Jan. 2. 1773.

515. 8/5
2

[Lord COALSTON Reporter.]

INFORMATION

FOR

Meſſ. JOHN HINTON of London, Bookſeller, and ALEXANDER MACKONOCHIE, Writer in Edinburgh, his Attorney, Purſuers;

AGAINST

Meſſ. ALEXANDER DONALDSON and JOHN WOOD, Bookſellers in Edinburgh, and JAMES MEUROSE, Bookſeller in Kilmarnock, Defenders.

THE late Reverend MR THOMAS STACKHOUSE, Vicar of Beenham in Berkſhire, was a gentleman juſtly eminent for his learning and abilities as a writer. Amongſt many other valuable works publiſhed by him, his *Hiſtory of the Bible*, which was firſt printed in two volumes in folio, has been univerſally eſteemed, and had a prodigious ſale in every part of the Britiſh dominions.

THE firſt edition of that work was publiſhed by Mr Stackhouſe himſelf, on his own riſk, about the year 1738; and as it ſoon gained a high reputation, ſo the copy-right, or property of it,

even after the ſale of a large impreſſion for the author's benefit, became a ſubject of conſiderable value to him, and for which a bookſeller might afford to give a good price.

ACCORDINGLY, in the year 1740, a bargain was concluded between Mr Stackhouſe and the now deceaſed Stephen Auſtein of London, bookſeller, whereby Mr Stackhouſe agreed to transfer to Mr Auſtein, his copy-right, or property in the ſaid work; and, on the other hand, Mr Auſtein agreed to pay him for the ſame 100 *l.* Sterling, and alſo to purchaſe from him the remaining copies of the firſt edition, amounting to 289, at the price of 505 *l.* 15 *s.* Sterling.

Jan. 8. 1740. IN purſuance of this agreement, Mr Stackhouſe, of this date, granted an aſſignment to Mr Auſtein, which, after acknowledging the receipt of the aforeſaid price, or conſideration-money, ſets forth, That Mr Stackhouſe, " by theſe preſents, doth grant, bar-
" gain, ſell, aſſign, and ſet over unto the ſaid Stephen Auſtein,
" his executor, adminiſtrator, and aſſigns, All that the *copy-right*
" and ſole privilege of printing, reprinting, and ſelling of all
" that book, compiled and written by the ſaid Thomas Stack-
" houſe, intituled, *A New Hiſtory of the Holy Bible, from the begin-*
" *ing of the world to the eſtabliſhment of Chriſtianity, with anſwers*
" *to moſt of the controverted queſtions, diſſertations on the moſt re-*
" *markable paſſages, and a connection of profane hiſtory all along*, &c.
" *The whole illuſtrated with proper maps and ſculptures*; and all the
" eſtate, right, title, intereſt, claim, and demand whatſoever,
" either in law or equity, or otherwiſe howſoever of him the ſaid
" Thomas Stackhouſe, of, in, and to the ſaid copy-right and be-
" nefit of printing the ſaid book, and of, in, and to the ſaid book;
" to have and to hold the ſaid *copy-right*, and *ſole privilege* of
" printing, reprinting, and ſelling the ſaid book, and all benefit
" and advantage to be had thereby, unto the ſaid Stephen Auſtein,
" his

" his *executor*, *adminiſtrator*, *and aſſigns*, to and for his own uſe " and benefit, and as his own *proper goods*, *and chattels*, *and eſtate*, " from thenceforth and for ever. In witneſs whereof," *&c.*

And on the back of this aſſignment, Mr Stackhouſe granted the following receipt : " Received the day and year within writ- " ten, of and from the within-named Stephen Auſtein, the ſum of " one hundred pounds, being the conſideration-money within " mentioned ; and alſo by notes and money, 505 *l.* 15 *s.* which " is in full for 289 books, and all demands. (Signed)

" Tho. Stackhouse."

In virtue of this vendition and aſſignment, Mr Auſtein entered to and continued in the ſole and excluſive property and poſſeſſion of the ſaid work, and of the printing, publiſhing, and ſelling the ſame, during his life ; and for the better ſecuring the ſame, and deterring others from invading it, he, in 1742, obtained a pa- January 8. 1741-2. tent from his late Majeſty, for the ſole printing, *&c.* of the ſaid book, for the uſual term of 14 years.

By his latter-will and teſtament, of this date, Mr Auſtein no- March 20. 1745. minated and appointed his wife, Eliſabeth Auſtein, his ſole execu- trix, and bequeathed to her his whole eſtate, real and perſonal, as appears from an extract of the ſaid teſtament under the ſeal of the Prerogative Court of Canterbury. Mr Auſtein having died in December 1750, his widow proved his will in her favour, and obtained adminiſtration in common form.

Mrs Austein having thus ſucceeded to the whole eſtate and ef- fects of her deceaſed huſband, ſhe thereby acquired, *inter alia*, the copy-right and property of the aforeſaid book ; and ſhe having afterwards married the purſuer, John Hinton, upon the 10th of Auguſt 1752, as appears from the certificate produced from the regiſter

regiſter of the pariſh of St Sepulchre, the ſaid copy-right and property was thereby transferred to, and veſted in the purſuer, *jure mariti*; and he has ſince continued to enjoy the ſame, by printing, publiſhing, and ſelling the ſaid book as his property, both during his marriage, and ſince the diſſolution thereof by the death of his wife, which happened ſome time ago.

AFTER the ſaid right had been thus legally veſted in the purſuer, an attempt was made, about the year 1767, by ſome bookſellers of this country, to invade his property, and to deprive him of the profits thereof, to which he had the only juſt title. With this view, a pirated edition of the ſaid work was printed and publiſhed by the now defenders, Meſſ. Donaldſon, Wood, and Meuroſe, and by them openly advertiſed for ſale, without the authority or conſent of the purſuer. This ſurreptitious edition being printed in a ſmall *octavo* ſize, was calculated to be ſold at a much leſs price than the purſuer could afford to take for his genuine folio editions of the work; and therefore it became neceſſary for the purſuer, either to aſſert and vindicate his property in a legal manner, or to ſuffer himſelf to be unduly ſtripped of that valuable part of his eſtate.

