K (Donaldson (at.) Bookseller

THE PLEADINGS OF THE COUNSEL

BEFORE THE

HOUSE OF LORDS,

IN THE GREAT CAUSE CONCERNING

LITERARY PROPERTY;

TOGETHER WITH THE

OPINIONS OF THE LEARNED JUDGES,

ON THE

COMMON LAW COPY RIGHT OF AUTHORS AND BOOKSELLERS.

TO WHICH ARE ADDED, THE

SPEECHES OF THE NOBLE LORDS,

Who ſpoke for and againſt reverſing the DECREE of the COURT of CHANCERY.

LONDON:

Printed for C. WILKIN, Bookſeller, No. 2, Orange Street, Red Lion Square; S. AXTELL, No. 2, Red Lion Court, Fleet Street; J. AXTELL, No. 2, Well Yard, Little Britain; and J. BROWNE, No. 4, Wardrobe Court, Doctors Commons.

[Price One Shilling.]

PREFACE.

THE motive for printing these papers collected together, is, that such gentlemen of the law and others who are concerned in Literary Productions may see the substance of the Arguments and Opinions of those great men who distinguished themselves in the definition of so difficult a question as, What is called Literary Property? but particularly to preserve that elegant speech of the noble LORD CAMDEN, both with respect to law and equity.

The monopoly of books and copies has been for many years in the hands of a few persons who call themselves Booksellers, about the number of *twenty-five*, to the entire exclusion of all others, but more especially the Printers, whom they have always held it a rule never to let become purchasers in Copies, even though themselves never paid any valuable consideration for them originally, and those for which they have, have been repaid them ten-fold within the times limitted by authority of Parliament.

As it is impossible to set the matter in a clearer view than his Lordship has, we must beg to refer the Reader to his Speech in the House on that occasion, by which may be discovered

his

his great Knowledge of the Laws, and the intention of an *Honeſt Man* to do Juſtice to every perſon who has received a *real* injury.

The Bill now depending (if paſſed into a Law) will, it is hoped, in juſtice to thoſe who have made recent purchaſes, allow them a ſufficient time to indemnify themſelves for the hazard and expence which muſt neceſſarily be given for the encouragement of Authors; but thoſe Copies, by which ſo many Fortunes have been made in a long courſe of years, with reſpect to the number of editions, and the numbers printed of thoſe editions, will be matter of enquiry worthy the attention of Parliament.

ARGUMENTS

ARGUMENTS

USED BY COUNSEL IN THE

HOUSE OF LORDS,

ON THE CAUSE OF

LITERARY PROPERTY.

THIS great cauſe of Literary Property, which has ſo long engroſſed the attention of all thoſe concerned in the Republic of Letters, being now ſettled in the higheſt court of judicature in theſe kingdoms, it remains only for us to ſhew what arguments have been made uſe of to reverſe a decree of Chancery in favour of the reſpondents; where will eaſily be diſcovered the difference between manly reaſoning and ſound law, in oppoſition to ſophiſtical jargon and evaſive argument.

The litigation took its riſe from Meſſrs. Donaldſons' having printed (in Scotland) and publiſhed (in London) ſeveral of Thompſon's works. Several other bookſellers, claiming an excluſive property by purchaſe, filed their bill; had the matter decided in their favour in a Court of Common Law in England; loſt it in Scotland, and gained it in the Engliſh Court of Chancery, from whence, by appeal, the

the Donaldſons brought it before the Houſe of Lords, which began to be heard at their bar by counſel, on Friday February 4, 1774. The counſel were

For the Appellants	For the Reſpondents
Mr. Thurlow, Attorney-General.	Mr. Wedderburn, Solicitor-General.
Sir John Dalrymple.	Mr. Dunning, and
	Mr. Hargrave.

FRIDAY, February 4.

The Attorney-General opened as counſel for the appellants, and ſpoke for two hours, endeavouring to prove the decree of the Court of Chancery, on the 16th of November, 1772, in favour of the reſpondents, an injury to the appellants, and that what was termed LITERARY PROPERTY, was not warranted or ſecured at common law. The Attorney-General in his ſpeech uſed the ſame arguments, and went upon the ſame grounds which the counſel for Taylor, in his cauſe with Millar, in 1769, urged and maintained. He firſt entered into a minute inveſtigation of the idea inculcated by what is called a publication; "which, he ſaid, was not that myſterious thing the trade would make it; but ſimply a multiplication of copies; that whether they were multiplied to the number of five or five hundred, ſignified not an iota to the matter in diſpute." He ſaid, "that previous to the invention of printing, ſcribes, for copying an author's work, obtained a greater remuneration than perſons who, ſince the invention of printing, diffuſe writings by means of certain types."

He then dwelt much on the ſenſe of the word *Property*, defining it philoſophically, and in the ſeparate lights of being corporeal and ſpiritual; and proceeded to define property in the legal ſenſe of the word, in the following manner:

"Property, of whatever kind, is that which is begun by occupancy, and continued by poſſeſſion."

Mr. Thurlow ſaid, "that metaphyſicians talked of a property in life or limb, in fame, honour, and character; but this was not a language lawyers could adopt. There was alſo, he ſaid, ſuch a thing as property by ſpecification; he aſked under what denomination literary property was to be arranged? Was it corporeal or incorporeal? If corporeal, it was deſcendible, like any other chattel; if incorporeal, how was its incorporeality to be aſcertained? how ſpecifically diſtinguiſhed from its appendage or adjunct, the corporeal part? To ſay that a man has a property in the

the ideas of a book, and none in the book itſelf, is as if one ſhould affirm that a man has a property in the colouring of a picture, but none in the canvaſs on which that colouring is laid; or as if Mr. Harriſon had a property in the diſcovery made by his time-piece, but none in the wheels or mechanical parts of which it is compoſed: a notion to the laſt extreme abſurd! Applying this to the caſe of an author; if he had any diſtinct exclufive property in a book, ſeparate from the material and corporeal part, I have no objection to admit this excluſive property, (continued the counſel,) provided he will demonſtrate to me *quo jure* the property accrues."

The bookſellers, he obſerved, (exemplifying his obſervations by ſeveral caſes) had not, till lately, ever concerned themſelves about authors, but had generally confined the ſubſtance of their prayers to the legiſlature, to the ſecurity of their own property; nor would they probably have, of late years, introduced the authors as parties in their claims to the common law right of excluſively multiplying copies, had not they found it neceſſary to give a colourable face to their monopoly. He was very diffuſive upon grants, charters, licences, and patents from the crown, both to corporate bodies and individuals, tracing them far back, and aſſerting, that they all ſpecifically proved, that if there had been any inherent right of excluſively multiplying copies, ſuch inſtances of exerting the royal prerogative would have been unneceſſary. He particularly adverted to the ſtatute of the 8th of Queen Anne, maintaining that it was not merely an accumulative act declaratory of the common law, and giving additional penalties, but that it was a new law to give learned men a property which they had not before, and that it was an incontrovertible proof that there previouſly exiſted no common law right, as contended for by the reſpondents. He cited many caſes to prove his arguments; ſome before the 8th of Queen Anne, and others immediately upon that ſtatute, generally inferring that the grand queſtion touching the common law right, had never been deciſively determined by any Chancellor.

