In another ordinance of the Usurpation Parliament, passed the 20th of September, 1649,* for putting down false and scandalous pamphlets, and regulating printing, and restraining it "from too arbitrary and general an exercise," the following enactment was made:—

That any person *printing* or reprinting any books entered in the registry book of the Stationers' Company, *without the consent of the owner* thereof, or stitching or binding the same, should forfeit all such books, and 6s. 8d. for each.

* Scobell's Acts and Ord.

CHAPTER IV.

FROM THE RESTORATION IN 1660, TO THE ACCESSION OF WILLIAM AND MARY, 1688.

As the liberty of the press had met with but little sympathy even from the loudest declaimers for freedom, so it could not be expected to receive much consideration at the hands of the restored government, who could trace in it one of the great means of their original expulsion. But as there was no Star-Chamber any longer, to give an appearance of legality to the mandates of the Court, application was obliged to be made to Parliament to legislate on that subject; and that compliant body hesitated not to reforge for the press its old fetters. To enter into this, however, would be beside our subject at present, which is merely to show the authority that the act that they passed* gave to the right of copy in the owner, by the following clause:—

In which it is enacted, that no one should print any book or books, "which any person or persons, by force or virtue of any letters patent granted or assigned, or which should hereafter be granted or assigned to him or them, or (where the same are not granted by any letters patent), *by force or virtue of any entry* or entries thereof duly made or to be made in the register book of the said Company of Stationers, or in the register book of either of the Universities respectively, had or should have the right, privilege, authority, or allowance, solely to print, *without the consent of the owner or owners of such book* or books;" nor should bind, stitch, &c., on pain of forfeiting

* 13 & 14 Car. II. c. 33.

the same, and 6s. 8d. for each book, and being proceeded against as an offender against that act.

And by another clause, it obliged the printer of every work to reserve three copies; one for the King's library, and one for each of the Universities of Oxford and Cambridge.*

The entry of works in the register book of the Stationers' Company, had been so often recognised and treated as equivalent to proof of ownership by decrees and other acts, that a legal title was thought to be attained by it, even paramount to that of the king's patentee, if he had not registered his work; and Atkyns, who held a patent from the king for printing all books touching the common law, finding parties acting in defiance of it, on the pretext of priority of title by entry, petitioned the king, who issued a proclamation,† wherein, after stating that differences had arisen between the Stationers' Company and Mr. Atkyns, to whom the king had granted the sole right of printing all law books, *owing to divers copies* of such books *being entered* in the register books of the Stationers' Company, by which *a private property* was pretended to be *gained* thereto; it was stated to be his Majesty's pleasure, that no book concerning the common law should be entered in the register book, so as to give the person entering it any property in such book, but that the printing thereof be solely reserved to the said Edward Atkins.

A cause, in which this point was involved, was at this time pending in the Court of Common Pleas, and is the first case on record concerning Copyright before a legal tribunal. It is not regularly reported, but was quoted in the case of the Company of Stationers *v.* Parker, 1 Jac. II., Skinner's

* This was the first foundation of the present claim of public bodies to copies of every work published. Sir Thomas Bodley, had, as far back as 1610, made an agreement with the Stationers' Company, by which they agreed to give a copy of every work printed in the Company to the University of Oxford; but this was a matter of private agreement, and not a compulsory clause of a statute.

† Dated the 8th of Nov. 1671.

Rep. p. 234. The circumstances were these: 'Roper, the plaintiff, had bought of the executors of Mr. Justice Crook, the third part of his reports; Streater, the defendant, had a grant from the King, and printed upon Roper; upon which the latter brought an action of debt upon the stat. 14 Car. II. Streater pleaded the King's grant, upon which Roper demurred, and judgment was given for the plaintiff.' *

And although this judgment was reversed afterwards in Parliament, yet its authority was not shaken, since the reversal proceeded upon the grounds that the *copy belonged* to the King. Besides, the Judges were not consulted on the occasion, and it is not clear that they would have supported the reversal; for although the majority of the Lords concurred in reversing the judgment, it was not till after long debate and consultation; and the opinions of the Judges were not taken; for when the question was put, 'that the Judges be heard in this case,' it was carried in the negative, 'dissentiente Anglesey.'

* Roper *v.* Streater, M. T. 24 Car. II., Rot. 237. It was said afterwards, in the case of the Stationers' Company *v.* Parker, Skin. 233, in reference to the above case, and in answer to the argument of there being no right of copy at common law decided in this case, since it was brought on the Statute of 14 Car. II. that 'although it was true, that the action was brought on the act of 14 Car. II., yet that Statute did not give a *right*, but only an *action of debt*;' therefore, that the case was a precedent of an action on the common-law right of the owner.

Perhaps this case of Roper *v.* Streater was the one alluded to by Sergeant Pemberton in T. T. 29 Car. II., 1 Mod. Rep. 256, Stationers' Company *v.* Seymour, where he says, "When Sir Orlando Bridgeman was Chief Justice in this court, there was a question raised concerning the validity of a grant of the sole printing of any particular book, with a prohibition to all others to print the same, how far it should stand good against them that claim a property to the copy, paramount to the king's grant; and opinions were divided on the point." If so, the learned sergeant states the case rather differently when he says, "that opinions were divided on the point." Perhaps he refers to the case before it was decided, whilst it was pending in the court; and this appears more probable, since Sir Orlando Bridgeman was not Chief Justice, when judgment was pronounced, having been then recently elevated to the dignity of Lord Keeper.

