as heir of line, these services, as they refer specially to the rights by which the claimant claims, as heir of provision, the service as heir of line must be qualified by the rights upon which it proceeds, which is that of heir of provision, and therefore held to comprehend a service as heir of provision. Consequently, the prescription pleaded upon these can only go to confirm the respondents' right, and not undo it. In Smith and Bogle *v.* Gray, Kilk. 30th June 1752, a case of this nature was decided, where a party possessed for about 60 years upon retours and infeftments in their favour as *heirs of line*, and yet a *simple destination*, executed by their father, which had lain dormant for nearly 80 years, was found to be effectual to carry the estate from the heir of line to the heirs substituted in that deed. So that the appellants' plea on the ground of prescription cannot avail in this case. Voce Prescription.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *John Clerk, David Cathcart.*

For the Respondents, *Wm. Adam, Sir Samuel Romilly, J. Wolfe Murray.*

THOMAS CADELL and WILLIAM DAVIES, Booksellers in London; and WILLIAM CREECH Bookseller in Edinburgh, . . } *Appellants;*

JAMES ROBERTSON, Printer in Edinburgh, *Respondent.*

House of Lords, 16th July 1811.

LITERARY PROPERTY—COPYRIGHT — PROTECTION BOTH BY THE ACT AND AT COMMON LAW.—This was the case of an interdict and action of damages brought by the appellants, in right to the copyright of the Works of Burns the Poet, which, after the publication of Dr. Currie's edition, had been pirated and published by the respondent. The book had not been entered at Stationers' Hall, and the Court of Session held, that the only protection lay in the statutory penalties; and if the book was not entered in Stationers' Hall, no action was competent at common law for indemnification or protection. In the House of Lords, this judgment was reversed by a special declaration, stating that, though the work was not so registered, yet that the parties had, for the term specified in the statute, a right vested in them, entitling them to maintain a suit for damages, and also to interdict in case of the violation of

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that right. It was also held, That the penalties and forfeitures in the statutes of Queen Anne applied only to the first fourteen years, and not to the second.

The appellants were proprietors of the Works of the late Robert Burns, the Scottish poet; and the question at issue by the present appeal was, Whether the appellants had any legal remedy for the protection of the right which they had acquired in the copyright of these works, though they had not been entered in the register book of the Company of Stationers in London; and if they had such legal remedy, what that remedy was?

In the year 1786, Burns published at Kilmarnock, in Ayrshire, the first edition of his poems.

In the year 1787, he published in Edinburgh, a second edition, which he sold to the appellant, Mr. Creech. As to this edition, the term granted by the statute expired in 1801.

In the year 1793, the poems of Burns came to a new edition. On this occasion he added twenty new poems to the collection. The property of these new pieces was vested in the appellant, Mr. Creech, in consequence of an agreement entered into between the author and him in the year 1787. By this agreement, Burns conveyed to the appellant, Mr. Creech, his right of property in this new edition, in the

1793. following terms:—"The sole property legally inherent in "me of the poems already published by me in one volume "octavo, and of which I am the author, with any additions, "alterations, or corrections I may make to the said volume, "in any future edition, if such shall be."

The benefit of this right the appellant, Mr. Creech, communicated to the other appellants, Messrs. Cadell and Davies. Of the additional pieces published in 1793, the exclusive privilege, according to the provisions of the statute, did not expire till the year 1807.

In the year 1796 Burns died. He left his family in very distressed circumstances, their only resource being in the publication of his works. Dr. Currie of Liverpool benevolently undertook to be the editor of a complete collection of these; and the appellants were applied to by the guardians of the family, and by Burns' widow, (who had been confirmed his executrix, and had conveyed her rights as such to trustees), to purchase the book when prepared for the press. The appellants agreed to the proposal, and, on the 25th of February 1800, a contract was entered into between the appellants of the one part, and of the other, "William Max-

" well, Esq., physician in Dumfries, John Murdo, Esq. of " Hardriggs, and John Syme, Esq. collector of stamp-duties " at Dumfries, the acting trustees for the family of the de- " ceased Robert Burns, sometime residing in Dumfries, " North Britain, Gilbert Burns, farmer at Mossgeil, only " brother and nearest heir-male to the surviving infant chil- " dren of the said Robert Burns, Jean Armour, the widow " and mother to the said children, William Thomson of " Moat, writer in Dumfries, factor *loco tutoris*, appointed by " the Right Honourable the Lords of Council and Session in " Scotland to the said infant children, viz. Robert, Frances, " William Wallace, Nicol, and James, of the said Robert " Burns and Jean Armour, during their pupillarity."

The agreement proceeded on the recital :—That the said Messrs. Thomas Cadell, William Davies, jointly, with the said William Creech, were entitled to the copyright of the Works formerly published of the said Robert Burns, for the remainder of a period of years then unexpired; and the family of the said Robert Burns having in their possession at the time of his death several original works and writings of his own composition, and then unpublished, the said trustees, upon the behalf of the family, agreed with the said Messrs. Thomas Cadell and William Davies, and William Creech, that the same should be united and incorporated with the said Works so formerly published. And that a new complete edition of such, and so many of the works and compositions of the said Burns as James Currie, M.D. and F. R. S. of Liverpool, with the advice and consent of the said trustees, should think proper for publication, should be printed in four volumes octavo, with a life of the said Robert Burns to be prefixed thereto, to be written by the said James Currie. Therefore, and for certain valuable considerations to be paid, and obligations to be performed, on the part of the appellants, the other parties " give, grant, bargain, sell, assign, and con- " firm, unto them, their executors, administrators, and assigns, " all that the said intended edition, not exceeding 2000 copies, " in four volumes octavo of the Works of the said Robert " Burns, with his life, by the said James Currie, to be prefixed " thereto, so to be printed and published, under the super- " intendence of the said James Currie, and at the costs, " charges, and expenses of the said Thomas Cadell and " William Davies; and also, all the copyright, right of " authorship, use, interest, trust, property, claim, demand, " privilege, and authority whatsoever, which the said Ro-

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" bert Burns in his lifetime had, or which they, the said " William Maxwell, John Murdo, John Syme, Gilbert Burns, " Jean Armour, and William Thomson, or any other of " them, or any other person or persons, now have, or of " right ought to have, by force or virtue of any law, statute, " usage, or custom whatsoever, or howsoever, of, in, and to " the said Works of the said Robert Burns, and his life to " be prefixed thereto, and to be contained in such intended " edition, and every part and parts thereof. And also " of, in, and to all other works and compositions of the " said Robert Burns, which may not be inserted in such in- " tended edition, together with full power and authority to " print and reprint all such works, and to sell, vend, and " dispose of the same from time to time; and at all times " hereafter to have and hold the said intended edition, and " all future editions of the said works, and also the copy- " right in and to all the works of the said Robert Burns, " and all other premises with the appurtenances hereby " assigned; and all profit, benefit, and advantage that shall " or may arise by and from printing, reprinting, publishing, " selling, vending, and disposing of the same, unto the said " Thomas Cadell and William Davies, their executors, ad- " ministrators, or assigns, as their own proper goods and " chattels, and sole and exclusive property for ever, for so " long time as such property can or may by law subsist, " remain, and endure."

Under this assignment, joined with the original assignment in the year 1787, the appellants were fully vested in all right of property, or exclusive privilege, in regard to these works, which had stood in the persons of Burns or of his representatives.

In 1802, about two years after the publication of Dr. Currie's edition of Burn's Works, the respondent, James Robertson, a printer and bookseller in Edinburgh, published a book, entitled, " Poems, chiefly in the Scottish dialect, by " Robert Burns, 1802."

Besides the poems published in 1787, of which the term of exclusive privilege had expired in 1801, this publication, the appellants stated, included many poems pirated from the edition 1793, and from Dr. Currie's edition of 1800.

In order to stop these depredations, the appellants brought a suspension and interdict (injunction), which was passed by Lord Meadowbank, Ordinary on the Bills.

They also raised an action in the Court of Session against

the respondent, concluding against him to pay to the pursuers the sum of £200, in name of damages, and as an indemnification for the loss they had sustained by his invasion of their exclusive right, and for £60 sterling of expenses.

