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thought that it *could not* be a part of the *common law of England.*

But I will now consider the *second* general ground, upon which this perpetual copy-right was argued at the bar; namely, the ***supposed usage and law of this kingdom.***

Under this head, it was contended, "that the right of "an author to the *sole* publication and *perpetual* mono- "poly of his works, though it were not maintainable on "*general principles*, is yet a kind of *customary* property, "a right that has always been *allowed* and *supported* in "*this kingdom.*"

If it was so, it is strange that in all our laws, where every kind of property is so much discussed, a claim so extensive as this, is not absolutely *established.* And yet it was admitted by the plaintiff's counsel, "that they "*could not produce any one determination* in a Court of "*law* that had established any such kind of property." They attempted, however, to set up some extraordinary *substitutes*, to supply this deficiency. The first was the *finding* in the special verdict, "that *before the reign of* "*Queen Ann*, it was USUAL to purchase from authors "the perpetual copy-rights of their books, and to *assign* "the same from hand to hand, for valuable considera- "tions; *and* to make them the subject of *family-settle-* "*ments.*"

A description thus painted, with the striking ideas of *purchase* and *family-possessions*, may at first sight, dazzle the eye, and catch our passions: but, when nearer looked at, and fairly viewed and examined, we shall find it merely an illusion.

There are but two lights, in which it can be applied to the present question: either, 1st, as *establishing a customary property*, in *fact;* or 2dly, as shewing that there was a *general idea* or notion of such a right, *antecedent* the statute of Queen *Ann.*

With respect to the former—it is impossible that it can establish any *customary* claim. It is no usage of which the *law* can *take notice;* being merely an allegation of *particular* contracts which some *individuals* have made before the reign of Queen *Ann.* Whereas, to constitute a *legal custom*, it must have these two qualities: first, a custom must import some general right in a *district*, and not a few mere private acts of *individuals*; and, in the next place, such custom must appear to have existed *immemorially.* All customs *operate* (if they have any operation) as *positive laws.* The *mere fact of* USAGE will be *no* right at all, in *itself:* but when a *custom* has

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prevailed from time immemorial, it has the evidence and force of an *immemorial law*.

If the custom be *general*, it is the law of the *realm*: if *local only*, it is *lex loci*, the *law of the place*.

Now, *all* laws are general, *as far* as the law *extends*; and *all customs* of *England* are of course *immemorial*. No *usage*, therefore, can be *part* of that law, or have the force of a *custom*, that is *not* immemorial.

Here, no such general or immemorial usage is suggested: this finding is merely an allegation of *particular* contracts made with particular *individuals* before the *reign* of *Queen Ann*.

So far, it is true, appears from this finding, "that "*prior* to that reign, copies have been *purchased* for va- "luable considerations, and made the subject of *family-* "*settlements*."—But, *how long* before? Whether one hundred years, fifty years, or ten years, is not stated. Very certainly, it could *not* be *immemorial*: For, the *art of printing* was *not known* in this kingdom,* till the reign of *Ed.* 4. Therefore these contracts could not be derived from the *ancient immemorial* law of the land: and, consequently, they could not *create* a species of property which was *unknown* to that law.

* See the Note subjoined to the end of this Case.

It is indeed impracticable, to draw any inference from such a proposition as this is. For, the verdict does not find "that these rights were ever *enforced against* "STRANGERS." The *parties* would undoubtedly *acquiesce in the agreement*: and the *families* on whom they were settled would *not reject* a settlement, however chimerical. But, unless it was shewn that these claims have been enforced against *strangers*, no *private contracts* or *family-settlements* can *impose* a LAW upon the *public*.

It is said, "they serve to shew there was a *general idea* "*and apprehension* of the existence of such a right, be- "fore the statute of Queen *Ann*." Admit the idea had been *ever so general*; what are we thence to infer? If the ideas and sentiments and apprehensions of individuals were sufficient ground whereupon to establish a species of *property*; what a vast extent would this carry it to!

Immense *ideas* of property were raised in the South-Sea stock, in the year 1720. In that year, innumerable rights of this kind were bought and sold; and these transactions passed between parties whose ideas were as sanguine as any authors could be "that the ideas they "sold were real property:" and yet the subjects that were sold were, in truth and fact, *no* real property.

The good-will of a shop, or of an ale-house, and the custom of the road (as it is called among carriers,) are constantly bargained for and sold, *as if* they were pro-

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perty. But what are these? Nothing more than the good-will of the customers, who may withdraw from them, the very next day, if they please. The purchaser of this custom or good-will gains no certain property in it; he has no power to *confine* it to himself, nor can he use any power to *prevent other people* from gaining the custom. It is an advantage, indeed, so far of service, as it gives the purchaser a *priority* for custom. And so it is in the case of the publication of a book: it gives a *priority*, and gets a set of *first customers*. But none of these cases can establish an *absolute*, *perpetual*, *exclusive* property.

Whatever ideas individuals may form, or however they may traffic among themselves in imaginary claims, they cannot affect the real right of the public, who are no parties to such contracts: they can't create law.

It is a well-known maxim in our law, "that no man "can by any device whatever, *create a new consequence* "out of an estate, or *innovate* upon the law of the land." He cannot annex to his estate any *novel conditions* that are *inconsistent* with the nature of the estate: much less, can the acts or interests of *individuals* abridge the *public* of their *natural right*, or *establish monopolies*.

The next arguments urged in favour of this claim, were the *two by-laws* of the Stationers Company; the former, made in *August* 1681; the latter, in *May* 1694: the former, recognizes it. It is material to attend to the words of this by-law. It asserts,* that divers of the members of the company had great part of their estates in copies; and that by the ancient usage of that company, when any books or copies were entered in their register to any of the members of that company, such persons were always reputed the proprietors of them, and ought to have the sole printing of them. The next is the same,† only with this additional entry (after these two recitals, and reciting "that the copies were con-"stantly bargained and sold, amongst the members of "the company, as their property, and devised to the "children and others, for legacies, and to their widows, "for their maintenance;" it is *ordained*, that when any entry shall be duly made of any book or copy, by or for any member of the company; in such case, if any other member shall, without the licence or consent of the member for or to or by whom the entry is made, print, import, or expose to sale, &c. they shall for every copy forfeit twelve pence.

The view of inserting these by-laws in the special verdict, was, first, to draw from the preamble, something in *favour* of copy-rights; and, in the second place, to

* V. ante, p. 2306, 2307.

† V. ante, p. 2308.

shew that these rights were *protected* by these by-laws. 1769.

With respect to the first——whatsoever these by-laws, have or might have suggested in favour of this claim, they would be certainly *no evidence* at all. They are *confined to the members* of that company, and could not be read against the present defendant, who is *no member* of their company, nor subject to their by-laws. They are *confined* too to such books as are entered in the register-book of that company by to or for some member of the company: and this is founded on the ancient privilege of *that company*; and can only affect their *own members*. MILLAR v. TAYLOR.

So *peculiar* a claim is so far from being a proof of a *common-law* right, that it is an argument *against* it. For, if such a right existed by the *common law of the land*, it could not be spoken of as subsisting only by *usage of the company*.

But we are on a question of LAW: and *that* is only to be determined on *legal* principles, and *not* upon the allegation of a particular set of men. Here is a question, "whether this or that article of property belongs to *A.* "or *B.*" And upon a *general* question, "whether such "a thing is the *subject of property*, or does *freely belong* "*to all*," it is the LAW that must determine; *not* the *by-laws* of the Company of Stationers.

It would be strange indeed, if this great point which the courts of law have thought *so arduous* to determine, were to be decided at last by the opinions and resolutions of the *Stationers Company*.

With respect to the second view of inserting these by-laws in the special verdict; namely, "the shewing that "these rights of authors were protected by these by-"laws"—these by-laws seem as deficient in this view, and as little capable of establishing this point, as they were in the former view, and in support of the right itself.