The act of Charles the Second above mentioned, was at first made only for a limited period, but was afterwards renewed from time to time till the end of the session, 31 Car. II., which was in May, 1679, when it was suffered to expire. The many debates about the Popish Plot, the bill for excluding the Duke of York from the throne, the impeachment of the Lord Treasurer Danby, the ill-humour of the Parliament, and their encroaching spirit, the short period of their session, their hasty prorogation and subsequent dissolution, are all reasons why this bill was not again renewed, as it most likely would have been under other circumstances. And the two subsequent Parliaments which were held in this reign, were conducted so tumultuously, betrayed such a spirit of faction, and were dissolved so hastily, that no time was found for discussing a bill like the present one, so comparatively unimportant at that moment.

As soon as the legislative protection was thus removed from the copies of works, the meaner and least honourable men of the Stationer's Company, who had little to lose, having no copies of their own, and much to gain by pirating the valuable works of their wealthier neighbours, and so reaping without cost what it had cost others much to sow, began without shame or fear to appropriate to themselves the labours and property of others; whereupon the principal stationers met together in council, on the 17th of August, 1681, to take some effectual steps to prevent a practice so ruinous to the best interests of their trade, and agreed upon the following by-law, which was accordingly passed.*

It recited, that 'Whereas several members of the company had great part of their estate in copies, and by ancient usage of the company, when any book or copy was duly entered in the register book of the company, such person to whom such entry is made, was, and always had been, reputed and

* Register Book.

taken to be the proprietor of such book or copy, and ought to have the sole printing thereof, which privilege and interest was then of late often violated and abused;' and ordained, that where any such entry was duly made, any other person printing, or importing, selling, binding, or stitching the same, without the consent of the owner or his assigns, should forfeit 12d. for every such copy so printed or imported.*

As our present object is confined strictly to tracing the different steps by which the Law of Copyright arrived at its present state, we pass by, as foreign to our purpose, the legal arguments and discussions that now arose in several cases, as to the King's power of granting exclusive patents for different works; since they were not so much cases interfering with the particular Copyright of individuals, as restrictions on the general liberty of printing.

On the accession of James II. the 13 and 14 Car. II. c. 33, was revived by the 1st of Jac. II., c. 17, for the term of seven years, and thence to the end of the next Session of Parliament.

* This was afterwards, on the 7th of October, approved of and confirmed by the Lord Chancellor and the Lords Chief Justices, to whom it was submitted for that purpose, pursuant to a statute passed in the 19 of Henry VII. which requires that all by-laws made by companies, shall be first examined and approved of by the persons therein named, under penalty of £40 for every default.

CHAPTER V.

FROM THE REVOLUTION IN 1688, TO THE ACCESSION OF ANNE.

In William and Mary's reign, when this act, commonly called 'The Licensing Act,' was about to expire, it was renewed by the 4 W. & M. c. 24, sec. 15, for a year from the 13th day of Feb. 1692, O.S. and from thence until the end of the next Session of Parliament.

It may appear curious that in times when liberty was so zealously asserting her rights, a bill that thus completely fettered the press should have been again renewed; but it was in a manner secretly passed through the House of Commons, it being an amendment proposed in committee to a general act for renewing about a dozen of statutes then about to expire; and when the motion was put that the house agreed with the committee in that amendment, it was only carried by a majority of 19 out of 179 members present. On the bill being submitted to a Committee in the House of Lords, the house, after reading the petition of several booksellers and bookbinders, and others, dealers in books and printing, praying to be heard before the passing of the bill, ordered that they should be heard. But they do not appear to have met with much success, as the bill was soon after read a third time; on which occasion two riders were offered, but these being negatived the bill was passed. A protest was, however, drawn up and signed by eleven Lords, which thus concludes their reasons against the bill,—

"Because it subjects all learning and true information to the arbitrary will and pleasure of a mercenary, and perhaps ignorant, licenser; *destroys the property of authors in their copies;* and sets up many monopolies."*

We learn from 'Reasons humbly offered to be considered before the act for printing be renewed,'† that this 'destruction of property' referred to certain mal-practices in the management of the register book of the Company of Stationers. The Company, it appears, not being compelled to do so by any express words in the statute, sometimes asked large sums for making an entry, and at others refused or neglected to enter books; and not unfrequently made false entries and erasures to the confusion of all property. It was also alleged, that the terms of the Act itself were liable to misconstruction, as it seemed to make the fact of an entry equivalent to proof of legal ownership. "By the said Act it is enacted, that a book being licensed and entered into the Register-book of the Company of Stationers, it is forbid to be printed without the owner's licence (who by virtue of that entry is owner) under the penalty of 6s. 8d. per book; which Register hath (by the undue practices of the Master and Wardens), been so ill kept, that many entries have been unduly made, insomuch that the true proprietors, both by purchase, licence, and entry, all duly made of several books, which afterwards have been erased, or the leaves wherein they have been written have been cut out, and undue entries made to others who had no right, which is directly contrary to the plain words and meaning of the said Act, whereby the owners have not only been defrauded of their right, but also rendered liable to the penalty of 6s. 8d. per book for all the books they printed, sold or bound. Many learned authors have been defrauded of their rights thereby, who, after many years' pains and study, and after-

* Lords' Journals.