The Attorney-General then attempted to prove "that no ſuch idea as that of an excluſive right to multiply copies prevailed previous to, or indeed long after, the invention of printing." This was inſtanced in ſeveral caſes, where "one writer complained of another for printing his works, not on account of any violation of property, but merely becauſe the party complained of had printed them inaccurately." On the whole, he contended "that Literary Property exiſted only in the imagination; that it never, till it was found advantageous, entered into the heads of bookſellers themſelves; that authors never conceived the notion of any property veſting in them, but what was given by ſtatute, by patent, the licenſing act, the royal privilege, or in virtue of the inſtitution of the Stationers Company; that what was called Literary Property only gave riſe to a ſcandalous monopoly of ignorant bookſellers, who fattened at the expence of other men's ingenuity, grew opulent by oppreſſion; and that, as the Lords of Seſſion had freed Scotland from

from ſuch a monopoly, he ſincerely hoped their Lordſhips, following ſo praiſe-worthy an example, would emancipate this kingdom from ſuch an odious oppreſſion."

MONDAY, February 7th.

The Lords met agreeable to their adjournment the Friday before, and proceeded to hear further counſel on behalf of the appellants, when

Sir John Dalrymple, at the bar, entered into an hiſtorical review of what he called this ideal property, which he endeavoured to explain to the following purport:

"It ſhould be conſidered, my Lords, that this pretended property, which is ſuppoſed to have a foundation in common law, cannot in the records of the common law courts any where be found: If you ſpeak of the ſubject before the act of Queen Anne, you hear of nothing but licenſing acts, and the company of Stationers.—My Lords, during the tory reign of King Charles the ſecond the bookſellers were the mere engines of the court's deſigns, and therefore the licenſing act ſufficed;—it was the ſame through the tory reign of King James the ſecond, while it was the court ſide of every queſtion that could alone be handled with ſafety; the licenſing act gave that property to the bookſellers, which was ſufficient for their purpoſe. In the whig reign of King William they began to move out of the old ſphere, and then we accordingly find new movements. In the tory reign of Queen Anne they looked out for freſh ſecurities; then firſt appeared a new trade. My Lords, the bookſellers then found they could make as much or more by abuſing the ſovereign, her parliament, her council, her ſervants, and her government, than they could before make by the ſupport of them. Printing books thus coming into oppoſition to the court, the trade laboured hard to eſtabliſh a right to their copies that was independent of the court. They applied every where for the means of eſtabliſhing that right; but were forced at laſt to have recourſe to parliament to eſtabliſh and veſt in them a right which the common law did not give them.

"My Lords, the hiſtory of the act of Queen Anne deſerves your Lordſhips attention: What was the view of the booksellers? abſurdity on the very face of it. They applied for an act, veſting in them a property for fourteen years which they pretend to have derived from the common law, for futurity. Can it be ſuppoſed that men who were any ways clear in their perpetual right, would apply for a freſh right for fourteen years only? It could not be. They knew their own ſituation: they knew the rottenneſs of their pretended right, and wanted a new real one, inſtead of the old imaginary one.

"Yet, my Lords, this act, which changed their perpetuity to a term of fourteen years, was obtained at a period when the intereſts of learning was far from being without

without good ſupport: Addiſon, after being the friend of many miniſters, became ſecretary of ſtate; and Swift was high in the eſteem, and an adviſer of, the heads of another party. Happy would it be, my Lords, if miniſters had always ſuch friends, and ſuch adviſers!

"But, my Lords, this act of Queen Anne, which was uſhered in under the idea of encouraging literature, was very far from having ſuch a tendency. It was to encourage bookſellers, but not authors; however, ſuppoſing both intereſts the ſame,---What did they gain? Why, a perpetuity was changed to a term of fourteen years only. A price was fixed, and a clauſe inſerted to force them to ſend copies to publick libraries—What encouragements are theſe?—They, on the contrary, were diſcouragements.—All which is ſufficient to ſhew that the bookſellers never dreamed of a ſerious property at common law for perpetuity; had they ſuch a notion they would have petitioned againſt the act.

"Obſerve, My Lords, the title of the act: *To veſt* the copy rights: that is, my Lords, to *give* them a right they had not before; a marked expreſſion which could not be miſtaken.—And though the word *ſecured* is uſed in the body of the act, it does not enter there as the ſignification of a different idea: it is the ſame idea: the bill was to veſt a new property, and provide accordingly, and inflicts penalties, after which the word *ſecures* occurs, and is uſed perfectly conſiſtently with the former term.

"What could be more abſurd, my Lords, than an act to veſt a perpetual right to a ſet of perſons for a limited term, and inflicting penalties? Lord Shaftſbury tells us that ridicule is the teſt of truth: let us try ſuch an act by that teſt. I will read an imaginary act which enacts ſuch purpoſes.

(Here he read an act drawn up in the terms of the act of Queen Anne, for veſting the right to hedges and trees in the planters for fourteen years and no longer, laying penalties on perſons who cut or broke down ſuch hedges and trees.)

"Now, my Lords, does it not from hence appear that an act to convert a perpetuity into a limited term is abſurd upon the face of it? And may we not from hence conclude that the bookſellers, when they applied for the act of Queen Anne, knew that they had no perpetual common law right?

"My Lords, this perpetual right which they want would, inſtead of being beneficial to the intereſts of literature, be pernicious to it. It encourages the ſpirit of writing for money; which is a diſgrace to the writer, and to his very age. My Lords, why ſhould not honour and reputation be powerful inducements enough for authors, without that mean one of profit? Foreigners know no ſuch exorbitant pecuniary rewards as have diſgraced this country. The Germans get nothing by writing.

writing. The Italian ſtates are ſo ſmall that no literary property can exiſt, as the bookſellers of one ſtate would immediately print upon thoſe of another.—In France the ſums given to authors are too ſmall to have this effect. My friend, Mr. Hume, has told me that Rouſſeau aſſured him he had but fourſcore Lewis d'ors 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 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 employment 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?"

The foregoing is the ſubſtance of this laborious pleader's argument; thoſe who were preſent at the delivery of it, will recollect how far it reſembles what it is meant to give thoſe who were not preſent, ſome image of.

In the courſe of the ſpeech, Sir John Dalrymple made a multitude of remarks, many of which ſeemed calculated to enliven and ſtrengthen his argument; among the moſt particular was an obſervation that Printers and Bookſellers were not remarkable for too much modeſty; that authors were generally proud, and of ſo old-faſhioned a turn of thinking, that if a great man gave them a promiſe, they were weak enough to imagine it was to be kept; that Bookſellers were alſo exceedingly vain, and took every advantage of authors which they could, adding their name to their cauſe, merely from motives of ſelf-intereſt: that otherwiſe they would have got Mr. Addiſon to have aſſiſted them with his influence while he was in power; that a numerous multiplication of copies was of late date; Shakeſpear's works had ſold but two editions of 500 each in two centuries, and Smollet's Hiſtory of England, the worſt of the many bad Hiſtories of England extant, had ſold 11,000 in a very ſhort time; that when large numbers were firſt printed, the arts of reviling the Sovereign, abuſing the Miniſter, and libelling

libelling every Officer of Government were diſcovered; arts happily baniſhed in this quiet era! that Junius had an enflamed imagination, a weak head, and a worſe heart; that 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; that Alexander Donaldſon, his client, never printed a work either within the time of the limitation of the 10th of Queen Anne, or in the life-time of the author; that Bookſellers opprobriouſly termed men who laudably enlarged the circle of literature, by giving new editions of works of merit, pirates; that procuring the reverſal of the decree of the Court of Chancery, would rather be of ſervice to the authors than diſſervice; and finally that there were near 20,000 Printers in London.

