſite to every idea of public utility, condemned by the principles of the *Common Law* as tending to a moſt odious monopoly, and only permitted for a ſhort term of years by the ſpecial indulgence of an *Act of Parliament*. I am to maintain the former of theſe diſcordant propoſitions; and for that purpoſe I ſhall examine the claim of an author to the ſole printing of his own Works; *firſt*, by the *general* principles of *reaſon* and property; and *ſecondly*, by the *particular* principles and authorities of the *Common Law* of England. This diſtribution of the Argument is adopted, not ſo much from neceſſity, as from convenience, and a perſuaſion, that the right claimed, in whatever light it is viewed, will when well underſtood appear unexceptionable, and capable of being ſuſtained. I might perhaps be juſtified in avoiding to refer the Caſe to *general* and abſtract principles; for I hope to prove, that the current of authorities and decided Caſes in favour of the claim is too ſtrong and powerful to be overcome by the force of

any ſpeculative reaſoning, however ingeniouſly imagined, however agreeably and ſpeciouſly expreſſed. Should I ſucceed in this expectation, I muſt not be underſtood to waive the advantage. On the contrary, I mean to inſiſt, that grave precedents of law, long acquieſced in and long acted upon, muſt prevail and be ſubmitted to, even though the juſtice of the claim, unſupported by the weight of authority, ſhould ſeem doubtful, or liable to objection. Reſerving to myſelf the full benefit of this obſervation, I will now purſue the argument under the two general heads into which I have divided it.

I. FROM the manner in which I have ſtated the general queſtion, it appears, that nothing more is meant by the term of *Literary Property*, than ſuch an intereſt in a written compoſition, as entitles the Author, and thoſe claiming under him, to the ſole and excluſive right of multiplying printed copies for ſale. I agree, that ſo far as the Caſe is to be tried by general principles, and independently of the Law of England, there are two things eſſential to the exiſtence of Literary Property. One is, that the right of printing a book *may be* peculiar to certain perſons, in excluſion of all others. The other is, that the Author ſhould ſhew a *title* in himſelf to the enjoyment of ſuch an excluſive right. If the *former* propoſition is true, then the right of printing a book

may

may be property: if the latter can be proved, *the right of printing ought to be, and is,* the property of the Author. I ſhall conſider both in their proper order.

THERE are ſome truths ſo plain and obvious, that the mind yields its aſſent to them the moment they are mentioned, without waiting for the formality of a demonſtration. Of this kind I ſhould have deemed the propoſition, That the right of printing a book *may be* appropriated; but, in fact, even this has been denied; and to ſuch an extremity has the Argument been preſſed on the other ſide, that ſome of the objections principally relied upon, apply not to the *juſtice* of the claim, or to the *expediency* of giving effect to it, but merely to the *practicability* of enforcing it. This renders it abſolutely incumbent upon me in a formal manner to enquire, Whether the right of printing a book is ſuſceptible of appropriation?

I MIGHT indeed urge, that facts are conceded ſufficient to render ſuch a diſquiſition wholly unneceſſary; that it has been the practice to appropriate the right of printing books in all countries, ever ſince the invention of printing; that it ſubſiſts in ſome form in every part of Europe; that in foreign countries it is enjoyed under grants of *privileges* from the Sovereign; that in our own country it is admitted to be legally exerciſed in *perpetuity* by the Crown and its Grantees;

Grantees over particular books; and that even the Legiſlature has protected ſuch a right over books in general for a term of years, and has repeatedly called it *a property*, and thoſe in whom it is veſted, *proprietors*. Theſe facts, however inconſiſtent they may ſeem, and really are, with the Argument againſt the *practicability* of aſſerting the claim of *literary property*, cannot be denied; but this is not the proper place for urging them. I ſhall therefore for the preſent waive the authority of *examples*, and ſhall reaſon wholly from the nature of the ſubject in which the property is claimed.

I APPREHEND, that ſo far as regards *practicability*, nothing more can be requiſite, than to ſhew, that there is a *ſubject*, over which the excluſive right claimed may be exerciſed, with marks ſufficient to aſcertain and diſtinguiſh it; and that there are *means*, by which the poſſeſſion and enjoyment of ſuch an excluſive right may be effectually regulated and ſecured. Few words will ſerve to evince, that according to this rule the right of printing a book *may* be appropriated.

THE ſubject of the property is a *written compoſition*; and that one written compoſition may be diſtinguiſhed from another, is a truth too evident to be much argued upon. Every man has a mode of combining

bining and expreſſing his ideas peculiar to himſelf. The ſame doctrines, the ſame opinions, never come from two perſons, or even from the ſame perſon at different times, cloathed wholly in the ſame language. A ſtrong reſemblance of ſtile, of ſentiment, of plan and diſpoſition, will be frequently found; but there is ſuch an infinite variety in the modes of thinking and writing, as well in the extent and connection of ideas, as in the uſe and arrangement of words, that a literary work *really* original, like the human face, will always have ſome ſingularities, ſome lines, ſome features, to characterize it, and to fix and eſtabliſh its identity; and to aſſert the contrary with reſpect to either, would be juſtly deemed equally oppoſite to reaſon and univerſal experience. Beſides, though it ſhould be allowable to ſuppoſe, that there *may* be caſes, in which, on a compariſon of two literary productions, no ſuch diſtinction could be made between them, as in a competition for originality to decide whether both were really original, or which was the original and which the copy; ſtill the obſervation of the poſſibility of diſtinguiſhing would hold in *all other* inſtances, and the Argument in its application to them would ſtill have the ſame force.

So much for the *ſubject* of the Property, and for the manner and facility of tracing the difference be-

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tween one literary work and another. Nor will it be more difficult to ſatisfy an impartial mind, that the enjoyment of the excluſive right, claimed to be exercifed over a literary compoſition, is as capable of being guarded and regulated, as any other right, or any other ſpecies of property. It is not neceſſary for this purpoſe to frame new laws, new remedies, or new modes of alienation and ſucceſſion. Admit the title of the author to the ſole printing of his own Works, and it will be eaſy to point out, how that title may have its due and full effect. The rules and principles, by which other property and other rights are governed, will furniſh the means of ſecuring the enjoyment of this peculiar kind of right or property. It is ſcarce poſſible to conceive any ſyſtem of laws in a country advanced in civilization ſo groſly deficient, as not to have general rules capable of being applied to every ſpecies of *right*, whatever may be the ſource of it, however novel; whether in the creation and conſtitution, or in the exerciſe and exertion. If a right of a *new* kind becomes the ſubject of litigation, a wiſe judge will compare it with ſuch rights as have been long known and acknowledged; and by analogy to ſome of them will be able to explore, how it ought to be claſſed, how enjoyed, how protected from invaſion, and how tranſmitted from one perſon to another. This in ſome meaſure is *general* aſſertion; and tho'

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from its apparent reaſonableneſs, it might be deemed very ſufficient to oppoſe to the unſupported objections, which have been ſo confidently urged againſt the practicability of allowing literary property, yet I do not intend to reſt the argument here. When I ſtate and anſwer thoſe objections, I ſhall be more particular in the illuſtration of what I advance; and I ſhould be more ſo here, if I was not ſtudious to avoid a diſagreeable repetition. Hereafter too I ſhall have occaſion to confirm the Argument by an inſtance from the law of England; and I do not doubt the being able to demonſtrate, that whatever may be the caſe of the laws of *other* countries, however narrow and incomprehenſive they may be in their frame and foundation, there are remedies, there are rules incident to the *common law of England*, by which the excluſive right of printing a book may be as well guarded *in* the enjoyment, as well directed in the mode of alienation and ſucceſſion, as any other ſpecies of right, or incorporeal property whatever.

