clined it. Mr. Roberts, being himself unacquainted with the city laws, demanded counsel, that justice might be done him in the course of the scrutiny. This reasonable demand, contrary to the usage of the city of London, and unprecedented in the general conduct of elections, was denied him; and therefore he chose rather to have recourse to the impartiality of a parliamentary scrutiny, than to trust himself in the hands of such partial scrutinizers. And no man, surely, can have a juster claim to prefer a petition, and to have it fairly heard.

Sir *Joseph Mawbey*. The hon. gentleman who has now told the House that Mr. Roberts was refused counsel, appears to have been misinformed. Mr. Roberts began his scrutiny without counsel, and did not give notice to the lord mayor of his intention until a day or two before the sheriffs were obliged to make their return of a member. By this artful method of demanding counsel at such a time, it was thought, when no other hope was left, to have prolonged the time, and to have defeated the election by protracting the return. He can therefore have no right to petition on this ground.

The motion was then agreed to.

Feb. 28. The Speaker informed the House, that he had received a letter from Mr. Roberts, acquainting him that he desired to withdraw his petition.

Mr. Alderman *Hopkins* then made an apology for the trouble he had given the House on Mr. Roberts's account; he said, he was averse, from the first, to any petition being presented, as he was confident the present sitting member was a gentleman of such honour, that he would not make use of any unfair means to gain a seat; that he could wish the lord mayor was present, as he was sure he would entirely acquit him of any partiality in the business; and he wished to acquaint the House, that he only presented the petition as a member, by the desire of Mr. Roberts, who, he said, had not acquainted him with any intention of withdrawing it. He concluded, wishing the lord mayor health and prosperity to enjoy his seat for life.

The Petition was then withdrawn.

*Proceedings in the Lords on the Question of Literary Property.**] February 4.

The order of the day being read, for hearing counsel in the cause wherein Alexander Donaldson and John Donaldson are appellants, and Thomas Beckett and others are respondents; and for the judges to attend; counsel were accordingly called in;

Mr. Attorney General *Thurlow* opened as counsel for the appellants. He first entered into a minute investigation of the idea inculcated by what is called a publication; he then dwelt much upon the sense of the word 'property,' defining it philosophically, and in the separate lights of being corporeal and spiritual; the term Literary Property, he in a manner laughed at, as signifying nothing but what was of too abstruse and chimerical a nature to be defined. The booksellers, he observed, (exemplifying his observations by several cases) had not, till lately, ever concerned themselves about authors, but had generally confined the substance of their prayers to the legislature, to the security of their own property; nor would they probably have, of late years, introduced the authors as parties in their claims to the common law right of exclusively multiplying copies, had not they found it necessary to give a colourable face to their monopoly. He was very diffusive upon grants, charters, licences, and patents from the crown, both to corporate bodies and individuals, tracing them far back, and asserting, that they all specifically proved, that, if there had been any inherent right of exclusively multiplying copies, such instances of exerting the royal prerogative would have been unnecessary. He particularly adverted to the statute of the 8th of queen Anne, maintaining that it was not merely an accumulative act declaratory of the common law, and giving additional penalties, but that it was a new law to give learned men a property which they had not before, and that it was an incontrovertible proof that there previously existed no common law right, as contended for by the respondents. He cited many cases to prove his arguments; some before the 8th of queen Anne, and others immediately upon that statute, generally inferring that the grand question touching the common law right had never been decisively determined by any chancellor.

He concluded his speech with a compliment to his learned coadjutor, and a hope, that as the lords of session in Scotland had freed that country from a mono-

* "The House of Lords this session, in its judicial capacity, determined the great question of literary property, which was brought before them by an appeal from a decree in

poly which took its rise from the chimerical idea of the actuality of literary property, their lordships, whom he addressed, would likewise, by a decree of a similar nature, rescue the cause of literature and authorship from the hands of a few monopolizing booksellers, in whom the perquisites of other men's labours, the fruits of their inventions, and result of their ingenuity, were at present wholly centered.

When the Attorney General had finished, the counsel were desired to withdraw,

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chancery. The present age, in this country, favourable to every species of meritorious and beneficial industry, has been peculiarly advantageous to literary ability. In former times, when the circulation of learned productions was confined, and the number of readers small, genius often lay buried in obscurity, and merit was not sufficient, without a fortunate coincidence of circumstances, to ensure protection and support: the most successful adventurers could receive no other recompence than the patronage of the great, and at best could only enjoy a precarious and irksome dependence. Since the art of printing has rendered the multiplication of copies easy, and the progress of science and erudition has introduced a taste for reading among numerous classes of people, authors have had it in their power to repay themselves for their labours, without the humiliating idea of receiving a donative. But the degree in which they were to reap this benefit, depended on the security and the duration of their literary property. The protection afforded by the laws of the country to this species of labour, is not only important to the author, but also to the public; for literary works, like all others, will be undertaken and pursued with greater spirit, when, to the motives of public utility and fame, is added the inducement of private emolument.

"The occasion which brought this question before the public was as follows: certain booksellers had supposed, that an author possessed by common law an exclusive right for ever to the publication of his own works, and consequently could transfer that right. On this supposition, some of them had purchased copyrights, and had prosecuted others who published the same books, as invaders of an exclusive right which they had acquired by purchase. A decree of chancery had been obtained in favour of Mr. Becket, a prosecutor on these grounds, against Messrs. Donaldsons, as pirates, in having published a work belonging to Mr. Becket. The defendants had appealed to the House of Peers; and the question rested principally, on three points: 1st, Whether the author of a book, or literary composition, has a common law right to the sole and exclusive publication of such book, or literary composition? 2nd, Whether an action for a violation of common-law right, will lie against those persons who publish the book or literary composition of an author without his consent? and, 3rd, How far the statute of the 8th of queen Anne affects the supposition of a common-law right? Under the 1st head, it was contended by the advocates of perpetual literary property, that this right was founded in the general principle by which every man is entitled to the fruits of his own labour. Whoever by the exertion of his rational powers has produced an original work, appears to have a clear right to dispose of the identical work as he pleases; and any attempt to vary the disposition, seems an invasion of that right. The identity of a literary composition consists entirely in the sentiment and language: the same conceptions, clothed in the same words, must necessarily be the same composition; and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited. On these grounds of natural justice it was contended, that common law respecting literary property was founded, and by that common law the right of an author or his assignee was perpetual. A statute of queen Anne had declared an author and his assigns to have a right to a work for fourteen years, and for fourteen years more if the author should so long live. Certain judges, among whom was lord Kaimes in the court of session, and Yates in London, denied that ever such a right existed at common law. This opinion they founded on the following allegations: that a literary composition is in the sole dominion of the author while it is in manuscript; the manuscript is the object only of his own labour, and is capable of a sole right of possession; but this is not the case with respect to his ideas. No possession can be taken, or any act of occupancy asserted, on mere ideas. If an author have a property in his ideas, it must be from the time when they occur to him; therefore, if another man should afterwards have the same ideas, he must not presume to publish them, because they were pre-occupied, and become private property. Lord Mansfield shewed the fallacy of the maxim, that nothing but corporeal substance can be an object of property; reputation, though no corporeal substance, was property, and a violation thereof was entitled to damages. Every man's ideas are doubtless his own, and not the less so because another person may have happened to fall into the same train of thinking with himself: but this is not the property which an author claims; it is a property in his literary composition, the identity of which consists in the same thoughts, ranged in the same order, and expressed in the same words. This illustrious judge conceived a common law right to the copy of his work to be vested in an author and his assigns originally, and still to exist, notwithstanding the

and the further hearing was adjourned until the 7th.

February 7. Counsel being called in,

Sir *John Dalrymple* was heard for the Appellants:

He laid down two preliminary observations: First; that the best and only method of discovering how the law stood in any abstruse case, was by adverting to an history of the law. Secondly, Sir John observed, That he combated the matter upon an exceeding advantageous ground; for it having been decided in favour of his clients by the lords of session in Scotland, ten lords to one, though it could not prepossess their lordships before whom he spake, yet it evinced that the appellants had more than a shadow of claim, had substantial justice on their side.

Sir John observed, That in Scotland the *jus gentium*, or laws and customs of other nations, were pleaded in the courts of that kingdom, and from a diligent search into the laws and customs of every nation, ancient or modern, the Scotch lawyers, when the question concerning literary property was lately agitated in that kingdom, found themselves justified in affirming that no such property ever existed or ever was claimed in any civilized nation, England excepted, under the canopy of heaven.

In conformity to the first preliminary observation, That the law in any abstruse case was best discovered by entering into a history of it, sir John proceeded to give an history of the law respecting literary works. This historic account he divided into three periods; from the invention of printing to the institution of the Stationers Company in queen Mary's reign; from the institution of the Stationers Company to the licensing act; and from the licensing act to the statute of the 8th of queen Anne.

Printing, sir John said, was, when first discovered, deemed a mystery, like that of making sal ammoniac, or any other chymical preparation; the journeymen and apprentices were laid under severe injunctions not to lay open the principles of the art to the unskilful; as a manufacture of the kingdom it was therefore exercised.

Sir John then mentioned the several books printed previous to the institution of the Stationers Company; and from the silence respecting literary property during the whole of that period, from the right every printer exercised of printing any book he chose, sir John deduced a strong presumptive proof, that the common law recognized no such thing as literary property.

Sir John then stated the history of the institution of the Stationers Company. He said, it was instituted in the reign of Philip and Mary, princes who ruled with a despotic sway; that they, like every other despotic prince, wished to crush the liberty of the press; the booksellers, however, acquiesced in the Act, because such of them as were members of the Stationers Company were benefited by it. There were many curious regulations, sir John said, subsisting in this Company; he had read them all, and found the following three. "1. That no two persons should speak at once. 2. That every member should speak with his hat off. 3. That a member should speak seriously."

From such important regulations, the importance of the Company might be deduced; yet, during the whole of this period, from the invention of printing to the institution of the Stationers Company, not a suggestion about common law right to literary property was started; books were printed by licence or leave from the Sta-

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statute of queen Anne. It was agreeable to the principles of right and wrong, convenience and policy, and therefore to the common law. The court of chancery, proceeding upon its conception of moral justice and general equity, had uniformly decreed that this, like every other species of property, was perpetual to the original acquirer, his heirs, assigns, or others to whom it might be transferred by gift, sale, or any other means of transmission. Lord Camden did not contest the conformity to natural justice of either lord Mansfield's principle or the chancery decrees, nor undertake to prove that there was any reason in the nature of literary productions for rendering the property of these less durable than that of other fruits of labour, but confined himself to what he apprehended to be the written law of the land. The statute of queen Anne, he affirmed, took away any right at common-law for an author's multiplying copies exclusively for ever, if such right ever existed.

"The House of Peers concurred in his opinion, the decree was reversed, and thenceforth literary property depends on the statute of the 8th of queen Anne, which secures to the author or his assigns an exclusive property for 14 years, and 14 years after the expiration of that period if he so long live; but, on the expiration of the one or both of these terms, ordains the copy-right to be at an end." Bisset's George the Third.

tioners Company, and published "cum privilegio." Whilst, therefore, the members of the Stationers Company agreed amongst themselves, the charter granted to that company was a charter enacting a body of licensers, sued for on a principle of interest, and granted by the crown on a principle of policy. That books were published during all this time by privilege, or patent, was a notorious fact, for he could produce a list of many thus published, almost as long as his arm.

