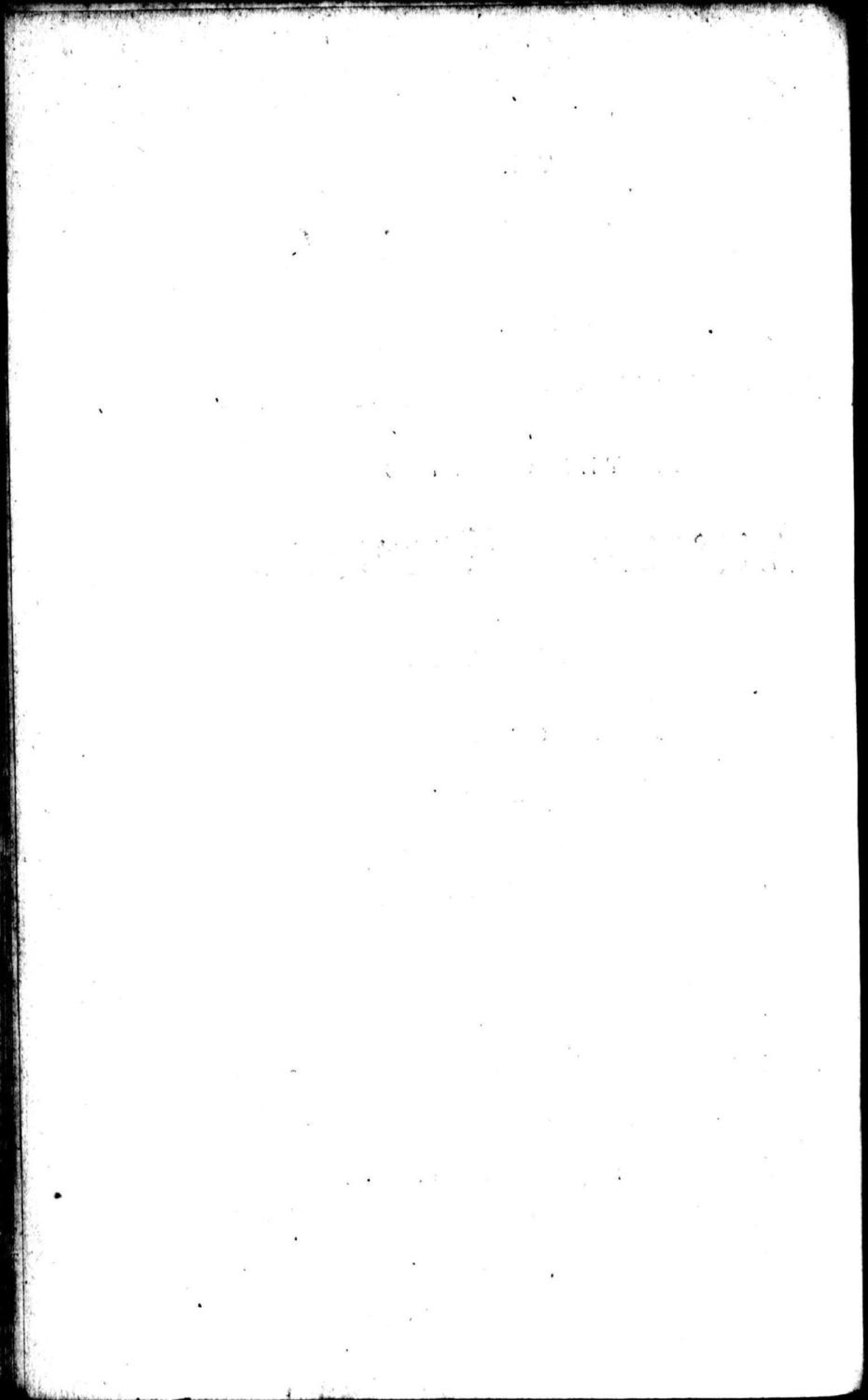

PREFACE.

THE shrewd Remark of the School Boy, on his being reprimanded for stealing the Old Woman's Ginger-bread *Letters*, viz. *that he understood, that the supreme Judicature of* Great Britain *had lately determined that* lettered *Property was common*; though related of a School Boy, would not, in my Opinion, disgrace the first Abilities; for it is observable, that there is no such Epithet as *literary*, in the *English* Language, but *lettered* is to be found, and is always used in the Sense, and applied for the Purpose of expressing the self same Meaning, the Schoolboy wished to convey, when he made the above Observation. So that *lettered Property*, and not *literary Property*, seems to be the Subject Matter of the following Sheets.

I presume the Reader will require no Apology for this Publication, as the following Arguments, Opinions, and Speeches, are confessedly the most interesting and able that have been delivered either in the House of Lords, or in *Westminster* Hall, since the Statute of Queen *Anne*. Their Subject is of special Concernment to the Gentlemen of the Profession, and to all those who are any ways concerned in *lettered* Productions, or desirous of reading some of the best Arguments, Opinions, and Speeches, delivered by the greatest Men, the first Lawyers and Statesmen in this Country, on the Definition of a most difficult and important Question.

The Reader will find an incredible Fund of Learning and Knowledge; and among other interesting and able Disquisitions, the following ones are most learnedly debated, viz. the History of the Statute of the 8th of Queen *Anne*; the History of Injunctions, relative to *lettered* Property; the general

general Rules of Law for the Conſtruction of the legal Senſe of the Term private Property; which is alſo defined philoſophically, and conſidered in the ſeparate Lights of being corporeal and ſpiritual; the Nature of Patents, Privileges, and Grants of the Crown are minutely entered into; and theſe ſeveral Inquiries are embelliſhed with great (1) Elegance and Force of Language, and illuſtrated with many appoſite and judicious Obſervations.

This Deciſion of the Lords hath very conſiderably ſhaken the Law (2) Patent, and reduced its *excluſive* Right to print, within the *incluſive* Compaſs of a Nut-ſhell; much to the Honor and Intereſts of the Profeſſion; the Works of (3) *Shakeſpeare*, of *Addiſon*, *Pope*, *Swift*, *Gay*, and many other excellent Authors of the preſent Century, are, by this Reverſal, declared to be the Property of any Perſon, who chuſes to be at the Expence of Paper and Print.

It would have been tedious and tautologous, to have repeated the Arguments of the Council, or the Caſes and Authorities cited by them, as they are all of them ſo very fully and amply ſet forth, and ſo elaborately expatiated upon, canvaſſed, and diſcuſſed, not only by the Appellants, in their printed Caſe; but alſo by the Judges in their Opinions; together with the Reaſons, whereon they were founded.

We have made ſeveral Extracts from *Catharine Macaulay*'s "Modeſt Plea for Copy Right;" and alſo tranſcribed Lord *Kames*'s (4) ſenſible Opinion, on the Statute of the 8th of Queen *Anne*.

(1) It ſeems almoſt unneceſſary to intimate to the Reader, that we, in the above Obſervation, particularly allude to Lord *Camden*'s Speech.

(2) See Baron *Eyre*'s Opinion, Fol. 34. Lord *Camden*'s Speech, Fol. 50.

(3) Id. 34.

(4) See End of Appendix.

Lord

Lord *Camden*'s Speech is elegant and forcible, in respect to Language; and contains the soundest Doctrine with respect to Law, Equity, and Justice.

The Opinion of Mr. Baron *Eyre* is delivered with the Erudition of a Scholar, the Acuteness of an able Lawyer, and the Accuracy of a sound Reasoner.

Though Lord *Mansfield* declined speaking to the Question in the House, and though Mr. Justice *Yates* had not an Opportunity of delivering his Opinion there; yet as the former hath, been pleased to signify his Sentiments elsewhere, and the latter too, on the same Question, and as they differed in Opinion we wish to mention them both on this Occasion.

Sir *James* (5) *Burrow* observes, "that except in this Case of *lettered Property*, and of *Perrin* v. *Blake*, then (6) depending by Writ of Error, in the House of Lords, wherein Mr. Justice *Yates* differed with the other three Judges, every Rule, Order, Judgment, and Opinion had, been (as far as Sir *James* could recollect) unanimous."

Sir *James* (5) also observes, that such Unanimity "gives Weight and Dispatch to the Decisions, Certainty to the Law, and infinite Satisfaction to the Suitors."

And we, in our Turn, beg Leave to observe, that the two only Cases, wherein the Judges of the Court of *King's Bench* differed in Opinion, have both since been determined agreeable to the Opinion of the dissenting Judge, the late Mr. Justice *Yates*; and we beg Leave also to observe further, that

(5) *Bur.* Lit. Prop. 112.

(6) However singular the Opinion of Judge *Yates* was in the *Court of King's Bench*, it afterwards appeared, that the Majority of the Judges in the *Exchequer* Chamber, were influenced by his strict Attachment to established Rules of Law; and accordingly reversed that unprecedented Decision of the Court of *King's Bench*, and thereby restored the venerable Train of preceding uniform Judgments, upon the same Point, to its former Authority.

the

the Court of *King's Bench*, in their Judgment in *Perrin* v. *Blake*, in a liberal Spirit soared above *nugatory* Refinements, and *senseless* Distinctions, arising from *the strict Letter of the Law*; and laughed at those Restrictions, by which a Court of Equity esteems itself bounden; and that Judge *Yates*, from an *illiberal* Habit of Attachment to established Laws, was of a direct contrary Opinion; but his *antiquated* Arguments were easily answered, by the Court's observing, that there were Lawyers of a different *Bent of Genius* and *Mode of Education* (from that Part of the Bench, which concurred in the Judgment) who chose to adhere *to the strict Letter of the Law*.

Perhaps, when these special Circumstances, attending this Difference of Opinion, are maturely considered, the boasted Unanimity of the Court of *King's Bench*, may not have always been happy in its Consequences to the Suitors of *that* Court.

In reporting the Arguments of the Council, I have not scrupulously followed the Style and Method of the Speaker; I hope, however, the Reader will do me the Justice to believe, that the *Substance* of what was delivered, is faithfully reported; but oftentimes in my own Words; Every Defect therefore in Point of Method or Expression, which the Reader meets with, I alone am answerable for; though I flatter myself the learned Gentlemen, whose Sentiments I have thus delivered, will not often find themselves or their Characters, greatly wronged in that Respect.

I do most humbly beg Pardon of the Lords and the Judges, for innumerable Injuries I must have done them, as to *Language* and Argument. I did not take my Notes in short Hand; I watched the *Sense*, rather than the *Words*; and therefore may often use some of my own: not being blessed with the quckest natural Parts, I may have misapprehended

Topics

Topics and Allusions; I may have made Blunders in the Sense, by endeavouring to rectify those of my Pen; these are Imperfections which Diligence could not cure. I am only concerned, lest my Errors should be imputed, not to myself, but to those able and illustrious Lords and Judges, whose Discourses, I may happen (through my own Infirmities) to have misrepresented.

As the same Arguments were used, and the same Grounds gone on, in this Appeal, as in the Cause of *Millar* v. *Taylor*, we beg Leave to recommend to the Reader, an attentive Perusal of " The Question concerning *literary Property*, published by Sir *James Burrow*, in Quarto, A. D. 1773," wherein he will find the separate Opinions of the four Judges; and the Reasons given by each, in Support of his Opinion. The very able Argument of *Arthur Murphy*, Esq; who was Council for the Defendant in the said Cause, is also most worthy of Perusal; which Argument he delivered in the Court of *King's Bench*, 7 *June* 1768. And as this same Question hath undergone the Investigation of the Lords of Session, in *Scotland*, in the Cause of *Hinton* v. *Donaldson* & *al.* we wish the Reader to peruse the able and judicious Arguments and Opinions, delivered by the Council and Lords, in that Kingdom, on that Occasion; which are all to be found, and well taken, by *James Boswell*, Esq; one of the Council in the Cause; they were published in *London* and *Edinburgh*, in Quarto, in the Year 1774.

The ingenious Argument of *Francis Hargrave*, Esq; one of the Council for the Defendants in *Chancery*, in the Cause of *Becket* & *al.* v. *Donaldson* and another, and which Mr. *Hargrave* favoured the Public with in Print, not having an Opportunity

of

of delivering it in the *proper* and *regular* Manner, which well deſerves the Notice of the curious Reader.

To conclude. Mrs. *Macaulay* obſerves, that " if ſome poſitive Law does not lend its Aid to the Support of the tottering State of Literature in this Country, this Deciſion will be a more mortal Stab to the Freedom, Virtue, Religion, and Morals of the People of *England*, than the unthinking Multitude in general at preſent apprehend." *Quere.*

CONTENTS.

