INFORMATION

FOR

ALEXANDER DONALDSON and JOHN WOOD, Bookſellers in EDINBURGH, and JAMES MEUROSE, Bookſeller in KILMARNOCK, Defenders;

AGAINST

JOHN HINTON, Bookſeller in London, and ALEXANDER M'CONOCHIE, Writer in Edinburgh, his Attorney, Purſuers.

[Lord COALSTON Reporter.]

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ABOUT the year 1732 the reverend Mr. Thomas Stackhouſe, vicar of Beenham, in the county of Berks, publiſhed a book, entitled, 'A new hiſtory of the 'holy Bible, from the beginning of the world to the 'eſtabliſhment of Chriſtianity, &c.'

A ſecond edition of this work was publiſhed by Stephen Auſtin, bookſeller in London, who obtained a patent from his Majeſty in the following terms: 'George, &c. To all to whom 'theſe preſents ſhall come, greeting: Whereas, our truſty and 'well-beloved Stephen Auſtin, of our city of London, book-'ſeller, hath humbly repreſented unto us, that he is now print-'ing a ſecond edition of a work, entitled, *A new hiſtory of the* '*holy Bible, from the beginning of the world to the eſtabliſhment of* '*Chriſtianity, with anſwers to moſt of the controverted queſtions, diſſerta-*

' *tions upon the moſt remarkable paſſages, and a connection of prophane*
' *hiſtory all along; to which are added, notes explaining difficult texts,*
' *rectifying miſtranſlations, and reconciling ſeeming contradictions;* in
' two volumes in folio; compiled and written by our truſty and
' well-beloved Thomas Stackhouſe, maſter of arts, and vicar of
' Beenham in our county of Berks: And whereas the ſaid Ste-
' phen Auſtin has informed us, that the ſaid work has been per-
' fected with great labour, ſtudy, and expence, and that the
' ſole right and title of the copy of the ſaid work (as now pu-
' bliſhing) is veſted in him, he has therefore prayed us to grant
' unto him, the ſaid Stephen Auſtin, our royal privilege and li-
' cence for the ſole printing, publiſhing, 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, (*as far as may be agreeable*
' *to the ſtatute in that caſe made and provided*) grant to the ſaid Ste-
' phen Auſtin, his heirs, executors, adminiſtrators and aſſigns,
' our royal privilege and licence for the ſole printing, publiſh-
' ing and vending the ſaid work, *during the term of fourteen years*,
' to be computed from the date hereof, ſtrictly prohibiting
' and forbidding all our ſubjects within our kingdoms, and
' dominions, to reprint or abridge the ſame, either in the like
' or any other volume or volumes whatſoever, or to import, buy,
' vend, utter, or diſtribute any copies thereof reprinted beyond
' the ſeas, during the aforeſaid term of fourteen years, without
' the conſent or approbation of the ſaid Stephen Auſtin, his
' heirs, executors, adminiſtrators, and aſſigns, by writing un-
' der his or their hands and ſeals firſt had and obtained, as they
' will anſwer the contrary at their peril: Whereof the commiſ-
' ſioners and other officers of our cuſtoms, the maſter, wardens,
' and company of ſtationers of London, and all other officers
' and miniſters whom it may concern, are to take notice that
' ſtrict obedience be given to our pleaſure herein ſignified.
' Given at our court of St. James's the eighth day of January
' 1741-2, in the fifteenth year of our reign.'

This ſecond edition appeared about the year 1744.

Stephen

Stephen Auſtin executed a will, by which he appointed his wife to be his ſole executrix, and bequeathed to her his eſtate real and perſonal. March 20, 1745.

Elizabeth, the widow of Auſtin, proved the will, and obtained adminiſtration of his effects. January 24, 1750.

Elizabeth afterwards married John Hinton, the purſuer, and is now deceaſed. Auguſt 10, 1752.

Mr. Stackhouſe, the author, died in October 1752.

About the end of the year 1765 Mr. Meuroſe compleated an edition of Stackhouſe's hiſtory in ſix volumes octavo, which he had frequently advertiſed in the newſpapers for two years preceding; during which time he was employed in printing and publiſhing the work in volumes, without any challenge on the part of Mr. Hinton.

Mr. Meuroſe thinking there might poſſibly be leſs demand for that part of the work which related to the Old Teſtament than for the New-Teſtament part, kept the two ſeparate, making indexes for each, and printing more copies of the latter than of the former. But afterwards finding, upon trial, that the whole book went off equally well, he agreed with Mr. Donaldſon and Mr. Wood, to reprint and publiſh ſo many copies of the firſt four volumes, (being the Old-Teſtament part) as, joined to the copies remaining of the two laſt, would make compleat ſets. This was done in 1767, when the book was advertiſed as formerly, and ſtill no complaint made.

No earlier than 1770, Mr. Hinton without any previous notice, was pleaſed to bring this action before the Court of Seſſion, concluding againſt the defenders for reſtitution and damages, on account of a ſuppoſed violation of his *property*, by printing and publiſhing ſaid work. He did not pretend to lay his claim upon the patent, then confeſſedly at an end, or upon the ſtatute of Queen Anne, which was likewiſe out of the queſtion; but he endeavoured to maintain the concluſions of his action upon the footing of a *common-law property* in authors, independent of ſtatute, or of ſpecial grant.

The cauſe having come before Lord Coalſton, Ordinary, the defenders moved an objection to the title; that, ſuppoſing the exiſtence of ſuch a right in authors and their heirs or aſſigns, the purſuer in this caſe had produced no ſufficient evidence of his

his being either the heir or aſſignee of the author. To which it was anſwered, that the author having made over his copy-right to Auſtin, the aſſignee, and Auſtin having conveyed his whole effects by teſtament in favour of his wife, the ſame paſſed *jure mariti* to Mr. Hinton, the ſecond huſband of Auſtin's widow; and conſequently this property, if it did at all exiſt, was now in the purſuer. The Lord Ordinary was of this opinion, and the objection to the title having been over-ruled, his Lordſhip took the cauſe to report upon the merits, and ordered informations; in obedience to which, this is humbly offered for the defenders.

In general they are to maintain, That the law of this country acknowledges no perpetual monopoly in authors, or, in other words, no reſerved excluſive right to their works after publication, ſuch as hath of late been contended for, under the name of *literary property*.

The ſubject is copious, and has of late been much handled. The defenders would encroach greatly too far on the patience of your Lordſhips, were they to ſtate every thing that has been wrote and ſaid upon it. The plan which they propoſe, is,

I. To inquire into the nature of this ſpecies of property claimed by authors, or rather by bookſellers; and to ſhow, that it is not founded in the general principles of law; that it is not conſonant to reaſon: and that neither the intereſt of ſociety, the advantage of authors themſelves, nor any conſideration of expediency or police, are concerned in eſtabliſhing ſuch a property.

II. To examine how far it is a ſpecies of property acknowledged by the *common law of Scotland*, independent of ſpecial privilege and of the act of Queen Anne: Under which head, the defenders expect to ſatisfy your Lordſhips, that it is ſupported by no authorities or precedents with us; by no cuſtom; by no circumſtance tending to ſhow that ſuch a property ever exiſted in Scotland.

III. To conſider the act of Queen Anne, with its effect upon this queſtion.

IV. With great deference, to ſubmit a few obſervations on the law of England, which is ſaid to ſtand in favour of the excluſive right of authors.

V. Shortly

V. Shortly to bring under view thoſe ſpecial circumſtances of the preſent caſe, which may have an influence upon the queſtion.

