Books

Tonſon *againſt* Collins.

ACTION on the Caſe, for ſelling certain Books called the Spectators, printed without any Licence or Conſent from the ſole and true Proprietors of the Copy thereof, *viz.* the Plaintiffs, to their Injury and Damage. On Not Guilty pleaded, the Jury found a ſpecial Verdict to the following Effect.

Qu. Whether Copyright ſubſiſts in Authors, as a valuable Property, independant of the Stat. 8 *Ann.*

" That the Spectator is an original Compoſition, by natural " born Subjects reſident in *England*, *viz.* Mr. *Addiſon*, Sir *R.* " *Steele*, *&c.* firſt publiſhed A. D. 1711. That *Jacob Tonſon* " deceaſed, in 1712 purchaſed of the Authors for a valuable " Conſideration, the ſaid Work, to him and his Aſſigns for " ever. That the Plaintiffs *Jacob* and *Richard* are his perſonal " Repreſentatives and Aſſigns. That old *Jacob* in his Life- " time, and the Plaintiffs ſince his Death, have conſtantly printed " and ſold the ſaid Work as their Property; and now have and al- " ways have had a ſufficient Number of Books of the ſaid Work, " expoſed to Sale at a reaſonable Price. That before the Reign " of Queen *Anne*, it was uſual to purchaſe from Authors the " perpetual Copy-right of their Books, and to aſſign the ſame " for valuable Conſideration, and to ſettle them in Family Set- " tlements, for the Proviſion of Wives and Children. That, " to ſecure the Enjoyment of ſaid Copy-right, the Stationer's " Company have made ſeveral By-Laws; particularly, one dated " 17 *Auguſt* 1681. and another, dated 14 *May* 1694, (therein " ſet forth) reciting and recognizing, in the ſtrongeſt Terms, " the Copy-right of Authors and their Aſſigns, and prohibiting " any Infraction of ſuch Right by Members of their Company, " under certain pecuniary penalties. That the ſaid *Jacob* " *Tonſon* deceaſed complied with the Conditions required by the " ſaid Company, to aſcertain his Right, by regiſtring the ſaid " Work as ſoon as he had purchaſed the Copy. That the De- " fendant without Licence of the Plaintiffs, and knowing the " ſaid Copy to have been purchaſed by ſaid *Jacob Tonſon* de- " ceaſed, printed, publiſhed, and ſold ſeveral Copies of the " ſame in *April* and *May* 1759, whereby the Plaintiffs were

" damnified; but whether the Defendant is liable in Law to
" anſwer the Damages, they are ignorant. But if the Court
" ſhall adjudge him liable, they find him Guilty, Damages 5*l.*
" if otherwiſe, Not Guilty."

Wedderburn for the Plaintiff.

The general Queſtion will turn on the Right of the Plaintiffs. For ſufficient Acts of the Defendant are found, of infringing that Right if exiſting: Which Right, if any, muſt be a Right of Property at Common Law; for this Caſe is quite out of the Statute of Queen *Anne*. The Right of Authors in general is now to be determined; not of any particular Bookſeller. —— From the Induſtry of the Author, a Profit muſt ariſe to ſomebody: I contend it belongs to the Author; and when I ſpeak of the Right of Property, I mean in the Profits of his Book; not in the Sentiments, Stile, *&c.* I ſhall endeavour to ſhew,

I. That this Right is as well founded as any other Right of Property.

II. That it is alſo recognized by the Laws of *England*.

I. Property, according to *Selden*, *Mar. Clauſ.* is *Jus utendi, fruendi, alienandi, &c.* Different Originals are aſſigned of the Right of Property. All agree, that it's final Cauſe is to promote the Induſtry of Individuals. Property at firſt continued only as long as Poſſeſſion; then, was extended for Life; then, was tranſmiſſible to Repreſentatives; laſtly, was refined into the Multiplicity of Rights we now experience.