The bill of suspension and action of damages were founded upon the before recited assignments, and upon the act of Parliament of the 8th of Queen Anne, c. 18, entituled, "An "act for the encouragement of learning, by vesting the "copies of printed books in the authors or purchasers of "such copies during the time therein mentioned."

These two actions being conjoined, the respondent stated the following defence:—That the appellants had not produced the assignments from Burns and his family upon which they founded their title to bring the action; but this defence having been done away with by producing the assignments, the defences were, 1st, Supposing the appellants to have a legal right to the exercise of the exclusive privilege of printing Burns' Works, there was, in point of fact, no invasion of that privilege, since all the poems published by the respondent were either first published in the edition of 1787, the privilege of which was admitted to be expired; or were given freely to the public, and abandoned by Burns himself, who sent them to newspapers, or occasional publications, not only with no expectations of emolument, but with express contempt for remuneration. Secondly, With regard to the poems in Dr. Currie's edition, published from the manuscripts found in Burns' repositories, the respondent contended, that there was not vested or acknowledged by the law any right to the executors or representatives of a deceased author, exclusively to print and sell his unpublished compositions. That his family, after his death, might refuse to publish them, or they might sell them as manuscripts; but if they published them to the world, they could claim no exclusive privilege of multiplying copies of them. On the merits, it was pleaded, 1st, That even in the simplest and most abstract case, no author, nor assignee of an author, has by the statute of Queen Anne, an exclusive privilege relative to a book which has been published, unless it has been previously entered in Stationers' Hall. And, secondly, That at all events, even were such exclusive privilege admitted, though it might justify an interdict, or give the appellants a right to penalties, it could never be made the foundation of an action for damages.

Lord Glenlee, before whom, as Ordinary, the cause came, ordered memorials, to report the whole cause to the Court.

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He also directed a condescendence to be given in, so that certain disputed facts might be specifically stated by the parties, to be answered by the respondent.

The disputed facts related to the question, Whether, on the supposition that the appellants had a right to legal remedies for the protection of a book not entered in Stationers' Hall, the respondent was not entitled to plead that all the pieces which he was accused of having pirated from the editions in 1793 and 1800, had been abandoned to the world by Burns himself before they appeared in either of these editions.

The Lord Ordinary, in ordering this condescendence, expressed his opinion that the appellants ought to specify the poems which they charged against the respondent as piracies; and that the respondent should, on his part, specifically state in what manner he intended to justify the publication of these particular pieces, and from what publication he alleged he had taken them, which accordingly the appellants did, by furnishing a list of the pirated pieces. But the respondent, instead of a specific answer, contented himself with stating, 1st, That the poems first published in the edition 1793, were never conveyed to the appellants, there being (as he stated) no new conveyance from Burns at that period, and that the original contract in 1787 only gave a right to the poems then published, with any additions, alterations, or corrections, which the author might make on them; and did not extend to any new poems he might afterwards compose. And, 2d. That all the other poems in the appellants' condescendence were abandoned and given to a publication, termed, "Johnston's Musical Museum," or to the collection of songs published in Edinburgh by Mr. Thomson, without any reservation of Burns' right of property. Informations for the parties were also given in and reported to the Court by the Lord Ordinary. When the cause came to be advised, the Court took it up as a question, chiefly, if not solely, as to the effect of the statute, whether or not it could protect the copyright of a book not entered in Stationers'

May 16, 1804. Hall? And pronounced this interlocutor:—"Upon the report of Lord Glenlee, and having advised the informations for the parties, the Lords recall the interdict; find the letters orderly proceeded; sustain the defences against the action of damages; assoilzie the defender, and decern.

Dec. 18, 1804. On reclaiming petition, the Court adhered.*

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* Opinions of the Judges.

LORD PRESIDENT CAMPBELL.—"There is one point only argued

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded by the Appellants.—1. The appellants being proprietors of the Works in question for the term of years granted by the statute of Queen Anne, had, by virtue of that statute, a right vested in them, which they were entitled to have protected by an interdict, and by an action of da-

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here; and this is upon the late act, in regard to literary property. In my opinion, the decision of the cause does not depend on this point alone, but much more upon others. 1. The few poems which are in question had been abandoned to the world before any of these editions were published. 2. They were mixed up in the mass of the volumes published and republished by Dr. Currie, as to which the term of the statute is expired, and cannot be prorogated by this device of putting in a few additional poems, especially as even these had come under the original purchase. 3. The statute, whether conferring a new right, or settling the boundaries of an old one, prescribed remedies as the only ones that could be used, and left no room for actions of damages. The conditions there set forth were adopted accordingly, and this is the true reason why the clause concerning entry in Stationers' Hall is so worded. Is it possible that two actions could go on at the same time, or two conclusions—one for damages, the other for penalties? Monopolies in general cannot well be imposed by actions of damages. The fines provided by the act, or the penalties, or the seizure of the goods, are the proper remedies.

"As to injunctions and interdicts, these are no evidence of common law right, or indeed of any right at all, unless perhaps a *prima facie* one granted every day, and upon any colour of right, to keep matters entire, until the merits are tried, especially where it is in favour of possession. But suppose only a statutory penalty, *e.g.* stamp acts, it is very proper to grant an interdict against doing what the law declares punishable."

LORD JUSTICE CLERK (HOPE).—"I am for adhering."

LORD WOODHOUSELEE.—"An action of damages lies at common law, and the entry in Stationers' Hall was only applicable to the case where the penalties alone are sought to be recovered, and the limitation of action to three months applies to the whole statute."

LORD HERMAND.—"No; it does not. There is a literary property at common law."

LORD MEADOWBANK.—"A British statute cannot be construed differently here, and in the House of Lords. I am clear that the action lies here, independent of the entry in Stationers' Hall."

LORD ARMADALE.—"The damage given to the author is the forfeiture and delivery of all the sheets published to the author and his assignees, who also may be the informer. I am for adhering."

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mages as in the present case. 2. The condition of entry in Stationers' Hall does not apply to the vesting the property of any work in the author, or his assignees, for the term of years limited by the statute; but such condition of entry relates merely to the subjecting the offenders to the forfeitures and penalties of the act granted. The intention of the Legislature, in passing the act of Queen Anne, was to accomplish two objects. In the first place, To declare, in absolute terms, that an author and his assigns should have the exclusive privilege of printing and reprinting his own works for the term of fourteen years from the date of publication; and for a second term of fourteen years, provided he should survive the expiration of the first; and, 2ndly, To enact certain penalties and forfeitures against offenders, upon the particular conditions, one of which was, that the book should be entered in Stationers' Hall. The entry in Stationers' Hall, is only applicable to the recovery of the penalties and forfeitures, but the vesting of the right. and the protection which the act affords, stands free of any such condition. Indeed, were it otherwise, the inadequacy of the remedies prescribed in this statute for the protection of authors, would be apparent, since, on the one hand, although the statute orders the copies to be forfeited, it also orders them forthwith to be damasked, and made waste paper of. And also, on the other hand, there is a penalty of one penny per sheet; this penalty goes not to the author; but one half to the informer, the other to the king. The consequence of this is, that the author, who alone is injured, receives no indemnification, unless he had some such remedy at common law as the present action of damages. The remedies of the statute can never apply to any other case than that in which the piracy has not been fully accomplished. If the piratical bookseller has sold off his edition, and so accomplished the whole evil, there is no remedy for the author, since no copies remain to be forfeited; and no sheet is to be found in the custody of the person contravening the statute, upon which, in terms of

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LORD BALMUTO.—"I am for adhering."

