INFORMATION

FOR

ALEXANDER DONALDSON and JOHN WOOD, Bookſellers in EDINBURGH, and JAMES MEUROSE, Bookſeller in KILMARNOCK, Defenders;

AGAINST

JOHN HINTON, Bookſeller in London, and ALEXANDER M'CONOCHIE, Writer in Edinburgh, his Attorney, Purſuers.

January 2. 1773.

[Lord COALSTON Reporter.]

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ABOUT the year 1732 the reverend Mr. Thomas Stackhouſe, vicar of Beenham, in the county of Berks, publiſhed a book, entitled, 'A new hiſtory of the 'holy Bible, from the beginning of the world to the 'eſtabliſhment of Chriſtianity, &c.'

A ſecond edition of this work was publiſhed by Stephen Auſtin, bookſeller in London, who obtained a patent from his Majeſty in the following terms: 'George, &c. To all to whom 'theſe preſents ſhall come, greeting: Whereas, our truſty and 'well-beloved Stephen Auſtin, of our city of London, book-'ſeller, hath humbly repreſented unto us, that he is now print-'ing a ſecond edition of a work, entitled, *A new hiſtory of the* 'holy Bible, *from the beginning of the world to the eſtabliſhment of* 'Chriſtianity, *with anſwers to moſt of the controverted queſtions, diſſerta-*

'*tions upon the moſt remarkable paſſages, and a connection of prophane hiſtory all along; to which are added, notes explaining difficult texts, rectifying miſtranſlations, and reconciling ſeeming contradictions;* in two volumes in folio; compiled and written by our truſty and well-beloved Thomas Stackhouſe, maſter of arts, and vicar of Beenham in our county of Berks: And whereas the ſaid Stephen Auſtin has informed us, that the ſaid work has been perfected with great labour, ſtudy, and expence, and that the ſole right and title of the copy of the ſaid work (as now publiſhing) is veſted in him, he has therefore prayed us to grant unto him, the ſaid Stephen Auſtin, our royal privilege and licence for the ſole printing, publiſhing, and vending the ſaid work for the term of fourteen years. We being graciouſly inclined to give encouragement to all works that may be of public uſe and benefit, and eſpecially to thoſe of this kind, which tend ſo much to the advancement of religion, and the general good of mankind, are pleaſed to condeſcend to his requeſt, and do, by theſe preſents, (*as far as may be agreeable to the ſtatute in that caſe made and provided*) grant to the ſaid Stephen Auſtin, his heirs, executors, adminiſtrators and aſſigns, our royal privilege and licence for the ſole printing, publiſhing and vending the ſaid work, *during the term of fourteen years*, to be computed from the date hereof, ſtrictly prohibiting and forbidding all our ſubjects within our kingdoms, and dominions, to reprint or abridge the ſame, either in the like or any other volume or volumes whatſoever, or to import, buy, vend, utter, or diſtribute any copies thereof reprinted beyond the ſeas, during the aforeſaid term of fourteen years, without the conſent or approbation of the ſaid Stephen Auſtin, his heirs, executors, adminiſtrators, and aſſigns, by writing under his or their hands and ſeals firſt had and obtained, as they will anſwer the contrary at their peril: Whereof the commiſſioners and other officers of our cuſtoms, the maſter, wardens, and company of ſtationers of London, and all other officers and miniſters whom it may concern, are to take notice that ſtrict obedience be given to our pleaſure herein ſignified. Given at our court of St. James's the eighth day of January 1741-2, in the fifteenth year of our reign.'

This ſecond edition appeared about the year 1744.

Stephen

Stephen Auſtin executed a will, by which he appointed his wife to be his ſole executrix, and bequeathed to her his eſtate real and perſonal. March 20, 1745.

Elizabeth, the widow of Auſtin, proved the will, and obtained adminiſtration of his effects. January 24, 1750.

Elizabeth afterwards married John Hinton, the purſuer, and is now deceaſed. Auguſt 10, 1752.

Mr. Stackhouſe, the author, died in October 1752.

About the end of the year 1765 Mr. Meuroſe compleated an edition of Stackhouſe's hiſtory in ſix volumes octavo, which he had frequently adverti ſed in the newſpapers for two years preceding; during which time he was employed in printing and publiſhing the work in volumes, without any challenge on the part of Mr. Hinton.

Mr. Meuroſe thinking there might poſſibly be leſs demand for that part of the work which related to the Old Teſtament than for the New-Teſtament part, kept the two ſeparate, making indexes for each, and printing more copies of the latter than of the former. But afterwards finding, upon trial, that the whole book went off equally well, he agreed with Mr. Donaldſon and Mr. Wood, to reprint and publiſh ſo many copies of the firſt four volumes, (being the Old-Teſtament part) as, joined to the copies remaining of the two laſt, would make compleat ſets. This was done in 1767, when the book was advertiſed as formerly, and ſtill no complaint made.

No earlier than 1770, Mr. Hinton without any previous notice, was pleaſed to bring this action before the Court of Seſſion, concluding againſt the defenders for reſtitution and damages, on account of a ſuppoſed violation of his *property*, by printing and publiſhing ſaid work. He did not pretend to lay his claim upon the patent, then confeſſedly at an end, or upon the ſtatute of Queen Anne, which was likewiſe out of the queſtion; but he endeavoured to maintain the concluſions of his action upon the footing of a *common-law property* in authors, independent of ſtatute, or of ſpecial grant.

The cauſe having come before Lord Coalſton, Ordinary, the defenders moved an objection to the title; that, ſuppoſing the exiſtence of ſuch a right in authors and their heirs or aſſigns, the purſuer in this caſe had produced no ſufficient evidence of

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his being either the heir or aſſignee of the author. To which it was anſwered, that the author having made over his copy-right to Auſtin, the aſſignee, and Auſtin having conveyed his whole effects by teſtament in favour of his wife, the ſame paſſed *jure mariti* to Mr. Hinton, the ſecond huſband of Auſtin's widow; and conſequently this property, if it did at all exiſt, was now in the purſuer. The Lord Ordinary was of this opinion, and the objection to the title having been over-ruled, his Lordſhip took the cauſe to report upon the merits, and ordered informations; in obedience to which, this is humbly offered for the defenders.

In general they are to maintain, That the law of this country acknowledges no perpetual monopoly in authors, or, in other words, no reſerved excluſive right to their works after publication, ſuch as hath of late been contended for, under the name of *literary property*.

The ſubject is copious, and has of late been much handled. The defenders would encroach greatly too far on the patience of your Lordſhips, were they to ſtate every thing that has been wrote and ſaid upon it. The plan which they propoſe, is,

I. To inquire into the nature of this ſpecies of property claimed by authors, or rather by bookſellers; and to ſhow, that it is not founded in the general principles of law; that it is not conſonant to reaſon: and that neither the intereſt of ſociety, the advantage of authors themſelves, nor any conſideration of expediency or police, are concerned in eſtabliſhing ſuch a property.

II. To examine how far it is a ſpecies of property acknowledged by the *common law of Scotland*, independent of ſpecial privilege and of the act of Queen Anne: Under which head, the defenders expect to ſatisfy your Lordſhips, that it is ſupported by no authorities or precedents with us; by no cuſtom; by no circumſtance tending to ſhow that ſuch a property ever exiſted in Scotland.

III. To conſider the act of Queen Anne, with its effect upon this queſtion.

IV. With great deference, to ſubmit a few obſervations on the law of England, which is ſaid to ſtand in favour of the excluſive right of authors.

V. Shortly

V. Shortly to bring under view thoſe ſpecial circumſtances of the preſe nt caſe, which may have an influence upon the queſtion.

I. The aſſertors of *literary property* define it to be, ‘ A right ‘ which the author of any work has in the combination of ideas ‘ produced by himſelf, and of which his book is compoſed.’ It is not merely a property in the manuſcript, which is a tangible ſubſtance, capable of poſſeſſion; but they are pleaſed to figure ſomething incorporeal and inviſible, in which that ſort of right, called *literary property*, conſiſts. It is a right to the doctrine contained in the book; to a ſet of ideas, or modes of thinking, communicated by words and ſentences; and which carries along with it the ſole privilege and power of diſpoſal even after publication. I. Nature of literary property.

This incorporeal right, detached from any phyſical exiſtence, they expreſs by the word *copy*, or *copy-right*; and the benefit attending it when ſold, they call *copy-money*. The technical terms here uſed, are of modern invention; and when we enquire into the nature of the ſubject to which they are applied, we find nothing real in it, nothing to which the character of *property* can either in language or in reaſon be affixed.

A man who puts his thoughts into writing, or who prints them, may keep hold of the volumes, and call them his property: But this will not anſwer the purpoſe of thoſe who contend for literary property, without ſuppoſing the *matter* of the book, or the ideas and compoſition, to be the foundation of another kind of property, independent of the materials; and this property we muſt figure to be of ſuch a nature, that it can ſubſiſt and be retained by a poſſeſſion of the mind, after the ſubject of it is given away, and put under the power of others. Their poſition is, That though the author diſpoſes of his edition, and makes his work patent and public to the whole world, he nevertheleſs reſerves to himſelf a property in the *literary compoſition*, whereby he alone has the power of regulating all future publications, and of reſtraining others from tranſcribing or reprinting his work.

The ſmalleſt conſideration will ſhow, that the word *property* is here moſt erroneouſly uſed. If it be any thing at all, it is not a property, but a *monopoly*, or right of prohibiting others from doing what otherwiſe would be competent to them. Property

is defined to be, *jus in re*; and there can be no property without a subject or *corpus*, to which it refers. Neither the definitions of *property* given by Puffendorff, Grotius, and other writers, nor the modes of acquiring it, do at all apply to this metaphyſical right which an author is ſuppoſed to have in his ideas after publication. Such a right is not capable of occupancy, of acceſſion, of tradition; nor is it the object of any viſible poſſeſſion. Ideas, whether remaining in the mind, or expreſſed and publiſhed by word or writing, cannot be deemed *property* in a civil or legal ſenſe. They are indeed *proper* to the perſon who conceived thoſe ideas; but when they are called his *property*, it muſt be metaphorically, and not in a ſtrict ſenſe.

Beſides, it has been well obſerved by writers on this ſubject, That all men whoſe ſenſations are equally well ordered, ought to have the ſame perceptions. It will be extremely difficult therefore to aſcertain whoſe ideas they originally were, or to ſay that they are proper to one man more than to another. All that can be ſaid of the matter is, That an ingenious and ſpeculative man improves his intellectual powers more, and makes a better uſe of them than his neighbours. But this cannot come under the denomination of *property*, any more than the circumſtance of one man's blood circulating faſter than another's, or of being more expert in walking, riding, or fencing.

If by the word *property* is meant, That ſuch a man is the *author* of ſuch a work, *i. e.* that the work is the reſult of his labour and ingenuity, in arranging a ſet of ideas, putting them into writing, and cauſing them to be printed and publiſhed; all this may be very true, and ſo far the author may be ſaid to be *proprietor*. But this is a definition which will be of no avail in the preſent queſtion; it is merely a *metaphorical property*, and an abuſive ſignification of the word.

It may likewiſe be admitted, without hurt to the argument, that by publication the author is not diveſted of this ſpecies of property. He ſtill remains entitled to the character of *author*; he has a right to all the *fame* ariſing from that character; and if any perſon attempts to rob him of that fame, for example, by denying that he is the author; ſuch perſon is guilty of an injury and liable to juſt cenſure; though whether even this offence would be actionable before a court of com-

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mon law, is far from being clear. A ſtory is told of one Simon Marius, a German, reſiding at Padua, who having tranſlated into Latin a book publiſhed the year before by Galilæo, cauſed his diſciple Capra to print it as his own. Galilæo complained of this to the Reformers of the univerſity of Padua, who very juſtly ordered Capra's book to be ſuppreſſed, and give ſatisfaction to Galilæo for the injury done him *againſt the laws of printing*. It is plain, that the offence here conſiſted in the attempt to rob the author of his fame, by printing the book under a falſe name; for as Marius was the tranſlator of it, he had clearly a title to publiſh his tranſlation, even according to the modern ideas of literary property, had he done it fairly, and publiſhed it as the work of Galilæo. It appears too, that the complaint was made, not to a court of common law; but to an extraordinary juriſdiction, erected for the purpoſe of regulating ſuch matters, and of inquiring into literary frauds. Such literary thefts are committed every day, and are known by the names of *piracy* and *plagiariſm*; however contrary to good manners, it may be doubted if they are cognizable in courts of common law.

But the preſent queſtion is, Whether, after an author has publiſhed his work, he reſerves a property in it, whereby he can reſtrain all other men from tranſcribing, printing, or multiplying copies of this work, which falls into their hands, no injury being done to his *character* as *author* of the work, which may afford him any perſonal ground of complaint? The queſtion in ſhort is, Whether he has a retained *property* in the words, ſentiments, and compoſition, after having preſented them to the public; or if, on the contrary, by the very act of publication, he does not make them common?

That he does make them common, and put it in the power of all mankind to copy, tranſcribe, and print them at pleaſure, is, with ſubmiſſion, a ſelf-evident propoſition. He can have no hold of the ſentiments which he has publiſhed; he throws them into the common ſtock; he quits the poſſeſſion of his ideas, and allows every perſon to make of them what uſe he thinks proper. In certain caſes, the law acknowledges a *poſſeſſio animi*; but here no ſuch mental poſſeſſion can be figured: For the very purpoſe of publication is, to communicate the poſſeſſion to all mankind; and this is the natural and neceſſary conſequence of the act.

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'In vain (ſays Puffendorff) would we appropriate to ourſelves 'thoſe things which others can enjoy without our conſent, 'and without our being in a condition to hinder them in any 'ſhape.'

By publiſhing, whether *gratis* or for a valuable conſideration, the author gives his ſentiments and doctrine to the world at large; and there are not *termini habiles* for ſuppoſing that he ſtill retains a power and control over them. If a proprietor of land gives off a road to the public, he cannot afterwards obſtruct that road, or hinder the public from uſing it. When an author is out of poſſeſſion, by publiſhing his work, he cannot ſtill have a *jus in re*, or ſuch dominion over it as to limit the uſe of thoſe who came lawfully into the poſſeſſion of what he has publiſhed.

The purſuer ſays, 'That property in its juſt ſenſe compre-'hends the intereſt of a party in any thing which is capable 'of ownerſhip, whether corporeal or incorporeal, ſuch as his 'life, his labour, or his fame, and that the common law means 'to ſecure to him whatever he has a juſt right to hold and en-'joy, or whatever cannot be violated, conſiſtently with the 'peace and happineſs of mankind, and that every man's feel-'ings can eaſily diſtinguiſh what falls under this idea.' It is further obſerved, 'that the definitions of property given by 'Grotius and other lawyers, are not adapted to the preſent 'ſtate of ſociety.'

But it is plain, that the deſcriptions of property here ſubſti-tuted, in place of thoſe which have uniformly been adopted by lawyers, both antient and modern, are by much too lax and in-definite. In this way, every ſort of right, whether real or other-wiſe, whether connected with a corporeal ſubject, or merely ari-ſing from contract, or founded in the ſtate of perſons, and in the duties which men owe to one another in ſociety: All theſe, ac-cording to the purſuer's definition, muſt come under the idea of property; ſo that if he has children, he may ſay that he has a property in the obedience which they owe him:—If he has a wife, the conjugal duties are his property:—If a certain privi-lege is given him by law, or by grant, of doing a particular thing, or of hindering others from doing it, this he may like-wiſe call his property. In ſhort, every right whatever may be brought

brought under this general denomination, and every legal and known diſtinction of terms muſt be given up, in order to anſwer the purſuer's hypotheſis.

But after all, ſuppoſing his argument were founded in the propriety of language, and in the juſt ſignification of the words uſed by him, it would ſtill remain to prove his right of *ownerſhip*, which muſt mean an *excluſive* right, in a ſubject not under his power, *viz.* a literary compoſition, which he himſelf has communicated to all mankind by publication. He neither has the poſſeſſion, nor enjoys the uſe of it, except in common with other men. How then can he exerciſe this pretended property, or upon what foundation does it reſt?

The difficulties of a retained *ownerſhip* in a publiſhed compoſition, are ſo great and ſo obvious, that the aſſertors of literary property have been driven to ſuppoſe, that there is ſome *implied contract* in the act of publication, by which it is underſtood, that only a limited uſe is conveyed, and that purchaſers are not to multiply copies for their own benefit. But if there is ſuch an implied contract in the nature of the tranſaction, it muſt be *juris gentium*, it ought to obtain every where, and we would have ſeen it eſtabliſhed and enforced in all ages, at leaſt ſince the invention of printing. On the contrary, no notice has ever been taken, either by lawyers or by authors, of any ſuch contract; no action has ever been ſued upon it; and at this day, it would ſound very ſtrange in the courts of France, Holland, or other countries, were an Engliſh author to ſue for breach of contract on account of his works being republiſhed there by perſons who never had any contract with him.

When an author, or bookſeller, ſells a printed copy of his book, he does not ſtipulate with the purchaſer that he ſhall only make this or that uſe of it; and, in particular, that he ſhall not tranſcribe, or multiply copies. No title-page ever bore, that the book was ſold upon condition that the purchaſer ſhould not write or print it over again. No bargain of this kind ever was expreſſed, and none can be implied, as the purchaſe is made without any reſervation; and it would be againſt the common principles of law, as well as public good, to limit the purchaſer's right by implication. The diffuſion of learning is a matter of general concern; and it might be a means of obſtructing this, if

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any perſon who has *bona fide* acquired as his own property either a written or printed copy of a book, might not tranſcribe, print and circulate ſuch book at his pleaſure. A prohibition to multiply copies can no more be *inferred*, than a prohibition to lend to a friend, or to keep a circulating library; by which, as well as by multiplying, the profits of the firſt publiſher may be abridged.

The purſuer ſays, why ſhould an author forfeit the right of printing his own work, by the firſt publication? and why ſhould it be ſuppoſed, that when one purchaſes a printed copy of a book for a few ſhillings, he has thereby acquired the right of reprinting and ſelling that work? The anſwer has already been given. The author forfeits no right which he could poſſibly retain, and the purchaſer of the book is entitled to beſtow his labour upon it, either by copying, printing, or in any other ſhape he thinks proper, unleſs reſtrained by ſpecial authority; in the ſame way as the purchaſer of a table or a chair is at liberty to make as many other tables or chairs exactly ſimilar to it as he ſhall think fit, either for his own uſe, or for ſelling to others.

So far from being againſt the nature of the tranſaction, it is plain, that ſuch multiplication is moſt agreeable to it; nay, is the very thing which every author muſt be ſuppoſed to have in view by the act of publication. For every author who brings forth his ſentiments into the world, muſt be underſtood to mean, that thoſe ſentiments ſhould be propagated; and therefore the perſon who is moſt aſſiſting to him in this, by multiplying copies, is the perſon to whom the author is, or ought to be, moſt obliged. He does him the greateſt of all favours, by diſtributing his work, and conſequently ſpreading his fame. This is the true light in which the matter ought to be viewed by authors: For as to the paltry conſideration of copy-money, (the late invention, not of authors, but of bookſellers), it is plain, that whatever an author may be entitled to upon the firſt publication, he has no foundation in reaſon, or in the nature of the thing, to expect that this ſhould be repeated, after the book is no longer under his power.

It was ſaid, that a literary compoſition does certainly remain under the ſole dominion of the author, till he thinks proper to

publiſh

publiſh it; and if ſo, why ſhould he loſe this property by the act of publication?

The diſtinction is extremely obvious. Before publication, he has the manuſcript in his pocket; he may exclude all others from ſeeing it, or may throw it into the fire. The manuſcript is as much his property as a table, or a chair, or any moveable belonging to him. Of courſe the ſentiments and doctrine, which are only to be found, either in his own head, or in the manuſcript, muſt be under his power, being not communicated to others. Even after publication, the original writing may continue under his power; and any perſon who opens his cabinet, and takes it away, may be puniſhed as a felon. But the author's dominion over the ſentiments and compoſition is at an end by the publication; it could not in nature ſubſiſt any longer.

The author may avail himſelf as much as he pleaſes of the property of his manuſcript; but it is denied that he has any *property* in the ideas thereby conveyed, further than that he could have retained them in his mind; or, when formed into a literary compoſition, could have ſhut up this in his cabinet; which no more conſtitutes him the *proprietor* of the compoſition, conſidering it as an intellectual conception, than a man can be ſaid to be *proprietor* of a good thought, or of a witty ſaying. He is the *author* of it, but not the *proprietor*; and as ſoon as he divulges it to the world, he gives up his words and thoughts to the public; he cannot poſſibly recall them, nor can he hinder any perſon from repeating and ſpreading them at pleaſure. It is inaccurate to ſay, that the author *loſes* his property by publication. He only makes his ideas common; he delivers his compoſition to the public; and puts it in the power of every individual who gets this publication into his hand, to make any uſe of it he ſhall think proper. There is only one caſe in which it can be figured that an author retains the excluſive enjoyment of his ideas, after having publiſhed them, *viz.* if he writes in an unknown language, or character invented by himſelf, and which he alone can decypher. At the ſame time even there, ſuppoſing any perſon into whoſe hands the book has come, ſhould take a fancy to reprint it, what power has the author to hinder him?