I. Nature of literary property.

I. The aſſertors of *literary property* define it to be, 'A right 'which the author of any work has in the combination of ideas 'produced by himſelf, and of which his book is compoſed.' It is not merely a property in the manuſcript, which is a tangible ſubſtance, capable of poſſeſſion; but they are pleaſed to figure ſomething incorporeal and inviſible, in which that ſort of right, called *literary property*, conſiſts. It is a right to the doctrine contained in the book; to a ſet of ideas, or modes of thinking, communicated by words and ſentences; and which carries along with it the ſole privilege and power of diſpoſal even after publication.

This incorporeal right, detached from any phyſical exiſtence, they expreſs by the word *copy*, or *copy-right*; and the benefit attending it when ſold, they call *copy-money*. The technical terms here uſed, are of modern invention; and when we enquire into the nature of the ſubject to which they are applied, we find nothing real in it, nothing to which the character of *property* can either in language or in reaſon be affixed.

A man who puts his thoughts into writing, or who prints them, may keep hold of the volumes, and call them his property: But this will not anſwer the purpoſe of thoſe who contend for literary property, without ſuppoſing the *matter* of the book, or the ideas and compoſition, to be the foundation of another kind of property, independent of the materials; and this property we muſt figure to be of ſuch a nature, that it can ſubſiſt and be retained by a poſſeſſion of the mind, after the ſubject of it is given away, and put under the power of others. Their poſition is, That though the author diſpoſes of his edition, and makes his work patent and public to the whole world, he nevertheleſs reſerves to himſelf a property in the *literary compoſition*, whereby he alone has the power of regulating all future publications, and of reſtraining others from tranſcribing or reprinting his work.

The ſmalleſt conſideration will ſhow, that the word *property* is here moſt erroneouſly uſed. If it be any thing at all, it is not a property, but a *monopoly*, or right of prohibiting others from doing what otherwiſe would be competent to them. Property

is defined to be, *jus in re*; and there can be no property without a ſubject or *corpus*, to which it refers. Neither the definitions of *property* given by Puffendorff, Grotius, and other writers, nor the modes of acquiring it, do at all apply to this metaphyſical right which an author is ſuppoſed to have in his ideas after publication. Such a right is not capable of occupancy, of acceſſion, of tradition; nor is it the object of any viſible poſſeſſion. Ideas, whether remaining in the mind, or expreſſed and publiſhed by word or writing, cannot be deemed *property* in a civil or legal ſenſe. They are indeed *proper* to the perſon who conceived thoſe ideas; but when they are called his *property*, it muſt be metaphorically, and not in a ſtrict ſenſe.

Beſides, it has been well obſerved by writers on this ſubject, That all men whoſe ſenſations are equally well ordered, ought to have the ſame perceptions. It will be extremely difficult therefore to aſcertain whoſe ideas they originally were, or to ſay that they are proper to one man more than to another. All that can be ſaid of the matter is, That an ingenious and ſpeculative man improves his intellectual powers more, and makes a better uſe of them than his neighbours. But this cannot come under the denomination of *property*, any more than the circumſtance of one man's blood circulating faſter than another's, or of being more expert in walking, riding, or fencing.

If by the word *property* is meant, That ſuch a man is the *author* of ſuch a work, *i. e.* that the work is the reſult of his labour and ingenuity, in arranging a ſet of ideas, putting them into writing, and cauſing them to be printed and publiſhed; all this may be very true, and ſo far the author may be ſaid to be *proprietor*. But this is a definition which will be of no avail in the preſent queſtion; it is merely a *metaphorical property*, and an abuſive ſignification of the word.

It may likewiſe be admitted, without hurt to the argument, that by publication the author is not diveſted of this ſpecies of property. He ſtill remains entitled to the character of *author*; he has a right to all the *fame* ariſing from that character; and if any perſon attempts to rob him of that fame, for example, by denying that he is the author; ſuch perſon is guilty of an injury and liable to juſt cenſure; though whether even this offence would be actionable before a court of com-

mon

mon law, is far from being clear. A ſtory is told of one Simon Marius, a German, reſiding at Padua, who having tranſlated into Latin a book publiſhed the year before by Galilæo, cauſed his diſciple Capra to print it as his own. Galilæo complained of this to the Reformers of the univerſity of Padua, who very juſtly ordered Capra's book to be ſuppreſſed, and give ſatisfaction to Galilæo for the injury done him *againſt the laws of printing*. It is plain, that the offence here conſiſted in the attempt to rob the author of his fame, by printing the book under a falſe name; for as Marius was the tranſlator of it, he had clearly a title to publiſh his tranſlation, even according to the modern ideas of literary property, had he done it fairly, and publiſhed it as the work of Galilæo. It appears too, that the complaint was made, not to a court of common law; but to an extraordinary juriſdiction, erected for the purpoſe of regulating ſuch matters, and of inquiring into literary frauds. Such literary thefts are committed every day, and are known by the names of *piracy* and *plagiariſm*; however contrary to good manners, it may be doubted if they are cognizable in courts of common law.

But the preſent queſtion is, Whether, after an author has publiſhed his work, he reſerves a property in it, whereby he can reſtrain all other men from tranſcribing, printing, or multiplying copies of this work, which falls into their hands, no injury being done to his *character* as *author* of the work, which may afford him any perſonal ground of complaint? The queſtion in ſhort is, Whether he has a retained *property* in the words, ſentiments, and compoſition, after having preſented them to the public; or if, on the contrary, by the very act of publication, he does not make them common?

That he does make them common, and put it in the power of all mankind to copy, tranſcribe, and print them at pleaſure, is, with ſubmiſſion, a ſelf-evident propoſition. He can have no hold of the ſentiments which he has publiſhed; he throws them into the common ſtock; he quits the poſſeſſion of his ideas, and allows every perſon to make of them what uſe he thinks proper. In certain caſes, the law acknowledges a *poſſeſſio animi*; but here no ſuch mental poſſeſſion can be figured: For the very purpoſe of publication is, to communicate the poſſeſſion to all mankind; and this is the natural and neceſſary conſequence of the act.

In

'In vain (ſays Puffendorff) would we appropriate to ourſelves 'thoſe things which others can enjoy without our conſent, 'and without our being in a condition to hinder them in any 'ſhape.'

By publiſhing, whether *gratis* or for a valuable conſideration, the author gives his ſentiments and doctrine to the world at large; and there are not *termini habiles* for ſuppoſing that he ſtill retains a power and control over them. If a proprietor of land gives off a road to the public, he cannot afterwards obſtruct that road, or hinder the public from uſing it. When an author is out of poſſeſſion, by publiſhing his work, he cannot ſtill have a *jus in re*, or ſuch dominion over it as to limit the uſe of thoſe who came lawfully into the poſſeſſion of what he has publiſhed.

The purſuer ſays, 'That property in its juſt ſenſe compre-'hends the intereſt of a party in any thing which is capable 'of ownerſhip, whether corporeal or incorporeal, ſuch as his 'life, his labour, or his fame, and that the common law means 'to ſecure to him whatever he has a juſt right to hold and en-'joy, or whatever cannot be violated, conſiſtently with the 'peace and happineſs of mankind, and that every man's feel-'ings can eaſily diſtinguiſh what falls under this idea.' It is further obſerved, 'that the definitions of property given by 'Grotius and other lawyers, are not adapted to the preſent 'ſtate of ſociety.'

But it is plain, that the deſcriptions of property here ſubſti-tuted, in place of thoſe which have uniformly been adopted by lawyers, both antient and modern, are by much too lax and in-definite. In this way, every ſort of right, whether real or other-wiſe, whether connected with a corporeal ſubject, or merely ari-ſing from contract, or founded in the ſtate of perſons, and in the duties which men owe to one another in ſociety: All theſe, ac-cording to the purſuer's definition, muſt come under the idea of property; ſo that if he has children, he may ſay that he has a property in the obedience which they owe him:—If he has a wife, the conjugal duties are his property:—If a certain privi-lege is given him by law, or by grant, of doing a particular thing, or of hindering others from doing it, this he may like-wiſe call his property. In ſhort, every right whatever may be brought

brought under this general denomination, and every legal and known diſtinction of terms muſt be given up, in order to anſwer the purſuer's hypotheſis.