In Favour of the COMMON LAW *lettered* PROPERTY.	Page
1. Lord *Lyttleton.*	55
2. Lord Chief Baron *Smythe.*	43
3. Mr. Juſtice *Aſton.*	39
4. Mr. Juſtice *Willes.*	38
5. Mr. Juſtice *Blackſtone.*	36
6. Mr. Juſtice *Aſhhurſt.*	35
AND	
7. Mr. Juſtice *Nares.*	35

In Favour of the STATUTE LAW *lettered* PROPERTY.	Page
1. Lord Chancellor.	55
2. Lord *Camden.*	48
3. Biſhop of *Carliſle.*	56
4. Lord Chief Juſtice *De Grey.*	44
5. Mr. Baron *Adams.*	43
6. Mr. Juſtice *Gould.*	42
7. Mr. Baron *Perrott.*	40
AND	
8. Mr. Baron *Eyre.*	31

ERRATA.

Page 20, for *our*, read *our*. Page 28, for *Vac.* read *Term.* Page 36, for *in like Manner as*, read *and was of the ſame Opinon with.* Page 41, for *ſine*, read *ſine.*

Literary Property.

HOUSE of LORDS.

Alexander Donaldſon, *and* John Donaldſon, *Bookſellers*, — — — —	Appellants.
Thomas Becket, Peter Abraham de Hondt, John Rivington, William Johnſton, William Strahan, Thomas Longman, William Richardſon, John Richardſon, Thomas Lowndes, Thomas Caſlon, George Kearſley, Henry Baldwin, William Owen, Thomas Davies, and Thomas Cadell, *Printers and Bookſellers*, — — —	Reſpondents.

CASE of the APPELLANTS.

ON the 21ſt of January, 1771, the Reſpondents filed their Bill in the High Court of Chancery, and, among other Things, charged, that one JAMES THOMPSON was the Author of a Tragedy called SOPHONISBA, and of a Poem entitled SPRING.

Bill filed Jan. 21, 1771.

James Thompſon, Author of the Book in Queſtion.

And that, on or about the 16th Day of January, 1729, He, the ſaid JAMES THOMPSON, by *Indenture*, bargained and ſold *true Copies* of the ſaid Works to one ANDREW MILLAR, together with the ſole and excluſive Right of printing the ſame, for the Sum of £137 : 10.

16th Jan. 1729, he ſold to Millar the Poem called Spring.

That the ſaid JAMES THOMPSON was alſo the Author of other Poems, entitled SUMMER, AUTUMN, WINTER, BRITANNIA, a Poem ſacred to the Memory of Sir ISAAC NEWTON, an Hymn on the Succeſſion of the SEASONS, and an Eſſay on DESCRIPTIVE POETRY.

James Thompſon, Author of three Poems and Hymn.

And that on the 28th Day of July, 1729, He, the ſaid JAMES THOMPSON, bargained and ſold the ſeveral Copies of the laſt mentioned Poems to one JOHN MILLAN, together with the ſole Right of printing the ſame, for £105.

28th July, 1729, ſold ſame to John Millan.

The Reſpondents further charged, that, by Indenture, bearing Date the 16th of June, 1738, JOHN MILLAN ſold to ANDREW MILLAR the Copies of the laſt mentioned Poems, and the Right and *Property* of printing, publiſhing, and vending the ſame, for the Sum of £105.

16th June, 1738, John Millan ſells the laſt Poems to A. Millar.

That ANDREW MILLAR departed this Life in June, 1768, leaving JANE MILLAR, (now JANE GRANT) WILLIAM MILLAR, and the Plaintiffs, THOMAS LONGMAN and THOMAS CADELL, his Executors.

June, 1768, Millar died.

A

That

13th June, 1769, Millar's Representatives sold same by Auction to the Respondents.

That on the 13th of June, 1769, the several Copies above mentioned, with the sole Righ of printing and publishing the same, were sold at the *Queen's-Arms Tavern*, in *St. Paul's Church-Yard*, and that the Plantiffs, in certain Proportions, were the Purchasers at and for the Sum of £505.

Charge that Appellants sold without License from the Respondents.

The Respondents then proceeded to charge, that the Appellants, notwithstanding the Premises, and without the Licence and Consent of the Respondents, published and sold several Copies of the above mentioned Poems, called THE SEASONS, and the said HYMN on the Succession of the Seasons, each Copy being bound up in a single Volume, and entitled, The SEASONS, by *James Thompson*; *Edinburgh*, printed by *A. Donaldson*, 1768, thereby deriving to themselves great Gain, to the Detriment of the Respondents, who claimed to themselves the whole Profit arising from the Publication and Sale of the same.

Charge that Appellants refuse to render an Account.

And the Respondents further charged, that the Appellants had not at any Time purchased from the said JAMES THOMPSON the Right of printing and publishing the said Poems; but insisted, notwithstanding, upon the Liberty of selling the same, without accounting to the Respondents for the Price thereof.

Prayer of the Bill.

The Respondents, therefore, prayed that the Appellants might come to an Account with the Respondents, for all the Money by them received by Sale of the Poems, and pay the same to the Respondents, and should for the future be restrained, by an Injunction, from publishing and vending any Copies of the said Poem, called the SEASONS, and the HYMN.

The Answer of the Appellants.
28 Years Monopoly by 8th Anne, Chap. 19, had elapsed.
Deny exclusive Right claimed by Respondents.

To this BILL, the Appellants put in their Answer, sworn the 16th of *July*, 1771, and thereby admitted, that the said THOMPSON was the Author of the Poems, called the SEASONS, and the HYMN: But, forasmuch as twenty eight Years (the longest Period allowed by the Statute of Queen *Anne*, for the Monopoly of any new Work) had elapsed since the first Publication, and before the Appellants had printed or sold the same, they denied (and think themselves still warranted to deny) that the Respondents had, or could then have the sole Privilege of printing and uttering the SEASONS and the HYMN: And they admit the Publication and Sale of the said Poems, as charged by the Bill.

Appellants admit Publication of the Poems,

Death of Millar, and the Charges in the Bill.

They admit also the Death of ANDREW MILLAR, and the Purchase made by the Respondents at the *Queen's-Arms Tavern*.

On the Part of the Respondents, several Witnesses were examined, and the said JOHN MILLAN deposed, that THOMPSON was the Author of the second Parcel of Poems in the Bill mentioned, and wrote great Part of the same at his House. That they were afterwards assigned to him by THOMPSON, and that he conveyed all his Right therein to ANDREW MILLAR.

Upon this State of the Case, it is observable that the Respondents derive a Title through Executors, *eo Nomine*; and not by Means of any specific Device to them. From this it is conjectured, that they mean to claim some *Chattel* or other, and to complain of a Wrong done to that Species of Property.

Of Chattels it is certain, that they all go absolutely to Executors, together with all the Rights, which can exist in them. The Case is the same of Rights purely incorporeal, which lie *only in Action*, and are independent of any Subject real or personal, if they are for Terms of Years, as an Annuity, a Franchise, or a Privilege, (such as Monopolies, &c.) for a limited Time. But it is conceived, that a perpetual Annuity, Franchise, or Privilege, must be a Fee Simple, and descend to Heirs. If this be so, the main Difficulty will then consist in ascertaining the Chattel claimed by the Respondents, and how and in what Manner the Wrong complained of applies to it.

The Bill was penned with extreme Caution by the Respondents, solicitous, as it should seem, to avoid entangling themselves in a Variety of Circumstances, which yet make Part of the SPECIAL VERDICT in the Cause of MILLAR and TAYLOR; and, in the (1) Report of Sir *James Burrow*, are stated to be highly material, although in support of that Opinion no Reason is alledged. It may, therefore, be inferred, that the present Attempt is an Experiment to try how far the Doctrines of that Case may be extended beyond the Case itself. What was done with the Poems in Question, between the Time of their being first written and the 16th of January, or the 28th of July, 1729, (when the Copies were sold) does not appear in any

(1) See Fol. 9, 10, 126. of this Report, published in 4to under the Title of "The Question concerning Literary Property," in the Cause of *Millar v. Taylor*; by Sir *James Burrow*, Knight. A. D. 1773.

Part

Part of these Proceedings. The Respondents have not thought fit, in Support of their Claim, to alledge that the Author had neither published, sold, nor given *true Copies* of them, to other Persons before those particular Days; indeed, such an Allegation could not have been made with Truth, because it is notorious that they were published at separate and distinct Times, as they happened to be written. The Seasons, in particular, were found by the special Verdict, in the Cause of *Millar* and *Taylor*, to have been published in the Year 1727, at *several Times* between the Beginning of the Year 1727, and the End of the Year 1729, and of Course many *true Copies* of them were sold to various Persons, before the Purchases by *Andrew Millar* and *John Millan* supposed by the Bill. But it is immaterial to the present Claim, in what Manner, or with what View the Author published originally, since if any Property adhered to him, after and notwithstanding the first Publication, the same, without any Manner of Doubt, was disposable by him at his pleasure.

Upon the same Principle, the Respondents have industriously declined to charge, (2) *that the said James Thompson was a natural born Subject, or resident in that Part of Great Britain, called England*; or that the Poems in Question *were first printed and published in the City of London, the same having never before been published elsewhere*; meaning, apparently, to insist that the Right which they claim, being derived from *Property*, cannot depend for its Existence on such Accidents: And that, therefore, this Case has to do with that of Foreign Books, *which do not*, in their Apprehension, *stand on a different Footing from Copies printed and published in the City of London* (3).

The Respondents have, for the above-mentioned Reasons, declined to charge (if the Truth be so) that the Work now in Question *was* (4) *upon the said Purchases of the several Parts thereof, by the said* ANDREW MILLAR *and* JOHN MILLAN, *respectively, and before the Publication thereof, duly entered in the Register of the Company of Stationers of the City of London, as the whole and sole Property of the said Andrew Millar and John Millan*; to avoid the Appearance of Recourse to a STATUTE, made in their Favour, but now under the ill Luck of being thought an Impediment. The Respondents, by the Omission of the above Circumstances, intend, no doubt, for Reasons sufficiently obvious, (if the Foundation of their Argument were sound) that the *Species of Right*, to which they set up their Claim, is not liable to a *Supposition* that *the Author has relinquished the Copy, and consequently given a general Licence to print* (5).

They deny that (5) *many of the best Books fall under that Description, and that a very little Evidence might be sufficient, after the Author's Death, to imply such a tacit Consent; as if the Book had not been* ENTERED *before Publication that it would be a Circumstance to be submitted to a Jury, "That the Copy was intended to be left open."* In Fact, Mr. Thompson, their Author, died in 1748, and they disregard the Rest of the Inference. Besides, if they had admitted the Circumstance above stated to be material to *themselves*, it would have been equally so to the *Author*, who likewise omitted to enter his Poems in the Stationers' Register.

For the same Reason, they have not pretended (2) *that, from the Time of the said two several Purchases*, ANDREW MILLAR *and* JOHN MILLAN, *and the Executors of the former, and their Assigns, have printed and sold the said Works as their Property, and now have, and constantly have had a sufficient Number of Books exposed to Sale at a reasonable Price.* To their unbounded Claim of *Property*, it is certainly repugnant, that the Owner should be obliged to part with it at any Price, but that which he sets himself. Nor will they admit (5) *that their Relief may be rebutted by shewing that they mean to inhance the Price; which is against Law.* There is certainly no Law against it. The Statutes of (6) *Richard the Third*, and (7) *Henry the Eighth*, relate to the Importation of Books from Foreign Parts, and extend no Case to *Property* or *Privilege*: And the Price of Books has nothing to do with *Ingrossing*, *Forestalling*, *Regrating*, or any other Offences against the Police of a public Market.

The Respondents have likewise forborne to charge, that, (2) *before the Reign of Queen*

(2) See the special Verdict, in *Millar* v. *Taylor*. id. Fol. 5.
(3) *Id.* Fol. 9.
(4) See Special Verdict. *Id.* Fol. 8.
(5) *Id.* Fol. 10.
(6) 1 *Rich.* III Chap. 9. Sect. 12.
(7) 25 *Hen.* VIII. Chap. 15. whereby 1 *Rich.* III. Chap. 9. Sect. 12. is repeale

Anne,

Anne, *it was usual to purchase from Authors the perpetual Copy-right of their Books*, *and to assign the same from Hand to Hand for valuable Considerations*, *and to make the same subject to Family Settlements for the Provision of Wives and Children*: perhaps as judging, that if such a Property had *always existed* at Common Law, the Purposes to which it hath been applied, would be perfectly immaterial, and, if it *did not exist*, the Application of it to Family Interests would not be a sufficient Ground, to build up a *new and unheard-of Property*; perhaps conceiving, that *what was done among others* would not be received as Evidence in the Court of Chancery; perhaps convinced that no such Usage could be proved, or that such Usage, if stated in all its Circumstances, would be seen advantageous to Booksellers only, and not to Authors, and upon the Whole might turn out just so much of nothing to their Purpose.

