

Andrew Millar, Daniel Midwinter, William Innys, John Knapton, Samuel Birt, Daniel Brown, Thomas Longman, Richard Hett, Charles Hitch, John Shuckburgh, Mary Senex, John Rivington, Francis Gosling, and the Executors of Isaac Clarke, John Pemberton, and Aaron Ward, of London, Bookfellers, - - - - - } Appellants.

Alexander Kincaid, Gavin Hamilton, John Balfour, John Paton, William Drummond, John Traile, William Sands, Gideon Crawford, Lauchlan Hunter, Janet Brown, Relict of William Brown, the Executors of Alexander Symers, Alexander Brymer, William Hamilton, William Millar, Alexander Dunning, John Yare, Andrew Beveridge, the Executors of Gavin Drummond, and John Aitkin, Bookfellers in Edinburgh; John Barrie, Andrew Stalker, Alexander Carlisle, and Robert Fowlis, Bookfellers in Glasgow; - - - - - } Respondents.

The CASE of the Respondents.

THE Appellants, who are Seventeen Bookfellers in London, jointly instituted a Suit before the Lords of Council and Session at Edinburgh, against the Respondents jointly, who are Twenty Bookfellers of Edinburgh, and Four Bookfellers of Glasgow, and who are all separate Traders; and by their Libel charged,

That, notwithstanding of the good Laws made, and in Force, for the Encouragement of Learning, by vesting of Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned, in an Act made in that behalf in the 8th Year of Queen Anne, and another Act made in the 12th Year of his present Majesty's Reign, For the prohibiting the Importation of Books reprinted abroad, and first composed or written, and printed, in Great-Britain; by the former of which Statutes, the Property of the Copy of every Book was vested in the Author, or his Assignees, for the Term of Fourteen Years; during which, if any other Person should print, reprint, or import, any such Books, without the Consent of the Proprietors thereof; or, knowing the same to be so printed or reprinted, should sell, publish, or expose to Sale, any such Books; that such Offenders should incur the Forfeitures and Penalties in the Statute specified; one Moiety thereof to his Majesty, and the other Moiety thereof to any Person who shall sue for the same.—— And by the other of the said Statutes it was Enacted, That, from and after the 29th Day of September 1739 Years, it shall not be lawful for any Person or Persons to import or bring into this Kingdom any Book or Books first composed or written, and printed and published, in this Kingdom, and reprinted in any other Place or Country whatsoever; or, knowing the same to be so reprinted or imported, to sell, publish, or expose to Sale, any such Book or Books; and that under the Penalties and Forfeitures in the said last-mentioned Statute specified.—— And moreover, That, abstracting from the Penalties of the said Statutes, all Persons contravening the Prohibitions thereof, and thereby encroaching on the Property of their Fellow-Subjects, to the great Discouragement of Learning, and Prejudice of the Interest of the Publick, become liable to an ordinary Action in Law or Equity, that they may be compelled to render Damage to the Party aggrieved, in respect of such Books as they should have sold, contrary to the Prohibitions of the Law, and to render up such Books or Copies as they might still have upon hand, and are not legally intitled to expose the same to Sale, as having been printed, reprinted, or imported, contrary to the Law, and to the private Interest of the lawful Proprietors of the Copies of such Books; and are further liable to pay full Costs of Suit to such Proprietors.

And that the Plaintiff the said Andrew Millar is lawfully vested in, and intitled to, the Property of the Copies of the following Books, *inter alios*, The History of the Reformation of the Church of England. The Second Edition corrected. In Three Volumes.

An Exposition of the Thirty-nine Articles of the Church of England. The Fourth Edition. The above Two written by Gilbert Burnett, D. D. late Lord Bishop of Sarum.

The Oeconomy of Love. The Third Edition.

All the Works of John Lock, Esq; with alphabetical Tables. The Fourth Edition. In Three Volumes, Folio.

The History of the Adventures of Joseph Andrews, and his Friend Mr. Abraham Adams. Written in Imitation of the Manner of Cervantes, Author of Don Quixote. The Second Edition, revised and corrected by the Author. In Two Volumes in Duodecimo.

