THE PLEADINGS OF THE COUNSEL BEFORE THE HOUSE of LORDS,

IN THE GREAT CAUSE CONCERNING

LITERARY PROPERTY;

TOGETHER WITH THE

OPINIONS OF THE LEARNED JUDGES,

ON THE

COMMON LAW COPY RIGHT of AUTHORS AND BOOKSELLERS.

TO WHICH ARE ADDED, THE

SPEECHES OF THE NOBLE LORDS,

Who ſpoke for and againſt reverſing the DECREE of the COURT of CHANCERY.

LONDON:

Printed for C. WILKIN, Bookſeller, No. 2, Orange Street, Red Lion Square; S. AXTELL, No. 2, Red Lion Court, Fleet Street; J. AXTELL, No. 2, Well Yard, Little Britain; and J. BROWNE, No. 4, Wardrobe Court, Doctors Commons.

[Price One Shilling.]

PREFACE.

THE motive for printing these papers collected together, is, that such gentlemen of the law and others who are concerned in Literary Productions may see the substance of the Arguments and Opinions of those great men who distinguished themselves in the definition of so difficult a question as, What is called Literary Property? but particularly to preserve that elegant speech of the noble LORD CAMDEN, both with respect to law and equity.

The monopoly of books and copies has been for many years in the hands of a few persons who call themselves Booksellers, about the number of *twenty-five*, to the entire exclusion of all others, but more especially the Printers, whom they have always held it a rule never to let become purchasers in Copies, even though themselves never paid any valuable consideration for them originally, and those for which they have, have been repaid them ten-fold within the times limitted by authority of Parliament.

As it is impossible to set the matter in a clearer view than his Lordship has, we must beg to refer the Reader to his Speech in the House on that occasion, by which may be discovered

his

his great Knowledge of the Laws, and the intention of an *Honeſt Man* to do juſtice to *every* perſon who has received a *real* injury.

The Bill now depending (if paſſed *into a Law*) will, it is hoped, in juſtice to thoſe who have made recent purchaſes, allow them a ſufficient time to indemnify themſelves for the hazard and expence which muſt neceſſarily be given for the encouragement of Authors; but thoſe Copies, by which ſo many Fortunes have been made in a *long courſe of years*, with reſpect to the number of editions, and the numbers printed of thoſe editions, will be matter of enquiry worthy the attention of Parliament.

ARGUMENTS

ARGUMENTS

USED BY COUNSEL IN THE

HOUSE OF LORDS,

ON THE CAUSE OF

LITERARY PROPERTY.

THIS great cauſe of Literary Property, which has ſo long engroſſed the attention of all thoſe concerned in the Republic of Letters, being now ſettled in the higheſt court of judicature in theſe kingdoms, it remains only for us to ſhew what arguments have been made uſe of to reverſe a decree of Chancery in favour of the reſpondents; where will eaſily be diſcovered the difference between manly reaſoning and ſound law, in oppoſition to ſophiſtical jargon and evaſive argument.

The litigation took its riſe from Meſſrs. Donaldſons' having printed (in Scotland) and publiſhed (in London) ſeveral of Thompſon's works. Several other bookſellers, claiming an excluſive property by purchaſe, filed their bill; had the matter decided in their favour in a Court of Common Law in England; loſt it in Scotland, and gained it in the Engliſh Court of Chancery, from whence, by appeal, the

the Proceedings brought it before the Houſe of Lords, which began to be heard at their bar by counſel, on Friday February 4, 1774. The counſel were

For the Appellants	For the Reſpondents
Mr. Thurlow, Attorney-General.	Mr. Wedderburn, Solicitor-General.
Sir John Dalrymple.	Mr. Dunning, and
	Mr. Hargrave.

FRIDAY, February 4.

The Attorney-General opened as counſel for the appellants, and ſpoke for two hours, endeavouring to prove the decree of the Court of Chancery, on the 16th of November, 1772, in favour of the reſpondents, an injury to the appellants, and that what was termed LITERARY PROPERTY, was not warranted or ſecured at common law. The Attorney-General in his ſpeech uſed the ſame arguments, and went upon the ſame grounds which the counſel for Taylor, in his cauſe with Millar, in 1769, urged and maintained. He firſt entered into a minute inveſtigation of the idea inculcated by what is called a publication; "which, he ſaid, was not that myſterious thing the trade would make it; but ſimply a multiplication of copies; that whether they were multiplied to the number of five or five hundred, ſignified not an iota to the matter in diſpute." He ſaid, "that previous to the invention of printing, ſcribes, for copying an author's work, obtained a greater remuneration than perſons who, ſince the invention of printing, diffuſe writings by means of certain types."

He then dwelt much on the ſenſe of the word *Property*, defining it philoſophically, and in the ſeparate lights of being corporeal and ſpiritual; and proceeded to define property in the legal ſenſe of the word, in the following manner:

"Property, of whatever kind, is that which is begun by occupancy, and continued by poſſeſſion."

Mr. Thurlow ſaid, "that metaphyſicians talked of a property in life or limb, in fame, honour, and character; but this was not a language lawyers could adopt. There was alſo, he ſaid, ſuch a thing as property by ſpecification; he aſked under what denomination literary property was to be arranged? Was it corporeal or incorporeal? If corporeal, it was deſcendible, like any other chattel; if incorporeal, how was its incorporeality to be aſcertained? how ſpecifically diſtinguiſhed from its appendage or adjunct, the corporeal part? To ſay that a man has a property in the

the ideas of a book, and none in the book itſelf, is as if one ſhould affirm that a man has a property in the colouring of a picture, but none in the canvaſs on which that colouring is laid; or as if Mr. Harriſon had a property in the diſcovery made by his time-piece, but none in the wheels or mechanical parts of which it is compoſed: a notion to the laſt extreme abſurd! Applying this to the caſe of an author; if he had any diſtinct exclusive property in a book, ſeparate from the material and corporeal part, I have no objection to admit this excluſive property, (continued the counſel,) provided he will demonſtrate to me *quo jure* the property accrues."

The bookſellers, he obſerved, (exemplifying his obſervations by ſeveral caſes) had not, till lately, ever concerned themſelves about authors, but had generally confined the ſubſtance of their prayers to the legiſlature, to the ſecurity of their own property; nor would they probably have, of late years, introduced the authors as parties in their claims to the common law right of excluſively multiplying copies, had not they found it neceſſary to give a colourable face to their monopoly. He was very diffuſive upon grants, charters, licences, and patents from the crown, both to corporate bodies and individuals, tracing them far back, and aſſerting, that they all ſpecifically proved, that if there had been any inherent right of excluſively multiplying copies, ſuch inſtances of exerting the royal prerogative would have been unneceſſary. He particularly adverted to the ſtatute of the 8th of Queen Anne, maintaining that it was not merely an accumulative act declaratory of the common law, and giving additional penalties, but that it was a new law to give learned men a property which they had not before, and that it was an incontrovertible proof that there previouſly exiſted no common law right, as contended for by the reſpondents. He cited many caſes to prove his arguments; ſome before the 8th of Queen Anne, and others immediately upon that ſtatute, generally inferring that the grand queſtion touching the common law right, had never been deciſively determined by any Chancellor.

The Attorney-General then attempted to prove "that no ſuch idea as that of an excluſive right to multiply copies prevailed previous to, or indeed long after, the invention of printing." This was inſtanced in ſeveral caſes, where "one writer complained of another for printing his works, not on account of any violation of property, but merely becauſe the party complained of had printed them inaccurately." On the whole, he contended "that Literary Property exiſted only in the imagination; that it never, till it was found advantageous, entered into the heads of bookſellers themſelves; that authors never conceived the notion of any property veſting in them, but what was given by ſtatute, by patent, the licenſing act, the royal privilege, or in virtue of the inſtitution of the Stationers Company; that what was called Literary Property only gave riſe to a ſcandalous monopoly of ignorant bookſellers, who fattened at the expence of other men's ingenuity, grew opulent by oppreſſion; and that, as the Lords of Seſſion had freed Scotland

 from

from ſuch a monopoly, he ſincerely hoped their Lordſhips, following ſo praiſeworthy an example, would emancipate this kingdom from ſuch an odious oppreſſion."

MONDAY, February 7th.

The Lords met agreeable to their adjournment the Friday before, and proceeded to hear further counſel on behalf of the appellants, when

Sir John Dalrymple, at the bar, entered into an hiſtorical review of what he called this ideal property, which he endeavoured to explain to the following purport:

"It ſhould be conſidered, my Lords, that this pretended property, which is ſuppoſed to have a foundation in common law, cannot in the records of the common law courts any where be found: If you ſpeak of the ſubject before the act of Queen Anne, you hear of nothing but licenſing acts, and the company of Stationers.—My Lords, during the tory reign of King Charles the ſecond the bookſellers were the mere engines of the court's deſigns, and therefore the licenſing act ſufficed;—it was the ſame through the tory reign of King James the ſecond, while it was the court ſide of every queſtion that could alone be handled with ſafety; the licenſing act gave that property to the bookſellers, which was ſufficient for their purpoſe. In the whig reign of King William they began to move out of the old ſphere, and then we accordingly find new movements. In the tory reign of Queen Anne they looked out for freſh ſecurities; then firſt appeared a new trade. My Lords, the bookſellers then found they could make as much or more by abuſing the ſovereign, her parliament, her council, her ſervants, and her government, than they could before make by the ſupport of them. Printing books thus coming into oppoſition to the court, the trade laboured hard to eſtabliſh a right to their copies that was independent of the court. They applied every where for the means of eſtabliſhing that right; but were forced at laſt to have recourſe to parliament to eſtabliſh and veſt in them a right which the common law did not give them.

"My Lords, the hiſtory of the act of Queen Anne deſerves your Lordſhips attention: What was the view of the bookſellers? abſurdity on the very face of it. They applied for an act, veſting in them a property for fourteen years which they pretend to have derived from the common law, for futurity. Can it be ſuppoſed that men who were any ways clear in their perpetual right, would apply for a freſh right for fourteen years only? It could not be. They knew their own ſituation: they knew the rottenneſs of their pretended right, and wanted a new real one, inſtead of the old imaginary one.

"Yet, my Lords, this act, which changed their perpetuity to a term of fourteen years, was obtained at a period when the intereſts of learning was far from being without

without good support: Addiſon, after being the friend of many miniſters, became ſecretary of ſtate; and Swift was high in the eſteem, and an adviſer of, the heads of another party. Happy would it be, my Lords, if miniſters had always ſuch friends, and ſuch adviſers!

"But, my Lords, this act of Queen Anne, which was ushered in under the idea of encouraging literature, was very far from having ſuch a tendency. It was to encourage booklellers, but not authors; however, ſuppoſing both intereſts the ſame,---What did they gain? Why, a perpetuity was changed to a term of fourteen years only. A price was fixed, and a clauſe inſerted to force them to ſend copies to public libraries—What encouragements are theſe?—They, on the contrary, were diſcouragements.—All which is ſufficient to ſhew that the booklellers never dreamed of a ſerious property at common law for perpetuity; had they ſuch a notion they would have petitioned againſt the act.

"Obſerve, My Lords, the title of the act: *To veſt* the copy rights: that is, my Lords, to *give* them a right they had not before; a marked expreſſion which could not be miſtaken.—And though the word *ſecured* is uſed in the body of the act, it does not enter there as the ſignification of a different idea: it is the ſame idea: the bill was to veſt a new property, and provide accordingly, and inflicts penalties, after which the word *ſecures* occurs, and is uſed perfectly conſiſtently with the former term.

"What could be more abſurd, my Lords, than an act to veſt a perpetual right to a ſet of perſons for a limited term, and inflicting penalties? Lord Shaftſbury tells us that ridicule is the teſt of truth: let us try ſuch an act by that teſt. I will read an imaginary act which enacts ſuch purpoſes.

(Here he read an act drawn up in the terms of the act of Queen Anne, for veſting the right to hedges and trees in the planters for fourteen years and no longer, laying penalties on perſons who cut or broke down ſuch hedges and trees.)

"Now, my Lords, does it not from hence appear that an act to convert a perpetuity into a limited term is abſurd upon the face of it? And may we not from hence conclude that the booklellers, when they applied for the act of Queen Anne, knew that they had no perpetual common law right?

"My Lords, this perpetual right which they want would, inſtead of being beneficial to the intereſts of literature, be pernicious to it. It encourages the ſpirit of writing for money; which is a diſgrace to the writer, and to his very age. My Lords, why ſhould not honour and reputation be powerful inducements enough for authors, without that mean one of profit? Foreigners know no ſuch exorbitant pecuniary rewards as have diſgraced this country. The Germans get nothing by writing.

writing. The Italian ſtates are ſo ſmall that no literary property can exiſt, as the booksellers of one ſtate would immediately print upon those of another.—In France the ſums given to authors are too ſmall to have this effect. My friend, Mr. Hume, has told me that Rouſſeau aſſured him he had but fourſcore Lewis d'ors for the copy of his Emile. Such ſums as we hear of in England are merely an encouragement to the mercenary ſpirit of writing, not to the merits of it.

"But farther, my Lords: if you give this perpetual right to publiſh, you give the ſame right to ſuppreſs. If an author is to have this excluſive right to his works after publication, he may ſuppreſs them at will, or at leaſt ſtop the future publication of them. My Lords, this is not a mere imaginary idea; it is poſſible, and even probable.