(1) They have likewise avoided to charge any supposed BYE-LAWS of the Stationers Company, perhaps aware, that such BYE-LAWS would imply a special Right *created* by themselves, and extending only to their own Members; perhaps, considering that the Appellants (not being Members of that Company) would not be affected by such BYE-LAWS, even to the extent of making them competent Evidence: Perhaps, apprehending that such BYE-LAWS would throw a Light upon the imaginary Usage above mentioned, and by revealing the *Origin*, *Nature and Extent of the Property* contended for, point the Force of it against their own Argument.

The Question, therefore, before the Court of Chancery, stood in this simple Form: Whether the Author, having sold and delivered, for a competent Price, ONE or FIVE HUNDRED TRUE COPIES of his Work, retains in each of the Copies so sold and delivered (by the true Construction of such Contract) the *mere and absolute Dominion* and Property, conveying to the *Vendee* no more than a special and limited Use thereof; or *è converso*, whether such *Vendee*, or rather *Baillée*, acquires (by the true Construction of the Contract of Sale and Delivery) no absolute Property to *himself*, but only a Right of using, to a certain Extent, the Property of *another*?

If this Proposition be maintainable by the Respondents, the Consequence insisted upon is, that in respect of the Property so retained, the mere and absolute Owner, viz. THE PERSON WHO HAS SOLD, may maintain an Action for the exclusive Use of it by the *Baillée*, viz. the BUYER.

To avoid the difficulty of making out the whole of this Idea, some have taken Part of it, and they divide it thus.

Every Book, they say, consists of Two distinct Parts, the material Part, namely, the Paper, Print, and Binding, which is a Manufacture; and the immaterial Part, namely, the Doctrine contained in it, which is the Facture of the Mind. The Property in the material Part passes according to the Law in all other Cases; but the Property in the immaterial Part remains to the Author, which is about as intelligible, as if one should state JOHN to be the Owner of the CARCASE and LIMBS of the Horse, and THOMAS the Owner of his Colour, his Shape, Speed and Mettle.

This seems to have led to an elaborate Discussion of the Principles of Property; whether it could exist in an Idea for want of Substance, Physical Locality, distinguishing Marks, and many other Enquiries of the same Abstract Nature. A mere *scio-machia*, wherein, by no uncommon Accident, the Absurdity of the Position made a serious Answer seem ridiculous.

Some have stated the *Property* to exist in the Profits of Sale, which (as they assume for the Purpose) belong to the original Author. But this is only substituting another, and as it seems, a less proper Phrase in the place of the Word MONOPOLY, which, to use the Words of *Brook*, is *Property not properly known*. The Privilege, however, of Monopoly is an Interest or Estate well known to the Law. It only remains to shew what Title the Author has to it.

(2) Some have contented themselves with declaiming upon the *Moral Fitness*, the *Reasonableness*, the *Justice*, and *Public Conveniency* of putting into the Hands of an AUTHOR the Means of raising upon the World, for his own Profit, the utmost Sum of Money for the Use

(1) See *Bur*. Lit. Prop. 5, 6, 7.
(2) See Mrs. *Macauley*'s "Modest Plea for the Property of Copy-right," 4to. A. D. 1774.

of

of his Book, and this can only be done by giving him a MONOPOLY. Now, if the Truth of all this were admissible and clear, it would prove, *at most*, that it OUGHT *to be* done, NOT that it *has been* done; and that those, who alone *can* do it, ought to consider and pronounce upon it. But, in fact, *they* have considered of it, and pronounced upon it otherwise.

Some contend, that such a Monopoly is already established by Law, and appeal to Usage for the Proof of it: But the Usage adduced is incompetent, for want of Time beyond Memory, and, in Truth, does not exist, as appears abundantly by the Instances produced to prove it.

Some draw their Proof of the Common Law from the INJUNCTIONS granted by the Court of Chancery, admitting (or rather insisting) that such INJUNCTIONS ought to be granted, ONLY where the Common Law is known and clear; admitting also, that the Case is NEW to the Common Law, and was therefore properly sent thither by the Court of Chancery. After which, it will not be wonderful if Injunctions, granted in a COURT of EQUITY, should not be thought an indisputable Proof of the Common Law.

16th Nov. 1772. Decree.

On the 16th of November 1772, the Cause came on to be heard in the high Court of Chancery, when the Court was pleased to decree, that the Injunction, which had been granted, *pendente Lite*, to restrain the Appellants from publishing any more Copy or Copies of the several Poems or Hymn, or any of them, should be made perpetual, "and that it be "referred to a Master in Chancery to take an Account of what had been received by the "Appellants, or either of them, or by any other Person, by their or either of their Order, or "for their or either of their Use, by, from, or on Account of publishing and selling of the "Poems in the Pleadings mentioned, and that the Appellants should pay to the Respondents, "what should be found due from them on the Ballance of the said Account, and reserve the "Consideration of Costs until after the Master should have made his Report."

The Appellants, apprehending themselves to be aggrieved by this Decree, have appealed from it, and humbly hope that it will be reversed, for the following, among other

REASONS.

I. The Object contended for by the Respondents, is of so abstruse and chimerical a Nature, that it is hardly capable of being defined. It is sometimes called PROPERTY, and for the Sake of Distinction, LITERARY PROPERTY. The Word PROPERTY has various Significations. In a Philosophical Sense, the Qualities, inherent in any Subject or Thing, are called its PROPERTIES. In a Civil Sense, PROPERTY is CORPOREAL or INCORPOREAL. CORPOREAL PROPERTY is the actual Possession of some Substance, with the Power of enjoying and disposing of it. The Object now contended for is not CORPOREAL PROPERTY. INCORPOREAL PROPERTY is of two Sorts; First, it is a Right relating to some Substance, as a Right to take the Profits of Land, without having the Possession of the Land, or a Title to it. 2dly, It is a right to exercise some Faculty, or to do some particular Thing for Profit. The Perception of the Profits, is a taking of some Substance, or CORPOREAL PROPERTY; and hence the *incorporeal Right* is metaphorically called PROPERTY. The Word, thus used, becomes equivocal, importing alternately the *Right* and the Profits resulting from the *Right*. In like manner *Land* and the *Right* to it, are both called PROPERTY. If the Object of the Respondents be an *incorporeal Right*, it is a mere Right to do some particular Thing for Profit. The Thing to be done is the *multiplying of Copies of Books*. The SOLE RIGHT of *multiplying Copies*, is a *sole Right* to exercise a *natural Faculty*, and this, it is obvious, is an EXTRAORDINARY PRIVILEGE. A sole Right to take the Profits arising from the Exercise of a *natural Faculty*, is a MONOPOLY in itself very extraordinary. This PRIVILEGE and this MONOPOLY, the Respondents chuse to call their *Property*, and they are to maintain their

Title

Title to it at *Common Law*. But by that Law, it is submitted, on the Part of the Appellants, that the PRIVILEGE and MONOPOLY never did, and never can exist.

II. A Right at Common Law must be founded upon Principles of CONSCIENCE and NATURAL JUSTICE. CONSCIENCE and NATURAL JUSTICE are not local or municipal. NATURAL JUSTICE is the same at *Athens*, at *Rome*, in *France*, *Spain*, and *Italy*. Copies of Books have existed in all Ages, and they have been multiplied; and yet an *exclusive Privilege*, or the *sole Right* of ONE MAN to multiply Copies, was never dictated by NATURAL JUSTICE in any Age or Country, and of course the *sole Liberty of vending Copies* could not exist of *common Right*, which gives an equal Benefit to all.

III. An EXCLUSIVE PRIVILEGE to exercise a *natural Faculty* is an Encroachment upon the Rights of Man. A NATURAL FACULTY differs from the Execution of an OFFICE. An OFFICE is the Work of civil Policy, and being of *positive Institution*, may be granted to ONE, without Injury to the Rest: But when that, which of *common Right* should be free to all, becomes confined to any ONE MAN, or any BODY OF MEN, the rest of the Community suffer an Abridgement of their natural Liberty. But such a Restraint of the LIBERTY of MANY, for the Sake of ONE, was never established by NATURAL JUSTICE. If it ever has existed, it has been the *Creature* of the CIVIL MAGISTRATE upon Principles of Policy; but the Respondents disclaim the Aid of the LEGISLATURE upon the present Question, and derive their Claim from the COMMON LAW.

IV. The Common Law has ever regarded *public Utility*, the MOTHER of *Justice* and of *Equity*. *Public Utility* requires that the Productions of the Mind should be diffused as wide as possible, and therefore the *Common Law* could not, upon any Principles consistent with itself, abridge the Right of multiplying Copies. When the *Common Law* took Root in this Kingdom, Literary Composition stood, in regard to the Manner of making it public, upon the same Footing as in *Greece* or *Rome*. WRITING was, in those States, the *only Method* of multiplying Copies. To transcribe or copy out a Book was the Right of every Individual; there was no other Way of propagating Knowledge: Of a perpetual Right in ONE MAN to write out Books or to make Copies, there is not a single Trace in any Author that has come down from Antiquity. ATTICUS retained a Number of Slaves trained up to Writing, and it appears in TULLY's Epistles, that ATTICUS transcribed, not only for his own Use, but to sell again to CICERO.

In like Manner the natural Liberty of transcribing Books was never checked by the Common Law. From AMES, and other Compilers of the History of Letters, we learn, that, from the slow Progress of *transcribing*, Books were held up at an enormous Price. *Livy* was sold for 120 Crowns of Gold for each Book, and a French Romance, called "*Le Romans de la Rose*," was sold for 33l. 6s. 6d. The Common Law could not with Justice uphold a Price so prejudicial to the Cause of Learning. Accordingly he, who possessed a BRACTON or a CHAUCER, had an undoubted Right to make as many *true Copies* as he pleased. A MONOPOLY would have been pernicious, and Learning, in Consequence, must have gone to Ruin.

V. The *Common Law* is IMMEMORIAL USAGE. If, therefore, THERE WAS A TIME, when the PRIVILEGE and MONOPOLY, now contended for, could not, and in Fact did not exist at *Common Law*, they never can exist by *that Law*. But SUCH A TIME has been, namely, from the Beginning of our History down to the GREAT ÆRA of Printing; and Printing (which is *only* a more expeditious Method of multiplying Copies) it is contended, could not change the Principles of Right and Wrong, or innovate the Law.

Printing was invented at Mentz in Germany, Anno 1458.

In 1471 CAXTON, a Mercer, of London, brought the Art into this Kingdom. In Acts of Parliament it is called a *Trade*, or *Manufacture of the Kingdom*. To exercise the Art was the Right of the Subject; in this Light the first Printers considered it. CHAUCER's Works were printed by CAXTON 1498, when the Author had long been dead. Another Edition of *Chaucer* was soon given by *Thomas Godfrey*. *Littleton*'s Tenures were printed

printed 1481, by John Lettou, and in a short Period, by Richard Pinson 1526, by Thomas Berthelet 1330, by Willam Rastall 1534, by Robert Redman 1540. Pinson, indeed, says, in the Wit of that Age, that Redman should be called *Rudeman, quia Hominem rudiorem vix invenias.* He abuses *Redman's* Edition, but not a Word about an Invasion of Property.

Objection. It is said on the Part of the Respondents, that the Name "*Copy of a Book*," has been a Term *for Ages*, to signify the *sole Right* of *printing*, *publishing*, and *selling*, and that this *Species of Property* has existed in *Usage* as long *as the Name.*

Answer. It is admitted on the Part of the Respondents, that there is no Bye-Law or Ordinance relative to Copies till after the Year 1640. The Usage, whatever it be, is therefore not immemorial.

Objection. From the Erection of the Stationers Company, *Copies* were entered as *Property*, and *Pirating* was punished.

Answer. The Common Law, according to this, begins with the Stationers Company.