Sermons on several important Subjects. By James Foster. In Two Volumes.

And that he the said Andrew Millar, and the other Plaintiffs before-named, are the Proprietors of the Copy of a Book, intituled, Cyclopaedia, or, An universal Dictionary of Arts and Sciences. Written by E. Chalmers, F. R. S. which they had purchased at a very great Price, the Plaintiff Andrew Millar having paid no less than 100 l. Sterling for a 64th Share thereof.

And that yet true it was, that the Persons therein after-mentioned; *viz.* Alexander Kincaid, Gavin Hamilton, John Balfour, John Paton, William Drummond, John Trail, William Sands, Gideon Crawford, Lauchlan Hunter, Relict of William Brown, Bookfeller, Alexander Symers, Alexander Brymer, William Hamilton, William Millar, Alexander Dunning, John Yare, Andrew Beveridge, Gavin Drummond, and John Aitkin, all Bookfellers in Edinburgh; John Barrie, Andrew Stalker, Alexander Carlisle, and Robert Fowlis, all Bookfellers in Glasgow; had all and each of them presumed to transgress the Laws before-mentioned, and to injure the Plaintiffs in their Property; in so far as they, the Persons complained upon, had, contrary to the Form, and true Intent and Meaning, of the said Statutes, within their respective Houses and Shops in Edinburgh and Glasgow, within the Space of Three Months then last past, or at some other Time or Times since the First Publication of the Books before-mentioned, taken upon them to print, reprint, or import, or cause to be printed, reprinted, or imported, the several Books before-mentioned, or one or other of them, or some Part of them, without the Consent of the Proprietors obtained in Writing: Or that the Defendants, knowing the said Books to be so printed, or reprinted, without Consent of the Proprietors, had taken upon them to sell, publish, or expose to Sale, or had caused to be sold, published, or exposed to Sale, the Books before-mentioned, or some or other of them, without such Consent first had and obtained, as aforesaid.

And also, That the said Twenty-four Defendants had taken upon them, at the respective Places aforesaid, and at different Times since the 29th of September 1739. to import, or bring into this Kingdom for Sale, the Books before-mentioned, or some of them: And that all the said Books were first composed or written, and printed and published, in this Kingdom, and were thereafter printed in Ireland, Holland, or elsewhere without this Kingdom; or at least, that the Defendants, knowing the same to be so reprinted or imported, contrary to the Statute, had taken upon them to sell, publish, or expose to Sale, such Books.

And that therefore the Premises being sufficiently tried and verified before the Lords of Council and Session, the Defendants ought and should be adjudged to incur, suffer, and pay, the several Penalties and Forfeitures, which are enacted against Offenders in such Case by the above Statutes, which they the above Defendants had counteracted, at least,

‘ least, and in the Option of the Plaintiffs, That the Defendants ought to be ordained, by the Decree of the Lords, to pay Damages to the Plaintiffs for every surreptitious Copy, whether printed at home or abroad, of the Books, whereof the Copies are the Property of the Plaintiffs, that had been then already sold by the Defendants, or any of them; and to deliver up all such unlawful or surreptitious Copies as then remained in the Possession, Power, or Custody, of the Defendants, to the Plaintiffs, or their Order, to the end the same might be damasked, destroyed, or disposed of at the Plaintiffs Pleasure.’

‘ And, lastly, That the said Defendants might be decerned and ordained, jointly and severally, to pay to the Plaintiffs their full Cofts of Suit.’

To this extraordinary Suit, which the Appellants admit to be the First of the Kind in Scotland, the Defendants, on the 9th Day of June 1743. appeared, and denied the Relevancy and Suggestions of the Libel.

The Cause being called before the Lord Ordinary, the Plaintiffs Advocate repeated their Libel, and the Acts of Parliament therein stated; and declared, That, AT PRESENT, he did not insist for the Penalties in the Acts of Parliament, but only upon the common Law; and that, AT PRESENT, he restricted their said Libel to the Property of the Two Books, the *Oeconomy of Love*, and the *Cyclopædia*; and for the Profits which the Defendants had made by Sale of those Books, and the Damages sustained by the Plaintiffs.