"My Lords, I ſhall beg leave to ſtate a ſuppoſition. Suppoſe there was a man who, with the utmoſt diligence and attention, ſought into the records of his country, and alſo of foreign ones, for ſtate-papers to illuſtrate hiſtory; ſuppoſe he meet with ſuch ſucceſs in this employment as to make diſcoveries of the higheſt importance: ſuppoſe, when his book comes to be publiſhed, that inſtead of receiving that public applauſe which he might perhaps have reaſon to expect, he, on the contrary, finds himſelf hunted down for that very circumſtance which ought to have added to his fame. Suppoſing there was ſuch a man, my Lords, muſt he not be uncommonly firm and reſolute to bear up againſt the illiberal voice of the publick? muſt he not be tempted to ſuppreſs a book, when he found it thus received, notwithſtanding the injury which he would thereby do to, I may ſay, his country?"

The foregoing is the ſubſtance of this laborious pleader's argument; thoſe who were preſent at the delivery of it, will recollect how far it reſembles what it is meant to give thoſe who were not preſent, ſome image of.

In the courſe of the ſpeech, Sir John Dalrymple made a multitude of remarks, many of which ſeemed calculated to enliven and ſtrengthen his argument; among the moſt particular was an obſervation that Printers and Bookſellers were not remarkable for too much modeſty; that authors were generally proud, and of ſo old-faſhioned a turn of thinking, that if a great man gave them a promiſe, they were weak enough to imagine it was to be kept; that Bookſellers were alſo exceedingly vain, and took every advantage of authors which they could, adding their name to their cauſe, merely from motives of ſelf-intereſt: that otherwiſe they would have got Mr. Addiſon to have aſſiſted them with his influence while he was in power; that a numerous multiplication of copies was of late date; Shakeſpear's works had ſold but two editions of 500 each in two centuries, and Smollet's Hiſtory of England, the worſt of the many bad Hiſtories of England extant, had ſold 11,000 in a very ſhort time; that when large numbers were firſt printed, the arts of reviling the Sovereign, abuſing the Miniſter, and libelling

libelling every Officer of Government were diſcovered; arts happily baniſhed in this quiet era! that Junius had an enflamed imagination, a weak head, and a worſe heart; that in the cauſe of Midwinter, both Plaintiff and Defendant reſembled fencers with ſkates on, treading upon ice, as they both went farther than they either of them intended; that Alexander Donaldſon, his client, never printed a work either within the time of the limitation of the 10th of Queen Anne, or in the life-time of the author; that Bookſellers opprobrioufly termed men who laudably enlarged the circle of literature, by giving new editions of works of merit, pirates; that procuring the reverſal of the decree of the Court of Chancery, would rather be of ſervice to the authors than diſſervice; and finally that there were near 20,000 Printers in London.

As the manner of Sir John Dalrymple's proving this latter extravagant aſſertion is ſomewhat peculiar, we ſhall circumſtantially recite it. "I happened (ſaid he) to be upon the Streets when a Lord Mayor two years ſince was coming to the Houſe of Commons, to anſwer for having diſcharged a City-printer out of the hands of a Meſſenger of that Houſe. The cavalcade was numerous; but I obſerved only half the number of Printers, who uſually make up the mob. I aſked the reaſon of it, and was informed that ten thouſand of them were gone to Tyburn to ſee a brother Printer hanged: ſo that I found they were divided in opinion whether they ſhould conduct one friend to the gallows, or another friend to the Houſe of Commons."

The above was in ſubſtance, if not in words, delivered at the Bar of the higheſt and moſt auguſt Aſſembly in this kingdom, under a ſpecious ſhew of pleading; but it is conceived Sir John Dalrymple miſtook his ſituation, or he never would have been the firſt to have made uſe of ſuch language to ſo noble an Aſſemblage. With reſpect to the characters and numbers of the Printers, &c. he ſeems more ignorant of them than he was of thoſe men of virtue by traducing whom he has received ſo much advantage, or what opinion muſt the world have of a man who ſome months before received the enormous ſum of near One Thouſand Pounds for the compilation of a few Papers, from a Bookſeller, and then to ſtand foremoſt in oppoſing his right to indemnify himſelf by the ſale of ſuch Books in perpetuity?

TUESDAY, February 8th.

The Attorney General and Sir John Dalrymple having finifhed their pleadings on the behalf of the appellants, Mr. Solicitor General and the other counfel were called to the bar, when he fpoke for the refpondents to the following purport.

He began his fpeech with a feries of compliments to the two counfel on the other fide of the queftion; "one of the learned pleaders, he obferved, had entered into the argument with great ability; his definition of the word *property* had been fhrewd, metaphyfical and fubtle; but he hoped to be able to convince their Lordfhips, that ingenious as the definition of that word had been, it was nevertheleſs erroneous.

"Literary Property had, by thofe who had fpoke before him, been faid to be fo abftrufe and chimerical, that it was not poſſible to define it. The interpretation they had put upon the word *property* was, that it implied fomething corporeal, tangible and material. He begged leave to differ from this opinion, and to point out how common it was for terms to be miſapplied as to their import.

"The word *property* had, by the ableſt writers, been called *jus utendi, fruendi, diſponendi*; it was therefore evident that any idea, although it was incorporeal in itſelf, yet if it promiſed future profit to the inventor of it, was a property. And the latter word had, through inaccuracy, been uſed as deſcribing that, over which a poſſeſſor held an abſolute reign, dominion, or power of diſpoſal. The ſubject matter might be immaterial, and yet liable to be appropriated. Property changed its nature with its place: In England, portions of land were private property, among the Arabs and Tartars no ſuch idea prevailed; they looked upon cattle and chattels as the only private property. Among the Americans, in certain diſtricts, land was conſidered as property, but not as the property of individuals; as the inhabitants lived upon the gains of hunting, a circumference of land, ſufficient for them to hunt on, was conſidered as the general property of one tribe or nation.

"The lawyers mode of deſcribing property was exceedingly trite and familiar; they generally divided it into corporeal and incorporeal, and in the preſent caſe it had been ſaid to commence by occupation, and to continue by poſſeſſion. This was a narrow ſcale of argument. In the courts of law it was univerſally admitted that matters incorporeal were nevertheleſs matters of property, and the lawyers diviſion of it proved that matters not in occupancy or poſſeſſion, were yet of value, and could be ſold or given over, as in the caſes of manors and advowſons, remainders and reverſions. They could be ſold by aſſignment, and the mode of ſale was by title.

Poſſeſſion

Poſſeſſion was uſually deſcribed as originating from two things, livery and grant. Under the latter title, in ſome degree, ſtood Literary Property; but it was not to be conſidered as originating from crown grants, for excepting the prerogative copies, the crown had no right, and in the firſt of thoſe (the bible) no farther right, than in that particular tranſlation publiſhed in the reign of King James.

After a very learned and ingenious argument, as to the qualities of property with regard to its occupancy, its being material, and its adhipilcency, the Solicitor General obſerved "that every inventor had a right to the profit of his invention; and as he found that Grotius had not eſcaped the Attorney General's reſearches, he was much ſurpriſed that in his definition of property, the learned pleader had not hit upon a poſition which was directly in point."

He then read an obſervation cited by Grotius as having been made by Paulus, a Roman lawyer, who declared that one mode of acquiring property was invention, and that from the nature of things, he who made a matter was the owner of it.

"This, he obſerved, was a much more liberal conſtruction of the word invention than had been put on it by the other ſide, who had taken it up in its vulgar acceptation, and only given it alluſion to trifles, ſuch as the finding ſhells on the ſea-ſhore, &c.

"It had been contended, that the maker of an orrery was in the ſame predicament as an author, when he publiſhed. Such alluſion came not to the point; the firſt ſheet of an edition, as ſoon as it was given impreſſion, in a manner loaded an author with the expences of a whole edition, and if that edition was 5000 number, the author was not repaid for his labour and his hazard, till the laſt of the 5000 were ſold. The maker of an orrery was at no other trouble and charge, than the time, ingenuity and expence, ſpent in making one orrery; and when he had ſold that one, he was amply paid. Orrery-making was an invention, and the inventor reaped the profit accruing from it. Writing a book was an invention, and ſome profit muſt accrue after publication; who ſhould reap the benefit of it?

"Authors, he contended, both from principles of natural juſtice, and the intereſt of ſociety, had the beſt right to the profits accruing from a publication of their own ideas; and as it had been admitted on all hands that an author had an intereſt or property in his own manuſcript, previous to publication, he deſired to know who could have a greater claim to it afterwards. It was an author's dominion over his ideas that gave him his property in his manuſcript originally, and nothing but a transfer of that dominion or right of diſpoſal could take it away. It was abſurd to imagine that either a ſale, a loan, or a gift of a book, carried with it an implied right of multiplying copies; ſo much paper and print were ſold, lent or given, and an unlimited peruſal was warranted from ſuch ſale, loan or gift, but it could not be conceived that when five ſhillings were paid for a book, the ſeller meant to transfer a right of gaining one hundred pounds; every man muſt feel to the contrary, and confeſs the abſurdity of ſuch an argument."

The Solicitor General produced a copy of the original grant of King James for printing ſome Poems of his writing, which, excepting ſome royal ſtile in the beginning, he obſerved, ran in the ordinary phraſe of an author's aſſignment of copy-

right

right to a Bookſeller; nay, indeed, it was more ample, for it not only transferred the right of the matter then published, but alſo transferred a right to every thing he ſhould hereafter be pleaſed to write.

Among other matters adverted to in this ſpeech, Ames's Typographical Hiſtory was particularly noticed: the application of the Printers in Prynne's time to ſuppreſs and call in the patents for printing and publiſhing the Bible, was mentioned; the applicants terming thoſe patents a ſanction for monopolizers, the matter was heard by counſel, when Prynne pleaded on one ſide of the queſtion, and his anſwer turned on nine points, in one of which that celebrated lawyer declared, that the moſt ſerious and ſolid objection againſt the Printers was the inherent Common Law Right for an Author to multiply copies. This the Soliciter General ſaid was one ſtrong proof that in the worſt of times the *jus naturale* reſpecting Literary Property was not forget. Licenſes in general, he obſerved, proved not that Common Law Right did not inherently exiſt, but were the univerſal fetters of the Preſs at the times in which Authors were obliged to obtain them.

With regard to the ſtatute of Queen Anne, he was very willing to let that reſt on the ſame grounds as the Attorney General had placed it laſt Friday, viz. that it it gave no right, it took none away. But he could not help obſerving that it contained a poſitive clauſe to let the matter reſpecting a Common Law right remain preciſely in the ſtate in which it was when that act paſſed: and that the Court of Chancery conſidered that ſuch a right did exiſt, was evident from the ſeveral injunctions that Court had granted ſince the enacting of the ſtatute, which did not govern thoſe injunctions, as it did not particularly ſpecify how the Court of Chancery were to act. He inſtanced the caſes of Pope and Curl, Gwynne and Dr. Shebbeare, and two Law Books, as proofs of what he aſſerted. He mentioned alſo the caſe of Dodſley *verſus* Kinnerſly, in 1761, before Sir Thomas Clark, Maſter of the Rolls. The former prayed an injunction againſt the latter, for abſtracting a part of Dr. Johnſon's Raſſelas, and publiſhing ſuch abſtract in a Magazine.

The Solicitor General, after noticing the great ability of Sir Thomas, declared that his opinion was the ſame, reſpecting Literary Property, as that he had maintained, and after a variety of very ingenious remarks, he concluded his argument, invoking the Lords to ſanctify the final determination of a queſtion founded on natural juſtice, and the intereſt of ſociety, by affirming the decree.

The Soliciter General, in the courſe of his argument, paid Mr. Hargrave a very elegant compliment for his publication touching the queſtion. He alſo adverted to Sir John Dalrymple's publication, and hoped that work would not be ſuppreſſed, as he had reaſon to lament its author intended. And in following the obſervations made on the other ſide, he ſaid it was true that Attieus employed his ſlaves in tranſcribing, but that even then the expence was ſo enormous, that although he was a man of great fortune, he was, from a principle of œconomy, under the neceſſity of ſelling his library; and Cicero, who was alſo a rich man, was, from the ſame principle, unable to purchaſe it.

Mr.

Mr. Dunning likewiſe pleaded in favour of the reſpondents, which he did by entering into an hiſtorical review of the ſtate of this property in different parts of our annals; he obſerved,

"It has been very falſely aſſerted, my Lords, that this property, before the act of Queen Anne, was not to be found at common law, and attempts have been made to prove, that no caſes of it are to be produced; but, my Lords, this is not reaſoning to the purpoſe; we muſt conſider the times which we examine, and the nature of the property in queſtion: In ages wherein civility had made but ſmall progreſs, it would be abſurd to look for litigations of a property ſo little valued and ſo ſeldom diſputed; but, my Lords, the want of precedents in ſuch a caſe proves nothing againſt us: there are many unqueſtionable common law rights for which you can find no precedent, ſo far back as Richard the Second. How, my Lords, is it to be ſuppoſed, that the deciſions relative to ſo peculiar a property are to be clearly aſcertained through an age wherein we have only a dim light to view objects of much greater importance? Where would be the equity, if I may ſo expreſs myſelf, of our conſtitution, if we were to eſtabliſh it by ſuch remote precedents? Can any one wonder that we have only a dim view of this property in ages when nothing was clear but injuſtice and oppreſſion? The nature of the property ſhews at firſt ſight that it would be in vain to look far back for dec ſions in its favour, even ſuppoſing that from other circumſtances the exiſtence of it was unqueſtionable.