When the members of the Stationers Company however quarrelled (as it was natural to suppose they would) amongst themselves, then each talked of some favourite book as his property; that the public might be impressed with the consequential notion of the word, it was generally printed, said sir John, in letters as long as my finger. Those who plumed themselves upon being the owners of these works called themselves proprietors, and the works were copy right.

Thus dismissing the Stationers Company, with several other severe animadversions, sir John touched upon the decrees of the Star Chamber, which he observed were heinous exertions of unconstitutional power; yet none of them, respecting books, recognized any other right to vest in the author, or his assignees, than that created by patent.

Sir John then proceeded to examine the ordinances issued in the time of the Commonwealth, upon which he vented some humorous remarks. He said, he should mention a truth founded on the experience of ages; it was this; that men always took the very same methods to keep power, when they had obtained it, which they blamed in others before they gained their point. Thus, argued he, the commonwealth-men abused the king and ministry for edicts laying restraints upon the press; and yet no sooner had they obtained the reins of government, than they caused ordinances to be issued prohibiting a book to be published that had not undergone state revision. But, though the press was ever an object both to legal and usurping princes, yet in no regulations respecting it was a common law right in books noticed in the most distant manner; yet had such right existed, we surely must have heard of it, particularly as some of the British princes were authors. James the 1st (added sir John humorously) took it into his head to turn poet; he employed his leisure hours, whilst in Scotland, in translating the Psalms of David. His son published this work; yet so far was he from dreaming about a common law right, that he granted a patent for the printing it.

The statute of queen Anne sir John noticed, with respect to the title, the preamble, and some of the clauses contained therein. He observed, That it had been mentioned the word 'vest' was adopted in the title, and the word 'secured' was inserted in the body of the Act. This he thought was a distinction of the greatest propriety, for the Act was framed to give an author or his assignees a property in that which he had not before; it therefore vested something in him, and after having vested it, there was a provision made to secure it to the author.

With respect to the preamble of the Act, sir John took notice, that, admitting such a right as that claimed under the denomination of literary property, to have existed anterior to this statute, the preamble was couched in terms the most ridiculous. It runs thus, "Whereas divers persons have taken the liberty to print," &c. A curious expression, argued sir John, one man deprives another of his property, and the legislature calls this only taking a liberty! Can it be believed that British legislators will talk in this absurd strain? Might it not be with equal propriety said, that divers persons have taken the liberty to commit fraud, perjury, or theft? From the very phraseology of the preamble, sir John inferred, that one man printing a book, published by another, was in fact no more than taking a liberty not perhaps quite equitable, but against which, however, except by statute, no proviso was made.

Another clause in the Act furnished sir John with ample matter of discussion. The statute vested a property in the author for 14 years, "and no longer." Sir John asked, why the phrase "and no longer" was adopted? Admitting the respondents right in their notions about a common law property, a claim so founded must vest the property in the owner for a perpetuity: How then could this statute be called, as it is, 'An Act for the better encouragement of learning.' Was learning encouraged by depriving learned men of a property they had for a perpetuity, and vesting it in them for a term of years only? The supposition was absurd; and yet if the Act by some certain privileges not enjoyed before, did not encourage learning,

a statute of the legislature was suffered to be published with a direct falshood for its imprimatur. Upon the supposition of a common law right, the statute curtailed, instead of enlarging an author's privileges; it vested nothing in him but what he had before; it secured nothing to him but what he was previously secured in by the common law; and in the place of enjoying a property transmissible in perpetuity to his heirs, he enjoyed one for 14 years only.

Sir John then stated his notion of the statute in question, humorously thus: there is nothing, said he, an author or a printer detests so much as a minister. Now, if no common law right exists, the property must be vested by patent; but for an author to be eternally soliciting for patent after patent, would have too much the air of dependance on a great man: now, continued sir John, an author is foolish enough to think, that if a great man promises to grant him a patent, or any other favour, the great man should keep his word; and if he breaks his promise, the author is apt, said sir John bluntly, to think the great man a rogue. To save therefore an author from the pain of reiterated solicitations, this statute of queen Anne passed; it serves for an universal patent, and supercedes the necessity of an author's applying for particular ones. It passed in the reign of a Tory prince, under the influence of a Tory ministry; yet the statute is defensible, and lawyers would defend it upon different principles. The truth is, continued sir John, that lawyers, like parliaments, vary in their language. The style of the House of Commons, in my time, has varied; it is the same with courts; what at one time is prerogative, at another is necessity; proclamations are now out of fashion, yet I remember them in tolerable vogue; hence lawyers, as well as ministers, vary about; and according to the fashion of the times, will defend a thing upon the principles either of prerogative, property, or state necessity, or all together. Chief Justice Scroggs, at the head of the Whigs, would contend for liberty and property; judge Jefferies for prerogative; a prudent lawyer, for both liberty, property, and prerogative.

Sir John having thus combated the statute of queen Anne, made a variety of miscellaneous observations rather foreign to the point, but introduced seemingly to level a stroke of sarcastic humour. He said, that he was informed the counsel on the opposite side intended to prove that a copy right had been acknowledged by the testimony of several divines; but with deference to the church, he did not believe what they signed to be the truth. He said, that authors and booksellers seldom were men of family or fortune; it was therefore extremely difficult to find out their heirs ten years after their deaths. He said, that twelve or thirteen booksellers were hovering, like eagles over a carcase, about the remains of poor Thomson; but he hoped their lordships would protect those remains from such hungry vultures.

Sir John, after thus jocularly discoursing, thus returned to combat the subject upon more serious, as well as substantial grounds. He argued thus: the book about which the action is brought, was printed at Edinburgh; in Scotland there is no such thing as literary property; by the articles of Union, matters respecting traffic stand mutually upon the same footing; can, therefore, or cannot a man import into this kingdom, and here sell books printed in Scotland?

Sir John then talked about ideas. If I copy a manuscript, says he, and publish it, I am liable to a civil action; if I steal a book, to a criminal one; the one is simply taking ideas, the other a chattel. But, argues he, what property can a man have in ideas? whilst he keeps them to himself they are his own, when he publishes them they are his no longer. If I take water from the ocean it is mine, if I pour it back it is mine no longer. Besides, continues sir John, there are various methods of conveying ideas; by looks, at which the ladies are most expert. Now an ogle is a lady's own whilst in private, but if she ogles publicly they are every one's property. By gesture ideas are conveyed; Foote's, or any other person's puppet-shew continued his before public representation, but after that any one might imitate it. Prints and engravings were, when once made public, the property of every imitator. Hence in the case of some of Hogarth's prints, an Act passed vesting an exclusive right in his widow for a term of years. Besides all this, sir John contended, that a decision in favour of the appellants would benefit authors, promote trade, and increase the revenue. It would benefit authors because the old stock upon booksellers' hands becoming common, authors would be applied to for new works; hence trade as well as authorship would

be served, and the revenue by consequence encreased considerably.

Such are the substance of the most of sir John Dalrymple's arguments, sir John spoke for two hours and a half, and seemed to exhaust, in this one speech, all the knowledge, metaphysical, legal, chemical and political, he possesses. He passed the greatest encomiums on lord Hardwicke, mentioned a doubt of his lordship's upon the subject of literary property, and said, " that the doubts of one wise man contained more information than the dogmatic opinions of ten thousand weak blockheads.

Sir John computed the number of printers and booksellers in London to amount to thirty thousand, and dropped the following expression: when the lord mayor was parading from the House after some popular act about discharging the printers, I was in the city, and perceiving the mob not so numerous as might be expected, I enquired the reason, and was told that a printer had been hanged that day, and ten thousand of the brotherhood chose rather to attend that than the lord mayor's procession.

Feb. 8. Counsel being called in,

Mr. Solicitor General *Wedderburn* was heard for the Respondents:

He began his speech with complimenting the two counsel on the other side of the question; one of the learned pleaders, he observed, had entered into the argument with great ability, his definition of the word 'property' had been shrewd, metaphysical, and subtle; but he hoped to be able to convince their lordships, that ingenious as the definition of that word had been, it was nevertheless erroneous. Literary property had, by those who spoke before him, been said to be so abstruse and chimerical, that it was not possible to define it. The interpretation they had put upon the word 'property' was, that it implied something corporeal, tangible, and material. He begged leave to differ from this opinion, and to point out how common it was for terms to be misapplied as to their import. The word 'property' had, by the ablest writers, been called 'jus utendi, fruendi, disponendi;' it was therefore evident that any idea, although it was incorporeal in itself, yet if it promised future profit to the inventor of it, was a property. And the latter word had, through inaccuracy, been used, as describing that, over which a possessor held an absolute reign, dominion, or power of disposal. The subject matter might be immaterial, and yet liable to be appropriated. Property changed its nature with its place: in England, portions of land were private property; among the Arabs and Tartars no such idea prevailed, they looked upon cattle and chattels as the only private property. Among the Americans, in certain districts, land was considered as property, but not as the property of individuals; as the inhabitants lived upon the gains of hunting, a circumference of land, sufficient for them to hunt on, was considered as the general property of one tribe or nation. The lawyers' mode of describing property was exceedingly trite and familiar, they generally divided it into corporeal and incorporeal, and in the present case it had been said to commence by occupation, and to continue by possession. This was a narrow scale of argument. In the courts of law it was universally admitted that matters incorporeal were nevertheless matters of property, and the lawyers' division of it proved that matters not in occupancy or possession, were yet of value, and could be sold or given over, as in the cases of manors and advowsons, remainders, and reversions. They could be sold by assignment, and the mode of sale was by title. Possession was usually described as originating from two things, livery and grant. Under the latter title, in some degree, stood literary property; but it was not to be considered as originating from crown grants, for excepting the prerogative copies, the crown had no right, and in the first of those (the Bible) no farther right, than in that particular translation published in the reign of king James.

The Solicitor General observed, that every inventor had a right to the profit of his invention; and as he found that Grotius had not escaped the Attorney General's researches, he was much surprised that in his definition of property, the learned pleader had not hit upon a position which was directly in point. He then read an observation cited by Grotius as having been made by Paulus, a Roman lawyer, who declared, that one mode of acquiring property was invention, and that from the nature of things, he who made a matter was the owner of it. This he observed was a much more liberal construction of the word 'invention' than had been put on it by the other side,

who had taken it up in its vulgar acceptation, and only given it allusion to trifles, such as the finding shells on the seashore, &c. It had been contended, that the maker of an orrery was in the same predicament as an author, when he published. Such allusion came not to the point; the first sheet of an edition, as soon as it was given impression, in a manner loaded an author with the expences of a whole edition, and if that edition was 5,000 number, the author was not repaid for his labour and his hazard, till the last of the 5,000 was sold. The maker of an orrery was at no other trouble and charge, than the time, ingenuity and expence, spent in making one orrery; and when he had sold that one, he was amply paid. Orrery-making was an invention, and the inventor reaped the profit accruing from it. Writing a book was an invention, and some profit must accrue after publication: who should reap the benefit of it? Authors, he contended both from principles of natural justice, and the interest of society, had the best right to the profits accruing from a publication of their own ideas; and as it had been admitted on all hands that an author had an interest or property in his own manuscript, previous to publication; he desired to know who could have a greater claim to it afterwards. It was an author's dominion over his ideas that gave him his property in his manuscript originally, and nothing but a transfer of that dominion or right of disposal could take it away. It was absurd to imagine, that either a sale, a loan, or a gift of a book, carried with it an implied right of multiplying copies; so much paper and print were sold, lent, or given, and an unlimited perusal was warranted from such sale, loan or gift, but it could not be conceived that when 5*s.* were paid for a book, the seller meant to transfer a right of gaining 100*l.*; every man must feel to the contrary, and confess the absurdity of such an argument.

