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in that place carried at the common ordinary price of carrying other things. And if he was apprized of the defendant's advertisement, that might be equivalent to personal communication of the carrier's refusal to be answerable for money not notified to him: and this was left to the jury.

Mr. Justice ASTON, who tried the cause, said he had no doubt about the *justice* of the case: his difficulty had only arisen from the cases and authorities which had been now mentioned; which put him upon more caution in admitting the evidence. But it appeared to be notorious in the country where this transaction happened, that the price of carrying money from thence to *London* was three pence in the pound: and it manifestly appeared that this was money sent under a *concealment* of its being money. The true principle of a carrier's being answerable is the *reward*. And a higher price ought, in conscience, to be paid him for the insurance of money jewels and valuable things, than for insuring common goods of small value. And here, though it was not directly and strictly brought home to the plaintiff that he had a clear certain knowledge of the defendant's advertisements and hand-bills, yet it was highly probable that he must have known of them: and his own letter shewed his being conscious that he could not recover, by reason of the concealment. (a) Therefore I think the verdict against him ought to stand.

Mr. Justice WILLES concurred in the same opinion.

Per CUR.' unanimously—

RULE DISCHARGED.

[2303]

Thursday 20th April 1769.

Authors are only secured in their copy right under the Stat. of 8 Ann. c. 19.

[1935] 1 Ch. 273
23 T.L.R. 719.
[1907] 2 Ch 585
[1908] 1 Ch 567.

MILLAR *versus* TAYLOR.

THIS CASE was a revival of the old and often-litigated question concerning LITERARY PROPERTY: and it was the *first determination* which the question ever received, in *this* Court of KING'S BENCH.

The declaration was of *Michaelmas* Term in the seventh year of his present *majesty*, 1766. The first argument at the Bar was on *Tuesday* 30th of *June* 1767:

(a) The case as stated demonstrates his notice, at least of the course of dealing, and that is sufficient notice, whether he knew of the advertisements or not.

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when the Court ordered it to stand over to the next term, for a second argument. It was argued, a second time at the Bar, on the 7th *June* 1768. The first argument was by Mr. *Dunning*, for the plaintiff; and Mr. *Thurlow*, for the defendant: the second, by Mr. *Blackstone*, for the plaintiff; and Mr. *Murphy*, for the defendant.

[1922] 2 A.C. 383

After the second argument, the following rule was made; *viz.*

12 A.C. 357

"*Tuesday* 7th *June* (in *Trinity* Term, 1768.)

[Post. 2407.]

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"*Millar.*
"*Taylor.* } "IT is ordered that this cause shall *stand* "*over for the* OPINION of this Court, until "the next term. And, by the CONSENT of the counsel "for *both* parties, it is further ordered, that the *judgment* "which shall *then* be given, *shall be* ENTERED UP *as a* "*judgment of* THIS *term*, in the same manner as if the "said judgment had been given on *this* day. Mr. *Black*-"*stone*, for the plaintiff; Mr. *Murphy*, for the defen-"dant."

Note—Mr. *Millar* DIED *the next morning*.

In *Hilary* Term 1769, 9 *G.* 3. (on *Tuesday* 7th *February* 1769,)

[See 5 Durn. 245. 6 Ves. 695. 8 Ves. 218, 224. 2 Bro. 81.]

THE COURT ordered it to be set down in the paper, upon the second-paper day of the next term, for the OPINION of the Court.

It would be tedious and tautologous, to repeat the arguments of the counsel at the *Bar*, or the cases and authorities cited by them; as they were, all of them, so very fully and amply taken up again from the *Bench*, and so elaborately expatiated upon, canvassed, and discussed by the judges, in delivering their opinions, and the reasons whereupon they formed them.

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Let it suffice to say, in general, that the counsel for the plaintiff insisted, "that there is a *real property* re-"maining in authors, *after publication* of their works; "and that *they* ONLY, or those who *claim under them*, "have a right to *multiply* the copies of such their lite-"rary property, at their pleasure, for sale." And they likewise insisted, "that this right is a *common law* right, "which *always has existed*, and does *still exist*, *indepen*-"*dent of* and *not taken away by* the statute of 8 *Ann.* "*c.* 19."

On the other side, the counsel for the defendant absolutely *denied* that any such property remained in the author, *after the publication* of his work: and they treated the pretension of a *common law* right to it, as mere *fancy* and *imagination*, void of any ground or foundation. They said, that formerly the *printer*, not the author, was the

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person who was supposed to have the right, (whatever it might be:) and accordingly the grants were all made to printers. No right remains in the author, at *common law*.

They insisted, that if an original author *publishes* his work, he sells it to the public: and the purchaser of every book or copy has a right to make *what use* of it he pleases; and may *multiply* each book or copy, to what quantity he pleases; and the *sole exclusive* right of multiplying such copies does *not* remain in the author, *after* publication. It would be a monopoly, if it did. The purchaser of the book has the *jus fruendi et disponendi*.

The act of parliament of 8 *Ann. c.* 19. for the encouragement of learning, *vests* the copies of printed books in the authors or purchasers of such copies, *during* the times therein *limited*. But it is *only during that limited time*; and under the *terms* prescribed by the act. And the utmost extent of the limited time is, in the present case, *expired*.

And they argued from the case of MECHANICAL INVENTIONS; where it is admitted, "that the rule does *not* "hold." Yet the *same* rule ought to hold, in *all similar* instances. And the copy of *one* of these is just like the copy of the *other*: and a great deal of *mental labour* is often bestowed upon *mechanical* inventions, as well as upon *literary* productions.

[2305]

Of *Michaelmas* Term, in the seventh year of the reign of King *George* the third.

The Declaration.

London, to wit, } BE it remembered, that on *Thursday* next after the morrow of *All Souls* in this same term, before our Lord the King, at *Westminster*, comes *Andrew Millar*, by *John Stirling* his attorney, and brings into the Court of our said Lord the King now here, his bill against *Robert Taylor*, in the custody of the marshal, &c. a plea of *trespass upon the case*: and there are pledges of prosecuting, to wit, *John Doe* and *Richard Roe*. Which said bill follows in these words, to wit, *London* to wit, *Andrew Millar* complains of *Robert Taylor*, being in the custody of the marshal of the marshalsea of our Lord the King himself; for this, to wit, that whereas the said *Andrew*, on the 20th day of *January* in the year of our Lord 1763, to wit, in the parish of *St. Mary le Bow*, in the ward of *Cheap*, was, and hath ever since been, and still is, the *true and only proprietor of the copy* of a certain *book of poems*, intituled "the Seasons, by *James*

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"*Thomson*." And whereas the said *Andrew*, after he became and whilst he was proprietor of the said copy as aforesaid, to wit, on the day and in the year abovementioned, in the parish and ward aforesaid, did, at his own proper costs and charges, cause 2000 books of the said copy to be printed for sale, and afterwards, to wit, on the 20th day of *May*, in the third year of the reign of his present majesty, in the parish and ward aforesaid, had a great number, to wit, 1000, of the said books so printed of the said copy intituled, "The Seasons, by *James Thomson*," remaining in his hands for sale; nevertheless the said *Robert*, not ignorant of the premisses, but contriving and fraudulently intending to deprive the said *Andrew* of the whole profit and benefit of the said 1000 books of the said *Andrew*, intituled, "The Seasons, by *James Thomson*," then remaining in his hands for sale, and injuriously to prevent the sale thereof; afterwards, to wit, the day and year last abovementioned, to wit, in the parish and ward aforesaid, did *publish and expose to sale* several other books, intituled, "The Seasons, by *James Thomson*," to wit, 1000 *other books of the like copy*, which last-mentioned books, intituled, "The Seasons, "by *James Thomson*," had been *injuriously printed by some person or persons without the licence or consent of the said Andrew*; and then and there *sold* several, to wit, 20, of the said last-abovementioned books so printed as last mentioned; he the said *Robert* then and there well knowing that the same had been so injuriously printed without the licence or consent of the said *Andrew*; by means whereof, the said *Andrew* was *deprived of the profit and benefit of the said copy and book*, intituled, "The Seasons, by *James Thomson*," *and of the said* 1000 *books so printed at his costs and charges* as aforesaid, and *then remaining in his hands unsold*: whereby the said *Andrew* is injured and hath damage to the amount of £200; and therefore he brings this suit, *&c.*

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Special Verdict.