But after all, ſuppoſing his argument were founded in the propriety of language, and in the juſt ſignification of the words uſed by him, it would ſtill remain to prove his right of *ownerſhip*, which muſt mean an *excluſive* right, in a ſubject not under his power, *viz.* a literary compoſition, which he himſelf has communicated to all mankind by publication. He neither has the poſſeſſion, nor enjoys the uſe of it, except in common with other men. How then can he exerciſe this pretended property, or upon what foundation does it reſt?

The difficulties of a retained *ownerſhip* in a publiſhed compoſition, are ſo great and ſo obvious, that the aſſertors of literary property have been driven to ſuppoſe, that there is ſome *implied contract* in the act of publication, by which it is underſtood, that only a limited uſe is conveyed, and that purchaſers are not to multiply copies for their own benefit. But if there is ſuch an implied contract in the nature of the tranſaction, it muſt be *juris gentium*, it ought to obtain every where, and we would have ſeen it eſtabliſhed and enforced in all ages, at leaſt ſince the invention of printing. On the contrary, no notice has ever been taken, either by lawyers or by authors, of any ſuch contract; no action has ever been ſued upon it; and at this day, it would ſound very ſtrange in the courts of France, Holland, or other countries, were an Engliſh author to ſue for breach of contract on account of his works being republiſhed there by perſons who never had any contract with him.

When an author, or bookſeller, ſells a printed copy of his book, he does not ſtipulate with the purchaſer that he ſhall only make this or that uſe of it; and, in particular, that he ſhall not tranſcribe, or multiply copies. No title-page ever bore, that the book was ſold upon condition that the purchaſer ſhould not write or print it over again. No bargain of this kind ever was expreſſed, and none can be implied, as the purchaſe is made without any reſervation; and it would be againſt the common principles of law, as well as public good, to limit the purchaſer's right by implication. The diffuſion of learning is a matter of general concern; and it might be a means of obſtructing this, if

any perſon who has *bona fide* acquired as his own property either a written or printed copy of a book, might not tranſcribe, print and circulate ſuch book at his pleaſure. A prohibition to multiply copies can no more be *inferred*, than a prohibition to lend to a friend, or to keep a circulating library; by which, as well as by multiplying, the profits of the firſt publiſher may be abridged.

The purſuer ſays, why ſhould an author forfeit the right of printing his own work, by the firſt publication? and why ſhould it be ſuppoſed, that when one purchaſes a printed copy of a book for a few ſhillings, he has thereby acquired the right of reprinting and ſelling that work? The anſwer has already been given. The author forfeits no right which he could poſſibly retain, and the purchaſer of the book is entitled to beſtow his labour upon it, either by copying, printing, or in any other ſhape he thinks proper, unleſs reſtrained by ſpecial authority; in the ſame way as the purchaſer of a table or a chair is at liberty to make as many other tables or chairs exactly ſimilar to it as he ſhall think fit, either for his own uſe, or for ſelling to others.

So far from being againſt the nature of the tranſaction, it is plain, that ſuch multiplication is moſt agreeable to it; nay, is the very thing which every author muſt be ſuppoſed to have in view by the act of publication. For every author who brings forth his ſentiments into the world, muſt be underſtood to mean, that thoſe ſentiments ſhould be propagated; and therefore the perſon who is moſt aſſiſting to him in this, by multiplying copies, is the perſon to whom the author is, or ought to be, moſt obliged. He does him the greateſt of all favours, by diſtributing his work, and conſequently ſpreading his fame. This is the true light in which the matter ought to be viewed by authors: For as to the paltry conſideration of copy-money, (the late invention, not of authors, but of bookſellers), it is plain, that whatever an author may be entitled to upon the firſt publication, he has no foundation in reaſon, or in the nature of the thing, to expect that this ſhould be repeated, after the book is no longer under his power.

It was ſaid, that a literary compoſition does certainly remain under the ſole dominion of the author, till he thinks proper to

publiſh it; and if ſo, why ſhould he loſe this property by the act of publication?

The diſtinction is extremely obvious. Before publication, he has the manuſcript in his pocket; he may exclude all others from ſeeing it, or may throw it into the fire. The manuſcript is as much his property as a table, or a chair, or any moveable belonging to him. Of courſe the ſentiments and doctrine, which are only to be found, either in his own head, or in the manuſcript, muſt be under his power, being not communicated to others. Even after publication, the original writing may continue under his power; and any perſon who opens his cabinet, and takes it away, may be puniſhed as a felon. But the author's dominion over the ſentiments and compoſition is at an end by the publication; it could not in nature ſubſiſt any longer.

The author may avail himſelf as much as he pleaſes of the property of his manuſcript; but it is denied that he has any *property* in the ideas thereby conveyed, further than that he could have retained them in his mind; or, when formed into a literary compoſition, could have ſhut up this in his cabinet; which no more conſtitutes him the *proprietor* of the compoſition, conſidering it as an intellectual conception, than a man can be ſaid to be *proprietor* of a good thought, or of a witty ſaying. He is the *author* of it, but not the *proprietor*; and as ſoon as he divulges it to the world, he gives up his words and thoughts to the public; he cannot poſſibly recall them, nor can he hinder any perſon from repeating and ſpreading them at pleaſure. It is inaccurate to ſay, that the author *loſes* his property by publication. He only makes his ideas common; he delivers his compoſition to the public; and puts it in the power of every individual who gets this publication into his hand, to make any uſe of it he ſhall think proper. There is only one caſe in which it can be figured that an author retains the excluſive enjoyment of his ideas, after having publiſhed them, *viz.* if he writes in an unknown language, or character invented by himſelf, and which he alone can decypher. At the ſame time even there, ſuppoſing any perſon into whoſe hands the book has come, ſhould take a fancy to reprint it, what power has the author to hinder him?

Allowing

Allowing that the word *property* could, in the ſtricteſt ſenſe, be applied to this ſort of incorporeal eſſence called *compoſition*, where is the difficulty in ſuppoſing, that, before publication, this property remains with the author; and that, after publication, it becomes communicated to thoſe who purchaſe his book? Take the caſe of a man who deals in horſes, and who has a ſtud for the purpoſe of breeding. This man may keep the whole produce to himſelf, without ſale or communication to any perſon; but if he chooſes to do the contrary, is it not plain that every perſon who buys from him, muſt have the power of multiplying the breed, unleſs ſpecially reſtrained by law, or paction? The ſame thing holds with regard to the inventor of a machine, the raiſer of a new ſpecies of grain, the diſcoverer of a *noſtrum*, or of any ſecret art. In all ſuch caſes, the act of publication muſt make an eſſential difference; and why it ſhould not make the ſame difference in the article of books, the defenders cannot ſee. While the inventor retains his diſcovery to himſelf, or the author, his ideas, it is plain that none other can interfere in the uſe or practice of what is known to none but him; but when the ſecret is once diſcovered, and the ideas are publiſhed, every perſon is at liberty to take benefit from them, where no lawful impediment occurs.

It was ſaid, That literary property was attended with the eſſential qualifications of other property; for that it was uſeful to mankind, and was capable of having its poſſeſſion aſcertained.

If by this it is meant, That the publiſhing books is uſeful to mankind, the defenders ſhall not diſpute the propoſition: But they cannot admit, that a reſerved excluſive property after publication, would either be uſeful to mankind, or eaſily aſcertained by poſſeſſion.