The first Charter was 1556, 3 & 4 *Phil.* and *Mar.* The Grant was founded on Principles of Bigotry, to *prevent*, as it recites, *the Renewal of great and detestable Heresies.* The new Members of the Company (in Number 97) were made *literary Constables* to search for Books, &c. and, though the Crown had no Right over the Trade of Printing, it was ordered, "*That no Man should exercise the Mystery of Printing, unless he be of the Stationers Company, or have a Licence.*"

To this Company so constituted, and thus armed with a GENERAL WARRANT, we are referred for Evidence of the *Common Law.*

Objection. Anno 1558, the Charter was confirmed in the 1st of Elizabeth. In *that Year* there are *Entries of Copies* to particular Persons, and down from that Time.

Answer. Patent Rights began soon after the first Introduction of Printing. FROISSART's *Chronicles of England, France, and Spain* were published, *Privilegio a Rege indulto*, by RICHARD PINSON, 1525. From that Time the Patents "*ad solum imprimendum*" were innumerable. Men, who had such Rights, might enter their Books as *Property* in the Stationers Register. But neither the *Patent*, nor the *Entry*, can be now received as Evidence of a *Common Law Right.* The Charter comprehended all the Printers in England: The new Company had the *sole Privilege* of Printing, and they agreed to divide the Spoil among themselves; but AUTHORS *were not Parties* to the Agreement.

Objection. The Stationers Company was empowered to make Bye Laws.

Answer. They were; and those BYE-LAWS might create a *relative Right* among the Members of the Company.

In 1681, a BYE-LAW declares, that where a Book was entered to any Member, such Person, *by the antient Usage of the Company*, was *reputed* and *taken* to be the PROPRIETOR. By *antient Usage of the Realm* had been more conducive to the Point. But it was not competent to the Stationers Company to make Laws for the rest of the Kingdom; and, if it had, it would NOT be *Common Law.*

Objection. The Decrees of a STARCHAMBER have been cited as strong Authorities in Support of the Bye-Laws and Customs of the Stationers Company.

Answer. The STARCHAMBER was a *criminal Court*, and had not constitutional Authority to determine *civil Rights.* That Court has been long since abolished, without Regret, and it is the Happiness of the Subject, that the *Common Law* has flowed through *purer Channels.*

Objection. It has been said, that a STAR-CHAMBER *Decree*, 1637, expressly supposes a *Copy-Right* to exist, otherwise than by *Patent, Order*, or *Entry*; which could only be by *Common Law.*

Answer.

Answer. The relative Rights of the Company were supported *per fas et nefas*, in those Times of high Prerogative: *Licences* from the ARCHBISHOP OF CANTERBURY were frequent, and such LICENCES, it is submitted, were neither PATENT, ORDER, or ENTRY. And, moreover, a *Common Law Right* is never *expresly* mentioned in any *Ordinance*, *Proclamation*, or *Bye-Law*. It is often called the *Right*, *Privilege*, *Authority*, or *Allowance* SOLELY TO PRINT. Had the STAR-CHAMBER, and the HIGH COMMISSION COURT, expresly stated a *Common Law Right*, it could not be received as an Authority in Point; and it is submitted, that a *Common Law Usage* cannot arise by *mere Implication* from *dark Hints* of the STAR-CHAMBER.

The same Argument applies to *Acts* of the *Privy-Council*, to *Edicts*, *Proclamations*, the *Ordinance* of the TWO HOUSES in 1642, and all the *Ordinances* during the Usurpation. This whole Body of Precedents forms the History of *Despotism*, NOT of the *Common Law*. The most that can be said in their Favour is, that they supported an Usage first set on Foot by *Acts of Parliament*, by *Patents*, *Bye-Laws*, &c.

Objection. It has been said, that in those Times *Copies* were protected by a much speedier and more effectual Remedy than *Actions at Law*, or *Bills in Equity*.

Answer. One successful *Action at Law* would have been a better Proof of the Right, than a thousand Instances of *arbitrary Power*.

Objection. The LICENSING ACT has been called in Aid by the Respondents, and they observe, that the printing of any Book WITHOUT CONSENT of the OWNER is forbid by that Act.

Answer. The OWNERSHIP was created by *Patent*, *Order*, *Bye-Laws* of the Stationers, &c. and if that Act recognized a *Right so created*, it was an ACT OF THE LEGISLATURE; but the Act, with all the other Encroachments upon Liberty, has long since gone to Rest, to revive no more.

Objection. It has been said, that soon *after the Expiration* of the LICENSING ACT, 9th May, 1679, 31 Car. II. there was a Case, as appears by LILLIE's ENTRIES, fol. 67, Hilary Term, 31 Car. II. (1) *Ponder* v. *Bradyll*, for printing 4000 Copies of the *Pilgrim's Progress*, whereof the Plaintiff was *Proprietor*.

Answer. It is a *Declaration*, ONLY, in the Book of a *Special Pleader*, and if the Defendant printed and exposed to Sale FOUR THOUSAND BOOKS, he was left in Possession of them.

Objection. The Respondents, as if conscious that the Ground of Bye-Laws of the Stationers, Ordinances, &c. is not tenable, resort to a *Court of Equity*, and rely much upon the Injunctions that have issued out of the *Court of Chancery*.

Answer. The Injunctions of CHANCERY may be all drawn into a narrow Compass, and it will be seen, that they do not apply to the Point in Question.

I. *Injunctions before the 8th of Anne*, c. 19.

15th Nov. 1681. Stationers against Lee, (2) for printing Psalters and Almanacs.
17th Nov. 1681. Stationers against Wright (3), for publishing Almanacs.
9th and 22d Feb. 1709. Stationers against Partridge, (4) for selling Almanacs.
All these are Prerogative Rights.

II. *Injunctions upon the Right given by the Statute of Queen Anne.*

9th Nov. 1722. (5) Knaplock against Curl, for printing Prideaux's Directions to Church-Wardens.

(1) *Bur.* Lit. Prop. 19.
(2) *Bur.* Lit. Prop. 31. 96.
(3) *Id.* 96.
(4) *Id.* 31, 96, 121.
(5) 2 *Black.* Com. 407. 4 *Vin.* Abr. 278. pl. 3.

11th

11th Dec. 1722. Tonson against Clifton, for Sir Richard Steele's Conscious Lovers.

19th and 23d May, 1729. Gulliver against Watson, (1) for printing Pope's Dunciad.

28th Nov. 1735. Motte against Faulkner (2) for Pope and Swift's Miscellanies.

27th Jan. 1736. Walthoe against Walker, (2) for Nelson's Festivals.

6th Dec. 1737. Baller against Watson, (3) for Gay's Polly.

13th March, 1740. Gyles against Wilcox, (4) for Hale's Pleas of the Crown.

19th May, 1740. Read against Hodges, (5) for History of Peter the Great.

6th Nov. 1757. Tonson against Mitchell, for Byng's Expedition to Sicily.

III. *Injunctions for printing unpublished Manuscripts without Licence from the Author.*

24th May, 1732. Webb against Rose, (6) for Webb's Conveyancer.

5th June, 1741. Pope against Curl, (7) for printing Pope's Letters.

13th June, 1741. Forrester against Waller, (8) for Forrester's Reports.

Duke of Queensbury against Shebbeare, (8) for Clarendon's Life.

Trinity Term, 1768. Macklin against Richardson, for printing Love A-la-Mode.

IV. *Injunctions as to Old Books after the 21 Years granted by the 8th Anne.*

9th June, 1735. Eyre against Walker, (2) for The Whole Duty of Man.

N. B. This could not be the Old Duty of Man; if it was, the Right must have been founded upon an Assignment from the Author, and the Author is unknown to this Hour.

30th April, and 11th May, 1752. Tonson against Walker, (9) for Dr. Newton's Milton.

V. *Injunctions relative to Books after the Twenty-eight Years given by the 8th Anne.*

Trinity Term 1765. Millar against Donaldson, (10) for Thompson's Seasons—Pope's Iliad—Swift's Works, with the Life and Notes by Dr. Hawkesworth.

Here as to Swift's Works, (the Notes and Life being within the Statute) the Injunction was continued.

As to *Thompson's Seasons*, and *Pope's Iliad*, (being beyond the 28 Years of 8th Anne) the Injunction was dissolved.

From these Cases it appears, that the *General Question* touching "the *Common Law Right*" has never been determined by any CHANCELLOR.

VI. MECHANICAL INSTRUMENTS, and also PRINTS made by *Engravers*, have ever been open to all Artists, unless secured to the INVENTOR by *Patent*, or by *Act of Parliament*. Between *such Inventions* and *Copies of Books* no sensible Distinction can be made. An *Orrery* represents the *Planetary System*: He, who makes one after the first Model, takes the Science of Astronomy as represented by the *Orrery*: And he, who prints a Book, takes the *Author's Sentiments*.——Where is the Difference?

(1) 4 *Vin.* Abr. 278, 279.
(2) *Bur.* Lit. Prop. 27, 61. 2 *Black.* Com. 407.
(3) 2 *Black.* Com. 407. 4 *Vin.* Abr. 479.
(4) 2 *Tr. Atk.* Rep. 141. pl. 130.
(5) 2 *Tr. Atk.* Rep. 142, 143.
(6) *Bur.* Lit. Prop. 33, 34. 2 *Black.* Com. 407.
(7) *Bur.* Lit. Prop. 28, 34. 2 *Tr. Atk.* Rep. 342. 2 *Black.* Com. 407.
(8) *Bur.* Lit. Prop. 34, 2 *Black.* Com. 407.
(9) *Bur.* Lit. Prop. 28, 61. 2 *Black.* Com. 407.
(10) *Bur.* Lit. Prop. 31, 97.

VII. *Prerogative Copies*, such as the *Bible*, and Books of *Divine Service*, do not apply to the present Case. They are left to the Superintendance of the Crown, as the HEAD and SOVEREIGN of the STATE, upon Principles of *public Utility*. To ascribe to the CROWN a perpetual Right to the BIBLE upon *Principles of Property*, is to make the CROWN turn BOOKSELLER. If it be true, that the KING paid for the Translation of the Bible, it was a Purchase made for the whole BODY OF THE PEOPLE, for the *Use of the Kingdom*.

Acts of Parliament, it is admitted, are the Work of the LEGISLATURE, and therefore under the Direction of the CROWN, as the *executive Part* of the CONSTITUTION. *Property*, therefore, is NOT the Foundation of *Prerogative Copies*.

King Charles I. published a Translation of *David's Psalms*, written, as his MAJESTY says in the Preface, by his ROYAL FATHER. But the Idea of a *perpetual Property* was not then conceived, and therefore a *Patent* was granted to *give the sole Right* to the BOOKSELLER.

Objection. It has been said, that the Authority of such a Man as MILTON is of great Weight. He is represented as speaking, *after much Consideration*, on the *very Point*, and his Words are, " (1) *The just retaining of each Man's Copy, which God forbid should* " *be gainsaid.*"

Answer. MILTON, in the Close of his famous Speech " *for the Liberty of unlicensed Printing,*" in 1644, says, the *Ordinance* of the two Houses for subjecting the Press to a *Licenser* was obtained by indirect Means. " *It may,*" says he, *be* " *doubted whether there was not in it the Fraud of some* OLD PATENTEES *and* " MONOPOLIZERS *in the Trade of Bookselling, who, under the Pretence of the Poor* " *in their Company not to be defrauded,* and the just retaining of each Man's " Copy *(which God forbid should be gainsaid) brought divers glossing Colours to* " *the House,*" &c.

MILTON's Idea of *each Man's Copy* arises from the old PATENTEES and MONOPOLIZERS, and certainly, while there was a RELATIVE PROPERTY in the Stationers Company, the poorer Members ought not to be defrauded. He does not say, how long the *Copy* should be *retained*, and that is the Point in this Cause. It may be presumed, MILTON could not wish, that *Paradise Lost*, which was sold for 5l. and two further Sums of 5l. to be paid conditionally, should continue a SPLENDID FORTUNE in the Hands of a BOOKSELLER, and his GRAND-DAUGHTER be obliged to beg a *Charity-Play* at Drury-Lane Theatre, 1752.

Doctor (2) SWIFT and Mr. PULTENEY were both clearly of Opinion, that there was no *Common Law Right* and the Opinion of such a Man as Mr. PULTENEY, who was for Years of the first Ability in Parliament, my be allowed to have some Weight.

Doctor WATTS published a Volume of Sermons in 1720: Mr. LONGMAN, one of the Respondents, republished it in 1758; and though the Period of 28 Years was expired, a *Common Law Right*, if it existed, would have protected the *Property*: But the Respondent, LONGMAN, annexed to his Edition a *Patent* for 14 Years, dated the 21st March, 1758.