"My Lords, the little eſtimation and dubious circumſtances that attended the copy right to the Paradiſe Loſt of Milton, is no proof againſt the exiſtence of a deciſive right. That poem was ſo much neglected, that the bookſeller had perhaps as much reaſon to complain of his bargain as the author. It was the fault of the age; and had the ſame inattention and want of taſte continued, the property for which we contend would, perhaps, to this day have never been litigated; but certainly, my Lords, the right in caſe of litigation would not thereby have been injured.

"Attempts, my Lords, have been made to prove that the eſtabliſhment of this right would be injurious to literature; a ſtrange aſſertion ſurely. It is as much as to ſay, that rewarding authors in proportion to their merit, is the way to diſcourage their productions; an argument too weak to make an impreſſion on your Lordſhips. So very far is this from being the caſe, that it is evident the money given for copyrights has increaſed with the increaſe of ſecurity that has been given to the property. Go back to Milton's time, and from thence advance gradually to Queen Anne's reign, when the act of fourteen years right was one encouragement to the booksellers, followed by ſome conſiderable emoluments in their way to authors; then, my Lords, reflect on the progreſs which has been made ſince, and permit me to call your attention on three famous works, Mr. Hume's and Dr. Robertſon's hiſto ies, and Dr. Hawkeſworth's voyages; the ſums given for the copies of the former, at that time unparalleled, followed the ſecurity of the property, which flowed from ſeveral injunctions granted by chancery: and the yet greater ſum given for the latter, followed an actual determination of the King's-Bench in favour of this very

property. My Lords, I conceive that whoever reads the books will not find it poſſible to account for the ſum in one caſe ſo much exceeding thoſe in the other, unleſs it be attributed to this caſe; that the merit of the voyages is to be claſſed with that of the hiſtories, which will ſcarcely be allowed; yet the copy-money much exceeded that of the others. In no way is this to be accounted for but by ſuppoſing the booksellers liberality to flow from the additional ſecurity thus given to their property: and if this is not an encouragement to literature, my Lords, I ſhould be glad to be informed what is an diſcouragement. It might as reaſonably be aſſerted, that penſions and rewards given by a ſovereign to learned men, did not advance the intereſt of learning.

"My Lords, the very act of Queen Anne has been brought to prove, that there could not be a previous common law right in the copies of books; but, my Lords, nothing can be more futile than ſuch an idea: let me illuſtrate this by a ſimilar caſe; there paſſed an act laſt ſeſſions to make turnips, cabbages, potatoes, and carrots property; now, my Lords, might it not be urged with as much juſtice, that cabbages and ſo forth were not property at common law? Such an idea would be ridiculous. Acts may paſs to regulate property, and to inflict penalties on the invaſion of it, without in the leaſt derogating from the principles and foundation of ſuch property.

"We have been farther told, my Lords, that giving the property of copies will be giving the right of ſuppreſſion; but this I conceive is a groundleſs idea; we are not to ſuppoſe that books of inſtruction, entertainment, or amuſement, will ever be ſuppreſſed, and as to books neither inſtructive nor entertaining, the ſooner they are ſuppreſſed the better. Certain, however, it is, that on ſome ſubjects they are read in proportion to their meriting neglect.

In the courſe of his pleadings he animadverted upon ſeveral parts of the oppoſite counſels conceptions or explanations of this property. He ſaid it was to him the moſt extraordinary idea that ever he heard, that it ſhould be admitted that an author had a property originally in his compoſition, and that the firſt moment he exerciſed his dominion over that property, and endeavoured to raiſe a profit from it, he loſt it. Publication he could not conceive was of ſuch a nature to deſtroy that right to the matter publiſhed, which it was acknowledged an author had before it was publiſhed.

One part of the argument (he obſerved) uſed for the appellants, was, that it would benefit authors, if no excluſive right of multiplying copies exiſted: this was a very ſtrange aſſertion, and it was very extraordinary that authors in general ſhould think otherwiſe. It was cuſtomary for Bookſellers, as buyers, to buy as cheap as they could, and it was alſo cuſtomary for authors to ſell as dear as they could; this could not be the caſe if the moment a book was publiſhed every man had a right to print it.

Authors formerly, when there were but few readers, might get but ſmall prices for their labours, but the books above-mentioned had been paid enormous ſums for, eſpecially the laſt. That if the Purchaſers of theſe Copies had not the ſole right of multiplying Copies, how was this difference to be accounted for? not from

any

any uncommon generosity in the Booksellers, not from any superiority in point of merit in the Books, but from the idea of a Common Law Right prevailing, and from that idea's being established by the determination of the Court of King's Bench in the case of Miller and Taylor; for it was idle to contend that the subject of the present appeal was not exactly on the same grounds.

The Appellants wanted to sanctify the importation of Scotch Books into England, in the same manner as the importation of Scotch cattle. The Book on which the present cause was grounded, was written, indeed, by a Scotchman, but it was written in English, and originally printed in England. The Appellants had invaded the legal purchaser, by printing a copy in Scotland, and offering it to sale in London; he hoped, therefore, that their Lordships would teach them that Literary Property was sacred, by affirming the decree.

The House, as soon as Mr. Dunning had finished, adjourned till next Day.

WEDNESDAY, *February 9th.*

The Counsel were again called to the Bar, and the Attorney General made his reply to the arguments in behalf of the respondents, when he advanced very little more in substance than what he had already urged, and after Mr. Attorney General had finished his reply, the Lord Chancellor rose up, and put the three following questions to the Judges, viz.

1. Whether at Common Law, the Author of any literary composition had the sole first right of printing and publishing the same for sale, and could bring an action against any person for publishing the same without his consent?

2. If the Author had such right originally, did the Law take it away upon his printing and publishing the said Book or literary composition, or might any person re-print and publish the said literary composition for his own benefit, against the will of the author?

3. If such action would have laid at Common Law, is the same taken away by the statute of Queen Anne? or is an Author precluded by such statute from any remedy, except on the foundation of the said statute?

After the above questions had been twice read, and put to the learned Judges, Lord Camden moved that the two following might also be put, viz.

1. Whether the Author of any literary composition, or his assigns, had the sole right of printing and publishing the same in *perpetuity* by the Common Law?

2. Whether this right is any ways impeached, restrained, or taken away by the 8th of Queen Anne?

They were immediately read by the Lord Chancellor, and put to the Judges accordingly, and then the House adjourned to Tuesday the 15th.

TUESDAY,

TUESDAY, *February 15th.*

The Lords met, agreeable to their adjournment, and after the diſpatch of ſome private buſineſs, proceeded to hear the opinions of the Judges upon the five queſtions relative to the important cauſe of Literary Property.

The Chancellor opened the buſineſs by obſerving, that "as the learned Judges might maintain diſſimilar opinions upon the ſubject, their Lordſhips attendance was required to hear the opinion of each Judge delivered *ſeriatim*."

Baron EYRE then aroſe and delivered his opinion with the reaſons whereon that opinion was founded, in ſubſtance as follows:

He obſerved, "that great pains had been taken by the ingenious Counſel for the Reſpondents, to avoid conſidering the ſubject as at all connected with *metaphyſic ſubtleties*; that ſuch an attempt, though highly praiſe-worthy in thoſe who had the intereſt of their clients at heart, was yet totally impracticable, as every endeavour to diſclaim the uſe of metaphyſic reaſoning, tended only to ſhew how neceſſary it was to the accurate diſcuſſion of the ſubject: That the queſtion, in fact, was reſpecting a right TO APPROPRIATE IDEAS: That the objects over which a right, and in which an *excluſive Property* was claimed, were incorporeal exiſtences, which could not be treated of with any degree of accuracy, without having recourſe to the aid of ſcientific diſquiſition: That the thinking faculty, common to all, ſhould likewiſe be held common, and no more be deemed ſubject to excluſive appropriation, than any other of the common gifts of nature."

Hence the Baron put an abſolute *negative* upon the firſt queſtion, relative to "the Author of a Book, or Literary Compoſition, having a right *at Common Law* to the excluſive ſale of ſuch Book or Literary Compoſition." This the Baron denied in the moſt poſitive terms. He ſaid; "that, from the very nature of the contents of a book, they were incapable of being made objects of Common Law Property; nothing could be predicated of them, which was predicable of every other ſpecies of Property ſubject to the controul, and within the limits of the protection of the Common Law. *A right to appropriate ideas, was a right to appropriate ſomething ſo ethereal as to elude definition; ſo intellectual as not to fall within the limits of the human mind to deſcribe with any tolerable degree of accuracy.* Ideas, if convertible into objects of property, ſhould bear ſome feint ſimilitude to other objects of property; they did not bear any ſuch ſimilitude, they were altogether *ingenia.* They could not paſs by deſcent to heirs; they were not liable to bequeſt; no characteriſtic marks remained whereby to aſcertain them; and, were ſuch incorporealities not ſubject to one of the conditions which conſtituted the very eſſence of property original or derivative; were ſuch incorporealities liable to *excluſive appropriation*, by any right founded in the Common Law?

"No traces, the Baron ſaid, of ſuch a Common Law right were to be found amongſt the Greeks or *Romans*; *nor did the municipal Laws of any country* warrant the ſuppoſition of a right of the kind exiſting; *yet both Greeks and* Romans were careful in arranging every matter ſuſceptive of property under its diſtinct head."

But

But here lay another insuperable difficulty. Admitting ideas liable to exclusive appropriation, and thus to become *objects of property*; in treating of them as such, "how would you class, how arrange them? Would you recount them as simple, complex, combined, or multifarious? as being so many species *ejusdem generis*? or would you resort to truth and common sense, and say, "they are not to be classed, arranged, defined, or ascertained?" They are not subject to alienation, transmission, grant, or delivery; and yet they are objects of property, to the exclusive *right of appropriating* which, men are clearly entitled by the Common Law, and by every principle of natural justice!"

The Baron then proceeded to combat this latter principle; for upon a supposition that ideas were produced by a thinking faculty, *common to all men*, the Baron questioned, "whether it was consonant to the principles of natural justice, to appropriate that to the exclusive *benefit of one or a few*, which was designed as a common gift distributed to *all*."

The Baron concluded, that "if the *notion* of a Common Law right should be reprobated, such reprobation carried *with it an explicit* answer to the second Question: There being no Common Law right, an action could not be maintained against the re-publishers of an Author's book or literary composition, without his consent."

The Baron next proceeded to brand an exclusive appropriation of literary works, with the epithets of "A MONOPOLY," against every kind of which the Statute of James I. had sufficiently provided. Yet the Baron contended, "that even Monopolies, in some cases, were allowable, but then the state had taken care to allow them only *for a convenient time*."

Previous to the invention of printing, the idea of a Common Law right, the Baron said, had not been suggested; and subsequent to the invention of this useful art, so little notion had Authors of a right at Common Law to exclusive appropriation, that before the *institution of the Stationers Company* they had recourse to the Legislature for a license, grant, patent, or privilege; that after the institution of the Stationers Company the only mode thought of to secure the appropriation of a *literary* composition was, "by an *Entry in the* Records of that Company, and *the person* in whose name the book was entered, *let him* come by it how he would, was deemed the Proprietor, the Author never being *so much as* mentioned on these occasions."

The Baron then reviewed the cases, which, by the Respondents Counsel, had been adduced to prove "the sentiments of the Court of Chancery in favour of a Common Law right." But the Baron contended, "that although the Court of Chancery had frequently granted Injunctions, it cautiously avoided giving any final adjudication upon the matter. An *antecedent Common Law* [illegible] was never hinted at; nor were the *injunctions* granted in the cases cited, at all in point; they had been granted on the appearance of *something* fraudulent upon the face of the transaction; as in the case of Pope and Curl."

"Nor did injunctions prove the Chancellor's opinion upon a matter of Common Law Right, in confirmation of which, added the Baron, I will venture an anecdote."

date." "There is a paper now exifting, containing fome Notes Lord Hardwicke had taken down, which fet forth. "the fole and exclufive right of an Author at Common Law, to multiply copies for fale." In the margin of which Paper, and oppofite to this very paffage, there is in Lord Hardwicke's own hand writing a very large Q. which proves that his Lordfhip entertained doubts refpecting the legality of the pofition."

The Baron then obferved, "that the Counfel for the Refpondents had flipped over the cafe of Mechanical Inventions." The Baron thought them highly commendable for fo doing, as they were well aware how ftrenuoufly every argument drawn from the cafe of Mechanical Inventions would militate againft the intereft of their Clients.

The Baron confidered a Book precifely upon the fame footing with any other Mechanical Invention. In the cafe of Mechanic Invention, "Ideas were in a manner embodied, fo as to render them tangible and viffible; a Book was no more than a Tranfcript of Ideas; and, whether Ideas were rendered cognizable to any of the fenfes, by the means of this or that art, of this or that contrivance, was altogether immaterial: Yet every Mechanical Invention was common, whilft a Book was contended to be the object of Exclufive Property! So that Mr. Harrifon, after conftructing a Time-Piece, at the expence of forty years labour, had no method of fecuring an exclufive Property in that invention, unlefs by a grant from the ftate; yet, if he was in a few hours to write a Pamphlet, defcribing the properties, the utility and conftruction of his Time-piece, in fuch Pamphlet he would have a right fecured by Common Law! though the Pamphlet contained exactly the fame ideas on Paper, that the Time-piece did in Clock-work Machinery! The cloathing is diffimilar; the Effences cloathed were identically the fame."

