Evidence of the real Time of ſuing out the Writ may be given in Evidence.

Poſtea delivered to Plaintiff.

N. B. As the Judgment againſt *Pugh* was by *Default*, it was a Doubt, whether *Harwood* could have had Coſts, even if the Verdict had been found in his Favour; as not being within the Statute of *Car.* 2.

Tonſon *againſt* Collins.

Books

Qu. Whether any Copy-right exiſts in Authors, independent of Stat. 8 *Ann.*

THIS Caſe (*vide Trin.* 1 *Geo.* 3. page 301.) was again argued by *Blackſtone* for the Plaintiff.

The Queſtion is, whether the Damage occaſioned by the Defendant is, or is not, accompanied with Injury. If ſo, he is liable to anſwer that Damage: If otherwiſe, not liable. All Injury being a Privation of Right, this brings it to a Queſtion of Right. —— I contend, that by Law (independent of Stat. 8 *Ann.*) "Every Author hath in himſelf the ſole excluſive Right "of multiplying the Copies of his literary Productions;" —— which Right is, by Aſſignment, now veſted in the Plaintiffs.

I ſhall conſider this Right,

I. As founded in Reaſon. And therein,

1ſt. The natural Foundation and Commencement of Property; *viz.* by Invention, and Labour. Both exerted in a literary Production; the preſent Work is found to be *an original Compoſition*. *Original* (*ex vi termini*) implies Invention; as *Compoſition* does, Induſtry, and Labour. Property may with equal Reaſon be acquired by *mental*, as by *bodily* Labour. This, the Exertion of *animal* Faculties, and common both to Us and the Brute Creation, in their Neſts, Caves, &c: That, the Exertion of the *rational* Powers, by which we are denominated Men; and which therefore have as fair a Title to confer Property, as the other. The Right of Occupancy is referred to this Original, of *bodily* Labour. *Locke* on Go-

 vern-

vernment. *part.* 2. *c.* 5. Same Right of Occupancy in Ideas, as in a Field, a Tree, or a Stone. Both at first owing to good Fortune: to casually lighting on a vacant Possession, in the one; to a happy Texture of the Understanding, in the other. Both useless to the Proprietor, unless cultivated and improved: Neither liable to be taken from him, but by his own Consent.

2dly. The End of establishing and protecting Property: It's common Utility to Mankind. *Agriculture* and the *Arts* are supported, by vesting a Property, in whatever a Man's Industry can produce. Without such a Law, no Man would build, plow or sow, weave, *&c.* *Science* equally encouraged, by protecting the Produce of Genius and Application. Without some Advantage proposed, few would read, study, compose or publish. This Advantage can only arise from the Profits of Publication: And those Profits can only be secured, by vesting in the Author an exclusive Right of Publication. Universal Law has established a permanent, perpetual Property in bodily Acquisitions: And Reason requires, that the Property in mental Acquisitions should be equally permanent.

3dly. The one essential Requisite of every Subject of Property is, that it must be a Thing of *Value.* It's Value consists in it's Capacity of being exchanged for other valuable Things; and if I can exchange it, it must be mine previous to the Exchange: For, *Nemo dat quod non habet.* Whatever therefore hath a *Value* is the Subject of Property. For it would be absurd and unjust in any System of Law, not to secure the Enjoyment of that, by which (when lawfully acquired) a Man may make a Profit or Advantage. And it matters not, whether that Value be intrinsic, or merely capricious. A Man hath a Property in an Ape or a Popinjay, and Trespass lies for taking them away. *Bro. Trespass. pl.* 407. So, every literary Composition hath a Value; which is measured by the Sale it obtains. *Hoyle* on Whist has been protected by the Court of *Chancery*, and considered as a saleable Book; it is equally entitled to Protection, as *Newton*'s *Principia.*

Notwithstanding therefore Mr. *Thurlow*'s Assertion, I must maintain, that " A literary Composition, as it lies in the Au-
" thor's

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" thor's Mind, before it is ſubſtantiated by reducing it into Writ-
" ing," has the eſſential Requiſites to make it the Subject of Property.

While it thus lies dormant in the Mind, it is abſolutely in the Power of the Proprietor. He alone is intitled to the Profits of communicating, or making it public. The firſt Step to which, is cloathing our Conceptions in Words, the only Means to communicate abſtracted Ideas. Ideas drawn from external Objects, may be communicated by external Signs; but Words only, demonſtrate the genuine Operations of the Intellect. Theſe may be addreſſed either to the Ear or the Eye, by Diſcourſe or Writing.

The former, being the more obvious, is therefore the more antient Way. Orations, Plays, Poems, and even philoſophical Diſcourſes, were uſually communicated in this Manner. And all Ages have allotted to the Compoſer, the Profits that aroſe from this Mode of Publication. The Author was rewarded by the Contributions of the Audience, or the Patronage of thoſe illuſtrious Perſons, in whoſe Houſes they recited their Works. The Sale of Copies, or a Price paid for the Liberty of rehearſing an Author's Works in public, are as old as the Eſtabliſhment of Letters. Whoever contravened this Right was eſteemed no better than a Robber. *Terence* ſold his *Eunuch* to the Ædiles, and was afterwards charged with ſtealing his Fable from *Menander* —— *Exclamant Furem, non Poetam, Fabulam dediſſe.* He ſold his *Hecyra* to *Roſcius* the Player. *Statius* would have ſtarved, had he not ſold his Tragedy of *Agave* to *Paris,* another Player —— *Eſurit, intactam Paridi niſi vendat Agaven. Juvenal.* Theſe Sales were, and are founded upon natural Juſtice. No Man has a Right to make a Profit, by thus publiſhing the Works of another, without the Conſent of the Author. It would be converting, to one's own Emolument, the Fruits of another's Labour.