Allowing

Allowing that the word *property* could, in the ſtricteſt ſenſe, be applied to this ſort of incorporeal eſſence called *compoſition*, where is the difficulty in ſuppoſing, that, before publication, this property remains with the author; and that, after publication, it becomes communicated to thoſe who purchaſe his book? Take the caſe of a man who deals in horſes, and who has a ſtud for the purpoſe of breeding. This man may keep the whole produce to himſelf, without ſale or communication to any perſon; but if he chooſes to do the contrary, is it not plain that every perſon who buys from him, muſt have the power of multiplying the breed, unleſs ſpecially reſtrained by law, or paction? The ſame thing holds with regard to the inventor of a machine, the raiſer of a new ſpecies of grain, the diſcoverer of a *noſtrum*, or of any ſecret art. In all ſuch caſes, the act of publication muſt make an eſſential difference; and why it ſhould not make the ſame difference in the article of books, the defenders cannot ſee. While the inventor retains his diſcovery to himſelf, or the author, his ideas, it is plain that none other can interfere in the uſe or practice of what is known to none but him; but when the ſecret is once diſcovered, and the ideas are publiſhed, every perſon is at liberty to take benefit from them, where no lawful impediment occurs.

It was ſaid, That literary property was attended with the eſſential qualifications of other property; for that it was uſeful to mankind, and was capable of having its poſſeſſion aſcertained.

If by this it is meant, That the publiſhing books is uſeful to mankind, the defenders ſhall not diſpute the propoſition: But they cannot admit, that a reſerved excluſive property after publication, would either be uſeful to mankind, or eaſily aſcertained by poſſeſſion.

If there be ſuch a property, it is of all others the moſt whimſical: For it may be taken away entirely from the owner, by only adding a little to it, or improving it; for example, by republiſhing with notes, or tranſlating it into another language, or making a few alterations here and there, ſtill preſerving the ſubſtance of the ideas.

Further: If it be a property, it is ſingular in this, that no creditor ever attached it, nor is it capable of being attached: For one of the great arguments uſed in favour of a reſerved right in the author, is, That it is fit he ſhould judge when to publiſh, and when

when not; that he ſhould not only chuſe the time, but the manner of the publication; how many and what volumes; what type; and to whoſe care he would truſt the accuracy and neatneſs of the impreſſion; in whoſe honeſty he would confide, not to put in additions, *&c.* At this rate, it becomes a *res meræ facultatis* in the author, though he has once publiſhed his work, whether he will ever allow a ſecond impreſſion of it to be made or not. All theſe things he, or the perſon whom he truſts, muſt alone judge of: And therefore, though the argument ſuppoſes him to have a perpetual hereditary right in this literary compoſition, beneficial to himſelf, and excluſive of all others; yet it is a right which no creditor can lay his hand upon, becauſe *inhæret oſſibus* of the author, or the perſon to whom he gives it.

Suppoſe the author dies before publication, and the manuſcript is found in his repoſitories, the *paper* may no doubt be conſidered as executry; but how is the property in the *compoſition* to be diſpoſed of? If this is to yield a perpetual revenue, or to be the ſubject of future profits at every publication, it ought by the law of Scotland to be accounted as *heritage*; ſo that here will be a queſtion not eaſily reſolved between heir and executor. And with reſpect to creditors, it may be aſked, can they force the repreſentatives of the author to publiſh and republiſh this work, in order to enlarge the fund for their payment? Can they arreſt the ideas or adjudge them? Perhaps the author had no intention to publiſh this work; poſſibly it contains ſomething criminal, or of a bad tendency, is it in the power of creditors, by attaching the manuſcript, to publiſh it contrary to the will of his heirs, and thereby to bring infamy on the author's name and family? It may further be aſked, whether the author's ſon, by publiſhing his father's manuſcript, would ſubject himſelf in a paſſive title to creditors? Theſe, and other difficulties, would reſult from eſtabliſhing this imaginary property.

To ſay, That a literary compoſition is of common utility, and therefore ſuſceptible of property, is quite inconcluſive. Light and air are of common utility; and yet no perſon ever conſidered them as the ſubject of *property*.

A more plauſible argument is, That an author is juſtly entitled to all the benefit ariſing from the labour of his mind; and that literary compoſitions being the produce of ſuch labour, it is wrong to interfere with him in reaping the profits of it.

To this it is anſwered, in the *firſt* place, That the wrong here ſuggeſted, depends entirely on the extent and duration of the author's property; and it is the violation of that property that muſt alone conſtitute the injury. If his property be at an end, no injury is done him; and the queſtion therefore returns, Whether, by the act of publication, the author himſelf did not make his work common? That this is the caſe, has already been ſhown; it is implied in the very word *publication*, and in the nature of the act itſelf.

2dly, It will be conſidered, that in order to give the extraordinary benefit here contended for to authors, the natural rights of others muſt be abridged. A perſon who copies or reprints a book which he acquired without any limitation, does no more than exerciſe a legal right; and however we may lean to literary merit, the property of other men is likewiſe entitled to protection. If the author himſelf has laid his work open, and has acquired all the fame ariſing from it, and even the profits of the publication, can he complain of the natural conſequences of publication? He may, if he pleaſes, republiſh, and reprint his work; but he has alſo put it in the power of others to do the ſame; and this being his own act and deed, he cannot ſay that he is injured.

3dly, Though it may be true, that the labour and ſervices of an author often merit pecuniary reward as well as reputation, the queſtion is, Whether this ought to be infinite, and without end; or if the advantages attending a firſt publication, are not, for the moſt part, fully adequate to the purpoſe; and if it would not be highly detrimental to the public, were not ſome bounds ſet to this ſuppoſed equitable claim? The man of genius and ſtudy ought, no doubt, to have ſuitable encouragement; but this muſt be limited by the general good, and by a proper attention to the rights of others.

That an author ſhould have the ſole diſpoſal of his original manuſcript, and ſhould enjoy the profit which naturally attends the act of making it public, is certainly moſt reaſonable. Accordingly, every author has this in his power; and it is impoſſible to diſpute it with him, becauſe he may refuſe to make it public, and may deſtroy his manuſcript, if not previouſly inſured of a ſuitable encouragement. Sir Walter Raleigh deſtroyed the manuſcript

nuſcript of the ſecond volume of his hiſtory, becauſe his book-ſeller told him he had loſt upon the firſt; and every author may do the ſame.

If he chooſes to publiſh his work, he has the further advantage accruing from the *reputation* of it, which may often be conſiderable, even in a pecuniary view. A phyſician writing ably upon his profeſſion, may advance his reputation, and conſequently his practice; a lawyer may do the ſame; and even thoſe who apply themſelves to hiſtory, to poetry, or to *belles lettres*, have generally met with patronage and ſupport from rich and powerful men, according to the merit of their works. This was of old, and this ought ſtill to be, the true idea of an author's profit; and it is an idea far ſuperior to the modern invention of copy-money: An invention which has tended much to degrade the author's character, and to render him ſubſervient to book-ſellers and printers.

At the ſame time, the author may likewiſe, if he pleaſes, have his *copy-money*, if by this is meant the immediate pecuniary profits ariſing from the act of making his book public. Nay, he may have a great deal more. He may, by the eſtabliſhed practice in this and all other countries in Europe, have a ſpecial *exclusive privilege* for a certain limited time, which will ſecure him in reaſonable profits, if the work is entitled to any. The only queſtion is, Whether he ſhould not only have theſe advantages, but ſomething farther? Whether he ſhould have a renewal of copy-money upon every ſubſequent publication without end, although, by the firſt act of publication, he has put the book, *i. e.* the ſentiments and compoſition, entirely out of his power, and communicated them to the public? Or, in other words, Whether, at the ſame time that he publiſhes his book, he is underſtood not to have made it public, but reſerved to himſelf an excluſive poſſeſſion and power over it. A little attention will ſhow, in the *firſt* place, That it is impoſſible to give way to ſuch contradictions. *2dly*, That it would be no advantage to authors to go into them.

Indeed it is remarkable, that the claim of literary property has ſcarce ever been inſiſted in by *authors*; and is almoſt confined to a particular ſociety, even of *bookſellers*, *viz.* thoſe of London. At the ſame time, it is a queſtion in which regularly the bookſellers ought to have no concern: For when a bookſeller purchaſes any

work

work from an author, he can adapt his price to the extent of the benefit which he acquires; and he can no more complain that the monopoly is not perpetual, than a perſon, who takes the leaſe of a farm, can complain, that his leaſe is only to endure for a certain period.

Beſides: It is well known, that every book or manuſcript is purchaſed upon the preſumption, that there will be an immediate call for it. Few bookſellers can afford to ſink their money, even for certain returns, if they are very diſtant, much leſs would the uncertain chance that a book will continue ſaleable for ever, although the perpetual monopoly were fixed, go any great length in enhancing the price. No bookſeller ever purchaſes a book, without calculating that he is to be indemnified, and to have profit upon the firſt, or at furtheſt the ſecond edition; and every perſon converſant in this matter knows, that the London bookſellers give an author very little more for the abſolute diſpoſal of the manuſcript, than for one large impreſſion. Neither would they give more for a perpetual right, were it to be aſcertained, than for the terms allowed by the ſtatute of Queen Anne.

The eſtabliſhing a perpetual monopoly, therefore, would be of no benefit to authors; and it is plain, that bookſellers have no pretence of claim to ſuch a monopoly. Their profits have always been much beyond thoſe of an author; and it would not only be againſt juſtice, but moſt detrimental to the public, to extend their advantages any farther. One conſequence would be, that the bookſeller, being freed from all rivals in the price, paper, correctneſs, or any other part of the good execution of the work, would think himſelf at liberty to ſerve the public in all theſe reſpects as he chooſed. The execution would therefore be inferior, and the price very high. In this laſt article, the London bookſellers have of late gone to a moſt extravagant pitch. In every kind of commerce, and in every art, there ought to be a competition. Without this, induſtry will not proſper; and any monopoly or reſtraint muſt nouriſh tyrants, to oppreſs the country, and to annihilate ingenuity. The more uſeful any invention is, the more grievous the monopoly muſt be.

Beſides, it was well obſerved by a late *honourable perſon* in England, ‘ That he could never entertain ſo diſgraceful an opinion ‘ of learned men, as to imagine, that nothing would induce them ‘ to write, but an abſolute perpetual monopoly: That he could

‘ not

'not believe they had no benevolence to mankind; no honour-
'able ambition of fame; no incitement to communicate their
'knowledge to others; but the moſt avaricious and mercenary
'motives. From authors ſo very illiberal, the public would hard-
'ly receive much benefit.'

Another effect of making books a monopoly would be to enrich a few bookſellers, at the expence of the whole nation; a conſequence already too much felt from the temporary excluſive privileges by patent, and from the act of Queen Anne. The defenders have been aſſured, that the bookſellers in London have by ways and means engroſſed, or attempted to engroſs, many of the moſt valuable books, both ancient and modern, under the ſpecious colour of having purchaſed the copy-rights from the authors either immediately or by progreſs; and that, when *new works* are produced, eſpecially in Scotland, *they combine together* to put a negative on the ſale of them, if they are not placed under their immediate protection. One inſtance of this was Mr. Hume's Hiſtory, Vol. I. It is even aſſerted as a fact, That in the year 1759, they entered into articles of agreement, and bound themſelves under ſevere penalties, not to keep in their ſhops any Engliſh books whatever that had been reprinted in *Scotland*: That they raiſed a large ſubſcription for employing perſons to ſearch for ſuch books, and for proſecuting thoſe who ſhould tranſgreſs their reſolution; and alſo wrote circular letters, threatening the country bookſellers, if they dealt in Scots editions: That, in other words, the London booktellers claimed to themſelves, and reſolved to aſſert, the ſole privilege of printing and publiſhing all Engliſh books.

The conſequences to the public, and particularly to Scotland, are extremely injurious. Inſtances could be given of publications, even of works compoſed by Scotchmen, which ought to have been ſold at one-fourth of the price put on them by the London bookſellers. This is a ſerious matter to the country, and will ſoon prove ſo to authors themſelves, if the book-trade is carried on by a few hands, who will be enabled to dictate their own terms.

Milton's Paradiſe Loſt was ſold by the author to a bookſeller in London for 15 l. Sterling, the notion of perpetual copy-right not having then taken place. From this circumſtance of being originally publiſhed by a London bookſeller, the gentlemen of

that

that profeſſion, now in London, draw an inference of perpetual excluſive right to themſelves in this book, which has already produced to them many thouſands of pounds; and, if the doctrine of literary property were to be eſtabliſhed according to their ideas of it, there is hardly a book extant in the Engliſh language, which might not in the ſame way be claimed by them. The trade of printing, bookſelling, and paper-making, would in effect be knocked up in every part of the iſland, except London; for the moſt of the capital books being firſt publiſhed in London, the whole buſineſs would be there carried on.

The right of ſuppreſſion, is another dangerous though neceſſary conſequence of the doctrine of literary property.—Suppoſe the heirs of Napier of Merchiſton ſhould inſiſt to deprive mankind of the uſe of the logarithms invented by their predeceſſor, and on which navigation ſo greatly depends, would not ſuch an attempt be alarming to ſociety? Yet the author and his heirs are ſaid to be the only judges of this. A perſon miſchievouſly inclined might buy up copy-rights, in order to ſuppreſs them.

Let it be ſuppoſed, that the pretended copy-rights of Milton, Shakeſpear, Locke, Newton, and all the beſt authors preſently claimed by the London bookſellers, ſhould happen in the courſe of time to be brought to ſale, and purchaſed perhaps by a bookſeller in Aberdeen, or in the Orkneys, who, in conſequence of their own doctrine, would for the future have the ſole regulation and diſpoſal of theſe works, it may be aſked, would the London bookſellers truſt to the Aberdeen or Orkney bookſeller for ſupplying the Engliſh market? It would certainly appear hard to every Engliſhman, to ſee his country deprived of the right of printing her beſt authors. It would be ſaid, that theſe great men did not write merely to get a little pittance to themſelves or their families, but to enlighten mankind; and that the race of bookſellers, after being indemnified a hundred times over, had no right to deprive their country, or prevent the public, from having the full benefit of ſuch uſeful works; that England had the beſt right to poſſeſs and enjoy the writings of thoſe great men to whom ſhe had given birth, education, and protection, and was not for ever to be at the mercy of a Scotch bookſeller.

Beſides: The eſtabliſhment of ſuch a perpetual monoply, would be attended with endleſs confuſion and litigation among authors and bookſellers themſelves. The work of the mind, or

what

what is called the *doctrine*, is ſaid to be the foundation of the author's claim of property. Now, if this be the criterion, many will be found who have no pretence of right, and yet whoſe works are very uſeful to the public. In the firſt place, All editors who only publiſh the works of others, cannot plead this title. Then, all authors who give us nothing new, are in the ſame ſituation. The follower of any ancient or modern ſect of philoſophy, who only utters the doctrine of his maſter, cannot be ſaid to publiſh his own ideas, or to furniſh any original compoſition. A tranſlator does not add a ſingle idea. The publiſher of a newſpaper only tranſcribes. The compiler of a dictionary, of a grammar, or of the rudiments of a language, will generally be much in the ſame ſtate.

It may often happen too, that different authors, writing upon the ſame ſubject, have the ſame reaſonings. Can the author who publiſhes firſt on that ſubject, exclude all others from uſing the ſame ſet of words or ideas? Certainly he cannot. Suppoſe two different men compoſe tables of intereſt; if both their calculations are exact, they muſt, according to the rules of arithmetic, turn out to be the ſame. This obſervation will apply to moſt kinds of tables or calculations, as on life-annuities, logarithms, almanacks, &c If the firſt publiſhers of any ſuch works were to have a perpetual monopoly, how abſurd would ſuch a poſition be, and how unjuſt to the reſt of mankind!

Further: If this idea of property, in compoſitions of the mind, is at all gone into, it is difficult to ſee where we are to ſtop. The author of a ſong, or of a piece of muſic; the perſon who makes a ſpeech in public, or who whiſtles a tune, will have the ſame property in his compoſition, and may equally inſiſt in lawſuits againſt every one who pretends to borrow from, or to repeat after him. A lawyer may be proſecuted for copying authorities, and for taking arguments from the ſuggeſtion of others; yet he would not otherwiſe do juſtice to his cauſe.

It is entertaining however to obſerve, what ſhifts the Engliſh bookſellers and publiſhers fall upon, to evade their own doctrine. They ſuppoſe an author's works to be part of his eſtate, tranſmiſſible to his heirs and aſſigns for ever; yet any third perſon, unconnected with the author, and deriving no right from him, may lay hold of this property, and transfer it to himſelf, by only making a few inſignificant criticiſms, in the form of notes;

or perhaps correcting the text, by the addition of ſome words and commas. *Shakeſpear's works* have been publiſhed by a number of perſons in England; by Mr. Rowe, Mr. Pope, Mr. Theobald, Sir Thomas Hanmer, Mr Samuel Johnſon, &c. and if we can believe what theſe critics ſay of one another, their alterations are oftener for the worſe than the better *; yet, bad as they are, they carry along with them a property in the book thus manufactured, and each critic becomes proprietor of a work which he never was capable of writing. In this way, not only the works of Shakeſpear, but thoſe of Spenſer, Ben Johnſon, Butler, Milton, &c. have been appropriated by different commentators.

* 'Mr. *Rowe* (ſays Dr. Warburton) was ſo utterly unacquainted with the whole buſineſs 'of criticiſm, that he did not even collate or conſult the firſt editions of the work he un- "dertook to publiſh." The ſame character is given of Mr. *Rowe*'s edition by Theobald. And Johnſon ſays, "Mr. *Rowe* ſeems to have thought very little on correction or explanation, but that our author's works might appear like thoſe of his fraternity, with the "appendages of a life, and recommendatory preface."

"Mr. *Pope* (ſays Theobald) pretended to have collated the old copies, and yet ſeldom "has corrected the text, but to its injury."—"I know not (ſays Johnſon) why Mr. *Pope* "is commended by Dr. Warburton for diſtinguiſhing the genuine from the ſpurious plays. "In this choice, he exerted no judgment of his own; the plays which he received, were "given by Hemings and Condel, the firſt editors."

"Mr. *Theobald* (ſays Dr. Warburton) wanted ſufficient knowledge of the progreſs and "various ſtages of the Engliſh tongue, as well as acquaintance with the peculiarity of "Shakeſpear's language, to underſtand what was right; nor had he either common judg- "ment to ſee, or critical ſagacity to amend, what was manifeſtly faulty; hence he ge- "nerally exerts his conjectural talent in the wrong place."—"*Theobald* (ſays Johnſon) "was a man of narrow comprehenſion, and ſmall acquiſitions, with no intrinſic ſplendor "of genius, with little of the artificial light of learning, but zealous for minute accuracy. "In his reports of copies and editions, he is not to be truſted without examination. I have "ſometimes adopted his reſtoration of a comma, without inſerting the panegyric in which "he celebrated himſelf for his atchievement."

"Sir *Thomas Hanmer* (ſays Warburton) was abſolutely ignorant of the art of criticiſm, "as well as the poetry of that time, and the language of his author: And ſo far from "having thought of examining the firſt editions, that he even neglected to compare Mr. "Pope's, from which he printed his own, with Mr. Theobald's." In another paſſage, he ſays, "*Theobald* and Sir *Thomas Hanmer* have left their author in ten times a worſe condition than they found him."—"Sir *Thomas Hanmer* (ſays Mr. Dodd) proceeds in the "moſt unjuſtifiable method, foiſting into his text, a thouſand idle alterations."

This critic, Mr. Dodd, is ſomewhat ſevere in his remarks. He ſays, "Mr. *Warburton's* "conduct can never be juſtified, for inſerting every fancy of his own in the text, when I "dare venture to ſay, his better and cooler judgment muſt condemn the greateſt part of "them. That there are good notes in his edition of Shakeſpear, I never did deny: but "as he has had the plundering of two dead men (Theobald and Hanmer), it will be diffi- "cult to know which are his own Some of them, I ſuppoſe, may be; and hard indeed "would be his luck, if, among ſo many bold throws, he ſhould never have a winning caſt. "But I do inſiſt, that there are great numbers of ſuch ſhameful blunders, as diſparage the "reſt if they do not diſcredit his title to them."——See alſo a pamphlet entitled, *The Caſtrated Letter of Sir Thomas Hanmer*, printed at London in 1763.

Even

Even ſome of the antient claſſic authors have been laid hold of, and divided into ſhares among the London bookſellers. If the doctrine of literary property is eſtabliſhed in Scotland, the bookſellers and printers here muſt fall upon ſome device of the ſame nature, as they have no other method of employing themſelves, except printing law-papers to the Court of Seſſion, and reprinting and publiſhing books which have formerly been publiſhed in London and elſewhere; in doing which laſt, they imagine they are lawfully employed, while they do not encroach on the ſtatutory or ſpecial privileges of others.

An argument uſed for literary property, is, That when an author has beſtowed much time and labour in compoſing, and perhaps expended all his ſtock of money in printing and publiſhing an uſeful work, it is unfair and unjuſt that another ſhould ſtep in, the very next day after the work is publiſhed, and by purchaſing a ſingle copy, forthwith ſet about a cheaper edition, by which the profits of the author are intercepted, and even a loſs brought upon him. That the edition thus publiſhed may be ſhamefully incorrect, and the author is alſo thereby deprived of the power of retracting errors, or making neceſſary additions; that the author has evidently a title in juſtice to prevent theſe things; and where there is a wrong, there ought to be a remedy in common law.