The defendant pleaded the general issue, "not guilty." And, upon the trial, the jury found a *special* verdict, as follows,—that the said work intituled "The Seasons" is an *original composition* in one volume, composed by *James Thomson*, Esq; a natural born subject resident in that part of *Great Britain* called *England*; and *first printed and published by the said James Thomson, the author*, for his *own use and benefit* as the *proprietor* thereof, at several times, between the beginning of the year 1727 and the end of the year 1729, in the city of *London*; the same having never before been printed elsewhere. And the said jurors upon their said oath further say, that the said *Andrew Millar*, in the year 1729, pur-

chased the said work called "The Seasons," for a *valuable and full consideration, from the said James Thomson, the said author and proprietor,* to him and his *heirs and assigns for ever.* And the said jurors upon their said oath further say, that from the time of the said purchase, the said *Andrew Millar* hath printed and sold the said work *as his property,* and *now hath and constantly hath had a sufficient number of books* of the said work *exposed to sale at a reasonable price.* And the said jurors upon their oath further say, that *before* the reign of her late Majesty Queen *Anne,* it was USUAL *to purchase from authors the* PERPETUAL *copy-right of their books;* and to *assign* the same from hand to hand, for valuable considerations; and to make the same the subject of *family settlements,* for the provision of *wives and children.* And the said jurors upon their oath further say, that the stationer's-company, to secure the enjoyment of the said copy-right as far as in them lay, made several by-laws, particularly the two following:

> At an assembly of the masters and keepers or wardens and commonalty of the mystery or art of stationers of the city of *London,* held at their common-hall in the parish of *St. Martin Ludgate,* in the ward of *Farringdon* within *London,* on *Wednesday* the 17th day of *August anno domini* 1681, for the well governing the members of this company, the several laws and ordinances hereafter mentioned were then made, enacted and ordained by the master and keepers or wardens and commonalty of the mystery or art of stationers of the city of *London,* in manner and form following, *viz.*

And whereas several members of this company have great part of their estates *in copies;* and by ancient usage of this company, when any book or copy is *duly entered* in the register-book of this company to any member or members of this company, such person to whom such entry is made, is and always hath been reputed and taken to be PROPRIETOR *of such book or copy,* and *ought to have the sole printing thereof;* which privilege and interest is now *of late often violated and abused*—it is therefore ordained that, where *any entry or entries* is or are, or hereafter shall be duly made, *of any book or copy* in the said *register book of this company,* by or for any *member or members* of this company that in such case if *any member or members* of this company shall then after, *without the licence or consent of such member or members* of this company for whom such entry is duly made in the register-

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book of this company, *or his or their assignee or assigns*, PRINT *or* CAUSE *to be* PRINTED, *import or* CAUSE *to be* IMPORTED from beyond the seas or elsewhere, *any such copy or copies, book or books*, or *any part* of any such copy or copies, book or books; or shall *sell, bind, stitch* or *expose the same or any part or parts thereof to sale*, that then such member or members so offending shall FORFEIT, to the master and keepers or wardens and commonalty of the mystery or art of stationers of the city of *London*, the sum of *twelvepence for every such copy or copies, book or books, or any part of such copy or copies, book or books, imprinted, imported, sold, bound, stitcht*, and *exposed to sale* contrary hereunto.

At an assembly of the masters and keepers or wardens and commonalty of the mystery or art of Stationers of the city of *London*, held at their Common Hall in the parish of *St. Martin Ludgate*, in the ward of *Farringdon* within *London*, on *Monday* the 14th day of *May Anno Domini* 1694, the several laws, ordinances and oath hereafter following were then by them made, enacted, and ordained, for the well-governing of the members of the corporation of them the said master and keepers or wardens and commonalty of the mystery or art of Stationers of the city of *London, viz.*

Whereas *divers members of this company* have great part of their *estates in* COPIES, *duly entered in the register-book of this company*; which, by the *ancient usage of this 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 their 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*;

[Post. 2371.]

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Wherefore, 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, it is ordained, that *after any entry or entries* is or are or shall be *duly made* of any copy or copies, book or books, in *the register-book* of this company, by or from any member or members of this company, *if any other member or members* of this company shall, *without the licence or*

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consent of *such member or members* of this company *for or by whom such entry is duly made*, or of his *assignee or assigns*, *print* or *cause to be printed*, *import* or *cause to be imported* from beyond the seas or elsewhere, any such copy *or copies*, *book or books*, or *part* of any such copy or copies, book or books, whereof such due entry hath been made in the register-book of this company to or for such other member of this company; or shall *sell*, *bind*, *stitch* or *expose* the same, *or any part or parts thereof*, to sale, without such *licence*; that then such member and members so offending shall *forfeit and pay* to the master and keepers, or wardens and commonalty of the mystery or art of Stationers of the city of *London*, the sum of *twelvepence for every such several copy or copies*, *book or books*, *part or parts* of every such copy or copies, book or books, imprinted, imported, sold, bound, stitcht, or exposed to sale without such licence or consent as aforesaid.

And the said jurors upon their said oath further say, that the said book or work intituled "*The Seasons*" was, upon the said purchase thereof by the said *Andrew Millar*; and *before* the publication and sale thereof by the said *Robert Taylor*, DULY ENTERED *in the register of the company of Stationers* of the city of *London*, *as the whole and sole property of the said Andrew Millar*. And the said jurors, upon their said oath further say, that the said *James Thomson*, the said author of the said work, died on the 27th day of *August* in the year 1748; and that after his death, and before the above action was brought, the said *Robert Taylor*, *without the licence or consent of the said Andrew Millar*, on the 20th day of *May* in the year 1763, PUBLISHED, EXPOSED TO SALE, AND SOLD, within that part of *Great Britain* called *England*, *several copies* of the said book, intituled, "The Seasons, by *James Thomson*;" which last-mentioned copies had been *printed by some person or persons without the licence or consent of the said Andrew Millar*; whereby the said *Andrew Millar* hath been and is *damnified*. But *whether*, upon the whole matter aforesaid in form aforesaid found, the said *Robert Taylor* is LIABLE IN LAW *to answer the damages* sustained by the said *Andrew Millar* by reason or means of the said *Robert Taylor*'s publishing, selling and exposing to sale within that part of *Great Britain* called *England* the said several copies of the said book intituled "The Seasons, by *James Thomson*," *without the licence or consent of the said Andrew Millar* as aforesaid, the jurors aforesaid are altogether ignorant; and therefore pray the advice of the Court here. And if upon the whole matter by the said jurors in form afore-

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said found, it shall seem to the Court here, that the said *Robert Taylor is liable by law* to answer the damages sustained by the said *Andrew Millar* on the occasion of the premisses within mentioned, then the said jurors upon their said oath say, that the said *Robert Taylor is guilty* of the premisses within laid to his charge, as the said *Andrew Millar* hath within complained against him; and assess the damages to the said *Andrew Millar* occasioned by the premisses within mentioned, besides his costs and charges by him about his suit in this particular laid out, to one shilling; and for such costs and charges, to forty shillings. And if upon the whole matter aforesaid by the jury aforesaid in form aforesaid found, it shall seem to the Court here, that the said *Robert Taylor* is *not liable in law* to answer for the damages within mentioned; then the said jurors upon their oath aforesaid say, that the said *Robert Taylor* is *not guilty* of the premisses within laid to his charge, as the said *Andrew Millar* within in pleading hath alledged.

Substance of the case.

THE short substance of the case is no more than this. The declaration charges, that the plaintiff *Millar* was the true and only proprietor of the copy of a book of poems, intituled, "The Seasons, by *James Thomson*;" and, whilst he was so proprietor of the said copy, caused 2000 books of it to be *printed for sale*, at his own expence; and had a great number of the said 2000 books *remaining in his hands for sale*. That the defendant *Taylor published and exposed to sale* several *other* books of the *like copy*, and bearing the same title; which latter books had been *injuriously printed* by some person or persons WITHOUT *the licence or consent* of the plaintiff *Millar;* the defendant *knowing* "that they had been so injuriously printed, without the plaintiff's licence or consent." By means whereof, the plaintiff *Millar* was deprived of the profit and benefit of the said *copy* and *book*, and of the *books printed* at his expence as aforesaid, and then remaining in his hands *unsold*. And he lays his damages at £200. The defendant *Taylor* pleads "Not Guilty." Issue is thereupon joined. And the jury find the special verdict as above.

THE JUDGES delivered their opinions separately, and at large; the junior judge beginning, and so proceeding upward to the lord chief justice.

