1769. the reward will be in proportion to the merit of the work.

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He who engages in a laborious work, (such, for instance, as *Johnson's Dictionary*,) which may employ his whole life, will do it with more spirit, if, besides his own glory, he thinks it may be a provision for his family.

I never heard any inconvenience objected to literary property, but that of *enhancing the price* of books. This judgment will *not* be a precedent in favour of a proprietor who is *found* by a jury to have enhanced the price. An owner may find it worth while to give more correct and more beautiful editions; which is an advantage to literature: but his *interest* will prevent the price from being unreasonable. A *small* profit, in a *speedy* and *numerous* sale, is much larger gain, than a *great* profit upon each book in a *slow* sale of a *less* number.

V. 12 G. 2. c. 36.

Upon these reasons, I am of opinion, That there is a *common-law right* of an author to his copy; that it is not taken away by the act of the 8th of Queen *Ann*; and that judgment ought to be for the *plaintiff*.

Mr. Justice ASTON—This case has been so often, so fully, and so ably argued; the citations from history, decrees, ordinances, statutes and precedents in *Westminster-Hall*, have been stated so accurately in point of time and substance; and the whole arguments have been gone into so largely by my brother WILLES; that I shall content myself with alluding to them, as *now* fully and precisely known, without stating any of them over again (at large), which I shall have occasion to take notice of.

The great question in this cause is a *general* one: "how the *common law* stands, independent of the Statute [2336] "of 8 *Ann.* in respect to an author's *sole right* to the "copy of his literary productions."

The material facts to introduce that question, found by the special verdict, are—That the book intituled "The "Seasons," was an *original composition* by *James Thomson*; that it was *printed and published by him for his own use*, as the *proprietor* thereof, at several times, from the beginning of the year 1727, to the end of the year 1729; and was never before printed elsewhere.

That the plaintiff, in 1729, *purchased* this work of the original author and proprietor for a *valuable consideration*; that the plaintiff has from that time printed and sold this work *as his property*, and has *ever had a sufficient number* of the said work *for sale*, at a *reasonable price*.

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That the defendant, *without the plaintiff's licence or consent*, has *published and sold* several copies of this work, which were printed without the plaintiff's consent. So, taking it affirmatively and negatively, it is expressly found "that it was *printed without his consent*, "and it is "not found" that it was ever *made common*, or *given to the* "*public*." Therefore there is no room for *implying* a consent, by any arguments whatsoever.

By this verdict, then, the *original property* in this work, and *publication of it by the author*; his *transferring* it to the plaintiff; the *identity* of the work, and of the copy, (which expressly makes use of the name of the author, and purports to be his work;) and its *continuing* in the author and the plaintiff respectively, uninterrupted, down to the defendant's invasion of that property, is found.

The questions therefore are——(1st,) "Whether an "*author's property* in his own literary composition is "such as will intitle him, at *common law*, to the *sole* "*right of multiplying* the copies of it:" or (2dly,) supposing he *has* a property in the original composition, "whether the *copy-right*, by his *own publication* of the "work, is necessarily GIVEN *away*, and his *consent* to "such gift *implied by operation of law*, manifestly "*against his will, and contrary to the finding of the* "*jury*;" or (3dly,) "TAKEN *away* from him, or re-"strained, by the *Statute of Queen Ann*."

It has been ingeniously, metaphysically and subtilly argued on the part of the defendant, "that there is a "*want of property* in the *thing itself*, wherein the "plaintiff supposes himself to be injured; and conse-"quently, if there is *no property* or *right*, there is *no* "*injury* or *privation of right*."

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The plaintiff's supposed property has been treated as quite *ideal* and *imaginary*; not reducible to the comprehension of man's understanding; not an *object* of law, nor *capable* of protection.

As *all the objections* to this property or right being *allowed or protected by the common law*, rest entirely upon arguments which endeavour to shew "that such allow-"ance or protection is *contrary to right reason and natural* "*principles*," the only grounds of common law *originally* applicable to this question;—I think fit (however abstract they may seem) to consider certain great truths and sound propositions; which we, as rational beings; we, to whom reason is the great law of our nature; are laid under the obligation of being *governed by*; and which are most ably illustrated by the learned author of the religion of nature delineated; that is to say—

"That *moral good and evil* are *coincident* with *right*

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" *and wrong:*" for, that can not be good, which is wrong; nor that evil, which is right*. "That *right* " *reason* is the *great law of nature*; by which, our Acts " are to be adjudged; and according to their conformity " to this, or deflection from it, are to be called *lawful*, " or *unlawful*; good, or bad.†" "That *whatever* will " bear to be *tried* by that reason, is *right*; and that " which is *condemned* by it, is wrong ‡." "That to act " according to *right reason*, and to act according to " *truth*, are in effect the *same* thing §."

* P. 20. § 1.
† P. 23. § 5. P. 126.
‡ P. 23.
§ Ibid.

Then (speaking of truths respecting mankind in general, antecedent to all human law ‖—) "that man being " capable of distinct properties in things which he only, " of all mankind, can call *his*;" he says—

‖ P. 127. § 6.

" The *labour* of *B* cannot be the labour of *C*; because " it is the application of the organs and powers of *B*, *not* " of *C*, to the effecting of something: and therefore the " *labour* is as much *B*'s as the *limbs* and *faculties* made " use of are *his*."

Again the *effect* or *produce* of the labour of *B* is " *not* the *effect* of the labour of *C*: and therefore *this* " *effect or produce* is *B*'s, *not C*'s. It is as much *B*'s, " as the *labour* was his, *not C*'s; because, what the " labour of *B* causes or produces, *B* produces *by his* " labour; or it is the product of his labour. Therefore " it is *his; not C*'s, or any other's. And if *C* should " *pretend* to any *property* in that, which *B only* can truly " call *his*, he would act *contrary to truth* ¶."

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¶ P. 127, 128.

" That to deprive a man of the fruit of his own *cares* " and *sweat*; and to enter upon it," (he is here speaking of the cultivation of *lands*,) "as if it was the effect of " the *intruder's* pains and travel; is a most manifest *vio-* " *lation of truth: it is asserting, in fact, that to be* HIS, " *which cannot be* HIS **."

** Prop. 8. § 6. Pa. 134.

There *is*, then, such a thing as *property*, *founded in nature and truth*; or, there *are* things, which *one* man *only* can, consistently with nature and truth call *his* ††; as proposition 2, 8, 9, demonstrate.

†† Prop. 10. § 6. Pa. 136.

And those things, which *only one man* can truly and properly call *his*, must *remain* his, *till he agrees to part with them* by *compact* or *donation*: because no man can deprive him of them without his approbation; but the *depriver* must use them *as his*, when they are *not his*, in contradiction to truth. For "to have the *property*" of any thing, and "to have the *sole right* of using and " disposing of it," are the *same* thing: they are equipollent expressions ‡‡.

‡‡ Pa. 136.

Property, *without the use*, is an *empty sound*. He who *uses or disposes* of any thing, does by *that* declare it to be *his*; because this is *all* that he whose it *really* is, can

do. *Borrowing* and *Hiring* afford no objection to this: for he uses what is *his own for the time allowed*; and his doing so is only *in one of those ways, in which the true proprietary* disposes of it*.

From this *great theory of property*: it is to be collected—

That a man may have property in his *body*, *life*, *fame*, *labours*, and the like; and, in short, in any thing that can be called *his* †. That it is incompatible with the *peace and happiness of mankind*, to *violate* or *disturb*, by *force* or *fraud*, his possession, use or disposal of those rights; as well as it is against the principles of *reason*, *justice* and *truth*. That it is what every man would think unreasonable in his *own* case. That a *partial disposition*, by the true proprietor, of a thing that is his, is not to be carried *beyond the intent and measure* of the *proprietor's assent and approbation* in that behalf; whether it be the case of *borrowing*, *hiring*, or a compact of *any other* sort: of which I shall take further notice, when I speak of *publication* ‡.

I shall in the next place observe, that the written definitions of property, which have been taken notice of at the bar, are, in my opinion, very inadequate to the objects of property at this day. They are adapted, by the writers, to things in a *primitive* (not to say *imaginary*) state; when all things were *in common*; when that common right was to be *devested* by some act to render the thing privately and *exclusively* a man's own, which, before that act so done to separate and distinguish it, was as much *another's*.