If there be ſuch a property, it is of all others the moſt whimſical: For it may be taken away entirely from the owner, by only adding a little to it, or improving it; for example, by republiſhing with notes, or tranſlating it into another language, or making a few alterations here and there, ſtill preſerving the ſubſtance of the ideas.

Further: If it be a property, it is ſingular in this, that no creditor ever attached it, nor is it capable of being attached: For one of the great arguments uſed in favour of a reſerved right in the author, is, That it is fit he ſhould judge when to publiſh, and when

when not; that he ſhould not only chuſe the time, but the manner of the publication; how many and what volumes; what type; and to whoſe care he would truſt the accuracy and neatneſs of the impreſſion; in whoſe honeſty he would confide, not to put in additions, *&c.* At this rate, it becomes a *res meræ facultatis* in the author, though he has once publiſhed his work, whether he will ever allow a ſecond impreſſion of it to be made or not. All theſe things he, or the perſon whom he truſts, muſt alone judge of: And therefore, though the argument ſuppoſes him to have a perpetual hereditary right in this literary compoſition, beneficial to himſelf, and excluſive of all others; yet it is a right which no creditor can lay his hand upon, becauſe *inhæret oſſibus* of the author, or the perſon to whom he gives it.

Suppoſe the author dies before publication, and the manuſcript is found in his repoſitories, the *paper* may no doubt be conſidered as executry; but how is the property in the *compoſition* to be diſpoſed of? If this is to yield a perpetual revenue, or to be the ſubject of future profits at every publication, it ought by the law of Scotland to be accounted as *heritage*; ſo that here will be a queſtion not eaſily reſolved between heir and executor. And with reſpect to creditors, it may be aſked, can they force the repreſentatives of the author to publiſh and republiſh this work, in order to enlarge the fund for their payment? Can they arreſt the ideas or adjudge them? Perhaps the author had no intention to publiſh this work; poſſibly it contains ſomething criminal, or of a bad tendency, is it in the power of creditors, by attaching the manuſcript, to publiſh it contrary to the will of his heirs, and thereby to bring infamy on the author's name and family? It may further be aſked, whether the author's ſon, by publiſhing his father's manuſcript, would ſubject himſelf in a paſſive title to creditors? Theſe, and other difficulties, would reſult from eſtabliſhing this imaginary property.

To ſay, That a literary compoſition is of common utility, and therefore ſuſceptible of property, is quite inconcluſive. Light and air are of common utility; and yet no perſon ever conſidered them as the ſubject of *property*.

A more plauſible argument is, That an author is juſtly entitled to all the benefit ariſing from the labour of his mind; and that literary compoſitions being the produce of ſuch labour, it is wrong to interfere with him in reaping the profits of it.

To this it is anſwered, in the *firſt* place, That the wrong here ſuggeſted, depends entirely on the extent and duration of the author's property; and it is the violation of that property that muſt alone conſtitute the injury. If his property be at an end, no injury is done him; and the queſtion therefore returns, Whether, by the act of publication, the author himſelf did not make his work common? That this is the caſe, has already been ſhown; it is implied in the very word *publication*, and in the nature of the act itſelf.

2*dly*, It will be conſidered, that in order to give the extraordinary benefit here contended for to authors, the natural rights of others muſt be abridged. A perſon who copies or reprints a book which he acquired without any limitation, does no more than exerciſe a legal right; and however we may lean to literary merit, the property of other men is likewiſe entitled to protection. If the author himſelf has laid his work open, and has acquired all the fame ariſing from it, and even the profits of the publication, can he complain of the natural conſequences of publication? He may, if he pleaſes, republiſh, and reprint his work; but he has alſo put it in the power of others to do the ſame; and this being his own act and deed, he cannot ſay that he is injured.

3*dly*, Though it may be true, that the labour and ſervices of an author often merit pecuniary reward as well as reputation, the queſtion is, Whether this ought to be infinite, and without end; or if the advantages attending a firſt publication, are not, for the moſt part, fully adequate to the purpoſe; and if it would not be highly detrimental to the public, were not ſome bounds ſet to this ſuppoſed equitable claim? The man of genius and ſtudy ought, no doubt, to have ſuitable encouragement; but this muſt be limited by the general good, and by a proper attention to the rights of others.

That an author ſhould have the ſole diſpoſal of his original manuſcript, and ſhould enjoy the profit which naturally attends the act of making it public, is certainly moſt reaſonable. Accordingly, every author has this in his power; and it is impoſſible to diſpute it with him, becauſe he may refuſe to make it public, and may deſtroy his manuſcript, if not previouſly inſured of a ſuitable encouragement. Sir Walter Raleigh deſtroyed the manuſcript

nuſcript of the ſecond volume of his hiſtory, becauſe his bookſeller told him he had loſt upon the firſt; and every author may do the ſame.

If he chooſes to publiſh his work, he has the further advantage accruing from the *reputation* of it, which may often be conſiderable, even in a pecuniary view. A phyſician writing ably upon his profeſſion, may advance his reputation, and conſequently his practice; a lawyer may do the ſame; and even thoſe who apply themſelves to hiſtory, to poetry, or to *belles lettres*, have generally met with patronage and ſupport from rich and powerful men, according to the merit of their works. This was of old, and this ought ſtill to be, the true idea of an author's profit; and it is an idea far ſuperior to the modern invention of copy-money: An invention which has tended much to degrade the author's character, and to render him ſubſervient to bookſellers and printers.

At the ſame time, the author may likewiſe, if he pleaſes, have his *copy-money*, if by this is meant the immediate pecuniary profits ariſing from the act of making his book public. Nay, he may have a great deal more. He may, by the eſtabliſhed practice in this and all other countries in Europe, have a ſpecial *excluſive privilege* for a certain limited time, which will ſecure him in reaſonable profits, if the work is entitled to any. The only queſtion is, Whether he ſhould not only have theſe advantages, but ſomething farther? Whether he ſhould have a renewal of copy-money upon every ſubſequent publication without end, although, by the firſt act of publication, he has put the book, *i. e.* the ſentiments and compoſition, entirely out of his power, and communicated them to the public? Or, in other words, Whether, at the ſame time that he publiſhes his book, he is underſtood not to have made it public, but reſerved to himſelf an excluſive poſſeſſion and power over it. A little attention will ſhow, in the *firſt* place, That it is impoſſible to give way to ſuch contradictions. *2dly*, That it would be no advantage to authors to go into them.

Indeed it is remarkable, that the claim of literary property has ſcarce ever been inſiſted in by *authors*; and is almoſt confined to a particular ſociety, even of *bookſellers*, *viz.* thoſe of London. At the ſame time, it is a queſtion in which regularly the bookſellers ought to have no concern: For when a bookſeller purchaſes any work

work from an author, he can adapt his price to the extent of the benefit which he acquires; and he can no more complain that the monopoly is not perpetual, than a perſon, who takes the leaſe of a farm, can complain, that his leaſe is only to endure for a certain period.

Beſides: It is well known, that every book or manuſcript is purchaſed upon the preſumption, that there will be an immediate call for it. Few bookſellers can afford to ſink their money, even for certain returns, if they are very diſtant, much leſs would the uncertain chance that a book will continue ſaleable for ever, although the perpetual monopoly were fixed, go any great length in enhancing the price. No bookſeller ever purchaſes a book, without calculating that he is to be indemnified, and to have profit upon the firſt, or at furtheſt the ſecond edition; and every perſon converſant in this matter knows, that the London bookſellers give an author very little more for the abſolute diſpoſal of the manuſcript, than for one large impreſſion. Neither would they give more for a perpetual right, were it to be aſcertained, than for the terms allowed by the ſtatute of Queen Anne.