According to *Grotius*, Invention is one Ground of Property; Occupancy another. The preſent Ground is Invention.

While a Work is in Manuſcript, the Author has intire Dominion over it. Courts have interpoſed, to ſtop it's Publication by other Men. *Webb* and *Roſe*. *Foreſter* and *Walker*. Late Caſe of Lord *Clarendon*'s Manuſcripts in Chancery. If, inſtead of copying by Clerks, an Author prints for the Uſe of his Friends; he gives them no Right over the Copies. Proceed

ceed one Step farther: If he publiſhes by Subſcription, and no Books are delivered but to Subſcribers; they have no Right over the Copies, but only to uſe them. This leads us to a general Publication: There alſo every Purchaſer has a Right to uſe, but nothing farther. The Profits of the Sale muſt go to Somebody. The Printer and other mechanic Artiſts concerned in the Impreſſion are paid for their Parts; the Author who is the firſt Mover ought in Juſtice to be paid too.

This Doctrine is alſo conſiſtent with public Utility. Learning would be prejudiced, if Authors may be ſtripped of this independent Proviſion for themſelves.]

It may be objected, 1ſt. That this Right is incapable of Poſſeſſion. —— Not more than Advowſons and other incorporeal Rights are. 2dly. It is impoſſible to be guarded. —— Laws are the Guard of Property in Society, not Bolts and Bars. This very Action is a Proof, that it may be guarded.

II. This Right is recognized by the Laws of *England*.

Manuſcripts are quite out of the Caſe. They could produce no Profit. Therefore I ſhall begin from the Introduction of Printing by *Caxton* in 1471, (for Dr. *Middleton* has confuted the Story of it's prior Importation at the King's Expence) and herein ſhall rely principally on *Ames*'s typographical Antiquities. *Caxton*'s Books were all printed at the Expence of private Perſons. *Pynſon*'s and *De Werde*'s, the ſame. There were then no Profits, or but little, ariſing from the Impreſſion. About 1500, the Encouragement ariſing from Sale began to be ſufficient, without Patronage. Since 1506, no Books have been printed at the private Expence of Patrons. But now they began to be printed, *cum Privilegio ad imprimendum ſolum*. Theſe Privileges do not contradict the Idea of a prior Right of Property; they only ſupport and protect it. *Henry* 8th's Book on the Sacraments was printed 1521, *cum Privilegio*. This he gave the Printers, in his private Right as Author. Another antient Book called the *Cuſtoms of London* having no certain Author, has therefore no Privilege.

About

About this Time the Crown began to exert it's Prerogative Copy-right; which ſhews, that *a* Copy-right *may* exiſt. There was no King's Printer by Patent, till the Reign of *Edw.* 6. He granted one to *Grafton*, with ſome Exceptions, as of Grammars; which were then the Property of *Barthelet*, Printer to *Hen.* 8, being Books compoſed at the King's Expence. In *Rym.* XV. 150. There is a Patent for printing Greek and Hebrew. This aroſe from the great Expence of purchaſing Manuſcripts. There could be no Copy-right in Claſſic Books; therefore, the King ſeiſed them, as *Bona nullius* and Things *derelict*. Theſe Patents are moſt of them for Bibles, *&c.* which are Things gained at the Expence of the Crown, and therefore they are the Subject of Copy-right; —— or for Almanacks, *&c.* which are Things *derelict*. One Patent indeed goes out of this Rule; that for printing Law Books. I cannot account for the Principle upon which that is founded.

Next came the Power of Licenſing, which aroſe from the religious Diſputes then prevalent. This made Printing be looked upon all over *Europe*, as a Matter of State, and proper to be regulated by Law.