As the manner of Sir John Dalrymple's proving this latter extravagant aſſertion is ſomewhat peculiar, we ſhall circumſtantially recite it. "I happened (ſaid he) to be upon the Streets when a Lord Mayor two years ſince was coming 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."

The above was in ſubſtance, if not in words, delivered at the Bar of the higheſt and moſt auguſt Aſſembly in this kingdom, under a ſpecious ſhew of pleading; but it is conceived Sir John Dalrymple miſtook his ſituation, or he never would have been the firſt to have made uſe of ſuch language to ſo noble an Aſſemblage. With reſpect to the characters and numbers of the Printers, &c. he ſeems more ignorant of them than he was of thoſe men of virtue by traducing whom he has received ſo much advantage, or what opinion muſt the world have of a man who ſome months before received the enormous ſum of near One Thouſand Pounds for the compilation of a few Papers, from a Bookſeller, and then to ſtand foremoſt in oppoſing his right to indemnify himſelf by the ſale of ſuch Books in perpetuity?

TUESDAY, February 8th.

The Attorney General and Sir John Dalrymple having finiſhed their pleadings on the behalf of the appellants, Mr. Solicitor General and the other counſel were called to the bar, when he ſpoke for the reſpondents to the following purport.

He began his ſpeech with a ſeries of compliments to the two counſel on the other ſide of the queſtion; "one of the learned pleaders, he obſerved, had entered into the argument with great ability; his definition of the word *property* had been ſhrewd, metaphyſical and ſubtle; but he hoped to be able to convince their Lordſhips, that ingenious as the definition of that word had been, it was nevertheleſs erroneous.

" Literary Property had, by thoſe who had ſpoke before him, been ſaid to be ſo abſtruſe and chimerical, that it was not poſſible to define it. The interpretation they had put upon the word *property* was, that it implied ſomething corporeal, tangible and material. He begg^ed leave to differ from this opinion, and to point out how common it was for terms to be miſapplied as to their import.

" The word *property* had, by the ableſt writers, been called *jus utendi, fruendi, diſponendi*; it was therefore evident that any idea, although it was incorporeal in itſelf, yet if it promiſed future profit to the inventor of it, was a property. And the latter word had, through inaccuracy, been uſed as deſcribing that, over which a poſſeſſor held an abſolute reign, dominion, or power of diſpoſal. The ſubject matter might be immaterial, and yet liable to be appropriated. Property changed its nature with its place: In England, portions of land were private property, among the Arabs and Tartars no ſuch idea prevailed; they looked upon cattle and chattels as the only private property. Among the Americans, in certain diſtricts, land was conſidered as property, but not as the property of individuals; as the inhabitants lived upon the gains of hunting, a circumference of land, ſufficient for them to hunt on, was conſidered as the general property of one tribe or nation.

" The lawyers mode of deſcribing property was exceedingly trite and familiar; they generally divided it into corporeal and incorporeal, and in the preſent caſe it had been ſaid to commence by occupation, and to continue by poſſeſſion. This was a narrow ſcale of argument. In the courts of law it was univerſally admitted that matters incorporeal were nevertheleſs matters of property, and the lawyers diviſion of it proved that matters not in occupancy or poſſeſſion, were yet of value, and could be ſold or given over, as in the caſes of manors and advowſons, remainders and reverſions. They could be ſold by aſſignment, and the mode of ſale was by title.

Poſſeſſion was uſually deſcribed as originating from two things, livery and grant. Under the latter title, in ſome degree, ſtood Literary Property; but it was not to be conſidered as originating from crown grants, for excepting the prerogative copies, the crown had no right, and in the firſt of thoſe (the bible) no farther right, than in that particular tranſlation publiſhed in the reign of King James.

After a very learned and ingenious argument, as to the qualities of property with regard to its occupancy, its being material, and its adhipiſcency, the Solicitor General obſerved "that every inventor had a right to the profit of his invention; and as he found that Grotius had not eſcaped the Attorney General's reſearches, he was much ſurpriſed that in his definition of property, the learned pleader had not hit upon a poſition which was directly in point."

He then read an obſervation cited by Grotius as having been made by Paulus, a Roman lawyer, who declared that one mode of acquiring property was invention, and that from the nature of things, he who made a matter was the owner of it.

"This, he obſerved, was a much more liberal conſtruction of the word invention than had been put on it by the other ſide, who had taken it up in its vulgar acceptation, and only given it alluſion to trifles, ſuch as the finding ſhells on the ſea-ſhore, &c.

"It had been contended, that the maker of an orrery was in the ſame predicament as an author, when he publiſhed. Such alluſion came not to the point; the firſt ſheet of an edition, as ſoon as it was given impreſſion, in a manner loaded an author with the expences of a whole edition, and if that edition was 5000 number, the author was not repaid for his labour and his hazard, till the laſt of the 5000 were ſold. The maker of an orrery was at no other trouble and charge, than the time, ingenuity and expence, ſpent in making one orrery; and when he had ſold that one, he was amply paid. Orrery-making was an invention, and the inventor reaped the profit accruing from it. Writing a book was an invention, and ſome profit muſt accrue after publication; who ſhould reap the benefit of it?

"Authors, he contended, both from principles of natural juſtice, and the intereſt of ſociety, had the beſt right to the profits accruing from a publication of their own ideas; and as it had been admitted on all hands that an author had an intereſt or property in his own manuſcript, previous to publication, he deſired to know who could have a greater claim to it afterwards. It was an author's dominion over his ideas that gave him his property in his manuſcript originally, and nothing but a transfer of that dominion or right of diſpoſal could take it away. It was abſurd to imagine that either a ſale, a loan, or a gift of a book, carried with it an implied right of multiplying copies; ſo much paper and print were ſold, lent or given, and an unlimited peruſal was warranted from ſuch ſale, loan or gift, but it could not be conceived that when five ſhillings were paid for a book, the ſeller meant to transfer a right of gaining one hundred pounds; every man muſt feel to the contrary, and confeſs the abſurdity of ſuch an argument."

The Solicitor General produced a copy of the original grant of King James for printing ſome Poems of his writing, which, excepting ſome royal ſtile in the beginning, he obſerved, ran in the ordinary phraſe of an author's aſſignment of copy-

right to a Bookſeller; nay, indeed, it was more ample, for it not only transferred the right of the matter then publiſhed, but alſo transferred a right to every thing he ſhould hereafter be pleaſed to write.