The Baron urged "the exactitude of the refemblance between a Book and any other mechanical invention, from various inftances of agreement. There was the fame identity of intellectual fubftance; the fame fpiritual unity. In a Mechanic Invention the corporation of parts, the junction of powers, tended to produce fome one end. A Literary Compofition was an aflemblage of ideas fo judicioufly arranged, as to enforce fome one truth, lay open fome one difcovery, or exhibit fome one fpecies of mental improvement." On the whole, the Baron contended "that a mechanic Invention, and a Literary Compofition, exactly agreed in point of fimilarity; the one therefore was no more entitled to be the object of Common Law Property than the other; and as the Common Law was entirely filent with refpect to what is called Literary Property, as antient ufage was againft the fuppofition of fuch a Property; and as no exclufive right of appropriating thofe other operations of the mind, which pafs under the denomination of "Mechanical Inventions was veftcd in the inventor by Common Law, the Baron, for thefe reafons, declared himfelf againft the principle of admitting the Author of a Book, any more than the inventor of a Piece of Mechanifm, to have a right at Common Law to the exclufive appropriation and fale of the fame."

This was an anfwer to the firft and fecond queftions. It was alfo an anfwer to the firft queftion propofed by Lord Camden; for if an author had no right at all by common law, he could have none in perpetuity.

But

But admitting him to have had ſuch common law right; in reply to the third and fifth queſtion, which aſks, "how far the ſtatute of the 8th of Queen Ann affects the caſe, or takes away a common law right exiſting antecedently in an author or his aſſignees?" Baron Eyre contended, "that every principle of a common law right was effectually done away by this ſtatute." This he eſſayed to prove from the title, preamble, and certain clauſes of the act, from the adoption of the word *veſt*, and the mode of expreſſion uſed, of giving an author an excluſive property for fourteen years, *and no longer*.

The Baron obſerved "that he knew of no right the crown had at common law to print what were deemed crown copies; ſuch excluſive right originating only *from an exertion* of the prerogative. Before the invention of printing it was proper *for the crown to have copies* of the public acts taken from the parliamentary rolls to tranſmit to the ſheriffs of the ſeveral counties; and printing being no more than an expeditious art of tranſcribing copies, the ſame power, and for pretty much the ſame ends, continues now to be a part of *the crown's prerogative*; and as the crown takes care to have the ſtatutes printed for the public promulgation of the law, ſo by virtue of the ſame authority, bibles and common-prayer books are printed, and the copies of them thus multiplied for the ſervice of religion, which it becomes the chief magiſtrate to protect. But no common law right was veſted in the crown of thus printing and multiplying crown copies."

Such are the heads, the moſt material parts of Baron Eyre's opinion againſt what is called literary property. And if the editor preſumes to ſay that the Baron argued *the point with the erudition of a ſcholar, the acuteneſs of an able lawyer, and the accuracy of a ſound reaſoner*, ſuch praiſe cannot be deemed the language of flattery. *After a variety of obſervations in oppoſition to the arguments of the Solicitor General, Baron Eyre concluded with paſſing a negative upon the firſt and fourth queſtions, and an affirmative upon the ſecond, third, and fifth.*

Judge Nares ſpoke next, and was followed by Judge Aſhurſt, both of whoſe opinions were delivered in favour of the common law right of authors.

Mr. Juſtice NARES began by obſerving that the hiſtorical nature of the caſe had been ſo learnedly and fully agitated in the hearing of the houſe, that he ſhould wave entering into it, but ſhould rather reſt his opinion on general *concluſions, deduced from principles* which aroſe from fair argument.

He ſtated to the *Houſe why he thought a Common Law right in Literary* Property did exiſt, and why the ſtatute of Queen Anne did not take it away. He obſerved that he was of Mr. Dunning's ſentiments, that as it was admitted on all hands that an author had a beneficial intereſt in his own manuſcript before publication, it was a moſt extraordinary circumſtance that he ſhould loſe that beneficial intereſt the very firſt moment he attempted to exerciſe it.

Mr Juſtice Nares put ſeveral caſes to ſupport his argument, and the ſtatute, he ſaid, did not take away the Common Law remedy, although it gave an additional one, as in the caſe of an action for maliciouſly ſuing out a commiſſion of bankruptcy, although the ſtatutes of bankruptcy have provided an additional penalty for that offence by the bond given to the Chancellor. After having ſpoken near an

hour he concluded with anſwering the queſtions in a manner directly oppoſite to that of Mr. Baron Eyre.

Judge Aſhurſt then roſe, and accorded in the ſame opinion with Mr. Juſtice Nares, after tracing the nature of Literary Property, and producing many cogent reaſons to prove that ſuch a claim was warranted by the principles of natural juſtice and ſolid reaſon. Making an Author's intellectual ideas common, was, he obſerved, giving the purchaſer an opportunity of uſing thoſe ideas, and profiting by them, while they inſtructed and entertained him; but he could not conceive that the vender, for the price of five ſhillings, ſold the purchaſer a right to multiply copies, and ſo get five hundred pounds.

Literary Property was to be defined and deſcribed as well as other matters, and matters which were tangible. Every thing was property that was capable of being known or defined, capable of a ſeparate enjoyment, and of value to the owner. Literary Property fell within the terms of this definition. According to the appellants, if a man leads his manuſcript to his friend, and his friend prints it, or if he loſes it, and the finder prints it, yet an action would lie (as Mr. Juſtice Yeates had admitted) which ſhewed that there was a property beyond the materials, the paper and print. That a man, by publiſhing his book, gave the public nothing more than the uſe of it. A man may give the public a highway through his field, and if there was a mine under that highway, it was nevertheleſs his property. It had been ſaid, that when the bird was once out of the hand, it was become common, and the property of whoever caught it; this was not wholly true, for there was a caſe upon the law books, where a hawk with bells about its neck had flown away; a perſon detained it, and an action was brought at Common Law againſt the perſon who did detain it; *a book, with an author's name to it was the hawk, with the bells about its neck, and an action might be brought againſt* whoever pirated it.

Since the ſtatute of Monopolies, no queſtions could exiſt about mechanical inventions. Manufactures were at a very low ebb till Queen Elizabeth's time. In the reign of James the Firſt, the ſtatute of Monopolies was paſſed; ſince that act no inventor could maintain an action without a patent. 'Tis the policy of kingdoms, and preſervation of trade, to exclude them. The appellants were contending for the right of printing; but the right of exerciſing a trade with another man's materials, could not be allowed, either by reaſon, or natural juſtice. A miller might grind corn, and a carpenter might build a houſe; but the firſt was not warranted in grinding any corn but his own; nor the carpenter in building a houſe with another man's wood. The caſes of Eyre and Walker, and Tonſon and Walker, happened ſince the ſtatute.

With regard to the queſtion; Its being capable of perpetuity, few ſubjects were ſo. Even land, the moſt tangible ſpecies of property, might be waſhed away by the ſea, and therefore might be rendered incapable of being perpetually enjoyed. He thought, however, that the reſpondents were entitled to as full an enjoyment, as the nature of the caſe could allow.

As ſoon as Judge Aſhurſt had concluded, he informed the houſe that Judge Blackſtone was ill with the gout, but had ſent his written opinion, which he read to the Houſe; Judge BLACKSTONE in general Terms, anſwered the five queſtions, and

was

was of the ſame opinion with his brethren, Mr. Juſtice Nares, and Mr. Juſtice Ashurſt. The further hearing was poſtponed till Thurſday.

THURSDAY, *February* 17th.

Mr. Juſtice Willes, Mr. Juſtice Aſton, Mr. Juſtice Gould, Mr. Baron Perrot, and Mr. Baron Adams, gave their ſeveral opinions.

Mr. Juſtice WILLES ſpoke firſt, and after having ſhewn of what ſpecies of property the author's copy-right ſtood; that it was eſtate perſonal, that it was aſſignable, and that every man conceived what it meant; he declared it as his opinion, that an author had an indiſputable power and dominion over his manuſcript; that that power was not alienated when the manuſcript was printed and publiſhed; that the author had an excluſive right of multiplying copies according to the common law, which was foundedon reaſon and truth. This claim of right began with printing, and for the eſpecialreaſon, becauſe copies could not be eaſily multiplied but by the preſs; and therefore, that from which no profit could be got, was hardly a property.

In the courſe of the arguments this claim had been called by the odious name of a *monopoly*. This was a popular argument; but *argumenta ad populum* were not always well founded; and upon proper inveſtigation, this appeared to be more ſpecious than real.

After a variety of learned obſervations and ſeveral inſtances cited to prove that copy-right did exiſt independent of patents, privileges, ſtar-chamber decrees, or the ſtatute of Queen Anne; particularly the caſe of Tilotſon's ſermons, for the copy-right of which the Arch-biſhop's family received twenty-five hundred pounds after the expiration of the licenſing act, and previous to the act of Queen Anne; Judge Willes gave his opinion upon the firſt, ſecond, and fourth queſtions, that at common law an author had the ſole right of firſt printing and publiſhing the ſame for ſale, and might bring an action againſt any perſon who printed, publiſhed, and ſold the ſame without conſent; and likewiſe that, after publication, an author or his aſſigns, had an excluſive right in perpetuity of multiplying copies.

He then proceeded upon the ſtatute of Queen Anne, which he declared did not take away that right. It was, he obſerved, an act very inaccurately penned, but nevertheleſs it conveyed to his mind no idea of the legiſlature's entertaining an opinion that, at the time of paſſing it, there was no common law right; the word veſting appearing in the title had given riſe to ſuch an idea, but the preamble contradicted it in the fulleſt manner; the words of it were, "Whereas certain printers and bookſellers have taken the liberty of printing and *reprinting*, &c &c." the phraſeology of this ſentence plainly proved, that a known right previous to that ſtatute exiſted; the legiſlature would not have termed the exerciſe of what was common to all, taking a liberty, had they not underſtood that a right in perpetuity exiſted at common law, the words of the preamble to the bill would probably have been, "Whereas certain printers and bookſellers claim a right of printing. &c." And the intention of the word printing ſhewed that the idea prevailed that an author's property went farther then the firſt publication.

The univerſity of the ſaving claufe, Judge Willes obſerved, convinced him that the right at common law, which he had ſuppoſed to have exiſted antecedent to that act, was left untouched by it. That it was not a particular ſalvo for the univerſities, and the holders of copy-right by patent, but that it was general, mentioning the words "all perſons."

Having by a multitude of forcible arguments maintained the doctrine of a perpetuity, he anſwered the third and fifth queſtions by giving it as his opinion that an action at common law was not any ways impeached, reſtrained, or taken away by the ſtatute of Queen Ann; nor was the author precluded by ſuch ſtatute from any remedy, except on the foundation of the ſaid ſtatute, and the terms and conditions preſcribed thereby.

Mr Juſtice Aston next gave his anſwer, beginning with reading a learned Judge's ſentiments in favour of literary property, as reported by Sir James Burrow; he agreed with the three Judges who had ſpoke before him, that it was a property, and that is belonged to an author independent of any ſtatutary ſecurity. It was not neceſſary, he obſerved for any man to advert either to the Grecians or Romans to diſcover the principles of the common law of England. Every country had ſome certain general rules which governed its law; that our common law had its foundation in private juſtice, moral fitneſs and public convenience; the natural rights of every ſubject were protected by it, and there did not exiſt an argument which would amount to conviction that an author had not a natural right to the produce of his mental labour. If this right originally exiſted, what but an act of his own could take it away? By publication he only exerciſed his power over it in one ſenſe; when one book was ſold it never could be thought that the purchaſer had poſſeſſed himſelf of that property which the author held before he publiſhed his work. A real abandonment on the part of the firſt owner muſt have taken place, before his original right became common.

In all abandonments, Judge Yeates had defined, that two circumſtances were neceſſary; an actual relinquiſhing the poſſeſſion, and an intention to relinquiſh it; in the preſent caſe neither could be proved. Many manuſcripts had not been committed to the preſs till years after they were written, the poſſeſſion of them for a century did not invalidate the claim of the author or his aſſigns. With regard to mechanical inſtruments, becauſe the act againſt monopolies had rendered it neceſſary for the inventors of them to ſeek ſecurity under a patent, it could be no argument why in literary property there ſhould be no common law right. He thought it would be more liberal to conclude, that previous to the monopoly ſtatute, there exiſted a common law right, equally to an inventor of a machine, and author of a book.

After a variety of arguments drawn from the nature of the property, and the conſtruction which would rationally be put upon the act of publication, Judge Aſton gave his opinion in favour of the firſt, ſecond, and fourth queſtions.