These by-laws, in the first place, have no relation to the claims of *authorship*. The *copies* they *refer to*, are *only* those copies which *particular members of the Stationers Company* had the *privilege to print*; either by *patents* to themselves, or by *licence* of the Stationers Company. In the next place, they do *not give protection*, they *do not pretend* to give protection, to *any but* those of their *own company*. The offence of infringing those rights, and the penalties inflicted, are confined to their *own members only*: and the penalty is given to the *company* * themselves. The whole is nothing more than a *corporate regulation* of their *own company*. Many mem- [2371]

* V. ante, p. 2307, 2308.

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bers of that company were possessed of copies; and others, of particular allotments from the company for the sole printing of their own books: and, to preserve proper order *amongst themselves*, the books, that each member was allowed to print, were entered in their register; that every one's claim might be *known among themselves*, and they might not intrude upon *each other's* right.

But these entries and by-laws extended no further than to the *members* of *that company*. *No author* whatever had from *them*, the least pretension to *copy-right*. And even these members themselves could have no redress against *strangers*; but only amongst *themselves*. These by-laws provided no remedies against *other* persons: nor indeed had the company a right to *impose* their restrictions on any but their *own body*. Where then is that *copy-right* of authors, which they plead for? Or that general *protection* which these by-laws have been imagined to afford to them?

But other things were urged at the bar, and several other matters were substituted, to account for the want of judicial determinations in favour of this claim; as, the charters of the Stationers Company; two proclamations of *H.* 8. and Queen *Mary*; two decrees in the Star-Chamber; two ordinances made in the time of the usurpation; and the Licensing Act of 13 & 14 of *C.* 2.

These extraordinary Acts of State were quoted as giving protection to copy-rights, and to account for the want of judicial determinations. But none of them, except the Statute, come regularly before us; so that we can properly take notice of them.

If these were *material* to the deciding this question, they should all, I apprehend, except the Licensing Act of *C.* 2. have been *found by the jury*. For, all the rest are *particular instruments*; and if admissible at all, they were matter of *evidence*, and *not of law*: they could not come properly before us by way of *argument*, from the bar; nor can we regularly *take notice* of them, upon the bench.

[2372] But I mention this merely for the sake of *precedent and regularity*; meaning at the same time, to wave all objections of this sort, and to consider the several instruments themselves.

First, as to the *charters of the Stationers Company*— The chief stress was laid on the clause in the charter of 36 *C.* 2. which mentions the *proprietors of copies* entering their books or copies in the register-book of the Stationers Company; and declares that they should thereupon have

the *same right* as had been usual for one hundred years past. 1769.

But *the proprietors* of books and copies to *whom this refers*, were merely those *members of the Stationers Company*, who had the *sole printing* of books by *patent*. And we see by their by-laws, they claim *for themselves and their members* a peculiar privilege in copies. And there is an *ancient usage of the company* referred to and confirmed, as the usage which existed for one hundred *years* past. MILLAR v. TAYLOR.

It is not pretended, that such right existed *immemorially*. And whatever these charters may have suggested, *no charters from the crown*, and consequently *no expressions* in such charters, could affect the general *rights of the subject*. And it would be strange indeed to infer *usage of law*, from *grants* made to the *Stationers Company*.

When the prerogative made such extraordinary strides as it did at that time, the company were impowered to *search* the houses of all printers and booksellers, and to *seize* all books that were contrary to any Statute then made or that should be made, *&c.*

Are we therefore to conclude, or could we draw any deductions (either legal or historical) that such search, seizings or imprisonments could be *legal* in themselves? and as to the *protection* these charters gave to *copy-rights* —they do not pretend to *extend* to any claim of *copy-right*; but, to *such persons only* as should *enter* their books in that company's register. But if authors had any *common law* right, it would be *equally good*, whether they entered them there or not: for, such entry can not *extend* nor *abridge* that right, if they really had it.

The institution "that *all* books should be *entered* in "that register," was merely *political*: the design of it was, to suppress *seditious*, *heretical* or *immoral* books. The *inserting* in these registers the *claims* of patentees or any others, was an original institution of the *Stationers Company*, and *extended no further* than their *own members*. With respect to all *others*, these privileges extended not to *them*. This concerned merely their own government: and their own by-laws could not extend further than their *own community*. [2373]

The two proclamations were issued, one by *H.* 8. (as despotic a prince as ever sat upon the throne:) the other, by his bigotted daughter Queen *Mary*; and relate to other purposes. The former was a general proclamation against the printing *any* books whatsoever without a *licence*: and that of Queen *Mary*, from printing what she called *heretical* books.

What have these to do with the *copy-right of authors*?

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these exclusions extend as much to *one*, as to *another*: if the book was offensive, it was indifferent to the court, *whose* it was.

The *patents cum privilegio* granted the book to particular persons, for a certain *term of years*.—From hence it was said, "it was *no innovation* in authors to claim "this *exclusive* right." The patents that were asserted in this part of the arguments, were taken from *Ames's* Typographycal Antiquities; and were so arbitrary gross and absurd, that one would not have expected such a quotation. *Growte* had a patent for the * primer of *Salysbury* use; † *Saxton*, for all maps and charts of *England*; and ‡ *Tallis* and *Birde*, and also § *Morley*, for the printing of music; and ‖ *Symcocke*, for all things printed on one side of a sheet, or any part of a sheet: provided the other side was white paper. In all these patents there were *penalties* inflicted; and they had power given them to *seize* books, and *search* houses. They are too gross, to be argued from: but they exclude all notion of proprietary right. The grant was given to the *printers* themselves, without any regard to the *authors*, or *new* compositions. The very *name* of being patents to *printers*, and the *limits* fixed, shew that they exclude all ideas of a *literary right*, and a property subsisting in the *author*.

* Qu. Vide Ames, p. 496.
† V. Ames, p. 541 to 544. temp. Queen Eliz.
‡ P. 536, 539, temp. Queen Eliz.
§ p. 569.
‖ P. 570.

Next we are told of some proceedings in the STAR-CHAMBER; a Court the very name whereof is sufficient to blast all precedents brought from it. But I will do the gentlemen the justice to say, they did not mean to adduce them as *authorities*; but to apply them as *historical anecdotes* in their favour.

¶ 23 June, 1585, Vide ante, p. 2312.

It was said, in one of these decrees ¶, that no person should print any book, work, or copy against the true intent and meaning of any letters patent, or prohibition of any known law of *England*, or other ordinances laid down for the good government of the Stationers Company, &c. And this decree was afterwards by the command of *Jac.* 1. ordered to be put in execution.

In 1607 *, it was ordered by a decree, that no person should print any book, which the Stationers Company should, in their books, prohibit; and which that company should, by letters patent, have a right of printing.

* Or 1637. Qu. V. ante, p. 2313.

Such were the edicts of that imperious Court. And is it possible to apply this *despotic* decree to the *legal right of authors*, in *any* light? *tyrannical and illegal* as the Star-Chamber was, the *sole jurisdiction* they possessed was in *criminal* matters respecting books; and these only, (as their decree mentions,) in such as were *bad*.

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They considered all infringements of patents and grants of the crown, as *contempts of royal authority*; and on *that* idea they supported any patent the crown thought proper to grant. For, as Lord *Coke* * observes, "such "boldness the monopolists took, that often at the coun- "cil-table, Star-Chamber and Exchequer, petitions, in- "formations and bills were preferred, pretending a con- "tempt for not obeying the commandments and clauses "of the said grants of Monopolies, and of the procla- "mations concerning the same." For preventing which mischief, Lord *Coke* says, that branch of the Statute was added, which directs, "that all grants of monopo- "lies shall be tried and determined by and according to "the *common-law*." In that of 21 *James* the first †, a proviso was contained, "that it should not extend to "any patent of privilege concerning printing‡." Therefore, as to *these* patents, the Star-Chamber, *continued* the same usurped power of injoining obedience, and punishing contempts.