[2310]

Mr. Justice WILLES, after stating the case and special verdict, spoke to the following effect. The questions of law must arise out of the facts found by this verdict. *Some* of them are worthy of observation.

It is found "that the work is an *original composition*, first "printed and published in *London*; the *author*, a

"a natural born subject, *resident in England*." Therefore this case has nothing to do with *foreign* books; which stand on a very different footing.

It is found "that the *author printed* this work from the "beginning of the year 1727, to the end of 1729, for his "*own use and benefit, as the proprietor*; and then sold "the copy to the plaintiff, *his heirs and assigns for ever*, "for a *full and valuable consideration*." Therefore there is no occasion to meddle with cases, where the author may be supposed to have *relinquished* the copy, and consequently to have *given a general licence to print*.

Many of the best books fall under *that* description. A *very little evidence* might be sufficient, *after the author's death*, to *imply such a tacit consent*: as if the book had *not been entered before publication*; it would be a circumstance to be submitted to the jury, "that the copy was "*intended* to be *left open*." So, if *after publication*, the author had *not transferred* his right, or *acted himself as proprietor*.

But the finding here, being of *a sale and tranfer for a valuable consideration*, this verdict will not authorize any claim founded on the *supposed consent* of the author.

It is also found, "that the plaintiff always had a sufficient number of these books exposed to sale, at *a reasonable price*." Therefore this case has nothing to do with cases where the plaintiff's relief may be rebutted, by shewing that he *meant* to *enhance the price*; which is against law.

It is found too "that the defendant sold several copies "of the SAID Book." And therefore this case is not embarrassed with any question, "*wherein consists the* IDEN"TITY of a book."

Certainly *bonâ fide imitations*, *translations*, and *abridgments* are different; and, in respect of the property, may be considered as *new* works; but *colourable* and *fraudulent* variations will not do.

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This is *not* the case of an *unpublished manuscript* taken *in execution* by creditors, or *claimed by assignees* under a commission against a *bankrupt-author*. When a question of that sort *arises*, the Court will consider what is right. And the same question may equally arise upon the term granted by the *Act of Parliament*. And therefore this is not a doubt which subsists *merely* on the *common law right*.

If the copy of the book belonged to the author, there is no doubt but that he might *transfer* it to the plaintiff. And if the plaintiff, by the transfer, is *become the proprietor* of the copy, there is as little doubt that the defen-

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dant has done him an *injury*, and *violated his right*: for which, this action is the *proper remedy*.

But the *term of years secured by* 8 *Ann. c.* 19. is *expired*. Therefore the *author's title to the copy* depends upon two questions———

1st. Whether the COPY *of a book, or literary composition*, belongs to the *author*, by the COMMON LAW:

2d. Whether the COMMON LAW-RIGHT of *authors* to the copies of their *own* works is TAKEN AWAY by 8 *Ann. c.* 19.

The *name*, "COPY of a book," which has been used for ages, as a term to signify the SOLE *right of printing publishiug and selling*, shews *this species of property* to have been *long known*, and to have *existed in fact and usage*, *as long* as the *name*.

Till the year 1640, the crown exercised an unlimited authority over the press; which was enforced by the summary powers of search, confiscation and imprisonment, given to the Stationers Company, all over the realm and the dominions thereunto belonging, and by the then supreme jurisdiction of the Star-Chamber, without the least obstruction from *Westminster-Hall*, or the parliament, in any instance.

"Whether *before* 1640, copy-rights *existed* in *this* "*kingdom* upon *principles* and *usage*," can be only looked for in the *Stationers Company*, or the *Star-Chamber*, or *Acts of State*.

As to *this* point, their evidence is competent, and liable to LITTLE suspicion. It was indifferent to the views of government, whether the copy of an innocent book licensed, was *open*, or *private* property. It was certainly

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against the power of the crown, to allow it as a *private right*, without being protected by any royal privilege.

It could be done only on principles of *private justice*, *moral fitness*, and *public convenience*; which, when applied to a *new* subject, make common law *without* a precedent; much more, when received and approved by *usage*.

It appears from the acts of state taken notice of at the bar, that unless *pirating another man's copy* be an abuse on such principles as *make* common law, it was *not prohibited*. If it *be* such an abuse, then there are *general* words in several prohibitions, to *include* it.

The decree of the Star-Chamber in 1556, regulating the manner of printing and the number of presses is confirmed, with additional penalties, by ordinances of the

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Star-Chamber * signed by Sir *N. Bacon*, Ld. *Burleigh*, and all the most eminent privy counsellors of that age.

Among other things, it is forbidden to print against the force and meaning of any ordinance, prohibition or commandment in any of the Statutes or *laws* of this realm; or in any injunction, letters patent, or ordinances set forth or to be set forth by the Queen's Grant, commission or authority.

By another decree of the *Star-Chamber*, 23 *June* 1585, 28 *Eliz. Art.* 4 † every book, *&c.* is to be licensed—"nor shall any one print any book, work or copy, "against the form or meaning of any restraint contained "in any statute or *laws* of this realm, or in any injunc-"tion made by her majesty or her privy council; or "against the true intent and meaning of any letters patent, "commissions or prohibitions under the great seal; or "contrary to any *allowed* ordinance set down for the good "government of the Stationers Company."

A proclamation of the 25th *September* 1623, 21 *Jac.* 1. recites the above decree of 28 *Eliz.* and that the same had been evaded, amongst other things, "by *printing beyond "sea* such *allowed* books, works or writings, as have "been imprinted within the realm by such to whom the "*sole printing thereof*, by letters patent, or lawful "ordinance or *authority*, doth appertain." And then this proclamation enforces the said decree.

By another decree of the Star-Chamber, made on 11th *July* 1637, article the the 7th,—no person is to *print*, or *import* (printed abroad) any book or copy which the company of stationers, or any other person hath or shall, by any letters patent, order or entrance in their register-book, *or otherwise*, have the right, privilege, authority or allowance SOLELY *to print*.

[2313]

These are *all the Acts of state* relative to this matter.

No case of a prosecution in the *Star-Chamber*, for printing *without licence*, or *against letters patent*, or *pirating another man's copy*, or *any other disorderly printing*, has been *found*. Most of the judicial proceedings of the Star-Chamber are *lost* or *destroyed*.

But it is certain, that *down to the year* 1640, copies were *protected and secured from piracy*, by a *much speedier and more effectual remedy*, than *actions at law*, or *bills in equity*.

No LICENCE could be obtained "to *print another "man's copy*:—Not from any *prohibition*; but *because* the thing was *immoral*, *dishonest*, and *unjust*. And he who printed WITHOUT *a licence*, was liable to *great penalties*.

Mr. *Blackstone* argued very materially from the books

* 29th June 1566, Strype's Life of Archbishop Parker, 221.

† Strype's Life of Archbishop Whitgift, 222-3. and Appendix, No. 24.

[Post. 2375.]

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of the Stationers Company; and read many entries. And from the extract of them, it appears that there is *no ordinance or by-law* relative to COPIES, till *after* the year 1640: and yet, from the *erection* of the company, copies were *entered as property*: and *pirating was punished.*

Their first *Charter* was in 1556; their second, in 1558.

In 1558, and down from that time, there are *entries of copies* for particular persons.

In 1559, and downward from that time, there are persons *fined* for *printing other men's copies.*

In 1573, there are entries which take notice of the *sale of the copy*, and the *price.*

In 1582, there are entries with an express proviso, "that if it be found *any other has right to any of the co-*" *pies*, then the *licence*, touching such of the copies so "*belonging to another*, shall be *void.*"

It is remarkable, that the decree of the Star-Chamber in 1637 expressly supposes a *copy-right to exist otherwise* than by patent, order, or entry in the register of the Stationers Company: which could *only* be by COMMON *law.*

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But in 1640, the *Star-Chamber was abolished.* The troubles began soon after. The king's authority was set at naught: all regulations of the press, and restraints of unlicensed printing, by proclamations, decrees of the Star-Chamber, and charter powers given to the Stationers Company, were deemed to be, and certainly were *illegal.*

The *licentiousness of libels* induced the two houses to make an *ordinance* which *prohibited printing*, unless the book was first *licensed, and entered in the register of the Stationers Company.* COPY RIGHTS, in *their* opinion, then, could only stand upon the COMMON LAW: both houses take it for granted.

The *ordinance* therefore prohibits *printing*, without *consent of the owner*; or *importing* (if printed abroad;) upon pain of *forfeiting* the same to the OWNER OR OWNERS *of the copies of the said books*, &c.