In 1537, *Hen.* 8. publiſhed a Proclamation againſt printing without Licence. *Fox* 572. In 1555, another, ordering the Poſſeſſors of heretical Books to burn them; elſe, to be accounted Rebels, and executed by military Law. The ſame King erected the Company of Stationers, profeſſedly to regulate the Preſs. His Charter was confirmed by Queen *Elizabeth* in 1558. In 1556, a Decree of the Star Chamber regulated the Manner of printing, and Number of Preſſes. *Ames* 534. In 1583 two Printers *Wolf* and *Ward* inſiſted upon a Right of printing all Books, even where there were Copy-rights exiſting. *Stowe*, 223, *tit.* Stationer's Company. But Commiſſioners appointed by the Crown willed them to deſiſt. In 1585, another Decree of the Star Chamber, that no Man ſhould print Books, whereof the Property was in others, according to the allowed Ordinances of the Stationer's Company. In 1583 ſeveral Printers ſurrendered certain Copy-rights, to the Uſe of the Poor of the Company of Stationers; reſerving a Power of printing them at the loweſt Rates. *Ames* 551. This ſhews, that the

Profits of Publication were then uſually aſſigned. *Tottel* had ſeveral Copy-rights. This Severity of the Star-chamber had no good End. Another Decree of the Star-chamber was made in 1637, modelled on that of Qu. *Eliz.* During the enſuing Uſurpation, the ſame tyrannical Powers were exerted. After the Reſtoration, the Statute of the 13 & 14 *Car.* 2. was modelled on the Star-chamber Decrees, and ſtates, that many had the Right ſolely to print, talks of the Owner's Conſent, and gives a Penalty in caſe of Tranſgreſſion, to the Owners of Books and Copies. Though all theſe Reſtrictions were founded on wrong Principles of Policy, yet they are ſtrong Arguments of a generally-allowed pre-exiſting Copy-right.

As to the Law Patent (the beſt Account of which is in the Caſe of *Roper* and *Streeter* in *Carter*) whatever Validity it may have, it can have no Effect on the preſent Queſtion. It confines the Author of a Law Book, to print with a particular Perſon. It does not take away any Copy-right.

Few Precedents to be met with in the Books. *Ponder* and *Braddel.* 13 *Car.* 2. *Lill. Entr.* 67. Action upon the Property of the *Pilgrim's Progreſs.* What Caſes there are, are ill reported; being all on Patent Rights, and therefore the Law Printers would only print the Arguments on one Side. In 1 *Mod.* 256. Property of Almanacks are ſaid to be the King's, firſt becauſe derelict; ſecondly, as Prerogative Copies, ſince they regulate the Feaſts of the Church.—The Expiration of the Licenſing Act of *Car.* 2. gave riſe to the Statute of Qu. *Anne*; which recognizes Authors as Proprietors; and gives particular Remedies by a penal Action. It takes away no antecedent Right. There is a ſaving Clauſe of all antecedent Rights. The Words, "for fourteen Years and no longer," extend only to the accumulative Remedy by penal Action.

There have been many Caſes in Chancery, wherein Injunctions have been granted, to reſtrain the Sale of Books, in prejudice to the Proprietors of Copy Rights. *Motte* and *Falkner* before *Talbot* C. 1735.— *Eyre* and *Walker*, *coram Talbot* C. 1735.—*Walthoe* and *Walker*, 1736. *coram Jekyll* M. R.—The Caſe of *Gay's* Works in 1737, where Lord Chancellor made

the Injunction perpetual; which he could not have done merely under the Act. *Auſten* and *Cave*, 1739.

In fine, this Species of Property is acknowledged by Act of Parliament—Long underſtood to be veſted, and made the Subject of Family Settlements—Recognized by the Court of Chancery. Therefore, we preſume that a Court of Law will allow an Action on the Caſe to lie for it's Violation.

Thurlow for the Defendant.

The Right contended for, if it exiſts, muſt ariſe from either 1. Privilege. 2. Common Law Property. It ſuppoſes a Right to multiply Copies *in infinitum*; and to exclude other Perſons from making Profit by multiplying them.