The eſtabliſhing a perpetual monopoly, therefore, would be of no benefit to authors; and it is plain, that bookſellers have no pretence of claim to ſuch a monopoly. Their profits have always been much beyond thoſe of an author; and it would not only be againſt juſtice, but moſt detrimental to the public, to extend their advantages any farther. One conſequence would be, that the bookſeller, being freed from all rivals in the price, paper, correctneſs, or any other part of the good execution of the work, would think himſelf at liberty to ſerve the public in all theſe reſpects as he chooſed. The execution would therefore be inferior, and the price very high. In this laſt article, the London bookſellers have of late gone to a moſt extravagant pitch. In every kind of commerce, and in every art, there ought to be a competition. Without this, induſtry will not proſper; and any monopoly or reſtraint muſt nouriſh tyrants, to oppreſs the country, and to annihilate ingenuity. The more uſeful any invention is, the more grievous the monopoly muſt be.

Beſides, it was well obſerved by a late *honourable perſon* in England, ‘ That he could never entertain ſo diſgraceful an opinion ‘ of learned men, as to imagine, that nothing would induce them ‘ to write, but an abſolute perpetual monopoly: That he could

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'not believe they had no benevolence to mankind; no honour-
'able ambition of fame; no incitement to communicate their
'knowledge to others; but the moſt avaricious and mercenary
'motives. From authors ſo very illiberal, the public would hard-
'ly receive much benefit.'

Another effect of making books a monopoly would be to enrich a few bookſellers, at the expence of the whole nation; a conſequence already too much felt from the temporary excluſive privileges by patent, and from the act of Queen Anne. The defenders have been aſſured, that the bookſellers in London have by ways and means engroſſed, or attempted to engroſs, many of the moſt valuable books, both ancient and modern, under the ſpecious colour of having purchaſed the copy-rights from the authors either immediately or by progreſs; and that, when *new works* are produced, eſpecially in Scotland, *they combine together* to put a negative on the ſale of them, if they are not placed under their immediate protection. One inſtance of this was Mr. Hume's Hiſtory, Vol. I. It is even aſſerted as a fact, That in the year 1759, they entered into articles of agreement, and bound themſelves under ſevere penalties, not to keep in their ſhops any Engliſh books whatever that had been reprinted in *Scotland*: That they raiſed a large ſubſcription for employing perſons to ſearch for ſuch books, and for proſecuting thoſe who ſhould tranſgreſs their reſolution; and alſo wrote circular letters, threatening the country bookſellers, if they dealt in Scots editions: That, in other words, the London booktellers claimed to themſelves, and reſolved to aſſert, the ſole privilege of printing and publiſhing all Engliſh books.

The conſequences to the public, and particularly to Scotland, are extremely injurious. Inſtances could be given of publications, even of works compoſed by Scotchmen, which ought to have been ſold at one-fourth of the price put on them by the London bookſellers. This is a ſerious matter to the country, and will ſoon prove ſo to authors themſelves, if the book-trade is carried on by a few hands, who will be enabled to dictate their own terms.

Milton's Paradiſe Loſt was ſold by the author to a bookſeller in London for 15 l. Sterling, the notion of perpetual copy-right not having then taken place. From this circumſtance of being originally publiſhed by a London bookſeller, the gentlemen of

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that profeſſion, now in London, draw an inference of perpetual excluſive right to themſelves in this book, which has already produced to them many thouſands of pounds; and, if the doctrine of literary property were to be eſtabliſhed according to their ideas of it, there is hardly a book extant in the Engliſh language, which might not in the ſame way be claimed by them. The trade of printing, bookſelling, and paper-making, would in effect be knocked up in every part of the iſland, except London; for the moſt of the capital books being firſt publiſhed in London, the whole buſineſs would be there carried on.

The right of ſuppreſſion, is another dangerous though neceſſary conſequence of the doctrine of literary property.—Suppoſe the heirs of Napier of Merchiſton ſhould inſiſt to deprive mankind of the uſe of the logarithms invented by their predeceſſor, and on which navigation ſo greatly depends, would not ſuch an attempt be alarming to ſociety? Yet the author and his heirs are ſaid to be the only judges of this. A perſon miſchievouſly inclined might buy up copy-rights, in order to ſuppreſs them.

Let it be ſuppoſed, that the pretended copy-rights of Milton, Shakeſpear, Locke, Newton, and all the beſt authors preſently claimed by the London bookſellers, ſhould happen in the courſe of time to be brought to ſale, and purchaſed perhaps by a bookſeller in Aberdeen, or in the Orkneys, who, in conſequence of their own doctrine, would for the future have the ſole regulation and diſpoſal of theſe works, it may be aſked, would the London bookſellers truſt to the Aberdeen or Orkney bookſeller for ſupplying the Engliſh market? It would certainly appear hard to every Engliſhman, to ſee his country deprived of the right of printing her beſt authors. It would be ſaid, that theſe great men did not write merely to get a little pittance to themſelves or their families, but to enlighten mankind; and that the race of bookſellers, after being indemnified a hundred times over, had no right to deprive their country, or prevent the public, from having the full benefit of ſuch uſeful works; that England had the beſt right to poſſeſs and enjoy the writings of thoſe great men to whom ſhe had given birth, education, and protection, and was not for ever to be at the mercy of a Scotch bookſeller.

Beſides: The eſtabliſhment of ſuch a perpetual monoply, would be attended with endleſs confuſion and litigation among authors and bookſellers themſelves. The work of the mind, or

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what is called the *doctrine*, is ſaid to be the foundation of the author's claim of property. Now, if this be the criterion, many will be found who have no pretence of right, and yet whoſe works are very uſeful to the public. In the firſt place, All editors who only publiſh the works of others, cannot plead this title. Then, all authors who give us nothing new, are in the ſame ſituation. The follower of any ancient or modern ſect of philoſophy, who only utters the doctrine of his maſter, cannot be ſaid to publiſh his own ideas, or to furniſh any original compoſition. A tranſlator does not add a ſingle idea. The publiſher of a newſpaper only tranſcribes. The compiler of a dictionary, of a grammar, or of the rudiments of a language, will generally be much in the ſame ſtate.

It may often happen too, that different authors, writing upon the ſame ſubject, have the ſame reaſonings. Can the author who publiſhes firſt on that ſubject, exclude all others from uſing the ſame ſet of words or ideas? Certainly he cannot. Suppoſe two different men compoſe tables of intereſt; if both their calculations are exact, they muſt, according to the rules of arithmetic, turn out to be the ſame. This obſervation will apply to moſt kinds of tables or calculations, as on life-annuities, logarithms, almanacks, &c If the firſt publiſhers of any ſuch works were to have a perpetual monopoly, how abſurd would ſuch a poſition be, and how unjuſt to the reſt of mankind!

Further: If this idea of property, in compoſitions of the mind, is at all gone into, it is difficult to ſee where we are to ſtop. The author of a ſong, or of a piece of muſic; the perſon who makes a ſpeech in public, or who whiſtles a tune, will have the ſame property in his compoſition, and may equally inſiſt in lawſuits againſt every one who pretends to borrow from, or to repeat after him. A lawyer may be proſecuted for copying authorities, and for taking arguments from the ſuggeſtion of others; yet he would not otherwiſe do juſtice to his cauſe.

It is entertaining however to obſerve, what ſhifts the Engliſh bookſellers and publiſhers fall upon, to evade their own doctrine. They ſuppoſe an author's works to be part of his eſtate, tranſmiſſible to his heirs and aſſigns for ever; yet any third perſon, unconnected with the author, and deriving no right from him, may lay hold of this property, and transfer it to himſelf, by only making a few inſignificant criticiſms, in the form of notes;

or perhaps correcting the text, by the addition of ſome words and commas. *Shakeſpear's works* have been publiſhed by a number of perſons in England; by Mr. Rowe, Mr. Pope, Mr. Theobald, Sir Thomas Hanmer, Mr Samuel Johnſon, &c. and if we can believe what theſe critics ſay of one another, their alterations are oftener for the worſe than the better *; yet, bad as they are, they carry along with them a property in the book thus manufactured, and each critic becomes proprietor of a work which he never was capable of writing. In this way, not only the works of Shakeſpear, but thoſe of Spenſer, Ben Johnſon, Butler, Milton, &c. have been appropriated by different commentators.