The next Way of Publication is by Writing, or deſcribing in Characters, thoſe Words in which an Author has cloathed his Ideas. Here the Value which is ſtamped upon the Writing, ariſes merely from the Matter it conveys. Characters are but the Sign of Words, and Words are the Vehicle of Sentiments. The Sentiment therefore is the Thing of Value, from which the

the Profit muſt ariſe. Conſider Writing, 1ſt. As an Aſſiſtant to the Memory; 2dly. As a Means of conveying Sentiment to diſtant Times and Places. In neither of theſe Lights, does the Writer relinquiſh his Title of making Profit by his Works; except that, when he has once written and publiſhed, he gives up the excluſive Privilege of reciting to the Ear; ſince, by parting with his Manuſcript, he has conſtituted a Subſtitute in his Stead, which ſpeaks perpetually to the Eyes of every Reader. But, though he has given out one or a hundred Copies, has conſtituted one or a hundred Subſtitutes to ſpeak for him; yet no Man has a Right to multiply thoſe Copies, to make a thouſand Subſtitutes inſtead of one; eſpecially, if any Gain is to ariſe from ſuch Multiplication.

The *Roman* Law of Acceſſion, *Inſt.* 2. 1. 33. (hinted at in the former Argument) was founded on very abſurd Principles. If one wrote a Poem on another Man's Paper, the Poem belonged to the Owner of the Paper, and not to the Poet. Surely, a Satisfaction for the Paper, was all that the Owner was entitled to. The ſame Law, in the ſame Breath, gives Teſtimony to it's own Unreaſonableneſs. If a Picture be painted upon my Tablet, it belongs to the Painter. For it is ridiculous (ſays the Emperor) that the Painting of an *Apelles* or a *Parrhaſius* ſhould follow the Property of a worthleſs Board. Certainly there is as little Reaſon, that the Works of a *Bacon* or a *Milton* ſhould become the Property of the Stationer, upon whoſe Paper they might caſually be written. But, abſurd as this Law is, it is not abſurd enough to ſay, that the Owner of the Paper acquired any more than a Right to that identical Copy. It never ſuppoſed, that he acquired a Right to the Sentiment, ſo as to multiply Copies. For, this being the uſual Way of rewarding the Labour of an Author, it would be unjuſt, to make him a Sharer in the Reward, who has been no Sharer in the Labour. It is the only Species of Property whereof Authors are uſually poſſeſſed; and it would be doubly hard, to take from them their only Means of Subſiſtence.

Printing is no other than an Art of ſpeedily tranſcribing. What therefore holds with reſpect to Manuſcripts is equally true of Printing. If an Author has an excluſive Property in his

his own Compoſition, while it lies in the Mind,—when cloathed in Words,—when reduced to Writing;——he ſtill retains the ſole Right of multiplying the Copies, when it is committed to the Preſs. The Purchaſer of each individual Volume has a Right over that, which he has purchaſed; but no Right to make new Books, and gain perhaps 500 *l.* at the original Expence of only five Shillings.

This anſwers Mr. *Thurlow*'s Queſtion concerning the *Extent* of the preſent Remedy. "Does it lie againſt the Keepers of "circulating Libraries, who buy one Book, and lend it to an "Hundred to read."? Certainly not. The Purchaſer of a ſingle Book may make any Uſe, he pleaſes, of it; but no Man, without Leave from the Author, has the Right of making *new* Books, by multiplying Copies of the old. If a Man has an Opera Ticket, he may lend it to as many Friends as he pleaſes; but he may not counterfeit the Impreſſion, and forge others. The Owner of a ſingle Guinea may barter it, or lend it, as he pleaſes; but he may not copy the Die, and coin another.

It is neceſſary to ſift this Right to the Bottom, and to argue on Principles, as it probably will be a leading Precedent; and it is more ſatisfactory, firſt to convince by Reaſon, than merely to ſilence by Authority; when we conſider this Right, in the next Place,

II. As ſupported by Law.

It will previouſly be neceſſary to obviate Mr. *Thurlow*'s Objection, that, becauſe no Action was ever brought in a Court of Law for the Invaſion of this Right, therefore none will ever lie.

The Obſervation (if true) rather ſhews, that no Man ever had the Hardineſs before, to invade this Right, than that this Court is unable to give a Remedy. There is no Right, without a legal Remedy to protect it from Invaſion. The comprehenſive Remedy of an Action on the Caſe, founded on equitable Principles, is every Day applied, in peculiar Caſes of Fraud and Wrong, none of which (in Circumſtances exactly ſimilar)

 perhaps

perhaps ever exifted before. The wife Provifion of the Statute of *Weft*. 2. *cap*. 24. for the Writ in *Cafu confimili*, is founded upon the fame Principles, and is a full Anfwer to this Objection, at the fame Time that it is one of the Glories of the *Englifh* Law.

But the fhort and plain Anfwer is this; that the Parties aggrieved have ufually purfued their Remedy in a Court of Equity, which occafions the Scarcity of Precedents in this Court. But unlefs Equity be contradictory, inftead of fupplemental, to Law; there is no Doubt, but that every Violation of Property, which is a Ground for an Injunction, is a Ground alfo for an Action on the Cafe; becaufe the Injunction prefuppofes, and proceeds upon, a legal Property in the Plaintiff. In all the Cafes cited by Mr. *Thurlow*, there had neither been legal Action, nor Suit in Equity.

Under his Head of Argument, I fhall,

1ft. Shew, that this Species of Property exifts by the Common Law, and has been recognized, not only by the Crown, but alfo by feveral Acts of Parliament.

The Jury have found, "that, before the Reign of Queen "*Anne*, it was *ufual* to purchafe from Authors perpetual "Copy-rights, to affign them, and to make them the Subject "of Family Settlements." And they find two Orders of the Stationer's Company, 1681, and 1690, which ftate the fame to have been then the antient Ufage. And when the Exiftence of a Cuftom is found by a Jury, and that Cuftom is neither unreafonable nor inconvenient; that Cuftom I take to be Part of the Common Law. To go ftill higher than the Verdict: *Tottell*'s *Patent for Law Books*, 20 *Jan*. 1 *Eliz*. (not printed in *Ames*, but among Mr. *Bagford*'s Manufcripts in the *Britifh Mufeum*) "No Perfon fhall imprint any Books, out of any "written Copy, which he the faid *Richard Tottell* or his Af- "figns had, or fhould attain unto, or buy at any other Man's "Hand." This fhews the Antiquity of purchafing Copy-rights.