These definitions too, when examined, will be found *principally* to apply to the *necessaries of life*, and the *grosser objects of dominion*, which the immediate natural occasions of men called for: and for that reason, the property, so acquired by occupancy, was required to be an object *useful to men*, and capable of being *fastened on* §. Enough was to be left for others. *As much* as any one could use *to an advantage of life before it spoiled*, so much he could fix a property in: whatever was *beyond this*, was more than his share, and belonged to others ‖. 'Tis plain too, that the definition is so understood by *Grotius* ¶, when he says "*Jus in res inferioris naturæ Deus* "*humano generi indivisim contulit, hinc factum, quod* "*quisque hominum* ad suos usus *arripere posset, quod* "*vellet; et* quæ consumi poterant, *consumere.*"

'Tis evident, surely, that these definitions give a sort of property little superior to the legal idea of a beast-common,—the bit of mouth *snatched*, or taken for *necessary consumption to support life.*

* Pa. 137.

† Pa. 137. Prop. 15.

‡ Post. 2342.

§ Pufendorf, Lib. 4. c. 5. § 1.

‖ Locke, Vol. 2. Book 2. c. 25. § 27, 31.

¶ Lib. 2. § 2.

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Thus great men, ruminating back to the *origin* of things, lose sight of the *present* state of the world; and *end* their inquiries at that point where they should *begin* our improvements.

But *distinct properties*, says *Pufendorf**, were not *settled* at the same time, nor by one single act, but *by successive degrees;* nor in all *places* alike: but property was *gradually* introduced, according as either the condition of things, the number and genius of men required; or as it appeared requisite to the common peace.

* Lib. 4. c. 4. pa. 367. § 6. Pa. 377. § 14.

SINCE those supposed times, therefore, of universal communion, the *objects* of property have been much *enlarged*, by discovery, invention, and arts.

The mode of *obtaining* property by occupancy has been *abridged;* and the precept "of abstaining from "what is another's" enforced by laws.

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THE RULES attending property must *keep pace* with its increase and improvement, and must be *adapted to every case.*

A DISTINGUISHABLE *existence* in the thing claimed as property; an ACTUAL VALUE in that thing *to the true owner*; are its *essentials;* and not less evident in the present case, than in the immediate object of those definitions.

And there is a material *difference* in favour of *this* sort of property, from that gained by *occupancy;* which before was common, and *not* yours; but was to be rendered so by some act of your own. For, THIS is *originally* the *author's:* and, therefore, *unless* clearly rendered common by his own act and full consent, it ought *still to remain his.*

The UTILITY of the thing to man, required by the definition † to make it an object of property, has been long *exploded*; as appears from *Barbeyrac*'s note upon this very passage; where it is held an *unnecessary and superfluous condition.*

† Pufendorf, Lib. 4. c. 5. Pa. 378. Not. 1.

Things of *fancy*, *pleasure* or *convenience* are as much *objects of property*; and so considered by the *common law; monkeys*, *parrots*, or the like; in short any thing *merchandizable* and *valuable*. 12 *H.* 8. 3. *a. b. &c. Bro. Abr. Tit.* "property," *pl.* 44. *Comyns Digest*, 1 *Vol. pa.* 602.

The best rule, both of reason and justice, seems to be, "to assign to every thing *capable* of ownership, *a legal* "*and determinate owner.*"

A capacity to fasten on, not the true only definition: but, a capacity to be distinguished.

For, the *capacity to fasten on*, as a thing of a *corporeal* nature, *being a requisite in every object of property*, plainly partakes of the *narrow and confined sense* in which

property has been defined by authors in the *original* state of things. *A capacity* TO BE DISTINGUISHED answers every end of *reason* and *certainty*; which is the great favourite of the law, and is all that wisdom requires to secure their possessions and profits to men, and to preserve the peace.

It is settled and admitted *, and is not now controverted but that literary compositions in their *original state*, " and the *incorporeal right of the publication* of them " are the *private and exclusive* PROPERTY of the author, " and that they *may* ever be retained so; and that if " they are ravished from him *before* publication, *trover* " or *trespass* lies."

* Pope v. Curl. Webb v. Rose. L'd. Clarendon's Works. Forrester v. Waller. D. of Queensbury v. Shebbeare.

I should be glad to know, then, in such a case where the property is admitted, "*how* the *damages* ought to be estimated " by a jury?"——Should they *confine* their consideration to the value of the *ink and paper?*—Certainly *not:* it would be most reasonable, to consider the known character and ability of the author, and the value which his work (so taken from him) would produce by the publication and sale. And yet, *what* could that *value* be, if it was true, that the instant an author published his works, they were to be considered by the law as *given to the public;* and that his private property in them *no longer existed?*

The present claim is founded upon the *original* right to this work, as being the *mental labour* of the author; and that the *effect and produce* of the labour is *his*. It is a *personal, incorporeal* property, *saleable* and *profitable*; it has *indicia certa:* for, though the sentiments and doctrine may be called *ideal*, yet when the same are communicated to the sight and understanding of every man, by the medium of *printing*, the work becomes a DISTINGUISHABLE subject of property, and *not totally* destitute of *corporeal* qualities.

Now, *without* publication, 'tis useless to the owner; because without *profit:* and PROPERTY, *without the power of use and disposal*, is an empty sound.* In *that* state, 'tis lost to the society, in point of improvement; as well as to the author, in point of interest.

† V. ante, pa. 2338.

PUBLICATION therefore is the necessary act, and only means, to render this *confessed property useful* to *mankind*, and *profitable* to the *owner:* in *this*, they are *jointly* concerned.

Now, to construe this only and necessary act to make the work useful and profitable, to be "*destructive*, at " once, of the author's *confessed original property*, *against* " *his express will*," seems to be quite harsh and unreasonable: nor is it at all warranted by the arguments de-

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rived from those *authors* * who advance "that, by the "law of nature, *property ends, when corporeal possession* "*ceases*."

For *Barbeyrac*, in his notes on *Pufendorf*,† clearly shews that the right acquired from taking possession does *not* cease when there is no possession; that *perpetual* possession is *impossible;* that the above hypothesis would reduce property to *nothing;* that *the consent of the proprietor* to that renunciation ought to *appear:* for, as *possession* is nothing else but an *indisputable mark of the will* to retain what a man has seized; so, to authorize us to look upon a thing *as abandoned by him to whom it belonged*, because he is *not* in possession, we ought to have *some other reasons* to believe he has *renounced* his personal right to it.

Wherefore, says he, though we may presume this, in respect to those things which remain such as nature has produced them; yet, as for *other* things which are the *fruits of human industry*, and which are done with great *labour and contrivance* usually,—it *cannot be doubted but every one would preserve* his right to them, *till* he makes an *open renunciation.*

Now there is *no open renunciation* of the property in the present case; but a *constructive* one only, barely from *publication.* "RENUNCIATION, or not," is a *fact.* It is *not found;* and ought not to be *presumed.* But the contrary is found: 'tis found here "that it is *against his* "*express will.*"

But it was said at the bar, "if a man *buys* a book, it "is his *own.*"

What! is there no difference betwixt selling the PROPERTY *in the work*, and only *one* of the *copies*? To say, "*selling* the book conveys *all* the right," begs the question. For, if the *law* protect the book, the sale does *not* convey away the right, *from the nature of the thing*, any more than the sale conveys it where the *statute* protects the book.

The proprietor's *consent* is not to be carried *beyond* his manifest intent. Would not such a construction extend the *partial* disposition of the true owner *beyond his plain intent and meaning*? Which, from the principles I have before laid down, is no more to be done in *this* compact, than in the case of *borrowing* or *hiring.*‡

Can it be conceived, that in purchasing a literary composition at a shop, the purchaser ever thought he bought the right to be the *printer and seller* of that specific work? The *improvement*, *knowledge*, or *amusement*, which he can derive from the performance, is all his

* Bynkershoek, &c.

† Lib. 4. c. 6. Not. 1.

‡ V. ante, pa. 2338.

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but the *right* to the work, the *copy-right* remains in *him* whose industry *composed* it.

The buyer might *as truly* claim the *merit of the composition*, by his purchase, (in my opinion,) as the right of *multiplying the copies* and *reaping the profits*.