But it is objected, that only *corporeal* things can be the objects of property; and that every ſpecies of *incorporeal* property has reſpect to, and muſt have, a corporeal ſubſtance for its ſupport. The doctrine contained in this objection has been relied upon as a principal argument againſt the

claim of Literary Property; as one too well founded in reaſon and the nature of things, too well fenced by the authority of the legal definitions of property, to be controverted with the leaſt degree of ſucceſs. But even this boaſted propoſition, tho' ſeemingly entrenched in the profoundeſt ſubtlety of legal metaphyſicks, has its naked and vulnerable parts. I ſhall attack the objection, firſt by denying that a corporeal ſubſtance is abſolutely univerſally and invariably eſſential to the exiſtence of property; and then by inſiſting, that even tho' the truth of that propoſition, in the moſt unlimited ſenſe of it, ſhould be admitted, ſtill it would not prove any thing againſt the claim of a right to the ſole printing of a written compoſition.

If the objection is advanced as having its foundation in reaſon, the plain anſwer is, That whatever is ſuſceptible of an excluſive enjoyment, *may* be property; and that rights may ariſe, which, tho' quite unconnected with any thing corporeal, may be confined in the exerciſe to certain perſons, and be as capable of a ſeparate enjoyment, and of modes of alienation and tranſmiſſion, as any ſpecies of corporeal ſubſtance. Even the right in queſtion, if it ſhould be admitted to be ſo deſtitute of any corporeal ſubſtance for its foundation as has been repreſented, will of itſelf be a ſufficient proof of

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the fallacy of making corporeal things, or rights in them, the ſole objects of property, and may be fairly propoſed as an inſtance to the contrary; at leaſt until the practicability of appropriating the printing of a book can be diſproved, which I conceive to be impoſſible. *How* the exclusive right of printing any particular book may originate; what may give a proper title to the ſole exerciſe of ſuch a right, whether authorſhip, or any other cauſe, is not here of the leaſt importance; becauſe if ſpringing from *any* ſource, the right *may* be well appropriated, the argument of impracticability will fall to the ground, and conſequently the objection derived from the ſuppoſed want of ſomething corporeal to uphold and ſuſtain the right. But in order to maintain the objection, ſome moſt reſpectable Writers on the Law of Nature and Nations, particularly Grotius *(a)* and Puffendorf *(b)*, have been cited as authorities; and the definitions of property in uſe amongſt Lawyers are reſorted to. I do not underſtand that there any particular paſſages from Grotius or Puffendorf ſo much relied upon, as the general tendency of their learned writings in reſpect to Property; and the circumſtance of their not being very applicable to the particular kind of

(a) De Jur. Bell. et Pac. Lib. 2. cap. 2.
(b) De Jur, Nat, et Gent. Lib, 4. cap. 5.

property now in queſtion. But it is to be conſidered, that the nature of their undertaking, ſo far as regards the ſubject of proporty, principally was to account for its origin and progreſs in land and other *corporeal* things, the more uſual ſubjects of property; and *that* is the true reaſon why they do not extend their ſpeculations to objects of a kind leſs groſs, when they inquire, what are fit objects of property; and what things ought ever to remain in their primitive ſtate, unappropriated and common for the uſe of all mankind. There are many ſubjects, ſuch as offices, titles, annuities, and other things of a ſimilar kind, which, though wholly detached from corporeal ſubſtances, were known and acknowledged objects of property long before the times in which Grotius and Puffendorf lived, and yet are never mentioned, or even hinted at, by either of them. But would it be reaſonable from thence to infer, that they did not deem ſuch things to be Property? As to the legal definitions of Property, they vary very much.—— Some (*c*) civilians reſtrain the idea of property to things corporeal, and intirely exclude all incorporeal things, even the ſervitudes and uſufructs of the Roman law, which are certainly rights only exer-

(*c*) Vid. Ulric. Huber. Diſputat. 305. Ejuſd. Auctor. Prælect. ed. 4ta, lib. 2. tit. 1. ſect. 12, 13.

ciſcable

ciſeable on objects of a corporeal kind. *Dominium*, as they deſcribe it, *eſt jus de re corporali perfectè diſponendi, eamque vindicandi, niſi lex aut conventio obſiſtat.* Others *(d)* again, of equal authority, extend the definition of property to all incorporeal things. But in fact it is not much to the preſent purpoſe, which opinion is the moſt accurate; the difference being more in *name* than *ſubſtance*. A very exact Writer *(e)*, who confines the ſtrict application of the word *dominium* to corporeal things, adds, *de rebus incorporalibus, non niſi impropriè, & per quandam ſimilitudinem dominium prædicatur, cùm nec illas poſſidere valeamus propriè, ſed tantummodò quaſi poſſidere.* From this paſſage, and many others which might be cited, it appears clearly, that the difference of opinion is merely upon the *ſtrict* import of the word *dominium*, particularly in the Roman Law, and is quite foreign to the inquiry, Whether there cannot be property without a corporeal ſubſtance for the ſubject, which intirely depends upon the *general* and *extenſive* ſenſe of the word. There are not any Commentators on the Roman Law, who pretend to exclude incorporeal things from the conſideration of Law; or to deny, that they are not as much objects of ſeparate enjoyment, of alienation, and of tranſmiſſion,

(*d*) Vid. Thomaſ. Schol. & Addit. Huber. Prælect. ubi ſupra.

(*e*) Hoppii Comment. ad Inſt. lib. 2. tit. 1.

as things corporeal. It is obſervable too, that all concur in enumerating amongſt things incorporeal, *obligations*, however contracted, and other objects, which have not the leaſt connection with, or reference to, corporeal ſubſtances; except, indeed, as the fruits and profits reſulting from the exerciſe of ſuch rights are generally of a corporeal kind. In that ſenſe, the right of printing books, and almoſt every other ſpecies of right, may be made referable to corporeal ſubjects *(f)*; and that being the caſe, the objection founded on the ſuppoſed want of ſomething corporeal, intirely fails in its application to the claim of Literary Property.

HITHERTO I have been controverting the ſuppoſed neceſſity of having a corporeal object for every ſubject of property; but I ſhall now endeavour to ſhew, that the propoſition, though it ſhould be true in its utmoſt latitude, cannot affect the claim of Literary Property; becauſe *that* is not merely corporeal in the *fruits* which it produces, but has an im-

(f) Res incorporales, as the text of the Roman Law deſcribes them, *ſunt quæ tangi non poſſunt; qualia ſunt ea, quæ in jure conſiſtunt, ſicut hæreditas, uſus-fructus, et* obligationes quoquo modo contractæ; *nec ad rem pertinet, quod in hæreditate res incorporales continentur, nam et fructus, qui ex fundo percipiuntur, corporales ſunt*; et id, quod ex aliquâ obligatione nobis debetur, plerumque corporale eſt; *veluti fundus, homo, pecunia.* Inſtit. lib. 2. tit. 2. . 3.

mediate

mediate and neceſſary reference to a corporeal ſubſtance in the *exerciſe*. A literary compoſition can ſubſiſt and have duration, only ſo long as the words, which eſtabliſh its identity, are repreſented by viſible and known characters expreſſed on paper, parchment, or ſome other *corporeal ſubſtance*; and by reference to *that* only, can the right of multiplying copies or printing be in any manner enjoyed. The original manuſcript, or a written or printed copy, being authenticated, will equally ſerve the purpoſe; but *one* muſt remain within the power of the perſon who claims the appropriated right of printing the work, or the exerciſe of the right *muſt* unavoidably ceaſe from the want of a *ſubject*.

UPON the whole, therefore, it ſeems very clear, that excluſive rights *may* ſubſiſt in law, and be tranſmiſſible as property, without the aid of any thing *corporeal* to uphold them; or that if a *corporeal* ſubſtance ſhould be neceſſary, it is in *ſuch* a manner, as not to furniſh any argument, againſt the appropriation of the right of printing a literary compoſition.