VIII. Whatever Encouragement may be due to AUTHORS, the *Common Law* cannot, after the Silence of Ages, pronounce at once upon a *new Species of Right*, which has been hitherto " *Property not properly known.*"

Bank Notes are of a Value well ascertained, and yet the Common Law did not adapt itself to that *Emergence of Commerce*, but it was for the LEGISLATURE (3) to make the stealing it or taking it by a Robbery a FELONY.

IX. The Statute of Queen Anne was not *declaratory* of the COMMON LAW, but *introductive* of a NEW LAW, to *give* learned Men a Property which they *had not before*.

Objection. It has been contended on the Part of the Respondents, that the Act of Queen Anne is an ACCUMULATIVE STATUTE, declaring *the Common Law*, and giving *additional Penalties*.

(1) *Milton's* prose Works, 1 Vol. 4to. Fol. 172.
(2) See 3 Vol. of *Swift's* Letters.
(3) See 2 *Geo.* II. Chap. 25.

In support of this, a Pamphlet, said to have been given to the Members in 1709, has been cited, and it appears that the Booksellers meant to inculcate the Idea of *antient Usage*, but what that *Usage* was, how it took its Origin, and how it was stated in the Pamphlet, the Extract leaves in Obscurity.

Answer. Cotemporary Exposition will, no doubt, deserve Attention. To this End, the *History* of the Bill, as it stands upon the *Journals* of the House of Commons, together with the Account of the *Conference* with the Lords, will clearly evince, that the Legislature were not employed in securing an *antecedent Property*, but expresly declared, "that Authors and Booksellers had the *sole* "*Property of Books* vested in them, by *that Act*, for the Terms therein men-"tioned." (1) When the Booksellers Petition was presented; also their 2d Petition, 2d Feb. 1709—14th March 1709, resolved that the Title be a Bill for *the Encouragement* of *Learning*, by vesting the Copies in the Authors or Purchasers, &c. 5th April the Bill returned from the Lords—5th April 1710, a Conference with the Lords and Mr. Addison, one of the Commons.

Objection. Of this Evidence the Respondents feel the Weight, and therefore they resort to a *Variety of Comments* upon the Statute itself.

They rely much upon the *Preamble*: The Words are, "Whereas Printers, "Booksellers, and other Persons, have of late frequently *taken the Liberty* of "printing, &c. Books and other Writings without the Consent of the Au-"thors or Proprietors of such Books, to their very great Detriment, and too "often to the Ruin of them and their Families; for preventing therefore *such* "*Practices*, for the future, &c."

From the Words "*taking the Liberty*," and "*such Practices*," it is inferred that the Persons within the Description of them, were wrong Doers. A Question is put, When the Legislature speak of a Liberty taken, could they mean a *Claim founded on any Right?* And by "*Practices*," did they mean to describe the Exercise of *a legal Right?* The Word "Practices" is properly applied to the doing of *illegal Acts*.

Answer. If they were *wrong Doers*, the Legislature has used the mildest Terms in the Compass of our Language; but it is submitted that they were not *Trespassers*. After the final Extinction of the licensing Act, 1694, Men had a Right to re-print Books in the same Manner as Printsellers had lawful Authority to copy, engrave, and publish *all Works, Designs, and Prints* which were not secured to the Inventors by Patent for a Term of Years; and yet the Legislature by 8 Geo. II. Chap. 13. in the very same Words recites in the Preamble, "Whereas divers Printsellers, &c. have of late frequently *taken the Li-*"*berty* of copying, engraving, &c. and for preventing therefore *such Practises*, &c.

Again, in the 7 Geo. III. Chap. 38. the Printsellers who *engraved* and exposed to Sale the *Designs* and *Prints* of the late William (2) Hogarth, after the Period of fourteen Years granted to him by Parliament, are in that Act

(1) See Com. Journ. 12 Dec. 1709.

(2) "There is nothing can be more similar, than the Art of Engraving is to literary Composition; I will illustrate this Proposition by the Works of Mr. *Hogarth*, who, in my humble Opinion, is the only truly original Author, this Age hath produced in *England*. There is scarcely any Character of an excellent Author, that is not justly applicable to his Works; what Composition! — what Variety! — what Sentiment! — what Fancy! — what Invention and Humour we discover in all his Performances! in every one of them an entertaining History, a natural Description of Characters, and an excellent Moral: I can read his Works over and over again: *Horace*'s Characteristic of Excellency in Writing is verified in *Hogarth*'s Prints, *decies repetita placebit*; every Time I peruse them, I discover new Beauties, and receive fresh Entertainment. Can I say more in Commendation of the literary Compositions of a *Butler*, or a *Swift*? There is great Authority for this Parallel. The Legislature hath considered the Works of Authors and Engravers in the same Light; they have granted the same Protection to both; and it is remarkable, that the Act of Parliament for the Encouragement of those who invent Engravings, runs almost in the same Words, as the Act for the Protection of literary Compositions." See Lord *Gardenstone*'s Argument on giving his Opinion, upon the Question of Literary Property, between *Hinton* and *Donaldson*, in *Boswell*'s *Scotish* Decision of the Court of Session, in that Cause, published at *Edinburgh* in 4to. A. D. 1774.

called the PROPRIETORS of the Copies of WILLIAM HOGARTH's Works, and then the LEGISLATURE proceeds to *restrain* those very PROPRIETORS from vending the Copies, which were their *legal Property*.—Thus it is plain, that the LEGISLATURE speaking of a *legal Right*, described it by the Words "*taking the Liberty*," and such "*Practices*."

If by the Terms, "taking the Liberty," and such "*Practices*," it can, by fair Construction, be intended that *Injustice*, *Fraud* and *Rapine* are implied, the like Imputation is thrown upon the *Printsellers*, who exercised a *legal Right*, and are allowed to be PROPRIETORS.

It may be presumed, that if the LEGISLATURE had perceived actual *Guilt* or *illegal Practices*, they would, agreeably to their own Dignity, have kept no Terms with Men, who *violated Laws*, and *wrought the Ruin of Families*.

But Learning, to the Honour of the LEGISLATURE, was to be encouraged; and it may be asked, if the *Statute* of *Queen Anne* did not *create a new Property*, what was done for Learning?

If the Right was *antecedent* to the Act, How did the LEGISLATURE *vest* the Property in Authors?

If the LEGISLATURE had the faintest Idea of a *pre-existing Property*, why was the *sole Right* of reprinting Books, which had been *previously* published, restrained to twenty-one Years, and *no more*? A strange Way of *encouraging Learning*, by abridging *ancient Rights*!

If the *Act of Queen Anne* intended merely to give *additional Penalties*, by Way of new Fences to a *common Law Right*, Why give those Penalties for fourteen Years only? If the Property is *perpetual*, Why should not the Remedy be *co-extensive*?

If by "Copy" be understood a *perpetual Property*, the Author who sold his Copy under the Idea of a Transfer *for fourteen Years only*, may be told by an *artful Bookseller*, that *more was meant than meets the Ear*, and that *a Sale of his Copy* imports a SALE FOR EVER. The Consequence will be, that, instead of encouraging Learning, a Snare has been *unwittingly* spread for Men of Genius and Industry, and the *Clause* of the STATUTE, which gives a Reversion to the AUTHOR at the End of fourteen Years, *if he live so long*, will be eluded by the Craft, and, as MILTON phrases it, by the *Sophisms of Merchandize*.

If the Book, at the End of fourteen Years, reverts to the Author, his Interest is served: If it does not, the LEGISLATURE, by such a Construction, has extended *no* Benefit *to learned Men*.

But happily it appears that PARLIAMENT has revised its own Acts, and in Terms as clear as the English Language affords, declared, that the *Property was given* by the Act of Queen Anne. FOR

7. Geo. II. Chap. 24. is intitled, "An Act for granting to *Samuel Buckley* the *sole Liberty* of printing and reprinting the *Histories* of *Thuanus*. The Preamble recites, "that *Buckley* at a very great Expence had prepared an Edition of THUANUS in 7 Volumes Folio, "and then adds," Whereas the sole *Liberty of printing and reprinting Books* for the *Term of fourteen Years*, to commence from the Day of the publishing the same, GRANTED TO THE PROPRIETORS THEREOF, by an Act made in the 8th *Year of Queen Anne*, intitled, an Act for *the Encouragement of Learning*, BY VESTING THE COPIES of printed Books in the AUTHORS or PURCHASERS, &c.

Of the Sense and Meaning of the Legislature, we are now *fully informed* by the HIGHEST AUTHORITY: He that runs may read the Intent and Scope of the Statute: "The *sole Liberty* of *printing* and *reprinting* for the Term of fourteen Years was GRANTED by the 8th of Queen Anne."

The Law was made for *the Encouragement* of Learning: INGENUITY has endeavoured to *puzzle* it, but the LEGISLATURE has given the Exposition.

X. The

X. The Notion of "a PERPETUAL PRIVILEGE and MONOPOLY," hath been within these few Years, hatched among the Booksellers; who now come with *glossing Colours*, and, *under a Pretence of serving the Cause of Literature*, but mean really and only to get the *Fruits of Genius* into their own Hands, for ever. The Consequences of this new Doctrine (were it established) would be fatal to the *Interest of Letters*, and the *Fame* of every valuable Author.

Books may be held up at too high a Price. Notes and Illustrations may be wanted, and generally are, in thirty or forty Years; not only the *Manners*, but even *Science* itself changes in the Progress of Time. *Moral Philosophy*, and *Mathematicks* should keep pace with the Vicissitudes of the World. Useful Commentaries upon valuable Works cannot be made without the Licence of the BOOKSELLER, who has purchased the Copy: His *Avarice*, his *Timidity*, or his *Want of Sense* may tell even the ORIGINAL AUTHOR, that he shall not re-print his OWN BOOK with further Improvements. If the Author should happily be permitted to do it, it must be upon the Bookseller's Terms; but more probably the Frugality of the BOOKSELLER will grudge an additional Expence, and taking upon him to *pronounce upon Wit*, he may say, that he likes the Book as it is.

MILTON, in his famous Speech, has thought this Head of Argument an important Topic against a *Licencer of the Press*. His Words are, "What if the "Author shall be one so *copious of Fancy*, as to have MANY THINGS, well "worth *the adding*, come INTO HIS MIND after LICENSING, while the Book "is yet under the Press, which not seldom happens to the best and diligentest "Writers, and that perhaps a dozen Times in one Book. The Printer dares "not go beyond his licensed Copy; so often then must the Author TRUDGE "TO HIS LEAVE-GIVER, that those his NEW INSERTIONS may be viewed; "and many a Jaunt will be made, ere that Licencer (for it must be the same "Man) can either be found, or found at leisure: Mean while either the Press "must stand still, which is no small Damage, or the Author LOSE HIS ACCURATEST THOUGHTS, and send the Book forth into the World, WORSE "THAN HE COULD MAKE IT, which to a diligent Writer is the GREATEST "MELANCHOLY and VEXATION that can befall."

In the Case of a *perpetual Privilege and Monopoly*, the Bookseller becomes the Author's LEAVE-GIVER: Many a Jaunt may be made that his new INSERTIONS may be viewed, and at length he may sit down with the MELANCHOLY and VEXATION of leaving his Book WORSE THAN HE COULD MAKE IT.

XI. Should the Work, pursuant to the Statute of Queen Anne, *revert* to the AUTHOR in fourteen Years, he will become the Guardian of his own Fame; and, in Consequence, *learned and industrious Men will be enabled to reap not only the Fame, but the Profits of their Labours, to the Honour and Advantage of themselves and their Families*.

Objection. It has been colourably said, that for *a perpetual Property* Authors may raise in their Demand, and gain a much LARGER SUM for the *Copy*; or they may publish upon their own Account, and feel the Pulse of the Public before they dispose of the Copy.

Answer. Except one or two very modern Instances, a competent Price has not been given. If Booksellers have hitherto been dealing under an Idea of a PERPETUAL MONOPOLY, they have not paid an adequate Compensation for it, and the same Phlegm will govern their future Transactions. It is a melancholy Consideration, that even a Writer of Mr. THOMPSON's Merit does not appear to have received ONE HUNDRED POUNDS for the Poems of the SEASONS. The whole

Sum paid to him for a Variety of Articles was 242l. 10s. The Tragedy of SOPHONISBA, at the old Price for a Play, was worth 105l. The Poem, sacred to the Memory of Sir ISAAC NEWTON, BRITANNIA, and an Essay on *Descriptive Poetry*, from the Pen of THOMPSON, were worth a considerable Sum. How much remains for the Seasons? no Work of late Years has been more generally received: The Profits to MILLAR must have been large, and, after all, the Copy sold for 505l. at a public Auction.