THE purſuer was thus obliged to commence the preſent action againſt theſe defenders; and in his ſummons he ſets forth his right to the ſaid book under the titles above mentioned, and the invaſion upon his property committed by the defenders; and concludes to have it found and declared, "That he has the copy-right and ſole "title to the privilege of printing, reprinting, and ſelling the ſaid "book, and to the profits and advantages from thence ariſing; "that the defenders have done wrong, and made a moſt illegal "encroachment upon his property, by printing, publiſhing, and "vending the ſaid work; and that therefore they ſhould be de-"cerned to deſiſt and ceaſe from all further printing, *&c.* thereof,

"and

" and to deliver to the purſuer all copies of the ſaid impreſſion " (conſiſting of 10,000 or thereby) remaining unſold; or to pay " to him 1 *l.* 10 *s.* Sterling for each copy ſold by them to any " other perſon, and not delivered to the purſuer; and alſo, that " the defenders ſhould be decerned to make payment to the pur- " ſuer of 700 *l.* Sterling of damages, together with the expences of " proceſs," *&c.*

THIS proceſs came in courſe before the Lord COALSTON, as Ordinary; when the defenders began with pleading a variety of frivolous, dilatory defences, moſt of which were either over-ruled at the firſt calling, or afterwards deſerted as untenible. But they for ſome time continued to inſiſt upon theſe two objections: 1*mo*, That Mrs Auſtein, who was married to the purſuer, not having been named in Mr Auſtein's will, which, in general terms, appointed *his wife* to be his executrix, it was incumbent on the purſuer to prove, that ſhe was truly the wife of Stephen Auſtein, at the time of his executing the ſaid will, before any goods or chattels could be allowed to be taken by her under it: And, 2*do*, That ſuppoſing the purſuer's wife to have had the right veſted in her as executrix to Mr Auſtein, yet that the ſaid right was not legally tranſmitted from her to the purſuer, in reſpect that a copy-right being not by the law of England of the nature of chattels in poſſeſſion, but *choſes in action*, the ſame does not paſs to the huſband, unleſs ſpecially made over to him by the wife, or unleſs during the marriage he has actually recovered, and been in poſſeſſion of the right.

THE anſwer to the *firſt* of theſe objections was, That Eliſabeth Auſtein, the purſuer's wife, had proved her right as executrix, underthe will of her firſt huſband Stephen Auſtein, before the only

 proper

proper and competent court for trying ſuch right, and by which the power of adminiſtration was thereupon granted to her; neither did the defenders alledge, that Stephen Auſtein had any other perſon for his wife at the time of making his will. And as to the *ſecond*, The property or right in queſtion, was not what is called a *choſe in action*, but a right in poſſeſſion, which was fully enjoyed by the huſband and wife during the marriage, and needed not the aid of an action at law, either to recover it or make it effectual, ſo long as no invaſion of it was committed.

As the deciſion, however, of theſe queſtions depended upon Engliſh law, the Lord Ordinary was pleaſed, of conſent of parties, to ordain them, at their mutual expence, to take the opinions of Mr Hugh Dalrymple and Mr Archibald Macdonald, both counſel learned in that law, upon the ſaid points. This was accordingly done; and thoſe gentlemen gave a clear and accurate opinion upon the ſide of the purſuer, as to both. In treating of the *ſecond* point, they expreſſed themſelves thus: " Property in copy-rights " ſtands now determined by the late judgment in the Court, in " the caſe of *Millar* contra *Taylor*, to be *perpetually veſted* in the " author, his heirs and aſſignees; and it was admitted by the " learned judge, who differed in opinion from the Court, that " this property could be no other than a perſonal chattel. Perſo- " nal chattels are diſtinguiſhed into *choſes in action*, and *choſes in* " *poſſeſſion*: The former ariſe from ſome contract expreſſed or im- " plied, and require the interpoſition of legal judgment and exe- " cution to reduce them into poſſeſſion; the latter not requiring " ſuch interpoſition, but ſo called when the right and occupation " are found to concur. Property in copy-right, therefore, cannot " be called a *choſes in action*; becauſe it is a *veſted* excluſive power " of printing and publiſhing ſuch copy, requiring no remedy of " law to aſcertain; the only mode of ſubmitting it to judicial

" examination,

" examination, being by action on the caſe for damages, or bill
" in equity for a ſpecific relief, only when this veſted right ſhall
" be invaded," *&c.*

FROM this opinion it appears, not only that the defenders objection to the title was ill-founded; but alſo, that thoſe gentlemen hold the point of literary property to be eſtabliſhed in England by the judgment in the caſe of Millar *contra* Taylor.

UPON report of this opinion, the Lord Ordinary pronounced this interlocutor: " Having again conſidered this memorial, with
" the anſwers thereto, and ſigned opinion of counſel learned in
" the law of England; in reſpect, that the defender does not offer to prove, that Stephen Auſtein, at the time of executing his
" will, had a wife different from Eliſabeth Auſtein, who is acknowledged to have been his wife at the time of his death, repels the objections to the purſuer's title, and ordains the defender to be ready to plead his defences *in cauſa*, againſt next calling." Nov. 16. 1771.

PARTIES having been afterwards heard on the merits of the cauſe, the Lord Ordinary was pleaſed to ſignify his reſolution to report the debate to your Lordſhips; and, in order thereto, this information is humbly offered on the part of the purſuer.

THE deciſion of this cauſe depends on a queſtion of a very curious and intereſting nature; and which, although often agitated, and at length decided in the courts of our neighbouring country, has never yet received your Lordſhips judgment. It was indeed lately debated, very fully, in an action brought by the Truſtees for the heirs of Mr Thomas Ruddiman, againſt John Robertſon,

for

for recovery of damages, on account of Mr Robertſon's having printed an edition of Mr Ruddiman's *Rudiments of the Latin tongue*; but the deciſion of that cauſe was prevented, as the purſuer is informed, by Mr Robertſon's having compounded the matter with thoſe Truſtees. But, as the general point has now again occurred in this caſe, a determination of this important queſtion as to literary property, may now be expected in it.

Defenders plea.

THE defence that has been here pleaded, has reſolved in ſubſtance into this, That the purſuer, as come in place of the author of this work, has no property or right in it, either by common law or ſtatute; and therefore, there has been no injury or invaſion of right committed by the defenders, in reprinting and vending this book, ſuch as can ſubject them in damages to the purſuer, or found any judgment or decree for reſtraining them from ſo doing.

Purſuers plea.

