THE

DECISION

OF THE

COURT OF SESSION,

UPON THE QUESTION OF

LITERARY PROPERTY;

IN THE CAUSE

JOHN HINTON of LONDON, Bookſeller, Purſuer;

AGAINST

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

PUBLISHED BY

JAMES BOSWELL, Eſq; ADVOCATE,

One of the COUNSEL in the Cauſe.

EDINBURGH:

Printed by JAMES DONALDSON, for ALEXANDER DONALDSON, and ſold at his Shop, No 48, ST. PAUL'S CHURCH-YARD, LONDON, and EDINBURGH; and by all the Bookſellers in SCOTLAND.

M,DCC,LXXIV.

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IN THE CAUSE

HINTON AGAINST DONALDSON, &c.

The SUMMONS, or LIBEL, in this Cauſe, was as follows:

GEORGE, by the grace of GOD, KING of Great Britain, France, and Ireland, Defender of the Faith: To Meſſengers at Arms, our Sheriffs in that part, conjunctly and ſeverally, ſpecially conſtituted, greeting. Foraſmuch as it is humbly meant and ſhown to us, by our lovite John Hinton of London, bookſeller, and by Alexander Maconnochie writer in Edinburgh, his attorney and commiſſioner, conform to power of attorney, bearing date 26th September laſt, That where the Revend Mr. Thomas Stackhouſe, late Vicar of Beenham in Berkſhire, Maſter of Arts, deceaſt, having, after many years ſtudy and labour, compiled a book, commonly known by the name of "Stackhouſe's Hiſtory of the Holy Bible;" he thereby acquired the ſole and excluſive property of ſaid book, and of printing and publiſhing the ſame: And that he, by his deed of alienation and vendition, dated 8th January, 1740 years, and regiſtrate in the Commiſſary-court books of Edinburgh, as a probative writ, 19th October, 1770 years; did, for certain onerous cauſes therein ſpecified, grant, bargain, ſell, aſſign, and ſet over to Stephen Auſtin of London, bookſeller, deceaſt, and to his executor, adminiſtrator, and aſſigns, the copy-right and ſole privilege of printing, reprinting,

reprinting, and ſelling, all the foreſaid book, compiled and written by him, the ſaid Mr. Thomas Stackhouſe, and entitled, " A new Hiſtory of the Holy " Bible, from the Beginning of the World to the Eſtabliſhment of Chriſtianity, " with anſwers to moſt of the controverted Queſtions, Diſſertations on the " moſt remarkable Paſſages, and a Connection of Profane Hiſtory all along; " to which are added, Notes explaining the difficult Texts, rectifying Miſ- " tranſlations, and reconciling ſeeming Contradictions: The whole illuſtrated " with proper Maps and Sculptures." And all the eſtate, right, title, intereſt, claim, and demand whatſoever, either in law or equity, or otherwiſe howſoever, of him the ſaid Thomas Stackhouſe, of, in, and to the ſaid copy-right, and benefit of printing the ſaid book; and of, in, and to the ſaid book, to have and to hold the ſaid copy-right and ſole privilege of printing, reprinting, and ſelling the ſaid book, and all benefit and advantage to be had or made thereby, unto the ſaid Stephen Auſtin, his executor, adminiſtrator, and aſſigns, to and for his own uſe and benefit, as his own proper goods, and chattels, and eſtate, from thenceforth and for ever, as the ſaid deed of vendition and alienation in itſelf more fully bears: And that the ſaid Stephen Auſtin, in virtue of the foreſaid vendition, did continue in the ſole and excluſive poſſeſſion of ſaid book during his life, and of printing, ſelling, and publiſhing the ſame; and he, by his latter-will and teſtament, dated 20th March, 1745, did nominate and appoint Eliſabeth Auſtin, his wife, to be his executrix, and bequeathed to her his whole eſtate, real and perſonal, conform to an extract of ſaid teſtament from the Prerogative court of Canterbury, dated 19th September, 1770 years: And that the ſaid Stephen Auſtin having died in the month of December 1750 years, Eliſabeth Auſtin, his widow, in virtue of ſaid laſt will and teſtament, ſucceeded to his means and eſtate, and, *inter alia*, to the copy-right, and ſole privilege of printing, reprinting, and ſelling the foreſaid book, and whole profits and advantages accruing therefrom, and that as executrix and adminiſtratrix of her ſaid huſband: And that the ſaid John Hinton, purſuer, having married the ſaid Eliſabeth Auſtin upon the 10th of Auguſt, 1752 years, conform to certificate of their marriage from the regiſter-book of marriages of the pariſh-church of St. Sepulchre, dated 20th September, 1770; he thereby acquired the copy-right of ſaid book, and ſole privilege of printing, reprinting, and ſelling the ſame, and whole profits and advantages ariſing therefrom, and continued to print and publiſh the ſame as his ſole property accordingly. But, notwithſtanding his having the undoubted right and title to ſaid book, and that he always had ſufficient quantities of the ſame for ſale: Yet ſome perſons, within that part of Great Britain

Britain called Scotland, have of late taken upon them, without his conſent and authority, to print, reprint, and ſell ſaid book, for their own private advantage and profit; and in particular Alexander Donaldſon, and John Wood, bookſellers in Edinburgh, and James Meuroſe bookſeller in Kilmarnock, did, in the year 1767, or on one or other of the years betwixt the year 1760 and 1770, without the conſent and authority of the ſaid John Hinton, purſuer, in a moſt fraudulent manner, and with a manifeſt view to deprive him of the profit and benefit ariſing from the publication of ſaid book, take upon them to print, reprint, ſell, and diſpoſe of the foreſaid book; at leaſt they, or one or other of them, cauſed an edition or impreſſion of the ſame, to the amount of ten thouſand copies or thereby, to be ſo printed and ſold, and applied the price and produce thereof to their own uſe and behoof, or for the uſe and behoof of one or other of them: and they, or one or other of them ſtill continue publickly to ſell ſaid books ſo unlawfully printed by them, or employ other perſons to ſell and diſpoſe of the ſame, in open defiance and violation of the ſaid John Hinton, his abſolute and excluſive right of property in ſaid book: And albeit it is of verity that the ſaid John Hinton, purſuer, and his ſaid attorney, have oft and divers times defired and required the ſaid Alexander Donaldſon, John Wood, and James Meuroſe, defenders, to deſiſt from ſelling and diſpoſing of the foreſaid book ſo illegally printed, by or for them, or for one or other of them, and to deliver to him ſuch of the ſaid books as are ſtill in their cuſtody, or in the cuſtody of any other perſon for their behoof; and alſo to make payment to him of the ſum of L. 1: 10 ſterling for each copy of ſaid book ſo printed and ſold by them, or either of them, or by any other perſon for their behoof, and likewiſe to make ſufficient reparation to him for the injury he has ſuſtained in his property by the printing and ſelling ſaid book in the illegal and fraudulent manner abovementioned; yet they wrongouſly refuſe, poſtpone, and delay ſo to do: And THEREFORE, it OUGHT and SHOULD be found and declared, by decreet of our Lords of Council and Seſſion, that the ſaid purſuer, John Hinton, has the copy-right, and ſole and undoubted title and privilege of printing, reprinting, and ſelling the foreſaid book commonly called Stackhouſe's Hiſtory of the Bible, and to the profits and advantages from thence ariſing; and that the ſaid Alexander Donaldſon, John Wood, and James Meuroſe, defenders, have done wrong and made a moſt illegal incroachment upon the purſuer's property, by printing, publiſhing, and vending the foreſaid book, and the ſame being ſo found, the ſaid Alexander Donaldſon, John Wood, and James Meuroſe, defenders, ought and ſhould be decerned and ordained, by decreet of our ſaid Lords, to deſiſt and ceaſe from

from all further printing, publiſhing, or ſelling ſaid book, commonly known by the name of Stackhouſe's Hiſtory of the Holy Bible, and to deliver to the purſuer all copies of the ſaid impreſſion thereof, conſiſting of ten thouſand copies or thereby, printed by them, or one or other of them, remaining unſold at the time; and they ought alſo to be decerned and ordained, by decreet foreſaid, conjunctly and ſeverally, to make payment to the purſuer of the ſum of L. 1 : 10 ſterling for each copy of the ſaid book, that they, or either of them, have ſold to any perſon, or perſons, and ſhall deliver leſs than the foreſaid number of ten thouſand copies; and further, the ſaid defenders ought and ſhould be decerned and ordained, by decreet foreſaid, conjunctly and ſeverally, to make payment to the purſuer of the ſum of L. 100 ſterling of damages for their moſt unjuſt and illegal invaſion of his property in the unwarrantable manner abovementioned, with a fraudulent intention to deprive him thereof, and in terror to others to commit the like practices in all time coming, or of whatever other ſum our ſaid Lords ſhall pleaſe to modify on that account; and they ought likeways to be decerned and ordained, by decreet foreſaid, conjunctly and ſeverally, to make payment to the ſaid purſuer of the expences of this proceſs, and of extracting the decreet to follow hereupon, as the ſame ſhall be aſcertained by our ſaid Lords at diſcuſſing this proceſs, conform to the laws and daily practice of this realm, uſed and obſerved in the like caſes, as is alledged.

