LEGAL RECREATIONS,

OR

POPULAR AMUSEMENTS

IN THE

LAWS OF ENGLAND.

BY A BARRISTER AT LAW.

VOL. II.

FLORIFERIS UT APES IN SALTIBUS OMNIA LIBANT,
OMNIA NOS ITIDEM——————————LUCR.

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being conſcious that he could not recover, by reaſon of the concealment. Therefore I think the plaintiff cannot recover. *Gibbon* againſt *Payton*, *King's Bench*, 4 *Burrow's Reports*, 2298. 17 *April* 1769. The rule for a new trial was therefore diſcharged.

A bailee (that is) a perſon to whoſe care any thing is entruſted to keep for the owner, is only obliged to keep the thing with the ſame care he would have kept his own, and if a loſs in that caſe happens, he is not liable to make it good. But a carrier in reſpect to the reward he receives for carriage is liable for loſs, though it happen without any negligence on his part; and even though he be robbed. But the reward ought to bear proportion to the riſque. He ought therefore to have more for carrying money or jewels, than for common goods, and he may undertake the carriage on what conditions he thinks proper; and is not liable if he be deceived in the value of the goods.

LITERARY PROPERTY.

LITERARY property is the right which an author may be ſuppoſed to have in his own original literary compoſitions. ſo that no other perſon without his leave may publiſh or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he ſeems to have clearly a right to diſpoſe of that identical work as he pleaſes, and any attempt to vary the diſpoſition he has made of it, appears to be an invaſion of that right. Now the identity of a literary compoſition conſiſts intirely in the ſentiment and the language; the ſame conceptions, clothed in the ſame words, muſt neceſſarily be the ſame compoſition: and whatever method be taken of exhibiting that compoſition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is ſo exhibited; and no other man (it hath been thought) can have a right to exhibit it, eſpecially for profit, without the author's conſent. This conſent may perhaps be tacitly given to all mankind, when an author ſuffers his work to be publiſhed by another hand, without any

claim

claim or reſerve of right, and without ſtamping on it any marks of ownerſhip; it being then a preſent to the public, like building a church or bridge, or laying out a new highway: but, in caſe the author ſells a ſingle book, or totally grants the copy-right, it hath been ſuppoſed, in the one caſe, that the buyer hath no more right to multiply copies of that book for ſale, than he hath to imitate for the like purpoſe the ticket which is bought for admiſſion to an opera or a concert; and that, in the other, the whole property, with all its exclu-ſive rights, is perpetually transferred to the grantee. On the other hand it is urged, that though the excluſive property of the manuſcript, and all which it contains, undoubtedly belongs to the author, before it is printed or publiſhed: yet from the inſtant of publication, the excluſive right of an author or his aſſigns to the ſole communication of his ideas immediately vaniſhes and evaporates; as being a right of too ſubtile and unſubſtantial a nature to become the ſubject of property at the common law, and only capable of being guarded by poſitive ſtatutes and ſpecial proviſions of the magiſtrate. 2 *Black. Comm.* 405.

At the time of Sir *William Blackſtone*'s writing the above obſervations, it was not determined, whether an author had an excluſive and permanent copy-right in his productions, independent of the acts of parliament which veſt it in him, this queſtion has been ſince ſettled, as will be noticed preſently. In the mean time, we will give an abſtract of theſe acts, by which this ſpecies of property is now entirely regulated.

The 8th. *Ann.* ch. 19. *A. D.* 1709, entitled

An act for the encouragement of learning, by veſting the copies of printed books in the authors or purchaſers of ſuch copies, during the times therein mentioned.

Reciting that, WHEREAS, printers, bookſellers, and other perſons have of late frequently taken the liberty of printing, reprinting, and publiſhing, or cauſing to be printed, reprinted, and publiſhed, books and other writings, without the conſent of the authors or proprietors of ſuch books, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore ſuch practices for the future, and for the encouragement of learned men to compoſe and write uſeful books. It was therefore enacted, that the author of any book or his aſſigns ſhall have the ſole liberty of printing it, for the term of fourteen years and no longer, but that if at the end of that term, the author himſelf be living, he ſhall have the ſole right to the printing thereof, for another term of fourteen years: and that if any other

perſon ſhall reprint or import the ſame, or expoſe it to ſale, being ſo reprinted or imported during theſe periods, without the conſent of the proprietor in writing: ſuch books ſhall be forfeited; and the offender ſhall forfeit one penny for every ſheet.

And whereas many perſons may through ignorance offend againſt this act, unleſs ſome proviſion be made whereby the property in every ſuch book, as is intended by this act to be ſecured to the proprietor thereof may be aſcertained, as likewiſe the conſent of ſuch proprietor for the printing or reprinting ſuch book may be known. It is therefore enacted, that in order to entitle the author or proprietor to proſecute any perſon for reprinting his book, he ſhall before the publication, enter it in the regiſter book of the company of ſtationers, which may be inſpected without fee by any perſon, and the clerk ſhall certify or requeſt, whether there has been ſuch an entry, for which his fee ſhall be ſixpence, and if he refuſe he forfeits 20l.

The fourth ſection of the act gives a power to the archbiſhop of *Canterbury*, the Lord Chancellor, and others on complaint, that books are ſold at an unreaſonable price, to reduce the price.

Section 5th enacts that nine copies of each book ſhall before publication be delivered to the warehouſe-keeper of the company of ſtationers, for the uſe of the univerſity libraries of *Oxford* and *Cambridge*, the libraries of the four univerſities of *Scotland*, the library of *Zion* college in *London*, and the library belonging to the faculty of advocates at *Edinburgh*; and if this be not done, the proprietor, printer, or bookſeller, ſhall forfeit the value of the books, and alſo 5l. for every copy not delivered.

The above act of parliament having thus given to authors the ſole liberty of printing and reprinting their works for fourteen years, and for another fourteen years, if at the expiration of the firſt, they be living, protected by penalties on any other perſons who without their leave printed or reprinted the ſame, ſtill it remained a queſtion, whether an author had not a permanent right of property in his work by common law and independent of this act of parliament; for as the act does not expreſſly take away any right which an author might be ſuppoſed to have, of courſe that right, if it exiſted, would continue even after the expiration of the term, for which the act gives him the ſole right of printing his productions, and the operation of the act would extend no farther than to give him certain remedies for the violation of this right.

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This became a very important queſtion, and produced an intereſting debate, in a caſe produced by *Thomſon's Seaſons*, which as found by a ſpecial verdict was in ſubſtance as follows.

James Thompſon, the author of this work, printed it on his own account from the year 1727, to 1729, after which he ſold the copy-right to *Andrew Millar*, and to his heirs and aſſigns for ever. After the expiration of the term, during which the beforementioned act of 8 *Ann.* ſecures the ſole printing to the author and his aſſigns, *Robert Taylor* thinking the copy-right to this work had expired with it, publiſhed it without *Millar's* licence or conſent, on which *Millar* brings his action againſt *Taylor*, and lays his damages at 200l. and the only queſtion was, whether an author or his aſſigns has not a permanent copy-right in his work?

The counſel for *Millar* the plaintiff, inſiſted that there is a real property remaining in authors, after publication of their works; and that they only, or thoſe who claim under them, have a right to multiply the copies of ſuch their literary property, at their pleaſure for ſale: and that this right is a common law-right, which always has exiſted, and does ſtill exiſt, independent of and not taken away by the ſtatute of 8th *Ann. c.* 19.

On the other ſide the council for *Taylor* the defendant, abſolutely denied that any ſuch property remained in the author, after the publication of his work: and they treated the pretenſion of a common law-right to it, as mere fancy and imagination, void of any ground or foundation. They ſaid that formerly, the printer and not the author, was the perſon who was ſuppoſed to have the right, (whatever it might be:) and that accordingly the grants were all made to printers. That if an original author publiſhes his work he ſells it to the public: and the purchaſer of every book or copy has a right to make what uſe of it he pleaſes; and may multiply each book or copy, to what quantity he pleaſes, and the ſole excluſive right of multiplying ſuch copies, does not remain in the author after publication. It would be a monopoly if it did. The purchaſer of the book has the *jus fruendi et diſponendi*. That the act of 8 *Ann.* c. 19. for the encouragement of learning, veſts the copies of printed books in the authors or purchaſers of ſuch papers, during the time therein limited. But it is only during the limited time; and under the terms preſcribed by the act, and that the utmoſt extent of the limited time, is in the preſent caſe expired.

The caſe was twice argued by Mr. *Dunning* and Mr.

Blackſtone for the plaintiff, *Millar*, and by Mr. *Thurlow* and Mr. *Murphy*, for the defendant, *Taylor*. After which, the judges of the Court of King's Bench, delivered their opinions ſeparately and at large, the junior Judge beginning, and ſo proceeding upward to the Lord Chief Juſtice.

Mr. *Juſtice Willes*, after ſtating the caſe and ſpecial verdict, ſpoke to the following effect. The queſtions of law muſt ariſe out of the facts found by this verdict. Some of them are worthy of obſervation.

It is found, "that the work is an original compoſition, firſt printed and publiſhed in *London*; the author, a natural born ſubject, reſident in *England*." Therefore this caſe has nothing to do with foreign books; which ſtand on a very different footing.

It is found, "that the author printed this work from the beginning of the year 1727, to the end of 1729, for his own uſe and benefit, as the proprietor; and then ſold the copy to the plaintiff, his heirs and aſſigns for ever, for a full and valuable conſideration." Therefore there is no occaſion to meddle with caſes, where the author may be ſuppoſed to have relinquiſhed the copy, and conſequently to have given a general licence to print.

Many of the beſt books fall under that deſcription. A very little evidence might be ſufficient, after the author's death, to imply ſuch a tacit conſent: as if the book had not been entered before publication; it would be a circumſtance to be ſubmitted to the jury, "that the copy was intended to be left open." So, if after publication, the author had not transferred his right, or acted himſelf as proprietor.

But the finding here, being of a ſale and transfer for a valuable conſideration, this verdict will not authorize any claim founded on the ſuppoſed conſent of the author.

It is alſo found, "that the plaintiff always had a ſufficient number of theſe books expoſed to ſale, at a reaſonable price." Therefore this caſe has nothing to do with caſes where the plaintiff's relief may be rebutted, by ſhewing that he meant to enhance the price; which is againſt law.

It is found too. "That the defendent ſold ſeveral copies of the *ſaid* book." And therefore this caſe is not embarraſſed with any queſtion, "wherein conſiſts the identity of a book."

Certainly *bona fide* imitations, tranſlations, and abridgments are different; and, in reſpect of the property, may be conſidered as new works: But colourable and fraudulent variations will not do.

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This is not the caſe of an unpubliſhed manuſcript taken in execution by creditors, or claimed by aſſignees under a commiſſion againſt a bankrupt-author. When a queſtion of that ſort ariſes, the court will conſider what is right. And the ſame queſtion may equally ariſe upon the term granted by the act of parliament. And therefore this is not a doubt which ſubſiſts merely on the common law right.

If the copy of the book belonged to the author, there is no doubt but he might transfer it to the plaintiff. And if the plaintiff, by the transfer, is become the proprietor of the copy, there is as little doubt that the defendant has done him an injury, and violated his right: For which, this action is the proper remedy.

But the term of years ſecured by 8 Ann. c. 19. is expired. Therefore the author's title to the copy depends upon two queſtions———

1ſt. Whether the copy of a book, or literary compoſition, belongs to the Author, by the common-law.

2d. Whether the common law-right of authors to the copies of their own works is taken away by 8 Ann. c. 19.

The name, "copy of a book," which has been uſed for ages, as a term to ſignify the ſole right of printing, publiſhing and ſelling, ſhews this ſpecies of property to have been long known, and to have exiſted in fact and uſage, as long as the name.

Till the year 1640, the crown exerciſed an unlimited authority over the preſs; which was enforced by the ſummary powers of ſearch, confiſcation and impriſonment, given to the Stationers Company, all over the realm and the dominions thereunto belonging, and by the then ſupreme juriſdiction of the *Star-Chamber* without the leaſt obſtruction from *Weſtminſter-Hall*, or the parliament, in any inſtance.

"Whether before 1640, Copy-Rights exiſted in this kingdom upon principles and uſage," *can be only looked for* in the *Stationers Company*, or the *Star-Chamber*, or acts of ſtate.

As to this point, their evidence is competent, and liable to little ſuſpicion. It was indifferent to the views of government, whether the copy of an innocent book licenſed, was open, or private property. It was certainly againſt the power of the crown, to allow it as a private right, without being protected by any royal privilege.

It could be done only on principles of private juſtice, moral fitneſs, and public convenience; which, when applied to

a new ſubject, make common law without a precedent; much more when received and approved by uſage.

It appears from the acts of ſtate taken notice of at the bar, that unleſs pirating another man's copy be an abuſe on ſuch principles as make common law, it was not prohibited. If it be ſuch an abuſe, then there are general words in ſeveral prohibitions, to include it.

The decree of the *Star-Chamber* in 1556, regulating the manner of printing and the number of preſſes is confirmed, with additional penalties, by ordinances of the *Star-Chamber*[a] ſigned by Sir *N. Bacon*, Lord *Burleigh*, and all the moſt eminent privy counſellors of that age.

Among other things, it is forbidden to print againſt the force and meaning of any ordinance, prohibition or commandment in any of the ſtatutes or laws of this realm; or in any injunction, letters patent, or ordinances ſet forth or to be ſet forth by the Queen's grant, commiſſion or authority.

By another decree of the *Star Chamber*, 23 *June* 1585, 28. *Eliz. Art.* 4.[b] "every book, &c. is to be licenſed—" nor ſhall any one print any book, work or copy, againſt the form or meaning of any reſtraint contained in any ſtatute or laws of this realm, or in any injunction made by her majeſty or her privy council; or againſt the true intent and meaning of any letters patent, commiſſions or prohibitions under the great ſeal; or contrary to any allowed ordinance ſet down for the good government of the ſtationers company."

A proclamation of the 25th *September* 1623, 21 *Jac.* 1. recites the above decree of 28 *Eliz.* and that the ſame had been evaded, amongſt other things, "by printing beyond ſea ſuch allowed books, works or writings, as have been imprinted within the realm by ſuch to whom the ſole printing thereof, by letters patent, or lawful ordinance or authority, doth appertain" And then this proclamation enforces the ſaid decree.

By another decree of the *Star-Chamber*, made on 11th *July* 1637, article the 7th,—No perſon is to print, or import (printed abroad) any book or copy which the company of ſtationers, or any other perſons hath or ſhall, by any letters patent, order or entrance in their regiſter book, or otherwiſe, have the right, privilege, authority or allowance ſolely to print.

Theſe are all the acts of ſtate relative to this matter.

[a] 29 *June* 1566. *Strype's Life* of Archbiſhop *Parker*, 221.
[b] *Strype's Life* of Archbiſhop *Whitgift*, 222-3. and appendix No. 24.

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No caſe of a proſecution in the Star-chamber, for printing without licence, or againſt letters patent, or pirating another man's copy, or any other diſorderly printing, has been found. Moſt of the judicial proceedings of the Star-chamber are loſt or deſtroyed.

But it is certain, that down to the year 1640, copies were protected and ſecured from piracy, by a much ſpeedier and more effectual remedy, than actions at law, or bills in equity.

No licence could be obtained, "to print another man's copy:—Not from any prohibition; but becauſe the thing was immoral, diſhoneſt, and unjuſt. And he who printed without a licence, was liable to great penalties.

Mr. *Blackſtone* argued very materially from the books of the Stationers Company; and read many entries. And from the extract of them, it appears that there is no ordinance or by-law relative to copies, till after the year 1640: and yet, from the erection of the company, copies were entered as property; and pirating was puniſhed.

Their firſt charter was in 1556; their ſecond, in 1558.

In 1558, and down from that time, there are entries of copies for particular perſons.

In 1559, and downward from that time, there are perſons fined for printing other men's copies.

In 1573, there are entries which take notice of the ſale of the copy, and the price.

In 1582, there are entries with an expreſs proviſo, "that "if it be found any other has right to any of the copies, then "the licence, touching ſuch of the copies ſo belonging to "another, ſhall be void."

It is remarkable, that the decree of the Star-chamber in 1637 expreſſly ſuppoſes a copy-right to exiſt otherwiſe than by patent, order, or entry in the regiſter of the ſtationers company: which could only be by common law.

But in 1640, the Star Chamber was aboliſhed. The troubles began ſoon after. The king's authority was ſet at nought: all regulations of the preſs, and reſtraints of unlicenſed printing, by proclamations, decrees of the Star-Chamber, and charter-powers given to the Stationers Company, were deemed to be, and certainly were illegal.

The licentiouſneſs of libels induced the two houſes to make an ordinance which prohibited printing, unleſs the book was firſt licenſed, and entered in the regiſter of the Stationers Company. Copy rights, in their opinion, then, could only ſtand upon the common law: both houſes take it for granted.

The ordinance therefore prohibits printing, without con-

ſent of the owner; or importing (if printed abroad;) upon pain of forfeiting the ſame to the owner or owners of the copies of the ſaid books, &c.

This proviſion neceſſarily ſuppoſes the property to exiſt: it is nugatory, if there was no owner. An owner could not, at that time, exiſt, but by the common law.

In *November* 1644, *Milton* publiſhed his famous ſpeech, for the liberty of unlicenſed printing, againſt this ordinance: and among the gloſſes which he ſays were uſed to colour this ordinance, and make it paſs, he mentions "the juſt retaining "of each man his ſeveral copy; which God forbid ſhould be "gain-ſaid!".

So little did he, (though an enthuſiaſt for liberty,) think that the liberty of unlicenſed printing ſhould extend to violate the property of copies! and yet, this copy-right could, at that time, ſtand upon no other foundation, than natural juſtice and common law. Thoſe who were for, and thoſe who were againſt a licenſer, all agreed "that literary property "was not the effect of arbitrary power, but of law and juſ-"tice; and therefore ought to be ſafe."

In 1649, the long parliament made an ordinance which forbids printing any book legally granted, or any book entered, without conſent of the owner; upon pain of forfeiture, &c.

The ſame obſervations occur upon this laſt, as upon the former ordinance.

In 1662, the act of 13 & 14 C. II. (the licenſing act) prohibits printing any book, unleſs firſt licenſed, and entered in the regiſter of the Stationers Company: it alſo prohibits printing without the conſent of the owner, upon pain of forfeiting the book, and 6s. 8d. each copy; half to the king, and half to the owner: to be ſued for by the owner, in ſix months; beſides being otherwiſe proſecuted as an offender againſt the act.

The act ſuppoſes an ownerſhip at common law. And the right itſelf is particularly recognized in the latter part of the third ſection of the act; where the Chancellor and Vice-chancellor of the univerſities are forbid to meddle with any book or books, the right of printing whereof doth ſolely and properly belong to any particular perſon or perſons.

The ſole property of the owner is here acknowledged in expreſs words, as a common law-right: and the legiſlature who paſſed that act, could never have entertained the moſt diſtant idea, "that the productions of the brain were not a "ſubject matter of property." To ſupport an action on this ſtatute, ownerſhip muſt be proved: or the plaintiff could not recover;

recover: becauſe the action is to be brought by the owner; who is to have a moiety of the penalty.

The various proviſions of this act effectually prevented piracies; without actions at law, or bills in equity, by owners.

But caſes aroſe of diſputed property. Some of them were between different patentees of the crown: ſome, "whether "it belonged to the Author, from his invention and labour; "or the king, from the ſubject matter;" which occaſioned theſe points to be agitated in *Weſtminſter-Hall.*

The firſt caſe on this ſubject was between *Atkins*, the law-patentee, and ſome members of the Stationers Company. The plaintiff claimed under the law-patent. The defendants had printed *Roll's* abridgement. The bill was brought for an injuction. And the Lord Chancellor awarded an injunction againſt every member of the Company. The defendants appealed to the Houſe of Lords: and the decree was affirmed.

This was argued on the footing of a prerogative copy-right in the crown, in all law-books. It was urged, that the king pays the judges who pronounced the law—That the laws are the king's laws, &c. I do not enter into the reaſons of the determination; but only cite it to ſhow that the Lords went upon this doctrine, which was not diſputed, "that a copy-"right was a thing acknowledged at common law." and "then they agreed that the king had this right, and had "granted it to the patentees." In this light, this caſe was very properly ſtated by Mr. *Blackſtone*; and argued from, as being an authority in his favour.

The next caſe was that of *Roper* v *Streater*, *Skinner* 234. and mentioned and alluded to, in 1 *Mod.* 257. Which came on before this court (Lord Chief Juſtice *Hale* then preſiding) about 22 *C.* II. and judgment was given *M.* 24 *C.* 2. *Roper* had bought, from the executors of Mr. Juſtice *Croke*, the third part of his Reports. *Streater* was law-patentee; and reprinted it, without the plaintiff's conſent. *Roper* brought an action of debt, as owner, upon the licenſing act. *Streater* pleaded the king's grant. Upon which, the plaintiff demurred: and it was adjudged for the plaintiff, in the common pleas. Which is a judicial authority in point, "that the plaintiff, by purchaſe from the executors of the author, was owner of the copy at common law."

Nor did the reverſal in the Houſe of Lords at all ſhake this authority; becauſe the reverſal proceeded (as in the caſe of *Atkyns*) upon an opinion "that the copy belonged to the king."

Beſides, it appears that the judges were not aſked their opinions

opinions, on this occaſion; and probably they would not have concurred in the reverſal; as the majority of the Houſe of Lords, who were for reverſing, refuſed to hear their opinions. For, it is ſaid, in the journals, that after various debate and conſideration, the queſtion was propounded "whether the judges ſhould be heard in this caſe:" and it was reſolved in the negative; diſſentiente *Angleſey*.

In the argument of the caſe of the Stationers Company againſt *Parker*, in *Skinner* 233, it is ſaid, "it is true, that this action of *Roper* v *Streater* was brought on the act of 14 *C.* II. which is expired. But that ſtatute did not give a right, but only an action of debt." [*Vide Skinner*, 234.]

The next caſe is that of *The Company of Stationers* v *Seymour* 29 *Car.* II. in 1 *Mod.* 256. The plaintiffs, as grantees of the crown, brought an action of debt againſt the defendant, for printing *Gadſbury's Almanac*. *Pemberton*, in his argument ſaid, when Sir *Orlando Bridgman* was Chief Juſtice in this court (the common pleas) there was a queſtion raiſed concerning the validity of a grant of the ſole printing of any particular book, with a prohibition to all others to print the ſame; "how far it ſhould ſtand good againſt thoſe who claim a property paramount the king's grant:" and opinions were divided on that point.

But (ſays he) the defendant, in our caſe, makes no title to the copy: he only pretends a nullity in our patent.

The book which this defendant hath printed has no certain author: and then, according to the rules of law, the king has the property; and, by conſequence, may grant his property to the company.

The court thought that Almanacs might be prerogative copies; and ſaid, "theſe additions of prognoſtications do not alter the caſe; no more than if a man ſhould claim a property in another man's copy, by reaſon of ſome inconſiderable additions of his own."

Theſe were times when prerogative ran high. But ſtill theſe caſes prove "that the copy-right was at that time a well-known claim;" though the overgrown rights of the crown were, in ſome inſtances, allowed and adjudged (as in this caſe) to over-rule them.

The licenſing act of *C.* II. was continued by ſeveral acts of parliament; but expired 9th *May*, 1679. 31 *C.* II. Soon after which, there is a caſe in *Lilly's* entries, of *Hilary* term 31 *C.* II. *B. R.* an action on the caſe brought for printing the *Pilgrims Progreſs*; of which the plaintiff was and is the true proprietor;

proprietor; whereby he loſt the profit and benefit of his copy. But I don't find that this action was ever proceeded in.

The licenſing act of 13 & 14 *C.* II. was revived by 1 *Jac.* II. c. 7; and continued by 4 *W. & M.* c. 24; and finally expired in 1694.

For five years ſucceſſively, attempts were made for a new licenſing act. Such a bill once paſſed the Houſe of Lords; but the attempts miſcarried, upon conſtitutional objections to a licenſer.

The proprietors of copies applied to parliament, in 1703, 1706, and 1709, for a bill to protect their copy-rights which had been invaded, and to ſecure their properties. They had ſo long been ſecured by penalties, that they thought an action at law an inadequate remedy; and had no idea a bill in equity could be entertained, but upon letters patent adjudged to be legal. A bill in equity, in any other caſe, had never been attempted or thought of: an action upon the caſe was thought of in 31 *C.* II; but was not proceeded in.

In one of the caſes given to the members in 1709, in ſupport of their application for a bill, the laſt reaſon or paragraph is as follows—"The liberty now ſet on foot of breaking through this ancient and reaſonable uſage is no way to be effectually reſtrained, but by an act of parliament. For, by common law, a bookſeller can recover no more coſts than he can prove damage: but it is impoſſible for him to prove the tenth, nay perhaps the hundredth part of the damage he ſuffers; becauſe a thouſand counterfeit copies may be diſperſed into as many different hands all over the kingdom, and he not be able to prove the ſale of ten. Beſides, the defendant is always a pauper: and ſo the plaintiff muſt loſe his coſts of ſuit. (No man of ſubſtance has been known to offend in this particular; nor will any ever appear in it.) Therefore the only remedy by the common law, is to confine a beggar to the rules of the *King's Bench* or *Fleet*: and there he will continue the evil practice with impunity. We therefore pray, that confiſcation of counterfeit copies be one of the penalties to be inflicted on offenders."

On the 11th of *January* 1709, purſuant to an order made upon the bookſeller's petition, a bill was brought in, for ſecuring the property of copies of books to the rightful owners, &c. On the 16th of *February*, 1709, the bill was committed to a committee of the whole houſe; and reported with amendments, on the 21ſt of *February*, 1709.

I ſhall conſider the bill as it paſſed into a law, and the arguments drawn from the alterations made in the courſe of

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its paſſing in the Houſe of Commons, when I come to the ſecond head or queſtion which I propoſed to ſpeak to; and now proceed upon the fact of uſage and authority ſince 1709.

The Court of Chancery, from that time to this day, have been in an error, if the whole right of an author in his copy depends upon this poſitive act, as introductive of a new law. For, it is clear, the property of no book is intended to be ſecured by this act, unleſs it be entered: nobody offends againſt this act, unleſs the book be entered. Conſequently, the ſole copy-right is not given by the act, unleſs the book be entered. Yet it is held unneceſſary to the relief in Chancery, that the book ſhould be entered.

There is alſo an expreſs proviſo, "That all actions, ſuits, bills, &c. for any offence that ſhall be committed againſt this act, ſhall be brought, ſued and commenced within three months after ſuch offence committed; or elſe, the ſame ſhall be void and of none effect."

If all copies were open and free before, pirating is merely an offence againſt ſtatute; and can only be queſtioned, in any Court of Juſtice, as an offence againſt this act. Yet it is not neceſſary that the bill in Chancery ſhouldbe brought within three months.

Again, if the right veſted, and the offence prohibited by this act be new, no remedy or mode of proſecution can be purſued, beſides thoſe preſcribed by the act. But a bill in Chancery is not given; and conſequently could not be brought upon this act.

There is no ground, upon which this juriſdiction has been exerciſed or can be ſupported, except the antecedent property; confirmed, and ſecured for a limited term, by this act. In this light, the entry of the book is a condition in reſpect of ſtatutary penalty only: ſo likewiſe the three months is a limitation in reſpect of the ſtatutary penalty only. But the remedy by an action upon the caſe, or a bill in Chancery, is a conſequence of the common law-right; and is not affected by the ſtatutary condition or limitation.

