larceny; at worſt, in a very few, the moſt aggravated and capital crime.—Who ſteals from common authors, ſteals traſh; but he who ſteals from a *Spencer*, a *Shakeſpeare*, or a *Milton*, ſteals the fire of heaven, and the moſt precious gifts of nature.—So we muſt have new ſtatutes to regulate thoſe literary felonies.

Let us puſh this analogy of the principle of property in other ſubjects a little farther. If the publication of a whole work is theft, to publiſh parts of it muſt alſo be theft; as a man is undeniable a thief who ſteals five guineas out of my purſe, in which there is twenty:—Quotation is therefore literary theft. I have always believed that the author of a book called the *Elements of Criticiſm* is an ingenious man, and a very honeſt gentleman; but in this view of the matter, he lies under a very criminal charge; every page of his book is enriched with quotations from the moſt claſſical poets and other authors.

The moſt perplexing difficulties would ariſe by the tranſmiſſion of this property from the dead to the living. By the principles of our law, a man's moveable eſtate is underſtood to lie in *bonis defuncti*, untill it is veſted in proper form in the perſon who is entitled to take that ſucceſſion. It ſounds oddly, that a man's ideas and his literary compoſitions ſhould lay in *bonis defuncti*. Shall learning and genius be veſted in an ideot by confirmation? But there are more ſerious inconveniences and incongruities from this perpetual ſucceſſion in literary property. By the law of Scotland, poſſeſſion of moveables preſumes property, and this property is unembarraſſed by any written titles; but the literary property muſt for ever be tranſmitted by titles in writing, and a perpetual progreſs of title-deeds will be neceſſary. Tho' land eſtates are ſecured by a proper title, and forty year's poſſeſſion, which cannot be applicable to this ſpecies of property; in the courſe of time, and various ſucceſſions, it muſt happen, that the property of books muſt be ſplit and divided among a vaſt and indefinite number of ſharers. No publication can be legally made without the concurrence of all the common proprietors; for it is an indiviſible property, and the inextricable inconveniences ariſing from this are apparent. As to the authorities from the law of England, I ſhall ſay little. We muſt judge from our own laws, and our own ideas of property. I cannot however think, that the injunctions in Chancery are to be conſidered as judgments upon the right. Conſiderations of equity in particular caſes may afford ſufficient ground for a temporary injunction, without ſuppoſing a perpetual property. The ſtatute of Queen Anne, which no doubt extends to Scotland, is in my opinion, no foundation of a juſt argument on either ſide of the queſtion; for the ſaving clauſe expreſsly leaves the point of any ſeparate right

which authors may claim, entire and undetermined. Upon the whole, I am of opinion, that, by the common law of Scotland, authors have no property or perpetual right in their works after publication; and that it would neither be juſt nor expedient to allow it.

LORD COALSTON.

THIS is not a queſtion in which authors are much concerned; for whether their excluſive right of publication is ſuppoſed to be perpetual, or temporary to ſubſiſt for the ſpace of twenty-eight years, will make no great difference as to the extent of the price which will be paid to the author.

But though the queſtion is of no great importance to authors, yet it is a queſtion in which the bookſellers of London, on the one ſide, and the whole ſubjects of this country in general, and more particularly all the other bookſellers in Britain, on the other ſide, are deeply concerned: for if the purſuer ſhall prevail in this queſtion, the plain conſequence will be, to eſtabliſh a perpetual monopoly in favour of the bookſellers of London, not only over moſt of the valuable books which have been hitherto publiſhed in this kingdom, but alſo over all books which may be publiſhed in time coming.

The general queſtion is, Whether, after a voluntary publication of an author's works by himſelf, or by his authority, the author has, at common law, a ſole and perpetual property in that work, ſo as to give him a right to confine every ſubſequent publication to himſelf and his aſſigns for ever?

It is ſingular that this, though ſuppoſed to be a common-law right, has not been acknowledged in any country except England; and even there it appears to have been only a modern invention, always diſputed, and never ſettled, till a late deciſion in the Court of King's Bench, which was not unanimous; and in another caſe which has ſince occurred in England, the point is now under appeal.

In theſe circumſtances, it is incumbent on the purſuers to eſtabliſh the principles in the law of nature, and common law of Scotland, on which their claim is founded.