IN anſwer to this defence, and in order to ſupport the concluſions laid in his libel, the purſuer, on the other hand, endeavours to maintain, That the author or compoſer of a literary work has, at common law, and in the general principles of reaſon and juſtice, a property, or peculiar right, known in England by the name of a *copy-right*, which entitles him to the ſole and excluſive privilege of printing and publiſhing it; and which right, in the preſent caſe, ſtands legally veſted in the purſuer, by aſſignment from the author: That this right exiſts independent of any expreſs proviſion made to that effect by ſtatute or grant from the Crown: That it is not repugnant to, or anyways affected by any municipal law or cuſtom of Scotland: That it is not impeached, but on the contrary, acknowledged and confirmed by the Britiſh ſtatute, of the 8th of Queen Anne, intituled, *An act for the encouragement of learning*; and that it is further explained, and eſtabliſhed in the ſtrongeſt manner, by the law and uſage of England, where the work now

in

in queſtion was compoſed and publiſhed, and where the value of literary productions was more early underſtood, more extenſive in itſelf, and conſequently more carefully attended to, than it has hitherto been here.

I. Literary property founded in common-law.

To begin, then, with the nature of this right, or *property*, for which the purſuers contend; they hope it will appear to be neither ideal nor imaginary, but to be a ſolid and ſubſtantial right, conſiſtent with the general principles of law and reaſon. By the word *property* in a book, is not to be underſtood that ſort of property, which, in a ſtrict law ſenſe, is only applicable to corporeal or tangible ſubjects; it means, an original incorporeal right in the compoſition, entitling the author to the ſole right of printing and publiſhing his own ſentiments, expreſſed in terms, or language, of his own choice.

Grotius, lib. 2. c. 2. §. 2. and 5.

THE idea of property, and its ſubjects, adopted by many early writers, even ſuch as *Grotius*, has been too confined and inadequate to the whole ſubjects of it, at this day. In looking back to the origin of things, or to thoſe times when all things were in common, they have loſt ſight of the preſent ſtate of the world, which, in the progreſs of ſociety, has laid open and eſtabliſhed private rights of the moſt valuable kind, ſuch as, in early ages, were obſcured or overlooked, and which, notwithſtanding, are not leſs conſonant to reaſon and juſtice than thoſe others, whereof the exerciſe was more obvious and more neceſſary while men continued in a ruder ſtate.

THAT occupancy, or apprehenſion of the ſubject itſelf, ſhould be neceſſary to conſtitute a property, becauſe it was the moſt early means uſed for acquiring it, is giving too narrow an idea of that property which now obtains in the more refined ſtate of ſo-

ciety. A property ſo conſtituted, ſeems to have been chiefly adapted to the neceſſaries of life, and to the coarſer objects of dominion, which every man's neceſſities call for. But *property*, in its juſt ſenſe, now comprehends the intereſt of a party in any thing which is capable of ownerſhip, whether it is corporeal or incorporeal.

In this ſenſe of the word, it cannot be denied, that a man has a property not only in his lands or his goods, but alſo in his life, his fame, his labour, and the like, or in any thing that can be truly called his. Whatever he has a right to hold and enjoy, or whatever cannot be violated or diſturbed, conſiſtently with the peace and happineſs of mankind, is, in this ſenſe, his property. Every man's own judgment, and feelings, can eaſily diſtinguiſh what falls under this idea, by making the caſe his own, and aſking of his conſcience, and reaſon, Whether he would think it juſt and fair to deprive him of the enjoyment and profit of this or that particular thing?

Taking the matter in this light, it is plain, that a man has a juſt and lawful property, or right, in the fruits of his own labour or ingenuity. The labour of one man, cannot be the labour or work of another man; and he, whoſe it is, cannot, therefore, be juſtly deprived of its advantages. Now, if he has a natural and inherent right to exert his own ingenuity, or induſtry, or to uſe his labour, and enjoy the produce and fruits of it, then may he be juſtly ſaid to have a *poperty* in the work itſelf and its fruits, which, conſiſtently with juſtice, cannot be taken from him, without his own conſent.

Again: To diſtinguiſh, in this matter of property, between thoſe labours which are merely manual, and conſiſt in the exertion

tion of bodily ſtrength and corporal application, and thoſe which flow from the intellectual labours of the mind, and the exertion of genius and thought, ſo as to confine property or right to the former, and exclude it from the latter, is to repreſent the nature of right, or property, in a view unworthy of the enlightened times in which we live. Shall it be ſaid, that a man who, without any uncommon genius, or by mere habit, without almoſt any thought at all, can, by the labour of his hands, turn a piece of wood into a chair or table, or a piece of leather into a pair of ſhoes, has more property in, or right to, what is ſo produced by his labour, than he who, by the efforts of the moſt bright underſtanding and ſublime genius, does, in ſo many words, communicate ideas or principles in any art or ſcience of the greateſt utility to mankind, ſhall have in this his intellectual work, when reduced to writing? To hold ſuch a propoſition, would ſeem digraceful to that ſenſe of juſtice which may now be expected to obtain in the world.

Too nearly in kin to it, indeed, is that principle of the Roman law, which held, That if the moſt ingenious poet or hiſtorian ſhould write the moſt admirable piece, upon a paper or parchment belonging to another, the writing ſhould accreſce to the owner of the paper or parchment. Such a rule, if underſtood to import a transfer to the owner of the materials uſed in the writing, of that right which the author had in his own work, would be unjuſt and abſurd to a high degree. But truly the text can only mean to give to the owner of the paper, a right in the copy or tranſcript wrote upon it, without any right to the matter or compoſition itſelf; and, accordingly, it provides, that he ſhall pay for the expence of the writing.

§. 33. Inſt. *De per. diviſione.*

If then it muſt be confeſſed, that, in the principles of reaſon and juſtice, a man has a property or right in the fruits or production of his labour, whether that labour is mental or corporal, it muſt follow, that this right is a legal one, or ſuch as is maintainable by the common law of the land. The common law certainly comprehends the maintenance of every thing that is agreeable to the natural principles of ſound reaſon and juſtice, when the contrary is not expreſsly declared. What is repugnant to natural principles, muſt be repugnant to common law, unleſs that law ſhould be held to be an imperfect, arbitrary, and unjuſt ſyſtem, ſuch as cannot be ſuppoſed to obtain in any ſtate refined from barbariſm.