Mr. *Murphy* cited and laid ſtreſs upon the caſe of *Millar* v *Kincaid et al.* in the Houſe of Lords, 11th of *February* 1750. In that caſe, the ſuit was brought upon the 8 Queen *Ann* and 12 G. II. c. 36, by ſeventeen bookſellers of *London*, plaintiffs, againſt twenty-four bookſellers of *Edinburgh* and *Glaſgow*, defendants; for having offended againſt theſe two acts, as to many books ſpecified; praying the penalties, and an injunction and account, by way of damages.

The

The plaintiffs reſtrained their demand to an account of profits, by way of damages, for two or three books only.

The Court found, "That there lies no action of damages, *in this caſe.*"

The plaintiffs petitioned for a rehearing; and inſiſted that the 8 of Queen *Ann* gave an additional ſecurity by penalties, during a limited time, to a property which exiſted before; and therefore was declaratory of the property; and that the Court of Chancery had always underſtoood it in this ſenſe, and given relief, in conſequence of the common-law property, declared, and ſecured by the act for a limited time by penalties.

The Court found, "That an action of damages lies, to the extent of the profits made by the defendants, on ſuch of the books libelled, as have been entered in the Stationer's Hall and reprinted in *Britain.*"

The defendants prayed a review.

The Court ordered the cauſe to be re-argued; and directed them to conſider "Whether, by the laws of *Scotland*, an action lay, at the inſtance of an author or proprietor of a book, before the ſtatute."

The cauſe was further heard and debated: but both ſides avoided the queſtion upon the common law. The plaintiffs, probably, were adviſed not to put their caſe upon the common law of *Scotland*; becauſe the books were printed and publiſhed in *London*, and therefore might be conſidered as foreign books. And the defendants, thinking themſelves ſtrong againſt an action of damages upon the ſtatute, reſted upon that ground; and inſiſted that the action being brought upon the ſtatute, the plaintiffs could not reſort to the common law.

The Court therefore gave no opinion, as to the common law; but found, "That no action lies on the ſtatute, for offences againſt the ſame, except when it is brought within three months after the committing ſuch offence: and that no action lies, except for ſuch books as have been entered in Stationer's Hall in terms of the ſtatute." And "that no action of damages lies on the ſtatute."

The plaintiffs prayed a review; and objected to the ambiguity of the propoſition, "That no action of damages lies on the ſtatute;" becauſe they did not contend "that ſuch action was given by the ſtatute;" but that it followed the antecedent property, declared and ſecured by the ſtatute. And they urged the practice of the Court of Chancery.

The Court found, "That no action of damages does lie upon

upon or in conſequence of the ſtatute, but only for the penalties."

The plaintiffs appealed to the Houſe of Lords. In their reaſons annexed to the printed caſe, they ſay "The Court of Chancery has conſtrued 8 *Ann*, as declaratory of an author's property; and the remedies and penalties thereby given for a limited term, upon certain conditions, as additional ſanctions only, to preſerve that property from being injured." And in another part of the reaſons, they inſiſt "That it is like the caſe of a patent granted for any new and uſeful invention: the patentee, in conſequence of his property, is intitled to the ordinary relief in courts of law and equity."

It is remarkable that the reſpondents, (who had very able men for their counſel,) in their reaſons, do not litigate, "that the ſtatute was to be conſidered as giving an additional ſecurity;" nor conſequently, the competence of an action for damages: they only ſay, "If it is taken as an action upon the caſe, it cannot be joined with an action for the penalties, and inſiſt, from objections to the method of proceeding, that the plaintiffs could not recover."

Mr. *Murphy* cited a manuſcript, which ſays, Lord *Hardwicke*, in moving for the reſolution of the Houſe, ſpoke to the following effect—"As to the origin of relief given in the Court of Chancery, by injunction and account—The ſtatute of *Jac.* I. which took away monopolies, at the ſame time gave the King a power to grant patents for the encouragement of new inventions for fourteen years. Theſe patents were inrolled in Chancery: and the Court, upon complaint of the patentee, would take notice of its own records."

"The ſtatute of Queen *Ann* might be conſidered as a ſtanding patent to authors: and, being a record of the higheſt nature, the Court will give relief.

"But he doubted whether that ſtatute was declaratory of the common law; or introductive of a new law, to give learned men a property which they had not before.

"He ſaid, it was material to conſider how the common law of *Scotland* ſtood before the ſtatute: and he repeated, more than once, that as the queſtion could not be judicially determined upon the preſent appeal, he would be ſtill open to all reaſonings upon the ſubject; and would not be underſtood to give an opinion which might bind himſelf."

This account of what Lord *Hardwicke* ſaid, is taken from a letter ſaid to be written to the reſpondents in *Scotland*, by their ſolicitor. It purports only to be heads, by way of narration;

narration; and not a report of his words, or the order in which he ſpoke, or all he ſaid; and plainly contains what the ſolicitor thought would make moſt for his clients.

Lord *Hardwicke* muſt have intimated more of his opinion than is mentioned in the letter; by his repeatedly guarding "that he would not be underſtood to give an opinion which might bind himſelf."

What he is reported to have ſaid, is very material in this light.

The only queſtion brought before the houſe by the appeal, was, "Whether any remedy lay, in conſequence of the ſtatute, except for the penalties:"

Lord *Hardwicke* ſtates the doubt to be, "Whether the ſtatute was declaratory of the common law; or introductive of a new law, to give learned men a property which they had not before." He ſtates no doubt, "Whether any remedy could lie, except for the penalties only, if the act gave a new property."

The doubt was a queſtion of conſtruction upon the ſtatute, not to be ſolved by the words; for there are no words declaratory of the common law: and there is an expreſs proviſo againſt inferences either way.

The queſtion then depended upon ſettling "whether the property exiſted by the common law." If it did, the act confirms that right, and ſecures it by penalties. If there was no right at the common law, then the act gives a new right upon condition, under a ſanction ſpecially preſcribed. Therefore ſays Lord *Hardwicke*, it is material to conſider "How the common law of *Scotland* ſtood, before the ſtatute."

As to what he is reported to have ſaid of the relief given in Chancery—The ſolicitor has certainly omitted ſomething.

Lord *Hardwicke* could never ground the relief given to a patentee, merely upon the patent being inrolled in Chancery: much leſs could he argue from thence to an act of parliament, merely becauſe it was a record of a high nature; without ſaying a word as to the conſtruction of the act, upon which the Court of Chancery proceeded; though that was the only thing material, and relied upon in the argument as deciſive.

The printed reaſons argued from the relief given upon patents for new inventions, by action or bill, as a parallel caſe.

Suppoſing a common law property ſecured and confirmed by the ſtatute for a term; this legal right ſtands upon the ſame ground with the legal right excepted in the act of 21 *Jac.*

Jac. I. But ſuppoſing the privilege given to authors by this act, to ariſe out of a new prohibition; there is no colour, from the caſe of letters patent, for the juriſdiction exerciſed by the Court of Chancery upon 8 *Ann.*

In letters patent, all the conditions required by 21 *Jac.* I. muſt be obſerved. Patentees for new inventions are left, by that ſtatute, to the common law, and the remedies which follow the nature of their right.

But this ſtatute of the 8th of Queen *Ann*, is a penal ſtatute; which preſcribes the remedy for the party aggrieved, and the mode of proſecution, to be commenced within three months. Upon ſuch an act, if the offence, and conſequently the right which ariſes from the prohibition, be new, no remedy or mode of proſecution can be purſued, except what is directed by the act.

The ſtatutes which prohibit interlopers, give, by that prohibition the ſole *Eaſt India* trade to the company. The trade was free before. Conſequently, the ſtatutes create a new offence. Was it ever imagined that any remedy could be purſued by the company, except thoſe preſcribed by the ſtatutes?

Where an act enforces a duty with penalties, the ordinary remedies follow the debt of obligation to pay; and the penalties are by way of ſecurity. But where the privilege to one perſon ariſes out of and conſiſts in a new prohibition to others, there is no proceeding but for a breach of the prohibition. If the act has preſcribed the remedy for the party grieved, and the mode of proſecution; all other remedies and modes are excluded.

If a conditional right is created by an act of parliament, the condition can not be diſpenſed with. If the ſame act, which creates the right, limits the time within which proſecutions for violation of it ſhall be commenced, that limitation can not be diſpenſed with.

Therefore the whole juriſdiction exerciſed by the Court of Chancery ſince 1710, againſt pirates of copies, is an authority "that authors had a property antecedent; to which the act gives a temporary additional ſecurity:" It can ſtand upon no other foundation. And I am perſuaded Lord *Hardwicke* dropt ſomething as to the reaſons and grounds of the relief given by the Court of Chancery, in conſequence of this act; which occaſioned his repeating, more than once, "that he would be ſtill open to all reaſonings upon the ſubject."

The order declares, "that the action brought by the appellants in the court of ſeſſion in *Scotland* was improperly and incon-

inconſiſtently brought, by demanding at the ſame time a diſcovery and account of the profits of the books in queſtion, and alſo the penalties of the acts of parliament, (which the appellants had never abſolutely waved in the proceedings below;) and alſo by joining ſeveral purſuers, claiming diſtinct and independent rights in different books, in the ſame action; and that therefore the points determined by the ſaid interlocutors could not regularly come in queſtion in this cauſe: and therefore ordered and adjudged that the ſaid ſeveral interlocutors be reverſed, without prejudice to the determination of any of the ſaid points, when the ſame ſhall properly be brought in judgment. And it is hereby alſo declared, that libel in this cauſe is *nontrelevant*: and ordered, that the ſaid Court of Seſſion do proceed accordingly."

If the ground of the relief in Chancery, during the continuance of the term given by the act, was the antecedent property; it is to be wondered, that after the expiration of the term, the Court had no difficulty to grant the ſame relief, merely upon the common law-right.

But before I mention the caſes, it may be proper to premiſe what will put the authority of them in its true light.

Injunctions to ſtay printing or the ſale of books printed, are in the nature of injunctions to ſtay waſte; they never are granted, but upon a clear right. If moved for, upon filing the bill; the right muſt appear clearly, by affidavits: If continued after the anſwer put in; the right muſt be clearly admitted by the anſwer, or not denied.

Where the plaintiff's right is queſtioned and doubtful, an injunction is improper; becauſe no reparation can be made to the defendant for the damage he ſuſtains from the injunction: But if the defendant proceeds to commit the waſte or injury, the plaintiff may afterwards have compenſation.

Few bills againſt pirates of books are ever brought to a hearing. If the defendant acquieſces under the injunction, it is ſeldom worth the plaintiff's while to proceed for an account; the ſale of the edition being ſtopped.

From the year 1709 to this day, there have not been more than two or three ſuch cauſes heard.

The queſtion upon the common law-right, could not ariſe till 21 years from the 10th of *April* 1710, for old copies: conſequently, the ſooneſt it could ariſe was after the 10th of *April* 1731.

On the 9th of *June* 1735, in the caſe of *Eyre* v. *Walker*, Sir *Joſeph Jekyll* granted an injunction to reſtrain the defendant from printing the Whole Duty of Man; the firſt aſ-

ſignment of which had been made in *December* 1657: and was acquieſced under.

In the caſe of *Motte* v. *Falkner*, 28 *November* 1735, an injunction was granted for printing *Pope's* and *Swift's* Miſcellanies. Many of theſe pieces were publiſhed in 1701, 1702, 1708: and the counſel ſtrongly preſſed the objection, as to theſe pieces. Lord *Talbot* continued the injunction, as to the whole. and it was acquieſced under. Yet *Falkner*, the *Iriſh* Bookſeller, was a man of ſubſtance; and the general point was of conſequence to him: but he was not adviſed to litigate further.

On 27 *January* 1736, in the caſe of *Walthoe* v. *Walker*, an injunction was granted by Sir *Joſeph Jekyll*, for printing *Nelſon's* Feſtivals and Faſts, though the bill ſets forth, that it was printed in the life time of *Robert Nelſon* the author, and that he died in *January* 1714. This too was acquieſced under.

On 5th *May* 1739, in the caſe of *Tonſon et al* v. *Walker* otherwiſe *Stanton*, before Lord *Hardwicke*, an injunction was granted, to reſtrain the defendants from printing *Milton's* Paradiſe Loſt. The plaintiffs derived their title under an aſſignment of the copy from the author in 1667; which was read. This injunction was alſo acquieſced under.

In the caſe of *Tonſon* v. *Walker* and *Merchant*, before Lord *Hardwicke*, the bill was filed 26th *November* 1751, ſuggeſting that the defendants had advertiſed to print "*Milton's* Paradiſe Loſt, with his life by *Fenton*; and the notes of all the former editions," of which Dr. *Newton's* was the laſt. The bill ſuggeſts a pretence "that the defendant had a right." It derives a title to the poem. from the author's aſſignment in 1667. That it was publiſhed about 1668. And it derives a title to his life by *Fenton*, publiſhed in 1727; and to *Bentley's* notes, publiſhed in 1732; and Dr. *Newton's*, in 1749. The anſwer came in, the 12th *December* 1751: wherein the defendants inſiſted they had a right to print their work in numbers, and to take in ſubſcriptions. And they put in their anſwer ſo expeditiouſly, as to prevent an injunction before anſwer.

It was intended to take the opinion of the Court ſolemnly. The ſearches and affidavits, which were thought neceſſary to be made, occaſioned a delay: and no motion was made till near the end of *April* 1752.

The injunction was moved for, on *Thurſday* the 23d of *April*. Lord *Mansfield* argued it. It was argued at large, upon the general ground of copy rights at common law.

Lord

Lord *Chancellor* directed it to proceed on the *Saturday* following; and to be ſpoken to by one of a ſide. Afterwards, it ſtood over, by order, till *Thurſday* the 30th of *April*; when it was argued very diffuſively.

The caſe could not poſſibly be varied, at the hearing of the cauſe. The notes of the laſt edition (Dr. *Newton*'s) were within the act; but an injunction as to them only, would have been of little avail; and it did not follow, that the defendants ſhould not be permitted to print what they had a right to print; becauſe they had attempted to print more. For, in the caſe of *Pope* v *Curl*, 5th *June* 1741, Lord *Hardwicke* injoined the defendant only from printing and ſelling the plaintiff's letters: there were a great many more in the book which the defendant had printed, which the plaintiff had no right to complain of.

If the inclination of Lord *Hardwicke*'s own opinion had not been ſtrongly with the plaintiff, he never would have granted the injunction to the whole, and penned it in the disjunctive; ſo that printing the poem, or the life, or *Bentley*'s notes, without a word of Dr. *Newton*'s, would have been a breach.

The injunction is not barely to the ſelling of that book, of which *Newton*'s notes made a part; but to future printing.

He might have ſent it to law then, as well as at the hearing: but he probably foreſaw he ſhould never hear of it again. Accordingly, the parties underſtood his way of thinking: and the defendants acquieſced under the injunction, and ſo have made it perpetual; and would now be guilty of a breach, if they printed *Milton*.

I do admit that (except from the order he made, which he ſaw and penned,) he guarded againſt being thought finally to determine the queſtion.

He cited the *Stationer*'s *Company* v *Partridge*, as an authority for an injunction, where the right was doubtful. He obſerved upon Dr. *Newton*'s notes, either tranſcribed or colourably abridged, being within the act: and, according to a note I have of the caſe, he ſaid, "The ſtrongeſt authority is what the Judges have ſaid in the caſe of *Seymour* (1 *Mod.*) and in the argument of prerogative copies. Diſtinctions are taken upon the ground of the King's property in Bibles, Latin Grammars, Common Prayer and Year Books; that they were made and publiſhed at the expence of the Crown; *ergo* the King's property. Theſe arguments

being allowed to ſupport that right, infer ſuch a property exiſting."

That very point was then depending in this Court, upon a caſe ſent by himſelf, in *Baſkett* v *the Univerſity of Cambridge.*

It would not have been agreeable to Lord *Hardwicke*'s great decency and prudence, to have ſpoken out deciſively, upon a general legal right never decided at law; and to have grounded his opinion upon an argument which was then a queſtion *ſub judice.*

The queſtion upon Literary Property was brought before this Court in the caſe of *Tonſon* v *Collins*; and after two arguments, was adjourned into the Exchequer Chamber. I have been informed, from the beſt authority, that ſo far as the Court had formed an opinion, they all inclined to the plaintiff. But as they ſuſpected that the action was brought by colluſion; and a nominal defendant ſet up, in order to obtain a judgment, which might be a precedent againſt third perſons; and that therefore a judgment in favour of the plaintiff would certainly have been acquieſced in; upon this ſuſpicion, and becauſe the Court inclined to the plaintiff, it was ordered to be heard before all the Judges.

Afterwards, upon certain information received by the Judges, "that the whole was a colluſion; that the defendant was nominal only; and the whole expence paid by the plaintiff;" they refuſed to proceed in the cauſe; though it had been argued *bona fide*, and very ably, by the counſel, who appeared for the defendant. They thought, this contrivance to get a colluſive judgment was an attempt of a dangerous example, and therefore to be diſcouraged.

The pendency of this cauſe was publicly known: but the reaſon of its diſcontinuance was not.

Whilſt this queſtion hung in this Court, a doubt aroſe in Chancery: and in the caſes of *Millar* v *Donaldſon*, and *Oſborne* v *Donaldſon*, the injunction was refuſed, without any opinion given. Mr. *Murphy* ſtated Lord *Northington* to have ſaid—"It would be preſumption in me: therefore I ſhall ſay nothing as to the merits."

Under theſe circumſtances, I think the injunction was rightly refuſed: for, whatever his lordſhip's own opinion might be, either way, it was a becoming decency, "to doubt." And no Judge ever granted ſuch an injunction to ſtay waſte, upon a legal property, and continued it to the hearing; where the whole fact was admitted upon the motion, and he in his own mind doubted of the plaintiff's right.

right. To what end ſhould an injunction be granted? Since the matter cannot appear in a different light at the hearing: and it may be ſent to law directly. To ſtay the defendant from making a profit, which he may probably be intitled to, is unjuſt.

The *Stationer*'s *Company* v *Partridge*, for printing Almanacs, is no inſtance to the contrary. Lord *Cowper* continued the injunction to the hearing, upon grounds which he might think bound him to conſider the plaintiff's legal right to be clear. Their patent for printing Almanacs had been tried at law, and adjudged for them: injunctions had been decreed in Chancery; and any further trial at law refuſed, upon ſolemn argument. Had not Lord *Cowper* inclined ſtrongly for the plaintiffs, he never would have injoined a work which is annual, and ſerves only for one year.

There is no report of what paſſed on the motion before Lord *Cowper*. But the queſtion founding in prerogative; and the former determinations having been before the revolution; Lord *Harcourt* thought it prudent to make a caſe for the opinion of this Court.

Theſe caſes in 1765 add great weight to the precedents where injunctions have been granted after the expiration of the term; becauſe they ſhew that there was no doubt before. And I am perſuaded that if, in 1752, the queſtion had been depending in this Court, Lord *Hardwicke* would not have granted the injunction in the caſe of *Tonſon* v *Walker*; how ſtrong ſo ever his own opinion might have been.

Lord *Hardwicke* laid great ſtreſs on the argument made uſe of to ſupport Crown copies; as preſuming the property of authors. That argument has ſince prevailed: and it has been ſince ſolemnly adjudged, "that there are copies of which the King is proprietor."

This Court had no idea that the King, by prerogative, had any power to reſtrain printing, which is a trade and manufacture; or to grant an excluſive privilege of printing any book whatſoever; except as a ſubject might, by reaſon of the copy being his property.

The Court agreed with Mr Juſtice *Powell*, who ſaid, in the caſe of the *Stationer*'s *Company* v *Partridge*, "You muſt ſhew ſome property in the Crown, and bring it within the caſe of the Common Prayer Book." Mr. *Yorke* argued it upon this ground.

It is ſettled, then, "that the King is owner of the copies of all books or writings which he had the ſole right originally

ally to publiſh; as Acts of Parliament, Orders of Council, Proclamations, the Common-prayer book. Theſe and ſuch like are his own works, as he repreſents the ſtate. So likewiſe, where by purchaſe he had the right originally to publiſh; as the Latin Grammar, the Year-Books, &c. And in theſe laſt caſes the property of the crown ſtands exactly on the ſame footing as private copy right: as to the Year-books, becauſe the crown was at the expence of taking the notes; and as to the Latin Grammar, becauſe it paid for the compiling and publiſhing it.

The right of the crown to theſe books is independent of every prerogative idea.

The only doubt, as to the judgment of the Houſe of Lords, upon *Roll's Abridgment* and *Croke's Reports*, is, "that neither collection was made by the authority, or at the expence of the crown;" and "that the king had no right of original publication; the Courts of *Westminſter-Hall* having the ſole power to authorize and authenticate the publication of their own proceedings."

In the caſe of *Manley et al.* v *Owen et al.* 8th of *April*, 1755, a bill was filed by ſome printers, who had bought from the Lord Mayor the copy of the Seſſions Paper, to injoin the defendants from printing it. The Lord Chancellor went fully into it, upon affidavits of the purchaſe, and authority from the Lord Mayor; and that it had always been uſual for the Lord Mayor, (being firſt in the commiſſion,) to appoint the printer of the trials, and to take a conſideration for it. The Lord Chancellor thought the right to print gave the plaintiffs the property; and granted an injunction: which was acquieſced under.

If an author, by the common law, has the ſole right to make the firſt impreſſion and publication, I cannot diſtinguiſh his caſe from crown-copies, or copies analogous to the ſeſſions-paper; as votes of the Houſe of Commons, or trials publiſhed by authority.

Suppoſe a man, with or without leave to peruſe a manuſcript work, tranſcribes and publiſhes it; it is not within the act of Queen *Ann*; it is not larceny; it is not treſpaſs; it is not a crime indictable; (the phyſical property of the author, the original manuſcript, remains:) But it is a groſs violation of a valuable right.

Suppoſe the original, or a tranſcript, was given or lent to a man to read, for his own uſe; and he publiſhes it; it would be a violation of the author's common law right to the copy.

copy. This never was doubted; and has often been determined.

In the caſe of *Webb* v. *Roſe*, 24th of *May*, 1732, a bill was filed by the ſon and deviſee of Mr. *Webb* the conveyancer, againſt the clerk, for intending to print his father's draughts. Sir *Joſeph Jekyll* granted an injunction: and it was acquieſced under.

In the caſe of *Pope* v. *Curl*, 5th of *June*, 1741, Lord *Hardwicke*, upon motion, granted an injunction as to *Pope*'s Letters to *Swift*: and the point was fully conſidered. Lord *Hardwicke* thought, "ſending a letter transferred the paper upon which it was wrote, and every uſe of the contents, except the liberty and profit of publiſhing."

When expreſs conſent is not proved, the negative is implied as a tacit condition.

In this caſe too, the injunction was acquieſced under.

In the caſe of the Duke of *Queenſbury* v. *Shebbeare*, 31ſt of *July*, 1758, an injunction was granted, for printing the ſecond part of Lord *Clarendon*'s Hiſtory. Lord *Clarendon*, the ſon, let Mr. *Francis Gwyn* have a copy. His ſon and repreſentative inſiſted "he had a right to print and publiſh." The Court was of opinion "that Mr. *Francis Gwyn* might make every uſe of it, except the profit of multiplying in print." It was to be preſumed, Lord *Clarendon* never intended that, when he gave him a copy. The injunction was acquieſced under: and Dr. *Shebbeare* recovered, before Lord *Mansfield*, a large ſum againſt Mr. *Gwyn*, for repreſenting "that he had a right to print."

In the caſe of Mr. *Forreſter* v. *Waller*, 13th of *June*, 1741, an injunction, for printing the plaintiff's notes, gotten ſurreptitiouſly, without his conſent, was granted.

From hence, it is clear, that there is a time, when without any poſitive ſtatute, an author has a property in the copy of his own work, in the legal ſenſe of the word. *Id quod noſtrum eſt, ſine noſtro facto, ad alterum transferri non poteſt. facti autem nomine, vel conſenſus, vel etiam delictum intelligitur.*

In this caſe, the author has aſſerted his property in the copy from the firſt moment. Conſent to leave it open, or give it to the public, whether expreſs or implied, is a fact: it is not pretended here.

But the defendant's counſel inſiſt, "that by the author's ſale of printed books, the copy neceſſarily becomes open; in like manner as by the inventor's communicating a trade, manufacture or mechanical inſtrument, the art becomes free

to

to all who have learnt, from such communication, to exercise it."

The resemblance holds only in this.—As by the communication of an invention in trade, manufacture or machines, men are taught the art or science, they have a right to use it; so all the knowledge, which can be acquired from the contents of a book, is free for every man's use: if it teaches mathematics, physic, husbandry; if it teaches to write in verse or prose, if, by reading an epic poem, a man learns to make an epic poem of his own; he is at liberty.

But printing is a trade or manufacture. The types and press are the mechanical instruments: the literary composition is as the material; which always is property. The book conveys knowledge, instruction, or entertainment: but multiplying copies in print is a quite distinct thing from all the book communicates. And there is no incongruity to reserve that right; and yet convey the free use of all the book teaches.

In 43 *Eliz.* and 21 *Jac.* I. when monopolies were the subject of much discussion, copies of literary works were protected; and never thought to be like a trade, manufacture, or mechanical instrument.

But if the copy necessarily becomes open, as a gift to the public, by the printing and publication; it must likewise be so, as to crown copies: the contrary of which is now settled.

I cannot distinguish between the king, and an author. I disclaim any idea that the king has the least control over the press, but what arises from his property in his copy.

I am by the opinion of the court in *Baskett* v. *University of Cambridge*, to say "that the first publication and sale does not by the common law, necessarily, and in spite of the author, make his copy open: though I admit, an author's consent to leave it open may be implied from circumstances."

It remains to consider the second question, upon the 8th of Queen *Ann*; though I have already, in part, anticipated the argument.

Mr. *Murphy* strongly contended, from the amendments in the committee of the House of Commons, and from the change of the title, "that the Parliament meant to take away, or to declare there was no property at the common law.

The sense and meaning of an act of parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the House

where

where it took its riſe. That hiſtory is not known to the other houſe, or to the ſovereign.

Upon the face of this act, the very preamble ſtrongly implies a declaration of the property at the common law. For, it ſpeaks thus—"Whereas of late," (that is, ſince the determination of the licenſing act,) "the liberty taken by divers perſons, of printing, re-printing, and publiſhing books without the conſent of the authors or proprietors, to their very great detriment, and too often to the ruin of them and their families;" For preventing therefore, ſuch practices for the future, &c.

Now, every word, almoſt, in this preamble is emphatical, and deſerves to be remarked upon.

When the legiſlature ſpeak of a "liberty taken," could they mean a claim founded on any right? If they had, they would certainly have ſo expreſſed themſelves: and then, probably, the preamble would have run thus—"Whereas bookſellers and divers other perſons have of late claimed the right of printing and re-printing," &c.

Now the word "reprinting" is alſo obſervable. For, if the firſt printing or publication was a gift of the work to the public, it could be no injury to re-print a ſecond edition without conſent. But without conſent of whom? The "author or proprietor," (in the disjunctive:) Thereby clearly pointing out what ſorts of perſons are intitled to this property; the original author, or his aſſignee, become alſo the proprietor, either by aſſignment (in caſe of a private perſon,) or by grant from the crown.

I might, without ſtraining the conſtruction, ſuppoſe that by the *words* "*too often to the ruin of them and their families*," the parliament might allude to diſpoſitions made by authors, of their works at their deceaſe, for the maintenance and benefit of their families.

