d'ors for the Copy of his Emile. Such Sums as we hear of in *England*, are merely an Encouragement to the mercenary Spirit of Writing, not to the Merits of it.

But farther, my Lords, if you give this Perpetual Right to publish, you give the same Right to surpress. If an Author is to have this Exclusive Right to his Works after Publication, he may surpress them at will, or at least stop the future Publication of them. My Lords, this is not a mere imaginary Idea; it is possible, and even probable.

My Lords, I shall beg Leave to state a Supposition. Suppose there was a Man (r) who, with the utmost Diligence and Attention, sought into the Records of his Country, and also of foreign ones, for State-Papers to illustrate History; suppose he meet with such Success in this Imployment as to make Discoveries of the highest Importance: Suppose, when his Book comes to be published, that instead of receiving that public Applause which he might perhaps have Reason to expect, he, on the contrary, finds himself hunted down for that very Circumstance which ought to have added to his Fame. Supposing there was such a Man, my Lords, must he not be uncommonly firm and resolute to bear up against the illiberal Voice of the Publick? must he not be tempted to suppress a Book, when he found it thus received, notwithstanding the Injury which he would thereby do to, I may say, his Country?

Printers and Booksellers, my Lords, are not remarkable for too much Modesty; Authors are generally proud, and of so old-fashioned a Turn of thinking, that if a great Man gives them a Promise, they are weak enough to imagine it is to be kept; that Booksellers are also exceedingly vain, and take every Advantage of Authors which they can, adding their Name to their Cause, merely from Motives of Self Interest: otherwise they would have got Mr. *Addison* to have assisted them with his Influence while he was in Power. A numerous Multiplication of Copies is of late Date; *Shakespear's* Works have gone through but two Editions of 500 each in two Centuries, and 11000 of *Smollet's* History of England, the worst of the many bad Histories of *England* extant, have been sold in a very short Time; when large Numbers were first printed, the Arts of reviling the Sovereign, abusing the Minister, and libelling every Officer of Government were discovered; Arts happily banished in this quiet Era! *Junius* had an enflamed Imagination, a weak Head, and a worse Heart; in the Cause of *Midwinter*, both Plaintiff and Defendant resembled Fencers with Skates on, treading upon Ice, as they both went farther than they either of them intended; *Alexander Donaldson*, his Client, never printed a Work either within the Time of the Limitation of the 8th of Queen *Ann*, or in the Life-time of the Author; Booksellers opprobriously term Men who laudably enlarge the Circle of Literature, by giving new Editions of Works of Merit, Pirates; the Reversal of the Decree of the Court of *Chancery*, will rather be of Service to Authors than disservice; there are now 20000 Printers in London; and in order to convince your Lordships, of the Truth of the Assertion, I beg leave to trouble your Lordships, with a particular Circumstance in Proof thereof. I happened to be upon the Streets when a Lord Mayor two Years since was coming

(r) Sir *John*, we presume, here alludes to his "Memoirs of *Great Britain*," published in 1773, and for the Copy Right of which having received near £1000, he hath, as we are well informed, since the final Decision of this Cause, honourably assigned his reversionary, as well as his original Right, to the Purchaser.

to the House of Commons, to answer for having discharged a City Printer out of the Hands of a Messenger of that House. The Cavalcade was numerous; but I observed only half the Number of Printers, who usually make up the mob. I asked the Reason of it, and was informed, that ten thousand of them were gone to Tyburn to see a Brother Printer hanged: so that I found they were divided in Opinion, whether they should conduct one Friend to the Gallows, or another Friend to the House of Commons.

ARGUMENTS of the COUNCIL for the RESPONDENTS.

Mr. Solicitor General *Wedderburn*.

ONE of the learned Pleaders, my Lords, on the other Side of the Question, hath entered into the Argument with great Ability; his Definition of the Word *Property* is shrewd, metaphysical and subtile; but I hope to be able to convince your Lordships, that ingeniously as that word hath been defined, it is nevertheless erroneous.

Literary Property, my Lords, hath, by those who have spoke before me, been said to be so abstruse and chimerical, that it is not possible to define it. The Interpretation they have put upon the Word *Property* is, that it implies something corporeal, tangible and material. I beg Leave to differ from this Opinion, and to point out how common it is for Terms to be misapplied, as to their Import.

The Word *Property*, my Lords, hath, by the ablest Writers, been called *Jus utendi, fruendi, disponendi*; it is therefore evident that any Idea, although it is incorporeal in itself, yet, if it promises future Profit to the Inventor of it, is a Property. And the latter Word hath, through Inaccuracy, been used as describing that, over which a Possessor holds an absolute Reign, Dominion, or Power of Disposal. The subject Matter may be immaterial, and yet liable to be appropriated. Property changes its Nature with its Place: In *England*, Portions of Land are private Property, among the *Arabs* and *Tartars* no such Idea prevails; they look upon Cattle and Chattels as the only private Property. Among the *Americans*, in certain Districts, Land is considered as Property, but not as the Property of Individuals; as the Inhabitants live upon the Gains of hunting, a Circumference of Land, sufficient for them to hunt on, is considered as the general Property of one Tribe or Nation.

The Lawyers Mode of describing Property, my Lords, is exceedingly trite and familiar; they generally divide it into corporeal and incorporeal, and in the present Case it hath been said to commence by Occupation, and continue by Possession. This is a narrow Scale of Argument. In the Courts of Law it is universally admitted, that Matters incorporeal are nevertheless Matters of Property, and the Lawyers Division of it proves that Matters not in Occupancy or Possession, are yet of Value, and can be sold or given over, as in the Cases of Manors and Advowsons, Remainders and Reversions. They can be sold by Assignment, and the Mode of Sale is by Title.

Possession,

Possession, my Lords, is usually described as originating from two Things, Livery and Grant. Under the latter Title, in some Degree, stands Literary Property; but it is not to be considered as originating from Crown Grants, for excepting the prerogative Copies, the Crown has no Right, and in the first of those (the Bible) no farther Right, than in that particular Translation, published in the Reign of King *James* the *First*.

Every Inventor, my Lords, has a Right to the Profit of his Invention; and as I find that *Grotius* has not escaped the Attorney General's Researches, I am much surprised that in his Definition of Property, the learned Pleader hath not hit upon a Position which is directly in Point; for *Grotius* informs us, that *Paulus*, a *Roman* Lawyer, declared that one Mode of acquiring Property was Invention, and that from the Nature of Things, he who made a Matter, was the Owner of it.

This, my Lords, is a much more liberal Construction of the Word Invention, than hath been put on it by the other Side, who have taken it up in its vulgar Acceptation, and only given it Allusion to Trifles, such as the finding Shells on the Sea-shore, &c.

It hath been contended, my Lords, that the Maker of an Orrery is in the same Predicament as an Author, when he publishes. Such Allusion comes not to the Point; the first Sheet of an Edition, as soon as it is given Impression, in a Manner subjects an Author to the Expences of a whole Edition, and if that Edition is 5000 in Number, the Author is not repaid for his Labour and his Hazard, till the last of the 5000 is sold The Maker of an Orrery is at no other Trouble and Charge, than the Time, Ingenuity and Expence, spent in making one Orrery; and when he has sold that one, he is amply paid. Orrery-making is an Invention, and the Inventor reaps the Profit accruing from it. Writing a Book is an Invention, and some Profit must accrue after Publication; Who shall reap the Benefit of it?

Authors, my Lords, both from Principles of natural Justice, and the Interest of Society, have the best Right to the Profits accruing from a Publication of their own Ideas; and as it hath been admitted on all Hands that an Author hath an Interest or Property in his own Manuscript, previous to Publication, I desire to know who can have a greater Claim to it afterwards? It is an Author's Dominion over his Ideas, that gives him Property in his Manuscript originally, and nothing but a Transfer of that Dominion or Right of Dispose can take it away. It is absurd to imagine that either a Sale, a Loan, or a Gift of a Book, carries with it an implied Right of multiplying Copies; so much Paper and Print is sold, lent or given, and an unlimited Perusal is warranted from such Sale, Loan or Gift: but it cannot be conceived, that when five Shillings is paid for a Book, the Seller means to transfer a Right of gaining one hundred Pounds; every Man must feel the contrary, and confess the Absurdity of such an Argument.

I have in my Hand, my Lords, a Copy of the original Grant of King *James* the *First* for printing some Poems of his writing, which, excepting the royal Stile in the Beginning, runs in the ordinary Phrase of an Author's Assignment of Copy-right to a Bookseller; nay, indeed, it is more ample, for it not only transfers the Right of the Matter then published, but also transfers a Right to every Thing he should thereafter be pleased to write.

Ames's Typographical History seems particularly worthy your Lordship's Notice, and also the Application of the Printers in *Prynne*'s Time to suppress and call in the Patents for printing and publishing the Bible; the Applicants terming those Patents a Sanction for Monopolizers, the Matter was heard by Council, when *Prynne* pleaded on one Side of the Question, and his Answer turned on nine Points, in one of which that celebrated Lawyer declared, that the most serious and solid Objection against the Printers was, the inherent Common Law Right for an Author to multiply Copies. This is one strong Proof that in the worst of Times the *Jus naturale* respecting Literary Property was not forgot. Licenses in general prove not that Common Law Right did not inherently exist, but were the universal Fetters of the Press at the Times in which Authors were obliged to obtain them.

With Regard to the Statute of Queen *Anne*, my Lords, I am very willing to let that rest on the same Grounds the Attorney General hath placed it, viz. that if it gives no Right, it takes none away. But I cannot help observing, that it contains a positive Clause, to let the Matter respecting a Common Law Right, remain precisely in the State in which it was, when that Act passed: and that the Court of *Chancery* considers that such a Right does exist, is evident from the several Injunctions that Court hath granted since the enacting of the Statute, which do not govern those Injunctions, as it doth not particularly specify how the Court of *Chancery* is to act. The Case of *Pope* v *Curl*; of *Guyne* v Doctor *Shebbeare*, and the Case of *Lintot* & *Richardson* v *Owen* in *Mich.* Term, 1760, before the late Earl *Northington*; this last was a Bill by the *Common Law* Patentees against a Bookseller for not printing *Cuningham*'s Law of Bills of Exchange, &c. at the Law Press; when the Chancellor declared the said Book not within the Law Patent. The Case of *Dodsley* v *Kinnersly*, in 1761, before Sir *Thomas Clark*, Master of the Rolls. The former prayed an Injunction against the latter, for abstracting Part of Dr. *Johnson*'s *Rasselas*, and publishing such Abstract in a Magazine. The Case of *Basket & al.* v *Woodfall & al.* at Lincoln's Inn Hall, after *Hil.* Vac. 1762. this was a Bill by the Statute Law Patentees against the Common Law Patentees for printing the Statutes; when the same Chancellor delivered himself in Favor of the Plaintiffs. These Cases, I mention as so many Instances and Proofs of my last Observations. I entirely agree, my Lords, in Opinion respecting Literary Property, with Sir *Thomas Clarke*, who was a most able Lawyer and upright Judge.

I hope, my Lords, Sir *John Dalrymple*'s Memoirs of *Great Britain*, will not be suppressed, as I have Reason to lament its Author intends. I admit it to be true, that *Atticus* employed his Slaves in transcribing, but that even then the Expence was so enormous, that although he was a Man of great Fortune, he was, from a Principle of Oeconomy, under the Necessity of selling his Library; and *Cicero*, who was also a rich Man, was, from the same Principle, unable to purchase it. I therefore earnestly invoke your Lordships to sanctify the final Determination of a Question, founded on natural Justice, and the Interest of Society, by affirming the Decree.