This provision necessarily supposes the *property* to EXIST: it is nugatory, if there was no OWNER. An *owner* could not, at that time, exist, *but* by the COMMON LAW.

In *November* 1644, MILTON published his famous *speech*, for the liberty of *unlicensed printing*, against this ordinance: and among the glosses which he says were used to colour this ordinance, and make it pass, he men-

tions, "the just retaining of each man his several copy; "*which God forbid should be gain-said!*"

So little did he, (though an enthusiast for liberty,) think that the liberty of unlicensed printing should extend to *violate the property of copies!* and yet, this copyright could, at *that* time, stand upon no other foundation, than *natural justice* and *Common Law*. Those who were for, and those who were against a licenser, all agreed "that literary property was not the effect of arbitrary power, but of *law and justice*; and therefore "*ought to be safe.*"

In 1649, the *long parliament* made an *ordinance* which *forbids printing* any book *legally granted*, or any book *entered without consent*, of the *owner*; upon pain of forfeiture, &c.

The same observations occur upon this last, as upon the former ordinance.

In 1662, the Act of 13 & 14 *C.* 2. (the Licensing Act) prohibits printing any book, unless *first licensed, and entered* in the register of the Stationers Company: it also prohibits printing *without the consent* of the OWNER, upon pain of forfeiting the book, and 6*s.* 8*d.* each copy; half to the king, and half to the OWNER; to be sued for by the *owner*, in six months; besides being otherwise prosecuted as an offender against the Act.

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The act supposes an *ownership at common law.* And the *right* itself is particularly recognized in the latter part of the third section of the Act; where the chancellor and vice-chancellor of the Universities are forbid to meddle with any book or books, the *right* of printing whereof doth *solely and properly belong to any particular person or persons.*

The *sole property* of the owner is here *acknowledged in express words*, as a *common law* right: and the legislature who passed that Act, could never have entertained the most distant idea, "that the productions of the brain "were not a subject matter of property." To support an action on this statute, *ownership* must be *proved;* or the plaintiff could not recover: because the action is to be brought by the *owner*; who is to have a moiety of the penalty.

The *various provisions* of this Act *effectually prevented piracies*; WITHOUT actions at law, or bills in equity, by owners.

But cases arose of *disputed property.* Some of them were between different patentees of the crown: some, "whether it belonged to the *author*, from his invention "and labour; or the *king*, from the subject matter;"

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The first case on this subject was between *Atkins*, the law-patentee, and some members of the Stationers Company. The plaintiff claimed under the law-patent. The defendants had printed *Roll's Abridgment.* The bill was brought for an injunction. And the lord chancellor awarded an injunction against every member of the company. The defendants appealed to the House of Lords; and the decree was affirmed.

M. 18 C. 2. in parliament. Vid. Carter 89.

This was argued on the footing of a *prerogative* copy right in the *crown*, in *all law-books.* It was urged, that the king *pays the judges* who pronounced the law—that the laws are the *king's* laws, &c. I do not enter into the reasons of the determination; but only cite it to show that the lords went upon this doctrine, which was not disputed "that a *copy right* was a thing acknowledged at common "law: and then they agreed that the king *had* this "right, and had *granted* it to the patentees." In this light, this case was very properly stated by Mr. *Blackstone*; and argued from, as being an authority in his favour.

[2316]

The next case was that of *Roper* v. *Streater*, Skinner 234. and mentioned and alluded to, in 1 *Mod.* 257. Which came on, before this court (Lord Chief Justice *Hale* then presiding) about 22 *C.* 2. and judgment was given *M.* 24 *C.* 2. *Roper* had bought, from the executors of Mr. Justice *Croke*, the third part of his reports. *Streater* was law-patentee; and *reprinted* it, *without* the plaintiff's consent. *Roper* brought an action of debt, as *owner*, upon the *Licencing Act.* *Streater* pleaded the *king's grant.* Upon which, the plaintiff demurred: and it was adjudged for the plaintiff, in the Common Pleas. Which is a judicial authority in point, "that the plaintiff, by *purchase* from the *executors of the author*, was OWNER of the Copy at *common law.*"

Nor did the reversal * in the House of Lords at all shake this authority; because the reversal proceeded (as in the case of *Atkyns*) upon an opinion "that the copy belonged to the "*king.*"

* On 26th May, 1705.

Besides, it appears that the judges were not asked their opinions, on this occasion: and probably they would not have concurred in the reversal; as the majority of the House of Lords, who were for reversing, refused to hear their opinions For, it is said, in the journals, that after various debate and consideration, the question was propounded "whether the judges should be heard in "this case:" and it was resolved in the *negative*: dissentiente Anglesey.

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In the argument of the case of *the Stationers Company* against *Parker*, in *Skinner* 233. it is said, " it is true, " that this action of *Roper* v. *Streater* was brought on " the Act of 14 *C.* 2. which is expired. But that " Statute did not give a *right*, but only an *action of* " *debt*." [*Vide Skinner*, 234.]

The next case is that of *the Company of Stationers* v. *Seymour*, 29 *Car.* 2. in 1 *Mod.* 256. The plaintiffs, as grantees of the crown, brought an action of debt against the defendant, for printing *Gadsbury's Almanac. Pemberton*, in his argument said, when Sir *Orlando Bridgman* was chief justice in this court (the Common Pleas) 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 those who claim a *property* " PARAMOUNT *the king's grant*:" and opinions were divided on that point.

[2317]

But (said he) the defendant, in our case, makes *no* title to the copy: he only pretends a nullity in our patent.

The book which this defendant hath printed has *no certain author*: and then, according to the rules of law, the *king* has the property; and, by consequence, may grant his property to the company.

The court thought that *Almanacs* might be *prerogative* copies; and said, " these *additions* of prognostications " do not alter the case; no more than if a man should " claim a property in *another man's* copy, by reason of " some *inconsiderable additions of his own.*"

These were times when prerogative ran high. But still these cases prove " that the *copy-right* was at *that* " time a *well-known claim*;" though the overgrown rights of the crown were, in some instances, allowed and adjudged (as in *this* case) to over-rule them.

The *Licensing* Act of *C.* 2. was continued by several Acts of Parliament; but *expired* 9th *May*, 1679. 31 *C.* 2. Soon after which, there is a case in *Lilly's* Entries, of *Hilary* Term 31 *C.* 2. *B. R.* * 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 profit and benefit of his copy. But I don't find, that this action was ever proceeded in.

* Lilly's Entries 67, Ponder *v.* Bradyl.

The Licensing Act of 13 & 14 *C.* 2. was *revived* by 1 *Jac.* 2. *c.* 7; and continued by 4 *W* & *M.* c. 24; and *finally expired* in 1694.

For five years successively, attempts were made for a *new* Licensing Act. Such a bill once passed the House

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of Lords: but the attempts miscarried, upon constitutional objections to a *licenser.*

The proprietors of copies applied to parliament, in 1703, 1706, and 1709, for a bill to protect their copyrights which had been invaded, and to secure their properties. They had so long been secured by *penalties*, that they thought an *action at law* an *inadequate* remedy; and had no idea *a bill in equity* could be entertained, but upon *letters patent adjudged* to be *legal*. A *bill* in equity, in any *other* case, had *never* been attempted or thought of: an *action* upon the case was thought of in 31 *C.* 2; but was * *not proceeded in.*

* Ponder v. Bradyl.

[2318]

In one of the cases given to the members in 1709, 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 per- " haps the hundredth part of the damage he suffers; be- " cause a thousand counterfeit copies may be dispersed " into as many different hands all over the kingdom, and " he not be 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 has been " known to offend in this particular; nor will any ever " appear in it.) Therefore the only remedy by the *com-* " *mon law*, is to confine a beggar to the rules of the King's " Bench or Fleet: and there he will continue the evil prac- " tice with impunity. We therefore pray, that CON- " FISCATION *of counterfeit copies* be *one of the penalties* " to be inflicted on offenders."

On the 11th of *January* 1709, pursuant to an order made upon the booksellers petition, a bill was brought in, for *securing* the property of copies of books to the *rightful owners*, &c. On the 16th of *February*, 1709, the bill was committed to a committee of the whole house; and reported with amendments, on the 21st of *February*, 1709.

I shall consider the bill as it passed into a law, and the arguments drawn from the alterations made in the course of its passing in the House of Commons, when I come to the second head or question which I proposed to speak to; and now procéed upon the fact of usage and authority since 1709.