But I chooſe rather to go to the firſt words of the enacting clauſe—"For preventing therefore, the like practices for the future."

Did the parliament, by the word "practices," mean to deſcribe the exerciſe of a legal right? (which the publication of books would be, if there was no copy-right?) or did they mean to point out acts committed in fraud and violation of private rights; which this act was made to prevent; and which are properly ſtyled practices?

The word "practices," is properly applied to the doing of illegal acts; but is improperly and incongruouſly made

uſe of to deſcribe the exerciſe of right, either ſtrictly legal, or even doubtful.

The preamble is infinitely ſtronger in the original bill, as it was brought into the houſe, and referred to the committee.

But to go into the hiſtory of the changes, the bill underwent in the Houſe of Commons—It certainly went to the committee, as a bill to ſecure the undoubted property of copies for ever. It is plain, that objections aroſe in the committee, to the generality of the propoſition: which ended in ſecuring the property of copies for a term: without prejudice to either ſide of the queſtion upon the general propoſition as to the right.

By the law and uſage of parliament, a new bill cannot be made in a committee: a bill to ſecure the property of authors could not be turned into a bill to take it away. And therefore this is not to be ſuppoſed, though there had been no proviſo ſaving their rights.

What the act gives with a ſanction of penalties, is for a term: and the words "and no longer," add nothing to the ſenſe; any more than they would in a will, if a teſtator gave for years, yet, probably, theſe words occaſioned the expreſs proviſo being afterwards added; from the anxiety of the Univerſity-Members, who knew the univerſities had many copies. The univerſity of *Oxford* had publiſhed Lord *Clarendon*'s Hiſtory in three volumes, but about five years before; and had the property of the copy.

Great ſtreſs has been laid by the counſel for the defendant, upon the change of the title, and the word "veſting" being uſed inſtead of the word "ſecuring."

The reſtraining of the proviſions of the bill to a term, neceſſarily occaſioned an alteration in the title. "Securing for a term" would not import that there was a common-law right beyond the term: and "veſting for a term" does not import that there is no common-law right. If it did, the title is but once read; and, if there had been no proviſo, could not control the body of the act, which ſpeaks (in the preamble to the ſecond ſection) of the property intended to be thereby ſecured to the proprietor. But the proviſo ſaving the ancient common-law right, is as full as could be drawn —"provided, that nothing in this act contained ſhall extend, or be conſtrued to extend, either to prejudice or confirm any right that the ſaid Univerſities or any of them, or any perſon or perſons have, or claim to have, to the printing or re-printing any book or copy already printed, or hereafter to be printed." What was the right to be ſaved, either as to books

books already printed, or much more as to books hereafter to be printed, but the common-law right?

Without this proviſo, it might fairly have been argued, that there is nothing in this act which can prejudice the property of authors in the copy: and every adjudication upon the act ſince it has paſſed, is an authority that there never was an idea that this act had decided againſt the property of authors at common law.

I have avoided a large field which exerciſed the ingenuity of the bar. Metaphyſical reaſoning is too ſubtile: and arguments from the ſuppoſed modes of acquiring the property of acorns, or a vacant piece of ground in an imaginary ſtate of nature, are too remote. Beſides, the compariſon does not hold between things which have a phyſical exiſtence, and incorporeal rights.

It is certainly not agreeable to natural juſtice, that a ſtranger ſhould reap the beneficial pecuniary produce of another man's work. *Jure naturæ æquum eſt, neminem cum alterius detrimento et injuria fieri locupletiorem.*

It is wiſe in any ſtate, to encourage letters, and the painful reſearches of learned men. The eaſieſt and moſt equal way of doing it, is, by ſecuring to them the property of their own works. Nobody contributes, who is not willing: and though a good book may be run down, and a bad one cried up, for a time; yet ſooner or latter, the reward will be in proportion to the merit of the work.

A writer's fame will not be the leſs, that he has bread, without being under the neceſſity of proſtituting his pen to flattery or party, to get it.

He who engages in a laborious work, (ſuch, for inſtance, as *Johnſon's Dictionary*,) which may employ his whole life, will do it with more ſpirit, if, beſides his own glory, he thinks it may be a proviſion for his family.

I never heard any inconvenience objected to literary property, but that of enhancing the price of books. This judgment will not be a precedent in favour of a proprietor who is found by a jury to have enhanced the price. An owner may find it worth while to give more correct and more beautiful editions; which is an advantage to literature: but his intereſt will prevent the price from being unreaſonable. A ſmall profit, in a ſpeedy and numerous ſale, is much larger gain, than a great profit upon each book in a ſlow ſale of a leſs number.

Upon theſe reaſons, I am of opinion, that there is a common law-right of an author to his copy; that it is not taken

away by the act of the 8th of Queen *Ann*; and that judgment ought to be for the plaintiff.

Mr. Juſtice *Aſton*—This caſe has been ſo often, ſo fully, and ſo ably argued; the citations from hiſtory, decrees, ordinances, ſtatutes and precedents in *Weſtminſter-Hall*, have been ſtated ſo accurately in point of time and ſubſtance; and the whole arguments have been gone into ſo largely by my brother *Willes*; that I ſhall content myſelf with alluding to them, as now fully and preciſely known, without ſtating any of them over again (at large,) which I ſhall have occaſion to take notice of.

The great queſtion in this cauſe is a general one: "how the common law ſtands, independent of the ſtatute of 8 *Ann.* in reſpect to an author's ſole right to the copy of his literary productions."

The material facts to introduce that queſtion, found by the ſpecial verdict, are—That the book intitled "The Seaſons," was an original compoſition by *James Thomſon*; that it was printed and publiſhed by him for his own uſe, as the proprietor thereof, at ſeveral times, from the beginning of the year 1729; and was never before printed elſewhere.

That the plaintiff, in 1727, purchaſed this work of the original author and proprietor for a valuable conſideration; that the plaintiff has for that time printed and ſold this work as his property; and has ever had a ſufficient number of the ſaid work, for ſale, at a reaſonable price.

That the defendant, without the plaintiff's licenſe or conſent, has publiſhed and ſold ſeveral copies of this work, which were printed without the plaintiff's conſent. So, taking it affirmatively and negatively, it is expreſſly found "that it was printed without his conſent:" and it is not found, "that it was ever made common, or given to the public." Therefore there is no room for implying a conſent, by any arguments whatſoever.

By this verdict, then, the original property in this work, and publication of it by the author; his transferring it to the plaintiff; the identity of the work, and of the copy, (which expreſſly makes uſe of the name of the author, and purports to be his work;) and its continuing in the author and the plaintiff reſpectively, uninterrupted, down to the defendant's invaſion of that property, is found.

The queſtions therefore are——(1ſt,) "Whether an author's property in his own literary compoſition is ſuch as will intitle him, at common law, to the ſole right of multiplying the copies of it:" or (2dly,) ſuppoſing he has a property in the

the original compoſition, "Whether the copy-right, by his own publication of the work, is neceſſarily given away, and his conſent to ſuch gift implied by operation of law, manifeſtly againſt his will, and contrary to the finding of the Jury;" or (3dly,) "taken away from him, or reſtrained, by the ſtatute of Queen *Ann*."

It has been ingeniouſly, metaphyſically and ſubtilly argued on the part of the defendant, "That there is a want of property in the thing itſelf, wherein the plaintiff ſuppoſes himſelf to be injured; and conſequently, if there is no property or right, there is no injury or privation of right."

The plaintiff's ſuppoſed property has been treated as quite ideal and imaginary; not reducible to the comprehenſion of man's underſtanding; not an object of law, nor capable of protection.

As all the objections to this property or right being allowed or protected by the common law, reſt entirely upon arguments which endeavour to ſhew "that ſuch allowance or protection is contrary to right reaſon and natural principles," the only grounds of common law originally applicable to this queſtion;—I think fit (however abſtract they may ſeem) to conſider certain great truths and ſound propoſitions; which we, as rational beings; we, to whom reaſon is the great law of our nature; are laid under the obligation of being governed by; and which are moſt ably illuſtrated by the learned author of the Religion of Nature Delineated; that is to ſay——

"That moral good and evil are coincident with right and wrong:" for, that cannot be good, which is wrong; nor that evil, which is right. "That right reaſon is the great law of nature; by which, our acts are to be adjudged; and according to their conformity to this, or deflexion from it, are to be called lawful, or unlawful; good, or bad." "That whatever will bear to be tried by that reaſon, is right; and that which is condemned by it, is wrong." "That to act according to right reaſon, and to act according to truth, are in effect the ſame thing."

Then (ſpeaking of truths reſpecting mankind in general, antecedent to all human law—) "That man being capable of diſtinct properties in things which he only, of all mankind, can call his;" he ſays—

"The labour of *B* cannot be the labour of *C*; becauſe it is the application of the organs and powers of *B*, not of *C*, to the effecting of ſomething: and therefore the labour is as much *B*'s, as the limbs and faculties made uſe of are his."

Again,

Again, "The effect or produce of the labour of *B* is not the effect of the labour of *C*: and therefore this effect or produce is *B*'s, not *C*'s It is as much *B*'s, as the labour was his, not *C*'s; becauſe, what the labour of *B* cauſes or produces, *B* produces by his labour; or it is the product of his labour. Therefore it is his; not *C*'s, or any others. And if *C* ſhould pretend to any property in that, which *B* only can truly call his, he would act contrary to truth."

"That to deprive a man of the fruit of his own cares and ſweat; and to enter upon it," (he is here ſpeaking of the cultivation of lands,) "as if it was the effect of the intruder's pains and travel; is a moſt manifeſt violation of truth: it is aſſerting, in fact, that to be his, which cannot be his."

There is, then, ſuch a thing as property, founded in nature and truth; or, there are things, which one man only can, conſiſtently with nature and truth call his: as propoſition 2, 8, 9, demonſtrate.

And thoſe things, which only one man can truly and properly call his, muſt remain his, till he agrees to part with them by compact or donation: becauſe no man can deprive him of them without his approbation; but the depriver muſt uſe them as his, when they are not his, in contradiction to truth. For, "to have the property" of any thing, and "to have the ſole right of uſing and diſpoſing of it," are the ſame thing: they are equipollent expreſſions.

Property, without the uſe, is an empty ſound. He who uſes or diſpoſes of any thing, does by that declare it to be his; becauſe this is all that he whoſe it really is, can do. Borrowing and hiring afford no objection to this: for he uſes what is his own for the time allowed; and his doing ſo is only in one of thoſe ways, in which the true proprietary diſpoſes of it.

From this great theory of property: it is to be collected—

That a man may have property in his body, life, fame, labours, and the like; and, in ſhort, in any thing that can be called his. That it is incompatible with the peace and happineſs of mankind, to violate or diſturb, by force or fraud, his poſſeſſion, uſe or diſpoſal of thoſe rights; as well as it is againſt the principles of reaſon, juſtice and truth. That it is what every man would think unreaſonable in his own caſe. That a partial diſpoſition, by the true proprietor, of a thing that is his, is not to be carried beyond the intent and meaſure of the proprietor's aſſent and approbation in that behalf; whether it be the caſe of borrowing, hiring, or a com-

a compact of any other ſort: of which I ſhall take further notice, when I ſpeak of publication.

I ſhall in the next place obſerve, that the written definitions of property, which have been taken notice of at the bar, are, in my opinion, very inadequate to the objects of property at this day. They are adapted, by the writers, to things in a primitive (not to ſay imaginary) ſtate; when all things were in common; when that common right was to be diveſted by ſome act to render the thing privately and excluſively a man's own, which, before that act ſo done to ſeparate and diſtinguiſh it, was as much another's.

Theſe definitions too, when examined, will be found principally to apply to the neceſſaries of life, and the groſſer objects of dominion, which the immediate natural occaſions of men called for: and for that reaſon, the property, ſo acquired by occupancy, was required to be an object uſeful to men, and capable of being faſtened on. Enough was to be left for others. As much as any one could uſe to an advantage of life before it ſpoiled, ſo much he could fix a property in: whatever was beyond this, was more than his ſhare, and belonged to others. It is plain too, that the definition is ſo underſtood by *Grotius*, when he ſays, "*Jus in res inferioris naturæ Deus humano generi indiviſim contulit. hinc factum, quod quiſque hominum ad ſuos uſus arripere poſſit, quod vellet; et quæ conſumi poterant, conſumere.*"

It is evident, ſurely, that theſe definitions give a ſort of property little ſuperior to the legal idea of a beaſt-common,—the bit of mouth ſnatched, or taken for neceſſary conſumption to ſupport life.

Thus great men, ruminating back to the origin of things, loſe ſight of the preſent ſtate of the world; and end their inquiries at that point where they ſhould begin our improvements.

But diſtinct properties, ſays *Pufendorf*, were not ſettled at the ſame time, nor by one ſingle act, but by ſucceſſive degrees; nor in all places alike: but property was gradually introduced, according as either the condition of things, the number and genius of men required; or as it appeared requiſite to the common peace.

Since thoſe ſuppoſed times, therefore, of univerſal communion, the objects of property have been much enlarged, by diſcovery, invention, and arts.

The mode of obtaining property by occupancy has been abridged; and the precept "of abſtaining from what is another's," enforced by laws.

The

The rules attending property muſt keep pace with its increaſe and improvement, and muſt be adapted to every caſe.

A diſtinguiſhable exiſtence in the thing claimed as property; an actual value in that thing to the true owner; are its eſſentials: and not leſs evident in the preſent caſe, than in the immediate object of thoſe definitions.

And there is a material difference in favour of this ſort of property, from that gained by occupancy; which before was common, and not yours; but was to be rendered ſo by ſome act of your own. For, this is originally the author's: and, therefore, unleſs clearly rendered common by his own act and full conſent, it ought ſtill to remain his.

The utility of the thing to man, required by the definition to make it an object of property, has been long exploded, as appears from *Barbeyrac*'s note upon this very paſſage; where it is held an unneceſſary and ſuperfluous condition.

Things of fancy, pleaſure or convenience are as much objects of property; and ſo conſidered by the common law: monkeys, parrots, or the like; in ſhort any thing merchandizeable and valuable. 12 *H.* 8. 3. *a. b. &c. Bro. Abr. Tit.* "Property," *pl.* 44. *Jmyns Digeſt*, 1 *Vol. pa* 602.

The beſt rule, both of reaſon and juſtice, ſeems to be, "to aſſign to every thing capable of ownerſhip, a legal and determinate owner."

For, the capacity to faſten on, as a thing of a corporeal nature, being a requiſite in every object of property, plainly partakes of the narrow and confined ſenſe in which property has been defined by authors in the original ſtate of things. A capacity to be diſtinguiſhed anſwers every end of reaſon and certainty; which is the great favourite of the law, and is all that wiſdom requires to ſecure their poſſeſſions and profits to men, and to preſerve the peace.

It is ſettled and admitted, and is not now controverted, but "that literary compoſitions, in their original ſtate, and the incorporeal right of the publication of them, are the private and excluſive property of the author; and that they may ever be retained ſo; and that if they are raviſhed from him before publication, trover or treſpaſs lies."

I ſhould be glad to know, then, in ſuch a caſe where the property is admitted, "How the damages ought to be eſtimated by a jury?"——Should they confine their conſideration to the value of the ink and paper?—Certainly not; it would be moſt reaſonable, to conſider the known character and ability of the author, and the value which his work (ſo taken from him) would produce by the publication and ſale.

ſale. And yet, what could that value be, if it was true, that the inſtant an author publiſhed his works, they were to be conſidered by the law as given to the public; and that his private property in them no longer exiſted?

The preſent claim is founded upon the original right to this work, as being the mental labour of the author; and that the effect and produce of the labour is his. It is a perſonal, incorporeal property, ſaleable and profitable; it has *indicia certa:* For, though the ſentiments and doctrine may be called ideal, yet when the ſame are communicated to the ſight and underſtanding of every man, by the medium of printing, the work becomes a diſtinguiſhable ſubject of property, and not totally deſtitute of corporeal qualities.

Now, without publication, it is uſeleſs to the owner; becauſe without profit: and property, without the power of uſe and diſpoſal, is an empty ſound. In that ſtate, it is loſt to the ſociety, in point of improvement; as well as to the author, in point of intereſt.

Publication therefore is the neceſſary act, and only means, to render this confeſſed property uſeful to mankind, and profitable to the owner: in this, they are jointly concerned.

Now, to conſtrue this only and neceſſary act to make the work uſeful and profitable, to be "deſtructive, at once, of "the author's confeſſed original property, againſt his ex-"preſs will," ſeems to be quite harſh and unreaſonable: Nor is it at all warranted by the arguments derived from thoſe authors who advance "That by the law of nature, property ends, when corporal poſſeſſion ceaſes."

For *Barbeyrac*, in his notes on *Pufendorf*, clearly ſhews that the right acquired from taking poſſeſſion does not ceaſe where there is no poſſeſſion; that perpetual poſſeſſion is impoſſible; that the above hypotheſis would reduce property to nothing; that the conſent of the proprietor to that renunciation ought to appear: for, as poſſeſſion is nothing elſe but an indiſputable mark of the will to retain what a man has ſeized; ſo, to authorize us to look upon a thing as abandoned by him to whom it belonged, becauſe he is not in poſſeſſion, we ought to have ſome other reaſons to believe he has renounced his perſonal right to it.

Wherefore, ſays he, though we may preſume this, in reſpect to thoſe things which remain ſuch as nature produced them; yet, as for other things which are the fruits of human induſtry, and which are done with great labour and contrivance uſually, it cannot be doubted but every one would preſerve his right to them, till he makes an open renunciation.

Now there is no open renunciation of the property in the preſent caſe; but a conſtructive one only, barely from publication. "Renunciation, or not," is a fact. It is not found; and ought not to be preſumed. But the contrary is found: 'Tis found here "that it is againſt his expreſs will."

But it was ſaid at the bar, "if a man buys a book, it is his "own."

What! is there no difference betwixt ſelling the property in the work, and only one of the copies? To ſay, "ſelling the book conveys all the right," begs the queſtion. For, if the law protect the book, the ſale does not convey away the right, from the nature of the thing, any more than the ſale conveys it where the ſtatute protects the book.

The proprietor's conſent is not to be carried beyond his manifeſt intent. Would not ſuch a conſtruction extend the partial diſpoſition of the true owner beyond his plain intent and meaning? Which, from the principles I have before laid down, is no more to be done in this compact, than in the caſe of borrowing or hiring.

Can it be conceived, that in purchaſing a literary compoſition at a ſhop, the purchaſer ever thought he bought the right to be the printer and ſeller of that ſpecific work? The improvement, knowledge, or amuſement, which he can derive from the performance, is all his own: but the right to the work, the copy-right remains in him whoſe induſtry compoſed it.

The buyer might as truly claim the merit of the compoſition, by his purchaſe, (in my opinion) as the right of multiplying the copies and reaping the profits.

The invaſion of this ſort of property is as much againſt every man's ſenſe of it, as it is againſt natural reaſon and moral rectitude. It is againſt the conviction of every man's own breaſt, who attempts it. He knows it, not to be his own; he knows, he injures another: and he does not do it for the ſake of the public, but *malâ fide* et *animo lucrandi*.

The artificial reaſoning, drawn from refined metaphyſical ſpeculation, is all on that ſide of the queſtion. It is arguing by analogy, only, to things of a different nature—"That it is not tangible:" and the like.

The law of nature and truth, and the light of reaſon, and the common ſenſe of mankind, is on the other ſide: for, *jus naturæ propriè eſt dictamen rectæ rationis, quo ſcimus quid turpe quod honeſtum, quid faciendum, quid fugiendum ſit.*

If the above principles and reaſoning are juſt, why ſhould the common law be deemed ſo narrow and illiberal, as not to recognize

recognize and receive under its protection a property ſo circumſtanced as the preſent?

The common law, now ſo called, is founded on the law of nature and reaſon. Its grounds, maxims and principles are derived from many different fountains, (ſays Judge Doderidge, in his *Engliſh* Lawyer) from natural and moral philoſophy, from the civil and canon law, from logic, from the uſe, cuſtom and converſation among men, collected out of the general diſpoſition, nature and condition of human kind.

He ſtates the ſeveral maxims and grounds, under the particular heads, from whence they are derived: and he places under the head of moral philoſophy a maxim of the common law, as borrowed from thence—*Quod tibi fieri non vis, alteri ne feceris.*

"That what is now called the common law of *England* was made up of a variety of different laws, enacted by the ſeveral *Saxon* kings reigning over diſtinct parts of the kingdom; which ſeveral laws, affecting then only parts of the *Engliſh* nation, were reduced into one body and extended equally to the whole nation by king *Alfred*;" appears from *Forteſcue*'s Preface; and that it is therefore properly called the common law of *England*; becauſe it was done "Ut in jus *commune totius gentis* tranſiret."

But it had an ancienter original than *Edward* the Confeſſor; and was at firſt called the ſolcright or people's right, (for it is plain it could not be called the common law in *Edward* the Confeſſor's time, for then they ſpoke *Saxon*; nor in *William* the Conqueror's time, for then they ſpoke *French:*) but it received this name, when the language came to be altered. And Lord *Coke* (1 Inſt. 142.) ſays, "the common law is ſometimes called right, common right, common juſtice." Which obſervations I make upon its general name, to free it from any imputation of their being any thing reſtrictive of its efficacy in the name itſelf; or that it is not equally comprehenſive of, and co-extenſive with theſe principles and grounds from which it is derived.

The common law, ſo founded and named, is univerſally comprehenſive—*Jubens honeſta; prohibens contraria:* its precepts are, in reſpect to mankind,—"*Honeſte vivere; alterum non lædere; Suum cuique tribuere.*"

In reſpect to the ſeveral ſpecies of property; though the rules touching them muſt ever have been the ſame, yet the object of it were not all at once known to the common law, or to the world: and many have been diſputed, as not being objects of property at common law, which yet are now eſtabliſhed to be ſuch; as, gunpowder, &c. &c. &c.

In the Year-book of 12 *H.* 8. *f.* 3. *a. b.* great diſpute was made, (upon the footing of property too) " whether an action would lie for taking away a blood-hound." The arguments uſed againſt it were ſuch as have, amongſt others, been uſed upon the preſent occaſion; viz. That it was of no value nor profit; but for pleaſure. That felony could not be committed of it; conſequently, not treſpaſs. That when the dog was out of the party's poſſeſſion, he ceaſed to have any property in him. That a dog was not titheable; would not paſs by a grant of *omnia bona*. That replevin or detinue would not lie of a dog.

N. B. See ſome of theſe arguments, (which I have put all together, for convenience,) in the ſubſequent caſes in *Cro. Eliz.* and *Owen*.

But upon what principles did the court determine " that the action lay? Upon theſe—" that where any wrong or damage is done to a man, the law gives him a remedy. That if it was only a thing for pleaſure, yet it was ſufficient; as a *poppinjay*, which ſings and refreſhes my ſpirits. That it was not lawful, to take him againſt my will—*Hoc facias alteri, quod tibi vis fieri*—and that though it be not felony, yet treſpaſs well lies: for, if a man cut my trees, and take them; it is treſpaſs, though not felony."

Brooke, in his Abr. of this caſe, (Tit. " property," *pl.* 44) ſays, " the reaſon why this property was not liable to the other remedies, or charges, or modes of conveyance there mentioned, is, becauſe it was a property not properly known: and yet treſpaſs would lie."

From this caſe, it is clear to me, that though the above was ſuch a ſpecies of property then not properly known to, or at leaſt not eſtabliſhed by precedent at the common law; yet that the novelty of the queſtion did not bar it of the common law remedy and protection. That it was ſufficient, that it was a diſtinguiſhable property; that it had a determinate owner. That its being a matter of pleaſure or profit to the owner, made no difference. That it was not neceſſary that every ſpecies of property ſhould be liable to all the ſame circumſtances, incidents or remedies. That the perſon invading it, had nothing to do with it. And that he erred againſt the rules of morality and juſtice, in diſturbing another's poſſeſſion or pleaſure.

One would have thought, after this caſe, that queſtion would have reſted. But in 31 *Eliz. Owen* 93. *Cro. Eliz.* 125. *Ireland* v. *Higgins*, it came on again, in an action for a greyhound; wherein, upon a demurrer to the declaration,

it

it was argued for the defendant, "that there was no conſideration to maintain the aſſumpſit: for that the plaintiff was out of poſſeſſion of the dog; and being *feræ naturæ*, he had loſt his intereſt in it, and had no remedy for it." But the action was held maintainable; though the like arguments were uſed as in the Year-book.

The common law being founded on ſuch principles as have been laid down and which are avowed by the above authorities; the remedy by action upon the caſe is ſuited to every wrong and grievance that the ſubject may ſuffer from a ſpecial invaſion of his right: for this ſort of action varies, ſays Lord *Coke*, according to the variety of the caſe.

That the invaſion of the plaintiff's property in the preſent caſe is the proper ſubject of ſuch an action; that it may be maintained at common law, without contradicting any maxim of its own, any ſtatute of the realm, or any principle of natural juſtice; and that it may well undergo a conſtitutional mode of trial by Jury, ſo as to anſwer every end of certainty and juſtice; ſeems to me without any ſolid objection: for, I confeſs, I do not know, nor can I comprehend any property more emphatically a man's own, nay, more incapable of being miſtaken, than his literary works. And if an author has really and openly abandoned them, that might be found; or the plaintiff on ſuch proof, would fail in his action. And there may be many circumſtances properly inquirable in an action of this ſort; viz. "if the compoſition be given to the public, made common, abandoned;" "if publiſhed without a name;" "if not claimed;" "if allowed to be pirated, without objection"—all this is evidence to the jury of the gift to the public; and not at all above the comprehenſion of a common juryman; nor ſo ideal, but that full and ſatisfactory evidence may be given of the ſubſtantial work or compoſition and of its original or derivate ownerſhip. So, an author being unknown, or long ſince dead; no aſſignment of the property; none, or unknown repreſentatives; the edition long deſerted, &c. are all circumſtances that may be brought into proof.

But all the difficulty lies on the plaintiff: he is to make out his right, and the injury done to his property.

In the preſent caſe, there is no chaſm or interval of time when the right to this work can be ſaid to be renounced, from the original publication to the preſent time; unleſs the bare act of publication itſelf is to be called ſo. And if that alone was to prevail againſt a private author, why ſhould not prerogative property, founded on the ſame ground of argument

argument as the general property of authors in their works, be liable to the ſame free and univerſal communion? For I know no difference, in that reſpect, between the rights of the Crown and the property of the ſubject.

"That there is any hardſhip put upon the defendant in this caſe, for that he may err innocently," I ſee no juſt grounds for ſaying; becauſe the defendant knows the work is not his, and that he had no original right to publiſh it. At his peril, therefore, he undertakes to give the edition; he does it with his eyes open: and "whether it was property renounced, or not," it was his buſineſs to inquire.

Upon the whole, I think an author's property in his works, and the copy-right, is fully and ſufficiently eſtabliſhed; becauſe it is admitted to be property in his own hands, and that he has the original right of firſt publiſhing them.

Further, that this idea of an author's property has been ſo long entertained, that the copy of a book ſeems to have been not familiarly only, but legally uſed as a technical expreſſion of the author's ſole right of printing and publiſhing that work: and that theſe expreſſions, in a variety of inſtruments, are not to be conſidered as the creators or origin of that right or property; but, as ſpeaking the language of a known and acknowledged right; and, as far as they are active, operating in its protection.