The Solicitor General produced a copy of the original grant of king James for printing some poems of his writing, which, excepting some royal stile in the beginning, he observed, ran in the ordinary phrase of an author's assignment of copyright to a bookseller; nay, indeed it was more ample, for it not only transferred the right of the matter then published, but also transferred a right to every thing he should hereafter be pleased to write. Among other matters adverted to in this speech, Ames's Typographical History was particularly noticed: the application of the printers in Prynne's time to suppress and call in the patents for printing and publishing the Bible, was mentioned; the applicants terming those patents a sanction for monopolizers, the matter was heard by counsel, when Prynne pleaded on one side of the question, and his answer turned on nine points, in one of which that celebrated lawyer declared, that the most serious and solid objection against the printers, was the inherent common law right for an author to multiply copies. This the Solicitor General said, was one strong proof that in the worst of time the *jus naturale* respecting literary property was not forgot. Licences in general, he observed, proved not that common law right did not inherently exist, but were the universal fetters of the press at the times in which authors were obliged to obtain them.—With regard to the statute of queen Anne, he was very willing to let that rest on the same grounds as the Attorney General had placed it last Friday, namely, that if it gave no right it took none away. But he could not help observing that it contained a positive clause to let the matter respecting a common law right, remain precisely in the state in which it was when that Act passed: and that the court of Chancery considered that such a right did exist, was evident from the several injunctions that court had granted since the enacting of the statute, which did not govern those injunctions, as it did not particularly specify how the court of Chancery were to act. He instanced the cases of Pope and Curl, Gwynne and Dr Shebbeare, and two law books, as proofs of what he asserted. He mentioned also the case of Dodsley *v.* Kinnersly, in 1761, before sir Thomas Clark, master of the rolls. The former prayed an injunction against the latter, for abstracting part of Dr. Johnson's Rasselas, and publishing such abstract in a magazine. The Solicitor General, after noticing the great ability of sir Thomas, declared that his opinion was the same respecting literary property, as that he had maintained; and after a variety of very ingenious remarks, he concluded his argument, invoking the Lords to sanctify the final determination of a question founded on natural justice, and the interest of society, by affirming the decree.

Mr. *Dunning* spoke also for the Respondents:

He began by observing that his learned leader had so ably considered the case, and so eloquently argued the point, that there remained little for him to offer, except some general observations on the question. He said it was to him the most extraordinary idea that ever he heard, that it should be admitted that an author had a property originally in his composition, and that the first moment he exercised his dominion over that property, and endeavoured to raise a profit from it, he lost it. Publication, he could not conceive, was of such a nature as to destroy that right to the matter published, which it was acknowledged an author had before it was published. It had been declared on the other side, that during the licensing act, and those reigns when the privileges were obtained, and Star Chamber decrees were so frequent, that the inherent right at common law appeared but dimly; this, he observed, was not to him any wonder, as during the period mentioned, nothing but injustice was seen openly. It reminded him, that while an act was passing for the preservation of cabbages and turnips, a man was exceedingly anxious to discover an act for the preservation of window curtains, and the reason he gave for this anxiety was, because he thought a window curtain full as deserving of preservation as either a cabbage or a turnip. Again, Addison and Dr. Swift had been said to have been the friends and advisers of ministers; till he was told the name of the minister who was so befriended and advised by Swift, he should decline entering upon that matter, but he was very sure that in Swift's time the ministry were not without their share of abuse. One part of the argument used for the appellants was, that it would benefit authors, if no exclusive right of multiplying copies existed: this was a very strange assertion, and it was very extraordinary that authors in general should think otherwise. It was customary for booksellers, as buyers, to buy as cheap as they could, and it was also customary for authors to sell as dear as they could; this could not be the case if the moment a book was published every man had a right to print it. Authors formerly, when there were few readers, might get but small prices for their labour; that however had not of late years been the case. Hume's History of England, and Dr. Robertson's History of Scotland, had been amply paid for, and Hawkesworth's Voyages still more largely: how was this difference to be accounted for? not from any uncommon generosity in the booksellers; not from any superiority in point of merit in the books, but from the idea of a common law right prevailing, and from that idea being established by the determination of the court of King's-bench in the case of Miller and Taylor; for it was idle to contend that the subject of the present appeal was not exactly on the same grounds. The appellants wanted to sanctify the importation of Scotch books into England, in the same manner as the importation of Scotch cattle. The book on which the present cause was grounded, was written, indeed, by a Scotchman, but it was written in English, and originally printed in England. The appellants had invaded the legal purchaser, by printing a copy in Scotland, and offering it to sale in London; he hoped therefore, that their lordships would teach them that literary property was sacred, by affirming the decree.

February 9. The counsel being called in,

Mr. Attorney General *Thurlow* was heard in reply:

He first took notice of Mr. Dunning's insinuation, that Mr. Justice Yeates, although a very honest and a very able lawyer, had inclined to the side now argued for by the appellants, merely from being accustomed to plead it; and that from the difficulty of any person's seeing a question impartially, which he had long been habituated to view in only one light, the late Mr. Justice Yeates did not sufficiently divest himself of the advocate when he was determining as a judge. This he conceived to be a very unfair conclusion, and thought that no judge was to be supposed influenced by what he had argued as a counsel. He again went into a definition of what the law termed property, denying the positions which had been laid down by the Solicitor General respecting it, and declaring that the matter in question was not at all comparable to advowsons, remainders, or reversions. Property, he said, was in his idea of a double nature, either original or derivable; it must be in itself corporeal, or derive its name from something of a corporeal nature; thence its relation to occupancy and possession; but he meant not to say that pos-

session must originate from a grant of the king, when he declared that the law described it as arising either from livery or grant. Literary property could not be of either of these origins, and was to all intents and purposes indefinable. But he could not help expressing his amazement, that it should have been attempted to charge him with unfairly defining the meaning of invention, by citing the very passage from Grotius which he had first quoted, as immediately proving the meaning he had given it. He read the whole period, and appealed to his hearers whether he had not drawn a fair and defensible conclusion from it. With regard to the observation, that the inventor of an orrery was not at all to be compared to the inventor of a book, because he was paid for his labour when he had sold one orrery; there was not a more fallacious doctrine in the power of words. The maker of a time-piece, or an orrery, stood in the same, if not in a worse predicament, than an author. The bare invention of their machines, might cost them twenty of the most laborious years in their whole life; and the expence to the first inventors in procuring, preparing, and portioning the metals, and other component parts of their machines, was too infinite to bear even for a moment the supposition that the sale of the first orrery recompensed it. And yet no man would deny that after an orrery was sold, every mechanist had a right to make another after its model. Authors had certainly an interest in their manuscripts before publication, and they had a right to every advantage which could possibly accrue from first communicating their manuscript to the world; but having once done so, they lost all further claim. Publication was in his mind sale, and after a man had sold his right, it was absurd to contend that he had any claim upon the purchaser. The case recorded by Prynne fully confirmed him in the opinion he entertained. The printers were then urging an improper suit. The sole printing of Bibles had been granted by the crown, and such a use of the prerogative was very defensible and very proper. As to the doctrine that any man had a right to publish translations, and that therefore other versions of the Bible might be published, it was exceedingly absurd, supposing that a common law right did exist. Lord Bacon and several of the old learned writers, always gave their thoughts in Latin; surely if they had a right to their own ideas, it would have been very hard for a translator to have published an English edition as soon as possible after their appearance in Latin; and more especially so, if the case could have happened at this day, as the English edition would have had the advantage greatly in point of profitable sale. In the case of Newton's Milton, the court of Chancery decreed generally; they did not, as had been observed on the other side, divide the author's text from the commentator's notes, and the reason is obvious, for no man would have purchased one without the other. It was true, he observed, that the statute of queen Anne had not either restricted or enlarged the power of the court of Chancery, respecting the mode of treating the question; but it was as true, that the court of Chancery had not only of itself always acted upon the principles of that statute, but that every prayer for an injunction had of late years been grounded upon it. The late lord Hardwicke had been declared to have been of opinion, that there did exist a common law right. Before lord Hardwicke's opinion was attempted to be positively pronounced, it was highly necessary, he presumed, to ascertain that he entertained any opinion relative to the matter. If one court's determination in favour of the common law rights, had given three guineas for such a work as Hawkesworth's Voyages, what would not a determination of the House of Lords give? Six guineas at least; so that the public would be materially injured if the monopoly contended for by the respondents was ratified and confirmed. That it was a monopoly tending to distress the public, injure literature, and contrary to every species of natural justice. After having argued near two hours, denying that the counsel on the other side had defeated his former positions, and endeavouring to produce new ones in support of his doctrine, he concluded with summing up the strongest parts of his argument, and hoping that their lordships would consider they were about to determine the law on a most important point, and wishing that they might pronounce in favour of the appellants.

The counsel were directed to withdraw.

And it being proposed, That the Judges be directed to deliver their Opinions upon the following Questions;

1. "Whether, at common law, an author of any book or literary composition, had the sole right of first printing and publishing the same for

sale, and might bring an action against any person who printed, published, and sold the same, without his consent?

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

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

The same was agreed to; and the said Questions were accordingly put to the Judges.

Then it was proposed, by lord Camden, That the Judges likewise be directed to deliver their Opinions upon the following Questions;

4. "Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same, in perpetuity, by the common law?

5. "Whether this right is any way impeached, restrained, or taken away, by the statute 8th Anne?"

The same was agreed to; and the said Questions were accordingly put to the Judges. Whereupon, the Judges desiring that some time might be allowed them for that purpose; it was ordered, That the further consideration of this cause be adjourned till Tuesday next; and that the Judges do then attend to deliver their opinions upon the said Questions.

Feb. 15. The Lord Chancellor acquainted the House, That the Judges differred in their Opinions upon the said Questions, upon which, it was ordered, That the Judges present do deliver their Opinions upon the said Questions *seriatim*, with their Reasons. Accordingly,

Mr. Baron *Eyre* first rose and delivered his Opinion, with the Reasons whereon that opinion was founded, in substance as follows:

He observed, that great pains had been taken by the ingenious counsel for the respondents, to avoid considering the subject as at all connected with metaphysic subtleties; that such an attempt though highly praise-worthy in those who had the interest of their clients at heart, was yet totally impracticable, as every endeavour to disclaim the use of metaphysic reasoning tended only to shew how necessary it was to the accurate discussion of the subject. That the question in fact was respecting a right to appropriate ideas. That the objects over which a right, and in which an exclusive property was claimed, were incorporeal existences, which could not be treated of with any degree of accuracy, without having recourse to the aid of scientific disquisition. That the thinking faculty was a gift with which all men were endowed; that ideas produced by the occupation of a thinking faculty common to all, should likewise be held common, and no more be deemed subject to exclusive appropriation than any other of the common gifts of nature.