A. D. 1583. Several Printers had affigned to the Company of Stationers their Copy-rights in feveral Books, for the Benefit

of the Poor. *Ames* 551. By Stat. 1649. *cap.* 60. *Scobel.* 92. This Grant is confirmed, and a Right of Ownerſhip ſtrongly recognized, in Books that belonged to Individuals, as well as the Company in general.

After the Reſtoration, the Licenſing Act 13 & 14 *Car.* 2. *c.* 33. in ſeveral Parts of it (§ 2, 3, 5, and 23.) protects Copy-rights; which it ſpeaks of, as exiſting prior to the Act. Theſe Laws therefore do not *create* the Right, but *guard* it by additional and cumulative Penalties.

This Statute was continued for ſhort Terms of Years, till 9th of *May* 1679, 31 *Car.* 2. and was then ſuffered to expire; till revived by Stat. 1 *Jac.* 2. *c.* 17. *A. D.* 1685.

7th *October* 21 *Car.* 2. *A. D.* 1669. A Patent was granted to *Seymour* for forty-one Years, to print Almanacks and Prognoſtications, " whoſe Originals he could purchaſe or obtain from " the reſpective Authors thereof, during the ſaid Term." (*Bagford*'s MSS.) This ſhews an acknowledged Copy-right in Authors, which might be ſold, and did not depend on the Stat. of *Car.* 2. which was ſhortly to expire; but during *Seymour*'s whole Term, which extended to 1710.

Arguments of the ſame Nature might be drawn from the Stat. 8 *Ann. c.* 19. but § 9. (which declares, " that nothing " therein ſhall prejudice, or confirm any Copy-rights in any " Perſon whatſoever") precludes the Uſe of any Arguments from thence, on either Side of the preſent Queſtion.

2dly, I inſiſt, that whenever any Cauſes, relating to Privileges of Printing derived from the Crown, have been brought before the Courts of *Common Law*, they have generally been argued, and determined on the Footing of a Property in the Copy, ſuppoſed to exiſt in the Crown. — And if the Crown is capable of a Copy-right, the Subject is equally capable.

Stationer's *Company* and *the Law Patentees*, for printing *Rolle*'s Abridgment. In the Houſe of Lords *M.* 18 *Car.* 2. *Carter.* 89. This was argued on the Footing of a Prerogative Copy-right in the Crown, over all Law Books. It was urged, that

that the Laws are the King's Laws; that the King pays the Judges who pronounce the Law, and formerly the Reporters of the Year-Books; and Adjudged for the Patentees. I do not enter into the Goodneſs of theſe Reaſons; but it appears to have been admitted on both Sides, as a *Datum* or firſt Principle, that a Copy-right might ſubſiſt at Common Law, and then they endeavoured, on the Part of the Patentees, to veſt the preſent Right in the Crown.

Roper and *Streater*, *M.* 22 *Car.* 2. *Common Pleas.* cited in *Skinn.* 234. and alluded to, 1 *Mod.* 257. *Roper* printed 3d *Cro.* Reports, by Aſſignment from *Croke*'s Executor. *Streater* the Law Patentee, printed upon him. *Roper* brought Action of Debt on the Statute of *Car.* 2.—Adjudged for the Plaintiff in *Common Pleas*, but reverſed in Parliament.—Said (in *Skinner*) that this Statute did not give the *Right*, but only the *Action* of Debt. Therefore, it was a cumulative Remedy. If the Judgment in *Common Pleas* was right, that went on a Copy-right in the Executors; if the Judgment in the Lord's Houſe was Law, that went (like the Caſe of *Rolle*'s Abridgment) upon a prior Copy-right in the Crown.

Stationer's *Company* and *Seymour*, for printing Almanacks. *Trin.* 29 *Car.* 2. *Common Pleas.* 1 *Mod.* 257. 3 *Keb.* 792. Serjeant *Pemberton* argued it, on the Footing of a general Copy-right in the Crown.——Nothing abſurd in this Suppoſition. The Regulation of Time has been always a Matter of State. *Roman Faſti* were under the Care of the pontifical College. *Romulus*, *Numa* and *Julius Cæſar*, ſucceſſively regulated the *Roman* Calendar.——The Court gave Judgment for the Plaintiffs; 1. Becauſe Almanacks have no certain Author, and therefore the Property (as in Things derelict) devolves to the Crown. 2. Becauſe they are ſubſtantially only Part of the Liturgy; and they ſaid, that "Adding Prognoſtications to the "Calendar does not alter the Caſe; any more than if a Man "ſhould *claim a Property in another Man*'s *Copy*, by reaſon "of ſome inconſiderable Additions of his own."

Earl of *Yarmouth* and *Darrel. P.* 1 *Jac.* 2. *King*'s *Bench.* 3 *Mod.* 75.——for printing blank Bonds, in oppoſition to the Plaintiff's

Plaintiff's Patent; —— Argued merely as a Copy-right in the Crown, as being Things without a legal Owner. —— The Court inclined, the Patent was not good; but it seems to have been admitted, that a Copy-right might subsist in a proper Subject, though this was not so.

Stationer's Company and *Partridge, M.* 11 *Ann. King's Bench* 10 *Mod.* 105. Serjeant *Hussey's* MSS. Same Case. Issue out of Chancery, on the Validity of a Patent for Almanacks. —— Argued on the Footing of a Copy-right —— No Opinion. But the Court said, "Monopolies were odious; therefore this "Case must be distinguished, by deriving to the Crown some "special Interest in Almanacks." Hence I may infer, that the Court thought, that a special Interest might subsist in the Copy of any given Book.

Baskett and *the University of Cambridge, M.* 32 *Geo.* 2. *King's Bench.* Case out of Chancery, for printing an Abridgment of Statutes. Certificate for the Defendants. It is our Misfortune, that the Reasons are not given, upon which the Judges certify. But it is fresh in every one's Memory, that the very learned Argument delivered on the Part of the Defendants, was entirely built, upon a supposed Copy-right of the Crown in Acts of Parliament.