This appears from the citations uſed at the bar, from hiſtory, acts of ſtate, proclamations, and decrees in the Star Chamber, particularly in 1586 and 1637, and down to the year 1640; alſo from the clauſes in ordinances and ſtatutes antecedent to the ſtatute of Queen *Ann*; and from the expreſſions uſed in that ſtatute too, which ſpeaks with preciſion of this ſort of property as a known thing; and which, with as much accuracy, ſuppoſes the licence and conſent of the author or proprietor neceſſary to the printing of their works.

This opinion too is ſtrongly ſupported by the concurrent ſenſe of Judges, to be collected from the expreſſions they have made uſe of in caſes at common law, at different periods of time. As in *Skinner*, "that the ſtatute of *Car.* II. did not give the right, but the action." In 1 *Mod.* 257—where *Pemberton* ſpeaks of a grant to print. "How far it ſhould ſtand good againſt thoſe who claimed a property paramount the King's grant:" and there too, the making title to a copy is mentioned.

The Court too, in ſpeaking of additions to the Almanac by

by prognoſtication, ſays, "They alter the caſe no more than if a man ſhould claim a property in another man's copy, by reaſon of ſome inconſiderable additions of his own."

In *Pender* v *Bradyl* alſo, in an action for printing the Pilgrim's Progreſs, the plaintiff is averred to be "the true proprietor."

In the *Stationer's Company* v *Partridge*, it ſeems that the Crown's ſole or original right to publiſh was founded in property. In 3 *Mod.* 75—that the property veſts in the King, where no individual perſon can claim a property in the thing. This argument ſhews that *Pemberton* thought he could reſt the caſe and the right of the Crown upon property only: for, here, to get at ſuch ground, the argument is far fetched and miſapplied; becauſe, in a caſe of this kind, if there is no private property, it would not belong to the King, but be common, like animals *feræ naturæ*, or air, water, or the like

And the caſe of *Baſkett* and the *Univerſity of Cambridge* is a ſolemn well conſidered determination upon the ground of the original right of publication belonging to the king.

So that though there is no preciſe deciſion in the point, yet this long uniform idea of ſuch an object of property at law deſerves the greateſt attention and weight; where every principle of reaſon and juſtice concurs with deciding in favour of the property.

It was compared to throwing land into a highway. The intent there precedes the right: as it is given, ſo it may be uſed. But the intent circumſcribes the right. Feed it with cattle; and an action lies: then, you exceed the purpoſe of the gift, and become a wrong doer.

But beſides this, the uniform conduct of the Court of Chancery ſince the ſtatute, in entertaining bills of injunction without regard to an entry being made of the work purſuant to the ſtatute, or to the ſuit's being brought within the limitation of the three months, or within the term given for its protection, ſhews, that that Court muſt neceſſarily have proceeded under the like idea of a right antecedent to, and not newly created by the ſtatute: for, the act could not mean to give a right of property, and an action at law or a bill in equity incident thereto, where the condition of entry is not complied with. The declaration, "That the author ſhall have the ſole right of printing the book," muſt be on the terms and conditions in the act. The conſequences of an action and injunction are worſe than the penalties; and one

one reaſon given by the act, for requiring the entry, is, "That perſons may not offend through ignorance." That circumſtance of notoriety was required by all the licenſing acts and ordinances.

As to the ſecond queſtion—"Whether the copy-right is given away by the author's publication—"

I have already ſpoken upon this head collectively with the firſt; and ſhall only add, that I am of opinion that the publication of a compoſition does not give away the property in the work; but the right of the copy ſtill remains in the author; and that no more paſſes to the public, from the free will and conſent of the author, than an unlimited uſe of every advantage that the purchaſer can reap from the doctrine and ſentiments which the work contains. He may improve upon it, imitate it, tranſlate it; oppoſe its ſentiments: but he buys no right to publiſh the identical work.

That the compariſon made betwixt a literary work and a mechanical production; and that the right to publiſh the one, is as free and fair, as to imitate the other; carries no conviction of the truth of that poſition, to my judgment. They appear to me very different in their nature. And the difference conſiſts in this, that the property of the maker of a mechanical engine is confined to that individual thing which he has made; that the machine made in imitation or reſemblance of it, is a different work in ſubſtance, materials, labour and expence, in which the maker of the original machine cannot claim any property; for it is not his, but only a reſemblance of his: whereas the reprinted book is the very ſame ſubſtance; becauſe its doctrine and ſentiments are its eſſential and ſubſtantial part; and the printing of it is a mere mechanical act, and the method only of publiſhing and promulging the contents of the book.

The compoſition therefore is the ſubſtance: the paper, ink, type, only the incidents or vehicle.

The value proves it. And though the defendant may ſay "Thoſe materials are mine," yet that cannot give him a right to the ſubſtance, and to the multiplying of the copies of it; which, (on whoſe paper or parchment ſoever it is impreſſed,) muſt ever be invariably the ſame. Nay, his mixing, if I may ſo call it, his ſuch like materials with the author's property, does not (as in common caſes) render the author's property leſs diſtinguiſhable than it was before: for, the identical work or compoſition will ſtill appear, beyond a poſſibility of miſtake.

The imitated machine, therefore, is a new and a different work:

work: the literary compoſition, printed on another man's paper, is ſtill the ſame.

This is ſo evident to my own comprehenſion, that the utmoſt labour I can uſe in expreſſions, cannot ſtrengthen it in my own idea.

Suppoſing then that the author has ſuch property, and that he has not given away or abandoned it by publication—

The next queſtion is,—" Whether the ſtatute of Queen *Ann* has taken it away; or ſo reſtrained it, that an author's right to the copy expires with the term limited by that ſtatute for its protection."

Whoever contends " that this kind of property is not known to the common law," muſt alſo contend " that this ſtatute creates a new kind of property, which it veſts for a time only, in the authors and their aſſigns, under the conditions and limitations ſpecified in the act."

It muſt be contended too, to ſupport the arguments that have been uſed, " that the legiſlature had in view and intended to aboliſh or ſuſpend for a time (if the terms required by the act were complied with) that right of univerſal communion, which the publication of any work gave indiſcriminately to all mankind; or (in caſe the terms of the act were not complied with,) that ſuch right might be ſtill freely exerciſed, without offence."

The idea of ſuch a common right does not appear to have exiſted at the time of the ſtatute, or to be warranted by any authority.

The preamble of the act reproves the liberty of late frequently taken, of printing books and writings without the conſent of the author or proprietor; and treats it as an abuſe of a right, not as an act done in aſſertion of any common law right which the ſtatute intended to put only a temporary reſtraint to: for, the act declares it to be done " To the detriment of the proprietors, and to the ruin of their families."

This is a very different language from the arguments now uſed, " That there is no injury, no privation of right, for want " of property in the thing itſelf." And yet the property now, and then, was exactly the ſame.

The particular wording of the enacting clauſe is very material; as it preciſely adopts the identical expreſſions anciently uſed in the decrees, ordinances and ſtatutes referred to; alike ſpeaking of the right of authors, as a known, ſubſiſting, transferrable property.

I am not ſatisfied with ſaying " that ſuch right may be

implied from the words"——They are ſo expreſs, that the legiſlature can not be otherwiſe underſtood, than as ſpeaking of a known propriety; "The copy of the book," "the title to the copy," is a technical recognition of the right, in the words of the act.

This act was brought in at the ſolicitation of authors, bookſellers, and printers, but principally of the two latter; not from any doubt or diſtruſt of a juſt and legal property in the works or copy-right, (as appears by the petition itſelf. pa. 240. vol. 16. of the Journals of the Houſe of Commons;) but upon the common-law remedy being inadequate, and the proofs difficult, to aſcertain the damage really ſuffered by the injurious multiplication of the copies of thoſe books which they had bought and publiſhed. And this appears from the caſe they preſented to the members at the time.

All the ſanction they could obtain, was a protection of their right, by inflicting penalties on the wrong doer.

The ſtatute extends to no caſe where the title to the copy is not entered in the regiſter of the Stationers Company: Which entry is neceſſary to aſcertain the commencement of the term, during which this protection by penalties is granted. If that requiſite is neglected, the benefit of the ſtatute does not attach.

The general caſe, of authors who do not comply with this, is ſtill open; and of thoſe too that do, who do not ſue within three months.

For, if a ſtatute gives a remedy in the affirmative, (without a negative, expreſſed or implied,) for a matter which was actionable before by common law; the party may ſue at common law, and wave his remedy by ſtatute, if he pleaſes. 2 Inſt. 200. 2 Roll. 49.

A negative can not be implied here. The queſtion wholly depends upon the point, "whether it be a right newly created, "or not?" If it was, then it would receive its birth, duration and remedy from the ſtatute; and no other remedy could be purſued.

But if there was an antecedent commonlaw right, the common-law remedy, will remain; and the ſtatute-remedy can only be made uſe of, by obſerving the particular conditions which the act preſcribes.

The preamble of the ſtatute, as it was originally brought in and went to the committee, was the fulleſt aſſertion of the legal property and undoubted right of authors at common law, that could be: And there was no ſaving clauſe at all, in the act.

When

When that florid introduction was abridged, 'tis moſt probable, as the fact appears, that a ſaving clauſe was guardedly inſerted.

The Univerſities had conſiderable copy-rights. Lord *Clarendon*'s Hiſtory was but lately publiſhed by the Univerſity of *Oxford:* I believe the 3d volume did not come out till 1707. They came out at different times.

The proviſo, however, is general—"That nothing in "this act contained, ſhall extend either to prejudice or con- "firm any right that the ſaid univerſities or any of them, "or any perſon or perſons have, or claim to have, to the "printing or reprinting any book or copy already printed, "or hereafter to be printed."

If there was not a common-law right previous to the ſtatute, what is this clauſe to ſave? Not a right of publiſhing, to throw it into univerſal communion as ſoon as it comes out. That was no more worth while, than the purchaſing a copy ſeems to me to be, if it is left unprotected by the law, and open to every piratical practice.

It has been ſaid, "that this was inſerted, That the rights "which the univerſities or others had, under letters pa- "tent, might not be affected."

There can be no ground for this: For, the act does not at all meddle with letters patent, or enact a title that could either prejudice or confirm them.

This proviſo ſeems to be the effect of extraordinary caution, That the rights of authors, at common law, might not be affected: For, if it had not been inſerted, I apprehend clearly, they could not have been taken away by conſtruction; but the right and the remedy would ſtill remain, unaffected by the ſtatute.

The repeated practice of the Court of Chancery, in entertaining a juriſdiction by bills by injunction, and for relief, (as appears by many caſes cited,) evidences the conſtant ſenſe of the great lawyers in that court to be, "That the ſtatute "did not ſtand in the way of a general remedy upon the "original right."

To this purpoſe, the caſes mentioned in Chancery after the expiration of the time given by the ſtatute of 8 Queen *Ann*, are extremely material: And the authority of Lord *Hardwicke*, Lord *Talbot*, Sir *Joſeph Jekyll*, or any other great lawyer, ſitting in Chancery, and deciding on a legal right, for the ſake of a more effectual relief given there, is as good an authority, as if they gave an opinion on that legal right, ſitting in this Court.

They have always been ſo conſidered; and always ſo cited.

In the very laſt opinion but one, given in the Houſe of Lords by all the Judges, (upon a limitation over upon dying without iſſue, *Kelly* v. *Fowler*, in *Dom. Proc.* in *January* 1768,) the caſes cited were almoſt all of them determinations in the Court of Chancery.

It is moſt certain, that an injunction in nature of an injunction to ſtay waſte, never is continued to the hearing, where the Court is not ſtrongly of opinion with the plaintiff: And if the caſe can not be varied at the hearing, the ſame grounds upon which it is continued, muſt be ſufficient for a perpetual injunction.

And therefore where the defendant cannot vary the caſe, he ſubmits, and the cauſe ſtops; unleſs the plaintiff thinks fit to go on for ſome further relief, beſides the injunction: or if the defendant is diſſatisfied with the order continuing the injunction, he may appeal to the Houſe of Lords. And many queſtions are finally determined in that ſhort way.

Upon the caſe of *Eyre* v. *Walker*, Sir *Joſeph Jekyll* granted an injunction to reſtrain the defendant from printing The Whole Duty of Man; though the firſt aſſignment that was produced appeared to have been made in *December* 1657. It was ſaid at the bar, "That it muſt be the new whole duty of man: and that it muſt be within the time of the act." I have compared the title-pages of thoſe two books They are very different: and the copy of the order of the 9th of *June* 1735 ſhews it to be the old one. Dr. *Hammond*'s letter to the bookſeller ſhews it to be that in 1657.

The anſwer given to the caſe of *Motte* v. *Falkner*, 28th of *November* 1735, before Lord *Talbot*, for printing *Pope*'s and *Swift*'s Miſcellanies, was, "that this book of Miſcellanies was printed in the year 1727." But it was argued by the counſel in Chancery, upon the foundation that many of the parts of that Miſcellany were printed ſo long before as to take it entirely out of the act; as "conteſts and diſſentions at *Athens* and *Rome*;" predictions for 1708;" *Partridge*'s death, 1708;" "ſentiments of a Church of *England* man." Lord *Talbot* continued the injunction as to the whole.

In *Tonſon et al.* v. *Walker alias Stanton*, 5th of *May* 1739, to reſtrain the defendants from printing *Milton*'s Paradiſe Loſt, the injunction was granted by Lord *Hardwicke*, on Lord *Mansfield*'s motion, upon reading the aſſignment in 1667; and acquieſced under.

In *Tonſon* v. *Walker* and *Merchant*, 30th of *April* 1752; the bill had been filed on 26th of *November* 1751, ſuggeſting the

the defendants had advertiſed to print *Milton*'s Paradiſe Loſt, with his life by *Fenton*, and the notes of all the former editions, of which Dr. *Newton*'s were the laſt, in 1749. (Theſe laſt notes were within the act.) Upon a very ſolemn hearing Lord *Hardwicke* granted the injunction: and it was penned in the disjunctive,—" to reſtrain the defendants from printing the life of " *Milton*, or *Milton*'s Paradiſe Loſt, or Dr. *Newton*'s notes.

Theſe caſes prove " that the Court of Chancery granted injunctions to protect the right, on ſuppoſition of its being a legal one."

And no injunction was ever refuſed in Chancery, upon the common law-right, till a doubt was ſuppoſed to have ariſen in this court, from the caſe of *Tonſon* v. *Collins* (which was then depending) having been twice argued, and then adjourned to be argued before all the judges: the reaſon of which has often been declared to be, not from doubts or difference of opinion; but merely from a ſuppoſition of colluſion; and which colluſion was afterwards the cauſe why it was neither argued nor determined.

Upon the whole, I conclude, that upon every principle of reaſon, natural juſtice, morality and common law; upon the evidence of the long-received opinion of this property, appearing in ancient proceedings and in law-caſes; upon the clear ſenſe of the legiſlature; and the opinions of the greateſt Lawyers of their time, in the Court of Chancery, ſince that ſtatute; the right of an author to the copy of his works appears to be well founded; and that the plaintiff therefore is, upon this ſpecial verdict, intitled to his judgment. And I hope the learned and induſtrious will be permitted from henceforth, not only to reap the fame, but the profits of their ingenious labours, without interruption; to the honour and advantage of themſelves and their families.

Mr. Juſtice *Yates* was of a different opinion from the two Judges who had ſpoken before him.

He ſaid he ſhould ever be extremely diffident of any judgment of his own, when he had the misfortune to diſſent from either of his brethren: and, after the very learned and ingenious arguments which each of them had now delivered, he could not but feel, with particular ſenſibility, the unequal taſk he had now before him.

He regretted too, that in ſo liberal a queſtion, ſo important to the literary world, and a queſtion of ſo much expectation, there ſhould be any diſagreement upon this bench. But he obſerved

obſerved, that if he ſhould happen to ſtand quite alone in the opinion he had formed, his ſentiments would no way affect the authority of the deciſion.

Whatever his opinion, however, might be; ſitting in his judicial capacity, he thought himſelf bound, both in this and in every cauſe, to declare it frankly and firmly.

After this very decent preface, he ſpoke near three hours in ſupport of his opinion. It cannot therefore be expected that I ſhould give the very words which he ſpoke: But I ſhall endeavour to convey the ſubſtance of what he ſaid; though not without ſome injury to the compoſition and language.

It was to the following effect——

The general queſtion for the determination of the court, is, "whether, after a voluntary and general publication of an author's works by himſelf, or by his authority, the author has a ſole and perpetual property in that work; ſo as to give him a right to confine every ſubſequent publication to himſelf and his aſſigns for ever."

Before I enter into the particular diſcuſſion of this queſtion, I will lay down one general poſition; which, I apprehend, can not be on either ſide diſputed:—"that in all private compoſitions, (I mean the compoſition of private authors, as contra-diſtinguiſhed from public prerogative copies,) the right of publication muſt for ever depend on the claimant's property in the thing to be publiſhed." Whilſt the ſubject of publication continues his own excluſive property, he will ſo long have the ſole and perpetual right to publiſh it: but whenever that property ceaſes, or by any act or event becomes common, the right of publication will be equally common.

In delivering my ſentiments upon this great queſtion, I will purſue the ſame method in which it was argued at the bar, both in this, and in a former cauſe between *Tonſon* and *Collins*: for, I deſire (once for all) to be underſtood as delivering my opinion, upon the arguments of the counſel, and upon my own conſideration of the matter; and not by way of reply to any thing that has fallen from either of my brothers.

By the counſel, it was argued on theſe two points—1ſt, on the general principles of property; and 2dly, on the peculiar, or at leaſt the ſuppoſed uſage and law of this kingdom.

Firſt then, it was contended, "that the claim of authors to a perpetual copy-right in their works, is maintainable upon the general principles of property." And this, I apprehend, was a neceſſary ground for the plaintiff to maintain: for,

for, however peculiar the laws of this and every other country may be, with reſpect to territorial property, I will take upon me to ſay, that the law of *England*, with reſpect to all perſonal property, had its grand foundation in natural law.

In ſupport therefore of this firſt propoſition, ſeveral plauſible arguments were ingeniouſly argued by the plaintiff's counſel. In the firſt place, they obſerved, property was defined to be "*Jus utendi et fruendi*;" and that an author has certainly that right over his own productions.

But this is a definition that merely relates to the perſonal dominion of a proprietor, and not to the object: It reſpects an acknowledged ſubject of property; not the object which is preſumed to be ſo; (which is now the queſtion in diſpute.) Nay, it even ſuppoſes an acknowledged proprietor; and merely deſcribes the extent of his dominion. He who has the property is the proprietor. But the dominion of a proprietor cannot extend beyond the duration of the property: No man can have that right beyond the juſt bounds of his property. And the point contended by the defendant is, "that a literary publication becomes no longer an object of property;" "that a literary publication becomes no longer an excluſive private right."

In anſwer to this, it was contended on the other ſide, "that an object of property is value; and literary compoſitions have their value, which is meaſured by the extent of their ſale."

I might here obſerve, that it will be difficult to annex a ſpecific value to incorporeal ſentiments, when they are detached from the manuſcripts, and publiſhed at large. From that time, the value, with reſpect to the author, depends upon his right to the ſole and perpetual publication of them: And the great point in queſtion is, "Whether he is intitled to that right or not." But laying this obſervation aſide, mere value, (all may ſee,) will not deſcribe the property in this. The air, the light, the ſun, are of value ineſtimable: But who can claim a property in them? Mere value does not conſtitute property. Property muſt be ſomewhat excluſive of the claim of another.

It was therefore alledged, "that a literary compoſition is certainly in the ſole dominion of the author, till he thinks proper to publiſh it:" For, no man can lawfully take it from him, or compel him to publiſh againſt his will.

This is moſt certainly true. But this holds good no longer than while it is in manuſcript.

Here, the defendant has not meddled with the author's manuſcript.

manuſcript. The work was publiſhed forty years ago. The defendant has printed a ſett of his own. He has not meddled with any property of the author's; unleſs the very ſtyle and ſentiments in the work were his.

It was neceſſary therefore for the plaintiff's counſel, to advance this propoſition (and which was the only one that affected the cauſe) namely, "That the author has a perpetual property in the ſtyle and ideas of his work; and therefore that he or his aſſigns will be for ever intitled to the ſole and excluſive right of it."

It was argued, That invention and labour are the means of acquiring property; and that literary compoſitions are the objects of the author's ſole pains and labour: Therefore they have the ſole right in them.

If this argument is confined to the manuſcript, it is true: It is the object only of his own labour, and is capable of a ſole right of poſſeſſion. But it is not true, if extended to his ideas.

All property has its proper limit, extent, and bounds. Invention or labour (be they ever ſo great) cannot change the nature of things; or eſtabliſh a right, where no private right can poſſibly exiſt.

The inventor of the air-pump had certainly a property in the machine which he formed: But did he thereby gain a property in the air, which is common to all? Or did he gain the ſole property in the abſtract principles upon which he conſtructed his machine? And yet theſe may be called the inventor's ideas, and as much his ſole property as the ideas of an author.

To extend this argument, beyond the manuſcript, to the very ideas themſelves, ſeems to me very difficult, or rather quite wild. Indeed the invention and labour, which are ranked among the modes of acquiring ſpecific property in the ſubject itſelf, are that kind of invention and labour, which are known by the name of occupancy. In that ſenſe, invention is defining or diſcovering of a vacant property: And labour is the taking poſſeſſion of that property, and beſtowing cultivation upon it. Property is founded upon occupancy.

But how is poſſeſſion to be taken, or any act of occupancy to be aſſerted, on mere intellectual ideas? All writers agree, that no act of occupancy can be aſſerted on a bare idea of the mind. Some act of appropriation muſt be exerted, to take the thing out of a ſtate of being common, to denote the acceſſion of a proprietor: For, otherwiſe, how ſhould other perſons be apprized they are not to uſe it? Theſe are

acts

acts that muſt be exerciſed upon ſomething. The occupancy of a thought would be a new kind of occupancy indeed. By what outward mark muſt the property denote approbation? And if theſe are void of that which the act of occupancy requires, it is a proof to me they cannot be the object of property.

Here another doubt ariſes, which I can not, I acknowledge, anſwer—"At what time, and by what act, does the authors common law property attach?

The ſtatute of Queen *Ann* very properly obviated this, by fixing the commencement of his property from the time of publication; firſt, entering it at Stationers Hall. And in the caſe of a mechanical invention, it commences from the date of the patent.

But if authors derive their right from common law, (a law which has exiſted from time immemorial, and therefore long before the Stationers Company exiſted, and can have no dependance on the Stationers company,) the author's right will be the ſame, whether he enters it in that book, or not.

Where therefore does this idea of the author's property attach? In other caſes, as when the heir has a right to any ſpecies of property, it commences from his taking poſſeſſion. An author is fully poſſeſſed of his ideas, when they ariſe in his mind: and therefore from the time theſe ideas occur to him; or from the time he writes them down, they are his property. Then if another man has the ſame ideas as an author, he muſt not preſume to publiſh them: he may be told theſe ideas were pre-occupied, and thereby became private property.

It would be ſtrange indeed, if the very act of publication can be deemed the commencement of private property. Even after publication, many thouſands may never ſet their eyes upon the book: yet would not theſe have a right to chooſe the ſame ſubject? and may they not have the ſame ideas upon it?

The improbability of their hitting upon thoſe ideas is not to the point. If they ſhould occur to the author; he has a right to publiſh them. Of this, I think, there can hardly be a doubt. Yet property, ſays *Pufendorf*, is a right by which the very ſubſtance of a thing belongs to one perſon, ſo that it can not, in the whole, nor after the ſame manner, become another's. And the digeſts ſpeak to the like effect. Sentiments are free and open to all: and many people may have the ſame ideas upon the ſame ſubject. In that caſe, every one of theſe perſons to whom they independently occur, is equally poſſeſſed and equally maſter of all theſe ideas; and

has an equal right to them as his own. Is it poſſible then that any one individual can have a ſole and excluſive property in theſe?

But there is one ground more upon which the plaintiff's counſel contended this claim of right; and which, at firſt ſight, appears the moſt ſpecious of all. They endeavoured to enforce this copy-right of authors, as a moral and equitable right; and to ſupport it by arguments calculated to prove that it is ſo.

For this purpoſe, Mr *Blackſtone* obſerved that the labours of the mind and productions of the brain are as juſtly intitled to the benefit and emoluments that may ariſe from them, as the labours of the body are; and that literary compoſitions, being the produce of the author's own labour and abilities, he has a moral and equitable right to the profits they produce; and is fairly intitled to theſe profits for ever; and that if others uſurp or encroach upon theſe moral rights, they are evidently guilty of injuſtice, in pirating the profits of another's labour, and reaping where they have not ſown.

This argument has indeed a captivating ſound; it ſtrikes the paſſions with a winning addreſs: but it will be found as fallacious as the reſt, and equally begs the very queſtion in diſpute. For, the injuſtice it ſuggeſts, depends upon the extent and duration of the author's property; as it is the violation of that property that muſt alone conſtitute the injury. If therefore his property be determined, no injury is done him. The queſtion, therefore, is "whether all the property of the author did not ceaſe, and the work become open, by his own act of publication." In that caſe, the defendant cannot be charged with any injuſtice; but has merely exerciſed a legal right. And however we may lean to literary merit, the property of authors muſt be ſubject to the ſame rule of law, as the property of other men is governed by. It is, therefore, as capable of being laid open, as any other invention of any other man's: and if, by publication, it becomes common, (as I ſhall obſerve by and by,) can the author complain of the loſs? Can he complain of loſing the bird he has himſelf voluntarily turned out?

But it is inſiſted, "that it conſcientiouſly belongs to the author himſelf, and his aſſigns, for ever; as being the fruits of his own labour."

"That every man is intitled to the fruits of his own labour," I readily admit. But he can only be intitled to this, according to the fixed conſtitution of things; and ſubject to the general rights of mankind, and the general rules of

of property. He muſt not expect that theſe fruits ſhall be eternal; that he is to monopolize them to infinity; that every vegetation and increaſe ſhall be confined to himſelf alone, and never revert to the common maſs. In that caſe, the injuſtice would lie on the ſide of the monopoliſt, who would thus exclude all the reſt of mankind from enjoying their natural and ſocial rights.

The labours of an author have certainly a right to a reward: but it does not from thence follow, that his reward is to be infinite, and never to have an end. Here, it is aſcertained. The legiſlature have fixed the extent of his property: they have allowed him twenty-eight years; and have expreſsly declared, he ſhall have it no longer. Have the legiſlature been guilty of injuſtice? Little cauſe has an author to complain of injuſtice, after he has enjoyed a monopoly of twenty-eight years, and the manuſcript ſtill remains his own property. It has happened in the preſent caſe, that the author and his aſſignee together, have enjoyed the emolument of this work between thirty and forty years: and the plaintiff ſtill has the manuſcript.

If a ſtranger had taken his manuſcript from him, or had ſurreptitiouſly obtained a copy of his work and printed it before him, he might then complain of injuſtice. And here lies the fallacy of this ſpecious argument: it was put as if the author was totally robbed of the profit of his labour; as if all his emolument was foreſtalled, without ſuffering him to reap any emolument whatever.

In that caſe, it would be the higheſt injuſtice. But when no ſuch intruſion has been made upon his property; when he and his aſſigns have enjoyed the whole produce of his labour for twenty-eight years together and upwards, what ground can remain for accuſing the defendant of immorality; or for the author or his aſſigns to ſay "He is robbed of the fruits of his labour?"