Lord President Campbell's Session Papers, vol. 115.*

* Lord Mansfield, in Midwinter's case, on a consultation from this country, gave his opinion as counsel in 1748, thus:—"It was always held that the entry in Stationers' Hall was only necessary to enable the party to bring his action for the penalties." And he reiterated that opinion in the case of Tonson v. Collins, in the Queen's Bench, as a judge.—*Vide* Blackstone's Reports, vol. i. p. 330.

the act, a penalty can be levied. In the interpretation of statutes, concerning crimes and public wrongs, the enactment of penalties may well be considered as superseding all proceedings at common law; but the statute in question was enacted, not so much for the punishment of crimes, as to bestow a private and individual right, and to provide certain remedies for protecting and enforcing it, which, according to the fair rule of interpretation, can never be held as anything else than a cumulative remedy; without which construction, the right, instead of being protected, would in many cases be entirely defeated. The right bestowed by the statute is not a monopoly, but merely a continuance to the author, after publication, of that right, which, till the moment of publication, he indisputably has, and giving him the benefit only for a limited time of the productions of his own genius and labour. It has the effect merely of correcting what is unjust and harsh in the principles of common law, when applied to a new and peculiar species of property. But to admit the competency of an interdict is to acknowledge the principle upon which an action of damages rests. Where the piracy is discovered in time to prevent the publication, an interdict is the remedy. When it is not discovered till afterwards, and the person guilty of the encroachment has made his advantage of it, while the author has proportionally suffered, an action of indemnification is the only remedy. Accordingly, it has always been held, that an entry in Stationers' Hall was only necessary to enable the party to bring his action for the penalties, and it was so found. Tonson *v.* Collins, 1 Black. p. 330, and other cases. 3. The act extending in its operation to both parts of the island, cannot admit of one interpretation in Scotland, and of a different interpretation in England; and the meaning and interpretation given to it by the appellants, have been confirmed by a long train of the opinions of judges, by the practice of the courts of equity, and decisions of the courts of common law in England; and, on a recent occasion, by the Legislature itself; and the rights of individuals, founded upon this meaning and interpretation of the statute, cannot now be shaken without extreme prejudice to the public.

After hearing counsel,

LORD CHANCELLOR (ELDON) said,—

"My Lords,—

"The appellants are proprietors of the Works of Burns, the celebrated Scottish poet.

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"The respondent having pirated parts of these works, the appellants, in 1803, applied to the Court of Session for an interdict against the respondent; and they also brought an action against him, concluding for £200 of damages, and £60 of expenses.

"The bill of suspension and action for damages were founded upon the statutes of Anne, c. 18, relative to literary property, and these actions were conjoined.

"The Court, upon these, pronounced the two interlocutors appealed from of 16th May and 18th December 1804. (Here his Lordship read the interlocutors appealed from.)

"In this cause, it came into discussion in the Court below, as to some of the poems in question, if the exclusive right to them was not expired by lapse of time; and, as to others, if Burns had not himself thrown them open to the public.

"But, on looking into this case with the attention due to it, it clearly appears to me that the Court proceeded entirely on the question, Whether the entry at Stationers' Hall was necessary, in order to give a right to maintain the action or not? One of the judges said, that with regard to some of the works, there was a dereliction of the author's exclusive right, but none of the other judges gave an opinion upon that point.

"The majority of the judges were of opinion, that if a book is entered in Stationers' Hall, the only protection lies in the statutory penalties; but that if the book was not so entered, no proceedings in equity could be had for the protection thereof.

"It is to this point only of the entry in Stationers' Hall that I can call your attention. I am not able to distinguish what poems fall within the other grounds of defence, and what do not.

"The sole question for our consideration, therefore, at present is, if there exists at common law any protection of the right of property given to authors by the statute of Queen Anne?

Donaldson v. Becket, 4 Burr p.2408; 2 Bro. P.C. p. 129.

"The judgment of this House in the great question as to literary property, declared that there was no right of property at common law.

"The act of Queen Anne, in the first section, enacts, that an author should have the exclusive right of printing and publishing his works for the term of fourteen years; and it then goes on to say, that, in case of pirated works, the same should be forfeited and damasked, and made waste paper of, and that for every sheet printed or exposed to sale, contrary to the true intent and meaning of the act, the offender or offenders should forfeit and pay one penny per sheet, one moiety to the crown, the other to the common informer.

"In the next section of the act, it is enacted, that no penalties should be received unless the title of the book was entered in Stationers' Hall; and the whole question in the present case is, If there be, or be not any remedy at law, or in equity, for the publication of a book not entered in Stationers' Hall.

"In the great cause, Donaldson *v.* Becket, in 1774, as to literary property, in this House, there was some difference of opinion among the judges as to the effect of this statute. Mr. Justice Willis thought that there was no protection but in the penalty. Mr. Justice Yates was of opinion that the statute gave a right, and that the common law attached remedies to enforce this statutory right.

"In the former case of Tonson *v.* Collins, Lord Mansfield had given as his opinion, that there was a right at common law to protect the authors given by the statute. 1 Blackstone, p. 330.

"In the case now under appeal, the judges below were of opinion that the statutory penalties formed the only remedy to an author. I conceive it follows, that if a civil right is given by statute, the party will be entitled to all the benefits known in the common law for the protection of that right, in addition to those in the statute. As a great Lord said (Hardwicke) on another occasion, when penalties in a statute are provided to supply a remedy for a wrong or defect in common law, it was an established rule in England that the judges ought to supply every defect in such a statute, and to complete the remedy intended by the Legislature.

"Upon this subject I know no difference between the law of this country and the law of Scotland.

"It is true there is a remedy given by the statute, but this is not a remedy to the author; the penny per sheet is given one half to the informer, and one half to the crown. The author may indeed destroy what he can seize, but that is no proper remedy to him.

"In the case of Beckford *v.* Hood, in this country, the Court held, that although the book was not entered at Stationers' Hall, that the party had at common law his remedy for the protection of the property given by the statute. It was not less his property than if it had been entered in Stationers' Hall. This has been understood to be clear in this country ever since. Durnf. and East's Reports, 7, p. 620.

"Your Lordships also know, that in this country, for a long time past, injunctions have been granted by our Courts of Equity for the protection of books not entered in Stationers' Hall.

"If the judgment in Beckford and Hood was wrong, this practice as to injunctions has also been fundamentally wrong; if the statute only gave a right to penalties, then there is no reason for an injunction.

"If we look to the words of the statute, we see that there is no right to the penalties given by it, unless the book be entered in Stationers' Hall; but it says nothing as to the civil redress competen to an author. Besides, by the statute, the right to penalties is only given for fourteen years; but as the exclusive right of property is given in a certain event, for a second term of fourteen years, if there be no right at common law for the protection of the property, there would be no protection during the *second* term of fourteen years at all. Midwinter *v.* Hamilton, Kames' Decisions. June 11, 1748.

"It was said that the case of Midwinter and Hamilton had re-

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Ante, vol. i. p. 488.

ceived a contrary decision in Scotland. This case of Midwinter was reversed in the House of Lords upon another point. It was also said there were one or two other decisions in Scotland to the same effect.

"But the statute has been uniformly administered otherwise in this country. The judges in Scotland say truly, that they ought not to decide as the judges in England decide, unless they decide rightly and according to the law of Scotland. On the other hand, we may say, that if the judges in Scotland have not decided right, they are not to be followed; and, in my own view, they have misunderstood the meaning of the statute in this instance.

"I therefore move your Lordships to declare the meaning of the statute to be according to the English decisions, and that the cause be remitted back to the Court of Session to apply this principle."

It was therefore declared,

That, although by the act of the 8th year of Queen Anne, entitled, "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned," no person printing or reprinting any book without such consent, as in the said act is mentioned, is liable to any of the penalties or forfeitures thereby enacted, unless the title to the copy of such book shall, before publication, be entered in the register-book of the Company of Stationers, as by the said act is directed; yet, that the persons to whom the sole liberty of printing books is thereby given, for the term or terms therein mentioned, have, by the said statute, a right vested in them, entitling them to maintain a suit for damages, in case of a violation of such right, and also entitling them to maintain a suit in order to prevent the violation thereof by interdict, for the term or terms for which the statute hath given them such sole liberty, although there shall not have been such entry made before publication as aforesaid. And it is ordered, that with this declaration the cause be remitted back to the Court of Session to review the interlocutor complained of; and further, to do therein what may be just.