While a perſon who has compoſed an ingenious work of this kind, and committed his ideas and words to writing, retains the compoſition in manuſcript, and in his own poſſeſſion, no man will venture to deny, that he has a property or right in it, which intitles him to reap not only all the honour, but all the profit, which can accrue from ſuch a production. To attribute this to the ſimple fact of his holding in his hands the manuſcript or paper in which his words are wrote down, would approach to the abſurdity already noticed, of making the great value of the intellectual work accreſce to the inſignificant value of the paper or materials on which the author's ideas or words are expreſſed. While the work is in this ſtate, ſhould it fall into the hands of another, and be by him tranſcribed, and the copy publiſhed, will any man doubt, that the author would, at common law, have an action againſt the tranſcriber and publiſher, not only for reſtitution of his own manuſcript, and for any damages he could ſhow to have ſuſtained by the publication, but alſo for pecuniary profits, if ſuch did ariſe from the ſame? In caſes of libels and forgery, the compoſing the libellous words, or the imitating the writing,

writing, is not ſufficient to convict, without the fact of publication of the one, or of uttering or uſing the other. Does not this ſhow, that he who compoſes and writes any thing, is underſtood to have the ſole property or intereſt in it, at leaſt ſo long as he keeps it for his own uſe? And, upon the ſame principles that he is liable for the harm done, by letting it abroad into the world, muſt he not have an inherent right of enjoying both the honour and profit that may flow from ſuch a communication?

HOLDING it then as conſonant to reaſon and natural juſtice, that he who compoſes a work of this kind, ſhould have the entire diſpoſal of it, and be allowed to judge when to publiſh it, or if he will ever publiſh it; ſo it can never be juſt or allowable, that another ſhould be ſuffered to uſe his name, or publiſh his work, without his conſent. It is juſt too, that the author ſhould not only chuſe the time, but the manner of the publication; and if, in print, that he ſhould have the choice of the types and the paper, and alſo of the perſon intruſted with the accuracy and neatneſs of the impreſſion, and upon whom he can depend, that no additions or caſtrations ſhall be committed, whereby his reputation, as well as his profit, may be affected.

IF theſe are ſolid reaſons, why, at common law, or in common juſtice, an author ſhould have, what is called a *copy-right*, or a property in his own ideas and ſentiments expreſſed in writing, which can entitle him to the ſole uſe and diſpoſal thereof, before it is publiſhed, and to direct the time and manner of its firſt publication; upon the ſame principles, his inherent right to reap the profits of his work, after publication, muſt remain and continue, unleſs it appear, from ſufficient reaſons, that he has abandoned or relinquiſhed it. Whether the publication is, of itſelf, a renunciation of the original right of the author to print and publiſh, muſt depend on the circumſtances concomitant with, or conſe-

quent upon ſuch publication. The alienation of a legal right is not to be preſumed, if the owner's conduct is reconcileable with an intention to retain it.

Now, whatever doubt there might have been on this point at any ſuppoſed period, if ſuch period did ever exiſt, when an author could neither expect honour nor profit from publication of his works; yet there can be no ſuch dubiety at preſent, when not only the writing of books, but the printing and publiſhing them, is become a trade or buſineſs, which every man capable of it may lawfully follow, and which is often attended with very large pecuniary advantages. An author cannot now draw any ſuch profit, without uſing the means of publication; and, when he uſes a ſtep ſo eſſential for reaping the fruits of his labours, ſhall he, without more, be preſumed at once to have loſt ſight of his object, and to content himſelf with the profit and honour which may chance to flow from *once* printing and publiſhing, abandoning hereafter to every needy printer or bookſeller, his own character, depending on the fidelity of other impreſſions, and alſo the profits ariſing from the ſale of them?

A PRESUMPTION, ſo violent and groundleſs, is adverſe to common ſenſe, and therefore cannot be compatible with common law. Every reaſon that holds for aſſuring to the author the copy-right before firſt publication, obtains for preſerving it to him afterwards. His title to the profits cannot be juſtly limited to one edition, or to one form of letter or volume, more than another. If he has right to any profits, he muſt have an equal right to the whole; and, if the ſafety of his character requires he ſhould at firſt have the choice of the perſon he intruſts to make the firſt edition, the ſame reaſon muſt apply, for his having the like power as to other editions.

INDEED,

INDEED, were it otherwiſe, the moſt unjuſt conſequences would follow: An author would not be ſecure of any part of either the honour or profit flowing from even his firſt impreſſion; in a few hours after its moſt early appearance, his edition might be pirated; and the author, inſtead of profit, might loſe the expence he had been at in the printing; while, at the ſame time, his work might be mangled in ſuch a manner, as to diſgrace his character. Even ſuppoſing this ſhould not happen till the firſt edition is ſold off, ſtill, if afterwards any one may print another edition without his conſent, he not only thereby deprives the author of a juſt part of his profits, but alſo of the power of retracting errors, or making neceſſary additions; and this invader of his right may proſtitute his name and reputation, may affix it to an edition ſhamefully incorrect, and may, under the ſanction of it, perpetuate ſentiments which the author already diſapproves and retracts, or interpolate others which he had never adopted, but would readily renounce and diſclaim.

To ſay, That a power of treating an author in this manner, or in any one of theſe reſpects, is at once acquired to every perſon, who, for a trifle, purchaſes a printed copy of a work, that had coſt many years to compoſe it, and perhaps ſome hundred pounds to print and publiſh it, is to ſuppoſe, that the law allows, what evidently neither reaſon, nor the principles of common honeſty can admit.—On the one hand, holding it for granted, that the author has a property in his work before publication, he can never forfeit ſuch right by the publication, becauſe it is not his intention to do ſo; neither is it juſt that he ſhould do it; and, becauſe the publication is a neceſſary act, without which his property can be of little or no value to him. On the other hand, he who purchaſes a printed copy of a book, cannot be thereby ſuppoſed to mean or intend to buy the right of being the printer and ſeller of that work. The learning, knowledge, or amuſement

which he can derive from its perusal, are indeed all his own, for these the author intended to bestow upon him. It may also be allowable for him, to versify, or perhaps to translate the book, because still the translation is not the same work with the original; but, to reprint, or republish the specific work, is to rob the author of that natural right, which in justice belonged to him, which he never meant to renounce, and which no man could, in reason, think he acquired from him, by purchasing for a trifle so much paper as contained a printed transcript of the author's original composition.