BUT it is aſked, how an author after publiſhing his work can confine it to himſelf, and exclude the world from participating of the ſentiments it contains? This objection depends on the ſuppoſi-

tion,

tion, that the exclusive right claimed for an author is to the *ideas* and *knowledge* communicated in a literary composition. An attempt to appropriate, to the author and his assigns, the perpetual use of the ideas contained in a written composition, might well be deemed so absurd and impracticable, as to deserve to be treated in a Court of Justice with equal contempt and indignation; and it would be a disgrace to argue in favour of such a claim. But the claim of Literary Property is not of this ridiculous and unreasonable kind; and to represent it as such, however it may serve the purposes of declamation, or of wit and humour, is a fallacy too gross to be successfully disguised. What the author claims, is merely to have the sole right of printing his own works. As to the ideas conveyed, every author, when he publishes, necessarily gives the full use of them to the world at large. To communicate and sell knowledge to the Public, and at the same moment to stipulate that none but the author or his bookseller shall make use of it, is an idea, which Avarice herself has not yet suggested. But imputing this absurdity to the claim of Literary Property, is mere imagination; and so must be deemed, until it can be demonstrated that the *printing* a book cannot be appropriated, without at the same time appropriating the use of the *knowledge* contained in it; or in other words, that the

use

uſe of the ideas communicated by an author cannot be *common* to all, unleſs the *right* of *printing* his works is *common alſo*. If the impoſſibility of proving ſuch a propoſition is not ſelf-evident, I am ſure, that there is not any argument I am furniſhed with, which would avail to evince the contrary.

In a late publication on the ſubject of Literary Property, there is a very ſtriking paſſage which compreſſes the objections againſt the *practicability* of Literary Property into the compaſs of a very few lines. Though I have anticipated almoſt every kind of exception, which can well be taken, yet for the ſake of meeting the opinion I am controverting in its moſt formidable ſhape, and in order to ſhew how unequal the moſt captivating language is to the taſk of ſuſtaining a feeble argument, I will ſelect this paſſage, and obſerve upon all the *pointed* expreſſions, which are introduced to give it ſtrength and force. The words are theſe: "The "*property* here claimed is all *ideal*; a ſet of ideas "which have *no bounds* or *marks* whatever; no-"thing that is capable of a *viſible* poſſeſſion; no-"thing that can ſuſtain any one of the *qualities* or "*incidents* of property. Their whole exiſtence is in "the *mind* alone. *Incapable* of any *other modes* of "*acquiſition* or *enjoyment*, than by *mental poſſeſſion* "or *apprehenſion*; ſafe and *invulnerable* from their

" own *immateriality*; no *treſpaſs* can *reach* them, no
" *tort affect* them; no *fraud* or *violence diminiſh* or
" *damage* them. Yet theſe are the *phantoms* which
" the author would *graſp* and *confine* to *himſelf!*"
Highly finiſhed in ſtile and compoſition as I muſt acknowledge this paſſage to be, yet it has not *one* ſignificant word, but what is either founded on a miſconception of the claim controverted, or is liable to ſome other obſervation equally deſtructive of the opinion intended to be maintained. The *property* claimed for the author is an excluſive right to the *printing* of his work, and *not* to the *ideas* contained in it, or to the *uſe* of them; therefore the property is not *ideal*.——*One* literary compoſition is diſtinguiſhable from *another*; and therefore *each* has its *marks* and *bounds* to identify it, and to fix the *poſſeſſion* and ſeparate enjoyment of the right of printing. *That poſſeſſion* is *viſible* by the *exerciſe* of the right claimed, nor is the *poſſeſſion* of *other* incorporeal property viſible in any other manner; for *incorporeal* things in general, however referable to corporeal ſubſtances, to uſe the words of a great civilian (*g*), *non incurrunt in ſenſus niſi ab exercitio*; and they are deſcribed by our own lawyers (*b*) in

(*g*) Hopp. Comment. ad Inſt. lib. 2. tit. 2.

(*b*) *Jura ſiquidem, cum ſint incorporalia, videri non poterunt, nec tangi, & ideo traditionem non patiuntur, ſicut res corporales.* Bract. lib. 2. cap. 23. ſect. 1.

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the ſame terms.——It is *mere aſſertion* to ſay, that literary property has not the *incidents* and *qualities* of *other* incorporeal property; unleſs it can be ſhewn, that the right of printing any particular book cannot be effectually veſted in certain perſons in excluſion of all others, and be as well poſſeſſed, enjoyed, alienated, tranſmitted, and protected from invaſion by the rules of law, as *any other* ſpecies of incorporeal property.—The *exiſtence* of literary property is not *more* in the *mind*, *more* the ſubject of *mental poſſeſſion* and *apprehenſion*, or *more* without *materiality*, than *other* incorporeal property; for *all* incorporeal things are neceſſarily incapable of being heard, ſeen, or handled, and are only to be conceived in the mind by reference to the objects with which they are connected in the exerciſe, or to the fruits and profits they produce.——Literary property is not *invulnerable* on account of its *immateriality*. If one has the excluſive right of printing a book, and others without his conſent multiply and ſell copies, *that* right is *wounded*, is *affected*; the profits, which would otherwiſe ariſe from the exerciſe of the right, are *diminiſhed*; and the intruding on this *particular* right is as much a *treſpaſs*, a *tort*, a *fraud*, a *violence*, a *damage*, as an invaſion of any *other* incorporeal property can be.

In being ſo particular in my obſervation on the favourite argument, from which the paſſage juſt cited is extracted, I muſt not be underſtood to intend the leaſt diſreſpect to the memory of its author. His character for ſhining talents, for extenſive knowledge, and for exemplary virtues both public and private, is fixed on a baſis too firm to be ſhaken, or in the leaſt hurt by imputing to him *one* erroneous opinion.

I THINK, that I have now anſwered every objection of importance, which has been made againſt the *practicability* of literary property; and if in arguing this point I have been guilty of a frequent and diſguſting repetition, my apology muſt ariſe from the various manner, in which I have been forced to combat the ſame enemy. Every objection, *Hydra*-like, has aſſumed a variety of forms; and when it has been deſtroyed in *one* ſhape, the power of language has inſtantly raiſed it up again in *another*, equally formidable in appearance, but equally devoid of ſubſtance.

HAVING thus, as I hope, evinced the *practicability* of making the right of printing a book property; the next ſtep in the Argument is, to exhibit the reaſons, on which the author founds his *title* to

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ſuch a property in his own works. As this part of the ſubject will not permit the having recourſe to abſtracted and metaphyſical diſquiſition, it will be more eaſy to ſolve the difficulties which oppoſe me.

In order to conceive properly, what is the origin of an author's title to the ſole printing and ſelling of his own works, the firſt thing to be conſidered is his *labor* in compoſing them. *This* is not the *ſole* foundation of his title; for *other* reaſons may and ſhall be urged to ſuſtain it; but they are of a *ſecondary* kind, and therefore improper to be introduced, till the *primary* reaſon, on which they are *dependant*, is explained. No literary work, whether calculated for the inſtruction or amuſement of mankind, whether conſiſting of *new* thoughts and ideas, or of *old* thoughts and ideas *newly* combined and expreſſed, can be produced without an induſtrious and painful application of the mental faculties to the particular ſubject. It is not my intention to inſiſt *generally*, that *all* the benefits and advantages of a man's labour either *can*, or *ought to be* confined to himſelf. *That* would be building on too broad a foundation; for there certainly are many caſes, in which the truth of ſuch a propoſition would fail. If an author was to claim the ſole right of *uſing*

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the *knowledge* contained in his works, as well as the ſole right of *printing* them for ſale, it would be both unfit and impoſſible to comply with a demand ſo abſurd, ſo illiberally ſelfiſh; and other inſtances without number might be mentioned, in which ſuch an unlimited appropriation of the fruits of a man's induſtry would be equally unreaſonable and ridiculous. But the caſe in queſtion doth not require me to argue in ſuch *general* terms. The author's title to the benefit, which he claims from the labor employed in his literary compoſitions, depends on a propoſition of a more limited kind; and I ſhall only inſiſt, that *every man has a right to appropriate to himſelf the fruits of his own induſtry, ſo far as is practicable in the nature of things, and is at the ſame time conſiſtent with the rights of others, and the reſtraints impoſed by the laws and political inſtitutions of the country in which he lives.* By this principle, which I may venture to call incontrovertible, it is, that I mean to try the *title* of an author to the ſole printing and ſelling of his own works; and for that purpoſe, I ſhall ſhortly ſtate, what the nature and extent of the author's right over his literary compoſitions are, *before* he conſents to *publiſh* them; and then conſider, what *effect* the *publication* has, and ought to have, upon that right.

