ment of the Manager, who ſtipulates that the Bearer of a Ticket, ſhall be intitled to a Seat. The Owner of this Ticket by multiplying it, would unconſcionably procure the Admiſſion of many, againſt his expreſs Agreement, to the Prejudice of the Manager, and to the Excluſion of other Subſcribers. He would be guilty of an equal Fraud, as if he had multiplied a Bill received from a Banker. *The Theatre, much leſs the Right of one Seat cannot be enjoyed by all, therefore it may be converted to the Emolument of a few.*

THE Right of the Author in his Copy, is incorporeal and *original*. The Sentiment contained in it, is perceptible to all Men at the ſame Inſtant.

A NOSTRUM is ſuppoſed to be a Property, becauſe the High Court of Chancery hath decreed it to be Aſſets in the Hands of Executors. Even in that Caſe, it can no longer be deemed a Property than the Compoſition is kept a Secret. Perhaps the Court of Chancery was guided by this Principle, that the Executor taking the Eſtate of the Teſtator as a Truſt, was bound in Conſcience to Account for all the Profits ariſing from it. If the Medicine was excellent, he might obtain a Patent, and thereby reduce it to a ſtrict legal Property: Which he was as much bound in Conſcience to do for the Sake of a Credi-

tor, as the Heir is to compleat an imperfect Conveyance to a Purchaſer for a valuable Conſideration. However that may be, I preſume that it was litigated only between the Executor and Creditor. Nothing was determined with reſpect to Strangers. If the Secret had been divulged, e'er a Patent had been obtained, the Inventor and his Repreſentatives would have loſt their Property. Whereas the Author after Publication retains nothing ſecret, and affirms that his Right of multiplying Impreſſions is attendant on each individual Book, to whomſoever it ſhall be tranſmitted by Gift, Sale, or Accident.

In truth, this Right whether conſidered abſtractly, or compared with others, ſeems to be then moſt plauſibly maintained, when it relies on an *Agreement of not multiplying*, tacitly annexed to each Book. Even in that Caſe, thoſe only would be bound, who claim under the firſt Purchaſers. Every implied Covenant muſt ariſe from a neceſſary Implication. It being contrary to common Right, that the Vendor ſhould exerciſe any Power over the Property, of which he has wholly diveſted himſelf. Therefore the Proof lies on him. As it muſt be founded on the Nature of the Contract, it muſt have been at all Times inſeparably incident to it. It has been proved, that this excluſive Right was never known before the

Introduction of Printing, therefore it is not inſeparably incident, and conſequently cannot ariſe by neceſſary Implication: Hence it follows, that no tacit Condition is annexed to the Sale.

ADMITTING the Subject-Matter of this Right to be of great Utility, and eaſy to be aſcertained: Admitting it to be endowed with every Condition eſſential to Property. It is not ſuch a Property, as is favoured and protected by the Common Law. Becauſe its Nature and Qualities, as we before demonſtrated, wholly differing from every other Property, cannot be governed by the ſame Rules, as it is not founded on the ſame Principles. This is evident from many Inſtances. A Uſe, or Truſt, is eaſy to be defined, and extenſively important in the Concerns of Life. If the *Ceſtui que* Truſt, or *uſufructuary* Owner, ſought Redreſs for a Breach of Truſt. The Common Law was ever inexorable. It acknowledged the Right but denied the Remedy. The Reaſon is clear. Becauſe a Truſt or * Uſe (as my Lord *Bacon* obſerves in his Reading on the Statute of Uſes) eſſentially differs from every other Property: Therefore a Court of Equity was erected, which might have a peculiar Cognizance of them.

* A Right of taking the Profits, when the legal Poſſeſſion is in another.

For the ſame Reaſon the Eccleſiaſtical Courts extend their Juriſdiction over Spiritual Rights, the Court of Admiralty over Cauſes which ariſe upon the High Seas. So the Earl Marſhal's Court claims Cognizance of Feats of Arms, and armorial Bearings. Hence it appears that it has been the Policy of the Common Law, rather to leave a Right without a Remedy, than to adopt new Principles, to give new Remedies. If this Species of Property be of ſo great Utility, let there be erected a literary Court of Judicature, where the Learned may decide their Differences. Animoſity, Pride and Envy, would enter into the Deciſions, and mix with all the Tranſactions of ſuch a Court. Authors are perhaps the only Men who would not chooſe to be tried by their Peers. If one was not ſo well convinced of the Diſintereſtedneſs of our Advocates, one might imagine, that this was ſo warmly contended to be a legal Property, on ſuppoſition, that a rich irritated Author, might be as profitable a Client, as a rich litigious Widow.