[Lord *Mansfield.* "The Court considered it as a Prerogative "Copy-right. The Crown has no Right over Books in ge-"neral; therefore the Patents could have no Effect, unless "by a special Right derived from the King's Prerogative."]

3dly. Consider the Cases out of Chancery; in which I shall confine myself to those, that stand clear of the Statute of Queen *Anne.* All compared with the Register.

Knaplock and *Curl,* 9th *November.* 1722. *coram Macclesfield* Chancellor. *Viner* (*tit.* Books. 3.) For printing *Prideaux's Directions to Churchwardens.* Books ordered to be damasked, and a perpetual Injunction awarded. Hence it appears, that Lord *Macclesfield,* (who sate in Parliament, 8 *Ann.*) did not look upon the Right to depend merely on the Statute of Queen *Anne*;

 for

for he then would have ordered a *temporary*, not a *perpetual* Injunction.

[*Foster* Justice. " This was a legal Right, clearly within " the Act of Parliament."]

I mention it only, because here the Injunction was *perpetual*.

Lord *Mansfield*. " Is there any Instance of a temporary Injunction, upon a Decree?" " It was plainly upon the Act of " Parliament; for the Books were ordered to be damasked. " The Court could not have ordered this, unless under the " Statute. It was going pretty far, for a Court of Equity " to proceed upon the Penalty. They have never done it " since."]

Tonson and *Clifton*, 11 *December*. 1722. *coram Macclesfield* Chancellor. For printing The *Conscious Lovers*. Injunction granted, and acquiesced under. The Book not stated to have been registred at *Stationer*'s Hall; which is requisite by the Statute of Queen *Anne*. It must therefore have proceeded on the general Common Law Right.

[Lord *Mansfield*. " No: It was always held, that the Entry " in *Stationer*'s Hall was only necessary, to enable the Party " to bring his Action for the Penalty. But the Property is " given absolutely to the Author, at least during the Term. " Whether the Act implies any larger Property, is another " Question. But the most judicious Way in Chancery is, " not to insist upon the Penalty, nor of course on the Entry, " but to pray an Injunction to protect the general Property.]

Webb and *Rose*, 24th *May*. 1732. *coram Jekyll* Master of the Rolls. For printing the *Draughts of Webb, the Father's Conveyances*. Decree; that the Draughts should be delivered up, and the Injunction continued. This could not be within the Act; It was never published; and the Term given by the Act commences from Publication. It therefore turned on the

the original and natural Right, which every Man has in his own Compositions.

Eyre and *Walker*, 9 *June*. 1735. *coram Jekyll* Master of the Rolls. For printing *The whole Duty of Man*. This was first published A. D. 1657, therefore clearly not within the Statute; Injunction acquiesced in.

Motte and *Falkner*, 28th *November*. 1735. *coram Talbot* Chancellor. For printing *Swift*'s *and Pope*'s *Miscellanies*. Some of these Pieces published in 1701, others in 1702 and 1708. The Term of the Statute clearly expired as to them. Yet an Injunction granted for the Whole, and acquiesced in.

[Lord *Mansfield*. "It was argued on that Objection; particularly as to the Predictions in 1708."]

Walthoe and *Walker*, 27 *January*. 1736. *coram Jekyl* Master of the Rolls. For printing *Nelson*'s *Festivals*; Published in 1704.

Injunction granted and acquiesced in.

Tonson and *Walker*, 12th *May*. 1739. *coram Hardwicke* Chancellor. For printing *Milton*'s *Paradise Lost*; First printed, A. D. 1667.

[Lord *Mansfield*. "That Case was solemnly argued on a "special Day appointed."]

That was upon a different Invasion. The solemn Argument was in 1752.

Pope and *Curl*, 5th *June*. 1741. *coram Hardwicke* Chancellor. For printing *Pope*'s *Letters to Swift*. This the Case of an unpublished Manuscript, like *Webb* and *Rose*. Indeed it goes much farther. If, in any Case, an Author parts with his Property by Publication, the Writer of a Letter seems to have consigned his, to his Correspondent. These were published with the Connivance, at least, if not under the Direction, of Dr. *Swift*.

[Lord

[Lord *Mansfield*. "Certainly not. Dr. *Swift* disclaimed it, "and was extremely angry. The only Question was, whether "the Property was in *Pope*, who filed the Bill, or in *Swift*, "who was no Party to the Suit."]

Mr. *Pope* seems to hint his Suspicions of his Friend. But it was allowed, that a Property did subsist in the Writer; for the Injunction was granted, and acquiesced in.

Tonson and *Walker* (second Case) 30th *April*. 1752. *Hardwicke* Chancellor. For printing *Milton*'s *Works*, with *Newton*'s *Notes*. This was upon solemn Argument for dissolving the Injunction; Lord Chancellor continued it till the Hearing, and the Defendant gave it up. The Injunction was penned in the Disjunctive; To restrain the Defendant from printing "*Milton*'s Poem, *or* the Life of *Milton*, *or* Dr. *Newton's* Notes." The two former were quite clear of the Statute.

[Lord *Mansfield*. "The Order was carefully penned and "perused by Lord *Hardwicke*, after it was drawn up."]

Duke of Queensbury and *Shebbeare*, 31st *July*. 1758. *coram Henley* Keeper. For printing *Lord Clarendon*'s *Life*. —— This another Case of an unpublished Manuscript. Lord Keeper, upon solemn Argument, continued the Injunction to the Hearing. This was finally acquiesced under.

I allow, that these Cases in Chancery are not quite decisive, as few of them are upon a final Decree. But they shew the uniform Opinion of that Court, that a Copy-right may, and does subsist, independent of the Statute of Queen *Anne*. —— This is farther supported by the Opinion of the Courts of Law, both Bar and Bench, in their Mode of arguing, and determining the Cases of privileged Printers. —— This Right has been recognized, two Centuries ago, and often since, by Letters Patent, and Acts of Parliament. —— It is found by the Jury to have been a uniform, and antient Usage. —— It is founded on the Principles of Reason, universal Justice, public Convenience and private Property.