Among other matters adverted to in this ſpeech, Ames's Typographical Hiſtory was particularly noticed: the application of the Printers in Prynne's time to ſuppreſs and call in the patents for printing and publiſhing the Bible, was mentioned; the applicants terming thoſe patents a ſanction for monopolizers, the matter was heard by counſel, when Prynne pleaded on one ſide of the queſtion, and his anſwer turned on nine points, in one of which that celebrated lawyer declared, that the moſt ſerious and ſolid objection againſt the Printers was the inherent Common Law Right for an Author to multiply copies. This the Solicitor General ſaid was one ſtrong proof that in the worſt of times the *jus naturale* reſpecting Literary Property was not forgot. Licenſes in general, he obſerved, proved not that Common Law Right did not inherently exiſt, but were the univerſal fetters of the Preſs at the times in which Authors were obliged to obtain them.

With regard to the ſtature of Queen Anne, he was very willing to let that reſt on the ſame grounds as the Attorney General had placed it laſt Friday, viz. that if it gave no right, it took none away. But he could not help obſerving that it contained a poſitive clauſe to let the matter reſpecting a Common Law right remain preciſely in the ſtate in which it was when that act paſſed: and that the Court of Chancery conſidered that ſuch a right did exiſt, was evident from the ſeveral injunctions that Court had granted ſince the enacting of the ſtatute, which did not govern thoſe injunctions, as it did not particularly ſpecify how the Court of Chancery were to act. He inſtanced the caſes of Pope and Curl, Gwynne and Dr. Shebbeare, and two Law Books, as proofs of what he aſſerted. He mentioned alſo the caſe of Dodſley *verſus* Kinnerſly, in 1761, before Sir Thomas Clark, Maſter of the Rolls. The former prayed an injunction againſt the latter, for abſtracting a part of Dr. Johnſon's Raſſelas, and publiſhing ſuch abſtract in a Magazine.

The Solicitor General, after noticing the great ability of Sir Thomas, declared that his opinion was the ſame, reſpecting Literary Property, as that he had maintained, and after a variety of very ingenious remarks, he concluded his argument, invoking the Lords to ſanctify the final determination of a queſtion founded on natural juſtice, and the intereſt of ſociety, by affirming the decree.

The Solicitor General, in the courſe of his argument, paid Mr. Hargrave a very elegant compliment for his publication touching the queſtion. He alſo adverted to Sir John Dalrymple's publication, and hoped that work would not be ſuppreſſed, as he had reaſon to lament its author intended. And in following the obſervations made on the other ſide, he ſaid it was 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 œconomy, under the neceſſity of ſelling his library; and Cicero, who was alſo a rich man, was, from the ſame principle, unable to purchaſe it.

Mr.

Mr. Dunning likewiſe pleaded in favour of the reſpondents, which he did by entering into an hiſtorical review of the ſtate of this property in different parts of our annals; he obſerved,

" 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 dec ſions 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-rights 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 Anne'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 unparalleled, 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 favour 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 ſcarcely be allowed; yet the copy-money much exceeded that of the others. 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 intereſt 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 ſimilar caſe; there paſſed an act laſt ſeſſions to make turnips, cabbages, potatoes, and carrots property; now, my Lords, might it not be urged with as much juſtice, that cabbages 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.

In the courſe of his pleadings he animadverted upon ſeveral parts of the oppoſite counſels conceptions or explanations of this property. He ſaid it was to him the moſt extraordinary idea that ever he heard, that it ſhould be admitted that an author had a property originally in his compoſition, and that the firſt moment he exerciſed his dominion over that property, and endeavoured to raiſe a profit from it, he loſt it. Publication he could not conceive was of ſuch a nature to deſtroy that right to the matter publiſhed, which it was acknowledged an author had before it was publiſhed.

One part of the argument (he obſerved) uſed for the appellants, was, that it would benefit authors, if no excluſive right of multiplying copies exiſted: this was a very ſtrange aſſertion, and it was very extraordinary that authors in general ſhould think otherwiſe. It was cuſtomary for Bookſellers, as buyers, to buy as cheap as they could, and it was alſo cuſtomary for authors to ſell as dear as they could; this could not be the caſe if the moment a book was publiſhed every man had a right to print it.

Authors formerly, when there were but few readers, might get but ſmall prices for their labours, but the books above-mentioned had been paid enormous ſums for, eſpecially the laſt. That if the Purchaſers of theſe Copies had not the ſole right of multiplying Copies, how was this difference to be accounted for? not from

any

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 Miller and Taylor; for it was idle to contend that the ſubject of the preſent appeal was not exactly on the ſame grounds.

The Appellants wanted to ſanctify the importation of Scotch Books into England, in the ſame manner as the importation of Scotch cattle. The Book on which the preſent cauſe was grounded, was written, indeed, by a Scotchman, but it was written in Engliſh, and originally printed in England. The Appellants had invaded the legal purchaſer, by printing a copy in Scotland, and offering it to ſale in London; he hoped, therefore, that their Lordſhips would teach them that Literary Property was ſacred, by affirming the decree.

The Houſe, as ſoon as Mr. Dunning had finiſhed, adjourned till next Day.

WEDNESDAY, *February 9th.*

The Counſel were again called to the Bar, and the Attorney General made his reply to the arguments in behalf of the reſpondents, when he advanced very little more in ſubſtance than what he had already urged, and after Mr. Attorney General had finiſhed his reply, the Lord Chancellor roſe up, and put the three following queſtions to the Judges, viz.

1. 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?

2. If the Author had ſuch right originally, did the Law take it away upon his printing and publiſhing the ſaid Book or literary compoſition, or might any perſon re-print and publiſh the ſaid literary compoſition for his own benefit, againſt the will of the author?

3. 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.

1. 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?

2. 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, and then the Houſe adjourned to Tueſday the 15th.

TUESDAY,

TUESDAY, *February 15th.*

The Lords met, agreeable to their adjournment, and after the diſpatch of ſome private buſineſs, proceeded to hear the opinions of the Judges upon the five queſtions relative to the important cauſe of Literary Property.

The Chancellor opened the buſineſs by obſerving, that "as the learned Judges might maintain diſſimilar opinions upon the ſubject, their Lordſhips attendance was required to hear the opinion of each Judge delivered *ſeriatim*."

Baron EYRE then aroſe and delivered his opinion with the reaſons whereon that opinion was founded, in ſubſtance as follows:

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

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

"No traces, the Baron ſaid, of ſuch a Common Law right were to be found amongſt the Greeks or Romans; nor did 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

But here lay 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!"

The Baron then proceeded to combat this latter principle; for upon a supposition that ideas were produced by a thinking faculty, *common to all men*, the Baron questioned, "whether it was 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*."

The Baron concluded, that "if the notion of a Common Law right should be reprobated, such reprobation carried with it an explicit answer to the second Question: There being no Common Law right, an action could not be maintained against the re-publishers of an Author's book or literary composition, without his consent."

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

Previous to the invention of printing, the idea of a Common Law right, the Baron said, had not been suggested; and subsequent to the invention of this useful art, so little notion had Authors of a right at Common Law to exclusive appropriation, that before the institution of the Stationers Company they had recourse to the Legislature for a license, grant, patent, or privilege; that after the institution of the Stationers Company the only mode thought of to secure the appropriation of a literary composition was, "by an Entry in the Records of that Company, and the person in whose name the book was entered, let him come by it how he would, was deemed the Proprietor, the Author never being so much as mentioned on these occasions."