* See 3 Inst. 182, 183.

† Cap. 3.

‡ The 5th proviso: V. 3. Inst. 185.

But the decrees of this arbitrary Court can not be applied, either judicially or historically, to *civil cases*, or (more particularly) to the *present* case.

Of such kind of patents the Stationers Company were the ingrossers. Some assumed claims and authorities were allowed to them, for the printing of particular books. They were of service to the state in suppressing any seditious books: and so that authority in them (however unwarrantable in itself) was preserved to them; and the Star-Chamber secured it to them.

By the charter of Queen *Mary*, the Company of Stationers were made a kind of literary constables, to seize all books that were printed contrary to the Statute, *&c.* And, as Mr. *Yorke* observed in arguing the case of *The University of Cambridge* v. *Baskett*, when once the company were made absolute, they attempted to execute such outrages that no body could submit to. And the Star-Chamber supported them, and insisted upon obedience to the Stationers Company. No book was allowed to be printed, till it was *entered* in their register: and consequently, they might stop whatever publication they pleased. The Star-Chamber was equally zealous in supporting the *interests*, as the *powers* of that favourite Company of Stationers: and therefore they exerted the terrors of their authority to enforce the *privilege* which had been granted to them or to any of their members, by patents or charters from the crown. And this they did, under their *criminal* jurisdiction, by assuming a power, in virtue of it, to punish for *disobedience* to the *patents and royal grants*, which they were possessed of.

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They did not *otherwise* interfere; where there was no grant or prohibition, to give them a colour for it. That Court, with all their extravagance, extended their jurisdiction in this matter, only to the grants of the crown or to the ordinances of the Stationers Company. Can this, then, be any proof at all of the *inherent right of authors* in the copies of their works? A right, which if it exists at all, is an *original independent* right.' Do these decrees serve for the protection of such rights of *authors?* Are they so conclusive, as to account for and supply the want of any *other* determination in their favour; when the *whole right* which was the subject-matter of them, is *confined* to the *Stationers Company*, or to those that had *patents from the crown?*

The next favourite topic of the plaintiff's counsel was the ordinances made by the Houses of Parliament. But they were calculated to political views; except what related to the Stationers Company: and no protection is given by them to the copy-rights of *authors in general.* What related to the Stationers Company is adapted to the particular privileges of that company and its members. The ordinance in 1649, is, "That no person "should print or reprint any book or part of a book that "was granted to the Stationers Company, without their "consent; nor any book or part of a book which was "entered in their books to or for any member of the "company, without the consent of the owner, *&c.*" The design was to stop the publication of those papers which the royalists published.

* In 1652. Qu. V. ante, p. 2314.

The title of the other ordinance * was for stopping unlicensed, scandalous publications, *&c.*: and therefore it enacted, "that no book should be published, unless it "was *approved by the licenser.*" And by the same ordinance, the Stationers Company were authorized to search for all unallowed printing presses employed in printing unlicensed books *&c.*; and likewise to apprehend all authors *&c.*

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The whole of these ordinances, from the beginning to the end, were adapted to the same political views; except that particular clause which is entirely confined (like the Star-Chamber decrees) to the privileges which had been granted to the Stationers Company, and the particular claims of their members.

But there is not a clause that states or protects the copy-right of *authors.*

The Statute of 13 & 14 *C.* 2. *c.* 33. (the Licensing-Act,) was next mentioned at the bar: and the plaintiff's counsel argued that it contained a recognition of the copy-right, and such a *protection to authors*, that they need

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sel for supporting their claim; and that is, the *injunctions* that have been granted by the Court of *Chancery*.

Great attention and respect is undoubtedly due to the decisions of a Lord Chancellor: but they are not conclusive upon a Court of *common law*. Had these injunctions (which were only temporary) been *perpetual*, they could have no effect on a Court of *common law*, in a *common law question*.

[6 Ves. 695. 8 Ves. 224.]

The common law of *England* must direct the determination of a common law question. By common-law determinations we are bound; and to *them* we must always adhere: for, these are the proper constitutional declarations of the law of the land. They are so considered, even by the Court of Chancery itself. When any doubt arises in a cause in *equity* concerning a point of *common law*, it is usually referred to the determination of a Court of common law. The very case now before us is sent hither for our determination, *because* it is a question of *common law*. But the Courts of law never apply to a Court of Equity for *their* decision, in a *common law question*. When the Court of Equity appeals to us, as a Court of Law, by reason of its being a common law question, it would seem a little strange, if we should go back to that very Court, to inquire *their* opinion upon it; or, in other words, if we should answer the question they put to us, by making the very same inquiry of *them*. Yet that would in effect be the case, if we were to form our decision of this question, upon the arguments and decisions made in the authorities that have been cited: it would be grounding our decision upon what is no judgment or authority at all. These injunctions were but temporary suspensions, "till the rights should be determined;" and none of them contain any *express* decision whatever.

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It was said at the bar, "that these injunctions were "acquiesced in, by the defendants." But no acquiescence of the parties can alter the law. The Court of Chancery could have reasoned and concluded from these arguments, as well as we: and they would hardly wish us to draw deductions from their own decisions. Their sending the cause to us is a decisive proof "that the "Court of Chancery, who granted these injunctions, "consider this matter as *unsettled*." And in the case of *Millar* v. *Donaldson*, which was a case depending upon common law, Lord NORTHINGTON would not determine the point; but left it to be considered as a *question of* COMMON *law*.

It is plain, then, that after all these injunctions, the

grand question itself is still, even in *that* Court, considered as an *undecided* point.

But as the plaintiff's Counsel relied so much upon them, I think it a due respect to the gentlemen, to examine particularly the injunctions themselves; and see whether they have any sort of influence upon the question before us, or not.

It is unnecessary to comment particularly on *every* injunction that has been mentioned. They may be reduced to these three classes: 1st, Causes on private trespass; *surreptitiously* or *treacherously* publishing what the owner had *never made public* at all, nor *consented* to the publication of; 2dly, Cases *expressly grounded upon the Statute of* Queen *Ann*, and within the terms which that Statute has granted; and 3dly, cases on *patents* from the Crown for the sole printing what is called *prerogative copies*.

Of the first class, were the cases of *Webb* v. *Rose*, *Pope* v. *Curl*, *Forrester* v. *Waller*, *The Duke of Queensbury* v. *Shebbeare*—they have been all stated. I will not restate them; but only observe, that in all these cases the publications were *surreptitious*, against the will of the owner, *before* he had consented to the publication of them; and, *as such*, they will have no effect upon the *present* question.

Most certainly, the *sole proprietor* of any copy may determine *whether* he will *print* it, or *not*. If any person takes it to the press without his consent, he is certainly a *trespasser;* though he came by it by *legal means*, as by loan or by devolution; for, he transgresses the *bounds* of his trust; and therefore is a *trespasser*.

Ideas are free. But *while the author confines* them to his study, they are like birds in a cage, which *none but he* can have a right to let fly: for, *till* he thinks proper to emancipate them, they are under his *own dominion*.

It is certain every man has a *right to keep* his own sentiments, if he pleases: he has certainly a right to judge whether he will make them *public*, or commit them only to the sight of his *friends*. In *that* state, the manuscript is, in every sense, *his peculiar property;* and no man can take it from him, or make any use of it which he has not authorized, without being guilty of a *violation* of his property. And as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the *first* publication: and whoever deprives him of *that priority* is guilty of a manifest *wrong;* and the Court have a right to *stop* it. But this does not apply to the *present* question: *this* author had *published it many years*, and *received the profit* of it.

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The second class of injunctions, in the manner I ranged them, relates to injunctions on the statute of Queen *Ann*. The case of *Knapton* v. *Curl*, *Eyre* v. *Walker*, *Motte* v. *Faulkner*, *Gill* v. *Wilcox*, *Tonson* v. *Walker*, were all the injunctions, I think, that have been cited, which fall in this division.