In Answer to which, the Defendants Counsel insisted, That the Defendants could not be subjected to the Penalties of the said Statutes, and that the Plaintiffs had produced no Title to the said Two Books; and that the Defendants were not liable by Law, in this sort of Action, for any Damages whatsoever.

The Plaintiffs Counsel, by his Reply, insisted on Two Certificates under the Hand of the Clerk of Stationers-Hall, London, as a Proof, that the above Two Books are there entered as the Property of the Plaintiffs; and further insisted, That such Actions as this were sustained at Common Law by the Courts in England.

The Lord Ordinary took time to consider of this Debate, and appointed both Parties to give in Memorials in Writing.

The Plaintiffs, by their Memorial, insisted, That they had brought their Action against the Defendants, founded upon the said Statutes, for recovering the Penalties thereby Enacted, and upon the Common Law for recovering Damages—That, the Process coming of course before the Lord Ordinary, the Plaintiffs did, *pro loco et tempore*, restrict their Libel to these Two Articles;—the *Cyclopædia*, or *Chalmers’s Universal Dictionary*, and the *Oeconomy of Love*; and, waving all Penalties Enacted by the foresaid Statutes, did insist on the other Conclusion of their Libel for Damages; and the Plaintiffs insisted the Lord Ordinary would find their Action competent, and oblige the Defendants to discover upon Oath what Number of the aforesaid Books they had upon Hand, and what Number of the same they had printed, or reprinted, or imported, or sold, and at what Prices, and what Profits they made thereby: And, in Answer to the Objection made by the Defendants, That the Plaintiffs had produced no Title to the Two Books, to which the Libel was restricted, the Plaintiffs insisted, That they were not obliged to bring any other Proof thereof, than the Copies of the Two Entries in the Books of Stationers-Hall. The Copies of those Entries are annexed to the Process, and are in the Words following:

‘ March 2d, 1735.

‘ Then entered for his Copy the *Oeconomy of Love*, a Poetical Essay.’

‘ March 24th, 1740. Then entered for their Copy *Cyclopædia*, or, *An Universal Dictionary of Arts and Sciences*, containing an Explication of the Terms, and an Account of the Things signified thereby, in the several Arts both Liberal and Mechanical; and the several Sciences Human and Divine: The Figures, Kinds, Properties, Productions, Preparations, and Uses, of Things Natural and Artificial: The Rise, Progress, and State, of Things Ecclesiastical, Civil, Military, and Commercial; with the several Systems, Sects, Opinions, &c. among Philosophers, Divines, Mathematicians, Physicians, Antiquaries, Critics, &c. The Whole intended as a Course of Antient and Modern Learning, extracted from the best Authors, Dictionaries, Journals, Memoirs, Transactions, Ephemerides, &c. In several Languages. By E. Chalmers, F. R. S. The Fourth Edition, corrected, and amended. With some Additions. In Two Volumes.’

The Defendants delivered in an Answer to the said Memorial delivered by the Plaintiffs; and thereby, after relying on their foregoing Defences, insisted, That it is not so much as libelled, that either of the Two Books in Question were ever entered at Stationers-Hall; and that the said Certificates of the Entries in Stationers-Hall did not mention the Plaintiffs Title to the Two Books in Question, or the Consent of the Proprietors, as required by the Statutes; and, with respect to the Book called the *Oeconomy of Love*, the Defendants insisted the same was first published anonymous, and the Author thereof was never known; so that no Person whatsoever could be intitled to the Property of the said Book; and that the only Action warranted by the Statute, was an Action for the Penalties.

The Plaintiffs delivered in a further Memorial to the Lord Ordinary; and, notwithstanding they had before restricted their Libel to the Two Books before-mentioned, they, by this last Memorial, insisted to restrict the same, *pro loco et tempore*, to the Three Books, the *Cyclopædia*, the *Oeconomy of Love*, and the *Adventures of Joseph Andrews*; and annexed thereto certain Instruments, which, the Plaintiffs pretended, made out their Titles to those Books.