The COUNSEL were,

For the PURSUER,	For the DEFENDERS,
Mr. DAVID RAE,	Mr. JOHN MACLAURIN,
Mr. ALEXANDER MURRAY,	Mr. ILAY CAMPBELL,
Mr. ALLAN MACONNOCHIE.	Mr. JAMES BOSWELL.

The cauſe came before the Lord *Coalſton* Ordinary, who took it to report, and ordered informations: That for the purſuer was drawn by Mr. *Rae*; and that for the defenders by Mr. *Campbell*. The Court alſo appointed a hearing in preſence, which began upon the 20th of July 1773: All the ſix counſel ſpoke, and the pleadings laſted four days.

LORD

LORD KENNET.

WE have had this queſtion very ably ſtated in papers, and very fully diſcuſſed in pleadings. I do not mean to run through all the arguments;—to ſupport thoſe on the one ſide, or confute thoſe upon the other. I will not meddle with the law of England; in the firſt place, becauſe I do not profeſs to underſtand that law; and, ſecondly, becauſe I think it ought to have no influence in determining upon the law of Scotland. I preſume the learned judges of the Court of King's Bench gave a juſt judgment upon the law of England; but they found much upon the acts of the Stationers Company, and the injunctions of the Court of Chancery, with which we in this country have no concern.

I am of opinion, that Literary Property is not in the law of Scotland. It is not in *the law of nature*, which is one great fountain of our law. The law of nature is not founded on metaphyſical arguments, and to be deduced from long, abſtruſe, and abſtract reaſonings. It muſt be obvious to mankind, at leaſt, as ſoon as it is propoſed; according to the elegant paſſage in Cicero, mentioned by Mr. Murray, "Eſt hæc non ſcripta, ſed nata lex, quam non "didicimus, accepimus, legimus, verum ex natura ipſa arripuimus, hauſi- "mus, expreſſimus, *ad quam non docti, ſed facti*, non inſtituti, ſed imbuti "ſumus." It is in vain to ſay, that it is founded on that part of the law of nature, by which we are not to hurt another, or take from him what belongs to him; for to apply that is a *petitio principii*.—It is not in the *law of nations*: there is not the *conſenſus gentium*; for it is admitted, that no ſuch *conſenſus* obtains. So far from this, we find it to be only ſuch a kind of right as particular ſtates have, in ſome inſtances, conferred by a patent, or *previlegium* for a limited time.—It is not in the law of *Scotland*, properly ſo called. We have no *reſponſa prudentum* for it. It is not even mentioned by any of the writers on our law, except by Lord Bankton, when treating of the ſtatute of Queen Anne. On the contrary, the practice of all our lawyers, who took limited patents for printing their works, ſhews that they entertained no ſuch idea.——There is no *ſeries rerum judicatarum*; nay not one judgment of this Court finding ſuch a property.—There is no *ſtatute* upon the ſubject, except the ſtatute of Queen Anne, which appears to me to be againſt the common-law right. The rubric, or title of that ſtatute, is clearly againſt it; for it bears to be, an act for *veſting* the right for a certain term: And it is material to

 conſider,

conſider, that the title at firſt ſtood otherways, and bore, to be for *ſecuring*; but it was altered by the legiſlature itſelf. Streſs has been laid on the narrative of the act; but this I think the weakeſt part of it. The moſt material part is certainly the enacting clauſe; which confers the right for a limited time. I admit, that the words, *no longer*, add nothing to the ſenſe. But then I ſee this to be an expreſs clauſe, diſtinctly limited, and quite ſeparate from the clauſe with regard to penalties. The moſt that can poſſibly be ſaid upon this clauſe is, that if literary property exiſted antecedently, it does not take it away. But I do not ſee that it exiſted at all before the act. The laſt clauſe of the act, which provides, that "the ſole right of printing or "diſpoſing of copies ſhall return to the authors thereof, if they are then liv-"ing, for another term of fourteen years," would have been abſurd, if authors were underſtood to have that ſole right *ab ante*. I am therefore of opinion, that there is no right in authors to the ſole printing of their works, except what the ſtatute has rationally given.

LORD AUCHINLECK.

THIS queſtion is new and intereſting: Till very lately, it never received a judgment in any Court of Europe. It has received but one, and that in England, the laws of which country are in many particulars ſpecial to itſelf, and, when it was there determined, the court was divided.

We have had the queſtion ably handled in mutual informations, both of them well drawn; in particular, that on the ſide of the defenders is a performance which does honour to the author: We have likewiſe had laboured and long pleadings, and now are to give our opinions.

In the entry, I cannot help obſerving, that it is well ſaid by a wiſe man, *nil tam abſurdum quod non dicendo ſit probabile*: By much labouring any ſubject, the attention is apt to be drawn away from the real merits, and run into extraneous matter: As I think that has been the caſe here, and that the diverſity of opinions has been owing to it,—in the opinion I am to give, I ſhall endeavour to confine myſelf to the proper merits of the caſe, without launching out into many of the learned arguments which both ſides have inſiſted on.

I'll own, that the cauſe, when ſtripped of extraneous matter, does not appear to me to be difficult. The queſtion is, whether he who writes a book, and publiſhes it, has, by common law, independent of any ſtatute or privilege

granted

granted him by the ſtate, a perpetual property in that performance, in the ſame way as he had before publiſhing?

It is agreed by all, that while the book is not publiſhed, whether the work be in the author's head or his cabinet, it is abſolutely his, and no man can deprive him of it. But the queſtion is, if this right continues after publication?

There has been much ſaid on the neceſſary conſequence from its being once owned to be a man's property, that it ſhould ſtill continue to be ſo. But, with ſubmiſſion, the reaſoning appears to me not juſt. My thoughts are mine ſo long as I retain them in my mind; but if I utter them, *neſcit vox miſſa reverti*; every hearer has a right to them as much as I. A man need not ſpeak in company unleſs he chuſes it; but if he ſpeaks, and does not enjoin ſecrecy, every man may propagate the ſayings with impunity. If a man throws out a thing in company, whether inſtructive or entertaining, can he maintain that he has a right of property in this *bon mot* to him and his heirs for ever.

And here I beg leave to ſay, unleſs it can be ſhewn there is a right of property in what a perſon utters verbally, there can be none in what he publiſhes to all mankind by printing it. Indeed, when a man publiſhes his thoughts, he gives them away ſtill more than the man who utters them in converſation. The latter gives them only to his hearers; but the former to the whole habitable earth.

For illuſtrating this, ſuppoſe ſeveral people well acquainted with this country, ſhould go up to the caſtle of Edinburgh, aud one of them, who liked ſpeaking, ſhould immediately deſcribe all the objects he ſaw from it, would he acquire a right ever after to that deſcription? And could he, by printing it, create a right not in him before?

What has created an obſcurity, is, that ever almoſt ſince printing began, there have been privileges and grants given as to publications of books; and men are apt to intermix the notion of theſe rights with a common-law right, a right independent of grants; and the moſt part of the argument in behalf of the purſuer ſeems to have been derived from that ſource, particularly that from what is called *injunctions*, which ſuppoſed a right in the complainer to ſtop a publication.

But to come at the certainty; let us go back to the times before any law was made for privileges to publiſhers, or any patent granted to them; which is all after printing came in, which happened in the fifteenth century; and we ſhall find no attempt made to aſſert the author's property, in any book

which

which he had publiſhed. We ſee, in the learned diſſertations delivered in the court of our neighbouring country, ſtreſs laid on the King's right to print certain books, and this is ſaid to be a right of property. It is true, the King has ſtill a right to print certain books, and he has his own printer; in the choice of whom great care ought to be taken, which is not always the caſe; for I remember, in the year 1745, the ſame printer officiated for the King and for the Pretender: But this right of the King's is *prerogative*, not *property*.