It is acknowledged by thoſe the moſt adverſe to the claim of literary property, that *before a voluntary publication*, the right of multiplying copies for ſale, belongs wholly, and without any limitation, to the author, or to thoſe who by purchaſe, gift, or *repreſentation*, ſucceed to all his rights, whatever they may be, in the manuſcript of his literary compoſitions. Nor is this right of the *imperfect* kind; for it is admitted to be under the protection of the law. Another thing allowed is, that *lending* a copy of the work, or even *giving* one, will not, without ſomething *further*, transfer the right of printing and ſelling; and therefore the juſtice and propriety of thoſe caſes, in which Courts of Juſtice have interpoſed to reſtrain perſons, poſſeſſed of copies by ſuch gift or lending, from multiplying copies for ſale, are not denied. Thus abſolute and unlimited is the author's ſole right of multiplying copies *before a voluntary publication*; and it is of importance to obſerve, that this right can only ſpring from the *labor* exerted by the author in compoſing his work, and the *conſequential powers* over his manuſcript.

I will now inquire, whether the right is *varied* by the act of *publication*.

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If the author's ſole and excluſive right of multiplying copies ceaſes *after publication*, it *muſt* be, either becauſe it is *impracticable* to *retain* the right; or becauſe the right is *renounced* by the *publication*; or laſtly, becauſe *after publication* the law of the particular country, in which the caſe ariſes, will *not permit* the author to retain the right. The *practicability* of giving effect to the right without the aid of any new law to regulate it, I have already argued; and, as I flatter myſelf, clearly evinced. Therefore it only remains to ſhew, that the right is not *renounced* by the publication, and that it is not *unlawful* to *retain* the right *afterwards*.

In order to prove, that publiſhing a literary compoſition is a renunciation of the author's previous right of multiplying copies, his intention to renounce muſt be ſhewn; and as *mere* publication certainly is not an *expreſs* renunciation, that is, not one declared by words, it is incumbent upon thoſe, who infer a renunciation, to found themſelves on ſomething incident to a publication, from which it may be reaſonable to *imply* an intention to renounce. One object of a publication is to convey knowledge and amuſement to the world, or both, according to the nature of the work; but this purpoſe of the author may be as well accompliſhed by *continuing* his right of multiplying copies, as by renouncing

ing and making the right of printing *common*. But it is not reaſonable to ſuppoſe, that the inſtruction, or entertainment of the world is the only view of an author in publiſhing his works; for ſome attention to his *own* advantage is very *proper*, and moſt frequently quite *neceſſary*. There are few ſituations in life ſo advantageous, as to permit an author, the moſt diſintereſted, to give the benefit of his labors to the public, without ſecuring to himſelf the profits which may ariſe from the ſole right of multiplying printed copies. It is ſo far from being a diſgrace to appropriate *that* right, that to renounce it would in *general* be an injuſtice to the author's family as well as to himſelf, and have the appearance of vanity and profuſion more than a well-directed generoſity. Another circumſtance incident to a publication, is the great expence of printing the work; but *this*, ſo far from being a reaſon for implying a renunciation of the right of multiplying copies, furniſhes a ſtrong argument of an intention to retain the right. Without retaining it, how is the author to ſecure a return of the money expended in making the impreſſion, and a reaſonable profit in the nature of intereſt? There is ſtill another circumſtance very neceſſary to be mentioned; and *that* is, the *price* paid by the purchaſer of each printed copy; which in fact is the *only* thing in a publication, affording the leaſt *pretence* for inferring a

renunciation of the right of multiplying copies. But I will not condeſcend formally to conſider the unreaſonableneſs of ſuch an inference. A moment's reflection on the expence of printing and paper, and on the real and ſuppoſed value of the contents of the book, and on the *comparatively* ſmall price uſually paid for a copy, will I am perſuaded ſuffice to evince, that the right of multiplying copies is not the *ſubject* of the ſale, either in the mind of the buyer or ſeller; and I appeal to the *heart* of every purchaſer of a book, for a confirmation of the truth of what I aſſert.

SUCH are the only important circumſtances of a publication; and from them I argue, that the *publication*, inſtead of *deſtroying* or *diminiſhing* the *previous* right of the author to the ſole printing and ſelling of his works, tends to render *that* right *more firm*, and *actually* ſuperinduces *new and additional* pretenſions for aſſerting it. The uſual incidents to a publication, ſo far from being a foundation for *implying* a *renunciation* of the right of multiplying by the *author*, furniſh the ſtrongeſt argument for *implying* a *contract* not to *invade* it. Such an *implied* contract is allowed to ariſe, when an author *lends* or *gives* a copy of his works to a particular perſon; which in fact is neceſſarily a publication in the *ſtrict* and *legal* ſenſe of the word, though one of a limited kind, and not attended with the leaſt ex-

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pence or hazard to the author. Is not the *cauſe* of implication infinitely *ſtronger*, when an author riſques the great expence of a *general* publication? In this latter caſe the implication is indeed ſo *violent*, as to become almoſt *neceſſary*; which is the only reaſon to be given, why the title page of every new book has not an *expreſs* reſervation of the right of multiplying copies.

I HAVE next to conſider, whether there is any thing *unlawful*, in the author's *retaining the right* of multiplying copies *after* a voluntary publication. Here I muſt obſerve, that *mere inexpediency* will not ſuffice to repel the claim of the author. *Inexpediency* is a good reaſon for *making* a law, but of itſelf is a feeble argument to prove its *exiſtence*. Innumerable things, though exceedingly inconſiſtent with public utility, are permitted in all civil ſocieties, till laws are made to prohibit them, and to prevent the inconvenience. If the *inexpediency* of a thing ſhould ever be deemed a ſufficient reaſon for declaring it unlawful, *policy* and *law* would be confounded; and the reſult would be an *arbitrary* exerciſe of *judicial* power; for then thoſe, intruſted with the authority to adminiſter juſtice, would in effect be *legiſlators* as well as *judges*. Hence I infer, that an idea of the general and public inconvenience, however well founded, will

not diſprove the excluſive right of an author to the ſole printing of his own works; unleſs a *particular* law for *annulling* it, or an *acknowledged principle* of law wholly inconſiſtent with the right, can be adduced. This renders a reference to the *poſitive* law of the country in which the claim is made, abſolutely neceſſary; and without ſuch a reference, it is impoſſible to decide whether it is, or it is not lawful to retain the ſole right of printing *after* publication. When I come to the law of England, I ſhall endeavour to ſhew, that there is not any thing in our own laws, from which it can be fairly argued, that an author *may not* enjoy the ſole right of multiplying copies as well *after* publication, as *before*. In the mean time I think it proper to obſerve, that the general principle in favour of the freedom of trade, which in moſt countries is an ancient and known part of the law, and was firſt eſtabliſhed to prevent *monopolies*, doth not extend ſo far as to affect the claim of literary property. A *monopoly*, in the *general* ſenſe of the word, as uſed amongſt lawyers, is an *appropriation* of the right of carrying on ſome particular branch of trade or commerce; to which all men have *originally* a *common* and *equal* pretenſion. But the caſe of literary property is not comprehended within the *general* idea of a monopoly; becauſe it is admitted, that before publication *only* the author has the right of multiplying copies of his works,

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works, and that none are intitled to print them without his *conſent*; and according to what I have eſtabliſhed in reſpect to a *publication*, his *previous* right of multiplying, inſtead of being renounced or weakened, is evidently intended to be retained; and there are *more* reaſons for allowing it to *continue after* publication, than can be given for its *exiſtence before*. The claim of the author is confeſſed to be unexceptionable *before* a general publication, and not to be within the principle of a monopoly. The ſame reaſons which are the foundation of his right *before* publication, continue *after*, and are ſtrengthened by *additional* reaſons; and conſequently ought to *better* his *claim*, and to make it ſtill *leſs* liable to the objection of a monopoly.