Objection. It has been said, "That the allowing such a right as is here "contended for, is unfavourable and inexpedient, as tending to "create a *monopoly* of books, and to inhance their price; that it "is inconsistent with the frequent practice of publishing books, "without any warning given to others not to reprint them; and "that it might create endless disputes, as the heirs of authors, "even as far back as *Homer* or *Virgil*, might set up such claims "of property, even after the books had been universally held to "be common."

Answer. But an obvious answer occurs to these objections. It can never be inexpedient to the public, that justice should be done to an author, as well as to any other man; and it is undoubtedly for the advancement of learning that authors should be protected in this their just right. It is a mistake to call it a *monopoly*, which is an exclusive privilege or right of doing that which otherwise all mankind have naturally an equal title to do; whereas the right here contended for, imports no more than a continuance of that inherent right which once stood vested in a particular person, without any other having the least pretensions to it. Authors or proprietors, by having an exclusive title to print and sell, may afford to sell the cheaper, as the profit chiefly depends on the numbers sold;

ſold; and the dearer a book is, the fewer copies will be ſold. This is now ſo well underſtood, that a power, which was given by the act of the 8th Anne, to certain perſons to regulate the prices of books, was repealed by another act of the 12th George II.

THE name of *monopoly* might as well be applied to that right which an author has to any other part of his real or perſonal eſtate, as to the property of his works; becauſe he can equally exclude others from poſſeſſing the ſame, or tranſmit it to his heirs or aſſignees. If this idea of monopoly is to be adopted, as a reaſon for aboliſhing literary property, it would tend to deſtroy property altogether, and reduce mankind to the ſame ſtate of ignorance and barbariſm, as when all things whatever were in ſo little eſteem as to be enjoyed in common.

BUT it is plain, that the world has no more cauſe to complain of an author's holding a property in a book compoſed and publiſhed by him, than in any other ſubject belonging to him, but quite the reverſe; for by his once printing and publiſhing it, he gives others a much greater enjoyment of it than they are indulged in as to any other ſpecies of private property, particularly as to any curious invention which the author thinks fit to keep in his cloſet, and may do ſo if he pleaſes. This indulgence too, an author, who once publiſhes his work, will certainly continue to give, ſo long as he finds the doing it tends to his own emolument: And if it can be ſuppoſed, that he ſhould capriciouſly refuſe to reprint his work, or endeavour to ſuppreſs it, the world is at leaſt no worſe off than it would have been, had he never compoſed or publiſhed it. Beſides, where the public good may require that ſuch a work ſhould be reprinted, or that the author ſhould be deprived of his negative, legiſlative authority can always effectuate it; and then it will be done with the juſtice becoming the legiſlature, by providing a ſuitable indemnification to the proprietor,

NOR is there any danger of innocent publiſhers being inſnared through ignorance of another's right, or of claims that are obſolete or abandoned being revived or aſſumed from the prevalency of this copy-right. This property, like all other civil rights, may be renounced, or loſt, through a long dereliction. If a publication is anonymous, or if it is ſuffered to be reprinted without challenge for a courſe of years, the copy-right may be held as abandoned or preſcribed. Queſtions of that kind muſt be ſeverally determined according to particular circumſtances; and the poſſibility of an author's loſing his right, can never prove that ſuch a right neither did, nor can exiſt. Beſides, in the preſent caſe, the author's name ſtood prefixed to his book, and is even ſo prefixed in the defenders ſurreptitious edition; and Mr Auſtin and his ſucceſſors continued to uſe and enjoy the ſole right of printing and publiſhing it till the preſent encroachment upon it was committed.

Objection. IT has likewiſe been objected, "That the ſame thoughts and "expreſſions, in treating of the ſame ſubject, may occur to differ-"ent perſons, ſo that their writings or compoſitions may be "extremely like; and that conſequently, it cannot be known, "where the effect of a literary property is to ſtop: for that every "later writer might be proſecuted by an earlier one, for taking "ſome thought or paſſage from his book, as well as for reprint-"ing it entire; whereas it has been hitherto held, even by the "advocates for a copy-right, that any book may be freely re-"printed, if the edition is attended with notes or criticiſms upon "it, or may be publiſhed ſingly, if tranſlated into another lan-"guage, without the author or proprietor's conſent."

Anſwer. IT is obvious, That the firſt point of this argument goes on a ſuppoſition, which the knowledge and experience of mankind entirely refutes. No inſtance can be given, of two men's ſeparately writing books on the ſame ſubject, agreeing in words or ſentiment

ment from beginning to end. Every man's book, (if an original compoſition), as well as every man's face, muſt be capable of diſtinction from another's. The freedom which is allowed, of borrowing thoughts, or making quotations, and even tranſlations from preceding works, pleads ſtrongly in favour of literary property; becauſe it removes any pretence of hardſhip to the public, while others are reſtrained only from reprinting the identical work of an author in its own original form and figure. The queſtion, How far any invaſion is committed on an author's right, by publiſhing an edition dreſſed up with additional notes or criticiſms, muſt, like all other queſtions of encroachments, depend on facts, and on the opinion of a court or jury, given on trial, of the particular caſe.But it can never argue, that a certain ſpecies of property, does not, or cannot exiſt, or ought to be aboliſhed, becauſe it appears poſſible in ſome ways to invade it with impunity.

II. Literary property not repugnant to the law of Scotland.

In fine, the purſuers ſubmit it to your Lordſhips, that the property they contend for is a real, not an imaginary right, and that it is founded in the principles of common juſtice and reaſon, and muſt therefore be held as authoriſed and ſupported by the laws of this and every country, where learning and ingenuity can expect the juſtice and regard they are well intitled to. If this is ſo, it muſt ſeem derogatory to the honour of the laws of Scotland, even to ſuppoſe them capable of rejecting ſuch a right, eſpecially at this time of day. But, upon due conſideration, it will appear, that this property, or copy-right, is no ways repugnant to any municipal law or cuſtom of Scotland.

Defender's argument.