Mr. *Dunning*.

IT has been very falsely asserted, my Lords, that this Property, before the Act of Queen *Anne*, was not to be found at Common Law, and Attempts have been made to prove, that no Cases of it are to be produced; but, my Lords, this is not reasoning to the Purpose; we must consider the Times which we examine, and the Nature of the Property in Question: In Ages wherein Civility had made but small Progress, it would be absurd to look for Litigations of a Property so little valued and so seldom disputed; but, my Lords, the Want of Precedents in such a Case proves nothing against us: there are many unquestionable Common Law Rights, for which you can find no Precedent, so far back as *Richard* the *Second*. How, my Lords, is it to be supposed, that the Decisions relative to so peculiar a Property, are to be clearly ascertained, through an Age, wherein we have only a dim Light to view Objects, of much greater Importance? Where would be the Equity, if I may so express myself, of our Constitution, if we were to establish it by such remote Precedents? Can any one wonder that we have only a dim View of this Property in Ages when nothing was clear but Injustice and Oppression? The Nature of the Property shews at first Sight, that it would be in vain to look far back, for Decisions in its Favour, even supposing that from other Circumstances the Existence of it was unquestionable.

My Lords, the little Estimation and dubious Circumstances that attended the Copy-right to the *Paradise Lost* of *Milton*, is no Proof against the Existence of a decisive Right. That Poem was so much neglected, that the Bookseller had perhaps as much Reason to complain of his Bargain as the Author. It was the Fault of the Age; and had the same Inattention and want of Taste continued, the Property for which we contend would, perhaps, to this Day have never been litigated; but certainly, my Lords, the Right, in Case of Litigation, would not thereby have been injured.

Attempts, my Lords, have been made to prove that the Establishment of this Right would be injurious to Literature; a strange Assertion surely. It is as much as to say, that rewarding Authors in proportion to their Merit, is the way to discourage their productions; an Argument too weak to make an impression on your Lordships. So very far is this from being the Case, that it is evident the Money given for Copy-Right has increased with the Increase of Security that has been given to the Property. Go back to *Milton's* Time, and from thence advance gradually to Queen *Ann's* Reign, when the Act of fourteen Years Right was one Encouragement to the Booksellers, followed by some considerable Emoluments in their Way to Authors; then, my Lords, reflect on the Progress which has been made since, and permit me to call your Attention on three famous Works, Mr. *Hume's* and Dr. *Robertson's* Histories, and Dr. *Hawkesworth's* Voyages; the Sums given for the Copies of the former, at that Time unparallelled, followed the Security of the Property, which flowed from several Injunctions granted by *Chancery*: and the yet greater Sum given for the latter, followed an actual Determination of the King's-Bench in Fovour of this very Property. My Lords, I conceive that whoever reads the Books will not find it possible to account for the Sum in one Case so much exceeding those in the other, unless it be attributed to this Cause; that the Merit of the Voyages is to be classed with that of the Histories, which

will

will ſcarcely be allowed; yet the Copy-Money much exceeded that of the other. In no way is this to be accounted for, but by ſuppoſing the Bookſellers Liberality to flow from the additional Security, thus given to their Property; and if this is not an Encouragement to Literature, my Lords, I ſhould be glad to be informed what is an Encouragement. It might as reaſonably be aſſerted, that Penſions and Rewards given by a Sovereign to learned Men, did not advance the Intereſts of Learning.

My Lords, the very Act of Queen *Anne* has been brought to prove, that there could not be a previous Common Law Right in the Copies of Books; but, my Lords, nothing can be more futile than ſuch an Idea: let me illuſtrate this by a ſimila caſe; there paſſed an (1) Act laſt Seſſions to make Turnips, Potatoes, Cabbages, Parſnips, Peaſe, and Carrots Property; now, my Lords, might it not be urged with as much Juſtice, that Turnips and ſo forth were not Property at common Law? Such an Idea would be ridiculous. Acts may paſs to regulate Property, and to inflict Penalties on the Invaſion of it, without in the leaſt derogating from the Principles and Foundation of ſuch Property.

We have been farther told, my Lords, that giving the Property of Copies will be giving the Right of Suppreſſion; but this I conceive is a groundleſs Idea; we are not to ſuppoſe that Books of Inſtruction, Entertainment, or Amuſement, will ever be ſuppreſſed, and as to Books neither inſtructive nor entertaining, the ſooner they are ſuppreſſed the better. Certain, however, it is, that on ſome Subjects they are read in Proportion to their meriting Neglect.

My Lords, it is to me moſt extraordinory to admit an Author hath a Property originally in his Compoſition, and that the firſt Moment he exerciſes his Dominion over that Property, and endeavours to raiſe Profit from it, he looſes it. Publication I cannot conceive to be of ſuch a Nature as to deſtroy that Right to the Matter publiſhed, which is acknowledged an Author hath before it is publiſhed.

One Part of the Argument, my Lords, uſed for the Appellants, is that it would benefit Authors, if no excluſive Right of multiplying Copies exiſted: that is a very ſtrange Aſſertion, and very extraordinary that Authors in general ſhould think otherwiſe. It is cuſtomary for Bookſellers, as Buyers, to buy as cheap as they can, and it is cuſtomary for Authors to ſell as dear as they can; this cannot be the caſe if the Moment a Book is publiſhed every Man hath a Right to print it.

Authors formerly, my Lords, when there were but few Readers, might get but ſmall Prices for their Labours, but the Books above-mentioned have been paid enormous Sums for, eſpecially the laſt. If the Purchaſers of theſe Copies have not the ſole Right of multiplying Copies, how is the difference to be accounted for? not from any uncommon Generoſity in the Bookſellers, not from any Superiority in point of Merit in the Books, but from the Idea of a common Law Right prevailing, and from that Idea's being eſtabliſhed by the Determination of the Court of *King's-Bench* in the caſe of *Millar* and *Taylor*; for it is idle to contend that the Subject of the preſent Appeal is not exactly on the ſame Grounds.

The Appellants, my Lords, want to ſanctify the Importation of *Scotch* Books into *England*, in the ſame manner as the Importation of *Scotch* Cattle. The Book on which the preſent Cauſe is grounded, was written, indeed, by a *Scotchman*, but it was written in *Engliſh*, and originally printed in *England*. The Appellants had invaded

(1) 13 *Geo.* III. Chap. 32.

invaded the legal Purchaser, by printing a Copy in *Scotland*, and offering it to Sale in *London*; I hope, therefore, that your Lordships will teach them that Literary Property is sacred, by affirming the Decree.

The Lord Chancellor put the three following Questions to the Judges, viz.

Lord Chancellor put three Questions to the Judges.

I. *Whether at Common Law, the Author of any literary Composition had the sole first Right of printing and publishing the same for Sale, and could bring an Action against any Person for publishing the same, without his Consent?*

II. *If the Author had such Right originally, did the Law take it away upon his printing and publishing the said literary Composition, or might any Person reprint and publish the said literary Composition, for his own Benefit, against the Will of the Author?*

III. *If such Action would have laid at Common Law, is the same taken away by the Statute of Queen Anne? or is an Author precluded by such Statute from any Remedy, except on the Foundation of the said Statute.*

After the above Questions had been twice read, and put to the learned Judges, Lord *Camden* moved that the two following might also be put, viz.

Lord *Camden* moved for two additional Questions, which were also put to the Judges

IV. *Whether the Author of any literary Composition, or his Assigns, had the sole Right of printing and publishing the same in Perpetuity by the Common Law?*

V. *Whether this Right is any ways impeached, restrained, or taken away by the 8th of Queen Anne?*

They were immediately read by the Lord Chancellor, and put to the Judges accordingly.

The OPINIONS of the JUDGES.

The Chancellor observed, that "as the learned (1) Judges might entertain dissimilar Opinions upon the Subject, their Lordships Attendance was required to hear the Opinion of each Judge delivered seriatim."

Mr. Baron Eyre.

Great Pains, my Lords, hath been taken by the ingenious Council for the Respondents, to avoid considering the Subject as at all connected with *metaphysic Subtilties*; such an Attempt, though highly praise-worthy in those who have the Interest of their Clients at Heart, is, however, totally impracticable, as every Endeavour to disclaim the Use of metaphysic Reasoning, tends only to show how necessary it is to the accurate Discussion of the Subject: The Question, in Fact, is respecting a Right to *appropriate Ideas*: The Objects over which, a Right and

(1) N. B. Lord Chief Justice *Mansfield* delivered no Opinion, but his Lordship's *Sentiments* may be *seen*, in *Bur.* Lit. Prop. 112. &c.

in which an *excluſive Property* is claimed, are incoporeal Exiſtences, which cannot be treated of with any Degree of Accuracy, without having Recourſe to the Aid of ſcientific Diſquiſition: The *Thinking Faculty*, common to all, ſhould likewiſe be held common, and no more be deemed ſubject to excluſive Appropriation, than any other of the common Gifts of Nature.

I am therefore clearly of Opinion, as to the *firſt* Queſtion, that "*at Common Law the Author of a literary Compoſition, hath no Right of printing and publiſhing the ſame for Sale,*" which is alſo an Anſwer to the *ſecond* Queſtion; for if an Author had no Right at all, *neither he or his Aſſigns cou'd have any in Perpetuity by the Common Law.* From the very nature of the Contents of a Book, they are incapable of being made Objects of Common Law Property; nothing can be predicated of them, which is predicable of every other Species of Property ſubject to the Controul, and within the Limits of the Protection of the Common Law. A Right to appropriate Ideas, is a Right to appropriate ſomething ſo ethereal as to elude Definition; ſo intellectual as not to fall within the Limits of the human Mind to deſcribe with any tolerable Degree of Accuracy. Ideas, if convertible into Objects of Property, ſhould bear ſome feint Similitude to other Objects of Property; they do not bear any ſuch Similitude, they are altogether *anomalous.* They cannot paſs by Deſcent to Heirs; they were not liable to Bequeſt; no characteriſtic Marks remain whereby to aſcertain them; and they are ſuch Incorporealities as not to be ſubject to any one of the Conditions which conſtitute the very Eſſence of Property original or derivative; are ſuch Incorporealities liable to *excluſive appropriation*, by any Right founded in the Common Law.

No Traces, my Lords, of ſuch a Common Law Right are to be found amongſt the Greeks or Romans; nor do the municipal Laws of any Country warrant the Suppoſition of a Right of the Kind exiſting; yet both Greeks and Romans were careful in arranging every Matter ſuſceptive of Property under its diſtinct Head.

But here, my Lords, lies another inſuperable Difficulty. Admitting ideas liable to excluſive Appropriation, and thus to become Objects of Property; in treating of them as ſuch, how would you claſs, how arrange them? Would you recount them as ſimple, complex, combined, or multifarious? as being ſo many, Species *ejuſdem Generis*? or would you reſort to Truth and common Senſe, and ſay they are not to be claſſed, arranged, defined, or aſcertained? They are not ſubject to Alienation, Tranſmiſſion, Grant, or Delivery; and yet they are Objects of Property, to the excluſive Right of appropriating which, Men are clearly entitled by the Common Law, and by every Principle of natural Juſtice.