As to the cases of *Nelson*'s Fasts and Festivals, and the Whole Duty of Man, I shall let them remain with the observations that have been made upon them by my learned brothers; with this additional one, that let the injunctions be what they may, they were *only till the hearing*, without any *final decisive* judgment.

There had appeared some doubts, (for I have seen copies of all those injunctions that were stated in the plaintiff's bill,) as to the Whole Duty of Man; because the copy-right was entered in the Stationers register by the plaintiff himself. In 1735 * he filed his bill, and founded it upon the statute of Queen *Ann:* (whether mistaken, or not, is not at all the question.) And in the case of *Nelson's* Fasts and Festivals, there is the like allegation, "that it was entered in the Stationers company's register." But, as I do not apprehend that either of them will very materially affect the present question, for the reason I set out with in the general observations I have made; I shall not say any more of them; but leave them with the observations my brethren have made upon them.

* V. ante, p. 2325.

But with respect to *Milton's* Paradise Lost, I must mention what I have seen in a note of Lord *Hardwicke's*. It seems from *that*, that the injunction was founded on Dr. *Newton's notes*, only. For, his Lordship said "that
[2380] "at first he was inclined to send the cause to the judges,
"to settle the point of law: but, as Dr. *Newton's* notes
"were *manifestly within* 8 *Ann*, he would grant an in-
"junction to *them*, without deciding the *general* question
"of property at *common* law."

But from these injunctions the plaintiff's counsel deduced this argument, in their application of them to the present case, "that all these injunctions granted since
"the statute were founded on a *supposed property* in the
"respective plaintiffs, and a *legal right* in the several
"copies to which they related; and that such a property
"must necessarily be a property at *common law;* as the
"statute consists only of *penal* provisions, and *prescribes*
"*the mode* of prosecution, which mode the plaintiffs in
"those cases had not followed."

To which it might be answered, "that these injunc-
"tions, being *temporary only*, decided *nothing at all.*"

But I will admit, that they were founded on a right

that would support a more *general* injunction: for, by this act of parliament they had certainly a property in those respective copies, *during the term* the statute has allowed. For, the statute in the *first* place, and * *before* any of the penal provisions, has *affirmatively and distinctly* enacted "that in any books *printed before* the "making that statute, the author, or the bookseller "who had purchased the copy in order to print or to re-"print it, should have the sole right of printing the "same for *twenty-one years;* and that in works not then "published, but *afterwards* to be published, they should "have the right for fourteen years."

* V. 8 Ann, c. 19. sect. 1.

By this clause, therefore, a sole right is *positively vested in the author*, during the *particular terms* which the statute has limited.

The subsequent provisions, indeed, have annexed *penalties*, and forfeiture of the sheets; (which are to be damasked.) But the *right* is wholly confined to the *parties interested*, the authors and purchasers of copies. The penalties are given half to the crown, and half to any common informer that will sue for them.

To *the author*, therefore, it is the same as a *lease*, a *grant*, or any other *common-law right*, whilst the *term exists;* and will equally intitle him to all *common-law remedies* for the enjoyment of that right. He may, I should think, file an injunction-bill to stop the printing: but I may say, with more positiveness, he might bring an *action*, to recover satisfaction for the injury done him, contrary to law, under the statute.

In the case of *Ewer* v. *Jones*, 2 *Salk.* 415. and 6 *Mod.* 26. Lord Chief Justice Holt lays it down, "that "wherever a statute gives a right, the party shall, by "consequence have an action at law, to recover it."

The *author's remedy* is very different from an *informer's* prosecuting for the *penalty*. The latter must pursue all the remedies the statute requires: for, in such a prosecution, the charge is for an *offence*, and therefore the offence must be *strictly brought within* all the provisions of the act. But if the plaintiff only seeks satisfaction to himself as the *party aggrieved*, without prosecuting for any penalty, there is not, in such case, any limitation by the statute.

I here give my opinion as a *common lawyer;* not presuming to say what the Court of *Chancery* would do upon the same question.

The third class of injunctions is of those that have been upon grants and patents from the crown, for the sole printing of what are called *prerogative*-copies. Of this sort, are *the Stationers Company* v. *Wright*, and

[S. C. cited Skin. 234, 5.]

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the Stationers Company v. *Partridge*. In these cases, injunctions were granted: but these, I apprehend, have no analogy to the private right of authors. The grantees did, indeed, claim a right of printing these copies; but *not* as the *authors*, *compilers* or *purchasers*; but merely as the *printers* of these books, under a *patent from the crown*.

The present claim is totally different from that of a grant from the crown. Here it is argued, "that authors "have a *perpetual* right to their *own* copies." In that case of *Partridge*, he was injoined from printing an Almanac of his own compiling.

The grand argument that was drawn from these injunctions is this—"that there are certain books, such "as the Bible, Common-prayer Book, acts of parliament, "and the like, which are usually called *prerogative* "copies, which the *crown has the sole right* of publish- "ing: and *if* the *King* may have a *legal property in* "*these*, there is no reason why private authors may not "claim a *sole right* in their *own compositions*."

"That there *is* such a right in the crown," is undoubtedly true. But this is *confined* to compositions of a *particular* nature; and to me seems to stand upon principles entirely *different* from the claim of an author. It
[2382] is *not* from any pretence of *dominion over printing*, that this *prerogative right* is derived: for, the crown has certainly *no* right of control over the press. But it is to *particular* copies that this right does extend: and as *no other* person is permitted to publish them, without *authority* from the crown, the King is said to have a *property* in them.

This kind of property has always the additional distinction of *prerogative* property. The right is grounded upon *another foundation*; and is founded on a distinction that cannot exist in common property, and in the case of a subject.

The books are Bibles, Common-prayer Books, and all extracts from them, (such as Primers, Psalters, Psalms,) and Almanacs. Those have relation to the national religion, or government, or the political constitution. Other compositions to which the King's right of publication extends, are the Statutes, acts of parliament, and State-papers. The King's right to all these is, as head of the church, and of the political constitution.

In the case of *the Company of Stationers* v. *Lee and others*, which is reported in 2 *Shower* 258, it is urged that, as the King is the head of the church, he has a particular prerogative in printing of Primers, Psalters,

Psalms, &c.; and in restraining and licensing prognostications of all sorts.

In the case of *the Stationers Company* v. *Wright*, (which was for importing, and printing Psalms, Psalters and Almanacs,) the words of the injunction are these—"this court, in respect to the well and true printing of "Psalms, Psalters and Almanacs, as it is of great concern "to the public, and of great danger to have these books "printed in a foreign nation, by any besides the patentees and their assigns, &c."—And therefore an injunction was granted.

In the case of *the Stationers Company* v. *Partridge*, the company grounded their plea on a right from the crown, being licensed by the Archbishop of *Canterbury*, for printing Almanacs.

In the case of *the Stationers Company* v. *Seymour*, the court assigned these reasons—* "that there was no difference in any material part, between that Almanac of "*Gadbury's*, and that that is put in the rubric of the "Common-prayer Books." They said, "the latter was "first settled by the *Nicene* council; is established by "the canons of the church; and is under the government of the Archbishop of *Canterbury*: so that Almanacs may be accounted *prerogative* copies."

* V. 1 Mod. 257.

And in a subsequent part of their opinion, the Court observed,† "that since printing has been invented, and "is become a common trade, matters of state and things "that concern the government were never left to any "man's liberty to print, that would."

† V. 1 Mod. 258.