It may add ſome Weight to what has been ſaid, if it be ſhewn that the Senſe of other Nations on this Point, correſponds with the Policy of our Common Law. To prove this, I ſhall relate a Tranſaction which happened in the Year 1607. *Simon Marius*, a *German*, being reſident at *Padua*,

Tranſlated into *Latin* the Book publiſhed the preceding Year by *Galilæo*, and cauſed his Diſciple *Capra*, to print it as his own. *Marius* dreading a Proſecution, retired, leaving *Capra*. *Galilæo* went to *Venice*, and laid the Affair before the Lords Reformers of the Univerſity of *Padua*, ſhewing them his own Book publiſhed *June* 10, 1606, and that of *Capra*'s publiſhed *March* 17, 1607. The Lords cited *Capra* to appear. The Cauſe was heard, and the Parties diſmiſſed.

On the 4th of *May*, their Lordſhips pronounced Sentence, and ſent it to *Padua* to be executed. The amount of their Sentence was, That having fully conſidered the Affair, it appeared to them that *Galilæo* had been abuſed, and that all the remaining Copies of *Capra*'s Book ſhould be brought before their Lordſhip's, to be ſuppreſſed in ſuch Manner as they ſhall think fit: Reſerving to themſelves, to proceed againſt the Printer and Bookſeller for the Tranſgreſſion they may have committed againſt the Laws of Printing, and ordering the ſame to be made known accordingly. The ſame Day, all the Copies of the ſaid Book were ſent to *Venice*, to the Lords Reformers.

I shall make ſome Obſervations on this Tranſaction. It appears that this Affair was not cognizable by the Common Law

of *Venice*: That the Lords Reformers had a peculiar Juriſdiction in literary Diſputes, which had been needleſs, could they have been terminated on the ſame Principles as other Property is decided. The Offence is ſaid to be committed not againſt the Common Law, but *The Laws of Printing*. Hence it appears, that what I before advanced is not only founded on Reaſon, and the Law of the Land, but corroborated by the wiſe Inſtitutions of the Republic of *Venice*, whoſe Skill in Juriſprudence has hitherto been unqueſtioned.

THERE muſt have been many Violations of Literary Property in the Courſe of ſeveral Centuries, ſince the Introduction of Printing, yet they have not produced a ſingle Determination at Common Law. If this be a natural Right, as is by ſome contended, to what Purpoſe was the Act of Parliament made, by which the Property of each Copy was eſtabliſhed for Fourteen Years? Every one knows that ſuch Laws proceed not from the ſpontaneous Motion of the Legiſlature, but are procured by the Intreaties and at the Suggeſtions of thoſe whoſe Intereſts are concerned. It argued in them a Diffidence and Diſtruſt of their own Cauſe, to apply to Parliament for a Confirmation of a natural Right for a limited Time, when by a Judgement in a Court of Law, they might have eſtabliſhed

it for ever. If other Circumſtances are equal, a Right at Common Law is preferable to one founded on a Statute. Becauſe the former, being more general and comprehenſive, is therefore able to cope with Fraud, whereas the preciſe Words of the latter are ever liable to Subterfuge and Evaſion. It is apparent, that the Legiſlature never conſidered it as a natural Right, and ſeemed to Doubt whether it would promote the Cauſe of Literature. If either of theſe Points had been evident, it would have given a perpetual Sanction. This is ſaid to be an affirmatory Act. But all affirmatory Acts ſtrengthen and extend the Common Law, whereas this eſtabliſhes for a Time a Right, which if natural, muſt have exiſted at all Times and in all Places, wherever Letters flouriſhed.

If one was to take into Conſideration all the Inconveniences reſulting to Authors themſelves from the Eſtabliſhment of this Property, they would be found very numerous. The Profeſſion of an Author is of all others the leaſt profitable. By the Study of antient Poets and Philoſophers, they eaſily contract a Contempt for Riches. Hence enſue a Neglect of Domeſtic Concerns, and diſtreſſed Circumſtances. If their Works were to become a Property, they might be taken in Execution for Debt. Creditors would raviſh from Dramatic Wri-

ters their half-formed Tragedies, from Clergymen their pious Diſcourſes, the Spiritual Food of their reſpective Flocks. A Moral Eſſay might go in Diſcharge of a Debt contracted in a Bagnio. Philoſophy, Poetry, Metaphyſics, Hiſtory and Divinity, would be taken in Satisfaction for Stay-Tape, Buckram and Canvaſs, or Legs of Mutton, Calf's-Heads, and other Articles, which uſually compoſe a Taylor and a Butcher's-Bill. If an Author had been willing to have taken the Benefit of the Inſolvent Act, he would have been guilty of Perjury if he had not diſcovered his Manuſcripts. His Creditors might inſiſt on publiſhing his Familiar Letters: For that Species of Compoſition is as much a Property as any other. If the Inſolvent was an ingenious Man, his Letters might have been Sold for a good Price. If literary Property conſiſts in the Ideas, the Creditors would have an Intereſt in all the Ideas of their Debtors. Ideas are in their Nature equally ſuſceptible of Property, whether they exiſt only in the Brain of the Author, or are by him tranſmitted to Paper; or whether they be written or printed. The Parliament of *Paris* ſeems to have conſidered this in a proper View. When the Creditors of *Crebillon* would have attached in the Hands of the Actors, a Sum of Money ariſing from a Repreſentation of a Tragedy, it was decreed, That