But for a moment I will ſuppoſe the right of the author to depend on the expediency or inexpediency of giving effect to it; for I think, that even upon *that* principle the right is capable of being ſupported.

Here the queſtion is, whether the trade of printing will be moſt uſeful to the public by allowing the author to *appropriate* the printing of his own works to himſelf and his aſſigns, or by making the right of printing books *common*. I know, that there is a great prejudice againſt confining the

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right of printing particular books to certain perſons, in excluſion of all others; and it is apprehended by many, that if there was not any ſuch thing as property in the printing of books, the art of printing would be *more beneficial* to the public in *general*, as well as to thoſe who practiſe the art or are, connected with it, in *particular*. But the truth is, that the opinion, however *popular* it may be, is without the leaſt foundation. How would making the right of printing every book *common* be advantageous to thoſe concerned in printing or manufacturing books, or in bookſelling? Every impreſſion of a work is attended with ſuch great expences, that nothing leſs than ſecuring the ſale of a large number of copies within a certain time, can bring back the money expended, with a reaſonable allowance for intereſt and profit. But is this to be effected, if immediately after the impreſſion of a book by *one* man, *all others* are to be left at liberty to make and vend impreſſions of the ſame work? A *ſecond*, by printing with an *inferior type*, on an *inferior paper*, is enabled to *underſell* the printer of the *firſt* impreſſion, and defeats him of the benefit of it, either by preventing the ſale of it within *due* time, or perhaps by *totally* ſtopping it. The *ſecond* printer is expoſed to the ſame kind of hoſtility; and a *third* perſon, by printing in a manner ſtill worſe, ſtill more inferior, ruins the *ſecond*; a *fourth* the *third*; and ſo

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on it would be in *progreſſion*, till experience of the diſadvantages of a rivalſhip ſo general would convince all concerned mediately or immediately in the trade of printing, that it muſt be ruinous to carry it on, without an appropriation of copies to ſecure a reaſonable profit on the ſale of each impreſſion. Such would be the obvious conſequences of making the right of printing every book *common*; and experience of them, ſoon after the introduction of the art of printing, was *one principal* cauſe of the firſt granting privileges for the ſole printing of particular books, as well in England as *in every* other part of Europe. I ſay *one* principal cauſe; for the anxiety of ſovereigns to reſtrain that *palladium* of *liberty*, that *aſylum* for oppreſſed ſubjects, the *freedom of the preſs*, under the *pretence* of preventing and correcting its licentiouſneſs, was *another* cauſe. In the *early* times of printing, there were few *original* works; and for want of a *title* derived from *authorſhip*, printers were glad to reſort to their ſovereigns, for an appropriation of copies, by the exerciſe of a *real* or rather *aſſumed prerogative* over the art of printing. I hint at theſe facts with reſpect to the origin of *privileges* and grants of a like kind; in order to ſhew, that *early experience* evinced the *impoſſibility* of carrying on the trade of printing with ſufficient profit, without an appropriation of copies for the protection of each impreſſion. Having thus ex-

explained the diſadvantages, which would accrue to thoſe concerned in printing, if *copies* were *common*, I will now aſk, how the making them *ſo* could produce the leaſt benefit to the public in *general?* Would *leſſening*, or rather *annihilating*, the profits of printing, tend to encourage perſons to be adventurers in the trade of printing? Would it make books cheaper? *So long* indeed as the *leaſt legal idea* of property in *copies remains*, *moſt* perſons will probably hold it both *diſhonourable* and *unſafe* to pirate editions; and *ſo long only* can the *few*, who now diſtinguiſh themſelves by trafficking in that way, afford to underſell the *real* proprietors. *Such* perſons at preſent enjoy *all* the fruits of a concurrent property without paying *any price* for it; and therefore it is not to be wondered at, that they *ſhould underſell thoſe*, who have paid a full and valuable conſideration for the purchaſe of their *copies*. But if the right of printing books ſhould once be declared *common* by a *judicial* opinion; the advantage, which enables particular perſons to underſell thoſe who claim the property, would ceaſe; pirating would then become *general*; and perhaps thoſe, who now practiſe it, would themſelves be ſacrifices to their own ſucceſs in the cauſe they ſupport. Whilſt the queſtion of literary property is in a *ſuſpended* ſtate, they have the *harveſt* to themſelves; but if they ſhould gain their cauſe, like *other Samſons*, they would be cruſhed by the fall

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of the building they are pulling down. Another great evil, which would arife from annihilating the property in *copies*, would be its difcouragement of literature of every kind; for *that* conſequence muſt enſue, in proportion as the profits to be derived from the publication of an author's works are diminiſhed by making the right of printing them *common*. But it has been ſuggeſted as a *certain* inconvenience, that in caſe the author's property in the publication of his works ſhould be allowed, there would be a *conſequential* right of *ſuppreſſion*, and of with-holding ſome of the beſt writings from the public uſe. But this is an *imaginary* evil, for after *one general publication*, ſuppreſſion becomes almoſt impoſſible; and if it ſhould be attempted, a jury or court would be very well warranted in inferring a renunciation of the property from *ſuch* a conduct. *Another* inconvenience ſuggeſted is, that if the claim of literary property ſhould have effect, then on every failure of a repreſentative to the author, and alſo on every forfeiture, the property would veſt in the ſovereign of the particular country; and conſequently, in Great-Britain, might, in the courſe of time, give the King a compleat controul, and arm him with a dangerous prerogative over all books, except new publications. But this too is another imaginary inconvenience,

or at leaſt one ſo remote and improbable, as not to be formidable. It may be a queſtion of difficulty to decide, whether the author's right would in *either* caſe devolve upon the Crown; and *ſuch* a conſequence is at *leaſt* diſputable. *Some* rights there certainly are, which by our own law may ſubſiſt in a *ſubject*, and yet are not tranſmiſſible to the *ſovereign*, either for forfeiture, or as intitled to all things *derelict*. Probably the author's right of printing may be of the number; and then *his* right *ceaſing*, the printing of his works would become *common*.—Upon the whole, it ſeems evident, that on an impartial review of the advantages and diſadvantages, which may ariſe from appropriating the right of printing the ballance ſtrongly inclines in favour of the property. But ſhould it be otherwiſe, ſtill I inſiſt, that the *inexpediency* of the property claimed by an author is no *proof*, that ſuch a property doth not *exiſt*; though I confeſs, that it may be urged as a *reaſon* for *making* a law to annihilate the author's right.

I HOPE by this time to have eſtabliſhed the claim of literary property on principles of *practicability* and *ſtrict right*, as well as of expediency; but two or three objections ſtill remain to be conſidered.