The purſuer's plea is founded on this ſuppoſition, that an author has a perpetual *property* in the ſtile and ideas of his work. But I cannot admit this propoſition, as it is eſſential to *property*, that it ſhould relate to ſomething corporeal and tangible; whereas abſtract ideas are not corporeal, but purely ſpiritual and mental.

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There are other eſſential characteriſtics of poverty,—that it ſhould be deſcendible to heirs, affectable by creditors, and forfeitable for crimes; none of which can apply to abſtract ideas.

A queſtion has been put, At what period this property in authors is ſuppoſed to commence or attach?

Is it from the firſt conception, from the time they are reduced to writing, or from the time of the firſt publication? I do not ſee how an excluſive right, which is eſſential to the idea of *property*, can commence or attach at any of theſe periods; as the ſame ideas might have occurred to others, independant of the publication.

And as to what is ſaid, that the ſame ideas cannot occur to two different perſons:—I admit, in works of imagination that can ſcarcely happen.

But in intellectual works it is otherwiſe.

In mathematical works, the ideas and compoſition muſt be the ſame in every particular; and in moral works, it will as naturally and probably happen, that the ideas of different perſons, equally well informed, will be the ſame, although the ſtile and compoſition may be different.

Upon theſe principles, I do not think that abſtract ideas or ſentiments can be conſidered as objects of property; and this is the chief ground on which the purſuer's plea is ſuppoſed to ſtand.

I do indeed admit, that every man has full power over his own ideas, and may communicate them, or reduce them into writing or not, as he thinks proper; and after he has reduced them into writing, the copy is his full property, which he may diſpoſe of at pleaſure; it will fall under his executry, may be affected like any other *corpus* by his creditors; and if any perſon ſhould break into his repoſitories, and carry off the copy, it will be an act of felony, for which he may be puniſhed. As the author has the full right and property of his own manuſcript, he has, at common law, and independant of any ſtatute, the ſole right of publiſhing and ſelling it, and if any perſon, having wrongfully poſſeſſed himſelf of the copy, without the conſent of the proprietor, ſhould publiſh it, there can be no doubt, that at common law, he would be liable to an action of damages; and the conſequences of ſuch action would be, at leaſt, to oblige him to account for his profits. But after an author has once publiſhed his works, and reaped the benefit of the firſt edition, I can ſee nothing in the common law, that can hinder the purchaſer of any copy, to make what uſe of it he thinks proper. The neceſſary conſequence of publication is to make it common to all mankind; and whoever does any act deſignedly, muſt be preſumed to intend every neceſſary conſe-

quence of that act. If ſo, I ſee no foundation at common law, for holding the purchaſer of the copy as guilty of any tortious act, by making what uſe of his copy he thinks proper. If otherwiſe, I don't ſee where the line can be drawn: it might as well be pretended, that lending, or circulating are excluded. If indeed the author, at the time when he ſells his copy, ſhould make it a condition, that the purchaſer ſhould not communicate his copy, or publiſh new editions, the contravention of ſuch condition might be the foundation for an action of damages; but where the ſale is unconditional, and, more eſpecially, where a full price is paid by the purchaſer, I ſee nothing to hinder him to make what uſe of his copy he thinks proper.

It has been ſaid, that it is juſt that authors ſhould have the full benefit of any profit that may ariſe from the publication of their own works; and on this principle, I admit that the juſtice of the ſtatute which gives them this excluſive right for a limited term of years, may be well ſupported; but however equitable that may be, it has no tendency to prove that, at common law, authors had an excluſive right over their own works, after that, by their own act and deed, they had made them common. The right of a proprietor cannot extend beyond the duration of his property; and if an author is ſecured in the enjoyment of his property, according to its nature, he has no injuſtice done him.