For the Appellants, *Wm. Adam, Sir Samuel Romilly.*
For the Respondent, *No case given in.*

NOTE.—The remit made was as to the other point in the cause, viz. Whether Burns, by sending many of his poems to the newspapers, and publishing them in this fugitive form, was to be held as having *abandoned* these poems to the world, to the effect of barring the protection claimed. Professor Bell, who was one of the counsel

for the appellants in this case, thought this part of the defence better founded; but on the point appealed, (entry in Stationers' Hall), the above judgment was held as fixing the law on the subject, reversing the judgment of the Court of Session.

The case of Donaldson *v.* Becket, referred to by Lord Eldon, was the great Literary Property cause, which occurred in England in 1774; first, in the King's Bench, before Lord Mansfield, and afterwards appealed to the House of Lords. It was different from the present. The booksellers there sought a much larger right—a perpetual copyright at common law after publication, and after the statutory right had expired. In the present case, the claim at common law was made within the statute, and sought a remedy while the statutory right was still current. In the English case, which came first before Lord Mansfield, his Lordship sustained the right at common law, and, when on appeal, the whole judges of England were consulted, five of these declared that there was a perpetual right in the author at common law, and six declared there was no such right. Lord Mansfield, on the case coming before him, on this second occasion, did not vote. Had he done so the numbers would have been equal. He still retained his original opinion, but refrained from expressing it; and the Lord Chancellor Camden, whose opinion was adverse to the common law right, reversed Lord Mansfield's judgment.

Simultaneously with the English case, another great cause, involving the same question of law, was going on and decided in the Court of Session, (Hinton *v.* Donaldson, and other Booksellers). It was decided a short time before the judgment in the House of Lords in the English case; and the Lords of Session came to the same result in denying the common law right. It is stated in Brown's Supplement to Morison, p. 508, and by Professor Bell, (Com. i. p. 119), that this case was affirmed on appeal; but this is a mistake. The case was never appealed, it being found unnecessary to do so, from the same question, involving similar interests, awaiting a final decision in the House of Lords in the English case.

Though it was so decided in 1774, yet the tendency of legal opinion continued to preponderate strongly in favour of Lord Mansfield's judgment, until, very recently, the case of Jeffreys *v.* Boosey, occurred in the House of Lords (1st August 1854, H. L. Cases, 4 p. 815), regarding the copyright of Bellini's Opera, "La Sonnambula," and in which the Lord Chancellor, and Lords Brougham and St. Leonard, after consulting the Judges, came to agree in opinion that there was no copyright at common law; so that this question, so long a moot point, may now be looked on as finally settled.

The opinions of some of the judges in the case which occurred in Scotland, above alluded to, being interesting, are given below :—

Opinions of the Judges :—

LORD KENNET.—"We have had this question very ably stated in

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papers, and very fully discussed in pleadings. I do not mean to run through all the arguments;—to support those on the one side, or confute those on the other. I will not meddle with the law of England; in the *first* place, because I do not profess to understand that law; and, *secondly*, because I think it ought to have no influence in determining upon the law of Scotland. I presume the learned judges of the Court of King's Bench gave a just judgment upon the law of England; but they founded very much upon the acts of the Stationers' Company, and the injunctions of the Court of Chancery, with which we in this country have no concern.

" I am of opinion, that literary property is not in the law of Scotland. It is not in *the law of nature,* which is one great fountain of our law. The law of nature is not founded on metaphysical arguments, nor to be deduced from long, abstruse, and abstract reasonings. It must be obvious to mankind, at least, as soon as it is proposed, according to the elegant passage in Cicero, mentioned by Mr. Murray,* ' Est hæc non scripta, sed nata lex, quam non didicimus, ' accepimus, legimus; verum ex natura ipsa arripuimus, hausimus, ' expressimus, *ad quam non docti, sed facti,* non instituti, sed imbuti ' sumus.' It is in vain to say, that it is founded on that part of the law of nature, by which we are not to hurt another, or take from him what belongs to him; for to apply that is a *petitio principii.*— It is not in the *law of nations:* there is not the *concensus gentium;* for it is admitted that no such *consensus* obtains. So far from this, we find it to be only such a kind of right as particular states have, in some instances, conferred by a patent, or *privilegium,* for a limited time.—It is not in the law of *Scotland,* properly so called. We have no *responsa prudentum* for it. It is not even mentioned by any of the writers on our law, except by Lord Bankton, when treating of the statute of Queen Anne. On the contrary, the practice of all our lawyers, who took limited patents for printing their works, shows that they entertained no such idea.—There is no *series rerum judicatarum;* nay, not one judgment of this Court finding such a property.—There is no statute upon the subject, except the statute of Queen Anne, which appears to me to be against the common law right. The rubric, or title of that statute, is clearly against it; for it bears to be an act for *vesting* the right for a certain time: And it is material to consider, that the title at first stood otherwise, and bore, to be for *securing;* but it was altered by the Legislature itself. Stress has been laid on the narrative of the act; but this I think the weakest part of it. The most material part is certainly the enacting clause, which confers the right for a limited time. I admit, that the words *no longer,* add nothing to the sense. But then I see this to be an express clause, distinctly limited, and quite separate from the

* Afterwards Lord Henderland, the eloquence of whose pleading in this case was much admired at the time.

clause with regard to penalties. The most that can possibly be said upon this clause is, that, if literary property existed antecedently, it does not take it away. But I do not see that it existed at all before the act. The last clause of the act, which provides, that 'the sole 'right of printing or disposing of copies shall return to the authors 'thereof, if they are then living, for another term of fourteen years,' would have been absurd, if authors were understood to have that sole right *ab ante*. I am therefore of opinion, that there is no right in authors to the sole printing of their works, except what the statute has rationally given."

LORD AUCHINLECK.—" This question is new and interesting: Till very lately, it never received a judgment in any court in Europe. It has received but one, and that in England, the laws of which country are, in many particulars, special to itself; and, when it was there determined, the court was divided.

" We have had the question ably handled in mutual informations, both of them well drawn; in particular, that on the side of the defenders, is a performance which does honour to the author: We have likewise had laboured and long pleadings, and now we are to give our opinions.

" In the entry, I cannot help observing, that it is well said by a wise man, *Nil tam absurdum quod non dicendo fit probabile.* By much labouring any subject, the attention is apt to be drawn away from the real merits, and run into extraneous matter: As I think that has been the case here, and that the diversity of opinions has been owing to it;—in the opinion I am to give, I shall endeavour to confine myself to the proper merits of the case, without launching out into many of the learned arguments which both sides have insisted on.

" I own that the cause, when stripped of extraneous matter, does not appear to me to be difficult. The question is, whether he who writes a book, and publishes it, has, by common law, independent of any statute or privilege granted him by the state, a perpetual property in that performance, in the same way as he had before publishing?

" It is agreed by all, that, while the book is not published, whether the work be in the author's head or his cabinet, it is absolutely his, and no man can deprive him of it. But the question is, if this right continues after publication?

" There has been much said on the necessary consequence from its being once owned to be a man's property, that it should still continue to be so. But, with submission, the reasoning appears to me not just. My thoughts are mine so long as I retain them in my mind; but if I utter them, *nescit vox missa reverti*, every hearer has a right to them as much as I. A man need not speak in company unless he chooses it; but if he speaks, and does not enjoin secrecy, every man may propagate the sayings with impunity. If a man throws out a thing in company, whether instructive or entertaining,

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can he maintain that he has a right of property in this *bon mot* to him and his heirs for ever?

"And here I beg leave to say, unless it can be shown there is a right of property in what a person utters verbally, there can be none in what he publishes to all mankind by printing it. Indeed, when a man publishes his thoughts, he gives them away still more than the man who utters them in conversation: The latter gives them only to his hearers; but the former to the whole habitable earth.

"For illustrating this, suppose several people, well acquainted with this country, should go up to the castle of Edinburgh, and one of them, who liked speaking, should immediately describe all the objects he saw from it, would he acquire a right ever after to that description? And could he, by printing it, create a right not in him before?

"What has created an obscurity in the case, is, that ever, almost since printing began, there have been privileges and grants given as to publications of books; and men are apt to intermix the notion of these rights with a common law right, a right independent of grants; and the most part of the argument, in behalf of the pursuer, seems to have been derived from that source, particularly that from what is called *injunctions*, which supposed a right in the complainer to stop a publication.