The *invasion* of this sort of property is as much against *every* man's sense of it, as it is against *natural reason* and *moral rectitude*. It is against the conviction of *every* man's own breast, who attempts it. He *knows* it, not to be his own; he *knows*, he injures another: and he does not do it for the sake of the public, but *malâ fide* et *animo lucrandi*.

The *artificial reasoning*, drawn from refined metaphysical speculation, is all on *that* side of the question. It is arguing by *analogy*, only, to things of a *different nature*—"that it is *not tangible*:" and the like.

The law of *nature and truth*, and the light of *reason*, and the *common sense* of mankind, is on the *other* side: for, *Jus Naturæ propriè est dictamen rectæ rationis, quo scimus quid turpe, quod honestum, quid faciendum, quid fugiendum sit.*

If the above principles and reasoning are just, why should the *common law* be deemed so narrow and illiberal, as not to *recognize* and receive under its protection a property so circumstanced as the present?

THE COMMON LAW, now so called, is *founded* on the law of nature and reason. Its *grounds*, *maxims* and *principles* are *derived* from *many different fountains*, (says Judge DODDERIDGE,* in his *English Lawyer*;) from natural and moral philosophy, from the civil and canon law, from logic, from the use, custom and conversation among men, collected out of the general disposition, nature and condition of human kind.

He states the several maxims and grounds, under the particular heads, from whence they are derived: and he places under the head of *moral philosophy* a maxim of the common law, as borrowed from thence—*quod tibi fieri non vis, alteri ne feceris.*

"That what is now called the *common law of England* "was *made up* of a variety of *different* laws, enacted by "the several *Saxon* Kings reigning over distinct parts "of the kingdom; which several laws, affecting then "only *parts* of the *English* nation, were *reduced into one* "*body* and *extended* equally to the *whole* nation by King "*Alfred*;" appears from *Fortescue's* preface;† and that it is therefore properly called the COMMON *law of England*; because it was done "Ut in jus *commune totius* "*gentis* transiret."

But it had an *ancienter original* than *Edward* the Con-

* P. 154 to 161. Doctor and Student passim avows the same. p. 6, 14, 51. Pa. 161.

† P. 6, 8.

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fessor; and was at first called the *folcright* or *people's* right; (for it is plain it could not be called the *common law* in *Edward* the confessor's time, for then they spoke *Saxon:* nor in *William* the conqueror's time, for then they spoke *French:*) but it received this name, when the language came to be altered. And Lord Coke (1 Inst. 142.) says "the common law is sometimes called "*right*, "*common right, common justice.*" Which observations I make upon its *general name*, to free it from any imputation of there being any thing restrictive of its efficacy in the name itself; or that it is not equally comprehensive of, and co-extensive with these principles and grounds from which it is derived.

The COMMON *law*, so founded and named, is *universally comprehensive—Jubens honesta; prohibens contraria;** its precepts are, in respect to mankind,—*honestè vivere, alterum non lædere;* "*Suum cuique tribuere.*"†

* Bracton, Lib. 1. c. 3.

† Justinian, Inst. 1. 1, 3.

In respect to the several *species* of property; though the *rules* touching them must ever have been the same, yet the *objects* of it were not all at once known to the common law, or to the world: and many have been *disputed*, as not being objects of property at common law, which yet are *now established* to be such; as, gunpowder, *&c. &c. &c.*

In the year-book of 12 *H.* 8. *f.* 3. *a. b.* great dispute was made, (*upon the footing of property too,*) "whether "an action would lie for taking away a *blood-hound.*" The arguments used against it were such as have, amongst others, been used upon the present occasion; *viz.* That it was of *no value* nor *profit;* but for *pleasure.* That *felony* could not be committed of it; consequently, *not trespass.* That when the dog was out of the party's *possession*, he *ceased* to have any property in him. That a dog was *not titheable;* would *not pass* by a grant of *omnia bona.* That *replevin* or *detinue* would not lie of a dog.

N. B. See some of these arguments, (which I have put all together, for convenience,) in the *subsequent* cases in *Cro. Eliz.* and *Owen.*

But *upon what principles* did the Court determine "that the action lay?" Upon *these*—"that where any "*wrong or damage is done* to a man, the *law gives him a* "*remedy.* That if it was only a thing for pleasure, yet "it was *sufficient;* as a *popinjay*,‡ which sings and re- "freshes my spirits. That it was *not lawful*, to take him "*against my will—hoc facias alteri, quod tibi vis fieri*— "and that though it be not felony, yet *trespass well lies*

‡ Property preserved even in a thing *so trifling.*

" for, if a man cut my trees, and take them; 'tis *tres-*
" *pass*, though not felony."

Brooke, in his Abr. of this case, (Tit. "property," *pl.* 41.) says, "the *reason* why this property was not liable " to the *other* remedies, or charges, or modes of convey- " ance there mentioned, is, because it was a *property not* " *properly known*: and yet *trespass* would lie."

From this case, it is clear to me, that though the above was *such a species* of property then not properly known to, or at least *not established by precedent* at the common law; yet that the *novelty* of the question did *not* bar it of the *common-law remedy and protection*. That it was sufficient, *that it was a* DISTINGUISHABLE *property*; that it had a DETERMINATE OWNER. That its being a matter of *pleasure* or *profit*, to the owner, made *no difference*. That it was *not necessary*, that *every* species of property should be liable to all the *same* circumstances, incidents or remedies. That the person invading it, had *nothing to do with it*. And that he erred against the rules of *morality and justice*, in *disturbing another's possession or pleasure*.

One would have thought, after this case, that question would have rested. But in 31 *Eliz. Owen* 93. *Cro. Eliz.* 125. *Ireland* v. *Higgins*, it came on again, in an action for a *greyhound;* wherein, upon a demurrer to the declaration, it was argued for the defendant, "that " there was no consideration to maintain the assumpsit: " *for that the plaintiff was out of possession of the dog;* " and being *feræ naturæ, he had lost his interest in it, and* " *had no remedy for it.*" But the action was held maintainable; though the like arguments were used as in the year-book.

The COMMON *law* being *founded* on such principles as have been laid down, and which are avowed by the above authorities; the remedy by *action upon the case* is suited to *every* wrong and grievance that the subject may suffer from a *special* invasion of his right: for this sort of action *varies*, says Lord *Coke*,* according to the *variety of the case*.

* 8 Co. 48. 2.

That the *invasion* of the *plaintiff's property* in the present case is the *proper* subject of *such an action;* that it may be *maintained at common law*, without contradicting any maxim of its own, any statute of the realm, or any principle of natural justice; and that it may well undergo a constitutional mode of *trial by jury*, so as to answer every end of certainty and justice; seems to me without any solid objection: for, I confess, I do *not know*, nor can I comprehend *any property more emphatically a man's own, nay, more incapable of being mistaken, than his lite-*

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[*7 Durn.624.]

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*rary works.** And *if* an author has really and openly abandoned them, *that* might be *found;* or the plaintiff on *such proof*, would *fail* in his action. And there may be many *circumstances* properly *inquirable* in an *action of this sort;* viz. "if the composition be *given* to the public, "*made common*, abandoned;" "if published *without* a "*name;*" "if *not claimed;*" "if *allowed* to be pirated "*without objection*"—all this is *evidence* to the jury of the *gift to the public;* and not at all above the comprehension of a common juryman; nor so ideal, but that full and satisfactory evidence may be given of the substantial work or composition, and of its original or derivate ownership. So, an author being *unknown*, or *long since dead; no assignment* of the property; *none*, or *unknown representatives;* the edition *long deserted*, &c. are all *circumstances* that may be brought into *proof*.

But all the difficulty lies on the plaintiff: he is to *make out his right*, and the *injury done to his property*.

In the present case, there is *no* chasm or interval of time when the right to this work can be said to be *renounced*, from the original publication to the present time; *unless the bare act of publication* itself is to be called so. And if *that alone* was to prevail against a *private* author, why should not *prerogative* property, founded on the *same* ground of argument as the *general* property of authors in their works, be *liable* to the *same* free and universal communion? For I know no difference, in *that* respect, between the rights of the *crown* and the property of the *subject*.