The Baron then reviewed the cases which, by the Respondents Counsel, had been adduced to prove "the sentiments of the Court of Chancery in favour of a Common Law right." But the Baron contended, "that although the Court of Chancery had frequently granted Injunctions, it cautiously avoided giving any final adjudication upon the matter. An *antecedent Common Law* [illegible] was never hinted at; nor were the injunctions granted in the cases cited, at all in point; they had been granted on the appearance of something fraudulent upon the face of the transaction; as in the case of Pope and Curl."

"Nor did injunctions prove the Chancellor's opinion upon a matter of Common Law Right, in confirmation of which, added the Baron, I will venture an anecdote."

dote." "There is a paper now exiſting, containing ſome Notes Lord Hardwicke had taken down, which ſet forth. "the ſole and excluſive right of an Author at Common Law, to multiply copies for ſale." In the margin of which Paper, and oppoſite to this very paſſage, there is in Lord Hardwicke's own hand writing a very large Q. which proves that his Lordſhip entertained doubts reſpecting the legality of the poſition."

The Baron then obſerved, "that the Counſel for the Reſpondents had ſlipped over the caſe of Mechanical Inventions." The Baron thought them 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.

The Baron conſidered a Book preciſely upon the ſame footing with any other Mechanical Invention. In the caſe of Mechanic Invention, "Ideas were in a manner embodied, ſo as to render them tangible and viſible; a Book was no more than a Tranſcript of Ideas; and, whether Ideas were rendered cognizable to any of the ſenſes, by the means of this or that art, of this or that contrivance, was altogether immaterial: Yet every Mechanical Invention was common, whilſt a Book was contended to be the object of Excluſive Property! So that Mr. Harriſon, after conſtructing a Time-Piece, at the expence of forty years labour, had no method of ſecuring an excluſive Property in that invention, unleſs by a grant from the ſtate; yet, if he was in a few hours to write a Pamphlet, deſcribing the properties, the utility and conſtruction of his Time-piece, in ſuch Pamphlet he would have a right ſecured by Common Law! though the Pamphlet contained exactly the ſame ideas on Paper, that the Time-piece did in Clock-work Machinery! The cloathing is diſſimilar; the Eſſences cloathed were identically the ſame."

The Baron urged "the exactitude of the reſemblance between a Book and any other mechanical invention, from various inſtances of agreement. There was the ſame identity of intellectual ſubſtance; the ſame ſpiritual unity. In a Mechanic Invention the corporeation of parts, the junction of powers, tended to produce ſome one end. A Literary Compoſition was 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." On the whole, the Baron contended "that a mechanic Invention, and a Literary Compoſition, exactly agreed in point of ſimilarity; the one therefore was no more entitled to be the object of Common Law Property than the other; and as the Common Law was entirely ſilent with reſpect to what is called Literary Property, as antient uſage was againſt the ſuppoſition of ſuch a Property; and as no excluſive right of appropriating thoſe other operations of the mind, which paſs under the denomination of "Mechanical Inventions was veſted in the inventor by Common Law, the Baron, for theſe reaſons, declared himſelf againſt the principle of admitting the Author of a Book, any more than the inventor of a Piece of Mechaniſm, to have a right at Common Law to the excluſive appropriation and ſale of the ſame."

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

But

But admitting him to have had ſuch common law right; in reply to the thir and fifth queſtion, which aſks, "how far the ſtatute of the 8th of Queen Ann affects the caſe, or takes away a common law right exiſting antecedently in an author or his aſſignees?" Baron Eyre contended, "that every principle of a common law right was effectually done away by this ſtatute." This he eſſayed to prove from the title, preamble, and certain clauſes of the act, from the adoption of the word *veſt*, and the mode of expreſſion uſed, of giving an author an excluſive property for fourteen years, *and no longer*.

The Baron obſerved "that he knew of no right the crown had at common law to print what were 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 was veſted in the crown of thus printing and multiplying crown copies."

Such are the heads, the moſt material parts of Baron Eyre's opinion againſt what is called literary property. And if the editor preſumes to ſay that the Baron argued the point with the erudition of a ſcholar, the acuteneſs of an able lawyer, and the accuracy of a ſound reaſoner, ſuch praiſe cannot be deemed the language of flattery. After a variety of obſervations in oppoſition to the arguments of the Solicitor General, Baron Eyre concluded with paſſing a negative upon the firſt and fourth queſtions, and an affirmative upon the ſecond, third, and fifth.

Judge Nares ſpoke next, and was followed by Judge Aſhurſt, both of whoſe opinions were delivered in favour of the common law right of authors.

Mr. Juſtice NARES began by obſerving that the hiſtorical nature of the caſe had been ſo learnedly and fully agitated in the hearing of the houſe, that he ſhould wave entering into it, but ſhould rather reſt his opinion on general concluſions, deduced from principles which aroſe from fair argument.

He ſtated to the Houſe why he thought a Common Law right in Literary Property did exiſt, and why the ſtatute of Queen Anne did not take it away. He obſerved that he was of Mr. Dunning's ſentiments, that as it was admitted on all hands that an author had a beneficial intereſt in his own manuſcript before publication, it was a moſt extraordinary circumſtance that he ſhould loſe that beneficial intereſt the very firſt moment he attempted to exerciſe it.

Mr Juſtice Nares put ſeveral caſes to ſupport his argument, and the ſtatute, he ſaid, did not take away the Common Law remedy, although it gave an additional one, as in the caſe of an action for maliciouſly ſuing out a commiſſion of bankruptcy, although the ſtatutes of bankruptcy have provided an additional penalty for that offence by the bond given to the Chancellor. After having ſpoken near an

hour he concluded with anſwering the queſtions in a manner directly oppoſite to that of Mr. Baron Eyre.

Judge ASHURST then roſe, and accorded in the ſame opinion with Mr. Juſtice Nares, after tracing the nature of Literary Property, and producing many cogent reaſons to prove that ſuch a claim was warranted by the principles of natural juſtice and ſolid reaſon. Making an Author's intellectual ideas common, was, he obſerved, giving the purchaſer an opportunity of uſing thoſe ideas, and profiting by them, while they inſtructed and entertained him; but he could not conceive that the vender, for the price of five ſhillings, ſold the purchaſer a right to multiply copies, and ſo get five hundred pounds.

Literary Property was to be defined and deſcribed as well as other matters, and matters which were tangible. Every thing was property that was capable of being known or defined, capable of a ſeparate enjoyment, and of value to the owner. Literary Property fell within the terms of this definition. According to the appellants, if a man lends his manuſcript to his friend, and his friend prints it, or if he loſes it, and the finder prints it, yet an action would lie (as Mr. Juſtice Yeates had admitted) which ſhewed that there was a property beyond the materials, the paper and print. That a man, by publiſhing his book, gave the public nothing more than the uſe of it. A man may give the public a highway through his field, and if there was a mine under that highway, it was nevertheleſs his property. It had been ſaid, that when the bird was once out of the hand, it was become common, and the property of whoever caught it; this was not wholly true, for there was a caſe upon the law books, where a hawk with bells about its neck had flown away; a perſon detained it, and an action was brought at Common Law againſt the perſon who did detain it; a book, with an author's name to it was the hawk, with the bells about its neck, and an action might be brought againſt whoever pirated it.