"But to come at the certainty; let us go back to the times before any law was made for privileges to publishers, or any patent granted to them, which is all after printing came in, which happened in the fifteenth century; and we shall find no attempt made to assert the author's property in any book which he had published. We see, in the learned dissertations delivered in the court of our neighbouring country, stress laid on the king's right to print certain books, and this is said to be a right of property. It is true the king has still a right to print certain books, and he has his own printer; in the choice of whom great care ought to be taken, which is not always the case; for I remember, in the year 1745, the same printer officiated for the king and for the pretender: But this right of the king is *prerogative*, not *property*.

"We had in Scotland, pretty early, licences granted to printers; particularly there is one in 1567, to *Robert Lickprivick*; and when your Lordships hear the list of the books which he obtained a special privilege to print, you will judge if they were the king's property. His licence is to print 'Donatus pro Pueris, Rudiments of Pelisso, 'the Acts of Parliament, except those of the last part, the Chronicles 'of the Realm, Regiam Majestatem, the Psalms of David, with the 'English and Latin Catechisms, less and mair, with the buik callet 'Omilies for Reiders in Kirks, with the general Grammar to be set 'out for erudition of Zouth.—The privilege to endure twenty years; 'and none to print the said buiks without his consent, under the 'pain of the escheat of the buiks, and being fined.'

" This privilege, and all such, were granted to printers, and were not calculated for the benefit of authors, and not founded on any right of property in the printer.

" But there is not upon record in any country, not even in England, a patent, or privilege, in favour of any person whatsoever before printing; nor is there at this day any privilege granted to authors, which hinders as many copies to be taken of the work as people choose, provided they be not printed copies: Nay, these gentlemen, the London booksellers, who have obtained so many patents, and even the act of Queen Anne, though they call *printers* who interfere with them *pirates* (a cruel name), never pretend that they can hinder *written* copies to be taken. The law, then, is directed only against printing, and is no restraint from writing; though we all know, that, before the art of printing, there was no other method of spreading books. It was then a great trade. It may be so again; and the London booksellers would have no remedy. This is a clear proof, that the restraint was introduced after printing began, and that it is nowise founded on common law, but on grants; for if it were founded on common law, it would reach against manuscript copies as well as printed ones; and this to me is demonstration, that there is no common law property in authors.

" And, as a farther illustration of this, let us consider, that anciently very valuable performances were preserved only by the memory. It is said *Homer* was so, and *Ossian*. When that was the case, what privilege could the author have? The poem of *Chevychace*, so much celebrated, and upon which we have a criticism by Mr. Addison, was, in my remembrance, repeated by every body. Was there a *copy* of this little heroic poem? What privilege could the author have in it, after he had let one man get it by heart?

" Again, as to *extempore* compositions, such as all our sermons in this country were long ago, or were supposed to be, as some of us who are far advanced in life remember; (for at that time a minister who used notes, and would not *trust to Providence,* as it was said, would have been very ill heard); when, as was common, people took them down in writing, as some of them were very good, very entertaining discourses; had the preacher any property in these sermons? He could have none in writing; for he never had written himself: Could he have said, that they were only intended for his own congregation, and were not to be communicated to others? I apprehend the proprietor of these was the person who wrote; for the author was not able to repeat what was in the copy.

" In short, the whole of the author's plea consists in his claim to restrain from printing; and it is founded on blending the notions arising from privileges and patents with a common law right, which is quite erroneous; and this clearly must put an end to the common law right; for as it is directed only against printing, it is plain, that, before printing, there was no such right; that, to this day, it could

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not be pleaded against uttering as many manuscript copies as a man chooses; so consequently, it is not founded on common law property.

"I have said nothing of the act of the eighth of Queen Anne, for I do not think it necessary; but, if there were any dubiety, that act removes it; for it gives the author a right, under certain conditions, and for a fixed period."

LORD HAILES.—"Authors in England may have a common law right in their works, even after publication.

"So English lawyers have said; so the Court of King's Bench have determined.

"English law, as to us, is foreign law; foreign law is matter of fact. Of the fact I ask no better evidence; for I can have no better evidence than the opinion of the lawyers and judges of that foreign country.

"Whether this common law right be considered as a *property*, or as an *interest*, or as something distinguishable from either, is of no moment.

"If we are once satisfied of the *existence* of a legal right, all inquiry into the *mode of its existence* is superfluous.

"This common law right is strangely interpreted by the London booksellers.

"The Bishop of Gloucester, in his admirable Charge to his Clergy, has bestowed on the London booksellers the appellation of *The Sages of St. Paul's Church Yard.*

"The doctrine of these *sages* is commodious; they *limit* or *enlarge* this common law right as best suits their own conveniency.

"They *limit* it, 1. When, maintaining that an author has a right to the *whole* of his work, they take the liberty of borrowing whatever *part* of the work may be a proper ingredient for their monthly hashes of literature, their *Universal Magazines of Knowledge and Pleasure.*

"If a work chances to be short, they retail it in a newspaper, under the appellation of a *criticism* or an *extract.*

"2. Again, they *limit* this common law right, by exciting their dependants to make abridgments of valuable works.

"Herein *Stackhouse*, the author of this day, was an adept: He abridged the discourses pronounced at Mr. Boyle's lectures.

"He and his bookseller would have condemned Donaldson and his associates for encroaching on the common law right of Bentley or Gastrel; and yet *he* scrupled not to make, nor his bookseller to publish, an abridgment of the arguments of Bentley and Gastrel in defence of religion!

"How much of the argument evaporated in this literary process, I pretend not to say.

"Perhaps an abridger is held to acquire a right by specification in the work abridged; according to the trite saying,—'Male dum recitas, incipit esse *tuus*.'

" 3. They *limit* this common law right, by publishing *Dictionaries of Arts and Sciences*—the works of a hundred authors are ransacked: out of them is produced, as *the Sages* express it, *an entire new work*.

" Postlethwayt common-placed the authors who had written of trade and commerce. ' It would be hard,' says he [article *Books*], ' were I to be deprived of the fruit of my twenty years' labour by a ' literary pirate.' That is, it would be hard that any one should steal from me what I have stolen from others.

" To show his consistency, he has transcribed Forbes's *Treatise on Bills of Exchange*, in so far as relates to Scotland.

" What right had he to plunder Forbes? Yet the London booksellers can see no fault in this as long as they are *proprietors* of *Postlethwayt's Dictionary*.

" 4. They *limit* this right even in prerogative copies. They dare not print the text of the English translation of the Bible by itself: *that* belongs to the king; but they print it with notes, borrowed from Geneva sometimes, but more frequently from Poland.

" Again, they *enlarge* the common law right, and *that* in various ways.

" 1. It is admitted, that there is no literary property in works whereof the author is absolutely unknown.

" If there ever was an anonymous writer, it is the author of the practical treatise, entitled *The whole Duty of Man*. At this day even the sex of the author is problematical.

" Nevertheless, the *trade* have found means to appropriate to themselves a copy in which the pious author pretended no property.

" Dr. Hammond, in his commendatory epistle, observes, that the author had thrown the work into the *Corban*, or common treasury; the London booksellers have taken it out of the *Corban*.

" And how? From Dr. Hammond's commendatory epistle they learn, that Garthwait the publisher had the MS. in his possession *before* he printed the work; therefore the property of the book is in the heirs or assigns of Garthwait.

" On this momentous discovery, that a publisher was possessed of the MS. which he published, is founded the injunction 1735.

" This, by the way, shows that injunctions have been granted sometimes without much attention to the merits of the cause.

" 2. The London booksellers *enlarge* the common law right, by conferring the name of *original author* on every *tasteless compiler*.

" Hereof there is an apposite example in *Stackhouse*, the author of this day.

" He was as very a compiler as ever descended from a bookseller's garret.

" The incorporeal substance of Stackhouse's ideas is a non-entity.

" And yet, in the opinion of *The Sages in St. Paul's Church Yard*, Stackhouse is no less an original author than Hooker or Warburton.