It has here been obſerved upon the part of the defender, "That when printing was firſt introduced into Scotland, the "exerciſe of that art was free to every one; that this freedom was "firſt reſtrained by the act 27th parliament 1551, which prohi- "bited the printing of books without previous examination by "the

" the Ordinaries, and a licence granted by the crown, under the " pains of confiſcation and baniſhment; that thereafter the " printers uſed to ſolicit and obtain *privilegia*, or ſpecial grants " from Princes, for the excluſive printing of certain books for a " limited time; that, agreeable thereto, Dr Edward Hendrieſon, " in 1566, obtained a patent or privilege from Queen Mary, for " printing the *Regiam Majeſtatem*, and Acts of Parliament, for the " ſpace of ten years; that privileges of this kind gave the firſt idea " of any literary property as derived from the crown, and which " was ſtill conſidered as an encroachment on the natural liberty " of the preſs; that it was therefore doubted, whether ſuch a " privilege or patent, though it bore *to aſſignees*, could be com- " municated to another, as appears from the patent obtained by " Murray of Glendoick, in 1680, for publiſhing the Acts of " Parliament; and that Sir George Mackenzie and Lord Stair, " *&c.* thought it neceſſary to obtain patents for printing their " works, which ſhowed, that, in their own opinion, they could " not hold and enjoy the excluſive right of printing and publiſh- " ing the ſame, without obtaining ſuch a grant from the crown, " and that too, limited to a ſhort term of years."

Purſuers argument.

In a country like Scotland, which, at the period of the introduction of printing, was torn with inteſtine diviſions, it is natural to ſuppoſe that the exerciſe of the art was not at firſt extremely beneficial, or much attended to. The freedom of the preſs, which is ſaid to have moſt early prevailed in Scotland, can only be underſtood of the feeedom of printing without reſtraint from public authority. Accordingly, the act 27th 1551, was intended only to reſtrain that kind of freedom, by ſubjecting new books to a previous examination and licence, before they were publiſhed, in order, as is ſuppoſed, to prevent the growth of the reformation, by the publication of books wrote againſt the then eſtabliſhed religion. But this act has no relation to that

right

right which an author naturally has to enjoy the profits of his labour, by printing and publiſhing, without the encroachments of private perſons upon it. It indeed made a licence neceſſary to the publication, for reaſons of *ſtate*, and ſo far reſtrained authors from part of their juſt right; but if the book was licenſed and publiſhed, it gave no right to any other perſon to reprint it, without the author's permiſſion, and rather fortified his property in it thereafter.

It is true, that although the act 1551 was ſuffered to go into deſuetude, yet it appears the crown occaſionally came into the practice of granting patents to particular perſons, giving them the excluſive privilege of printing books for a limited time. But neither does it from thence follow, that there was no literary property in Scotland before thoſe grants, or that the only property of the kind was that which flowed from them.

It is remarkable, that the moſt early patents of this kind, known in this country, are thoſe which were given by the crown for printing the acts of parliament. Such was the patent granted to Dr Hendrieſon, by Queen Mary, in 1566, and the patent granted to Sir John Skene, in 1597. Now the copy-right in theſe public ſtatutes certainly belonged to no private perſon, but to the public, under the direction of the crown. Accordingly, the patent to Hendrieſon mentions, that the acts were to be firſt reviewed and corrected by the Lords Commiſſioners appointed for that purpoſe; and the patent to Sir John Skene proceeds on the recital of "its having been ſtatute by King James V. that the acts "of parliament be printed by whatever printer it ſhould pleaſe "the Clerk Regiſter to appoint;" and therefore grants to Sir John, who was then Clerk Regiſter, the right and privilege of employing whom he thought fit, to print and publiſh the ſaid acts, for the ſpace of ten years. Thus, theſe moſt early patents may be well aſcribed to the crown's property, or copy-right of the

acts, which belonged to the crown, rather than to any exertion of prerogative in granting an exclusive right for a limited time, in the publication of works in which the crown had no concern.

AGREEABLE to this too, we find, that at a much later period than the last of those two patents, the crown was not understood to have a sufficient title to interfere in the publication of private works, by granting exclusive patents concerning them; for, in the 1633, application was made to the parliament itself, by the College of Justice and Mr Robert Craig, for an act to authorise the printing of the learned Craig's book *de feudis*, and prohibiting others to reprint or import the same, under pain of *confiscation*. And accordingly an act to that effect was passed, in the first parliament of King Charles I. whereby the heirs of the author obtained a legislative authority and penalty, in corroboration of any natural or inherent right competent to them, and which could never be prejudiced, however it might be strengthened and enforced thereby.

AFTER the Restoration, it indeed appears, that the Crown assumed more power in this respect, and, following the example of foreign princes, granted patents for the publishing and printing, not only acts of parliament, but even private works, for certain terms of years; and the like power was assumed and exercised by the Scots Privy Council. But no inference can be drawn from thence in prejudice of an author's right or property, independent of such grants. At that æra, when Sir George Mackenzie and Lord Stair obtained patents for their works, to wit, in the 1677, 1681, and 1685, the power and prerogative of the crown was stretched to a degree dangerous to the liberty of the subject. Its having a control over the press was, in particular, a favourite object. Sir George Mackenzie himself, in his observations on the act 1551, lays it down, "That printing is *inter regalia*, and so the "King may discharge any man to print without his licence;" though

though he owns that the contrary was held by ſome, whom he calls *republicans*.

WHILE ſuch maxims were held by thoſe in power, it can be no ſurpriſe that Sir George, who was one of the King's miniſters, or that Lord Stair, who was not in condition to preſerve his property effectually, without uſing the means then in practice, ſhould have applied for, and obtained patents of that kind. Their doing ſo cannot therefore be founded on as an authority for ſhowing, that, by the common law of this country, the author of a book had no right in his own compoſition other than what the crown might pleaſe to confer upon him. No writer on the law of Scotland has ſaid ſo, not even Sir George Mackenzie himſelf, though an advocate for the crown's prerogative in reſtraining the liberty of the preſs. Our other ancient writers are ſilent on a ſubject which had not in their time become an object of attention; and the taking out patents, in a few caſes, only ſhows, that a compliance with the reigning powers and principles was found expedient for ſuch as meant to be careful in preſerving that to which they had otherwiſe a juſt right. And it may be alſo obſerved, that the very earlieſt of theſe patents was granted to *aſſignees*; nor was there any room to doubt of their paſſing to aſſignees accordingly, though Glendoick, or others might incline to take a renewal of the patent, upon giving a conveyance.