† In the Brit. Mus., a printed sheet.

wards by a bare delivery of their books to be licensed, have been barred by surreptitious entries made in the said Register, (to instance, in the book called 'Regula Placitandi,' among many others, written by a learned lawyer and worthy Member of Parliament.)"

The Act so renewed was only of short duration, and another attempt was soon required to be made, to get its enactments again prolonged. Accordingly, on the 10th of February, 1694, O.S., when the Committee, appointed to inquire into what laws were expiring, or had expired, gave in their report, they recommended, amongst other laws, that the 13 and 14 Car. II., c. 33, should be revived. But the House rejected this recommendation, at the same time, however, ordering a Committee to be appointed to prepare and bring in a Bill, 'For the better Regulating of Printing and Printing Presses.'

A Bill was accordingly prepared and brought into the House on the 2nd of March, read a first time on the 7th, a second time on the 30th, and sent into Committee. On the latter day, a Petition was presented from the Master, Wardens, and Commonalty of the Company of Stationers, setting forth that they heard a Bill was depending in the House for the better regulation of Printing and Printing-Presses, and that if their property should not be provided for by the said Bill, not only the petitioners, but many widows and others, whose whole livelihood depended on the petitioners' property, would be utterly ruined.* They therefore prayed to be heard by counsel touching the said Bill.

What became afterwards of this Bill, we cannot learn; whether it was lost in the committee, or whether the report of the committee was never given in, on account of more pressing business, or the near termination of the session which occurred on the 3d of May. Perhaps it was a mea-

* House of Commons' Journals.

sure that satisfied neither party, for it appears probable that it was only brought forward to show that while the Commons refused to revive the Licensing Act, they were not unwilling to pass some measure of a more moderate nature to regulate the liberty of printing. We are, however, left to conjecture, for there were no debates on the subject, nor any information beyond what may be gleaned from the scanty details in the Commons' Journals.*

In the meantime the bill to continue the acts about to expire, was passed in the House of Commons, carried up to the Lords, and there on the 3rd of April committed; when, amongst other amendments to the bill, the very resolution which the Commons had rejected, of reviving the 13 and 14 Car. II, c. 33, was proposed and carried, and the bill, with this alteration, passed and sent down to the Commons for their concurrence. The Commons then desired a conference, which being had on the 18th of April, they submitted to their Lordships a great many reasons for not consenting to the renewal of that act. Amongst the rest: "Because that act prohibits printing any thing before entry thereof in the register of the Company of Stationers (except proclamations, acts of parliament, and such books as shall be appointed under the sign manual, or under the hand of a principal secretary of state); whereby both houses of parliament are disabled to order any thing to be printed; and the said Company are empowered to hinder the printing all innocent and useful books; and have an opportunity to enter a title to themselves and their friends, for *what belongs to and is the labour and right of others.*" † The Lords then retired

* The last that was heard of this Bill, was on the 3rd of April, when the House ordered, that the Committee to whom the Bill was committed, should have power to send for persons, papers, and records.

† And another reason was, "Because that Act prohibits any one, not only to print books whereof another has entered a claim of property in the register of the Company of Stationers; but to bind, stitch, or put them to sale, and that

to their own house, and on the question being put, whether they agreed with the Commons in leaving out the clause, reviving the 13 and 14 Car. II, c. 33, it was resolved in the affirmative.

So that this act, commonly called the 'Licensing Act,' finally expired on the 25th of April, 1694; which was the end of the next session, after the expiration of a year from the 13th of February, 1692, O.S.

The same inconveniences arising as did on the former occasion, on the expiration of this act, the stationers soon afterwards convened a common-hall,* and passed a by-law, similar to the one of August, 1681. It recited: "Whereas divers members of this company have great parts of their estates in copies, duly entered in the register book of this company, which, by the ancient usage of the company, is, are, or always hath and have been used, reputed, and taken to be the right and property of such person and persons (members of this company), for whom or whose benefit such copy and copies are so duly entered in the register book of this company, and constantly bargained and sold, amongst the members of this company, as their property; and devised to children and others, for legacies, and to their widows for maintenance; and that he and they, to whom such copy and copies are so duly entered, purchased, or devised, ought to have the sole printing thereof:" And ordained, "for the better preservation of the said ancient usage from being invaded by evil-minded men, and to prevent the abuse of trade by violating the same," that 'where any such entry of a book was duly made, any one printing, importing, selling, binding, stitching, or exposing the same to sale, should forfeit the sum of 12d. for each copy, or part of such copy.'

under a great pecuniary penalty; though it is impossible for a bookbinder, stitcher, or seller, to know whether the book brought to him were printed by the proprietor or another."

* 14th May, 1694.

CHAPTER VI.

FROM THE ACCESSION OF ANNE, TO THE PASSING THE 8TH ANNE, C. 19.

But as the foregoing by-law did not have the desired effect, and some of the poorer sort of the printers, and others not belonging to the company, persisted in printing other men's copies: the parties aggrieved petitioned parliament in the years 1703, 1706, and again in 1709, to put a stop to these mal-practices, and to enact penalties against the offenders.