We had in Scotland pretty early, licenſes granted to printers, particularly there is one in 1567, to *Robert Liekprivick*; and when your Lordſhips hear the liſt of the books which he obtained a ſpecial privilege to print, you will judge if they were the King's property. His licenſe is to print, "Donatus pro Pue-" ris, Rudiments of Peliſſo, the Acts of Parliament, except theſe of the laſt " part, the Cronicles of the Realm, Regiam Majeſtatem, the Pſalms of David " with the Engliſh and Latin Catechiſms leſs and mair, with the buik callet " Omilies for Reideris in Kirks, with the general Grammar to be ſet out for " erudition of Zouth.—The privilege to endure twenty years; and none to " print the ſaid buiks without his conſent, under the pain of the eſcheat of " the buiks, and being fined."

This privilege, and all ſuch, were granted to printers, and were not calculated for the benefit of authors, and not founded on any right of property in the printer.

But there is not upon record in any country, not even in England, a patent, or privilege, in favour of any perſon whatſoever before printing; nor is there at this day any privilege granted to authors, which hinders as many copies to be taken of the work as people chuſe, provided they be not printed copies: nay, theſe gentlemen, the London bookſellers, who have obtained ſo many patents, and even the act of Queen Anne;—though they call *printers* who interfere with them *pirates*, (a cruel name), never pretend that they can hinder *written* copies to be taken. The law, then, is directed only againſt printing, and is no reſtraint from writing; though we all know, that, before the art of printing, there was no other method of ſpreading books. It was then a great trade. It may be ſo again; and the London bookſellers would have no remedy. This is a clear proof, that the reſtraint was introduced after printing began, and that it is no way founded in common law, but on grants; for if it were founded on common law, it would reach againſt manuſcript copies, as well as printed ones: and this to me is demonſtration, that there is no common-law property in authors.

And,

And, as a farther illuſtration of this, let us conſider, that anciently very valuable performances were preſerved only by the memory. It is ſaid *Homer* was ſo, and *Oſſian*. When that was the caſe, what privilege could the author have? The poem of *Chevy-chace*, ſo much celebrated, and upon which we have a criticiſm by Mr. *Addiſon*, was, in my remembrance, repeated by every body.—Was there a *copy* of this little heroic poem? What privilege could the author have in it, after he had let one man get it by heart?

Again, *extempore* compoſitions, ſuch as all our ſermons in this country were long ago, or were ſuppoſed to be, as ſome of us who are far advanced in life remember; for at that time a miniſter who uſed notes, and would not truſt to Providence, as it was ſaid, would have been very ill heard:—When, as was common, people took them down in writing, as ſome of them were very good, very entertaining diſcourſes; had the preacher any property in theſe ſermons? He could have none in the writing; for he never had written himſelf. Could he have ſaid, that they were only intended for his own congregation, and were not to be communicated to others?—I apprehend the proprietor of theſe was the perſon who wrote;—for the author was not able to repeat what was in the copy.

In ſhort, the whole of the author's plea conſiſts in his claim to reſtrain from printing; and it is founded on blending the notions ariſing from privileges and patents with a common-law right, which is quite erroneous: and this clearly muſt put an end to the common-law right; for as it is directed only againſt printing, it is plain, that, before printing, there was no ſuch right; that, to this day, it could not be pleaded againſt uttering as many manuſcript copies as a man chuſes;—ſo, conſequently, it is not founded on common-law property.

I have ſaid nothing of the act of the 8th of Queen Anne, for I do not think it neceſſary; but if there were any dubiety, that act removes it; for it gives the author a right under certain conditions, and for a fixed period.

LORD HAILES.

AUTHORS in England may have a common-law right in their works even after publication.

So Engliſh lawyers have ſaid; ſo the Court of King's Bench has determined.

Engliſh law, as to us, is foreign law; foreign law is matter of fact. Of the fact I aſk no better evidence, for I can have no better evidence, than the opinion of the lawyers and judges of that foreign country.

Whether this common-law right be conſidered as a *property* or as an *intereſt*, or as ſomething diſtinguiſhable from either, is of no moment.

If we are once ſatisfied of the *exiſtence* of a legal right, all inquiry into the *mode of its exiſtence* is ſuperfluous.

This common-law right is ſtrangely interpreted by the London bookſellers.

The Biſhop of Glouceſter, in his admirable Charge to his Clergy, has beſtowed on the London bookſellers the appellation of *The Sages of St. Paul's Church-yard.*

The doctrine of theſe *ſages* is commodious: they *limit* or *enlarge* this common-law right as beſt ſuits their own conveniency.

They *limit* it, 1. when, maintaining that an author has a right to the *whole* of his work, they take the liberty of borrowing whatever *part* of the work may be a proper ingredient for their monthly haſhes of literature, their *Univerſal Magazines of knowledge and pleaſure.*

If a work chances to be ſhort, they retain it in a news-paper under the appellation of a *criticiſm*, or an *extract.*

2. Again, they *limit* this common-law right by exciting their dependents to make abridgements of valuable works.

Herein Stackhouſe, the author of this day, was an adept: he abridged the diſcourſes pronounced at Mr. Boyle's lecture.

He and his bookſeller would have condemned Donaldſon and his aſſociates for encroaching on the common-law right of Bentley or Gaſtrel: and yet *he* ſcrupled not to make, nor his bookſeller to publiſh, an abridgement of the arguments of Bentley and Gaſtrel in defence of religion!

How much of the argument evaporated in this literary proceſs, I pretend not to ſay.

Perhaps an abridger is held to acquire a right, by ſpecification in the work, abridged, according to the trite ſaying,

——" male dum recitas, incipit eſſe *tuus.*"

3. They

3. They *limit* this common-law right by publiſhing *Dictionaries of Arts and Sciences*—the works of a hundred authors are ranſacked; out of them is produced, as *the ſages* expreſs it, *an entire new work.*

Poſtlethwayt common-placed the authors who had written of trade and commerce. It would be hard, ſays he, [article *Books*], were I to be deprived of the fruit of my twenty years labour by a literary pirate. That is, it would be hard that any one ſhould ſteal from me, what I have ſtolen from others.

To ſhew his conſiſtency, he has tranſcribed Forbes's *Treatiſe on Bills of Exchange*, in ſo far as it relates to Scotland.

What right had he to plunder Forbes? Yet the London bookſellers can ſee no fault in this, as long as they are *proprietors* of *Poſtlethwayt's Dictionary.*

4. They *limit* this right even in prerogative copies. They dare not print the text of the Engliſh tranſlation of the Bible by itſelf: *that* belongs to the King; but they print it with notes, borrowed from Geneva ſometimes, but more frequently from Poland.

Again, they *enlarge* the common-right, and *that* in various ways.

1. It is admitted that there is no literary property in works whereof the author is abſolutely unknown.

If there ever was an anonymous writer, it is the author of the practical treatiſe entitled *The Whole Duty of Man.* At this day even the ſex of the author is problematical.

Nevertheleſs, the *trade* have found means to appropriate to themſelves a copy in which the pious author pretended no property.

Dr. Hammond, in his commendatory epiſtle, obſerves, that the author had thrown the work into the *Corban* or common treaſury: the London bookſellers have taken it out of the *Corban.*

And how? from Dr. Hammond's commendatory epiſtle they learn, that Garthwait the publiſher, had the MS. in his poſſeſſion *before* he printed the work: therefore the property of the book is in the heirs or aſſigns of Garthwait.

On this momentous diſcovery, that a publiſher was poſſeſſed of the MS. which he publiſhed, is founded the injunction 1735.

This, by the way, ſhews that injunctions have been granted ſometimes without much attention to the merits of the cauſe.

2. The London bookſellers *enlarge* the common-law right by conferring the name of *original author* on every *taſteleſs compiler.*

Hereof there is an appoſite example in Stackhouſe, the author of this day.

He was as very a compiler as ever deſcended from a bookſeller's garret.

The incorporeal ſubſtance of Stackhouſe's ideas is a non-entity.

And

And yet, in the opinion of *The Sages in St. Paul's Church Yard*, Stackhouſe is no leſs an original author than Hooker or Warburton.