Hence the baron put an absolute negative upon the first Question, relative to the author of a book or literary composition having a right at common law to the exclusive sale of such book or literary composition. This the baron denied in the most positive terms. He said, that, from the very nature of the contents of a book, they were incapable of being made objects of common law property; nothing could be predicated of them, which was predicable of every other species of property subject to the controul and within the limits of the protection of the common law. A right to appropriate ideas was a right to appropriate something so ethereal as to elude definition! so intellectual as not to fall within the limits of the human mind to describe with any tolerable degree of accuracy. Ideas, if convertible into objects of property, should bear some faint similitude to other objects of property; they did not bear any such similitude, they were altogether anomalous. They could not pass by descent to heirs; they were not liable to bequest; no characteristic marks remained whereby to ascertain them; and, were such incorporealities not subject to one of the conditions which constituted the very essence of property original or derivative; were such incorporealities liable to exclusive appropriation, by any right founded in the common law?

The baron observed, that if the notion of a common law right should be reprobated, such reprobation carried with it an explicit answer to the second Question:

there being no common law right, an action could not be maintained against the re-publishers of an author's book or literary composition, without his consent.

The baron next proceeded to brand an exclusive appropriation of literary works, with the epithets of "a monopoly," against every kind of which the statute of James I had sufficiently provided. Yet the baron contended, that even monopolies, in some cases, were allowable, but then the state had taken care to allow them only for a convenient time.

Previous to the invention of printing, the idea of a common law right, the baron said, had not been suggested; and subsequent to the invention of this useful art, so little notion had authors of a right at common law to exclusive appropriation, that before the institution of the Stationers Company they had recourse to the legislature for a licence, grant, patent, or privilege; that after the institution of the Stationers Company the only mode thought of to secure the appropriation of a literary composition was, by an entry in the records of that Company, and the person in whose name the book was entered, let him come by it how he would, was deemed the proprietor, the author never being so much as mentioned on these occasions.

The baron then reviewed the cases which, by the respondents' counsel, had been adduced to prove the sentiments of the court of Chancery in favour of a common law right. But the baron contended, that although the court of Chancery had frequently granted injunctions, it cautiously avoided giving any final adjudication upon the matter. An antecedent common law right was never hinted at; nor were the injunctions granted in the cases cited, at all in point; they had been granted on the appearance of something fraudulent upon the face of the transaction; as in the case of Pope and Curl.

Nor did injunctions prove the Chancellor's opinion upon a matter of common law right, in confirmation of which (added the baron) I will venture an anecdote. There is a paper now existing, containing some notes lord Hardwicke had taken down, which set forth the sole and exclusive right of an author at common law, to multiply copies for sale. In the margin of which paper, and opposite to this very passage, there is in lord Hardwicke's own hand writing a very large Q, which proves that his lordship entertained doubts respecting the legality of the position.

The baron considered a book precisely upon the same footing with any other mechanical invention. In the case of mechanic inventions, ideas were in a manner embodied, so as to render them tangible and visible; a book was no more than a transcript of ideas; and, whether ideas were rendered cognizable to any of the senses, by the means of this or that art, of this or that contrivance, was altogether immaterial: yet every mechanical invention was common whilst a book was contended to be the object of exclusive property! So that Mr. Harrison, after constructing a time-piece, at the expence of forty years labour, had no method of securing an exclusive property in that invention, unless by a grant from the state; yet if he was in a few hours to write a pamphlet, describing the properties, the utility, and construction of his time-piece, in such pamphlet he would have a right secured by common law; though the pamphlet contained exactly the same ideas on paper, that the time-piece did in clock work machinery. The clothing is dissimilar; the essences, clothed, were identically the same.

The baron urged the exactitude of the resemblance between a book and any other mechanical invention, from various instances of agreement. On the whole, the baron contended, that a mechanic invention and a literary composition exactly agreed in point of similarity; the one therefore was no more entitled to be the object of common law property than the other; and as the common law was entirely silent with respect to what is called literary property, as ancient usage was against the supposition of such a property, and as no exclusive right of appropriating those other operations of the mind, which pass under the denomination of mechanical inventions, was vested in the inventor by common law, the baron, for these reasons, declared himself against the principle of admitting the author of a book, any more than the inventor of a piece of mechanism, to have a right at common law to the exclusive appropriation and sale of the same.

This was an answer to the first and second questions. It was also an answer to the first question proposed by lord Camden; for if an author had no right at all by common law, he could have none in perpetuity.

But admitting him to have had such common law right; in reply to the third

and fifth question, which asks, "how far the statute of the 8th of queen Anne affects the case, or takes away a common law right existing antecedently in an author or his assignees?" Baron Eyre contended, that every principle of a common law right was effectually done away by this statute. This he essayed to prove from the title, preamble, and certain clauses of the Act, from the adoption of the word "vest," and the mode of expression used, of "giving an author an exclusive property for 14 years, and no longer." He therefore gave it as his opinion:

1. "That, at common law, an author of any book or literary composition had not the sole right of first printing and publishing the same for sale, and could not bring an action against any person who printed, published, and sold the same, without his consent:

2. "That if the author had such sole right of first printing, the law did take away his right upon his printing and publishing such book or literary composition; and that any person might afterward reprint and sell, for his own benefit, such book or literary composition, against the will of the author:

3. "That such right is taken away by the statute of 8th Anne, and that an author, by the said statute, is precluded from every remedy except on the foundation of the said statute: but that there may be a remedy in equity upon the foundation of the statute, independant of the terms and conditions prescribed by the statute in respect of penalties enacted thereby:

4. "That the author of any literary composition, and his assigns, had not the sole right of printing and publishing the same in perpetuity, by the common law:

5. "That the right is impeached, restrained, and taken away, by the statute 8th Anne."

Mr. Justice *Nares* spoke next, and began by observing that the historical nature of the case had been so learnedly and fully agitated in the hearing of the House that he should wave entering into it, but should rather rest his opinion on general conclusions, deduced from principles which arose from fair argument. He stated to the House why he thought a common law right in literary property did exist, and why the statute of queen Anne did not take it away. He observed that he was of Mr. Dunning's sentiments, that as it was admitted on all hands that an author had a beneficial interest in his own manuscript before publication, it was a most extraordinary circumstance that he should lose that beneficial interest the very first moment he attempted to exercise it. Mr. Justice Nares put several cases to support his argument, and the statute, he said, did not take away the common law remedy, although it gave an additional one, as in the case of an action for maliciously suing out a commission of bankruptcy, although the statutes of bankruptcy have provided an additional penalty for that offence by the bond given to the chancellor; after having spoke near an hour, he concluded with giving his opinion:

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

2. "That the law did not take away his right upon his printing and publishing such book or literary composition; and that no person might afterward reprint and sell, for his own benefit, such book or literary composition, against the will of the author:

3. "That such action at common law is taken away by the statute 8th Anne; and that an author, by the said statute, is precluded from every remedy except on the foundation of the said statute, and on the terms and conditions prescribed thereby:

4. "That the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity, by the common law:

5. "That this right is impeached, restrained, and taken away, by the statute 8th Anne."

Judge *Ashurst* then rose, and accorded in opinion with Mr. Justice Nares, after tracing the nature of literary property, and producing many cogent reasons to prove that such a claim was warranted by the principles of national justice and solid reason. Making an author's intellectual ideas common, was, he observed, giving the purchaser an opportunity of using those ideas, and profiting by them, while they instructed and entertained him; but he could not conceive that the vender, for the price of 5*s*., sold the purchaser a right to multiply copies, and so get 500*l*. Literary property was to be defined and described as well as other matters, and mat-

ters which were tangible. Every thing was property that was capable of being known or defined, capable of a separate enjoyment, and of value to the owner. Literary property fell within the terms of this definition. According to the appellants, if a man lends his manuscript to his friend, and his friend prints it, or if he loses it, and the finder prints it, yet an action would lie (as Mr. Justice Yeates had admitted), which shewed that there was a property beyond the materials, the paper and print. That a man, by publishing his book, gave the public nothing more than the use of it. A man may give the public a highway through his field, and if there was a mine under that highway, it was nevertheless his property. It had been said, that when the bird was once out of the hand, it was become common, and the property of whoever caught it; this was not wholly true, for there was a case upon the law books, where a hawk with bells about its neck had flown away; a person detained it, and an action was brought at common law against the person who did detain it; a book with an author's name to it was the hawk, with the bells about its neck, and an action might be brought against whoever pirated it. Since the statute of Monopolies, no questions could exist about mechanical inventions. Manufactures were at a very low ebb till queen Elizabeth's time. In the reign of James the first, the statute of Monopolies was passed; since that Act no inventor could maintain an action without a patent. It is the policy of kingdoms, and preservation of trade to exclude them. The appellants were contending for the right of printing; but the right of exercising a trade with another man's materials, could not be allowed either by reason or natural justice. A miller might grind corn, a carpenter might build a house; but the first was not warranted in grinding any corn but his own, nor the carpenter in building a house with another man's wood. The cases of Eyre and Walker, and Tonson and Walker, happened since the statute. With regard to the question, its being capable of perpetuity, few subjects were so. Even land, the most tangible species of property, might be washed away by the sea, and therefore might be rendered incapable of being perpetually enjoyed. He thought, however, that the respondents were entitled to as full an enjoyment, as the nature of the case could allow.—He declared it as his Opinion:

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

2. "That the law did not take away his right upon his printing and publishing such book or literary composition; and that no person might afterward reprint and sell, for his own benefit, such book or literary composition, against the will of the author:

3. "That such action at common law is not taken away by the statute 8th Anne; and that an author, by the said statute, is not precluded from every remedy except on the foundation of the said statute, and on the terms and conditions prescribed thereby:

4. "That the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity, by the common law:

5. "That this right is not any way impeached, restrained, or taken away, by the statute 8th Anne:"

Then Mr. Justice Ashurst delivered the Opinion of Mr. Justice *Blackstone* (who was absent, being confined to his room with the gout) upon the said questions;

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

2. "That the law did not take away his right upon his printing and publishing such book or literary composition; and that no person might afterward reprint and sell, for his own benefit, such book or literary composition against the will of the author:

3. "That such action at common law is not taken away by the statute of 8th Anne; and that an author, by the said statute, is not precluded from every remedy except on the foundation of the said statute, and on the terms and conditions prescribed thereby:

4. "That the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity, by the common law:

5. "That this right is not any way impeached, restrained, or taken away, by the statute 8th Anne."