The case of the Company of Stationers, 2d Chancery Cases 76, and again in page 93 of the same book, was this——The company had a patent for printing the Statutes. The defendant had some books of the Statutes printed at *Amsterdam*, and imported them. The Lord Chancellor determined that printing the laws was a matter of state, and concerned the state. But as for the Whole Duty of Man and such like books, the Lord Chancellor left them to the ordinary course. It is asserted in page 93, "that the defendant was not suffered "to print these books, because it was of great and public consequence for strangers to print and vend in *England*, our statutes and laws, if falsely done."

In the case of *Millar* v. *Donaldson*, which was before Lord *Northington* in 1765,‡ his lordship observed, "that "in the cases which had been determined in favour of "the Stationers Company, the Court went upon the letters patent."

‡ V. ante, p. 2327.

Upon the whole of this prerogative claim of the crown, it appears to me, that the right of the crown to the sole

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and exclusive printing of what is called *prerogative* copies, is founded on reasons of religion or of state. The only consequences to which they tend are of a national and public concern, respecting the established religion, or government of the kingdom; and have no analogy to the case of *private authors*. There is no instance of the crown's intermeddling with, or pretending any such right in private compositions.

It is necessary in all these claims, that uniformity and order be duly observed; and the subject informed with precision, how to regulate his conduct.

The King has ecclesiastical jurisdiction: and power is given to him over these publications, that no confusion may be introduced by such as are false and improper.

And as *printing* has, since the invention of that art, been the general *mode of conveying* these publications, the King has alway *appointed his printer*. This is a right which is inseparably annexed to the *King*'s Office: But no such right is annexed to the situation of any *private* author. The King does not derive this right from labour, or composition, or any one circumstance attending the case of *authors*.

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It is mentioned as one ground of the King's right to print them, "that some of these prerogative books were "composed at *his expence*." But in fact, it is no private disbursement of the *King*, but done at the *public* charge, and part of the expences of *government*. It can hardly be contended, that the produce of expences of a *public* sort are the *private property* of the *King*, when purchased with public money. He cannot *sell* nor *dispose of* one of those compositions. How, then, can they be his *private property*, like the private property claimed by an author in his own compositions?

The place or employment of *King's printer* is properly an *office*: it was formerly granted by *that name*, with a fee annexed to it; and the person appointed to it, *sworn into the office*.

From these authorities, therefore, I say, it seems to me, that the *King's* property in these particular compositions called prerogative copies stands upon *different* principles than that of an *author*; and therefore will *not apply* to the case of an author.

Now as the plaintiff contends "that this supposed "copy-right is what he is by *common law* intitled to," let us examine what *species* of property it is. What *class* of property does it fall within?

It cannot be contended, "that it is *real* or descendible "estate." If it falls within any class of property at all,

it must be that species of property which the law calls *chattels*.

But all chattel-property consists of goods, and debts or contracts. Now this right cannot be contended for, as a *debt*. The defendant, or the public, are *not debtors* to the plaintiff. Nor can it be claimed as a *contract*: the defendant never entered into any *stipulation* about it.

As, then, it cannot be claimed as any species of *inheritance*, nor yet as a *debt*, or *matter of contract*; there is *but one* class more of property, under which it can be reckoned: and *that* is GOODS.

But *goods* must be capable of *possession*; and must, of course, have some *visible substance*: for, nothing but what has visible substance, is *capable* of actual *possession*.

The author's *unpublished manuscript* will indeed very properly fall under *this* class of property; because, *that* is *corporeal*. But *after publication* of it, the *mere intellectual ideas* are totally *incorporeal*; and therefore *incapable* of any *distinct separate possession*: they can neither be seized, or forfeited, or possessed. If they could be matter of *property*, they must be *subject* to the *same* several changes of possession, as property is subject to; the *same* charges, seizures and forfeitures; the *same* circumstances to which *all other* chattels are *liable*.

Can the sentiments themselves (apart from the paper on which they are contained) be taken in *execution* for a debt? Or if the author commits treason, or felony, or is outlawed, can the ideas be forfeited? Can *sentiments* be *seized*; or by any kind of act whatsoever, be *vested in the crown*? IF they can not be *seized*, the *sole right of publishing* them can not be *confined* to the author: for, the ideas of *forfeitures* must *ever attend* the ideas of *property*.

How strange and singular must this extraordinary kind of property be; which can not be visibly possessed, forfeited, or seized; nor is susceptible of any external injury, nor (consequently) of any specific, or possible remedy!

But it was said, "that this is a kind of *special* right "to a *particular* interest, to a *particular* privilege."

Now, by the laws of *England*, there can be no special right, no particular interest or privilege whatever, of *perpetual duration*, but such as have respect to some kind of *inheritance*. Nothing but an *inheritance* can support a perpetual subsisting right. All *personal* property is total and absolute; susceptible of no collateral right, or partial interest; excepting for a time, as in the case of a loan, or the like.

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And here, *another reason* occurs, why the right now claimed can have no existence in the *common law of England:* and that is, that the whole of this right, in its utmost extent, is a *mere right of action*; a right of bringing an *action* against those that print the author's work without his consent. And this action is merely vindictive: it is *in personam*; *not in Rem.*

Now there is no maxim in our law more clear and plain than this, "that *things in actions* are *not assignable.*"

The law is too tenacious of private peace, to suffer litigations to be *negotiable.* And yet the *present action* is *founded* on the *assignment* of such a right to sue. This is the right which the author has assigned to the purchaser of the copy, the present plaintiff; and upon which assignment, he brings this action *in personam.*

The *legislature* indeed may *make a new* right. The Statute of Queen *Ann* has vested a *new* right in authors, for a *limited* time: and *whilst* that right exists, they will be established in the possession of their property.

But we are now considering a question at *common* law: and at *common* law, even *debts* are not assignable so as to enable the assignee to bring an action in his *own* name. However, the present action is a tort only: and no tort is assignable, in law or equity. It is not within *any* species of action at *common* law.

It seems to me, that this claim will not fall within any one known kind of property at *common* law; and can not, therefore, be a common-law right.

The whole claim that an *author* can *really* make, is on the *public benevolence*, by way of encouragement; but *not* as an absolute *coercive right.* His case is exactly similar to that of an *inventor of a new mechanical machine:* it is the right of every purchaser of the instrument, to make what use of it he pleases. It is, indeed, in the power of the crown to grant him a provision for a limited time: but if the inventor has no patent for it, every one may make it, and sell it.

Let us consider, a little, the case of *mechanical inventions.*

Both original inventions stand upon the *same* footing, in point of *property*; whether the case be *mechanical*, or *literary;* whether it be an *Epic Poem*, or an *Orrery.* The inventor of the one, as well as the author of the other, has a right to determine "whether the world "shall see it or not:" and if the inventor of the machine chooses to make a property of it, by selling the invention to an instrument-maker, the invention will procure

him benefit. But when the invention is once made known to the world, it is laid open; it is become a gift to the public: every purchaser has a right to make what use of it he pleases. If the inventor has no patent, any person whatever may *copy* the invention, and *sell* it. Yet every reason that can be urged for the invention of an author may be urged with equal strength and force, for the inventor of a machine. The very same arguments "of having a right to his own productions," and all others, will hold *equally*, in both cases: and the *immorality* of pirating another man's *invention* is full as great, as that of purloining his *ideas*. And the purchaser of a book and of a mechanical invention has exactly the same mode of acquisition: and therefore the *jus fruendi* ought to be exactly the same.

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Mr. *Harrison* (whom I mentioned before) employed at least as much *time* and *labour* and *study* upon his time-keeper as Mr. *Thomson* could do in writing his *Seasons:* for, in planning that machine, all the faculties of the mind must be fully exerted. And as far as *value* is a mark of property, Mr. *Harrison's* time-piece is, surely, as *valuable in itself*, as Mr. *Thomson's Seasons*.