Some Parts of the Verdict quite out of the Caſe. It is of no Conſequence, whether the Authors are natural born Subjects or no; becauſe this Right of Property, if any, is perſonal; and may be acquired by Aliens.—Of no Conſequence *now*, that they continued to publiſh it. If there be any Property, they may uſe it as they pleaſe. It might have been an Ingredient at the Trial, by which to meaſure the Damages.

The Caſe has not been argued as a Right ariſing from Privilege, or flowing from any Act of the State. I ſhall therefore inſiſt,

I. That it does not exiſt naturally or flow from natural Law.

II. That where this Kind of Property has been ſpoken of by learned Men, or even by Courts of Juſtice, it had Reference to the extraordinary Acts of the State.

I. Public Utility, *&c.* points one Way as well as the other. It is uſeful to the Public, that a Monopoly ſhould be aboliſhed. The Eſtabliſhment of Copy-right may tend to the Advantage of Authors; not of the Public. When a perpetual Monopoly is eſtabliſhed, Printers who purchaſe Copies will print in the

vileſt

vileſt and the cheapeſt Manner; which will make the Curious reſort to foreign Countries. The Act of Parliament therefore wiſely gives a *limited* Monopoly, and not a *perpetual*.

Property in the Profits of Publication muſt preſuppoſe Property in the Thing itſelf. And the Subject of this Property, if any, muſt be in the abſtracted, ideal, incorporeal Compoſition. Now the Idea of the Compoſition, as it lies in the Author's Mind, before it is ſubſtantiated by reducing it into Writing, has no one Idea of Property annexed to it.

In the *Roman* Law, there was a Queſtion concerning Specification, long debated between the *Proculi* and *Sabini*. If I write any *Carmen &c.* on the Materials whereon *Titius* has wrote his *Carmen &c.* before, it belongs to *Titius*, *jure Specificationis*. *Vide Inſtitut.* and *Puffendorf* on the Subject; who obſerves, that this is not an *original* Method of acquiring Property, but merely by *Contract*. See alſo *Seld. Mare Clauſ. cap.* 22.

Publications by Subſcription ſhew, that there is a Method, by which an Author may gain a Profit for his Works, without reſorting to any Copy-right. I inſiſt, that every Subſcriber has a Right, to do what he pleaſes with the Book he has ſo ſubſcribed for.

It will be difficult to ſhew the Remedy of ſuch a Right as this. Will the Remedy lie againſt the Keepers of Circulating Libraries, who buy one Copy, and hire it to an hundred to read?—Or againſt a Man who lends it gratis? Both gratify the Curioſity of others, and ſtop the Sale of the Book.

It will be difficult to confine this merely to Books, and not extend it to other Inventions. A learned Author * has endeavoured at it, and brangled it, and made miſerable Stuff of it. He attempts a Diſtinction between the Labour of the Head and of the Hand. But in ſome Machines the Labour of the Head is much greater than that of the Hand. Sir *Iſaac Newton* had no greater Property in his *Principia*, than Lord *Orrery* had in his Machine. If the Labour of the Head gives the Right, the Property is juſt the ſame. And it is poſſible, that the Invention

*Biſhop *Warburton.*

vention of a Mouſetrap might coſt it's Author the ſame Labour of Head, that the Orrery did it's noble Contriver. So that this Ground of Property depends entirely upon the Difference of Heads. The Right of Property in Books and Machines is therefore the ſame. Both have ariſen from