" *Here* lies my first difficulty. Were we to copy the judgment

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of the King's Bench in the case of Millar *v.* Taylor; were we to find that the common law right of authors in England could be made effectual in Scotland; were we even to find that literary property was established in the law of nature and nations, still we could not pronounce judgment for the pursuer, unless we were to hold Stackhouse to have been an original author; *this* I can never do.

"But I have still a farther difficulty.—'In this case it is material 'to consider how the common law of Scotland stood before the sta-'tute of Queen Anne.' These are the words of an eminent personage on a similar occasion.

"This inquiry was not *material*, had he understood literary property to be grounded on the law of nature and nations: *that* law varies not in different countries: according to the elegant passage which we heard from the bar, it is not *aliud Romæ, aliud Athenis;* neither was the inquiry *material* if the common law right in England could have had effect in a foreign country.

"The inquiry which that great man thought material has been made.

"Of this right there is not a vestige to be discovered in the law of Scotland.

"From Lord Stair down to Forbes all our authors are silent concerning it. From Lord Stair down to Forbes all our authors have acted as if there had been no such right.

"It is said, 'that the privilege which Lord Stair obtained, prohi-'biting others from printing his works, did indeed confer nothing 'upon him, but that his remedy lay by an ordinary action at law.' Strange! that he should have sought and obtained a privilege which gave him no right; and that he should never have mentioned that right which he had.

"It is in vain to say, 'that our authors lived under the despotic 'sway of a Scottish privy council; and that they were obliged to 'accommodate themselves to those wretched times.'—The Scottish privy council was not despotic after the revolution; it was a legal court, and legally administered; it was indeed abolished at the union of the two kingdoms, not because it was despotic, but because it could no longer subsist; for the same reason, and at the same time, the English privy council was abolished.

"Many of our authors lived not in *wretched times.* Lord Stair published his corrected work after the revolution; Forbes wrote in the days of Queen Anne; Lord Bankton in the days of George II.

"I dare not pronounce *that* to be a right in the law of Scotland, which has escaped the observation of all our statutes, lawyers, and authors.

"I therefore must give my judgment for the defenders."

LORD GARDENSTON.—"I think we are bound to take notice of the pleadings in this cause. They have been admirable on both sides. The lawyers are entitled to our thanks; and I do not believe that ever this question has been debated with greater ability than by the

Scotch bar. I cannot agree with any of your Lordships who consider this as a clear case. I think it is a nice and difficult question. I own I have been puzzled to fix my opinion. In my first reflection on the argument, I was strongly inclined to embrace the opinion of a literary property. I was moved by the great object of encouragement due to learned and ingenious men. By the apparent justice and reason of a right and property in a man's own works, and the productions of his genius or industry; and I was greatly moved by the authority of a judgment pronounced by a court of high reputation in our neighbouring country. But my maxim is, and ever shall be, *nullius addictus jurare in verba magistri;* and, on the fullest consideration of this matter, I am now of opinion, that authors have in reason and equity a right to be protected in the sole and exclusive publication of their own works for a limited time. But the nature of the thing, and the practice of nations, admits not of a real and perpetual property.

"The question in England depended upon the common law of that country. There is no need of argument to prove an undeniable proposition, that we must judge by the common law of Scotland; in which I cannot find a sufficient foundation for this claim of perpetual property in authors.

"There are three fountains from which the common law of Scotland is derived: 1. From certain usages and consuetudes which have been long and uniformly observed; the origin of which in some cases cannot be traced. Our law of deathbed is an example of this. 2. A great fountain of our common law is the civil law of the Romans, in so far as it has been received in our practice, and is evidently just and applicable to cases undetermined in our own law: and some of our statutes mention the Roman law as the common law of Scotland. 3. I admit into our common law every principle of justice, as distinguished from mere obligations of morality, which have been allowed and received as principles of justice by other civilized nations. I have examined this claim of literary property under those different branches of our common law.

As to the first, our usage stands against the plea of a property in authors. It is an upstart property in this country, which authors have never claimed, and our lawyers have never asserted. They have always contented themselves with demanding that limited protection which a patent gave. 2. It is admitted, that there is no foundation for this plea in the civil law, though we find in it the greatest variety, and the most subtle distinctions of property. 3. The principles of reason and justice, as approved by all civilized nations, do support the author's claim to a temporary protection or privilege, not to a property or perpetual right. Upon this ground I chiefly rest my opinion. The most substantial and convincing evidence of what is really just and rational, in a matter of public concern to all countries, is the concurring sense of nations. For above three hundred

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years, and ever since the invention of printing, all the nations and states of Europe have, by their practice, established the nature of an author's right. They have granted no more than a temporary privilege, and in that they have all concurred. I make no narrow distinctions of Popish and Protestant,—monarchies and free states. It is certain, that since the æra of printing, and of the reformation, even the Popish countries have been greatly enlightened; nor has learning and justice been confined to the Protestant and free countries only. This is the substantial ground of my opinion. I can conceive, in a question of this nature, no authority of equal weight with the sense and concurring practice of civilized nations for ages. The splendid error of one great man may mislead many; but I cannot be easily induced to think, that the concurring sense and practice of nations is erroneous.

" It does not appear to me that this question is of such importance even to the literary trade of London booksellers as they seem to imagine; and I am clear that authors have no concern in the question at all. The term of legal protection outlives the great bulk of books that are published. Nine hundred and ninety-nine of a thousand have little merit but their novelty: they are once read by idle people for amusement, and are never thought of again. How few books published in the last century are reprinted in this? How few books of this will be reprinted in the next? We had in Scotland some good solid law-books, and books of wild divinity; the latter may exist in some odd libraries. Lord Stair's Institutions has been reprinted, by which, I am informed, the bookseller lost. That book was reprinted without leave of his heirs; indeed I know not how many people must have been applied to, had it been understood to be *in bonis* of Lord Stair; and even the best authors are obliged to sell their works to the bookseller.

" When I consider this question of literary property upon principles of reason and expediency, I find so many intricacies, something so anomalous and inconsistent in this idea of perpetual property in an author's work, after he has published it to all the world, that I cannot assent to it. The great argument, or *ratio dubitandi*, which I own at first almost convinced me, is, that the author has undoubtedly a property right in the original manuscript composed by himself; why should he lose it by publication, as he intends only to give the instruction or pleasure of reading, not the profit of publication or reprinting? I answer, that certainly the author has a real property in the manuscript of his own work, but, in the nature of the thing, by publication, he gives his work to the public, and he gives the same species of property to every individual who buys his book, which he had in the original copy before publication. This is a natural, a necessary, and a legal consequence of the sale, and it has been so understood and settled by the sense and practice of nations ever since printing was introduced. So that every man who purchases a book, being

thereby unquestionably proprietor, has a right to use it at his discretion; to multiply the copies by transcribing, or by printing, except in so far as he may be restrained by statute, or the legal interposition of the sovereign, or the equitable injunctions of the civil magistrate.

"I have never been able to find a solid and substantial distinction between the right of an author in his book after publication, and the right of a person who invents a machine, after he makes it public. The distinctions which I have heard in the course of this debate, appear to me too metaphysical and immaterial. When I was inclined to the opinion of literary property, and bent to answer this objection, I found it insurmountable; at least, the distinctions are too nice for my discerning, or too unsubstantial for my principles of judging in matters of right. I will draw the comparison in every material point, and I think they coincide exactly. The author has a property admitted on both sides in the manuscript copy of his composition before publication. Is there any doubt that the inventor of a machine, which may be more beneficial to mankind than any book, has also a property in his work before it is made public? It is said, that the author of a book cannot be supposed to intend by publication and sale to part with his property in the literary composition, as contained in the original manuscript; and may it not with equal reason be supposed, that the inventor of a machine does not mean to sell his art or invention? he sells only the individual machine to be used for the purposes which it was contrived to serve. A distinction was made, that the mechanic who makes a machine, after the model of the original inventor, employs his own art and genius; it is an act of imitation which he cannot be barred from exercising; but the act of reprinting is merely mechanical, having no similarity to the author's art or genius. This seems also an immaterial distinction. The most stupid mechanic, incapable of any invention, far less the most sublime and useful, can as easily execute a machine, when he sees the model or original composition, as the most ignorant booksellers and printers can make a new edition of a book without any share of the author's taste or genius. There is nothing can be more similar, than the work of engraving is to literary composition. I will illustrate this proposition by the works of Mr. Hogarth, who, in my humble opinion, is the only truly original author which this age has produced in England. There is hardly any character of an excellent author which is not justly applicable to his works; what composition—what variety—what sentiment—what fancy—invention—and humour—we discover in all his performances! In every one of them an entertaining history, a natural description of characters, and an excellent moral. I can read his works over and over, Horace's characteristic of excellency in writing; *decies repetita placebit*, and every time I peruse them, I discover new beauties, and feel fresh entertainment. Can I say more in commendation of the literary compositions of a *Butler* or a *Swift?* There is

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great authority for this parallel. The Legislature has considered the works of authors and engravers in the same light; they have granted the same protection to both; and it is remarkable, that the act of Parliament for the protection of those who invent new engravings or prints, is almost in the same words with the act for the protection and encouragement of literary compositions.