It is highly juſt and proper, that the author of every new invention that is uſeful to the publick, ſhould reap the benefit of his own expence, genius and labour; and upon this principle, it is, that by ſpecial ſtatute an excluſive privilege is granted to engravers, and that the ſovereign is underſtood to have the prerogative of granting patents, with excluſive privileges, to the authors of all new inventions; but it has not been hitherto underſtood, that engravers, or the authors of ſuch new inventions had, at common law, any ſuch perpetual excluſive right, as is here contended for. If this is the caſe with regard to the authors of new inventions, I own, I am not quick-ſighted enough to diſcover any reaſon or argument of law which can diſtinguiſh between authors of books, and the other inventors of uſeful arts, who, by extreme application and genius, have made diſcoveries at leaſt, as beneficial to the publick as the works of moſt authors are: And it will naturally occur, how dangerous it would be, to adopt a doctrine which would eſtabliſh a perpetual monopoly in almoſt every art, where the firſt inventor could be diſcovered: and as I ſee no reaſon for diſtinguiſhing between the authors of books, and other uſeful diſcoveries, ſo, upon the ſuppoſition of a common-law right, I cannot diſtinguiſh between natives and ſtrangers; and if, in this caſe, we ſhall ſuſtain an ac-

tion at common law, at the inſtance of this purſuer, we ſhall be under the neceſſity of ſuſtaining the like action at the inſtance of Monſ. Voltaire or any other modern author on the Continent, who may with equal reaſon complain, that his common-law right has been violated and encroached upon by publications made of his works in this country without his conſent. There is real evidence that authors with us had no idea of this right at common law, as Lord Stair, and others of our authors, were in uſe of applying to the crown for patents, to enable them to publiſh their own works, and theſe limited to a term of years; which moſt certainly they would not have done, if they had imagined that they had in them a perpetual right at common law. And if any doubt remained with regard to this matter, it is effectually removed by the act of the 8th of Queen Anne. The title of that act bears to be " for VESTING " the copies of printed books in the authors" during the times therein mentioned; which was very proper on the ſuppoſition, that a temporary right was to be created; but utterly inconſiſtent with the idea of a perpetual right at common law.

And the ſtatutory part is ſtill more inconſiſtent with that idea, when it declares, " that authors ſhall have the ſole right of printing their works, for the " reſpective terms of fourteen and twenty-one years, and NO LONGER; which laſt words ſeem to have been inſerted for no other purpoſe, but to exclude the claim of perpetual right, now made by the purſurer.—Shall we then find, in direct contradiction to the terms of the ſtatute, that they ſhall have it LONGER, that they ſhall have it PERPETUALLY?

As to the deciſion given in the Court of King's Bench, which is the only concluſive argument brought from the law of England, that deciſion is a ſingle one, and has the leſs weight, as it was not unanimous; a very learned judge of that court having given a contrary opinion.—Which of theſe two different opinions were beſt founded, according to the law of that country, I cannot take upon me to determine:—But, however that may be, it cannot influence the deciſion in the preſent caſe, which muſt be determined, not according to the law of *England*, but by the law of *Scotland*; and, for the reaſons I have already given, I am clear, that, by the common law of *Scotland*, an author, after publication made by his own conſent, has no right of property, ſuch as can found him in action of damages againſt thoſe who may afterwards publiſh another edition of the ſame work. And, therefore, on the general principles I have mentioned, I am for aſſoilzieing the defenders. At the ſame time, ſuppoſing the general argument were with the purſuer, there is a ſpecial circumſtance in this caſe, which might go far to operate an abſolviture

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in favour of the defenders. It is averred by the defenders, and not denied by the purſuer, that the publication made by the defenders was not clandeſtinely made, but openly advertiſed, for a long courſe of time, in all the news-papers here, and by hand-bills at London; and that the work was afterwards publiſhed in numbers, at very diſtant intervals. In theſe circumſtances, the purſuer, who could not be ignorant of the intended publication, ought to have interpoſed to prevent the publication; and as he did not, it might naturally be preſumed, that he meant to abandon his right: which would be a ſeparate ground for aſſoilzieing the defender; or, at leaſt, it might be a ground for finding the purſuer barred *perſonali exceptione*, from inſiſting in the claim of damages he now makes againſt the defender.

LORD ALVA.

THE principles upon which I have endeavoured to fix my opinion in this cauſe, appear to me to be ſimple, and ſuch as may be communicated in a few words.