* 'Mr. *Rowe* (ſays Dr. Warburton) was ſo utterly unacquainted with the whole buſineſs 'of criticiſm, that he did not even collate or conſult the firſt editions of the work he un- "dertook to publiſh." The ſame character is given of Mr. *Rowe*'s edition by Theobald. And Johnſon ſays, "Mr. *Rowe* ſeems to have thought very little on correction or expla- "nation, but that our author's works might appear like thoſe of his fraternity, with the "appendages of a life, and recommendatory preface."

"Mr. *Pope* (ſays Theobald) pretended to have collated the old copies, and yet ſeldom "has corrected the text, but to its injury."—"I know not (ſays Johnſon) why Mr. *Pope* "is commended by Dr. Warburton for diſtinguiſhing the genuine from the ſpurious plays. "In this choice, he exerted no judgment of his own; the plays which he received, were "given by Hemings and Condel, the firſt editors."

"Mr. *Theobald* (ſays Dr. Warburton) wanted ſufficient knowledge of the progreſs and "various ſtages of the Engliſh tongue, as well as acquaintance with the peculiarity of "Shakeſpear's language, to underſtand what was right; nor had he either common judg- "ment to ſee, or critical ſagacity to amend, what was manifeſtly faulty; hence he ge- "nerally exerts his conjectural talent in the wrong place."—"*Theobald* (ſays Johnſon) "was a man of narrow comprehenſion, and ſmall acquiſitions, with no intrinſic ſplendor "of genius, with little of the artificial light of learning, but zealous for minute accuracy. "In his reports of copies and editions, he is not to be truſted without examination. I have "ſometimes adopted his reſtoration of a comma, without inſerting the panegyric in which "he celebrated himſelf for his atchievement."

"Sir *Thomas Hanmer* (ſays Warburton) was abſolutely ignorant of the art of criticiſm, "as well as the poetry of that time, and the language of his author: And ſo far from "having thought of examining the firſt editions, that he even neglected to compare Mr. "Pope's, from which he printed his own, with Mr. Theobald's." In another paſſage, he ſays, "*Theobald* and Sir *Thomas Hanmer* have left their author in ten times a worſe con- "dition than they found him."—"Sir *Thomas Hanmer* (ſays Mr. Dodd) proceeds in the "moſt unjuſtifiable method, foiſting into his text, a thouſand idle alterations."

This critic, Mr. Dodd, is ſomewhat ſevere in his remarks. He ſays, "Mr. *Warburton's* "conduct can never be juſtified, for inſerting every fancy of his own in the text, when I "dare venture to ſay, his better and cooler judgment muſt condemn the greateſt part of "them. That there are good notes in his edition of Shakeſpear, I never did deny; but "as he has had the plundering of two dead men (Theobald and Hanmer), it will be diffi- "cult to know which are his own Some of them, I ſuppoſe, may be; and hard indeed "would be his luck, if, among ſo many bold throws, he ſhould never have a winning caſt. "But I do inſiſt, that there are great numbers of ſuch ſhameful blunders, as diſparage the "reſt if they do not diſcredit his title to them."——See alſo a pamphlet entitled, *The Caſtrated Letter of Sir Thomas Hanmer*, printed at London in 1763.

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Even ſome of the antient claſſic authors have been laid hold of, and divided into ſhares among the London bookſellers. If the doctrine of literary property is eſtabliſhed in Scotland, the booksellers and printers here muſt fall upon ſome device of the ſame nature, as they have no other method of employing themſelves, except printing law-papers to the Court of Seſſion, and reprinting and publiſhing books which have formerly been publiſhed in London and elſewhere; in doing which laſt, they imagine they are lawfully employed, while they do not encroach on the ſtatutory or ſpecial privileges of others.

An argument uſed for literary property, is, That when an author has beſtowed much time and labour in compoſing, and perhaps expended all his ſtock of money in printing and publiſhing an uſeful work, it is unfair and unjuſt that another ſhould ſtep in, the very next day after the work is publiſhed, and by purchaſing a ſingle copy, forthwith ſet about a cheaper edition, by which the profits of the author are intercepted, and even a loſs brought upon him. That the edition thus publiſhed may be ſhamefully incorrect, and the author is alſo thereby deprived of the power of retracting errors, or making neceſſary additions; that the author has evidently a title in juſtice to prevent theſe things; and where there is a wrong, there ought to be a remedy in common law.

But the caſe here ſuppoſed, does, in fact, very ſeldom, if ever, happen. No bookſeller or printer will be ſo unwiſe as to republiſh the works of a living author without his conſent, with a view to intercept his profits; becauſe it is in the author's power to retaliate the injury, by immediately correcting and altering his work, and by publiſhing it in a new form. Inſtances could be given of authors who have actually followed this courſe, in order to prevent others from interfering with them. Thus it is a known fact, that *Mair* publiſhed ſeven or eight editions of his *Book-keeping*, all of them different from one another; and the ſame thing has been alledged of a more celebrated writer, *Voltaire*. Neither will any perſon ever knowingly print an incorrect edition, which will not ſell when a better one can be had. If the author's edition be incorrect, nothing hinders him to publiſh another, and to retract errors, or make additions, but he can never recall the copies he has once publiſhed and ſold.

Beſides: The argument, when attended to, will appear to be inconcluſive. It is, no doubt, ungenerous to interfere with an author upon his firſt publication; but it is ſuch a wrong as can only be remedied by *ſpecial interpoſition.* And accordingly, to prevent this very abuſe, the practice has been, here, and in other countries, to give excluſive privileges to authors for a definite time, in the ſame way as to the inventors of machines, or of any other art.

The poor have an equitable title to demand their maintenance from the rich; but it never was imagined, that, independent of any ſtatute, they could bring actions before courts of law or equity, for eſtabliſhing rates upon the rich, ſufficient to ſubſiſt them. Courts of juſtice can only interpoſe to make *perfect* rights effectual, not *imperfect* ones, ſuch as that juſt now mentioned, and many others, ariſing from the obligations of friendſhip, gratitude, and benevolence.

The author of a book is preciſely on the ſame footing, in this reſpect, with the inventor of a machine, or art uſeful in life. It is equitable that he ſhould have the excluſive right of ſelling his work, for ſuch a length of time as to reimburſe him of the expence, and recompenſe him for his trouble; but it by no means follows, that this right can be enforced by legal proceſs. He has always the advantage of priority of ſale; and if others have an opportunity of following him, this is the neceſſary conſequence of publication. It requires legiſlative power to reſtrain the natural rights of others.

The maintainers of literary property, finding it neceſſary to admit that the inventors of machines have no ſuch excluſive right, have been at great pains to diſtinguiſh between the caſe of machines, and that of books: But, with ſubmiſſion, their diſtinctions are inconcluſive and unintelligible. A book is a combination of ideas, ſo is a machine; both of them are the reſult of invention: Why then ſhould not the authors of both be equally entitled to make a trade of communicating this invention to the public? It is either wrong to interfere with either, or it is lawful to interfere with both.