For, my Lords, upon a Suppoſition that Ideas are produced by a thinking Faculty, *common to all Men*, it becomes a Queſtion whether it is conſonant to the Principles of natural Juſtice, to appropriate that to the excluſive Benefit of *one or a few*, which was deſigned as a common Gift diſtributed to *all*.

If, my Lords, the Notion of a Common Law Right ſhould be reprobated, ſuch Reprobation carried with it an explicit Anſwer to the latter Part of the *firſt* and to the *ſecond* Queſtion: There being no Common Law Right., "*An Author could*
"*not bring his Action againſt any Perſon for publiſhing his literary Compoſition with-*
"*out his Conſent.*"

I conſider, my Lords, an excluſive Appropriation of Literary Works, a Monopoly, againſt every Kind of which the Statute of *James* I. has ſufficiently provided.

Even

Even Monopolies, in some Cases, are allowable, but then the State has taken Care to allow them only *for a convenient Time.*

Previous, my Lords, to the Invention of Printing, the Idea of a Common Law Right, has not been suggested; and subsequent to the Invention of this useful Art, so little Notion had Authors of a Right at Common Law to exclusive Appropriation, that before the Institution of the Stationers Company, they had Recourse to the Legislature for a License, Grant, Patent, or Privilege; after the Institution of the Stationers Company the only Mode thought of to secure the Appropriation of a Literary Composition was, by an Entry in the Records of that Company, and the Person in whose Name the Book was entered, let him come by it how he would, was deemed the Proprietor, the Author never being so much as mentioned on these Occasions.

As to the Cases which, my Lords, the Respondents Counsel have adduced to prove the Sentiments of the Court of *Chancery* in Favour of a Common Law Right, it is observable, That although the Court of *Chancery* had frequently granted Injunctions, it cautiously avoided giving any final Adjudication upon the Matter. An *antecedent Common Law Right* was never hinted at; nor were the Injunctions granted in the Cases cited, at all in point; they had been granted on the Appearance of something fraudulent upon the Face of the Transaction; as in the Case of *Pope* v. *Curl.*

Injunctions, my Lords, do not prove the Chancellor's Opinion upon a Matter of Common Law Right, in Confirmation of which, I will venture an Anecdote. There is a Paper now existing, containing some Notes Lord *Hardwicke* had taken down, which set forth the sole and exclusive Right of an Author at Common Law, to multiply Copies for Sale. In the Margin of which Paper, and opposite to this very Passage, there is in Lord *Hardwicke*'s own Hand Writing, a very large Q. which proves that his Lordship entertained Doubts, respecting the Legality of the Position.

The Council, my Lords, for the Respondents, have slipped over the Case of mechanical Inventions; and they are highly commendable for so doing, as they were well aware how strenuously every Argument drawn from the Case of mechanical Inventions would militate against the Interest of their Clients.

Consider, my Lords, a Book precisely upon the same Footing with any other mechanical Invention. In the Case of mechanic Invention, Ideas are in a manner embodied, so as to render them tangible and visible; a Book is no more than a Transcript of Ideas; and, whether Ideas are rendered cognizable to any of the Senses, by the Means of this or that Art, of this or that Contrivance, is altogether immaterial: Yet every mechanical Invention is common, whilst a Book is contended to be the Object of exclusive Property! So that Mr. (1) *Harrison*, after constructing a Time-Piece, at the Expence of Fifty Years Labour, hath no Method of securing an exclusive Property in that Invention, unless by a Grant from the State; yet, if he was in a few Hours to write a Pamphlet, describing the Properties, the Utility and Construction of his Time-Piece, in such Pamphlet he would have a Right secured by Common Law, though the Pamphlet contained

(1) See *ante* Fol. 19. Note 1.

exactly the ſame Ideas on Paper, that the Time-Piece did in Clock-Work Machinery! The Cloathing is diſſimilar; the Eſſences cloathed are identically the ſame.

The Exactitude, my Lords, of the Reſemblance between a Book and any other mechanical Invention, form various Inſtances of Agreement. There is the ſame Identity of intellectual Subſtance; the ſame ſpiritual Unity. In a mechanic Invention the Corporeation of Parts, the Junction of Powers, tend to produce ſome one End. A literary Compoſition is an Aſſemblage of Ideas ſo judiciouſly arranged, as to enforce ſome one Truth, lay open ſome one Diſcovery, or exhibit ſome one Species of mental Improvement. A mechanic Invention, and a literary Compoſition, exactly agree in Point of Similarity; the one therefore is no more entitled to be the Object of Common Law Property than the other; and as the Common Law is entirely ſilent with reſpect to what is called Literary Property, as antient Uſage is againſt the Suppoſition of ſuch a Property; and as no excluſive Right of appropriating thoſe other Operations of the Mind, which paſs under the Denomination of mechanical Inventions, is veſted in the Inventor by Common Law; for theſe Reaſons, I declare myſelf againſt the Principle of admitting the Author of a Book, any more than the Inventor of a Piece of Mechaniſm, to have a Right at Common Law to the excluſive Appropriation and Sale of the ſame.

I am of Opinion, my Lords, in Anſwer to the *third* Queſtion, that "*if ſuch Action would have lain at Common Law, the ſame is taken away by the Statute of Queen* Anne; *and an Author is precluded by ſuch Statute, from any Remedy, except on the ſaid Statute*;" and in Anſwer to the *fifth* Queſtion, I am of Opinion, that "*this Right is totally impeached, reſtrained, and taken away by the 8th of Queen* Anne," for every Principle of a Common Law Right is effectually exploded, by the Adoption of the Word "*veſt*" in the Title, the Words "*taken the Liberty*" in the Preamble, and the Mode of Expreſſion uſed in the *firſt* Clauſe of the Act, of giving an Author an excluſive Property for fourteen Years, *and no longer*.

I know, my Lords, of no Right the Crown has at Common Law to print what are deemed Crown Copies; ſuch excluſive Right originating only from an Exertion of the Prerogative. Before the Invention of Printing it was proper for the Crown to have Copies of the public Acts taken from the Parliamentary Rolls, to tranſmit to the Sheriffs of the ſeveral Counties; and Printing being no more than an expeditious Art of tranſcribing Copies, the ſame Power, and for pretty much the ſame Ends, continues now to be a Part of the Crown's Prerogative; and as the Crown takes Care to have the Statutes printed for the public Promulgation of the Law, ſo by Virtue of the ſame Authority, Bibles and Common-prayer Books are printed, and the Copies of them thus multiplied for the Service of Religion, which it becomes the chief Magiſtrate to protect. But no Common Law Right is veſted in the Crown of thus printing and multiplying crown Copies. As to the *ſecond* Queſtion, I am of Opinion,

"*If the Author had ſuch Right originally, that the Law took it away upon his printing and publiſhing the literary Compoſition*, and that *any Perſon might reprint and publiſh the ſaid literary Compoſition, for his own Benefit, againſt the Will of the Author.*"

The

Mr. Justice *Nares*.

The historical Nature, my Lords, of the Case hath been so learnedly and fully agitated in the Hearing of the House, that I shall decline entering into it, and rest my Opinion on general Conclusions, deduced from Principles which arise from fair Argument.

I cannot, my Lords, help observing with Mr. *Dunning*, that, as it is admitted on all Hands that an Author hath a beneficial Interest in his own Manuscript before Publication, it is a most extraordinary Circumstance, that he shall lose that beneficial Interest, the very first Moment he attempts to exercise it.

The Statute, my Lords, does not take away the Common Law Remedy, although it gives an additional one, as in the Case of an (1) Action for maliciously suing out a Commission of Bankruptcy, although the Statutes of Bankruptcy have provided an additional Penalty for that Offence by the Bond given to the Chancellor. I am therefore, my Lords, of Opinion, as to the *first* Question,

That "*at Common Law, the Author of any literary Composition, hath the sole Right of printing and publishing the same for Sale, and may bring an Action against any Person, for publishing the same without his Consent.*" As to the *second* Question,

"*If the Author had such Right originally, that the Law did not take it away, upon his printing the said literary Composition, and that no Person might reprint and publish the said literary Composition for his own Benefit, against the Will of the Author*;" as to the *third* Question,

"*If such Action would have laid at Common Law, the same is not taken away by the Statute of Queen* Anne; *nor is an Author precluded by such Statute from any Remedy, except on the Foundation of the said Statute*;" as to the *fourth* Question,

That "*the Author of any literary Composition, and his Assigns, have the sole Right of printing and publishing the same in* PERPETUITY, *by the Common Law*;" and as to the *fifth* Question, I am of Opinion,

That "*this Right is no ways impeached, restrained, or taken away, by the 8th of Queen* Anne.

Mr. Justice *Ashhurst*.

The Claim of Literary Property, my Lords, is warranted by the Principles of natural Justice and solid Reason. Making an Author's intellectual Ideas common, means only to give the Purchaser an Opportunity of using those Ideas, and profiting by them, while they instruct and entertain him; but I cannot conceive that the Vendor, for the Price of Five Shillings, sells the Purchaser a Right to multiply Copies, and so get Five Hundred Pounds.

Literary Property, my Lords, is to be defined and described as well as other Matters, which are tangible. Every Thing is Property that is capable of being known or defined, capable of a separate Enjoyment, and of Value to the Owner. Literary Property falls within the Terms of this Definition. According to the Appellants, if a Man lends his Manuscript to his Friend, and his Friend prints it, or if he loses it, and the Finder prints it, yet an Action would lie (as Mr. Justice *Yeates* (2) admitted) which shews that there was a Property beyond the Materials, the Paper and Print. A Man, by publishing his Book, gives

(1) See the Case of *Chapman* v. *Pickersgill*, in *Wils.* Rep. C. B. 145.
(2) See *Bur.* Lit. Prop. 69.

the Public nothing more than the Use of it. A Man may give the Public a Highway through his Field, and if there is a Mine under that Highway, it is nevertheless his Property. It hath been said, that when the Bird is once out of the Hand, it becomes common, and the Property of whoever catches it; this is not wholly true, for there is a Case upon the Law Books, where a Hawk with Bells about its Neck had flown away; a Person detained it, and an Action was brought at Common Law against the Person who did detain it; a Book, with an Author's Name to it is the Hawk, with the Bells about its Neck, and an Action might be brought against whoever pirated it.

Since the Statute of Monopolies, my Lords, no Questions can exist about mechanical Inventions. Manufactures were at a very low Ebb till Queen *Elizabeth*'s Time. In the Reign of *James* the *First*, the Statute of Monopolies was passed; since that Act no Inventor can maintain an Action without a Patent. The Policy of Kingdoms, and Preservation of Trade, exclude them. The Appellants are contending for the Right of Printing; but the Right of exercising a Trade with another Man's Materials, cannot be allowed, either by Reason, or natural Justice. A Miller may grind Corn, and a Carpenter may build a House; but the first is not warranted in grinding any Corn but his own; nor the Carpenter in building a House with another Man's Wood. The Cases of *Eyre* v. *Walker*, and *Tonson* v. *Walker*, happened since the Statute.

With Regard, my Lords, to the Question; Its being capable of Perpetuity, few Subjects are so. Even Land, the most tangible Species of Property, may be washed away by the Sea, and therefore may be rendered incapable of being perpetually enjoyed. I am however of Opinion, that the Respondents are entitled to as full an Enjoyment, as the Nature of the Case will allow.