The Court of Chancery, from that time to this day, have been in an error, if the whole right of an author in his copy depends upon this *positive* Act, as introduc-

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tive of a *new* law. For, it is clear, the property of no book is intended to be secured by this Act, unless it be ENTERED: nobody offends against this Act, unless the book be ENTERED. Consequently, the *sole copy-right* is *not given* by the Act, UNLESS the book be *entered*. Yet it is held *unnecessary* to the relief in *Chancery*, that the book should be *entered*.

There is also an express proviso, "that all actions, "suits, *bills*, &c. for any offence that shall be committed "against this Act, shall be brought, sued and commen-"ced *within three months* after such offence committed; "or else, the same shall be void and of none effect."

[2319]

IF all copies were *open and free before*, pirating is *merely* an offence against Statute; and can only be questioned, in any court of justice, *as* an offence against *this* Act. Yet it is *not* necessary that the *bill in chancery* should be brought *within* three months.

Again, IF the *right vested*, and the *offence prohibited* by this Act be *new*, no remedy or mode of prosecution can be pursued, *besides* those *prescribed by* the Act. But a *bill in chancery* is *not* given; and consequently *could not be brought* upon *this* Act.

There is no ground, upon which this jurisdiction *has* been exercised or *can* be supported, except the ANTECEDENT *property*; *confirmed*, and *secured for a limited term*, by this Act. In *this* light, the ENTRY of the book is a condition in respect of *Statutary penalty only*. So likewise the three months is a limitation in respect of the *Statutary penalty only*. But the remedy by an *action upon the case*, or a *bill in chancery*, is a consequence of the *common law* right; and is *not affected* by the *Statutary* condition or limitation.

Mr. *Murphy* cited and laid stress upon the case of *Millar* v. *Kincaid et al.* in the House of Lords, 11th of *February* 1750. In that case, the suit was brought upon the 8 Queen *Ann* and 12 *G.* 2. *c.* 36, by seventeen booksellers of *London*, plaintiffs, against twenty-four booksellers of *Edinburgh* and *Glasgow*, defendants; for having offended against these two Acts, as to many books specified; praying the penalties, and an injunction and account, by way of damages.

The plaintiffs restrained their demand to an account of profits, by way of *damages*, for two or three books only.

The Court found, "that there lies *no action of damages* in "this case."

1st Interlocutor, 4th July 1746.

The plaintiffs petitioned for a rehearing; and insisted that the 8 of Queen *Ann* gave an ADDITIONAL *security by penalties, during a limited time*, to a *property* which EXISTED BEFORE; and therefore was *declaratory of the*

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property; and that the court of *Chancery* had always understood it in *this sense*, and *given relief*, in consequence of the COMMON-*law property*, declared, and *secured* by the Act for a *limited time* by *penalties*.

2d Interlocutor, 24 December, 1746.

The Court found, "that an action of damages lies, to "the extent of the profits made by the defendants, on "such of the books * libelled, as have been *entered* in the "Stationers Hall and *reprinted* in *Britain*."

[*2320]

The defendants prayed a review.

The Court ordered the cause to be re-argued; and directed them to consider "whether, by the laws of *Scot-* "*land*, an *action* lay, at the instance of an author or "proprietor of a book, BEFORE *the Statute*."

The cause was further heard and debated: but *both sides avoided* the question upon the *common* law. The plaintiffs, probably, were advised not to put their case upon the common law of *Scotland*; because the books were printed and published in *London*, and therefore might be considered as *foreign* books. And the defendants, thinking themselves strong against an action of *damages* upon the *Statute*, rested upon that ground; and insisted that the action being brought *upon the Statute* the plaintiffs could *not resort to the common law*.

3d Interlocutor, 2 December, 1747.

The Court therefore gave *no opinion*, as to the *common* law; but found, "that *no* action lies on the *Statute*, for "offences against the same, *except* when it is brought "*within three months* after the committing such offence: "and that no action lies, *except* for such books as have "been *entered* in Stationers Hall in terms of the Statute." And "that *no* action of *damages* lies *on the Statute*."

The plaintiffs prayed a review; and objected to the ambiguity of the proposition, "that no action of da- "mages lies on the Statute;" because they did not contend "that such action was *given by the Statute*;" but that it *followed* the ANTECEDENT *property*, *declared* and *secured* by the Statute. And they urged the *practice* of the court of *chancery*.

4th Interlocutor, 7 June 1748.

The Court found, "that *no* action of *damages* does lie "*upon* or *in consequence* of the *Statute*, but *only* for the "PENALTIES."

The plaintiffs appealed to the House of Lords. In their reasons annexed to the printed case, they say "the court of chancery has construed 8 *Ann*, as *declara-* "*tory* of an *author's property*; and the remedies and "penalties thereby given for a *limited term*, upon certain "*conditions*, as ADDITIONAL SANCTIONS *only*, to pre- "serve that property from being injured." And in another part of the reasons, they insist "That it is like "the case of a patent granted for any new and useful in-

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"vention: the patentee, in consequence of his *property*, "is intitled the *ordinary relief* in courts of law and "equity."

* It is remarkable that the respondents, (who had very able men for their † counsel,) in *their* reasons, do not litigate, "that the statute was to be considered as giving "an *additional* security;" nor consequently, the competence of an action for damages: they only say, "IF it is "taken as an action upon the case, it cannot be *joined* "with an action for the *penalties;* and insist, from objections to the method of proceeding, that the plaintiffs *could not recover.*"

† Mr. Hume, Campbell and Mr. York.

Mr. *Murphy* cited a manuscript, which says, Lord *Hardwicke*, in moving for the resolution of the house, spoke to the following effect—"As to the *origin of relief* "given in the Court of *Chancery*, by *injunction and account*—The statute of *Jac.* 1. which took away *monopolies*, at the same time *gave* the King a power to grant "*patents* for the encouragement of new inventions *for* "*fourteen years*. These patents were *inrolled in Chancery:* and the Court, upon complaint of the patentee, "would take notice of its *own records*."

"The Statute of Queen *Ann* might be considered as a "*standing patent* to authors: and, being a *record of the* "*highest nature*, the Court will give relief.

"But he *doubted* whether that statute was *declaratory* "of the *common* law; or *introductive* of a *new* law, to "*give* learned men a property which they had *not* "before.

"He said, it was material to consider how the com-"mon law of *Scotland* stood before the statute: and he "repeated, more than once, that as the question could "not be judicially determined upon the present appeal, "he would be *still open* to all reasonings upon the sub-"ject; and would *not* be understood to give an opinion "which might *bind* himself.

This account of what Lord *Hardwicke* said, is taken from a letter said to be written to the respondents in *Scotland*, by their solicitor. It purports only to be *heads*, by way of *narration;* and *not* a report of his *words*, or the *order* in which he spoke, or *all* he said; and plainly contains what the solicitor thought would make most for his clients.

Lord *Hardwicke* must have intimated *more* of his opinion than is mentioned in the letter; by his repeatedly guarding "that he would not be understood to give an "opinion which might bind himself."

What he is reported to have said, is very material, in this light. [2322]

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The only question brought before the house by the appeal, was, "whether any remedy lay, in consequence "of the Statute, *except* for the *penalties*."

Lord HARDWICKE states the doubt to be, "whether "the Statute was *declaratory of the common law*; or *in-* "*troductive of a new law*, to *give* learned men a property "which they had *not before*." He states no doubt, "whether any remedy could lie, except for the penal- "ties only, *if* the act gave a *new* property."

The doubt was a question of *construction* upon the Statute, not to be solved by the *words*; for there are *no words* declaratory of the common law: and there is an express proviso against *inferences* either way.

The question then depended upon settling "whether "the property *existed* by the *common law*." *If* it *did*, the act confirms that right, and secures it by penalties. *If* there was *no* right at the *common law*, then the act *gives a new right* upon *condition*, under a *sanction specially prescribed*. Therefore says Lord HARDWICKE, it is material to consider "*how* the common law of *Scotland* stood, *before* the statute."

As to what he is reported to have said of the relief given in chancery—the Solicitor has certainly *omitted* something.

Lord HARDWICKE could never ground the relief given to a patentee, merely upon the patent being *inrolled in chancery*: much less could he argue from thence to an act of parliament, *merely* because it was a record of a *higher* nature; without saying a word as to the *construction* of the act, upon which the Court of Chancery proceeded; though that was the *only* thing material, and relied upon in the argument as *decisive*.

The printed reasons argued from the relief given upon patents for new inventions, by action or bill, as a parallel case.