But the caſe here ſuppoſed, does, in fact, very ſeldom, if ever, happen. No bookſeller or printer will be ſo unwiſe as to republiſh the works of a living author without his conſent, with a view to intercept his profits; becauſe it is in the author's power to retaliate the injury, by immediately correcting and altering his work, and by publiſhing it in a new form. Inſtances could be given of authors who have actually followed this courſe, in order to prevent others from interfering with them. Thus it is a known fact, that *Mair* publiſhed ſeven or eight editions of his *Book-keeping*, all of them different from one another; and the ſame thing has been alledged of a more celebrated writer, *Voltaire*. Neither will any perſon ever knowingly print an incorrect edition, which will not ſell when a better one can be had. If the author's edition be incorrect, nothing hinders him to publiſh another, and to retract errors, or make additions, but he can never recall the copies he has once publiſhed and ſold.

Beſides: The argument, when attended to, will appear to be inconcluſive. It is, no doubt, ungenerous to interfere with an author upon his firſt publication; but it is ſuch a wrong as can only be remedied by *ſpecial interpoſition*. And accordingly, to prevent this very abuſe, the practice has been, here, and in other countries, to give excluſive privileges to authors for a definite time, in the ſame way as to the inventors of machines, or of any other art.

The poor have an equitable title to demand their maintenance from the rich; but it never was imagined, that, independent of any ſtatute, they could bring actions before courts of law or equity, for eſtabliſhing rates upon the rich, ſufficient to ſubſiſt them. Courts of juſtice can only interpoſe to make *perfect* rights effectual, not *imperfect* ones, ſuch as that juſt now mentioned, and many others, ariſing from the obligations of friendſhip, gratitude, and benevolence.

The author of a book is preciſely on the ſame footing, in this reſpect, with the inventor of a machine, or art uſeful in life. It is equitable that he ſhould have the excluſive right of ſelling his work, for ſuch a length of time as to reimburſe him of the expence, and recompenſe him for his trouble; but it by no means follows, that this right can be enforced by legal proceſs. He has always the advantage of priority of ſale; and if others have an opportunity of following him, this is the neceſſary conſequence of publication. It requires legiſlative power to reſtrain the natural rights of others.

The maintainers of literary property, finding it neceſſary to admit that the inventors of machines have no ſuch excluſive right, have been at great pains to diſtinguiſh between the caſe of machines, and that of books: But, with ſubmiſſion, their diſtinctions are inconcluſive and unintelligible. A book is a combination of ideas, ſo is a machine; both of them are the reſult of invention: Why then ſhould not the authors of both be equally entitled to make a trade of communicating this invention to the public? It is either wrong to interfere with either, or it is lawful to interfere with both.

It is ſaid, 'That a machine or utenſil is the work of the 'hand, not of the mind; and that property in the work of the 'hand is confined to the individual thing made, which if the 'proprietor thinks not fit to hide, others may make the like in

'imitation

'imitation of it, and thereby acquire the ſame property in their 'manual work, which he hath done in his. But in the caſe of 'a production of the mind, the property conſiſts in the doctrine 'produced, which the owner ought to have the ſole right of 'tranſcribing and copying for gain.'

This argument is founded on a propoſition not true in fact, That a machine is ſolely the work of the hand. The hand is no doubt neceſſary to put it into form, in the ſame way as in the caſe of a book: But ſurely it will not be denied, that the microcoſm was the reſult of long labour and ingenuity of the mind; that Mr. Harriſon's time-piece is in the ſame caſe; and that every ſpecies of mechanical work is more or leſs ſo. The author of a machine certainly uſes his mind as much as the author of a book; and the copier of a book uſes his hand as much as the copier of a machine.

It is next ſaid, That 'in the caſe of an utenſil made, the 'principal expence is in the materials employed, which whoever furniſhes, acquires a property in the thing made, though 'by imitation: On the contrary, in a book compoſed, the principal expence is in the form given, which, as the original maker only can ſupply, it is but reaſonable, how greatly ſoever 'the copies of his work may be multiplied, that they be multiplied to his own excluſive profit.'

This argument is far from being intelligible; and it ſeems alſo to be founded on a miſtake, that in the caſe of valuable machines, ſuch as orreries, teleſcopes, time-pieces, *&c.* the chief expence conſiſts in the materials furniſhed. In moſt books, the charge of printing the impreſſion, is much more than the copy-money, often ten times as much.

It is unneceſſary to go through the other arguments which have been ſuggeſted, for ſhowing a difference between a book and a machine. They are all of the ſame ſtamp, all founded on *data* which at firſt ſight muſt appear to be erroneous, or on diſtinctions too nice and ſubtile to be perceived by common eyes. There is no real difference with reſpect to the queſtion of property, between a mechanical invention, and a literary one. The *inventor*, as well as the *author*, has a right to determine, whether the world ſhall ſee his production or not; but if he once makes it *public*, every acquirer has a right to make what uſe of it he pleaſes. If the in-

ventor

ventor has no patent, his inſtrument may be copied: If the author has no patent, his book may be multiplied.

A printer of linen cloth, who deviſes new and elegant patterns, does not eſſentially differ from an author of books. An engraver of prints, who improves the art, and diſcovers ſomething ingenious and new, is likewiſe in the ſame caſe; yet it never was thought, that either in the one inſtance or the other, there was any ground in law upon which copying could be hindered. It required a ſpecial act of Parliament to ſecure engravers in a *temporary* excluſive privilege, as in the ſequel will be ſhown. The reaſon is plain; becauſe ſtamping and engraving, as well as printing books, are lawful employments, which every one may exerciſe, unleſs forbid by ſpecial authority.

Beſides the inconveniences already noticed, another difficulty which would follow the doctrine of inherent literary property, is, That it is attended with no marks by which the property can be denoted. The moſt ſtrenuous aſſertors of this property admit, That a work may be abandoned to the public, in ſuch manner as to leave no property in the author; and that this will be the caſe, 'if he ſtamps no mark of ownerſhip upon it.' But they ſay, That if he ſells for gain, or if his name be on the title-page, theſe are indications of property, which ſhow his intention to preſerve his right.

This is, in effect, retracting the admiſſion: For few books are publiſhed without bringing gain; and, for the moſt part alſo, the author's name is upon the title-page, which is only expreſſive of a fact, that he was the compoſer of the book; but does not inform the public, whether he is to claim a perpetual property in this work, or to make a free offering of it for the uſe of mankind. Third parties have no acceſs to know what bargain there was between the author and the bookſeller, or whether any price was paid to the former by the latter. When a temporary right was aſcertained to authors by the act of Queen Anne, the legiſlature ſaw the neceſſity of eſtabliſhing ſome *ouvert* evidence of the author's intention, and provided for it; but upon the footing of the common-law right, a perſon may offend without having any poſſible means of knowing whether he does right or wrong.

Upon theſe grounds, the defender is adviſed, that the perpetual right, ſuppoſed to be in authors and their heirs and aſſigns, which

which has received the name of *literary property*, reſts upon no general principle of law, reaſon, or expediency. The next queſtion is, How far there are any traces of it in the law of Scotland, prior to and independent of the act of Queen Anne?

II. Common Law of Scotland.

II. If this ſpecies of property be at all a branch of the municipal law of Scotland, it muſt be founded either in the civil law, or in our own ancient cuſtoms, acts of the legiſlature, authorities of our lawyers, or judicial determinations of our Courts. All of theſe ſources have been inveſtigated; every corner has been ſearched; but not the leaſt glimpſe diſcovered of literary excluſion, independent of ſpecial grant: On the contrary, we find ample materials to ſhow, that it is adverſe to every notion of the common law of this country.

Before the invention of printing, the idea of property in an author, in the ſenſe now contended for, could hardly exiſt; becauſe the multiplication of copies by writing was ſo tedious, that it could yield no gain to the author, whatever it might do to thoſe who endeavoured to procure a ſubſiſtence by their manual labour. This, in the Roman and Grecian ſtates, was generally the taſk of ſlaves; and it was common for learned men, or thoſe who were fond of making libraries, to keep ſlaves for the purpoſe of tranſcribing. This, in particular, was the caſe of Atticus, who made a large collection of very valuable books by means of his ſlaves, at no other expence than that of copying; and it does not appear that by ſo doing he gave any offence either to authors or to bookſellers.

C. Nepos Vita Attici.

The only literary property acknowledged in the civil law, was that which was in the owner of the paper, or parchment, on which the words were wrote. ‘ Literæ quoque, licet aureæ ſint, ‘ perinde chartis membraniſve cedunt; ac ſolo cedere ſolent ea, ‘ quæ inedificantur, aut inſeruntur. Ideoque ſi in chartis mem- ‘ braniſve tuis carmen, vel hiſtoriam, vel orationem Titius ſcrip- ‘ ſeret; hujus corporis non Titius, ſed tu dominus eſſe videris. ‘ Sed ſi a Titio petes tuos libros, tuaſve membranas, nec impen- ‘ ſas ſcripturæ ſolvere paratus ſis; poterit ſe Titius defendere ‘ per exceptionem doli mali, utique ſi earum chartarum mem- ‘ branarumve poſſeſſionem bona fide nactus eſt.’ *Inſt. de rerum diviſione*, § 33.

A late author takes notice of this text, and ſays, ‘ We find no ‘ other mention in the civil law of any property in the works of ‘ the

Mr. Blackſtone, b. 2. c. 26. § 8.

« the underſtanding, though the ſale of literary copies for the « purpoſes of recital or multiplication, is certainly as ancient « as the times of Terence, Martial, and Statius.' The latter part of this propoſition, if it means that ſuch copies were ſold with an *excluſive* power of multiplication, is not ſupported by the authorities referred to.

Thus, in the prologue to the Eunuch, Terence ſays, ' Hanc « fabulam poſtquam ediles emerunt.' This only ſhows, that the public magiſtrate ſuperintended the amuſements of the theatre, and gave the dramatic poet a price for his work: It does not prove, that there was a trade ſubſiſting between the bookſeller and the author upon the footing of perpetual copy-right.

In the ſame way, the epigrams referred to in Martial, ſerve only to evince, that there was a bookſeller, or copyiſt, who made it his trade to tranſcribe manuſcripts and ſell them, and who no doubt was paid for his trouble.

Sunt quidem, qui me dicunt non eſſe poetam;
Sed qui me vendit bibliopola, putat. MART. *l.* 14. *ep.* 194.

The paſſage relative to Statius, in the ſeventh ſatire of Juvenal, is equally inconcluſive, as it only proves, that Statius diſpoſed of his tragedy to the players.

The following lines of Horace ſhow very plainly, that there was no ſuch thing as copy-right among the Romans.

Hic meret æra liber Soſiis, *hic et mare tranſit,*
Et longum noto ſcriptori *prorogat ævum.* De art. poet. *v.* 345.

In the preceding verſes the book is deſcribed, which is here ſpoke of, as procuring *money* to the *Soſii*, two brothers of that name, eminent bookſellers in Rome; and to the *author*, *fame*. This contraſt between the author and the bookſeller is remarkable: It ſhows Horace's ſenſe of the matter; and that the notion of profit to an author, by perpetual ſale of his works, was not then entertained.

Neither do the writers on the civil law take the leaſt notice of a property in literary compoſitions; though Voet, in treating of *privilegia*, makes mention of the excluſive *patents* ſometimes given to printers of books.

Comment. lib. 1. tit. 4. § 11.

The idea therefore of literary property could not creep in among us from the civil law; and as little can it be traced to

any

any other ſource. It is ſaid by *Ames*, in the preface to his *Typographical Antiquities*, 'That in the time of Henry II of England, 'the manner of publiſhing the works of authors, was to have 'them read over for three days ſucceſſively before the Univerſi-'ty, or other judges appointed by the public; and if they met 'with approbation, copies of them were then permitted to be 'taken, which were uſually done by monks, ſcribes, illuminors, 'and readers trained up to that purpoſe for their maintenance.'

At this period, ſurely authors could have no monopoly after publication, either in Scotland or England. Every perſon who choſe to be at the labour of tranſcribing, muſt have been entitled to reap the fruit of his labour; and as our common law goes back that length, ſo it follows, that literary property is no original part of the common law of this country. Public utility, as well as the nature of the thing, muſt have rejected any ſuch pretence; and if ſo, it will be difficult to explain how, or at what time, or for what good reaſon, it ſhould afterwards have been introduced among us.

Upon the revival of learning, and after printing had been invented, the publication of books was ſtill an expenſive operation, and could not be attended with profit to the author; but the zeal of learned men was great, and they publiſhed their works not only without reward, but at great private expence. The art of printing was introduced into England by Caxton about 1471, and into Scotland at or ſoon after the ſame time, as appears from *Ames*, and from *Watſon's Hiſtory of Printing*. When introduced, it was conſidered as a mechanic buſineſs, a manufacture of the kingdom, which all men had a right at common law to exerciſe: It was only a more expeditious method of copying. The firſt printers, both in England and Scotland, conſidered it in this light, and printed every book that came in their way, without any notion of being reſtrained, either by literary property, or by any other conſideration.

The only method taken in thoſe days to prevent interference was to conceal their art as far as poſſible, not being metaphyſicians enough to imagine, that, by inventing the art, they had acquired any excluſive right to exerciſe it. 'Inventores primos 'id clam habuiſſe, omneſque ſecreti conſcios, religione etiam 'jurisjurandi interpoſita, excluſiſſe; ideoque vaſtæ molis opera 'per paucis operariis fuiſſe concredita.' In ſpite of their endea- Maitaire. Annal Typogr. I. p. 4.

vours

vours however, the art ſpread, printers multiplied, and books were publiſhed without any controll, till the policy of different ſtates reſtrained it by poſitive regulations, or the prerogative of the prince, in arbitrary times, encroached upon the natural liberty of the ſubject.

The invention therefore of printing wrought no alteration to make the common law adopt new principles.

The liberty of the preſs in Scotland was firſt reſtrained by the ſtatute of Queen Mary, 1551, *cap.* 27. which, upon the narrative, 'That diverſe prenters in the realme prented *buikes concerning the* '*faith*, ballates, ſanges, blaſphemationes, &c. to the defama-' tion and ſlander of the lieges,' therefore ſtatutes and ordains, 'That na prenter preſume, attempt, or take upon hande, to 'prent *ony buikes*, ballates, ſanges, blaſphemationes, rimes, or tra-'gedies, outher in Latine or Engliſh toung, in ony times to 'cum, unto the time the ſamin be ſeene, viewed, and examined 'be ſome wiſe and diſcreit perſons, depute thereto be the Ordi-'nares quhat-ſum-ever; and thereafter ane licence had and ob-'teined fra our Soveraine Ladie and the Lord Governour, for 'imprenting of ſik buikes, under the paine of confiſcation of all 'the prenter's gudes, and baniſhing him of the realme for ever.' This was entirely agreeable to the ſpirit of the eſtabliſhed religion in thoſe times, averſe to free enquiry, and having no other means left of oppoſing the reformation than by obſtructing the progreſs of knowledge and true literature, then faſt gaining ground by means of the invention of printing.

Sir George Mackenzie, in his obſervations on this act, maintains, That printing is *inter regalia*, and that the King may diſcharge any man to print without his licence. At the ſame time he owns, 'It is the opinion of ſome republicans, that, printing 'being a trade, no man can be debarred from the free uſe of it, 'except by Parliament, in which their own conſent is implied.' It is immaterial to the preſent argument, whether the power of reſtraining the preſs was in this country acknowledged to be in the Sovereign, or in Parliament; for ſtill theſe reſtraints were of a very different kind from that of literary property, of which neither the legiſlature at the time, nor our lawyers, appear to have had the ſmalleſt conception. The *act above recited* ſtrikes againſt *authors* as much as againſt others, and, paying no regard to *literary property*, prohibits them from even publiſhing

their

their own works without licence.

Prior to the aforeſaid act, 1551, there appears one in James the Fifth's reign, 1540, *cap.* 127. ordaining the acts of Parliament to be publiſhed, and the clerk-regiſter 'to make ane authentic extract and copy of all the ſaidis acts, ſa far as concernis the common weill, under his ſubſcription manual, to be imprented, be quhat prenter it ſall pleaſe the ſaid clerke of regiſter to chuſe: And it ſhall not be leaſum to ony uther prenter, to imprent the ſamin within this realme, or without the ſamin, or bring hame to bee ſaulde, *for the ſpace of ſex zeirs nixt to cum*, under the paine of confiſcation of the ſamin: Providing alwaies, That the ſaid prenter to be choſen be the ſaid clerke of regiſter, as ſaid is, have our ſaid Sovereigne Lordis ſpecial licence thereto.' Accordingly, in the ſame year 1540, we find a patent granted by the King to Thomas Davidſon, for printing the acts of Parliament, and diſcharging all others for the ſpace of ſix years, under the pain of confiſcation; and there are ſundry renewals of thoſe licences to print the acts from time to time.

But this can hardly be accounted a reſtriction of the liberty of the preſs, as it was thought proper very early, both in England and Scotland, that acts of Parliament, and other acts of State, ſhould be publiſhed under the direction of the King or his officers, and likewiſe *Bibles*; and in England, *Prayer-books*, and *Almanacks*, regulating the faſts and feſtivals of the church. Theſe, in our neighbouring country, are called *prerogative copies*, having been veſted in the ſupreme Magiſtrate from political conſiderations, for the ſake of uniformity in law and national religion. They had no connection either with the ſuppoſed private right of authors, or with the general reſtriction of the preſs. At the ſame time it may be noticed with regard to the above act 1540, that the excluſive privilege, even of printing the acts of Parliament, was limited to ſix years, and that the authority of Parliament was thought neceſſary to confer this monopoly.

It is probable, that the eſtabliſhment of the Reformation ſoon rendered the act 1551 unpopular, ſo far as regarded a general prohibition of printing without licence; But the ideas of prerogative at that time were high, and a cuſtom had been introduced in other parts of Europe, of applying to the ſovereign

for *privilegia*, or exclusive patents, of printing and publishing for a term of years. This took its rise in the more absolute governments of Europe, where the printers having been at great expence in searching out ancient authors, collating the manuscripts, and printing them, and being justly entitled to encouragement for so doing, applied to particular Princes for such *privilegia*, within their dominions; and it was no uncommon thing to obtain them from several potentates at once, *e. g.* the Emperor, the King of France, the Pope, and other Italian States *. Such privileges were in a great measure necessary, in order to bring these excellent authors from rubbish and obscurity: And as the work was attended with great expence, it was but fair to allow those who performed it to be indemnified; and even, by the prospect of gain, to be encouraged. It deserves, however, to be remarked, that these *privilegia* never were perpetual, but always granted for a limited term of years; sometimes seven, sometimes ten, and seldom, if ever, exceeding twenty years.

In Scotland, the first books were printed without either licence or exclusive privilege, generally at the expence of some rich or learned man, who had no profit from the work, but the satisfaction of doing good. The first printed book which we have in Scotland, is a Breviary of the church of Aberdeen, *pro Hyemali Parte*, said to have been printed in 1509. The only remaining copy of it is in the Advocates Library; and as it wants the beginning and end, the manner in which it was printed does not appear: But the next is a continuation, or second volume, of the same Breviary, called, the 'Pars Æstivalis, cum diversorum sanctorum Legendis, &c. per reverendum in Christo patrem, Wilelmum, Abirdonen, episcopum studiosius, maximisque cum laboribus collectis, non solum ad ecclesiæ suæ Abirdonen, verum etiam ad totius ecclesiæ Scoticanæ usum percelebrem Oppido Edinburgensi impresso, jussu et impensis honorabilis viri Walteri Chapman, ejusdem oppidi mercatoris, quarto die mensis Julii, anno Domini 1510.' And there are some others, soon after, printed in the same way.

Afterwards follow some books printed and published *cum privilegio;* such as, a translation of Hector Boece, by Mr. John Bellenden, Archdean of Murray, printed by Thomas Davidson, the King's printer, *cum privilegio*, in 1541. The works of Sir

* See an example of this in Rymer's Fœdera, 18th April, 1551, tom. 15. p. 255.

David

David Lindſay of the Mount, printed by John Scott, at the expence of Henry Charteris, *cum privilegio regali*, in 1568, *&c.*

Whether theſe laſt were merely licences to print, or *excluſive* privileges, does not clearly appear; though it is certain, that, by degrees, *excluſive* privileges by patent from the Crown, and limited to certain periods, became in uſe in Scotland as in other countries; but always granted as a matter of favour, upon ſupplication of the author, or publiſher of the work, or of the printer employed by him.

In the reign of Charles II. a new and very dangerous check was given to the liberty of the preſs in Scotland by the King's printers, who, under pretence of their gifts from the Crown, aſſumed a power of controlling the preſs, and of licenſing other printers: Particularly it appears, that one Anderſon having, in 1671, obtained a gift of this office for forty-one years, he and his widow pretended to very high powers over the preſs, and which were attended with very bad conſequences. Watſon, in his *Hiſtory of Printing*, ſays, that 'by this gift the art of printing in this kingdom got a dead ſtroke; for by it no printer could print any thing, from a Bible to a ballad, without Mr. Anderſon's licence" He adds, that under his widow, nothing came from the *Royal Preſs*, (as Mrs. Anderſon vainly termed it) but the moſt illegible and uncorrect Bibles and books that ever were printed in any one place in the world. She regarded not the honour of the nation, and never minded the duty lay upon her as the Sovereign's ſervant. Prentices, inſtead of the beſt workmen, were generally employed in printing the ſacred word of GOD. And in fine, nothing was ſtudied but gaining of money by printing Bibles at any rate; which ſhe knew none other durſt do, and that nobody could want them. The whole nation being ſenſible how ill they were ſerved, and the oppreſſion of this monopolizer being the common diſcourſe in moſt places of the kingdom, thoſe who formerly were her friends, and ſupported this unaccountable gift, began to be aſhamed of her practices, and turned their back upon her. At laſt, His Royal Highneſs the Duke of York (our late Sovereign) coming to Scotland, 1680, John Reid informs him, by petition, of the perſecution and oppreſſion he and others of his employment had undergone through the extenſiveneſs of Mr. Anderſon's gift.