If eſtabliſhed generally, it muſt have exiſted in the Authors of the *Spectator*, under whom it is derived to the Plaintiffs. It's Invaſion is an Injury, as well as a Damage; and therefore ought to be anſwered by the Defendant.

Yates for the Defendant.

The Right contended for by the Plaintiffs is inconſiſtent with our Laws and Conſtitution; and claſhes with every Species of Property known in this Kingdom.

The Queſtion is, Whether the Plaintiff has, or has not, any legal Property in the Book before Us. I agree, that the Faculties of the Mind may give a Property, as well as thoſe of the Body: But this, and every other Kind of Property may be rendered common, by the Act of the Proprietor.

I allow, that the Author has a Property in his Sentiments, till he publiſhes them. He may keep them in his Cloſet; he may give them away; if ſtolen from him, he has a Remedy; he may ſell them to a Bookſeller, and give him a Title to publiſh them. But from the Moment of Publication, they are thrown into a State of univerſal Communion. I ſhall argue this,

I. Upon general Principles of Property. II. Upon the local Law of this Kingdom.

I. It is no Species of Property upon general Principles; becauſe,

1ſt. It is incapable of ſeparate and excluſive Enjoyment. All Property implies Poſſeſſion. *Bynkerſhock* ſays, it begins and ends with manual Poſſeſſion. It is the *Jus utendi, et fruendi*. And though actual Poſſeſſion is not always neceſſary, yet potential Poſſeſſion is. There muſt be *Potentia Poſſidendi*. The ſubject of Property muſt be ſomething ſuſceptible of Poſſeſſion. *Puffendorf* (book 4.) lays it down as eſſential to Property, that it muſt be, 1. Uſeful. 2. Under the Power of Man, ſo as to faſten on it.

How is the Property of the Plaintiffs invaded in the preſent Inſtance? The original MS. is not, nor ever was, in the Hands of the Defendants. The Books ſold are not, nor ever were, the Property of the Plaintiffs. The Paper and Ink belonged to the Defendants. All the Plaintiffs can claim is, the Ideas which the Books communicate. Theſe, when publiſhed, the World is as fully in Poſſeſſion of, as the Author was before. From the Moment of Publication, the Author could never confine them to his own Enjoyment.

It is begging the Queſtion, to ſay, that the Law will protect what is acquired by the Labour of an Author. An Act of Parliament may create ſuch a Right. The Stat. of Qu. *Anne* has done it for a limited Time. But no ſuch Property ariſes from the Principles of Common Law; becauſe that acts only upon Subjects, where there is a Poſſibility of ſeparate and excluſive Enjoyment.

The Plaintiffs can claim no Right to the Profits made by the Defendant, becauſe they accrued in the Way of his Trade. Their Property, if any, is only in the incorporeal Ideas, and not in the Profits, to which another Man applies them. If he may lend, or repeat them to others, why may he not as well communicate them in a Type of his own? The Buſineſs of a Printer is a lawful Trade, and where there is no Property, but what merely ſubſiſts in Idea, no Man can be guilty of a private Wrong, by merely following his Trade.

2dly, There are no *Indicia*, or Marks of Appropriation to aſcertain the Owner of this Species of Property. What are the Marks? It is not in manual Occupation; it is not in viſible Poſſeſſion, which Lord *Kayms* (Hiſt. of Property) lays down as an eſſential Condition of Property. How is an Author to be diſtinguiſhed? Some few may be known by their Style; but the Generality are not known at all. The Act of Publication has thrown down all Diſtinction, and made the Work common to every body; like Land thrown into the Highway, it is become a Gift to the Public. Is the Title-page a Mark of Appropriation? No; that is often loſt or omitted, and yet a Purchaſer of the Book has as good a Title to it, without a Title-page, as with it. It cannot therefore be diſtinguiſhed.

guiſhed. The Legiſlature, by the Statute of Qu. *Anne*, ſupplied this Defect, by directing an Entry of the Book in the Regiſtry of the Stationer's Company. But in a Claim, like the preſent, independent of the Act, this Defect ſtill remains: It wants one neceſſary Quality to make it legal Property.

II. It is no Species of Property, recognized by the local Law of the Kingdom.

As to the Uſage ſtated by the Verdict, there is no Cuſtomary Property known to our Law, but what has been ſo Time immemorial. This is not ſo found. It is impoſſible it ſhould be; ſince the Art of Printing is itſelf within Time of Memory. It is ſtated, that it has been uſual to aſſign *&c.* this Species of Property. So the Goodwill of a Shop is every Day ſold for a valuable Conſideration: Yet that does not make it Property.

[Lord *Mansfield.* " There are many Decrees which make " theſe Things Aſſets. I remember one with regard to the " Title of the St. *James*'s *Evening Poſt.* The Buyer was " quieted in the Poſſeſſion of it, and nobody elſe permitted to " ſet it up."]

The By-Laws of the Company are private Regulations among themſelves, and cannot eſtabliſh a new Law for the Kingdom in general. But the very Requiſite of an Entry in the Books, to make a Copy become Property, ſhews it was not ſo by any original Right.

In the former Arguments, the Patents to Printers were relied upon, and chiefly cited from *Ames*'s typographical Antiquities. But theſe were merely *Privileges*, which excludes the Idea of a *Right*. They are to Printers, not to Authors, as a Reward for their Mechanic Ingenuity. They are all for Terms of Years.——Why this Limitation, if the Authors had a permanent and perpetual Right in themſelves? Theſe Patents were moſt of them illegal, and void upon the Face of them; and your Lordſhip will not draw any Part of the Law from ſo polluted a Fountain.

I

I agree with Lord *Bacon*, that the King has an undoubted Prerogative to confine the Printing of certain Things—Statutes —Liturgies—Almanacks as Calendars, and ſettled as ſuch by the Council of *Nice*——But in the preſent Caſe, neither Patent nor Prerogative has any thing to do. It ſtands upon the Right at Common Law.

Uſe was alſo made of ſome Star-chamber Decrees. Theſe were profeſſedly intended to correct ſome Offences of the Preſs; and no Argument to affect the Law of private Property can be drawn from thence.