With regard to the ſtatute of Queen Ann, he obſerved that it was no more than a temporary ſecurity, given by the legiſlature to the author, enabling him to recover penalties, and bring a matter of complaint againſt any perſon who printed upon him to a more certain iſſue than by an action at common law. It was an act paſſed for the encouragement of learned men, and being ſo termed in its title, it was a ſufficient

ſufficient proof that it was no bar to the common law right which exiſted previous to its being enacted. He read the preamble, and contended that it was evident from the wording of it, that it meant to give an additional ſecurity to a right, which they who paſſed the act knew exiſted. Beſides, the manner of paſſing it ſpoke in favour of this idea. He had ſeen the original bill as preſented to the committee appointed to bring it in, and it then had a long flouriſhing preamble, which the committee ſtruck out. Thoſe who were ſanguine for the petitioners, begged a perpetuity by ſtatute. The enemies to them at firſt refuſed to grant any ſtatutary ſecurity. *The bill gave particular trouble in paſſing; there were ſeveral conferences* between the two houſes upon it; and the very day it paſſed, it was ſo backward, that the Queen did not come to the houſe till three in the afternoon. Beſides, the ſaving clauſe was clearly a ſalvo to the common law right. The idea was as forcibly expreſſed, as words could expreſs.

After citing the injunctions granted by the court of Chancery, and arguing upon the multitude of circumſtances deducible in favour of *Literary Property* from the natural rights of the ſubject, the immediate nature of the property, the idea uniformly entertained of its exiſtence from the era of the commencement of printing to the preſent day, as well as his conſtruction of the ſtatute of Queen Anne, he gave his anſwer to the third and fifth queſtions, declaring it his opinion that an action at common law was not any ways impeached, reſtrained, or taken away by the 8th of Queen Anne.

Baron PERROT ſpoke next, and began by obſerving, that the argument for *the exiſtence of a common law right*, and the definition of Literary Property, as chattel property, was in his idea exceedingly ill-founded and abſurd. If Literary Property was a chattel, then upon the death of the poſſeſſor of a manuſcript, any ſimple contract creditor might oblige his family or aſſigns to give it up and ſuffer him to print it. An author certainly had a right to his manuſcript; he might line his trunk with it, or he might print it. After publication, any man might do the ſame, their Lordſhips might turn printers if they choſe, and print it. From the patents, the privileges, the ſtar-chamber decrees, and the licenſing acts, it was evident that in thoſe days no idea was entertained of an author's having any claim *to the excluſive right of printing what* he had once publiſhed: If a manuſcript was ſurreptitiouſly obtained, an action at common law would certainly lie for the corporeal part of it, the paper. So if a friend to whom it was lent, or a perſon who found it, multiplied copies, having ſurrendered the original manuſcript, he had ſurrendered all that the author had any common law right to claim.

He ſpoke of the right under patents and privileges as a right petitioned for by printers without any thought of an author's entertaining an idea that he had any claim. As to the Stationers Company, ſurely we were not to look for the common law among them. All their rules and orders were for the ſecurity of ſuch peculiar works as their own members had been wont to print. An inventor of a machine or mechanical inſtrument, like an author, gave his ideas to the public. Previous to publication, he poſſeſſed the *jus utendi, fruendi, et diſponendi*, in as full an extent as the writer of a book; and yet it never was heard that an inventor, when he ſold one of his machines, or inſtruments, thought the purchaſer, if he choſe it, had not a right to make another after its model. The right of excluſively making any

mechanical

Mechanical Invention was taken away from the Author or Inventor by the Act against Monopolies of the 21ſt of James the Firſt. Which Act ſaved prerogative Copy Rights, and which would have mentioned what was now termed Literary Property, had an idea exiſted that there was a Common Law right for an Author or his Aſſigns exclusively to multiply copies. The argument, that when a book was published and ſold, there was an implied contract between the Author and Purchaſer could not be maintained. The Purchaſer bought the paper and print, the corporeal part of his purchaſe; and he bought a right to uſe the ideas, the incorporeal part of it.

The doctrine of implied contracts would not hold, as it was improbable. The Author ſuſtained a loſs, but no injury, from another's printing his copy. *Damnum ſine injuria* was an eſtabliſhed maxim of Law. As another by multiplying copies reaped profit, the original Author ſuſtained a loſs, but he ſuſtained no injury. To be injured, a man muſt loſe his right; that right muſt be founded in law; and *where the Law gives no remedy*, an author can claim no right; the matter is common to all. It had been ſaid that a declaration had been filed on an action at Common Law, for the invaſion of *copy right*; but it had not been found, although every Law Book had been ranſacked for the purpoſe, that a trial was ever had at Common Law. An incontrovertible proof that there was not a lawyer in Weſtminſter-hall who ſuppoſed that there exiſted any right at Common Law. The preſent claim was neither more nor leſs than a claim for a monopoly, and all monopolies were odious to the Common Law.

The Baron contended that the arguments of the counſel, and the opinions of thoſe on the other ſide of the queſtion were more ingenious than convincing. He therefore anſwered the firſt, ſecond and fourth queſtions in the Negative, being fixed in opinion that there never exiſted a Common Law right, and that an Author had no claim to his Manuſcript after publication.

Reſpecting the Statute of Queen Anne, he was perfectly convinced that it was the only ſecurity that Authors or Bookſellers had. That it gave a right for 14 years to the holders of copies, and after that period the right reverted to the Authors for 14 years longer. The Baron ſaid he could not ſpeak to the Act, without having it in his hand; he firſt read the title, and declared that all the metaphyſical ſubtlety or definition which the ableſt logician could muſter, could not give any other ſenſe to the words "for the Encouragement of learning, and for veſting a right in authors," than a creation of a property, not a further ſecurity for one. He then read the preamble, and went through the act ſentence by ſentence, particularly inveſtigating the meaning of each clauſe, and drawing from its meaning ſtrong arguments in favour of the opinion he was laying down. The words, "*and no longer*," he declared were clear and concluſive; out of the power of argument to ſurmount. They ſhewed that the legiſlature thought it a great favour to grant any, even a limited ſecurity, and that they might not be miſunderſtood, they expreſſed their idea in the fulleſt terms. After theſe words it was in the higheſt degree abſurd to contend that any ſaving clauſe could be ſo conſtrued as to affect, and indeed deſtroy the moſt ſubſtantial meaning of the enacting part of the act. The ſaving clause was evidently a ſalvo for thoſe who held a patent-right to copies; and as it

would

would have been tedious to have enumerated all, the Univerſities were mentioned, as being the greateſt holders under that kind of deſcription.

The Baron enforced this obſervation, and the concluſion he drew from the words *and no longer* in the enacting clauſe, by citing a caſe of an attainder in the reign of Edward the VI. being taken off by an act of parliament many years afterwards, which act, in the enacting clauſe, took off the attainder in the fulleſt and moſt entire manner, and afterwards contained a ſaving clauſe for certain leaſes granted by the King, who paſſed the bill of attainder. One of the holders of theſe leaſes brought an action againſt the family relieved from the attainder, and grounded his claim upon the ſaving clauſe; but the court adjudged againſt him, for that the attainder being entirely taken off by the enacting clauſe, it was idle to contend that any ſaving clauſe could impeach it, or ſecure a right held under the idea of the attainder.

With regard to the injunctions cited on *the occaſion*, the Court of Chancery muſt have uniformly miſtaken the law, if they had not granted *them* under the idea of the ſtatute.

The act itſelf gave no more remedy with its penalties, than it did without them. An author in the firſt was allowed to damaſk all the books pirated upon him; by damaſking he underſtood, turn to waſte paper and line trunks, which linings were figured like damaſk. What remedy was this? none in the world. Then again, a penny per book was to be recovered, half of which went to the informer and half to the King; here therefore the author got nothing. The ſtatute afforded him grounds for a *remedy in equity*. The Court of Chancery, by an injunction and a decree, not only ſtopped the ſale of the pirated copies, but alſo obliged the pirate to account for what he had ſold. This was a ſatisfaction; this was an actual and an effectual remedy. To ſuppoſe that the ſaving clauſe maintained a perpetuity of property, was to ſuppoſe that the act granted an author fourteen years *and no longer*, except *for ever*, which was ſo barefaced, ſo egregious an abſurdity, that no man of ſenſe could be the dupe of it. That the Court of Chancery had never dreamt of a Common Law Right, he proved by citing a caſe between the Stamp Office and a news-paper printer; a printer got into the Fleet, and there printed news-papers without ſtamps. The Stamp Office prayed an injunction, the Court refuſed it, and told them the ſtatute having enacted, that a penalty was to be paid on conviction, that they muſt proſecute to conviction under the ſtatute, and they had a right to the penalty, but they could not upon the principles of Common Law prevent the printer from continuing his trade. This proved that ſtatute laws were unneceſſary where remedies could be had at Common Law.

After the Baron had ſeverely animadverted on the printers who claim the right of perpetuity, and inſtanced many caſes, all tending to corroborate his opinion, he concluded his ſpeech by affirming that there was no right at Common Law previous to the 8th of Queen Ann, and that if there was, that ſtatute entirely and effectually took it away.

Mr. Juſtice Gould agreed, that an author had a right at Common Law to his manuſcript, previous to publication. With regard to the ſtatute of Queen Anne, he

he conceived that the act entirely took away any previous right that an author might have, and that an author was precluded by such statute from any remedy, except on the foundation of the same statute, and the terms and conditions prescribed thereby. This answer he gave to the third and fifth question.

Baron Mounteney entered very learnedly into the nature of patents, privileges, and grants of the crown; traced them respecting books to a very early period, and cited a variety of instances, all tending to prove, that till of late years no idea was entertained that a Common Law right existed respecting Literary Property. He was clearly of opinion that, previous to the statute of Queen Anne, authors and printers had no security but by patents. He therefore answered the first, second, and fourth questions in the negative. The Baron answered the third and fifth questions also in the negative.

MONDAY, *February* 21.

Lord Chief Baron SMYTHE gave his opinion concerning Literary Property. In answer to the first, second, and fourth, he observed, that the cases proved, and it was allowed, that it was property previous to publication, and that publication could not alter it; for that publication neither made it a sale, a gift, a forfeiture, nor an abandonment, which were the only ways that a person could part with his property. When a man published his manuscript, he sold to one person only one book, and the use of that one book, without any design of allowing the purchaser to multiply copies: if he gave a book away, he gave it under the same restrictions; a forfeiture always implied a crime, and then the right of property became vested in the Crown; an abandonment could not be without an intent of relinquishing his right; and such intent was not deducible from a publication of the ideas written by an author. In the cases of Pope and Curl, the letters were the the property of those to whom they were sent; but the ideas remained as matter of right vested in the sender. In the case of Lord Shaftesbury's manuscript, the same deduction followed; for Mr. Gwynne sold to Shebbeare what he had no authority from the author, (Lord Shaftesbury) or his assigns, to dispose of. There was no act of dishonesty on the part of Shebbeare, although the manuscript was surreptitiously obtained, and the family had a remedy.

Some lawyers, yet alive, remembered the case of Lord Chief Baron Gilbert's manuscripts, which he devised to Baron Clarke; the Baron never published them, but a hackney writer, whom he employed, took an opportunity of copying them, and these stolen copies were committed to the press. The same argument lay against pirating after, as before publication.

It had been mentioned, that a man made his landed estate common, by giving a part of it to the highway; but it surely would not be contended, that although he gave a part of his estate for such a purpose, that any person but himself had a

right

right to the trees on it, or the mines beneath it. He adverted to the case of Basket and the University of Cambridge, and declared that the argument was then grounded on these principles. This case was reported in Burn's Ecclesiastical Law.

He cited likewise the cases, which, both at the bar and by the Judges, had been mentioned of Eyre and Walker, and others, all of which were after the 21 years were expired, and which, redress being obtained, spoke in favour of the Common Law Right. He instanced also the case of the Sessions Paper as corroborative of this opinion, and observed, that in order to alarm their Lordships passions, two very odious names had been thrown out, perpetuity and monopoly; neither of which, he thought, applied to the present claim. The first was entirely out of the question, and the latter, Lord Coke had defined to mean a grant from the Crown, to vend any single matter.

As to mechanical inventions, he did not know that previous to the act of 21 James 1. an action would not lie against the person who pirated an invention. An orrery none but an astronomer could make; and he might fashion a second, as as soon as he had seen a first: it was then in a degree an original work. Whereas, in multiplying an author's copy, his name as well as his ideas were stolen, and it was passed upon the world as the work of the original author, altho' he could not possibly amend any errors which might have escaped in his first edition, nor cancel any part which subsequent to the first publication appeared to be improper.

After several other observations, tending to prove that an author had a right at Common Law, both before and after publication, he answered the first, second, and fourth questions in the affirmative.

The statute of Queen Anne, he looked upon as a compromise between authors and printers contending for a perpetuity, and those who denied them any statute right. There were general rules for the construction of all statutes. One was that it should never be interpreted so as to be unreasonable; another, that no clause could be construed so as to make it inconsistent with any former clause; it should neither be repugnant, nor inconsistent. With regard to this statute, we must not reject the saving clause, nor the motive for which it was made, viz. the advancement of learning. The word *vesting*, if it could be tortured so as to tell against the present claim, was sufficiently qualified and done away by the word *secure*, which occurred in the enacting clause, and which plainly implied a security for something pre-existing. That the preamble gave full authority to this construction, the word *re-printing* particularly implying a right after the first publication; and the word *purchaser*, (which was one of the parties mentioned by the act as being secured in their property) indicated most amply a previous right, for nobody could be thought to purchase what another had not a right to sell. The Baron said that the statute afforded the holders of copy-right a more efficacious remedy than the Common Law, but that it by no means impeached, restrained, or took away the Common Law right. He therefore answered the third and fifth questions in the negative.