If an author is permitted to enjoy his property according to the nature of it, he can have no injuſtice done him: and if his ſituation is ſuch, that he can only diſpoſe of it as other people can of their goods; or if he can only diſpoſe of it for the firſt publication; can the author murmur, becauſe he can diſpoſe of it only as other people can of their property? Shall an author's claim continue, without bounds of limitation; and for ever reſtrain all the reſt of mankind from their natural rights, by an endleſs monopoly? Yet ſuch is the claim that is now made; a claim to an excluſive right of publication, for ever: For, nothing leſs is demanded as a

reward and fruit of the author's labour, than an abſolute perpetuity.

Examples might be mentioned, of as great an exertion of natural faculties, and of as meritorious labour in the mechanical inventions, as in the caſe of authors. We have a recent inſtance, in Mr. *Harriſon*'s time-piece; which is ſaid to have coſt him twenty years application: and might not he inſiſt upon the ſame arguments, the ſame chain of reaſoning, the ſame foundation of moral right, for property in his invention, as an author can for his?

If the public ſhould rival him in his invention, as ſoon as it comes out, might not he as well exclaim, as an author, "that they have robbed him of his production, and have iniquitouſly reaped where they have not ſown?" And yet we all know, whenever a machine is publiſhed, (be it ever ſo uſeful and ingenious,) the inventor has no right to it, but only by patent; which can only give him a temporary privilege.

As therefore, this charge of injuſtice depends upon the extent of the author's property; (for if no right is invaded, no injury is done;)—Let us now conſider the general rules concerning property; and ſee whether this claim will coincide with any one of them.

The claim is to the ſtyle and ideas of the author's compoſition. And it is a well-known and eſtabliſhed maxim, (which I apprehend holds as true now, as it did 2000 years ago,) "That nothing can be an object of property, which has not a corporeal ſubſtance."

There may be many different rights, and particular diſtinct intereſts, in the ſame ſubject; and the ſeveral perſons intitled to theſe rights may be ſaid to have an intereſt in them: but the objects of them all, the principal ſubject to which they relate, or in which they enjoy, muſt be corporeal. And this, I apprehend, is no arbitrary ill-founded poſition; but a poſition which ariſes from the neceſſary nature of all property. For, property has ſome certain, diſtinct and ſeparate poſſeſſion: the object of it, therefore, muſt be ſomething viſible. I am ſpeaking now, of the object to which all rights are confined. There muſt be ſomething viſible; which has bounds to define it, and ſome marks to diſtinguiſh it. And that is the reaſon why theſe great marks are laid down by all writers——It muſt be ſomething that is viſibly and diſtinctly enjoyed; that which is capable of all the rights and accidents and qualities incident

incident to property: and this requires a ſubſtance to ſuſtain them.

But the property here claimed is all ideal; a ſet of ideas which have no bounds or marks whatever, nothing that is capable of a viſible poſſeſſion, nothing 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: and theſe are what the defendant is charged with having robbed the plaintiff of.

In anſwer to theſe objections, it was alledged for the plaintiff, "that there are many other inſtances of incorporeal rights; ſuch as all the various kinds of preſcriptive rights and partial claims."

But the fallacy lies in the equivocal uſe of the word "property;" which ſometimes denotes the right of the perſon; (as when we ſay, "ſuch a one has this eſtate, or that piece of goods;") ſometimes, the object itſelf.

Here, the queſtion is upon the object itſelf, not the perſon. I readily admit that the rights of perſons may be incorporeal.

But the queſtion is now, "Whether any thing can be the object of proprietary right, which is not the object of corporeal ſubſtance." And, for my own part, I know not of any one inſtance of any one right which has not reſpect to corporeal ſubſtance. Every preſcriptive inheritance, every title whatever has reſpect to the lands in which they are exerciſed. No right can exiſt, without a ſubſtance to retain it, and to which it is confined: it would, otherwiſe, be a right without any exiſtence.

To get over this, it was ſaid, the profits of publication, till they are received, are uncertain and caſual, and cannot in themſelves be an object of property: they are alſo incidental, ariſing entirely from the matter which is publiſhed. The compoſition therefore is the principal object of property; upon which, all the profits depend, and which alone can intitle the author to thoſe profits: for, theſe, like the profits of an eſtate, depend upon the property in that perſon to whom they ariſe.

If the author will pretend to a perpetual right in thoſe, he

he muſt prove he has a perpetual right to the ideas which produced them.

Then the queſtion returns again, "Whether, after publication, the work continues ſolely the author's for ever.

Here, the maxim occurs which I mentioned before, that nothing can be an object of property, which is not capable of a ſole and excluſive enjoyment. For, property, as *Puſendorf* obſerves, implies a right of excluding others from it. For, without that power, the right will be inſignificant: It will be in vain to contend that "that is your own," which you can not prevent others from ſharing in.

It is not neceſſary, I own, that the proprietor ſhould always have the total actual poſſeſſion in himſelf. A potential poſſeſſion; a power of confining it to his own enjoyment, and excluding all others from partaking with him; is an object or accident of property.

But how can an author, after publiſhing his work, confine it to himſelf? If he had kept the manuſcript from publication, he might have excluded all the world from participating with him, or knowing the ſentiments it contained: but by publiſhing the work, the whole was laid open; every ſentiment in it made public for ever; and the author can never recall them to himſelf, never more confine them to himſelf, and keep them ſubject to his own dominion.

The quotation from the inſtitutes relating to wild animals, is very applicable to this caſe. They are yours, while they continue in your poſſeſſion; but no longer. So, from the time of publication, the ideas become incapable of being any longer a ſubject of property: all mankind are equally intitled to read them; and every reader becomes as fully poſſeſſed of all the ideas, as the author himſelf ever was.

From theſe obſervations, this corollary, in my opinion, (for I ſpeak only my own ſentiments,) does naturally follow: "That the act of publication, when voluntarily done by the author himſelf, is, virtually and neceſſarily, a gift to the public." For, when an author throws his work into ſo public a ſtate that it muſt immediately and unavoidably become common, it is the ſame as expreſsly giving it to the public. He knows, before he publiſhes, that this will be the neceſſary conſequence of the publication: therefore he muſt be deemed to intend it. For, whoever does an act of any kind whatever deſignedly and knowingly, muſt of courſe intend every neceſſary conſequence of that act. To which I might add, that in every language, the words which expreſs a publication of a book, expreſs it as giving it to the public.

But

But in the argument, it was contended, " that the author gives nothing to the public, but the mere peruſal of it; and ſtill preſerves the perpetual right to the work;" " that an author's publiſhing and ſelling a book is only like giving the buyers ſo many keys to a gate, or tickets to an opera;" that " thoſe were only given for the parties themſelves, but would not entitle them to forge other keys or tickets."

To this the anſwer is, I think, eaſy and evident. If the author had not publiſhed his work at all, but only lent it to a particular perſon, he might have injoined that particular perſon, " that he ſhould only peruſe it;" becauſe, in that caſe, the author's copy is his own; and the party to whom it is lent contracts to obſerve the conditions of the loan: but when the author makes a general publication of his work, he throws it open to all mankind.

That is, then, very different from the caſe of giving keys or tickets to particular perſons. The very condition of giving them is the excluſion of all other perſons. And theſe keys or tickets give the party to whom they are given no property to the land they paſs through, or to the Opera-Houſe: they are given them for a particular time, and to give them a tranſient admiſſion, a temporary privilege only. It is like an author's lending his manuſcript to particular friends; who ſtill retains the right over it, to recall it whenever he pleaſes.

But when an author prints and publiſhes his work, he lays it entirely open to the public, as much as when anown of a piece of land lays it open into the highway. Neither the book, nor the ſentiments it contains, can be afterwards recalled by the author. Every purchaſer of a book is the owner of it: and, as ſuch, he has a right to make what uſe of it he pleaſes.

Property, according to the definition given of it by the defendant's counſel, is " *jus utendi et fruendi.*" And the author, by impowering the bookſeller to ſell, impowers him to convey this general property: and the purchaſer of the book makes no ſtipulations about the manner of uſing it.

The publiſher himſelf, who claims this property, ſold theſe books, without making any contract whatever. What colour has he, to retrench his own contract, or impoſe ſuch a prohibition?

Nothing leſs than legiſlative power can reſtrain the uſe of any thing. If the buyer of a book may not make what uſe of it he pleaſes, what line can be drawn that will not tend to ſuperſede all his dominion over it? He may not lend it, if he

is not to print it; becauſe it will intrench upon the author's profits. So that an objection might be made even to his lending the book to his friends; for he may prevent thoſe friends from buying the book; and ſo the profits of ſuch ſale of it will not accrue to the author. I do not ſee that he would have a right to copy the book he has purchaſed, if he may not make a print of it: for, printing is only a method of tranſcribing.

With regard to books, the very matter and contents of the books are by the author's publication of them, irrevocably given to the public; they become common; all the ſentiments contained therein, rendered univerſally common: and when the ſentiments are made common by the author's own act, every uſe of thoſe ſentiments muſt be equally common.

To talk of reſtraining this gift, by any mental reſervation of the author, or any bargain he may make with his bookſeller, ſeems to me quite chimerical.

It is by legal actions that other men muſt judge and direct their conduct: and if ſuch actions plainly import the work being made common; much more, if it be a neceſſary conſequence of the act, "that the work is actually thrown open by it;" No private tranſaction or ſecretly-reſerved claim of the author can ever controul that neceſſary conſequence. Individuals have no power, (whatever they may wiſh or intend,) to alter the fixed conſtitution of things: a man cannot retain what he parts with. If the author will voluntarily let the bird fly, his property is gone; and it will be in vain for him to ſay "He meant to retain" what is abſolutely flown and gone.

There is another maxim too, concerning property; "that nothing can be an object of property, that is not capable of *diſtinguiſhable proprietary marks.*"

The principal end for which the firſt inſtitution of property was eſtabliſhed, was to preſerve the peace of mankind; which could not exiſt in a promiſcuous ſcramble. Therefore a moral obligation aroſe upon all, "that none ſhould intrude upon the poſſeſſion of another." But this obligation could only take place where the property was diſtinguiſhable; and every body knew that it was not open to another, Mankind muſt have a knowledge of what is their duty, in order to obſerve it by abſtaining from every violation of it; the breach of a duty muſt be wilful, to make it criminal.

It was neceſſary, therefore, that every perſon ſhould have ſome

ſome *indicia*, ſome diſtinguiſhing marks upon his property to denote his being the proprietary therein: For, hard would be the law that ſhould adjudge a man guilty of a crime, when he had no poſſibility of knowing that he was doing the leaſt wrong to any individual.

Now where are the *indicia* or diſtinguiſhing marks of ideas? what diſtinguiſhing marks can a man fix upon a ſet of intellectual ideas, ſo as to call himſelf the proprietor of them? They have no ear-marks upon them; no tokens of a particular proprietor.

If the author's name be inſerted in the title page, that is no reaſon: For, many of our beſt and nobleſt authors have publiſhed their works from more generous views than pecuniary profit. Some have written for fame and the benefit of mankind: others have had ſuch pecuniary views, only for a time; and have afterwards left their work open to all mankind.

On the other hand, if the author's name was omitted in the title-page, he might equally inſiſt on the claim: For, if the property be abſolutely his, he has no occaſion to add his name to the title-page. How is it to be known, when ſuch a ſort of property is abandoned? In all abandonments, two circumſtances are neceſſary; an actual relinquiſhing the poſſeſſion, and an intention to relinquiſh it. But in what manner is the poſſeſſion of intellectual ideas to be relinquiſhed? Or how is the intention of relinquiſhing them to be manifeſted? Mere mental ideas admit of no actual or viſible poſſeſſion; and conſequently are capable of no ſigns or tokens of abandonment.

The legiſlature had plainly this objection in view, when they penned the ſtatute of Queen *Anne*, to give authors a temporary property in their works. For, in the preamble, it is ſaid—"Whereas many perſons may, through ignorance, offend againſt this act; unleſs ſome proviſion be made, whereby the property in every ſuch book as is intended by this act to be ſecured to the proprietor or proprietors thereof, may be aſcertained; be it therefore enacted, that nothing in this act contained ſhall be conſtrued, &c. unleſs the title to the copy of the book be entered in the regiſter-book of the Stationers Company." And from that regiſter-book any perſon may ſee whether the author intended to make a property of his work; and they may ſee the duration of ſuch property: for the property is to commence from the publication of the work, provided it be ſo regularly entered as the act requires.

But if authors have a right at common-law, they need not

enter their books at all with the Stationers Company: they may wave that. And in caſe they do not enter them, by what marks, then, muſt this property in ideas be diſtinguiſhed? And how will the difficulty encreaſe, if the property extends not only to fourteen, or twenty-eight years, but for ever?

Therefore it appears to me, that this claim of a perpetual monopoly is by no means warranted by the general principles of property: and from thence I ſhould have thought that it could not be a part of the common law of *England*.

But I will now conſider the ſecond general ground, upon which this perpetual copy-right was argued at the bar; namely, the ſuppoſed uſage and law of this kingdom.

Under this head, it was contended, "that the right of an author to the ſole publication and perpetual monopoly of his works, though it were not maintainable on general principles, is yet a kind of cuſtomary property, a right that has always been allowed and ſupported in this kingdom."

If it was ſo, it is ſtrange that in all our laws, where every kind of property is ſo much diſcuſſed, a claim ſo extenſive as this, is not abſolutely eſtabliſhed. And yet it was admitted by the plaintiff's counſel, "that they could not produce any one determination in a court of law, that had eſtabliſhed any ſuch kind of property." They attempted, however, to ſet up ſome extraordinary ſubſtitute, to ſupply this deficiency. The firſt was the finding in the ſpecial verdict, "that before the reign of Queen *Ann*, it was uſual to purchaſe from authors the perpetual copy-rights of their books, and to aſſign the ſame from hand to hand, for valuable conſiderations; and to make them the ſubject of family-ſettlements."

A deſcription thus painted, with the ſtriking ideas of purchaſe and family-poſſeſſions, may, at firſt ſight, dazzle the eye, and catch our paſſions: but, when nearer looked at, and fairly viewed and examined, we ſhall find it merely an illuſion.

There are but two lights, in which it can be applied to the preſent queſtion: either, 1ſt, as eſtabliſhing a cuſtomary property, in fact; or 2dly, as ſhewing that there was a general idea or notion of ſuch a right, antecedent to the ſtatute of Queen *Ann*.

With reſpect to the former—It is impoſſible that it can eſtabliſh any cuſtomary claim. It is no uſage of which the law can take notice; being merely an allegation of particular contracts which ſome individuals have made before the reign of Queen *Ann*. Whereas, to conſtitute a legal cuſtom,

it

it muſt have theſe two qualities: firſt, a cuſtom muſt import ſome general right in a diſtrict, and not a few mere private acts of individuals; and, in the next place, ſuch cuſtom muſt appear to have exiſted immemorially. All cuſtoms operate (if they have any operation) as poſitive laws. The mere fact of uſage will be no right at all, in itſelf: but when a cuſtom has prevailed from time immemorial, it has the evidence and force of an immemorial law.

If the cuſtom be general, it is the law of the realm: if local only, it is *lex loci*, the law of the place.

Now, all laws are general, as far as the law extends; and all cuſtoms of *England* are of courſe immemorial. No uſage, therefore, can be part of that law, or have the force of a cuſtom, that is not immemorial.

Here, no ſuch general or immemorial uſage is ſuggeſted: this finding is merely an allegation of particular contracts made with particular individuals before the reign of Queen *Ann*.

So far, it is true, appears upon this finding, "That prior to that reign, copies have been purchaſed for valuable conſiderations, and made the ſubject of family-ſettlements."—But how long before? Whether one hundred years, fifty years, or ten years, is not ſtated. Very certainly, it could not be immemorial: for, the art of printing was not known in this kingdom; till the reign of *Ed.* IV. Therefore theſe contracts could not be derived from the ancient immemorial law of the land: and, conſequently, they could not create a ſpecies of property which was unknown to that law.

It is indeed impracticable, to draw any inference from ſuch a propoſition as this is. For, the verdict does not find "that theſe rights were ever enforced againſt ſtrangers." The parties would undoubtedly acquieſce in the agreement: and the families on whom they were ſettled would not reject a ſettlement, however chimerical. But, unleſs it was ſhewn that theſe claims have been enforced againſt ſtrangers, no private contracts or family-ſettlements can impoſe a law upon the public.

It is ſaid, "They ſerve to ſhew there was a general idea and apprehenſion of the exiſtence of ſuch a right, before the ſtatute of Queen *Ann*." Admit the idea had been ever ſo general; what are we thence to infer? If the ideas and ſentiments and apprehenſions of individuals were ſufficient ground whereupon to eſtabliſh a ſpecies of property; what a vaſt extent would this carry it to!

Immenſe ideas of property were raiſed in the South-ſea

ſtock, in the year 1720. In that year, innumerable rights of this kind were bought and ſold; and theſe tranſactions paſſed between parties whoſe ideas were as ſanguine as any authors could be "that the ideas they ſold were real property: and yet the ſubjects that were ſold were, in truth and fact, no real property.

The good-will of a ſhop, or of an ale-houſe, and the cuſtom of the road (as it is called among carriers,) are conſtantly bargained for and ſold, as if they were property. But what are theſe? Nothing more than the good-will of the cuſtomers, who may withdraw from them, the very next day, if they pleaſe. The purchaſer of this cuſtom or good-will gains no certain property in it; he has no power to confine it to himſelf, nor can he uſe any power to prevent other people from gaining the cuſtom. It is an advantage, indeed, ſo far of ſervice, as it gives the purchaſer a priority for cuſtom. And ſo it is in the caſe of the publication of a book: it gives a priority, and gets a ſet of firſt cuſtomers. But none of theſe caſes can eſtabliſh an abſolute, perpetual, excluſive property.

Whatever ideas individuals may form, or however they may traffick among themſelves in imaginary claims, they cannot affect the real right of the public, who are no parties to ſuch contracts: they cannot create law.

It is a well known maxim in our law, "that no man can by any device whatever, create a new conſequence out of an eſtate, or innovate upon the law of the land." He cannot annex to his eſtate any novel conditions that are inconſiſtent with the nature of the eſtate: much leſs, can the acts or intereſts of individuals abridge the public of their natural right, or eſtabliſh monopolies.

The next arguments urged in favour of this claim, were the two by-laws of the Stationer's Company; the former, made in *Auguſt* 1681; the latter, in *May* 1694: the former, recognizes it. It is material to attend to the words of this by-law. It aſſerts, that divers of the members of the company had great part of their eſtates in copies; and that by the ancient uſage of that company, when any books or copies were entered in their regiſter to any of the members of that company, ſuch perſons were always reputed the proprietors of them, and ought to have the ſole printing of them. The next is the ſame, only with this additional entry (after theſe two recitals, and reciting "that the copies were conſtantly bargained and ſold, amongſt the members of the company, as their property; and deviſed to the children

children and others, for legacies, and to their widows, for their maintenance;" it is ordained, that when any entry ſhall be duly made of any book or copy, by or for any member of the company; in ſuch caſe, if any other member ſhall, without the licence or conſent of the member for or to or by whom the entry is made, print, import, or expoſe to ſale, &c. they ſhall for every copy forfeit twelve pence.

The view of inſerting theſe by-laws in the ſpecial verdict, was, firſt, to draw from the preamble, ſomething in favour of copy-rights; and, in the ſecond place, to ſhew that theſe rights were protected by theſe by-laws.

With reſpect to the firſt——Whatſoever theſe by-laws, have or might have ſuggeſted in favour of this claim, they would be certainly no evidence at all. They are confined to the members of that company, and could not be read againſt the preſent defendant, who is no member of their company, nor ſubject to their by-laws. They are confined too to ſuch books as are entered in the regiſter-book of that company by to or for ſome member of the company: and this is founded on the ancient privilege of that company; and can only affect their own members.

So peculiar a claim is ſo far from being a proof of a common law right, that it is an argument againſt it. For, if ſuch a right exiſted by the common law of the land, it could not be ſpoken of as ſubſiſting only by uſage of the company.

But we are on a queſtion of law: and that is only to be determined on legal principles, and not upon the allegation of a particular ſet of men. Here is a queſtion, "Whether this or that article of property belongs to *A.* or *B.*" And upon a general queſtion, "Whether ſuch a thing is the ſubject of property, or does freely belong to all," it is the law that muſt determine; not the by-laws of the Company of Stationers.

It would be ſtrange indeed, if this great point which the Courts of Law have thought ſo arduous to determine, were to be decided at laſt by the opinions and reſolutions of the Stationer's Company.

With reſpect to the ſecond view of inſerting theſe by-laws in the ſpecial verdict; namely, "the ſhewing that theſe rights of authors were protected by theſe by-laws"—Theſe by-laws ſeem as deficient in this view, and as little capable of eſtabliſhing this point, as they were in the former view, and in ſupport of the right itſelf.

Theſe by-laws, in the firſt place, have no relation to the claims of authorſhip. The copies they refer to, are only

thoſe copies which particular members of the Stationer's Company had the privilege to print; either by patents to themſelves, or by licence of the Stationer's Company. In the next place, they do not give protection, they do not pretend to give protection, to any but thoſe of their own company. The offence of infringing thoſe rights, and the penalties inflicted, are confined to their own members only: and the penalty is given to the company themſelves. The whole is nothing more than a corporate regulation of their own company. Many members of that company were poſſeſſed of copies; and others, of particular allotments from the Company for the ſole printing of their own books: and, to preſerve proper order amongſt themſelves, the books, that each member was allowed to print, were entered in their regiſter; that every one's claim might be known among themſelves, and they might not intrude upon each other's right.

But theſe entries and by-laws extended no further than to the members of that company. No author whatever had from them, the leaſt pretenſion to copy-right. And even theſe members themſelves could have no redreſs againſt ſtrangers; but only amongſt themſelves. Theſe by-laws provided no remedies againſt other perſons: nor indeed had the Company a right to impoſe their reſtrictions on any but their own body. Where then is that copy-right of authors, which they plead for? Or that general protection which theſe by-laws have been imagined to afford to them?

But other things were urged at the bar, and ſeveral other matters were ſubſtituted, to account for the want of judicial determinations in favour of this claim; as, the charters of the Stationer's Company; two proclamations of *H.* VIII. and Queen *Mary*; two decrees in the Star Chamber; two ordinances made in the time of the uſurpation; and the licenſing act of 13 & 14 of *C.* II.

Theſe extraordinary acts of ſtate were quoted as giving protection to copy-rights, and to account for the want of judicial determinations. But none of them, except the ſtatute, come regularly before us; ſo that we can properly take notice of them.

If theſe were material to the deciding this queſtion, they ſhould all, I apprehend, except the licenſing act of *C.* II, have been found by the Jury. For, all the reſt are particular inſtruments; and if admiſſible at all, they were matter of evidence, and not of law: they could not come properly before

before us by way of argument, from the bar; nor can we regularly take notice of them, upon the bench.

But I mention this merely for the ſake of precedent and regularity; meaning, at the ſame time, to wave all objections of this ſort, and to conſider the ſeveral inſtruments themſelves.

Firſt, As to the charters of the Stationer's Company—The chief ſtreſs was laid on the clauſe in the charter of 36 *C.* II. which mentions the proprietors of copies entering their books or copies in the regiſter book of the Stationer's Company; and declares that they ſhould thereupon have the ſame right as had been uſual for one hundred years paſt.

But the proprietors of books and copies to whom this refers, were merely thoſe members of the Stationer's Company, who had the ſole printing of books by patent. And we ſee by their by-laws, they claim for themſelves and their members a peculiar privilege in copies. And there is an ancient uſage of the Company referred to and confirmed, as the uſage which exiſted for one hundred years paſt. It is not pretended, that ſuch right exiſted immemorially. And whatever theſe charters may have ſuggeſted, no charters from the Crown, and conſequently no expreſſions in ſuch charters, could affect the general rights of the ſubject. And it would be ſtrange indeed to infer uſage of law, from grants made to the Stationer's Company.

When the prerogative made ſuch extraordinary ſtrides as it did at that time, the Company were empowered to ſearch the houſes of all printers and bookſellers, and to ſeize all books that were contrary to any ſtatute then made or that ſhould be made, &c.

Are we therefore to conclude, or could we draw any deductions (either legal or hiſtorical) that ſuch ſearch, ſeizings or impriſonments could be legal in themſelves? And as to the protection theſe charters gave to copy-rights—they do not pretend to extend to any claim of copy-right; but, to ſuch perſons only as ſhould enter their books in that Company's regiſter. But if author's had any common law right, it would be equally good, whether they entered them there or not: for, ſuch entry cannot extend nor abridge that right, if they really had it.

The inſtitution "that all books ſhould be entered in that regiſter," was merely political: the deſign of it was, to ſuppreſs ſeditious, heretical or immoral books. The inſerting in theſe regiſters the claims of patentees or any others, was an original inſtitution of the Stationer's Company, and extended

tended no further than their own members. With reſpect to all others, theſe privileges extended not to them. This concerned merely their own government: And their own by-laws could not extend further than their own community.

The two proclamations were iſſued, one by *H.* 8. (as deſpotic a Prince as ever ſat upon the throne;) the other, by his bigotted daughter Queen *Mary*; and relate to other purpoſes. The former was a general proclamation againſt the printing any books whatſoever without a licence: And that of Queen *Mary*, from printing what ſhe called heretical books.

What have theſe to do with the copy-right of authors? theſe excluſions extend as much to one, as to another: if the book was offenſive, it was indifferent to the Court, whoſe it was.

The patents *cum privilegio* granted the book to particular perſons, for a certain term of years.—From hence it was ſaid, "it was no innovation in authors to claim this excluſive right." The patents that were aſſerted in this part of the arguments, were taken from *Ames*'s Typographical Antiquities; and were ſo arbitrary groſs and abſurd, that one would not have expected ſuch a quotation. *Growte* had a patent for the primer of *Saliſbury* Uſe; *Saxton*, for all maps and charts of *England*; and *Tallis* and *Birde*, and alſo *Morley*, for the printing of muſick; and *Simcoke*, for all things printed on one ſide of a ſheet, or any part of a ſheet; provided the other ſide was white paper. In all theſe patents there were penalties inflicted; and they had power given them to ſeize books, and ſearch houſes. They are too groſs, to be argued from: but they exclude all notion of proprietary right. The grant was given to the printers themſelves, without any regard to the authors, or new compoſitions. The very name of being patents to printers, and the limits fixed, ſhew that they exclude all ideas of a literary right, and a property ſubſiſting in the author.

Next, we are told of ſome proceedings in the *Star-Chamber*; a Court the very name whereof is ſufficient to blaſt all precedents brought from it. But I will do the gentlemen the juſtice to ſay, they did not mean to adduce them as authorities; but to apply them as hiſtorical anecdotes in their favour.

It was ſaid, in one of theſe decrees, That no perſon ſhould print any book, work, or copy againſt the true intent and meaning of any letters patent, or prohibition of any known law of England, or other ordinances laid down for the good government

government of the Stationers Company, &c. And this decree was afterwards by the command of *Jac.* I. ordered to be put in execution.

In 1607, it was ordered by a decree, That no perſon ſhould print any book, which the Stationers Company ſhould, in their books, prohibit; and which that Company ſhould, by letters patent, have a right of printing.

Such were the edicts of that imperious Court. And is it poſſible to apply this deſpotic decree to the legal right of authors, in any light? Tyrannical and illegal as the Star-chamber was, the ſole juriſdiction they poſſeſſed was in criminal matters reſpecting books; and theſe only, (as their decree mentions,) in ſuch as were bad.