Here lies my firſt difficulty: were we to copy the judgment of the King's Bench in the caſe Miller *verſus* Taylor; were we to find that the common-law right of authors in England could be made effectual in Scotland; were we even to find that literary property was eſtabliſhed in the law of nature and nations; ſtill we could not pronounce judgment for the purſuer, unleſs we were to hold Stackhouſe to have been an original author; *this* I can never do.

But I have ſtill a farther difficulty.—"In this caſe it is material to conſider "how the common-law of Scotland ſtood before the ſtatute of Q. Anne." Theſe are the words of an eminent perſonage on a ſimilar occaſion.

The inquiry was not *material*, had he underſtood literary property to be grounded on the law of nature and of nations: *that* law varies not in different countries: according to the elegant paſſage which we heard from the bar, it is not *aliud Romæ, aliud Athenis:* neither was the inquiry *material* if the common-law right in England could have had effect in a foreign country.

The inquiry which that great man thought material has been made.

Of this right there is not a veſtige to be diſcovered of the law of Scotland.

From Lord Stair down to Forbes all our authors are ſilent concerning it: from Lord Stair down to Forbes all our authors have acted as if there had been no ſuch right.

It is ſaid, "that the privilege which Lord Stair obtained prohibiting others "from printing his works did indeed confer nothing upon him, but that his "remedy lay by an ordinary action at law." Strange that he ſhould have fought and obtained a privilege which gave him no right, and that he ſhould never have mentioned that right which he had!

It is vain to ſay "that our authors lived under the deſpotic ſway of a Scot-"tiſh Privy Council, and that they were obliged to accommodate themſelves "to thoſe wretched times."—The Scottiſh Privy Council was not deſpotic after the Revolution: it was a legal court and legally adminiſtered: it was indeed aboliſhed at the union of the two kingdoms, not becauſe it was deſpotic, but becauſe it could no longer ſubſiſt: for the ſame reaſon, and at the ſame time, the Engliſh Privy Council was aboliſhed.

Many of our authors lived not in *wretched times:* Lord Stair publiſhed his corrected work after the Revolution; Forbes wrote in the days of Q. Anne; Lord Bankton in the days of George II.

I dare not pronounce *that* to be a right in the law of Scotland, which has eſcaped the obſervation of all our ſtatutes, lawyers, and authors.

I therefore muſt give my judgment for the defenders.

LORD

LORD MONBODDO.

THIS cauſe, whatever way it ſhall be decided, does great honour to our Bar; for it has been moſt ably pleaded, nor do I remember ever to have heard a better pleading. It is a very important cauſe. It is of importance, as being perhaps the cauſe of greateſt property that ever came before us; the property indeed is immenſe, we know not the extent of it: and it is of importance in another reſpect, that it divided the preſent Judges of England, and my Lord Hardwick would give no opinion upon it. I am to give my opinion with the majority of the Engliſh Judges. If it had been on the other ſide, I ſhould have given it with the ſame freedom.

As this cauſe has been treated, the firſt queſtion is,—Whether ſuch a property as I contend for, of authors in their works, can at all exiſt? For, a great deal of argument has been uſed to prove, that ſuch a property is a mere chimera, incapable of being defined or aſcertained. This part of the argument, I own, ſurpriſed me a good deal: for it muſt be allowed, that ſuch a property is given by the ſtatute, at leaſt for a time; and, if it be given by the ſtatute for a time, there is nothing to hinder it to be given by common law for a perpetuity. And the nature of it is ſufficiently defined by the ſtatute; for it is there ſaid to be, "the ſole liberty of printing or reprinting the book." It is therefore what every right of property is,—the right of uſing a thing excluſive of others. And the uſe of the thing in this caſe aſcertained by the ſtatute, is, the printing or reprinting of the book. For, there may be ſundry uſes of the ſame thing; and as many uſes as there are, ſo many different rights or interests there may be in it. If I purchaſe a book, I may uſe it for my inſtruction or amuſement, or I may employ the paper or binding of it as I think proper; and ſo far I may be ſaid to have the property of it. But, I cannot reprint it, becauſe that uſe belongs to the author or his aſſigney, and ſo far he is proprietor. Here is nothing obſcure or unintelligible, but it is what every man, even though he be no philoſopher, can readily conceive. All, therefore, that we have heard about the abſurdity of a property in ideas, appears to me to be nothing to the purpoſe. Ideas, or *bon mots*, as my brother ſaid, are not by their nature a ſubject of property. For property, though it be an *incorporeal* right, it muſt have for its ſubject ſome *corporeal* thing: But, ſuppoſing they were capable of property, I allow every man who purchaſes a book to *appropriate* the ideas of it to himſelf as much as he can, and the words too, if his memory be good enough. I think I could go farther without hurting my ar-

gument, and admit that he may carry thoſe ideas in his mind, and thoſe words in his memory, to a printing preſs, and get them thrown off. Such a man I would call a *plagiary*, but not the *pirate* of a book; nor do I think that he would fall under the ſanction of the ſtatute, which only forbids him to uſe the book for a preſs-copy, to transfer the author's words from paper to paper, by the mere mechanical operation of printing, without any labour of the mind; but does not prohibit him to exerciſe either his memory or judgment upon it.

This being the nature of literary property, the next queſtion to be conſidered is, Whether there be ſuch a property at common law, independent of the ſtatute? And let us begin with the manuſcript.—That every author has a property in his own manuſcript, has not been denied. And it has been admitted, that, in conſequence of this property, he may, as the law now ſtands, print it if he pleaſes. Thus far, therefore, he may reap the fruits of his property. But theſe, it is ſaid, are the only fruits he can reap. For if the MS. is once printed, and the copy ſold, then it becomes *juris publici*, and every man is at liberty to reprint it, and make what profit of it he can. If this be ſo, the property of a MS. is a property of a very extraordinary kind, of which a man can only make profit once: whereas other things, which are the ſubject of property, we may uſe for our profit as often as we pleaſe, and hinder others from interfering with us in that uſe.

Let us ſuppoſe that the author, inſtead of multiplying his MS. by the preſs, makes ſeveral copies of it in writing; and let us ſuppoſe, that he gives the uſe of one of thoſe copies to a friend. This happened in the caſe of Lord Clarendon's hiſtory, and it was there adjudged, that the perſon who got the uſe of the copy had not a right to print it, though it did not appear that when he got it he was laid under any reſtraint or limitation as to the uſe of it. It is true, indeed, that the perſon in that caſe got the uſe of the MS. for nothing. But would it have altered the caſe, if Lord Clarendon's heir, in conſideration of the expence or trouble of tranſcribing the MS. had made him pay ſomething for the uſe of it? Or ſuppoſe that, inſtead of tranſcribing it, he had taken the more expeditious way of making copies of it by the preſs.

It appears, therefore, that by giving the uſe either of MS. or book for hire, or without hire, I do not give the liberty of printing or reprinting it, even though no ſuch condition was mentioned. And ſo it was adjudged by my Lord Hardwick in the caſe of a *Letter*, of which the man to whom it was written and ſent, appears to be as much proprietor, as any man of any book or MS.; and yet he is not entitled to print it. I hold it to be part of the contract of emption, when a book is ſold, that it ſhall not be multiplied. If, in

the

the ſale of a book, it were made a condition, that the buyer ſhould not reprint it, all your Lordſhips would be of opinion, that he would not have that right. Now I ſay, that, in the caſe of a printed book, it is not only *underſtood* that the poſſeſſor of it ſhall not reprint it; but it is *expreſſed*. For the title-page bears, that it is printed either for the author or for ſome bookſeller, to whom he has aſſigned the right of the copy; the meaning of which cannot be, that the author or bookſeller has a right to the copies already printed (for as they are in his poſſeſſion ſuch advertiſement is altogether unneceſſary), but to intimate, that he has the ſole right of printing. So that the ſelling a book with ſuch a title, is in effect covenanting that the purchaſer ſhall not reprint it.

The common law of Scotland and England, muſt, I think, be the ſame in this caſe, as the common law of both is founded upon common ſenſe and the principles of natural juſtice, which require that a man ſhould enjoy the fruits of his labours. For it is certainly contrary to juſtice, that a man ſhould employ perhaps his whole life in compoſing a book, and that others ſhould enjoy the profit of printing and publiſhing it, "to his very great detriment, and too often "to the ruin of him and his family," as is ſaid in the preamble of the ſtatute.