The myſtery of author-craft, which appears to be ſo conſiderable an object in the other part of this iſland, once a ſeparate kingdom, and ſtill entirely diſtinct and independent as to the laws relating to private property, ſeems to have taken its riſe from violent ſtretches of prerogative in the earlier periods of the ſtate, and to have increaſed by various acts of the crown, and ſome even of the legiſlature, in favour of the Stationers company and London bookſellers; and, laſtly, to have been confirmed by inveterate cuſtom, and various proceedings even of the ſupreme courts of judicature, ſo as to be held, by ſome of the greateſt lawyers, as part of the common law of that country: But, as common law, it can only operate within the proper juriſdiction of theſe courts, and can extend no farther, unleſs in ſo far as it may be extended in later ſtatutes, which from the coalition of the kingdoms have acquired a more extenſive power. As this plant took root and ſprung up in a climate where the influence of the Roman law was for many ages entirely diſclaimed by their lawyers, it is not ſurpriſing that it branched out into forms and modes very inconſiſtent with the principles and rules laid down in that law, and that it has in proceſs of time given occaſion to a dictionary, and a character, that will not ſubmit to the rules to be found in that grammar. But as we are not now judging within the limits where the common law of England takes place, we are called upon to enquire, if the ſpecies of property, endeavoured to be

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eſtabliſhed by the purſuer, can be ſupported on any other foundation; and particularly, how far it has any ſupport from the Roman law, which our ſtatute-book teaches us to acknowledge by the name of the common law of this ancient kingdom; in which the ideas of literary property do not ſeem to have been objects of attention in any conſiderable degree. Nevertheleſs, I am happy to find, that even in the Rudiments of my moſt early education, there are diſtinctions which lead me to a deciſion in this caſe. I find there *jures*, which are ſaid to be relative to *res incorporales*, and *dominium*, which is *jus in re corporali*: the firſt term of theſe I incline to tranſlate—*an intereſt*; and the ſecond, *a property*, in the ſenſe we generally uſe that word. I will acknowledge, that an author has an intereſt originally in the productions of his own brain, by which he is at liberty to publiſh or conceal them, as he thinks proper; and to make what conditions he chuſes on communicating them, either to individuals or the public. When he has committed them to writing, on paper, parchment, or any other material, he has then a *res corporalis*, which is a proper object for *dominium*, or property; and if he ſells, or otherwiſe alienates his MS. I think he therewith conveys his whole intereſt, in ſo far as it is not ſpecially reſerved: in that caſe, *literæ cedent chartæ*, as the picture would alſo *tabulæ*, if it was conveyed by the artiſt. Nor do I ſee any abſurdity in preſuming ſuch a conveyance, where the author or artiſt knowingly applies his knowledge and art to paper or canvas which is the property of others.—On theſe principles I muſt found my opinion, that, by the common law of this country, or any other country, where there is not a reſtriction upon natural liberty underſtood, either *tacito populi ſuffragio*, or by expreſs ſtatute, there is no antecedent property veſted in an author, or his heirs, or aſſigns, further than what relates to the *ipſum corpus* of the MS.: that this property, in ſo far as it exiſts, is merely a creature of civil ſociety and refined policy, and conſequently will go no further than it is expreſſly eſtabliſhed by cuſtom or ſtatute: but we have no cuſtom or common law for it here; and therefore it can go no farther with us than it is carried by the ſtatute; which I will gladly give force to, becauſe it goes as far as, I think, juſtice, and the encouragement of learning and induſtry, require. And I do not envy any other ſtate or country, where either common or ſtatute law may have carried it farther.

LORD

LORD PRESIDENT.

THE great attention which your Lordſhips have beſtowed on this cauſe, and the diſtinctneſs with which you have delivered your opinions, render it almoſt unneceſſary for me to add any thing. But I never chuſe to cover my opinion, when ſitting in this chair. Without farther preamble, I am of opinion with the majority of your lordſhips; though I will own, that I have had much difficulty, from the weight of the ſentiments of a learned judge, who preſides in the Court of King's Bench; for whoſe opinion, as well as for his perſon, I entertain the higheſt eſteem, and whom I have ever conſidered as one of the brighteſt ornaments of the law.

But I muſt not permit myſelf to be biaſſed by the moſt reſpectable authority, when, after the moſt mature deliberation, I have formed the opinion which I now deliver.

At the ſame time, after ſo accurate pleadings from the bar, and reaſonings amongſt your Lordſhips, I do not intend to treat the ſubject at length; but only to throw out a few hints which have convinced my mind.

The queſtion before your Lordſhips muſt be diveſted of an act of parliament,—of conſiderations of *commodum* and *incommodum*; and we muſt enquire, if, from the law of nature, and the law of Scotland, an author has, for him and his heirs for ever, a right to the ſole publication of his works?