Moſt of theſe Monopolies were deſtroyed by Stat. 21 *Jac.* 1. which Lord *Coke* has given the Hiſtory of, in 2 *Inſt.*

Next came the Ordinances of Parliament, againſt malignant Papers publiſhed by the Royaliſts. They were copied from the Star-chamber Decrees, and liable to the ſame Obſervations.

Stat. 13 *Car.* 2. was of the ſame Tendency. It's Scope was merely political. The Words in it, which imply a Right of printing to be veſted in particular Perſons, may be ſatiſfied, by applying them to the Patentees of the Bible, &c, who had an undoubted Right. Blank Indentures are ſpecially mentioned: They, I fancy, will hardly be ranked among original Compoſitions.

I hope, I am not precluded from arguing from the Stat. 8th of Qu. *Anne*, from which Mr. *Blackſtone* ſays ſome Arguments might be drawn on his Side of the Queſtion. I know it has been ſaid, that this Statute is merely declaratory of the Common Law——That it is only an accumulative Remedy —— That Authors are in Terms called the Proprietors——And that Publiſhing, without their Conſent, is treated as unlawful and injurious; and therefore, that a general Common Law Property is ſtrongly implied by the Act. But the leaſt Attention will ſhew the direct contrary. Where is the accumulative Remedy? It conſiſts merely in damaſking the Paper. This Revenge is all that is given to the Author; the pecuniary Penalty is given to others:——It's Title is an Act for Encouragement of

of Learning (*i. e.* by giving ſome new Advantages unknown before, deſcribed thus) by *veſting* the Copies in Authors, *&c.* It was not therefore veſted before. —— The Limitation of Time is a ſtill farther Proof of the ſame: It commences at a future Day; It endures for fourteen Years; if the Author be living, the Right returns to him for fourteen Years more. Why only for fourteen? Why not to his Repreſentatives, as well as himſelf? —— An Entry in the Regiſter is neceſſary to veſt the Right. Why this Ceremony, if the Author's Right was inherent? —— There are alſo negative Words, that the Privilege ſhall endure for fourteen Years *and no longer*. This alone might determine the Merits of the Caſe.

As to Injunctions out of Chancery, it is not a Conſequence, that whatever that Court prohibits is actionable at Law. If Tenant for Life, *ſans* Waſte, is cutting down Trees in an Avenue, Equity will enjoin him, but no Action would lie againſt him at Common Law.

[Lord *Manſfield*. " If the Injunction be well founded, the " ſame Determination would be at Law. If the Waſte com- " mitted, be a Species of Deſtruction, not within the Mean- " ing of the Parties who made the Settlement or Will, " under which he claims to be diſpuniſhable for Waſte, a " Remedy would lie at Law. Lord *Cowper* went upon this " Ground, when the Tenant for Life of *Raby Caſtle*, *ſans* Waſte, " endeavoured to pull down the Caſtle itſelf."]

I wiſh, the Arms of this Court were always long enough to reach every Caſe, without the Aid of a Court of Equity. All the Chancery Caſes cited are ſubſequent to the Statute of Queen *Anne*.

[Lord *Manſfield*. " Where the Date of the Book is evident- " ly within the Statute, there the Court ſeems to have proceed- " ed upon the Right of Property created by that Act. But " Mr. *Blackſtone* has argued, 1ſt. That it cannot be ſo, where " the Term of the Act is clearly expired: There they evidently " go upon the original Right. 2dly. That the ſame may be ob-

"ſerved, where the Copy has never been publiſhed, but ſur-
"reptitiouſly got from the Owner."]

As to thoſe Caſes where the Term is expired, the Injunctions are only granted till Anſwer; there is no final Decree. As to unpubliſhed Manuſcripts, I admit, that the Property does continue in the Author till Publication; till he emancipates it, and makes it common. The piratical Printer is here guilty of a double Wrong; —— in publiſhing private Manuſcripts without the Leave of the Owner, —— and in anticipating the Profits of the firſt Publication, to which, I acknowledge, that the Author is intitled.

What Species of Property is this, that is now contended for? Not Real certainly. Is it Perſonal? It is not a *Choſe* in Poſſeſſion; it is neither material nor viſible. It is not a *Choſe in Action*, for thoſe are not aſſignable, and this is inſiſted to have been uſually aſſigned. It is merely a Right of publiſhing Ideas; and under what Denomination of Property that can fall, unleſs the Legiſlature will give it one, I cannot comprehend.

Is this a Contract between the Public and the Author, that none, but he, ſhall print theſe Ideas? No: The Public is not a Corporation capable of contracting. There is no Mutuality in the Contract. The Public cannot compel the Author, to furniſh a ſufficient Number of Copies.

It has been ſaid, that if the Author neglects to print, it is an Abandonment. How ſhall this Neglect be aſcertained? When will the Property ceaſe? What are the Marks of Dereliction? There can be none, any more than of Appropriation. Who can ſeize or occupy it, when relinquiſhed? It is incapable of Poſſeſſion, and therefore is no perſonal Chattel. It ſhould be ſomething, that may be ſeen, felt, given, delivered, loſt or ſtolen, in order to conſtitute the Subject of Property.

[Lord *Mansfield*. "How would you ſteal an Option, or
"the next Turn of an Advowſon?"]

I ſay,

I ſay, if the Property contended for be in Action, the Plaintiffs, as Aſſignees, cannot claim it; if in Poſſeſſion, it muſt bear the Marks of viſible Poſſeſſion, and muſt have the Qualities of other perſonal Property. Will Trover, Detinue, Treſpaſs or Replevin, lie for it? Can it be forfeited for Treaſon or Felony? How will You ſeize or transfer it? It does not lie merely in Grant. Nothing can be granted, but where a Man has an actual or potential Property. One cannot grant all the Wool that ſhall grow upon Sheep, which he intends to buy. So one cannot grant the Profits of a future Edition of a Book.

Lord *Coke* ſays, a Poſſibility cannot be granted, What is a more bare Poſſibility than the Profits of an Author?