They conſidered all infringements of patents and grants of the crown, as contempts of royal authority; and on that idea they ſupported any patent the crown thought proper to grant. For, as lord *Coke* obſerves, "Such boldneſs the monopoliſts took, that often at the council-table, Star-Chamber and Exchequer petitions, informations and bills were preferred, pretending a contempt for not obeying the commandments and clauſes of the ſaid grants of monopolies, and of the proclamations concerning the ſame." For preventing which miſcief, Lord *Coke* ſays, that branch of the ſtatute was added, which directs, "That all grants of monopolies ſhall be tried and determined by and according to the common law." In that of 21 *James* the Firſt, a proviſo was contained, "that it ſhould not extend to any patent of privilege concerning printing." Therefore, as to theſe patents, the Star-Chamber continued the ſame uſurped power of injoining obedience, and puniſhing contempts.

But the decrees of this arbitrary Court can not be applied either judicially or hiſtorically, to civil caſes, or (more particularly) to the preſent Caſe.

Of ſuch kind of patents the Stationers Company were the ingroſſers. Some aſſumed claims and authorities were allowed to them, for the printing the particular books. They were of ſervice to the ſtate in ſuppreſſing any ſeditious books: And ſo that authority in them (however unwarrantable in itſelf) was preſerved to them; and the Star-Chamber ſecured it to them.

By the charter of Queen *Mary*, the Company of Stationers were made a kind of literary conſtables, to ſeize all books that were printed contrary to the ſtatute, &c. And, as Mr. *Yorke* obſerved in arguing the caſe of *the Univerſity of Cambridge* v. *Baſkett*, when once the company were made

abſolute, they attempted to execute ſuch outrages that no body could ſubmit to. And the Star-Chamber ſupported them, and inſiſted upon obedience to the Stationers Company No book was allowed to be printed, till it was entered in their regiſter: and conſequently, they might ſtop whatever publication they pleaſed. The Star-Chamber was equally zealous in ſupporting the intereſts, as the powers of that favourite Company of Stationers: And therefore they exerted the terrors of their authority to enforce the privilege which had been granted to them or to any of their members, by patents or charters from the crown. And this they did, under their criminal juriſdiction, by aſſuming a power, in virtue of it, to puniſh for diſobedience to the patents and royal grants, which they were poſſeſſed of.

They did not otherwiſe interfere; where there was no grant or prohibition, to give them a colour for it. That Court, with all their extravagance, extended their juriſdiction in this matter, only to the grants of the crown, or to the ordinances of the Stationers Company. Can this, then, be any proof at all of the inherent right of authors in the copies of their works? A right, which if it exiſts at all, is an original independent right. Do theſe decrees ſerve for the protection of ſuch rights of authors? Are they ſo concluſive, as to account for and ſupply the want of any other determination in their favour; when the whole right which was the ſubject-matter of them, is confined to the Stationers Company, or to thoſe that had patents from the crown?

The next favourite topic of the plaintiff's counſel was the ordinances made by the Houſes of Parliament. But they were calculated to political views; except what related to the Stationers Company: and no protection is given by them to the copy-rights of authors in general. What related to the Stationers Company is adapted to the particular privileges of that company and its members. The ordinance in 1649, is, "That no perſon ſhould print or reprint any book or part of a book that was granted to the Stationers Company, without their conſent; nor any book or part of a book which was entered in their books to or for any member of the company, without the conſent of the owner, &c." The deſign was to ſtop the publication of thoſe papers which the royaliſts publiſhed.

The title of the other ordinance was for ſtopping unlicenſed, ſcandalous publications, &c:" And therefore it enacted, "that no book ſhould be publiſhed, unleſs it was approved by the licenſer." And by the ſame ordinance, the Stationers Company

Company were authorized to ſearch for all unallowed printing preſſes employed in printing unlicenſed books, &c. and likewiſe to apprehend all authors, &c.

The whole of theſe ordinances, from the beginning to the end, were adapted to the ſame political views; except that particular clauſe which is entirely confined (like the Star-Chamber decrees) to the privileges which had been granted to the Stationers Company; and the particular claims of their members.

But there is not a clauſe that ſtates or protects the copy-right of authors.

The ſtatute of 13 & 14 *C.* II. *c.* 33. (the licenſing-act,) was next mentioned at the bar: and the plaintiff's counſel argued that it contained a recognition of the copy-right, and ſuch a protection to authors, that they need not to ſeek any other. In proof whereof, three clauſes of that act were quoted. In the 18th ſection, is a proviſo to ſave the rights and privileges of the univerſities touching the licenſing or printing of books. By the third ſection, no private perſon may print any book, unleſs it be entered in the Stationers Company's regiſter-book, and licenſed, &c. The twenty-third ſection contains a proviſo to ſave the rights and privileges of particular perſons who have grants from the crown, according to their reſpective grants.

But how will theſe clauſes avail thoſe authors who are not members of the Stationers Company, nor have any particular grant of an excluſive privilege? or if the author had failed to enter his book in the regiſter-book of the Company of Stationers, what relief or redreſs could he have had?

For my own part, I cannot collect from any of theſe ſeveral inſtruments, any authorities that favour the preſent plaintiff. They were no ſecurity to the copy rights of authors in general: nor can they account for the want of legal determinations in favour of the plaintiff's claim. The patents were enormous ſtretches of the prerogative, to raiſe a revenue, and to gratify particular favourites, without the leaſt regard to authors and new compoſitions. And all the reſt of theſe authorities were founded on political views, to prevent (as they declare) heretical and ſeditious publications, &c. And the orders "that all books ſhould be entered in the regiſter of the Stationers Company," were to prevent improper publications; and have no view to eſtabliſhing the right of copy to authors. The innocence or delinquency of the work, and not any private property in the authors, were the object of their inquiry. If the licenſer did not approve the copy,

he could ſtop the author himſelf from publiſhing his own compoſition. The inſtitution of the licenſer's office was, to guard againſt improper political publications.

The by-laws of the Stationers Company protect none but their own members.

What ſecurity then were all theſe inſtruments for the copy-right of an author?

I might alſo obſerve upon all theſe inſtruments, that theſe expreſs prohibitions plainly imply "that authors had no protection at common law:" for, if they had, it would have been alone and of itſelf, a competent protection to them; and all theſe prohibitions would have been needleſs.

I am now come to the laſt reſort of the plaintiff's counſel for ſupporting their claim: and that is, the injunctions that have been granted by the Court of Chancery.

Great attention and reſpect is undoubtedly due to the deciſions of a Lord Chancellor: but they are not concluſive upon a court of common-law. Had theſe injunctions (which were only temporary) been perpetual, they could have no effect on a Court of common law, in a common law queſtion.

The common law of *England* muſt direct the determination of a common law queſtion. By common-law determinations we are bound; and to them we muſt always adhere: for, theſe are the proper conſtitutional declarations of the law of the land. They are ſo conſidered, even by the Court of Chancery itſelf. When any doubt ariſes in a cauſe in equity concerning a point of common law, it is uſually referred to the determination of a Court of common law. The very caſe now before us is ſent hither for our determination, becauſe it is a queſtion of common law. But the Courts of law never apply to a Court of Equity for their deciſion, in a common law queſtion. When the Court of Equity appeals to us, as a Court of Law, by reaſon of its being a common law queſtion, it would ſeem a little ſtrange, if we ſhould go back to that very Court, to inquire their opinion upon it; or, in other words, if they ſhould anſwer the queſtion they put to us, by making the very ſame inquiry of them. Yet that would in effect be the caſe, if we were to form our deciſion of this queſtion, upon the arguments and deciſions made in the authorities that have been cited: It would be grounding our deciſion upon what is no judgment or authority at all. Theſe injunctions were but temporary ſuſpenſions, "till the rights ſhould be determined;" and none of them contain any expreſs deciſion whatever.

It was ſaid at the bar, "that theſe injunctions were acquieſced

eſced in, by the defendants." But no acquieſcence of the parties can alter the law. The Court of Chancery could have reaſoned and concluded from theſe arguments, as well as we: and they would hardly wiſh us to draw deductions from their own deciſions. Their ſending the cauſe to us is a deciſive proof "that the Court of Chancery, who granted theſe injunctions, conſider this matter as unſettled." And in the caſe of *Millar* v. *Donaldſon*, which was a caſe depending upon common law, Lord *Northington* would not determine the point; but left it to be conſidered as a queſtion of common law.

It is plain, then, that after all theſe injunctions, the grand queſtion itſelf is ſtill, even in that Court, conſidered as an undecided point.

But as the plaintiff's counſel relied ſo much upon them, I think it a due reſpect to the gentlemen, to examine particularly the injunctions themſelves; and ſee whether they have any ſort of influence upon the queſtion before us, or not.

It is unneſſary to comment particularly on every injunction that has been mentioned. They may be reduced to theſe three claſſes; 1ſt, Cauſes on private treſpaſes; ſurreptitiouſly or treacherouſly publiſhing what the owner had never made public at all, nor conſented to the publication of; 2dly, Caſes expreſſly grounded upon the ſtatute of Queen *Ann*, and within the terms which that ſtatute has granted; and 3dly, Caſes on patents from the crown for the ſole printing what is called prerogative copies.

Of the firſt claſs, were the caſes of *Webb* v. *Roſe*, *Pope* v. *Curl*, *Forreſter* v. *Waller*, the Duke of *Queenſbury* v. *Shebbeare*—they have been all ſtated. I will not reſtate them; but only obſerve that in all theſe caſes the publications were ſurreptitious, againſt the will of the owner, before he had conſented to the publication of them: and, as ſuch, they will have no effect upon the preſent queſtion.

Moſt certainly, the ſole proprietor of any copy may determine whether he will print it, or not. If any perſon takes it to the preſs without his conſent, he is certainly a treſpaſſer, though he came by it by legal means, as by loan or by devolution: for, he tranſgreſſes the bounds of his truſt; and therefore is a treſpaſſer.

Ideas are free. But while the author confines them to his ſtudy, they are like birds in a cage, which none but he can have a right to let fly: for, till he thinks proper to emancipate them, they are under his own dominion.

It is certain every man has a right to keep his own ſentiments,

ments, if he pleaſes: He has certainly a right to judge whether he will make them public, or commit them only to the ſight of his friends. In that ſtate, the manuſcript is, in every ſenſe, his peculiar property; and no man can take it from him, or make any uſe of it which he has not authorized, without being guilty of a violation of his property. And as every author or proprietor of a manuſcript has a right to determine whether he will publiſh it or not, he has a right to the firſt publication: and whoever deprives him of that priority is guilty of a manifeſt wrong; and the Court have a right to ſtop it. But this does not apply to the preſent queſtion; this author had publiſhed it many years, and received the profit of it.

The ſecond claſs of injunctions, in the manner I ranged them, relates to injunctions on the ſtatute of Queen *Ann*. The caſe of *Knapton* v. *Curl*, *Eyre* v. *Walker*, *Motte* v. *Faulkner*, *Gill* v. *Wilcox*, *Tonſon* v. *Walker*, were all the injunctions, I think, that have been cited, which fall in this diviſion.

As to the caſes of *Nelſon's* Faſts and Feſtivals, and the Whole Duty of Man, I ſhall let them remain with the obſervations that have been made upon them by my learned brothers; with this additional one, that let the injunctions be what they may, they were only till the hearing, without any final deciſive judgment.

There had appeared ſome doubts, (for I have ſeen copies of all thoſe injunctions that were ſtated in the plaintiff's bill) as to the Whole Duty of Man; becauſe the copy-right was entered in the Stationers regiſter by the plaintiff himſelf. In 1735 he filed his bill, and founded it upon the ſtatute of Queen *Ann*: (whether miſtaken, or not, is not at all the queſtion.) And in the caſe of *Nelſon*'s Faſts and Feſtivals, there is the like allegation, "That it was entered in the Stationers Company's regiſter." But, as I do not apprehend that either of them will very materially affect the preſent queſtion, for the reaſon I ſet out with in the general obſervations I have made; I ſhall not ſay any more of them; but leave them with the obſervation my brethren have made upon them.

But with reſpect to *Milton*'s Paradiſe Loſt, I muſt mention what I have ſeen in a note of Lord *Hardwicke*'s. It ſeems from that, that the injunction was founded on Dr. *Newton*'s notes, only. For, his Lordſhip ſaid "that at firſt he was inclined to ſend the cauſe to the judges, to ſettle the point of law: but, as Dr. *Newton*'s notes were manifeſtly within

within 8 *Ann*, he would grant an injunction to them, without deciding the general queſtion of property at common law."

But from theſe injunctions the plaintiff's counſel deduced this argument, in their application of them to the preſent caſe, "That all theſe injunctions granted ſince the ſtatute were founded on a ſuppoſed property in the reſpective plaintiffs, and a legal right in the ſeveral copies to which they related; and that ſuch a property muſt neceſſarily be a property at common law; as the ſtatute conſiſts only of penal proviſions, and preſcribes the mode of proſecution, which mode the plaintiffs in thoſe caſes had not followed."

To which it might be anſwered, "that theſe injunctions, being temporary only, decided nothing at all."

But I will admit, that they were founded on a right that would ſupport a more general injunction: for, by this act of parliament they had certainly a property in thoſe reſpective copies, during the term the ſtatute has allowed. For, the ſtatute in the firſt place, and before any of the penal proviſions, has affirmatively and diſtinctly enacted "that in any books printed before the making that ſtatute, the author, or the bookſeller who had purchaſed the copy in order to print or to reprint it, ſhould have the ſole right of printing the ſame for twenty-one years; and that in works not then publiſhed, but afterwards to be publiſhed, they ſhould have the right for fourteen years."

By this clauſe, therefore, a ſole right is poſitively veſted in the author, during the particular terms which the ſtatute has limited.

The ſubſequent proviſions, indeed, have annexed penalties, and forfeiture of the ſheets; (which are to be damaſked.) But the right is wholly confined to the parties intereſted, the authors and purchaſers of copies. The penalties are given half to the Crown, and half to any common informer that will ſue for them.

To the author, therefore, it is the ſame as a leaſe, a grant, or any other common law right, whilſt the term exiſts; and will equally intitle him to all common law remedies for the enjoyment of that right. He may, I ſhould think, file an injunction-bill to ſtop the printing: but I may ſay, with more poſitiveneſs, he might bring an action, to recover ſatisfaction for the injury done him, contrary to law, under the ſtatute.

In the caſe of *Ewer* v *Jones*, 2 *Salk.* 415. and 6 *Mod.* 26. Lord Chief Juſtice *Holt* lays it down, "that wherever a ſtatute

ſtatute gives a right, the party ſhall, by conſequence have an action at law, to recover it."

The author's remedy is very different from an informer's proſecuting for the penalty. The latter muſt purſue all the remedies the ſtatute requires; for, in ſuch a proſecution, the charge is for an offence, and therefore the offence muſt be ſtrictly brought within all the proviſions of the act. But if the plaintiff only ſeeks ſatisfaction to himſelf as the party aggrieved, without proſecuting for any penalty, there is not, in ſuch caſe, any limitation by the ſtatute.

I here give my opinion as a common lawyer; not preſuming to ſay what the Court of Chancery would do upon the ſame queſtion.

The third claſs of injunctions is of thoſe that have been upon grants and patents from the Crown, for the ſole printing of what are called prerogative copies. Of this ſort, are the *Stationer's Company* v *Wright*, and the *Stationer's Company* v *Partridge*. In theſe caſes, injunctions were granted: but theſe, I apprehend, have no analogy to the private right of authors. The grantees did, indeed, claim a right of printing theſe copies; but not as the authors, compilers or purchaſers; but merely as the printers of theſe books, under a patent from the Crown.

The preſent claim is totally different from that of a grant from the Crown. Here it is argued, "that authors have a perpetual right to their own copies." In that caſe of *Partridge*, he was injoined from printing an Almanac of his own compiling.

The grand argument that was drawn from theſe injunctions is this—"That there are certain books, ſuch as the Bible, Common Prayer Book, Acts of Parliament, and the like, which are uſually called prerogative copies, which the Crown has the ſole right of publiſhing: and if the King may have a legal property in theſe, there is no reaſon why private authors may not claim a ſole right in their own compoſitions."

"That there is ſuch a right in the Crown," is undoubtedly true. But this is confined to compoſitions of a particular nature; and to me ſeems to ſtand upon principles entirely different from the claim of an author. It is not from any pretence of dominion over printing, that this prerogative right is derived: for, the Crown has certainly no right of control over the preſs. But it is to particular copies that this right does extend: and as no other perſon is permitted

mitted to publiſh them, without authority from the Crown, the King is ſaid to have a property in them.

This kind of property has always the additional diſtinction of prerogative property. The right is grounded upon another foundation; and is founded on a diſtinction that cannot exiſt in common property, and in the caſe of a ſubject.

The books are Bibles, Common Prayer Books, and all extracts from them, (ſuch as Primers, Pſalters, Pſalms,) and Almanacs. Thoſe have relation to the national religion, or government, or the political conſtitution. Other compoſitions to which the King's right of publication extends, are the Statutes, Acts of Parliament, and State Papers. The King's right to all theſe is, as head of the church, and of the political conſtitution.

In the caſe of the *Company of Stationers* v *Lee*, and others, which is reported in 2 *Shower* 258, it is urged that, as the King is the head of the church, he has a particular prerogative in printing of Primers, Pſalters, Pſalms, &c. and in reſtraining and licenſing prognoſtications of all ſorts.

In the caſe of the *Stationer's Company* v *Wright*, (which was for importing, and printing Pſalms, Pſalters and Almanacs,) the words of the injunction are theſe—"This Court, in reſpect to the well and true printing of Pſalms, Pſalters, and Almanacs, as it is of great concern to the public, and of great danger to have theſe books printed in a foreign nation, by any beſides the patentees and their aſſigns, &c."—And therefore an injunction was granted.

In the caſe of the *Stationer's Company* v *Partridge*, the Company grounded their plea on a right from the Crown, being licenſed by the Archbiſhop of *Canterbury*, for printing Almanacs.

In the caſe of the *Stationer's Company* v *Seymour*, the Court aſſigned theſe reaſons—"That there was no difference in any material part, between that Almanac of *Gadbury's*, and that that is put in the rubrick of the Common Prayer Books." They ſaid, "the latter was firſt ſettled by the *Nicene* Council; is eſtabliſhed by the Canons of the church; and is under the government of the Archbiſhop of *Canterbury*: ſo that Almanacs may be accounted prerogative copies."

And in a ſubſequent part of their opinion, the Court obſerved, "that ſince printing has been invented, and is become a common trade, matters of ſtate and things that con-

cern the government were never left to any man's liberty to print, that would."

The caſe of the Company of Stationers, 2d Chancery Caſes 76, and again in page 93 of the ſame book, was this——The Company had a patent for printing the Statutes. The defendant had ſome books of the Statutes printed at *Amſterdam*, and imported them. The Lord Chancellor determined that printing the laws was a matter of ſtate, and concerned the ſtate. But as for the Whole Duty of Man and ſuch like books, the Lord Chancellor left them to the ordinary courſe. It is aſſerted in page 93, "that the defendant was not ſuffered to print theſe books, becauſe it was of great and public conſequence for ſtrangers to print and vend in *England*, our ſtatutes and laws, if falſely done."

In the caſe of *Millar* v *Donaldſon*, which was before Lord *Northington* in 1765, his Lordſhip obſerved, "that in the caſes which had been determined in favour of the Stationer's Company, the Court went upon the letters patent."

Upon the whole of this prerogative claim of the Crown, it appears to me, that the right of the Crown to the ſole and excluſive printing of what is called prerogative copies, is founded on reaſons of religion or of ſtate. The only conſequences to which they tend are of a national and public concern, reſpecting the eſtabliſhed religion, or government of the kingdom; and have no analogy to the caſe of private authors. There is no inſtance of the Crown's intermeddling with, or pretending any ſuch right in private compoſitions.

It is neceſſary in all theſe claims, that uniformity and order be duly obſerved; and the ſubject informed with preciſion, how to regulate his conduct.

The King has eccleſiaſtical juriſdiction: and power is given to him over theſe publications, that no confuſion may be introduced by ſuch as are falſe and improper.

And as printing has, ſince the invention of that art, been the general mode of conveying theſe publications, the King has always appointed his printer. This is a right which is inſeparably annexed to the King's office: but no ſuch right is annexed to the ſituation of any private author. The King does not derive this right from labour, or compoſition, or any one circumſtance attending the caſe of authors.

It is mentioned as one ground of the King's right to print them, "that ſome of theſe prerogative books were compoſed at "his expence." But in fact, it is no private diſburſement

of

of the King, but done at the public charge, and part of the expences of government. It can hardly be contended, that the produce of expences of a public ſort are the private property of the king, when purchaſed with public money. He cannot ſell nor diſpoſe of one of thoſe compoſitions. How, then, can they be his private property, like the private property claimed by an author in his own compoſitions?

The place or employment of King's Printer is properly an office: It was formerly granted by that name, with a fee annexed to it; and the perſon appointed to it, ſworn into the office.

From theſe authorities, therefore, I ſay, it ſeems to me, that the King's property in theſe particular compoſitions called prerogative copies ſtands upon different principles than of an author; and therefore will not apply to the caſe of an author.

Now as the plaintiff contends "that this ſuppoſed copyright is what he is by common law intitled to," let us examine what ſpecies of property it is. What claſs of property does it fall within?

It can not be contended, "that it is real or deſcendible eſtate." If it falls within any claſs of property at all, it muſt be that ſpecies of property which the law calls chattels.

But all chattel-property conſiſts of goods, and debts or contracts. Now this right can not be contended for, as a debt. The defendant, or the public, are not debtors to the plaintiff. Nor can it be claimed as a contract: the defendant never entered into any ſtipulation about it.

As, then, it can not be claimed as any ſpecies of inheritance nor yet as a debt, or matter of contract; there is but one claſs more of property, under which it can be reckoned: and that is goods.

But goods muſt be capable of poſſeſſion; and muſt, of courſe, have ſome viſible ſubſtance: for, nothing but what has viſible ſubſtance, is capable of actual poſſeſſion.

The author's unpubliſhed manuſcript will indeed very properly fall under this claſs of property; becauſe, that is corporeal. But after publication of it, the mere intellectual ideas are totally incorporeal; and therefore incapable of any diſtinct ſeparate poſſeſſion: they can neither be ſeized, or forfeited, or poſſeſſed. If they could be matter of property they muſt be ſubject to the ſame ſeveral changes of poſſeſſion as property is ſubject to; the ſame charges, ſeizures and forfeitures; the ſame circumſtances to which all other chattels are liable.

Can the ſentiments themſelves (apart from the paper on which they are contained) be taken in execution for a debt? or if the author commits treaſon, or felony, or is outlawed, can the ideas be forfeited? can ſentiments be ſeized; or by any kind of act whatſoever, be veſted in the crown? if they can not be ſeized, the ſole right of publiſhing them can not be confined to the author: for, the ideas of forfeitures muſt ever attend the ideas of property.

How ſtrange and ſingular muſt this extraordinary kind of property be; which can not be viſibly poſſeſſed, forfeited, or ſeized, nor is ſuſceptible of any external injury, nor (conſequently) of any ſpecific, or poſſible remedy!

But it was ſaid, "that this is a kind of ſpecial right to a particular intereſt, to a particular privilege."

Now by the laws of *England*, there can be no ſpecial right, no particular intereſt or privilege whatever, of perpetual duration, but ſuch as have reſpect to ſome kind of inheritance. Nothing but an inheritance can ſupport a perpetual ſubſiſting right. All perſonal property is total and abſolute; ſuſceptible of no collateral right, or partial intereſt; excepting for a time, as in the caſe of a loan, or the like.

And here, another reaſon occurs, why the right now claimed can have no exiſtence in the common law of *England*, and that is, that the whole of this right, in its utmoſt extent, is a mere right of action; a right of bringing an action againſt thoſe that print the author's work without his conſent. And this action is merely vindictive: It is *in perſonam*; not *in rem*.

Now there is no maxim in our law more clear and plain than this, "that things in action are not aſſignable."

The law is too tenacious of private peace, to ſuffer litigations to be negotiable. And yet the preſent action is founded on the aſſignment of ſuch a right to ſue. This is the right which the author has aſſigned to the purchaſer of the copy, the preſent plaintiff; and upon which aſſignment, he brings this action *in perſonam*.

The legiſlature indeed may make a new right. The ſtatute of Queen *Ann* has veſted a new right in authors, for a limited time; and whilſt that right exiſts, they will be eſtabliſhed in the poſſeſſion of their property.

But we are now conſidering a queſtion at common law: and at common law, even debts are not aſſignable ſo as to enable the aſſignee to bring an action in his own name. However, the preſent action is a tort only: and no tort is aſſignable in law or equity. It is not within any ſpecies of action at common law.

It

It ſeems to me, that this claim will not fall within any one known kind of property at common law, and can not, therefore, be a common-law right.

The whole claim that an author can really make, is on the public benevolence, by way of encouragement; but not as an abſolute coerceive right. His caſe is exactly ſimilar to that of an inventor of a new mechanical machine: It is the right of every purchaſer of the inſtrument, to make what uſe of it he pleaſes. It is, indeed, in the power of the crown to grant him a proviſion for a limited time: but if the inventor has no patent for it, every one may make it, and ſell it.

Let us conſider, a little, the caſe of mechanical inventions.

Both original inventions ſtand upon the ſame footing, in point of property; whether the caſe be mechanical or literary; whether it be an Epic Poem, or an Orrery. The inventor of the one, as well as the author of the other, has a right to determine "whether the world ſhall ſee it or not:" And if the inventor of the machine chooſes to make a property of it, by ſelling the invention to an inſtrument-maker, the invention will procure him benefit. But when the invention is once made known to the world, it is laid open; it is become a gift to the public: every purchaſer has a right to make what uſe of it he pleaſes. If the inventor has no patent, any perſon whatever may copy the invention, and ſell it. Yet every reaſon that can be urged for the invention of an author may be urged with equal ſtrength and force, for the inventor of a machine. The very ſame arguments "of having a right to his own productions," and all others, will hold equally, in both caſes: and the immorality of pirating another man's invention is full as great, as that of purloining his ideas. And the purchaſer of a book and a mechanical invention has exactly the ſame mode of acquiſition: and therefore the *jus fruendi* ought to be exactly the ſame.

Mr. *Harriſon* (whom I mentioned before) employed at leaſt as much time and labour and ſtudy upon his time-keeper as Mr *Thomſon* could do in writing his ſeaſons: for, in planning that machine, all the faculties of the mind muſt be fully exerted. And as far as value is a mark of property, Mr. *Harriſon*'s time-piece is, ſurely, as valuable in itſelf, as Mr. *Thomſon*'s ſeaſons.

So the other arguments will equally apply. The Inventors of the mechaniſm may as plauſibly inſiſt, "that in publiſhing their invention, they gave nothing more to the public than merely the uſe of their machines;" "that the inventor has a ſole right of ſelling the machines he invented;" "and "that the purchaſer has no right to multiply or ſell any co-

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pies." He may argue, "that though he is not able to bring back the principles to his own poſſeſſion, yet the property of ſelling the machines juſtly belongs to the original inventor."

Yet with all theſe arguments, it is well known, no ſuch property can exiſt, after the invention is publiſhed.

From hence it is plain, that the mere labour and ſtudy of the inventor, how intenſe and ingenious ſoever it may be, will eſtabliſh no property in the invention, will eſtabliſh no right to exclude others from making the ſame inſtrument, when once the inventor ſhall have publiſhed it.