BUT, without entering deeper into the nature and riſe of patents for the printing of books, which have been long practiſed in England as well as Scotland, the purſuers do humbly contend, that there is nothing in that practice repugnant to an author's having an inherent natural right in his own work. It has been held by ſome of the beſt lawyers in England, that the crown has no good right to interfere in this matter, further than in regard to the printing of its own copies, ſuch as Bibles, Prayer-books, and acts of parliament

ment; yet, ſuppoſing the crown had, by uſage, obtained a right to grant ſuch patents even for other books than thoſe which properly belong to it, there can ſurely be no harm in an author's taking the benefit of any additional ſecurity that can be thereby given him. It is not the patent which creates the right, but it only tends to ſecure and preſerve it, by a public prohibition of encroachments upon it. It is true, that the prohibition is uſually limited to a term of years; but this only imports, that the aid of the royal authority is no longer to be interpoſed than during that time; and he who applies for it, muſt take it in the terms it is granted. When the term expires, the author's right continues the ſame as it was before the patent was procured. And it is remarkable, that no Engliſh or Britiſh patents pretend to enforce the prohibition by extraordinary penalties, but leave the authors or proprietors to ſue the offenders for damages at common law; which could never have obtained, had it not been underſtood, that literary property was founded in law, and invaſions of it the ground of action, without the aid of any royal licence or patent. The ſame obſervation likewiſe applies to the Scots patent or privilege granted to Lord Stair in the 1681, which only contains a licence and a prohibition, without any penalty laid upon the contraveners.

Objection. WHAT has been here ſaid, affords an anſwer to an argument uſed by the defenders, " That, in the preſent caſe, Mr Auſtein " renounced or diſclaimed any right of property in this book, as " derived from the author, by applying for, and obtaining a pa- " tent for the ſole right of printing it, during the term of 14 " years after the 1742, and that, upon expiry of the ſaid term, " it became free to them, and every other perſon that pleaſed, to " print and publiſh editions of it."

Anſwer. THE patent itſelf was in theſe terms, " George, *&c.* Whereas " our truſty and well beloved Stephen Auſtein, of our city of London,

" don, bookſeller, hath humbly repreſented unto us, that he is
" now printing a *ſecond edition* of a work, intituled, *A New Hiſtory*
" *of the Holy Bible from the beginning of the world, &c.* in two vo-
" lumes in folio, compiled and written by our truſty and well-be-
" loved *Thomas Stackhouſe*, Maſter of Arts, and Vicar of Beenham,
" in our county of Berks : And whereas the ſaid Stephen Auſtein
" has informed us, that the ſaid work has been perfected with
" great labour, ſtudy, and expence; and that *the ſole right and title*
" *of the copy of the ſaid work*, as now publiſhing, *is veſted in him*;
" he has therefore prayed us to grant unto him, the ſaid Stephen
" Auſtein, our royal privilege and licence for the ſole printing, pu-
" bliſhing, and vending the ſaid work for the term of fourteen
" years. We being graciouſly inclined to give encouragement to
" all works that may be of public uſe and benefit, and eſpecially
" to thoſe of this kind, which tend ſo much to the advancement
" of religion, and the general good of mankind, are pleaſed to
" condeſcend to his requeſt ; and do, by theſe preſents," *&c.*

FROM the above words, it appears, that Mr Auſtein did then poſitively and truly aſſert his having obtained *the ſole right and title of the copy of the ſaid work*, antecedent to his application to his Majeſty ; and he only demanded the aid of the royal licence, during ſuch time as his Majeſty pleaſed to grant it, for the better publication of his right, and preventing others from interfering in his enjoyment of it. This could never enervate or deſtroy that property which ſtood veſted in him by aſſignment from the author, before, and at the time of obtaining the patent, and which neceſſarily ſubſiſted with equal force after its expiry : On the contrary, the patent contains an acknowledgment, even upon the part of the Sovereign himſelf, of the inherent property or copy-right of an author in his own works, and that too more plainly than could be inferred from a patent granted to an author ; becauſe it admits, that another perſon, ſuch as a bookſeller, may, by purchaſe

from, or bargain with an author, acquire the *ſole* right or property in a literary work, even after one edition has been publiſhed by the author, and before any patent is granted.

NEITHER could Mr Auſtein have obtained this patent, had ſuch patents been merely grants in favour of ingenious authors or inventors themſelves, or were it not clearly underſtood, that authors have, independent thereof, a legal right in their works, capable of transfer to any perſon they think fit.

Concluſion as to law of Scotland.

BUT to return; the purſuer apprehends, that he may with confidence aſſert, that there is nothing to be found in the municipal law or practice of Scotland, prior to the union of the two kingdoms, that is adverſe to, or inconſiſtent with the right he now contends for: And if it is not repugnant to our law, he muſt alſo conclude, that it is agreeable to, and warranted by it; becauſe he muſt hold, that every right which is either deduceable from natural principles, or from the laws of nations, and rules of ſound policy, muſt be conſidered as aided and ſupported by every ſyſtem of laws and adminiſtration of juſtice, that have the good and happineſs of mankind for their object, and which have not, by any expreſs municipal conditions, cut off or excluded ſuch right.

Argument from this being an Engliſh work.

AT the ſame time, inſtead of creating any diſtinction prejudicial to the plea of the purſuer, it muſt, in his humble apprehenſion, tend much to remove any difficulty in the preſent caſe, that his right of property was originally created and veſted in him in England, where ſuch property is held and allowed to be a legal right. If the right is better known there, than it is yet here, the defenders invaſion of it is ſo much the leſs juſtifiable, than a like encroachment would have been upon the property of a work wrote and publiſhed in Scotland. If the purſuer has a property in this book,

book, eſtabliſhed by the laws of England, it would be inconſiſtent with common juſtice, as well as ſound policy, to permit perſons ſubject to the Scots juriſdiction, to make, with impunity, any undue invaſion or encroachment upon it. Suppoſe the caſe, that a man in Scotland were to counterfeit, and iſſue here, the notes of a banking company in England, which might afterwards be carried there, to the prejudice of ſuch company; it is thought there could not be a doubt, that ſuch a wrong might be proſecuted and puniſhed in this country. So likewiſe in the preſent caſe, theſe defenders are equally guilty of injuring the purſuer in point of property, as they have counterfeited his book, by printing an edition of it without his authority, in order to ſell it both here and in England, and thereby to tranſfer from him to themſelves, the profits which he has a juſt right to receive, upon the ſale of every copy of the work.