Since the ſtatute of Monopolies, no queſtions could exiſt about mechanical inventions. Manufactures were at a very low ebb till Queen Elizabeth's time. In the reign of James the Firſt, the ſtatute of Monopolies was paſſed; ſince that act no inventor could maintain an action without a patent. 'Tis the policy of kingdoms, and preſervation of trade, to exclude them. The appellants were contending for the right of printing; but the right of exerciſing a trade with another man's materials, could not be allowed, either by reaſon, or natural juſtice. A miller might grind corn, and a carpenter might build a houſe; but the firſt was not warranted in grinding any corn but his own; nor the car, enter in building a houſe with another man's wood. The caſes of Eyre and Walker, and Tonſon and Walker, happened ſince the ſtatute.

With regard to the queſtion; Its being capable of perpetuity, few ſubjects were ſo. Even land, the moſt tangible ſpecies of property, might be waſhed away by the ſea, and therefore might be rendered incapable of being perpetually enjoyed. He thought, however, that the reſpondents were entitled to as full an enjoyment, as the nature of the caſe could allow.

As ſoon as Judge Aſhurſt had concluded, he informed the houſe that Judge Blackſtone was ill with the gout, but had ſent his written opinion, which he read to the Houſe; Judge BLACKSTONE in general Terms, anſwered the five queſtions, and

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was of the ſame opinion with his bretheren, Mr. Juſtice Nares, and Mr. Juſtice Aſhurſt. The further hearing was poſtponed till Thurſday.

THURSDAY, *February* 17th.

Mr. Juſtice Willes, Mr. Juſtice Aſton, Mr. Juſtice Gould, Mr. Baron Perrot, and Mr. Baron Adams, gave their ſeveral opinions.

Mr. Juſtice WILLES ſpoke firſt, and after having ſhewn of what ſpecies of property the author's copy-right ſtood; that it was eſtate perſonal, that it was aſſignable, and that every man conceived what it meant; he declared it as his opinion, that an author had an indiſputable power and dominion over his manuſcript; that that power was not alienated when the manuſcript was printed and publiſhed; that the author had an excluſive right of multiplying copies according to the common law, which was foundedon reaſon and truth. This claim of right began with printing, and for the eſpecialreaſon, becauſe copies could not be eaſily multiplied but by the preſs; and therefore, that from which no profit could be got, was hardly a property.

In the courſe of the arguments this claim had been called by the odious name of a monopoly. This was a popular argument; but *argumenta ad populum* were not always well founded; and upon proper inveſtigation, this appeared to be more ſpecious than real.

After a variety of learned obſervations and ſeveral inſtances cited to prove that copy-right did exiſt independent of patents, privileges, ſtar-chamber decrees, or the ſtatute of Queen Anne; particularly the caſe of 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; Judge Willes gave his opinion upon the firſt, ſecond, and fourth queſtions, that at common law an author had the ſole right of firſt printing and publiſhing the ſame for ſale, and might bring an action againſt any perſon who printed, publiſhed, and ſold the ſame without conſent; and likewiſe that, after publication, an author or his aſſigns, had an excluſive right in perpetuity of multiplying copies.

He then proceeded upon the ſtatute of Queen Anne, which he declared did not take away that right. It was, he obſerved, an act very inaccurately penned, but nevertheleſs it conveyed to his mind no idea of the legiſlature's entertaining an opinion that, at the time of paſſing it, there was no common law right; the word veſting appearing in the title had given riſe to ſuch an idea, but the preamble contradicted it in the fulleſt manner; the words of it were, "Whereas certain printers and bookſellers have taken the liberty of printing and reprinting, &c &c." the phraſeology of this ſentence plainly proved, that a known right previous to that ſtatute exiſted; the legiſlature would not have termed the exerciſe of what was common to all, taking a liberty, had they not underſtood that a right in perpetuity exiſted at common law, the words of the preamble to the bill would probably have been, Whereas certain printers and bookſellers claim a right of printing. &c." And the intention of the word printing ſhewed that the idea prevailed that an author's property went farther then the firſt publication.

The univerſity of the ſaving clauſe, Judge Willes obſerved, convinced him that the right at common law, which he had ſuppoſed to have exiſted antecedent to that act, was left untouched by it. That it was not a particular ſalvo for the univerſities, and the holders of copy-right by patent, but that it was general, mentioning the words "all perſons."

Having by a multitude of forcible arguments maintained the doctrine of a perpetuity, he anſwered the third and fifth queſtions by giving it as his opinion that an action at common law was not any ways impeached, reſtrained, or taken away by the ſtatute of Queen Ann; nor was the author precluded by ſuch ſtatute from any remedy, except on the foundation of the ſaid ſtatute, and the terms and conditions preſcribed thereby.

Mr Juſtice Aston next gave his anſwer, beginning with reading a learned Judge's ſentiments in favour of literary property, as reported by Sir James Burrow; he agreed with the three Judges who had ſpoke before him, that it was a property, and that is belonged to an author independent of any ſtatutary ſecurity. It was not neceſſary, he obſerved for any man to advert either to the Grecians or Romans to diſcover the principles of the common law of England. Every country had ſome certain general rules which governed its law; that our common law had its foundation in private juſtice, moral fitneſs and public convenience; the natural rights of every ſubject were protected by it, and there did not exiſt an argument which would amount to conviction that an author had not a natural right to the produce of his mental labour. If this right originally exiſted, what but an act of his own could take it away? By publication he only exerciſed his power over it in one ſenſe; when one book was ſold it never could be thought that the purchaſer had poſſeſſed himſelf of that property which the author held before he publiſhed his work. A real abandonment on the part of the firſt owner muſt have taken place, before his original right became common.

In all abandonments, Judge Yeates had defined, that two circumſtances were neceſſary; an actual relinquiſhing the poſſeſſion, and an intention to relinquiſh it; in the preſent caſe neither could be proved. Many manuſcripts had not been committed to the preſs till years after they were written, the poſſeſſion of them for a century did not invalidate the claim of the author or his aſſigns. With regard to mechanical inſtruments, becauſe the act againſt monopolies had rendered it neceſſary for the inventors of them to ſeek ſecurity under a patent, it could be no argument why in literary property there ſhould be no common law right. He thought it would be more liberal to conclude, that previous to the monopoly ſtatute, there exiſted a common law right, equally to an inventor of a machine, and author of a book.

After a variety of arguments drawn from the nature of the property, and the conſtruction which would rationally be put upon the act of publication, Judge Aſton gave his opinion in favour of the firſt, ſecond, and fourth queſtions.

With regard to the ſtatute of Queen Ann, he obſerved that it was no more than a temporary ſecurity, given by the legiſlature to the author, enabling him to recover penalties, and bring a matter of complaint againſt any perſon who printed upon him to a more certain iſſue than by an action at common law. It was an act paſſed for the encouragement of learned men, and being ſo termed in its title, it was a

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ſufficient proof that it was no bar to the common law right which exiſted previous to its being enacted. He read the preamble, and contended that it was evident from the wording of it, that it meant to give an additional ſecurity to a right, which they who paſſed the act knew exiſted. Beſides, the manner of paſſing it ſpoke in favour of this idea. He had 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 was clearly a ſalvo to the common law right. The idea was as forcibly expreſſed, as words could expreſs.