Preface, p. 12.

—p. 13.

'gift. And the matter lying then before the Privy Council, 'and being moved, His Royal Highneſs there declared, That it 'could only be the King's meaning and pleaſure, by that gift, 'that his printer ſhould enjoy what privileges his Royal prede-'ceſſors were in uſe to grant to their printers, ſuch as printing 'of Bibles, Acts of Parliament, *etc.* Therefore the Council al-'lowed the printers to go on in their ordinary work.'

This matter being ſet to rights, printers and publiſhers went on as formerly; and when they thought it material to have an *excluſive privilege* for a term of years, they applied for, and obtained it. This was held by lawyers to be a part of the prerogative; though, as Sir George Mackenzie ſays, the legality of it was much doubted by ſome, who rather inclined to think, that monopolies, granted by the ſole authority of the Prince, were not quite conſiſtent with the nature of a free government. However, upon this footing ſtood the excluſive privileges of printing all over Europe. It was never once dreamed that they were granted *ex juſtitia*, in virtue of a perfect right. They were indulged from *favour*, and with a view to expediency, in the ſame way as patents granted to the contrivers of uſeful machines. It is remarkable too, that they were at firſt granted, not to authors, to prompt them to write, but to printers and publiſhers, to induce them to make correct and uſeful editions of books which lay in manuſcript; though by degrees they came alſo to be granted to authors, but ſtill for a limited time, and only meant for the equitable purpoſe of indemnification. If at any time a more ample privilege was obtained, this could be conſidered in no other light than as an abuſe, being unjuſt to others, and contrary to the original deſign of ſuch grants. Fritchius, an author, on this ſubject, ſays, 'Iniquum tamen non eſt, ſi quis 'ſuper impreſſione libri, in quem multos erogavit ſumptos, lu-'crum & commodum aliquod laboris ſui præ aliis ſentiat, ne 'quod alias fieri poſſet, aliorum facto in paupertatem inopina-'tam conjiciatur. Quod ſi tamen abuſus privilegii conceſſi in 'perniciem reip. verget, dubium non eſt illud, quocunque 'etiam modo impetratum ſit, juſtiſſime revocari, aut tolli poſſe. 'Eſt autem precipuus privilegii abuſus hic, quod typographi & 'bibliopolæ librorum pretia pro lubitu augere ſoleant, quæ ho-'die, non ſine reip. literariæ decremento in tanqaum excrevere,

De abuſibus typogr. tollendis, § 2. par. 4.

'ut

'ut magiſtratus rei huic obicem ponendi juſtiſſimam cauſam ha-
'berent.'

All the writers and publiſhers on our law have clearly ſignified their opinion, that they could not preſerve an excluſive right to their works, without a ſpecial grant either from the Crown or Parliament. Sir Thomas Craig's book, *De Feudis*, was publiſhed under the authority of an act of parliament, obtained in 1633 by his ſon, Mr. Robert Craig advocate; granting to him the ſole privilege of printing the ſaid book for the ſpace of twenty-one years; and prohibiting all others from printing and ſelling the ſame during that time, under the penalty of confiſcation. Sir Thomas Craig.

Lord Durie's Deciſions were publiſhed by his grandſon, Sir Alexander Gibſon, a lawyer; who obtained an excluſive patent from the Privy Council for nineteen years, from the 12th of July 1688, to print, reprint, import and vend the ſaid book. Lord Durie.

Sir John Niſbet of Dirleton's Doubts and Deciſions were publiſhed by Mr. Robert Bennet, Dean of the Faculty of Advocates, who obtained for George Moſman ſtationer, burgeſs of Edinburgh, his heirs and aſſignees, a patent from the Privy Council in 1697, giving the ſole privilege of ſelling this book for nineteen years, and diſcharging all others under a penalty. Sir John Niſbet.

Preſident Gilmour and Preſident Falconer's Deciſions were publiſhed in the ſame manner, under a patent, in 1699. Gilmour and Falconer.

Sir George Mackenzie, advocate to Charles II. and James II. author of ſome of the moſt valuable books on the law of Scotland, publiſhed his Criminals in 1678, under the authority of an excluſive patent from the Privy Council for the ſpace of nineteen years, from 7th April 1677; and, upon the expiration of this term, it appears, that Andrew Simpſon, who had been Sir George's amanuenſis, applied for and obtained a new patent, for the ſole printing and publiſhing another edition of the ſame book, during the ſpace of nineteen years, from the 11th November 1697, and prohibiting all others to print, &c. under a penalty. And Sir George's other works, which were publiſhed by himſelf, appear to have been guarded by patents in the ſame manner, and for the ſame term of nineteen years. See the patents prefixed to the firſt edition of his Inſtitutions in 1684, and to the firſt edition of his Obſervations in 1687. This laſt patent he aſſigns to Thomas Brown ſtationer, his heirs and aſſig- Sir George Mackenzie.

nees,

nees,' ' to do and act in virtue thereof, in all points, as fully ' and freely as I might have done myself.'

Lord Stair. Lord Stair, one of the greateſt of our lawyers, thought it neceſſary to ſecure, by a patent to his printer, the ſole privilege of printing and publiſhing his valuable works for nineteen years. The patent from King Charles II bearing date the 11th April, 1681, is inſerted after the epiſtle dedicatory of the firſt volume of his Deciſions. It is intituled, ' His Majeſty's gift and pri- ' vilege to Sir James Dalrymple of Stair, for printing his Inſti- ' tutions,' &c. It proceeds on a narrative of the uſefulneſs of theſe works, and his Majeſty ' being willing to give to the ſaid ' Sir James, all encouragement therein;' therefore ratifies an a- greement which he had made with his printer, and prohibits all others to print the ſaid books for the ſpace of nineteen years, without the ſpecial leave of the ſaid Sir James, his heirs and ſuc- ceſſors. This patent contains no penalty upon contravention; it is a ſimple grant of excluſive right for ninteen years, which ſurely there was no occaſion for, if the author had by common law an excluſive right for ever.

Sir James Stuart. Sir James Stuart, advocate to Queen Anne, took out a pa- tent of the ſame nature, when he publiſhed his abridgment of the acts of parliament, and aſſigned it to his printer; the term limited being nineteen years, from the 25th September 1701.

Forbes. Mr. Forbes, when he publiſhed his treatiſe on tithes in 1705, got a ſimilar patent from the Privy Council for nineteen years, proceeding on this narrative; ' That where the ſaid Lords are ' in uſe to *encourage the author* of any new book, *by granting to him* ' *the ſole privilege* of printing and vending the ſame.' The like patent is prefixed to the ſecond part of his Juſtice of Peace, in 1707. What uſe was there for this encouragement, if authors had a perpetual excluſive right at common law?

The opinions of theſe lawyers, expreſſed *rebus ipſis et factis*, in a matter concerning themſelves, muſt have great weight. They ſhow more clearly what was underſtood to be the law of Scot- land, than the moſt direct authorities from their books could have done. Their works are ſilent upon the ſubject, but the reaſon is plain, becauſe the notion of literary property was not then conceived in Scotland. All that any of our authors ever looked for, was an excluſive right by patent, or by act of par- liament, for a certain number of years; and it may be obſerved, that ſeveral of theſe books have been republiſhed ſince the expi-

ration

ration of the patents, not by the heirs of the authors, but by ſtrangers, without any challenge.

It was ſaid, that patents were the faſhion of the times; that Sir George Mackenzie was an advocate for prerogative, and Lord Stair was *not in condition to preſerve his property*, without uſing the means then in practice; that the patents did not *create* the right, but only tended to ſecure and preſerve it by a public prohibition; and that they were often without any penalties annexed, which ſhowed, that an action of damages lay at common law.

The defenders muſt be permitted to ſay, that theſe obſervations appear to them in a very extraordinary light. Sir George Mackenzie was at the head of the bar, Lord Stair Preſident of the Seſſion, and both were very able to preſerve their rights againſt any unlawful invaſion of them. Lord Stair's patent being merely probibitory, without any mention of a penalty, affords a ſtrong argument againſt the pretended common law-right, as already ſaid; for if he had an excluſive privilege at common law, what earthly advantage did he obtain by the patent? If, on the other hand, he had none ſuch by the common law, the patent was neceſſary to *create* a right in his favour, which might be the foundation of a claim for reſtitution and damages in caſe of violation. All theſe patents were underſtood to be *creative*, not corroborative of the author's right.

Neither did any alteration happen in conſequence of the Union: On the contrary, the neceſſity of patents was rather enforced, from this circumſtance, that, by the Union, the Engliſh laws relative to trade were communicated to Scotland, and a mong others, that moſt ſalutary Engliſh ſtatute, 21 Ja. I. *cap.* 3. prohibiting all grants of monopolies to any perſon, except the firſt inventor of a new manufacture, and to him only for the term of fourteen years, and from which ſtatute, 'any letters 'patent, or grants of privilege, heretofore made, or hereafter 'to be made, for or concerning *printing*,' are alſo excepted.

The firſt time that ever this queſtion appears to have been ſtirred in Scotland, was in the year 1743, when Daniel Midwinter, and other bookſellers in London, brought an action before the Court of Seſſion, againſt the bookſellers of Edinburgh and Glaſgow, complaining, that the defenders had tranſgreſſed the ſtatute of Queen Anne, by printing, reprinting, &c. the ſeveral books

therein

therein ſpecified, without conſent of the purſuers, who had purchaſed theſe books from the authors; and therefore, concluding for the penalties and forfeitures of the ſtatute: At leaſt, that the defendants ought to pay *damages* for every ſurreptitious copy, on account of their having invaded the property of the purſuers. In this action, the alternative claim of damages, to which at laſt the purſuers reſtricted their action, gave occaſion to much argument upon the alledged common-law right, a topic then for the firſt time broached in Scotland. The caſe is very well abridged in a Collection of Deciſions lately publiſhed: But as it will fall to be more particularly noticed under the next head, concerning the act of Queen Anne, the defenders ſhall only at preſent obſerve, That neither the pleadings here, the judgment of the Court of Seſſion, nor what afterwards paſſed in the Houſe of Lords in that caſe, were in any degree favourable to the pretended common-law right.

Remark. Deciſ. June 7. 1748.

The author of the late Inſtitute, who wrote poſterior to the caſe of Midwinter, is the firſt Scots law writer who has taken notice of authors of books being entitled to any privilege; and as he gives them nothing but what they are entitled to by the act of Queen Anne, ſo it is plain, that he rejects any common-law right. He brings in their privilege, under the claſs of *monopolies*, and ſays, 'It is only granted to authors of books, 'or their aſſigns, that enter them in Stationers Hall in London, 'as the ſtatutes in that behalf direct; and in ſuch caſe, they are 'entitled to the ſole right of printing or ſelling the books for '*fourteen years* after the publication.' He then mentions the caſe of Midwinter, and miſtakes the deciſion, not knowing that the laſt interlocutor was in favour of the Scots bookſellers. But he ſays not one word of a common-law right; he founds the right of authors entirely upon the ſtatute: And indeed, when he publiſhed his own book, he thought it neceſſary to comply literally with the terms of the ſtatute, by entering it in Stationers-hall, in order that he might have the benefit of the act.

M'Dowal, b 1. tit. 19. § 11. & 12.

In the late abridgement of the ſtatute-law of Scotland, the act of Queen Anne is placed under the word *monopoly*; which goes ſome length to ſhow that author's opinion.

In further evidence of the common law of Scotland, the underſtanding of the country may be appealed to. Many muſt have been the treſpaſſes, and many the violations of this property

by

by printers and bookſellers, if we can ſuppoſe it to have exiſted; but which never were in any one inſtance complained of, or brought before a court in this country, except in the caſe of Midwinter, when no encouragement was given to it. The defenders are ready to produce evidence of numberleſs publications carried on in Scotland openly and avowedly againſt the ſuppoſed perpetual right of authors, and they call upon the other party to ſhow a ſingle caſe in which this was ever found illegal.

If ſuch a property had exiſted in Scotland, it ought to have manifeſted itſelf in ſome *ouvert* manner, in the way of tranſmiſſion, ſale, diligence, forfeiture, or teſtament. It is either a real or a perſonal property: It ought either to have been the ſubject of ſervice or confirmation: It ought to have been attachable by creditors; conveyable by diſpoſition; an object of preſcription poſitive or negative; an eſtate or intereſt, falling under gifts of *ultimus hæres*, forfeiture, and eſcheat. Authors are often poor, and ſome inſtances ought to have appeared of their ſurrendering their ideas in a *ceſſio bonorum*. The defenders have in vain endeavoured to find this property in ſome one or other of theſe ſhapes. They can diſcover no veſtige of it, except now and then, that a royal patent, limited to a term of years, has been conveyed by aſſignation or teſtament. The caſe may be otherwiſe in England; but certain it is, that no ſuch exiſtence is to be found in any part of the law or practice of Scotland.

An opinion of the late Mr. York, obtained in the caſe of Mrs. Ruddiman againſt Rivington, concerning a violation of her right, under a patent obtained by her deceaſed huſband, has been founded on by the purſuer in this cauſe. When the opinion is looked into, it will be found to give no judgment upon the common-law right even in England, far leſs in Scotland, but only to point out the eaſieſt method of applying for redreſs againſt an Engliſh bookſeller, *viz.* by bill in Chancery for an injunction: And it ſets out with ſaying, that Mrs. Ruddiman's right *depends on the law of Scotland*, where Mr. Ruddiman lived and died. So far the opinion will be admitted to be applicable to this caſe. As not only the defenders live, but the action is brought in Scotland, the law of Scotland muſt undoubtedly be the rule here; and they cannot, with ſubmiſſion, conceive a propoſition more clear, than that the law

of Scotland rejects the idea of an exclusive right, after publication.

III. Act of Q. Anne.

III. The next question is, Whether the act of Queen Anne made any alteration upon our law favourable to the pursuer's claim? This act took its rise from a petition of the London booksellers; and, by way of introduction to the statute, it may be proper to enquire, what were the rights claimed or exercised by the Stationer's Company of London prior to that period, and, what may have been their views in applying for a new law.

The liberty of the press, or, as Milton calls it, *the liberty of unlicensed printing*, was invaded in England much about the same time that it was in Scotland, and from the same causes.

It has already been said, that the first printers carried on their business as a lawful employment, without any patent or licence. Caxton's title pages never bear *cum privilegio*, but only these humble words: 'Imprinted by me simple man William 'Caxton.'

In 1539 injunctions were issued, in the King's name, against importing books from abroad without examination of the King or his council (or some person appointed), particularly English books; or printing, publishing, and selling within the realm, English books of Scripture, without examination by the King's Highness, or one of his council, or one Bishop whose name was to be expressed.

In 1555, there was a proclamation by Philip and Mary against importing heretical and seditious books, specifying the books of all the great reformers of Europe, English and foreign. This was said to be founded on a statute of Henry IVth for repressing heresies.

In 1556, the first charter was granted to the stationers company, requiring all printers to be of that company, and giving power of search and seizure, in respect of all books printed or stamped contrary to the form of any statute or proclamation.

In 1559, additional injunctions were published against heretical and seditious books, requiring in the first instance, previous to the printing or publishing of any books, the licence of the Queen in writing, or of six privy counsellors, the Archbishops of Canterbury and York, the Bishop of London, the Chancellors of the two Universities, the Bishop, (being Ordinary,) and the Archdeacon, or any two of them, the Ordinary of the place being

one.

one. As to pamphlets, plays and ballads, (wherein regard was to be had, that nothing be ſeditious, heretical, or unſeemly for Chriſtian ears,) ſuch writings were turned over to be licenſed by the commiſſioners of eccleſiaſtical cauſes.

This was the firſt general regulation for licenſing in England, and as it flowed from the royal authority, ſo it appears that many unconſtitutional proceedings, with regard to printing, were enforced from time to time by ordinances of the Star Chamber; and that the ſtationer's company was encouraged and ſupported as a creature of the crown, and uſed as an engine for promoting thoſe arbitrary meaſures.

Nothing indeed could be more ridiculous than ſome of the patents that were given. Thus, Chriſtopher Saxton having repreſented to Queen Eliſabeth that he had travelled over divers parts of England, and made *pleaſant maps* thereof, and intended to travel ſtill more, a patent was obtained by him from her Majeſty, during ten years, to make as many pleaſant maps, as to him ſhould ſeem meet, and forbidding all her loving ſubjects to do the ſame. Another man got the liberty of printing 'all 'ſorts of things that are, may, or ſhall be printed on one ſide 'of a ſheet, provided the other ſide be white paper'

The Stationers Company pretended to various excluſive priviledges, and they had letters patent from the crown, giving them temporary rights to the ſole printing and publiſhing certain books. They had likewiſe regulations and agreements among themſelves, by which any member of the corporation who claimed a right of printing any particular book by patent or otherwiſe, was to enter the ſame in the regiſter of the company, and the other members were not to encroach upon the right or priviledge thus claimed. By degrees the entry in this regiſter-book of the company became a criterion or mark by which the individuals of the company regulated queſtions among themſelves, but which could be of no avail as to others.

Soon after the Reſtoration, a general licenſing act was paſſed, (1662, cap. 33.) entitled, 'An act for preventing abuſes in 'printing ſeditious, treaſonable, and unlicenſed books and 'pamphlets, and for regulating of printing and printing preſſes.' By this ſtatute it was enacted, 'That no private per-'ſon whatſoever ſhall at any time hereafter, print, or cauſe to 'be printed, any book or pamphlet whatſoever, unleſs the ſame

'book

'book or pamphlet, together with all and every the titles, e-
'piſtles, prefaces, proems, preambles, introductions, tables,
'dedications, and other matters and things thereunto annexed,
'be firſt entered *in the book of the regiſter of the Company of Stationers of*
'*London*,' (except acts of parliament, and ſome others); 'and un-
'leſs the ſame book and pamphlet, and alſo all and every the
'ſaid titles, &c. ſhall be firſt lawfully licenſed and authoriſed
'to be printed, by ſuch perſon or perſons only as ſhall be con-
'ſtituted and appointed to licenſe the ſame:' That is, that all books concerning the common laws of the realm, be printed by the ſpecial allowance of the Lord Chancellor, or Lord Keeper of the great ſeal of England, Lords Chief Juſtices, and Lord Chief Baron, or one or more of them, or by their appointments; all books of hiſtory, or other books concerning the ſtate, by the principal ſecretaries of ſtate; all books concerning heraldry by the Earl Marſhal, &c. 'And all other books to be imprinted or
'reprinted, whether of divinity, phyſic, philoſophy, or what-
'ſoever ſcience or art, ſhall be firſt licenſed and allowed by the
'Lord Archbiſhop of Canterbury, and Lord Biſhop of London
'for the time being, or one of them, or by their or one of their
'appointments, or by either of the Chancellors or Vice-chancel-
'lors, of either of the univerſities of the realm for the time be-
'ing: Provided always, that the ſaid Chancellors or Vice-chan-
'cellors of either of the ſaid univerſities, ſhall only licenſe ſuch
'books as are to be imprinted or reprinted within the limits of
'the ſaid univerſities reſpectively, but not in London or elſe-
'where, not meddling either with books of common laws, or mat-
'ters of ſtate or government, nor any book or books, *the right*
'*of printing whereof doth ſolely or properly belong* to any particular
'perſon or perſons, without his or their conſent firſt obtained
'in that behalf.'

Theſe laſt words are taken hold of as implying a copy-right in authors at common law. But that this was not meant, appears from an after clauſe of the act, in which the rights of individuals are more fully explained and ſaved, in theſe words: 'And be it further enacted, That no perſon or perſons ſhall,
'within this kingdom, or elſewhere, imprint, or cauſe to be
'imprinted, nor ſhall import or bring in, or cauſe to be im-
'ported into this kingdom, from or out of any other his Majeſ-
'ty's dominions, nor from any other parts beyond the ſeas,

'any

'any copy or copies, book or books, or part of any book or 'books, or forms of blank bills or indentures for any of his 'Majeſty's iſlands, printed beyond the ſeas, or elſewhere, which 'any perſon or perſons by force or virtue of any *letters patent* '*granted or aſſigned*, or which ſhall hereafter be granted or aſ-'ſigned to him or them, or (where the ſame are not granted by 'letters patent,) by force or virtue of any entry or entries 'thereof, duly made, or to be made *in the regiſter-book of the* '*ſaid Company of Stationers*, or in the regiſter-book of either of the '*univerſities* reſpectively, have or ſhall have the right, privilege, 'authority or allowance, ſolely to print without the conſent of 'the owner or owners of ſuch book or books, copy or copies, form 'or forms, of ſuch blank bills, nor ſhall bind, ſtitch, or put to 'ſale, any ſuch book, or books, or part of any book or books, 'form or forms, without the like conſent, upon pain of loſs 'and forfeiture of the ſame, and of being proceeded againſt as 'an offender againſt this preſent act,' &c.

It is plain that the rights here meant to be protected are thoſe conferred by ſpecial privilege, either to individuals or to univerſities, or thoſe rights which the ſtationers claimed in queſtions with one another by virtue of entries in their regiſter-book.