the Fruits of Learning and Genius, tho' actually converted into Money, was not liable to the Demands of Creditors. Tho' the old *Roman* Law delivered the insolvent Debtor into the Hands of his mercileſs Creditor, that by his bodily Labour, he might make ſome Satisfaction for the Debt: Yet no one ever imagined, that the Mind itſelf could be taken in Execution, and be ſtripped of its Ideas; which Abſurdity neceſſary reſults from the Suppoſition of Ideas being capable of Property.

THE greateſt Grievance of which the learned complain, cannot be remedied by the Common Law. This Grievance ariſes from the Diſingenuity of ſome, who vindicate to themſelves, the Diſcoveries which have been made by the Labour and Abilities of other Men. As if the miſtaken Praiſe due to another's Merit, could afford a home-felt Satisfaction. It was owing to the Modeſty and Diffidence of Sir *Iſaac Newton*, that he communicated ſome of his Diſcoveries to his Friends, before he publiſhed them. Unfortunately they came into the Hands of a Foreigner, who conteſted the Invention. In what Court of Juſtice could Sir *Iſaac* have inſtituted a Suit for a Reparation of this Injury? I will venture to affirm that he could have had no Redreſs in any Court either antient or modern, where it was to have been determined on

the Principles of other Property. He might profecute his Suit with ſome Effect in a Literary Court of Judicature, ſuch a one as I lately mentioned in the Story of *Galilæo*. It was the Wiſdom of the *French* to erect the Court of *Marſchalles*, the Object of whoſe Juriſdiction was the *Point d'Honneur*. Let it be ours to terminate the Diſputes of Authors in a Literary Court of Judicature, where may be inflicted Pains and Penalties ſuitable to the Nature of the Offence, for imaginary Rights ſhould always have imaginary Remedies.

I WILL now briefly recapitulate the Arguments in the former Part of the Diſcourſe, that the Reader by comprehending the Whole at one View, may form a better Judgement. Firſt, I proved that the Copy was not ſuſceptible of Property: But admitting that it was, it was not capable of a perpetual excluſive Poſſeſſion. I then traced its Origin, which was within the Time of Memory. I have diſtinguiſhed it from thoſe Rights with which it has been confounded. I have ſhewn the Reſemblance between this and other Rights, which the Law has never protected. It has been proved prejudicial to the Advancement of Letters, and of ill Conſequence to Authors themſelves. The very Notion of an original incorporeal Right is incon-

fiſtent with the neceſſary Qualification of Property, as mentioned by *Puffendorf* in his Law of Nature and of Nations*, which is, *That it be ſo far under the Power of Men, as they may faſten and keep it for their Occaſions.* Agreeable to this Condition, every incorporeal Right acknowledged by the Law, is capable of Diſſeiſſin. Grantee of a Rent-ſeck at Common Law, may be diſſeiſſed by a *Reſcous.* An Advowſon may be uſurped. In the ſame Manner, Rights of Common, Eſtovers, may be forcibly diveſted from their ſeveral Owners. How can the Proprietor of a Copy be put out of Poſſeſſion? Other Men ſelling Impreſſions will not prevent him from doing the ſame. It is very obſervable, that this Point was again brought into Queſtion, by an Action on the Caſe, which is not a poſſeſſory Action.

I SHALL again apply the Principle formerly laid down, which is, That this Right cannot be excluſively poſſeſſed by a few, becauſe it may be enjoyed by all.

I SHALL now ſubmit what has been ſaid, to the Judgement of the Public. If any Arguments ſhould have entered into this Diſquiſition, which are of a Nature far different from thoſe commonly

* Book IV. Chap. v.

employed in diſcuſſing Points of Law, the intelligent Reader will obſerve, that I have not deviated from my Subject, but that the Subject itſelf is foreign to a Court of Judicature.

FAR be it from me to deprive the INGENIOUS of the *Fruits* of their Wit and Induſtry; may they long enjoy every Advantage, every reaſonable Encouragement. Let not the Sources of the Common Law be corrupted, nor its Principles be perverted, in Support of a Right, prejudicial to the Cauſe of Literature, which it was calculated to promote.

F I N I S.

A. R. Heath
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