On what ground then can an author claim this right? How comes his right to be ſuperior to that of the ingenious inventor of a new and uſeful mechanical inſtrument? Eſpecially, when we conſider this iſland as the ſeat of commerce, and not much addicted to literature in ancient days; and therefore can hardly ſuppoſe that our laws give a higher right or more permanent property to the author of a book, than to the inventor of a new and uſeful machine.

Improvement in learning was no part of the thoughts or attention of our anceſtors. The invention of an author is a ſpecies of property unknown to the common law of *England*. Its uſages are immemorial: and the views of it tend to the benefit and advantage of the public with reſpect to the neceſſaries of life, and not to the improvement and graces of the mind. The latter, therefore, could be no part of the ancient common law of *England*.

When the genius of the nation took a more liberal turn, and learning had gained an eſtabliſhment among us, it was then the office of the legiſlature, to make ſuch proviſions for its encouragement, as to them ſhould ſeem proper. And accordingly they have done ſo, by the ſtatute of Queen *Ann*; which Lord *Hardwicke* is ſaid to have ſtiled (in the caſe of *Midwinter et al.* v the *Scotch Bookſellers*) "an univerſal patent for authors."

Let us look, then, into that act of parliament; and ſee if we cannot find in it, more authentic declarations of the law concerning this right, than in the charters and by-laws of the Stationer's Company; the proclamations and patents of the Crown; the decrees of the Star Chamber; the ordinances made during the uſurpation; or the licenſing act of *C.* II. This ſtatute of Queen *Ann* was made by a legal and regular authority, without any mixture of political views.

The counſel for the plaintiff were aware how deciſive this ſtatute was againſt them: and therefore they endeavoured to preclude all arguments from it. They urged

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the ſaving clauſe, in the 9th ſection, "That nothing in that act ſhall extend to any right that the univerſities or any perſons have in any book already printed, or after to be printed."

But this ſaving clauſe ſeems to me to have no view at all to any general queſtion of law, or to any general claim. It is not meant as a ſaving of any right or claim which authors might have at common law. That would have rendered the whole act of parliament of no effect at all, and defeated the very end for which it was made. It is only pointed at the printing and reprinting of particular books.

The deſign of the ſtatute was to veſt a temporary copy right in authors, and to eſtabliſh that right for a limited time. But if it had ſaid, after all, that it ſhould not have any effect at all upon the poſſeſſions of authors, what a laborious nullity would it be! The proviſo is, that the act ſhould not confirm or prejudice any particular claim. It don't relate to authors; but to the Univerſity privileges of printing.

The Univerſity will hardly be conſidered as an author. But the Univerſities had the privilege of printing and reprinting particular books; of which there were ſeveral ſorts, (as Bibles, Common Prayer, and Law-books;) and the Univerſity of *Cambridge*, a more general licence: and as ſome of theſe patents might be diſputable, (as we have lately ſeen in the caſe of *Baſkett* v the *Univerſity of Cambridge*,) and the patent rights ſtood on a different foundation from that of the copy rights veſted in authors; it was a proper proviſion, "that this act ſhould not affect theſe particular claims; nor either eſtabliſh or abridge the duration of patents."

So, in one of the ordinances of the parliament for laying a reſtriction on printing, there is a like proviſo, "That that ordinance and one made in 1642, ſhould not extend to infringe the juſt privileges of the printers of the two univerſities."

So in the ſtatute of *J.* I. againſt monopolies, there is a clauſe, "that it ſhall not extend to any patents or grants of privilege of for or concerning printing;" that is, that ſuch patents or grants ſhould neither be prejudiced nor confirmed by that ſtatute.

It was ſaid, "that this ſtatute of Queen *Ann* was merely declaratory of a common law right; and that it was accumulative, and only introduced ſome additional remedies."

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But to me, from the title quite to the end of this act, it ſeems very clearly to be a plain declaration "that no ſuch right exiſts at common law." The act ſeems to me, manifeſtly deſigned to veſt the property in the author and publiſher during the time limited and preſcribed by it. The deſign ſeems plainly and profeſſedly to be, to give encouragement to learning by ſome new advantage; namely, by veſting the copy in the author and publiſher during a certain time. The title is, "An Act for the Encouragement of Learning, by veſting the copies of printed books in the authors or purchaſers of ſuch copies, during the time therein mentioned:" and by the enacting clauſe, there is a right given in thoſe already printed, for twenty-one years from the 10th of *April* 1710.

Does not this plainly imply, that they had no ſuch right before the 10th of *April* 1710? How can it be ſaid, "that this act veſted that right," if they had the ſame right before, by common law? Why ſhould the enacting clauſe particularly provide that after the 10th of *April* 1710, the author or publiſher ſhould have the ſole right of printing for twenty-one years and no longer, books then in print; and for fourteen years and no longer, books then compoſed but not printed; if they had it before?

This plainly implies that they had no ſuch right before the 10th of *April* 1710. There is not one clauſe, one expreſſion, throughout the whole act, that hints at a prior excluſive right in authors to an eternal monopoly. The monopoly is particularly limited to a certain number of years, and that it ſhall continue no longer. The only prolongation that is given, is, that if the author ſhall be alive after fourteen years, the privilege ſhall recur to him for another fourteen years. But both theſe terms are created by the act; and both of them limited to fourteen years.

This ſtatute alſo provided for limiting and ſettling the price of books. But if authors had a ſole right to their copies for ever, what encouragement would they receive from this proviſion? It would be a ſtrange ſort of encouragement; to abridge an actual right before ſubſiſting in them; to deprive them of the natural right (which every other perſon has) of fixing the price of the goods he ſells; and to ſubject the value of their property to the regulation of others.

The penalty does not ſeem much calculated for the encouragement of the author. For, the books are to be forthwith damaſked, and made waſte-paper of: and the forfeiture is to

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go, one half to the King; the other, to the informer; but no part of it to the author.

Were theſe the encouragements which authors were ſo anxious to obtain? So little do they regard them, that we ſcarce ever hear of an inſtance of their reſorting to thoſe penalties.

How then can we conſider this act, but as veſting in authors a property in their works, which they had not before?

After examining the ſeveral clauſes and expreſſions contained in it, I cannot but conclude that the legiſlature had no notion of any ſuch things as copy rights, as exiſting for ever at common law: but that, on the contrary, they underſtood that authors could have no right in their copies after they had made their works public; and meant to give them a ſecurity which they ſuppoſed them not to have had before. And that this was the idea of the legiſlature, is plainly diſcoverable from the debate before it paſſed into a law.

The booksellers petitioned, "that they might have their right ſecured to them." The committee expunged that word; and ſubſtituted "veſting," in the place of "ſecuring," (as it had ſtood in the original bill:) and the houſe determined the title ſhould be "for the encouragement of learning, by veſting the copies of printed books in the authors or purchaſers of ſuch copies, during the times therein mentioned." And afterwards, when the Lords would have ſtruck out the clauſe reſtraining the authors with regard to the price, they came to a conference. The Commons ſaid, they thought it reaſonable that ſome proviſion ſhould be made, "that extravagant prices ſhould not be ſet on uſeful books." And the Lords gave it up. It certainly appeared to the legiſlature, that abſtractedly from this ſtatute, authors had no excluſive right whatever; and conſequently, muſt be very far from having any pretenſions to an eternal monopoly: but that, as the act gave them a temporary monopoly for a limited time, it might be reaſonable to make the proviſions and reſtrictions contained in it; and they would then have a proper operation. But if this act of parliament was merely a recognition of a common law right, every perſon who had ſuch a common law right might wave the benefit of the act: and then the reſtrictions in it would have no operation, as to them.

Upon the whole, it ſeems evident to me, that this claim cannot poſſibly be maintained on either of the grounds on which it was argued. That, far from being warranted by

the general principles of property, every one of thoſe principles are flatly againſt it. That it cannot be a part of the common law of *England*; the exiſtence whereof is immemorial, and long antecedent to every circumſtance of literary claim.

I ſhould have here cloſed what I had to ſay; and am indeed aſhamed to have taken up ſo much time. But the ſingularity of my opinion may ſeem to require ſome apology, as I have the misfortune to be alone in it. I can ſafely ſay, that, be it ever ſo erroneous, it is my ſincere opinion. The grounds on which I have formed it muſt be judged of, by others: to me, they appear ſufficient.

As the counſel for the plaintiff have urged the unfavourableneſs of it to men of learning, I will add a few words upon that topic; and alſo upon the inconvenient conſequences the public may feel, in caſe the plaintiff's claim ſhould be eſtabliſhed.

It was argued, "that this allowance of a perpetual excluſive right to authors would encourage publications, and be of uſe for the explaining and cultivating of learning and ſcience."

It is of uſe, certainly, that learning and ſcience, and all valuable improvements ſhould be encouraged, and every man's labour properly rewarded. But every reward has its proper bounds: and an entire monopoly for fourteen, or if the author remains alive, for twenty-eight years, ſeems encouragement enough for his labours: at leaſt, the legiſlature have thought it ſufficient encouragement to them; and have expreſsly declared "They ſhall have it no longer." And have we power to control that authority; and to ſay, in direct oppoſition to the ſtatute, "That they ſhall have it longer?—That they ſhall have it for ever?" If the encouragement which the legiſlature has given will not ſatisfy authors, it is not our province to extend it further. But I can never entertain ſo diſgraceful an opinion of learned men, as to imagine the profits of publication for twenty-eight years will not content them. I will not believe, "that nothing will induce them to write, but an abſolute perpetual monopoly;" "That they have no benevolence to mankind; no honourable ambition of fame; no incentive to communicate their knowledge to others, but the moſt avaricious and mercenary motives." From authors ſo very illiberal, the public could hardly expect to receive much benefit.

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On the other hand, let us look to the conſequences of eſtabliſhing this claim. Inſtead of tending to the advancement and the propagation of literature, I think it would ſtop it; or at leaſt, might be attended with great diſadvantages to it.

It was a juſt obſervation of Lord *Northington*, "that it might be dangerous to veſt an excluſive property in authors. For, as that would give them the ſole right to publiſh, it would alſo give them a right to ſuppreſs; and then thoſe bookſellers who are poſſeſſed of the works of the beſt of our authors, might totally ſuppreſs them." The public have no tie upon authors or bookſellers, to oblige them to keep a ſufficient number of copies printed.

It was ſaid, "that if the authors or bookſellers did not take care to print a ſufficient number of copies, it would be abandoning the copy."

To me, however, ſuch abandoning of a copy in a ſpecies of property like this, ſeems impoſſible. For, if there is any abandoning the property at all, it muſt be upon this foundation, "That no man has a right to publiſh the ſentiments of an author without his conſent:" And it is in that light alone, that an author can claim the ſole right of publication. Now, ſuppoſe an author ſhould drop all deſign of making further gains to himſelf, and diſcontinue the publication; he may inſiſt "the ſentiments are his, and no other perſon ſhall publiſh his own thoughts without his conſent; and that notwithſtanding he has publiſhed them once, he does not chooſe they ſhould be publiſhed any further." And in that light, what colour will there be for extorting his conſent, under the idea of an abandonment?

But admitting this extraordinary propoſition "That an author may abandon the future profits of publication;" (that is, may abandon what he was never poſſeſſed of;) we ſhould ſtill find, the public would be laid under difficulties, and would be liable to diſagreeable conſequences. It muſt reſt on circumſtances capable, not only of erroneous, but arbitrary interpretations. This muſt produce confuſion and danger. What a hazard muſt every man riſque, who ventures from mere argumentative circumſtances to infer an abandonment; and under that idea, proceeds to publiſh! Whatever concluſions he may have formed to himſelf, he knows not what light it may appear in to others; and, after an expenſive litigation about it, may find it at laſt determined againſt him.

But beſides theſe difficulties—Suppoſing the author ſhould continue the publication, and print a ſufficient number of

copies; but ſhould fix ſuch an exhorbitant price upon his books, as to lock the work up from the general bulk of mankind; yet it can not be ſaid "he had abandoned his property." In this caſe, all the learning and all the advantage would be confined to a few; and yet the public has no remedy againſt it; and no other perſon muſt preſume to publiſh this work.

The Legiſlature were aware of this; and therefore eſtabliſhed an authority in proper perſons, by the ſtatute of Queen *Ann*, to limit and ſettle the price of books. But if authors and their aſſignees were to be allowed a ſole right of publiſhing, as being out of the act, and having a diſtinct and excluſive right ſtill remaining in them, that proviſion would be totally nugatory; and it would be ſtill in the power of a bookſeller to ſet an extravagant price on uſeful books.

Can this excluſive right of publication, this monopoly which claims an entire dominion over it, and puts an abſolute prohibition on every other perſon, be deemed an encouragement to learning, and to tend to the advancement and propagation of it?

There is another light too, in which the conſequences of this claim may be highly injurious to the public: and that is the reſtraints it will lay upon the natural rights of mankind in the exerciſe of their trade and calling.

It is every man's natural right, to follow a lawful employment for the ſupport of himſelf and his family. Printing and bookſelling are lawful employments. And therefore every monopoly that would intrench upon theſe lawful employments is a reſtraint upon the liberty of the ſubject And if the printing and ſelling of every book that comes out, may be confined to a few, and for ever with-held from all the reſt of the trade; what proviſion will the bulk of them be able to make for their reſpective families?

There is yet another miſchief that reſults from this claim; the door it will open for perpetual litigations.

I have before obſerved the dangerous ſnares which this ideal property will lay, as it carries no proprietary marks in itſelf, and is not bound down to any formal ſtipulations. So obſcure a property, (eſpecially after the work has been a long while publiſhed) might lead many bookſellers into many litigations: and in ſuch litigations, many doubtful queſtions might ariſe; ſuch as—"Whether the author of the work did not intend it as a gift to the public"—"Whether, ſince that, he has not abandoned it to the public"—"And at what time."———Diſputes alſo might ariſe among authors themſelves—"Whether the works of one author were or were

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not the ſame with thoſe of another author; or whether there were only colourable differences:"—(A queſtion that would be liable to great uncertainties and doubts.) So, "Whether thoſe who ſhould compile notes on a publication, and ſhould inſert the text, ſhould be liable to an action for it:" or if the notes were good, the author might refuſe the publication of them.

I wiſh as ſincerely as any man, that learned men may have all the encouragements, and all the advantages that are conſiſtent with the general right and good of mankind. But if the monopoly now claimed be contrary to the great laws of property, and totally unknown to the ancient and common law of *England*; if the eſtabliſhing of this claim will directly contradict the legiſlative authority, and introduce a ſpecies of property contrary to the end for which the whole ſyſtem of property was eſtabliſhed; if it will tend to embroil the peace of ſociety, with frequent contentions;—(Contentions moſt highly diſfiguring the face of literature, and highly diſguſting to a liberal mind;) if it will hinder or ſuppreſs the advancement of learning and knowledge; and laſtly if it ſhould ſtrip the ſubject of his natural right; if theſe, or any of theſe miſchiefs would follow; I can never concur in eſtabliſhing ſuch a claim.

The legiſlature have provided the proper encouragements for authors; and, at the ſame time, have guarded againſt all theſe miſchiefs. To give that legiſlative encouragement a liberal conſtruction, is my duty as a Judge; and will ever be my own moſt willing inclination. But it is equally my duty, not only as a judge, but as a member of Society, and even as a friend to the cauſe of learning, to ſupport the limitations of the ſtatute.

I ſhall therefore conclude, in the words of the act of parliament, "that the author or purchaſer of the copy, ſhall have the ſole right for the particular term which the ſtatute has granted and limited; but no longer:" and conſequently that the plaintiff, who claims a perpetual and unbounded monopoly, has no legal right to recover.

Lord *Mansfield* (not intending to go into the argument) ſaid———

This is the firſt inſtance of a final difference of opinion in this court, ſince I ſat here. Every order, rule, judgment, and opinion, has hitherto been unanimous.

That* unanimity never could have happened, if we did

* Except in this, and one other caſe now depending (by writ of error) in the Houſe of Lords, where Mr. Juſtice *Yates* differed from the other three, every rule;

not among ourſelves communicate our ſentiments with great freedom; if we did not form our judgments without any preposſeſſion to firſt thoughts; if we were not always open to conviction, and ready to yield to each other's reaſons.

We have all equally endeavoured at that unanimity, upon this occaſion: we have talked the matter over, ſeveral times. I have communicated my thoughts at large, in writing: and I have read the three arguments which have been now delivered. In ſhort, we have equally tried to convince, or be convinced: but, in vain. We continue to differ. And whoever is right, each is bound to abide by and deliver that opinion which he has formed upon the fulleſt examination.

His Lordſhip obſerved, that to repeat the two firſt arguments, or go over the ſame topics again, would be idle and nugatory, when he had already declared "that he read, approved, and previouſly concurred in them:" and to be particular in oppoſing or anſwering the ſeveral parts of the laſt argument (though he differed from the concluſions of it,) would be indecent, and look too much like altercation.

He therefore only deſired to refer to the two firſt arguments, without actually repeating them; and that he might be underſtood as if he had ſpoken the ſubſtance of them, and fully adopted them. After which, he expreſſed himſelf to the following effect.

From premiſes either expreſsly admitted, or which cannot and therefore never have been denied, concluſions follow, in my apprehenſion, deciſive upon all the objections raiſed to the property of an author, in the copy of his own work, by the common law.

I uſe the word "copy," in the technical ſenſe in which that name or term has been uſed for ages, to ſignify an incorporeal right to the ſole printing and publiſhing of ſomewhat intellectual, communicated by letters.

It has all along been expreſsly admitted, "that, by the common law, an author is intitled to the copy of his work until it has been once printed and publiſhed by his authority;" and "that the four caſes in Chancery, cited for that purpoſe, are agreeable to the common law; and the relief was properly given, in conſequence of the legal right,"

rule, order, judgment, and opinion, has, to this day, been (as far as I can recollect) unanimous. This gives weight and diſpatch to the deciſions, certainly to the law, and infinite ſatisfaction to the ſuitors: And the effect is ſeen by that immenſe buſineſs which flows from all parts, into this channel; and which, we who have long known *Weſtminſter-Hall*, behold with aſtoniſhment; the rather, as during this period, all the other courts have been filled with Judges of unexceptionable integrity, eminent talents, and diſtinguiſhed abilities.

The

The property in the copy, thus abridged, is equally an incorporeal right to print a ſet of intellectual ideas or modes of thinking, communicated in a ſet of words and ſentences and modes of expreſſion. It is equally detached from the manuſcript, or any other phyſical exiſtence whatſoever.

The property thus abridged is equally incapable of being violated by a crime indictable. In like manner, it can only be violated by another's printing without the author's conſent: which is a civil injury.

The only remedy is the ſame; by an action upon the caſe, for damages, or a bill in equity for a ſpecific relief.

No action of detinue, trover, or treſpaſs *quare vi et armis*, can lie; becauſe the copy thus abridged is equally a property in notion, and has no corporeal tangible ſubſtance.

No diſpoſition, no transfer of paper upon which the compoſition is written, marked, or impreſſed, (though it gives the power to print and publiſh,) can be conſtrued a conveyance of the copy, without the author's expreſs conſent "to print and publiſh;" much leſs, againſt his will.

The property of the copy, thus narrowed, may equally go down from generation to generation, and poſſibly continue for ever; though neither the author nor his repreſentatives ſhould have any manuſcript whatſover of the work, original duplicate, or tranſcript.

Mr. *Gwynn* was intitled, undoubtedly, to the paper of the tranſcript of Lord *Clarendon*'s hiſtory: which gave him the power to print and publiſh it, after the fire at *Peterſham*, which deſtroyed one original. This might have been the only manuſcript of it in being. Mr. *Gwynn* might have thrown it into the fire, had he pleaſed. But, at the diſtance of near a hundred years, the copy was adjudged the property of Lord *Clarendon*'s repreſentatives; and Mr. *Gwynn*'s printing and publiſhing it, without their conſent, was adjudged an injury to that property; for which, in different ſhapes, he paid very dear.

Dean *Swift* was certainly proprietor of the paper upon which *Pope*'s letters to him were written. I know, Mr. *Pope* had no paper upon which they were written; and a very imperfect memory of their contents: which made him the more anxious to ſtop their publication—; knowing that the printer had got them.

If the copy belongs to an author, after publication; it certainly belonged to him, before. But if it does not belong to him after; where is the common law to be found, which ſays

"there

"there is such a property before?" All the metaphysical subtilties from the nature of the thing may be equally objected to the property before. It is incorporeal: it relates to ideas detached from any physical existence. There is no *indicia*: another may have had the same thoughts upon the same subject, and expressed them in the same language *verbatim*. At what time, and by what act does the property commence? the same string of questions may be asked upon the copy before publication: Is it real or personal? Does it go to the heir, or to the executor? Being a right which can only be defended by action, is it, as a chose in action, assignable, or not? Can it be forfeited? Can it be taken in execution? Can it be vested in the assignees under a commission of bankruptcy?

The common law, as to the copy before publication, can not be found in custom.

Before 1732, the case of a piracy before publication never existed: It never was put, or supposed. There is not a syllable about it to be met with any where. The regulations, the ordinances, the acts of Parliament, the cases in *Westminster-Hall*, all relate to the copy of books after publication by the authors.

Since 1732, there is not a word to be traced about it; except from the four cases in Chancery.

Besides, if all *England*, had allowed this property two or three hundred years, the same objection would hold, "that "the usage is not immemorial:" for printing was introduced in the reign of *Edw.* 4th, or *H.* 6th.

From what source, then, is the common law drawn, which is admitted to be so clear, in respect of the copy before publication?

From this argument——Because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit, that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect.

I allow them sufficient to shew "it is agreeable to the prin-"ciples of right and wrong, the fitness of things, convenience, "and policy, and therefore to the common law, to protect "the copy before publication."

But the same reasons hold, after the author has published.

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He can reap no pecuniary profit, if, the next moment after his work comes out, it may be pirated upon worſe paper and in worſe print, and in a cheaper volume.

The 8th of Queen *Ann* is no anſwer. We are conſidering the common law, upon principles before and independent of that act.

The author may not only be deprived of any profit, but loſe the expence he has been at. He is no more maſter of the uſe of his own name. He has no control over the correctneſs of his own work. He cannot prevent additions. He cannot retract errors. He cannot amend; or cancel a faulty edition. Any one may print, pirate, and perpetuate the imperfections, to the diſgrace and againſt the will of the author; may propagate ſentiments under his name, which he diſapproves, repents and is aſhamed of. He can exerciſe no diſcretion as to the manner in which, or the perſons by whom his work ſhall be publiſhed.

For theſe and many more reaſons, it ſeems to me juſt and fit, "to protect the copy after publication,"

All objections which hold as much to the kind of property before, as to the kind of property after publication, go for nothing: they prove too much.

There is no peculiar objection to the property after, except, "that the copy is neceſſarily made common, after the book is once publiſhed."

Does a tranſfer of paper upon which it is printed, neceſſarily tranſfer the copy, more than the tranſfer of paper upon which the book is written?

The argument turns in a circle. "The copy is made common, becauſe the law does not protect it: and the law cannot protect it, becauſe it is made common."

The author does not mean to make it common: and if the law ſays "He ought to have the copy after publication," it is a ſeveral property, eaſily protected, aſcertained, and ſecured.

The whole then muſt finally reſolve in this queſtion, "Whether it is agreeable to natural principles, moral juſtice and fitneſs, to allow him the copy, after publication, as well as before."

The general conſent of this kingdom, for ages, is on the affirmative ſide. The legiſlative authority has taken it for granted; and interpoſed penalties to protect it for a time.

The ſingle opinion of ſuch a man as *Milton*, ſpeaking, after much conſideration upon the very point, is ſtronger than any inferences from gathering acorns and ſeizing a va-

cant piece of ground; when the writers, ſo far from thinking of the very point, ſpeak of an imaginary ſtate of nature before the invention of letters.

The judicial opinions of thoſe eminent lawyers and great men who granted or continued injunctions, in caſes after publication, not within 8 Queen *Ann*; uncontradicted by any book, judgment, or ſaying; muſt weigh in any queſtion of law; much more, in a queſtion of mere theory and ſpeculation as to what is agreeable or repugnant to natural principles. I look upon theſe injunctions, as equal to any final decree.

Whoever has attended the Court of Chancery, knows that if an injunction in the nature of an injunction to ſtay waſte, is granted, upon motion, or continued after anſwer, it is in vain to go to hearing. For, ſuch an injunction never is granted upon motion, unleſs the legal property of the plaintiff be made out; nor continued after anſwer, unleſs it ſtill remains clear, allowing all the defendant has ſaid. In ſuch a caſe, the defendant is always adviſed, either to acquieſce, or appeal: for, he never can make a better defence than is ſtated upon his own anſwer.

This caſe is not ſent hither from the Court of Chancery, upon any doubt of theirs. There never was a doubt in the Court of Chancery, till a doubt was raiſed there from decency, upon a ſuppoſed doubt in this Court, in the caſe of *Tonſon* and *Collins*. There is not an inſtance of an injunction refuſed, till it was refuſed upon the grounds of that doubt. The Court of Chancery never grant injunctions in caſes of this kind, where there is any doubt. Therefore they refuſed it, when they thought there was a doubt. That caſe was argued twice, with ſolemnity: and after the ſecond argument, it was referred to the Exchequer Chamber, to be argued before all the Judges.

That reference did not ariſe from any difference of opinion, or difficulty among us. On the contrary, we ſuſpected colluſion; and that if we gave judgment for the plaintiff, there certainly would be no writ of error. We wiſhed to take the opinion of all the Judges. We were afterwards clearly informed of the truth of the colluſion: and therefore the cauſe proceeded no further.

But while it hung under this appearance of difficulty, there was ſufficient ground for the Court of Chancery to ſay, "the property was doubtful." They did not ſend it to law: they left the party to follow his legal remedy. A doubtful legal title muſt be tried at law, before it can be made the ground of an injunction. Injunctions of this kind are rightly

and

and properly refuſed. In a doubtful caſe, it would be iniquity to grant them; becauſe, if it ſhould come out "that the plaintiff has no legal title," the defendant is injured by the injunction, and can have no reparation.

If it is agreeable to natural principles, to allow the copy after publication, I am warranted by the admiſſion which allows it before publication, to ſay, "This is common law."

There is another admiſſion equally concluſive.

It is, and has all along been admitted, "that by the common law, the king's copy continues after publication; and that the unanimous judgment of this court, in the caſe of *Baſkett* and the *Univerſity* of *Cambridge*, is right."

The king has no property in the art of printing. The ridiculous conceit of *Atkins* was exploded at the time.

The king has no authority to reſtrain the preſs, on account of the ſubject-matter upon which the author writes, or his manner of treating it.

The king cannot, by law, grant an excluſive privilege to print any book which does not belong to himſelf.

Crown-copies are, as in the caſe of an author, civil property; which is deduced, as in the caſe of an author, from the king's right of original publication. The kind of property in the crown or a patentee from the crown, is juſt the ſame; incorporeal, incapable of violation but by a civil injury, and only to be vindicated by the ſame remedy, an action upon the caſe, or a bill in equity.

There were no queſtions in *Weſtminſter-Hall*, before the Reſtoration, as to crown copies. The reaſon is very obvious: It will occur to every one that hears me. The fact, however, is ſo: there were none, before the Reſtoration.

Upon every patent which has been litigated ſince, the counſel for the patentee, (whatever elſe might be thrown out, or whatever encouragement they might have, between the Reſtoration and Revolution, to throw out notions of power and prerogative,) have tortured their invention, to ſtand upon property.