It has been ſaid that literary property is unknown in this country, and was not known till of late in England: That in this, and other kingdoms of Europe, authors did formerly ſecure to themſelves the profit of their works by getting patents from the crown, with the excluſive privilege of printing them for a certain number of years: And particularly our great lawyers, Sir George M'Kenzie, Lord Stair, and Lord Dirleton, took patents of this kind for the printing of their works.—To this I anſwer, that in thoſe times, the licenſing the preſs was held to be part of the prerogative: Sir George M'Kenzie has expreſsly ſaid, that it was *inter regalia*: No man therefore had then a right to print any thing without the permiſſion of the king; ſo that every copy of a book was what is now called a prerogative copy; and upon this foot matters ſtill continue in the other kingdoms of Europe. But in Britain, it is now admitted, that the king has no ſuch prerogative, except as to Bibles, common-prayer books, or law-books, which cannot yet be printed without his permiſſion; of ſuch books, I think, the king may be properly enough ſaid to have the property, which, as it is defined by the ſtatute, conſiſts in the excluſive privilege of printing. And accordingly, I ſee that in England, the king's right to prerogative copies is maintained upon the principle of property: and the ſame right that the king has to thoſe books, every author has to the book he writes, now that the encroachment of the crown upon the liberty of the preſs is

is at an end. And thus I think a very good reaſon may be given why authors have now a right in their works which they were not ſuppoſed to have before.

The reprinting a book has been compared to the imitating or copying of an engine, which every man may do, if the inventor has not ſecured to himſelf the property of it by a patent. But the caſes are very different; for the printing of a book is a mere mechanical operation, which a man may perform without underſtanding one word of it: Whereas, no man can copy an engine, unleſs he have in his mind the idea of that engine, and know the purpoſe for which it is intended, and the mechanical powers by which it operates: Now, ſo far as concerns ideas, and every operation of the mind, any man who purchaſes a book is abſolute maſter of it. But with reſpect to the multiplying of copies by the mechanical operation of the preſs, that belongs only to the author; and in the ſame way the imitating a print or copperplate is to be diſtinguiſhed from the printing a book, or the taking an impreſſion of the copperplate. This laſt is a mere mechanical operation like printing; whereas, the imitating a copperplate by engraving a new plate, is like copying a picture, a work of ſome taſte and genius, and often very ill performed. Every man therefore was at liberty to engrave any print, though it had been invented and firſt engraved by another, till he was prohibited by the act 8th Geo. II. But as the two operations of engraving and printing are ſo different, no argument can proceed from the one to the other.

The laſt thing to be conſidered is, whether ſuppoſing a right to exiſt at common law, it be taken away by the ſtatute. And I have the ſatisfaction to find, that the Judge in the Court of King's Bench, who was ſingle in his opinion there, as I ſhall probably be here, did not think it was taken away, if it did once exiſt. The argument drawn from the word *veſting* in the title of the ſtatute to prove that authors had no right before, is not at all concluſive; for the ſame word occurs in the title of the act annexing the eſtates lately forfeited to the crown, which however did certainly belong to the crown before that act was made. The word, in both titles, ſignifies nothing more than that a fuller right was given, and of more ready execution, than what was given by the common law: Beſides, the title of an act is but once read, whereas, the preamble is thrice read, as well as the reſt of the act. Now, in the preamble of this act, the right of an author to his works is aſſerted in expreſs terms: And if there were any doubt in the matter, it is removed by that proviſo in the end of the act, by which it is declared, that nothing in the act ſhall either prejudice or confirm any right claimed by any perſon to the printing or reprinting any book or copy. This leaves the matter juſt where it was

before

before the ſtatute, and appears to have been intended to obviate this very doubt, whether the right which formerly belonged to authors was not taken away by this ſtatute, giving them a new right, I mean a right ſecured by penalties and forfeitures.

As to the alledged inconveniencies of literary property, the cleareſt principles of law may be attended with inconveniencies; but that conſideration belongs not to us, but to the legiſlature. Here, however, I ſee no inconveniencies; on the contrary, were there not ſuch a property, ſuch a right, there would be great inconveniencies, great injuſtice. I think it would be very hard, and much to the diſcouragement of literature, if an author, after ſpending a laborious life in compoſing a book, did not provide by it, not only for himſelf, but alſo for his family: Nor is the remedy in the ſtatute againſt this evil ſufficient; for, the beſt books may be twenty years publiſhed, without having their merit known, and afterwards have a great and univerſal ſale. The copy of Milton's Paradiſe Loſt was ſold for fifteen pounds, and it is probable that the bookſeller loſt by it; for, it is certain, that the book was in no repute, or eſtimation, till my Lord Sommers let the people of England know that they had in their language the beſt heroic poem of modern times.

Upon the whole, therefore, I am of opinion, 1*mo*, That authors had a right of property in their works before this act was made; and 2*do*, That ſuch right was not taken away by the act.

LORD JUSTICE CLERK.

THIS queſtion comes before the Court, upon a ſimple caſe—It is an action of damages brought by a bookſeller of England, againſt the defenders, reſiding and carrying on their buſineſs, as printers and bookſellers, in Scotland, for re-printing a book firſt publiſhed in England in the year 1738. It is not founded upon ſtatute, or letters patent, but upon the *copy-right* originally veſted in the author, and derived from him, to his purſuer, by which he claims the ſole right of printing this book, and of debarring all others for ever from printing the ſame, and conſequently that he is entitled to recover damages from theſe defenders, for their illegal encroachment upon his excluſive right.

As the action is brought in this Court, and againſt ſubjects reſiding in this country, we can have no rule for our judgment, but the law of Scotland; and the fair way of trying the caſe is, firſt, by ſuppoſing the action brought by

by the executor or aſſignee of a Scotch author, who had firſt publiſhed his book in Scotland thirty or forty years ago; and the queſtion is, Whether the law of Scotland acknowledges any ſuch original property, or *copy-right*, in the author?

I do not mean to enter at large into the grounds aſſigned for this *copy-right*, but to ſay in general, that it falls under none of the ideas, principles, or definitions of property, which I have learnt in the common law of this country.

No veſtige of it is to be found in the ancient world, though the ſame grounds of it exiſted then as at preſent. No trace of it can be diſcovered in modern nations, even ſince the art of printing was invented, England only excepted.

Before publication this *copy-right* in the author exiſts, and muſt have all the effects of property in every nation.

But when a man publiſhes his book, and ſells it, he makes every purchaſer abſolute owner of what he purchaſes; and the neceſſary conſequence of that ownerſhip is, that he may tranſcribe as many copies of it as he pleaſes, and conſequently may re-print it.

The force of this obſervation is well perceived by the purſuer's counſel; and, in order to obviate it, they ſuppoſe a *tacit condition* not to re-print, as concomitant of every purchaſe of a book.

But this is very inaccurate; becauſe it reſolves into a *petitio principii*. I admit that in any country where this copy-right in the author is eſtabliſhed by law, ſuch tacit condition will be implied in the contract, and the right of re-printing will not be underſtood to be transferred by the ſale of the book. But where no ſuch *copy-right* or excluſive privilege is eſtabliſhed, or known in the law of any country, there are no *termini habiles* for ſuch tacit condition, and the ſale of a copy of the book, transfers to the purchaſer the right of uſing it as a proprietor, by tranſcribing or re-printing as many copies of it as he pleaſes.

In eſtabliſhing the various modes of acquiring property, the law has followed the dictates of the human mind, ſufficiently partial to its own intereſt, and able to diſcern the grounds upon which property, or an excluſive right in any ſubject, may be acclaimed.

But, in this inſtance, the law, it ſeems, has given to men a property, a *copy-right*, of which they had no idea nor conception. For it is certain, that neither Homer, nor Virgil, nor Chaucer, nor Spencer, had any idea, that, after they publiſhed their works to the world, they, and their heirs and

aſſigns,

aſſigns, retained this property, this excluſive right of tranſcribing, or re-printing their works for ever.