If Authors had always Access to a CLARENDON PRESS, where the precise Number ordered would be printed, *and no more*, the Impression might be distributed to the London Booksellers, and an Author might stand the Hazard. But AUTHORS are not often in that Situation, and, besides, the immediate Expence of Paper and Print is not favourable to such Experiments.

A Period of fourteen Years is a sure Test of every Book. If, after that Time, it be worth reprinting, the Authors ACCURATEST THOUGHTS may be interwoven, and the *Fame* and *Profit* will accrue to the Man of Labour and Invention.

But if a PERPETUAL PRIVILEGE and MONOPOLY are to interrupt his Hopes, the PURCHASERS of the *Copy* will be enriched, and, in the emphatic Words of DRYDEN, "It will continue to be the Ingratitude of Mankind, that they who "TEACH WISDOM by the SUREST MEANS, shall generally live poor AND "UNREGARDED; as if they were born ONLY FOR THE PUBLIC, and had no "Interest in their own well-being, but were to be LIGHTED UP LIKE TAPERS, "and *waste* themselves for THE BENEFIT OF OTHERS."

E. THURLOW.

J. DALRYMPLE.

AR. MURPHY.

CASE of the RESPONDENTS.

Mr. Thompson was Author of a Poem called *Spring*, and on 16th Jan. 1729, assigned the Copyright to Andrew Millar.

JAMES THOMPSON, late of Richmond, in Surry, Esq; deceased, was, in his Life-time, the Author of a Tragedy called *Sophonisba*, and also a Poem intitled *Spring*.—In January 1729, Andrew Millar (now deceased) contracted with Mr. Thompson for the Purchase of the said Tragedy and Poem; and, by Indenture, dated the 16th of January, 1729, Mr. Thompson, in Consideration of 137l. 10s. paid to him by the said Andrew Millar, did assign to the said Andrew Millar, his Executors, Administrators, and Assigns, the true Copies of the said Tragedy and Poem, and the sole and exclusive Right and Property of printing the said Copies, for his and their sole Use and Benefit: And also all Benefit of all Additions, Corrections, and Amendments, which should be afterwards made in the said Copies.

Mr. Thompson was also the Author of several other Poems, particularly three, called *Summer*, *Autumn*, and *Winter*; and an *Hymn on the Succession of the Seasons*; and on 28th July, 1729, assigned the Copies of them to John Millan.

Mr. Thompson was also the Author of the following Poems, viz. a Poem called *Summer*, a Poem called *Autumn*, a Poem called *Winter*, a Poem called *Britannia*, a Poem *sacred to the Memory of Sir Isaac Newton*, an *Hymn on the Succession of the Seasons*, and an *Essay on descriptive Poetry*; and, in Consideration of 105l. which, by a Receipt under his Hand, dated 28th of July, 1729, he acknowledged to have received from John Millan, of the Parish of St. Margaret, Westminster, Bookseller, Mr. Thompson sold to the said John Millan the Copies of the several Poems last mentioned, with the sole Right of printing and publishing them, together with such Alterations and Additions as the Author should afterwards occasionally make.

About

About June, 1738, the ſaid Andrew Millar contracted with the ſaid John Millan for the Purchaſe of the ſeveral Poems laſt mentioned, ſo ſold to him by Mr. Thompſon: And, by Indenture, dated 18th June, 1738, John Millan, in Conſideration of 105l. paid to him by Andrew Millar, did aſſign unto the ſaid Andrew Millar, his Executors, Adminiſtrators, and Aſſigns, the ſeveral Copies of the Poems laſt mentioned, with all the Corrections, Alterations, and Additions, which the Author had made, or ſhould make; and all the Right, Title, Intereſt, Property, Claim, and Demand of the ſaid John Millan to, or in, the ſaid Copies. And alſo, the ſeveral Plates of the Prints of the ſaid *Seaſons*, and the Plate of the Print in the Frontiſpiece of the ſaid *Seaſons*: And alſo, the Plate of the Print of Sir Iſaac Newton's Monument: All which Prints had been uſually bound up with the ſaid Poems and Pieces.

18th June, 1738, John Millan aſſigned the Copies of the Poems, which he had purchaſed of Mr. Thompſon, to Andrew Millar.

By Virtue of the aforeſaid Indenture, Andrew Millar became lawfully intitled to all the Profits ariſing by the printing and publiſhing of the ſeveral Poems before-mentioned, and to the ſole and exclusive Property and Right of printing Copies of them, and of vending and diſpoſing of the ſame.

Andrew Millar died in June, 1768, having firſt made his Laſt Will, in Writing, dated 20th February, 1768; and thereof appointed his then Wife, Jane Millar, (now Dame Jane Grant) William Millar, Thomas Longman, and the Reſpondent, Thomas Cadell, Executors.

In June, 1768, Andrew Millar died, having, by his Will, appointed his Wife Jane, (now Dame Jane Grant) W. Millar, Tho. Longman, and T. Cadell, his Executors.

Soon after Andrew Millar's Death, his Will was duly proved by his Widow, the ſaid William Millar, and the Reſpondent Thomas Cadell, who thereby became intitled to the ſeveral Copies of the Poems before mentioned to have been purchaſed by the ſaid Andrew Millar, and to the ſole Right of printing, publiſhing, and vending them.

The Teſtator's Widow, William Millar, and Thomas Cadell, proved the Will.

On the 13th June, 1769, the Copy-right of the ſeveral Poems before mentioned, with the ſole Right of printing, publiſhing, and vending them, was ſold, by Order of Andrew Millar's Executors, by Auction, at the Queen's Arms Tavern, in Saint Paul's Church-yard, London. At this Sale, the Reſpondents purchaſed the Copy-right of the ſaid Poems, in the Proportions, and for the Prices, following, viz. John Rivington purchaſed one fifteenth Part of the ſaid Copy-right for 32l. 12s. William Johnſton, another fifteenth Part for 32l. 12s. William Strahan, another fifteenth Part for 32l. 12s. Thomas Longman, another fifteenth Part for 32l. 12s. William Richardſon, and John Richardſon, two twelfth Parts for 88l. 10s. Thomas Lowndes, one-twelfth Part for 43l. Thomas Caſlon, one-twelfth Part for 43l. George Kearſley, one-twelfth Part for 42l. Henry Baldwin, one-twelfth Part for 42l. Thomas Cadell, one-fifteenth Part for 32l. 12s. William Owen, one-twelfth Part for 41l. 10s. Thomas Davies, one-twelfth Part for 42l. and Thomas Becket and Peter Abraham De Hondt purchaſed of the ſaid Thomas Davies one-twenty-fourth Part for 21l. Afterwards the Reſpondents reſpectively paid to the Executors of Andrew Millar the ſeveral Sums of Money agreed at the Auction to be given for their ſeveral Parts of the Copy-right in the ſaid Poems, and thereby became intitled to the ſaid Copy-right, in the ſeveral Proportions before mentioned.

13th June, 1769, the *Copy-right* of the before mentioned Poem put up to Auction, by Order of Andrew Millar's Executors, and ſold in Parts to the Reſpondents.

After the Purchaſe by the Reſpondents of the *Copy-right* in the ſaid Poems, the Appellants, notwithſtanding the ſole and excluſive Right which the Reſpondents claim of printing, publiſhing, and vending all the ſaid Poems, publiſhed and ſold ſeveral thouſand Copies of the ſaid Poems called *Spring*, *Summer*, *Autumn*, and *Winter*, and the ſaid *Hymn on the Succeſſion of the Seaſons*, in a Volume intitled, *the Seaſons, by James Thompſon*; *Edinburgh, printed by A. Donaldſon*, 1768; and thereby acquired conſiderable Profits, to the great Loſs and Prejudice of the Reſpondents.

The Appellants, without Conſent of the Reſpondents, publiſhed and ſold Copies of Mr. Thompſon's *Seaſons*, and of the *Hymn on the Succeſſion of the Seaſons*.

Upon

21st January, 1771, Respondents filed a Bill in Chancery against the Appellants, for an Account of the Copies sold, and to restrain them from selling any Copies in future.

Upon this, the Respondents applied to the Appellants to stop the Sale of the Poems and Hymn, so published and sold without the Consent of the Respondents, and for an Account of the Number of Copies sold, and of the Monies which had been received for them. But the Appellants refusing either to stop the Sale, or to Account; the Respondents, on the 21st of January, 1771, filed a Bill in Chancery against the Appellants; thereby stating the several Facts before mentioned, and praying that the Appellants might answer the Premises, and come to an Account with the Respondents for the Money which the Appellants had received by the Sale of the said Poems and Hymn; and that the Appellants might for ever after be restrained by the Injunction of the Court from publishing the said Poems and Hymn, and from selling any Copies of them in future, and for general Relief.

Answers of the Appellants: sworn 16th and 20th July, 1771.

The Appellants, in their Answers, insist, That the several Terms of fourteen Years, and fourteen Years, given by the 8th Ann, Chap. 19, having expired in 1757, as to the Poems in Question, the Appellants had a Right to print, publish, and sell Copies of them, without Consent of the Respondents.

On the 16th and 20th July, 1771, the Appellants put in their Answers, and thereby admit, That Mr. Thompson was the Author of the several Poems mentioned in the Bill, but deny all Knowledge of the several Assignments, which the Bill states, of the Copies of the said Poems; and say, that they believe that Mr. Andrew Millar, by Virtue of the several Indentures mentioned in the Bill, or by any other Means, did not become intitled to the Copyright in the Poems before mentioned, for a longer Time than the several Terms limited by an Act passed in the eighth Year of her late Majesty Queen Ann, intitled, *An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors, or Purchasers of such Copies, during the Times therein mentioned.* The Clauses relied upon in the Answer of the Appellants are, that by which it is enacted, (1) *That the Author of any Book, or Books, then already composed, and not printed or published, or that should thereafter be composed, and his Assignee, or Assigns, should have the sole Liberty of printing and reprinting such Book, and Books, for the Term of fourteen Years, to commence from the Day of first publishing the same, and no longer*; and a Proviso, by which it is further enacted, (2) *That after the Expiration of the said Term of fourteen Years, the sole Right of printing and disposing of Copies shall return to the Authors thereof, if they are then living, for another Term of fourteen Years.* The Appellants, in their Answers, also say, That the Copies of the several Works, in the Bill mentioned to have been written by Mr. Thompson, having, as appears by the Bill, been assigned by him, and first published, in 1729; the sole Right of printing, publishing, and selling the same could not be extended beyond the Term of twenty-eight Years, from the Time of such first Publication, which Term expired in 1757; and deny, that during the said Term they were concerned in the printing, publishing, or selling any Copies of the said Works. They admit the Death of Andrew Millar; and that, before his Death, he made his last Will, and appointed such Persons Executors, as in the Bill are named; and that it was proved in Manner therein mentioned. But they insist, for the Reasons aforesaid, that the Executors of Andrew Millar did not, by his Will, or otherwise, become intitled to the sole Right of printing and publishing the said Poems. The Appellants admit in their Answers, that they have, since the Expiration of the said Term of twenty-eight Years, without the Consent of the Respondents, printed, published, and sold several Copies of the Poems in the Bill mentioned; and insist, *that unless the Respondents are able to make out a Title to the sole and exclusive Property of the said Poems, paramount the aforesaid Act of Parliament*, the Appellants are, by Virtue of that Act, well authorised in printing, publishing, and selling the said Poems, and are not compellable to account for, or discover the Number of Copies they had printed, published, or sold, and ought not to be restrained from the further Publication and Sale of the same; and, therefore, claim the Benefit of the said Act of Parliament, as if they had pleaded the same in Bar to the Relief and Discovery sought by the Bill.

20th Nov. 1771, the Respondents amend their Bill by making the Respondent, Thomas Cadell, a Party.

On the 17th November, 1771, the Respondents obtained an Order for leave to amend their Bill; and it was amended accordingly, by making the Respondent, Thomas Cadell, whose Name was before omitted, a Party.

(1) By Sect. 1. (2) By Sect. 11.

After-

Afterwards, the Respondents replied to the Answer of the Appellants; and they rejoined: And then the Cause being at Issue, two Witnesses were examined by the Respondents to prove Mr. Thompson the Author of the before mentioned Poems, and the several Assignments of the *Copy-right* in them to Andrew Millar, and the Sale, by his Executors, to the Respondents.