So the other arguments will equally apply. The inventors of the mechanism may as plausibly insist, "that "in publishing their invention, they gave nothing more "to the public than merely the *use* of their machines;" "that the inventor has a *sole right of selling* the ma-"chines he invented;" and "that the purchaser has *no* "right to *multiply* or *sell* any copies." He may argue, "that though he is not able to bring back the *principles* "to his own sole possession, yet the property of *selling* "the machines justly belongs to the original inventor."

Yet with all these arguments, it is well known, *no such* property can *exist*, after the invention is *published*.

From hence it is plain, that the *mere labour and study* of the inventor, how intense and ingenious soever it may be, will establish *no property* in the invention, will establish no right to *exclude others* from making the same instrument, when once the inventor shall have published it.

On what ground then can an *author* claim this right? How comes *his* right to be superior to that of the ingenious inventor of a new and useful mechanical instrument? Especially, when we consider this island as the seat of commerce, and not much addicted to literature in ancient days; and therefore can hardly suppose that our laws give a higher right or more permanent property to the

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author of a book, than to the inventor of a new and useful machine.

Improvement in learning was no part of the thoughts or attention of our ancestors. The invention of an author is a species of property *unknown* to the common law of *England*. Its usages are *immemorial*: and the views of it tend to the benefit and advantage of the public with respect to the necessaries of life, and not to the improvement and graces of the mind. The latter therefore, could be no part of the ancient common law of *England*.

When the genius of the nation took a more liberal turn, and learning had gained an establishment among Us, it was then the office of the *legislature*, to make such provisions for its encouragement, as to them should seem proper. And accordingly they *have* done so, by the Statute of * Queen *Ann*; which Lord *Hardwicke* is said to have stiled (in the case of *Midwinter et al.* v. *The Scotch Booksellers*) "an *universal patent* for authors."

* 8 Ann. c. 19.

Let us look, then, into that Act of parliament; and see if we can not find in it, more authentic declarations of the law concerning this right, than in the charters and by-laws of the Stationers Company; the proclamations and patents of the crown; the decrees of the Star-Chamber; the ordinances made during the usurpation; or the licensing Act of *C. 2.* This Statute of Queen *Ann* was made by a legal and regular authority, without any mixture of political views.

The counsel for the plaintiff were aware how decisive this Statute was against them: and therefore they endeavoured to preclude all arguments from it. They urged the saving clause, in the 9th section, "That nothing in "that Act shall extend to any right that the Universities "*or any persons* have in any book already printed, or "after to be printed."

But this saving clause seems to me to have no view at all to any *general* question of law, or to any *general* claim. It is not meant as a saving of any right or claim which *authors* might have at *common* law. That would have rendered the whole Act of Parliament of no effect at all, and defeated the very end for which it was made. It is only pointed at the printing and reprinting of *particular* books.

The design of the Statute was to vest a *temporary* copy-right in authors, and to establish *that* right for a limited time. But if it had said, after all, that it should not have any effect *at all* upon the possessions of authors, what a laborious nullity would it be! the proviso is, that

the act should not confirm or prejudice any particular claim. It don't relate to *authors*; but to the university privileges of printing.

The university will hardly be considered as an author. But the universities had the privilege of printing and reprinting particular books, of which there were several sorts, (as Bibles, Common-prayer, and Law-books;) and the University of *Cambridge*, a more general licence: and as some of these patents might be *disputable*, (as we have lately seen in the case of *Baskett* v. *The University of Cambridge*,) and the *patent*-rights stood on a different foundation from that of the *copy-rights vested in authors*; it was a proper provision, "that this Act should *not affect* "these *particular* claims; nor either *establish* or *abridge* "the duration of *patents*."

So, in one of the ordinances of the parliament for laying a restriction on printing, there is a like proviso, "That that ordinance and one made in 1642, should not "extend to infringe the just privileges of the printers of "the two Universities."

So in the Statute of *J.* 1. * against monopolies, there is a clause, "that it shall not extend to any patents or "grants of privilege of for or concerning printing;" that is, that such patents or grants should neither be prejudiced nor confirmed by that Statute.

* 21 J. 1. c. 3 § 10.

It was said, "that this Statute of Queen *Ann* was "merely *declaratory of a common law-right*; and that it "was *accumulative*, and only introduced some *additional* "remedies."

But to me, from the *title* quite to the end of this Act, it seems very clearly to be a plain declaration "that *no* "such right exists at common law." The Act seems to me, manifestly designed to *vest* the property in the author and publisher *during the time* limited and prescribed by it. The design seems plainly and professedly to be, to give *encouragement* to learning by some *new* advantage; namely, by *vesting* the copy in the author and publisher during a certain time. The title is, "an "act for the encouragement of learning, by *vesting* the "copies of printed books in the *authors* or *purchasers* of "such copies, *during* the time therein mentioned:" and by the enacting clause, there is a right given in those already printed, for twenty-one years *from* the 10th of *April* 1710.

Does not this plainly imply, that they had *no* such right *before* the 10th of *April* 1710? How can it be said, "that this Act *vested* that right," if they had the *same* right *before*, by *common* law? Why should the enacting clause particularly provide that after the 10th *April* 1710,

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the author or publisher should have the sole right of printing for twenty-one years and no longer, books then in print; and for fourteen years and no longer, books then composed but not printed; if they had it *before?* *This plainly implies that they had *no such right before* 10*th of April* 1710. There is not one clause, one expression, throughout the whole Act, that hints at a prior exclusive right in authors to an *eternal* monopoly. The monopoly is particularly limited to a certain number of years, and that it shall continue no longer. The only prolongation that is given, is, that if the author shall be alive after fourteen years, the privilege shall recur to him for another fourteen years. But both these terms are *created* by the act; and both of them *limited* to fourteen years.

* V. sect. 4. since repealed by 12 G. 2. c. 36. § 3.)

This Statute also provided * for limiting and settling the *price* of books. But if authors had a sole right to their copies for ever, what *encouragement* would they receive from this provision? it would be a strange sort of *encouragement;* to *abridge* an actual right before subsisting in them; to *deprive* them of the natural right (which every other person has) of fixing the *price* of the goods he sells; and to subject the value of their *property* to the regulation of *others*.

The penalty does not seem much calculated for the encouragement of the author. For, the books are to be forthwith damasked, and made waste-paper of; and the forfeiture is to go, one half to the king; the other, to the informer; but no part of it to the author.

Were *these* the encouragements which authors were so anxious to obtain? So little do they regard them, that we scarce ever hear of an instance of their resorting to those penalties.

How then can we consider this Act, but as *vesting in Authors a property* in their works, which they *had not before?*

After examining the several clauses and expressions contained in it, I can not but conclude that the legislature had no notion of any such things as copy-rights, as existing for ever at common law: but that, on the contrary, they understood that authors could have *no* right in their copies *after* they had made their works *public*; and meant to *give* them a security which they supposed them *not* to have had before. And that this was the idea of the legislature, is plainly discoverable from the debate before it passed into a law.

The booksellers petitioned, "that they might have "their right *secured* to them." The committee *expunged* that word; and substituted "*vesting*," in the place of

"*securing*," (as it had stood in the original bill:) and the house determined the title * should be "for the encouragement of learning, by *vesting* the "copies of printed books in the authors or purchas- "ers of such copies, during the times therein men- "tioned." And afterwards, when the lords would have struck out the clause restraining the authors with regard to the price, they came to a conference. The Commons said, they thought it reasonable that some provision should be made, "that extravagant prices "should not be set on useful books." And the lords gave it up. It certainly appeared to the legislature, that abstractedly from this Statute, authors had *no exclusive right whatever*; and consequently, must be very far from having any pretensions to an eternal monopoly: but that, as the Act *gave* them a *temporary* monopoly for a limited time, it might be reasonable to make the provisions and restrictions contained in it; and they would then have a proper operation. But if this Act of Parliament was *merely a recognition* of a *common*-law right, every person who had such a common-law right might wave the benefit of the Act: and then the restrictions in it would have no operation, as to *them*.