"That there is any *hardship* put upon the defendant "in this case, for that he may err innocently," I see no just grounds for saying; because the defendant *knows* the work is *not his*, and that he had *no original right* to publish it. At his *peril*, therefore, he undertakes to give the edition; he does it with his *eyes open:* and "whether it was property renounced, or "not," it was *his* business to *inquire*.

Upon the whole, I think an *author's property in his works*, and the *copy-right*, is *fully and sufficiently* ESTABLISHED; because it is admitted to be *property in his own hands*, and that he has the ORIGINAL *right of first publishing* them.

Further, that this idea of an author's property has been so long entertained, that the COPY of a BOOK seems to have been not familiarly only, but *legally* used as a *technical* expression of the *author's* SOLE *right of printing and publishing* that work: and that *these expressions*, in a variety of instruments, are *not* to be considered as the *creators or origin* of that right or property; but, as

speaking the language of a *known and acknowledged* right; and, as far as they are active, *operating in its protection.*

This appears from the citations used at the bar, from history, acts of state, proclamations, and decrees in the star-chamber, particularly in 1586 and 1637, and down to the year 1640; also from the clauses in ordinances and statutes antecedent to the statute of Queen *Ann;* and from the expressions used in that statute too, which speaks with precision of this sort of property as a *known thing;* and which, with as much accuracy, supposes the *licence and consent* of the author or proprietor *necessary* to the printing of their works.

This opinion too is strongly supported by the *concurrent sense of judges,* to be collected from the expressions they have made use of in cases at common law, at different periods of time. As in *Skinner,* "that the Statute "of *Car.* 2. did *not give the right,* but the *action.*" In 4 *Mod.* 257—where *Pemberton* speaks of a grant to print, "*How far* it should stand good against those *who claim-*"*ed a property paramount* the king's grant:" and there too, *the making title to a copy* is mentioned.

The Court too, in speaking of additions to the Almanac by prognostications, says, "they 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."

In *Pender* v. *Bradyl* also, in an action for printing the Pilgrim's Progress, the plaintiff is averred to be "*the* "TRUE *proprietor.*"

In *The Stationers Company* v. *Partridge,* it seems that the CROWN's *sole or original right* to publish was FOUNDED *in property.* In 3 *Mod.* 75—that the property vests in the *king,* where *no individual person* can *claim a property in the thing.* This argument shews that *Pemberton* thought he could rest the case and the *right of the crown* upon *property only:* for, here, to *get at such ground,* the argument is *far fetched and misapplied;* because in a case of this kind, *if there is no private property,* it would *not* belong to the *king,* but be *common,* like animals *feræ naturæ,* or air, water, or the like.

And the case of *Baskett* and *The University of Cambridge* is *a solemn well considered determination* upon the ground of the original right of publication belonging to the *king.*

So that though there is *no precise decision in the point,* yet this *long uniform idea* of such an object of property at law deserves the *greatest attention and weight;* where

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every principle of *reason* and *justice* concurs with deciding in *favour of the property*.

It was *compared* to throwing *land* into a *highway*. The *intent* there *precedes* the right: as it is *given*, so it may be *used*. But the *intent circumscribes* the right. *Feed* it with *cattle*; and an action lies: then you *exceed* the purpose of the gift, and become a *wrong doer*.

But besides this, the uniform conduct of the Court of CHANCERY since the Statute, in entertaining bills of injunction *without regard* to an *entry* being made of the work pursuant to the Statute, or to the suit's being brought within the *limitation* of the three months, or within the *term* given for its protection, shews, that *that* Court must necessarily have proceeded under the like idea of a right *antecedent to*, and *not newly created* by the Statute: for, the act could not mean to give a right of property, and an action at law or a bill in equity incident thereto, where the *condition* of entry is *not* complied with. The declaration, "that the author shall have the sole right of "printing the book," must be on the *terms and conditions* in the Act. The consequences of an action and injunction are *worse* than the *penalties*: and one reason given by the act, for *requiring the entry*, is, "that persons may not offend through "ignorance." That circumstance of *notoriety* was required by all the licensing acts and ordinances.

Second question.

As to the second question—"whether the *copy-right* is "*given away* by the author's *publication*—"

I have already spoken upon this head collectively with the first; and shall only add, that I am of opinion that the publication of a composition does *not* give away the property in the work; but the right of the copy *still remains* in the author; and that no more passes to the public, from the free will and consent of the author, than an unlimited use of every advantage that the purchaser can reap from the *doctrine* and *sentiments* which the work contains. He may *improve* upon it, *imitate* it, *translate* it; *oppose* its sentiments: but he buys *no right to publish the identical work*.

That the *comparison* made betwixt a *literary* work and a *mechanical* production; and that the right to *publish* the *one*, is *as* free and fair, as to *imitate* the *other*; carries no conviction of the truth of that position, to *my* judgment. They appear to me *very different in their nature*. And the difference consists in *this*, that the property of the maker of a *mechanical* engine is confined to that *individual thing* which he has made; that the machine made in imitation or resemblance of it, is a

different work in *substance*, *materials*, *labour* and *expence*, in which the maker of the original machine can not claim any property; for it is *not his*, but *only a resemblance* of his: whereas the *reprinted book* is the *very same substance*; because its *doctrine and sentiments* are its *essential* and *substantial part*; and the *printing* of it is a *mere mechanical act*, and the method only of *publishing and promulging* the contents of the book.

The *composition* therefore is the *substance*: the *paper*, *ink*, *type*, only the *incidents or vehicle*.

The VALUE proves it. And though the defendant may say "those *materials* are mine," yet that can not give him a right to the *substance*, and to the *multiplying of the copies* of it; which, (on whose paper or parchment soever it is impressed,) must *ever be invariably the same*. Nay, his *mixing*, if I may so call it, his such like materials with the author's property, *does not* (as in common cases) render the author's property *less distinguishable* than it was *before*: for, the *identical work or composition* will *still appear*, beyond a possibility of mistake.

The imitated *machine*, therefore, is a *new* and a *different* work: the *literary* composition, printed on another man's paper, is still the *same*.

THIS is so evident to my *own* comprehension, that the utmost labour I can use in *expressions*, can not strengthen it in my own idea.

Supposing then that the author *has* such property, and that he *has not* given away or abandoned it by *publication*—

Question on 8 Ann.

The next question is,—"whether the *Statute of Queen* "*Ann* has *taken it away*; or so *restrained* it, that an "author's right to the copy *expires* with the term limited "by that Statute for its protection."

Whoever contends "that this kind of property is not "known to the *common* law." must also contend "that "*this Statute creates a new kind of property*, which it "*vests for a time only*, in the authors and their assigns, "under the *conditions and limitations* specified in the "Act."

It must be contended too, to support the arguments that have been used, "that the legislature had in view "and intended to *abolish* or *suspend for a time* (if the "terms required by the Act *were* complied with) *that* "*right of universal communion*, which the *publication* "of any work *gave indiscriminately* to all mankind; or "(in case the terms of the Act were *not* complied with,) "that such right might be *still freely exercised*, without "offence."

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THE IDEA of such a *common right* does *not* appear to have *existed* at the time of the Statute, or to be *warranted* by any authority.

The preamble of the Act *reproves* the LIBERTY *of late* frequently *taken*, of printing books and writings *without* the consent of the author or proprietor; and treats it *as an* ABUSE of a right, *not* as an act done in *assertion* of any common-law right which the Statute intended to put only a *temporary* restraint to: for, the Act declares it to be done "to the *detriment* of the *proprietors*, and to the "*ruin* of their families."

THIS is a *very different language* from the arguments now used, "that there is *no injury*, *no privation of right*, "for *want of property* in the thing itself." And yet the property *now*, and *then*, was exactly the *same*.

The *particular wording* of the *enacting clause* is very material; as it precisely adopts the identical expressions anciently used in the decrees, ordinances and statutes referred to, alike speaking of the right of authors, as a *known*, *subsisting*, *transferrable* property.

I am not satisfied with saying "that such right may be "*implied* from the words"——they are *so express*, that "the legislature *can not* be otherwise understood, than as speaking of a *known* property. "The *copy* of the "book," "the *title* to the copy," is a *technical recognition* of the right, in the words of the Act.