And the Plaintiffs further insisted, That, so far as their Libel was founded upon the Statute of the 12th Year of his present Majesty, it required no Title of Property in the Persons of the Plaintiffs, it being *Actio popularis*, which every Subject is intitled to pursue; and that therefore, as the Plaintiffs have first brought their Action against the Defendants for recovering these Penalties, they insisted there could be no Difficulty as to the Relevancy of the Action; and, for Proof, they referred to the Defendants Oaths, in relation to the several Facts, which, in Terms of the Statute, are necessary to be proved; viz.—First, That they did reprint, and import for Sale from Foreign Parts, all and each of the Three Books above-mentioned—Secondly, Or that, knowing the same to be reprinted and imported, they did sell, and expose to Sale, or caused the said Books to be sold, and exposed to Sale—And, in the last place, what Numbers of those Books, or Sheets thereof, were then in the Defendants Custody or Possession—And that, these Facts being proved, the Application of the Law was obvious and easy.

2. The Plaintiffs waving all Penalties, on the Statutes of the 8th of the Queen, thereby insisted against the Defendants for Damages at Common Law, or in Equity; the Proof whereof the Plaintiffs thereby insisted to refer to the Defendants respective Oaths: And further insisted, That, as to this Point, they were not obliged to enter into any Question concerning the Entry of those Books in Stationers-Hall: it being totally immaterial, whether they were ever entered there or not.

3. The Plaintiffs concluded this last Memorial with praying the Lord Ordinary to find the Action competent upon both Branches of the Libel; and therefore to ordain,

1. The Defendants to set forth upon Oath what Books they had imported, or sold, &c. contrary to the Statute of the 12th of his present Majesty; and that it being proved, That the Defendants have transgressed in the Terms of the aforesaid Statute, to ordain such of the aforesaid Books, and Sheets thereof, as are upon Hand, to be damasked, and made Waste-paper of, and to forfeit the Sum of 5*l.* and double the Value of every Book so imported, sold, published, or exposed to Sale, the one Moiety thereof to his Majesty, the other to the Plaintiffs.
2. To ordain the Defendants to set forth upon Oath, upon the other Branches of the Libel, touching their having printed, reprinted, or imported, &c. any of the aforesaid Books; as also to set forth upon Oath, what Numbers of those Copies are upon Hand, what Numbers were by them respectively sold, and at what Prices; and, upon Proof of the Fact, to ordain such of the Books, or Sheets, as are upon Hand, to be delivered up; and to account to the Plaintiffs for the Copies, as they have respectively sold; and, further, to pay Cofts of Suit.

The Defendants delivered to the Lord Ordinary their Answer to this last Memorial. The Lord Ordinary having reported the Cause to the Lords of Sessions, they found, ‘ That there lies no Action of Damages in this Case, and remitted the Cause to the Lord Ordinary to proceed accordingly.’

The

9 June 1743. The Defendants appeared to this Libel.

23d June 1743.

The Plaintiffs Memorial given in to the Lord Ordinary.

Andrew Millar the Whole.	Shares.
Charles Rivington	1
Richard Hett	1
Samuel Birt	1
John Shuckburgh	2
Daniel Browne	2
Isaac Clarke	2
Charles Hitch	2
Andrew Millar	3
John Pemberton	4
Mary Senex	4
John and Paul Knaption	4
Aaron Ward and Dan. Midwinter	5
Francis Gosling	6
Edward Symon	8
William Inyis	8
Thomas Longman	11
	Shares 64

28th June 1743. The Defendants Answer to the Plaintiffs said Memorial.

3d Feb. 1744. The Plaintiffs Second Memorial.

10th Feb. 1744. The Defendants Answer to the Plaintiffs Second Memorial.

4th July 1745. Final Interlocutory.

The Plaintiffs preferred their Petition to the Lords against this Interlocutor; to which the Defendants having, on the 29th of July 1746. put in their Answer,

The Cause came to be reheard before the Lords, who found, " That an Action of Damages lies at the Plaintiffs Instance, to the Extent of the Profits made by the Defendants, on such of the Books libelled as have been entered in Stationers-Hall, and reprinted in Britain, and found that the Defendants ought to discover, upon Oath, the Extent of the Profits; and with respect to the Books reprinted abroad and imported, the Lords declared they would hear Parties Procurators on the Second Sederunt Day of January then next, upon this Question, Within what Length of Time the Penalties enacted by the 12th of King George can be sued for."