Upon the whole, it seems evident to me, that this claim cannot possibly be maintained on either of the grounds on which it was argued. That, far from being *warranted* by the *general* principles of property, every one of those principles are flatly *against* it. That it cannot be a part of the *common* law of *England*; the existence whereof is *immemorial*, and long *antecedent* to every circumstance of *literary claim*.

I should have here closed what I had to say; and am indeed ashamed to have taken up so much time. But the singularity of my opinion may seem to require some apology, as I have the misfortune to be *alone* in it. I can safely say, that, be it ever so erroneous, it is my *sincere* opinion. The *grounds* on which I have formed it must be judged of, by *others*: to *me*, they appear sufficient.

As the counsel for the plaintiff have urged the unfavourableness of it to men of learning, I will add a few words upon *that* topic; and also upon the inconvenient *consequences* the public may feel, in case the plaintiff's claim should be *established*.

It was argued, "that this allowance of a perpetual "exclusive right to authors would *encourage publica-* "*tions*, and be of use for the *explaining and cultivating* "of learning and science."

It is of use, certainly, that learning and science, and

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all valuable improvements should be encouraged, and every man's labour properly rewarded. But every reward has its proper * bounds: and an entire monopoly for fourteen, or if the author remains alive, for twenty-eight years, seems encouragement enough for his labours: at least, the legislature have thought it sufficient encouragement to them; and have expressly declared "they "shall have it *no longer*." And have *we* power to *control* that authority; and to say, in direct *opposition* to the statute, "that they *shall* have it longer?—that they "shall have it *for ever?*" If the encouragement which the *legislature* has given will not satisfy authors, it is not *our* province to extend it further. But I can never entertain so disgraceful an opinion of learned men, as to imagine the profits of publication for twenty-eight years will *not* content them. I will not believe, "that nothing "will induce them to write, but an *absolute perpetual* "*monopoly*;" "that they have *no benevolence* to mankind; *no honourable ambition of fame; no incentive* to "communicate their knowledge to others, but the most "*avaricious and mercenary* motives." From authors so very *illiberal*, the public could hardly expect to receive much benefit.

On the other hand, let us look to the consequences of *establishing* this claim. Instead of tending to the advancement and the propagation of literature, I think it would *stop* it; or at least, might be attended with great disadvantages to it.

* In Donaldson's case.

It was a just observation of Lord *Northington*,* "that "it might be *dangerous* to vest an *exclusive property* in "authors. For, as that would give them the *sole* right "to *publish*, it would also give them a right to *suppress*: "and then those booksellers who are possessed of the "works of the best of our authors, might *totally suppress* "them." The public have *no tie* upon authors or booksellers, to *oblige* them to keep a *sufficient number* of copies printed.

It was said, "that *if* the authors or booksellers did "*not* take care to print a sufficient number of copies, it "would be *abandoning the copy*."

To me, however, such *abandoning of a copy* in a species of property like this, seems impossible. For, if there is any abandoning the property at all, it must be upon *this foundation*, "that no man has a right to publish the *sen*-"*timents* of an author without his consent:" and it is in that light alone, that an author can claim the *sole* right of publication. Now, suppose an author should drop all design of making further gains to himself, and discontinue the publication; he may insist "the *sentiments are his*,

" and no other person shall publish " *his own thoughts* " without his consent; and that notwithstanding he has " published them once, he does not choose they * should " be published any further." And in *that* light, what colour will there be for *extorting* his consent, under the idea of an *abandonment?*

But admitting this extraordinary proposition " that " an author *may abandon the future profits* of publica- " tion;" (that is, may abandon what he was *never pos-* " *sessed of;*) we should still find, the public would be " laid under *difficulties*, and would be liable to *disagree- able consequences*. It must rest on circumstances capable, not only of erroneous, but arbitrary interpretations. This must produce confusion and danger. What a hazard must every man risque, who ventures from mere argumentative circumstances to *infer an abandonment;* and under that idea, proceeds to publish! Whatever conclusions he may have formed to *himself*, he knows not what light it may appear in to *others;* and, after an expensive litigation about it, may find it at last determined against him.

But besides these difficulties—supposing the author should *continue* the publication, and *print a sufficient number* of copies; but should fix such an *exorbitant price* upon his books, as to lock the work up from the general bulk of mankind; yet it cannot be said " he " had *abandoned* his property." In this case, all the learning and all the advantage would be *confined to a few;* and yet the public has no remedy against it; and *no other* person must presume to publish this work.

The *legislature* were aware of this; and therefore established an authority in proper persons, by the statute of Queen *Ann*,* to *limit and settle the price* of books. But if authors and their assignees were to be allowed a *sole* right of publishing, as being out of the act, and having a distinct and exclusive right still remaining in them, that provision would be totally *nugatory;* and it would be still in the power of a bookseller to set an extravagant price on useful books.

* Vide § 4.

Can this *exclusive* right of publication, this monopoly which claims an entire dominion over it, and puts an absolute *prohibition* on every *other* person, be deemed an encouragement to learning, and to tend to the advancement and propagation of it?

There is *another* light too, in which the consequences of this claim may be highly injurious to the public: and that is the *restraints* it will lay upon the natural rights of mankind in the exercise of their trade and calling.

It is every man's natural right, to follow a lawful em-

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ployment for the support of himself and his family. Printing and * bookselling are lawful employments. And therefore every monopoly that would intrench upon these lawful employments is a restraint upon the liberty of the subject. And if the printing and selling of every book that comes out, may be *confined to a few*, and *for ever with-held* from all the *rest* of the trade; what provision will the *bulk* of them be able to make for their respective families?

There is yet *another mischief* that results from this claim; the door it will open for *perpetual litigations*.

I have before * observed the dangerous snares which this *ideal property* will lay, as it carries *no proprietary marks* in itself; and is not bound down to any formal *stipulations*. So *obscure* a property, (especially after the work has been a long while published) might lead many booksellers into many *litigations*: and in such litigations, many doubtful questions might arise; such as—"whether "the author of the work did not *intend it as a gift* to "the public"—"whether, *since that*, he has not *aban-* "*doned* it to the public"—"and at *what time*."——disputes also might arise *among authors themselves*—"whether the works of *one* author were or were not the *same* "with those of *another* author; or whether there were "only *colourable* differences:"—(a question that would be liable to great uncertainties and doubts.) So, "whether those who should compile notes on a publication, "and should insert the text, should be liable to an action "for it:" or if the notes were good, the author might refuse the publication of them.†

I wish as sincerely as any man, that learned men may have all the encouragements, and all the advantages that are consistent with the general right and good of mankind. But *if* the monopoly now claimed be *contrary* to the *great laws of property*, and totally *unknown to the ancient and common law of England: if* the establishing of this claim will directly *contradict the legislative authority*, and *introduce* a *species* of property *contrary* to the end for which the whole system of property was established; *if it* will tend to *embroil the peace* of society, with frequent contentions;—(contentions most highly disfiguring the face of literature, and highly disgusting to a liberal mind;) *if* it will hinder or suppress the advancement of learning and knowledge; and lastly, *if* it should *strip the subject of his natural right; if*, these, or *any* of these mischiefs would follow; I can never concur in establishing such a claim.

THE LEGISLATURE have provided the proper encouragements for authors; and, at the same time, have

* Vide ante, p. 2361, 2362.

† Qu. of this part. For, here, I was out of Court a few minutes.

guarded against all these mischiefs. To give that legislative encouragement a *liberal* * *construction*, is my *duty* as a judge; and will ever be my *own* most willing *inclination*. But it is *equally* my duty, not only as a *judge*, but as a *member of society*, and even as a *friend to the cause of learning*, to *support the limitations of the statute*.

I shall therefore conclude, in the words of the act of parliament, "that the author or purchaser of the copy, "shall have the sole right for the *particular term* which "the statute has granted and limited; *but* NO LONGER:" and consequently, that the plaintiff, who claims a *perpetual and unbounded monopoly*, has NO LEGAL RIGHT *to recover*.