Supposing a *common* law property *secured* and *confirmed* by the statute *for a term*; this legal right stands upon the same ground with the legal right excepted in the act of 21 *Jac.* 1. But supposing the privilege given to authors by this act, to *arise* out of a *new* prohibition; there is no colour, from the case of *letters patent*, for the jurisdiction exercised by the Court of Chancery upon 8 *Ann.*

[2323]

In *letters patent*, all the conditions required by 21 *Jac.* 1. must be observed. Patentees for new inventions are left, by that statute, to the common law, and the remedies which follow the nature of their right.

But this statute of the 8th of Queen *Ann*, is a *penal* statute; which prescribes the remedy for the party ag-

grieved, and the mode of prosecution, to be commenced within three months. Upon *such* an act, if the offence, and consequently the right which arises from the prohibition, be *new*, no remedy or mode of prosecution can be pursued, except what is directed by the act.

The statutes which prohibit interlopers, give, by that prohibition, the sole *East India* trade to the company. The trade was free before. Consequently, the statutes create a *new* offence. Was it ever imagined that any remedy could be pursued by the company, except those prescribed by the statutes?

Where an act *enforces a duty with penalties*, the ordinary remedies follow the *debt of obligation to pay*; and the penalties are by way of security. But where the *privilege to one* person arises out of and consists in a *new prohibition to others*, there is no proceeding but for a *breach of the prohibition*. If the act has prescribed the remedy for the party grieved, and the mode of prosecution; all other remedies and modes are excluded.

If a *conditional* right is *created* by an act of parliament, the *condition cannot be dispensed with*. If the same act, which *creates* the right, *limits the time* within which prosecutions for violation of it shall be commenced, that *limitation cannot be dispensed with*.

Therefore the *whole jurisdiction* exercised by the Court of *Chancery* since 1710, *against pirates of copies*, is an authority "that authors *had a property antecedent*; to "which the act gives a *temporary additional security*:" it can stand upon *no other* foundation. And I am persuaded Lord *Hardwicke* dropt something as to the reasons and grounds of the relief given by the Court of Chancery, in consequence of this act; which occasioned his repeating, more than once, "that he would be *still* "*open* to all reasonings upon the subject."

The order declares, "that the action brought by the "appellants in the Court of Session in *Scotland* was im-"properly and inconsistently brought, by demanding at "the *same time* a discovery and account of the *profits* of "the books in question, and *also the penalties* of the acts "of parliament, (which the appellants had never abso-"lutely waved in the proceedings below;) and also by "*joining several pursuers*, claiming distinct and indepen-"dent rights in different books, in the *same action*; and "that therefore the points determined by the said interlocu-"tors could not regularly come in question in this cause: "and therefore ORDERED and ADJUDGED that the said "several interlocutors be *reversed*, *without prejudice* to "the determination of any of the said points, when the "same shall properly be brought in judgment. And it

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"is hereby also declared, that libel in this cause is *non-* "*relevant:* and ordered, that the said Court of Session "do proceed accordingly."

If the ground of the relief in chancery, *during the continuance* of the term given by the act, was the *antecedent property;* it is not to be wondered, that *after the expiration of the term*, the Court had no difficulty to grant the same relief, *merely* upon the *common law right.*

But before I mention the cases, it may be proper to premise what will put the authority of them in its true light.

Injunctions to stay *printing* or the *sale* of books printed, are in the nature of injunctions to stay *waste:* they never are granted, but upon a clear right. If moved for, upon filing the bill; the *right* must appear clearly, by affidavits: if continued, after the answer put in; the *right* must be clearly admitted by the answer, or not denied.

Where the plaintiff's right is *questioned* and *doubtful*, an injunction is *improper;* because *no reparation* can be made to the defendant for the damage he sustains from the injunction: but if the defendant proceeds to commit the waste or injury, the plaintiff may afterwards have *compensation.*

Few bills against pirates of books are ever brought to a hearing. If the defendant acquiesces under the injunction, it is seldom worth the plaintiff's while to proceed for an account; the sale of the edition being stopped.

From the year 1709 to this day, there have not been more than two or three such causes *heard.*

The question upon the common law-right, could not arise till 21 years from the 10th of *April* 1710, for old copies: consequently, the soonest it could arise was after the 10th of *April* 1731.

[2325]

On the 9th of *June* 1735, in the case of *Eyre* v. *Walker*, Sir *Joseph Jekyll* granted an injunction to restrain the defendant from printing the Whole Duty of Man; the first assignment of which * had been made in *December* 1657: and this was acquiesced under.

In the case of *Motte* v. *Falkner*, 28th *November* 1735, an injunction was granted for printing *Pope*'s and *Swift*'s Miscellanies. Many of these pieces † were published in 1701, 1702, 1708: and the counsel strongly pressed the objection, as to these pieces. Lord *Talbot* continued the injunction, as to the whole: and it was acquiesced under. Yet *Falkner*, the *Irish* bookseller, was a man of substance; and the general point was of consequence to him: but he was not advised to litigate further.

* Dr. Hammond's Letter to the Booksellers.

† 1701, contests and dissensions between Athens and Rome. 1707, productions for 1708. 1708, *Partridge*'s death. 1708, Sentiments of a Church of *England*-Man. *Vanbrugh*'s House. *Baucis* and *Philemon*. 1709, Project for Advancement of Religion, and Reformation of Manners.

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On 27 *January* 1736, in the case of *Walthoe* v. *Walker*, an injunction was granted by Sir *Joseph Jekyll*, for printing *Nelson*'s Festivals and Fasts; though the bill sets forth, that it was printed in the lifetime of *Robert Nelson* the author,* and that he died in *January* 1714.† This too was acquiesced under.

On 5th *May* 1739, in the case of *Tonson et al.* v. *Walker otherwise Stanton*, before Lord *Hardwicke*, an injunction was granted, to restrain the defendants from printing *Milton*'s *Paradise Lost*. The plaintiffs derived their title under an assignment of the copy from the author in 1667; which was read. This injunction was also acquiesced under.

[1 East. 361.]

In the case of *Tonson* v. *Walker and Merchant*,‡ before Lord *Hardwicke*, the bill was filed 26th *November* 1751, suggesting that the defendants had advertised to print "*Milton*'s Paradise Lost, with his life by *Fenton*; "and the notes of all the former editions," of which Dr. *Newton*'s was the last. The bill suggests a pretence "that the defendant had a right." It derives a title to the poem, from the author's assignment in 1667. That it was published about 1668. And it derives a title to his life by *Fenton*, published in 1727; and to *Bentley's* notes, published in 1732; and Dr. *Newton*'s, in 1749. The answer came in, the 12th *December* 1751: wherein the defendants insisted they had a right to print their work in numbers, and to take in subscriptions. And they put in their answer so expeditiously, as to prevent an injunction before answer.

It was intended to take the opinion of the Court solemnly. The searches and affidavits, which were thought necessary to be made, occasioned a delay: and no motion was made till near the end of *April* 1752.

[2326]

The injunction was moved for, on *Thursday* the 23d of *April*. Lord MANSFIELD argued it. It was argued at large, upon the general ground of *copy-rights* at *common*-law.

Lord CHANCELLOR directed to proceed on the *Saturday* following; and to be spoken to by one of a side. Afterwards, it stood over, by order, till *Thursday* the 30th of *April;* when it was argued very diffusively.

The case could not possibly be varied, at the hearing of the cause. The notes of the last edition (Dr. *Newton's*) were *within* the act; but an injunction as to *them only*, would have been of little avail; and it did not follow, that the defendants, should not be permitted to print what they had a *right* to print; because they had attempted to print *more*. For, in the case of *Pope* v. *Curl*, 5th *June* 1741, Lord *Hardwicke* injoined the defendant

* It was printed in 1703.
† Prout Preface.
‡ 30th April 1752.

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only from printing and selling the *plaintiff*'s letters; there were a great many *more* in the book which the defendant had printed, which the *plaintiff* had no right to complain of.

If the inclination of Lord *Hardwicke*'s own opinion had not been strongly with the plaintiff, he never would have granted the injunction to the *whole*, and penned it in the *disjunctive;* so that printing the poem, *or* the life, *or Bentley*'s notes, without a word of Dr. *Newton*'s would have been a breach.

The injunction is not barely to the selling of *that* book, of which *Newton's* notes made a part; but to *future printing*.