Feb. 17. The order of the day being read, for the rest of the Judges to deliver their Opinions upon the several Questions put to them,

Mr. Justice *Willes* spoke first, and after having shewn of what species of property the author's copy right stood: that it was like an estate, that it was assignable, and that every man conceived what it meant; he declared it as his opinion, that an author had an indisputable power and dominion over his manuscript; that that power was not alienated when the manuscript was printed and published; that the author had an exclusive right of multiplying copies according to the common law, which was founded on reason and truth. This claim of right began with printing, and for the especial reason, because copies could not be easily multiplied but by the press; and, therefore, that from which no profit could be got, was hardly a property. In the course of the arguments this claim had been called by the odious name of a monopoly. This was a popular argument; but *argumenta ad populum* were not always well founded; and upon proper investigation, this appeared to be more specious than real. After a variety of learned observations and several instances cited to prove that copy-right did exist independent of patents, privileges, Star Chamber decrees, or the statute of queen Anne; particularly the case of Tillotson's Sermons, for the copy-right of which the archbishop's family received 2,500*l.* after the expiration of the licensing act and previous to the act of queen Anne, judge Willes gave his opinion upon the 1st, 2nd, and 4th questions, that at common law an author had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent; and likewise that after publication, an author, or his assigns, had an exclusive right in perpetuity of multiplying copies. He then proceeded upon the statute of queen Anne, which he declared did not take away that right. It was, he observed, an Act very inaccurately penned, but nevertheless it conveyed to his mind no idea of the legislature entertaining an opinion that, at the time of passing it, there was no common law right; the word 'vesting' appearing in the title had given rise to such an idea, but the preamble contradicted it in the fullest manner; the words of it were, "Whereas certain printers and booksellers have taken the liberty of printing and reprinting, &c. &c.;" the phraseology of this sentence plainly proved that a known right previous to that statute existed; the legislature would not have termed the exercise of what was common to all, 'taking a liberty,' had they not understood that a right in perpetuity existed at common law, the words of the preamble to the Bill would probably have been, "Whereas certain printers and booksellers claim a right of printing, &c." And the mention of the word 'reprinting,' shewed that the idea prevailed that an author's property went farther than the first publication. The universality of the saving clause, judge Willes observed, convinced him that the right at common law, which he had supposed to have existed antecedent to that Act, was left untouched by it. That it was not a particular salvo for the universities, and the holders of copy-right by patent, but that it was general, mentioning the words "all persons." Having, by a multitude of arguments, maintained the doctrine of a perpetuity, he answered the 3rd and 5th questions by giving it as his opinion, that an action at common law was not any way impeached, restrained, or taken away by the statute of queen Anne; nor was the author precluded by such statute from any remedy, except on the foundation of the said statute, and the terms and conditions prescribed thereby.

Mr. Justice *Aston* next gave his answer, beginning with reading a learned judge's sentiments in favour of literary property, as reported by sir James Burrow: he agreed with the three judges who had spoken before him, that it was a property, and that it belonged to an author independent of any statuary security. It was not necessary, he observed, for any man to advert either to the Grecians or Romans to discover the principles of the common law of England. Every country had some certain general rules which governed its law: that our common law had its foundation in private justice, moral fitness, and public convenience; the natural rights of every subject were protected by it, and there did not exist an argument which would amount to conviction that an author had not a natural right to the produce of his mental labours. If this right originally existed, what but an act of his own could take it away? By publication he only exercised his power over it in one sense; when one book was sold, it never

could be thought that the purchaser had possessed himself of that property which the author held before he published his work. A real abandonment on the part of the first owner must have taken place, before his original right became common.

In all abandonments, Judge Yeates had defined, that two circumstances were necessary; an actual relinquishing the possession, and an intention to relinquish it; in the present case neither could be proved. Many manuscripts had not been committed to the press till years after they were written: the possession of them for a century did not invalidate the claim of the author or his assigns. With regard to mechanical instruments, because the Act against monopolies had rendered it necessary for the inventors of them to seek security under a patent, it could be no argument why in literary property there should be no common law right. He thought it would be more liberal to conclude, that previous to the monopoly statute, there existed a common law right, equally to an inventor of a machine and an author of a book. After a variety of arguments drawn from the nature of the property, and the construction which could rationally be put upon the Act of publication, judge Aston gave his opinion in favour of the first, second and fourth questions. With regard to the statute of queen Anne, he observed that it was no more than a temporary security, given by the legislature to the author, enabling him to recover penalties, and bring a matter of complaint against any person who printed upon him to a more certain issue than by an action at common law. After citing the injunctions granted by the court of Chancery, and arguing upon the multitude of circumstances deducible in favour of literary property from the natural rights of the subject, the immediate nature of the property, the idea uniformly entertained of its existence from the æra of the commencement of printing to the present day, as well as his construction of the statute of queen Anne, he gave his answer to the third and fifth questions, declaring it his opinion that an action at common law was not any ways impeached, restrained, or taken away by the 8th of queen Anne.

Mr. Baron *Perrott* spoke next, and began, by observing, that the argument for the existence of a common law right, and the definition of literary property, as chattel property, was in his idea exceedingly ill founded and absurd. If literary property was a chattel, then upon the death of the possessor of a manuscript, any simple contract creditor might oblige his family or assigns to give it up and suffer him to print it. An author certainly had a right to his manuscript; he might line his trunk with it, or he might print it. After publication, any man might do the same, their lordships might turn printers if they chose and print it. From the patents, the privileges, the Star-chamber decrees, and the licensing acts, it was evident that in those days no idea was entertained of an author's having any claim to the exclusive right of printing what he had once published: if a manuscript was surreptitiously obtained, an action at common law would certainly lie for the corporeal part of it, the paper. So if a friend to whom it was lent, or a person who found it, multiplied copies, having surrendered the original manuscript, he had surrendered all that the author had any common law right to claim. He spoke of the right under patents and privileges as a right petitioned for by printers without any thought of an author's entertaining an idea that he had any claim. As to the Stationers Company, surely we were not to look for the common law among them. All their rules and orders were for the security of such peculiar works as their own members had been wont to print. An inventor of a machine or mechanical instrument, like an author, gave his ideas to the public. Previous to publication, he possessed the *jus utendi, fruendi, et disponendi*, in as full an extent as the writer of a book; and yet it never was heard that an inventor, when he sold one of his machines, or instruments, thought the purchaser, if he chose it, had not a right to make another after its model. The right of exclusively making any mechanical invention was taken away from the author or inventor by the Act against monopolies of the 21st of James the 1st. Which Act saved prerogative copy rights, and which would have mentioned what was now termed literary property, had an idea existed that there was a common law right for an author or his assigns exclusively to multiply copies. The argument that when a book was published and sold, there was an implied contract between the author and purchaser, could not be maintained. The purchaser bought the paper and print, the corporeal part of his purchase; and he bought a right to use the ideas, the incorporeal part of it. The doctrine of implied contracts would not hold, as it was

improbable. The author sustained a loss, but no injury, from another's printing his copy. *Damnum sine injuria* was an established maxim of law. As another, by multiplying copies reaped profit, the original author sustained a loss, but he sustained no injury. To be injured, a man must lose his right; that right must be founded in law: and where the law gives no remedy, an author can claim no right; the matter is common to all. It had been said that a declaration had been filed on an action at common law, for the invasion of copy right; but it had not been found, although every law book had been ransacked for the purpose, that a trial was ever had at common law. An incontrovertible proof that there was not a lawyer in Westminster-hall who supposed that there existed any right at common law. The present claim was neither more nor less than a claim for a monopoly, and all monopolies were odious to the common law.

The baron contended that the arguments of the counsel, and the opinions of those on the other side of the question, were more ingenious than convincing. He therefore answered the first, second, and fourth questions in the negative, being fixed in opinion that there never existed a common-law right, and that an author had no claim to his manuscript after publication. Respecting the statute of queen Anne, he was perfectly convinced that it was the only security that authors or booksellers had. That it gave a right for 14 years to the holders of copies, and after that period the right reverted to the authors for 14 years longer. The baron said he could not speak to the Act, without having it in his hand; he first read the title, and declared that all the metaphysical subtlety of definition which the ablest logician could muster, could not give any other sense to the words "for the encouragement of learning, and for vesting a right in authors," than a creation of a property, not a further security for one. He then read the preamble, and went through the Act sentence by sentence, particularly investigating the meaning of each clause, and drawing from its meaning strong arguments in favour of the opinion he was laying down. The words "and no longer," he declared were clear and conclusive; out of the power of argument to surmount. With regard to the injunctions cited on the occasion, the court of Chancery must have uniformly mistaken the law, if they had not granted them under the idea of the statute. The Act itself gave no more remedy with its penalties, than it did without them. An author in the first was allowed to damask all the books pirated upon him; by damasking he understood, turn to waste paper and line trunks, which linings were figured like damask. What remedy was this? none in the world. Then again, a penny per book was to be recovered, half of which went to the informer and half to the king; here therefore the author got nothing. The statute afforded him grounds for a remedy in equity. The court of Chancery, by an injunction and a decree, not only stopped the sale of the pirated copies, but also obliged the pirate to account for what he had sold. This was a satisfaction; this was an actual and an effectual remedy. To suppose that the saving clause maintained a perpetuity of property, was to suppose that the Act granted an author 14 years and no longer, except for ever, which was so barefaced, so egregious an absurdity, that no man of sense could be the dupe of it. That the court of Chancery had never dreamt of a common-law right, he proved by citing a case between the Stamp Office and a news-paper printer; a fellow, a printer, got into the Fleet, and there printed news-papers without stamps. The Stamp Office prayed an injunction, the court refused it, and told them, the statute having enacted, that a penalty was to be paid on conviction, that they must prosecute to conviction under the statute, and they had a right to the penalty, but they could not upon the principles of common law prevent the printer from continuing his trade. This proved that statute laws were unnecessary where remedies could be had at common law. After the baron had animadverted on the printers who claim the right of perpetuity, and instanced many cases, all tending to corroborate his opinion, he concluded his speech by affirming that there was no right at common law previous to the 8th of queen Anne, and that if there was, that statute entirely and effectually took it away.

Mr. Justice *Gould* agreed, that an author had a right at common law to his manuscript previous to publication, and he thought that right should continue to him under certain restrictions after publication; as public convenience was one of the elements of the common law, that should be consulted by an author or

printer after publication; he was glad therefore to hear it stated, that the respondents always kept a certain number of the book upon which the present appeal was grounded, ready for those who chose to purchase; he observed, that if this was not the case, it might be urged that the claim was a monopoly detrimental to the public, and he thought that if a book was kept out of print for an unreasonable time, it was a kind of abandonment of property in the original possessor, and the subject of it ought, for the public convenience, to become common. Under this idea he answered the first, second, and fourth questions. With regard to the statute of queen Anne, he conceived that the Act entirely took away any previous right that an author might have, and that an author was precluded by such statute from any remedy, except on the foundation of the same statute, and the terms and conditions prescribed thereby. This answer he gave to the third and fifth questions.

Mr. Baron *Adams* entered very learnedly into the nature of patents, privileges, and grants of the crown; traced them respecting books to a very early period, and cited a variety of instances, all tending to prove, that till of late years no idea was entertained that a common-law right existed respecting what was now termed literary property. That authors never dreamt of any claim in their favour, after they had parted with their manuscript; that printers, conscious of their having no other security, had recourse to patents and privileges. That there were many books which were called prerogative copies, but that they were not so called from the crown having paid for them. Acts of parliaments were prerogative copies, but they could not be said to be the property of the crown. It was an especial part of the prerogative to protect the religion and laws of the kingdom, therefore the king had the right of appointing his own printer in both instances. He was clearly of opinion that, previous to the statute of queen Anne, authors and printers had no security but by patents. He therefore answered the first, second, and fourth questions in the negative. It had been said that the statute of queen Anne was very inaccurately penned, the observation he declared would certainly hold, if it was construed as not to affect the original common-law right of an author, but if on the other hand it was supposed to give a legal security for a limited time only, it was worded with a proper degree of precision and accuracy. The Act most evidently created a property which did not exist before; the words "fourteen years and no longer," limited the security it gave, and the saving clause could not refer to any common-law right, because he was convinced that there existed no common-law right. It was merely a salvo to the Universities and all who held under letters patent, which alone could in books or copies give a perpetuity. The baron answered the third and fifth questions in the negative.

