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# LEGAL RECREATIONS,

OR

## POPULAR AMUSEMENTS

IN THE

L A W S O F E N G L A N D .

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BY A BARRISTER AT LAW.

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V O L . II.

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

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being conscious that he could not recover, by reason of the concealment. Therefore I think the plaintiff cannot recover. *Gibbon against Paynton, King's Bench, 4 Burrow's Reports, 2293. 17 April 1769.* The rule for a new trial was therefore discharged.

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

## LITERARY PROPERTY.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 1st. Whether the copy of a book, or literary composition, belongs to the Author, by the common-law.
- 2d. Whether the common law-right of authors to the copies of their own works is taken away by 8 Ann. c. 19.

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>a</sup> 29 June 1566. *Strype's Life of Archbishop Parker*, 221.

<sup>b</sup> *Strype's Life of Archbishop Whitgift*, 222-3. and appendix No. 24.



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

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

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

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

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

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

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

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

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

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

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

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

The ordinance therefore prohibits printing, without con-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I shall consider the bill as it passed into a law, and the arguments drawn from the alterations made in the course of  
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its passing in the House of Commons, when I come to the second head or question which I proposed to speak to; and now proceed upon the fact of usage and authority since 1709.

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

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

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

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

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

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

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

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

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

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

The defendants prayed a review.

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

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

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

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

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

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

The plaintiffs appealed to the House of Lords. In their reasons annexed to the printed case, they say "The Court of Chancery has construed 3 *Ann*, as declaratory of an author's property; and the remedies and penalties thereby given for a limited term, upon certain conditions, as additional sanctions only, to preserve that property from being injured." And in another part of the reasons, they insist "That it is like the case of a patent granted for any new and useful invention: the patentee, in consequence of his property, is intitled to the ordinary relief in courts of law and equity."

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

*Jac.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lord

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

In this case too, the injunction was acquiesced under.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Again,

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was to the following effect—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But how is possession to be taken, or any act of occupancy to be asserted, on mere intellectual ideas? All writers agree, that no act of occupancy can be asserted on a bare idea of the mind. Some act of appropriation must be exerted, to take the thing out of a state of being common, to denote the accession of a proprietor: For, otherwise, how should other persons be apprized they are not to use it? These are  
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acts that must be exercised upon something. The occupancy of a thought would be a new kind of occupancy indeed. By what outward mark must the property denote approbation? And if these are void of that which the act of occupancy requires, it is a proof to me they cannot be the object of property.

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

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

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

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

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

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

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

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

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

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

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

"That every man is intitled to the fruits of his own labour," I readily admit. But he can only be intitled to this, according to the fixed constitution of things; and subject to the general rights of mankind, and the general rules  
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of property. He must not expect that these fruits shall be eternal; that he is to monopolize them to infinity; that every vegetation and increase shall be confined to himself alone, and never revert to the common mass. In that case, the injustice would lie on the side of the monopolist, who would thus exclude all the rest of mankind from enjoying their natural and social rights.

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

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

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

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

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

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

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

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

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

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

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

But the property here claimed is all ideal; a set of ideas which have no bounds or marks whatever, nothing that is capable of a visible possession, nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment, than by mental possession or apprehension; safe and invulnerable, from their own immateriality: no trespass can reach them; no tort affect them; no fraud or violence diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself: and these are what the defendant is charged with having robbed the plaintiff of.

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

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

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

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

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

If the author will pretend to a perpetual right in those,  
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he must prove he has a perpetual right to the ideas which produced them.

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

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

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

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

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

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

But



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Immense ideas of property were raised in the South-sea  
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stock,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

The patents *cum privilegio* granted the book to particular persons, for a certain term of years.—From hence it was said, “it was no innovation in authors to claim this exclusive right.” The patents that were asserted in this part of the arguments, were taken from *Ames’s* *Typographical Antiquities*; and were so arbitrary gross and absurd, that one would not have expected such a quotation. *Groote* had a patent for the primer of *Salisbury Use*; *Saxton*, for all maps and charts of *England*; and *Tallis* and *Birde*, and also *Morley*, for the printing of musick; and *Simcoke*, for all things printed on one side of a sheet, or any part of a sheet; provided the other side was white paper. In all these patents there were penalties inflicted; and they had power given them to seize books, and search houses. They are too gross, to be argued from: but they exclude all notion of proprietary right.

The grant was given to the printers themselves, without any regard to the authors, or new compositions. The very name of being patents to printers, and the limits fixed, shew that they exclude all ideas of a literary right, and a property subsisting in the author.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

But

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

That\* unanimity never could have happened, if we did

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

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

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

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

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

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

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

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

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

The



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I allow them sufficient to shew “it is agreeable to the principles of right and wrong, the fitness of things, convenience, and policy, and therefore to the common law, to protect the copy before publication.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There is another admission equally conclusive.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

not

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lord *Hardwicke* had before reasoned in the same way, in the case of *Manby* and others against *Owen* and others, on 5th April 1755, relating to the Sessions-Paper. The plaintiffs had bought the sessions paper of my Lord Mayor, and had (I think) given him an hundred guineas for it. And upon an affidavit "that the Lord Mayor had always appointed the printers of that paper; and that it was usual for the Lord Mayor to take a sum of money for it; and that the defendant had pirated it; Lord *Hardwicke* considered the grant as property in the copy, and granted the injunction upon the foot of property; and never dreamt "that the first edition of it made it common." This was acquiesced under: and the defendants were not advised to proceed further. Nothing is more manifest, than that the injunction proceeded upon the infringement of the plaintiff's property: for, as a contempt of the Court of the *Old Bailey*, the Court of Chancery



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

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

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

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

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

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

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

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

The

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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## ENGRAVING, DESIGNING, AND ETCHING.

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

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

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

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

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

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

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

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

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

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

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

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

The only charge against the defendant is selling, which is not liable to the penalties of the act, unless the person selling knows them to be printed by one who is not the author and proprietor of them, and knows likewise who is the real au-  
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thor at the same time. The forty first plants produced in the cause are as common plants as exist, and are in every herbal extant; and it could never be the intention of the act, to include such as inventions, which have been published before only in another form.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Here the clause which vests the property is distinct.

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

The next consideration is, what will be the consequence?

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

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



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

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

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

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

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

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

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

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

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

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## OUTLAWRY.

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

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

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

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

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

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