On the 16th November, 1772, the Cause was heard before the Right Honourable the Lord Chancellor, when his Lordship was pleased to decree, That the Injunction, which had been before granted in the Cause, should be made perpetual; and that it should be referred to the Master to take an Account of what had been received by the Appellants, or either of them, or by any other Person by their Order, or for their Use, from the Publication and Sale of the Poems in the Pleadings mentioned, and that the Appellants should pay unto the Respondents what should be found due to them on the Balance of the said Account; and his Lordship reserved the Consideration of Costs until the Master should have made his Report; and any of the Parties were to be at Liberty to apply to the Court as there should be Occasion.

16th Nov. 1772, the Lord Chancellor's Decree for the Respondents.

From this Decree the Appellants have brought their Petition and Appeal, praying that it may be reversed. But the Respondents are advised, and humbly beg leave to contend, that the Decree of the Lord Chancellor is just and equitable, and ought to be affirmed; and that the Petition and Appeal ought to be dismissed with Costs, for the following (amongst other)

REASONS.

I. The Claim of Authors to the sole and exclusive Right of printing and publishing their own Works, is founded upon Principles of Reason and natural Justice. It is just and equitable, that those, who labour in the Advancement of Knowledge, and communicate their Ideas in written Compositions to the Public, should have a Recompence; and in order to obtain a suitable one, Authors, when they publish their Works, mean to reserve to themselves the Right of multiplying printed Copies; and the Nature of Printing, and the Circumstances attending a Publication, being considered, there is an *implied Agreement*, on the Sale of each particular Copy, that the Purchaser shall not invade the beneficial Right of multiplying Copies intended to be reserved by the Author.

II. From the first Introduction of the Art of Printing into England, this peculiar Species of Property has been known by the expressive Name of *Copy-right*; has continually been the Subject of *Sale*, *Gift*, and *Family Settlement*; has always been protected from Invasion; and, in some Instances, has even been *recognized by the Legislature*.

III. It is a Point too well established to be denied, that at *Common Law*, the sole and exclusive Right of multiplying for Sale the Copies of Acts of Parliament, Proclamations, and other Papers of a *public* Nature, belongs to the King, and his Patentees; not in consequence of any Prerogative over the Art of Printing, but on Account of his peculiar Interest, as the *executive Power*, in all Publications and Acts of State flowing from himself, or Parliament. This shews, that an *Interest* or *Property* similar to that claimed by Authors, may subsist at *Common Law*; and though the Reasons, on which Authors claim an *Interest* in their own *private* Copies, are not precisely the same as those from which the *Interest* of the Crown in *public* Copies is derived, yet they are not

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less forcible; but give to Authors a Title of Property, as well founded in *Justice*, as the Title of the Crown is founded in *Policy*, and one equally consistent with Public Utility.

IV. There is nothing in the Statute of Queen Ann to take away that Interest or Property, to which Authors were before intitled in the Publication and Sale of their own Works. The Object of that Statute was to secure Literary Property by Penalties from Piracy and Invasion; and though the Protection given is only *temporary*, yet, so far from being made so under an Idea of the Legislature, that Authors had no Property in their Works before, or with an Intention to limit its Duration, the Statute expressly declares, that nothing contained in it shall *prejudice* or confirm any Right which the Universities, *or any Person or Persons*, might claim to the printing or reprinting of any Book or Copy *then* printed, or *afterwards* to be printed.

V. Since the Statute of Queen Ann, many Injunctions have been granted by the Court of Chancery to restrain the Invasion of *Copy-right*, notwithstanding the Expiration of the Term during which *only* the Statute gives a Protection by Penalties; and the Opinion of the Chancellors, who granted such Injunctions, has been confirmed by a Judgment of the Court of King's Bench in Favour of Literary Property, which was given after solemn Argument.

VI. Upon the Faith of the Protection, which has hitherto been given to Literary Property independently of the Statute of Queen Ann, great Sums of Money have been expended in purchasing *Copies*; and if such Protection should be now withdrawn, many Hundred Families will lose their whole Estates, and necessarily be involved in Ruin.

AL. WEDDERBURN.

J. DUNNING.

FRA. HARGRAVE.

ARGUMENTS

ARGUMENTS

OF THE

COUNCIL FOR THE APPELLANTS.

Mr. Attorney General Thurlow.

I SHALL endeavour, my Lords, to ſhew that the Decree of the Court of Chancery, pronounced on the 16th Day of November, 1772, in Favour of the Reſpondents, to be highly injurious to the Appellants, my Clients; and that what is termed LITERARY-PROPERTY, is not warranted or ſecured at Common Law. The Idea inculcated by what is called a *Publication*, is not that myſterious Thing the bookſelling Trade would make it, being ſimply a Multiplication of Copies; and whether they were multiplied to the Number of five or five hundred, ſignifies not an Iota to the Matter in Diſpute. Previous to the Invention of Printing, Scribes, for copying an Author's Work, obtained a greater Remuneration than Perſons who, ſince the Invention of Printing, diffuſe Writings by Means of certain Types.

Property, my Lords, of whatever Kind, is that which is begun by Occupancy, and continued by Poſſeſſion. Metaphyſicians talk of Property in Life or Limb, in Fame, Honor, and Character; but this is not a Language Lawyers can adopt. There is, alſo, ſuch a Thing as Property by Specification; but under what Denomination is Literary Property to be arranged? Is it corporeal or incorporeal? If corporeal, it is deſcendible, like any other Chattel; if incorporeal, how is its Incorporeality to be aſcertained? how ſpecifically diſtinguiſhed from its Appendage or Adjunct, the corporeal Part? To ſay that a Man has a Property in the Ideas of a Book, and none in the Book itſelf, is as if one ſhould affirm that a Man has a Property in the Coloring of a Picture, but none in the Canvaſs on which that Coloring is laid; or as if Mr. (1) Harriſon had a Property in the Diſcovery made by his Time-Piece, but none in the Wheels or mechanical Parts of which it is compoſed: a Notion to the laſt

(1) Lord *Camden*, as Lord Chief Juſtice of the *Common Pleas*, on a Queſtion reſerved for the Conſideration of that Court, on a Trial before him, Whether a Man might exerciſe as many Trades as he had worked at, or ſerved ſeven Years Apprenticeſhip to? in giving the Opinion of the Court, which was in the Affirmative, obſerved, "That Mr. *Harriſon* ſerved an Apprenticeſhip "to the Trade of a Carpenter, but that for 26 Years had been a Watchmaker; and though he had "never ſerved as an Apprentice to the Trade of a Watchmaker, was the beſt Maker of Time-Pieces "in the World, and the Parliament had given him 5000l. towards finding out the Longitude by the "Help of his Watches or Time-Meaſurers: And ſhall this Man (ſaid Lord *Camden*) be hindered "from making Watches, and exerciſing the Trade of a Carpenter alſo, if he pleaſes?" *Wils. Rep.* C. B. 169.

last Extreme absurd!" Applying this to the Case of an Author; if he had any distinct exclusive Property in a Book, separate from the material and corporeal Part, I have no Objection to admit this exclusive Property, provided he will demonstrate to me *quo Jure* the Property accrues.

I should now, my Lords, proceed to consider the Sense of the Word Property, and to define it philosophically, and in the separate Lights of being corporeal and spiritual; but as your Lordships are in Possession of the printed Case of the Appellants, you are in Possession of every Thing in my Power to urge in that View of the Subject; I will not therefore presume to draw the Attention of your Lordships unnecessarily, by troubling you with a Repitition of what I am persuaded you are all so well informed of.

The Booksellers, my Lords, have not, till lately, ever concerned themselves about Authors, but have generally confined the Substance of their Prayers to the Legislature, for 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 they not found *that* necessary to give a colorable Face to their Monopoly. For several Cases exemplifying this Observation I beg Leave again to refer your Lordships to the said printed Case; all the Grants, Charters, Licences, and Patents from the Crown, as well to corporate Bodies as Individuals, (which are traced far back in the said printed Case) specifically prove, that if there had been any inherent Right of exclusively multiplying Copies, such Instances of exerting the Royal Prerogative would have been unnecessary. The Statute of Queen (1) *Anne* is not merely an accumulative Act, declaratory of the Common Law, and giving additional Penalties, but a new Law to give learned Men a Property which they had not before; and it is an incontrovertible Proof that there previously existed no Common Law Right, as contended for by the Respondents; nor hath the Question touching the Common Law Right ever been decisively determined by any Chancellor. Many Cases, my Lords, some before 8 An. Chap. 19. 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; will be found collected in our Point of View, and in chronological Order, in the said printed Case.

No such Idea, my Lords, as that of an exclusive Right to multiply Copies prevailed previous to, or indeed long after, the Invention of Printing. This is instanced in several Cases, adduced for that Purpose, by the Appellants, in their said printed Case, where one Writer complains of another for printing his Works, not on account of any Violation of Property, but merely because the Party complained of had printed them inaccurately. Literary Property consists only in the Imagination; it never, till it was found advantageous, entered into the Head, of Booksellers themselves; Authors never conceived the Notion of any Property

Since the above reported Compliment, the Parliament have granted Mr. *Harrison* the further Sum of 8750l. for the Discovery of the Invention of his Time-Keepers, by Stat. 13, Geo. III. Chap. 77, Sect. 29. And the late Mr. Justice *Yates*, in giving his Opinion on this very Question of *Literary Property*, observed, that Examples might be mentioned of as great an Exertion of natural Faculties, and of meritorious Labour in the mechanic Inventions, as in the Case of Authors. "We have "(continues the Judge) a recent Instance in Mr. *Harrison*'s Time-Piece, which is said to have cost "him near 50 Years Application; and might not he insist upon the same Argument, the same Chain "of Reasoning, the same Foundation of moral Right, for Property in his Invention, as an Author "can for his?" See *Bur*. Lit. Prop. 70, 102.

(1) 8 *An*. Chap. 19. An Abstract whereof is added by Way of Appendix.

vesting

vesting in them, but what was given by Statute, by Patent, the licensing Acts the royal Privilege, or in Virtue of the Institution of the Stationers Company. What is called Literary Property gave rise to a scandalous Monopoly of ignorant booksellers, who, fattened at the Expence of other Mens Ingenuity, grew opulent by Oppression. As the Lords of Session have freed (1) Scotland from such a Monopoly, I sincerely hope your Lordships, following so praise-worthy an Example, will emancipate this Kingdom from such an odious Oppression.

Sir John Dalrymple.

It should be considered, my Lords, that this pretended Property, which is supposed to have a Foundation in Common Law, cannot in the Records of the Common Law Courts any where be found: If you speak of the Subject before the Act of Queen *Anne*, you hear of nothing but licensing Acts, and the Company of Stationers—My Lords, during the tory Reign of King Charles the Second the Booksellers were the mere Engines of the Court's Designs, and therefore the licensing Act sufficed;—it was the same through the tory Reign of King James the Second, while it was the Court side of every Question that could alone be handled with safety; the licensing Act gave that Property to the Booksellers, which was sufficient for their Purpose. In the whig Reign of King William they began to move out of the old Sphere, and then we accordingly find new Movements. In the tory Reign of Queen *Anne* they looked out for fresh Securities; then first appeared a new Trade. My Lords, the Booksellers then found they could make as much or more by abusing the Sovereign, her Parliament, her Council, her Servants, and her Government, than they could before make by the Support of them. Printing Books thus coming into Opposition to the Court, the Trade laboured hard to establish a Right to their Copies independent of the Court. They applied every where for the Means of establishing that Right; but were forced at last to have recourse to Parliament to establish and vest in them a Right which the Common Law did not give them.

My Lords, the History of the Act of Queen *Anne* deserves your Lordships Attention: What was the View of the Booksellers? Absurdity on the very Face of it. They applied for an Act, vesting in them a Property for fourteen Years which they pretend to have derived from the Common Law, for Futurity. Can it be supposed that Men who were any Ways clear in their perpetual Right, would apply for a fresh Right for fourteen Years only? It could not be. They knew their own Situation: they knew the Rottenness of their pretended Right, and wanted a new real one, instead of the old imaginary one.

Yet, my Lords, this Act, which changed their Perpetuity to a Term of fourteen Years, was obtained at a Period when the Interests of Learning was far from being without good Support: *Addison*, after being the Friend of many Ministers, became Secretary of State; and *Swift* was high in the Esteem, and an Adviser of the Heads of another Party. Happy would it be, my Lords, if Ministers had always such Friends, and such Advisers!