Feb. 21. The order of the day being read for the rest of the Judges to deliver their Opinion upon the several Questions put to them,

Lord Chief Baron *Smythe* observed, in answer to the first, second, and fourth questions, that the cases proved that property did exist previous to publication, and that publication could not alter it; for that publication neither made it a sale, a gift, a forfeiture, nor an abandonment, which were the only ways that a person could part with his property. When a man published his manuscript, he sold to one person only one book, and the use of that one book, without any design of allowing the purchaser to multiply copies: if he gave a book away, he gave it under the same restrictions. A forfeiture always implied a crime, and then the right of property became vested in the crown; an abandonment could not be without an intent of relinquishing his right, and such intent was not deducible from a publication of the ideas written by an author. In the cases of Pope and Curl, the letters were the property of those to whom they were sent; but the ideas remained as matter of right vested in the sender. In the case of lord Shaftesbury's manuscript, the same deduction followed; for Mr. Gwynne sold to Shebbeare what he had no authority from the author (lord Shaftesbury,) or his assigns, to dispose of. There was no act of dishonesty on the part of Shebbeare, although the manuscript was surreptitiously obtained, and the family had a remedy.

Some lawyers, yet alive, remembered the case of lord chief baron Gilbert's manuscripts, which he devised to baron Clarke; the baron never published them, but a hackney-writer, whom he employed, took an opportunity of copying them, and these stolen copies were committed to the

press. The same argument lay against pirating after, as before publication.

It had been mentioned, that a man made his landed estate common by giving a part of it to the highway; but it surely would not be contended, that, although he gave a part of his estate for such a purpose, any person but himself had a right to the trees on it, or the mines beneath it. He adverted to the case of Basket and the University of Cambridge, and declared that the argument was then grounded on these principles. He cited likewise the cases which, both at the bar and by the judges, had been mentioned of Eyre and Walker, and others, all of which were after the 21 years were expired, and which, redress being obtained, spoke in favour of the common-law right. He instanced also the case of the Sessions-Paper as corroborative of this opinion.

As to mechanical inventions, he did not know that, previous to the Act of 21 James 1, an action would not lie against the person who pirated an invention. An orrery none but an astronomer could make; and he might fashion a second, as soon as he had seen a first; it was then in a degree an original work: whereas, in multiplying an author's copy, his name as well as his ideas were stolen, and it was passed upon the world as the work of the original author, although he could not possibly amend any errors which might have escaped in his first edition, nor cancel any part which, subsequent to the first publication, appeared to be improper.

After several other similar observations, he answered the first, second, and fourth questions in the affirmative.

The statute of queen Anne he looked upon as a compromise between authors and printers contending for a perpetuity, and those who denied them any statute right. The word 'vesting,' if it could be tortured so as to tell against the present claim, was sufficiently qualified and done away by the word 'secure,' which occurred in the enacting clause, and which plainly implied a security for something pre-existing. The preamble gave full authority to this construction, the word 're-printing' particularly implying a right after the first publication; and the word 'purchaser' (which was one of the parties mentioned by the Act as being secured in their property) indicated most amply a previous right, for nobody could be thought to purchase what another had not a right to sell. The baron said that the statute afforded the holders of copy right a more efficacious remedy than the common law, but that it by no means impeached, restrained, or took away, the common-law right. He therefore answered the third and fifth questions in the negative.

Lord Chief Justice *De Grey* spoke next. His arguments were substantially as follow:

With respect to the first question, there can be no doubt that an author has the sole right to dispose of his manuscript as he thinks proper; it is his property, and, till he parts with it, he can maintain an action of trover, trespass, or upon the case, against any man who shall convert that property to his own use: but the right now claimed at the bar, is not a title to the manuscript, but to something after the owner has parted with, or published his manuscript; to some interest in right of authorship, to more than the materials, or manuscript, on which his thoughts are displayed; which is termed literary property, or an exclusive privilege of multiplying copies of the manuscript, or book, which right is the subject of the second question proposed to us.

Now, if there exists any incorporeal right or property in the author, detached from his manuscript, no act of publication can destroy it. Can then such right or property exist at all? Does such a right come within the knowledge or reach of the common law? In answer to the first of these queries, I acknowledge that, though this claim of property is abstract and ideal, novel and refined, it is yet intelligible, and may as easily be made to exist for ever as for a term of years; but, in order to know whether it is so protected by law, a preliminary question is necessary, whether any determination has been made in its favour, by the great and learned men who have been my predecessors, in regular course of judicature? It is not for me to shake a respectable series of decisions, and unhinge the foundations of an established right, by any *à priori* reasoning of my own; but, after investigating the decisions of the courts of common law, I can find no such determinations. What is common law now, must have been so 300 years ago, when printing was invented. No traces of such a claim are to be met with prior to the Restoration. Very few cases of this kind happened in Charles 2d's time, or before the licensing act, and those few were deter-

mined upon the prerogative right of the crown. The executive power of the crown drew after it this prerogative right, which extended to all acts of parliament, matters of religion, and acts of state. The case of Basket and the University of Cambridge, which was a late one of the same kind, appeared, upon the pleadings, to be a question arising between two parties, who claimed under concurrent and inconsistent grants of the crown. My late hon. and learned friend, Mr. Yorke, who argued that case, endeavoured to shew, that his client's right might arise from the power of the crown; and, to illustrate his argument, said, it might perhaps be "property founded on prerogative,"—a language, however allowable for counsel, not very admissible by, or intelligible to, a judge: but the certificate in the above case does not say a word of property; and, indeed, if such a claim as that had been founded on property, every one would have as good right to publish abridgments of the statutes, as of any other book.

Lord Northington granted injunctions on behalf of publications which he considered as matters of state, but left such works as The Whole Duty of Man to their common remedy at law. When works of literature, encouraged by the facility of printing, began to spread, we find the cases multiply. Of these, however, I lay entirely out of the question, all those which appear to be cases between rival patentees of the crown, all those relating to the Stationers Company, all those concerning religion, law, or the state, and all unpublished manuscripts.

I shall premise, too, before I examine the cases which happened after the statute, that I am of opinion, that the statute gives authors and their assigns a general right not connected with the penalty, and that statutable right falls under the protection of a court of equity, and may claim the benefit of an injunction. To obtain such an injunction, it is by no means necessary that the plaintiff should make out a clear indisputable title. It may be granted on a reasonable pretence, and a doubtful right, before the hearing of the cause; nor is it objection that the party applying for it has a remedy at law. No bill for an injunction is to be found before the statute.

The causes which have come before the court of Chancery since the statute, I find to be 17 in number. Of these eight were founded on the statute right: in two or three, the question was, whether the book was a fair abridgment: and all the rest were injunctions granted *ex parte*, upon filing the bill, with an affidavit annexed. In these cases the defendant is not so much as heard; and can I imagine, that so many illustrious men, who presided in the court of Chancery, would, without a single argument, have determined so great and copious a question, and which has taken up so much of your lordships' time? In fact, none of them wished to have it said he had formed any opinion on the subject.

From my own experience at the bar, I know that the successive chancellors and masters of the Rolls, lord Northington, lord Camden, sir Thomas Clark, &c. have all looked upon the case as undetermined; it may now, therefore, be fairly treated as a new question; and indeed, it has been argued as such upon general principles. Let us consider what principles have been laid down as the foundation of this new species of property. I have heard but of one, namely, that such a claim is inconsistent with the moral fitness of things. This idea of moral fitness is indeed an amiable principle, and one cannot help wishing all claims derived from so pure a source might receive all possible encouragement; but this principle is no universal rule of law, nor can it be made to apply in all cases. Beautiful as it may be in theory, to reduce it into the practice and execution of common law would create intolerable confusion; it would make laws vain, and judges arbitrary.

Nor is it possible to support the Respondents' claim upon this principle, and not allow its operation in a variety of other cases, where, it is confessed on all hands, it cannot be allowed. Abridgments of books, translations, notes, as effectually deprive the original author of the fruit of his labours, as direct particular copies, yet they are allowable. The composers of music, the engravers of copper-plates, the inventors of machines, are all excluded from the privilege now contended for; but why, if an equitable and moral right is to be the sole foundation of it? Their genius, their study, their labour, their originality, is as great as an author's, their inventions are as much prejudiced by copyists, and their claim, in my opinion, stands exactly on the same footing: a nice and subtle investigation may, perhaps, find out some little logical or mechanical diffe-

rences, but no solid distinction in the rule of property that applies to them can be found. If such a perpetual property remains in an author, and his right continues after publication, I cannot conceive what should hinder him from the full exercise of that right in what manner he pleases; he may set the most extravagant price he will upon the first impression, and refuse to print a second when that is sold. If he has an absolute controul over his ideas when published, as before, he may recal them, destroy them, extinguish them, and deprive the world of the use of them ever after; his forbearing to reprint is no evidence of his consent to abandon his property, and leave it as a derelict to the public.

But it is said, that the sale of a printed copy is a qualified or conditional sale, and that the purchaser may make all the uses he pleases of his book, except that one of reprinting it; but where is the evidence of this extraordinary bargain? or where the analogy of law to support the supposition? In all other cases of purchase, payment transfers the whole and absolute property to the buyer: there is no instance where a legal right is otherwise transferred by sale, an example of such a speculative right remaining in the seller. It is a new and metaphysical refinement upon the law; and laws, like some manufactures, may be drawn so fine as at last to lose their strength with their solidity. When printing was first introduced, cardinal Wolsey warned king Henry 8 to be cautious how he encouraged it, as a matter which might be dangerous to the state. The event, however, did not prove it so, and, therefore, the statute of the 21st of James 1 excepted it, as a reasonable and allowable monopoly.

The subsequent licensing act gave only an adventitious right; and thus it rested till the statute of queen Anne. The statute certainly recognizes no common law right, *hinc illæ lachrymæ!* Nor can I suppose this omission happened through ignorance or inadvertence, when I see such great law-names as Holt, Cooper, Harcourt, Somers, &c. in the list of that parliament.

If such a right existed at common law, and it remained unimpeached by that statute, why that anxiety in authors and booksellers afterwards to obtain another sanction for their property? whence those different applications to parliament, in the years 1735, 1738, 1739, for a longer term of years, or for life, in this kind of property, and afterwards to get an act to prohibit the liberty of printing books in foreign kingdoms, and sending them back again. The truth is, the idea of a common-law right in perpetuity was not taken up till after that failure in procuring a new statute for an enlargement of the term. If (say the parties concerned) the legislature will not do it for us, we will do it without their assistance; and then we begin to hear of this new doctrine, the common law right, which, upon the whole, I am of opinion, cannot be supported upon any rules or principles of the common law of this kingdom.—The Chief Justice answered the first question in the affirmative; the second and fourth in the negative; and the third and fifth in the affirmative.