It is ſaid, 'That a machine or utenſil is the work of the 'hand, not of the mind; and that property in the work of the 'hand is confined to the individual thing made, which if the 'proprietor thinks not fit to hide, others may make the like in

'imitation

'imitation of it, and thereby acquire the ſame property in their
'manual work, which he hath done in his. But in the caſe of
'a production of the mind, the property conſiſts in the doctrine
'produced, which the owner ought to have the ſole right of
'tranſcribing and copying for gain.'

This argument is founded on a propoſition not true in fact, That a machine is ſolely the work of the hand. The hand is no doubt neceſſary to put it into form, in the ſame way as in the caſe of a book: But ſurely it will not be denied, that the microcoſm was the reſult of long labour and ingenuity of the mind; that Mr. Harriſon's time-piece is in the ſame caſe; and that every ſpecies of mechanical work is more or leſs ſo. The author of a machine certainly uſes his mind as much as the author of a book; and the copier of a book uſes his hand as much as the copier of a machine.

It is next ſaid, That 'in the caſe of an utenſil made, the
'principal expence is in the materials employed, which whoe-
'ever furniſhes, acquires a property in the thing made, though
'by imitation: On the contrary, in a book compoſed, the prin-
'cipal expence is in the form given, which, as the original mak-
'er only can ſupply, it is but reaſonable, how greatly ſoever
'the copies of his work may be multiplied, that they be multi-
'plied to his own excluſive profit.'

This argument is far from being intelligible; and it ſeems alſo to be founded on a miſtake, that in the caſe of valuable machines, ſuch as orreries, teleſcopes, time-pieces, *&c.* the chief expence conſiſts in the materials furniſhed. In moſt books, the charge of printing the impreſſion, is much more than the copy-money, often ten times as much.

It is unneceſſary to go through the other arguments which have been ſuggeſted, for ſhowing a difference between a book and a machine. They are all of the ſame ſtamp, all founded on *data* which at firſt ſight muſt appear to be erroneous, or on diſtinctions too nice and ſubtile to be perceived by common eyes. There is no real difference with reſpect to the queſtion of property, between a mechanical invention, and a literary one. The *inventor*, as well as the *author*, has a right to determine, whether the world ſhall ſee his production or not; but if he once makes it *public*, every acquirer has a right to make what uſe of it he pleaſes. If the inventor

ventor has no patent, his inſtrument may be copied: If the author has no patent, his book may be multiplied.

A printer of linen cloth, who deviſes new and elegant patterns, does not eſſentially differ from an author of books. An engraver of prints, who improves the art, and diſcovers ſomething ingenious and new, is likewiſe in the ſame caſe; yet it never was thought, that either in the one inſtance or the other, there was any ground in law upon which copying could be hindered. It required a ſpecial act of Parliament to ſecure engravers in a *temporary* excluſive privilege, as in the ſequel will be ſhown. The reaſon is plain; becauſe ſtamping and engraving, as well as printing books, are lawful employments, which every one may exerciſe, unleſs forbid by ſpecial authority.

Beſides the inconveniences already noticed, another difficulty which would follow the doctrine of inherent literary property, is, That it is attended with no marks by which the property can be denoted. The moſt ſtrenuous aſſertors of this property admit, That a work may be abandoned to the public, in ſuch manner as to leave no property in the author; and that this will be the caſe, 'if he ſtamps no mark of ownerſhip upon it.' But they ſay, That if he ſells for gain, or if his name be on the title-page, theſe are indications of property, which ſhow his intention to preſerve his right.

This is, in effect, retracting the admiſſion: For few books are publiſhed without bringing gain; and, for the moſt part alſo, the author's name is upon the title-page, which is only expreſſive of a fact, that he was the compoſer of the book; but does not inform the public, whether he is to claim a perpetual property in this work, or to make a free offering of it for the uſe of mankind. Third parties have no acceſs to know what bargain there was between the author and the bookſeller, or whether any price was paid to the former by the latter. When a temporary right was aſcertained to authors by the act of Queen Anne, the legiſlature ſaw the neceſſity of eſtabliſhing ſome *ouvert* evidence of the author's intention, and provided for it; but upon the footing of the common-law right, a perſon may offend without having any poſſible means of knowing whether he does right or wrong.

Upon theſe grounds, the defender is adviſed, that the perpetual right, ſuppoſed to be in authors and their heirs and aſſigns,

which

which has received the name of *literary property*, reſts upon no general principle of law, reaſon, or expediency. The next queſtion is, How far there are any traces of it in the law of Scotland, prior to and independent of the act of Queen Anne?

II. Common Law of Scotland.

II. If this ſpecies of property be at all a branch of the municipal law of Scotland, it muſt be founded either in the civil law, or in our own ancient cuſtoms, acts of the legiſlature, authorities of our lawyers, or judicial determinations of our Courts. All of theſe ſources have been inveſtigated; every corner has been ſearched; but not the leaſt glimpſe diſcovered of literary excluſion, independent of ſpecial grant: On the contrary, we find ample materials to ſhow, that it is adverſe to every notion of the common law of this country.

Before the invention of printing, the idea of property in an author, in the ſenſe now contended for, could hardly exiſt; becauſe the multiplication of copies by writing was ſo tedious, that it could yield no gain to the author, whatever it might do to thoſe who endeavoured to procure a ſubſiſtence by their manual labour. This, in the Roman and Grecian ſtates, was generally the taſk of ſlaves; and it was common for learned men, or thoſe who were fond of making libraries, to keep ſlaves for the purpoſe of tranſcribing. This, in particular, was the caſe of Atticus, who made a large collection of very valuable books by means of his ſlaves, at no other expence than that of copying; and it does not appear that by ſo doing he gave any offence either to authors or to bookſellers.

C. Nepos Vita Attici.

The only literary property acknowledged in the civil law, was that which was in the owner of the paper, or parchment, on which the words were wrote. ‘ Literæ quoque, licet aureæ ſint, ‘ perinde chartis membraniſve cedunt; ac ſolo cedere ſolent ea, ‘ quæ inedificantur, aut inſeruntur. Ideoque ſi in chartis mem- ‘ braniſve tuis carmen, vel hiſtoriam, vel orationem Titius ſcrip- ‘ ſerit; hujus corporis non Titius, ſed tu dominus eſſe videris. ‘ Sed ſi a Titio petes tuos libros, tuaſve membranas, nec impen- ‘ ſas ſcripturæ ſolvere paratus ſis; poterit ſe Titius defendere ‘ per exceptionem doli mali, utique ſi earum chartarum mem- ‘ branarumve poſſeſſionem bona fide nactus eſt.’ *Inſt. de rerum diviſione*, § 33.

A late author takes notice of this text, and ſays, ‘ We find no ‘ other mention in the civil law of any property in the works of

Mr. Blackſtone, b. 2. c. 26. § 8.

'the underſtanding, though the ſale of literary copies for the 'purpoſes of recital or multiplication, is certainly as ancient 'as the times of Terence, Martial, and Statius.' The latter part of this propoſition, if it means that ſuch copies were ſold with an *excluſive* power of multiplication, is not ſupported by the authorities referred to.

Thus, in the prologue to the Eunuch, Terence ſays, 'Hanc 'fabulam poſtquam ediles emerunt.' This only ſhows, that the public magiſtrate ſuperintended the amuſements of the theatre, and gave the dramatic poet a price for his work: It does not prove, that there was a trade ſubſiſting between the bookſeller and the author upon the footing of perpetual copy-right.

In the ſame way, the epigrams referred to in Martial, ſerve only to evince, that there was a bookſeller, or copyiſt, who made it his trade to tranſcribe manuſcripts and ſell them, and who no doubt was paid for his trouble.

Sunt quidem, qui me dicunt non eſſe poetam;
Sed qui me vendit bibliopola, putat. MART. *l.* 14. *ep.* 194.