After citing the injunctions granted by the court of Chancery, and arguing upon the multitude of circumſtances deducible in favour of *Literary Property* from the natural rights of the ſubject, the immediate nature of the property, the idea uniformly entertained of its exiſtence from the era of the commencement of printing to the preſent day, as well as his conſtruction of the ſtatute of Queen Anne, he gave his anſwer to the third and fifth queſtions, declaring it his opinion that an action at common law was not any ways impeached, reſtrained, or taken away by the 8th of Queen Anne.

Baron PERROT ſpoke next, and begin by obſerving, that the argument for the exiſtence of a common law right, and the definition of Literary Property, as chattel property, was in his idea exceedingly ill-founded and abſurd. If Literary Property was a chattel, then upon the death of the poſſeſſor of a manuſcript, any ſimple contract creditor might oblige his family or aſſigns to give it up and ſuffer him to print it. An author certainly had a right to his manuſcript; he might line his trunk with it, or he might print it. After publication, any man might do the ſame, their Lordſhips might turn printers if they choſe, and print it. From the patents, the privileges, the ſtar-chamber decrees, and the licenſing acts, it was evident that in thoſe days no idea was entertained of an author's having any claim to the excluſive right of printing what he had once publiſhed: If a manuſcript was ſurreptitiouſly obtained, an action at common law would certainly lie for the corporeal part of it, the paper. So if a friend to whom it was lent, or a perſon who found it, multiplied copies, having ſurrendered the original manuſcript, he had ſurrendered all that the author had any common law right to claim.

He ſpoke of the right under patents and privileges as a right petitioned for by printers without any thought of an author's entertaining an idea that he had any claim. As to the Stationers Company, ſurely we were not to look for the common law among them. All their rules and orders were for the ſecurity of ſuch peculiar works as their own members had been wont to print. An inventor of a machine or mechanical inſtrument, like an author, gave his ideas to the public. Previous to publication, he poſſeſſed the *jus utendi, fruendi, et diſponendi*, in as full an extent as the writer of a book; and yet it never was heard that an inventor, when he ſold one of his machines, or inſtruments, thought the purchaſer, if he choſe it, had not a right to make another after its model. The right of excluſively making any

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Mechanical Invention was taken away from the Author or Inventor by the Act againſt Monopolies of the 21ſt of James the Firſt. Which Act ſaved prerogative Copy Rights, and which would have mentioned what was now termed Literary Property, had an idea exiſted that there was a Common Law right for an Author or his Aſſigns excluſively to multiply copies. The argument, that when a book was publiſhed and ſold, there was an implied contract between the Author and Purchaſer could not be maintained. The Purchaſer bought the paper and print, the corporeal part of his purchaſe; and he bought a right to uſe the ideas, the incorporeal part of it.

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

The Baron contended that the arguments of the counſel, and the opinions of thoſe on the other ſide of the queſtion were more ingenious than convincing. He therefore anſwered the firſt, ſecond and fourth queſtions in the Negative, being fixed in opinion that there never exiſted a Common Law right, and that an Author had no claim to his Manuſcript after publication.

Reſpecting the Statute of Queen Anne, he was perfectly convinced that it was the only ſecurity that Authors or Bookſellers had. That it gave a right for 14 years to the holders of copies, and after that period the right reverted to the Authors for 14 years longer. The Baron ſaid he could not ſpeak to the Act, without having it in his hand; he firſt read the title, and declared that all the metaphyſical ſubtlety or definition which the ableſt logician could muſter, could not give any other ſenſe to the words "for the Encouragement of learning, and for veſting a right in authors," than a creation of a property, not a further ſecurity for one. He then read the preamble, and went through the act ſentence by ſentence, particularly inveſtigating the meaning of each clauſe, and drawing from its meaning ſtrong arguments in favour of the opinion he was laying down. The words, "*and no longer,*" he declared were clear and concluſive; out of the power of argument to ſurmount. They ſhewed that the Legiſlature thought it a great favour to grant any, even a limited ſecurity, and that they might not be miſunderſtood, they expreſſed their idea in the fulleſt terms. After theſe words it was in the higheſt degree abſurd to contend that any ſaving clauſe could be ſo conſtrued as to affect, and indeed deſtroy the moſt ſubſtantial meaning of the enacting part of the act. The ſaving clauſe was evidently a ſalvo for thoſe who held a patent-right to copies; and as it would

would have been tedious to have enumerated all, the Universities were mentioned, as being the greateſt holders under that kind of deſcription.

The Baron enforced this obſervation, and the concluſion he drew from the words *and no longer* in the enacting clauſe, by citing a caſe of an attainder in the reign of Edward the VI. 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 theſe 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.

With regard to the injunctions cited on the occaſion, the Court of Chancery muſt have uniformly miſtaken the law, if they had not granted them under the idea of the ſtatute.

The act itſelf gave no more remedy with its penalties, than it did without them. An author in the firſt was allowed to damaſk all the books pirated upon him; by damaſking he underſtood, turn to waſte paper and line trunks, which linings were figured like damaſk. What remedy was this? none in the world. Then again, a penny per book was to be recovered, half of which went to the informer and half to the King; here therefore the author got nothing. The ſtatute afforded him grounds for a remedy in equity. The Court of Chancery, by an injunction and a decree, not only ſtopped the ſale of the pirated copies, but alſo obliged the pirate to account for what he had ſold. This was a ſatisfaction; this was an actual and an effectual remedy. To ſuppoſe that the ſaving clauſe maintained a perpetuity of property, was to ſuppoſe that the act granted an author fourteen years *and no longer*, except *for ever*, which was ſo barefaced, ſo egregious an abſurdity, that no man of ſenſe could be the dupe of it. That the Court of Chancery had never dreamt of a Common Law Right, he proved by citing a caſe between the Stamp Office and a news-paper printer; a printer got into the Fleet, and there printed news-papers without ſtamps. The Stamp Office prayed an injunction, the Court refuſed it, and told them the ſtatute having enacted, that a penalty was to be paid on conviction, that they muſt proſecute to conviction under the ſtatute, and they had a right to the penalty, but they could not upon the principles of Common Law prevent the printer from continuing his trade. This proved that ſtatute laws were unneceſſary where remedies could be had at Commmon Law.

After the Baron had ſeverely animadverted on the printers who claim the right of perpetuity, and inſtanced many caſes, all tending to corroborate his opinion, he concluded his ſpeech by affirming that there was no right at Common Law previous to the 8th of Queen Ann, and that if there was, that ſtatute entirely and effectually took it away.

Mr. Juſtice Could agreed, that an author had a right at Common Law to his manuſcript, previous to publication. With regard to the ſtatute of Queen Anne, he

he conceived that t'e act entirely took away any previous right that an author might have, and that an author was precluded by ſuch ſtatute from any remedy, except on the foundation of the ſame ſtatute, and the terms and conditions preſcribed thereby. This anſwer he gave to the third and fifth queſtion.