II. The extraordinary Acts of the State.

The Licenſing Acts began in *England* in 1400 and odd. Before that, no Marks appear of Property in Books. St. *Ambroſe de Vitis Patrum* appears from *Ames*, to have been licenſed by the Archbiſhop. In *Caius Coll.* Library at *Cambridge*, there are many Books, in MS. as well as Print, publiſhed under Licence. From 1539 Privileging and Printing went Hand in Hand, Printing being ſuppoſed a Flower of the Crown. Indeed there are great Arguments for ſuppoſing, that Printing was imported by the Crown. Lord *Coke* ſays ſo—And *Polydore Vergil* the ſame, in the Reign of *Henry 8th.* Be this as it will; the Privileges granted imply no Idea whatſoever of Copy-right in Authors. They relate merely to Printers, as if in nature of a Patent for this new Invention of Publication. In 1551, Licence granted to *Laurentius Torrentinus* to print the *Piſan Code.* Here was nothing new in the Invention of the Book: The Encouragement is to the Labour of Printing. Qu. *Eliz.* granted a Patent for the ſole Printing of Muſic.—Another for Maps of *England*,—Another for Latin, *&c.*—All theſe Patents are totally foreign to any Notion of Copy-right. They rather exclude it.

The Reaſons of creating this excluſive Property in Printers, were Reaſons of State. *Darey* and *Allen*. *Moor.* 671. The Privilege for ſole printing was held to be good, for the Peace and Safety of the Realm. So in *Holland*, a theological Controverſy once ran ſo high, that the State enjoined the Diſputants to proceed no farther, leſt they ſhould offend *contra bonos mores.* At length it was provided in 1556, that no one ſhould print Books without Leave from the Company of Stationers.

In 43 *Eliz.* among other Complaints of Monopolies, by the Houſe of Commons, a Monopoly of the Tranſlation of *Tacitus* was complained of; which ſhews very little Regard to any

Right, of either Authors or Tranſlators. The Stat. 21 *Jac.* 1. gives to the Crown the Right of giving Privileges in Matters of Printing: Which ſhews, that the Property was ſuppoſed to be derived from the Crown.

The Word Property in the Statute of Queen *Anne* ariſes from the Wording of the Orders of the Company of Stationers in 1691; who were fond enough of aſſerting ſuch a Right. This Statute provides, that if the Author overlives fourteen Years, the Property ſhall return to him: that is, it ſhall no longer remain in the Printer, according to the Orders of the Stationer's Company. Suppoſe now the Author had aſſigned it for fifty Years; I ſhould contend, that the Subject-Matter of this Aſſignment is, by the Statute, made incapable of ſubſiſting for more than fourteen Years. By one Clauſe in the Statute of Queen *Anne*, certain great Officers were enabled to regulate the Prices of Books; not only of thoſe entered at Stationer's Hall, but of all others. This would not have been repealed, had the Legiſlature thought, a Property attached in Authors excluſive of the Terms in this Statute. For it would be extremely inconvenient, if no Power of Regulation were veſted any where. For then Authors might ſet what Price upon their Works they pleaſed; ſince no Action can lie againſt them, for abuſing their Power.

This is the firſt Action ever known to be brought upon this Head of Property; (for the Declaration in *Lilly*'s Entries is the mere Invention of the Author) and therefore ought not to be received. *Littleton*, Chapter Knight's Service, ſays, No Action can be brought upon the Statute of *Merton* for diſparaging an Heir, becauſe none ever had been brought. Diverſity of Courts ſays, Writ of Error will run to the five Ports; *Brooke* ſays the like: But in *Dyer* 376, Becauſe none ever had gone, it was determined none ever ſhould go. Year-Book 39 *Hen.* 6. A Royal Protection to the King's Proctor at *Rome* diſallowed, becauſe none ever granted before. —— The Caſes in Chancery are none of them oppoſite to this Doctrine. The Injunctions granted are all of them ſince the Statute of Queen *Anne*, which clearly veſts an abſolute Right in Authors, *&c.* for fourteen Years. In the late Caſe of *Tonſon* and *Walker*, about *Newton*'s Edition of

Milton, Lord Chancellor did not determine upon the general Right of Property, but upon the Statute. For Dr. *Newton*'s Notes were clearly within the Term. However an Injunction in Chancery is not concluſive to the Right. It is not that ſolemn Adjudication, which the Law requires.