In ſhort, upon examination it will be found, that there is no foundation for this *copy-right* in authors, in the common principles of law, and that the only ground for it is this, that, from the love of knowledge, and the admiration of the works of learning and genius, mankind are prone to give to authors, not only the merit, but the reward that is due to them for their works; and upon this principle every civilized ſtate in modern times has introduced excluſive privileges to authors, in the publication of their own works, ſome for a longer, ſome for a ſhorter time. But this ſuggeſts no idea of an original property in the author; on the contrary, it is inconſiſtent with it: for if ſuch property previouſly exiſted in the author, how ſhould it have occured to Sovereigns, meaning to encourage authors, to limit the endurance of the author's right to a certain term of years; which is the caſe of all letters patent known in the different ſtates of Europe, and of our ſtatute of the 8th of Q. Anne, which enacts a general privilege to all authors for a certain time.

The principle of theſe letters patent, and of our act of Queen Anne, is to give an encouragement to authors, which they could not have had by common law. Their purpoſe is not to give effect to a property which was antecedently in the author, but to lay a reſtraint upon the right of the other ſubjects, by prohibiting them from re-printing ſuch authors works, during the term of their privilege.

It is ſaid, that it is fit and expedient to give to authors a perpetual property in their own works.

I ſhould doubt much of the expediency of enacting ſuch a perpetual property. But if the argument ftom expediency were clearer than it appears to me, it cannot influence the preſent queſtion. It may have its weight with the legiſlature; not with me, in determining what the law is.

Neither can I ſee, if I were to judge of expediency, where to draw the line; for, notwithſtanding all that has been ſaid, I cannot, for my life, difference the author of a new book, from the inventor of a new machine, or of a new medicine; they are equally the works of genius and induſtry, and in their publication may be equally uſeful to mankind.

But if I were of opinion, that it would be expedient to give this copy-right, this perpetnal property to authors, what avails it, if it is not given by the law of Scotland. And this leads to the deciſive branch of the argument, Whether the law of Scotland has given, or, in any ſhape, has acknowledged, this *copy-right* in authors.

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The known ſources, or component parts of the law of ſcotland are, our ſtatutes, the Roman law, the ancient cuſtoms of the kingdom, the doctrines of our lawyers, and the deciſions of this court; all theſe have been inveſtigated, and no trace or veſtige is to be found of this idea of a *copy-right* or property in an author, upon which the preſent action is founded. On the contrary, we find all our great lawyers, in effect, admitting, that there is no ſuch principle in the law, which they certainly did, by reſorting in all caſes to letters patent from the ſovereign, for the excluſive publication of their own works for a limited timë, never exceeding twenty-one years.

To this may be added the confeſſed uſage of the kingdom, furniſhing a number of inſtances of books firſt publiſhed in Scotland, and, when not protected by letters patent, or after the expiry of ſuch letters patent, re-printed there, without any injunction, ſiſt, or ſuſpenſion by this court, for ſtaying ſuch re-publication, or any action of damages at the ſuit of the authors, their heirs or aſſigns, againſt the printers.

Such being the ſtate of our law, I do not ſee how this court could poſſibly award damages in the caſe ſuppoſed of a proceſs brought by the executor or aſſignee of a Scotch author, who had firſt publiſhed his book in Scotland, not protected by letters patent, or, after the expiry of ſuch patent, againſt the reprinters of ſuch a book in Scotland.

The ſecond queſtion ariſing upon the preſent caſe is, Whether or not this court can award damages to the executor or aſſignee of an author who had firſt publiſhed his book in England againſt the defendants, for re-printing ſuch book in Scotland, at the diſtance of thirty or forty years from the firſt publication.

The action is not founded upon letters patent, nor upon the act of Queen Anne, which does not apply to the caſe, but upon the common law of England, by which, it is ſaid, an author has a copy-right or property in his book, and conſequently muſt be intitled to a decree in this court, for rendering that property effectual againſt the ſubjects of this country, who have invaded that property.

But ſuppoſing this ſpecies of property to be known, and even eſtabliſhed in the common law of England, I deny the conſequence drawn from it. The law and judicatures of Scotland will give their aid to an Engliſhman, and to every foreigner, for rendering effectual every property, and every right eſtabliſhed in him by the law of his own country, not adverſe to the property and right of the ſubjects of this country, eſtabliſhed in them by the common law of Scotland.

Thus

Thus property of every kind founded upon the known principles of the law of nations; all rights and obligations founded upon covenant, without regard to the mode or form of that covenant, will have their full effect in this court, at the ſuit of a foreigner, againſt the ſubjects of this country: becauſe the law of Scotland, and of all civilized nations, give effect to ſuch property and to ſuch rights; and the ſubjects of this country can have no legal defence againſt the ſuit. But when an action is brought in this court for making effectual a property or right, founded upon the peculiar law or conſtitution of a foreign country, not only not acknowledged in the law of Scotland, but contrary to the principles of the common law of Scotland, and to the right and property of the ſubjects, as founded in that common law, it is impoſſible for this court to ſuſtain ſuch action; becauſe the ſubjects of this country are to be governed by their own law, and not by the law of another country.

If an Engliſh ſtatute had enacted this *copy-right* in authors, it could have had no effect againſt the ſubjects of Scotland; how then can a right, founded upon the judgments of the courts of England, in affirmance of a common-law-right in authors, be binding upon the ſubjects of this country? They certainly are no more bound by the common law than they are by the ſtatute law of England.

In the whole of this argument, I have kept entirely clear of the late deciſion in the Court of King's Bench: I have the higheſt reſpect for the judges of that court; but that judgment has nothing to do with the preſent caſe; becauſe it can have no effect upon the common law of Scotland.

That judgment proceeded upon a variety of matter, of which there is no veſtige in the common law of Scotland.

If the ſame queſtion had occurred in the King's Bench ſoon after the art of printing was introduced into England, I preſume the judgment would have been different, becauſe the court would have then wanted almoſt the whole materials, upon which their late judgment is founded.

We are now in a ſtronger caſe, as not only wanting that variety of matter and precedents, upon which the late judgment of the court of King's Bench proceeded, none of which exiſt in our law, but having alſo the ſenſe of all our great lawyers, and the uſage of the kingdom, ever ſince printing was known amongſt us, ſtanding in oppoſition to this *copy-right* of authors.

Upon the whole, I am humbly of opinion, that the defenders ought to be abſolved from this action.

LORD KAMES.

WHAT may be the law of England, with reſpect to the queſtion at preſent under deliberation, I pretend not to know. Nor is it neceſſary that I ſhould know; becauſe an alledged treſpaſs committed in Scotland againſt the purſuer, and proſecuted for damages in the Court of Seſſion, muſt be determined by the law of Scotland.

I know no foundation for damages, but a breach of contract, which is not pretended in this caſe; or an injury to one's perſon or character, which is as little pretended; or a hurt to his property; and this laſt is the ground upon which damages are claimed.

Let us then enquire into the nature of the property here inſiſted on. The meaning of *property*, in the laws of all nations, is a right to ſome corporeal ſubject, that can be poſſeſſed, that can be transferred from hand to hand, that goes to heirs, that may be ſtolen or robbed, and that may be demanded by a real action, termed *rei vindicatio*. The purſuer's right is not of that nature. When a man compoſes a book, the manuſcript is his property: if it be ſtolen from him, he may demand it by a *rei vindicatio*: it may be gifted by him, or ſold. But by ſuch gift, or ſale, the property is transferred to the purchaſer: he has now the ſame right over it that the compoſer had originally: he may ſuppreſs it, or he may publiſh it to all the world.

What is then the nature of the purſuer's right? He does not pretend to ſay, that it is a right to any *corpus*, to any ſubject that can be poſſeſſed, or that can be ſtolen from him. *Ergo*, it is not property. Taking it in all views, no more can be made of it than to be a privilege or monopoly, which intitles the claimant to the commerce of a certain book, and excludes all others from making money by it. The important queſtion then is, from what ſource is this monopoly derived, a monopoly that endures for ever, and is effectual againſt all the world? The act of Queen Anne beſtows this monopoly upon authors for a limited time upon certain conditions. But our legiſlature, far from acknowledging a perpetual monopoly at common law, declares that it ſhall laſt no longer than a limited time.