February 22. The Judges having all delivered their Opinions except lord Mansfield, who declined speaking as a Judge, it was this day moved, "to reverse the Decree complained of." Upon this occasion,

Lord *Camden* spoke as follows:

My lords; after what the lord chief justice De Grey yesterday so ably enforced, there will be little occasion for me to trouble your lordships; nor will the present state of my health, and the weakness of my voice, allow me to exert myself were I ever so much inclined; but the nature of my profession, and the duty I owe to this House, will not suffer me to remain silent, when so important a question is to be determined. The fair ground of the argument has been very truly stated to you by the Lord Chief Justice: I hope what was yesterday so learnedly told your lordships, will remain deeply impressed on your minds.

The arguments attempted to be maintained on the side of the Respondents, were founded on patents, privileges, Star-chamber decrees, and the bye laws of the Stationers' Company; all of them the effects of the grossest tyranny and usurpation; the very last places in which I should have dreamt of finding the least trace of the common law of this kingdom: and yet, by a variety of subtle reasoning and metaphysical refinements, have they endeavoured to squeeze out the spirit of the common law from premises, in which it could not possibly have existence. They began with their pretended precedents

and authorities, and they endeavoured to model these in such a manner, as to extract from them something like a common law principle, upon which their argument might rest.

I shall invert the order, and first of all lay out of my way the whole bead-roll of citations and precedents, which they have produced—that heterogeneous heap of rubbish, which is only calculated to confound your lordships, and mislead the argument. After the first invention of printing, the art continued free for about fifty years. I mean to lay no stress upon this; I mention it only historically, not argumentatively; for as the use of it was little known, and, not very extensive, its want of importance might protect it from invasion; but as soon as its effects in politics and religion were felt, all the crowned heads in Europe at once seized on it, and appropriated it to themselves. Certain it is, that in England the crown claimed both the power of licensing what should be printed, and the monopoly of printing. Two licences were granted to those who petitioned for them. An author not only was obliged to sue for a licence to print at all, but he was also obliged to sue for a second licence that he might print his own works. When the king had once claimed the right of printing, he secured that right by patents and by charters. Still further to secure his monopoly, he combined the printers, and formed them into a company, then called the Stationers' Company, by whose laws, none but members could print any book at all. They assumed powers of seizure, confiscation and imprisonment, and the decrees of the Star Chamber confirmed their proceedings. These transactions, I presume, have no relation to the common law; and when they were established, where could an author, independent of the company, print his works, or try his right to it? Who could make head against this arbitrary prerogative, which stifled and suppressed the common law of the land? Every man who printed a book, no matter how he obtained it, entered his name in their books, and became a member of their company: then he was complete owner of the book. Owner was the term applied to every holder of copies; and the word 'author' does not occur once in all their entries.

All societies, good or bad, arbitrary or illegal, must have some laws to regulate them. When an author died, his executors naturally became his successors. The manner in which the copy-right was held was a kind of copyhold tenure, in which the owner has a title by custom only, at the will and pleasure of the lord. The two sole titles by which a man secured his right was the royal patent and the licence of the Stationers' Company; I challenge any man alive to shew me any other right or title. Where is it to be found? some of the learned judges say the words 'or otherwise' in the statute of queen Anne relate to a prior common law right? To what common law right could these words refer? At all the periods I have mentioned, the common law rights were held under the law of prerogative. It was the general opinion that there was no other right, and the corrupt judges of the times submitted to the arbitrary law of prerogative. In the case of the Stationers' Company against Seymour, all the judges declared that printing was under the direction of the crown, and that the court of King's-bench could seize all printers of news, true or false, lawful or illicit. But if it was made use of to protect authors, what was this protection? a right derived under a bye law of a private company. A protection similar to that which we give the Great Mogul; when we want any grant from him, we talk submissively, and pay him homage, but it is to serve our own purpose, and to feast him with a shadow that we may attain the substance.

In short, the more your lordships examine the matter, the more you will find that these rights are founded upon the charter of the Stationers' Company and the royal prerogative; but what has this to do with the common law right? for never, my lords, forget the import of that term. Remember always that the common law right now claimed at your bar is the right of a private man to print his works for ever, independent of the crown, the company, and all mankind. In the year 1681, we find a bye law for the protection of their own company and their copy-rights, which then consisted of all the literature of the kingdom; for they had contrived to get all the copies into their own hands. In a few years afterwards, the Revolution was established, then vanished prerogative, then all the bye laws of the Stationers' Company were at an end; every restraint fell from off the press, and the whole common law of England walked at large. During the succeeding fourteen or sixteen years, no action was brought, no injunction obtained, although no illegal force prevented it; a strong proof, that at

that time there was no idea of a common law claim. So little did they then dream of establishing a perpetuity in their copies, that the holders of them finding no prerogative security, no privilege, no licensing act, no Star Chamber decree to protect their claim, in the year 1708 came up to parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to excite compassion, and induce parliament to grant them a statutory security. They obtained the Act. And again and again sought for a further legislative security.

Thus, my lords, stands the pretence on the score of usage, of which your lordships have heard so much on one side the question. I come now to consider upon what foundation stand the prerogative copies; and these were in fact cases between co-patentees (for I must consider the Stationers' Company itself as a patentee of the crown) and no authorship right occurs here. The right in the crown is supposed to come either from purchase or contract; and our law argues from principles, cases, and analogy; but not a word of this in the judgment of the court; but the arguments of counsel are adduced to prove the point. The argument of counsel is a sorry kind of evidence indeed; in most cases it would be very dangerous to rely on it, but here it is such stuff as I am ashamed to mention. You have them at length in Carter: First, it is put on the topic of prerogative, next of ownership. 1. Henry the 6th brought over the printers and their presses, *ergo*, says the counsel, he has an absolute right to the whole art, and all that it can produce. 2. Printing belongs to nobody, and what is nobody's is of course the king's. 3. The king pays his judges, *ergo*, he purchases this right for a valuable consideration. 4. He paid for the translation of the Bible, therefore, forsooth, he bought a right to sell bibles. Away with such trifling! Mr. Yorke put it on its true footing. Ought not the promulgation of your venerable codes of religion and of law to be entrusted to the executive power, that they may bear the highest mark of authenticity, and neither be impaired, or altered, or mutilated? These printed acts are records themselves, are evidence in a court of law, without recurring to the original parliamentary roll. Will you, then, give this honourable right to your sovereign as such? or will you degrade him into a bookseller? Indeed, had he no other title to this distinction, that could hardly be maintained.

But if this will not serve the purpose, recourse is next had to injunctions; they, it is said, have put the right out of doubt; nay, lord Hardwicke's name is triumphantly brought on the stage, and he is declared to have absolutely decided the point: no man, I am sure, can venerate his name (which will be dear to posterity as long as law or equity remain) more than I do. But this boasted case, like all the rest that have been produced, entirely fails in the proof; and when my lord chief justice reads his own note of what lord Hardwicke said upon the occasion, it appeared that lord Hardwicke's words had been twisted to an opposite meaning to what he intended. All the injunction cases have been ably gone through. I shall only add, in general terms, that they can prove nothing: they are commonly obtained for the purpose of staying waste, and the prevention of irreparable damage. They must, therefore, in their nature be sudden and summary, or the benefit of them would be lost before they are obtained, and they are granted though the right is not clear, but doubtful. The question, whether I am tenant for life or in tail, whether I can maintain my right against the devisee or the heir at law, may be discussed afterwards at leisure; but unless upon shewing a reasonable pretence of title you in the mean time tie up the spoiler's hands who is selling my timber, or ploughing my pasture, my remedy is gone, or comes too late to prevent the mischief. What, then, if a thousand injunctions had been granted, unless the Chancellor at the time he granted them had pronounced a solemn opinion, that they were grounded upon the common law? It would only come to this at last, that the right in question was claimed on one side and denied on the other; therefore till the matter was tried and determined, let the injunction go. Lord Hardwicke, after 20 years experience, in the last case of the kind that came before him, declared that the point had never yet been determined. Lord Northington granted them on the idea of a doubtful title; I continued the practice upon the same foundation; and so did the present Chancellor. Where, then, is the Chancellor who has declared *ex cathedra* that he had decided upon the common law right? Let the decision be produced in direct terms. It is amazing that we should have been

so long amused with this kind of argument from such vague authorities!

At length, my lords, having removed every stumbling-block that opposed our progress to the pure source of common law; having cleared the way of all those spurious, pretended authorities, which will not bear the test of a moment's serious examination, the question begins to assume its natural shape. Here, then, I feel myself upon my own ground, and I challenge any man to produce any adjudication, a precedent, a case, or any thing like legal authority on which this claim can be grounded. Does there appear a scintilla, a glimpse of common law under any of those different heads I have mentioned, and which have been so often repeated to us? For my own part, I find nothing in the whole that savours of law, except the term itself, Literary Property. They have borrowed one single word from the common law, and have raked into every store-house of literary lumber to find out how to apply it to the subject, and to deduce some principles to which it may refer, and be governed by.

And now what are they? What are the foundations of this claim in the English common law? Why, in the first place, say the respondents, every man has a right to his ideas. Most certainly, every man who thinks has a right to his thoughts while they continue his; but here the question again returns; when does he part with them? When do they become *publici juris?* While they are in his brain no one indeed can purloin them; but what if he speaks, and lets them fly out in private or public discourse? Will he claim the breath, the air, the words in which his thoughts are clothed? Where does this fanciful property begin, or end, or continue? Oh, say they, the ideas are marked in black and white, on paper or parchment—now, then, we get at something; and an action, I allow, will lie for ink and paper: but what says the common law about the incorporeal ideas, and where does it prescribe a remedy for the recovery of them, independent of the materials to which they are affixed? I see nothing about the matter in all my books; nor were I to admit ideas to be ever so distinguishable and definable, should I infer they must be matters of private property, and objects of the common law?

But granting this general position, we get footing but upon one single step, and new doubts and difficulties arise whenever we attempt to proceed. Is this property descendable, transferable, or assignable? When published, can the purchaser lend his book to his friend? Can he let it out for hire as the circulating libraries do? Can he enter it as common stock in a literary club, as is done in the country? May he transcribe it for charity? Then what part of the work is exempt from this desultory claim: does it lie in the sentiments, the language and style, or the paper? If in the sentiments or language no one can translate or abridge them. Locke's Essay might perhaps be put into other expressions, or newly methodized, and all the original system and ideas be retained. These questions shew how the argument counteracts itself, how the subject of it shifts, and becomes public in one sense, and private in another: and they are all new to the common law, which leaves us perfectly in the dark about their solution? And how are the judges, without a rule or guide, to determine them when they arise, whose books and studies afford no more light upon the subject than the common understandings of the parties themselves? What diversity of judgments! what confusion in opinion must they fall into! without a trace or line of law to direct their determination! What a code of law yet remains for their ingenuity to furnish, and could they all agree in it, it would not be law at last, but legislation.