Some time before, in one of the petitions offered against the renewal of the licensing act, we find the following, suggested by the petitioners, as heads of a bill, they were willing to have passed. '1, That it should be made felony for any printer to neglect to put his name and address to any book he printed. 2, That a penalty should be fixed on seditious, treasonable, and scandalous books. 3, That "the proprietor should be *secured* in his particular copies, by giving him a *method of process*, and treble costs and damages against the invader." 4, That the register-book of the Company of Stationers should be duly rectified, and all fraudulent and false entries, and entries of popish books, and other illegal and scandalous books there entered, be expunged, and the true proprietor thus reinstated in his right.'

It is in fact the burden of almost all the petitions that we meet with, prior to the 8th of Anne, that *security* be given to the proprietor for *quiet enjoyment* of his property in his copies; not that a *property* in his copies be given to him.

It is his undoubted right, they say. In the petition above alluded to they assert: "The property of English authors hath been always *owned as sacred* among the traders, and generally forborne, hitherto to be invaded: but if any should invade such properties, *there is remedy*, by laws already made, and no other were ever thought needful till 1662."

Again, in another petition entitled "Reasons against the Act for Licensing," they say: "As for securing property, *it's secured by law already*, as our own experience may show; and before 1662, there was no Act of Parliament for regulating printing; it is the enclosed common that is intended by the patentees to be made a property by Act of Parliament. That particular property may be secured, is earnestly desired."

But although there was remedy, it was not equally clear what that remedy was. Copyright had been so long protected in the manner we have shown, by decrees and acts, that any other mode of proceeding was almost unknown.* Besides, what use was there in running the hazard of an action at law against persons, who could not, even in the event of success, pay the costs, much less the damages, that might be adjudged against them?

It was these circumstances that induced the respectable portion of the trade to earnestly desire that some step should be taken in Parliament to more effectually secure their property; and by the authority of the legislature, to proclaim, that their rights were no longer to be trampled on with impunity.

"They set forth to the Parliament," says Mr. Strype, in his edition of Stow's Survey of London, "that when the

* It is true, there was the instance in Charles the Second's time, soon after the expiration of the Licensing Act, in the King's Bench, of an action on the case, brought for printing the Pilgrim's Progress, 'of which the plaintiff was and is the true proprietor; whereby he lost the benefit and profit of his copy.' Poynder *v.* Bradyl, H. T. 31. Car. II. Lilly's Entries, p. 67. But this was a solitary case, and as it does not appear that the action was proceeded in, it could hardly operate as a precedent.

author had conveyed over his copy to any of them, they had a just and legal property thereunto. And that they had given sums of money for copies, and had settled those copies on their wives at marriage, or on their children at their deaths. And that at this time many widows and orphans had none other subsistence; and that the copies then in use had cost the present possessors (exclusively of all other charges of print and paper) at least £50,000. Urging further that this property was the same with houses and other estates, being agreeable to common law and good reason. To which might be added, that unless this liberty of printing upon the owners of copies were stopped, it would prove a great discouragement to the printing of many good books, offered by authors to the booksellers, who would not care to meddle in such uncertain gain, and thereby might ensue great prejudice to knowledge and learning."

And in another case given to the members in support of their application for a bill, the last reason or paragraph is as follows:—"The liberty now set on foot of breaking through this ancient and reasonable usage is no way to be effectually restrained, but by an Act of Parliament. For, *by common law, a bookseller can recover no more costs than he can prove damage;* but it is impossible for him to prove the tenth, nay perhaps the hundredth part of the damage he suffers, because a thousand counterfeit copies may be dispersed into as many different hands all over the kingdom, and he is not able to prove the sale of ten. Besides, the defendant is always a pauper; and so the plaintiff must lose his costs of suit. *No man of substance had been known to offend in this particular;* nor will any ever appear in it. Therefore, *the only remedy by the common law* is to confine a beggar to the rules of the King's Bench or Fleet; and there he will continue the evil practice with impunity. We therefore pray that *confiscation of counterfeit copies be one of the penalties* to be inflicted on offenders."

By which we may learn that the reason of applying for some law on the subject, was not because an author was thought to have no right in his copy, or no remedy for its infringement; but because it was sought to render his right more beneficial, by the remedy being made more effective. The action on the case could only give the damages arising from each particular sale of a copy proved at the trial; and the judgment obtained could have no effect on the pirated copies still remaining in the printer's hands, which he was still at the same liberty to attempt to dispose of as at first. Besides, the action on the case was a peculiarly inappropriate and expensive remedy against parties, who had no property to answer the event of the trial, and where the plaintiff, even when successful, was left to pay his own costs; for at this time no man of respectability or substance as has been already stated, had been known to offend in such a case.

In compliance, therefore, with the above petitions, leave was given to bring in a bill, which, we are told, went to the Committee as "A Bill to secure the undoubted property of copies for ever."* And as this Bill has had a very material effect on the property of authors, and has been adjudged to take away from them any common law right they before possessed, it will not be unprofitable to mark the steps by which it passed into a law.

On the 11th of January, 1709, O. S., say the Journals of the House of Commons, "Mr. Wortley† according to order presented to the House, 'A Bill for the encouragement of Learning, and for *securing* the property of copies of Books to the *rightful* owners thereof;' and the same was received and read a first time."