Patents for new Inventions are ſimilar to the preſent Caſe. They are allowed as temporary Privileges, but the very Grants are a Proof, that independant of them, the Grantees could have had no Monopoly. Patents of perpetual Duration are injurious to the Subject, and contrary to *Magna Carta*. *Darcy* and *Allen*, *Noy*. 182. A Patent for the ſole Uſe of a new Invention is good, provided it be for a Time certain; becauſe in that Time, the Invention may become common, and others have the Skill to uſe it. *Clothworkers of Ipſwich*'s *Caſe*. *Godb.* 254. Same Reaſon given in *Mitchell* and *Reynalds*. 1 *P. Wms.* 183.

[Lord *Mansfield*. "That is but a weak Reaſon. Patents "are a Guard rather againſt thoſe who know how to uſe the "Trade, than thoſe who do not."]

Since then no permanent Privilege is allowed to the Inventor of an Art, or a mechanical Engine, what Pretence have literary Productions to a greater Right? Both are the Productions of Genius, both require Labour and Study, and both, by Publication, become equally common to the World.

The Legiſlature ſeems to have judged ſo. The Stat. 21 *Jac.* 1. againſt Monopolies allows Patents for new Inventions; twenty-one Years for ſuch as were then in being, fourteen for new ones.

Stat.

Stat. 8 *Ann.* allows twenty-one Years to Books already printed, fourteen to future Publications. The Statute of *James* provides againſt raiſing the Prices of Manufactures, that of *Anne* gave Power to the Archbiſhop and others, to ſettle the Price of Books.

[Lord *Mansfield.* " The Statute of King *James* expreſsly " provides, that it ſhall not extend to Books."]

On the whole, neither on the general Principles of Property, nor on the local Law of the Kingdom, can this Claim be ſupported. I wiſh all due Encouragement to ingenious Authors, conſiſtent with the Principles of Law, and the Rights of the Subject. But if their Claim tends to a Monopoly, is contrary to the Proviſions of the Legiſlature, or the Good of the Community; if it introduces any Change or Novelty into the Common Law, they muſt excuſe me. *Nolumus Leges Angliæ mutare* is Language of *Magna Carta.* I truſt, that the Law, in this, as in all other Caſes, will be preſerved intire by this Court. The Author can claim no Privilege, by Common Law: Let him reſort to, and avail himſelf of that temporary Indulgence, which the Statute has thought proper to allow him.

Blackſtone in Reply.

The principal Pillar of Mr. *Yates*'s Argument reſts upon his Deſcription of Property. He conſiders it as having nothing for it's Subject, but what is ſubſtantial, palpable and viſible. He has omitted the Diſtinction, between corporeal and incorporeal Rights; the latter of which are as much conſidered by the Law, as the Baſis of Property, as the former. Your Lordſhip gave an Inſtance in Options; the ſame may be ſaid of Advowſons, Commons, Ways, &c. The Right of preſenting to a Church is not more viſible or material, than the Right of publiſhing a Book. All theſe are mere *potential* Rights, dormant and unnoticed, till Opportunity calls them into *Act*; and then they produce a viſible Fruit, by preſenting a Clerk, by travelling on the Way, by turning Cattle into the Common, and, in

in the present Case, by publishing the Book. The Profits of a Common are as uncertain, and as much a mere Possibility, as those arising from a Publication.

They depend on the Season, the Weather, and an hundred other Accidents. But is a Right of Common therefore incapable to be granted? If not, why should the present incorporeal Right, which is not less substantial than the former.

It is asserted, that the bare Act of Publication renders the Performance common to all Mankind: It was asserted; but the Proof of that Position, if given, totally escaped my Observation. He allows, that to constitute an Abandonment, there must be plain Tokens of a voluntary Dereliction: In the present Instance, it is so far from a Dereliction, that the very Act of Publication shews an Intention to continue the Use of it, for the Purpose of Profit, so long as the Author can.

The Argument drawn from circulating Libraries was before considered. As for the Profits which the Defendant has made in the Way of his Trade, we claim them not; this is not a Bill for an Account, but an Action for disturbing Us, in making that Profit in the Way of our Trade, which we say we have a Right to do. *Sic utere Jure tuo, ut alienum non lædas.*

He says, a Book, when published, is a Gift to the Public, like Land thrown into a Highway. It may be so, where the Author conceals himself, and gives no *Indicia* to distinguish his Property. The Title, the Utterance, the Vending, are sufficient *Indicia* here. In such a Case, it is more like making a Way through a Man's own private Grounds, which he may stop at Pleasure; He may give out a Number of Keys, by publishing a Number of Copies; but no Man, who receives a Key, has thereby a Right to forge others, and sell them to other People.

The Usage of Copy-right is called in question, because not shewn to be immemorial. There is no other Way to prove an immemorial Usage, but by tracing Facts back to the earliest Times, and seeing if it has ever been otherwise. We have

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ſhewn it for two Centuries back; there is nothing that contradicts it, and the Law will then ſuppoſe it immemorial. But Printing itſelf is within Time of Memory. True, but the Art of Writing is certainly immemorial. They are both different Modes of the ſame Thing; the ſubſtantial Part is the deſcribing a Sentiment in Characters. It is Matter of Indifference, whether a Man prints 100 Copies, or employs 100 Amanuenſes to write them.

Mr. *Yates* has gone through the Patents of privileged Printers, to prove them illegal. I agree with him, they were; the only Uſe I made of them, was to ſhew, that, whenever ſupported, they were ſupported only on the Suppoſition of a Prerogative Copy-right; which ſhews, that ſuch Right is not merely ideal. He allows, that the King has a Copy-right in ſome Books; why then is the Exiſtence of a Subject's Copy-right in others, a Thing ſo abſurd and ſhocking to the Principles of Common Law?

Why then, he aſks, were Patents granted for fourteen Years, if the Author had before a perpetual Property? I anſwer, they were additional Guards to that Property, by giving an accumulative Remedy for a Term of Years. A new Remedy will not deſtroy an ancient Right.

As to the Statute of Qu. *Anne*, which has been laid open very accurately, I decline meddling with it at all, for the Reaſons I gave before.