A literary property is claimed.—Strange! that property ſhould lie concealed for ages, and no perſon ſtep forth to vindicate it.

We are told, that it is a combination of ideas, delineated in words.—Shall it be ſaid, that this invention differs from all others? The perfection of a machine does not conſiſt merely in putting pieces together; but in the genius, the deſign.

My brother obſerved, that if there is ſuch a thing as literary property, there muſt be a property in much nonſenſe. Indeed too many books are ſo now-a-days. Where then is the excellence of the invention of a book over that of a machine? And if there is no foundation for a claim to a perpetual excluſive right in the property of the machine, why ſhould there be one with reſpect to books?

I ſhall put a caſe.—Many gentlemen have publiſhed ſchemes of taxation. Shall not parliament be allowed to adopt any one of thoſe ſchemes, if it ſhall approve of it; or ſhall it be prevented from doing ſo, becauſe it is the right of the author?

I will

I will not run over what has been ſaid upon engraving. The ſame conſiderations apply there as in printing. We have even had books engraved. The act concerning engravers, which gives them the ſame privileges given to authors, makes it clear to me, that the legiſlature had no idea of literary property at common law.

If there had been ſuch a property, would the legiſlature have looked on for years, and ſeen it violated? The caſe which I allude to, is that of books printed abroad. This right of property then was *impune* violated, even after the act of Queen Anne, till the 12th of George II. for untill the laſt mentioned act was made, it was lawful for a man, who could not print in London, to ſtep over to Holland, print there, and then import the books to England. Is not this inconſiſtent with a common-law right? When we look at that ſtatute, where we ſhould have expected a narrative of the common-law right, had any ſuch been underſtood, not a ſingle idea of property is urged as a motive for preventing the importation of foreign editions.—No:—There is only a narrative of the revenue being defrauded of its ſtamp-duties: beſides, had there been ſuch a property, would not that act have been perpetual? whereas, we find that it is only temporary, though indeed it has been ſeveral times renewed.

But I go farther:—If there was really a property in the author, the law could not take it away from him; I maintain it on the great principles of property; yet that act ſays, that any perſon may re-print ſmall tracts, if bound in with others: this would be permitting a treſpaſs on property, if an author had a property in his compoſitions; and I muſt obſerve, that ſome of the beſt pieces I have ſeen, have conſiſted only of fifty or a hundred pages.

When theſe things are conſidered, it ſeems to me, very clear, that there is no common law right, and that the legiſlature only interferes to give a temporary right.

I will not run over my brother's arguments as to Bayes's method of making a thing his own, or as to tranſlation, which, however, do ſtrongly ſhew that a property in ideas is not underſtood. If a man publiſhes a book originally in Latin, and another ſhall tranſlate that book into Engliſh, the tranſlator will draw more profit than the author, becauſe, there are comparatively but few who read Latin.

Beſides, the ſpecialities, mentioned in the judgment of the Court of King's Bench, convince me, that this is a property of an extraordinary nature: I have no notion of a property of this kind. One of the circumſtances found by the jury, upon which that judgment proceeds, is, that a ſufficient number of co-

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pies was ready for ſale. If a book is my property, who ſhall force me to throw off more copies of it than I pleaſe? I may throw off only a hundred copies; I may wiſh to enhance the price, though indeed it cannot be higher than that of many of our new books; I may ſay I want to have it ſold as high as Doctor Hawkeſworth's book.

That it ſhould be maintained, that there is an expreſs contract between the purchaſer of a book and the author, that the purchaſer ſhall not multiply copies of it, ſeems to me ſtrange. The note upon a title page, mentioning that the book is printed for the author, means that that edition is printed for him.

If there is ſuch a right as this literary property, I deſire to know how it can be affected by creditors? My brother talked of confirmation; but I ſay if there is ſuch a right, it is heritable; for it has *tractum futuri temporis*, ſo it muſt be adjudged.

But it is not a property at common law; it is one of thoſe *jura imperfecta*, that an honeſt man will not violate; but it cannot be ſupported by a *rei vindicatio*.

Many inſtances could be given of ſuch imperfect rights as produce no action at law; yet, in juſtice and equity, may not improperly be called equitable or juſt claims.