An early day was named for the second reading; but it

* Mr. Justice Willes, in Millar *v.* Taylor, 4 Burrow's Rep. p. 2333. But what authority the learned Judge had for this statement, does not appear.

† Afterwards the husband of the beautiful and accomplished Mary Pierrepoint, better known as Lady Mary Wortley Montague.

was suffered to pass by without any notice being taken till the 2nd of February, when was presented, "A Petition of the poor distressed printers and bookbinders, in behalf of themselves and the rest of the same trades, in and about the cities of London and Westminster; setting forth that the petitioners, who are in number at least five thousand, having served seven years' apprenticeship, hoped to have gotten a comfortable livelihood by their trades; but that the liberty lately taken, of some few persons printing books, to which they have no right to the copies, is such a discouragement to the bookselling trade, that no person can proceed to print any book without considerable loss, and consequently the petitioners cannot be employed, by which means the petitioners are reduced to very great poverty and want. And, praying that their deplorable case may be effectually redressed, in such a manner as to the house shall seem meet." The House ordered the petition to lie on the table, till the Bill before the House was read a second time, which it accordingly was on the 9th of the same month.

After several amendments had been made in Committee, it was read a third time on the 14th of March, and passed. The title was then fixed as, "An Act for the encouragement of learning, by *vesting* the copies of printed books in the authors, or purchasers of such copies, *during the times therein mentioned.*"

The Lords made some amendments, amongst the rest, the giving the further term of fourteen years in the event of the author surviving the first fourteen years; and the Commons having agreed to all of them except one, which was striking out the clause regulating the price of books, and which was subsequently abandoned by the Lords, the Bill was passed, and received the royal assent the same day, being the last of the session.

This act stands in the Statute Book as the 8 Annæ, c. 19. It recites that, "Whereas printers, booksellers, and other

persons, have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families:" And enacts, "for preventing, therefore, such practices for the future, and for the encouragement of learned men to compose and write useful books;" that the author or his assigns of any book published before the 10th of April, 1710, should have the sole right of printing and publishing it, for the term of twenty one years, to commence from that day; and the author or his assigns of any book thereafter to be published, should have the sole right of printing and publishing for the term of fourteen years, from the date of publication; with a provision for a further term of fourteen years, if the author should be living at the expiration of the first. And any one printing such book within the period specified, without the owner's consent, should forfeit all such books or parts thereof, and 1d. for every sheet of the same, one half of the penalty to go to her Majesty, and the other to any one suing for the same.

The forfeiture and penalties were not to extend to cases where the title of a work had not been duly entered in the register book of the Stationers' Company, which entry the clerk of the Company was required to make, on payment of a fee of 6d.; and, on refusal, notice in the Gazette to be of like avail.

When books were sold at unreasonable prices, the Lord Archbishop of Canterbury, the Lord Chancellor, the Lord Keeper of the Great Seal, the Lord Bishop of London, the Lord Chief Justices of Queen's Bench, Common Pleas, the Lord Chief Baron of the Exchequer, the Vice Chancellors of the two Universities, or any one of them, on complaint being made, might inquire into the same, and regulate the price;

and any bookseller selling contrary to that regulation should forfeit £5 for every book so sold. *

Nine copies of each book were to be sent to the public libraries therein named, on penalty of £5, and the value of such copy. †

Nothing in the act was to extend to the prohibiting the importing or selling any books in Greek, Latin, or any other foreign language, printed beyond the seas.

All actions were to be brought within three months.

These were the principal provisions of this Bill, which concluded with this very general proviso: "That nothing in this act contained should extend, or be construed to extend, either to prejudice or confirm any right that the said Universities, or any of them, or any person or persons have or claim to have to the printing or reprinting any book or copy already printed or hereafter to be printed."

We have no account of any debates on the subject; nor indeed do we know what were the provisions of this Bill, as it was first introduced into the House of Commons: but we may fairly assume from the language of the petitions, and from the original title of the Bill, that it was submitted to the House, as a Bill to protect the property in Copyright of an author in perpetuity; and that the House, unwilling to run the hazard of such prospective legislation, as the enact-

* This clause was repealed by 12 Geo. II. c. 36.

† With regard to this clause it may be curious to observe the changes it went through, before it became as it now stands.

As the Bill was originally brought into the House of Commons, it was only for three copies to be delivered to the same public bodies, who were entitled to them, under the 13 & 14 Car. II. c. 33. In the passage of the Bill through the Commons, two more copies were added for the Edinburgh University and Sion College; and the Scotch Peers, in the House of Lords, not to be behind hand in letting so good an opportunity pass for enriching their public libraries, at the expense of the poor author, added accordingly four more copies for Scotland, making the nine in all.

ment of penalties and forfeitures for ever, took a middle course, and granting the penalties and forfeiture for a term, introduced a proviso, saving all rights an author might have by common law for a longer period, the same as if the act had never been made. It has been said that the proviso was only meant to save the rights of patentees; but, as has been well observed, if so, it was of no utility; since there is nothing in the act that could have extended to injure or confirm patent rights, they not being mentioned or comprised in any words therein. Besides, it is evident that the common-law right of an author was admitted at the time; not only by the proofs before adduced, but by the very language of the recital,—'that divers persons had taken the liberty of late,'—'for preventing therefore such practices for the future'—by which phrases, the legislature would never have denominated the exercise of what, till then, was a legal right; and the common-law right of an author being admitted, it could not with any reason be supposed to have been bartered away for so short a period as that of fourteen years, with the contingency only of a further term on the expiration of the first; and the books to be limited, even during that time, to what price, certain persons, named by the act, should consider as reasonable. But we shall have to return to this subject further on, in the famous case of Millar *v.* Taylor, and therefore shall not insist more on it in this place.