As soon as Mr. Justice Ashhurst *had concluded his Opinion, he informed the House, that Mr. Justice* Blackstone *being confined with the Gout, had sent by him his Opinion in writing, which he had desired him to beg Leave of the House to permit him to read, which being granted, he accordingly did. As Mr. Justice* (1) Blackstone *answered in general Terms the* five *Questions, in like Manner, as his Brethren* Nares *and* Ashhurst, *we decline the Repetition; and for Judge* Blackstone's read, *presume to substitute his* printed *Opinion, on this Question of* LETTERED (2) *Property.*

Mr. Justice Blackstone.

" THIS my Lords, is a Species of Property, which, being grounded on " Labor and Invention, is more properly reducible to the Head of Occupancy " than any other; since the Right of Occupancy itself is supposed by Mr. (3) *Locke*, " and many (4) others, to be founded on the personal Labor of the Occupant; and " this is the Right, which an Author may be supposed to have in his own original " literary Compositions: so that no other Person, without his Leave, may publish " or make Profit of the Copies. When a Man by the Exertion of his rational " Powers has produced an original Work, he has clearly a Right to dispose of

(1) It is observable, that the Opinion of this consummate Lawyer, and able Judge, on the two most important Questions, that were ever agitated in this Country, touching *constitutional* and *legal* Polity; the one affecting the Right of Election, and the other that of private Property; hath been unanimously exploded, in both Houses of Parliament.

(2) See our Preface.

(3) On Govern. Part 2. Chap. 5.

(4) See 2 *Black.* Com. Chap. 1. P. 8.

" that

" that identical Work as he pleases, and any Attempt to take it from him, or vary
" the Dispofion he has made of it, is an Invasion of his Right of Property. Now
" the Identity of a literary Composition consists entirely in the *Sentiment* and the
" *Language*; the same Conceptions, cloathed in the same Words, must necessarily
" be the same Composition: and whatever Method be taken of conveying that
" Composition, to the Ear, or to the Eye, of another, by Recital, by Writing, or
" by Printing, in any Number of Copies, at any Period of Time; it is always the
" identical Work of the Author, which is so conveyed; and no other Man can
" have a Right to convey or transfer it, without his Consent, either tacitly or
" expressly given. This Consent may perhaps be tacitly given, when an Author
" permits his Work to be published, without any Reserve of Right, and without
" stamping on it any Marks of Ownership: it is then a Present to the Public, like
" the Building of a Church, or the laying out a new Highway: but in Case of a
" Bargain for a single Impression, or a Sale or Gift of the Copy Right, the Rever-
" sion is plainly continued in the original Proprietor, or the whole Property trans-
" ferred to another.

" The *Roman* Law, my Lords, adjudged, that if one Man writes any Thing,
" though never so elegantly, on the Paper or Parchment of another, the Writing
" should belong to the original Owner of the Materials, on which it was written (1):
" meaning certainly nothing more thereby, than the mere mechanical Operation of
" writing, for which it directed the Scribes to receive a Satisfaction; especially as,
" in Works of Genius and Invention, such as a Picture painted on another Man's
" Canvas, the same (2) Law gave the Canvas to the Painter. We find no other
" Mention in the civil Law of any Property in the Works of the Understanding;
" though the Sale of literary Copies, for the Purposes of Recital or Multiplication,
" is certainly as ancient as the Times of (3) *Terrence*, (4) *Martial*, and (5) *Statius*.
" Neither with us in *England* hath there been any direct Determination upon the
" Right of Authors, at the Common Law; but much may be gathered from the
" frequent Injunctions of the Court of *Chancery*, prohibiting the Invasion of this
" Property: especially, where, either the Injunctions have been (6) *perpetual*, or
" have related to unpublished Manuscripts (6) or to such ancient Books, as were not
" within the Provisions of the Statute of Queen (6) *Anne*. Much may also be
" collected, from the several legislative Recognitions of (7) Copy Rights; and
" from the adjudged Cases at Common Law, wherein the Crown hath been con-
" sidered as invested with certain prerogative (8) Copy Rights; for if the Crown

(1) " *If* Titus *should write a Poem on History, on your Paper or Parchment, not* Titus, *but you would be considered as the Owner thereof.*" Inst. 2. 1. 33.

(2) Inst. 2. 1. 3[illegible].

(3) Prol. in *Eunuch*. 20.

(4) Epigr. I. 67. IV. 72. XIII. 3. XIV. 194.

(5) Juv. VII. 83.

(6) See Case of Appellants. Fol. 8, 9.

(7) A. D. 1649. Chap. 60. *Scobel*. 92. 13 & 14 *Car*. II. Chap. 33. 10 *An*. Chap. 19. Sect. 112. 5 Geo. III. Chap. 12. Sect. 26.

(8) *Cart*. Rep. 89. Mod. Rep. 257. 2 *Bur*. Rep. 661.

" is

"is capable of an exclusive Right, in any one Book, the Subject seems also capa-
"ble of having the same Right, in another!" 2 *Black.* Com. Chap. 26. Sect. 8. P. 405, 406, 407. see *Bur.* Lit. Prop. 13, 63.

Mr. Justice [illegible]

The Copy Right of Authors, my Lords, is an Estate personal, it is assignable, and every Man conceives what it means; I declare it as my Opinion, that an Author hath an indisputable Power and Dominion over his Manuscript; that this Power is not alienated, when the Manuscript is printed and published; that the Author hath an exclusive Right of multiplying Copies, according to the Common Law, which is founded on Reason and Truth. This Claim of Right began with Printing, and for this especial Reason, because Copies could not be easily multiplied but by the Press; and therefore, that from which no Profit could be got, was hardly a Property.

In the Course of the Arguments, this Claim hath been called by the odious Name of a Monopoly. This is a popular Argument; but *Argumenta ad Populum* are not always well founded; and upon proper Investigation, this appears to be more specious than real.

Copy Right does exist, my Lords, independent of Patents, Privileges, Star-chamber Decrees, or the Statute of Queen *Anne.* Innumerable Instances occur to prove this; but more particularly the Case of *Tilotson's* Sermons, for the Copy Right of which the Arch-bishop's Family received twenty five hundred Pounds, after the Expiration of the licensing Act, and previous to the Act of Queen *Anne*; my Opinion upon the *first*, *second*, and *fourth* Questions, is, that at Common Law an Author hath the sole Right of first printing and publishing the same for Sale, and might bring an Action against any Person who printed, published, and sold the same without his Consent; and likewise that, after Publication, an Author or his Assigns, hath an exclusive Right in Perpetuity of multiplying Copies.

Which Right, my Lords, the Statute of Queen *Anne* does not take away. It is an Act very inaccurately penned, but nevertheless it conveys to my Mind no Idea of the Legislature's entertaining an Opinion, that at the Time of passing it, there was no Common Law Right; the Word "*vesting*" appearing in the Title hath given rise to such an Idea, but the Preamble contradicts it in the fullest Manner; the Words of it are, "Whereas certain Printers and Booksellers have taken the Liberty of printing and reprinting, &c. &c." the Phraseology of this Sentence plainly proves, that a known Right previous to that Statute, existed; the Legislature would not have termed the Exercise of what was common to all, *taking a Liberty*, had they not understood that a Right in Perpetuity existed at Common Law; the Words of the Preamble to the Bill would probably have been, "Whereas certain Printers and Booksellers claim a Right of printing, &c." And the Intention of the Word *printing* shews that the Idea prevailed that an Author's Property went farther than the first Publication.

The Universality of the saving Clause, my Lords, convinces me that the Right at Common Law, which I have supposed to have existed antecedent to that Act, is left untouched by it. It is not a particular *Salvo* for the Universities, and the Holders of Copy-right by Patent, but it is general, mentioning the Words "*all Persons.*"

In

In Answer, my Lords, to the *third* and *fifth* Questions, I am of Opinion, that an Action at Common Law is not any ways impeached, restrained, or taken away by the Statute of Queen *Anne*; nor is the Author precluded by such Statute from any Remedy, except on the Foundation of the said Statute, and the Terms and Conditions prescribed thereby (1).

Mr. Justice *Aston*.

I beg Leave, my Lords, to read the Sentiments of a learned (2) Judge, in Favour of Literary Property, as reported by an able (3) Lawyer: I agree with the three Judges who have spoke before me, that it is a Property, and that it belongs to an Author independent of any statutary Security. It is not necessary, for any Man to advert either to the *Grecians* or *Romans* to discover the Principles of the Common Law of *England*. Every Country hath some certain general Rules which govern its Law; our Common Law hath its Foundation in private Justice, moral Fitness, and public Convenience; the natural Rights of every Subject are protected by it, and there does not exist an Argument amounting to Conviction, that an Author hath not a natural Right to the Produce of his mental Labor. If this Right originally existed, what but an Act of his own can take it away? By Publication he only exercises his Power over it in one Sense; when one Book is sold it never can be thought that the Purchaser hath possessed himself of that Property which the Author held before he published his Work. A real Abandonment on the Part of the first Owner must take Place, before his original Right becomes common.

In all Abandonments, Judge *Yates* hath defined, my Lords, that two Circumstances are necessary; an actual relinquishing the Possession, and an Intention to relinquish it; in the present Case neither can be proved. Many Manuscripts have not been committed to the Press till Years after they were written, the Possession of them for a Century does not invalidate the Claim of the Author or his Assigns. With Regard to mechanical Instruments, because the Act against Monopolies hath rendered it necessary for the Inventors of them to seek Security under a Patent, it can be no Argument that in Literary Property there should be no Common Law Right. I think it would be more liberal to conclude, that previous to the Monopoly Statute, there existed a Common Law Right, equally to the Inventor of a Machine, as to the Author of a Book.

A Variety of Arguments might be, my Lords, drawn from the Nature of the Property, and the Construction which would rationally be put upon the Act of Publication, but to me they seem superfluous; I am therefore of Opinion in the affirmative, as to the *first*, *second*, and *fourth* Questions.

With Regard to the Statute of Queen *Anne*, my Lords, it is no more than a temporary Security, given by the Legislature to the Author, enabling him to recover Penalties, and bring a Matter of Complaint against any Person who printed upon him to a more certain Issue than by an Action at Common Law. It is an Act passed for the Encouragement of learned Men, and being so termed in its Title, it

(1) See the Judge's Opinion more at large, in *Bur.* Lit. Prop. 9.
(2) Lord *Mansfield*, which see in *Bur.* Lit. Prop. 112.
(3) Sir *James Burrow*.

is a sufficient Proof, that it is no Bar to the Common Law Right, which existed previous to its being enacted. It is evident from the wording of it, that it means to give an additional Security to a Right, which they who passed the Act knew existed. Besides, the Manner of passing it is in Favour of this Idea. I have seen the original Bill as presented to the Committee appointed to bring it in, and it then had a long flourishing Preamble, which the Committee struck out. Those who were sanguine for the Petitioners, begged a Perpetuity by Statute. The Enemies to them at first refused to grant any statutary Security. The Bill gave particular Trouble in passing; there were several Conferences between the two Houses upon it; and the very Day it passed, it was so backward, that the Queen did not come to the House till three in the Afternoon. Besides, the saving Clause is clearly a *Salvo* to the Common Law Right. The Idea is as forcibly expressed, as Words can desire.