But to follow out the common law. The compoſer of a valuable book has great merit with reſpect to the public: his proper reward is approbation and praiſe, and he ſeldom fails of that reward. But what is it that intitles him to a pecuniary reward? If he be intitled, the compoſer of a picture, of a machine, and the inventor of every uſeful art, is equally intitled. Such a monopoly, ſo far from being founded on common law, is contradictory to the firſt principles

ciples of ſociety. Why was man made a ſocial being, but to benefit by ſociety, and to partake of all the improvements of ſociety in its progreſs toward perfection? At the ſame time, he was made an imitative being, in order to follow what he ſees done by others. But to beſtow on inventors the monopoly of their productions, would in effect counteract the deſigns of Providence, in making man a ſocial and imitative being: it would be a miſerable cramp upon improvements, and prevent the general uſe of them. Conſider the plough, the loom, the ſpinning wheel. Would it not ſound oddly, that it would be rank injuſtice for any man to employ theſe uſeful machines, without conſent of the original inventors and thoſe deriving right from them. At that rate, it would be in the power of the inventors to deprive mankind both of food and raiment. The gelding of cattle for food, was not known at the ſiege of Troy. Was the inventor intitled to a monopoly ſo as to bar others from gelding their cattle? What ſhall be ſaid of the art of printing? If the monopoly of this uſeful art was to be perpetual, it would be a ſad caſe for learned men, and for the intereſt of learning in general: it would enhance the price of books far beyond the reach of ordinary readers. Such a monopoly would raiſe a fund ſufficient to purchaſe a great kingdom. The works alone of Shakeſpeare, or of Milton, would be a vaſt eſtate. The art of making ſalt water freſh is a very late invention. Was it ever dreamed to be a tranſgreſſion againſt property, to uſe that art without conſent of the inventor?

I obſerve, in the next place, that this claim, far from being founded on property, is inconſiſtent with it. The privilege an author has by ſtatute, is known to all the world. But I purchaſe a book not entered in Stationer's hall; does it not become my property? I ſee a curious machine, the fire engine, for example. I carry it away in my memory, and conſtruct another by it. Is not that machine the work of my own hands, my property? I buy a curious picture, is there any thing to bar me from giving copies without end? It is a rule in all laws, that the commerce of moveables ought to be free; and yet, according to the purſuer's doctrine, the property of moveables may be ſubjected to endleſs limitations and reſtrictions that hitherto have not been thought of, and would render the commerce of moveables extremely hazardous. At that rate, the author of every wiſe or witty ſaying, uttered even in converſation, has a monopoly of it; and no man is at liberty to repeat it.

Laſtly, I ſhall conſider a perpetual monopoly in a commercial view. The act of Queen Anne is contrived with great judgment, not only for the benefit of authors, but for the benefit of learning in general. It excites men of genius to exert their talents for compoſition; and it multiplies books both of

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inſtruction and amuſement. And when, upon expiration of the monopoly, the commerce of theſe books is laid open to all, their cheapneſs, from a concurrence of many editors, is ſingularly beneficial to the public. Attend, on the other hand, to the conſequences of a perpetual monopoly. Like all other monopolies, it will unavoidably raiſe the price of good books beyond the reach of ordinary readers. They will be ſold like ſo many valuable pictures. The ſale will be confined to a few learned men who have money to ſpare, and to a few rich men who buy out of vanity as they buy a diamond or a fine coat. The commerce of books will be in a worſe ſtate than before printing was invented: at that time, manuſcript copies might be multiplied at pleaſure; but even manuſcript copies would be unlawful if there were a perpetual monopoly. Faſhions at the ſame time, are variable; and books, even the moſt ſplendid, would wear out of faſhion with men of opulence, and be deſpiſed as antiquated furniture. The commerce of books would of courſe be at an end; for even with reſpect to men of taſte, their number is ſo ſmall, as of themſelves not to afford encouragement for the moſt frugal edition. Thus bookſellers, by graſping too much, would loſe their trade altogether; and men of genius would be quite diſcouraged from writing, as no price can be afforded for an unfaſhionable commodity. In a word, I have no difficulty to maintain that a perpetual monopoly of books would prove more deſtructive to learning, and even to authors, than a ſecond irruption of Goths and Vandals. And hence with aſſurance I infer, that a perpetual monopoly is not a branch of the common law or of the law of nature. God planted that law in our hearts for the good of ſociety; and it is too wiſely contrived to be in any caſe productive of miſchief.

Our bookſellers, it is true, aiming at preſent profit, may not think themſelves much concerned about futurity. But it belongs to judges to look forward; and it deſerves to be duly pondered whether the intereſt of literature in general ought to be ſacrificed to the pecuniary intereſt of a few individuals. The greateſt profit to them ought to be rejected, unleſs the monopoly be founded in common law beyond all objection: the moſt ſanguine partizan of the bookſellers will not pretend this to be the caſe. At the ſame time, it will be found, upon the ſtricteſt examination, that the profit of ſuch a monopoly would not riſe much above what is afforded by the ſtatute. There are not many books that have ſo long a run as fourteen years; and the ſucceſs of books upon the firſt publication is ſo uncertain, that a bookſeller will give very little more for a perpetuity, than for the temporary privilege beſtowed by the ſtatute. This was foreſeen by the legiſlature; and the privilege was

wiſely confined to fourteen years; a ſufficient encouragement to men of genius without hurting the public intereſt. The beſt authors write for fame: the more diffuſed their works are, the more joy they have. The monopoly then is uſeful only to thoſe who write for money or for bread, who are not always of the moſt dignified ſort. Such writers will gain very little by the monopoly; and whatever they may gain at preſent, the profits will not be of long endurance; a monopoly would put a final end to the commerce of books in a few generations. And therefore, I am for diſmiſſing this proceſs as contrary to law, as ruinous to the public intereſt, and as prohibited by the ſtatute.

LORD GARDENSTON.

I THINK we are bound to take notice of the pleadings in this cauſe.—They have been admirable on both ſides.—The lawyers are entitled to our thanks; and I do not believe that ever this queſtion has been debated with greater ability than by the Scotch bar.—I cannot agree with any of your Lordſhips who conſider this as a clear caſe.—I think it is a nice and difficult queſtion.—I own I have been puzzled to fix my opinion.—In my firſt reflection on the argument, I was ſtrongly inclined to embrace the opinion of a literary property.—I was moved by the great object of encouragement due to learned and ingenious men.—By the apparent juſtice and reaſon of a right and property in a man's own works, and the productions of his genius or induſtry;—and I was greatly moved by the authority of a judgment pronounced by a court of high reputation in our neighbouring country.—But my maxim is, and ever ſhall be, *nullius addictus jurare in verba magiſtri*; and, on the fulleſt conſideration of this matter, I am now of opinion, that authors have in reaſon and equity a right to be protected in the ſole and excluſive publication of their own works for a limited time. But the nature of the thing, and the practice of nations, admits not of a real and perpetual property.

The queſtion in England depended upon the common law of that country. There is no need of argument to prove an undeniable propoſition, that we muſt judge by the common law of Scotland; in which I cannot find a ſufficient foundation for this claim of perpetual property in authors.

There are three fountains from which the common law of Scotland is derived: *1ſt*, From certain uſages and conſuetudes which have been long and uniformly obſerved; the origin of which in ſome caſes cannot be traced. Our law of death-bed is an example of this. *2dly*, A great fountain of our common

law is the civil law of the Romans, in ſo far as it has been received in our practice, and is evidently juſt and applicable to caſes undetermined in our own law: and ſome of our ſtatutes mention the Roman law as the common law of Scotland. *3dly*, I admit into our common law every principle of juſtice, as diſtinguiſhed from mere obligations of morality, which have been allowed and received as principles of juſtice by other civilized nations.—I have examined this claim of literary property under thoſe different branches of our common law.

As to the firſt, our uſage ſtands againſt the plea of a property in authors.—It is an upſtart property in this country, which authors have never claimed, and our lawyers have never aſſerted. They have always contented themſelves with demanding that limited protection which a patent gave. *2dly*, It is admitted, that there is no foundation for this plea in the civil law, though we find in it the greateſt variety and the moſt ſubtle diſtinctions of property. *3dly*, The principles of reaſon and juſtice, as approved by all civilized nations, do ſupport the author's claim to a temporary protection or privilege, not to a property or perpetual right.—Upon this ground I chiefly reſt my opinion. The moſt ſubſtantial and convincing evidence of what is really juſt and rational, in a matter of public concern to all countries, is the concurring ſenſe of nations. For above three hundred years, and ever ſince the invention of printing, all the nations and ſtates in Europe have, by their practice, eſtabliſhed the nature of an author's right. They have granted no more than a temporary privilege, and in that they have all concurred. I make no narrow diſtinctions of Popiſh and Proteſtant,—monarchies and free ſtates. It is certain, that ſince the æra of printing, and of the reformation, even the Popiſh countries have been greatly enlightened; nor has learning and juſtice been confined to the Proteſtant and free countries only. This is the ſubſtantial ground of my opinion. I can conceive, in a queſtion of this nature, no authority of equal weight with the ſenſe and concurring practice of civiliged nations for ages. The ſplendid error of one great man may miſlead many; but I cannot be eaſily induced to think, that the concurring ſenſe and practice of nations is erroneous.