"The strange consequences which would arise from this new doctrine of perpetual property in authors, have been well explained, and have great weight in my opinion. I shall mention some of those consequences which affect me most.—There is either an absolute right of property in authors, or only an equitable claim to protection and exclusive publication for a limited time.—The last is agreeable to the practice of nations; and, I think, to material justice and expediency. If we admit the first, it is an unlimited right of property, and must have all the effects of property in other subjects. Let us try this literary property, by applying the principles of property in other subjects to it. This is a fair test to discover if it be current and legitimate property or not. There are three material things which concern property: 1. The objects or subjects of it. 2. The manner or mode in which it is conveyed among the living. 3d. The manner in which it is transferred from the dead to the living. The ordinary subjects of property are well known, and easily conceived. We have lands and tenements, houses and gardens, fishings, and moveables of great variety. But property, when applied to ideas, or literary and intellectual compositions, is perfectly new and surprising. In a law tract upon this species of property, the division of its subjects would be perfectly curious; by far the most comprehensive denomination of it would be a property in nonsense. It must also be branched out into the property of bawdy, blasphemy, and treason. For an instance, we might specify Mr. Wilkes's property in No. 45, in his licentious Essay on Woman; and in his abominable writings to inflame and divide the minds of a people united by nature, interest, and government. By the just principles of property, no man can lose his right in whole or in part, without his own act and consent. According to this principle, I cannot think it would be justifiable to translate a book without the author's warrant; for thereby you take the benefit and profit of his composition. You take his ideas, his sense and meaning, which is really his literary property, from him; as if I should take a piece of cloth from a manufacturer, and dye it of a different colour; I have taken the substance from the owner, the superficial appearance is only my own. This puts me in mind of the method practised by Mr. Bayes in the *Rehearsal*, to appropriate other men's wit. Mr. Bayes says, 'I take 'a book in my hand; if there is any wit in it, as there is no book 'but has some wit, if the wit be in prose I turn it into verse; this I 'call *transversing*, and so I make it *my own*; if, says he, it be in 'verse, I turn it into prose, which I call *transposing*, and make that

'my own.' Mr. Bayes had a perfect idea of this literary property, and had a method of stealing wit from conversation too. 'I go,' says he, 'where witty men resort; I make as if I minded nothing—do 'ye mark?—if any one says a good thing, pop! I slap it down; '—and so make that my own too!'

"If this is a real property, it must be theft to publish an author's work without a right from him. Literary property makes a strange figure in this view. The theft of all other property must be gainful, if the thief escape with impunity; but this is a perilous theft by the nature of it; in many cases the thief will be a loser by taking the author's property; for booksellers know well that many a publication is attended with loss. In most cases, it would be but petty larceny; at worst, in a very few, the most aggravated and capital crime.—Who steals from common authors, steals trash; but he who steals from a *Spenser*, a *Shakespeare*, or a *Milton*, steals the fire of heaven, and the most precious gifts of nature.—So we must have new statutes to regulate those literary felonies.

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

"The most perplexing difficulties would arise by the transmission of this property from the dead to the living. By the principles of our law, a man's moveable estate is understood to lie in *bonis defuncti*, until it is vested in proper form in the person who is entitled to take that succession. It sounds oddly, that a man's ideas and his literary compositions should lie in *bonis defuncti*. Shall learning and genius be vested in an idiot by confirmation? But there are more serious inconveniencies and incongruities from this perpetual succession in literary property. By the law of Scotland, possession of moveables presumes property, and this property is unembarrassed by any written titles; but the literary property must for ever be transmitted by titles in writing, and a perpetual progress of title-deeds will be necessary. Though land estates are secured by a proper title, and forty years possession, which cannot be applicable to this species of property, in the course of time, and various successions, it must happen that the property of books must be split and divided among a vast and indefinite number of sharers. No publication can be legally made without the concurrence of all the common proprietors; for it is an indivisible property, and the inextricable inconveniencies arising from this are apparent. As to the authorities from the law of Eng-

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land, I shall say little. We must judge from our own laws, and our own ideas of property. I cannot however think, that the injunctions in Chancery are to be considered as judgments upon the right. Considerations of equity, in particular cases, may afford sufficient ground for a temporary injunction, without supposing a perpetual property. The statute of Queen Anne, which no doubt extends to Scotland, is, in my opinion, no foundation of a just argument on either side of the question; for the saving clause expressly leaves the point of any separate right which authors may claim entire and undetermined.—Upon the whole, I am of opinion, that, by the common law of Scotland, authors have no property or perpetual right in their works after publication; and that it would neither be just nor expedient to allow it."

LORD MONBODDO.—" This cause, whatever way it shall be decided, does great honour to our bar; for it has been most ably pleaded, nor do I remember ever to have heard a better pleading. It is a very important cause. It is of importance, as being perhaps the cause of greatest property that ever came before us. The property indeed is immense. We know not the extent of it; and it is of importance in another respect, that it divided the present judges of England; and my Lord Hardwicke would give no opinion upon it. I am to give my opinion with the majority of the English judges. If it had been on the other side, I should have given it with the same freedom.

" As this cause has been treated, the first question is,—Whether such a property as I contend for, of authors in their works, can at all exist? For a great deal of argument has been used to prove that such a property is a mere chimera, incapable of being defined or ascertained. This part of the argument, I own, surprised me a good deal; for it must be allowed that such a property is given by the statute, at least for a time; and, if it be given by the statute for a time, there is nothing to hinder it to be given by common law for a perpetuity. And the nature of it is sufficiently defined by the statute; for it is there said to be 'the sole liberty of printing or re-'printing the book.' It is therefore what every right of property is, —the right of using a thing exclusive of others; and the use of the thing in this case ascertained by the statute is, the printing or reprinting of the book; for there may be sundry uses of the same thing; and as many uses as there are, so many different rights or interests there may be in it. If I purchase a book, I may use it for my instruction or amusement, or I may employ the paper or binding of it as I think proper; and so far I may be said to have the property of it; but I cannot reprint it, because that use belongs to the author or his assignee; and so far he is proprietor. Here is nothing obscure or unintelligible, but it is what every man, even though he be no philosopher, can readily conceive. All, therefore, that we have heard about the absurdity of a property in ideas appears to me to be

nothing to the purpose. Ideas, or *bons mot*, as my brother said, are not by their nature a subject of property ; for property, though it be an *incorporeal* right, it must have for its subject some *corporeal* thing : But, supposing they were capable of property, I allow every man, who purchases a book, to *appropriate* the ideas of it to himself as much as he can, and the words too, if his memory be good enough. I think I could go further without hurting my argument, and admit that he may carry those ideas in his mind, and those words in his memory, to a printing press, and get them thrown off. Such a man I would call a *plagiary*, but not the *pirate* of a book ; nor do I think that he would fall under the sanction of the statute, which only forbids him to use the book for a press-copy, to transfer the author's words from paper to paper by the mere mechanical operation of printing, without any labour of the mind, but does not prohibit him to exercise either his memory or judgment upon it.