The Subſtance of Lord Chief Juſtice DE GREY's *Speech.*

With reſpect to the firſt queſtion, there can be no doubt, that an author has the ſole right to diſpoſe of his manuſcript as he thinks proper; it is his property, and till he parts with it, he can maintain an action of trover, treſpaſs, or upon the caſe againſt any man who ſhall convert that property to his own uſe; but the right now claimed at the bar, is not a title to the manuſcript, but to ſomething, after the owner has parted with, or publiſhed his manuſcript; to ſome intereſt in right of authorſhip, to more than the materials or manuſcript on which his thoughts are diſplayed, which is termed Literary Property, or an excluſive privilege of multiplying copies of the manuſcript or book, which right is the ſubject of the ſecond queſtion propoſed to us.

Now if there exiſts any incorporeal right or property in the author detached from his manuſcript, no act of publication can deſtroy it. Can then ſuch right or property exiſt at all? Does ſuch a right come within the knowledge or reach of the common law? In anſwer to the firſt of theſe queries, I acknowledge, tho' this claim of property is abſtract and ideal, novel and refined, it is yet intelligible, and may as eaſily be made to exiſt for ever as for a term of years; but in order to know whether it is ſo protected by law, a preliminary queſtion is neceſſary. Whether it has been ſo determined in its favour by the great and learned men who have been my predeceſſors, in regular cauſe of judicature; it is not for me to ſhake a reſpectable ſeries of deciſions, and unhinge the foundations of an eſtabliſhed right, by any *a priori* reaſoning of my own; but after inveſtigating the deciſions of the courts of common law, I can find no ſuch determinations. What is common law now, muſt have been ſo 300 years ago when printing was invented. No traces of ſuch a claim are to be met with prior to the reſtoration. Very few caſes of this kind happened in Charles the Second's time, or before the licenſing act, and thoſe few were determined upon the prerogative right of the Crown. The executive power of the Crown drew after it this prerogative right, which extended to all acts of parliaments, matters of religion, and acts of ſtate. The caſe of Baſket and the Univerſity of Cambridge, which was a late one of the ſame kind, appeared upon the pleadings to be a queſtion ariſing between two parties who claimed under concurrent and inconſiſtent grants of the crown. My late honourable and learned friend (Mr. Yorke) who argued that caſe, endeavoured to ſhew that his client's right might ariſe from the power of the crown, and to illuſtrate his argument, ſaid, it might perhaps be "property "founded on prerogative,"—a language, however allowable for counſel, not very admiſſible by, or intelligible to a judge, but the certificate in the above caſe does not ſay a word of property, and indeed if ſuch a claim as that had been founded on property, every one would have as good a right to publiſh abridgments of the ſtatutes, as of any other book.

Lord Northington granted injunctions on behalf of publications which he conſidered as matters of ſtate, but left ſuch works as "The Whole Duty of Man," to their common remedy at law. When works of literature, encouraged by the facility of printing, began to ſpread, we find the caſes multiply. Of theſe, however, I

lay

lay entirely out of the queſtion, all thoſe which appear to be caſes between rival patentees of the crown; all thoſe relating to the Stationers Company; all thoſe concerning religion, law, or the ſtate; and all unpubliſhed manuſcripts.

I ſhall premiſe too, before I examine the caſes which happened after the ſtatute, that I am of opinion that the ſtatute gives authors and their aſſigns, a general right not connected with the penalty, and that ſtatutable right falls under the protection of a court of equity; and may claim the benefit of an injunction. To obtain ſuch an injunction, it is by no means neceſſary that the plaintiff ſhould make out a clear indiſputable title. It may be granted on a reaſonable pretence, and a doubtful right, before the hearing of the cauſe; nor is it objection that the party applying for it has a remedy at law. No bill for an injunction is to be found before the ſtatute.

The cauſes which have come before the Court of Chancery, ſince the ſtatute, I find to be 17 in number; of theſe eight were founded on the ſtatute right: in two or three, the queſtion was, whether the book was a fair abridgement, and all the reſt were injunctions granted *ex parte*, upon filing the bill, with an affidavit annexed. In theſe caſes the defendant is not ſo much as heard, and can I imagine that ſo many illuſtrious men who preſided in the Court of Chancery, would, without a ſingle argument, have determined ſo great and copious a queſtion, and which has taken up ſo much of your Lordſhips time? In fact, none of them wiſhed to have it ſaid, he had formed any opinion on the ſubject.

In the famous caſe of Tonſon and Walker, of which I have an accurate note of my own taking, Lord Hardwicke ſaid, before the defendant's counſel began to argue, "I am inclined to ſend a caſe to the judges, for I doubt whether the matter has been judicially determined, but wiſh to hear what the defendant ſays as to Dr. Newton's notes; however I determine the general queſtion either upon the Common Law or the ſtatute." The maſter afterwards reported the variations between the two books to be colourable and illuſory only, and therefore the injunction was made perpetual. Since that time during the laſt 20 years, or more, the main queſtion has been fluctuating, and in agitation.

From my own experience at the bar, I know that the ſucceſſive Chancellors and Maſters of the Rolls, Lord Northington, Lord Camden, Sir Thomas Clark, &c. have all looked upon the caſe as undetermined; it may now therefore be fairly treated as a new queſtion, and indeed it has been argued as ſuch upon general principles. Let us conſider what weight thoſe principles have which are laid down as the foundation of this new ſpecies of property; I have heard but of one, namely, that ſuch a claim is conſiſtent with the moral fitneſs of things. This idea of moral fitneſs is indeed an amiable principle, and one cannot help wiſhing all claims derived from ſo pure a ſource might receive all poſſible encouragement; but this principle is no univerſal rule of law, nor can it be made to apply in all caſes. Beautiful as it may be in theory, to reduce it into the practice and execution of Common Law, would create intollerable confuſion; it would make laws vain, and judges arbitary; nor is it poſſible to ſupport the reſpondents claim upon theſe principles and not allow their operation, in a variety of other caſes, where it is confeſſed on all hands they cannot be allowed.

Abridgements of books, tranſlations, notes, as effectually deprive the original author of the fruit of his labours as direct particular copies, yet they are allowable.

The compilers of music, the engravers of copper plates, the inventors of machines, are all excluded from the privilege now contended for; but why, if an equitable and moral right is to be the ſole foundation of it? their genius, their ſtudy, their labour, their originality is as great as an author's, their inventions are as much prejudiced by copyiſts, and their claim in my opinion ſtands exactly on the ſame footing; a nice and ſubtle inveſtigation may perhaps find out ſome little logical or mechanical differences, but no ſolid diſtinction in the rule of property that applies to them can be found.—If ſuch a perpetual property remains in an author, and his right continues after publication, I cannot conceive what ſhould hinder him from the full exerciſe of that right in what manner he pleaſes; he may ſet the moſt extravagant price he will upon the firſt impreſſion, and refuſe to print a ſecond when that is ſold. If he has an abſolute controul over his ideas when publiſhed, as before, he may recal them, deſtroy them, extinguiſh them, and deprive the world of the uſe of them ever after; his forbearing to reprint is no evidence of his conſent to abandon his property, and leave it as a derelict to the public.

But it is ſaid, that the ſale of a printed copy is a qualified or conditional ſale, and that the purchaſer may make all the uſes he pleaſes of his book except that one of re-printing it; but where is the evidence of this extraordinary bargain? or where the analogy of law to ſupport the ſuppoſition? In all other caſes of purchaſe, payment tranſfers the whole and abſolute property to the buyer: there is no inſtance where a legal right is otherwiſe tranſferred by ſale, an example of ſuch a ſpeculative right remaining in the ſeller; it is a new and metaphyſical refinement upon the law, and laws, like ſome manufactures, may be drawn ſo fine as at laſt to loſe their ſtrength with their ſolidity.—When printing was firſt introduced, Cardinal Wolſey warned King Henry VIII. to be cautious how he encouraged it, as a matter which might be dangerous to the ſtate. The event however did not prove it ſo, and therefore the ſtatute of the 21ſt of James I. excepted it, as a reaſonable and allowable monopoly.

The ſubſequent licenſing act, gave only an adventitious right; and thus it reſted till the ſtatute of Queen Anne. The ſtatute certainly recognizes no Common Law right, *hinc illæ lachrymæ!* Nor can I ſuppoſe this omiſſion happened through ignorance or inadvertence, when I ſee ſuch great law-names as Holt, Cooper, Harcourt, Somers, &c. in the liſt of that parliament. This act adopts the language of the old privileges in terms, 14 years had been the term before granted to inventors, a ſpecification of the work too, as in the caſe of machines, was preſcribed; nor do I recollect an inſtance where a ſtatute gives ſuch a temporary remedy as is here granted in aid of an abſolute Common Law right.

If ſuch a right exiſted at Common Law, and it remained unimpeached by that ſtatute, why that anxiety in authors and booksellers afterwards to obtain another ſanction for their property? Whence thoſe different applications to parliament, in the year 1735, 1738, 1739, for a longer term of years, or for life in this kind of property, and afterwards to get an act to prohibit the liberty of printing books in foreign kingdoms, and ſending them back again. The truth is, the idea of a Common Law right in perpetuity, was not taken up till after that failure in procuring a new ſtatute for an enlargement of the term; if (ſaith the parties concerned) the legiſlature will not do it for us, we will do it without their aſſiſtance, and then

we

we begin to hear of this new doctrine, the Common Law right, which, upon the whole, I am of opinion, cannot be ſupported upon any rules or principles of the Common Law of this kingdom.

The Chief Juſtice anſwered the firſt queſtion in the affirmative; the ſecond and fourth in the negative; and the third and fifth in the affirmative.

Lord Chief Juſtice MANSFIELD declined giving his opinion.

THURSDAY, *February 24th.*

The ſubſtance of Lord CAMDEN'S *ſpeech.*

"After what the Lord Chief Juſtice yeſterday ſo ably enforced, there will be little occaſion for me to trouble your Lordſhips; nor will the preſent ſtate of my health, and the weakneſs of my voice, allow me to exert myſelf, were I ever ſo much inclined; but the nature of my profeſſion, and the duty I owe to this houſe, will not ſuffer me to remain ſilent, when ſo important a queſtion is to be determined. The fair ground of the argument has been very truly ſtated to you by the Lord Chief Juſtice; I hope what was yeſterday ſo learnedly told your Lordſhips, will remain deeply impreſſed on your minds.

"The arguments attempted to be maintained on the ſide of the reſpondents were founded on patents, privileges, ſtar-chamber decrees, and the bye laws of the Stationers Company; all of them the effects of the groſſeſt tyranny and uſurpation; the very laſt places in which I ſhould have dreamt of finding the leaſt trace of the common law of this kingdom: and yet, by a variety of ſubtle reaſoning and metaphyſical refinements, have they endeavoured to ſqueeze out the ſpirit of the common-law from premiſes in which it could not poſſibly have exiſtence.

"They began with their pretended precedents and authorities, and they endeavoured to model theſe in ſuch a manner, as to extract from them ſomething like a common law principle, upon which their argument might reſt. I ſhall invert the order, and firſt of all lay out of my way the whole bede-role of citations and precedents which they have produced: that heterogeneous heap of rubbiſh, which is only calculated to confound your Lordſhips, and miſlead the argument. After the firſt invention of printing, the art continued free for about fifty years. I mean to lay no ſtreſs upon this; I mention it only hiſtorically, not argumentatively; for as the uſe of it was little known, and not very extenſive, its want of importance might protect it from invaſion; but as ſoon as its effects in politics and religion were felt, all the crowned heads in Europe at once ſeized on it, and appropriated it to themſelves. Certain it is, that in England, the crown claimed both the power of licenſing what ſhould be printed, and the monopoly of printing. Two licenſes were granted to thoſe who petitioned for them. An author not only was obliged to ſue for a licence to print at all, but he was alſo obliged to ſue for a ſecond licence that he might print his own work.