Baron ADAMS entered very learnedly into the nature of patents, privileges, and grants of the crown; traced them reſpecting books to a very early period, and cited a variety of inſtances, all tending to prove, that till of late years no idea was entertained that a Common Law right exiſted reſpecting Literary Property. He was clearly of opinion that, previous to the ſtatute of Queen Anne, authors and printers had no ſecurity but by patents. He therefore anſwered the firſt, ſecond, and fourth queſtions in the negative. The Baron anſwered the third and fifth queſtions alſo in the negative.

MONDAY, *February* 21.

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

Some lawyers, yet alive, remembered the caſe of Lord Chief Baron Gilbert's manuſcripts, which he deviſed to Baron Clarke; the Baron never publiſhed them, but a hackney writer, whom he employed, took an opportunity of copying them, and th ſe ſtolen copies were committed to the preſs. The ſame argument lay againſt pirating after, as before publication.

It had been mentioned, that a man made his landed eſtate common, by giving a part of it to the highway; but it ſurely would not be contended, that although he gave a part of his eſtate for ſuch a purpoſe, that any perſon but himſelf had a

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right to the trees on it, or the mines beneath it. He adverted to the caſe of Baſket and the Univerſity of Cambridge, and declared that the argument was then grounded on theſe principles. This caſe was reported in Burn's Eccleſiaſtical Law.

He cited likewiſe the caſes, which, both at the bar and by the Judges, had been mentioned of Eyre and Walker, and others, all of which were after the 21 years were expired, and which, redreſs being obtained, ſpoke in favour of the Common Law Right. He inſtanced alſo the caſe of the Seſſions Paper as corroborative of this opinion, and obſerved, that in order to alarm their Lordſhips paſſions, two very odious names had been thrown out, perpetuity and monopoly; neither of which, he thought, applied to the preſent claim. The firſt was entirely out of the queſtion, and the latter, Lord Coke had defined to mean a grant from the Crown, to vend any ſingle matter.

As to mechanical inventions, he did not know 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 could make; and he might faſhion a ſecond, as ſoon as he had ſeen a firſt: it was then in a degree an original work. Whereas, in multiplying an author's copy, his name as well as his ideas were ſtolen, and it was paſſed upon the world as the work of the original author, altho' he could not poſſibly amend any errors which might have eſcaped in his firſt edition, nor cancel any part which ſubſequent to the firſt publication appeared to be improper.

After ſeveral other obſervations, tending to prove that an author had a right at Common Law, both before and after publication, he anſwered the firſt, ſecond, and fourth queſtions in the affirmative.

The ſtatute of Queen Anne, he looked upon as a compromiſe between authors and printers contending for a perpetuity, and thoſe who denied them any ſtatute right. There were general rules for the conſtruction of all ſtatutes. One was that it ſhould never be interpreted ſo as to be unreaſonable; another, that no clauſe could be conſtrued ſo as to make it inconſiſtent with any former clauſe; it ſhould 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 could be tortured ſo as to tell againſt the preſent claim, was ſufficiently qualified and done away by the word *ſecure*, which occurred in the enacting clauſe, and which plainly implied a ſecurity for ſomething pre-exiſting. That the preamble gave full authority to this conſtruction, the word *re-printing* particularly implying a right after the firſt publication; and the word *purchaſer*, (which was one of the parties mentioned by the act as being ſecured in their property) indicated moſt amply a previous right, for nobody could be thought to purchaſe what another had not a right to ſell. The Baron ſaid that the ſtatute afforded the holders of copy-right a more efficacious remedy than the Common Law, but that it by no means impeached, reſtrained, or took away the Common Law right. He therefore anſwered the third and fifth queſtions in the negative.

The Subſtance of Lord Chief Juſtice DE GREY's *Speech.*

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

Now if there exiſts any incorporeal right or property in the author detached from his manuſcript, no act of publication can deſtroy it. Can then ſuch right or property exiſt at all? Does ſuch a right come within the knowledge or reach of the common law? In anſwer to the firſt of theſe queries, I acknowledge, tho' this claim of property is abſtract and ideal, novel and refined, it is yet intelligible, and may as eaſily be made to exiſt for ever as for a term of years; but in order to know whether it is ſo protected by law, a preliminary queſtion is neceſſary, Whether it has been ſo determined in its favour by the great and learned men who have been my predeceſſors, in regular cauſe 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 300 years ago when printing was invented. No traces of ſuch a claim are to be met with prior to the reſtoration. Very few caſes of this kind happened in Charles 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 Cambridge, which was a late one of the ſame kind, appeared upon the pleadings to be a queſtion ariſing between two parties who claimed under concurrent and inconſiſtent grants of the crown. My late honourable and learned friend Mr. Yorke) who argued that caſe, endeavoured to ſhew that his client's right might ariſe from the power of the crown, and to illuſtrate his argument, ſaid, it might perhaps be "property "founded on prerogative,"—a language, however allowable for counſel, not very admiſſible by, or intelligible to a judge, but the certificate in the above caſe does not ſay a word of property, and indeed if ſuch a claim as that had been founded on property, every one would have as good a right to publiſh abridgments of the ſtatutes, as of any other book.

Lord Northington granted injunctions on behalf of publications which he conſidered as matters of ſtate, but left ſuch works as "The Whole Duty of Man," to their common remedy at law. When works of literature, encouraged by the facility of printing, began to ſpread, we find the caſes multiply. Of theſe, however, I

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lay entirely out of the queſtion, all thoſe which appear to be caſes between rival patentees of the crown; all thoſe relating to the Stationers Company; all thoſe concerning religion, law, or the ſtate; and all unpubliſhed manuſcripts.

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

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

In the famous caſe of Tonſon and Walker, of which I have an accurate note of my own taking, Lord Hardwicke ſaid, before the defendant's counſel began to argue, "I am inclined to ſend a caſe to the judges, for I doubt whether the matter has been judicially determined, but wiſh to hear what the defendant ſays as to Dr. Newton's notes; however I determine the general queſtion either upon the Common Law or the ſtatute." The matter afterwards reported the variations between the two books to be colourable and illuſory only, and therefore the injunction was made perpetual. Since that time during the laſt 20 years, or more, the main queſtion has been fluctuating, and in agitation.

From my own experience at the bar, I know that the ſucceſſive Chancellors and Maſters of the Rolls, Lord Northington, Lord Camden, Sir Thomas Clark, &c. have all looked upon the caſe as undetermined; it may now therefore be fairly treated as a new queſtion, and indeed it has been argued as ſuch upon general principles. Let us conſider what weight thoſe principles have which are laid down as the foundation of this new ſpecies of property; I have heard but of one, namely, that ſuch a claim is conſiſtent with the moral fitneſs of things. This idea of moral fitneſs is indeed an amiable principle, and one cannot help wiſhing all claims derived from ſo pure a ſource might receive all poſſible encouragement; but this principle is no univerſal rule of Law, nor can it be made to apply in all caſes. Beautiful as it may be in theory, to reduce it into the practice and execution of Common Law, would create intolerable confuſion; it would make laws vain, and judges arbitary; nor is it poſſible to ſupport the reſpondents claim upon theſe principles and not allow their operation, in a variety of other caſes, where it is confeſſed on all hands they cannot be allowed.

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