The paſſage relative to Statius, in the ſeventh ſatire of Juvenal, is equally inconcluſive, as it only proves, that Statius diſpoſed of his tragedy to the players.

The following lines of Horace ſhow very plainly, that there was no ſuch thing as copy-right among the Romans.

Hic meret æra liber Soſiis, *hic et mare tranſit,*
Et longum noto ſcriptori *prorogat ævum.* De art. poet. *v.* 345.

In the preceding verſes the book is deſcribed, which is here ſpoke of, as procuring *money* to the *Soſii*, two brothers of that name, eminent bookſellers in Rome; and to the *author*, *fame*. This contraſt between the author and the bookſeller is remarkable: It ſhows Horace's ſenſe of the matter; and that the notion of profit to an author, by perpetual ſale of his works, was not then entertained.

Neither do the writers on the civil law take the leaſt notice of a property in literary compoſitions; though Voet, in treating of *privilegia*, makes mention of the excluſive *patents* ſometimes given to printers of books.

Comment. lib. 1. tit. 4. § 11.

The idea therefore of literary property could not creep in among us from the civil law; and as little can it be traced to

any

any other ſource. It is ſaid by *Ames*, in the preface to his *Typographical Antiquities*, 'That in the time of Henry II of England, 'the manner of publiſhing the works of authors, was to have 'them read over for three days ſucceſſively before the Univerſi-'ty, or other judges appointed by the public; and if they met 'with approbation, copies of them were then permitted to be 'taken, which were uſually done by monks, ſcribes, illuminors, 'and readers trained up to that purpoſe for their maintenance.'

At this period, ſurely authors could have no monopoly after publication, either in Scotland or England. Every perſon who choſe to be at the labour of tranſcribing, muſt have been entitled to reap the fruit of his labour; and as our common law goes back that length, ſo it follows, that literary property is no original part of the common law of this country. Public utility, as well as the nature of the thing, muſt have rejected any ſuch pretence; and if ſo, it will be difficult to explain how, or at what time, or for what good reaſon, it ſhould afterwards have been introduced among us.

Upon the revival of learning, and after printing had been invented, the publication of books was ſtill an expenſive operation, and could not be attended with profit to the author; but the zeal of learned men was great, and they publiſhed their works not only without reward, but at great private expence. The art of printing was introduced into England by Caxton about 1471, and into Scotland at or ſoon after the ſame time, as appears from *Ames*, and from *Watſon's Hiſtory of Printing*. When introduced, it was conſidered as a mechanic buſineſs, a manufacture of the kingdom, which all men had a right at common law to exerciſe: It was only a more expeditious method of copying. The firſt printers, both in England and Scotland, conſidered it in this light, and printed every book that came in their way, without any notion of being reſtrained, either by literary property, or by any other conſideration.

The only method taken in thoſe days to prevent interference was to conceal their art as far as poſſible, not being metaphyſicians enough to imagine, that, by inventing the art, they had acquired any excluſive right to exerciſe it. 'Inventores primos 'id clam habuiſſe, omneſque ſecreti conſcios, religione etiam 'jurisjurandi interpoſita, excluſiſſe; ideoque vaſtæ molis opera 'per paucis operariis fuiſſe concredita.' In ſpite of their endea- Maitaire. Annal Typogr. I. p. 4.

vours

vours however, the art ſpread, printers multiplied, and books were publiſhed without any controll, till the policy of different ſtates reſtrained it by poſitive regulations, or the prerogative of the prince, in arbitrary times, encroached upon the natural liberty of the ſubject.

The invention therefore of printing wrought no alteration to make the common law adopt new principles.

The liberty of the preſs in Scotland was firſt reſtrained by the ſtatute of Queen Mary, 1551, *cap.* 27. which, upon the narrative, 'That diverſe prenters in the realme prented *buikes concerning the* '*faith*, ballates, ſanges, blaſphemationes, &c. to the defama-'tion and ſlander of the lieges,' therefore ſtatutes and ordains, 'That na prenter preſume, attempt, or take upon hande, to 'prent *ony buikes*, ballates, ſanges, blaſphemationes, rimes, or tra-'gedies, outher in Latine or Engliſh toung, in ony times to 'cum, unto the time the ſamin be ſeene, viewed, and examined 'be ſome wiſe and diſcreit perſons, depute thereto be the Ordi-'nares quhat-ſum-ever; and thereafter ane licence had and ob-'teined fra our Soveraine Ladie and the Lord Governour, for 'imprenting of ſik buikes, under the paine of confiſcation of all 'the prenter's gudes, and baniſhing him of the realme for ever.' This was entirely agreeable to the ſpirit of the eſtabliſhed religion in thoſe times, averſe to free enquiry, and having no other means left of oppoſing the reformation than by obſtructing the progreſs of knowledge and true literature, then faſt gaining ground by means of the invention of printing.

Sir George Mackenzie, in his obſervations on this act, maintains, That printing is *inter regalia*, and that the King may diſcharge any man to print without his licence. At the ſame time he owns, 'It is the opinion of ſome republicans, that, printing 'being a trade, no man can be debarred from the free uſe of it, 'except by Parliament, in which their own conſent is implied.' It is immaterial to the preſent argument, whether the power of reſtraining the preſs was in this country acknowledged to be in the Sovereign, or in Parliament; for ſtill theſe reſtraints were of a very different kind from that of literary property, of which neither the legiſlature at the time, nor our lawyers, appear to have had the ſmalleſt conception. The *act above recited* ſtrikes againſt *authors* as much as againſt others, and, paying no regard to *literary property*, prohibits them from even publiſhing

their

their own works without licence.

Prior to the aforeſaid act, 1551, there appears one in James the Fifth's reign, 1540, *cap.* 127. ordaining the acts of Parliament to be publiſhed, and the clerk-regiſter ' to make ane au-' thentic extract and copy of all the faidis acts, ſa far as con-' cernis the common weill, under his ſubſcription manual, to be ' imprented, be quhat prenter it ſall pleaſe the ſaid clerke of ' regiſter to chuſe: And it ſhall not be leaſum to ony uther ' prenter, to imprent the ſamin within this realme, or without ' the ſamin, or bring hame to bee ſaulde, *for the ſpace of ſex* ' *zeirs nixt to cum*, under the paine of confiſcation of the ſamin: ' Providing alwaies, That the ſaid prenter to be choſen be the ' ſaid clerke of regiſter, as ſaid is, have our ſaid Sovereigne ' Lordis ſpecial licence thereto.' Accordingly, in the ſame year 1540, we find a patent granted by the King to Thomas Davidſon, for printing the acts of Parliament, and diſcharging all others for the ſpace of ſix years, under the pain of confiſcation; and there are ſundry renewals of thoſe licences to print the acts from time to time.

But this can hardly be accounted a reſtriction of the liberty of the preſs, as it was thought proper very early, both in England and Scotland, that acts of Parliament, and other acts of State, ſhould be publiſhed under the direction of the King or his officers, and likewiſe *Bibles;* and in England, *Prayer-books*, and *Almanacks*, regulating the faſts and feſtivals of the church. Theſe, in our neighbouring country, are called *prerogative copies*, having been veſted in the ſupreme Magiſtrate from political conſiderations, for the ſake of uniformity in law and national religion. They had no connection either with the ſuppoſed private right of authors, or with the general reſtriction of the preſs. At the ſame time it may be noticed with regard to the above act 1540, that the excluſive privilege, even of printing the acts of Parliament, was limited to ſix years, and that the authority of Parliament was thought neceſſary to confer this monopoly.

It is probable, that the eſtabliſhment of the Reformation ſoon rendered the act 1551 unpopular, ſo far as regarded a general prohibition of printing without licence; But the ideas of prerogative at that time were high, and a cuſtom had been introduced in other parts of Europe, of applying to the ſovereign