This appears to be the firſt ſtatute in which any notice is taken of the regiſter of Stationer's Hall, and it does not contain the leaſt inſinuation of a property in all authors at common law. On the contrary, one clauſe of the act ſays, that printing is 'an 'art and manufacture of the kingdom,' and the whole tenor of it ſuppoſes, that every perſon is entitled to print and publiſh, unleſs in ſo far as reſtrained by the ſtatute itſelf, or by ſpecial excluſive privileges belonging to individuals.

This act was only to continue in force for a limited time, which was renewed afterwards, but finally expired in 1694.

From the rules and ordinances of the Stationer's Company, it is clear, that they themſelves did not entertain the idea of a literary property in authors at common law.

Thus, at an aſſembly of the maſter and wardens, &c. of the ſaid Company, upon the 17th Auguſt 1681, it was, *inter alia*, reſolved: 'And whereas ſeveral members of this Company have 'great part of their eſtates in copies; and by ancient *uſage of* '*this Company*, when any book or copy is duly entered in the 'regiſter-book of this Company, to any member or members of

' this Company, ſuch perſon to whom ſuch entry is made, is,
' and always hath been *reputed and taken to be proprietor* of ſuch
' book or copy, and *ought* to have the ſole printing thereof, which
' privilege and intereſt is now of late *often violated* and abuſed.
' It is therefore ordained, That *where any entry or entries, is, or*
' *are, or hereafter ſhall be duly made* of any book or copy in the *ſaid*
' *regiſter-book* of this Company, by or for any member or mem-
' bers of this Company; that in ſuch caſe, if any *other member or*
' *members of this Company* ſhall thereafter, without the licenſe or
' conſent of ſuch member or members of this Company, for
' whom ſuch entry is duly made in the regiſter-book of this
' Company, or his or their aſſignee or aſſigns, print, or cauſe to
' be printed, import, &c. any ſuch copy or copies, book or
' books, &c. or ſhall ſell, bind, ſtitch, or expoſe the ſame, or
' any part or parts thereof, to ſale, that then *ſuch member* and
' members ſo offending, *ſhall forfeit* to the maſters, and keepers
' or wardens, and commonalty of the myſtery or art of Station-
' ers of the city of London, *the ſum of twelve pence* for every
' ſuch copy or copies,' &c.

By another article, ' Whereas his moſt Excellent Majeſty,
' King Charles II. that now is, by his *letters patents* under the
' great ſeal of England, bearing date the 11th day of October,
' in the 18th year of his reign, did grant unto the maſter, and
' keepers or wardens, and commonalty of the myſtery or art
' of Stationers of the city of London, and their ſucceſſors, li-
' cenſe, authority, and privilege only to print, utter, and ſell
' the ſeveral books therein to them particularly mentioned, for
' a term of years yet in being; It is therefore ordained, that
' if any *member or members of this Company* ſhall hereafter, *during*
' *the continuance of the term in the foreſaid letters patents granted,*
' without the licenſe or conſent of the ſaid maſters, and keepers
' or wardens, and commonalty of the myſtery or art of Stationers
' of the city of London, imprint, or cauſe to be imprinted, or
' import, &c. any ſuch book or books, or put to ſale, contrary
' hereto; then ſuch member ſhall forfeit to the keeper or war-
' dens, &c. for every ſuch book, twelve pence.'

And by another article, it is ordained, ' That where the ſole
' printing of any copy or copies, book or books, is already
' *granted to any member*, or members of this Company, by any *let-*
' *ters patents* of his now Majeſty, or any of his Royal predeceſ-

' ſors,

'ſors, Kings, or Queens of this realm; or where the printing 'of any copy or copies, book or books, is by any *letters patent* 'granted to any perſon or perſons, not being a member or 'members of this Company, to his and their own uſe; or when 'the printing of any copy or copies hereafter ſhall be *granted by* '*his now Majeſty, or any of his Royal ſucceſſors*, to any member or 'members of this Company, to his and their own uſe; or ſuch 'letters patents ſhall be duly and legally aſſigned to any member 'or members of this Company, to his and their own uſe: Then, 'if any other member or members of this Company ſhall, with-'out the licenſe or conſent of ſuch owner or owners, or the ex-'ecutor or adminiſtrator of ſuch owner or owners (*being a mem-*'*ber or members of this Company*) of ſuch copy, or book, &c. print, 'or cauſe to be printed, or import, or put to ſale, any copy, &c. 'ſuch member ſhall forfeit twelve pence to the Company for 'every ſuch book.'

Theſe regulations ſeem to point out, what was the ſenſe of the Stationers Company, with reſpect to this matter. The firſt article above recited, does not pretend that there was any ſuch thing as a common-law property, but is founded on a ſuppoſed uſage *among themſelves*; by which, when any book is entered in the regiſter of the Company, as belonging to any particular member, the book is *reputed* to be his property, and the other *members* oblige themſelves not to interfere with him in it, though they often violate this obligation; and therefore, by *private concert* among themſelves, they agree that they ſhall not encroach on one anothers rights, eſtabliſhed in this manner, by the rules of the Company. The other two articles expreſsly acknowledge the Royal letters and patents, to be the ſole foundation of any excluſive privilege belonging either to the Company in general, or to individuals.

Thus matters ſtood when the act of Queen Anne was applied for; and it is material to attend to the proceedings on that occaſion.

Upon examining the Journals of the Houſe of Commons, it appears, that, on the 12th December, 1709, 'A petition of 'Henry Mortlock, *&c.* on behalf of themſelves, and other *book-* Vol. 16. '*ſellers and printers* in and about the city of London, and elſe- p. 240. 'where, was preſented to the Houſe and read; ſetting forth, 'That it has been the conſtant uſage ſo the writers of books,

'to

'to ſell their copies to bookſellers or printers, to the end they 'might hold thoſe copies *as their property*, and enjoy the profit 'of making and vending impreſſions of them; yet divers per-'ſons have of late invaded the properties of others, by reprint-'ing ſeveral books without the conſent, and to the great inju-'ry of the proprietors, even to their utter ruin, and the diſ-'couragement of all writers in any uſeful part of learning: 'And praying, that leave may be given to bring in a bill, *for ſe-'curing to them the property* of books bought and obtained by 'them.'

Here it is to be obſerved, That the narrative or preamble of this petition (which is to be conſidered as the aſſertion of the bookſellers who preſented it) differs from the ſubſumption. The narrative does not alledge, that at common law authors or bookſellers had any right of property; but only that there had been an *uſage* among them of purchaſing books, to be held *as* their property: Which is a plain acknowledgment by the petitioners themſelves, that there was no real property, but only ſomething which they had been pleaſed to view *as* a ſort of property, or compare or *liken* to a property. But the ſubſumption immediately infers from this, that they actually had a property, entitled to the protection and aid of the law; which, however artful, is neither conſiſtent nor concluſive.

It would ſeem, That the view of the bookſellers in their petition was, to be ſecured in a *perpetual* property of their books, not a *temporary* excluſive right. They had been pleaſed to figure to themſelves, that an author, or the perſon to whom he ſold his work ought to be conſidered as the proprietor of it. Their own particular rules, and the boundaries ſettled with one another, had given birth to this idea, however adverſe to the true meaning of thoſe very rules. They were diffident however of the ſtrength of common law to ſupport them in it; and therefore they made this application to Parliament, hoping to have the queſtion decided in their favour: A queſtion highly important to the London bookſellers, who were in poſſeſſion of all the moſt valuable books, but of little conſequence to authors; and accordingly not one author joins in the application.

Leave having been given to bring in the bill, 11th January 1709, 'Mr. Wortley, according to order, preſented to the 'Houſe, A bill for the encouragement of learning, and *for ſe-*

Vol. 16. p. 240.

'*curing*

'*curing the property* of copies of books to the rightful owners
'thereof; and the ſame was received, and read the firſt time.'

The bill was then ordered to be read a ſecond time, and further conſideration of it lay over till the 2d February, when the bookſellers, being afraid that it would be loſt or neglected, obtained a new petition to be given in, from 'the *poor diſtreſſed* *printers and bookbinders* in London and Weſtminſter; ſetting forth,
'That the petitioners having ſerved ſeven years apprenticeſhip,
'hoped to have gotten a comfortable livelihood by their trades,
'who are in number at leaſt 5000; but the liberty lately ta-
'ken of ſome few perſons *printing books*, to which they have no
'right to the copies, is ſuch a diſcouragement to the bookſelling
'trade, that no perſon can proceed to print any book without
'conſiderable loſs, and conſequently the petitioners cannot be
'employed; by which means the petitioners are reduced to ve-
'ry great poverty and want: And praying, that their deplor-
'able caſe may be effectually redreſſed, in ſuch manner as to
'the Houſe ſhall ſeem meet.'

Vol. 16. p. 291.

Here the *poor* printers and bookbinders are introduced to revive and ſecond the petition of the *rich* bookſellers. It will not eſcape notice, that the fact upon which this petition reſts, does by no means infer the concluſion: For how ſhould the printing of books make printers or binders lack employment, and reduce them to poverty and want?

9th February 1709, The bill was read a ſecond time and or- —p. 300.
dered to be committed.

21ſt February 1709, 'Mr. Compton reported from the Com- —p. 332.
'mittee, that they had gone through the bill, and made ſeveral
'*amendments*, which they had directed him to report, when the
'Houſe were pleaſed to receive the ſame.'

25th February 1709, 'Mr. Compton reported, from the Com- —p. 339.
'mittee of the whole Houſe, the *amendments* they had made on
'the bill; and he read the ſame in his place, and afterwards de-
'livered them in at the clerk's table; where they were once
'read throughout, and then a ſecond time, one by one; and
'upon the queſtions ſeverally put thereupon, with amendments
'to ſome of them, agreed unto by the Houſe.'

'*Ordered*, That the bill with the amendments be ingroſſed.'

14th March 1709. 'An ingroſſed bill for the encourage- —p. 369.
'ment of learning, by *veſting* the copies of printed books, *in the*

'*authors*

'*authors or purchaſers* of ſuch copies, *during the times therein men-*
'*tioned*,' was read the third time.

'*Reſolved*, That the bill do paſs, and that the title be, A bill
'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*.'

Here it is material to advert, That the title given to the bill when engroſſed, and which the Houſe reſolved it ſhould bear when they paſſed it, is extremely different from the title the bill had when preſented by Mr. Wortley. The title originally given, was agreeable to the views of the bookſellers, and ſeemed to imply, that the authors or purchaſers of books, had, *ab ante*, a right of property in the copies: Whereas the title given to it, when engroſſed and paſſed, *viz.* 'A bill for the encourage-
'ment of learning, by *veſting*,' *&c.* as plainly implies, that the authors or purchaſers had no right of property, but what was given by this act, and would have none after the times mentioned therein ſhould expire. The intention of the bookſellers was to have a perpetual property aſcertained: The parliament would only veſt in them a temporary, conditional, and limited right. Neither was this title given *per incuriam*: On the contrary, it appears to have been an *amended title*, given upon mature conſideration, for the very purpoſe of ſhowing, that the legiſlature did not acknowledge an *ab ante* right.

Vol. 16. p. 394. 5th April 1710. 'The Houſe proceeded to take into conſi-
'deration the amendments made by the Lords to the bill, inti-
'tuled, *An act for the encouragement, etc.* and the ſame were read,
'and are as follow.'

The firſt four amendments being of no conſequence, it is needleſs to inſert them.

The next is, To leave out the fourth ſection, about regulating exorbitant prices: and the laſt amendment is, to add the following proviſo to the end of the bill: 'Provided always, that after
'the expiration of the ſaid term of fourteen years, *the ſole right*
'*of printing, or of diſpoſing* of copies, ſhall *return to the authors* there-
'of, if they are then living, *for another term of fourteen years*.'
This was a moſt extraordinary clauſe to be added, if by common law *the ſole right* was to *return* to them *for ever*.

All the amendments were agreed to, except that reſpecting the prices.

Ordered, 'That a Committee be appointed to draw up rea-
'ſons,

'ſons, to be offered to the Lords at a conference, for diſagree-
'ing to the ſaid amendment.' And it was referred to Mr. Secretary Boyle, and ſeveral others, (of whom Mr. Addiſon was one), who were ordered to withdraw immediately into the Speaker's chamber, and report to the Houſe.

Mr. Compton reported from the Committee, That they had drawn up reaſons, which he read in his place, and afterwards dēlivered in at the clerk's table, and are as follow: 'That Vol. 16. p. 395.
'the Commons diſagree to your Lordſhips amendments, in pr.
'3. l. 14. *Firſt*, Becauſe authors and bookſellers having the
'*ſole property* of printed books *veſted in them by this act*, the Com-
'mons think it reaſonable, that ſome proviſion ſhould be made,
'that they do not ſet an extravagant price on uſeful books. *2dly*,
'Becauſe the proviſion made for this purpoſe by the ſtatute, 25th
'Henry VIII. chap. 15. having been found to have been ineffec-
'tual, and not extending to that part of Great Britain called *Scot-*
'*land*, it is neceſſary to make ſuch a proviſion as may be effec-
'tual, and which may extend to the whole united kingdom.

The Lords did not inſiſt upon their amendment.

This conference about regulating the prices, affords a ſtrong additional evidence of what was underſtood. The meaning of the act was not to declare a pre-exiſting right in authors, which they might uſe at their diſcretion; but to confer a *new right* for a term of years, and which therefore it was reaſonable the parliament ſhould grant upon its own terms. This is the very argument uſed by the Commons, and at length acquieſced in by the Lords; the reſtriction of the price being thought neceſſary, in order to prevent the ill effects of the monopoly thus given by the ſtatute. It did not *then* occur, that the very ſame author, who, during the term of the ſtatute, was limited as to his price, was, at the expiry thereof, to become quite unlimited, and, at the ſame time, to retain the excluſive power of ſelling his works for ever.

The act was paſſed, *verbatim*, as hereto annexed. But it may be obſerved, That the *fourth* clauſe, reſpecting the regulation of prices, was afterwards repealed by an act in the 12th of *Geo.* II. *cap.* 36. becauſe, upon trial, it was found not eaſy to be executed; ſo that the prices are now left to the diſcretion of bookſellers, and the monopoly is thereby rendered ſo much the more dangerous.

Not only does the *title* of the act ſhow what was underſtood by

by parliament, but the *enacting clauſes* do in the moſt explicit manner point out, that a common-law right was not meant to be confirmed; but a ſtatutory-right granted for a certain time, under certain conditions. The preamble indeed uſes the word *proprietors*, as ſynonimous with *authors*; but the enacting words are more correct. The preamble ſays, 'Whereas printers, book-'ſellers, and other perſons, have of late frequently taken the li-'berty of printing, reprinting, and publiſhing; or cauſing to 'be printed, reprinted, and publiſhed, books, and other wri-'tings, without the conſent of the authors or proprietors of ſuch 'books and writings, to their very great detriment, and too of-'ten to the ruin of them and their families.' The enacting words are; 'For preventing therefore ſuch practices for the fu-'ture, and for the encouragement of learned men to compoſe 'and write uſeful books; be it enacted, That from and after 'the 10th of April 1710, the *author* of any book or books already 'printed, who hath not transferred to any other, the copy or 'copies of ſuch book or books, ſhare or ſhares thereof, or the '*bookſeller* or bookſellers, *printer* or printers, or *other perſon* or per-'ſons, who hath or have purchaſed or acquired the copy or co-'pies of any book or books, in order to print or reprint the ſame, 'ſhall have the *ſole right and liberty* of printing ſuch book and books, '*for the term of one and twenty years*, to commence from the ſaid 10th 'day of April, *and no longer*; and that the *author* of any book or 'books already compoſed, and not printed and publiſhed, or that 'ſhall hereafter be compoſed, and *his aſſigney or aſſigns*, ſhall have 'the ſole liberty of printing and reprinting ſuch book and books, '*for the term of fourteen years*, to commence from the day of firſt 'publiſhing the ſame, *and no longer*.' Then follow the penalties on tranſgreſſors of the act, by forfeiture of the books, *etc.* and proviſoes for entering in Stationers Hall, preſenting copies to the Univerſities, and regulating the prices.

That the word *proprietors*, in the preamble of this act, does not mean to declare any antecedent property in authors or their aſſigns, but is uſed in a ſenſe not ſtrictly proper, appears not only from what follows in the act itſelf, but from other inſtances in the ſtatute-law, where the ſame word is uſed to expreſs a monopoly or exclufive right, ſpecially conferred, without any pretence of an actual *property*, in the ſtrict and true ſenſe of the word. For example; the act 8*vo* *Geo.* II. *cap.* 13. for encou-

ragement

ragement of the arts of deſigning, engraving, and etching prints, ſays, '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 printſellers, 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.—For remede thereof, and for preventing ſuch practices for the future, be it enacted, &c. That from and after the 24th day of June, which ſhall be in the year of our Lord 1735, every perſon who ſhall invent and deſign, engrave, etch, or work in *mezzotinto*, or *chiaro oſcuro*, or from his own works and 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.' Then follow the like forfeitures and penalties, as in the act concerning books.

The one act ſeems in a great meaſure to be copied from the other. And indeed, upon looking into the Journals of the Houſe of Commons, it appears, that the petition of the engravers refers to the law in favour of authors, and deſires to be put on the ſame footing. No two ſubjects can be liker, and no two acts of parliament can more nearly reſemble one another; yet it never was thought, that the deſigner of a print had an inherent excluſive right to hinder others from copying that print, after having publiſhed it, or that he was in this ſenſe *proprietor* of his invention. It never was maintained, that he had a common-law property, or excluſive right of any kind, independent of ſtatute. Vol. 22. P. 304.

By an act in the 7th of his preſent Majeſty, *cap.* 38. it was further provided in favour of engravers, "That all and every perſon and perſons who ſhall engrave, etch, or work in *mezzotinto*,

'or

'or *chiaro ofcuro*, or cauſe to be engraved, etched, or worked, 'any print taken from any picture, drawing, model, or ſculp-'ture, either ancient or modern, ſhall have, and are hereby de-'clared to have, the benefit and protection of the ſaid act, and 'this act for the term herein after mentioned, in like manner as 'if ſuch print had been graved or drawn from the original de-'ſign of ſuch graver, etcher, or draftſman; and if any perſon 'ſhall engrave, print, and publiſh, or import for ſale, any copy 'of any ſuch print, contrary to the true intent and meaning of 'this and the ſaid former act, every ſuch perſon ſhall be liable 'to the penalties contained in the ſaid act, to be recovered as 'therein, and herein after is mentioned.'

By this act, the term of the excluſive privilege is prolonged as follows: 'That the ſole right and liberty of printing and re-'printing, intended to be ſecured and protected by the ſaid 'former act and this act, ſhall be extended, continued, and be '*veſted* in the reſpective *proprietors*, for the ſpace of *twenty eight* '*years*, to commence from the day of the firſt publiſhing of any 'of the works reſpectively herein before, and in the ſaid former 'act mentioned.'

On account of the extraordinary genius of Hogarth, his widow was, by another clauſe of the ſame act, indulged with a particular monopoly of his prints for *twenty years*, to commence from January 1767, over and above the fourteen years which Hogarth himſelf had had by the act, 8th of George II. But as in the interval between the expiry of the firſt privilege, and the commencement of the ſecond, ſeveral engravers had copied and publiſhed Hogarth's works, the following clauſe is very properly added in the act 7th of his preſent Majeſty.

'Provided nevertheleſs, That the *proprietor* or *proprietors* of ſuch 'of the copies of the ſaid William Hogarth's works, which have 'been copied, and printed, and expoſed to ſale, after the expi-'ration of the term of fourteen years from the time of their firſt 'publication by the ſaid William Hogarth, and before the ſaid 'firſt day of January, ſhall not be liable or ſubject to any of the 'penalties contained in this act, any thing herein before con-'tained to the contrary thereof in any wiſe notwithſtanding.'

Here the legiſlature made a very juſt diſtinction. No perſon was to be puniſhed, or ſued in any action, for publiſhing Ho-

garth's

garth's works, after the monopoly of fourteen years had elapſed; and nothing could reſtrain any perſon from continuing ſo to do, but this new law, giving a further monopoly for twenty years. It is to be obſerved too, that throughout the whole ſtatute, although *property* and *proprietor* are the terms uſed, nothing more was meant than a ſtatutory excluſive right; not an actual, but a *quaſi property*, the creature of that particular ſtatute; and the ſame obſervation does clearly apply to the ſtatute of Queen Anne concerning books.

It is remarkable, that even the *copiers* of Hogarth's prints are called *proprietors* in the above clauſe, in as large a ſenſe of the word as he is himſelf. The bookſellers had introduced theſe cant words *property* and *copy-right*; and they were naturally made uſe of by others, as phraſes belonging to the trade; they were copied from the petition of the bookſellers into the act of Queen Anne, and from thence into the ſtatutes of his late and preſent Majeſty. It is juſtly obſerved by Mr. Blackſtone, That 'words Vol. I. 'are to be underſtood in their uſual and moſt known ſignifica- P. 59. 'tion, not ſo much regarding the propriety of grammar as their 'general *popular* uſe;' and in particular, 'terms of art, or tech- 'nical terms, muſt be taken according to the acceptation of the 'learned in each art, trade, and ſcience.'