Thus, a man in proſperity advances to his friend in diſtreſs a ſum of money; by the viciſſitude of human affairs the rich man becomes poor, and the poor man rich; upon every principle of equity, juſtice, or gratitude, ſurely the perſon who received the former's favours, ſhould now return them to his benefactor; yet there is no action at law that compels a man to gratitude.

An author who has given his ideas to the publick, may have done a good thing, for which the publick is indebted to him; but common law does not enforce the return that he ſhould receive, and therefore a reaſonable proviſion is made by ſtatute.

As to the law of England, I much doubt, if, even there, there is underſtood ſuch a right in authors as is here claimed. Where is the act of parliament, before the act of Queen Anne, that mentions an author?

All the acts of parliament, as well as all the decrees of the Star Chamber, are not in favour of authors, but of bookſellers.

During the courſe of the pleadings, one of my brethren ſeemed averſe to any reflections againſt the privy-council of Scotland. I will join with Mr. Rae on principles of liberty, for I think the privy-council and Star Chamber ſhould go together.

The act of Queen Anne I am bound to regard as part of the law of Scotland; and that, I think, is a ſtrong confirmation that there is no right of literary property at common law. The title went in, for *ſecuring*, it came out, for *veſting*. I could venture to ſay, that, if we could ſee the amendments, it would appear, that the word *ſecuring* ſtruck the houſe ſo ſtrongly, as inferring a common-law right, that they would not allow it: and I could alſo venture to ſay, that the words *no longer*, were thrown in from the jealouſy of the houſe as to this.

One of my brethren mentioned the *veſting act*, and ſeemed to think that it did not confer any right, but only ſecured what belonged to the crown *ipſo jure*; but there I differ from him.——By the law of England, the eſtates of traitors were not veſted in the crown without an office of inquiſition, and many other ſubtleties required by law.—To prevent critical objections that might ariſe from informality of proceedings, the ſtatute directly veſted the right to the eſtates in the crown, ſubject to the claim of all juſt and lawful creditors, particularly mentioned in the ſtatute.

Mr. Rae pleaded with great force, that the act of Queen Anne could not be meant to deſtroy an antecedent right. I grant it could not. But I think it is clear, that the clauſe of return in the act, that "if an author ſhall be alive "after the expiry of fourteen years, the ſole right of printing his book ſhall "return to him and his heirs *for other fourteen years*," is a proof that no previous right was underſtood to exiſt.

I am no author, and I hope in God never ſhall be.—I ſay this not out of any diſreſpect to any of thoſe gentlemen.—But I think authors are not much concerned in this queſtion.—I could ſet a jury of authors—with the greateſt hiſtorian of this place at their head—and call for their verdict, whether this perpetual right of literary property would be to their advantage or not; and I could venture to ſay, they would agree in thinking it of no moment.

If a great and laborious work ſhall be compoſed by any man, an act of parliament may be obtained for his having the ſole right of printing it for a term of long endurance. I do not at preſent remember an inſtance of ſuch an act being procured in the caſe of a book; but we all know that it has often been done in the caſe of machines, when the inventor has thought the term allowed by a patent too ſhort.

Upon the whole, I am of opinion that this action ſhould be diſmiſſed.

No more of their Lordſhips inclining to ſpeak upon the cauſe, the LORD PRESIDENT put the queſtion, *Suſtain* or *repel* the defences? and the vote ſtood thus:

For the PURSUER.	For the DEFENDERS.
LORD MONBODDO.	LORD JUSTICE CLERK,
	LORD KAMES,
	LORD AUCHINLECK,
	LORD ALVA,
	LORD COALSTON,
	LORD ELLIOCK,
	LORD STONEFIELD,
	LORD PITFOUR,
	LORD GARDENSTON,
	LORD KENNET,
	LORD HAILES.

N. B. The LORD PRESIDENT only votes when the Judges are equally divided. Lord STRICHEN and Lord ALEMORE were abſent.

The Interlocutor was in the following words:

Edinburgh, 28th *July*, 1773.

On report of the Lord Coalſton, and having adviſed the Informations *hinc inde*, and heard parties procurators in the cauſe, the Lords ſuſtain the defences, and aſſoilzie and decern.

(Signed) RO. DUNDAS, J. P. D.

FH
MVSEVM
BRITANNICVM