" This being the nature of literary property, the next question to be considered is, Whether there be such a property at common law, independent of the statute? And let us begin with the manuscript. —That every author has a property in his own manuscript, has not been denied ; and it has been admitted, that, in consequence of this property, he may, as the law now stands, print it if he pleases. Thus far, therefore, he may reap the fruits of his property ; but these, it is said, are the only fruits he can reap ; for, if the MS. is once printed, and the copy sold, then it becomes *juris publici*, and every man is at liberty to reprint it, and make what profit of it he can. If this be so, the property of a MS. is a property of a very extraordinary kind, of which a man can only make profit once ; whereas other things, which are the subject of property, we may use for our profit as often as we please, and hinder others from interfering with us in that use.

" Let us suppose that the author, instead of multiplying his MS. by the press, makes several copies of it in writing ; and let us suppose that he gives the use of one of those copies to a friend. This happened in the case of Lord Clarendon's history, and it was there adjudged, that the person who got the use of the copy had not a right to print it, though it did not appear that when he got it he was laid under any restraint or limitation as to the use of it. It is true, indeed, that the person in that case got the use of the MS. for nothing. But would it have altered the case, if Lord Clarendon's heir, in consideration of the expense or trouble of transcribing the MS., had made him pay something for the use of it? Or suppose that, instead of transcribing it, he had taken the more expeditious way of making copies of it by the press.

" It appears, therefore, that, by giving the use either of MS. or book for hire, or without hire, I do not give the liberty of printing or reprinting it, even though no such condition was mentioned ; and so it was adjudged by my Lord Hardwicke in the case of a *Letter*, of which the man, to whom it is written and sent, appears to be as

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much proprietor as any man of any book or MS., and yet he is not entitled to print it. I hold it to be part of the contract of emption, when a book is sold, that it shall not be multiplied. If, in the sale of a book, it were made a condition, that the buyer should not reprint it, all your Lordships would be of opinion that he would not have that right. Now I say, that, in the case of a printed book, it is not only *understood* that the possessor of it shall not reprint it, but it is *expressed;* for the title-page bears that it is printed either for the author, or for some bookseller, to whom he has assigned the right of the copy; the meaning of which cannot be, that the author or bookseller has a right to the copies already printed (for, as they are in his possession, such advertisement is altogether unnecessary), but to intimate that he has the sole right of printing: so that the selling a book with such a title is in effect covenanting that the purchaser shall not reprint it.

"The common law of Scotland and England must, I think, be the same in this case, as the common law of both is founded upon common sense, and the principles of natural justice, which require that a man should enjoy the fruits of his labours: for it is certainly contrary to justice that a man should employ perhaps his whole life in composing a book, and that others should enjoy the profit of printing and publishing it, 'to his very great detriment, and too 'often to the ruin of him and his family,' as is said in the preamble of the statute.

"It has been said that literary property is unknown in this country, and was not known till of late in England: That in this, and other kingdoms of Europe, authors did formerly secure to themselves the profit of their works by getting patents from the crown, with the exclusive privilege of printing them for a certain number of years; and particularly our great lawyers, Sir George Mackenzie, Lord Stair, and Lord Dirleton, took patents of this kind for the printing of their works.—To this I answer, that, in those times, the licensing the press was held to be part of the prerogative. Sir George Mackenzie has expressly said, that it was *inter regalia.* No man, therefore, had then a right to print any thing without the permission of the king; so that every copy of a book was what is now called a prerogative copy; and upon this foot matters still continue in the other kingdoms of Europe. But in Britain, it is now admitted, that the king has no such prerogative, except as to Bibles, common prayer books, or law books, which cannot yet be printed without his permission; of such books, I think, the king may be properly enough said to have the property, which, as it is defined by the statute, consists in the exclusive privilege of printing; and accordingly I see, that in England the king's right to prerogative copies is maintained upon the principle of property; and the same right that the king has to those books, every author has to the book he writes, now that the encroachment of the crown upon the liberty of the press

is at an end. And thus I think a very good reason may be given why authors have now a right in their works which they were not supposed to have before.

" The reprinting a book has been compared to the imitating or copying of an engine, which every man may do, if the inventor has not secured to himself the property of it by a patent. But the cases are very different; for the printing of a book is a mere mechanical operation, which a man may perform without understanding one word of it; whereas no man can copy an engine, unless he have in his mind the idea of that engine, and know the purpose for which it is intended, and the mechanical powers by which it operates. Now, so far as concerns ideas, and every operation of the mind, any man who purchases a book is absolute master of it: but with respect to the multiplying of copies by the mechanical operation of the press, that belongs only to the author; and in the same way the imitating a print or copperplate is to be distinguished from the printing a book, or the taking an impression of the copperplate. This last is a mere mechanical operation like printing; whereas the imitating a copperplate by engraving a new plate, is like copying a picture, a work of some taste and genius, and often very ill performed. Every man, therefore, was at liberty to engrave any print, though it had been invented and first engraved by another, till he was prohibited by the act 8th Geo. II. But as the two operations of engraving and printing are so different, no argument can proceed from the one to the other.

" The last thing to be considered is, whether, supposing a right to exist at common law, it be taken away by the statute. And I have the satisfaction to find, that the judge in the Court of King's Bench, who was single in his opinion there, as I shall probably be here, did not think it was taken away if it did once exist. The argument drawn from the word *vesting* in the title of the statute, to prove that authors had no right before, is not at all conclusive; for the same word occurs in the title of the act annexing the estates lately forfeited to the crown, which, however, did certainly belong to the crown before that act was made. The word, in both titles, signifies nothing more than that a fuller right was given, and of more ready execution than what was given by the common law; besides, the title of an act is but once read, whereas the preamble is thrice read, as well as the rest of the act. Now, in the preamble of this act, the right of an author to his work is asserted in express terms; and if there was any doubt in the matter, it is removed by that proviso in the end of the act, by which it is declared, that nothing in the act shall either prejudice or confirm any right claimed by any person to the printing or reprinting any book or copy. This leaves the matter just where it was before the statute, and appears to have been intended to obviate this very doubt, whether the right which formerly belonged to authors was not taken away by this statute, giving them a new right, I mean a right secured by penalties and forfeitures.

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"As to the alleged inconveniencies of literary property, the clearest principles of law may be attended with inconveniencies; but that consideration belongs not to us, but to the Legislature. Here, however, I see no inconveniencies; on the contrary, were there not such a property, such a right, there would be great inconveniencies, great injustice. I think it would be very hard, and much to the discouragement of literature, if an author, after spending a laborious life in composing a book, did not provide by it, not only for himself, but also for his family: Nor is the remedy in the statute against this evil sufficient; for the best books may be twenty years published without having their merit known, and afterwards have a great and universal sale. The copy of Milton's Paradise Lost was sold for fifteen pounds, and it is probable that the bookseller lost by it; for it is certain, that the book was in no repute or estimation, till my Lord Somers let the people of England know that they had in their language the best heroic poem of modern times.

"Upon the whole, therefore, I am of opinion, 1mo, That authors had a right of property in their works before this act was made; 2do, That such right was not taken away by the act."

STEUART MENZIES of Culdares, an Infant, and the Hon. HENRY ERSKINE and Others, his Guardians, ... } *Appellants;*

MRS. ELIZABETH MACKENZIE BERESFORD (formerly MENZIES), and JOHN CLAUDIUS BERESFORD, of the City of Dublin, Esq., her Husband, ... } *Respondents.*

House of Lords, 20th July 1811.

ENTAIL—FETTERS—INSTITUTE, OR HEIR OF TAILZIE.—Here the question was, whether the party first called in the entail was an institute or an heir of tailzie? In the first part of the deed (nomination of heirs of tailzie) he was called expressly as an heir of tailzie; but in the latter part of the deed of disposition he was called as an institute or fiar. Held him not subject to the fetters of the entail. Affirmed in the House of Lords.

The particulars of this case are reported, ante vol. iv. p. 242.

The case was remitted from the House of Lords to the Court of Session, to review the interlocutors which the Court had pronounced, and which were appealed from.

On resuming consideration under this remit, the Court of Session ordered mutual memorials on the whole question.