That the above is a juſt conſtruction of the ſtatute of Queen Anne, may further be illuſtrated from the report in the caſe of Midwinter, where the argument upon the ſtatute is laid down with great preciſion. Treating of the right of an author after- publication, the reporter ſays: 'All that remains with him is p. 157. 'an excluſive privilege, granted by the ſtatute, of reprinting 'this book, and of barring others from reprinting or vending it 'under certain penalties. It is neither more nor leſs than 'creating a monopoly, barring others from dealing in that par- 'ticular commodity; the direct conſequence of which is, that 'ſo far as reſtrained by ſtatute they muſt ſubmit; but that, in 'all other particulars, their natural liberty is preſerved entire. 'It is true, this monopoly or excluſive privilege is named *a pro-* 'perty in the ſtatute; and ſo it is in one ſenſe, becauſe it is pro- 'per or peculiar to thoſe to whom it is given by the ſtatute. 'But then it was not intended to be made *property* in the ſtrict 'ſenſe of the word; for we cannot ſuppoſe the legiſlature guilty

'of

‘ of ſuch a groſs abſurdity, as to eſtabliſh property without a ‘ ſubject or *corpus*: Theſe are relative terms which cannot be ‘ diſjoined; and property, in a ſtrict ſenſe, can no more be ‘ conceived without a *corpus*, than a parent can be conceived ‘ without a child. But if the words of the ſtatute ſhall be laid ‘ hold of, neglecting its ſpirit and meaning, all that can be con- ‘ cluded is, that it is a property *ad certum effectum* only, granted ‘ in order to ſupport the ſeveral actions and penalties directed ‘ by the ſtatute. It is a ſtatutory property, and not a property ‘ in any juſt ſenſe to be attended with any of the effects of pro- ‘ perty at common law.’

‘ In the *ſecond* place, Suppoſing ſo abſurd a thing as that a real ‘ property is eſtabliſhed by the ſtatute, it appears evident, that ‘ the purſuers can take no advantage of it, when they have not ‘ fulfilled the conditions upon which it is granted The very ‘ firſt clauſe of the ſtatute, which talks of beſtowing the property ‘ upon the author, is what follows: ‘ And whereas many per- “ ſons 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*, things to be ſecured to the pro- “ prietor may be aſcertained,’ &c. Here two things are plainly ‘ implied, or rather expreſſed: *1ſt*, That the property is not in- ‘ tended to be beſtowed in every caſe; for the words are, “ Whereby the property in every ſuch book, as is intended by “ this act to be ſecured to the proprietor, may be aſcertained.’ ‘ And *2dly*, The property is not beſtowed directly upon compo- ‘ ſing, but is to be claimed or aſcertained in a certain form ‘ eſtabliſhed in the ſtatute, viz. by entering in Sationers Hall, ‘ the name of the book, and the author’s conſent for printi g ‘ the ſame. Upon theſe conditions the property is beſtowed, ‘ and not otherwiſe: Nor does this argument land in a criticiſm ‘ upon words; it is founded on the very nature of the thing; ‘ for if it be true in fact, that many perſons of diſtinction amuſe ‘ themſelves with compoſing books, without intending to take ‘ any pecuniary benefit by the publication, muſt it not be com- ‘ petent to every mortal to deal in ſuch books, as much as it was ‘ to deal in all books before exclufive privileges were invented? ‘ It follows therefore, that every author, who intends to make ‘ profit of his works, muſt ſignify the ſame to the public, or, in

‘ the

'the language of the ſtatute, muſt have the property aſcertained
'to him. And, as the method for claiming or aſcertaining this
'property is alſo laid down in the ſtatute, there muſt be eſta-
'bliſhed a *preſumptio juris et de jure*, that every new book, which
'is not thus entered in Stationers Hall, is abandoned to the pub-
'lic, and a lawful ſubject of commerce for every man to deal in.

'In the *third* place, Suppoſing all obſtructions removed which
'bar the purſuers from a property in this caſe, ſtrictly taken,
'and ſuppoſe their property to be ſuch as to afford the ſame
'actions that may be founded on real property; yet it does not
'appear, that they could take any benefit from theſe conceſſions:
'for how are damages to be aſcertained? The only footing to
'go upon is to ſhow how far the proprietor's ſale is leſſened by
'interlopers. But this can never be determined otherwiſe than
'by mere conjecture: The proprietor himſelf cannot be certain,
'that the perſons who dealt with the interlopers would have
'purchaſed from him, without which the aſcertaining damages
'is beyond the reach of law. And the purſuers tacitly yield
'this point, when they agree to confine their claim of damages
'to the ſuppoſed profits made by the defendants. Their claim,
'ſo qualified, does indeed relieve them of ſome part of the dif-
'ficulty of proof, by no means of the whole; becauſe an inter-
'loper, who has ſome part of a piratical edition in his poſſeſſion,
'cannot know what profits he makes till the whole be ſold off.
'But to let this paſs: Where is the foundation in law, equity,
'or common ſenſe, to deprive the defendants even of their pro-
'fits, unleſs the purſuers can ſpecify that they have ſuffered
'thereby? If their ſale be not leſſened, they have no juſt ground
'of complaint. Let us give an example, which ſhall be Millar's
'Dictionary, publiſhed in two folios, and ſold at a price beyond
'the reach of common gardeners. If a printer ſhall undertake
'an impreſſion of this book on a very ſmall type and very coarſe
'paper, which will be purchaſed only by common gardeners,
'Philip Millar and his aſſigns will not loſe a ſhilling by this edi-
'tion: yet by this low-priced book, knowledge in gardening is
'ſpread much to the benefit of the public. Would it be reaſon-
'able or juſt to deprive ſuch an undertaker of his profits, when
'the public gain by the undertaking, and Mr. Millar loſes no-
'thing? It is obvious then, that this claim for profits cannot be

'supported leſs or more as a claim of damages, when there is really no damage to the party privileged, or, which is the ſame, 'where damages cannot be proved.'

Theſe, and other arguments uſed upon that occaſion, are a better commentary upon the act than any that the defenders can make. The Court of Seſſion found in that caſe, 'That no action lies upon the ſtatute, except for ſuch books as have been 'entered in Stationers Hall, in terms of the ſtatute. And found, 'That no action of damages lies upon the ſtatute.'

The cauſe was appealed by the London booklellers to the Houſe of Peers; and having come to a hearing, it was the opinion of that moſt honourable Houſe, that the action ought to be diſmiſſed as irrelevant, without prejudice to the points pleaded therein, when they ſhould be properly brought in judgment; and accordingly an order was given to that purpoſe.

The London booklellers were ſo little encouraged by this deciſion, and by what paſſed in the Houſe of Lords upon occaſion of it, that they never ventured to renew their action in Scotland, though it is well known how deſirous they were to extend their ſchemes of monopoly over the whole iſland, and to prevent all interference of their brethren here. This they have not yet been able to accompliſh, and it is hoped never will.

It is indeed, with ſubmiſſion, thought, that the act of Queen Anne leaves no room for the pretence of a common-law property independent of the ſtatute. Your Lordſhips, in the only queſtion of the kind which has come before you, ſeem to have conſidered it in that light. At the ſame time, it is a poſſible caſe, that the view of the legiſlature may have been to ſettle a contraverted point, by *aſcertaining* this claim of property *for a certain limited time*, and fixing the boundary there, ſo as to cut off all pretences *quoad ultra*. The word *veſting* ſeems rather to ſhow, that the antecedent right was in no ſhape acknowledged. But taking the act in either ſenſe, as conferring a new right which had never before exiſted, or as declaratory ſo far of a right *ab ante* claimed; it does not occur to be a doubt that this right, whether veſted or declared, is, by the expreſs tenor of the act, limited in its duration, and made entirely dependent on the ſtatute.

Other

Other inſtances might be given, of rights clearly founded in common law being limited by ſtatute. Bribery was a ground for reducing the elections of magiſtracy, long prior to the act 14th of George II. whereby it was, *inter alia*, 'made 'lawful for any conſtituent member of a meeting for election, 'who ſhall apprehend any wrong to have been done by the ma'jority of ſuch meeting, to apply to the Court of Seſſion by 'ſummary complaint, for rectifying ſuch abuſe, or making void 'the election, ſo as ſuch complaint be preſented to the ſaid 'Court within two calendar months after the annual election of 'magiſtrates and counſellors.'

In a late caſe, Young and others of Anſtruther-Eaſter, having allowed the two calendar months to elapſe, were cut out of their remedy of ſummary complaint upon the ſtatute; but they brought an action at *common law* for voiding the election. Proofs were adduced of the bribery and corruption. The purſuers prevailed in this Court, and the election was voided.

An appeal, however, having been taken againſt this decree, the chief reaſon urged for a reverſal, and for the firſt time ſtated from the bar of the Houſe of Peers, not having been before attended to, was, That the Court had given judgment in an action which appeared incompetent, the ſtatute having limited the time, and pointed out the only mode for obtaining redreſs, which had been neglected.

The *anſwer* made was, That the ſtatute only authorized a new mode of action for redreſs of wrongs at annual elections, but that theſe wrongs were ſtill actionable at common law; and that the remedies *ab ante* competent, could not be meant to be taken away by the ſtatute: That where a ſtatute only allowed a particular and new mode of redreſs, in a caſe which was before remediable at common law, the common-law remedy ſtill remained entire.

Replied, That the intendment of the legiſlature was to take into conſideration all the election laws, and by that ſtatute, ſo full and particular, to cut off at once, and put an end to all queſtions and diſputes that might have ariſen upon theſe laws.

The Houſe of Lords reverſed the decree of the Court of Seſſion.

The

The reaſoning in that caſe appears extremely applicable to the preſent; and indeed, *a fortiori* applies, as the antecedent right here was at beſt diſputable and uncertain. The ſtatute of Queen Anne conſidered fully, and included, all the prior pretences of authors to copy-right, and ſettled this kind of property on a clear, equitable, and ſolid footing. It ſays, as clearly as words can expreſs, That they ſhall have a right for a certain term of years, *and no longer*.

Though authors, and thoſe in their right, ſhould be ſuppoſed to have had a perpetual property in their books; yet there was no iniquity in rendering it temporary by this act, by which their right is protected by forfeitures and penalties for a conſiderable tract of time, during which, if their books are good for any thing, they will draw much more than ſuffices to reimburſe and recompenſe them. Many natural rights are reſtrained by ſtatute; ſuch as, the exportation of wool, grain, &c. at certain times. If the proprietors of theſe goods were allowed to go to any market they pleaſed, their gains would often be much greater.

The laſt clauſe of the act declares, That if the author ſhall happen to be alive at the expiry of the term of fourteen years, the ſole right of printing and diſpoſing, &c. ſhall return to *him* for another term of fourteen years; not the *penalties*, but the *right*, or what is called the *property*; and not to the bookſeller, but to the *author* himſelf, if he be alive. What poſſible uſe was there for this clauſe, or what purpoſe could it ſerve, if, independent of the act, the excluſive right returned to the author, not for fourteen years only, but for ever? And how could the right return to the author, if he had already given it away for ever to an aſſignee? A more unmeaning, nay, more improper clauſe, cannot be figured, if the purſuers are well founded in their argument.

It is ſaid, That the purpoſe of the act of Queen Anne was to give an additional ſecurity to authors, by means of penalties upon tranſgreſſion; and that the reaſon of limiting this penal ſanction to a certain term of years, was, that the chief temptation to invade the property of authors was when the demand was great, which generally laſted only a few years.

But, with ſubmiſſion, this is by no means a natural or reaſonable conſtruction of the ſtatute. No ſimilar inſtance will be pointed

pointed out, of a property being guarded with penalties for a certain number of years only, and left unguarded after that period. If a common-law property is at all allowed to authors in their works, this property is as ſtrong and as entire the *fifteenth* year as it is the *fourteenth*, and the demand may be as great. It is impoſſible to conceive, that ſo trivial a circumſtance, as the difference of demand between the fifteenth and the fourteenth year after the publication of a book, would be thought ſufficient by the legiſlature to make ſo important a diſtinction between theſe two periods. Beſides, independent of penalties, which by this ſtatute are not given at all to the author, but to the informer and to the King, the author's right is made to continue fourteen years longer, in the caſe of publications after the act, if the author himſelf be alive; ſo that the penal conſequences in this caſe expire in fourteen years, and the prorogated right of the author, unattended with any penalties, in twenty-eight years, which ſurely muſt ſuppoſe, that he has not a right in him which laſts for ever.

Moſt articles of moveable property are more valuable when new than when old; yet it never was thought neceſſary to make a law for ſecuring more effectually the owner's right to new furniture, or new property of any kind, leaving the old to ſhift for itſelf. No act of parliament ever declared, That a man ſhould have the ſole excluſive right to diſpoſe of his goods for fourteen or twenty-eight years *and no longer*; and that whoever invaded this property during that time, ſhould be liable in penalties and puniſhment. So far from ſecuring the property, this would rather look like an invitation to invade it at the end of the term aſſigned. If by common law a man had a perpetual right or privilege to do a certain thing, it would ſurely appear very ſingular, were he to apply for, and obtain an act of parliament, declaring his right to do that thing for fourteen years *and no longer*. Any perſon who acted in this manner, would be conſidered as waving his right at common law.

It was ſaid, There are many inſtances of penalties ſuperadded, as in the caſes of treaſon, bribery in elections, &c. But will an inſtance be ſhown of any ſtatute which ſays, that treaſon ſhall be puniſhable for fourteen years, *and no longer*; or, that bribery ſhall be a crime for fourteen years only, and puniſhable during

that term; or, that elections ſhall be free and uncorrupt for fourteen years, *and no longer?*

In ſhort, this ſtatute cannot be explained upon the footing of a ſuperadded penalty. The clear and plain conſtruction of it is, That it is a ſtanding univerſal patent, giving authors an excluſive right in their works, or what is called a *ſtatutory property*, for a certain time. It was intended not to give an additional ſecurity, but a new benefit to authors, and to free them from the charge and trouble of procuring patents from the Crown.

The act therefore, (ſo far, at leaſt, as applicable to Scotland), appears to be neither accumulative nor reſtrictive of any former right, but rather creative of a full clear one, for a determinate time, and under certain conditions: And the reaſon of guarding it with penalties ſeems to have been, that this was the beſt manner of ſecuring the right introduced by the ſtatute, as the liquidation of damages muſt often be extremely difficult. An act of this kind was fully ſufficient for all the purpoſes of rewarding authors, and encouraging learning; whereas the eſtabliſhing an independent inextinguiſhable property in copies, would be pernicious and deſtructive.

The clauſe in the act, which provides, 'That it do not extend 'either to prejudice or confirm any right that the ſaid Univer-'ſities, or any of them, or any perſon or perſons have, or claim 'to have, to the printing or reprinting any book, or copy al-'ready printed, or hereafter to be printed,' has been appealed to by ſome, as containing a general ſalvo of all antecedent rights; and conſequently of the common-law right of authors. But the ſmalleſt conſideration will ſhow, that this clauſe could only have in view thoſe ſpecial rights, founded upon ſtatute, charter, or other privilege, which either the Univerſities or particular perſons may have a claim to; rights not merely natural, but founded on privilege. It is obvious, that if the words of this proviſo are interpreted to mean any more than a ſalvo of ſpecial rights, ſuch as the claims of King's printers, patentees, and Univerſities, they muſt operate a repeal of all the preceding clauſes.

By the words 'ſaid Univerſities,' are meant Oxford and Cambridge, who, before this act, had the privilege, by patent, of printing ſeveral books, ſuch as Bibles, Acts of Parliament, &c. Baſket, who was King's Printer, diſputed this right with them. The Stationers Company likewiſe had, or claimed, the ſole right of

of printing different books, particularly Almanacks, Pſalms, Pſalters, &c. Partridge diſputed this, and inſiſted to print an Almanack of his own compiling. They likewiſe pretended a right to law books; but Atkins, a law-patentee, got an injunction againſt every member of the Company, for printing Roll's Abridgment. Roper, who purchaſed Croke's Reports, printed the book without the conſent of the law-patentees, upon which they in 1705 raiſed an action againſt him. In like manner theſe law patentees diſputed with Viner the right to print his abridgement though compiled by himſelf. Other inſtances might be given; and as ſeveral of theſe diſputes were ſubſiſting at the time the act of Queen Anne was in agitation, it was proper to throw in a proviſion to leave the queſtion as to theſe patent-rights entire, whether regarding works already printed, or hereafter to be printed; for even authors, who might afterwards write on particular ſubjects, might poſſibly be debarred from printing their own works, as happened in the caſe of Viner, Partridge, &c. which whether juſt or not was left undetermined. The ſame thing was done in the licenſing act 1662, and in the act of James II. againſt monopolies.

Before leaving the act of Queen Anne, it may be obſerved, That the London bookſellers, not ſatified with the advantages which they had thereby obtained, did, in 1734, make a new application to Parliament, for leave to bring in a bill for making more effectual the act of Queen Anne, and for preventing the ſurreptitious printing or importation of books from foreign parts. It is probable, the chief object in view was to prevent importation from Ireland, as it had long been, and indeed ſtill is a practice, to reprint every Engliſh book of any conſequence in Ireland, immediately after being publiſhed in England, and to underſell the Engliſh edition. Had any ſuch thing as a common-law property been underſtood to be in authors, or the bookſellers to whom their copies were aſſigned, this abuſe might ſurely have been redreſſed, by applying to the Courts of Ireland. But no ſuch attempt appears ever to have been made; which at leaſt ſhows, that there is no remedy at common law in Ireland; though, if the defenders are not miſtaken, the common law of Ireland is, in other reſpects, the ſame with that of England.

Swift, in ſome of his letters, complains, That even his manuſcripts were ſtole from him there, and publiſhed without his conſent,

ſent, and that he could have no redreſs. Thus he writes to Mr. Pulteney, 'You will hear, perhaps, that one Faulkner hath printed four volumes, which are called my works. He hath only prefixed the firſt letters of my name. It was done utterly againſt my will; for *there is no property in printers or bookſellers here*, and I was not able to hinder it. I did imagine, that, after my death, the ſeveral London bookſellers would *agree among themſelves* to print what each of them had, by common conſent; but the man here hath prevented it, much to my vexation; for I would as willingly have it done even in Scotland. All this has vexed me not a little, as done in ſo obſcure a place. I have never yet looked into them, nor I believe ever ſhall.' He ſeems here to have had in view the temporary property which in England was veſted in authors by the act of Queen Anne, but which did not extend to Ireland; and he had no notion of a property at common law. See alſo his letter to Mr. Pulteney, 12th May 1735, on the ſame ſubject; where he ſays, 'I never got a farthing by any thing I writ, except one, about eight years ago; and that was by Mr. Pope's prudent management for me.' And he adds, '*Here the printers and bookſellers have no property in their copies.*'

Mar. 8, 1734. Vol. 3. No 381.

Vol. 3. No 382.

The ſame obſervation holds as to the American colonies, where the works of Engliſh authors are every day republiſhed openly and avowedly, without any leave from the London bookſellers.

The application made in 1734, appears to have been attended with no effect: But, in 1735, and 1736, the London bookſellers made another effort; and particularly in 1736, upon a motion made in their behalf, a bill was allowed to be brought in, 'for the better encouragement of learning, by the more effectual ſecuring the copies of printed books to the authors or purchaſers, during the times therein to be mentioned, and to *repeal* an act, paſſed in the eighth year of the reign of her late Majeſty, entitled,' &c.

Journals, Vol. 22. P. 741.

This bill had probably been in agitation the year before, as a letter appears from Mr. Pulteney to Dr Swift, of date 29th April 1735, in theſe words: 'I have ſent you the copy of a bill now depending in our Houſe, for the encouragement of learning, (as the title bears;) but I think, *it is rather of advantage to bookſellers than authors*. Whether it will paſs or not

Swift's letters, vol. 3. No. 346.

'this

'this ſeſſion, I cannot ſay; but if it ſhould not, I ſhould be glad 'of your thoughts upon it, againſt another ſeſſion It ſeems to 'me to be extremly imperfect at preſent. I hope you have 'many more writings to oblige the world with, than thoſe which 'have been ſo ſcandalouſly ſtolen from you; and when a bill of 'this nature paſſes in England, (as I hope it will next year), '*you may then* ſecure the property to any friend, or any chari-'table uſe you think fit.' This plainly ſhows Mr. Pulteney's opinion, That, unleſs upon the footing of ſtatute, there was no ſuch thing as a property in authors.

This bill was likewiſe thrown out, and the ſcheme of repealing the act of Queen Anne appears to have been dropt. But, in 1739, a new act was paſſed, not materially altering the act of Queen Anne, but eſtabliſhing two points in favour of the bookſellers. It is intitled, 'An act for prohibiting the importation 'of books reprinted abroad, and firſt compoſed, or written, and 'printed in Great Britain; and for repealing ſo much of an 'act, made in the eighth year of the reign of her late Majeſty 'Queen Anne, as impowers the limiting the prices of books.' The firſt part of this act ſubjects the importers to certain penalties, and muſt have been chiefly intended againſt the interference of Iriſh bookſellers, as already obſerved. At the ſame time, it contains this material proviſo, That the act 'ſhall not 'extend to any book that has not been printed or reprinted in 'this kingdom, within twenty years before the ſame ſhall be 'imported.' Which ſhows, that the legiſlature ſtill had in view, to debar all *perpetual* excluſive privileges, and to prevent the poſſibility of authors or bookſellers ſuppreſſing uſeful books.

IV. Law of England.

IV. The defenders can pretend to no knowledge in the common law of England; but they may without offence ſtate what appears from books, and they have already had occaſion to obſerve in what manner printing was originally exerciſed in England as well as in Scotland.