He might have sent it to law then, as well as at the hearing: but he probably foresaw he never should hear of it again. Accordingly, the parties understood his way of thinking: and the defendants acquiesced under the injunction, and so have made it perpetual; and would now be guilty of a breach, if they printed *Milton*.

I do admit that (except from the order he made, which he saw and penned,) he guarded against being thought finally to determine the question.

[Lucas, 105.]

He cited *the Stationers Company* v. *Partridge*, as an authority for an injunction, where the right was *doubtful*. He observed upon Dr. *Newton*'s notes, either transcribed or colourably abridged, being within the act: and, according to a note I have of the case, he said, "the "strongest authority is what the judges have said in the "case of *Seymour* (1 *Mod.*) and in the argument of pre"rogative-copies. Distinctions are taken upon the "ground of the King's property in *Bibles*, *Latin Gram"mars*, *Common-Prayer* and *Year-Books;* that they "were made and published at the *expence* of the crown; "*ergo* the *King's property*. These arguments being "allowed to support that right, *infer* such a *property* "*existing*."

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That very point was then depending in this Court, upon a case sent by himself, in *Baskett* v. *the University of Cambridge*.

It would not have been agreeable to Lord *Hardwicke*'s great decency and prudence, to have spoken out *decisively*, upon a general *legal* right *never decided at law*, and to have grounded his opinion upon an argument which was then a question *sub judice*.

The question upon literary property was brought before this Court in the case of *Tonson* v. *Collins;* and after two arguments, was adjourned into the Exchequer-chamber. I have been informed, from the best authority, that so far as the Court had formed an opinion, they all

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inclined to the plaintiff. But as they suspected that the action was brought by collusion; and a nominal defendant set up, in order to obtain a judgment, which might be a precedent against third persons; and that therefore a judgment in favour of the plaintiff would certainly have been acquiesced in; upon *this* suspicion, and because the Court inclined to the plaintiff, it was ordered to be heard before *all* the judges.

Afterwards, upon certain information received by the judges, "that the whole was a collusion; that the defendant was *nominal only;* and the *whole expence* paid by the *plaintiff;*" they refused to proceed in the cause; though it had been argued *bonâ fide*, and very ably, by the counsel, who appeared for the defendant. They thought, this contrivance to get a collusive judgment was an attempt of a dangerous example, and therefore to be discouraged.

The pendency of this cause was publicly known: but the reason of its discontinuance was not.

Whilst this question hung in *this* Court, a doubt arose in *Chancery:* and in the cases of *Millar* v. *Donaldson*, and *Osborne* v. *Donaldson*,* the injunction was refused, without any opinion given. Mr. *Murphy* stated Lord *Northington* to have said—"It would be presumption in me: therefore I shall say nothing as to the merits."

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* Trinity Vacation, 1765.

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Under *these* circumstances, I think the injunction was rightly refused: for, whatever his Lordship's own opinion might be, either way, it was a becoming decency, to *doubt*." And no judge ever granted such an injunction to stay waste, upon a legal property, and continued it to the hearing; where the whole fact was admitted upon the motion, and he in his own mind doubted of the plaintiff's right. To *what end* should an injunction be granted? Since the matter cannot appear in a different light at the hearing: and it may be sent to law directly. To stay the defendant from making a profit, which he may probably be intitled to, is unjust.

The Stationers Company v. *Partridge*, for printing Almanacs, is no instance to the contrary.† Lord *Cowper* continued the injunction to the hearing, upon grounds which he might think bound him to consider the plaintiff's legal right to be clear. Their patent for printing Almanacs had been tried at law, and adjudged for them: injunctions had been decreed in ‡ chancery; and any further trial at law refused, upon solemn argument. Had not Lord *Cowper* inclined strongly for the plaintiffs, he never would have injoined a work which is *annual*, and serves only for *one* year.

† 9th Feb. 1709, 11 Ann. B. R. Lucas 105.

‡ Stationers Company *v.* Lee, 15 Nov. 1681. 2 Show. 258. Stationers Company *v.* Wright, 17 Nov. 1681.

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There is no report of what passed on the motion before Lord *Cowper*. But the question founding in *prerogative*, and the former determinations having been *before* the revolution;* Lord *Harcourt* thought it prudent to make a case for the opinion of this Court.

These cases in 1765 add great weight to the precedents where injunctions have been granted *after* the expiration of the term; because they shew that there was no doubt before. And I am persuaded that if, in 1752, the question had been depending in this Court, Lord *Hardwicke* would not have granted the injunction in the case of *Tonson* v. *Walker*; how strong soever his own opinion might have been.

Lord *Hardwicke* laid great stress on the argument made use of to support *crown*-copies; as *presuming* the property of authors. That argument has since prevailed; and it has been since solemnly adjudged, "that there are "copies of which the *King* is *proprietor*."

This Court had no idea that the King, *by prerogative*, had any power to *restrain* printing, which is a trade and manufacture; or to grant an *exclusive* privilege of printing any book whatsoever; *except* as a subject might, by reason of the copy being *his property*.

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The Court agreed with Mr. Justice *Powell*, who said, in the case of *The Stationers Company* v. *Partridge*, "you must shew some *property in the crown*, and bring "it within the case of the *Common-Prayer Book*." Mr. *York* argued it upon this ground.

It is settled, then, "that the *King* is *owner* of the "copies of all books or writings which he had the *sole* "right *originally* to publish; as *Acts of Parliament*, "*Orders of Council*, *Proclamations*, the *Common-Prayer* "*Book*." These and such like are his *own* works, as he represents the state. So likewise, where *by purchase* he had the right *originally* to publish; as the *Latin Grammar*, the *Year-Books*, &c. And in these last cases the property of the *crown* stands exactly on the same footing as *private* copy-right: as to the *Year-Books*, because the crown was at the *expence* of taking the notes; and as to the *Latin Grammar*, because it *paid* for the compiling and publishing it.

The right of the crown to these books is independent of every *prerogative* idea.

The *only doubt*, as to the judgment of the House of Lords, upon *Roll's Abridgment* and *Croke's Reports*, is, "that *neither collection* was made by the *authority*, or at "the *expence* of the crown;" and "that the King had "*no* right of *original* publication; the *Courts of Westminster-Hall* having the *sole* power to authorize and

* 2 Feb. 1710, Lucas 105. No judgment at law as to this case; but the injunction granted by Lord Cowper remained. Lord Parker seemed on the argument, to think "that the calendar was "*not* part of "the Common-"Prayer "Book."

"authenticate the publication of their *own* proceedings."

In the case of *Manley et al.* v. *Owen et al.* 8th of *April*, 1755, a bill was filed by some printers, who had bought from the Lord Mayor the copy of the Sessions paper, to enjoin the defendants from printing it. The Lord Chancellor went fully into it, upon affidavits of the purchase, and authority from the Lord Mayor; and that it had always been usual for the Lord Mayor, (being first in the commission,) to appoint the printer of the trials, and to take a consideration for it. The Lord Chancellor thought the *right to print* gave the plaintiffs the *property;* and granted an injunction: which was acquiesced under.

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If an *author*, by the *common law*, has the *sole right* to make the *first impression and publication*, I cannot distinguish his case from *crown*-copies, or copies analogous to the *Sessions-Paper;* as *votes* of the House of Commons, or *trials* published by authority.

Suppose a man, with or without leave to peruse a manuscript work, transcribes and publishes it; it is not within the act of Queen *Ann*; it is not larceny; it is not trespass; it is not a crime indictable; (the physical property of the author, the original manuscript, remains:) but it is a gross violation of a valuable right.

Suppose the original, or a transcript, was given or lent to a man to read, for his own use; and he publishes it; it would be a violation of the author's *common law-right to the copy.* This never was doubted; and has often been determined.

In the case of *Webb* v. *Rose*, 24th of *May*, 1732, a bill was filed by the son and devisee of Mr. *Webb* the conveyancer, against the clerk, for *intending* to print his father's draughts. Sir *Joseph Jekyll* granted an injunction: and it was acquiesced under.

In the case of *Pope* v. *Curl*, 5th of *June*, 1741, Lord *Hardwicke*, upon motion, granted an injunction as to *Pope*'s Letters to *Swift:* and the point was fully considered. Lord *Hardwicke* thought, "sending a letter "transferred the *paper* upon which it was wrote, and "*every use* of the contents, EXCEPT the *liberty* and *profit* "of PUBLISHING."

When *express consent* is not proved, the *negative is implied* as a tacit condition.

In this case too, the injunction was acquiesced under.