Upon *Rolle*'s *Abridgement*, they argued from the year-books, which are there abridged, "That the year-books having been compiled at the king's expence, were the king's property, and therefore the printing of them belonged to his patentee."

Upon *Croke*'s *Reports*, they contended, "That the king paid the Judges who made the deciſions: *Ergo*, the deciſions were his." The judges of *Weſtminſter-Hall* thought, they belonged to the author; that is, to the purchaſer from, or

the executor of the author: But, ſo far the controverſy turned upon property.

In *Seymour*'s caſe, 1 *Mod.* 256. (who printed *Gadbury*'s Almanac, without leave of the Stationers Company, who had a patent for the ſole printing of Almanacs,) *Pemberton* reſorted to property. He argued (beſides arguing from the prerogative,) "that an almanac has no certain author: therefore the king has the property; and by conſequence may grant his property." It was far fetched, and it is truly ſaid, "that the conſequence did not follow." For, if there was no certain author, the property would nothe the king's, but common. *Pemberton* was a very able lawyer; and ſaw the neceſſity of getting at property, if he could make it out.

All the decrees in Chancery, and the judgments at common law upon almanacs, are now out of the caſe, and all the doctrine of prerogative rejected, by what was done in the caſe of the *Stationers Company* and *Partridge*.

It came on, in the year 1709, before Lord *Cowper*, on continuing the injunction. There is no report of it, I believe, in print: at leaſt, I have not ſeen any. I have read the bill and anſwer. The bill puts it upon all the prerogative notions of power; and inſiſts, that the king's patentee had a ſole excluſive right of printing almanacs. The anſwer inſiſts, that theſe were extravagant illegal notions; that they were taken up at times when the prerogative ran high, and when the diſpenſing power was allowed: and it inſiſts, that the queſtion ought, ſince the Revolution, to be argued upon proper principles, conſiſtent with the rights and privileges of the ſubject. The defendants denied the authority of all the caſes ſtated by the bill, as far as they went upon prerogative right. Lord *Cowper* continued the injunction till hearing. I have office-copies of all the orders and pleas that were cited: I dare ſay, I have thirty or forty of them. It appears, that theſe decrees were all read; and that the judgment of the Houſe of Lords was read and gone through. Lord *Harcourt* afterwards heard the cauſe. He did not chooſe, in a caſe about almanacs, to decide upon prerogative. He therefore made a caſe of it, for the opinion of this court; Lord *Parker* being then Chief Juſtice. This court, ſo far as it went, inclined againſt the right of the crown in almanacs. But, to this hour, it has never been determined: and the injunction granted by Lord *Cowper* ſtill continues.

I have *Salkeld*'s manuſcript report (and have had it many years) of what paſſed in this court in the courſe of the argument of this caſe of the *Company of Stationers* againſt *Partridge*. I do not know whether it is got into print: I have not

not ſeen it in print, Mr. *York* had a copy of it, when he argued the caſe of the *Univerſity of Cambridge* and *Baſkett*. Mr. *Salkeld* argued for the defendant *Partridge*: Sir *Peter King*, for the plaintiffs.

I will ſtate to you, ſo far as is material to the argument, how they put it, and the only grounds that they thought tenable.

Mr. *Salkeld*, after poſitively and expreſſly denying any prerogative in the crown over the preſs, or any power to grant any excluſive privilege, ſays, "I take the rule, in all theſe caſes to be, that where the crown has a property or right of copy, the king may grant it. The crown may grant the ſole printing of *Bibles* in the Engliſh tranſlation; becauſe it was made at the king's charge. The ſame reaſon holds, as to the ſtatutes, year-books, and common prayer-books."

Sir *Peter King*, for the plaintiffs, argues thus—(throwing out, at the ſame time, the things that I have already mentioned; though he does not ſeem to be very ſerious in it—) "I argue, that if the crown has a right to the Common-Prayer-Book, it has a right to every part of it. And the calendar is a part of the Common-Prayer-Book And an almanac is the ſame thing with the calendar, &c."

Parker, Chief Juſtice, ſpeaks to nothing ſaid at the bar, but only "whether the calendar is part of the Common-Prayer-Book." And as to that, he goes back as far as to the council of *Nice*; and doubts whether it is, or rather indeed thinks that it is not part of it: he ſays, it may be an index, but is no part of it.

Mr. Juſtice *Powell* ſays—"You muſt diſtinguiſh this from the common caſes of monopolies; by ſhewing ſome property in the crown, and bringing it within the caſe of the Common-Prayer-Book." And he rather inclined to think, "that almanacs might be the king's;" becauſe there is a trial by almanacs.

To which, Lord *Parker* replied, "that he never heard of ſuch a thing as a trial by almanac."

They leave it upon this. It ſtood over, for another argument, to ſee if they could make it like the caſe of the Common-Prayer-Book. I do not know what happened afterwards: but there never was any judgment; and though I have made ſtrict enquiry, I do not find that there was ever any opinion given.

I heard Lord *Hardwicke* ſay what Mr. Juſtice *Willes* has quoted, as to theſe arguments from property in ſupport of the king's right, neceſſarily inferring an author's.

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The Caſe of *Baſkett* and the *Univerſity of Cambridge* was then depending in this Court, when Lord *Hardwicke* made uſe of that expreſſion or argument: It has, ſince been determined. We had no idea of any prerogative in the crown over the preſs; or of any power to reſtrain it by excluſive privileges, or of any power to control the ſubject-matter on which a man might write, or the manner in which he might treat it. We reſted upon property from the king's right of original publication.

Acts of parliament are the works of the legiſlature: and the publication of them has always belonged to the king, as the executive part, and as the head and ſovereign.

The art of printing has only varied the mode. And, though printing be within legal memory, we thought the uſage ſince the invention of printing, very material.

Whoever looks into Mr. *York*'s argument, upon which the opinion of the Court in that caſe in a great meaſure went, (I do not ſay throughout, but in a great meaſure,) will ſee the great pains he takes to ſhew the original property in the crown.

Though the king may grant a concurrent right; for, in that caſe the grant was of concurrent right, and he might grant it to ten thouſand; he might grant it to every member of the Stationers Company; he might grant it to every bookſeller;) we had no idea "that the firſt edition of acts of parliament made the copy common." And yet any man may tranſcribe an act of parliament, or a record: and any perſon may make labourious ſearches and abſtracts from records, and have a right to print them.

Lord *Hardwicke* had before reaſoned in the ſame way, in the caſe of *Manby* and others againſt *Owen* and others, on 8th *April* 1755, relating to the Seſſions-Paper. The plaintiffs had bought the ſeſſions-paper of my Lord Mayor, and had (I think) given him an hundred guineas for it. And upon an affidavit "that the Lord Mayor had always appointed the printers of that paper; and that it was uſual for the Lord Mayor to take a ſum of money for it; and that the defendant had pirated it; Lord *Hardwicke* conſidered the grant as property in the copy, and granted the injunction upon the foot of property; and never dreamt "that the firſt edition of it made it common." This was acquieſced under: and the defendants were not adviſed to proceed further. Nothing is more manifeſt, than that the injunction proceeded upon the infringement of the plaintiff's property: for, as a contempt of the Court of the *Old Bailey*, the Court of Chancery

very would not have interfered. But they were of opinion "that the copy was transferred to the plaintiff, and that it was not made common by the firſt publication."

If the common law be ſo in theſe caſes, it muſt alſo be ſo in the caſe of an author. All the reaſoning "that ſubſequent editions ſhould be correct," holds equally to an author. His name ought not to be uſed, againſt his will. It is an injury, by a faulty, ignorant and incorrect edition, to diſgrace his work and miſlead the reader.

The copy of the *Hebrew* Bible, the *Greek* Teſtament, or the *Septuagint* does not belong to the king: It is common. But the *Engliſh* tranſlation he bought: Therefore it has been concluded to be his property. If any man ſhould turn the Pſalms, or the writings of *Solomon*, or *Job*, into verſe, the king could not ſtop the printing or ſale of ſuch a work: It is the author's work. The king has no power or control over the ſubject-matter: his power reſts in property. His whole right reſts upon the foundation of property in the copy by the common law. What other ground can there be for the king's having a property in the Latin Grammar, (which is one of the ancienteſt copies,) than that it was originally compoſed at his expence? Whatever the common law ſays of property in the king's caſe, from analogy to the caſe of authors, muſt hold concluſively, in my apprehenſion, with regard to authors.

I always thought the objection from the Act of Parliament, the moſt plauſible. It has generally ſtruck, at firſt view. But upon conſideration, it is, I think, impoſſible to imply this act into an abolition of the common-law right, if it did exiſt; or into a declaration "that no ſuch right ever exiſted."

The bill was brought in, upon the petition of the proprietors, to ſecure their property for ever, by penalties; the only way in which they thought it could be ſecured; having had no experience of any other; there being no example of an action at law tried, or any idea "that a bill would lie for an injunction and relief in equity."

An alteration was made in the committee, to reſtrain the perpetual into a temporary ſecurity.

The argument drawn from the clauſe to regulate the price of books, cannot hold. That clauſe goes to all books; is perpetual; and follows the act of *H.* 8.

The words "no longer" add nothing to the ſenſe; which is exactly the ſame, whether theſe words are added, or not.

The word "veſting," in the title, cannot be argued from, as declaratory "that there was no property before." The title is but once read; and is no part of the act. In the body, the word "ſecured" is made uſe of.

Had there been the leaſt intention to take or declare away every pretence of right at the common law, it would have been expreſsly enacted; and there muſt have been a new preamble, totally different from that which now ſtands.

But the legiſlature has not left their meaning to be found out by looſe conjectures. The preamble certainly proceeds upon the ground of a right of property, having been violated; and might be argued from, as an allowance or confirmation of ſuch a right at the common law. The remedy enacted againſt the violation of it being only temporary, might be argued from, as implying "there exiſted no right but what was ſecured by the act." Therefore an expreſs ſaving is added, "that nothing in this act contained ſhall extend or be conſtrued to extend to prejudice or confirm any right, &c." "Any right" is, manifeſtly, any other right than the term ſecured by the act. The act ſpeaks of no right whatſoever, but that of authors, or derived from them. No other right could poſſibly be prejudiced or confirmed by any expreſſion in the act. The words of the ſaving are adapted to this right: "Book or copy already printed, or hereafter to be printed—." They are not applicable to prerogative copies. If letters patent to an author or his aſſigns could give any right, they might come under the generality of the ſaving. But, ſo little was ſuch a right in the contemplation of the legiſlature, that there is not a word about patents in the whole act. Could they have given any right, it was not worth ſaving; becauſe it never exceeded fourteen years.

It was ſtrongly urged, "that a common law right could not exiſt; becauſe there was no time from which it could be ſaid to attach or begin:" whereas the ſtatute property was aſcertained by and commenced from the entry.

Undoubtedly, the previous entry is a condition upon which all the ſecurity given by the ſtatute depends: and if every man was intitled to print, without the author's conſent, before this act, no body can be queſtioned for ſo printing ſince the act, before an entry. Nay, the offence being newly created, it can only be proſecuted by the remedies preſcribed, and within the limited time of three months.

But the Court of Chancery has uniformly proceeded upon a contrary conſtruction. They conſidered the act, not as

creating

creating a new offence; but as giving an additional ſecurity to a proprietor grieved, and gave relief, without regard to any of the proviſions in the act, or whether the term was or was not expired. No injunction can be obtained, till the Court is ſatisfied "that the plaintiff has a clear legal right." And where, for the ſake of the relief, the Court of Chancery proceeds upon a ground of common or ſtatute law, their judgments are precedents of high authority in all the Courts of *Weſtminſter Hall.*

His Lordſhip adopted and referred to other obſervations made upon the act by the two Judges who ſpoke firſt:—And then concluded thus———

I deſire to be underſtood, that it is upon this ſpecial verdict, I give my opinion. Every remark which has been made, as to what is and what is not found, I conſider as material. The variation of any one of the circumſtances may change the merits of the queſtion: the variation of ſome, certainly would. Every caſe, where ſuch variation ariſes, will ſtand upon its own particular ground; and will not be concluded by this judgment.

The ſubject at large is exhauſted: and therefore I have not gone into it. I have had frequent opportunities to conſider of it. I have travelled in it for many years. I was counſel in moſt of the caſes which have been cited from Chancery: I have copies of all, from the regiſter book. The firſt caſe of *Milton*'s Paradiſe Loſt was upon my motion. I argued the ſecond: which was ſolemnly argued, by one on each ſide. I argued the caſe of *Millar* againſt *Kincaid*, in the Houſe of Lords. Many of the precedents were tried by my advice. The accurate and elaborate inveſtigation of the matter, in this cauſe, and in the former caſe of *Tonſon* and *Collins*, has confirmed me in what I always inclined to think, "That the Court of Chancery did right, in giving relief upon the foundation of a legal property in authors; independent of the entry, the term for years, and all the other proviſions annexed to the ſecurity given by the act."

Therefore my opinion is—"That judgment be for the plaintiff." *Burrow's Reports*, 1310, A. D. 1769.

Thus then in the Court of King's Bench it was determined by three Judges, viz. *Willes*, *Aſton*, and *Mansfield* againſt *Yates*, that there is a common law right of an author to his copy, and that it is not taken away by the 8th *Ann.*

The queſtion however did not reſt here, though in this particular caſe the plaintiff *Millar* was ſo fortunate as to ſucceed.

In about four years after a ſimilar diſpute aroſe between *Donaldſon* and *Becket*, which came before the Court of Chancery, when the Lord Chancellor decreed in conformity with the above determination of the Court of King's Bench: from this decree, there was an appeal to the Houſe of Lords, where it was ordered that the twelve Judges ſhould ſeparately give their opinions on the ſubject: and for that purpoſe the following queſtions were ſtated.

1. Whether at common law, an author of any book or literary compoſition had the ſole right of firſt printing and publiſhing the ſame for ſale; and might bring an action againſt any perſon who printed publiſhed and ſold the ſame without his conſent?

2. If the author had ſuch right originally, did the law take it away, upon his printing and publiſhing ſuch book or literary compoſition: and might any perſon afterward reprint and ſell, for his own benefit, ſuch book or literary compoſition, againſt the will of the author?

3. If ſuch action would have lain at common law, is it taken away by the ſtatute of 8th *Ann?* And is an author, by the ſaid ſtatute precluded from every remedy, except on the foundation of the ſaid ſtatute and on the terms and conditions preſcribed thereby?

Whereupon, the Judges deſired that ſome time might be allowed them for that perpoſe.

On the 15th of *February* 1774, the Judges gave their opinions.—Lord *Mansfield* did not ſpeak, it being very unuſual, (from reaſons of delicacy) for a Peer to ſupport his own judgment, upon an appeal to the Houſe of Lords.

Out of the eleven Judges, there were eight to three, in the affirmative on the firſt queſtion. Seven to four in the negative on the ſecond queſtion. Six to five in the affirmative of the third queſtion.

So that the deciſion of the Court of King's Bench, and the decree of the Court of Chancery was overturned by this deciſion of the majority of the twelve Judges, and the law ſettled as follows. That an author had at common law a property in his work, and the ſole right of printing and publiſhing the ſame, and that when printed or publiſhed, the law did not take this right away, but that by the ſtatute 8th *Ann*,

Ann, an author has now no copy-right, after the expiration of the ſeveral terms created thereby.

The Univerſities were alarmed at the conſequence of this determination, and applied for and obtained an act of parliament eſtabliſhing in perpetuity, their right to all the copies given them heretofore, or which might hereafter be given to or acquired by them. This was done by ſtatute 15 *Geo.* III. c. 53. A. D. 1775, beſides which this latter act alſo amended the act of 8th *Ann*, reſpecting the regiſtering the work at Stationer's Hall; in doing which, the title to the copy of the whole book and every volume thereof, muſt now be entered.

ENGRAVING, DESIGNING, AND ETCHING.

AS we have been ſo full on the ſubject of Literary Property, it may not be amiſs here to deviate ſo far from our immediate attention to Lord *Mansfield*'s deciſions as to inſert the laws reſpecting, Property in Engraving, Deſigning and Etching, which ſeem to have ſo immediate a connection with the preceding ſubject.

By the 8th *Geo.* II. c. 13, A. D. 1735, an act was paſſed, entitled,

"An Act for the Encouragement of the Arts of Deſigning Engraving, and Etching Hiſtorical and other Prints, by veſting the properties thereof in the inventors and engravers, during the time therein mentioned," after reciting that

Whereas divers perſons have by their own genius, induſtry, pains, and expence, invented and engraved, or worked in mezzotinto, or chiaro oſcuro, ſets of hiſtorical and other prints, in hopes to have reaped the ſole benefit of their labours: and whereas print-ſellers and other perſons have of late, without the conſent of the inventors, deſigners, and proprietors of ſuch prints, frequently taken the liberty of copying, engraving, and publiſhing, or cauſing to be copied, engraved, and publiſhed, baſe copies of ſuch works, deſigns, and prints, to the very great prejudice and detriment of the inventors, deſigners, and proprietors thereof; it therefore

enacted that after the 24th of *June*, 1735, the property of hiſtorical and other prints ſhall be veſted in the inventor for fourteen years, from the day of publiſhing thereof, the name of the proprietor to be engraved on each print. And if any perſon pirate the ſame, he ſhall forfeit the plate wherein the deſign is ſo pirated, and all the copies taken therefrom, to the proprietor, and alſo the ſum of 5 ſhillings (half to the king and half to the perſon ſueing therefore) for every ſuch copy.

A queſtion aroſe on the above act of parliament, in the following caſe——

The plaintiff Mrs. *Blackwell* has engraved no leſs than 300 medicinal plants, and has now brought her bill to eſtabliſh her right to the ſole property in them, and to reſtrain the defendants from copying and engraving them, upon the penalties within the act of parliament.

For the plaintiff was cited, the caſe of *Baller*, adminiſtrator of *John Gay*, Eſq. v. *Walker* and others, the printing of the ſecond part of the *Beggar's Opera*; a perpetual injunction was granted, and an account decreed: it was heard before Lord Chancellor *Talbot*.

Mr. *Attorney General* for the defendant inſiſted, firſt, that this is a monopoly, and an infringment upon the common law; the plaintiff therefore muſt make out very clearly that ſhe is exactly within the words of this act of parliament.

Secondly, that this does not come within the meaning of the act, which has the word inventors.

For engraving is not properly inventing, and therefore is not within the act, unleſs it had been ſomething in the mind, and not already in nature, as all theſe plants certainly are.

Thirdly, that the name of the proprietor ſhould have been ingraved on each plate, and printed on every ſuch print; for Mrs. *Blackwell* might both delineate and engrave them, and yet not be the proprietor of them. It ought to have been mentioned at the foot of each print, when it was publiſhed, the day of the firſt printing, and the name of the proprietor, that all mankind may know when it commences, and when it expires, and that people may be apprized to fell clear of the penalty in this act.

The only charge againſt the defendant is ſelling, which is not liable to the penalties of the act, unleſs the perſon ſelling knows them to be printed by one who is not the author and proprietor of them, and knows likewiſe who is the real author

thor at the ſame time. The forty firſt plants produced in the cauſe are as common plants as exiſt, and are in every herbal extant; and it could never be the intention of the act, to include ſuch as inventions, which have been publiſhed before only in another form.

Lord *Chancellor*. The principal thing inſiſted on for the defendant, is the want of engraving the time, and the name, at the foot of each plate, as the fourteen years are to commence from the day of the fifth publication.

It was objected in the caſe of *Baller* v. *Walker*, that the book ought to have been regiſtered in Stationers-Hall, or otherwiſe it is not notice of property within the 8th of Queen *Anne*. c. 19. but this objection was over-ruled by the Court.

This is the firſt caſe under the act of the preſent King.

Two objections have been taken againſt the injunction, and to the account prayed by the bill.

Firſt, againſt the right of the plaintiff, as not being ſuch prints as are within the meaning of the act.

Secondly, if they are, that Mrs. *Blackwell* has not complied with the terms of the act of parliament ſo as to veſt the ſole property in herſelf.

As to the firſt objection. It is extremely clear that they are prints within the meaning of the act of parliament It has been ſaid that the words of this ſtatute muſt he confined ſtrictly to invention, and not to engraving any thing copied from what is already in nature; but this certainly never could be the deſign of the act.

The words of the act are "Every perſon who ſhall invent and deſign, engrave, etch, or work in *mezzotinto* or *chiaro oſcuro*, or from his own works or invention, ſhall cauſe to be deſigned and engraved, etched, or worked in *mezzotinto* or *chiaro oſcuro*, any hiſtorical or other print or prints, ſhall have the ſole right and liberty of printing and reprinting the ſame. for the term of fourteen years, to commence from the day of the firſt publiſhing thereof, which ſhall be truly engraved with the name of the proprietor on each plate, and printed on every ſuch print or prints."

But I do not think the act confines it merely to invention; as for inſtance, an allegorical or fabulous repreſentation; nor to hiſtorical only, as, ſuppoſe the deſign of a battle, &c. but it means the deſigning or engraving any thing that is already in nature.

Therefore, I am of opinion, that if there ſhould be a print publiſhed of any building, or houſe and gardens, or that great deſign of Mr. *Pine*'s of the City of *London*, they will all

come

come properly within this act of parliament, or elſe it would be narrowing it greatly, and making it of little uſe.

If it had not been for the clauſe thrown in for Mr. *Pine*'s benefit, any body might have copied the prints of the hangings in the Houſe of Lords, for what is tapeſtry but copies taken from drawings.

The defendant, to make out the caſe he aims at, muſt ſhew me that theſe prints of medicinal plants are in any other book or herbal whatſoever, in the ſame manner and form as they are repreſented here, for they are repreſented in all their ſeveral gradations, the flower, the flower cup, the ſeed veſſel, and the ſeed.

The ſecond objection is, as to the directions of the act, that Mrs. *Blackwell* has not complied with the terms of it ſo as to veſt the ſole property in herſelf. *Elizabeth Blackwell ſculpſit et delineavit* is ſufficient, and are the very words of the act of parliament to ſhew the perſon to be the proprietor.

The more material objection is, as to the day of publication, for it is inſiſted here is no *terminus a quo*, from whence the term is to commence, nor the *terminus ad quem* when it ſhall expire.

I am of opinion that the words are only directory, and not deſcriptive of the day, and that they are only neceſſary to make the penalty incur, and that the property in the prints veſts abſolutely in the engraver, deſigner, &c. though the day of the publication is not annexed to the foot of it.

Upon the act of 8 *Ann.* c. 19. the clauſe of regiſtering with the Stationers Company, is relative to the penalty, and the property cannot veſt without ſuch entry; for the words are, "That nothing in this act ſhall be conſtrued to ſubject any bookſeller, &c. to the forfeitures, &c. by reaſon of printing any book, &c. unleſs the title to the copy of ſuch book hereafter publiſhed, ſhall, before ſuch publication, be entered in the regiſter book of the Company of Stationers."

Here the clauſe which veſts the property is diſtinct.

The clauſe concerning the printing and reprinting, and publication, relates to the penalty, and is diſtinct: it is true in the firſt act the clauſe is ſeparate, but that will make no difference in my opinion.

The next conſideration is, what will be the conſequence?

The plaintiff will be entitled to a perpetual injunction, but not to an account of profits, becauſe it would be hard to make the defendant account as he was ignorant of the property.

In the caſe of *Baller* v. *Walker* it was ſtated by the bill, and

and not denied by the anſwer, that the book was entered in Stationers-Hall and coſts were given for that reaſon.

There is a material objection in this caſe againſt giving coſts; that the defendant, though he knew the plants were publiſhed, yet did not know the exact time, ſo that they might have been publiſhed before the act.

My conſtruction, that the words requiring the day to be annexed at the foot of the act are directory, and not deſcriptive of the day, I do not ſay is ſo certain, but Judges may think otherwiſe; however, as it is doubtful, I cannot give coſts, nor decree any thing more beſides a perpetual injunction. *Blackwell againſt Harper, Chancery*, 2 *Atkin's Reports* 93. 8 *December*, 1740.

In the 7 Geo. III. c. 38. A. D. 1766, another act paſſed to amend and render more effectual the former act.

After reciting that the former act, and ſtating that it had been found ineffectual, it enacted that the engraver of any print taken from any drawing whatever ſhall have the ſame protection and under the ſame penalties as the engraver of any print from his own drawing, as enacted in the former ſtatute; and further, that the property of ſuch prints ſhall be inveſted in the engraver, &c. for twenty-eight years, from the day of publication.

In 17 Geo. III. c. 57. A. D. 1777, another act paſſed intituled,

An act for more effectually ſecuring the property of prints to inventors and engravers, by enabling them to ſue for, and recover penalties in certain caſes.

"Whereas an act of Parliament paſſed in the eighth year of the reign of his late Majeſty King *George* the Second, intituled, an act for the encouragement of the arts of deſigning, engraving, and etching hiſtorical and other prints, by veſting the properties thereof in the inventors and engravers, during the time therein mentioned: and whereas by an act of Parliament, paſſed in the eleventh year of the reign of his preſent Majeſty, for amending and rendering more effectual the aforeſaid act, and for other purpoſes therein mentioned, it was, (among other things) enacted, that, from and after the firſt day of *January*, one thouſand ſeven hundred and ſixty-ſeven, all and every perſon or perſons who ſhould engrave, etch, or work in *mezzotinto*, or *chiaro oſcuro*, or cauſe to be engraved, etched, or worked, any print taken from any picture, drawing, model, or ſculpture, either antient or modern, ſhould have, and were thereby declared to have the benefit and protection of the ſaid former act, and that act, for the

term

term therein after mentioned, in the like manner as if ſuch prints had been graved or drawn from the original deſign of ſuch graver, etcher, or draughtſman: and whereas the ſaid acts have not effectually anſwered the purpoſes for which they were intended, and it is neceſſary for the encouragment of artiſts, and for ſecuring to them the property of and in their works, and for the advancement and improvement of the aforeſaid art, that ſuch further proviſions ſhould be made as are herein after mentioned and contained. It is therefore enacted, that after *June* 24, 1777, if any perſon ſhould engrave &c. or in any manner copy in the whole or in part, or ſhall publiſh, ſell, or import for ſale, any copy of any print whatſoever done in *Great Britain*, without the expreſs conſent of the proprietor, he ſhall be liable to ſuch damages as a jury ſhall aſſeſs, together with double coſts of ſuit."

OUTLAWRY.

To be outlawed is to be put out of the protection of the law; ſo that he is incapable of taking the benefit of it in any reſpect, either by bringing actions or otherwiſe. Such outlawry may, however, be frequently reverſed; the proceedings therein being (as it is fit they ſhould be) excedingly nice and circumſtantial; and if a ſingle minute point be omitted or miſconducted, the whole outlawry is illegal, and may be reverſed.

JOHN *Wilkes* was charged by information with publiſhing a ſeditious and ſcandalous libel, (the North Briton, No. 45)

Another charge againſt him in another information was for publiſhing an obſcene and impious libel, (an Eſſay on Woman, &c.)

21ſt. Feb. 1764. He pleaded not guilty to both charges, but the jury gave verdicts againſt him.

Mr. *Wilkes* was at this time in France, whither he had voluntarily retired ſome time before, and from whence he did not return till towards the election of members for the new Parliament, (into which he was afterwards choſen.) Judgment being paſſed againſt him, and he not appearing, he was, according to the law and cuſtom of this realm, outlawed.

On