This Act was brought in at the solicitation of *authors*, *booksellers* and *printers*, but principally of the two latter; *not* from any doubt or distrust of a just and legal property in the works or copy-right, (as appears by the petition itself, pa. 240. vol. 16. of the Journals of the House of Commons;) but upon the *common-law remedy being inadequate*, and the *proofs difficult*, to ascertain the damage *really* suffered by the injurious multiplication of the copies of those books which they had bought and published. And this appears from the case they presented to the members at the time.

All the *sanction* they could obtain, was a protection of their right, by inflicting *penalties* on the wrong-doer.

The Statute extends to no case where the *title to the copy* is not *entered* in the register of the Stationers Company: which entry is necessary to ascertain the commencement of the term, during which this protection by *penalties* is granted. If that requisite is neglected, the benefit of the *Statute* does not attach.

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The general case, of authors who do *not* comply with this, is *still open*; and of those too that *do*, who do not sue *within* three months.

For, if a Statute gives a remedy in the *affirmative*,

(without a negative, expressed or implied,) for a matter which was *actionable before by common law*; the party may *sue at common law*, and *wave* his remedy by Statute, if he pleases. 2 *Inst.* 200. 2 *Roll.* 49.

A *negative can not be implied* here. The question wholly depends upon the point, "whether it be a right "*newly created*, or not?" *If* it *was*, then it would receive its birth, duration and remedy *from* the Statute; and *no other* remedy could be pursued.

But *if* there was an *antecedent common-law right*, the *common-law remedy* will *remain*; and the *Statute-remedy* can only be made use of, by observing the particular *conditions* which the Act prescribes.

The *preamble* of the Statute, as it was *originally brought in* and went to the committee, was the *fullest assertion* of the legal property and undoubted right of authors at *common law*, that could be: and there was *no saving clause* at all, in the Act.

When that florid introduction was *abridged*, 'tis most probable, as the fact appears, that a *saving-clause* was guardedly *inserted*.

The *universities* had considerable *copy-rights*. Lord *Clarendon's History* was but *lately* published by the University of *Oxford*: I believe the 3d volume did not come out till 1707. They came out at different times.

The *proviso*, however, is *general*—"That nothing in "this act contained, shall extend either to *prejudice* or "*confirm any right* that the said Universities or any of "them, or *any person or persons* have, or claim to have, "to the printing or reprinting *any* book or *copy* already "printed, or hereafter to be printed."

If there was not a common-law right *previous* to this Statute, *what* is this clause to *save*? not a right of *publishing*, to throw it into *universal communion* as soon as it comes out. *That* was no more worth while, than the *purchasing a copy* seems to me to be, if it is left *unprotected* by the law, and *open* to every piratical practice. [2359

It has been said, "that this was inserted, that the "rights which the Universities or others had, *under* "*letters patent*, might not be affected."

There can be no ground for *this*: for, the Act does not at all meddle with *letters patent*, or enact a title that could either *prejudice* or *confirm* them.

This Proviso seems to be the effect of *extraordinary caution*, that the rights of authors, at *common law*, might not be affected: for, if it had *not* been inserted, I apprehended clearly, they could *not* have been taken away by *construction*; but the *right and the remedy* would stil *remain*, unaffected by the Statute.

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The repeated practice of the *Court of* CHANCERY, in entertaining a jurisdiction by bills of *injunction*, and for *relief*, (as appears by many cases cited,) evidences the constant sense of the great lawyers in *that* court to be, "that the statute did *not* stand in the way of *a general* "*remedy upon the original right.*"

To this purpose, the cases mentioned in Chancery *after the expiration* of the time given by the Statute of 8 Queen *Ann*, are *extremely material*: and the authority of Lord *Hardwicke*, Lord *Talbot*, Sir *Joseph Jekyll*, or any other great lawyer, sitting in Chancery, and deciding on a *legal* right, for the sake of a more effectual relief given there, is *as good* an authority, as if they gave an opinion on that legal right, sitting in *this* Court.

They have always been so considered; and always so cited.

In the very last opinion but one, given in the House of Lords by all the judges, (upon a limitation over upon dying without issue, *Reily* v. *Fowler*, in *Dom. Proc.* in *January* 1768,) the cases cited were almost all of them determinations in the Court of Chancery.

It is most certain, that an *injunction* in nature of an *injunction to stay waste*, never is *continued to the hearing*, where the Court is not strongly of opinion with the plaintiff: and if the case can not be varied at the hearing, the *same* grounds upon which it is *continued*, must be sufficient for a *perpetual* injunction.

And therefore where the defendant can not vary the case, he submits, and the cause stops; unless the plaintiff thinks fit to go on for some further relief, besides the in-
[2353] junction: or, if the defendant is dissatisfied with the order continuing the injunction, he may appeal to the House of Lords. And many questions are finally determined in that short way.

Upon the case of *Eyre* v. *Walker*, Sir *Joseph Jekyll* granted an injunction to restrain the defendant from printing the Whole Duty of Man; though the first assignment that was produced appeared to have been made in *December* 1657. It was said at the bar, "that "it must be the *New* Whole Duty of Man; and that it "must be *within* the time of the Act." I have compared the title-pages of those two books. They are very different: and the copy of the order of the 9th of *June* 1735 shews it to be the *old* one. Dr. *Hammond*'s letter to the bookseller shews it to be that in 1657.

The answer given to the case of *Motte* v. *Falkner*, 28th of *November* 1735, before Lord *Talbot*, for printing *Pope*'s and *Swift*'s Miscellanies, was, "that this book "of Miscellanies was printed in the year 1727." But it

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" was argued by the counsel in chancery, upon the " foundation that many of the *parts* of that miscellany " were printed so long before as to take it entirely out of the Act; as " contests and dissentions at *Athens* and " and *Rome* * ;" " Predictions for 1708 †; " *Partridge*'s " death, 1708 ‡;" " Sentiments of a Church of *England* " Man §." Lord *Talbot* continued the injunction as to the *whole*.

In *Tonson et al.* v. *Walker alias Stanton*, 5th *May* 1739, to restrain the defendants from printing *Milton*'s Paradise Lost, the injunction was granted by Lord *Hardwicke*, on Lord *Mansfield*'s motion, upon reading the assignment in 1667 ‖; and acquiesced under.

In *Tonson* v. *Walker and Merchant*, 30th of *April* 1752; the bill had been filed on 26th of *November* 1751, suggesting 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 were the *last*, in 1749 (these *last* notes were *within* the Act.) Upon a very solemn hearing, Lord *Hardwicke* granted the injunction: and it was penned in the disjunctive,— to restrain the defendants from printing the life of *Milton*, " or *Milton*'s Paradise Lost, *or* Dr. *Newton's* notes."

These cases prove " that the Court of Chancery granted injunctions to protect the right, on supposition of its being a *legal* one."

And no injunction was ever *refused in Chancery*, upon the *common-law* right, till a doubt was *supposed* to have arisen in *this* Court, from the case of *Tonson* v. *Collins* (which was then depending) having been twice argued, and then adjourned to be argued before all the judges: the reason of which has often been declared to be, *not* from any *doubts or difference of opinion*: but merely from a supposition of *collusion*; and which collusion was afterwards the cause why it was neither argued nor determined.

UPON THE WHOLE, I conclude, that upon every principle of *reason, natural justice, morality* and *common law*, upon the evidence of the *long received opinion* of this property, appearing in ancient proceedings, and in law-cases; upon the clear sense of the *legislature*; and the opinions of the *greatest lawyers* of their time, in the Court of *Chancery*, since that Statute; the RIGHT *of an author to the* COPY *of his works* appears to be *well founded*, and that the *plaintiff* therefore is, upon this special verdict, *intitled to his judgment*. And I hope the learned and industrious will be permitted from henceforth, not only to reap the *fame*, but the PROFITS of their ingeni-

* 1701.
† 1708.
‡ 1707.
§ 1708.

‖ Assignment by the author, 27th April 1667, to Samuel Symonds, and several mesne assignments. [See 1 East. 361.]

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ous labours, without interruption; to the honour and advantage of themselves and their families.

Mr. Justice YATES was of a different opinion from the two judges who had spoken before him.

He said he should ever be extremely diffident of any judgment of his own, when he had the misfortune to dissent from either of his brethren: and, and after the very learned and ingenious arguments which each of them had now delivered, he could not but feel, with particular sensibility, the unequal task he had now before him.