It does not appear to me that this queſtion is of ſuch importance even to the literary trade of London bookſellers as they ſeem to imagine; and I am clear that authors have no concern in the queſtion at all. The term of legal protection outlives the great bulk of books that are publiſhed. Nine hundred and ninety-nine of a thouſand have little merit but their novelty: they are once read by idle people for amuſement, and are never thought of again. How few books publiſhed in the laſt century are re-printed in this? How few books

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of this will be re-printed in the next? We had in Scotland ſome good ſolid law-books, and books of wild divinity; the latter may exiſt in ſome odd libraries. Lord Stair's Inſtitutions has been re-printed, by which, I am informed, the bookſeller loſt. That book was re-printed without leave of his heirs; indeed I know not how many people muſt have been applied to, had it been underſtood to be *in bonis* of Lord Stair; and even the beſt authors are obliged to ſell their works to the bookſeller.

When I conſider this queſtion of literary property upon principles of reaſon and expediency, I find ſo many intricacies, ſomething ſo anomulous and inconſiſtent in this idea of perpetual property in an author's work after he has publiſhed it to all the world, that I cannot aſſent to it. The great argument, or *ratio dubitandi*, which I own at firſt almoſt convinced me, is, that the author has undoubtedly a property-right in the original manuſcript compoſed by himſelf; why ſhould he loſe it by publication, as he intends only to give the inſtruction or pleaſure of reading, not the profit of publication or re-printing? I anſwer, that certainly the author has a real property in the manuſcript of his own work; but, in the nature of the thing, by publication, he gives his work to the public, and he gives the ſame ſpecies of property to every individual who buys his book, which he had in the original copy before publication. This is a natural, a neceſſary, and a legal conſequence of the ſale, and it has been ſo underſtood and ſettled by the ſenſe and practice of nations ever ſince printing was introduced: So that every man who purchaſes a book, being thereby unqueſtionably proprietor, has a right to uſe it at his diſcretion; to multiply the copies by tranſcribing, or by printing, except in ſo far as he may be reſtrained by ſtatute, or the legal interpoſition of the ſovereign, or the equitable injunctions of the civil magiſtrate.

I have never been able to find a ſolid and ſubſtantial diſtinction between the right of an author in his book after publication, and the right of a perſon who invents a machine, after he makes it public. The diſtinctions which I have heard in the courſe of this debate, appear to me too metaphyſical and immaterial. When I was inclined to the opinion of literary property, and bent to anſwer this objection, I found it inſurmountable; at leaſt, the diſtinctions are too nice for my diſcerning, or too unſubſtantial for my principles of judging in matters of right. I will draw the compariſon in every material point, and I think they coincide exactly. The author has a property admitted on both ſides in the manuſcript copy of his compoſition before publication. Is there any doubt that the inventor of a machine, which may be more beneficial to mankind than any Book, has alſo a property in his work before it is made public?—It is

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ſaid that the author of a book cannot be ſuppoſed to intend by publication and ſale to part with his property in the literary compoſition, as contained in the original manuſcript; and may it not with equal reaſon be ſuppoſed, that the inventor of a machine does not mean to ſell his art or invention? he ſells only the individual machine to be uſed for the purpoſes which it was contrived to ſerve. A diſtinction was made, that the mechanic who makes a machine, after the model of the original inventor, employs his own art and genius; it is an act of imitation which he cannot be barred from exerciſing: But the act of re-printing is merely mechanical, having no ſimilarity to the author's art or genius. This ſeems alſo an immaterial diſtinction. The moſt ſtupid mechanic, incapable of any invention, far leſs the moſt ſublime and uſeful, can as eaſily execute a machine, when he ſees the model or original compoſition, as the moſt ignorant bookſellers and printers can make a new edition of a book without any ſhare of the author's taſte or genius. There is nothing can be more ſimilar, than the work of engraving is to literary compoſition. I will illuſtrate this propoſition by the works of Mr. *Hogarth*, who, in my humble opinion, is the only truly original author which this age has produced in England. There is hardly any character of an excellent author which is not juſtly applicable to his works; what compoſition—what variety—what ſentiment—what fancy—invention—and humour—we diſcover in all his performances! In every one of them an entertaining hiſtory, a natural deſcription of characters, and an excellent moral: I can read his works over and over, *Horace*'s characteriſtic of excellency in writing; *decies repetita placebit*, and every time I peruſe them, I diſcover new beauties, and feel freſh entertainment. Can I ſay more in commendation of the literary compoſitions of a *Butler* or a *Swift?* There is great authority for this parallel. The legiſlature has conſidered the works of authors and engravers in the ſame light; they have granted the ſame protection to both; and it is remarkable, that the act of parliament for the protection of thoſe who invent new engravings, or prints, is almoſt in the ſame words with the act for the protection and encouragement of literary compoſitions.

The ſtrange conſequences which would ariſe from this new doctrine of perpetual property in authors, have been well explained, and have great weight in my opinion. I ſhall mention ſome of thoſe conſequences, which affect me moſt. There is either an abſolute right of property in authors, or only an equitable claim to protection and excluſive publication for a limited time.—— The laſt is agreeable to the practice of nations, and, I think, to material juſtice and expediency. If we admit the firſt, it is an unlimited right of property, and muſt have all the effects of property in other ſubjects. Let us try this

literary

literary property, by applying the principles of property in other ſubjects to it. This is a fair teſt to diſcover if it be current and legitimate property or not. There are three material things which concern property. 1*ſt*. The objects or ſubjects of it. 2*dly*, The manner or mode in which it is conveyed among the living. 3*dly*, The manner in which it is transferred from the dead to the living. The ordinary ſubjects of property are well known, and eaſily conceived. We have lands and tenements, houſes and gardens, fiſhings, and moveables of great variety. But property, when applied to ideas, or literary and intellectual compoſitions, is perfectly new and ſurpriſing. In a law-tract upon this ſpecies of property, the diviſion of its ſubjects would be perfectly curious; by far the moſt comprehenſive denomination of it would be, a property in nonſenſe. It muſt alſo be branched out into the property of bawdy, blaſphemy, and treaſon. For an inſtance, we might ſpecify Mr. *Wilkes*'s property in No. 45; in his licentious Eſſay on Woman; and in his abominable writings to inflame and divide the minds of a people united by nature, intereſt, and government. By the juſt principles of property, no man can loſe his right in whole or in part, without his own act and conſent. According to this principle, I cannot think it would be juſtifiable to tranſlate a book without the author's warrant; for thereby you take the benefit and profit of his compoſition. You take his ideas, his ſenſe and meaning, which is really his literary property, from him; as if I ſhould take a piece of cloth from a manufacturer and die it of a different colour; I have taken the ſubſtance from the owner, the ſuperficial appearance is only my own. This puts me in mind of the method practiſed by Mr. *Bayes* in the *Rehearſal*, to appropriate other men's wit. Mr. *Bayes* ſays, "I take a book in my hand; if there is any wit in it, as there is no "book but has ſome wit, if the wit be in proſe I turn it into verſe; this I call "*tranſverſing*, and ſo I make it *my own*; if," ſays he, "it be in verſe, I turn it "into proſe, which I call *tranſpoſing*, and make that my own." Mr. Bayes had a perfect idea of this literary property, and had a method of ſtealing wit, from converſation too. "I go," ſays he, "where witty men reſort; I make "as if I minded nothing,—do ye mark;—if any one ſays a good thing, pop! "I ſlap it down;—and ſo make that my own too!"

If this is a real property, it muſt be theft to publiſh an author's work without a right from him. Literary property makes a ſtrange figure in this view. The theft of all other property muſt be gainful, if the thief eſcape with impunity: But this is a perilous theft by the nature of it; in many caſes the thief will be a loſer by taking the author's property; for bookſellers know well, that many a publication is attended with loſs. In moſt caſes, it would be but petty

larceny