"When the King had once claimed the right of printing, he ſecured that right by patents and by charters. Still further to ſecure his monopoly, he combined the printers, and formed them into a company, then called the Stationers Company, by whoſe laws, none but members could print any book at all. They aſſumed powers of ſeizure, confiſcation and impriſonment, and the decrees of the ſtar-chamber confirmed their proceedings. Theſe tranſactions, I preſume, have no relation to the common law; and when they were eſtabliſhed, where could an author, independent,

dent of the company, print his works, or try his right to it? Who could make head againſt this arbitary prerogative, which ſtifled and ſurpreſſed the common law of the land? Every man who printed a book, no matter how he obtained it, entered his name in their books, and became a member of their company: then he was compleat owner of the book. Owner was the term applied to every holder of copies; and the word author does not occur once in all their entries. All ſocieties, good or bad, arbitrary or illegal, muſt have ſome laws to regulate them. When an author died, his executors naturally became his ſucceſſors. The manner in which the copy-right was held, was a kind of copyhold tenure, in which the owner has a title by cuſtom only, at the will and pleaſure of the Lord. The two ſole titles by which a man ſecured his right was the royal patent and the licenſe of the Stationers company; I challenge any man alive to ſhew me any other right or title; Where is it to be found? ſome of the learned Judges ſay the words *or otherwiſe* in the ſtatute of Queen Anne relate to a prior common law right; To what common law right could theſe words refer? At all the periods I have mentioned the common law rights were held under the law of prerogative. It was the general opinion that there was no other right, and the corrupt Judges of the times ſubmitted to the arbitrary law of prerogative. In the caſe of the Stationers Company againſt Seymour, all the Judges declared that printing was under the direction of the Crown, and that the Court of King's Bench could ſeize all printers of news, true or falſe, lawful or illicit. But if it was made uſe of to protect authors, what was this protection? a right derived under a bye law of a private company. A protection ſimilar to that which we give the great Mogul; when we want any grant from him, we talk ſubmiſſively, and pay him homage, but it is to ſerve our own purpoſe, and to feaſt him with a ſhadow that we may attain the ſubſtance. In ſhort, the more your Lordſhips examine the matter, the more you will find that theſe rights are founded upon the charter of the Stationers Company and the royal prerogative; but what has this to do with the common law right? for never, my Lords, forget the import of that term. Remember always that the common law right now claimed at your bar is the right of a private man to print his works for ever, independent of the crown, the company, and all mankind. In the year 1681 we find a bye law for the protection of their own company and their copy-rights, which then conſiſted of all the literature of the kingdom; for they had contrived to get all the copies into their own hands. In a few years afterwards the revolution was eſtabliſhed, then vaniſhed prerogative, then all the bye laws of the Stationers Company were at an end; every reſtraint fell from off the preſs, and the old common law of England walked at large. During the ſucceeding fourteen or ſixteen years, no action was brought, no injunction obtained, although no illegal force prevented it; a ſtrong proof, that at that time there was no idea of a common law claim. So little did they then dream of eſtabliſhing a perpetuity in their copies, that the holders of them finding no prerogative ſecurity, no privilege, no licenſing act, no ſtar chamber decree to protect their claim, in the year 1708 came up to parliament in the form of petitioners, with tears in their eyes, hopeleſs and forlorn; they brought with them their wives and children to excite compaſſion, and induce parliament to grant them a ſtatutary ſecurity. They obtained the act. And again and again ſought for a further legiſlative ſecurity.

" Thus

" Thus, my Lords, ſtands the pretence on the ſcore of uſage, of which your Lordſhips have heard ſo much on one ſide the queſtion. I come now to conſider upon what foundation ſtand the prerogative copies; and theſe were in fact caſes between co-patentees (for I muſt conſider the Stationers Company itſelf as a patentee of the crown), and no authorſhip right occurs here. The right in the crown is ſuppoſed to come either from purchaſe or contract; and our law argues from principles, caſes, and analogy; but not a word of this in the judgment of the court; but the arguments of counſel are adduced to prove the point. The argument of counſel is a ſorry kind of evidence indeed, in moſt caſes it would be very dangerous to rely on it, but here it is ſuch ſtuff as I am aſhamed to mention. You have them at length in Carter. Firſt, it is put on the topic of prerogative, next of ownerſhip. 1. Henry the ſixth brought over the printers and their preſſes, *ergo*, ſay the counſel, he has an abſolute right to the whole art, and all that it can produce. 2. Printing belongs to nobody, and what is nobody's is of courſe the King's. 3. The King pays his Judges, *ergo*, he purchaſes that right for a valuable conſideration. 4. He paid for the tranſlation of the Bible, therefore, forſooth, he bought a right to ſell bibles. Away with ſuch trifling! Mr. Yorke put it on its true footing. Ought not the promulgation of your venerable codes of religion and of law to be intruſted to the executive power, that they may bear the higheſt mark of authenticity, and neither be impaired, or altered, or mutilated? Theſe printed acts are records themſelves, are evidence in a court of law, without recurring to the original parliamentary roll. Will you then give this honourable right to your Sovereign as ſuch? or will you degrade him into a Bookſeller? indeed, had he no other title to this diſtinction, that could hardly be maintained. But if this will not ſerve the purpoſe, recourſe is next had to injunctions; they, it is ſaid, have put the right out of doubt: nay, Lord Hardwicke's name is triumphantly brought on the ſtage, and he is declared to have abſolutely decided the point: no man, I am ſure, can venerate his name (which will be dear to poſterity as long as law and equity remain) more than I do. But this boaſted caſe, like all the reſt that have been produced, entirely fails in the proof; and when my Lord Chief Juſtice read his own note of what Lord Hardwicke ſaid upon the occaſion, it appeared that Lord H.'s words had been twiſted to an oppoſite meaning to what he intended. All the injunction caſes have been ably gone through. I ſhall only add, in general terms, that they can prove nothing: they are commonly obtained for the purpoſe of ſtaying waſte, and the prevention of irreparable damage. They muſt therefore in their nature be ſudden and ſummary, or the benefit of them would be loſt before they are obtained, and they are granted though the right is not clear, but doubtful. The queſtion, whether I can maintain my right againſt the deviſee or the heir at law, may be diſcuſſed afterwards at leiſure; but unleſs upon ſhewing a reaſonable pretence of title you in the mean time tie up the ſpoiler's hands who is ſelling my timber, or ploughing my paſture; my remedy is gone, or comes too late to prevent the miſchief. What then if a thouſand injunctions had been granted, unleſs the Chancellor at the time he granted them had pronounced a ſolemn opinion, that they were grounded upon the common law? it would only come to this at laſt, that the right in queſtion was claimed on one ſide and denied on the other: therefore till the matter was tried and determined, let the injunction go. Lord Hardwicke after twenty years experience, in the laſt caſe of

the

the kind that came before him, declared that the point had never yet been determined. Lord Northington granted them on the idea of a doubtful title; I continued the practice upon the same foundation; and so did the present Chancellor. Where then is the Chancellor who has declared *ex cathedra* that he had decided upon the Common-Law right? Let the decision be produced in direct terms. It is amazing that we should have been so long amused with this kind of argument from such vague authorities!

"At length, my Lords, having removed every stumbling-block that opposed our progress to the pure source of Common Law; having cleared the way of all those spurious, pretended authorities, which will not bear the test of a moment's serious examination, the question begins to assume its natural shape: Here then I feel myself upon my own ground, and I challenge any man to produce any adjudication, a precedent, a case, or any thing like legal authority on which this claim can be grounded. Does there a Scintilla, a glimpse of Common Law appear under any of those different heads I have mentioned, and which have been so often repeated to us? For my own part, I find nothing in the whole that favours of Law, except the term itself, Literary *Property*. They have borrowed one single word from the Common Law, and have raked into every store house of literary lumber to find out how to apply it to the subject, and to deduce some principles to which it may refer, and be governed by. And now what are they? What are the foundations of this claim in the English Common Law? Why, in the first place, say the Respondents, every man has a right to his ideas.—Most certainly every man who thinks, has a right to his thoughts, while they continue HIS; but here the question again returns; when does he part with them? When do they become *publici juris?* While they are in his brain no one indeed can purloin them; but what if he speaks, and lets them fly out in private or public discourse? Will he claim the breath, the air, the words in which his thoughts are cloathed? Where does this fanciful property begin, or end, or continue? Oh! say they, the ideas are marked in black and white, on paper or parchment——now, then, we get at something; and an action, I allow, will lie for ink and paper: but what says the Common Law about the incorporeal ideas, and where does it prescribe a remedy for the recovery of them, independent of the materials to which they are affixed? I see nothing about the matter in all my books; nor were I to admit ideas to be ever so distinguishable and definable, should I therefore infer they must be matters of private property, and objects of the Common Law? But granting this general position, we get footing but upon one single step, and new doubts and difficulties arise whenever we attempt to proceed. Is this property descendible, transferrable, or assignable? When published, can the purchaser lend his book to his friend? Can he let it out for hire as the Circulating Libraries do? Can he enter it as common stock in a literary club, as is done in the country? (Every thing of this kind, in a degree, prejudices the author's sale of the impression.) May he transcribe it for a charity? Then what part of the work is exempt from this defultory claim? Does it lye in the sentiments, the language, and style, or the paper? If in the sentiments, or language, no one can translate or abridge them. Locke's Essay might perhaps be put into other expressions, or newly methodized, and all the original system and ideas be retained. These questions shew how the argument

counter-

counter-acts itſelf, how the ſubject of it ſhifts, and becomes public in one ſenſe, and private in another: and they are all new to the Common Law, which leaves us perfectly in the dark about their ſolution? And how are the Judges, without a rule or guide, to determine them when they ariſe, whoſe books and ſtudies afford no more light upon the ſubject than the common underſtandings of the parties themſelves? What diverſity of judgments! what confuſion in opinion muſt they fall into! without a trace or line of law to direct their determination! What a code of Law yet remains for their ingenuity to furniſh, and could they all agree in it, it would not be law at laſt, but Legiſlation. But 'tis ſaid that it would be contrary to the ideas of private juſtice, moral fitneſs and public convenience, not to adopt this new ſyſtem. But who has a right to decide theſe new caſes, if there is no other rule to meaſure by but moral fitneſs and equitable right? Not the Judges of the Common Law, I am ſure. Their buſineſs is to tell the ſuitor how the law ſtands, nor how it ought to be; otherwiſe each Judge would have a diſtinct tribunal in his own breaſt, the deciſions of which would be as irregular and uncertain and various, as the minds and tempers of mankind. As it is, we find they do not always agree, but what would it be, where the rule of right would always be the private opinion of the Judge, as to the moral fitneſs and convenience of the claim? Caprice, ſelf-intereſt, vanity would by turns hold the ſcale of juſtice, and the law of property be indeed moſt vague and arbitrary. That excellent judge, Lord Chief Juſtice Lee, uſed always to aſk the counſel, after his argument is over, "Have you any caſe?" I hope Judges will always copy the example, and never pretend to decide upon a claim of property, without attending to the old black letter of our law, without founding their judgment upon ſome ſolid written authority, preſerved in their books, or in judicial records. In this caſe I know there is none ſuch to be produced."

With reſpect to inventors, I can ſee no real and capital difference between them and authors; their merit is equal, they are equally beneficial to ſociety, or perhaps the inventor of ſome of thoſe maſter-pieces of art, which have been mentioned, have there the advantage. All the Judges who have been of a different opinion, conſcious of the force of the objection from the ſimilarity of the claim, have told your Lordſhips they did not know but that an action would lie for the excluſive property in a machine at Common Law, and choſe to reſort to the patents. It is indeed extraordinary that they ſhould think ſo, that a right that never was heard of could be ſupported by an action that never yet was brought. If there be ſuch a right at Common Law, the crown is an uſurper; but there is no ſuch right at Common Law, which declares it a monopoly; no ſuch action lies; relief muſt be had to the crown in all ſuch caſes. If then there be no foundation of right for this perpetuity by the poſitive laws of the land, it will, I believe, find as little claim to encouragement upon public principles of ſound policy, or good ſenſe.

"If there be any thing in the world common to all mankind, ſcience and learning are in their nature *publici juris*, and they ought to be as free and general as air or water. They forget their creator, as well as their fellow creatures, who wiſh to monopolize his nobleſt gifts and greateſt benefits. Why did we enter into ſociety at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the ſpecies? Thoſe great men, thoſe favoured mortals,

to ſo divine ſpirits, who ſhare that ray of divinity which we call genius, are intruſted by providence with the delegated power of imparting to their fellow-creatures that inſtruction which heaven meant for univerſal benefit: they muſt not purloin it to the world, or hoard up for themſelves the common ſtock. We know what was the puniſhment of him who hid his talent, and providence has taken care that there ſhall not be wanting the nobleſt motives and incentives for men of genius to communicate to the world thoſe truths and diſcoveries which are nothing if uncommunicated. Knowledge has no value or uſe for the ſolitary owner: to be enjoyed it muſt be communicated. *Sere tuum nihil eſt, niſi te ſcire, hoc ſciat alter.* Glory is the reward of ſcience, and thoſe who deſerve it, ſcorn all meaner views; I ſpeak not of the ſcribblers for bread, who teaze the preſs with their wretched productions; fourteen years is too long a privilege for their periſhable trash. It was not for gain, that Bacon, Newton, Milton, Locke, inſtructed and delighted the world; it would be unworthy ſuch men to traffic with a dirty bookſeller for ſo much as a ſheet of letter-preſs. When the bookſeller offered Milton 5l. for his Paradiſe Loſt, he did not reject it, and commit his poem to the flames, nor did he accept the miſerable pittance as the reward of his labor; he knew that the real price of his work was immortality, and that poſterity would pay it.

"Some authors are as careleſs about profit as others are rapacious of it, and what a ſituation would the public be in with regard to literature if there were no means of compelling a ſecond impreſſion of a uſeful work to be put forth, or wait till a wife or children are to be provided for by the ſale of an edition. All our learning will be locked up in the hands of the Tonſons and the Lintots of the age, who will ſet what price upon it their avarice chuſes to demand, 'till the public become as much their ſlaves, as their own hackney compilers are.