The Lords found " That the Claim for the Penalties enacted by the Act of the 12th of the King is limited to Two Years, by the Statutes of the 31st of Queen Elizabeth; and found, the Defendants must discover, upon Oath, the Extent of the Profits on the Books reprinted abroad, and imported, and sold by them; and remitted to the Lord Ordinary to proceed accordingly."

The Defendants petitioned the Lords to vary their Interlocutor of the 24th of December 1746; and thereby insisted, That the Cyclopædia was originally published by the Author in the Year 1727. and that therefore the First 14 Years expired in 1741. and that Mr. Chambers died before that Period; so that the Plaintiffs sole Right of printing that Book expired above Two Years before they commenced the present Action; and the Petitioners thereby prayed their Lordships to review the Interlocutor of the 24th of December 1746. and to find according to their former Interlocutor of the 4th of July 1746; that no Action for Damages lies in the present Case, at least to confine their Interlocutor to such of the Books as had been entered in Stationers-Hall before Publication, agreeable to the said Statute of Queen Anne.

The Plaintiffs put in their Answer to the foregoing Petition, and thereby admitted the Cyclopædia was first printed and published in 1727. and that the Author died before the Year 1740; but insisted, that the Work was greatly altered and improved, with large Additions, in the after Editions of that Work, and rendered quite a different Work from that first published in the Year 1727. although it still bore the same Name and Title, and was afterwards published under the Name of the Second, Third, and Fourth Editions.

The Cause being called before the Lords, was further adjourned to the 10th of November; and the Lords allowed Parties Procurators to be heard on the Cause, and particularly, Whether, by the Law of Scotland, an Action lay at the Instance of an Author or Proprietor of a Book before the Statute of the 8th of Queen Anne.

The Cause was further heard and debated before the Lords of Session: Who found,

1. " That no Action lies on the Statute for Offences against the same, except when it is brought within Three Months of the committing such Offence.
2. " That no Action lies upon this Statute, except for such Books as have been entered in Stationers-Hall in Terms of the Statute.
3. " That no Action of Damages lies upon the Statute, and remitted the Lord Ordinary to proceed accordingly.

The Plaintiffs petitioned the Lords to vary their last Interlocutor.

The Defendants having put in their Answer to this Petition, the Cause came on again before the Lords of Session, on the

When their Lordships found, That no Action of Damages does lie upon, or in Consequence of, the Statute, but only for the Penalties: And therefore adhered to their former Interlocutor.

The Plaintiffs proceeded upon this last-mentioned Interlocutor; and, on the

The Cause being brought on before the Lord Ordinary, the Plaintiffs Counsel resumed the Interlocutors of the 2d Dec. 1747. and 7th June 1748. finding, " That no Action lies on the Statute, except for such Books as had been entered in Stationers-Hall in Terms of the Statute, and remitting to the Lord Ordinary to proceed further in the Cause;" and represented, That it was always objected by the Defendants, from the Beginning of this Cause, to the Entries of all the Three Books; viz. Chalmers's Dictionary, The Oeconomy of Love, and the History of Joseph Andrews; and albeit satisfying Answers were made to these Objections, both in the former Pleadings, and in the Petitions and Answers, That yet that Point about the Entry of these Books in Stationers-Hall had hitherto received no Decision in the Court; and therefore insisted for the Plaintiffs, That the Lord Ordinary would find, That these Three Books were duly entered in Stationers-Hall, in respect of the Three Certificates of such Entries produced in the Process, that so the Plaintiffs might proceed in what remained undetermined in the Cause.

The Cause being again called before the Lord Ordinary, the Plaintiffs Counsel again resumed the former Interlocutors; and prayed it might be found, That the Books before-mentioned were duly entered in Stationers-Hall in Terms of the Statute; and insisted against the Defendants, For the Penalties in the Statute: Whereunto the Defendants Counsel answered, That for the present he would not insist on any Objection to the Evidence, with respect to the Entry of the Books in Stationers-Hall, but agreed to dispute the Point with respect to the Penalties, upon the Supposition that they were regularly entered.—Whereupon the Lord Ordinary, in respect the Defendants Counsel did not at present object to the Evidence of the Books being regularly entered in Stationers-Hall, found no Necessity for determining that Point, but allowed the Process FOR THE PENALTIES to proceed, as if the Books were regularly entered.