He regretted too, that in so liberal a question so important to the literary world, and a question of so much expectation, there should be any disagreement upon this bench. But he observed, that if he should happen to stand quite *alone* in the opinion he had formed, his sentiments would no way affect the *authority* of the decision.

Whatever his opinion, however, might be; sitting in his judicial capacity; he thought himself bound both in *this* and in *every* cause, to *declare* it *frankly and firmly*.

After this very decent preface, he spoke near three hours in support of his opinion. It cannot therefore be expected that I should give the very *words* which he spoke: but I shall endeavour to convey the *substance* of what he said; though not without some injury to the composition and language.

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It was to the following effect—

The *general* question for the determination of the Court, is, "whether, *after a voluntary and general publication* of "an author's works by *himself*, or by his *authority*, the "*author* has a SOLE *and* PERPETUAL *property* in that "work; so as to give him a right to *confine* every subse-"quent publication to *himself* and his *assigns* for *ever*."

Before I enter into the particular discussion of this question, I will lay down one general position; which, I apprehend, cannot be on either side disputed:—"That "in all *private* compositions, (I mean the composition of "*private authors*, as contra-distinguished from *public* "*prerogative* copies), the *right of publication* must for "ever *depend* on the claimant's *property* in the thing to "be published." *Whilst* the subject of publication *continues his own exclusive property*, he will *so long* have the *sole and perpetual right to publish* it; but whenever that *property ceases*, or by any act or event becomes *common*, the *right of publication* will be *equally common*.

In delivering my sentiments upon this great question, I will pursue the same method in which it was argued at the bar, both in this, and in a former cause between *Tonson* and *Collins*: for, I desire (once for all) to be understood as delivering my opinion, *upon the arguments of the*

Counsel, and *upon my own consideration* of the matter; and *not by way of reply* to any thing that has fallen from either of my brothers.

By the Counsel, it was argued on these two points—1st, On the *general principles of property;* and 2dly, On the peculiar, or at least the *supposed usage and law of this kingdom*.

First then, it was contended, "that the claim of au-"thors to a *perpetual copy-right* in their works, is main-"tainable upon the *general* principles of *property*." And this, I apprehend, was a necessary ground for the plaintiff to maintain; for, however peculiar the laws of this and every other country may be, with respect to *territorial* property, I will take upon me to say, that the law of *England*, with respect to all *personal* property, had its grand foundation in *natural* law.

In support therefore of this first proposition, several plausible arguments were ingeniously urged by the plaintiff's Counsel. In the first place, they observed, property was defined to be "*jus utendi et fruendi;*" and that an author has certainly *that* right over his own productions.

But this is a definition that merely relates to the *personal dominion of a proprietor*, and *not to the object:* it respects an *acknowledged subject* of property; not the object which is *presumed* to be so; (which is *now* the *question in dispute*.) Nay, it even supposes an *acknowledged proprietor;* and merely describes the *extent* of his dominion. He who has the property is the *proprietor*. But the dominion of a proprietor cannot extend beyond the *duration* of the property; no man can have that right beyond the just bounds of his property. And the point contended by the defendant is, "that a literary *publica-*"*tion* becomes *no longer* an *object of property;*" "that a "literary *publication* becomes *no longer* an *exclusive pri-*"*vate* right."

In answer to this, it was contended on the other side, "that an object of property is value; and literary com-"positions *have their value*, which is *measured by the ex-*"*tent of their sale*."

I might here observe, that it will be difficult to annex a specific value to *incorporeal sentiments*, when they are *detached from the manuscripts*, and *published* at large. From *that* time, the value, with respect to the author, *depends* upon his *right to the sole and perpetual publication* of them: and the great point in question is, "whether he is "intitled to that right, or not." But laying this observation aside, *mere value*, (all may see), will *not describe the property* in this. The *air*, the *light*, the *sun*, are of value inestimable: but *who* can claim a *property* in

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them? *mere value* does not constitute property. *Property* must be somewhat *exclusive* of the claim of *another*.

It was therefore alledged, "that a literary composition "is certainly in the *sole dominion* of the author, *till* he "thinks proper to *publish it*:" for, no man can lawfully take it from him, or compel him to publish against his will.

This is most certainly true. But this holds good no longer than while *it is in manuscript*.

Here, the defendant has not meddled with the author's *manuscript*. The work was *published* forty years ago. The defendant has printed a sett of his own. He has not meddled with any *property* of the *author*'s; unless the very *style and sentiments* in the work were *his*.

It was necessary therefore for the plaintiff's Counsel, to advance this proposition (and which was the only one that affected the cause) namely, "That the *author* has a [2357] "*perpetual property* in the *style and ideas* of his work; "and therefore that *he or his assigns* will be *for ever* in- "titled to the *sole and exclusive right* of it."

It was argued, that invention and labour are the means of acquiring property; and that literary compositions are the objects of the *author's sole pains and labour*; therefore they have the *sole* right in them.

If this argument is confined to the *manuscript*, it is true; it is the object *only* of his *own labour*, and is *capable of a sole right of possession*. But it is *not* true, if extended to his IDEAS.

All property has its proper limit, extent, and bounds. *Invention* or *labour* (be they ever so great) cannot change the *nature* of things; or establish a right, where no private right can possibly *exist*.

The inventor of the air-pump had certainly a property in the *machine* which he formed; but did he thereby gain a property in the *air*, which is common to all? or did he gain the sole property in the *abstract principles* upon which he constructed his machine? and yet these may be called the inventor's ideas, and as much his sole property as the ideas of an author.

To extend this argument, beyond the *manuscript*, to the very IDEAS themselves, seems to me very difficult, or rather quite wild. Indeed the invention and labour, which are ranked among the modes of acquiring specific property in the subject itself, are *that kind of invention and labour*, which are known by the name of *occupancy*. In *that* sense, *invention* is defining or discovering of a *vacant* property: and *labour* is the taking *possession* of that property, and bestowing *cultivation* upon it. Property is founded upon *occupancy*.

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But how is *possession* to be taken, or any act of *occupancy* to be asserted, on *mere intellectual ideas*? all writers agree, that *no* act of occupancy can be asserted on a *bare idea of the mind*. Some *act of appropriation* must be exerted, to take the thing out of the state of being common, to denote the accession of a *proprietor*: for, otherwise, how should *other* persons be apprized they are not to use it? these are acts that must be exercised upon *something*. The occupancy of a *thought* would be a new kind of occupancy indeed. By *what outward mark* must the property *denote* appropriation? and if these are void of *that* which the act of occupancy requires, it is a proof to me they cannot be the *object* of property.

Here another doubt arises, which I cannot, I acknowledge, answer—" at what *time*, and by what *act*, does the " author's *common law* property *attach*?"

The *Statute* of Queen *Ann* very properly obviated this, by fixing the commencement of his property from the *time of publication*; first, *entering* it at Stationers Hall. And in the case of a *mechanical* invention, it commences from the *date* of the patent.

But if authors derive their right from *common law*, (a law which has existed from time immemorial, and therefore long before the Stationers Company existed, and can have no dependance on the Stationers Company,) the author's right will be the *same*, whether he *enters* it in that book, *or not*.

When therefore does this idea of the author's property *attach*? in *other* cases, as where the heir has a right to any species of property, it commences from his *taking possession*. An author is fully possessed of his ideas, when they *arise* in his mind: and therefore from the time these ideas *occur* to him; or from the time he *writes them down*, they are his property. Then if *another* man has the *same* ideas as an author, he must not presume to publish them: he may be told these ideas were *pre-occupied*, and thereby became *private property*.

It would be strange indeed, if the very act of *publication* can be deemed the *commencement of private property*. Even after publication, many thousands may never set their eyes upon the book: yet would not these have a right to choose the same subject? and may they not have the *same ideas* upon it?

The improbability of their *hitting* upon those ideas is not to the point. *If they should* occur to the author; he has a right to publish them. Of this, I think, there can hardly be a doubt. Yet property, says *Pufendorf*, is a right by which the very substance of a thing belongs to *one* person, so that it cannot, in the whole, nor after the same

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manner, become *another*'s. And the Digests speak to the like effect. Sentiments are free and open to all; and many people may have the same ideas upon the same subject. In that case, every one of these persons to whom they independently occur, is equally possessed and equally master of all these ideas; and has an equal right to them as his *own*. Is it possible then that any one individual can have a *sole and exclusive property* in these?