But, my Lords, this Act of Queen *Anne*, which was ushered in under the Idea of encouraging Literature, was very far from having such a Tendency. It was to encourage Booksellers, but not Authors; however, supposing both interests the same,—What did they gain? Why, a Perpetuity was changed to a Term of fourteen

(1) See *Boswell*'s Decision of the Court of Session, upon the same Question, in the Cause of *Hinton* v *Donaldson* & al. 4to, 1774.

fourteen years only. A Price was fixed, and a Clause inserted to force them to send Copies to public Libraries — What Encouragements are these? — They, on the contrary, were Discouragements. — All which is sufficient to shew that the Booksellers never dreamed of a serious Property at Common Law for Perpetuity; had they such a Notion they would have petitioned against the Act.

Observe, My Lords, the Title of the Act: *To vest* the Copy-rights: that is, my Lords, to *give* them a Right they had not before; a marked Expression which could not be mistaken.—And though the Word *secured* is used in the Body of the Act, it does not enter there as the Signification of a different Idea: it is the same Idea: the Bill was to vest a new Property, and provide accordingly, and inflicts Penalties, after which the Word *secures* occurs, and is used perfectly consistent with the former Term.

What could be more absurd, my Lords, than an Act to vest a perpetual Right to a set of Persons for a limitted Term, and inflicting Penalties? Lord Shaftsbury tells us that Ridicule is the Test of Truth: let us try such an Act by that Test. I will read an imaginary Act which enacts such Purposes.

An Act for the Encouragement of PLANTING, *by vesting* THE SHOOTS OF HEDGES *and* BRANCHES OF TREES, IN THE PLANTERS, *during the Times therein mentioned.*

An imaginary Act of Parliament.

"WHEREAS *Botanists, Florists, Gardeners, Nurserymen*, and other persons, have of late frequently taken the Liberty of *planting, transplanting*, and *advertizing*, or causing to be *planted, transplanted*, and *advertised, Hedges, Trees*, and *other Plants*, without the Consent of the Proprietors of such *Hedges, Trees*, and *other Plants*, to their very great Detriment, and too often to the Ruin of them and their Families." "For preventing therefore such Practices, for the future, and for the Encouragement of *ingenious* Men to *set* and *rear up necessary Hedges* and *Trees*, may it please your Majesty, that from and after the *first* Day of *April*, 1774, the *Planter* of any *Tree* or *Trees*, or of any *Hedge* or *Hedges*, already *planted*, who hath not transferred, to any other the *Shoot or Shoots, Branch or Branches*, of such *Hedge* or *Hedges, Tree* or *Trees*, Share or Shares thereof, or the *Botanist or Botanists, Florist or Florists, Gardener or Gardeners, Nurseryman or Nurserymen*, or other Person or Persons, who hath or have purchased or acquired, the *Shoot* or *Shoots, Branch* or *Branches, of any Hedge* or *Hedges, Tree* or *Trees*, in order to *plant or transplant* the same, shall have the sole Right and Liberty of *planting* such *Tree* and *Trees*, and such *Hedge and Hedges*, for the Term of 21 Years, to commence from the said *first* Day of *April*, and no longer; and that the *Planter* of any *Tree* or *Trees, Hedge* or *Hedges*, already *planted*, and not *reared, grown up*, or that shall hereafter be *planted*, and his Assignee or Assigns, shall have the sole Liberty of *planting and transplanting* such *Hedge* and *Hedges, Tree and Trees*, for the Term of 14 Years, to commence from the Day of the first *advertizing* the same and no longer; and that if any other *Botanist, Florist, Gardener, Nurseryman*, or other person whomsoever, from and after the *first* Day of *April*, 1774, within the Times granted and limited by this Act, as aforesaid, shall *plant, transplant, import, cut or break down*, or cause to be *planted, transplanted, imported, cut or broken down*, any such *Hedge* or *Hedges, Tree or Trees*, without the Consent of the Proprietor or Proprietors thereof, first had and obtained in writing, signed in the Presence of two or more credible Witnesses; or knowing the same to be so *planted, transplanted, imported, cut* or *broken down*, without the Consent

After first April, 1774, the *Planters* of *Hedges* or *Trees* already *planted*, who have not transferred their Rights, and the Botanists, &c. who have purchased *Shoots* or *Branches*, shall have the sole Right of *planting* them, for 21 Years.

And the *Planters* of *Hedges* or *Trees* not *planted*, to have the sole Right of *planting* for 14 Years.

Punishment of *Botanist*, &c. *planting* without the Consent of the Proprietor.

Consent of the Proprietors; shall sell, *advertize* or expose to Sale, or cause to be sold, *advertized*, or exposed to Sale, any such *Hedge* or *Hedges*, *Tree or Trees*, without such Consent, first had and obtained, as aforesaid, then such Offender or Offenders shall forfeit such *Hedge* or *Hedges*, *Tree or Trees*; and all and every *Leaf* or *Leaves*, being Part of such *Hedge* or *Hedges*, *Tree or Trees*, to the Proprietor or Proprietors of the *Shoots or Branches* thereof; who shall forthwith *damage* and *destroy* them; and further, that every such Offender shall forfeit one Penny for every *Root* which shall be found in his, her, or their Custody, either *planted* or *planting*, *advertized*, or exposed to Sale, contrary to this Act: one Moiety, &c."

"II. And whereas many Persons may through Ignorance offend against this Act, unless some Provision be made, whereby the Property in every such *Hedge and Tree*, as is intended by this Act to be secured to the Proprietor or Proprietors thereof, may be ascertained, as likewise the Consent of such Proprietor or Proprietors, for the *planting* or *transplanting* of such *Hedge* or *Hedges*, *Tree or Trees*, may from Time to Time be known," Be it therefore further enacted, by the Authority aforesaid, that Nothing in this Act contained, shall be construed to extend, to subject any *Botanist*, *Florist*, *Gardener*, *Nurseryman*, or other Person whomsoever, to the Forfeitures or Penalties, therein mentioned, for or by reason of the *planting* or *transplanting* of any *Hedge* or *Hedges*, *Tree or Trees*, without such Consent, as aforesaid, unless *a Sprig or Spray to the Shoots* of such *Hedge, or Hedges, or a Bud, or Leaf of a Branch of such Tree or Trees*, hereafter *advertized*, shall, before such *Advertisement*, be *deposited among the natural Curiosities in the* British Museum, *and the same* be entered in the Registry Book, in such Manner, as hath been usual, which Register Book shall at all Times be kept at the *said* Museum: and unless such Consent of the Proprietor or Proprietors, be in like Manner entered as aforesaid, for every of which several Entries, Sixpence shall be paid, and no more, which said Register Book may, at all seasonable and convenient Times, be resorted to, and inspected by any *Botanist*, *Florist*, *Gardener*, *Nurseryman*, or other Person, for the Purposes before mentioned, without any Fee or Reward, and Daniel Charles Solander, *Doctor of Physic and of Law, or his Successor in Office, in the said* Museum, shall, when and as often as thereunto required, give a Certificate under his Hand, of such Entry or Entries, and for every such Certificate may take a Fee, not exceeding six Pence."

Sprigs or Sprays of Shoots of Hedges, Buds or Leaves of Branches of Trees, to be deposited before advertising in the Registry Book of the British Museum.

Which may be inspected, at any Time, without Fee.

Doctor Solander, &c. to give Certificate of such Entry.

"III. Provided nevertheless, That if the *said* Daniel Charles Solander, *or his Successor in Office*, for the Time being, *in the said* Museum, shall refuse or neglect to register, or make such Entry or Entries, or to give such Certificate, being thereunto required, by the *Planter* or Proprietor of such *Shoot or Shoots, Branch or Branches*, in the Presence of two or more credible Witnesses, that then such Person or Persons, so refusing, Notice being first duly given of such Refusal, by an Advertizement in the *Gazette*, shall have the like Benefit, as if such Entry or Entries, Certificate or Certificates, had been duly made and given; and that the said Daniel Charles Solander, *and his Successors for the Time being*, so refusing, shall for any such Offence *respectively* forfeit, to the Proprietor of such *Shoot* or *Shoots*, *Branch or Branches*, the Sum of £.20 to be recovered, in any of his Majesty's Courts of Record at *Westminster*, &c.

Penalty of Refusal.

"IV. Provided always, and it is hereby enacted, that nine *Shoots* of each *Hedge* or *Hedges*, and nine *Branches of* each *Tree or Trees*, that from and after the said *first* Day of April 1774, shall be *planted* and *advertised*, as aforesaid, or *transplanted* and *advertised*, shall by the *Planter* and *Planters, or Transplanter and Transplanters* thereof, be delivered

After first of April, 1774, nine Shoots of each Hedge, and nine Branches of each Tree, shall be delivered to

to

Doctor Solander for the Use of the Royal Garden, &c.

to the said DANIEL CHARLES SOLANDER, *or his Successor*, for the Time being, *at the said* MUSEUM, before such *Advertisement be inserted in any public Paper* for the Use of the *Royal Garden at Kew, the Botanic Garden, belonging to the Company of Apothecaries, at Chelsea, the Garden belonging to* JOHN HILL, *Doctor in Physic, at* BAYSWATER, *the Nursery Grounds, at Brompton, Kensington, Turnham-Green, Brentford, and Highgate, in the said County* of MIDDLESEX, respectively, and for the Use of the Nursery Ground at South *Lambeth*, in the County of *Surry*; which said DANIEL CHARLES SOLANDER, *and his Successor in the said Office, for the Time being*, is hereby required, within ten Days after Demand, by the Keepers of the respective *Gardens and Nurseries*, or any Person or Persons, by them, or any of them, authorized, to demand the said *Shoots and Branches* to deliver the same, for the Use of the aforesaid *Gardens and Nurseries*; and if any Proprietor, *Botanist, Florist, Planter, Transplanter, Gardener, or Nurseryman*, or *the said* DANIEL CHARLES SOLANDER, *or his Successor, for the Time being*, shall not observe the Directions of this Act therein, that then he and they so making Default, in not delivering the said *planted Shoots and Branches* as aforesaid, shall forfeit, besides the Value of the said *planted Shoots and Branches*, the Sum of five Pounds for every *Shoot or Branch*, not so delivered, as also the Value of the said *planted Shoot or Branch*, not so delivered, the same to be recovered by *the Royal Family, the said Company of Apothecaries, the said* JOHN HILL, *and the Owners or Proprietors of the said Nurseries and Gardens*, with their full Costs, respectively."

Doctor Solander to deliver the Shoots and Branches ten Days after Demand.

Penalty of Proprietor, &c. not observing the Directions of this Act.

"V. Provided, that Nothing in this Act contained, do extend, or shall be construed to extend, to prohibit the Importation, vending, or selling of any *Hedges or Trees planted* beyond the Seas, any Thing in this Act contained to the contrary notwithstanding."

This Act not to hinder the Importation, &c. of *Hedges or Trees planted* beyond Sea.

"VI. Provided, that Nothing in this Act contained, shall extend, or be construed to extend, either to prejudice or confirm any Right that the said *Royal Family, the Company of Apothecaries*, JOHN HILL, *or the respective Keepers of the said Nurseries or Gardens*, or any of them, or any Person or Persons have, or claim to have, to the *planting* or *transplanting any Hedge or Hedges, Tree or Trees*, or *Shoot or Branch* already *planted*, or hereafter to be *planted*."

This Act not to prejudice the Right of the Royal Family, &c.

"VII. Provided always, that after the Expiration of the said Term of 14 years, the sole Right of *planting* or disposing of *Shoots or Branches*, shall return to the *Planters* thereof, if they are then living, for another Term of 14 years.

After the 14 years, the Right of *planting*, &c. to return to the Planter for other 14 Years.

Now, my Lords, does it not from hence appear that an Act to convert a Perpetuity into a limitted Term is absurd upon the Face of it? And may we not from hence conclude that the Booksellers, when they applied for the Act of Queen *Anne*, knew they had no perpetual Common Law Right?

My Lords, this perpetual Right which they want would, instead of being beneficial to the Interests of Literature, be pernicious to it. It would encourage the Spirit of writing for Money; which is a Disgrace to the Writer, and to his very Age. My Lords, why should not Honour and Reputation be powerful Inducements enough for Authors, without that mean one of Profit? Foreigners know no such exorbitant pecuniary Rewards as have disgraced this Country. The Germans get nothing by writing. The Italian States are so small that no Literary Property can exist, as the Booksellers of one State would immediately print upon those of another.—In France the Sums given to Authors are too small to have this Effect. My Friend, Mr. Hume, has told me that Rousseau assured him he had but fourscore Lewis-d'ors