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One is, that the claim of literary property is not founded on any principle, hitherto mentioned by the *general* writers on the ſubject of property, as an *original* mode of acquiring it.—It is ſaid, that *occupancy* is the only head, to which the origin of the author's property can in any manner be referred; and that *occupancy* of *thoughts* and *ideas* is quite of a new kind. But a ſhort anſwer will remove this objection. If the foundation, on which I have before reſted the title of the author, is a ſolid one, it is not of importance, whether the title falls under the uſual denominations of original modes of acquiring property; and if it ſhould not, it would be a proof, not of the defect of the author's title, but of the imperfection of thoſe writers, who do not mention any origin of property, under which the author's title can be claſſed. It is not, however, neceſſary to rely wholly on this anſwer; for in truth, *occupancy*, in the proper ſenſe of the word, includes the principal *ſource* of literary property. The title by *occupancy commences* by the taking *poſſeſſion* of a *vacant* ſubject; and the *labor* employed in the cultivation of it, *confirms* the title. Literary property falls preciſely within this idea of *occupancy*. By compoſing and writing a literary work, the author *neceſſarily* is the *firſt poſſeſſor* of it; and it being the produce of his own labor, and in fact a *creation* of his own, he has, if poſſible, a *ſtronger*

title, than the *uſual* kind of *occupancy* gives; becauſe in the *latter* the ſubject has its exiſtence *antecedently* to, and *independently* of, the perſon from whom the *act* of *occupancy* proceeds. Another objection is, that the claim of the right of multiplying copies extends in *principle* to *tranſcribing*, as well as *printing*. I acknowledge as much; and if the *former* was *profitable* like the *latter*, and it was poſſible to multiply copies for ſale ſo expeditiouſly as *materially* to interfere with the *latter*, I ſhould not deem the claim extravagant. But *that* is not poſſible in the nature of *things*; no damage of conſequence can ariſe to the author, from a *common* exerciſe of the right of tranſcribing; and therefore he doth not *pretend* to appropriate that right to himſelf.

I HAVE only one other objection to encounter, ſo far as the claim of literary property depends on general reaſoning. It is an objection, founded on a *ſuppoſed* reſemblance between the caſe of an *inventor* of a *machine*, and *that* of the *author* of a *book*. I claim the full benefit of all the ingenious reaſons, which others have made uſe of to diſtinguiſh the *two* caſes; but inſtead of repeating them, I will add *one* to their number. In my own opinion, the principal diſtinction is, that in *one* caſe the claim really is to an appropriation of the *uſe* of *ideas*; but in the *other*, the claim leaves the uſe of the ideas

ideas *common* to the whole world. There are not any bounds to the extent of such a claim. It would be *impracticable* to receive it; because it could never be fairly decided, when an idea was *new* and *original*, when it was *old* and *borrowed*. The title of the *supposed* inventor of the machine to the sole making of it, cannot be allowed, without excluding all others, not only from the *use* of their *borrowed* ideas; but *even* from the *use* of ideas, which may be as *original* in *them*, as in the person who *first* publishes the invention. The *same* ideas will arise in *different* minds, and it is impossible to establish precisely, in whom an idea is *really original*; and perhaps *most* ideas may in fact be *equally original* in the greater part of mankind; and *priority* in the *publication* of an idea is a most *insufficient proof of its originality*. This shews, that the *perpetual* appropriation of the use of an idea to the real or supposed inventor of a machine, would be as inconsistent with the *rights of others*, as it would be *impracticable*. But these are not the only arguments against perpetually appropriating the *use* of *knowledge* and inventions. It is impossible to sustain the claim consistently with the laws of any country, in which the policy of disallowing monopolies prevails. Every article of trade, every branch of manufacture and commerce, would be affected and clogged, if not totally stopped. Such a per

petual

petual appropriation of the uſe of inventions and ideas would be the *moſt unlimited kind of monopoly* ever yet heard of—a *monopoly*, not of *one* trade or manufacture, but ſuch, that if it had *ever* been endured, it would have ended in a monopoly of almoſt *all* trades and manufactures *collectively*. I have already ſhewn, that the appropriation of the right of printing, to an author, is not liable to *any* of theſe objections; that the claim has its limits and bounds; that the *uſe* of *ideas* and *knowledge* is as *common* as it would be, if the *right* of printing was *not* appropriated; that the author's title to the ſole right of printing, is quite conſiſtent with the rights of others; and that his appropriation of his *copies*, is ſo far from falling within the true idea of a *monopoly*, that the appropriation of copies, independently of the author's right, is even *eſſential* to the carrying on the trade of printing in a manner beneficial to the public.

I HAVE now travelled through the *ſubject* of *literary property*, ſo far as *general principles* of reaſon and property affect the queſtion; and I hope to have ſucceeded in evincing, that according to *them*, the claim of literary property is free from every kind of objection, which has hitherto been ſuggeſted againſt it.

II. I HAVE at length reached the Law of England; but thoſe, who have gone before me in that part of the ſubject, have already been ſo *full* and *accurate* in the ſtating of the authorities, that I hope to be excuſed for being very *general* in that part of the Argument. The manner in which I mean to proceed is, *firſt*, by exhibiting the *principles*, on which literary property falls within the *notice* and *protection* of the *common law* of England; *then* by exhibiting a *general* view of the ſeveral kinds of *authorities*, by which the claim of literary property is corroborated; and, *laſtly*, by taking ſome notice of *ſuch objections*, againſt literary property, as are referable to the law of England.

THE manner, in which I have already explained the *title* of an author to the ſole printing of his own works, renders it unneceſſary *here* to do little more, than to refer to the principles attempted to be eſtabliſhed in the former part of the Argument. The *primary* cauſe of the author's claim is his *labor* in the compoſing of his works; and *this*, *combined* with his *conſequential* power over, and intereſt in, the manuſcript, is the foundation of the author's ſole and excluſive right; which is allowed to be intitled to the protection of the *common law* of England before a *voluntary* and *general* publication. Therefore the author's right *before* publication, is to be conſidered

deſed as *inherent* to his ownerſhip of the *manuſcript* of his compoſition. *After* publication his *right* receives an *acceſſion* of ſtrength ; and from the circumſtances of the publication, there ſprings a *new* and *ſubſidiary* right, founded on each purchaſer's *implied contract* not to invade the author's *pre-exiſting* right of multiplying copies. Viewed in *either* of theſe lights, the author's claim is equally within *acknowledged principles* of the *common law of England.* The right *inherent* before publication is conceded to be conformable to the principles of the *common law*, and in caſe of invaſion, to be intitled to aid from the Court of *Chancery.* The only doubt raiſed is in reſpect to the right *after* publication. I have already evinced, that the author's right is not *intentionally diminiſhed* by the publication. If it is not, the right is *at leaſt* intitled to as much protection as *before.* Beſides, the *implied contract* is of *itſelf* a foundation for the right *after* publication ; and under the form of a contract the *common law* may protect this right, as well as other rights originating from contracts. Even upon that foundation alone, though I do not hereby mean to deſert the other ground, the right may be as effectually protected, as if it ſhould be deemed *property* according to the *rigid* ſenſe of the word. Such rights indeed are, in the eye of the *common law*, *mere choſes in action* ; but the reſult is *ſubſtantially* the ſame ; for in *equity*, ſuch rights are aſſignable in the

ſame

ſame manner as property. If it is aſked, how the *enjoyment* of the right is to be protected, the anſwer is, That action on the caſe, for the damages of an actual invaſion of the right, will protect it in the courts of *common law*; and the remedy by injunction to reſtrain *future* invaſions by printing, may be had in a court of equity. The *claſſing* of the right is as obvious. *Real* eſtate it cannot be, becauſe it has not the moſt diſtant connection with land; and beſides, *it* is a right ſpringing from ownerſhip of the author's *manuſcript*; and *that* being perſonalty, the right incident to it muſt be *ſo* alſo; and as ſuch therefore it is alienable, tranſmiſſible, and liable to the other conſiderations of perſonalty.

BEFORE I explain the various ſources of authorities, from which a recognition of the right claimed may be inferred; I deſire to have it underſtood, that I conceive the *general* principles of reaſon and the *particular* principles of the *common law of England*, ſuch as I have already delineated, to be of themſelves ſufficient to ſuſtain the author's right; and I do moſt ſincerely think, that if the art of printing had been invented in *our own times*, the foundation on which I have argued the title of the author, would not require the leaſt aid from decided caſes, parliamentary recognitions, or any other authority

whatever. With this declaration, I ſhall proceed to ſtate the ſeveral kinds of authorities.