CHAPTER VII.

FROM THE PASSING THE 8 ANNE, C. 19, TO THE CASE OF MILLAR AGAINST TAYLOR, IN 1769.

A LONG period had not elapsed, before application was made to Parliament to amend the foregoing act. It would appear that most of the popular works, which appeared about this time, were reprinted in Ireland and in Holland, and imported into England, where, by reason of their cheapness, they met with a ready and scarcely concealed sale. For the penalty, by the 8 Annæ, c. 19, being only a penny per sheet and the forfeiture of the book, was not of a nature to deter those who were concerned in this profitable traffic; so that Parliament was applied to for further protection: and on a committee being appointed, pirated editions, printed abroad, of no less than twenty-nine different English authors, were placed before them. In pursuance of their recommendation, leave was then given to bring in a Bill 'to *make more effectual* the 8 of Anne, c. 19.'*

What the exact nature of this Bill was, or what were the amendments made to it in the Commons, we cannot ascertain; but its provisions seem to have undergone considerable change in their progress through the House, if we may infer anything from the alteration in its title, which was ordered to be "An Act for the better encouragement of learning, and the more effectual securing of the copies of printed books to the authors or purchasers of such copies during the times

* On the 12th of March, 1735.

therein mentioned, and for *repealing* an Act passed, &c., intituled, &c." (the 8 of Anne, c. 19.) It passed the Commons; but the second reading in the Lords was put off from day to day till the 19th of May, before which day the Parliament was prorogued.

On the 11th of February, 1737, this Bill was again brought forward in the House of Commons, and a division took place on the question that the Bill do pass, which was carried by a majority of 63, out of 237 members present. In the House of Lords it advanced a further stage than in the last session, for it passed a second reading, but was afterwards put off, for a month, on the question of the House going into committee on the 10th of May.

Finding that the opposition was too strong to this Bill to give any hopes of its being finally carried, its framers turned their attention more immediately to the remedy of the evils of foreign importation, and obtained leave on the 17th of April, in the following year, to bring in "A Bill for prohibiting the importation of books, reprinted abroad, which were originally printed in Great Britain." The words "and for limiting the price of books," were added to its title in its progress through the house. This Bill, like the foregoing, was thrown out in the House of Lords, although it reached as far as the motion for the third reading.

Such uninterrupted ill-success did not however prevent its promoters from bringing it forward again, at the next session of Parliament, and they reaped the usual reward of perseverance; for although an attempt was made to throw it out in the House of Lords, on the question of going into Committee, it was defeated, and the Bill finally passed on the 9th of May 1739, and received the royal assent on the 14th of June.* Perhaps their ultimate success was owing to the changed nature of the Bill; for it now contained only two

* 12 Geo. II. c. 36.

clauses; one, which so far from limiting the prices of books, expressly repeals the section of the 8 Anne c. 19, to that effect; and the other, which forbids the importation from abroad of any book first printed here within twenty years, on penalty of forfeiture of books, £5, and double the value of each copy so imported or knowing sold.†

Although the foregoing act prevented in a great measure the importation of pirated editions from Ireland, it did not prevent their being printed there: and to how great an extent this system of reprinting was carried, may be seen by the following extracts from a statement made by Richardson, the printer of Sir Charles Grandison, in 1753. It appears that some Irish printers, notwithstanding the extraordinary precautions he had taken, contrived to get proof sheets as the work was in the press, from some of his servants, and announced it for publication in Dublin, almost contemporaneously with the London edition.

He says: "It has been customary for the Irish booksellers to make a scramble among themselves who should first entitle himself to the reprinting of a new English book, and happy was he who could get his agent in England to send him a copy of a supposed saleable piece, as soon as it was printed and ready to be published. This kind of property was never contested with them by authors in England; and was agreed among themselves (*i. e.* among the Irish booksellers and printers,) to be a sufficient title, though now and then a shark was found, who preyed on his own kind, as the newspapers of Dublin have testified. But the present case will show to what a height of baseness such an undisputed licence is arrived." And he concludes his remonstrance with these observations: "After all, if there is no law to right the editor

† This Act was only temporary; but was continued by the 27 Geo. 2. c. 18, 33 Geo. 2. c. 16, and the 29 Geo. 3. c. 55. It is now expired, and the existing regulation against importation of books is 41 Geo. 3, c. 107. sec. 7.

and proprietor of this new work (new in every sense of the word), he must acquiesce; but with this hope, that, from so flagrant an attempt, a law may one day be thought necessary, in order to secure to authors the benefits of their own labours. At present the English writers may be said, from the attempts and practices of the Irish booksellers and printers, to live in an age of *liberty*, but not of *property*."