NEITHER does it afford any juſtification to the defenders, that books publiſhed in England, are frequently reprinted in Ireland or foreign countries. This only ſhows, that in all countries, people may be found equally diſpoſed with theſe defenders to do wrong, or to deſpoil authors, and their publiſhers, of the juſt fruits of their labour and expence. It does not prove, that thoſe piratical practices are ſanctified, or allowed by the laws of the countries in which they are committed; and it is probable, that the injured parties find it more eligible, to ſubmit to the conſequences of the wrong done, than to follow the offender to foreign courts and countries, where the obtaining a remedy might prove worſe than the diſeaſe; eſpecially as the importation of all ſuch editions from Ireland, or foreign parts, is by ſtatute ſtrictly prohibited; whereas Scots editions may be carried to, and vended in England, without any control from the officers of the cuſtoms or revenue. 12. Geo. II. Cap. 36.

BUT

BUT even ſuppoſing, that, in ſome foreign countries, they had ſtill ſuch ideas of this matter, as actually to ſanctify and authoriſe an unlimited invaſion of a right of this kind, when claimed either by one of their own ſubjects, or by thoſe of a neighbouring kingdom; yet this would never be a ſufficient ground for inducing your Lordſhips to follow ſuch an example, were it altogether optional ſo to do. In countries ſo connected as Scotland and England, it would be productive of infinite diſadvantages, ſhould the people in one end of the iſland be ſuffered to invade with impunity, rights that are legally veſted in thoſe of the other. But, in ſhort, this matter of literary property cannot now be held to remain on any different ground here, from what it is in England, even ſuppoſing that in ancient times it had done ſo; ſince, by the happy union of the two kingdoms, the ſubjects of both are put upon the ſame footing as to their legal rights and privileges reſpecting commercial concerns, and every thing conſiſtent with the municipal laws of each country. More particularly, it appears, that by this union, they have come to be ſubject to the ſame rules, and entitled to the ſame privileges, reſpecting the printing and publiſhing of books; and accordingly, the Britiſh ſtatutes, that have been ſince made concerning the ſame, eſpecially the *act of the 8th of Queen Anne*, hereafter explained, do undeniably extend over the whole united kingdom, and proceed on the ſuppoſition of the copyright of authors being the ſame in every part of it.

III. State of literary property ſince the Union.

THIS leads the purſuer to the more immediate conſideration of the ſtate of literary property ſince the Union; and, in doing ſo, it is neceſſary firſt to look back a little into the ſtate of printing in England before that period.

The trade of printing came to flouriſh much ſooner there than in Scotland. The liberty of the preſs, that is, the liberty of an author's freely publiſhing his own works, not that of a printer's invading the property of an author, has been long and juſtly

juſtly a darling object of the friends to the conſtitution. For the ſame political reaſons, it was hampered and reſtrained in England, by the ſtretch of prerogative, in thoſe reigns, when the ſcale of government turned too much on the ſide of the crown. Hence licences to print were introduced, and inforced by proclamations and orders of the Privy Council and Star-Chamber, and other acts of regal power, before the middle of the laſt century.

THE Stationers Company at firſt aſſumed, or acquired, without the ſanction of a ſtatute, a ſuperintendency of the preſs, and licenſers were named by the King and Archbiſhop of Canterbury, to check the liberty of writers. But, however improper and unconſtitutional thoſe reſtraints were, yet they by no means tended either to create a right, otherwiſe unknown at common law, or to take away the natural right of the author, if once he had complied with the prevailing power in obtaining a licence to print, or made his entry in the books of the Stationers. From that time, his natural right to the copy was ſuffered to be exerted with its full force.

HENCE it came, that the copy-rights of authors were entered in the books of the Stationers Company at London, long before the act of the 8th of Queen Anne exiſted. Theſe entries have been traced ſo early as the 1656, and continued downwards. The purpoſe of them, while they had no authority from ſtatute, was merely to record the perſon's name who had a title to the work, that invaders might not pretend ignorance of it. It muſt have taken place in practice, from expediency, and the general idea of a common-law right. Thoſe regiſters likewiſe contain entries of the tranſmiſſions of copy-rights, in purſuance of ſales or bargains.

IN the reign of Charles II. ſuch entries obtained a parliamentary authority, by an act which prohibited the printing of 13 and 14. Car. II. cap. 33.

any book, without its being firſt licenſed and entered in this regiſter of the Stationers. This was the firſt ſtatute which laid the preſs under ſuch reſtraints, as had before been only occaſionally impoſed by unconſtitutional exertions of royal prerogative. But even this act provided, that thoſe who had power to licenſe, ſhould not meddle with " any book or books, the right of print-
" ing whereof doth ſolely and properly belong to any particu-
" lar perſon or perſons, without his or their conſent firſt obtain-
" ed in that behalf." This exception clearly imports, that a copy-right, or property, was known to ſubſiſt at common law, prior to this ſtatute; and, indeed, the ſame right had been acknowledged in an ordinance of the parliament 1649, c. 60. which alſo prohibited the printing books without the owner's conſent. By another clauſe in this ſtatute of K. Charles, the reprinting, importing, or ſelling of books, which any perſon had the *ſole right* to print, either by virtue of letters-patent, *or* of entries in the regiſter of the Stationers, without the conſent of the *owners*, was prohibited, under the pain of forfeiture of the books, and a penalty of 6 *s.* and 8 *d.* for each copy; one moiety to the king, and the other to the *owners*.

THIS act of Charles II. was but temporary. It was continued by ſeveral other acts of that and the ſucceeding reign, and revived by one ſoon after the Revolution; but it finally expired in 1694. From that period, down to the 8th of Queen Anne, the copy-right of authors, *&c.* ſtood unſecured by any other aid than that of the common-law. The ſtationers, however, having been accuſtomed to the aid of ſtatutory penalties, for protecting their copy-rights, were unwilling to loſe that additional ſecurity, and therefore applied for a new act to that purpoſe, ſo early as the 1703, but did not carry it through ſooner than the 1709. The act already mentioned was then paſſed, and which being the firſt Britiſh ſtatute reſpecting this matter, has been laid hold of by the

defender,