2359] But there is one ground more upon which the plaintiff's counsel contended this claim of right; and which, at first sight, appears the most specious of all. They endeavoured to enforce this copy-right of authors, as a *moral* and *equitable* right; and to support it by arguments calculated to prove that it is so.

For this purpose, Mr. *Blackstone* observed that the labours of the *mind* and productions of the *brain* are as justly intitled to the benefit and emoluments that may arise from them, as the labours of the *body* are; and that literary compositions, being the produce of the *author's own labour and abilities*, he has a *moral* and *equitable right* to the profits they produce; and is fairly intitled to these profits *for ever;* and that if others usurp or encroach upon these moral rights, they are evidently guilty of injustice, in pirating the profits of another's labour, and reaping where they have not sown.

This argument has indeed a captivating sound; it strikes the passions with a winning address: but it will be found as fallacious as the rest, and equally begs the very question in dispute. For, the *injustice* it suggests, *depends* upon the *extent* and *duration* of the *author's property;* as it is the *violation* of that property that must alone *constitute* the injury. *If* therefore his property be *determined*, *no* injury is done him. The question, therefore, is "whether ALL *the property* of the author "did not *cease*, and the work become *open*, by his own "act of PUBLICATION." In that case, the defendant cannot be charged with *any injustice;* but has merely exercised a *legal* right. And however we may lean to literary merit, the property of *authors* must be subject to the *same rule of law*, as the property of *other* men is governed by. It is, therefore, *as* capable of being *laid open*, *as any other* invention of any other man's: and if, by *publication*, it becomes *common*, (as I shall observe by and by,) can the author *complain* of the loss? Can he complain of losing the bird he has himself voluntarily turned out?

But it is insisted, "that it conscientiously belongs to "the author himself, and his assigns, *for ever*; as being "the fruits of his own labour."

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"That every man is intitled to the *fruits of his own* "*labour*," I readily admit. But he can only be intitled to this, *according to* the fixed constitution of things; and *subject to* the general rights of mankind, and the general rules of property. He must not expect that these fruits shall be *eternal;* that he is to monopolize them to infinity; that every vegetation and increase shall be confined to *himself alone*, and *never* revert to the *common mass*. In *that* case, the injustice would lie on the side of the *monopolist*, who would thus *exclude all the rest* of mankind from enjoying their *natural and social rights*.

The labours of an author have certainly a right to a *reward:* but it does not from thence follow, that his reward is to be *infinite*, and *never to have an end*. Here, it is *ascertained*. The *legislature* have *fixed the extent* of his property: they have allowed him twenty-eight years; and have expressly declared, he shall have it *no longer*. Have the legislature been guilty of injustice? Little cause has an author to complain of injustice, after he has enjoyed a monopoly for twenty-eight years, and the manuscript still remains his own property. It has happened in the present case, that the author and his assignee together, have enjoyed the emolument of this work between thirty and forty years: and the plaintiff still has the manuscript.

If a stranger had taken his manuscript from him, or had surreptitiously obtained a copy of his work and printed it before him, he might then complain of injustice. And here lies the *fallacy* of this specious argument: it was put as if the author was *totally robbed* of the profit of his labour; as if *all* his emolument was forestalled, without suffering him to reap *any* emolument *whatever*.

In *that* case, it would be the *highest injustice*. But when *no such* intrusion has been made upon his property; when he and his assigns have enjoyed the *whole produce* of his labour for *twenty-eight years* together and upwards, what ground can remain for accusing the defendant of *immorality;* or for the author or his assigns to say "he "is *robbed* of the fruits of his labour?"

If an author is permitted to enjoy his property according to the *nature* of it, he can have *no injustice* done him: and *if* his situation is such, that he can only dispose of it as other people can of their goods; or if he can only dispose of it for the *first publication;* can the author *murmur*, because he can dispose of it *only as other people* can of *their* property? Shall an *author's* claim continue, *without bounds of limitation;* and *for ever restrain all the rest* of mankind from their *natural rights*, by an *endless mono-*

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poly? Yet *such* is the claim that is now made; a claim to an *exclusive* right of publication, *for ever:* for, nothing less is demanded as a reward and fruit of the author's labour, than an *absolute perpetuity*.

EXAMPLES might be mentioned, of *as great* an exertion of natural faculties, and of *as meritorious* labour in the *mechanical* inventions, as in the case of *authors*. We have a recent instance, in Mr. HARRISON's *time-piece*, which is said to have cost him twenty years application; and might not he insist upon the *same* arguments, the same chain of reasoning, the same foundation of moral right, for property in *his* invention, as an author can for *his?*

If the public should rival him in his invention, as soon as it comes out, might not he *as well* exclaim, as an author, "that they have *robbed* him of his production, "and have *iniquitously reaped* where they have *not* "*sown?*" And yet we all know, *whenever* a MACHINE is *published*, (be it ever so useful and ingenious,) the *inventor* has no right to it, but *only* by PATENT; which can *only* give him a *temporary* privilege.

As therefore, this charge of *injustice* depends upon the EXTENT of the author's property; (for if *no right* is invaded, *no injury* is done;)—let US now consider the *general rules concerning* PROPERTY; and see whether this claim will *coincide* with *any one* of them.

THE CLAIM is to the STYLE AND IDEAS of the author's *composition*. And it is a well-known and established maxim, (which I apprehend holds as true now, as it did 2000 years ago,) "that nothing *can* be an *object* of property, which has not a "CORPOREAL substance."

There may be many *different rights*, and particular *distinct interests*, in the *same subject;* and the several persons intitled to these rights may be said to have an *interest* in them: but the *objects* of them all, the *principal subject* to which they relate, or in which they enjoy, must be *corporeal*. And this, I apprehend, is no arbitrary ill-founded position: but a position which arises from the *necessary nature of all property*. For, property has some certain, distinct and separate *possession:* the object of it, therefore, must be something *visible*. I am speaking now, of the *object* to which *all rights are confined*. There must be something *visible;* which has *bounds* to define it, and some *marks* to distinguish it. And that is the reason why these great marks are laid down by all writers—— It must be something that is *visibly* and *distinctly* enjoyed; that which is *capable* of all the rights and accidents and qualities incident to property: and this requires a *substance* to sustain them.

But the *property here claimed* is all *ideal;* a set of ideas which have *no bounds or marks* whatever, nothing that is capable of a *visible* possession, nothing that *can sustain any one* of the qualities or incidents of property. Their *whole existence* is in the *mind* alone; *incapable* of any *other* modes of acquisition or enjoyment, than by *mental* possession or apprehension; safe and invulnerable, from their own *immateriality:* no *trespass* can *reach* them; no *tort affect* them; no *fraud or violence diminish or damage* them. Yet these are the *phantoms* which the author would *grasp* and *confine to himself:* and these are what the defendant is charged with having *robbed* the plaintiff of.

In answer to these objections, it was alledged for the plaintiff, "that there are *many other instances* of *incor-* "*poreal* rights; such as all the various kinds of pre- "scriptive rights and partial claims."

But the fallacy lies in the equivocal use of the word "property;" which sometimes denotes the right of the *person;* (as when we say, "such a one has this estate, or that piece of "goods;") sometimes, the object itself.

Here, the question is upon the *object* itself, not the *person.* I readily admit that the rights of persons may be incorporeal.

But the question is now, "whether any thing *can be* "*the object of proprietary right*, which is *not* the *object* "*of corporeal substance.*" And, for my own part, I know not of any one instance of any one right which has not respect to *corporeal* substance. Every prescriptive inheritance, every title whatever has respect to the *lands* in which they are exercised. No right can exist, without a *substance* to retain it, and to which it is confined: it would, otherwise, be a right without any existence.

To get over this, it was said, the profits of publication, *till* they are received, are *uncertain and casual*, and cannot in themselves be an object of property: they are also *incidental*, arising entirely from the matter which is published. The *composition* therefore is the *principal object of property;* upon which, all the profits depend, and which alone can intitle the author to those profits: for, these, like the profits of an estate, depend upon the property in that person to whom they arise.

If the author will pretend to a *perpetual* right in those, he must prove he has a perpetual right to the ideas which produced them.