In the case of *the Duke of Queensbury* v. *Shebbeare*, 31st of *July*, 1758, an injunction was granted, for printing the second part of Lord *Clarendon's* history. Lord *Clarendon*, the son, let Mr. *Francis Gwyn* have a *copy*.

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His son and representative insisted "he had a right to "*print and publish*." The Court was of opinion "that "Mr. *Francis Gwyn* might make *every use* of it, *except* "the *profit of multiplying in print*." It was to be presumed, Lord *Clarendon never intended that*, when he gave him a copy. The injunction was acquiesced under: and Dr. *Shebbeare* recovered, before Lord *Mansfield*, a large sum against Mr. *Gwyn*, for representing "that he had a right to print."

[2331] In the case of Mr. *Forrester* v. *Waller*, 13th of *June* 1741, an injunction, for printing the plaintiff's notes gotten surreptitiously, without his consent, was granted.

From hence, it is clear, that *there is a time*, when *without* any positive statute, an author has a *property* in the copy of his own work, in the *legal* sense of the word. *Id quod nostrum est*, sine nostro Facto, *ad Alterum transferri non potest*. Facti *autem Nomine*, *vel* Consensus *vel etiam Delictum intelligitur*.

In *this* case, the author has *asserted* his property in the copy, from the first moment. *Consent* to leave it open, or give it to the public, whether express or implied, is a *fact*: it is not pretended here.

But the defendant's counsel insist, "that by the "author's *sale* of printed books, the copy *necessarily* "becomes open; in like manner as by the inventor's "communicating a trade, manufacture or mechanical "instrument, the art becomes free to all who have learnt, "from such communication, to exercise it."

The resemblance holds *only* in *this*.—As by the communication of an invention in trade, manufacture or machines, men are *taught the art or science*, they have a *right to use it*; so all the *knowledge*, which can be acquired from the *contents* of a Book, is *free for every man's use*: *if* it *teaches* mathematics, physic, husbandry; *if* it *teaches* to write in verse or prose; *if*, by reading an epic poem, a man *learns to make* an epic poem of his own; he is *at liberty*.

But PRINTING is a *trade* or *manufacture*. The types and press are the *mechanical* instruments: the *literary composition* is as the *material*; which always is *property*. The book conveys *knowledge*, *instruction*, or *entertainment*: but *multiplying copies in print* is a quite *distinct* thing from all the book communicates. And there is no incongruity, to *reserve that right*; and yet convey the *free use* of all the book *teaches*.

In 43 *Eliz.* and 21 *Jac.* 1, when monopolies were the subject of much discussion, *copies of literary works* were

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...nted; and *never thought* to be like a *trade, manufac-*...re, or *mechanical* instrument.

That *if* the copy *necessarily becomes open*, as a *gift to* the *public*, by the printing and publication; it must like-wise be so, as to *crown*-copies: the *contrary* of which is now *settled*.

I cannot distinguish between the *King*, and an *author*. I disclaim any idea that the *King* has the least control over the press, but what arises from *his property in his copy*.

I am bound by the opinion of the Court in *Baskett* v. *University of Cambridge*, to say "that the first publica-tion and sale does *not*, by the common law, *necessarily*, and in *spite of the author*, make his copy *open*: though I admit, "an author's consent to leave it open *may* be *implied from circumstances*."

2d Question.

It remains, to consider the second question, upon the ...h of Queen *Ann;* though I have already, in part, an-ticipated the argument.

Mr. *Murphy* strongly contended, from the *amendments* in the committee of the house of Commons, and from the change *of the title*, "that the Parliament meant to *take away*, or to declare there was *no property* at *the com-mon law*."

The sense and meaning of an Act of Parliament must be collected from what it says when *passed* into a law; and *not* from the history of changes it underwent in the house where it took its rise. That history is not known to the other house, or to the sovereign.

Upon the *face* of this act, the very *preamble* strongly implies a declaration of the *property at the common law*. For, it speaks thus—" whereas of late," (that is, since the determination of the licensing act,) " the *liberty* "*taken* by divers persons, of printing, re-printing, and "publishing books without the consent of the authors or "proprietors, to their very great detriment, and too "often to the ruin of them and their families;" for pre-venting, therefore, such practices for the future, &c.

Now, every word, almost, in this preamble is empha-tical, and deserves to be remarked upon.

When the legislature speak of a "*liberty taken*," could they mean a claim founded on any *right?* If they had, they would certainly have so expressed themselves: and then, probably, the preamble would have run thus— "whereas booksellers and divers other persons have of "late *claimed the right* of printing and re-printing, &c."

Now the word "*re-printing*" is also observable. For, *if* the *first* printing or publication was a *gift* of the work to the public, it could be no *injury* to re-print a

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second edition *without* consent. But without consent of *whom?* The "author *or* proprietor," (in the *disjunctive*:) thereby clearly pointing out *what sorts* of persons are intitled to this property; the original author, *or his assignee*, become also the proprietor, either by assignment (in case of a private person,) or by grant from the crown.

I might, without straining the construction, suppose that by the words "too often to the *ruin* of them and "their *families*," the parliament *might allude* to dispositions made by authors, of their works, at their decease, for the maintenance and benefit of their families.

But I choose rather to go to the first words of the *enacting* clause—"*for preventing*, therefore, the *like practices* "for the future."

Did the parliament, by the word "*practices*," mean to describe the exercise of a *legal right?* (which the publication of books would be, if there was no copy-right?) or did they mean to point out acts committed in fraud and *violation of private rights;* which this act was *made to prevent*, and which are properly styled *practices?*

The word "*practices*," is properly applied to the doing of *illegal* acts; but is improperly and incongruously made use of to describe the exercise of *right*, either strictly legal, or even doubtful.

The preamble is infinitely stronger in the original bill, as it was brought into the house, and referred to the committee.

But to go into the history of the changes the bill underwent in the House of Commons—It certainly went to the committee, as a bill to *secure the undoubted property* of copies *for ever*. It is plain, that objections arose in the committee, to the *generality* of the proposition; which ended in securing the property of copies for a *term*; without prejudice to either side of the question upon the *general* proposition as to the *right*.

By the law and usage of parliament, a *new* bill cannot be made in a *committee:* a bill to *secure* the property of authors could not be turned into a bill *to take it away*. And therefore this is not to be supposed, though there had been *no* proviso saving their rights.

What the act gives with a sanction of penalties, is for a *term*; and the words "*and no longer*," add nothing to the sense; any more than they would in a will, if a testa-

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tor gave for years. Yet, probably, these words occasioned the express proviso being afterwards added; from the anxiety of the University-members, who knew the Universities had many copies. The University of *Oxford* had published Lord *Clarendon's* history in three volumes,

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but about five years before; and had the property of the copy.

Great stress has been laid by the counsel for the defendant, upon the *change of the title*, and the word "*vesting*" being used instead of the word "*securing*."

The restraining of the provisions of the bill to a *term*, necessarily occasioned an alteration in the title. "*Securing* for a *term*" would not import that there was a common-law right beyond the term: and "*vesting* for a *term*" does not import that there is *no* common-law right. If it did, the title is but once read; and, if there had been no proviso, could not controul the body of the act, which speaks (in the preamble to the second section) of the property intended to be thereby *secured* to the proprietor. But the proviso saving the ancient common-law right, is as full as could be drawn—"Provided, that nothing in this Act contained shall 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 re-printing any book or copy already printed, or hereafter to be printed." *What* was the right to be saved, either as to books *already* printed, or much more as to books *hereafter* to be printed, but the *common-law* right?

Without this proviso, it might fairly have been argued, that there is nothing in this act which can prejudice the property of authors in the copy: and every adjudication upon the act since it has passed, is an authority that there never was an idea that this act had decided against the property of authors at common law.

I have avoided a large field which exercised the ingenuity of the bar. Metaphysical reasoning is too subtile; and arguments from the supposed modes of acquiring the property of acorns, or a vacant piece of ground in an imaginary state of nature, are too remote. Besides, the comparison does not hold between things which have a physical existence, and incorporeal rights.

It is certainly not agreeable to natural justice, that a *stranger* should reap the *beneficial pecuniary produce* of *another* man's work. *Jure Naturæ æquum est, Neminem cum Alterius Detrimento et injuria fieri locupletiorem.*

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It is wise in any state, to encourage letters, and the painful researches of learned men. The easiest and most equal way of doing it, is, by securing to them the property of their own works. Nobody contributes, who is not willing; and though a good book may be run down, and a bad one cried up, for a time; yet sooner or later,