But it is said that it would be contrary to the ideas of private justice, moral fitness, and public convenience, not to adopt this new system. But who has a right to decide these new cases, if there is no other rule to measure by but moral fitness and equitable right? Not the judges of the common law, I am sure. Their business is to tell the suitor how the law stands, not how it ought to be; otherwise each judge would have a distinct tribunal in his own breast, the decisions of which would be irregular and uncertain, and various, as the minds and tempers of mankind. As it is, we find they do not always agree: but what would it be, where the will of right would always be the private opinion of the judge, as to the moral fitness and convenience of the claim? Caprice, self-interest, vanity, would by turns hold the scale of justice, and the law of property be indeed most vague and arbitrary. That excellent judge, lord chief justice Lee, used always to ask the counsel, after his argument was over, "Have you any case?" I hope judges will always copy the ex-

ample, and never pretend to decide upon a claim of property, without attending to the old black letter of our law, without founding their judgment upon some solid written authority, preserved in their books, or in judicial records. In this case I know there is none such to be produced.

With respect to inventors, I can see no real and capital difference between them and authors; their merit is equal, they are equally beneficial to society, or perhaps the inventor of some of those master pieces of art which have been mentioned have there the advantage. All the judges who have been of a different opinion, conscious of the force of the objection from the similarity of the claim, have told your lordships they did not know but that an action would lie for the exclusive property in a machine at common law, and chose to resort to the patents. It is, indeed, extraordinary that they should think so, that a right that never was heard of could be supported by an action that never yet was brought. If there be such a right at common law, the crown is an usurper; but there is no such right at common law, which declares it a monopoly; no such action lies; resort must be had to the crown in all such cases.

If, then, there be no foundation of right for this perpetuity by the positive laws of the land, it will I believe find as little claim to encouragement upon public principles of sound policy, or good sense. If there be any thing in the world common to all mankind, science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water. They forget their Creator, as well as their fellow creatures, who wish to monopolize his noblest gifts and greatest benefits. Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species? Those great men, those favoured mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock. We know what was the punishment of him who hid his talent, and Providence has taken care that there shall not be wanting the noblest motives and incentives for men of genius to communicate to the world those truths and discoveries which are nothing if uncommunicated. Knowledge has no value or use for the solitary owner: to be enjoyed it must be communicated. 'Scire tuum nihil est, nisi te scire hoc sciat alter.' Glory is the reward of science, and those who deserve it, scorn all meaner views: I speak not of the scribblers for bread, who teaze the press with their wretched productions; fourteen years is too long a privilege for their perishable trash. It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of a letter press. When the bookseller offered Milton five pound for his Paradise Lost, he did not reject it, and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labour; he knew that the real price of his work was immortality, and that posterity would pay it. Some authors are as careless about profit as others are rapacious of it; and what a situation would the public be in with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife or children are to be provided for by the sale of an edition. All our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chuses to demand, till the public become as much their slaves, as their own hackney compilers are.

Instead of salesmen, the booksellers of late years have forestalled the market, and become engrossers. If, therefore, the monopoly is sanctified by your lordships' judgment, exorbitant price must be the consequence; for every valuable author will be as much monopolized by them as Shakespeare is at present, whose works, which he left carelessly behind him in town, when he retired from it, were surely given to the public if ever author's were; but two prompters or players behind the scenes laid hold of them, and the present proprietors pretend to derive that copy from them, for which the author himself never received a farthing.

I pass over the flimsy supposition of an implied contract between the bookseller who sells, and the public which buys the printed copy; it is a notion as unmeaning in itself as it is void of a legal foundation. This perpetuity now contended for is as odious and as selfish as any other, it de-

serves as much reprobation, and will become as intolerable. Knowledge and science are not things to be bound in such cobweb chains; when once the bird is out of the cage—*volat irrevocabile*—Ireland, Scotland, America, will afford her shelter, and what, then, becomes of your action? His lordship concluded with several observations on the statutes of queen Anne, in which he took notice that the old copies were entitled to 21 years, and the new ones but to 14, and said, that if the legislature had intended to make the right perpetual, they would have taken care that the remedy should be so too.

Lord Chancellor *Apsley* prefaced what he was about to say, by declaring, that he had made the decree entirely as of course, in pursuance of the decision upon the right in the court of King's-bench, and that as what he had decreed, as a chancellor, was merely a step in the gradation to a final and determinate issue in the House of Peers, he was totally unbiassed upon the question, and therefore could speak to it as fairly from his own sense of it, as any one of the judges, or any of the lords present. He then entered into a very minute discussion of the several citations and precedents that had been relied upon at the bar, shewed where they failed in application to the present case; and one by one described their complexion, their origin, and their tendency; in each of which he proved that they were foreign to any constructions which could support the respondents in their argument; he was no less precise and full in exposing the absurdity of the authorities derived from the Stationers' Company, quoting several extraordinary entries to be met with in their books; among others, he said, that one Sibthorpe had entered a book there "the title of which," says the entry, "is to be sent hereafter;" and another member entered the name of a book, "about to be translated by him;" by which all the rest of the world were to be restrained, in the mean time, perhaps for ever, from translating the same. He then very fully stated the several cases of injunctions in the court of Chancery, produced several original letters from Swift to Faulkner and others, relative to the statute of queen Anne, and gave an historial detail of all the proceedings in both Houses upon the several stages of that Act, and the alterations it had undergone in the preamble and enacting clauses, all tending to shew the sense of the legislature, at the time of passing it, to be against the right; and that they rejected the other Bills afterwards, drawn up chiefly by the advice of dean Swift, and the countenance of Mr. Addison, which were presented in the same spirit, and upon the same grounds; and concluded with declaring that he was clearly of opinion with the appellants.

Lord *Lyttelton** spoke in favour of authors; and, in opposition to the doctrine laid down by lord Camden, urged, that the science of literature, though not tangible, was nevertheless property; and that it must receive a very sensible shock from the reverse of the decree, should it unfortunately take place. He spoke very ingeniously on the subject; traced the origin of the arts and sciences from Greece to Rome, Arabia, &c., and at last seated them in Great Britain. He introduced a high panegyric on his present Majesty and the king of Prussia, under whose patronage they so much flourished; and represented them as the only crowned heads who were either men of learning themselves, or encouragers of literature.

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* Thomas, second lord Lyttelton. He was born January 30, 1744. He succeeded his father in 1773. "With great abilities, generally very ill applied; with a strong sense of religion, which he never suffered to influence his conduct, his days were mostly spent in splendid misery; and in the painful change of the most extravagant gaiety and the deepest despair. The delight, when he pleased, of the first and most select societies, he chose to pass his time, for the most part, with the most profligate and abandoned of both sexes. Solitude was to him the most insupportable torment, and to banish reflection, he flew to company whom he despised and ridiculed. His conduct was a subject of bitter regret both to his father and all his friends." He died Nov. 27, 1779, in his 36th year. See Brydges' Biographical Peerage, vol. 2, p. 301.

"His death is said to have been very extraordinary. He supposed that he saw in a dream a vision of a young woman dressed in white who told him that his dissolution would take place in three days. The third day arrived, and his lordship, engaged in a convivial party of friends, observed jocularly that he thought he should jockey the ghost, a few minutes after which he was seized with a sudden faintness, and being removed to his bed, never rose again." Lempriere.

"When I mentioned Thomas, lord Lyttelton's vision, the prediction of the time of his death, and its exact fulfilment: *Johnson*. 'I 'heard it with my own ears, from his uncle, 'lord Westcote.'" Boswell's Life of Johnson.

The Bishop of *Carlisle* made use of similar arguments with those of lord Camden against the property; and concluded by wishing, that an act might be brought to give authors and booksellers an equitable space of time for their works and no longer.

Lord *Effingham* rose last, and begged to urge the liberty of the press, as the strongest argument against this property; adding, that a despotic minister, hearing of a pamphlet which might strike at his measures, may buy the copy, and by printing 20 copies, secure it his own, and by that means the public would be deprived of the most interesting information. Lord Mansfield did not speak.

Ordered, That the Decree be reversed without costs of suit.

List of those noblemen who divided on the above question for reversing the Decree: dukes of Roxburgh, Bolton; earls of Denbigh, Gower, Sandwich, Spencer, Radnor, Jersey, Northington, Oxford, Abercorn, Loudon, Roseberry; viscounts Say and Sele, Weymouth, Falmouth; lords Camden, Ravensworth, Montague; bishops of St. Asaph, Litchfield and Coventry.—For confirming the Decree: dukes of Northumberland, Portland; marquis of Rockingham; earls of Carlisle, Fitzwilliam; viscounts Dudley, Torrington; lords Bruce, Lyttelton; archbishop of Canterbury; bishop of Chester.

*Proceedings in the Commons against the Reverend John Horne for a Libel upon the Speaker.**] February 7. Sir Edward Astley presented a Petition from Thomas De Grey, esq., lord of the manor of Tottington, in the county of Norfolk, and of several owners and proprietors of lands within the parish of Tottington; setting forth, That there are, within the said parish, several common lands, &c. belonging to the petitioners, which, in their present state, are inconveniently situated, and incapable of any considerable improvement; and that, if the same were divided, and allotted to all persons interested therein, the same would be greatly improved: and therefore praying, that leave may be given to bring in a Bill for dividing and inclosing the said lands.—Leave was accordingly given.

Sir Edward Astley also presented a Petition from William Tooke, esq., a proprietor of lands in the parish of Tottington, taking notice of the application in the preceding Petition, and setting forth, That the petitioner, and a great part of the owners and proprietors of lands within the said parish, have not consented to the above application, and which, they have reason to believe, is solely intended for the great gain and emolument of Thomas De Grey, esq., who hath already made many encroachments upon the commons of the said parish, in violation of the lawful rights and estates of the petitioner and other owners of lands, which encroachments, the petitioner apprehends, will be urged as a claim to a much larger proportion, in the proposed allotments, than the said Thomas De Grey would otherwise be entitled to; and that the petitioner is informed, no previous public notice has been given for a meeting of the proprietors and owners of lands within the said parish, as is usual on similar occasions; and therefore praying, that a sufficient and convenient time may be granted to the petitioner, and the other owners and proprietors of lands within the said parish, to be prepared and ready to make good their objections to the said Petition; and that the disputed rights of commons, between the said Thomas De Grey, and the petitioner and other owners of land within the said parish, may be first duly settled and determined by a jury, according to the laws of the land, before leave be given to bring in a Bill; and assuring the House, that there shall be no delay, on the part of the petitioner, in bringing the said encroachments and usurpations of the said Thomas De Grey, to a speedy, final, legal issue.—Ordered to lie on the table.

Feb. 10. Sir Edward Astley presented the Bill to enable Thomas De Grey to divide and inclose the common fields, and lands within the parish of Tottington. On the motion, that it be read a first time, Mr. Sawbridge moved, that Mr. Tooke's Petition might be again read. It was read

* A *very incorrect* account of the above Proceedings has recently appeared in a work intituled, "Memoirs of John Horne Tooke, by Alexander Stephens, esq. of the honourable society of the Middle Temple." As the author professes to have received his information from Mr. Horne Tooke himself, this is not a little surprising. It will, however, be seen, upon a slight comparison of Mr. Stephens's narrative, with Mr. Horne's Letter to sir Fletcher Norton and also with the Journals of the House of Commons, that the Dialogue, given in volume 1, p. 424, between Mr. Horne and Mr. William Tooke, minute and circumstantial as it is, *could never have taken place.* (A. D. 1813.)