He has treated the preſent Claim in the Light of a Monopoly, A very odious Term. But what is a Monopoly? An Endeavour to appropriate to private Uſe, what before belonged to all the World in Common. Like the ſole Printing of Latin Books, Law Books, &c. Every Man has a natural Right, to print in that Language, or that Science.——But who can have a Right to print another's Compoſition (in any Tongue or any Science) before he pleaſes to publiſh it?——And, after it is public, who but himſelf, can have a Right to make a Profit by re-printing it? The Profit muſt ariſe from his Sentiment, from the Matter contained in the Book. It ariſes not

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in the Way of Trade, by the bare Manufacture of Printing; For the Paper when printed on, abstracted from the Learning contained in it, is rendered less valuable than before.

It is therefore no Argument to say, that an Author is not bound to supply Copies to the Public; for which Reason another Man may. What Right has the Public to demand them? The Author has the sole Right; he may set on them what Value he pleases, as every Man may do upon his own Performances, whether Divine, Lawyer, Physician, or Author. Yet all will be blameable, if they set too high a Value on their Labours, and will feel the bad Effects of it.

It has been endeavoured, to compare intellectual Inventions with such as are merely mechanical; They bear no Comparison, as has been successfully shewn in a Pamphlet referred to, in the last Argument; and which deserves better Treatment than Mr. *Thurlow* then gave it. [A Letter from an Author to a Member of Parliament, by Dr. *Warburton*] I shall add one or two Remarks to his learned Observations.

Style and Sentiment are the Essentials of a literary Composition. These alone constitute it's Identity. The Paper and Print are merely Accidents, which serve as Vehicles to convey that Style and Sentiment to a Distance. Every Duplicate therefore of a Work, whether ten or ten thousand, if it conveys the same Style and Sentiment, is the same identical Work, which was produced by the Author's Invention and Labour. But a Duplicate of a mechanic Engine is, at best, but a Resemblance of the other, and a Resemblance can never be the same identical Thing. It must be composed of different Materials, and will be more or less perfect in the Workmanship. Although therefore the Inventor of a Machine may not be injured at Common Law, by the Sale of a Work made like his, it will not follow, that an Author is not injured, by the surreptitious Sale of a Work that is absolutely and specifically his own. The Proprietors of the *Spectator* were not injured by the Sale of the *Rambler &c.* which resembled their Composition; but we say, they are now injured by the Sale of the *Spectator* itself.

There

There is a Diſtinction then in the Nature of the Things compared together;—and there is alſo a Diſtinction ariſing from public Convenience. Mechanical Inventions tend to the Improvement of Arts and Manufactures, which employ the Bulk of the People; therefore they ought to be cheap and numerous: Every Man ſhould be at Liberty, to copy and imitate them at Pleaſure; which may tend to farther Improvements. However, a temporary Privilege may be indulged to the Inventer for a limited Time, by the poſitive Act of the State, by way of Reward for his Ingenuity. This Inconvenience will ſoon be over, and then the World will remain at it's natural Liberty. But as to Science, the Caſe is different. That can, and ought to be, only the Employment of a Few. And one Printing-Houſe will furniſh more Books, than any Nation can find able Readers; which differs it ſtill more from the Caſe of Mechaniſms, of which very few in Compariſon can be conſtructed, under the Inſpection of the Author.

But ſuppoſing, after all, that there was no real Diſtinction between literary and mechanical Compoſitions; yet the Concluſion drawn from this Argument is very illogical and unjuſt. If it be reaſonable, to allow a Property in a literary Production (and I ſubmit it is highly ſo) can we argue thus? Books and Machines are of the ſame Nature: No Property is allowed in a Machine: Therefore none ſhould be allowed in a Book. The Argument would rather ſtand thus. Books and Machines are of the ſame Nature; Property ſhould be allowed in Books; and therefore, it ſhould alſo be allowed in Machines. ——But ſince they are of Natures very different, both Arguments will fall to the Ground.

The Defects of this Reply will be amply ſupplied on the next Argument; and in the End, we ſtill hope for Judgment for the Plaintiffs.

Lord *Mansfield* Chief Juſtice.

This Queſtion is a very general one, and has never yet been finally determined. Though a fair Argument will ariſe from Sir *Joſeph Jekyll*'s, Lords *Macclesfield*'s, *Talbot*'s and *Hardwicke*'s

Proceedings

Proceedings, that they thought there was a Property in the Author at Common Law. Else they would not have granted the Injunctions, that have been cited. But even in the Case of *Newton*'s *Milton*, Lord *Hardwicke* gave no Opinion to bind himself, but continued the Injunction to the Hearing; following the Example of Lord *Harcourt*, in *Stationer*'s *Company and Partridge*, who, conceiving great Doubts concerning the Company's Right, continued the Injunction to the Hearing; and, at the Hearing, ordered a Case to be stated for the Opinion of this Court. It was twice argued here, but no Certificate was ever made. In *Milton*'s Case, Lord *Hardwicke* said, that if, at the Hearing, he should consider the Point as doubtful, he would send it to Law to be argued; and therefore, would give no Opinion, so as to bind himself. —— However the Inclination of his Opinion was, that there might be a Common Law Property, not taken away by the Statute of Queen *Anne*. What he grounded himself upon, were the Cases at Common Law, relating to Prerogative Copy-rights. It must have been a Copy-right in the Crown, though Printing is within Time of Memory, that produced this Prerogative Property.

I do not know, that, even in Equity, there has been any Case finally and solemnly determined, at the Hearing. When this came before me, I was determined, it should be argued and adjudged in the most solemn Manner. And therefore, I refused to make a Case of it, but directed a special Verdict. As perhaps the Parties may acquiesce under the Decision of this Court, I should be desirous to have it argued, before all the Judges.

Let it stand over for further Argument, before all the Twelve Judges.

Lessee of Clymer *against* Littler.

New Trial Copyhold Wills

ON Ejectment, a Verdict for the Plaintiff. *Norton* moved for a new Trial.

The Plaintiff claimed a Copyhold Estate at *Barnes* in *Surry*, of the Nature of *Borough English*, under a Will of Mr. *Clymer*

deceased,