After excluſive privileges came in uſe, we find much light thrown upon the ſubject, by thoſe very grants of excluſion, many of which are of ſuch a nature, and are expreſſed in ſuch terms, as ſhow an univerſal opinion, that there was no literary property at common-law in England.

A great number of patents to authors and printers are to be

found in Rymer's Fœdera, ſome few of which ſhall be here noticed.

By letters patent, dated 12th March 1563, Elizabeth, 'in 'conſideration, that Thomas Cooper of Oxford, hath diverſe 'and ſundry times heretofore travailed in the correcting and 'augmenting of the Engliſh Dictionary (commonly called Bibliotheca Eliota) and now of late as well to his further pains, &c. 'hath altered and brought the ſame into a more perfect form in 'the following notable work, called *Theſaurus Linguæ Latinæ*.' Therefore, 'grants privilege and licenſe to the ſaid Thomas 'Cooper and his aſſignies, to print and ſet forth to ſale the ſaid 'Engliſh Dictionary (before named Bibliotheca Eliota), and now 'in this laſt edition, intituled, Theſaurus Utriuſque Linguæ Latinæ et Britannicæ, and prohibits all others from printing and 'ſelling the ſame, *either by the copy heretofore imprinted*, or hereafter to be printed by the ſaid Thomas Cooper,' during the ſpace of 12 years. This prohibition ſeems to extend even to the author of the original work and his heirs, who are debarred from republiſhing it during the term of the privilege.

26th April 1626, a licenſe in favour of Joſeph Webb, ſets forth, 'That John Webb, by his petition, has repreſented that 'he has attained to a more exact, ſufficient, and uſeful way of 'teaching to write and ſpeak the tongues than has hitherto been 'communicated.'—Therefore grants to him, his deputes, ſubſtitutes and aſſignies for 14 years, 'to have the whole teach-'ing of all ſuch as deſire the ſame in the tongues and languages 'by the way and means by him invented. And the *ſole privi-'lege of printing and vending* all and every book and books whatſo-'ever, which now are or hereafter ſhall be *invented* by him, or 'by him made ſerviceable to the purpoſe aforeſaid, for the term 'of 31 years.' And prohibits all others from attempting to teach by the method invented by the ſaid John Webb, or to tranſport out of the kingdom any of the foreſaid books, or to reprint the ſame within the kingdom;—yielding and paying to his Majeſty for the ſaid privilege, *one fifth of the clear benefit* accreſcing thereby, and that yearly, at the feaſt of the annunciation for the whole foreſaid term, (the firſt three years being free) with L. 10 penalty, if not paid within ſixty days thereafter.

9th

9th March 1626, Caleb Morely obtained a ſimilar privilege for 21 years, of printing and vending every book and books which now are, or hereafter ſhall be *invented by him*, or by him made ſerviceable to the purpoſe therein mentioned, (viz. a method invented by him for the firm and infallible help of memory, and grounding of ſcholars in ſeveral languages, but chiefly in the Latin and Engliſh tongues) as alſo, all ſuch tables, modules and works whatſoever, which may any way further his ſaid good intention.

4th July 1635, a patent is given to Francis Holyoak for the ſole printing a book compiled by him, called *Dictionarium Etymologicum Latinum*, for 14 years. The preamble bears, that his majeſty, 'being willing to encourage his ſubjects in all lawful 'and commendable ſtudies and endeavours, *by appropriating unto 'them for ſome term of years*, the benefit and fruits of their labours,' therefore grants, &c. A clauſe is thrown in at the end to this effect; That if at any time during the ſaid 14 years, it ſhould appear to his Majeſty or the Privy Council, 'that the grant is con-'trary to the laws, or in any ſort inconvenient to the ſtate of 'the realm,' then, upon ſignification thereof by his Majeſty, under the ſignet or privy ſeal, or by the Privy Council, or any ſix of them under their hands, that the ſame is illegal or inconvenient, theſe letters patent ſhall forthwith ceaſe.

18th Auguſt 1635, a ſimilar privilege is given to William Braithwaite for the ſole privilege of printing, according to the method deviſed by him, any book, poem, or leſſon, for the more eaſy teaching of muſic, and the furtherance of poetry, oratory, and pronunciation of the Greek and Latin tongues for 21 years. This grant has the ſame clauſe in the preamble, and contains the ſame proviſo, as the immediately preceding one.

From theſe it appears what was the inductive cauſe of granting ſuch privileges, viz. 'to encourage the ſubjects in all lawful and 'commendable ſtudies, by appropriating unto them, for ſome 'term of years, the benefits and fruits of their labours.' In ſome other inſtances, theſe ſpecial grants and ordinances are expreſsly mentioned, as being the only foundation of the rights of authors and publiſhers; for example, a proclamation againſt the diſorderly printing and diſpoſing of books, pamphlets, &c. 25th September, 1623, narrates a decree of the Star-Chamber, anno 1586, and 'that the true intent and meaning of the ſaid decree

'has

'has been cautiouſly eluded, by printing beyond ſea and elſe-
'where, as well ſundry ſeditious books, &c. as alſo ſuch allow-
'ed books, works, and writings, as have been imprinted with-
'in the realm by ſuch, to whom the ſole printing thereof *by let-*
'*ters patent or lawful ordinance or authority* doth appertain, accord-
'ing to the true intent of the ſaid decree, and by importing
'the ſame into this our realm.' And a proclamation 15th April 1636, concerning the book, intitled *Mare Clauſum*, is expreſſed in ſimilar terms.

The great numbers of thoſe patents, which are to be found from the reign of Queen Elizabeth downwards, are another ſtrong proof of the ſenſe of authors, that they had no excluſive power at common law over their works after publication.

It appears too from ſome of the patents already cited, that it was a matter of doubt, whether the granting ſuch privileges even for a limited time was not contrary to the rights of the ſubject, and miſchievous to the ſtate.

In ſome caſes, ſo little were literary compoſitions conſidered to be the property of the authors, that, thoſe who obtained excluſive grants, were burdened with the payment of an annual ſum to the King.

To theſe obſervations may be added, that the Univerſities of Cambridge and Oxford obtained grants, from time to time, for printing and vending all books whatſoever, without taking any notice of the rights of authors *.

We do not find that Shakeſpear or Ben Johnſon, though their works were valuable, ever dreamed of having any excluſive right in them. Various editions of their plays came forth in their own time, not publiſhed by them, but by the prompters of the different places of exhibition.

Ja. I. of England made a tranſlation of David's Pſalms. This work was publiſhed by order of his ſon Ch. I. who claimed no property in the book, but gave it the protection of a patent. His words are, 'whereof our late dear father was author;' and he ſays, he has ordered it to be peruſed, 'and, being found to be 'truely and exactly done, we do hereby authoriſe the ſame to be 'imprinted according to the patent granted thereupon.' The

* See patent in favour of the Univerſity of Cambridge, 20th July 1534, and patent in favour of the Univerſity of Oxford, 12th November 1632.

edition

edition was printed at Oxford 'by William Turner, printer to the 'famous Univerſity, 1631.'

Swift's Letters, above noticed, ſhow, That he never underſtood himſelf to be proprietor of the works publiſhed by him. Mr. *Pope*'s opinion too appears from the ſale of his Homer, in 1712. The conveyance granted by him, was 'of the copy-right 'for fourteen years certain, or as long after as he is enabled by 'the ſtatute of Queen Anne to do it.'

And that Lord *Bolingbroke* was of the ſame opinion, may be inferred from his will, which, after ſetting forth, That he was the author of certain books, or tracts, therein mentioned, ſome of them already publiſhed, others not, adds, 'But I have not 'aſſigned to any perſon or perſons whatſoever, the copy, or the 'liberty of printing or reprinting any of the ſaid books or tracts, 'or letters. Now I do hereby, *as far as by law I can*, give and 'aſſign to David Mallet of Putney, in the county of Surry, 'Eſquire, the copy and copies of all and each of the before-'mentioned books, or tracts, or letters; and the liberty of re-'printing the ſame.'

Swift's letters by Hawkeſworth, vol. 3. let. 379.

Rolt, in his Dictionary of trade and commerce, ſecond edition, London, 1761, under the word *Book*, defines it to be, 'a work 'of wit or genius, compoſed and printed for the public utility, 'or ſometimes only for curioſity and pleaſure.' And adds, 'The 'ſtatute of Queen Anne regulates the property of authors.' Under the word *Privilege*, he ſays, 'Privilege for the impreſſion 'of books is properly excluſive, being a permiſſion which an 'author or bookſeller obtains under a Prince's ſeal, to have alone 'the impreſſion of a book, with a prohibition of all others to 'print, ſell, or diſtribute the ſame, within a certain term of 'years, uſually *fourteen*, under clauſes and penalties expreſſed 'therein. Theſe privileges were unknown till the beginning 'of the ſixteenth century, when they were introduced in France. 'The oldeſt is ſaid to bear date in the 1507, and to have been 'occaſioned by ſome printers counterfeiting the works of au-'thors as ſoon as they appeared. But people were yet at liber-'ty to take them, or let them alone, at pleaſure, till the inte-'reſts of religion and the ſtate occaſioned the reſtraining of 'this liberty. In 1563, Charles IX. publiſhed a celebrated *or-'donnance*, forbidding any perſon, on pain of confiſcation of

'body and goods, to print any letter, ſpeech, &c. without 'permiſſion. The like has been ſince done in England; though 'at preſent, privileges are not only ſeldom required, but, by 'the late act for ſecuring the properties of books, ſeem need-'leſs.'

Several other writers of note have declared againſt literary property, ſo far as claimed independent of the ſtatute. The author of a Letter to a member of Parliament, printed in 1747, ſeems to have been the firſt who entered the liſts on the other ſide. This letter has been aſcribed to an author of reputation, and of high rank in the Church, but probably by miſtake; as the perſon here meant had ſo little faith in the doctrine of common-law property, that when he publiſhed the works of Mr. Pope, with his own notes and commentaries, he applied for and obtained from his late Majeſty a patent for a term of years, prefixed to the edition 1764 of the ſaid work *.

From this patent, containing no penalties, but ſimply a grant of excluſive property for a term of years, and from a note againſt monopolies, Vol. iv. p 276. of the 8*vo* edition, 1760; it may be inferred what the learned editor's opinion was on the ſubject of literary property. Yet the anonymous letter imputed to him has been much founded on by the purſuer in this cauſe; and appears to have been adopted by *Poſtlethwhayt* in the laſt edition of his book, publiſhed in 1766, where he has been prevailed on by his bookſeller to inſert it *verbatim*, under the article *Book*; though his own remarks ſhow, that he does not think the property of authors is yet ſufficiently eſtabliſhed. For he ſays, 'Though what this learned gentleman has urged is 'more than ſufficient to ſhow the juſtice of *a law for the ſecurity* '*of literary property*; yet we ſhall preſume to add a word more, 'by obſerving what effect this *would have* on particulars, and on 'the public.'—The reaſons offered by him for *making ſuch a law*,

* It bears, That "being deſirous of reaping the fruits of his labour, *which he cannot enjoy without our royal licence and protection*, he hath therefore moſt humbly beſought Us to "grant him our royal privilege and licenſe, for the ſole printing, publiſhing, and vending "the ſaid works, *for the term of fourteen years*: We being graciouſly pleaſed to gratify him "in his ſaid requeſt, do by theſe preſents, agreeable to the ſtatute in that behalf made and "provided, for Us, our heirs and ſucceſſors, give and grant, &c.

which

which he ſays is ſtill wanted here, are ſomewhat extraordinary: In the *firſt* place, That it would tend to make books *cheaper*; and, *ſecondly*, That the licentiouſneſs of libelling the government, and inſulting the church, and goſpel itſelf, by impious books, would be *eaſier remedied*, than when property is inſecure. Under the word *Patent*, he ſays, 'Nothing is more inſecure in 'this nation than literary property.'

Savary, from whom this work is borrowed, ſays, '*Privilege* '*pour l'impreſſion des livres*. Ce privilege eſt proprement excluſif; 'c'eſt une permiſſion qu'un *auteur*, ou un libraire, *obtient au grand* '*ſceau*, pour avoir ſeul la permiſſion d'imprimier un livre, avec 'defenſes a touts autres de l'imprimier, vendre, & debiter, pen-'dant *un certain nombre d'annees*, avec les clauſes et ſous les peins 'qui y ſont exprimees.'

Mr. Blackſtone has been appealed to as an authority of weight in favour of literary property, But when the paſſage in his book is conſidered, it would rather ſeem that he is doubtful in his opinion. He admits, that a work may be tacitly given to the public, when the author permits it to be publiſhed without any reſerve of right, and without ſtamping on it any mark of ownerſhip. And he adds, '*Neither with us in England, hath there* '*been any direct determination upon the right of authors at the common* '*law*. But much may be gathered from the frequent injunctions 'of the Court of Chancery, prohibiting the invaſion of this pro-'perty; eſpecially where either the injunctions have been per-'petual, or have related to unpubliſhed manuſcripts, or to ſuch 'ancient books as were not within the proviſions of the ſtatute 'of Queen Anne. Much may alſo be collected from the ſeve-'ral legiſlative recognitions of copy-rights; and from thoſe ad-'judged caſes at common law, wherein the Crown hath been 'conſidered as inveſted with certain prerogative copy-rights: 'For if the Crown is capable of an excluſive right in any one 'book, the ſubject ſeems alſo capable of having the ſame right 'in another.'

B. II. c. 26. § 8.

Here your Lordſhips ſee it expreſsly admitted, That when this very learned author wrote, which was within theſe few years, there never had been any direct determination in England upon the right of authors at common law; and indeed the

fact

fact is certain, that till the cafe of Millar againſt Taylor was adjudged very lately in the Court of King's Bench, the point was entire as to any *judicial determination.* The circumſtances of that caſe will in the ſequel be explained. In the mean time, as Mr. Blackſtone ſays, that much may be gathered from the injunctions in Chancery, it may be proper to inquire into theſe.

Injunctions. With regard to injunctions, in the *firſt* place, it may in general be obſerved, That injunctions of the Court of Chancery are no evidence of a common-law right. They are every day granted in caſes where there is no remedy at common law. A variety of inſtances of this kind will be found in the Equity Caſes abridged. *2dly*, Theſe injunctions often paſs of courſe, upon a bill being filed, without any anſwers from the defendant. They are ſomething of the nature of a ſiſt upon a bill of ſuſpenſion in Scotland.

The defenders are informed, that the Court of Chancery has never yet avowedly proceeded in its injunctions touching literary compoſition, upon the principle of an inherent property, antecedent to the act of Parliament, and independent of ſpecial privilege.

The only injunctions which appear *prior* to the act, are; 15th November 1681, Stationers Company *v.* Lee, for printing almanacks; 17th November 1681, Stationers *v.* Wright, for the ſame; 9th and 22d February 1709, Stationers *v.* Partridge, for ſelling almanacks. Theſe were all upon patent-rights, and theretore have nothing to do with the preſent queſtion.

The injunctions *ſince* the act, may be ſubdivided into three claſſes. *1ſt.* Injunctions upon the right given by ſtatute. Of this kind are the two caſes, in which Mr. Blackſtone ſays, the injunctions were perpetual: *viz.* Knaplock *v.* Curl, 9th November 1722; and Baller *v.* Watſon, 6th December 1737. And of the ſame kind, the defenders are informed, were, 28th November 1735, Motte *v.* Faulkner; and 27th January 1736, Waltho, *v.* Walker. Injunctions given to inforce the ſtatute, do in no ſhape apply to the preſent caſe. *Viner*, under the title, *Books and Authors*, mentions Knaplock *v.* Curl, and ſays, that the plaintiff claimed the ſole right, *&c. per ſtat.* 8. *An.* He takes notice of ſeveral other injunctions, but all of them under the ſtatute.

2dly,

2dly, Injunctions to reſtrain the publication of papers obtained ſurreptitiouſly. Of this kind were; 24th May 1732, Webb *v.* Roſe; 5th June 1741, Pope *v.* Curl; 13th June 1741, Forreſter *v.* Walker; 31ſt July 1758, Duke of Queenſberry *v.* Shebbeare. In theſe caſes, where manuſcripts were clandeſtinely obtained and printed, the Court of Chancery had no occaſion to go on the ſuppoſed common-law right of authors, to the perpetual monopoly of their works; for, independent of this queſtion, it was certainly proper to reſtrain ſo fraudulent an act as that of publiſhing an author's manuſcript without his conſent. Beſides, the idea of the Court might be to ſecure to learned and induſtrious men, the right given by the ſtatute, and to hinder the piratical printer from robbing the author of a benefit, which, though not actually then veſted, might become veſted in him for fourteen years, with a contingent term of fourteen more, as ſoon as he choſe to publiſh.

3dly, Injunctions when the books were old, and the caſe not within the terms of the ſtatute. This is the only kind of injunction from which any aid can poſſibly be drawn in favour of literary property. At the ſame time, when the inſtances are examined, they will be found to be of no avail. The firſt is, Eyre *v.* Walker, for the Whole Duty of Man, 9th June 1735. In this there was only an injunction *till full anſwer, or further order*. Injunctions of this kind may eaſily be obtained, as the fact is taken upon the ſtating of the bill. Nothing further appears to have been done in this caſe. It never came to a final hearing, ſo that no concluſion can be drawn from it.

The next is, Tonſon *v.* Walker, for Dr. Newton's Milton, in 1752. From a written note of this caſe, it appears, that the counſel for the defendant was interrupted by the then Lord Chancellor, who deſired to know, whether the life, and preface, and notes, were not within the 8th Annē. On the firſt hearing, his Lordſhip ſent the book to the Maſter in Chancery, to ſee what notes there were of Mr. Merchant's, the piratical editor, and how many of Dr. Newton's. Afterwards his Lordſhip ſaid, he had been inclined to ſend a caſe to the Judges, in order to ſettle the general queſtion of law; but as Dr. Newton's notes came within the act of Queen Anne, without deciding on the point of

law, Merchant had no right to Dr. Newton's notes; and he continued the injunction,

The caſe of Millar *v.* Donaldſon, came before the next Lord Chancellor. This was a motion at the firſt ſeal after Trinity term, 1765, to continue the injunctions which had been obtained upon a bill without anſwers, to ſtay publication of the following books; *Thomſon's Seaſons*, claimed by Millar; *Pope's Iliad*, by Oſburne; *Swift's Miſcellanies* with notes, and the life of the author, by Bathurſt. A written note of the caſe ſays, it was obſerved, 'I have 'ſeen no caſe where the terms of the act being expired, the 'Court has continued the injunction, after anſwer put in.—If I 'ſee a queſtion of law, I only delay the parties by an injunction, 'when I ſee that at the hearing I ſhall ſend them to law; for 'they may go directly to law without the delay of this Court.— 'But where I ſee it within the ſtatute, then I ſhould, according 'to the precedents which I muſt approve, ſtay the publication. '—In the caſe of the Stationers Company, the Court went on 'the right of the letters patent: The Crown was conſidered as '*Pater patriæ*; and it was proper to print the acts of State, and 'that the Crown ſhould have the power of doing it.—In this 'caſe, it is a capital queſtion in law, ſubtile in its nature, and 'extenſive in its conſequences.—It would be preſumption in me, 'to determine a queſtion worthy of the higheſt conſideration of 'any Court in Weſtminſter-hall; therefore, I ſhall ſay nothing 'as to the merits:—It might be flattery to ones ſelf, on the one 'hand, to determine for authors, in order to get fame and pa'negyric from them; and on the other hand, it would be dan'gerous to veſt the property; for that contains not only a right 'to publiſh, but alſo to ſuppreſs, by which means, thoſe who 'have a right to the greateſt authors, may ſuppreſs them, which 'would be a fatal conſequence to the public.—Theſe outlines 'are ſo extenſive, that I do not care to draw them nearer in ſo 'great a queſtion. But as at the hearing I ſhall ſend it to law, 'I think I ought to diſſolve the injunction, *and leave the parties 'to proceed at law*, in regard to Thomſon's Seaſons and Pope's 'Homer's Iliad, which are both out of the act.—Swift's Miſcel'lanies ſtand on the ſame footing with Newton's Milton; for 'the Life of Swift by Dr. Hawkeſworth is new, and within the 'act.' Accordingly the injunctions were diſſolved, *except as to Swift's Miſcellanies;* and this was afterwards diſſolved.

Soon

Soon after came Millar *v.* Taylor, before the ſame Lord Chancellor, on motion to diſſolve the injunction obtained by the plaintiff, againſt publiſhing Thomſon's Seaſons.—The injunction had been granted by Mr. Baron Smyth, who ſat on a former occaſion for the Lord Chancellor. But at the time of granting the injunction, Mr. Baron Smyth had made a caſe for the King's Bench. —On the preſent motion, the Court proceeded on the principles of the former caſe *v.* Donaldſon, and therefore diſſolved the injunction.

Another caſe, of Millar *v.* Taylor, for printing Young's Night-Thoughts, came before the maſter of the rolls, Michaelmas term 1765. The book was manifeſtly within the 8th Anne, and a perpetual injunction was prayed. A note of the caſe ſays, it was obſerved, That a perpetual injunction might be improper, as it ſeemed to imply perpetual right. 'I think the injunction ought 'to be continued, but it ought to be ſo framed, as not to im-'ply a right beyond the two terms of *fourteen years*.'