Wedderburn in Reply.

The Juriſdiction of the Court of *Chancery*, to grant Injunction in theſe Caſes, well ſupported, by the Finding of the Jury that this is a cuſtomary Property.

The Profits of Authors, *&c.* muſt ariſe from an extenſive Sale. It is therefore their Intereſt to publiſh Books in the beſt and the cheapeſt Manner. But if they did not, this is only *Argumentum ab Abuſu*. If this Right be abuſed, you may lay Reſtrictions upon it, as was done by Stat. 8 *Ann.* though that Clauſe is now repealed by 8 *Geo.* 2.

Books cannot be compared to mechanical Inventions, with any Propriety: For thoſe are capable of Improvement, at every Copy made. Books are uſually reprinted *verbatim*.. We allow, that Reaſons of State gave Birth to excluſive Patents; but deny, that ſuch Patents gave Original to or interfered with Copy-rights. Patents were chiefly in Favour of Printers, being a new Art which tended to diffuſe Knowledge. Learned Men were originally rewarded by the Emoluments they received, from the Reſort of Pupils. When their Learning came to be diffuſed by Books, Society gave them this Recompence inſtead of it; which we hope the Court will protect.

Lord *Mansfield* Chief Juſtice. Let this Caſe ſtand over for farther Argument. There is no Doubt, but the Violation of that Property, which may be the Subject of an Injunction in Chancery, will maintain an Action on the Caſe in this Court. Becauſe every Injunction proceeds upon the Suppoſition of a legal Property. There are two Sorts of Caſes in the Court of Chancery, which I deſire may be looked into;

1ſt. Where there hath been no Printing or Publication at all. The Statute of Queen *Anne* ſeems evidently to diſtinguiſh this,

from other Caſes. In the Caſe of the Edition of *Pope*'s Letters to *Swift*, the Queſtion was, Whether the Property was not transferred to the Correſpondent. Lord *Hardwicke* thought not, and that the Writer was ſtill the Proprietor, and therefore granted an Injunction againſt the Aſſignee of *Swift*.

2d. Where the Term given by Act of Parliament has been clearly expired. I remember no Caſe, where the Merits have been fully argued, and the Injunction made perpetual, at the Hearing of the Cauſe; therefore, they are not quite deciſive; and yet they have great Authority. They at leaſt anſwer the Objection againſt the Diſuſe of theſe Actions; ſince the Parties injured have followed their Remedy, in another Court.

In *Tonſon* and *Walker*, Lord *Hardwicke* inclined to the Property; but ſent it to Law. It was there twice argued, but never certified. The Reaſon why he leant to the Property was, becauſe in all Prerogative Cauſes of this Kind, the Counſel for the Crown had endeavoured (right or wrong) to put the Merits, on a ſuppoſed Property in the Crown: And it ſeemed to be univerſally acknowledged, that ſuch a Property might be ſubſiſting.

Let the Judges be attended with Copies of the Caſes in Chancery. *post* 321

The King *againſt* Wheeler.

Motions

AN Attachment had iſſued againſt the Defendant, for diſobeying an Award, and filing a Bill in Chancery againſt the Arbitrators; and he had been examined upon Interrogatories. *Morton* moved for the Maſter's Report, upon the laſt Day of the Term, without previous Leave of the Court; upon an Affidavit, that the Defendant had made the Proceedings on this very Attachment the Subject of a ſupplemental Bill, and had moved for an Injunction. Objection by *Howard*, that this Motion was irregular. But *per Cur.* In a Caſe ſo extraordinary as this, the Contempt being every Day increaſing, the Court will diſpenſe with their Rule. —— However it being then objected, that the Defendant was not perſonally ſerved with Notice of this Motion, but

The Maſter's Report upon Interrogatories of Contempt, cannot be moved for, the laſt Day of the Term without previous Leave of the Court; unleſs upon extraordinary Caſes, and perſonal Service of Notice.