(1.) THE firſt kind of authority I adduce, is the *continual* protection given to *property* in the printing of books *antecedent* to any act of the *legiſlature*. Soon after the introduction of printing into England, the Crown *aſſumed* the power of granting patents for the ſole printing of books. The next ſtep was exerciſing a compleatly arbitrary power over the preſs; and no book was permitted to be publiſhed without a licence *(i)*. This is a ſource *too impure* to be uſed for any other purpoſe, than that of accounting for the not having recourſe to the ordinary courts of juſtice for the protection of property in the printing of books; nor do I aſk for any other benefit from *ſuch* authorities. In 1556 the Stationers Company was erected *(j)*, and from 1558 there are *entries* of *copies* in their books for *particular perſons*. In 1559 there are entries of fines for invading *copy right*; and in 1573 other entries, mentioning the *ſale* of *copies* and the *price*. But in 1582 the entries are ſtill more important; for ſome are made with a *proviſo*, that *if it be found any*

(i) See the Decrees of the Star Chamber in 1556, and 1585, and 1637, as cited in Burrow. Que. of Lit. Prop. 21.

(j) See Burrow. Lit. Prop. 13.

other

other has a right to any of the copies, then the licence for the copies ſo belonging to another ſhall be void. This proviſo is of importance, becauſe it indicates an idea of *copy-right antecedently* to the *licence*. However, I do not preſs *thoſe entries* in any other manner, than the decrees of the Star Chamber.

(2.) THE next kind of authority I ſhall introduce, is what appears to me a *legiſlative recognition of a property in the printing of books*.—On the 14th June 1643, both Houſes of Parliament made an ordinance, declaring.

" THAT no book, pamphlet, nor paper, nor part " of ſuch book, pamphlet, or paper, ſhould from " thenceforth be printed, bound, ſtitched, or put to " ſale by any perſon or perſons whatſoever, *unleſs* " *the ſame be entered in the regiſter-book of the Company* " *of Stationers, according to ancient cuſtom*; and that " no perſon or perſons ſhould thereafter print, or " cauſe to be printed, *any book or books*, or part of " book or books *entered in the regiſter of the ſaid Com-* " *pany for any particular member thereof, without the* " *licence and conſent of the owner or owners thereof; nor* " *yet import any ſuch book or books, or part of book or books* " *formerly printed here, from beyond the ſeas, upon pain* " *of forfeiting the ſame to the reſpective owner or owners* " *of the ſaid copies*, and ſuch further puniſhment as

"ſhall be thought fit." The like ordinance was made 20 September 1649; 7th January 1652; and 28th Auguſt 1655 (*k*).

It is obſervable, that theſe ordinances recognize an *ownerſhip* in books *paramount* to the entry in the books of the Stationers Company; which, without any thing further, might be fairly conſtrued to refer to a *property founded on authorſhip*, as well as to property founded on a leſs exceptionable title. But what puts this out of doubt is the following declaration, which was ſigned near two years before the ordinance of 1643, by ſome of the moſt favourite Divines of the then prevailing party in Parliament.

"We whoſe names are ſubſcribed, at the requeſt "of certain ſtationers or printers, do hereby inform "thoſe whom it may concern, that to the know- "ledge of divers of us (and as all of us do believe) "*that the ſaid ſtationers or printers have paid very con-* "*ſiderable ſums of money to many authors for the copies of* "*ſuch uſeful books as have been imprinted. In regard* "*whereof we conceive it to be both juſt and very neceſſa-* "*ry that they ſhould enjoy a propriety for the ſole imprint-* "*ing of their copies. And we further declare, that unleſs* "*they do ſo enjoy a propriety, all ſcholars will utterly be* "*deprived of any recompence from the ſtationers or prin-*

(*k*) See Scobell's Acts, p. 92. & 230.

"*ters*

"ters *for their ſtudies and labors in writing or prepar-*
" *ing books for the preſs.* Beſides, if the books that
" are printed in England be ſuffered to be imported
" from beyond the ſeas, or any other way reim-
" printed *to the prejudice of thoſe who bear the charges of*
" *the impreſſions*, the authors and the buyers will be
" abuſed by vicious impreſſions, to the great diſcou-
" ragement of learned men, and extream damage to
" all kinds of good learning. The plaintures (and
" other good reaſons which might be named) be-
" ing conſidered, we certify our opinions and de-
" ſires that fitting and ſufficient *caution* be provided
" in this behalf. Wherein we humbly ſubmit to
" grave wiſdoms of thoſe to whom it doth ap-
" pertain."

Calebat Downing, L. L. D.	*John Downine.*
C. Offspring.	*C. Burges.*
Rich. Cole.	*George Walker.*
William Jemat.	*Richard Barnard.*
Hen. Townley.	*Adoniran Byfield.*
Jam. Norris.	*Edm. Calamy.*
John Payne.	*La. Seaman.*
Daniel Featley, D. D.	*Sam. Rogers.*
Will. Gouge, S. T. P.	*N. Prime.*

THIS paper is copied from a manuſcript in the poſſeſſion of the Stationers Company, and ſhews, that property in *copies* founded on *authorſhip* was ſo far

far from not being thought of at the time of the ordinance of 1643, that it was moſt probably one cauſe of giving an *additional* ſecurity. But I ſhall give a ſtill further proof, that *authorſhip* was not then unknown as a *title* of property, by an extract from an Argument of the famous M. Prynn (*l*). The Argument was delivered in the 17th of Charles I. before a Committee of the Commons for printing; and was made againſt four patents for the ſole printing of books; one of which patents was for printing *Bibles* and *Teſtaments*. After endeavouring to prove, that the king had not a right to grant the patent by *prerogative*; he proceeds in the following words; " *Objection* 4. The copies of the Bibles and New " Teſtaments are the Patentees *own copies*, who *paid* " for them; and the Bible newly tranſlated was " the *King's copy, who had the ſame power as other au-* " *thors have to beſtow it on whom he pleaſed*, and that " tranſlation coſt the Patentees four thouſand " pounds, or more. *Therefore as all printers and ſta-* " *tioners claim a peculiar intereſt in their own proper* " *copies, that no man may print them but themſelves, or* " *by their order, ſo may the King's printers and the Pa-* " *tentees in theſe Bibles or other books, ſince that the* " *copies are their own; and that without any danger of*

(*l*) The original Argument is in the Temple Library; and there is a fair copy amongſt the Harleian manuſcripts at the Britiſh Muſeum.

" *a mono-*

" *a monopoly, ſince every printer or ſtationer may print*
" *his own copy ſtill, though* not another man's."——
" *Anſwer.* This being the *ſtrongeſt* and *moſt colourable*
" *objection*, I ſhall give a full anſwer unto it."

MR. Prynn then endeavours to remove the Objection, by diſtinguiſhing between the *Bible* and *other* books, and attempting to ſhew, that the Bible was intended to be *common*. He alſo calls in queſtion the expence ſaid to have been laid out by the Patentees; but he very *faintly* and *ambiguouſly* controverts the claim of an *author*. I do not mention Mr. Prynn's Argument for any other purpoſe, than to ſhew, that the queſtion of literary property now depending, had occurred and been argued before the paſſing of the firſt licenſing ordinance; and that whatever *recognition* it may contain, it was not an *accidental* one. The next ſtatute I have to mention is the Licenſing Act of the 13th and 14th Cha. II. c. 33. ſ. 6. in which there is a clauſe reſpecting *property* in *copies*, ſimilar to *that* in the *firſt* licenſing ordinance. The Licenſing *Act*, after being renewed ſeveral times, expired ſoon after the Revolution. Several attempts were made to revive it; and in order to ſhew what was the idea of the times in reſpect to *property* in *copies*, and that the licenſing acts were underſtood only to *ſecure copy-right*, and not to *create* it, I give the following extract from

ſome

ſome printed Reaſons for reviving the Licenſing Act.