The Injunctions granted by the Court of *Chancery*, the Multitude of Circumstances deducible in Favour of *Literary Property* from the natural Rights of the Subject, the immediate Nature of the Property, the Idea uniformly entertained of its Existence from the Era of the Commencement of Printing to the present Day; as well as my Construction of the Statute of Queen *Anne*, oblige me in Answer to the *third* and *fifth* Questions, to declare my Opinion, that an Action at Common Law is not any Ways impeached, restrained, or taken away by the 8th of Queen *Anne*. (1)

Mr. Baron *Perrot*.

The Argument for the Existence of a Common Law Right, and the Definition of Literary Property, as chattel Property, is, my Lords, in my Idea exceedingly ill-founded and absurd. If Literary Property is a Chattel, then upon the Death of the Possessor of a Manuscript, any simple contract Creditor may oblige his Family or Assigns to give it up, and suffer him to print it. An Author certainly hath a Right to his Manuscript; he may line his Trunk with it, or he may print it. After Publication, any Man may do the same; your Lordships may turn Printers if you chuse, and print it. From the Patents, the Privileges, the Star-chamber Decrees, and the licensing Acts, it is evident that in those Days no Idea was entertained of an Author's having any Claim to the exclusive Right of printing, when he had once published: If a Manuscript is surreptitiously obtained, an Action at Common Law will certainly lie for the corporeal Part of it, the Paper. So if a Friend to whom it is lent, or a Person who finds it, multiplies Copies, having surrendered the original Manuscript, he hath surrendered all that the Author hath any Common Law Right to claim.

The Right under Patents and Privileges was, my Lords, a Right petitioned for by Printers, without any thought of an Author's entertaining an Idea, that he had any Claim. As to the Stationers Company, surely we are not to look for the Common Law among them. All their Rules and Orders are for the Security of such peculiar Works, as their own Members had been wont to print. An Inventor of a Machine or mechanical Instrument, like an Author, gives his Ideas to the Public. Previous to Publication, he possesses the *Jus utendi, fruendi, et disponendi*, in as full an Extent

(1) See this Judge's Opinion more at large, in *Bur.* Lit. Prop. 40.

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as the Writer of a Book; and yet it never was heard that an Inventor, when he sold one of his Machines, or Instruments, thought the Purchaser, if he chose it, had not a Right to make another after its Model. The Right of exclusively making any Mechanical Invention is taken away from the Author or Inventor by the Act against Monopolies of the 21st of *James* the First. Which Act saves prerogative Copy Rights, and which would have mentioned what is now termed Literary Property, had an Idea existed that there was a Common Law Right for an Author or his Assigns exclusively to multiply Copies. The Argument, that when a Book is published and sold, there is an implied Contract between the Author and Purchaser cannot be maintained. The Purchaser buys the Paper and Print, the corporeal Part of his Purchase; and he buys a Right to use the Ideas, the incorporeal Part of it.

The Doctorine, my Lords, of implied Contracts will not hold, as it is improbable. The Author sustains a Loss but no Injury, from another's printing his Copy. *Damnum sine injuria* is an established Maxim of Law. As another by multiplying Copies reap Profit, the original Author sustains a Loss, but he sustains no Injury. To be injured a Man must loose his Right; that Right must be founded in Law; and where the Law gives no Remedy, an Author can claim no Right; the Matter is common to all. It hath been said, that a Declaration hath been filed on an Action at Common Law, for the Invasion of Copy Right; but it hath not been found, although every Law book hath been ransacked for the Purpose, that a Trial was ever had at Common Law. An incontrovertible Proof that there is not a Lawyer in *Westminster* Hall who suppose that there exist any Right at Common Law. The present Claim is neither more nor less than a Claim for a Monopoly, and all Monopolies are odious to the Common Law.

My Lords, the Arguments of the Council, and the Opinions of those on the other Side of the Question are more ingenious than convincing. I answer therefore the First, Second and Fourth Questions in the Negative, being of Opinion that there never existed a Common Law Right, and that an Author hath no Claim to his Manuscript after Publication.

Respecting the Statute of Queen *Anne*, my Lords, I am perfectly convinced that it is the only Security that Authors or Booksellers have. That it gives a Right for fourteen Years to the Holders of Copies, and after that Period the Right reverts to the Authors for fourteen Years longer. I declare that all the metaphysical Subtlety or Definition which the ablest Logician can muster, cannot give any other Sense to the Words "for the Encouragment of Learning, and for vesting a Right in Authors," in the Title to the Act, than a Creation of a Property, not a further Security for one. The Preamble and express Meaning of every Clause of the Act afford strong Arguments in Favour of the Opinion I am laying down. The Words, "*and no longer*," are clear and conclusive; out of the Power of Argument to surmount. They shew that the Legislature thought it a great Favour to grant any, even a limited Security, and that they might not be misunderstood, they have expressed their Idea in the fullest Terms. After these Words it is in the highest Degree absurd to contend, that any saving Clause can be so construed as to affect, and indeed destroy the most substantial Meaning of the enacting Part of the Act. The saving Clause is evidently a *Salvo* for those who hold a Patent-right to Copies; and as it

would heve been tedious to have enumerated all, the Universities are mentioned, as being the greatest Holders under that Kind of Description.

In order, my Lords, to enforce this Observation, and the Conclusion I draw from the Words, *and no longer*, in the enacting Clause, I beg Leave to cite the Case of an Attainder, in the Reign of *Edward* the VIth. being taken off by an Act of Parliament many Years afterwards, which Act, in the enacting Clause, took off the Attainder in the fullest and most entire Manner, and afterwards contained a saving Clause for certain Leases granted by the King, who passed the Bill of Attainder. One of the Holders of the Leases brought an Action against the Family relieved from the Attainder, and grounded his Claim upon the saving Clause; but the Court adjudged against him, for that the Attainder being entirely taken off by the enacting Clause, it was idle to contend that any saving Clause could impeach it, or secure a Right held under the Idea of the Attainder (1).

With regard, my Lords, to the Injunctions cited on the Occasion, the Court of *Chancery* must have uniformly mistaken the Law, if they had not granted them under the Idea of the Statute.

The Act itself, my Lords, gives no more Remedy with its Penalties, than it does without them. An Author in the first Place, is allowed to damask all the Books pirated upon him; by damasking I understand, turn to waste Paper and line Trunks, which Linings are figured like Damask. What remedy is this? none in the world. Then again, a Penny per Book is to be recovered, half of which goes to the Informer and half to the King; here therefore the Author gets nothing. The Statute affords him Grounds for a Remedy in Equity. The Court of *Chancery*, by an Injunction and a Decree, not only stops the Sale of the pirated Copies, but also obliges the Pirate to account for what he hath sold. This is a Satisfaction; this is an actual and an effectual Remedy. To suppose that the saving Clause maintains a Perpetuity of Property, is to suppose that the Act grants an Author fourteen Years *and no longer*, except *for ever*; which is so barefaced, so egregious an Absurdity, that no Man of Sense can be the Dupe of it. That the Court of *Chancery* never dreamt of a Common Law Right, I prove by a Case between the Stamp Office and a News-paper Printer. *Rayner*, a Printer, got into the *Fleet*, and there printed News-papers without Stamps; the Stamp Office prayed an Injunction, the Court refused it, and told them the Statute having enacted, that a Penalty was to be paid on Conviction, they must prosecute to Conviction under the Statute, and they had a Right to the Penalty, but they could not, upon the Principles of Common Law, prevent the Printer from continuing his Trade. This proves that Statute Laws are unnecessary where Remedies can be had at Common Law.

The Printers who claim the Right of Perpetuity, deserve severe Animadversion, Instances are innumerable, all tending to corroborate any Opinion that there was no Right at Common Law previous to the 8th of Queen *Anne*, and that if there was, that Statute entirely and effectually took it away.

Mr. Justice Gould.

I agree, my Lords, that an Author hath a Right at Common Law to his Manuscript, previous to Publication. With regard to the Statute of Queen *Anne*, and in answer to the *third* and *fifth* Questions, I conceive the Act entirely takes away any previous Right an Author might have, and that he is precluded thereby

(1) See *Walsingham's* Case, in *Plowd.* Com. 565. and *Altonwoods* Case, in 1 *Co.* Rep. 47. *a.*

from

from any Remedy, except on the Foundation of the said Statute, and the Terms and Conditions prescribed thereby.

Mr. Baron Adams.

The Nature, my Lords, of Patents, Privileges, and Grants of the Crown, respecting Books, have been so very learnedly traced, and that too to a very early Period, and such a Variety of Instances have been cited, all incontestably proving, that till of late Years no Idea was entertained, that a Common Law Right existed, respecting literary Property. For these Reasons I decline entering into a minute Investigation of the said Patents: Observing on the Cases, I am clearly of Opinion that, previous to the Statute of Queen *Anne*, Authors and Printers had no Security but by Patents, and therefore I answer all the Questions in the Negative.

Ld. Chief Baron Smythe.

In answer, my Lords, to the *first*, *second*, and *fourth* Questions, the Cases prove, and it is allowed, that Literary Property is Property previous to Publication, and that Publication cannot alter it; for that Publication neither makes it a Sale, a Gift, a Forfeiture, nor an Abandonment, which are the only Ways that a Person can part with his Property. When a Man publishes his Manuscript, he sells to one Person only, one Book, and the Use of that one Book, without any Design of allowing the Purchaser to multiply Copies: If he gives a Book away, he gives it under the same Restrictions; a Forfeiture always implies a Crime, and then the Right of Property becomes vested in the Crown; an Abandonment cannot be without an Intent of relinquishing his Right; and such Intent is not deducible from a Publication of the Ideas written by an Author. In the Case of *Pope* v *Curl*, the Letters were the Property of those to whom they were sent; but the Ideas remained as Matter of Right vested in the Sender. In the Case of Lord *Shaftesbury*'s Manuscript, the same Deduction followed; for Mr. *Gwynne* sold to *Shebbeare* what he had no Authority from the Author, (Lord *Shaftesbury*) or his Assigns, to dispose of. There was no act of Dishonesty on the Part of *Shebbeare* although the Manuscript was surreptitiously obtained, and the Family had a Remedy.

Some Lawyers, my Lords, yet alive, remember the Case of Lord Chief Baron *Gilbert's* Manuscripts, which he devised to Baron *Clarke*; the Baron never published them, but a Hackney Writer, whom he employed, took an Opportunity of copying them, and those stolen Copies were committed to the Press. The same Argument lay against pirating after, as before Publication.

It hath, my Lords, been mentioned, that a Man made his landed Estate common, by giving a Part of it to the Highway; but it surely will not be contended, that although he gave a Part of his Estate for such a Purpose, that any Person but himself had a Right to the Trees on it, or the Mines beneath it. The Arguments in the Case of *Basket* and the University of *Cambridge*, is grounded on these Principles. This Case is reported in *Burn*'s (1) Ecclesiastical Law, and Sir *James* (2) *Burrows*'s Reports.

The Cases of *Eyre* v *Walker*, and others, which have been mentioned, both at the Bar, and by the Judges, were all after the *Twenty-one* Years were expired, and which, Records being obtained, speak in Favour of the Common Law Right:

(1.) 8vo. Edit. Vol. I. P. 453. (2) 2 *Bur*. Rep. 66.

 and

and the Case of the Sessions (1) Paper corroborates my Opinion. In order to alarm your Lordship's Passions, two very odious Names have been thrown out, "*Perpetuity*" and *Monopoly*;" neither of which, I think, applies to the present Claim; the first being entirely out of the Question, and the latter Lord *Coke* has defined to mean a Grant from the Crown, to vend any single Matter.