CHAPTER VIII.

THE CASE OF MILLAR AGAINST TAYLOR.

We now come to the famous copyright case of Millar *v.* Taylor, in the King's Bench in 1769; in which the nature, custom, and law of literary property were most fully and ably discussed.

The term given in old copies by the 8 Anne, c. 19, was twenty-one years, from the 10th of April, 1710; and therefore the earliest period in which the common-law right of the author in them, could come in question, was after the 10th of April, 1731. And we find that in 1735, and afterwards, injunctions were granted by the Court of Chancery restraining the printing of particular books, the copyright by statute in which had expired; and these were acquiesced under. But a doubt afterwards arising, a common law action, Tonson against Collins, was by consent brought to decide the right. The Court heard two arguments upon the case, but being then informed that the action was brought by collusion, and that the defendant would acquiesce in the judgment, which was to be used against third parties, refused to proceed with it, although the counsel for the defendant, we are told, argued the case *bonâ fide* and very ably.

Whilst this cause was pending in the common-law courts, several injunctions were refused in Chancery on that ground. As soon, however, as the reason was known why the Court would not proceed with the case of Tonson *v.* Collins, and that the leaning of the opinion of the Court, as far as it could

be ascertained, was in favor of the plaintiff; the action was commenced of Millar against Taylor, which we are now about to notice. It must not be expected that we can give all the arguments, or objections, started on either side in this cause, since the judgments delivered by the Court occupy 97 pages of close 8vo. print.* All that we can hope to do, is to give a leading outline of the principles on which the case was argued, referring the more curious reader to the report itself for fuller information.

The facts were these: — Millar, a bookseller, purchased in 1729, from Thomson, the Copyright of his 'Seasons,' which had been published about a year before. In 1763, Taylor, the defendant, published an edition; and Millar accordingly brought the present action on the case for damages against him, on the supposed common-law right—since any right by statute had expired in 1756 or 7.

Reversing the order used at the trial, we shall commence first with the arguments adduced against literary property, and afterwards proceed to confute them.

And against the right of literary property, the arguments were divided into three heads.

First, That by its very nature no such property could exist.

Secondly, That if it could eixst, yet there was no proof that it did exist.

And thirdly, that if there was proof that such a property did once exist, yet the stat. 8 of Anne, c. 19, had taken it away; and on principles of public policy it ought not to be again revived.

And first, that by the very nature of literary productions, no property in them could exist. For to claim a property in a thing, it was said, it is necessary that it should have certain qualities; it should be of a *corporeal substance*, be *capable of occupancy or possession*, it should have *distinguishable proprietary marks*, and be a subject of *sole and exclusive*

* Burrow's Rep. Vol. IV. p. 2310-2407.

enjoyment. But the property claimed, possessed none of these indispensable characteristics. It had no *corporeal substance :* for the claim was not made to the print and paper; but to the ideas contained in a book, which are intangible and incorporeal. It was not *capable of occupancy or possession*. For an occupancy or possession to exist, must have a definite period at which it commenced; and when should this be? As soon as the author conceived the ideas, or not till he had written them down, or not till he had published them? In the first two cases, it was absurd to assert that he could thus have a right to prevent others, to whom they might equally occur, from publishing them; and in the last, it seemed strange to date the *private* property from the time of making them *public*. Besides, many might never see the book; and surely the ideas were as free to them to publish, as to the original parties. It had no *distinguishable proprietary marks :* for what stamp or token of property could a man affix to intellectual ideas: how signify to the world that he had appropriated them to himself; since mere mental ideas admit not of any actual or visible possession? And it could not be the subject of *sole and exclusive enjoyment*. For an author to have this, although he need not have total actual possession in himself, must have the *potential* power, that is, the power of confining it to himself and excluding others. Now an author could not be said to exercise this power over his ideas after publication. And it was no sign, as it was contended, that an author had a property in his works, because he had the 'jus fruendi, ac disponendi;' for that definition of property merely relates to the *personal dominion* of a proprietor, and not to the *object;* and respects an *acknowledged* subject of property, not the object which is *presumed* to be so.

And, secondly, that if such a right could exist, yet there was no legal proof that it did; for the only evidences in favour of a common-law right by custom before the statute

of Anne, besides some injunctions of the Court of Chancery, were two by-laws of the Stationers' Company, which applied exclusively to their own members, and some ordinances and particular privileges, made at a time when might had more sway than right. Therefore, to deduce a custom in favour of Copyright from proofs of this nature, was as absurd as if it had been contended, that there was a right to search houses, seize books, and imprison persons, because formerly such a right was sanctioned by those acts. Again, those acts, even allowing their validity, did not strictly apply, for there was no mention of the *author* in them; all the protections, all the rights, were conferred on *printers*. In fact, the ordinances and acts were all calculated with political views, and the protection they gave was only *incidentally* to members of the Stationers' Company and patentees, and not to the rights of authors in general.