"Inſtead of Saleſmen, the Bookſellers of late years have foreſtalled the market, and become engroſſers. If therefore the monopoly is ſanctified by your Lordſhips judgement, exorbitant prices muſt be the conſequence; for every valuable author will be as much monopolized by them as Shakeſpeare is at preſent, whoſe works, which he left careleſsly behind him in town, when he retired from it, were ſurely given to the public if ever author's were; but two prompters or players behind the ſcenes laid hold of them, and the preſent proprietors pretend to derive that copy from them, for which the author himſelf never received a farthing.——

I paſs over the flimſy ſuppoſition of an implied contract between the bookſeller who ſells, and the public which buys the printed copy; it is a notion as unmeaning in itſelf as it is void of a legal foundation. This perpetuity now contended for is as odious and as ſelfiſh as any other; it deſerves as much reprobation, and will become as intolerable. Knowledge and ſcience are not things to be bound in ſuch cobweb chains; when once the bird is out of the cage—*volat irrevocabile*—Ireland, Scotland, America will afford her ſhelter, and what then becomes of your action? His Lordſhip concluded with ſeveral obſervations on the ſtatute of Queen Anne, in which he took notice that the old copies were entitled to twenty-one years, and the new ones but fourteen, and ſaid, that if the legiſlature had intended to make the right perpetual they would have taken care that the remedy ſhould be ſo too.

SATURDAY,

SATURDAY, February 26.

The Lord Chancellor, Lord Lyttleton, the Biſhop of Carliſle, and Lord Effingham Howard, gave their ſeveral opinions.

The Lord CHANCELLOR prefaced what he was about to ſpeak, by declaring, that he had made the decree entirely as of courſe, in purſuance of the deciſion upon the right in the Court of King's Bench, and that as what he had decreed, as a Chancellor, was merely a ſtep in the gradation to a final and determinate iſſue in the Houſe of Peers, he was totally unbiaſſed upon the queſtion, and therefore could ſpeak to it as fairly from his own ſenſe of it, as any one of the Judges, or any of the Lords preſent.

He then entered into a very minute diſcuſſion of the ſeveral citations and precedents that had been relied upon at the Bar, ſhewed where they failed in application to the preſent caſe; and one by one deſcribed their complexion, their origin, and their tendency; in each of which he proved that they were foreign to any conſtructions which could ſupport the Reſpondents in their argument; he was no leſs preciſe and full in expoſing the abſurdity of the authorities derived from the Stationers Company; quoting ſeveral extraordinary entries to be met with in their books; among others, he ſaid, that one Sibthorpe had entered a book there, "the title of which," ſays the entry, "is to be ſent hereafter; and another member entered the *name* of a book "*about* to be tranſlated by him;" by which all the reſt of the world were to be reſtrained, in the mean time, perhaps for ever, from tranſlating the ſame. He then very fully ſtated the ſeveral caſes of injunctions in the Court of Chancery, produced ſeveral original letters from Swift to Faulkner and others, relative to the ſtatute of Queen Anne, and gave an hiſtorical detail of all the proceedings in both Houſes upon the ſeveral ſtages of that act, and the alterations it had undergone in the preamble and enacting clauſes, all tending to ſhew the ſenſe of the legiſlature, at the time of paſſing it, to be againſt the right; and that they rejected the other bills afterwards, drawn up chiefly by the advice of Dean Swift, and the countenance of Mr. Addiſon, which were preſented in the ſame ſpirit, and upon the ſame grounds; and concluded with declaring that he was clearly of opinion with the Appellants.

Lord Lyttleton owned that he had no great acquaintance with the quirks and quibbles of the law. He ſpoke to the matter merely as a queſtion of equity; he would not enter into a deluſive, refined, metaphyſical argument about tangibility, the materiality, or the corporeal ſubſtance of Literary Property; it was ſufficient for him, that it was allowed ſuch a property did exiſt. Authors, he preſumed, would not be denied a free participation of the common rights of mankind, and their property was ſurely as ſacred, and as deſerving of protection, as that of any other ſubjects. It was of infinite importance to every country, that the arts and ſciences ſhould be cultivated and encouraged; where men of letters were beſt protected, the people in general would be moſt enlightened, and where

the

the minds of men were enlarged, where their understandings were equally matured in perfection and in extension, there the arts and sciences would take their residence. The arts and sciences had their origin in Italy; from thence they fled to a remote corner of Asia: at length they returned companions of the all-conquering arms of the Roman Republic; and with it they were happily seated in this free country. In his Lordship's opinion, at present there were but two monarchs in Europe, who were the encouragers of the arts and sciences, and were themselves men of letters, the King of Prussia, and the King of England. It had been urged, that authors wrote for fame only; that glory was their best reward, and that immortality of renown was an ample recompence for their labours; they therefore did not stoop to claim a further right than that of a first communication of their ideas to the public. This, his Lordship observed, was in a confined sense, a proper and a noble observation, but it would not hold generally. He begged their Lordships to remember, that genius was peculiar to no clime, it belonged to no country, it was more frequently found in the cottage than the palace; it rather crawled on the face of the earth than soared aloft; when it did mount, its flight should not be impeded. To damp the wing of genius was, in his mind, highly impolitic, highly reprehensible, nay, somewhat criminal. If authors were allowed a perpetuity, it was a lasting encouragement; making the right of multiplying copies a matter common to all, was like extending the course of a river so greatly, as finally to dry up its sources. After several poetical sentiments, his Lordship concluded with giving his opinion that the decree should be affirmed.

The Bishop of Carlisle then spoke as follows.

"My Lords,

"As the proceedings in this important cause have been carried to so great a length, I should not have presumed to trouble your Lordships with any thoughts of mine upon the subject, did I not entertain hopes of shortening your Lordships farther trouble, by endeavouring to draw your attention from the many foreign topics that have been mixed with the present question: such for instance as the following—In which of the various classes of right or property, is this contested one to be ranked—Whether it is a property properly so called, or only a right to some property:—Whether such property be a corporeal one, or incorporeal—What is the subject in which it inheres—Whether it lies in the letters of a book, or the ideas, or in both—Whether it be a perfect, an imperfect, or only a *quasi* right—Whether it is real, or personal, original or derived—Whence it might derive its origin, and what is its extent and duration—How far it is deducible from ancient practice, or grounded on the authority of precedents—How it has stood in different countries—or in our own at different periods—before or after the art of printing—and the like.

"Speculations of this kind, however useful on some occasions, and always entertaining, yet I cannot help esteeming them in a great measure foreign to the main point, and am therefore desirous of having all such waved, and your Lordships deliberation reduced to the present state of that right under the direction of our legislature, which has made, or at least attempted to make, certain express regu-

regulations in it; more particularly that act in the 8th of Q. Anae, which has been so much tortured and perplexed in arguments offered at your Lordship's bar; but a fair stating and unforc'd construction of it, I apprehend to be sufficient for deciding the whole controversy. The title of the act runs, for the encouragement of learning, and some clauses in it evidently tend that way, while others have been understood in such a manner, as must rather occasion its discouragement, and made to signify either nothing at all, (which is surely one of the greatest absurdities in the interpretation of any law) or to imply something repugnant to its avowed intent, by putting affairs into a worse condition than they were in before the commencement of this favourable act; nay worse than others are who decline the acceptance of its benefits, while attended with all those clogs and limitations, which are too well known to need a particular detail. The method there adopted for this encouragement of learning, was, we find, very maturely digested in several conferences between the two Houses, and at last declared to be (not by securing any original Copy Right, as was proposed by those booksellers who promoted the bill; but) by vesting copies of printed books in the authors or purchasers of such copies, during the time therein mentioned, and no longer.—How far this deliberate alteration of the phrase may be deemed a material one, and whether insisting on the two distinct significations of these terms, vesting and securing, as here circumstanced, though they may be elsewhere used promiscuously; Whether the taking notice of that remarkable attention in our law makers to the wording of this act may not amount to something more than a trifling verbal criticism: whether this vesting of a right in authors is merely additional and accumulative, or does not imply a creative influence *de novo*, an actual constitution of such a plenary right, as had only an ideal pre-existence without it;—these points must be submitted to your Lordships.

"I shall here only take the liberty to repeat what has been observed on a subsequent statute of the 10th of Queen Anne, concerning stamp duties laid on pamphlets, which by expressly referring to this before us, and explaining the nature both of that copy right which springs from it, and of those others that may be drawn from different sources, seems to put the intention of both these acts out question. The penalty of a default here is extended to the annihilation of all copy-rights whatsoever, in these words; "Then the author, printer, and publisher, of such pamphlet shall lose all property therein, and in every copy thereof, although the title thereto were registered in the book of the Stationers in London, according to the late Act of Parliament in that behalf, so as any person may freely print and publish the same, without being liable to any action or prosecution for so doing; *any thing in the said Act of Parliament for vesting copies of printed books in the authors; or in any bye law contained; or an custom, or other thing to the contrary notwithstanding.*" I must leave it to your Lordships consideration whether that Common Law right, if it arises either from *custom* or *any other thing*, be not here manifestly included.

"To return to the former statute. After the creation then, or establishment of such an exclusive right as is conferred upon authors in the body of this act, there comes a *proviso*, that *nothing in the said act shall be construed to extend, either to prejudice or confirm any right that* the universities or any persons have or claim to have—*i. e.* (according to the most natural construction of these words) any persons

ons holding *in* or *under* the ſaid univerſities, or claiming any privilege of the ſame *kind*, and on the ſame *ground* with that of the univerſities, *i. e.* ſome *poſitive* one given or granted by ſpecial licence or letters patent, by ſtatute or charter, as their's evidently is; and all others under the conſideration of theſe law-makers are underſtood to be:—whereas *if this proviſo* were taken in ſo lax and indeterminate a ſenſe as to include ANY other perſons, ſetting up any claim on *other* grounds, it will admit *every body*; and conſequently its reſtrictive clauſes are reduced to a mere nullity.

"Neither is that obſervation drawn from the *preamble* of this act to be wholly admitted, nay that the apparently ſoft terms applied to thoſe ſeveral perſons who had *of late taken the liberty to print books without the conſent of their reſpective authors*—that theſe gentle terms (ſo unuſual in penal ſtatutes) would ſcarcely have been uſed on this occaſion if ſuch a practice as was then and there laid under certain reſtraints, were deſigned to be branded as antecedently, or abſolutely criminal. But if ſo great advantage is taken from a general mention in the proviſo, of *perſons* and *rights*, not there ſufficiently deſcribed, as to afford room for maintaining the forementioned abſurdity; if the ſaid act proves to be ſo inaccurate and defective, (as in truth it is extremely defective, with regard to the penalties annexed; the time of ſuing for them, the method of ſecuring their copies to the univerſities, and other particulars too notorious to need enlarging upon in this place) I beg leave to ſuggeſt an enquiry to your Lordſhips, (tho' the matter does not immediately fall under your preſent conſideration) whether it be not high time to have this faulty act amended:—let it be reviſed as ſoon as poſſible rather than ſuffered to be under ſo many imperfections as can ſerve only to enſnare numbers who are acting on the moſt obvious ſenſe, and ſuppoſed validity of it, to their ruin; and either miſlead others in the interpretation of ſome eſſential parts of it; or make the whole uſeleſs, and a dead letter.——

"However, ſo long as this ſame act does keep its ground, it muſt be conſidered as ſtanding on principles directly oppoſite to the notion of any abſtract independent perpetual Copy-right; which right, whatever it were ſuppoſed to be originally, is now plainly circumſcribed and ſubjected to certain reſtrictions; provided always that the ſaid act be really capable of affecting it in any reſpect, which ſome perſons ſeem to doubt of, and others, (if I miſtake not) have gone ſo far as to deny:—and if it once comes to be an eſtabliſhed maxim, that acts of parliament can have no effect on claims ſubſiſting at Common Law; in vain ſurely does the legiſlature employ itſelf in framing any concerning them.—But as this is not yet clearly admitted to be the caſe, even with the act before us, which is allowed to be in force, whatever that force may be—ſo long as ever it exiſts, it muſt exclude all that Right paramount and inextinguiſhable, which is exhibited along with it; which being dreſſed up at pleaſure, has made its appearance under ſo many queſtionable ſhapes, and been ſo warmly eſpouſed under each of them; but yet after all the pains taken with it, is ſtill, I humbly conceive, of too deluſory and unſubſtantial a nature to be laid hold of by common apprehenſions—too vague and intricate to be perfectly and unanimouſly aſcertained even by the moſt learned ſages of the law; and too feeble to be ſafely relied on, either for promoting the general ſervice of the public, or for ſupporting any true, valuable intereſts of Literature in particular."

Lord

Lord Effingham Howard ſpoke to the queſtion merely as likely to affect the Liberty of the Preſs. He thought that the confining the right of multiplying copies to the author and his aſſigns, might prove dangerous to the conſtitutional rights of the people, and he juſtified this idea by declaring that the preſs was the ſole controuler of the actions of Princes and Miniſters; that if a deſpotic meaſure was adopted by either, the freedom of the preſs would be properly and efficaciouſly exerted in informing the people and rouſing a ſpirit of reſiſtance. He finally inſtanced that ground of his argument by ſuppoſing that upon the occurrence of ſome very unconſtitutional and deſpotic meaſure, a pamphlet properly deſcribing the matter was publiſhed, and that the miniſter bought up the impreſſion and copyright, thereby choaking the channel of public information, and ſecuring in his cloſet the ſecret which might prevent the loſs of freedom to the ſubject. His Lordſhip concluded with declaring that he was ſatisfied in himſelf, that the Liberty of the Preſs was of ſuch infinite conſequence in this country, that if the conſtitution was over-turned, and the people were enſlaved, grant him but a free preſs and he would undertake to reſtore the one and redeem the other. His Lordſhip therefore was for reverſing the decree.

The Decree of the Court of Chancery was accordingly reverſed; and the Defendants have ſince preſented a petition to the Houſe of Commons, praying relief, which is now under the conſideration of a Committee.

FINIS.