As to mechanical Inventions, I do not know, my Lords, that previous to the Act of 21 *James* I. an Action would not lie against the Person who pirated an Invention. An Orrery none but an Astronomer can make; and he may fashion a second as soon as he hath seen a first: It is then in a Degree an original Work. Whereas, in multiplying an Author's Copy, his Name as well as his Ideas are stolen, and it is passed upon the World as the Work of the original Author, although he cannot possibly amend any Errors which may have escaped in his first Edition, nor cancel any Part, which subsequent to the first Publication, appears to be improper. In answer, my Lords, to the *first*, *second*, and *fourth* Questions in the Affirmative,

The Statute of Queen *Anne*, my Lords, I consider as a Compromise between Authors and Printers, contending for a Perpetuity, and those who deny them any Statute Right. There are general Rules for the Construction of all Statutes; one is that it shall never be interpreted so as to be unreasonable, another, that no Clause can be construed so as to make it inconsistent with any former Clause; it shall neither be repugnant, nor inconsistent. With regard to this Statute, we must not reject the saving Clause, nor the Motive for which it was made, viz. the Advancement of Learning. The Word *vesting*, if it can be tortured so as to tell against the present Claim, is sufficiently qualified and done away by the Word *secure*, which occurs in the enacting Clause, and which plainly implies a Security for something pre-existing. The Preamble gives full Authority to this Construction, the Word *re-printing* particularly implying a Right after the first Publication; and the word *Purchaser*, (which is one of the Parties mentioned by the Act as being secured in his Property) indicates most amply a previous Right, for Nobody can be thought to purchase what another has not a Right to sell. The Satute affords the Holders of Copy-right a more efficacious Remedy than the Common Law, but it by no Means impeaches, restrains, or takes away the Common Law Right. I therefore answer the *third* and *fifth* Questions in the Negative.

Lord Chief Justice *De Grey*. With respect to the first Question, my Lords, there can be no Doubt, that an Author has the sole Right to dispose of his Manuscript as he thinks proper; it is his Property, and till he parts with it, he can maintain an Action of Trover, Trespass, or upon the Case against any Man who shall convert that Property to his own Use; but the Right now claimed at the Bar, is not a Title to the Manuscript, but to something, after the Owner has parted with, or published his Manuscript; to some Interest in Right of Authorship, to more than the Materials or Manuscript on which his Thoughts are displayed, which is termed Literary Property, or an exclusive Privilege of multiplying Copies of the Manuscript or Book, which Right is the Subject of the second Question proposed to us.

(1) See the Cause of *Manby* & *al.* v *Owen* & *al.* in *Bur.* Lit. Prop. 33, 128.

Now

Now if there exists any incorporeal Right or Property, my Lords, in the Author detached from his Manuscript, no Act of Publication can destroy it. Can then such Right or Property exist at all? Does such a Right come within the Knowledge or Reach of the Common Law? In answer to the first of these Queries, I acknowledge, though this claim of Property is abstract and ideal, novel and refined, it is yet intelligible, and may as easily be made to exist for ever as for a Term of Years; but in order to know whether it is protected by Law, a preliminary Question is necessary: Whether it has been so determined in its Favour by the great and learned Men who have been my Predecessors in a regular Course of Judicature; it is not for me to shake a respectable series of Decisions, and unhinge the Foundations of an established Right, by any *a priori* Reasoning of my own; but after investigating the Decisions of the Courts of Common Law, I can find no such determinations. What is Common Law now, must have been so three hundred Years ago, when Printing was invented. No Traces of such a Claim are to be met with prior to the Restoration. Very few Cases of this Kind happened in *Charles* the *Second's* Time, or before the licensing Act, and those few were determined upon the prerogative Right of the Crown. The executive power of the Crown drew after it this prerogative Right, which extended to all Acts of Parliaments, Matters of Religion, and Acts of State. The Case of *Basket* and the University of *Cambrige*, which was a late one of the same Kind, appeared upon the Pleadings to be a Question arising between two Parties who claimed under concurrent and inconsistent Grants of the Crown. My late honourable and learned Friend (Mr. (1) *Yorke*) who argued that Case, endeavoured to shew that his Client's Right might arise from the Power of the Crown, and to llustrate his Argument, said, it might perhaps be "Property founded on Prerogative,"—a Language, however allowable for Council, not very admissible by, or intelligible to a Judge, but the Certificate in the above Cause does not say a Word of Property, and indeed if such a Claim as that had been founded on Property, every one would have as good a Right to publish Abridgments of the Statutes, as of any other Book.

Lord *Northington*, my Lords, granted Injunctions on behalf of Publications which he considered as Matters of State, but left such Works as "The Whole Duty of Man," to their common Remedy at Law. When Works of Literature, encouraged by the Facility of Printing, began to spread, we find the Cases multiply. Of these, however, I lay entirely out of the Question, all those which appear to be Cases between rival Patentees of the Crown; all those relating to the Stationers Company; all those concerning Religion, Law, or the State; and all unpublished Manuscripts.

I shall premise too, my Lords, before I examine the Cases which happened after the Statute, that I am of Opinion, that the Statute gives Authors and their Assigns, a general Right not connected with the Penalty, and that the statutable Right falls under the Protection of a Court of Equity; and may claim the Benefit of an Injunction. To obtain such an Injunction, it is by no means necessary that the Plaintiff should make out a clear indisputable Title. It may be granted on a reasonable

(1) *Ostendent Terris hunc tantum Fata, neque ultra esse sinent.* Virg.

Pretence,

Pretence, and a doubtful Right, before the Hearing of the Caufe; nor is it an Objection that the Party applying for it has a Remedy at Law. No Bill for an Injunction is to be found before the Statute.

The Caufes, my Lords, which have come before the Court of *Chancery*, fince the Statute, I find to be 17 in Number; of thefe, eight were founded on the Statute Right: in two or three, the Queftion was, whether the Book was a fair Abridgement? and all the Reft were Injunctions granted *ex Parte*, upon filing the Bill, with an Affidavit annexed. In thefe Cafes the Defendant is not fo much as heard, and can I imagine that fo many illuftrious Men who prefided in the Court of *Chancery*, would, without a fingle Argument, have determined fo great and copious a Queftion, and which has taken up fo much of your Lordfhips Time? In fact, none of them wifhed to have it faid, he had formed any Opinion on the Subject.

In the famous Cafe of *Tonfon* and *Walker*, my Lords, of which I have an accurate Note of my own taking, Lord *Hardwicke* faid, before the Defendant's Council began to argue, "I am inclined to fend a Cafe to the Judges, for I doubt whether the Matter has been judicially determined; but wifh to hear what the Defendant fays as to Dr. *Newton's* Notes, however I may determine the general Queftion, either upon the Common Law or the Statute." The Mafter afterwards reported the Variations between the two Books to be colourable and illufory only, and therefore the Injunction was made perpetual. Since that Time during the laft twenty Years, or more, the main Queftion has been fluctuating, and in Agitation.

From my own Experience at the Bar, my Lords, I know that the fucceffive Chancellors and Mafters of the Rolls, Lord *Northington*, Lord *Camden*, Sir *Thomas Clarke*, &c. have all looked upon the Cafe as undetermined, it may now therefore be fairly treated as a new Queftion, and indeed it has been argued as fuch upon general Principles. Let us confider what Weight thofe Principles have which are laid down as the Foundation of this new Species of Property; I have heard but of one, namely, that fuch a Claim is confiftent with the moral Fitnefs of Things. This Idea of moral Fitnefs is indeed an amiable Principle, and one cannot help wifhing all Claims derived from fo pure a Source might receive all poffible Encouragement; but this Principle is no univerfal Rule of Law, nor can it be made to apply in all Cafes. Beautiful as it may be in Theory, to reduce it into the Practice and Execution of Common Law, would create intollerable Confufion; it would make Laws vain, and Judges arbitrary; nor is it poffible to fupport the Refpondents Claim upon thefe Principles and not allow their Operation, in a Variety of other Cafes, where it is confeffed on all Hands they cannot be allowed.

Abridgements of Books, my Lords, Tranflations, Notes, as effectually deprive the original Author of the Fruit of his Labours as direct particular Copies, yet they are allowable. The Compofers of Mufic, the Engravers of Copper Plates, the Inventors of Machines, are all excluded from the Privilege now contended for; but why, if an equitable and moral Right is to be the fole Foundation of it? their Genius, their Study, their Labour, their Originality is as great as an Author's, their Inventions are as much prejudiced by Copyifts, and their Claim in my Opinion ftands exactly on the fame Footing; a nice and fubtle Inveftigation may perhaps find out fome little logical or mechanical Differences, but no folid Diftinction in the rule of Property that applies to them can be found.—If fuch a

perpetual

perpetual Property remains in an Author, and his Right continues after Publication, I cannot conceive what ſhould hinder him from the full Exerciſe of that Right in what Manner he pleaſes; he may ſet the moſt extravagant Price he will upon the firſt Impreſſion, and refuſe to print a ſecond when that is ſold. If he has an abſolute Controul over his Ideas when publiſhed, as before, he may recal them, deſtroy them, extinguiſh them, and deprive the World of the Uſe of them ever after; his forbearing to reprint is no Evidence of his Conſent to abandon his Property, and leave it as a Derilect to the Public.

But it is ſaid, my Lords, that the Sale of a printed Copy is a qualified or conditional Sale, and that the Purchaſer may make all the Uſes he pleaſes of his Book, except that one of re-printing it; but where is the Evidence of this extraordinary Bargain? or where the Analogy of Law to ſupport the Suppoſition? In all other Caſes of Purchaſe, Payment transfers the whole and abſolute Property to the Buyer: there is no Inſtance where a legal Right is otherwiſe transferred by Sale, or an Example of ſuch a ſpeculative Right remaining in the Seller; it is a new and metaphyſical Refinement upon the Law; and Laws, like ſome Manufactures, may be drawn ſo fine as at laſt to loſe their Strength with their Solidity. —When Printing was firſt introduced, Cardinal *Wolſey* warned King *Henry* VIII. to be cautious how he encouraged it, as a Matter which might be dangerous to the State. The Event however did not prove it ſo, and therefore the Statute of the 21ſt of *James* I. excepted it, as a reaſonable and allowable Monopoly.

The ſubſequent licenſing Act, my Lords, gave only an adventitious Right; and thus it reſted till the Statute of Queen *Anne*. The ſtatute certainly recognizes no Common Law Right, *hinc illæ lachrymæ!* Nor can I ſuppoſe this Omiſſion happened through Ignorance or Inadvertence, when I ſee ſuch great Law Names as *Holt*, *Cooper*, *Harcourt*, *Somers*, &c. in the Liſt of that Parliament. This Act adopts the Language of the old Privileges in Terms, 14 Years had been the Term before granted to Inventors, a Specification of the Work too, as in the Caſe of Machines, was preſcribed; nor do I recollect an Inſtance where a Statute gives ſuch a temporary Remedy as is here granted in Aid of an abſolute Common Law Right.