" THE ſecond deſign and intent of this Act is, " To encourage and preſerve *property* to *their au-* " *thors and their aſſigns*; and this, by enjoying entries " in a public regiſter (which is regularly and fairly " kept); by prohibiting the importation of any books " from beyond the ſeas which were printed here " before; and laſtly, aſcertaining the right of " copies to the proprietors thereof; which provi- " ſion, almoſt in the very ſame words, was eſta- " bliſhed, not only by decrees in Charles the " Firſt's time, and long before, but alſo by an Act " of Parliament, Sept. 20, 1649.

" THIS law is not only convenient for authors " of the preſent and future ages, but juſt even in " reſpect of *ancient copies, in which a legal intereſt hath* " *been acquired, and that at great charges*; and theſe " intereſt are become the livelihood and ſole eſtate " of ſeveral widows, fatherleſs children, and other " whole *families.*"

THERE are many ſtrong expreſſions in this extract; and I have to add, that in the printed *Anſwer* to the Reaſons for reviving the Licenſing *Act*, the *property* of authors in their works is *not denied.* As a further explanation

explanation of the Licenſing Act, I ſhall here introduce an extract from the Codicil (*m*) of Sir Matthew Hale. His words are theſe:

Item, "Whereas it may ſo fall out, that ſome "books of my own writing, as well touching the "common law as other ſubjects (*n*), And for that "purpoſe one book *De Homine* is now in the preſs, "for the which the ſtationer from Shrewſbury hath "contracted to pay 20l. *and* 20*l. more for a ſecond* "*impreſſion*, whereof 5l. is paid; I do appoint "that the reſt of the money coming for that "book ſhall be equally divided between Thomas "Sherman, Thomas Shrewſbury, Charles Crew, and "Phineas Unicum.—And if any other books ſhall "happen to be printed, I would have William "Shrewſbury to have the *copy* and *impreſſion*, giving "in reaſon as another ſtationer will give for it. And "the money ariſing by ſuch contracts to be divided "into ten equal ſhares or parts; whereof two ſhares "go to Mr. Edward Stephens, for his care about "the impreſſion; one ſhare to Mr. Allen, my ama-"nuenſis, for his care and aſſiſtance in examining "the copy and impreſſions; one ſhare among "my maid ſervants, equally to be divided; four "ſhares to be to Thomas Sherman, Thomas

(*m*) Dated 2d November, 1676.

(*n*) Here ſeems to be an omiſſion.

" Shrewſbury, Phineas Unicum, and Charles Crew;
" and the remaining two ſhares to be equally di-
" vided among all my houſhold ſervants."

THE words of this Codicil, reciting the agreement to receive a ſum for a *ſecond impreſſion*, ſeem to take for granted, that the right of multiplying copies was not renounced by the *firſt* impreſſion.

(3.) THE remaining head of authorities conſiſts of Adjudged Caſes. Theſe have been all ſtated very fully in a late publication *(o)*; and therefore I ſhall only mention generally what they prove. One order of Caſes ſhews the right of the King to the ſole printing of the Statutes, of the Bible, and ſome other publications peculiar to the Crown. Theſe are important Caſes; for they are the ſtrongeſt precedents in favor of a *property* in *copies* at *common law*.

THE *origin* of the property or excluſive right of printing which is veſted in the Crown, is *different* from the *origin* of the author's *title*. The King's right ſprings from *prerogative*; the author's from his *labor* in compoſing his work, and his intereſt in it. The *ſource* of their right is *different*; but the right itſelf is the ſame.——Another order of Caſes is thoſe, in which the *Court* of *Chancery* has reſtrained printing by injunction in favor of the author's

(*o*) Burr. Lit. Prop.

pro-

property. In ſome of theſe Caſes, the Court has interpoſed to prevent the printing of *unpubliſhed manuſcripts* without the conſent of the author or his repreſentatives. In others, the Court has reſtrained the invaſion of *copy-right*, notwithſtanding the expiration of the term of years granted by the ſtatute of queen Ann.

THE only Caſe, in which the author's property, independantly of the ſtatute of queen Ann, has been regularly argued and determined upon in a Court of Common Law, is that of Millar and Taylor, in which the judgment of the Court of King's Bench was given for the Author by three Judges againſt one.

As to the objections referable to the law of England, the only two of conſequence are *that* of a monopoly, and *that* founded on the ſtatute of Queen Ann.—The former objection I have in fact already anſwered, in the general reaſoning on the nature of a monopoly; and I have nothing to add to the diſtinction there made.

As to the ſtatute of Queen Ann, it doth not contain any thing 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 pro-

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* 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.

I HAVE now brought my Argument to a concluſion; and I hope, that the title of an author and his aſſigns to the ſole right of printing and ſelling his works is demonſtrated to be founded as well on the principles of the *common law* of *England*, as it is on the principles of *reaſon*, *natural juſtice*, and *public utility*.

FINIS.

POSTSCRIPT

TO

MR. HARGRAVE'S ARGUMENT

IN DEFENCE OF

LITERARY PROPERTY.

IT muſt be obvious to every perſon, who reads the preceding Argument, that the laſt twenty pages of it are at beſt but a rude and faint ſketch of the reaſoning, which might be urged to ſuſtain the claim of Literary Property. The truth is, that in conſequence of a delay, *principally* proceeding from a conſciouſneſs of not being armed with the qualifications ſo eſſential to a great undertaking, the Argument actually *remained* to be *compoſed*, at the time it ought to have been *printed*. My mind, indeed, had been previouſly ſtored with almoſt every idea, which an extenſive inquiry or a frequent reflection could ſuggeſt; but the arrangement of my materials, and the cloathing of my conceptions, though in my opinion

opinion far the moſt arduous part of the taſk, were ſtill unattempted. Finding myſelf in a ſituation ſo critical, I began the undertaking with the moſt diſcouraging apprehenſions for the event; and theſe continually operated in obſtructing my progreſs. Diſtreſſed, however, as I was for time, I ſaw the neceſſity of laying a firm and ſolid foundation; and therefore I determined at all events not to be ſparing of my attention to the firſt part of the ſubject. So far as the Argument depended on the ſtating of authorities and hiſtorical facts, or inferences from them, it had been already occupied by others, and was indeed almoſt exhauſted. But it appeared to me, that the *ſource* of the property claimed, and the *practicability* of *deriving a title* to it, without the aid of any *poſitive law* to *create* the *right*, or to *regulate* its *enjoyment*, would not only bear, but even required, a further and more minute obſervation; and that for want of it, and a more *pointed* anſwer to ſome objections much relied upon, the moſt unprejudiced perſon might be indiſpoſed to ſubmit to the weight of *authorities*. Accordingly, I exerted my whole force of mind on this part of the ſubject; and if I ſhould be deemed ſucceſsful in the execution, it muſt be chiefly imputed to the ſtrong influence of a ſelf-conviction, that I was arguing with reaſon and truth on my ſide. But by the time I had reached that part of the ſubject, in which I mentioned the *ſup-*

poſed

poſed reſemblance between the inventor of a machine and the author of a book, I found, that only one day remained for compleating the Argument. This will account for the crude manner, in which the remainder of the Argument is executed, particularly where I have expreſſed my idea of the true diſtinction between a claim to the ſole making of a machine, and to the ſole printing of a book; a diſtinction, which, if I have ſaid ſufficient to give the leaſt conception of what I found myſelf upon, will, I dare to ſay, be clearly and demonſtrably eſtabliſhed by others, however defective I may have been in unfolding and applying the principles on which it depends.

SUCH were the circumſtances, under which I wrote the preceding Argument; and I have thought it neceſſary to explain them, as well to exculpate myſelf from the charge of a wilful impropriety in the *mode* and *time* of uſing the Argument, as to prevent all inferences to the prejudice of the right in queſtion, from my feeble and imperfect defence of it.

Lincoln's-Inn,
Feb. 11, 1774.

F. H.

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AN

ARGUMENT

IN THE CASE OF

JAMES SOMMERSET,

A NEGRO:

Lately determined by the COURT of KING'S-BENCH.

By Mr. HARGRAVE.

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