LORD MANSFIELD (not intending to go into the argument) said———

THIS is the first instance of a *final* difference of opinion in this court, since I sat here. Every order, rule, judgment, and opinion, has *hitherto been unanimous*.

That † unanimity never could have happened, if we did not among ourselves communicate our sentiments with great freedom; if we did not form our judgments without any prepossession to first thoughts; if we were not always open to conviction, and ready to yield to each other's reasons.

† Except in *this*, and *one other* Case now depending (by writ of error) in the House of Lords, where Mr. Justice YATES differed from the other three, every rule, order, judgment, and opinion, has, to this day, been (as far as I can recollect) unanimous. This gives weight and dispatch to the decisions, certainty to the law, and infinite satisfaction to the suitors: and the effect is seen by that immense business which flows from all parts, into this channel; and which we who have long known Westminster Hall, behold with astonishment; the rather, as during this period, all the other Courts have been filled with Judges of unquestionable integrity, eminent talents, and distinguished abilities.

We have all equally endeavoured at that unanimity, upon this occasion: we have *talked* the matter over, several times. I have communicated my thoughts at large, *in writing*: and I have *read* the three arguments which have been now delivered. In short, we have *equally tried* to convince, *or* be convinced: but, in vain. We *continue to differ*. And whoever is right, *each* is bound to abide by and deliver *that* opinion which he has formed upon the fullest examination.

His LORDSHIP observed, that *to repeat* the two first arguments, or go over the same topics again, would be idle and nugatory, when he had already declared "that "he read, approved, and previously concurred in them:" and to be particular in opposing or answering the several parts of the last argument (though he differed from the conclusions of it,) would be indecent, and look too much like altercation.

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* He therefore only desired to *refer* to the two first arguments, *without* actually repeating them; and that he might be understood as if he had spoken the substance of them, and fully adopted them. After which, he expressed himself to the following effect.

From premisses either expressly admitted, or which cannot and therefore never have been denied, conclusions follow, in my apprehension, *decisive* upon all the objections raised to the *property* of an author, in the *copy of his own work*, by the *common law*.

I use the word "Copy," in the *technical* sense in which that name or term has been used for ages, to signify an *incorporeal right* to the *sole* printing and publishing of somewhat intellectual, communicated by letters.

1st. Admission. It has all along been expressly admitted, "that, by "the *common law*, an author is intitled to the copy of his "own work *until* it has been once printed and published "by his authority;" and "that the four cases in Chan-"cery, cited for that purpose, are *agreeable to the com-*"*mon law;* and the relief was *properly* given, in conse-"quence of the legal right."

The property in the copy, *thus abridged*, is *equally* an incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression. It is *equally* detached from the manuscript, or any other *physical* existence whatsoever.

The property thus abridged is *equally* incapable of being violated by a crime *indictable*. In like manner, it can only be violated by another's printing without the author's consent: which is a *civil* injury.

The only *remedy* is the same; by an action upon the case, for damages, or a bill in equity for a specific relief.

No action of *detinue*, *trover*, or *trespass quare vi et armis*, can lie; because the *copy thus abridged* is *equally* a property in *notion*, and has *no corporeal tangible* substance.

No *disposition*, no *transfer* of *paper* upon which the composition is written, marked, or impressed, (though it gives the *power* to print and publish,) can be construed a *conveyance of the copy*, without the author's express *consent* "*to print and publish;*" much less, *against* his will.

[2397] The property of the copy, *thus narrowed*, may *equally* go down from generation to generation, and possibly continue for ever; though neither the author nor his representatives should have any manuscript whatsoever of the work, original duplicate, or transcript.

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Mr. *Gwynn* was intitled, undoubtedly, to the *paper* of the transcript of Lord *Clarendon*'s History : which gave him the *power* to print and publish it, after the fire at *Petersham*, which destroyed one original. This *might* have been the *only* manuscript of it in being. Mr. *Gwynn* might have throwu it into the fire, had he pleased. But, at the distance of near a hundred years, the *copy* was adjudged the property of Lord *Clarendon*'s representatives; and Mr. *Gwynn*'s printing and publishing it, *without their consent*, was adjudged an *injury to that property*; for which, in different shapes, he paid very dear.

Dean Swift was certainly proprietor of the *paper* upon which *Pope*'s Letters to him were written. I know, Mr. *Pope* had *no* paper upon which they were written; and a very imperfect memory of their contents : which made him the more anxious to stop their publication—; knowing that the printer had got them.

If the copy belongs to an author, *after* publication; it certainly belonged to him, before. But if it does not belong to him after; where is the common law to be found, which says "there is such a property before?" all the metaphysical subtilties from the nature of the thing may be *equally* objected to the property before. It is *incorporeal :* it relates to ideas detached from any *physical* existence. There are *no indicia* : another may have had the same thoughts upon the same subject, and expressed them in the same language *verbatim*. At what time, and by what act does the property commence? the same string of questions may be asked, upon the copy before publication : is it *real* or *personal?* does it go to the heir or to the *executor?* being a right which can only be defended by action, is it, as a chose in action, *assignable*, or not? can it be *forfeited?* can it be taken in *execution?* can it be *vested in the assignees* under a commission of bankruptcy?

The common law, as to the copy before publication, can not be found in custom.

Before 1732, the case of a piracy *before* publication never existed : it never was put, or supposed. There is not a syllable about it to be met with any where. The regulations, the ordinances, the Acts of parliament, the cases in *Westminster-Hall*, all relate to the copy of books *after* publication by the authors.

Since 1732, there is not a word to be traced about it; except, from the four cases in chancery.

Besides, if all *England* had allowed this property two or three hundred years, the same objection would hold, "that the usage is *not immemorial :*" for, printing was introduced in the reign of *Edw.* 4th, or *H.* 6th. *

[2398]

* See the note at the end of this case, as to the *particular time* when it was first introduced into this Kingdom.

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From what source, then, is the *common* law drawn, which is admitted to be so clear, in respect of the copy *before* publication?

From *this* argument——because it is *just*, that an author should reap the pecuniary profits of his own ingenuity and labour. It is *just*, that another should not use his name, without his consent. It is *fit*, that he should judge when to publish, or whether he ever will publish. It is *fit* he should not only choose the time, but the manner of publication; how many; what volume; what print. It is *fit*, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect.

I allow them *sufficient* to shew "it is agreeable to the "principles of right and wrong, the fitness of things, "convenience, and policy, and therefore to the common "law, to protect the copy *before* publication."

But the *same* reasons hold, *after* the author has published. He can reap no pecuniary profit, if, the next moment after his work comes out, it may be pirated upon worse paper and in worse print, and in a cheaper volume.

The 8th of Queen *Ann* is no answer. We are considering the *common* law, upon principles *before* and *independent* of that Act.

The author may not only be deprived of any *profit*, but *lose* the expence he has been at. He is no more master of the use of his own *name*. He has no control over the *correctness* of his own work. He can not *prevent additions*. He can not *retract errors*. He can not *amend*; or *cancel* a faulty edition. Any one may print, pirate, and perpetuate the *imperfections*, to the disgrace and against the will of the author; may propagate sentiments under his name, which he *disapproves*, *repents* and is *ashamed of*. He can exercise no discretion as to the *manner* in which, or the *persons* by whom his work shall be published.

[2399] For these and many more reasons, it seems to me just and fit, "to protect the copy *after* publication."

All objections which hold as much to the kind of property *before*, as to the kind of property *after* publication, go for nothing: they prove *too much*.

There is *no peculiar* objection to the property *after* except, "that the copy is *necessarily made common*, after "the book is once published."

Does a transfer of paper upon which it is *printed*, necessarily transfer the copy, more than the transfer of paper upon which the book is *written*?