The next caſe in Chancery known to the defenders was, Macklin *v.* Richardſon, which came before the late Lord Chancellor, Trinity term 1768, relative to an injunction granted to ſtay the publication of *Love A-la-mode*, a farce written by Macklin.—The defendant had employed one Gurney, a ſhort-hand writer, to attend the performance at the play-houſe, and had the copy of him for one guinea. The firſt act was printed in a magazine, and the ſecond act was promiſed in a ſubſequent number. Macklin had never printed his farce, or transferred the copy-right. It appears, from a written note of the caſe, that after hearing counſel for the plaintiff, the Court deſired to know, Whether the queſtion of law was decided. 'Before he 'moved a ſtep, he deſired to know the ground.' The cauſe therefore was ordered to ſtand over till the general queſtion of property ſhould be determined. The defenders are informed, that Richardſon has ſince been condemned in one ſhilling damages.

It is ſaid, That the London bookſellers have all along been afraid of bringing the matter to a ſolemn trial at law, though much induſtry has been uſed in applying for injunctions in the Court of Chancery; and that more than once they have attempted to accompliſh their purpoſe, by a colluſive trial. Thus it is informed,

informed, that in 1758, a ſuit was commenced by them in the Court of Chancery, againſt one Collins of Saliſbury, for vending copies of the Spectator printed in Scotland. Collins had by this time become deeply concerned in copy-right, in conjunction with the London booktellers, ſo that it was very much his intereſt to loſe the cauſe; becauſe the advantage that would accrue to him from perpetuating the excluſive right, would far overbalance any trifling damages to which he could be ſubjected for ſelling Scotch Spectators, ſuppoſing it had been underſtood or intended that he ſhould pay. Collins's defence, therefore, it will be readily believed, was not managed with the greateſt accuracy; but the Court, upon hearing the caſe, being ſenſible of its importance, and perhaps ſuſpecting what was at bottom, referred the matter to the twelve Judges, and it has lain over ever ſince.

Thus matters ſtood, when, in conſequence of the above proceedings in Chancery, in the caſes of Millar *v.* Donaldſon, and *v.* Taylor, the plaintiff Millar at laſt brought his trial before the Court of King's Bench. The particulars of the trial are ſaid to have been theſe.

The ſubject in diſpute was Thomſon's Seaſons, a book firſt publiſhed in 1727. The monopoly of twenty-eight years expired in 1755. After that period, many editions of it were printed openly, with the names of the publiſhers affixed to the title-page, without any challenge from Millar, (who had purchaſed the copy-right from the author,) till 1763, when an injunction was obtained in Chancery againſt Donaldſon, and another againſt Taylor, to ſtop the ſale of an edition printed by Donaldſon; which injunctions, however, were afterwards in 1765 diſſolved upon anſwers, as already ſaid. Millar proceeded no farther in his ſuit with Donaldſon, but went on with Taylor, whom he ſeems to have thought a fitter perſon to be dealt with, in caſe at any time a compromiſe ſhould be needful. It may be obſerved, that Taylor had not printed the Seaſons, but only ſold ſome of Donaldſon's impreſſion.

The injunction having been diſſolved in the Court of Chancery, and the parties left to try the matter at common law, this of itſelf is proof poſitive, that hitherto the point was undetermined; and it is likewiſe proof, that the Court of Chancery conſidered it as a common-law queſtion, which did not fall to be determined

termined upon ſuggeſtions of equity in the Court of Chancery, but neceſſarily required the deciſion of the courts of law.

The trial having proceeded in the Court of King's Bench, the jury returned a verdict, finding the fact of publication; and the Court afterwards gave judgment in favour of the plaintiff, but not without contrariety of opinion.

The defendant at firſt took out a writ of error againſt the determination. Afterwards, however, it is informed, he was prevailed on to compromiſe matters with the bookſellers, who, it is ſaid, paid all his expences. Accordingly, he withdrew his writ of error.

A judgment of the Court of King's Bench, eſtabliſhing a point of the common law of England, not formerly decided, is undoubtedly of the higheſt authority in that country; but it cannot be admitted as concluſive of the preſent queſtion, which muſt neceſſarily be tried by the law of Scotland *.

The legiſlative recognitions, mentioned by Mr. Blackſtone, when looked into, are foreign to the purpoſe. The licenſing act, 13th Charles II. *cap.* 33. has already been ſpoke to. The act, 15th Q. Anne, *cap.* 19. § 112. only acknowledges that ſort of property, which was veſted by the act 8th of Q. Anne; and the act 5th of his preſent Majeſty, *cap.* 12. § 26. relates to ſelling pamphlets and newſ-papers without the author or publiſher's name.

The only other thing, founded on, is the Crown's prerogative copy-right to certain books, ſuch as Bibles and Acts of Parliament, which has already been explained, and has no connection with the preſent queſtion.

Theſe obſervations on the law of England are ſubmitted with the greateſt diffidence; and the defenders ſhall only add upon this head, that, if the law of England ſtands in favour of literary property, it is different from the law of Scotland, or of other countries. In France, patents are given to authors and bookſellers from ten to twenty years. And it appears that the great Colbert was of opinion, that even theſe gave too much

Colbert's political Teſtament.

* It is informed, that another injunction was lately moved for in the Court of Chancery, againſt Mr. Donaldſon, for printing Thomſon's Seaſons; and that the ſame was granted without any hearing on the merits, as it was underſtood in the Court, that Mr. Donaldſon was to bring the queſtion by appeal before the Houſe of Lords, which he is accordingly preparing to do.

opportunity to the ſtationers of Paris to oppreſs the bookſellers in other parts of the kingdom, whereby books were kept at an exorbitant price. It is believed, in Holland and in Germany, daily inſtances occur of temporary excluſive privileges to authors. Many of them are to be ſeen prefixed to their books. But it will not be pretended, that there is any ſuch thing there, as that which is now termed in England *a literary property at common law.*

V. Circumſtances of the preſent caſe.

V. The defenders ſhall not beſtow many words on the ſpecial circumſtances of this caſe, which plainly ſhow, that the purſuer, and thoſe in whoſe right he pretends to have come, had originally no view to a claim of property at common law, or to any thing further than a temporary right by patent in the work now in queſtion. The reverend author ſeems at firſt to have meant, that this work ſhould be abandoned to the public, as it is believed, he did not ſo much as enter it in Stationers Hall; but afterwards, having been told by his bookſeller, that ſomething might be made of reprinting it under an excluſive patent for a certain number of years, he aſſigned his right with that view, and a patent was obtained.

This patent, unguarded by penalties, and merely giving an excluſive right for the term of fourteen years, was clearly of no uſe, if ſuch right was antecedently in him not for fourteen years only, but for ever. If he could convey his property at common law, and if this conveyance would have been a ſufficient ground of action to the aſſignee againſt every violator of it, what higher right, what greater benefit, did the patent confer upon him? what better action could he maintain upon the patent, than upon his common law-property?

When Mr. Auſtin publiſhed the work with his patent prefixed, did he not hold forth to the world, that he had an excluſive right of printing this book for fourteen years, and for that term only? and did he not in effect acknowledge and declare, that, the term of the patent being elapſed, every other perſon might print and publiſh the work at pleaſure? If his preſent plea be good, he laid a ſnare for the lieges by founding only on his patent, which ought to bar him from the preſent action.

Neither was his conduct juſtifiable, in allowing the intended new edition to be advertiſed for two years and a half in all the newſ-

newſpapers without any challenge, and then bringing the preſent action upon titles ſcarce connected even with the aſſignee of the author, in order that he might run away with the profits, without being at the expence or trouble of the publication.

It may be added, that as the purſuer is a foreigner with reſpect to Scotland, and as this book of which he claims the property is the work of a foreigner, the queſtion is to be conſidered entirely in the ſame light, as if the action were brought at the inſtance of a *French* bookſeller, complaining of the defenders for having republiſhed in Scotland a book, which had been originally printed in France; and how far ſuch an action ought to be ſuſtained, even though the general doctrine of literary property were eſtabliſhed, may admit of conſiderable doubt.

The London bookſellers themſelves, have never underſtood, that the property of foreign authors extended to England, or that Voltaire, and other French writers of the firſt note, whoſe works are daily reprinted in England without leave aſked or given, would have any right to ſue the Engliſh publiſher, upon the common law of England. It would not be convenient to carry the doctrine ſo far; and yet it does not occur what better right an Engliſh bookſeller can have to come to Scotland, and there to maintain, that his property is invaded by a perſon who has done nothing more than exerciſed his buſineſs of a printer within Scotland, and who neither has encroached upon the right of any of the leiges of this country, nor can be accuſed of any violation of the common law of England having never ſet his foot in that kingdom, nor ſubjected himſelf to its laws.

The preſent queſtion can never be tried upon the common law of England, for the defenders are not bound to know any thing of that law, or to regulate their conduct by it in any ſhape. The purſuer muſt be able to ſay that, he has a property in this work by the common law of *Scotland*, which property happening to be accidentally in this country, has been unjuſtly ſeized by theſe defenders, whom he ſues before your Lordſhips, as the proper juriſdiction in order to obtain reſtitution from them. But upon what footing is it that the common law of Scotland can regulate the property of foreign authors with regard to works compoſed and publiſhed in another country? This would be giving it an effect beyond what the common law of England is allowed to have; and the conſequences of extending

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ing it ſo far would be highly inexpedient; as at this rate, we could not print a ſingle foreign book in Scotland, and we would be at the mercy of the bookſellers of other countries for every work not originally publiſhed in Scotland, ſo that the learning of this country would ſoon come within a very narrow compaſs.

It is ſubmitted, that theſe circumſtances ought to have weight in aid of the general argument; and upon the whole, the defenders, with humble confidence, expect to be abſolved from this action.

In reſpect whereof, &c.

ILAY CAMPBELL.

Anno Octavo Annæ Reginæ.

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.

WHEREAS printers, bookſellers, and other perſons have of late frequently taken the liberty of printing, reprinting, and publiſhing, or cauſing to be printed, reprinted, and publiſhed books, and other writings, without the conſent of the authors or proprietors of ſuch books and writings, to their very great detriment, and too often to the ruin of them and their families: For preventing therefore ſuch practices for the future, and for the encouragement of learned men to compoſe and write uſeful books; may it pleaſe your Majeſty, that it may be enacted, and be it enacted by the Queen's moſt Excellent Majeſty, by and with the advice and conſent of the Lords Spiritual and Temporal, and Commons in this preſent Parliament aſſembled, and by the authority of the ſame, That from and after the tenth day of April, One thouſand ſeven hundred and ten, the author of any book or books already printed, who hath not tranſferred to any other the copy or copies of ſuch book or books, ſhare or ſhares thereof, or the bookſeller or bookſellers, printer or printers, or other perſon or perſons, who hath or have purchaſed or acquired the copy or copies of any book or books, in order to print or reprint the ſame, ſhall have the ſole *right* and *liberty* of printing ſuch book and books for the term of *one and twenty years*, to commence from the ſaid tenth day of April, *and no longer*: And that the author of any book or books already compoſed, and not printed and publiſhed, or that ſhall hereafter be compoſed, and his aſſignee or aſſigns ſhall have the ſole *liberty* of printing and reprinting ſuch book and books for the term of *fourteen years*, to commence from the day of the firſt publiſhing the ſame, *and no longer*: And that if any other bookſeller, printer, or other perſon whatſoever, from and after the tenth day of April, One thouſand ſeven hundred and ten, within the times granted and limited by this act, as aforeſaid, ſhall print, reprint, or import, or cauſe to be printed, reprinted, or imported, any ſuch book or books, without the conſent of the proprietor or proprietors thereof firſt had and obtained in writing, ſigned in

the preſence of two or more credible witneſſes, or knowing the ſame to be ſo printed or reprinted, without the conſent of the proprietors, ſhall ſell, publiſh, or expoſe to ſale, or cauſe to be ſold, publiſhed, or expoſed to ſale, any ſuch book or books, without ſuch conſent firſt had and obtained, as aforeſaid, Then ſuch offender or offenders ſhall forfeit ſuch book or books, and all and every ſheet or ſheets, being part of ſuch book or books, to the proprietor or the proprietors of the copy thereof, who ſhall forthwith damaſk and make waſte paper of them: And further, That every ſuch offender or offenders ſhall forfeit one penny for every ſheet which ſhall be found in his, her, or their cuſtody, either printed or printing, publiſhed or expoſed to ſale, contrary to the true intent and meaning of this act, the one moiety thereof to the Queen's moſt excellent Majeſty, her heirs and ſucceſſors, and the other moiety thereof to any perſon or perſons that ſhall ſue for the ſame, to be recovered in any of her Majeſty's Courts of Record at Weſtminſter, by action of debt, bill, plaint, or information, in which no wager of law, eſſoign, privilege, or protection, or more than one imparlance ſhall be allowed.

And whereas many perſons may through ignorance offend againſt this act, unleſs ſome proviſion be made, whereby the property of every ſuch book, as is intended by this act to be ſecured to the proprietor or proprietors thereof, may be aſcertained, as likewiſe the conſent of ſuch proprietor or proprietors for the printing or reprinting of ſuch book or books may from time to time be known: Be it therefore further enacted by the authority aforeſaid, That nothing in this act contained ſhall be conſtrued to extend to ſubject any bookſeller, printer, or other perſon whatſoever, to the forfeitures or penalties therein mentioned, for or by reaſon of the printing or reprinting of any book or books without ſuch conſent as aforeſaid, unleſs the title to the copy, or ſuch book or books hereafter publiſhed, ſhall, before ſuch publication, be entered in the regiſter-book of the Company of Stationers, in ſuch manner as hath been uſual, which regiſter-book ſhall at all times be kept at the Hall of the ſaid Company; and unleſs ſuch conſent of the proprietor or proprietors be in like manner entered, as aforeſaid; for every of which ſeveral entries ſixpence ſhall be paid, and no more; which ſaid regiſter-book may, at all ſeaſonable and convenient times, be reſorted to, and inſpected by any bookſeller, printer, or other perſon, for the purpoſes before mentioned, without any fee or reward;

and

and the clerk of the ſaid Company of Stationers ſhall, when and as often as thereunto required, give a certificate under his hand of ſuch entry or entries, and for every ſuch certificate may take a fee not exceeding ſixpence.

Provided nevertheleſs, That if the clerk of the ſaid Company of Stationers for the time being, ſhall refuſe or neglect to regiſter or make ſuch entry or entries, or to give ſuch certificate, being thereunto required by the author or proprietor of ſuch copy or copies, in the preſence of two or more credible witneſſes, That then ſuch perſon and perſons ſo refuſing, notice being firſt duly given of ſuch refuſal, by an advertiſement in the Gazette, ſhall have the like benefit as if ſuch entry or entries, certificate or certificates, had been duly made and given; and that the clerks ſo refuſing, ſhall, for any ſuch offence, forfeit to the proprietor of ſuch copy or copies the ſum of twenty pounds, to be recovered in any of her Majeſty's Courts of Record at Weſtminſter, by action of debt, bill, plaint, or information, in which no wager of law, eſſoign, privilege, or protection, or more than one imparlance ſhall be allowed.

Provided nevertheleſs, and it is hereby further enacted by the authority aforeſaid, That if any bookſeller or bookſellers, printer or printers, ſhall, after the ſaid five and twentieth day of March, One thouſand ſeven hundred and ten, ſet a price upon, or ſell, or expoſe to ſale, any book or books at ſuch a price or rate as ſhall be conceived by any perſon or perſons to be high and unreaſonable; It ſhall and may be lawful for any perſon or perſons to make complaint thereof to the Lord Archbiſhop of Canterbury for the time being; the Lord Chancellor, or Lord Keeper of the Great Seal of Great Britain for the time being; the Lord Biſhop of London for the time being; the Lord Chief Juſtice of the Court of Queen's Bench, the Lord Chief Juſtice of the Court of Common Pleas, the Lord Chief Baron of the Court of Exchequer, for the time being; the Vice-Chancellors of the two Univerſities for the time being, in that part of Great Britain called England; the Lord Preſident of the Seſſions for the time being; the Lord Juſtice General for the time being; the Lord Chief Baron of the Exchequer for the time being; the Rector of the College of Edinburgh for the time being, in that part of Great Britain called Scotland; who, or any one of them, ſhall and have hereby full power and authority, from time to time, to ſend for, ſummon, or call before him

or

or them ſuch bookſeller or bookſellers, printer or printers, and to examine and enquire of the reaſon of the dearneſs and enhancement of the price or value of ſuch book or books by him or them ſo ſold or expoſed to ſale; and if upon ſuch enquiry and examination it ſhall be found, that the price of ſuch book or books is enhanced, or any wiſe too high or unreaſonable, then and in ſuch caſe the ſaid Archbiſhop of Canterbury, Lord Chancellor or Lord Keeper, Biſhop of London, two Chief Juſtices, Chief Baron, Vice-Chancellors of the Univerſities, in that part of Great Britain called England; and the ſaid Lord Preſident of the Seſſions, Lord Juſtice General, Lord Chief Baron, and Rector of the College of Edinburgh, in that part of Great Britain called Scotland, or any one or more of them, ſo enquiring and examining, have hereby full power and authority to reform and redreſs the ſame, and to limit and ſettle the price of every ſuch printed book and books, from time to time, according to the beſt of their judgments, and as to them ſhall ſeem juſt and reaſonable; and in caſe of alteration of the rate or price from what was ſet or demanded by ſuch bookſeller or bookſellers, printer or printers, to award and order ſuch bookſeller and bookſellers, printer and printers, to pay all the coſts and charges that the perſon or perſons ſo complaining ſhall be put unto, by reaſon of ſuch complaint, and of the cauſing ſuch rate or price to be ſo limited and ſettled; all which ſhall be done by the ſaid Archbiſhop of Canterbury, Lord Chancellor or Lord Keeper, Biſhop of London, two Chief Juſtices, Chief Baron, Vice-Chancellors of the two Univerſities, in that part of Great Britain called England; and the ſaid Lord Preſident of the Seſſions, Lord Juſtice General, Lord Chief Baron, and Rector of the College of Edinburgh, in that part of Great Britain called Scotland, or any one of them, by writing under their hands and ſeals, and thereof public notice ſhall be forthwith given by the ſaid bookſeller or bookſellers, printer or printers, by an advertiſement in the Gazette; and if any bookſeller or bookſellers, printer or printers, ſhall after ſuch ſettlement made of the ſaid rate and price, ſell, or expoſe to ſale, any book or books at a higher or greater price than what ſhall have been ſo limited and ſettled, as aforeſaid, Then and in every ſuch caſe, ſuch bookſeller and bookſellers, printer and printers, ſhall forfeit the ſum of five pounds for every ſuch book ſo by him, her, or them ſold or expoſed to ſale, one moiety thereof to the

Queen's

Queen's moſt Excellent Majeſty, her heirs and ſucceſſors, and the other moiety to any perſon or perſons that ſhall ſue for the ſame, to be recovered, with coſts of ſuit, in any of her Majeſty's Courts of Record at Weſtminſter, by action of debt, bill, plaint, or information, in which no wager of law, eſſoign, privilege, or protection, or more than one imparlance ſhall be allowed.

Provided always, and it is hereby enacted, That nine copies of each book or books, upon the beſt paper, that from and after the ſaid tenth day of April, One thouſand ſeven hundred and ten, ſhall be printed and publiſhed, as aforeſaid, or reprinted and publiſhed with additions, ſhall, by the printer and printers thereof, be delivered to the warehouſe-keeper of the ſaid Company of Stationers for the time being, at the Hall of the ſaid Company, before ſuch publication made, for the uſe of the Royal Library, the Libraries of the Univerſities of Oxford and Cambridge, the Libraries of the four Univerſities in Scotland, the Library of Sion College in London, and the Library commonly called the Library belonging to the Faculty of Advocates at Edinburgh, reſpectively; which ſaid warehouſe-keeper is hereby required, within ten days after demand by the keepers of the reſpective Libraries, or any perſon or perſons by them or any of them authorized to demand the ſaid copy, to deliver the ſame, for the uſe of the aforeſaid libraries; and if any proprietor, bookſeller, or printer, or the ſaid warehouſe-keeper of the ſaid Company of Stationers, ſhall not obſerve the

his act therein, That then he and they, ſo making

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the value of the ſaid printed copies, the ſum

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Provided,

Provided, That nothing in this act contained, do extend, or ſhall be conſtrued to extend, to prohibit the importation, vending or ſelling of any books in Greek, Latin, or any other foreign language, printed beyond the ſeas; any thing in this act contained to the contrary notwithſtanding.

And be it further enacted by the authority aforeſaid, That if any action or ſuit ſhall be commenced or brought againſt any perſon or perſons whatſoever, for doing or cauſing to be done any thing in purſuance of this act, the defendants in ſuch action may plead the general iſſue, and give the ſpecial matter in evidence; and if upon ſuch action a verdict be given for the defendant, or the plaintiff become nonſuited, or diſcontinue his action, then the defendant ſhall have and recover his full coſts, for which he ſhall have the ſame remedy as a defendant in any caſe by law hath.

Provided, That nothing in this act contained ſhall extend, or be conſtrued to extend, either to prejudice or confirm any right that the ſaid Univerſities, or any of them, or any perſon or perſons have, or claim to have, to the printing or reprinting any book or copy already printed, or hereafter to be printed.

Provided nevertheleſs, That all actions, ſuits, bills, indictments, or informations for any offence that ſhall be committed againſt this act, ſhall be brought, ſued, and commenced within three months next after ſuch offence committed, or elſe the ſame ſhall be void and of none effect.

Provided always, That after the expiration of the ſaid term of fourteen years, the ſole *right* of printing or diſ
ſhall return to the authors thereof, if they are
another term of *fourteen years*.

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