Then the question returns again, "whether, *after* "*publication*, the work continues *solely* the author's *for* "*ever.*"

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Here, the maxim occurs which I mentioned before,* that nothing can be an object of property, which is not capable of a †*sole and exclusive enjoyment*. For, property, as *Pufendorf* observes, *implies* a right of *excluding* others from it. For, *without* that power, the right will be *insignificant*: it will be in vain to contend that "*that* is "your own," which you cannot prevent others from *sharing in*.

* V. ante, pa. 2358.

It is not necessary, I own, that the proprietor should always have the total *actual possession* in himself. A *potential* possession; a *power* of confining it to his own enjoyment, and excluding all others from partaking with him; is an object or accident of property.

But how can an author, *after publishing* his work, *confine it to himself?* if he had kept the manuscript from publication, he might have excluded all the world from participating with him, or knowing the sentiments it contained: but by *publishing* the work, the whole was laid *open*; every sentiment in it made *public, for ever*; and the author can *never recall* them to himself, never more confine them to himself, and keep them subject to his *own dominion*.

The quotation from the Institutes relating to wild animals, is very applicable to this case. They are yours, while they continue in your possession; but no longer. So, from the time of *publication*, the *ideas* become *incapable* of being *any longer* a subject of property: *all mankind* are equally intitled to read them; and every reader becomes *as fully possessed* of all the ideas, as the author himself ever was.

From these observations, this corollary, in my opinion, (for I speak only my own sentiments,) does naturally follow; "that the *act of publication*, when *voluntarily* "done by the *author himself*, is, virtually and necessarily, *a* GIFT *to the public*." For, when an author throws his work into so public a state that it must immediately and unavoidably become common, it is the same as expressly giving it to the public. He knows, before he publishes, that this will be the *necessary consequence* of the publication: therefore he must be deemed to *intend* it. For, whoever does an act of any kind whatever *designedly* and *knowingly*, must of course *intend every necessary consequence* of that act. To this I might add, that in every language, the words which express a publication of a book, express it as *giving* it to the public.

But in the argument, it was contended, "that the "author gives nothing to the public, but the *mere* "*perusal* of it; and still preserves the perpetual right to

" the work;" " that an author's publishing and selling " a book is only like giving the *buyers so many *keys* to " a gate, or *tickets* to an opera;" that " those were only " given for the parties *themselves*, but would not intitle " them to forge *other* keys or tickets."

To this the answer is, I think, easy and evident. If the author had not published his work at all, but *only lent* it to a particular person, he might have injoined that particular person, "that he should *only peruse* it;" because, in *that* case, the author's copy is his *own*; and the party to whom it is lent contracts to observe the *conditions of the loan:* but when the author makes a *general publication* of his work, he throws it *open to all mankind.*

That is, then, very different from the case of giving *keys* or *tickets* to *particular persons.* The *very condition* of giving them is the exclusion of all *other* persons. And these keys or tickets give the party to whom they are given no property to the *land* they pass through, or to the Opera-*House:* they are given them *for a particular time*, and to give them a *transient admission*, a temporary privilege only. It is like an author's *lending his manuscript* to particular friends; who still retains the right over it, to *recall* it whenever he pleases.

But when an author *prints and publishes* his work, he lays it *entirely open to the public*, as much as when an owner of a piece of land lays it open into the *highway.* Neither the book, nor the sentiments it contains, can be afterwards recalled by the author. *Every purchaser* of a book is the *owner* of it: and, *as such*, he has a right to make *what use* of it he *pleases.*

Property, according to the definition given of it by the defendant's counsel, is "*Jus utendi et fruendi.*" And the author, by impowering the bookseller to *sell*, impowers him to *convey this general property:* and the *purchaser* of the book makes *no stipulations* about the *manner* of using it.

The *publisher* himself, who claims this property, sold these books, *without* making any contract whatever. What colour has he, to *retrench* his own contract, or *impose* such a prohibition?

Nothing less than *legislative* power can *restrain the use of* any thing. If the buyer of a book may not make *what use* of it he *pleases*, what line can be drawn that will not tend to supersede *all* his dominion over it? he may not *lend* it, if he is not to *print* it; because it will intrench upon the author's profits. So that an objection might be made even to his lending the book to his *friends;* for he may prevent those friends from *buying* the book; and so the profits of such sale of it will not accrue to

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the author. I don't see that he would have a right to *copy* the book he has purchased, *if* he may not make a *print* of it: for, printing is only a method of *transcribing*.

With regard to books, the very *matter and contents* of the books are by the author's publication of them, *irrevocably given to the public*; they become *common*; all the *sentiments* contained therein, rendered *universally common*: and when the sentiments are made *common* by the author's *own* act, EVERY USE *of those sentiments* must be *equally common*.

To talk of *restraining* this gift, by any *mental reservation* of the author, or any *bargain* he may make with his *bookseller*, seems to me quite chimerical.

It is by *legal* actions that *other* men must judge and direct their conduct: and if such actions plainly *import* the work being made common; much more if it be a *necessary consequence* of the act, "that the work is actually thrown open by it;" no *private* transaction or secretly-reserved claim of the author can ever *control* that necessary consequence. Individuals have no power, (whatever they may wish or intend,) to alter the fixed constitution of things: a man can't retain what he parts with. If the author will *voluntarily* let the bird fly, his property is gone; and it will be in vain for him to say "he *meant* to retain" what is absolutely flown and gone.

There is another maxim too, concerning property; "that nothing can be an object of property, that is not "capable of *distinguishable proprietary marks*."

The principal *end* for which the first institution of property was established, was to preserve the *peace* of mankind; which could not exist in a *promiscuous scramble*. Therefore a moral obligation arose upon all, "that none "should *intrude* upon the *possession* of another." But this obligation could only take place where the property was distinguishable; and every body knew that it was not open to another. Mankind must have a knowledge of what is their duty, in order to observe it by abstaining from every violation of it: the breach of a duty must be *wilful*, to make it criminal.

It was necessary, therefore, that every person should have some *indicia*, some *distinguishing marks* upon his property to *denote* his being the proprietary therein: for, hard would be the law that should adjudge a man guilty of a *crime*, when he had no possibility of knowing that he was doing the least wrong to any individual.

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Now where are the *indicia* or *distinguishing* marks of ideas? what distinguishing marks can a man fix upon a set of intellectual ideas, so as to call himself the *proprie-*

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of them? they have *no ear-marks* upon them; *no tokens* of a particular proprietor.

If the *author's name* be inserted in the title-page, that is no reason: for, many of our best and noblest authors have published their works from more generous views than pecuniary profit. Some have written for *fame*, and the *benefit of mankind*: others have had such pecuniary views, only for a *time*; and have *afterwards* left their work open to all mankind.

On the other hand, if the author's name was *omitted* in the title-page, he might *equally insist* on the claim: for, if the *property* be *absolutely his*, he has no occasion to add his name to the title-page. How is it to be known, when such a sort of property is abandoned? in all abandonments, two circumstances are necessary; an *actual* relinquishing the possession, and an *intention* to relinquish it. But in what manner is the possession of intellectual ideas to be relinquished? or how is the intention of relinquishing them to be manifested? *mere mental ideas* admit of no actual or visible possession; and consequently are capable of no signs or tokens of abandonment. [7 Durn. 624.]

The *legislature* had plainly this objection in view, when they penned the Statute of Queen *Ann*, to give authors a temporary property in their works. For, in the preamble, it is said *—"Whereas many persons may, "through ignorance, offend against this Act; unless some "provision be made, whereby the property in every such "book as is intended by this Act to be secured to the "proprietor or proprietors thereof, may be *ascertained*; "Be it therefore enacted. that nothing in this Act con- "tained shall be construed, *&c. unless* the title to the "copy of the book be entered in the register-book of "the Stationers Company." And from that register-book any person may see whether the author intended to make a property of his work; and they may see the duration of such property: for the property is to commence from the publication of the work, provided it be so regularly entered as the Act requires.

* Sect. 2.

But if authors have a right at *common-law*, they need not *enter* their books at all with the Stationers Company: they may *wave that*. And in case they do *not* enter them, by what marks, *then*, must this property in ideas be distinguished? And how will the difficulty *encrease* if the property extends not only to fourteen, or twenty-eight years, but *for ever*?

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Therefore it appears to me, that this claim of a perpetual monopoly is by no means warranted by the *general principles of property*: and from thence I should have