If ſuch a Right, my Lords, exiſted at Common Law, and it remained unimpeached by that Statute, why that Anxiety in Authors and Bookſellers afterwards to obtain another Sanction for their Property? Whence thoſe different Applications to Parliament, in the Year 1735, 1738, 1739, for a longer Term of Years, or for Life in this Kind of Property, and afterwards to get an Act to prohibit the Liberty of printing Books in foreign Kingdoms, and ſending them back again? The Truth is, the Idea of a Common Law Right in Perpetuity, was not taken up till after that Failure in procuring a new Statute for an Enlargement of the Term; if (ſay the Parties concerned) the Legiſlature will not do it for us, we will do it without their Aſſiſtance, and then we begin to hear of this new Doctrine, the Common Law Right, which, upon the whole, I am of Opinion, cannot be ſupported upon any Rules or Principles of the Common Law of this Kingdom. I therefore, my Lords, anſwer the *firſt*, *third*, and *fifth* Queſtions in the Affirmative; and the *ſecond* and *fourth* in the Negative.

THE

THE SPEECHES OF THE LORDS.

Lord Camden. AFTER, my Lords, what the Lord Chief Justice hath so ably enforced, there will be little Occasion for me to trouble your Lordships; nor will the present State of my Health, and the Weakness of my Voice, allow me to exert myself, were I ever so much inclined; but the Nature of my Profession, and the Duty I owe to this House, will not suffer me to remain silent, when so important a Question is to be determined. The fair Ground of the Argument has been very truly stated to you by the Lord Chief Justice; I hope what was Yesterday so learnedly told your Lordships, will remain deeply impressed on your Minds.

The Arguments, my Lords, attempted to be maintained on the Side of the Respondents are founded on Patents, Privileges, Star-chamber Decrees, and the Bye Laws of the Stationers Company; all of them the Effects of the grossest Tyranny and Usurpation; the very last Places in which I should have dreamt of finding the least Trace of the Common Law of this Kingdom: and yet, by a Variety of subtle Reasoning and metaphysical Refinements, have they endeavoured to squeeze out the Spirit of the Common Law from Premises, in which it could not possibly have Existence.

They began, my Lords, with their pretended Precedents and Authorities, which they endeavoured to model in such a Manner, as to extract from them something like a Common Law Principle, upon which their Argument might rest. I shall invert the Order, and first of all lay out of my Way the whole Bede-role of Citations and Precedents which they have produced; that heterogeneous Heap of Rubbish, which is only calculated to confound your Lordships, and mislead the Argument. After the first Invention of Printing, the Art continued free for about fifty Years; I mean to lay no Stress upon this; I mention it only historically, not argumentatively; for as the Use of it was little known, and not very extensive, its want of Importance might protect it from Invasion; but as soon as its Effects in Politics and Religion were felt, all the crowned Heads in *Europe* at once seized on it, and appropriated it to themselves. Certain it is, that in *England*, the Crown claimed both the Power of licensing what should be printed, and the Monopoly of Printing. Two Licenses were granted to those who petitioned for them. An Author not only was obliged to sue for a Licence to print at all, but he was also obliged to sue for a second Licence that he might print his own Work.

When the King, my Lords, had once claimed the Right of Printing, he secured that Right by Patents and by Charters. Still further to secure his Monopoly, he combined the Printers, and formed them into a Company, then called the Stationers Company, by whose Laws, none but Members could print any Book at all. They assumed Power of Seizure, Confiscation and Imprisonment, and the Decrees of the Star-chamber confirmed their Proceedings. These Transactions, I presume, have no Relation to the Common Law; and when they were established, where could an Author, independent of the Company, print his Works, or try his Right to it? Who could make head against this arbitrary Prerogative, which stifled and

suppressed

ſuppreſſed the Common Law of the Land? Every Man who printed a Book, no matter how he obtained it, entered his Name in their Books, and became a Member of their Company: then he was complete Owner of the Book. Owner was the Term applied to every Holder of Copies; and the word Author does not occur once in all their Entries. All Societies, good or bad, arbitrary or illegal, muſt have ſome Laws to regulate them. When an Author died, his Executors naturally became his ſucceſſors. The Manner in which the Copy-Right was held, was a kind of Copy-hold Tenure, in which the Owner has a Title by Cuſtom only, at the Will and Pleaſure of the Lord. Two ſole Titles by which a Man ſecured his Right was the royal Patent and the Licenſe of the Stationers Company; I challenge any Man alive to ſhew me any other Right or Title; Where is it to be found? ſome of the learned Judges ſay the Words *or otherwiſe* in the Statute of Queen *Anne* relate to a prior Common Law Right; To what common Law Right could theſe Words refer? At all the Periods I have mentioned the Common Law Rights were held under the Law of Prerogative. It was the general Opinion that there was no other Right, and the corrupt Judges of the Times ſubmitted to the arbitrary Law of Prerogative. In the Caſe of the Stationers Company againſt *Seymour*, all the Judges declared that Printing was under the Direction of the Crown, and that the Court of *King's Bench* could ſeize all Printers of News, true or falſe lawful or illicit. But if it was made Uſe of to protect Authors, what was this Protection? a Right derived under a Bye Law of a private Company; a Protection ſimilar to that which we give the great *Mogul*; when we want any Grant from him, we talk ſubmiſſively, and pay him Homage, but it is to ſerve our own Purpoſe, and to feaſt him with a Shadow that we may attain the Subſtance. In ſhort, the more your Lordſhips examine the Matter, the more you will find that theſe Rights are founded upon the Charter of the Stationers Company and the royal Prerogative; but what has this to do with the Common Law Right? for never, my Lords, forget the Import of that Term. Remember always that the Common Law Right now claimed at your Bar is the Right of a private Man to print his Works for ever, independent of the Crown, the Company, and all Mankind. In the Year 681 we find a Bye Law for the Protection of their own Company and their Copy Rights, which then conſiſted of all Literature of the Kingdom; for they had contrived to get all the Copies into their own Hands. In a few Years afterwards the Revolution was eſtabliſhed, then vaniſhed Prerogative, then all the Bye Laws of the Stationers (1) Company were at an End; every Reſtraint fell from off the

(1) If (ſaith *Catharine Macaulay*, a female elegant Writer) all literary Works were, at the Time of the Revolution, in the Hands of the Stationers Company, the Ravages which muſt have been made on this Property, by a Number of Invaders, were the Property not ſecured by a ſuppoſed common Law Right, would have obliged them before ſuch a Term of Twenty Years were expired, to have have had Recourſe to the Legiſlature for a legal Security. The Proprietors of Copy-Right aſſert, that the Statute of the 8th of Queen *Anne* was granted on the Principle of facilitating illegal [illegible]. Had it been taken in the Senſe of a full Deciſion in the Caſe, ſurely ſuch a Number of Proprietors of old Copies, as now ſuffer by the preſent Deciſion, would not have laid out their Fortunes on ſuch untenable Property; but if it is ſo very obvious that no Common Law Right exiſts for ſecuring Copy Right, ſurely the granting Injunctions could only tend to deny to one Party, what the Law entitled them to, and to amuſe the other to their greater Ruin." See "Modeſt Plea for Property of Copy Right," p. [illegible] in Notes.

Press, and the old Common Law of *England* walked at large. During the succeeding (1) fourteen Years, no (1) Action was brought, no Injunction obtained, although no illegal Force prevented it; a strong Proof, that at that Time there was no Idea of a Common Law Claim. So little did they then dream of establishing a Perpetuity in their Copies, that the Holders of them finding no Prerogative Security, no Privilege, no licensing Act, no Star-chamber Decree to protect their Claim, in the Year 17 8 came up to Parliament in the Form of Petitioners with Tears in their Eyes, hopeless and forlorn; they brought with them their Wives and Children to excite Compassion, and induce Parliament to grant them a *statutary* Security. They obtained the Act. And again and again sought for a further legislative Security.

" Thus, my Lords, stands the Pretence on the Score of Usage, of which your Lordships have heard so much on one Side the Question. I come now to consider upon what Foundation stand the Prerogative Copies; and these were in fact Cases between Co patentees (for I must consider the Stationers Company itself as a Patentee of the Crown), and no Authorship Right occurs here. The Right in the Crown is supposed to come either from Purchase or Contract; and our Law argues from Principles, Cases, and Analogy; but not a Word of this in the Judgment of the Court; but the Arguments of Council are adduced to prove the point. The Argument of Council is a sorry Kind of Evidence indeed, in most Cases it would be very dangerous to rely on it, but here it is such Stuff as I am ashamed to mention. You have them at length in *Carter*. First, it is put on the Topic of Prerogative, next of Ownership. 1. *Henry* the *Sixth* brought over the Printers and their Presses, *ergo*, say the Council, he has an absolute Right to the whole Art, and all that it can produce. 2. Printing belongs to Nobody, and what is Nobody's is of course the King's. 3. The King pays his Judges, *ergo*, he purchases that Right for a valuable Consideration. 4. He paid for the Translation of the *Bible*, therefore, forsooth, he bought a Right to sell *Bibles*. Away with such trifling! Mr. *Yorke* put it on its true footing. Ought not the Promulgation of your venerable Codes of Religion and of Law to be intrusted to the executive Power, that they may bear the highest Mark of Authenticity, and neither be impaired, or altered, or mutilated? These printed Acts are Records themselves, are Evidence in a Court of Law, without recurring to the original parliamentary Roll. Will you then give this honourable Right to your Sovereign as such? or will you degrade him into a Bookseller? indeed, had he no other Title to this Distinction, that could hardly be maintained. But if this will not serve the Purpose, recourse is next had to Injunctions; they, it is said, have put the Right out of Doubt: nay, Lord *Hardwicke*'s Name is triumphantly brought on the Stage, and he is declared to have absolutely decided the Point: no man, I am sure, can venerate his Name (which will be dear to Posterity as long as Law and Equity remain) more than I do. But this boasted Case, like all the Rest that have been produced, entirely fails in the Proof; and when my Lord Chief Justice *De Grey*, read his own

(1) " It is to be presumed (says Mrs. *Macaulay*) that, during this Space of Time, there were few or no Inventors, and that this Property, as in other Cases of Property, was for a long Time effectually secured by the Common Sense of the People." See *Macaul.* Plea. P. 12.

Note

Note of what Lord *Hardwicke* said upon the Occasion, it appeared that Lord *Hardwicke*'s Words had been twisted to an opposite Meaning to what he intended. All the Injunction Cases have been ably gone through. I shall only add, in general Terms, that they can prove Nothing: they are commonly obtained for the Purpose of staying Waste, and the Prevention of irreparable Damage. They must therefore in their Nature be sudden and summary, or the Benefit of them would be lost before they were obtained, and they are granted though the Right is not clear, but doubtful. The Question, whether I can maintain my Right against the Devisee or the Heir at Law, may be discussed afterwards at Leisure; but unless upon shewing a reasonable Pretence of Title you in the mean Time tie up the Spoiler's Hands who is felling my Timber, or ploughing my Pasture; my Remedy is gone, or comes too late to prevent the Mischief. What then if a thousand Injunctions had been granted, unless the Chancellor at the Time he granted them had pronounced a solemn Opinion, that they were grounded upon the Common Law? It would only come to this at last, that the Right in Question was claimed on one Side and denied on the other: therefore till the Matter was tried and determined, let the Injunction go. Lord *Hardwicke* after twenty Years Experience, in the last Case of the Kind that came before him, declared that the Point had never yet been determined. Lord *Northington* granted them on the Idea of a doubtful Title; I continued the Practice upon the same Foundation; and so did the present Chancellor. Where then is the Chancellor who has declared *ex Cathedra* that he had decided upon the Common Law Right? Let the Decision be produced in direct Terms. It is amazing that we should have been so long amused with this Kind of Argument, from such vague Authorities!