After thus proceeding under the said Interlocutors, the Plaintiffs, on the First Day of December 1749. interposed their Appeal to your Lordships from the said Interlocutors of the 4th of July 1746. and the Interlocutor of the 24th of December 1746. in so far as this last finds, That the Action of Damages did only lie at the Plaintiffs Instance, to the Extent of the Profits made by the Defendants on such of the Books as had been entered in Stationers-Hall, and reprinted in Britain; and also from the Interlocutors of the 2d December 1747. and the 7th of June 1748: But the Respondents humbly hope the Appellants said Appeal shall be dismissed, with Costs, among others, for the following

R E A S O N S :

For that this Action, which is of the First Impression in Scotland, appears, from the Libel, to be complicated.—One Branch is, for the Recovery of different Penalties given by different Statutes; one Half to the Crown, the other to the Informer; and yet the King's Advocate is not a Party, nor do the Plaintiffs sue as well for the Crown as themselves.—The Second Branch is, an Action upon the Statutes for Damages; which is not authorized by the Statutes: And, if it is taken as an Action upon the Case, it cannot be joined with an Action for the Penalties.

For that it is brought by Persons, who state in their Libel separate Rights to several Books, on which their Libel is founded against the Defendants, who are Twenty-four separate Traders, without charging them to be joint Offenders.

For that if, in either Light, this Sort of Action could be maintained, the Plaintiffs have not pursued the Requisites of this Statute, the Plaintiffs Title from the Author not being in any Instance proved or entered as the Act requires; and particularly as to the Cyclopædia, the Fourteen Years allowed by the Statute were expired, and the Author was dead long before the Action was brought.

That

Objection. That this is an Action in Nature of a Bill in Equity, for an Account of Profits, waving the Penalties.

Answer. This is a Mistake in Fact; for the Libel is expressly for *Penalties and Damages*, and the Attempt to vary the Nature of the Cause was *illegal*, and appears not to have been *really intended*: For, as the Plaintiffs first *restricted* their Libel to *Two Books*, and *waved Penalties*; and, in the next place, *restricted* it to *Three Books*, and *insisted* on the Penalties under the Act of the 12th of his present Majesty; so in the very last Step of the Cause they *resumed*, and insisted to proceed for the Penalties given by the Statute of Queen Anne.

IV. That by the Law of *Scotland*, and the Method of proceeding in the Court of Session, whether as at Law, or *ex nobili officio*, Defendants are not *put to their Oaths* but *after Issue joined*, and as the *conclusive Evidence* between the Parties; and even that is not allowed for *Penalties*, or to *ascertain Damages*.

For which, among other Reasons to be offered at the Hearing, the Respondents humbly hope the Appellants said Appeal shall be Dismissed with Costs; and that this Honourable House will make such other Order in the Premises, as shall be just.

11^o February 1750.

A. HUME-CAMPBELL.

C. YORKE.

It is Declared that the Action brought by the Appell^{ts} in the Court of Session in Scotland, improperly & inconsistently brought, by demanding at the same time a Discovery and Account of the Profits of the Books in Question, and also the Penalties of the Act of Parliam^t which the Appell^{ts} have now absolutely waived in the Proceedings below, and also by joining several Pursuers claiming distinct and independent Rights in different Books in the same Action, and that therefore the points determin'd by the said Interlocutors could not regularly come in Question in this Cause, and therefore Order'd & Adjudg'd That the said several Interlocutors be Revers'd without prejudice to the Determination of any of the said points, when the same shall be properly brought in Judgment; and it is hereby also Declared, that the Libel in this Cause is non-relevant, and Order'd that the said Court of Session do proceed accordingly.

Millar, *and Others*, Appellants.

Kincaid, *and Others*, Respondents.

The CASE of the Respondents.

*To be Heard at the Bar of the HOUSE OF
PEERS, on the Day of*

175