As to the injunctions of the Court of Chancery, except in three cases, one of Nelson's Fasts and Festivals, another of the Whole Duty of Man, and a third of Newton's Milton's Paradise Lost, they were not granted by virtue of any supposed common-law right, but under the provisions of the 8 of Anne, c. 19: for by this act, there was certainly a sufficient property during the term thereby secured, on which to found an application for an injunction; since the statute in the first place, and before the penal provisions, affirmatively enacts, that the author or his assigns shall have the sole right of printing, for the terms therein mentioned, and then ordains penalties in case of disobedience; so that there is a distinct *right* given to the *author* and his assigns, whilst the *penalty* is given to the *informer* and the Crown in equal parts. And Lord Chief Justice Holt lays it down, "that wherever a statute gives a right, the party shall by consequence have an action at law to recover it."* The author's remedy is very different from an informer's prosecuting for

* Ewer *v.* Jones, 2 Salk. 415 and 6 Mod. 26.

the penalty. The latter must pursue all the remedies the statute requires; for in such a prosecution, the charge is for an *offence*, and therefore the offence must be *strictly brought within* all the provisions of the act. But if the plaintiff only seeks satisfaction to himself as the *party aggrieved*, without prosecuting for any penalty, there is not in such case any limitation by the statute.* And as to the three excepted cases of injunctions, had they even been perpetual, instead of being only temporary as they were, they could have no effect in a court of common law, in a common-law case; and although it was urged that they were acquiesced under, yet the acquiescence of parties could not alter the law, and these injunctions were but temporary suspensions, 'till the rights should be determined;' and none of them contain any express *decision* whatever. For the Court of Chancery evidently considered this matter as unsettled, since in the case of Millar against Donaldson, Lord Northington would not determine the point, but left it to be considered in a court of common law. And with regard to the case of Milton's Paradise Lost, there is a note of Lord Hardwick's, by which it seems that the injunction in that case was founded on Dr. Newton's notes only; for his Lordship said, "that at first he was inclined to send the cause to the Judges to settle the point of law; but as Dr. Newton's notes were *manifestly within* 8 Anne, he would grant an injunction to them, without deciding the *general* question of property at *common* law."

And, thirdly, that if there was proof that such a property did once exist, yet the statute 8 of Anne, c. 19, had taken it away, and on principles of public policy it ought not to be again revived. The act is entitled, "An Act for the Encouragement of Learning:" and how?—"By vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." But had they had a right

* See the case of Beckford *v.* Hood, post. p. 56.

at common law before; it would have been a strange *encouragement* 'to *abridge* an actual right before subsisting in them; to *deprive* them (as was done by the 4th section, which regulated the price of books) of the natural right (which every other person has) of fixing the price of the goods he sells, and to subject the value of their *property* to the regulation of *others*.' Besides, 'the penalty does not seem much calculated for "the encouragement" of the author; for the books are to be forthwith damasked, and made waste paper of, and the forfeiture is to go, one half to the king, the other to the informer, but no part of it to the author.' It was clear, then, by the change made in the bill, from "securing the property," to "vesting the copies," that it appeared 'to the legislature that abstractedly from this statute, authors had no *exclusive right* whatever; and consequently, must be very far from having any pretensions to an *eternal monopoly*: but that, as the act gave them a temporary monopoly for a limited time, it might be reasonable to make the provisions and restrictions contained in it; and they would then have a proper operation.' And that as to the provision in the 9th section, "That nothing in this act should extend to any right that the Universities or any persons have in any book already printed, or after to be printed," which, it was contended, excepted the common-law right of the author; it was plain to see, that it had no view to any general question of law or general claim; but was only pointed at the printing and reprinting of particular books. For if the design of the statute clearly was to vest a temporary copyright in the author, what a laborious nullity it would have been, after all, to say, that the foregoing enactments were not to have any effect on the possessions of authors.

And on principles of public policy, such a claim should not be allowed, when the inconveniences were seen, which might ensue from it. For it would be in the power of booksellers or others, who had purchased the works of our best

authors, to wholly suppress them: and although it was said, that if they did not keep a sufficient number of copies in hand, it would amount to an abandonment of their right, and any might print them; yet who was to say, what was an abandonment, and what endless litigation it might lead to? And as to prices, a bookseller might ask what prices he pleased for useful works, and so the generality of mankind be debarred of their use, which was the purpose of their publication.

And, in truth, the only claim 'an author can *really* make, is to the *public benevolence*, by way of encouragement. For his case is exactly similar to that of an inventor of a new machine. Both original inventions stand upon the same footing in point of property; whether the case be *mechanical* or *literary*, whether it be an *Epic Poem* or an *Orrery*. Mr. Harrison, the inventor of the Time-piece, employed at least as much time and labour and study upon his time-keeper, as Mr. Thomson could do in writing his Seasons: for in planning that machine, all the faculties of the mind must have been fully exerted. And as far as value is a mark of property, Mr. Harrison's time-piece was, surely, as valuable in itself, as Mr. Thomson's Seasons. And yet it is on all sides acknowledged, whenever a machine is published, (be it ever so useful and ingenious) the inventor has no right to it, but only by patent; which can only give him a temporary privilege. And although the inventor of the air-pump had certainly a property in the *machine* which he formed, he did not thereby gain the sole property in the *abstract principles* upon which he constructed his machine: and yet these might well be called the inventor's ideas, and as much his sole property as the ideas of an author.'

Therefore, on the whole, inasmuch 'as the monopoly now claimed was contrary to the great laws of property, and totally unknown to the ancient and common-law of England: as the establishing of this claim would directly contradict the legis-