At length, my Lords, having removed every stumbling Block that opposed our Progress to the pure Source of Common Law; having cleared the Way of all those spurious, pretended Authorities, which will not bear the Test of a moment's serious Examination, the Question begins to assume its natural Shape: Here then I feel myself upon my own Ground, and I challenge any Man to produce any Adjudication, a Precedent, a Case, or any Thing like legal Authority on which this Claim can be grounded. Does there a *Scintilla*, a Glimpse of Common Law appear under any of those different Heads I have mentioned, and which have been so often repeated to us? For my own Part, I find nothing in the whole that favours of Law, except the Term itself, Literary *Property*. They have borrowed one single Word from the Common Law, and have raked into every Store house of literary Lumber to find out how to apply it to the Subject, and to deduce some Principles to which it may refer, and be governed by. And now what are they? What are the Foundations of this Claim in the *English* Common Law? Why, in the first Place, say the Respondents, every Man has a Right to his Ideas.— Most certainly every Man who thinks, has a Right to his Thoughts, while they continue HIS; but here the Question again returns; when does he part with them? When do they become *publici Juris*? While they are in his Brain no one indeed can purloin them; but what if he speaks, and lets them fly out in private or public Discourse? Will he claim the Breath, the Air, the Words in which his Thoughts are cloathed? Where does this fanciful Property begin,

or end, or continue? Oh! say they, the Ideas are marked in black and white, on Paper or Parchment——now, then, we get at something; and an Action, I allow, will lie for Ink and Paper: but what says the Common Law about the incorporeal Ideas, and where does it prescribe a Remedy for the Recovery of them, independent of the Materials to which they are affixed? I see nothing about the Matter in all my Books; nor were I to admit Ideas to be ever so distinguishable and definable, should I therefore infer they must be Matters of private Property, and Objects of the Common Law? But granting this general Position, we get Footing but upon one single Step, and new Doubts and Difficulties arise whenever we attempt to proceed. Is this Property descendible, transferrable, or assignable? When published, can the Purchaser lend his Book to his Friend? Can he let it out for Hire as the Circulating Libraries do? Can he enter it as common Stock in a Literary Club, as is done in the Country? (Every Thing of this Kind, in a Degree, prejudices the Author's Sale of the Impression.) May he transcribe it for a Charity? Then what Part of the Work is exempt from this desultory Claim? Does it lie in the Sentiments, the Language, and Style, or the Paper? If in the Sentiments, or Language, no one can translate or abridge them. *Locke's* Essay might perhaps be put into other Expressions, or newly methodized, and all the original System and Ideas be retained. These Questions shew how the Argument counter-acts itself, how the Subject of it shifts, and becomes public in one Sense, and private in another: and they are all new to the Common Law, which leaves us perfectly in the Dark about their Solution? And how are the Judges, without a Rule or Guide, to determine them when they arise, whose Books and Studies afford no more Light upon the Subject than the common Understandings of the Parties themselves? What Diversity of Judgments! what Confusion in Opinion must they fall into! without a Trace or Line of Law to direct their Determination! What a Code of Law yet remains for their Ingenuity to furnish, and could they all agree in it, it would not be Law at last, but Legislation. But 'tis said that it would be contrary to the Ideas of private Justice, moral Fitness and public Convenience, not to adopt this new System. But who has a Right to decide these new Cases, if there is no other Rule to measure by but moral Fitness and equitable Right? Not the Judges of the Common Law, I am sure. Their Business is to tell the Suitor how the Law stands, not how it ought to be; otherwise each Judge would have a distinct Tribunal in his own Breast, the Decisions of which would be as irregular and uncertain and various, as the Minds and Tempers of Mankind. As it is, we find they do not always agree; but what would it be, if the Rule of Right was always the private Opinion of the Judge, as to the moral Fitness and Convenience of the Claim? Caprice, Self-interest, Vanity would by Turns hold the Scale of Justice, and the Law of Property be indeed most vague and arbitrary (1). That excellent Judge, Lord

(1) This noble Debater on another Occasion thus emphatically defined the Description of a Judge: "It is the Law of Tyrants; it is always unknown; it is different in different Men; it is casual, and depends upon Constitution, Temper, and Passion; in the best, it is oftentimes Caprice; in the worst, it is every Vice, Folly, and Passion, to which human Nature is liable." Lord *Camden's* Argument in *Hindson* and *Kersey*. 4to. Edit. 1771. "Alteration of Records." 4to. 1769.

Chief

Chief Justice *Lee*, used always to ask the Council, after his Argument was over, "Have you any Case?" I hope Judges will always copy the Example, and never pretend to decide upon a Claim of Property, without attending to the old black Letter of our Law, without founding their Judgment upon some solid written Authority, preserved in their Books, or in judicial Records. In this Case I know there is none such to be produced."

With respect to (1) Inventors, my Lords, I can see no real and capital Difference between them and Authors; their Merit is equal, they are equally Beneficial to Society, or perhaps the Inventor of some of those Master pieces of Art, which have been mentioned, have there the Advantage. All the Judges who have been of a different Opinion, conscious of the Force of the Objection from the Similarity of the Claim, have told your Lordships they did not know but that an Action would lie for the exclusive Property in a Machine at Common Law, and chose to resort to the Patents. It is indeed extraordinary that they should think so, that a Right that never was heard of, could be supported by an Action, that never yet was brought. If there be such a Right at Common Law, the Crown is an Usurper; but there is no such Right at Common Law, which declares it a Monopoly; no such Action lies; Resort must be had to the Crown in all such Cases. If then there be no Foundation of Right for this Perpetuity by the positive Laws of the Land, it will, I believe, find as little Claim to Encouragement upon public Principles of sound Policy, or good Sense.

If (2) there be any thing in the World, my Lords, common to all Mankind, Science and Learning are in their Nature *publici Juris*, and they ought to be as free and general as Air or Water. They forget their Creator, as well as their Fellow-creatures, who wish to monopolize his noblest Gifts and greatest Benefits. Why did we enter into Society at all, but to enlighten one another's Minds, and im-

(1) Mrs. *Macaulay* observes, that "with the Intention of depriving Authors of the honest, the dear bought Reward of their Literary Labours, they have been levied with the Inventors of a very inferior Order, but supposing the Improvement of the human Mind is not more worthy the Attention of the Legislature than the luxurious, or at least those Conveniences, which are not absolutely necessary to the Ease of common Life, were the Inventor of inferior Order, and the Author to stand upon the same Footing, in regard to Time and other Circumstances, for the Emoluments arising from their different inventive Transactions; the Inventor of inferior Order would find himself much better rewarded than the Authors, for his Ingenuity; for every common Capacity can find out the Use of a Machine. But it is a Length of Time before the Value of a Literary Publication is discovered and acknowledged by the vulgar; and when the Merits of a Work of this kind, in regard to the honest Intention of the Writer, and the Execution of the Composition is in general allowed, the Malice of Party Prejudice, and the Leaven of Selfishness, when it prevails in the Characters of the greater Number of Individuals, may for a long Term of Years keep back the Sale of a Book, which teaches an offensive Doctrine, or tells imaginative Truths to the Public." See *Macaul.* Plea 17, 18.

(2) Mrs. *Macaulay* "is so far of this noble Lord's Opinion, as to regard with Horror those diabolical Governments who, by arbitrary Decrees and Punishments, have barred all the Avenues of arriving at Science and Learning from a whole People, who, to govern like Brutes, they have endeavoured to deprive of the Use of their Reason, which was given by the benevolent Creator, for the Preservation, the Happiness, and the Glory of the Species. But sure if there is any thing, which an Individual can properly call his own, it is acquired Science, and those high Gifts of Genius and Judgment, with which the Almighty has in a peculiar Manner distinguished some of his Creatures; Gifts which, if properly exerted for the Benefit of Mankind, deserve the Respect, the Care, and the Attention of Society. See *Macaul.* Plea, P. 28, 29.

prove

prove our Faculties, for the common Welfare of the Species? Those great Men, those favoured Mortals, those sublime Spirits, who share that Ray of Divinity which we call Genius, are intrusted by Providence with the delegated Power of imparting to their Fellow-creatures that Instruction which Heaven meant for universal Benefit; they must not be Niggards to the World, or hoard up for themselves the common Stock. We know what was the Punishment of him who hid his Talent, and Providence has taken Care that there shall not be wanting the noble Motives and Incentives for Men of Genius to communicate to the World those Truths and Discoveries which are nothing if uncommunicated. Knowledge has no Value or Use for the solitary Owner: To be enjoyed it must be communicated. *Scire tuum nihil est, nisi te scire, hoc sciat alter.* Glory is the Reward of Science, and those who deserve it, scorn all meaner Views; I speak not of the Scribblers for bread, who teize the Press with their wretched Productions; fourteen Years is too long a Privilege for their perishable Trash. It was not for Gain, that (1) *Bacon*, *Newton*, *Milton*, *Locke*, instructed and delighted the World; it would be unworthy such Men to traffic with a dirty Bookseller for so much as a Sheet of Letter-press. When the Bookseller offered *Milton* Five Pounds for his Paradise Lost, he did not reject it, and commit his Poem to the Flames, nor did he accept the miserable Pittance as the Reward of his Labor; he knew that the real price of his Work was Immortality, and that Posterity would pay it.

Some Authors, my Lords, are as careless about Profit as others are rapacious of it, and what a Situation would the Public be in with regard to Literature, if there were no Means of compelling a second Impression of a useful Work to be put forth, or wait till a Wife or Children are to be provided for by the Sale of an Edition (2). All our Learning will be locked up in the Hands of the *Tonsons* and the *Lintots* of the Age, who will set what Price upon it their Avarice chuses to demand, 'till the Public become as much their Slaves, as their own Hackney Compilers are (3).

Instead of Salesmen, the Booksellers of late Years have forestalled the Market, and become Engrossers. If therefore the Monopoly is sanctified by your Lordships Judgement, exorbitant Prices must be the Consequence; for every valuable Author will be as much monopolized by them as *Shakespeare* (4) is at present, whose

(1) Mrs. *Macaulay* observes, that, "the Names of *Bacon*, *Newton*, *Milton*, and *Locke*, have been brought into the Arguments, as Examples to prove that the first-rate Gentlemen have laboured in the Literary Way, on the single Motive of delighting and instructing Mankind." See *Macaul.* Plea, P. 18, 19. and see P. 21, 22, 23, 24, and 25. for more Particulars of these great Authors.

(2) Mrs. *Macaulay* "protests she does not understand the Force of this Objection of the learned Debater, on the Side of the Appellants, for surely neither that [illegible] Lord (the one Father as given by Mrs. *Macaulay* in Page 29 to her Creator) or the Public, would wish to have it in their Power to deprive the necessitous Children of an ingenious Man, with whose Literary Labours they had been delighted and instructed, of the just Emoluments arising from those Labours." See *Macaul.* Plea P. 27.

(3) Mrs. *Macaulay* "protests that she does not understand the Force of this Objection, for that the Public cannot want a second Edition of a Work, before they have bought up the first." See *Macaul.* Plea, P. 27.

(4) Mrs. *Macaulay* observes, that "the Player *Shakespeare*, it is urged, made a generous Bequest to the Public, of every one of his almost inimitable Productions." See *Macaul.* Plea, P. 15.

Works